# *Banksy's Graffiti: A Not-so-simple Case of Criminal Damage?*

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*Abstract* Graffiti artists are, if caught, most likely to be prosecuted under s. 1 of the Criminal Damage Act 1971. This article explores the extent to which the substantive definition of criminal damage applies to them. There is no separate exculpatory or justificatory defence of 'aesthetic value', and so graffiti artists must argue that they either have not 'damaged' property, they lacked *mens rea* or they had lawful excuse. It is argued that the work of artists such as Banksy forces a reappraisal of the precision and applicability of criminal damage.

*Keywords* Criminal damage; Graffiti; Lawful excuse; *Mens rea*

Are 'graffiti artists' such as Banksy[1] committing criminal damage in spraying or painting murals, tags and other forms of 'street art'? The academic literature contains much sociological and anthropological analysis of graffiti sub-culture (particularly in America and Australia)[2], but little discussion of the substantive criminal law's treatment of graffiti.[3] This article focuses on the potential liability of artists such as Banksy for criminal damage under s. 1 of the Criminal Damage Act 1971 (hereafter 'the CDA'), as it is the principal offence with which such individuals could be charged. There is no graffiti-specific offence; other states have targetted graffiti through distinct legislation, such as South Australia's Graffiti Control Act 2001 which criminalises a person who 'marks graffiti'[4] without lawful authority ('marks graffiti' includes 'deface[ment of] property in any way').[5] Most criminal law textbooks and articles that mention graffiti do so only in passing, assuming that spraying graffiti is inevitably and indisputably criminal damage under s. 1.[6]

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1 Banksy, *Wall and Piece* (Century: 2006, London). The identity of 'Banksy' was apparently revealed by the *Mail on Sunday* in 2008: C. Joseph, 'Graffiti artist Banksy unmasked . . .', 14 July 2008, available at *http://www.mailonsunday.co.uk/femail/article-1034538/Graffiti artist-Banksy-unmasked---public-schoolboy-middle-class-suburbia.html*, accessed 11 June 2009. He has not (yet) been prosecuted.

2 See references in M. Halsey and A. Young, '"Our Desires are Ungovernable": Writing Graffiti in Urban Space' (2006) 10(3) *Theoretical Criminology* 275; M. Halsey and A. Young, 'The Meanings of Graffiti and Municipal Administration' (2002) 35(2) *Australian and New Zealand Journal of Criminology* 165.

3 M. Watson, 'Graffiti—Popular Art, Anti-social Behaviour or Criminal Damage' (2004) 168 JP 668; on copyright issues arising from graffiti, see T. Rychlicki, 'Legal Questions About Illegal Art' [2008] 3(6) *Journal of Intellectual Property Law & Practice* 393.

4 Graffiti Control Act 2001, s. 9.

5 Ibid. s. 3.

6 For example, A. Smith, *Property Offences* (Sweet & Maxwell: London, 1994) para. 27-16: 'Plainly, the painting of slogans on a wall almost invariably amounts to damage . . . What message the dauber happens to scribble, for example, is irrelevant to the question whether . . . what is done amounts to criminal damage'.


doi:1350/jcla.2009.73.4.583

This article explores the application of criminal damage's legal definition to graffiti artists, and suggests it may be more complex than previously thought.

The social and cultural statuses of graffiti are ambiguous. Halsey and Young identify four types of graffiti (moving beyond Gomez's 1993 dichotomous categorisation of graffiti into 'graffiti art' and 'graffiti vandalism'[7]): 'tagging', 'throw-ups', 'pieces' and 'slogans'. The differences need not detain us here; what is significant is that graffiti is a 'paradoxical phenomenon . . . both aesthetic practice and criminal activity'.[8] Graffiti's aesthetic value is hotly debated in contemporary art criticism. Iain Sinclair notes the 'playful collages of argument and invective' that have a place in the 'discourse of London'[9] while Jones argues contemporary urban graffiti merely evinces 'the dead hand of convention', with a repetitive style of 'chunky fat lettering, mega-sized cartoons, tags'.[10] Graffiti's *social* significance is also contested. Anti-graffiti groups (such as Keep Britain Tidy) and followers of Wilson and Kelling's 'broken windows' thesis argue that it blights communities, creates a sense of urban decay and undermines processes by which communities maintain social control.[11] Graffiti artists may extol its subversive and political value; in Banksy's own words:

> Modern street art is the product of a generation tired of growing up with a relentless barrage of logos and images being thrown at their head every day, and much of it is an attempt to pick up these visual rocks and throw them back.[12]

Suppression of graffiti is part of society's 'headlong march into bland conformity'.[13]

Already we can see problems of nomenclature: are graffiti writers 'artists', 'vandals', etc.? The term 'graffiti artist' will be adopted in this article to emphasise the *potential* of such work to transcend the labels of 'anti-social behaviour' and 'vandalism'. The potential prosecution of artists such as Banksy (who has never been charged, but will be used here as an exemplar) forces us to confront law's role in regulating artistic expression in public spaces. The question is sometimes posed, 'Where is the boundary between art and criminal damage?' as if these concepts are mutually exclusive, and as if a threshold exists beyond which something

7 M. Gomez, 'The Writing on Our Walls: Finding Solutions through Distinguishing Graffiti Art from Graffiti Vandalism' (1993) 26(3) *University of Michigan Journal of Law Reform* 633.

8 Halsey and Young (2006), above n. 2 at 275.

9 Quoted in H. Muir, 'Is the writing on the wall for graffiti artists?', *Guardian*, 6 May 2004, 11.

10 J. Jones, 'Dim, cloned conservatives: Modern graffiti is not subversive—it is a formulaic, bankrupt cliché', *Guardian*, 7 August 2004, 21; Graffiti, Jones argues, has lost its outsider status that had been described by the French artist Jean Dubuffet (Dubuffet coined the term *art brut*, translated by Roger Cardinal in the 1970s as 'outsider art': R. Cardinal, *Outsider Art* (Littlehampton Book Services: London, 1972); Rychlicki, above n. 3 at 393).

11 Keep Britain Tidy Campaign, see *http://www.encams.org*, accessed 11 June 2009; J. Wilson and G. Kelling, 'Broken Windows' (1982) *Atlantic Monthly* 29.

12 'The Writing on the Wall', *Guardian*, 24 March 2006, available at *http://www.guardian.co.uk/artanddesign/2006/mar/24/art.australia*, accessed 11 June 2009.

13 Ibid.

adjudged 'art' loses that status and becomes criminal. Clearly, this is the wrong question to ask; the painting of an image in public space can have aesthetic value whilst also constituting a criminal offence.

The ambiguity of aesthetic value of graffiti is mirrored in substantive criminal law's somewhat ambivalent approach to the liability of its writers. Section 1 of the CDA provides:

> A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

There is no special defence of 'artistic merit' or 'aesthetic value' to a charge under s. 1, so a graffiti artist charged under s. 1 will have to argue that either his work is not 'damage', he lacks *mens rea* or he has lawful excuse for his actions. These arguments seem unlikely to succeed given that the offence appears based on objective terms such as 'damage', which seem ascertainable without evaluation of the graffiti's context or aesthetic significance. The 1971 Act stemmed from a Law Commission review of the law on malicious damage. In its 1969 Working Paper, the Law Commission called for simplification of the numerous offences of malicious damage, and in particular the avoidance of any distinctions based on:

> the means of damage or destruction employed . . . or the nature of the property or its situation . . . [These] should be regarded (if at all) as relevant to aggravation . . . The essence of offences of malicious damage should, we think, be, intentional or reckless destruction or damage to tangible property (in the widest sense) of another.[14]

The Commission strove for simplicity and certainty in substantive definition, with issues of context and motivation left until sentencing. The separation between substantive offence definition and issues affecting culpability and harm is significant in that motive and perhaps aesthetic value appear to have no possible legal relevance until sentencing.[15]

Yet three issues arise when we consider whether graffiti artists could be successfully prosecuted under s. 1. First, do Banksy's paintings or sprayings constitute 'damage' according to the tests developed by the appellate courts? Secondly, does s. 1 require the defendant to have *mens rea* in respect of each element of criminal damage's *actus reus*; in other words, how will the law treat defendants who claim that whilst they did a volitional act, intentionally applying paint to the surface of property belonging to another, they honestly believed that their work constitutes 'art' rather than 'damage'? Thirdly, might Banksy have a defence of

14 Law Commission, *Malicious Damage to Property* (1969) para. 17.

15 The Sentencing Guidelines Council has yet to publish a definitive guideline for offences under the Criminal Damage Act 1971. The Court of Appeal has repeatedly emphasised the need for a deterrent approach when it has considered appeals from graffiti writers against sentence, although these have usually involved hundreds of thousands of pounds of damage: *R* v *Verdi (Charan)* [2004] EWCA Crim 1485; *R* v *Dolan and Whittaker* (2008) 2 Cr App R (S) 67; *R* v *Pease* [2008] EWCA Crim 2515. See also the SGC's *Magistrates' Court Sentencing Guidelines* (2008) 44, available at *http://www.sentencing-guidelines.gov.uk*, accessed 11 June 2009.

lawful excuse under s. 5 if he honestly believes the property's owner will think his actions artistic rather than damaging?

Despite the fact that s. 1 appears to be clear, precise and not dependent on context, criminal damage remains somewhat ambiguous in scope and applicability with some (albeit limited) scope for graffiti artists to argue they fall outside it. This will be considered below.

## Is graffiti 'damage'?

Do graffiti artists 'damage' property? 'Damage' appears to be a simple enough term, yet it contains enough ambiguity for graffiti artists to argue cogently that they have not 'damaged' property.[16] Few appellate cases have provided clear guidance on the tests for deciding whether the acts alleged constitute 'damage', the Court of Appeal and Divisional Court repeatedly holding that 'damage' is a question of fact for the jury or magistrates. In *Roe* v *Kingerlee*[17] the Divisional Court held, 'What constitutes criminal damage is a matter of fact and degree, and it is for the justices, applying their common sense to decide whether what occurred was damage or not . . .'.[18] Sir Igor Judge in the Court of Appeal in *Fiak*[19] held that the trial judge's direction to the jury that a person damages property if he 'render[s] it imperfect or inoperative' accurately described the constituent of criminal damage.[20] However, Sir Igor Judge indicated that a trial judge should not direct the jury to find 'damage': '[W]e would expect an issue of this kind to be resolved by the jury'.[21]

The courts have set out further, broad tests for deciding when property is 'damaged', the Court of Appeal in particular focusing on whether the property's value or use has been impaired. The court in *Fiak* referred approvingly to a dictionary definition, 'harm or injury impairing the value or usefulness of something' and Sir Igor Judge followed the Divisional Court's decision in *Morphitis* v *Salmon*[22] in holding that 'damage' includes 'permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness'. In the earlier case of *Whiteley*,[23] the Court of Appeal adopted a very broad approach, Lord Lane holding that, 'Any alteration to the physical nature of the property concerned may amount to damage' within s. 1. He also held that damage need not be tangible (Whiteley had gained unauthorised access to a

16 There was no consideration in the Law Commission's 1969 Working Paper or the 1970 *Report on Offences of Damage to Property*, Law Com. Report No. 29, about the meaning of 'damage'.

17 [1986] Crim LR 735–6.

18 The court stressed that the Crown Court decision in *A (A Juvenile)* v *R* [1978] Crim LR 689–90 was not binding. In that case the Crown Court found that A, who had spat on a police officer's raincoat, had not damaged it as he had not rendered it 'imperfect' or 'inoperative'; a wipe with a damp cloth would have removed the spittle.

19 [2005] EWCA Crim 2381.

20 Ibid. at [22].

21 Ibid.

22 [1990] Crim LR 48; the Divisional Court in *Morphitis* also held that a scratch to the scaffolding bar could not amount to damage since scratching was a 'normal incident' of scaffolding components.

23 (1991) 93 Cr App R 25.

computer network and altered data on disks therein), and it sufficed that damage was sustained by the tangible property if the defendant caused 'an impairment of the value or usefulness of the disc to the owner'.[24]

Another test evident in the case law (although less prominent than the 'value or usefulness' test) is whether the owner would incur expense should he choose to remove the graffiti. In *Hardman*,[25] protesters from the Campaign for Nuclear Disarmament used soluble paint to draw outlines of human silhouttes on pavements, commemorating victims of the Hiroshima and Nagasaki nuclear bombs. Convicted by the justices, they argued on appeal that there was no damage, following the Crown Court's decision in *A (A Juvenile)* v *R*.[26] The Crown Court in *Hardman* held that painting soluble images on to public pavement constituted damage because the local authority incurred 'expense and inconvenience' in employing a 'Graffiti Squad' to clean the pavements using high-pressure water jets, even though the paint would have washed away when rain came.[27]

What are the implications of these tests for graffiti artists charged under s. 1? Taken together, the decisions give 'damage' a broad meaning; it appears difficult for anyone charged with criminal damage to argue that his actions did not constitute at least 'temporary impairment of value or usefulness', and harder still to argue that the property has not been physically altered in any way, the test adopted in *Whiteley*. The tests have been drawn sufficiently wide to facilitate straightforward criminal damage prosecutions with any issues about motive and the extent of damage caused dealt with at sentencing, as the Law Commission envisaged. In its recommendations for improving the law on malicious damage, the Law Commission said:

> [The] conduct to be penalised should be stated as broadly as possible, so that there should be one offence to cover the whole field of damage . . . [T]he essence of . . . criminal damage should be the destruction of or damage to the property of another. Distinctions based upon the nature of the property or its situation, or upon the means used to destroy or damage it, or upon the circumstances in which it is destroyed or damaged should not affect the basic nature of the offence. This is the philosophy underlying the Theft Act and we are convinced that it is right. Such features as the

24 In *R* v *Henderson and Battley*, unreported, 1984, Cantley J in the Court of Appeal held that tipping soil, rubble and mud on to a cleared development site was damage as the land's owner incurred cost in removing it from the site and its use for the time being was impaired. It was not necessary to show that V actually spent money in restoring the property.

25 [1986] Crim LR 330.

26 [1978] Crim LR 689, see above n. 18.

27 The Crown Court approved the approach of Walters J in *Samuels* v *Stubbs* [1972] 4 SASR 200 who noted the difficulties of providing general, precise and absolute rules about what constitutes 'damage', and held that the jury or magistrates must be guided 'in a great degree by the circumstances of each case, the nature of the article and the mode in which it is affected or treated . . .'. He went on to hold that the word 'is sufficiently wide in its meaning to embrace injury, mischief or harm done to property, and that in order to constitute "damage" it is unnecessary to establish such definite or actual damage as renders the property useless or prevents it from serving its normal function'.

> means used or their consequences are subsidiary matters relevant, if at all, in regard to sentence.[28]

The problem is that the tests laid down by the Divisional Court and Court of Appeal provide no clear guidance to magistrates and jurors when faced with a graffiti artist defendant as to the divide between 'damage' and 'non-damage'. The law allows jurors to conclude that graffiti artists are not 'damaging' property if the jurors consider it appropriate to do so. In *Roe* v *Kingerlee*, the Divisional Court stated that the application of graffiti to a structure will not *necessarily* amount to causing criminal damage, as it remains a question of fact and degree for the tribunal of fact. Even the very broad *Whiteley* approach (approved by the Court of Appeal in *Fiak*) positing 'damage' as the 'alteration to the physical nature of the property', is followed by the permissive '*may* amount to damage'.[29]

These tests contain sufficient ambiguities and leave enough jury discretion for some graffiti artists to appeal directly to the tribunal of fact's sympathy and aesthetic sensibilities. To the trite observation, 'Beauty is in the eyes of the beholder' we might add (more prosaically), '"Damage" can only be assessed by reference to the spatial context in which the act occurs'. Both 'beauty' and 'damage' are context-dependent; both involve an interaction between subject and observer, the labels being the means of conveying to others the observer's affective response to the subject.[30] The jury's residual discretion allows it legitimately to conclude, and without returning a perverse verdict, that no 'damage' has occurred even though value and/or use have been impaired. Implicit in the process of deciding if property has been 'damaged' is an assessment of 'anti-social behaviour' and, as Millie argues, what is or is not 'anti-social' is context-specific, including the aesthetic acceptability of the act and its consequences.[31] This has been little discussed in the case law or literature, although it was an issue in one Crown Court case. In *Fancy*[32] the defence submitted that there was no case to answer, on the basis that *inter alia* the Crown had failed to show that the activity intended, 'whitewashing National Front slogans off walls', would constitute damage if carried out. McNair J ruled that there was no case to answer; it was difficult to see how the application of white paint on top of 'mindless National Front graffiti' could constitute damage to a wall *per se*. Smith suggests that a possible implication of *Fancy* (despite its Crown Court status) is that, 'It would . . . not be damage if the whole wall was painted in such a way that people generally might see it as a more pleasing aesthetic sight than it was before receiving the actor's attentions'.[33]

28 Above n. 16 at paras 13 and 15.
29 My emphasis.
30 J. Berger, *Ways of Seeing* (Penguin: London, 1972).
31 A. Millie, 'Anti-social Behaviour, Behavioural Expectations and an Urban Aesthetic' (2008) 48(3) BJ Crim 379.
32 *R* v *Fancy* [1980] Crim LR 171.
33 Above n. 6 at para. 27–23.

A test of 'impairment of value or usefulness' also invites assessment of an action's consequences from both economic and aesthetic perspectives, neither of which may determine clearly whether the consequences have been negative (as implied by the word 'impairment'). Some of Banksy's images demonstrate the problems in ascertaining the impact on the 'value' of the property allegedly damaged. Banksy spray-painted a parody of characters from Quentin Tarantino's *Pulp Fiction* on a wall near Old Street tube station in London. The image depicted John Travolta and Samuel L. Jackson holding bananas instead of (the more Tarantino-esque) guns. Transport for London painted over it, saying it created 'a general atmosphere of neglect and social decay'.[34] Some residents and businesses living nearby said that it brightened up an otherwise dull wall, made the location more vibrant and drew in tourists.[35] For these residents and businesses it actually had economic (and possibly social) benefits. The physical act of applying paint to a wall may literally change the state of the bricks when the chemical interaction of paint and brick is examined, so that the owner will incur cost to restore it to its former state if possible (it can be difficult to get it back exactly as it was, which might involve sandblasting). Yet the *economic* value of that property may be greatly enhanced by having a Banksy mural on its side. In another example, the owners of a house in Bristol on which Banksy (uninvited) painted a mural said that when they decided to sell their property they had been overwhelmed with interest; they eventually offered the mural for sale with their house included for free.[36] It is property's urban context from which that property acquires its (sometimes extortionate) value, and anecdotal evidence suggests the value of some property on which Bansky has painted images has consequently soared.[37]

For other painted images a test based on the value or usefulness of the property may be inapposite. For example, Banksy painted murals on the Palestinian side of Israel's controversial grey, featureless West Bank barrier separating Israel from the Palestinian Territories. One image depicted a man pulling back a curtain to reveal a beautiful sunny scene on the other side, another showed a girl being lifted by balloons towards the top of the wall. Neither the wall's value nor usefulness were affected by the application of paint to the surface, and what these examples demonstrate is that the spatial contexts in which graffiti is situated needs to be considered if its social, aesthetic and legal significance is to be appreciated. They also show the contested economic, social and political value of some publicly situated property.

Beyond depressingly routine criminal damage incidents of smashed plate-glass shop fronts and keyed cars, 'damage' is a context-dependent term and the appellate courts' decisions gives scope for juries to view

34 BBC News Online, 'Iconic Banksy image painted over', 20 April 2007, available at *http://news.bbc.co.uk/1/hi/uk/6575345.stm*, accessed 11 June 2009.

35 Ibid.

36 BBC News Online, 'Free house as part of Bansky sale', 11 February 2007, *http://news.bbc.co.uk/1/hi/england/bristol/6351467.stm*, accessed 11 June 2009.

37 Banksy, above n. 1.

street art as a qualitatively different phenomenon from those acts within the core meaning of 'damage'.

A further problem with leaving the word 'damage' as a term for the tribunal of fact is that we are reliant on prosecutors to charge in only appropriate cases. This reliance on appropriate prosecutorial discretion as a solution to problems of definition was criticised by the House of Lords in *G* as unsatisfactory (in that case their Lordships rejected the suggestion that *Caldwell*'s potential unfairness could be addressed simply by prosecuting appropriately).[38] The breadth and vagueness of the term 'damage' also means there is little to guide or constrain police officers in using their powers of arrest; criminal damage is an arrestable offence under s. 24(1)(b) of the Police and Criminal Evidence Act 1984, even though damage that is evidently less than £5,000 is triable only summarily (by virtue of the Magistrates' Courts Act 1980).

The final issue in relation to assessments of damage concerns procedure. How the value of the alleged 'damage' is calculated matters, given the mode of trial provisions for criminal damage under s. 1. Criminal damage is a triable either way offence, but under s. 22 of the Magistrates' Courts Act 1980 (hereafter 'the MCA') for criminal damage (but not arson) offences the court has to first consider the value involved, having regard to representations from defence and prosecution. Under Sched. 2 to the MCA, courts must consider 'the value of the alleged damage' and if the value is less than £5,000, then the case will be tried summarily.[39] 'Value' is measured as follows:

> (*a*) If immediately after the material time the damage was capable of repair—(i) what would probably then have been the market price for the repair of the damage, or (ii) what the property alleged to have been damaged would probably have cost to buy in the open market at the material time, whichever is the less; or (*b*) if immediately after the material time the damage was beyond repair, what the said property would probably have cost to buy in the open market at the material time.[40]

The monetary cost of a spray-painted image by Banksy might be small if it can simply be painted over (although the costs of removing such images can mount once councils employ people and specialist cleaning equipment to remove each image). Yet it may be in the interests of such artists to argue that the alleged 'damage' caused is particularly *costly*, and valued at more than £5,000. In the few cases where the s. 22 procedure has been in issue, defendants (mainly campaigners against GM crops) have argued the damage they caused was *greater* than the prosecution claimed so that they might secure trial by jury, while the prosecution has argued the damage's value was less than the defendants claimed, and in

38 *R* v *G* [2003] UKHL 50.

39 Magistrates' Courts Act 1980, Sched. 2, para. 1.

40 The *Adult Court Bench Book* is less clear; subject to the general mode of trial considerations, basic criminal damage must be tried summarily if 'the *value of the property damaged or destroyed* is 5000 pounds or less . . .' (my emphasis) (Judicial Studies Board, *Adult Court Bench Book* (April 2005) section 2-11, see *http://www.jsboard.co.uk*, accessed 11 June 2009.

any event less than £5,000, so that the case will be tried summarily.[41] Implicit in the cases is an unarticulated acknowledgement that magistrates will be less sympathetic than juries to claims from political campaigners (and, I would suggest, graffiti artists) that their acts do not constitute 'damage' or that they have lawful excuse for their actions.

## *Mens rea* and the defendant's perception of his graffiti

Does Banksy have the requisite *mens rea* under s. 1? His liability seems clear; he is doing an intentional, volitional act applying paint to the surface of another's property and in doing so damaging that property.[42] But how will a defendant be judged if he argues that although he did that act, he did not intend to cause 'damage' or foresee that the consequences might be 'damage'? Rather he intended to create a work of art, a provocative image, or a political statement: in other words, a phenomenon that he perceived and perceives as qualitatively different from an act causing 'damage'? The issue here is not the relevance of the defendant's *motive*; the situation described is not one where the defendant argues that 'I knew I was committing damage but my motive was good'. English substantive criminal law tends to eschew issues of motive, leaving their consideration to sentencing (if at all). The issue here though is the effect of the defendant denying committing *damage* intentionally or recklessly: he honestly believed that what he was doing was not 'damage', or he gave no thought to the possibility of it amounting to 'damage'.

Research suggests that some graffiti artists do perceive their work as qualitatively different from damage. Halsey and Young interviewed graffiti writers and found that frequently those who 'pieced' (spraying large murals, usually with many colours and shades) considered their work to be art and not vandalism, although many thought 'tagging' (writing stylised signatures) to be of little artistic merit, and consequently more akin to vandalism.[43] They found graffiti artists described complex 'deliberative and contemplative dimensions' of their actions. The graffiti artists' perceptions of the dividing line between art and

41 In *R (on the application of Abbott)* v *Colchester Magistrates' Court* [2001] EWHC Admin 136, GM crop protesters argued the damage to the GM maize was greater than the £3,250 valued by the prosecution. The claimants argued that the justices had been wrong to base their valuation on the prosecution's case, and not on the claimants' commissioned valuation from another scientist, which included the overall cost to the government of carrying out trials on GM crops divided between the various trial areas, estimated at £13,900. The Divisional Court held that Sched. 2 to the MCA was not concerned with determining what, if any, consequential losses might have been sustained as a result of the damage. In *R (on the application of the DPP)* v *Prestatyn Magistrates' Court* [2002] EWHC 1177, the DPP challenged as irrational a district judge's decision that the GM crops damage did not fall below £5,000; the Divisional Court held that the market value of an object might owe far more to its associations than to its intrinsic composition, and the value of GM crops was uncertain, and the decision of the district judge was a rational one. To a farmer growing such crops the loss of the physical crop may be much lower than the cost to the researchers, who have lost research costs: [2002] Crim LR 924.

42 For the purposes of this section of the article it will be assumed that the justices or jury have decided that the defendant has 'damaged' property belonging to another.

43 Halsey and Young (2006), above n. 2 at 283.

vandalism (the dichotomy posed to the graffiti artists by the researchers) depended primarily on the perceived impact of the image upon the environment.[44] Several interviewees perceived unicoloured urban walls as 'negative space' and viewed them as 'locales of, and for, a ceaseless writing'.[45] What though, if anything, is the legal significance of the defendant's perception at the time of acting of the nature of his actions?

The dominant view in the literature is, unsurprisingly, that such an argument is legally *irrelevant*. For example, Ormerod notes, 'The defendant's opinion that what he did was not damage is irrelevant if damage is caused in law and fact. V's wall is damaged by D's graffiti irrespective of whether D regards it as an improvement'.[46] There are sound policy reasons for not requiring the prosecution to prove that the defendant appreciated his actions' consequences were, or might have constituted, 'damage'. The offence of criminal damage exists to protect property rights, and to allow a graffiti artist to avoid criminal liability by showing he considered his work to be 'artistic' would fail to protect property owners' interests, and fail to communicate law's symbolic condemnation of acts interfering adversely with private property.

This issue does not arise in most offences, as the offence can be proved without needing to consider D's interpretation of key terms within an offence's *actus reus*. A defendant charged with murder cannot argue that although others may consider the physical outcome he intended and caused to be 'death', *he* did not perceive the intended outcome of his act as 'death' but as a phenomenon deserving another label.[47] Twelve jurors asked to assess whether an alleged murder victim has 'died' will assess in the same way; it is hard to imagine a case in which six say he has, and six say he hasn't. A defendant charged under s. 20 of the Offences Against the Person Act 1861 cannot argue, 'I foresaw that my actions might cut both layers of my victim's skin, but I do not consider "penetration of both layers of the skin" to be "wounding" in s. 20'.[48]

The problem though is that in these examples the issue is the defendant's awareness of an *outcome*. That result is not context-dependent or requiring an affective response by an observer. In criminal damage, as I have argued, 'damage' may not have the same objective quality as a term such as 'death'. Nor does 'damage' have the same objective quality as 'dangerousness' in driving offences or 'sexual' in sexual assault, both of which are qualities explicitly stated in the relevant legislation to be objectively assessed by reference to the standards of the reasonably competent driver or what reasonable people would consider 'sexual'.[49] Section 1's prohibited consequence, 'damage', requires definition by the jury (or magistrates), with the attendant possibility that Bansky (or any

44 Above n. 43 at 285.
45 Ibid. at 286.
46 D. Ormerod, *Smith & Hogan: Criminal Law*, 11th edn (Oxford University Press: Oxford, 2005) 893.
47 Although such a defendant may be insane under the *M'Naghten* Rules if unable to understand the nature or quality of his act.
48 *R* v *Eisenhower* [1984] QB 331.
49 Road Traffic Act 1988, s. 1 (as amended); Sexual Offences Act 2003, ss 3, 78.

self-proclaimed artist who has an inflated sense of his work's importance) might honestly believe that no one would consider his work to constitute 'damage'.

There is then a deeper issue of principle at stake. Must the prosecution prove that a defendant has *mens rea* in respect of each element of criminal damage's *actus reus*? In other words, does D have to have intended, or been reckless about committing, an act that *he* is aware may constitute 'damage'? Or will it suffice that D intends to commit, or is reckless as to the commission of, an act that others identify and label as 'damage'? It is a principle in English law that a defendant is entitled to be judged on his honest belief about the circumstances in which the act occurred and the consequences of it.[50] The problem here is that, as Ashworth has argued, the construction of contemporary English criminal law is 'unprincipled and chaotic'.[51] The House of Lords has affirmed the principle on several occasions (in *B* v *DPP*, for example, the House of Lords held that in cases of mistaken belief, 'Considered as a matter of principle, the honest belief approach must be preferable [to an approach basing liability on the absence of a *reasonable* belief]').[52] However, Parliament has emphasised objective approaches to sexual offences in the Sexual Offences Act 2003. Much discussed in the context of homicide offences (especially in unlawful act manslaughter), the principle of correspondence (namely that a defendant should only be criminally liable for consequences he intended or knowingly risked) stipulates that the defendant's intention or recklessness should relate to the proscribed harm, yet we find numerous examples of offences that do not conform with it.[53] Yet the issue with criminal damage is slightly different; we are not concerned with a defendant who intending or foreseeing a harm of a particular seriousness actually causes a greater harm.

The logical consequence of the House of Lords in *G*[54] returning recklessness to a subjective meaning may be that the egotistical graffiti artist, as well as the graffiti artist who gives no thought to whether his actions might be 'damaging' property, will avoid conviction by virtue of honestly believing his actions do not constitute 'damage'. In *G*, the House of Lords clearly reaffirmed the subjectivist principle in criminal damage. Lord Bingham said:

> it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable . . . The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate

50 Although English law does not always adhere to the principle, for example, in cases of mistaken beliefs arising from intoxication.

51 A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225.

52 Their Lordships referred to *DPP* v *Morgan* [1976] AC 182, *R* v *Williams (Gladstone)* [1987] 3 All ER 411 as recent authorities heralding the development of an honest belief approach to *mens rea* issues. Also *R* v *K* [2001] UKHL 41.

53 A. Ashworth, *Principles of Criminal Law*, 4th edn (Oxford University Press: Oxford, 2003) 87.

54 [2003] UKHL 50.

> closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication . . .) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

Few graffiti artists would be able to avoid conviction in this respect. The slightest awareness that what he was doing *might* be damage would suffice to prove the graffiti artist had the requisite *mens rea*; and, of course, a jury would still have to believe a defendant who argued that he did not appreciate his act was 'damaging' property. Many of those interviewed by Halsey and Young recognised that what they were doing was, or might be, 'vandalising' (and by implication 'damaging') property. But in those rare cases in which the graffiti artist genuinely considers his work 'art' and has no appreciation of an alternative perspective labelling that work as 'damage', *G* seems to lead to acquittal.

The only case directly on this point appears to be the Crown Court decision in *Fancy*[55] mentioned above. The second strand to the defendant's submission of no case to answer was that the Crown's case was he intended to paint over the National Front slogans, but this was insufficient as s. 3 of the Criminal Damage Act 1971 requires a specific intention *to do damage*. McNair J held that there was no case to answer, ruling that the prosecution must show that D intended to use the paint to *damage* property; here D had an intention to white out the slogans, but there was no evidence of a specific intent to *damage* the property. However, the decision has limited importance given its Crown Court status, and given that s. 3 does not include recklessness within the fault element, unlike s. 1.[56]

Section 1 contains two fault elements, intention and recklessness, neither of which applies neatly to the graffiti artist who honestly perceives his actions as non-damage, but as great art. Neither is properly equipped to reflect the defendant's blameworthiness appropriately (which would perhaps be better done in a graffiti-specific offence such as in South Australia). There is a qualitative and moral difference between, on the one hand, a person who acts in order to bring about, or acts when aware that he may cause, a consequence that others *might* view as damage and, on the other, a person acting in order to bring about, or aware that he may cause, a consequence that he thinks will be perceived by no-one as damage; s. 1 does not accommodate that distinction. As Norrie has suggested in the context of murder's mental element:

55 [1980] Crim LR 171.

56 Under cl. 24(1) of the Law Commission's draft Criminal Code: 'Unless a contrary intention appears, a person does not commit a Code offence unless he acts intentionally, knowingly or recklessly in respect of each of its elements . . .'. Under cl. 20 of the draft Code, 'Every offence requires a fault element of recklessness with respect to each of its elements other than fault elements, unless otherwise provided'.

> in the process of legal and moral judgment in the criminal law, these terms [e.g. 'direct' and 'indirect' intention] cannot be fully separated from broader issues of 'motive' or 'ulterior intention', understood as the moral backdrop to the intentions that are formed and generally seen as irrelevant to culpability.[57]

We see in criminal damage's fault elements the fundamental division that Norrie argues exists between 'the moral issues it confronts and the orthodox subjectivist and cognitivist terms with which it operates'.[58] The law uses value-neutral, cognitive concepts of intention and recklessness, which appear free from moral evaluation. These criminal law categories are rooted in moral conceptions of responsibility, but 'they are also *doppelganger*, pale shadows of a moral and political substance that is excluded in the interest of the so-called positivisation of law and depoliticisation of the courtroom'.[59]

My argument is not that the defendant *should* be able to determine whether the *actus reus* of this offence is satisfied or that his honest belief ought to exculpate, simply that there is an issue of the defendant's honest belief in an aspect of criminal damage's *actus reus* that is or may be context-dependent and subject to the aesthetic sensibilities of the tribunal of fact. Under *Caldwell* (or the hybrid approach to defining recklessness proposed by Amirthalingam, in which the court would focus on whether someone like the defendant *ought* to have appreciated that damage would result from his actions[60]) the issue would not arise; *Caldwell* focused on what reasonable people would have appreciated in the circumstances, and if reasonable people would have appreciated that 'damage' might result then the defendant was guilty. In explaining *Caldwell*, Lacey *et al.* argue that 'Criminal damage, perhaps, is seen by the judiciary to represent lawlessness and rejection of authority in a more blatant way than theft or deception . . . At a symbolic level, it expresses rejection of the value of property and is therefore likely to be interpreted as nihilistic'.[61] *G* introduces a small element of doubt about the applicability of the fault element in s. 1 to graffiti artists.

## Lawful excuse and belief in consent

Of course, the graffiti artist will not be liable if the owner permits the artist to paint the mural or image, s. 1 requiring that the damage or destruction be done 'without lawful excuse'. Having the consent of the owner clearly provides that lawful excuse.[62] Commissions of public art provide great opportunities to enliven public spaces, challenge thinking and provide an outlet for budding artists: famous examples include the political murals in Northern Ireland and the East Side Gallery on the

57 A. Norrie, 'After *Woollin*' [1999] Crim LR 532 at 533.
58 Ibid. at 540.
59 Ibid. at 550.
60 K. Amirthalingam, '*Caldwell* Recklessness is Dead, Long Live *Mens Rea*'s Fecklessness' (2004) 67 MLR 491.
61 N. Lacey, C. Wells and O. Quick, *Reconstructing Criminal Law: Text and Materials*, 3rd edn (Butterworths: London, 2003) 406.
62 *R* v *Denton* [1982] 1 All ER 65.

Berlin Wall.[63] But how does the law treat the graffiti artist who claims although he did not ask the owner first he honestly believed the property owner would think the mural a great work of art? For example, some of Banksy's images have been painted without the permission of the owner, yet the owner has come to like and cherish the images, and this might foster a belief that other property owners will have a similar affection for future works. Will he have a lawful excuse?

Under s. 5(2)(a) of the Criminal Damage Act 1971 a defendant will have a defence of lawful excuse if he destroys or damages property if:

> at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances ...

Section 5(3) provides that 'it is immaterial whether a belief is justified or not if it is honestly held'. In *Jaggard* v *Dickinson*[64] the Divisional Court stressed the centrality of s. 5(3) to the issue of belief in consent. Mustill J said, 'Parliament has specifically isolated one subjective element, in the shape of honest belief, and has given it separate treatment, and its own special gloss in section 5(3)'.[65] It is the honesty of the belief that matters, rather than its reasonableness:

> Parliament has specifically required the court to consider the accused's actual state of belief, not the state of belief which ought to have existed. It seems to us that the court is required by section 5(3) to focus on the existence of the belief, not its intellectual soundness; and a belief can be just as much honestly held if it is induced by intoxication, as if it stems from stupidity, forgetfulness or inattention.[66]

Donaldson LJ added:

> Parliament has very specifically extended what would otherwise be regarded as 'lawful excuse' by providing that it is immaterial whether the relevant belief is justified or not provided that it is honestly held.[67]

It appears then that graffiti artists who genuinely think that their work will be loved by the property owner will have a defence of lawful excuse under s. 5(2)(a). However, the Divisional Court's decision in *DPP* v *Blake*[68] seems to undermine, or flatly contradict, the subjective nature of s. 5(3). Blake, a vicar, participated in a protest against the first Gulf War, and wrote a Biblical quotation on a pillar outside the Houses of Parliament. He was charged with criminal damage under s. 1, accepted he had damaged the property but claimed he had the consent of God to do so (he claimed God had instructed him the night before). God, he argued,

63 B. Rolston, 'The War of the Walls: Political Murals in Northern Ireland' (2004) 56(3) *Museum International* 38; B. Rolston, 'Politics, Painting and Popular Culture: The Political Wall Murals of Northern Ireland' (1987) 9 *Media, Culture & Society* 5; *http://www.eastsidegallery.com*, accessed 11 June 2009.
64 [1981] QB 527.
65 Ibid. at 532.
66 Ibid. at 531–2.
67 Ibid. at 533.
68 [1993] Crim LR 586.

owns everything on Earth, and therefore he honestly believed he had the consent of the property's owner to damage it.[69] In the Divisional Court, Otton J held:

> [C]ompelling though the submission may be, there is nothing in this line of argument which properly raises the defence of lawful excuse. A belief, however powerful, however genuine and however honestly held, that the appellant had the consent of God and thence the law of England to damage the pillar and that God had the requisite authority does not raise or amount to a lawful excuse under the domestic law of England . . .[70]

In the other strand of the lawful excuse defence under s. 5(2)(b), the Court of Appeal has read objective elements in to the section, apparently in defiance of s. 5(3). The court has said that determining whether D acted 'in order to protect property in immediate need of protection' involves an objective test to decide whether his actions were, objectively speaking, *capable* of being acts done in order to protect property in immediate need of protection.[71] Following *Blake*, it appears the courts will adopt an objective test in s. 5(2)(a) also, but quite what this test now involves is unclear. Given that s. 5(2)(a) refers to the defendant's belief, there seems little room for imposing an objective element, unless the courts insist the defendant's belief must be reasonable; yet this would clearly contradict s. 5(3). J. C. Smith described s. 5(3) as 'inconveniently subjective',[72] and suggested that courts dealing with s. 5(2)(a) are bound to follow the objective tests imported in to the s. 5(2)(b) defence. But this is less than clear; the objective test under s. 5(2)(b) that the Court of Appeal set out in *Hunt* and *Hill and Hall* (and more recently *Jones*[73]) is one of remoteness: was the action capable of protecting property in immediate need of protection, or was it too remote? That is a qualitatively different test from that required under s. 5(2)(a), which is unavoidably one focused on the defendant's honest belief in the owner's consent.

Is someone like Banksy entitled to be judged on his honest belief that the property owner had, or would have, given consent? Or does such a belief have to be reasonable? It is entirely conceivable that those who spray or paint graffiti will claim that they honestly believed the property's owner would consent to their work. In some instances, of course, this claim will have a sound basis. Several councils have established

69 Blake also argued that he had lawful excuse under s. 5(2)(b), in that he honestly believed he was acting to property others' property in immediate need of protection (e.g. Iraqi homes).

70 Compare Arthur Stace, the homeless Australian man who converted to Christianity in 1930. He spread his form of Gospel by writing the word 'Eternity' in chalk or crayon approximately half a million times over 35 years on pavements in Sydney. He said he was 'very nearly arrested' by the police on numerous occasions, yet avoided being detained and charged by saying he 'had permission from a higher source . . .': see *http://www.mreternity.info*, accessed 11 June 2009.

71 *R* v *Hunt* (1976) 66 Cr App R 105; *R* v *Hill and Hall* (1989) 88 Cr App R 74.

72 Commentary on *R* v *Blake* in [1993] Crim LR 586.

73 In *Jones* v *DPP* [2005] QB 259, the Court of Appeal confirmed that the only objective element in s. 5(2)(b) was the issue of whether 'it could be said on the facts, as believed by the defendant, the criminal damage alleged could amount to something done to protect another's property . . .' ([2005] QB 259 at 277, *per* Latham J).

'graffiti tolerance zones' (for example, subways or derelict buildings) where artists can spray-paint murals or images without fear of prosecution.[74] In other areas which have not been specifically designated as tolerance zones, the length of time the extant graffiti has remained might give rise to a belief amongst graffiti artists that the local authority is tolerating it.[75] There might be other reasons for a graffiti artist's belief that the owners would have consented (for example, if the mural becomes popular with the public). Banksy spray-painted a mural on the side of a Bristol sexual health clinic, depicting a naked man hanging nervously from a bedroom window whilst his lover and her cuckolded partner (who has apparently arrived home inconveniently early) look out of the window. Bristol City Council, which owns the property, set up an online discussion forum to gauge public reaction to the mural; 97 per cent of participants were positive about the mural, wanting it to stay.[76] Only six people who participated in the forum wanted it to go. The manager of that clinic said she loved the mural and would hate for it to be removed.[77] An artist whose work has acquired the popularity of Banksy's could conceivably argue that their reputation is such that the public will adore their latest image. In cases like the Bristol STD clinic, given that council property is public property, Banksy could also argue that he honestly believed that some, perhaps most, members of the public would have consented to the image being painted. Regardless of who specifically has the legal capacity to consent to public property being 'damaged', the artist's honest belief may be that, 'If council property is owned by all of us, doesn't the public have a legitimate interest in deciding whether or not such expressions are criminal? I believe most members of the public would consent to this . . .'.[78]

What of the graffiti artist who gives no thought to how the property owner might feel? According to s. 5(2)(a), only if 'he believed' in the owner's consent can he be said to have a lawful excuse; adverting to the possibility of consent seems a precondition for the defence to succeed. A failure to advert to the possibility of consent seems to mean he will be outside s. 5(2)(a). Of course, any defendant will most likely *say* that at the time he honestly believed the owner would have consented and the

74 *http://www.legal-walls.net*, accessed 11 June 2009.

75 For example, in Norwich there is an underpass on Pottergate which has, for at least seven years, featured different murals by local artists, and they have never been removed by the council.

76 Bristol City Council, *Banksy: Graffiti or Street Art?*, 2006, available at *http://www.bristol.gov.uk*, accessed 11 June 2009.

77 There are other examples of Bansky's work receiving subsequent approval from the owners of the property on which it has appeared; on the side of a pharmacy in Islington, London he painted two children saluting a flag at the top of a flagpole, the subversive twist being that the flag is a Tesco's carrier bag. An ITN News report claimed (without evidence) that this simple mural had added £300,000 to the value of the property: 'Artist Banksy strikes at London chemist', available at *http://uk.youtube.com/watch?v=1QsntxveF6E*, accessed 11 June 2009.

78 In one of Banksy's more bizarre images, he spray-painted the words, 'This is a graffiti tolerance zone' on a blank, white wall in London. Within days, the wall was covered in other writers' graffiti, giving rise to a possible charge against Banksy of *inciting* criminal damage: see Banksy, above n. 1.

issue then becomes evidential, the jury having to decide whether they think he *actually* believed in consent.

## Conclusion

In 2008, on the same day that the Tate Modern in London opened a new exhibition celebrating street art from around the world, five graffiti artists were imprisoned at Southwark Crown Court (less than two miles away) for spray-painting train carriages, apparently causing a million pounds' worth of damage in acts condemned by the trial judge as 'a wholesale self-indulgent campaign to damage property'.[79] Germaine Greer notes, 'Whether at Lascaux 17,000 years ago or in Western Arnhem Land 50,000 years ago, art began on a wall. If the sandblasters had been around in either place, we would have lost a precious inheritance',[80] while Lacey *et al.* argue that 'the field of property offences illustrates the fragility of social consensus about the lines to be drawn between "criminal" and "non-criminal" behaviour'.[81] Inherent in the law's protection of property rights is the marginalisation of other conceptions, in this context artistic expression.[82] Graffiti's ambiguous cultural status initially appears *not* to be reflected in its legal status, but I have tried to highlight potential ambiguities in s. 1, with attendant problems of ensuring successful prosecutions of graffiti artists as well as exploring opportunities for defendants to argue cogently that they are outwith s. 1. My argument is not that we should condone graffiti or that it should not be prosecuted under s. 1. Rather, aspects of the substantive definition in s. 1 raise deeper issues than previously recognised: s. 1 contains a context-dependent term, 'damage', that requires interpretation by the tribunal of fact; the relationship between the fault element and conduct element is somewhat unclear in respect of the graffiti artist's honest belief that his work is 'art' and not 'damage'; and the availability of lawful excuse for the graffiti artist is also ambiguous.

79 A. Akbar and P. Vallely ,'Graffiti: Street Art or Crime?', *Independent*, 16 July 2008, available at *http://www.independent.co.uk/arts-entertainment/art/features/graffiti-street-art-ndash-or-crime-868736.html*, accessed 11 June 2009.

80 *http://www.guardian.co.uk/artanddesign/artblog/2007/sep/24/whatshouldwedoaboutgraffiti*, accessed 11 June 2009.

81 Above, n. 61 at 311.

82 Ibid. at 314.