

# PUNISHING VANDALISM CORRECTLY IN AN ACCESS ECONOMY

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## ABSTRACT

*This Article argues that the social impact of vandalism must be factored into the expected criminal punishment for this offense. Existing law does so unevenly. Acts of vandalism may have a positive social impact, either as street art or as a form of protected speech, or a negative social impact as costs that preclude the provision of public goods or goods traded upon the basis of access, and not ownership. In general, vandalism cannot be prevented by means of observable security measures; rather, vandalism must be deterred by means of higher expected criminal punishment. A large expected punishment, however, implicates what this Article terms the “broken community theory of punishment.” Although broken community effects militate in favor of relatively minimal punishment for vandalism, a negative consequence of this punitive approach is less investment in the infrastructure or physical appearance of urban communities. Many urban communities may, in fact, benefit significantly from vandalism laws that allow for greater capital investment by more harshly punishing the deliberate damage or destruction of public goods or goods traded upon the basis of access, as vandalism in the first degree.*

## INTRODUCTION

The access economy is a business model under which goods and services are traded upon the basis of access as opposed to ownership: under this model, assets are rented temporarily rather than sold permanently.<sup>1</sup> The access economy represents an increasingly important business model, as the world is

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1. See, e.g., Giana M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn't About Sharing at All*, HARV. BUS. REV., (Jan. 28, 2015), <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all> (introducing the term “access economy” as a correction to the term “sharing economy” because important companies in the sharing economy, such as Airbnb, Zipcar, and Uber, are commercial enterprises whose businesses do not involve sharing of any kind).

becoming more open and interconnected, and customers are increasingly willing to pay for access rather than actual ownership. This business model often employs a digital technology platform to connect suppliers willing to rent assets to consumers who instead of grounding their lives on the premise of acquiring and owning more private property, are “finding meaning and satisfaction in having access to things and interacting with other people in the process.”<sup>2</sup> Under this business model, owners provide access to assets in their possession when not in use: an owner of an apartment, for instance, may, on a weekly basis, provide access to this real estate asset in exchange for rental income.<sup>3</sup> The benefits of the access economy derive from the greater optimization of resources through the shared use of excess capacity in goods and services, allowing people to transform idle capital into instantaneously realized revenue streams.<sup>4</sup>

With increased access to assets, however, comes increased opportunity for the theft and vandalism of such assets. The future success of the access economy critically depends upon how well both access economy firms, as well as local enforcement agencies, can prevent or deter these criminal offenses that serve to increase a firm’s operating expenses. If these expenses become sufficiently large, then a firm might no longer continue to profitably provide goods and services traded upon the basis of access, and not ownership, representing a harm, not only to the firm itself, but also, more broadly, to the communities in which such goods or services are now no longer provided. Consider, as an illustrative example, bike-sharing systems, which are described more fully in Part III.B. There exists a threshold, in terms of the financial costs of theft or vandalism, beyond which a bike-sharing company can no longer remain financially profitable. The company can take a number of security measures to prevent theft, including requiring a credit card for use—the user’s credit card can be charged if the bike is not returned to a docking station in a

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2. Steve Denning, *Three Strategies for Managing the Economy of Access*, FORBES, (May 2, 2014, 10:22 AM), <https://www.forbes.com/sites/stevedenning/2014/05/02/economic-game-change-from-ownership-to-access/#4e8786a431c9>; see also Lisa McLaughlin, *How to Live with Just 100 Things*, TIME, (June 5, 2008), <http://content.time.com/time/magazine/article/0,9171,1812048,00.html> (describing a grassroots movement to whittle down personal possessions to one hundred items, with the aim of decluttering and simplifying life).

3. See, e.g., Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), <https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators>.

4. See, e.g., ARUN SUNDARARAJAN, *THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM* (2016); see also SOLOMON GREENE & JOHN MCGINTY, *WHAT IF CITIES COULD CREATE A TRULY INCLUSIVE LOCAL SHARING ECONOMY?* (2016), <https://www.urban.org/sites/default/files/publication/81546/2000816-What-if-Cities-Could-Create-a-Truly-Inclusive-Local-Sharing-Economy.pdf>.

specified period of time.<sup>5</sup> Or, the bicycles themselves can be constructed with proprietary parts that require specialized tools to assemble and disassemble, reducing resale value, and, in turn, disincentivizing theft.<sup>6</sup> The firm is much more limited, however, in terms of the measures that can be taken to prevent vandalism. In seconds, a vandal can very easily slash a bicycle seat with a knife or puncture the tires of a docked bike. Of course, certain types of goods are equally vulnerable to both theft and vandalism. For example, inspired by bike-sharing systems, an umbrella-sharing service named Sharing E-Umbrella revealed that almost all of the 300,000 umbrellas it placed out for sharing purposes in eleven cities across China had been lost in the first few weeks of operation.<sup>7</sup> For most goods and services, however, the expected costs of vandalism, and not theft, represent the key threat to a business model based upon the provision of greater access (and not ownership).

In addition to “shared” goods, this Article contends that the deliberate damage or destruction of public goods must also be punished more harshly under the same basic rationale: the actions of a few result in a benefit deprived for all. But, the contention that the social harm of an act of vandalism must be fully incorporated into the level of expected punishment for the offense should, in all fairness, cut the other way: in addition to social harm, the expected punishment for vandalism must also reflect the potential social benefit of the offense as well. Existing state or federal law generally does not consider the broader social impact of vandalism or does so only in an ad hoc manner with a small number of specific instances of vandalism isolated for enhanced penalties. Drawing upon the economic theory of optimal deterrence, the principal claim set forth in this Article is that the social impact of an act of vandalism must be fully factored into the level of expected punishment for the offense.

This Article proceeds as follows: Part I provides a brief survey of existing vandalism laws. Part II applies the economic theory of optimal deterrence to the crime of vandalism and examines the marginal social cost of deterrence for vandalism in relation to the criminal offense of theft. Having considered the social cost of deterrence, as well as the direct private harm to the victim, Part III considers the possible broader indirect social impact that certain acts of vandalism may have in local communities. Specifically, Part III considers the extent to which an act of vandalism may have a positive social impact, exploring both (1) vandalism as street art, and (2) vandalism as a form of protected speech. Part III also examines the extent to which vandalism may have a negative social impact under both the broken windows theory of crime, as well as under a

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5. See SUSAN A. SHAHEEN ET AL., MINETA TRANSP. INST., PUBLIC BIKESHARING IN NORTH AMERICA: EARLY OPERATOR AND USER UNDERSTANDING, MTI REPORT 12-29, at 57, 61 (2014), [https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1072&context=mti\\_publications](https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1072&context=mti_publications).

6. See *id.* at 57.

7. See He Huifeng, *Chinese Umbrella-Sharing Firm Remains Upbeat Despite Losing Most of Its 300,000 Brollies*, S. CHINA MORNING POST, (July 11, 2017, 5:12 PM), <https://www.scmp.com/news/china/society/article/2101722/chinese-umbrella-sharing-firm-remains-upbeat-despite-losing-most>.

suboptimal provision of access theory introduced here. As a justification for enhanced penalties, Part III highlights a particular type of negative externality generated by vandalism of goods traded upon the basis of access, and not ownership, or public goods: that such goods will no longer be provided in the community, in any capacity, as a result of the increased financial or political costs created by the criminal actions of a few.

In most circumstances, acts of vandalism cannot feasibly be *prevented* by means of preemptive security measures; rather, such acts must be *deterred* by means of higher expected criminal punishment. A large expected criminal punishment for acts of vandalism, however, implicates what this Article terms “the broken community theory of punishment.” Under the broken windows theory of crime, disorder causes crime, and crime causes further disorder and crime.<sup>8</sup> Under the broken community theory of punishment, by contrast, punishing disorder causes crime, and crime causes further punishment of disorder. Broken community effects suggest relatively minimal punishment for low-level offenses such as vandalism. Part IV argues that a negative consequence of this punitive approach is less investment in the infrastructure or physical appearance of urban communities than would otherwise be the case under a punitive approach that fully incorporates the social impact of the offense into the level of expected punishment. This Article suggests that as goods and services are increasingly traded upon the basis of access and not ownership, certain urban communities that might otherwise run the risk of exclusion from the access economy may benefit significantly from vandalism laws that punish acts of vandalism with significant negative social impact more harshly, as vandalism in the first degree, under the suboptimal provision of access theory described in Part IV.

## I. THE LAW

Vandalism is a criminal offense that involves damage to, or defacing of, property belonging to another person without the consent of that person.<sup>9</sup> In the United States, the federal government has defined vandalism as a willful or malicious destruction, injury, disfigurement, or defacement of “any public or private property, real or personal, without the consent of the owner or person having custody or control.”<sup>10</sup> Vandalism is a broad category crime that is used to describe a variety of anti-social behaviors and can include such acts as breaking windows, defacing public property with graffiti, or slashing bike

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8. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 31; WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN CITIES* (1990); see also GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996).

9. See, e.g., Morley Witus, *The Paradox of Insurance Coverage for Vandalism but Not Theft*, 56 WAYNE L. REV. 1747 (2010).

10. U.S. DOJ, *UNIFORM CRIME REPORTING HANDBOOK* 141 (2004), [https://ucr.fbi.gov/additional-ucr-publications/ucr\\_handbook.pdf/](https://ucr.fbi.gov/additional-ucr-publications/ucr_handbook.pdf/).

tires.<sup>11</sup> Many states have additional laws intended to reduce specific forms of vandalism, such as graffiti or using man-made substances to destroy property. New York, for example, has local “aerosol container laws” that limit the purchase of spray paint containers or other “vandalism tools” that can be used for graffiti or other vandalism-related purposes.<sup>12</sup> California has a similar ban.<sup>13</sup> A number of states, including California and New Jersey, impose enhanced penalties if a person is convicted of a graffiti offense: the perpetrator, for example, may be required to pay restitution to the owner of the damaged property or perform community service that includes removing the graffiti from the vandalized property.<sup>14</sup> Recognizing the common connection with gang activity, Massachusetts has a distinct “tagging” statute that provides enhanced penalties for painting or signing one’s name, initials, or other designation to another’s property.<sup>15</sup> California imposes enhanced penalties for acts of vandalism that involve the use of butyric acid or other noxious or caustic chemicals.<sup>16</sup>

Interestingly, several states impose enhanced penalties for property damage to specific types of buildings or structures. North Carolina, for example, has many distinctive cave structures: state law specifically prohibits any person from intentionally breaking, burning, destroying, or damaging any cave in the state.<sup>17</sup> North Carolina state law also separately prohibits injury to the trees, crops, and lands of another.<sup>18</sup> In addition, a number of states have enhanced penalties for damage to religious buildings and cemeteries. In New Jersey, for instance, regardless of the value amount, if damage is caused at a cemetery, grave site, or mausoleum, then this act of vandalism may be charged as a third-degree crime, punishable by a term of incarceration ranging from three to five years.<sup>19</sup> In California, vandalism to a church, synagogue, mosque, temple, or other building owned and occupied by a religious institution, including cemeteries, likewise results in enhanced penalties.<sup>20</sup> Damage or destruction of war memorials is given similar additional protection under some state laws. Georgia, for example, specifically prohibits vandalism of any monument, plaque, marker, or memorial dedicated to any past or present

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11. See ARNOLD P. GOLDSTEIN, *THE PSYCHOLOGY OF VANDALISM* 23 (1996).

12. See N.Y.C., N.Y. ADMIN. CODE § 10-117(c) (2019), <https://nycadmincode.readthedocs.io/t10/c01/index.html>.

13. See CAL. PENAL CODE § 594.1(a)(1) (West 2019).

14. See *id.* § 594.1(e)(2); N.J. STAT. ANN. § 2C:17-3(c) (West 2019).

15. See MASS. GEN. LAWS ch. 266, § 126B (2019); see also ARIZ. REV. STAT. ANN. § 13-1602 (2019).

16. See CAL. PENAL CODE § 594.4 (West 2019).

17. See N.C. GEN. STAT. § 14-159.21 (2019).

18. See *id.* § 14-128. Several other states also punish agricultural vandalism. See, e.g., VA. CODE ANN. § 18.2-140 (2019); IND. CODE § 35-43-1-2(b)(3) (2019); 18 PA. CONS. STAT. § 3309 (2019).

19. See N.J. STAT. ANN. § 2C:17-3(b)(6) (West 2019).

20. See CAL. PENAL CODE § 594.3 (West 2019).

military service.<sup>21</sup> In many states, the punishment for damage to school buildings is also more severe. In Indiana, for example, a person who damages a school or community center is charged with institutional mischief, an offense that is punished more severely than ordinary criminal mischief—the official statutory term for vandalism in Indiana.<sup>22</sup> Pennsylvania has also created a separate crime called institutional vandalism that provides for harsher penalties, and applies to anyone who damages property belonging to a school, church, or cemetery.<sup>23</sup> Illinois too has harsher penalties if the property vandalized belongs to a school or church; specifically, if the property belongs to a school or church, then the maximum possible term of incarceration is five years for only \$350 in property damage.<sup>24</sup>

Finally, some states impose enhanced penalties for damage to property belonging to a public utility. In New Jersey, for example, if an act of vandalism involves tampering with gas lines, cable lines, or telecommunications lines, then, regardless of the value amount, the offense will be charged as a fourth-degree crime, punishable by a term of incarceration for up to eighteen months.<sup>25</sup> In Missouri, intentionally damaging the property of a utility and causing substantial interruption or impairment of service is a Class D felony, punishable by incarceration for up to seven years.<sup>26</sup> Under Georgia state law, a person commits the offense of criminal damage in the first degree, punishable by incarceration for up to ten years, if that person interferes with the operation of any system of sewerage, drainage, water supply, gas, power, or other public utility service.<sup>27</sup> In Florida, vandalism causing an interruption of public communication, transportation, supply of water, gas or power can be charged as a felony in the third degree and is punishable by a term of incarceration of up to five years.<sup>28</sup> In Minnesota, vandalism causing a substantial interruption or impairment of public safety services is punished similarly.<sup>29</sup>

Although vandalism laws exist primarily to prevent the deliberate damage or destruction of property, several state statutes are also intended to protect against hate crimes and other offensive, hostile, or abusive behavior directed at religious or minority groups, such as ransacking a church or synagogue. In California, for example, an act of vandalism that can be characterized as a hate crime committed principally for the purpose of intimidating or deterring a person from the free exercise of their religious belief results in significant

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21. See GA. CODE ANN. § 16-7-21(e) (2019); see also VA. CODE ANN. § 18.2-137(B) (2019).

22. See IND. CODE § 35-43-1-2 (2019).

23. See 18 PA. CONS. STAT. § 3307 (2019).

24. See 720 ILL. COMP. STAT. § 5/21-1.2 (2019); *id.* § 5/5-4.5-40.

25. See N.J. STAT. ANN. § 2C:17-3(b)(8) (West 2019); *id.* § 2C:43-6(a)(4).

26. See MO. REV. STAT. § 569.080 (2019); *id.* § 558.011; see also ARIZ. REV. STAT. ANN. §13-1602 (2019).

27. See GA. CODE ANN. § 16-7-22 (2019).

28. See FLA. STAT. § 806.13 (2019); *id.* § 775.082(3)(e) (2019).

29. See MINN. STAT. § 609.595 (2019).

enhanced penalties.<sup>30</sup> Similarly, in Massachusetts, malicious property damage constituting a hate crime may trigger additional charges and civil liability; specifically, the criminal penalty is incarceration for up to two and one-half years if a person damages property with the intent to intimidate another person based upon race, color, religion, national origin, sexual orientation, gender identity, or disability.<sup>31</sup>

In general, the severity of the penalty imposed for an act of vandalism is an increasing function of the dollar value of the property vandalized, where depending on the state and the value of the property damaged or destroyed, the act of vandalism can be charged either as a misdemeanor or as a felony offense. In California, for example, if the damage is four hundred dollars or more, then the penalty may include a jail sentence of between one and three years and/or a fine of up to ten thousand dollars, or more, if the property damage is extensive.<sup>32</sup> If the damage is less than four hundred dollars, then vandalism is punishable as a misdemeanor crime of up to one year in county jail and/or a maximum one thousand dollar fine.<sup>33</sup> Likewise, in New Jersey, if the property damage is valued at more than \$500, but less than \$2,000, then the offense is charged as a fourth-degree crime; if the property damage is valued at \$2,000 or more, then the offense is charged as a more serious third-degree crime.<sup>34</sup> In Virginia, if the damage to the property is less than \$1,000, then the offense is charged as a Class 1 misdemeanor; if the damage exceeds \$1,000, then the offense is charged as a Class 6 felony.<sup>35</sup> Indiana state law sets the misdemeanor-felony cutoff at a pecuniary loss of \$50,000.<sup>36</sup> In Michigan, the cutoff is \$20,000.<sup>37</sup> Colorado state law penalizes acts of vandalism differently depending on whether the aggregate amount of damage to property falls into one of eight distinct intervals ranging from under \$300 to over \$1,000,000<sup>38</sup>—the latter punishable as a felony offense with a possible term of incarceration ranging from eight to twenty-four years.<sup>39</sup> Texas and Tennessee each have at least five such distinct intervals corresponding to the value of the property vandalized.<sup>40</sup>

In general, the magnitude of the fines imposed approximately equals the value of the property vandalized. In California, for example, property damage

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30. See CAL. PENAL CODE § 422.6(b) (West 2019).

31. See MASS. GEN. LAWS ch. 265, § 39 (2019).

32. See CAL. PENAL CODE § 594(b)(1) (West 2019).

33. See *id.* § 594(b)(2)(A).

34. See N.J. STAT. ANN. § 2C:17-3 (West 2019).

35. See VA. CODE ANN. § 18.2-137 (2019).

36. See IND. CODE § 35-43-1-2 (2019).

37. See MICH. COMP. LAWS § 750.377a (2019).

38. See COLO. REV. STAT. § 18-4-501 (2019).

39. See *id.* § 18-1.3-401(1)(a)(V)(A.1) (stating that Class 2 felonies in Colorado are punishable by eight to twenty-four years in prison).

40. See TENN. CODE ANN. § 39-14-408 (2019); *id.* § 39-14-105; TEX. PENAL CODE ANN. § 28.03 (West 2019).

of up to \$10,000 is punishable by a fine of up to \$10,000.<sup>41</sup> In some states, the maximum statutory fines can exceed the value of the property vandalized. Massachusetts, for example, allows for fines of up to three times the value of the damaged property.<sup>42</sup> Tennessee state law imposes a fine of \$3,000 for damage to property between \$500 and \$1,000.<sup>43</sup> In Colorado, an act of vandalism resulting in damage to property between \$1,000 and \$5,000 is punishable by fines of up to \$100,000.<sup>44</sup> As the value of the property increases, the maximum statutory fine is less likely to exceed the value of the property damaged as the likelihood that the offender will be judgment-proof increases as well. In Illinois, for instance, property damage of \$100,000 is punishable by fines of up to \$25,000 only.<sup>45</sup> Pennsylvania state law caps statutory fines at \$15,000 for any act of criminal mischief that results in property damage in excess of \$15,000.<sup>46</sup> In Virginia, this cap is set at \$2,500;<sup>47</sup> in Indiana, the cap is \$10,000.<sup>48</sup> Colorado, by contrast, allows for fines of up to \$100,000.<sup>49</sup>

## II. ENFORCEMENT COSTS

This section applies the economic theory of optimal deterrence to the crime of vandalism and compares the marginal social cost of deterrence for vandalism with the marginal social cost of deterrence for the criminal offense of theft.

### A. *The Economic Theory of Optimal Deterrence*

Under the economic model of crime and punishment, criminals are assumed to be rational insofar as potential offenders weigh the expected private cost of a crime (i.e., the probability of detection multiplied by the severity of the punishment if detected) against the expected private benefit of the crime.<sup>50</sup>

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41. See CAL. PENAL CODE § 594 (West 2019).

42. See MASS. GEN. LAWS ch. 266, § 126A (2019).

43. See TENN. CODE ANN. § 39-14-408 (2019); *id.* § 39-14-105; see also *id.* § 40-35-111(b)(5) (stating that a Class E felony is punishable by a fine not to exceed \$3,000).

44. See COLO. REV. STAT. § 18-4-501 (2019); see also *id.* § 18-1.3-401 (stating that Class 6 felonies in Colorado are punishable by a fine up to \$100,000).

45. See 720 ILL. COMP. STAT. § 5/21-1 (2019); see also 730 ILL. COMP. STAT. § 5/5-4.5-50(b) (2019) (stating that a felony offender may be sentenced to pay a fine not to exceed, for each felony offense, \$25,000).

46. See 18 PA. CONS. STAT. § 3304 (2019); see also *id.* § 1101(3) (setting the maximum fine for a third-degree felony at \$15,000).

47. See VA. CODE ANN. § 18.2-137 (2019); see also *id.* § 18.2-10(f) (setting the maximum fine for a Class 6 felony at \$2,500).

48. See IND. CODE § 35-43-1-2 (2019); see also *id.* § 35-50-2-7(b) (setting the maximum fine for a Level 6 felony at \$10,000).

49. See COLO. REV. STAT. § 18-4-501 (2019).

50. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); see also Alon Harel, *Economic Analysis of Criminal Law: A Survey*, in

In addition, public enforcement of the law is assumed to be socially costly.<sup>51</sup> To deter crime, an offender must be apprehended and punished, which require the expenditure of costly public resources—and increasingly so, in that it is more costly to apprehend and convict a higher proportion of offenders or, alternatively, to impose even more severe punishments if detected (e.g., longer prison sentences).<sup>52</sup> Crime can also be prevented by observable expenditures on security measures designed to have a protective effect, such as locks, security guards, or interior home alarm systems.<sup>53</sup>

To help illustrate this economic model of crime, consider the following simple example: suppose that there exists some crime for which the expected punishment has been set at \$500. Assume further that increasing the expected punishment from \$500 to \$501 deters one additional crime. Should the expected punishment be increased by one dollar? The answer to that question depends on how the social cost of increasing the expected punishment by one dollar, from \$500 to \$501, compares to the social cost of the marginal offense. Assume that (1) increasing the expected punishment by one-dollar costs \$50, (2) the marginal crime does \$600 in damages, and (3) value of the crime to the offender, at the margin, is \$500. Under these assumptions, the social cost of the marginal crime, including the benefit to the offender, is  $\$600 - \$500 = \$100$ . Because a net loss of \$100 can be prevented at a cost of \$50, the net social cost of deterrence is \$50, and the expected punishment should, therefore, be increased by \$1 (or more).

As this example helps illustrate, socially optimal deterrence occurs at the point where the marginal social cost of crime reduction equals the marginal social benefit of crime.<sup>54</sup> Provided deterrence is costly, the optimal amount of crime is positive: costly deterrence precludes the elimination of all crime.<sup>55</sup> The rule for socially optimal deterrence can be expressed mathematically as follows<sup>56</sup>:

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RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 10 (Alon Harel & Keith N. Hylton eds., 2012).

51. See, e.g., Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT'L REV. L. & ECON. 367 (1997); Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT'L REV. L. & ECON. 225 (1993); see also Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

52. See Hasen & McAdams, *supra* note 51.

53. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 476 (6th ed. 2016); see generally Charles T. Clotfelter, *Private Security and the Public Safety*, 5 J. URB. ECON. 388, 390 (1978).

54. See COOTER & ULEN, *supra* note 53, at 476; see also DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 223 (2000).

55. See COOTER & ULEN, *supra* note 53.

56. Note that the marginal social benefit of crime equals the marginal benefit to the offender minus the marginal harm to the victim (including society more broadly). Thus, *Marginal Social Cost of Deterrence = Marginal Benefit to Offender - Marginal Harm to Victim*. In equilibrium, the marginal benefit to the offender equals the expected punishment. Thus, *Marginal Social Cost of*

$$\text{Expected Punishment} = \text{Marginal Harm to Victims} - \text{Marginal Social Cost of Deterrence}$$

It is sufficient for our purposes to simply note that if the marginal social costs of deterrence rise, then the optimal expected punishment falls and the optimal amount of crime, in turn, rises. Likewise, if the net marginal harm from crime rises, then the optimal expected punishment increases and the optimal amount of crime in society, in turn, now falls.<sup>57</sup>

### B. Comparing Marginal Social Costs of Deterrence

To better understand the optimal expected punishment for vandalism under a theory of optimal deterrence, this section examines the marginal social cost of deterrence for vandalism in relation to the criminal offense of theft.

#### 1. Do Vandals Have Relatively More Inelastic Supply Curves than Thieves?

The theory of optimal deterrence implies that different types of offenders may be punished differently for the same criminal act.<sup>58</sup> Consider, for example, a person who is criminally insane. If this potential offender is *not* deterred by a credible threat of punishment, then the supply of offenses with respect to this individual is perfectly inelastic, implying that the marginal social cost of deterrence is infinite and increasing expected punishment for an additional deterrent effect is not socially cost-benefit justified.<sup>59</sup> Of course, society may still wish to confine the criminally insane to reduce crime through an incapacitation effect, or in the hope of achieving some type of rehabilitation effect, but not as a punishment intended to deter future criminal acts, either by this individual, or by other criminally insane individuals.<sup>60</sup>

Like the criminal acts of an insane person, an act of vandalism is less often premeditated than an act of theft and is typically committed in the heat of the moment, possibly while under the incapacitating influence of drugs or alcohol, when the opportunity happens to present itself.<sup>61</sup> An act of theft, by contrast,

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*Deterrence = Marginal Harm to Victim – Expected Punishment.* Rearranging terms yields the expression in the text.

57. For an interesting model of deterrence that incorporates the crime rate as one of the determinants of the expected sanction, see Oren Bar-Gill & Alon Harel, *Crimes Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEGAL STUD. 485 (2001).

58. See FRIEDMAN, *supra* note 54, at 223.

59. See *id.*

60. See *id.*; see also Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001) (providing a rigorous overview of the different rationales for criminal punishment).

61. See, e.g., SUSAN GEASON & PAUL R. WILSON, PREVENTING GRAFFITI & VANDALISM 2 (Paul R. Wilson ed., 1990) (stating that “only a quarter of vandalism is premeditated”); Thomas E. Baker & Loreen Wolfer, *The Crime Triangle: Alcohol, Drug Use, and Vandalism*, 4 POLICE PRAC. & RES. 47 (2003); see also Stanley Cohen, *Property Destruction: Motives and Meanings*, in VANDALISM 23 (Colin Ward ed., 1973) (distinguishing the following behaviors as the motivations

tends to necessitate a certain amount of deliberate planning and preparation.<sup>62</sup> The chosen target may need to be scouted out in advance. The plan may require the use of certain specialized tools or the aid of a trusted band of accomplices. All of this requires organization and foresight and suggests a careful and measured weighing of both the likelihood of detection and the severity of the punishment if detected against the possible benefits of the criminal offense. The thief rationally considers the possible consequences of her actions—including the expected punishment—and is likely to alter or modify her behavior in response to changes in the expected punishment for the offense.

The vandal, by contrast, is less responsive to such changes in the level of expected punishment—a much larger change may be required to reduce the number of vandalism offenses. In general, acts of vandalism are spontaneous and reactive and may be committed for no obvious purpose save possibly a few seconds of enjoyment while in a state of impaired judgment and reduced inhibitions without any weighing of the possible consequences, including the expected punishment.<sup>63</sup> On balance, the thief, motivated by financial gain, is more likely to carefully consider the possible consequences of his actions—including the expected punishment—than is the vandal who intentionally damages or destroys property in a moment of blind indiscretion and is, therefore, relatively more easily deterred by varying levels of expected punishment. Under this view of the crime, the supply of vandalism offenses is relatively more *inelastic* compared to the supply of theft offenses, implying that the marginal social cost of deterrence is relatively higher, which, in turn, implies that the expected punishment for vandalism should be lower, all else equal, compared to the expected punishment for theft.<sup>64</sup>

A compelling argument can be made to the contrary, however. Some people may perceive a life of crime as superior to a life of honest work, as one that is more likely to bring greater monetary awards, admiration, freedom, or excitement—at least until apprehended by law enforcement.<sup>65</sup> For a person with limited employment opportunities, criminal activity, and theft in particular, may be the “best” available means by which to achieve financial gain.<sup>66</sup> Vandalism,

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for vandalism: acquisitive vandalism (e.g., looting and petty theft), tactical vandalism (e.g., sabotage in the work place), ideological vandalism (with ideological cause or to deliver a message, a statement), vindictive vandalism (for revenge), play vandalism (e.g., unintentional act such as a ball breaking a window pane), and malicious vandalism (out of boredom, exasperation, resentment, frustration; often occurs in public settings)).

62. See, e.g., Jay S. Albanese, *Tomorrow's Thieves*, FUTURIST, Sept./Oct. 1988, at 24.

63. See, e.g., V.L. Allen, *Toward an Understanding of the Hedonic Component of Vandalism*, in VANDALISM: BEHAVIOUR AND MOTIVATIONS 77 (Claude Lévy-Leboyer ed., 1984); see also Vernon L. Allen & David B. Greenberger, *Enjoyment of Destruction: The Role of Uncertainty*, 4 J. NONVERBAL BEHAV. 87 (1979).

64. See COOTER & ULEN, *supra* note 53, at 476.

65. See, e.g., SITUATIONAL CRIME PREVENTION: SUCCESSFUL CASE STUDIES (Ronald V. Clarke ed., 2d ed. 1997).

66. See generally BRANDON C. WELSH & DAVID P. FARRINGTON, SAVING CHILDREN FROM A LIFE OF CRIME: TOWARD A NATIONAL STRATEGY FOR EARLY PREVENTION (2007).

of course, lacks this element of financial gain. Unlike theft, a life of vandalism cannot serve as a reasonable substitute for a continued long-term existence of low-wage employment opportunities. Acts of vandalism may be a byproduct of a lack of economic opportunities, but unlike theft, such acts are not motivated by a desire for financial reward, and do not result in such.<sup>67</sup> Although vandalism and theft may both be causally related to a sense of despair deriving from a perceived future existence of mostly low-wage employment interrupted by sustained periods of unemployment, vandalism is only an indirect response to this apparent lack of economic opportunities and a manifestation of anger and frustration, whereas theft is a direct attempt to create opportunities for financial gain that are otherwise lacking.<sup>68</sup> Assuming those who have chosen theft as a primary means of economic livelihood are less easily deterred than those who have chosen vandalism as one of a number of possible ways of communicating rage and a sense of hopelessness (i.e., assuming that the supply of vandalism offenses, compared to the supply of theft, is relatively more *elastic*), the marginal social cost of deterrence is, therefore, lower for vandals than thieves, which, in turn, implies that the expected punishment for vandalism should be *more*, not less, severe than the expected punishment for theft, all else equal.

In sum, because equally compelling arguments can be made for, or against, the claim that the supply of vandalism offenses is relatively more *inelastic* compared to the supply of theft offenses, consideration of this variable alone does not predict whether, under the economic theory of optimal deterrence, the expected punishment for vandalism should be more or less severe than the expected punishment for theft.

## 2. It Is More Costly to Secure Property from Vandals than from Thieves

In addition to expenditures on measures designed to have a deterrent effect, such as police, prosecutors, or prisons, crime can also be prevented by expenditures on observable security measures designed to have a protective effect.<sup>69</sup> This subsection argues that not only is it relatively more costly to secure a *given* piece of property against vandalism than against theft, but the set of potential targets of vandalism is larger than the corresponding set of potential targets of theft. To help establish this claim, this Article proceeds, informally, by means of a couple of examples.

Consider, first, the exterior walls of a privately-owned building located upon a busy city street. For obvious reasons, the exterior walls of this building cannot be physically taken or carried away without substantial time and expense, and thus, very little, if any, expenditure upon security is required to prevent the theft of such walls. Significant expenditures upon preemptive security measures, by contrast, are required to preventing a vandalism offense. Compared to theft, the exterior walls of this building can be vandalized at much

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67. See Cohen, *supra* note 61, at 42.

68. See, e.g., Morgan Kelly, *Inequality and Crime*, 82 REV. ECON. & STAT. 530 (2000) (finding that property crime is well-explained by the economic theory of optimal deterrence).

69. See *id.*

lower risk of detection by enforcement agencies. In a matter of seconds, a vandal, armed with a can of aerosol spray-paint or a broad-tipped indelible marker, can intentionally mark or deface the exterior walls of the building. To prevent such acts of vandalism, public access must be monitored, or substantially restricted, if not eliminated entirely, which is likely to be prohibitively costly in the case of a privately-owned building located upon a busy city street.

What about property that is relatively less costly to transport, such as a road bike, for instance? The owner of a road bike can take several observable, low-cost security measures to prevent theft. Both the wheels and bike frame, for example, may be locked to an immovable object, such as a tree or lamppost. Or, the owner can keep a record of the bicycle's serial number such that if the bike is stolen and the police manage to recover the bike, the police can use this number to return the stolen bike to its original owner. Likewise, the bike may be equipped with GPS to aid recovery if stolen. Also, certain mobile applications now exist that allow an owner to observe the location of her bike at all times and alert the owner if the bike should move unexpectedly from its present location—indeed, the mere indication that a bike is protected by such a mobile application may have a significant deterrent effect upon potential thieves.<sup>70</sup> Compared to acts of theft, the set of private security measures available to secure a bike from acts of vandalism is smaller and more limited. Admittedly, there are certain observable security measures that an owner can take to reduce the incidence of vandalism, such as locking up the bike in a busy, well-lit area or purchasing a bike that uses graffiti-proof paint.<sup>71</sup> Still, a vandal can, in a matter of seconds, very easily slash a bicycle seat with a knife or puncture the tires of a docked bike. To prevent this type of intentional property damage, public access to the bike must, again, be monitored, or substantially restricted, if not eliminated entirely.

The key takeaway from the preceding examples is that, in general, if a person has stolen a piece of property, then this same person could have just as easily deliberately damaged or destroyed this same piece of property in some way as well. That is, the successful commission of an act of theft implies the successful commission of an act of vandalism. The implication does *not* run the other way, however. If a person has intentionally damaged or destroyed a piece of property, then it does not necessarily follow that this same person could have just as easily stolen this same piece of property as well. An act of theft requires more. Unlike vandalism, theft, for instance, requires the physical taking and carrying away of the property without being noticed or observed by others. For this reason, securing a piece of property from an act of vandalism requires security measures including, and in addition to, the security measures required to secure the same piece of property from an act of theft, which implies that it

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70. See, e.g., Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43 (1998) (showing how unobservable precautions provide positive externalities in that potential offenders cannot determine *a priori* who is protected).

71. See SHAHEEN, *supra* note 5, at 57.

is more costly to secure a given piece of property against vandalism than it is to secure that same piece of property against theft.

Not only is it more costly to secure a *given* piece of property against vandalism than it is against theft, but the set of potential targets of vandalism is larger than the corresponding set of potential targets of theft. Unlike theft, vandalism is not motivated by a desire for financial gain and is, therefore, not a function of the value of the property vandalized.<sup>72</sup> The benefit of vandalizing a statue in a public park, for instance, may very well be the same whether the statue is made of a cheap material, such as low-grade concrete, or an expensive material, such as bronze or marble. Assuming the same level of accessibility, a vandal may be indifferent as to which statue to vandalize: in general, the vandal chooses targets, not based upon market value, but based upon relative accessibility, which is not true of the thief who is more likely to steal the statue made of the more valuable material, all else equal. Accordingly, to protect against theft, property must be secured in proportion to its economic value. To protect against vandalism, by contrast, any property that is otherwise publicly accessible must be secured. Because the set of unsecured property of non-trivial economic value is a subset of all otherwise publicly accessible property, the set of unsecured valuable property will be smaller than the set of *all* unsecured publicly accessible property. Hence, compared to the thief, the vandal has a wider choice of relatively low-cost unsecured potential targets: there is no reason to incur the additional risk of vandalizing a secure target, of relatively high economic value, when many more less secure targets, of relatively low economic value, are available.

Finally, insofar as privately-owned property is protected by both private and public enforcement efforts, whereas publicly owned property is protected *only* by public enforcement efforts, the marginal social cost of prevention with respect to publicly-owned property is greater than the marginal social cost of prevention with respect to privately-owned property. Private enforcement efforts, which include investment in private observable security measures, such as locks, guards, and alarms, are generally not profitable in the case of publicly-owned property, because private parties have an incentive to let others pay for enforcement and to “free-ride” upon the costly enforcement efforts of others.<sup>73</sup> Consequently, insofar as acts of vandalism disproportionately impact publicly-owned property (as opposed to privately-owned property), the marginal social cost of enforcement for vandalism is higher compared to theft, not only because greater security expenditures are necessary to prevent an additional act of vandalism compared to an additional act of theft, but also because the

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72. See Cohen, *supra* note 61, at 42.

73. See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 634 (2013) (noting longstanding concern that private enforcers will “piggyback” on public enforcement initiatives or other private lawsuits in an effort to free ride on the enforcement efforts of others).

prevention of vandalism is less likely to benefit from the expenditure of private enforcement efforts.<sup>74</sup>

In sum, coupling the above conclusion with the fact that, for a given piece of property, the private harm to the victim of an act of vandalism is always larger than the private harm to the victim of an act of theft,<sup>75</sup> the economic theory of optimal deterrence implies that the expected punishment for vandalism should be *less* than the expected punishment for theft. Note, however, that this conclusion does not account for the potential broader social impact of an act of vandalism.

### III. THE SOCIAL IMPACT OF VANDALISM

Having examined the social cost of deterrence, as well as the direct private harm to the victim of an act of vandalism, this section considers the potential broader social impact of an act of vandalism. *First*, this section considers the extent to which vandalism may generate positive externalities, constituting a net benefit to society, and explores both (1) vandalism as street art and (2) vandalism as a form of protected speech. *Second*, this section examines the extent to which vandalism may generate negative externalities under both the broken windows theory of crime, as well as under a suboptimal provision of access theory.

#### A. Vandalism as a Benefit to Society

Defining terms first, an “externality” is an economic activity that imposes either a positive or negative effect upon a typically large number of unrelated third-parties: it is a benefit (or cost) that impacts a party who did not voluntarily choose to incur that benefit (or cost).<sup>76</sup> This subsection considers if, and to what extent, vandalism can be modeled as a positive externality, considering both (1) vandalism as street art, and (2) vandalism as a form of protected speech.

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74. In addition, the *physical characteristics* of many commonly-provided public goods, such as bridges, stop signs, parks, mass transit, street lighting, sewer systems, benches, fire hydrants, electricity lines, and so forth, further render the likelihood of vandalism much greater than the likelihood of theft. Given the low resale value and high transport costs, such goods do not make especially attractive targets for theft. Although a conspicuous street fixture, such as a thirty-foot-tall light pole, can be sold for scrap metal, the relatively low resale value, coupled with the difficulty of removal and transport, make it a brazen crime unlikely to be committed with significant frequency. On the other hand, given the degree to which such public goods tend to be both accessible and in open view to the public, these goods make very attractive targets for vandalism.

75. Replacement is always an option if the cost of repair exceeds the cost of replacement.

76. See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 196, 199 (6th ed. 2012) (defining positive externalities as arising from activities that yield benefits to parties who do not pay to receive them and negative externalities as arising from an actor’s behavior that imposes a cost on someone else, for which this actor does not pay).

## 1. Vandalism as Street Art

This subsection considers a relatively new form of vandalism, referred to as *street art*, and argues that street art is a form of public vandalism with positive externalities, and as such, should be punished less severely compared to acts of private vandalism.<sup>77</sup> Expanding upon existing definitions, street art is defined by four key elements that distinguish it from graffiti and other forms of private vandalism: street art is defined as (1) a *creative act* (2) performed *without the express consent* of the property owner upon whose property the street art is placed that (3) changes the viewer's experience of the surrounding environment in a positive, regenerative, and non-hateful manner, restoring *color, life, or joy* to property that can be defined as (4) a *blighting influence* lacking in such qualities.<sup>78</sup> To amplify, if the creative act is performed with the express consent of the property owner, then the act constitutes public art, not street art,<sup>79</sup> and is likely to entitle the work's creator to legal protection from destruction or future alteration, at least for the period of time during which the property owner has given consent to display the work.<sup>80</sup> If the property owner has provided valid consent, then the party typically most harmed by the act of vandalism has agreed to allow the work to be placed upon the property. And thus, any legal challenge to the act of vandalism will be much more strictly construed by courts that will look to whether the legal interests of those viewing the work outweigh the shared legal rights of the artist and the property owner.<sup>81</sup>

On the other hand, the law is clear that if trespassers, such as street artists or graffiti writers, place fixtures upon property, then the common law grants full property rights in those fixtures to the property owner.<sup>82</sup> The creative acts of a street artist must not impair the right of a property owner to enjoy the exclusive

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77. See, e.g., Marisa A. Gómez, Note, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 635 (1993) (arguing that the only effective means of controlling graffiti is to develop laws and policies which accommodate graffiti art but discourage graffiti vandalism).

78. See Sondra Bacharach, *Street Art and Consent*, 55 BRIT. J. AESTHETICS 481, 481–82 (2015); Nicholas Alden Riggle, *Street Art: The Transfiguration of the Commonplaces*, 68 J. AESTHETICS & ART CRITICISM 243, 246 (2010).

79. See Bacharach, *supra* note 78; see generally Henri Beunders, *The End of Arrogance, the Advent of Persuasion: Public Art in a Multicultural Society*, 51 SOC. ANALYSIS 42, 48 (2007) (“The term ‘public art’ properly refers to works of art in any media that [have] been planned and executed with the specific intention of being sited or staged in the public domain, usually outside and accessible to all.”) (alteration in original) (quoting *Public Art*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Public\\_art](https://en.wikipedia.org/wiki/Public_art)).

80. See Margaret L. Mettler, Note, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 259 (2012).

81. See *id.*

82. See, e.g., *Justice v. Nesquehoning Valley R.R.*, 87 Pa. 28, 31 (1878); FRANK HALL CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY, CHATTELS AND CHOSSES 27–29 (1914). Not only does a landowner possess the property rights in the street art, but he may also claim expressive rights in the piece. See Mettler, *supra* note 80, at 259.

use and enjoyment of her property.<sup>83</sup> Accordingly, as a general rule, acts of vandalism do *not* receive legal protection (e.g., in the form of copyright protection) if the work is placed upon property *without* the express consent of the property owner. There are notable exceptions, however, to this general rule under existing case law where acts of vandalism, such as graffiti, have been accorded legal protection even though the work of art was placed upon property without the express consent of the current property owner. Generally, this exception arises in situations where a prior owner had consented to a particular use of the property, the property was sold, and the new owner now no longer intends to preserve the work of art attached to the purchased property.<sup>84</sup>

A similar situation arises where the property owner has given consent to display the artwork for a limited, indefinite time period. The case, *Cohen v. G&M Realty*, is illustrative.<sup>85</sup> The facts of the case are as follows: Jonathan Cohen, an aerosol artist, approached Gerald Wolkoff to become the curator of several of his graffiti-covered industrial buildings, collectively known as the “Phun Phactory.”<sup>86</sup> Cohen hoped to improve the quality of the works covering the buildings that began to appear in the mid-1990s.<sup>87</sup> By the middle of the next decade, “[t]he site became known as 5Pointz and evolved into a mecca for high-end works by internationally recognized aerosol artists.”<sup>88</sup> As a result of the artwork’s popular appeal, 5Pointz became a destination for tourists and other street artists.<sup>89</sup> The agreement between Cohen and Wolkoff that spurred the advent of 5Pointz, however, was never formalized in writing.<sup>90</sup> Instead, the two had only a “general understanding that [Cohen] would be allowed to select who would be permitted to paint on the walls.”<sup>91</sup> In making this agreement, Wolkoff alleged that Cohen was informed of Wolkoff’s intention to knock down the building at some point in the future and understood that the 5Pointz structure “was always temporary.”<sup>92</sup>

In 2012, Wolkoff announced his intention to demolish the warehouse buildings and convert the 5Pointz site into high-rise luxury condominiums. In response, twenty-one street artists sought a preliminary injunction under the Visual Artists Rights Act of 1990 (VARA),<sup>93</sup> which serves as a supplement to traditional copyright law, to prevent the planned demolition and consequent

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83. See CHILDS, *supra* note 82.

84. See, e.g., *Craig v. Princeton Enterprises, LLC*, No. 2:16-CV-10027 (E.D. Mich. Apr. 20, 2017) (suing new owner that allegedly threatened to destroy her watercolor work having entered into agreement with previous owner that artwork would remain on building).

85. *Cohen v. G&M Realty (Cohen I)*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013).

86. See *id.* at 218.

87. See *id.*

88. *Id.* at 219.

89. See *id.*

90. See *id.*

91. *Id.* at 219 (alteration in original).

92. *Id.* at 223.

93. 17 U.S.C. § 106A (2018).

destruction of their paintings on the walls of the existing warehouse buildings.<sup>94</sup> Rather than wait for the proper judicial resolution of the matter, Wolkoff whitewashed the buildings, destroying almost all of the street art in the process.<sup>95</sup> After a protracted litigation, the court awarded the twenty-one plaintiffs the maximum statutory damage amount under the VARA for each work of street art wrongfully and willfully destroyed—a combined sum of \$6,750,000.<sup>96</sup>

The VARA amends existing copyright law to add protections for two “moral rights” of artists: (1) the right of attribution, and (2) the right of integrity.<sup>97</sup> Regarding the right to integrity, the VARA has codified this right to provide “the author of a work of visual art” the right to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.<sup>98</sup> Although the phrase “recognized stature” is not expressly defined in the VARA, the Second Circuit has held that this phrase requires a two-tiered showing: (1) that the visual art in question has “stature,” meaning that it is viewed as meritorious, and (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society.<sup>99</sup> In the trial court’s view, “the plaintiffs adduced such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most restrictive of evidentiary standards almost all of the plaintiffs’ works easily qualify as works of recognized stature.”<sup>100</sup> The court concluded that Wolkoff’s destruction of the street art violated the plaintiff’s right of integrity under the VARA.<sup>101</sup> Arguably, the street artists were awarded substantial monetary damages in this case, because the court believed that the works were created *with* the property owner’s permission and, therefore, the works at issue here are not works of street art under the definition set forth above that requires that the work be placed upon property *without* the express consent of the property owner. Hence, this particular case—nor any other as far as the author is aware—does not address the more difficult question: whether a court may invoke the VARA to protect a work of art placed upon property without the express consent of the property owner, or, alternatively, without the express objection of the property owner?

The fact that the works destroyed by Wolkoff, in the court’s view, constituted works of art, and not graffiti, was critically important in the case.

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94. See *Cohen v. G&M Realty (Cohen II)*, 320 F. Supp. 3d 421, 429 (E.D.N.Y. 2018).

95. See *id.* at 434.

96. See *id.* at 428.

97. See 17 U.S.C. § 106A(a).

98. *Id.* at § 106A(a)(3)(B).

99. *Carter v. Helmsley-Spear, Inc. (Carter I)*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, *Carter v. Helmsley-Spear, Inc. (Carter II)*, 71 F.3d 77 (2d Cir. 1995).

100. *Cohen II*, 320 F. Supp. 3d at 438.

101. *Id.* at 438.

Street art is not the same as graffiti: graffiti writers differ from street artists in the following important respects: (1) “the audience to which [a] work [of graffiti] is directed” (e.g., the audience of a graffiti writer tends to be fellow graffiti writers, while the audience of a street artist tends to be the general public more broadly); (2) the artistic medium (e.g., “calligraphically designed words as opposed to a variety of artistic media”); and (3) the intent or motivations for the art-making (e.g., establishing notoriety or demarcating territory as opposed to beautification of urban space).<sup>102</sup> In general, street artists view themselves as painters, as engaged in an intensely creative enterprise, and intend their works to beautify and improve the surrounding urban environment, to counter the visual pollution of corporate billboards, gray buildings, or the all-consuming blight of vacant lots and abandoned buildings.<sup>103</sup> While remaining committed to the original idea of graffiti as a statement directed against the growing privatization and commercialization of public space, street art is, in the main, a gift to an otherwise visually impoverished urban landscape that is meant to bring an aesthetic pleasure to its audience, just like any other recognized art form.<sup>104</sup> Graffiti, on the other hand, has little, or no, aesthetic appeal.<sup>105</sup> The graffiti tag is not produced for artistic purposes; rather, it is principally a means by which to indicate the writer’s physical presence, to proclaim, in an immediate and highly visible manner, to the outside world, “I was here.”<sup>106</sup>

Several questions arise under the legal definition of street art proposed above: does the street artist need merely to intend to restore color, life, or joy to the surrounding environment, or must the street artist also succeed in that intention, producing an effect that does, in fact, bring such qualities to an otherwise blighted landscape? And, how should that intent be assessed? Should the court consider subjective intent or objective intent? Requiring that the street artist is successful in bringing color, life, or joy to a given space runs the risk of transforming a court into the final arbiter of aesthetic value. Obviously, a court of law has little, if any, institutional competence to perform this role satisfactorily: courts have been consistently hesitant to “deal with questions of aesthetics,” because “art is hopelessly subjective and pliable.”<sup>107</sup> Rather than

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102. See Bacharach, *supra* note 78, at 483.

103. See *id.*

104. See GEORGE C. STOWERS, GRAFFITI ART: AN ESSAY CONCERNING THE RECOGNITION OF SOME FORMS OF GRAFFITI AS ART (Nov. 30, 1997), <https://www.graffiti.org/faq/stowers.html>; see also CEDAR LEWISOHN, STREET ART: THE GRAFFITI REVOLUTION (2008); Martin Irvine, *The Work on the Street: Street Art and Visual Culture*, in THE HANDBOOK OF VISUAL CULTURE 235 (Ian Heywood & Barry Sandywell, eds. 2012).

105. See STOWERS, *supra* note 104; see also LEWISOHN, *supra* note 104; Irvine, *supra* note 104.

106. See STOWERS, *supra* note 104; see also LEWISOHN, *supra* note 104; Irvine, *supra* note 104; Bacharach, *supra* note 78, at 483.

107. Genevieve Blake, *Expressive Merchandise and the First Amendment in Public Fora*, 34 FORDHAM URB. L.J. 1049, 1060 (2007); see also David Leichtman & Avani Bhatt, *Federal Courts and the Communicative Value of Visual Art: Is an Intended Message Required for Strong Protection of Rights Under the First Amendment?*, FED. LAW., Sept. 2011, at 25.

pontificate, at length, upon the visual impact of a particular act of alleged street art, the court should, instead, confine its analysis to intent, disregarding the actual state of a person's mind, and consider only whether or not there exists an objective manifestation of an intent, on the part of the alleged street artist, to add color, life, or joy in a positive, regenerative, non-hateful manner to an area otherwise lacking in such qualities. Taking into consideration the words and external actions of the alleged street artist, not the actual intent, as well as the totality of the circumstances, from the perspective of a reasonable person, the court should strive to determine whether it is reasonable to attribute to the alleged street artist an intention to visually improve or beautify an urban space for the collective benefit of others. That is, a court is not asked to determine if an alleged work of street art is a *good* work of art, only whether it *is* a work of art.

External factors that a court might consider in making this objective determination with respect to a work of alleged street art might include the number and intensity of colors used in the work, the artistic medium, the use of character representation, the presence of color transitions or three-dimensional effects, the overall complexity of the work's artistic composition, the size of the work, the total time spent planning and working on the piece, geographic location, and the degree and scope of public acceptance (i.e., is there evidence that people do, in fact, agree that the alleged work of street art brings color, life, or joy to the neighborhood). A court should assess the totality of the circumstances, paying close attention to how the work of alleged street art is received within the community: it is important for courts to remain sensitive to differing cultural values as urban neighborhoods develop and gentrify, placing longstanding works of street art at risk of destruction or future alteration.<sup>108</sup> Also, clear evidence of contrary intent should be accorded substantial weight. Markings, for example, intended to indicate the territory of an illegal gang or that serve as an indicator of otherwise unlawful activities should necessarily disqualify a work as street art no matter how elaborate or atheistically pleasing the work's overall effect.<sup>109</sup>

To qualify as street art under the definition above, the alleged street art must be placed upon property that can be described as a "blighting influence." Recall that the rationale for imposing a punishment for street art that is less severe than other forms of vandalism is that the act is motivated by a creative impulse to bring beauty to an otherwise unbeautiful urban space. Or, to express this more formally, the act of producing street art generates significant positive externalities. Arguably, these positive externalities are lower, or non-existent,

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108. See, e.g., Daniel Craig, *North Philly Graffiti Wall to Come Down, but a New Canvas Will Replace It*, PHILLYVOICE (July 13, 2018), <https://www.phillyvoice.com/5th-cecil-b-moore-graffiti-wall-development>. Interestingly, some have suggested that street art actually contributes to gentrification and increases property values, especially in areas with low crime rates. See, e.g., GREGORY J. SNYDER, *GRAFFITI LIVES: BEYOND THE TAG IN NEW YORK'S URBAN UNDERGROUND* (2009).

109. See, e.g., Kelly P. Welch, *Graffiti and the Constitution: A First Amendment Analysis of the Los Angeles Tagging Crew Injunction*, 85 S. CAL. L. REV. 205 (2011).

if the street art infringes upon the property owner's intentions to also bring beauty to the same location given the general public's strong conviction in the importance of protecting property rights.<sup>110</sup> A work of street art should not supersede the efforts of the owner upon whose property the street art is placed: the right of a property owner to exert and maintain control over the outward appearance of her property must be strongly protected under the law, especially if the owner has deliberately undertaken costly efforts to make this outward appearance generally pleasing and agreeable to others. The street artist is not permitted to substitute her aesthetic views for those of the property owner. An exception to this broad deference shown to property rights may properly arise, however, where little, if any, effort has been undertaken by a property owner to adequately maintain or upkeep her property, as in the case of an abandoned building. Here, absent highly unusual circumstances, the street artist is not substituting her aesthetic preferences for those of the property owner; instead, the street artist is engaging in a laudable effort to improve a visual landscape defined by the conspicuous absence of such efforts on the part of the current property owner: the street artist is bringing life and humanity to a neglected space that otherwise constitutes a blighting influence.

To establish if a property is a blighting influence, as part of a larger determination as to whether the work qualifies as street art, courts can import the definition of blighted property from local real estate ordinances. For example, to determine if a property is a blighting influence, the city of Philadelphia employs, in addition to an objective standard, a subjective standard under which real property qualifies as a blighting influence if the property has "a significant adverse influence" on the community based upon a number of specific factors including the "safety of the surrounding community," "community morale," "marketability of the property," and the value of surrounding properties.<sup>111</sup> Likewise, in Gilroy, California, real property is defined as "blighted" under a town ordinance if the property is, *inter alia*, "inadequately maintained," which includes the presence of "[o]vergrown, diseased, dead, or decayed trees, weeds or vegetation that . . . are likely to harbor rats, pigeons, vermin, and other nuisances."<sup>112</sup> Further, many local governments impose some form of punishment on an owner who allows her property to become a blighting influence as defined under local ordinance. In Philadelphia, for instance, an owner of a building adjudged to be a "blighting influence" is required to install glass windows and doors with frames on the blighted property subject to stiff monetary punishment, having to pay up to three

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110. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Armen A. Alchian & Harold Demsetz, *The Property Rights Paradigm*, 33 J. ECON. HIST. 16 (1973); O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441 (2001).

111. PHILA., PA. PROP. MAINT. CODE § 202 (repealed 2015). Under the objective standard, if the property without windows or door is on a block where eighty percent (or more) of the properties are occupied, then the property is considered a blighting influence.

112. GILROY, CA. CITY CODE ch. 5B, § 2 (2018), <https://www.codepublishing.com/CA/Gilroy/html/Gilroy05B.html#5B.2>.

hundred dollars per day for each individual door or window in violation of the anti-blight ordinance.<sup>113</sup>

The criminal punishment for street art should reflect the fact that an alleged street artist, albeit on a more informal basis, is pursuing the same basic objective as municipal anti-blight ordinances designed to protect the livability and visual appearance of the community and to counter the impairment of property values that results from the persistent neglect and deterioration of property.<sup>114</sup> The street artist and local government are both intertwined in the same broader social endeavor—improving the visual appearance of otherwise dismal and lifeless urban space. In the absence of investment on the part of government or local property owners in the infrastructure or physical appearance of a neighborhood, street art may be rightly viewed as an alternative form of capital investment in the community.<sup>115</sup> Accordingly, works of street art intended to improve the physical appearance of an urban space characterized by the lack of such rehabilitative efforts on the part of other stakeholders in the community should, at a minimum, qualify for a reduced criminal penalty compared to other acts of private vandalism.<sup>116</sup>

In fact, having failed to maintain or upkeep her property, the owner of a blighted property may even be said to have relinquished the right to pursue the placement of street art on the property as a criminal offense. Or, perhaps even more controversially, provided the property owner does not object to the placement of the street art on the property in an open and timely manner, it may

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113. PHILA., PA., PROP. MAINT. CODE §§ 901.2, 902.12 (repealed 2015); *id.* § 311.2.2 (stating that the penalty for a violation of any provision of the code shall be a fine of not less than one hundred dollars nor more than three hundred dollars); *see also* James M. Lammendola & Harper J. Dimmerman, *The Constitutionality of Philadelphia's Windows and Doors Ordinance*, LEGAL INTELLIGENCER (Oct. 8, 2018, 12:53 PM), <https://www.law.com/thelegalintelligencer/2018/10/08/the-constitutionality-of-philadelphias-windows-and-doors-ordinance>. Failing to distinguish between art forms, treating street art and graffiti as two types of the same problem, a number of cities have enacted ordinances mandating that property owners remove graffiti works from their property. *See, e.g.*, N.Y.C., N.Y. ADMIN. CODE § 10-117.3 (2019), <https://nycadmincode.readthedocs.io/110/c01/index.html> (requiring property owners to remove graffiti on their premises at their own cost and imposing monetary penalties for noncompliance).

114. *See, e.g.*, Kermit Lind & Joe Schilling, *Abating Neighborhood Blight with Collaborative Policy Networks—Where Have We Been? Where Are We Going?*, 46 U. MEM. L. REV. 803, 844 (2016).

115. *See, e.g.*, Joshua Guetzkow, *How the Arts Impact Communities: An Introduction to the Literature on Arts Impact Studies* (Princeton Univ. Ctr. for Arts & Cultural Policy Studies, Working Paper No. 20, 2002), [https://culturalpolicy.princeton.edu/sites/culturalpolicy/files/wp20\\_-\\_guetzkow.pdf](https://culturalpolicy.princeton.edu/sites/culturalpolicy/files/wp20_-_guetzkow.pdf).

116. A number of cities have approached the punishment of street art, and graffiti more generally, with greater leniency. In response to growing concerns over increased levels of vandalism, the city of Philadelphia, for example, established the Mural Arts Program under which a graffiti writer is given the option of either going to jail or participating in a city beautification initiative that allows these artists to showcase their talent in a socially constructive way. MURAL ARTS PHILA., <https://www.muralarts.org>.

be further argued, under cases such as *Cohen v. G&M Realty*, that the street artist has acquired copyright protection under the VARA disallowing the property owner from destroying, or otherwise modifying, without the express consent of the street artist, the work of art placed upon the property.<sup>117</sup>

## 2. Vandalism as Protected Speech

This subsection considers *resistance art*, and argues that, like street art, resistance art is a form of public vandalism characterized by positive externalities and should be punished less severely than acts of private vandalism. Under the First Amendment of the U.S. Constitution, the right to freely exercise speech is protected so long as this free speech right is exercised “peaceably.”<sup>118</sup> Interestingly, physical destruction of one’s own private property may be deemed peaceable. In general, courts that have considered this type of property destruction in the First Amendment context have proved sympathetic to the interests of the destroyers.<sup>119</sup> To be communicative, an act of destruction must be more than “mindless nihilism,” however.<sup>120</sup> Instead, the destroyer must intend “to convey a particularized message,” and it must be likely that the audience for the message would have understood it.<sup>121</sup> Physical destruction of another’s private property, however, is *not* peaceable: purely destructive acts, such as throwing a brick through a shop window as a form of anti-consumerism protest, are not constitutionally protected forms of expression.<sup>122</sup> What about creative works of art?

In addition to protecting actual spoken words, courts have consistently held that the Free Speech Clause of the First Amendment extends to mediums for expressive content, such as paintings, song lyrics, or parades.<sup>123</sup> The Second

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117. See, e.g., Peter N. Salib, *The Law of Banksy: Who Owns Street Art?*, 82 U. CHI. L. REV. 2293, 2309 (2015) (arguing that the traditional doctrines of property law are ill-equipped to decide questions of street-art ownership and that courts should employ their equitable powers to divide street-art ownership). But see Cathay Y. N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property’s “Negative Space” Theory*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 259 (2014) (arguing that normative rules, and not legal rules, are better suited to protect street art).

118. See U.S. CONST. amend. I. The Fourteenth Amendment makes the First Amendment applicable against the states. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

119. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 824 (2005).

120. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974); cf. *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 160–61 (3d Cir. 2002).

121. *Spence*, 418 U.S. at 411.

122. See, e.g., Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 963 (2015).

123. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (protecting the act of burning an American flag to protest government policies as expressive content under the First Amendment); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (declaring a parade to be a form of expression and citing other examples of the “painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll” as “unquestionably shielded” by the First Amendment).

Circuit, for example, has held that a work of art merits First Amendment protection if the dominant purpose of the work is to communicate a message.<sup>124</sup> Likewise, the Ninth Circuit has granted protection based upon the communicative value of the “art.”<sup>125</sup> Art does not need to contain words to be capable of expressing a message; therefore, First Amendment protection also extends to art that contains an expression, even if the specific ideas expressed are not readily discernable, and especially if the work is displayed to the public.<sup>126</sup> In particular, courts have characterized graffiti as art subject to constitutional protection, finding graffiti to be expressive and, therefore, protectable under the First Amendment.<sup>127</sup>

With this jurisprudence in mind, this subsection draws a distinction between ideologically motivated graffiti, referred to here as resistance art, and non-ideologically motivated graffiti. In general, non-ideologically motivated graffiti is motivated by territorial marking (often gang-related), by a personal craving for fame and recognition, by frustration or rage, or by a jealous impulse to destroy or “diss” the work of another graffiti writer, and does not generate positive externalities as does ideologically-motivated graffiti.<sup>128</sup> Resistance art or ideologically-motivated graffiti, on the other hand, is a form of expression that is entitled to some degree of presumptive First Amendment protection and should, for that reason, be punished less severely than acts of private vandalism. Of course, it is well-settled law that owners are not required to allow the free speech of others upon their property.<sup>129</sup> On private property, or on government property not considered a traditional (or a limited) public forum, it is legally permissible to exclude speech, even if the exclusion is strictly based upon the content of the speech.<sup>130</sup> The claim here is *not* that the First Amendment right to free speech establishes an unfettered right to place resistance art upon

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124. See *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006) (using a four-factor test to determine whether a non-traditional expressive medium (clothing) was predominantly expressive and, therefore, under the ambit of the First Amendment).

125. See, e.g., *White v. City of Sparks*, 500 F.3d 953 (9th Cir. 2007) (finding that an artist’s paintings that were sold in public places were entitled to First Amendment protection because he intended to convey a message through his works).

126. See Daniel Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383, 388–91 (1997).

127. See, e.g., *Mastrovincenzo*, 435 F.3d at 84; *Ecko.Complex LLC v. Bloomberg*, 382 F. Supp. 2d 627 (S.D.N.Y. 2005).

128. See Bacharach, *supra* note 78; see also Cohen, *supra* note 61.

129. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 925, 1137 (3d ed. 2006); see also *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972) (“It would be an unwarranted infringement of property rights to require [property owners] to yield to the exercise of First Amendment rights . . .”).

130. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983) (“Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.”).

property without the express consent of the property owner. Rather, the claim is simply that, unlike non-ideologically motivated graffiti, resistance art generates positive externalities that militate in favor of relatively less severe punishment, compared to other acts of vandalism, in the case of resistance art placed upon property that is a blighting influence.

The case for vandalism as a form of socially beneficial protected speech deserving of reduced penalties is most compelling where the act of vandalism itself is a textual expression that is easy-to-read and renders the social or political message conveyed immediately evident. In the late 1980s, for instance, social activists in South Africa painted on public walls, often in bright colors, simple, easily decipherable phrases, such as “stop the violence,” as part of a broader anti-apartheid movement.<sup>131</sup> The slogan painted most often was “Free Mandela.”<sup>132</sup> The political message was very clear in this case: Lock us up, but we will keep fighting—even imprisoned, Nelson Mandela is present and part of this political struggle.<sup>133</sup> Although this form of resistance art is a creative act performed without the express consent of the property owner that changes the viewer’s experience of the surrounding environment in a positive way, this act of vandalism is primarily intended not to bring color, life, or joy to a public space otherwise lacking such qualities, but, rather, to express a specific political or social message.<sup>134</sup> In the case of South Africa, such public writings were used to transform the horrendous experience and circumstance of the country’s oppressed minority groups into an expressive form of resistance art directed squarely against the demeaning and dehumanizing forces of the hostile apartheid.<sup>135</sup> In the absence of access to the dominant government-controlled mainstream media, resistance art developed into an alternative medium by which to challenge the status quo, giving a powerful voice to a mass movement that had been heretofore unaware of its collective power.<sup>136</sup>

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131. See SUE WILLIAMSON, RESISTANCE ART IN SOUTH AFRICA 96 (1989).

132. See *id.* at 96–97.

133. See *id.*

134. The message may be granular, focusing on issues within the local community, or broad, focusing on issues of more global concern.

135. See WILLIAMSON, *supra* note 131, at 93.

136. See Jane Battersby, *Sometimes It Feels Like I’m Not Black Enough: Recast(e)ing Coloured through South African Hip-hop as a Postcolonial Text*, in SHIFTING SELVES: POST-APARTHEID ESSAYS ON MASS MEDIA, CULTURE AND IDENTITY 109 (Herman Wasserman & Sean Jacobs eds., 2003). Along similar lines, the people of Nicaragua, in July 1979, carried out a successful revolution against the dictator, Anastasia Somoza. At least since the mid-1960s, the *pinta*, or what Nicaraguans refer to as graffitied political slogan, was as an integral part of the eventual overthrow of the government. See Carmen Cowick, *Preserving Street Art: Uncovering the Challenges and Obstacles*, 34 ART DOCUMENTATION 29 (2015). The image most commonly drawn was that of Augusto Sandino, a Nicaraguan nationalist who led a rebellion between 1927 and 1933 against the U.S. military occupation of Nicaragua. Sandino had a very specific and easily-recognizable look—a militarized horse-wrangler with a giant cowboy hat—that became a near-universal symbol of resistance to state corruption and oppression. See *id.* Throughout the 1960s and early 1970s, thousands of Nicaraguans represented the image of Sandino by means of resistance art

As defined here, resistance art is an example of core political speech that the First Amendment elevates above all other forms of individual expression because of its purely expressive nature and its importance to a functional democratic republic.<sup>137</sup> This application is especially true if the core political speech is expressed in traditional public forums that have been customarily devoted to public assembly and social debate.<sup>138</sup> Under the First Amendment, content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny review, meaning that the restriction will be held constitutional *only if* it is narrowly drawn to achieve a compelling state interest.<sup>139</sup> These strong protections provided under the First Amendment suggest that the expression or communication of social or political messages generate significant positive externalities that, in the context of criminal law, argue strongly in favor of reduced criminal sanctions. Further, the marginal social costs of deterrence with respect to resistance art are higher compared to street art, which is more elaborate and time-consuming to create, often requiring street artists to form large crews to execute the more complex, labor-intensive designs and styles, and, as such, is easier for law enforcement agencies to detect or prevent.<sup>140</sup> Hence, insofar as that the positive externalities of resistance art exceed the positive externalities of street art, resistance art, under the optimal deterrence theory, should be punished less severely than street art (or other acts of private vandalism) with comparable property damage.<sup>141</sup>

In South Africa, however, as in other countries as well, such as France and Nicaragua, resistance art has, to the contrary, been punished quite harshly, as a political crime, and offenders have been detained, at length, without a trial, or in some cases, even killed.<sup>142</sup> Compared to creative acts of street art that are primarily intended to beautify a public space that is a blighting influence, writings placed in public view, especially ones that express ideological opposition to existing power structures, pose much greater political risk to

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on the street. *See id.*; *see also* JOEL C. SHEESLEY, SANDINO IN THE STREETS 4 (Wayne G. Bragg ed. & trans., 1991).

137. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *see also* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (asserting that the First Amendment encapsulates this nation's strong commitment to producing a public debate that is "uninhibited, robust, and wide-open"); *cf.* O. Lee Reed, *Is Commercial Speech Really Less Valuable than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L.J. 1 (1996).

138. *See* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985); *see also* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

139. *See* *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Boos v. Barry*, 485 U.S. 312, 319 (1988); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also* *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642–43 (1994) ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.").

140. *See* LEWISOHN, *supra* note 104, at 18.

141. *See* Part IV.

142. *See, e.g.*, WILLIAMSON, *supra* note 131, at 93; *see also* SHEESLEY, *supra* note 136.

parties in power.<sup>143</sup> This political risk overrides the theoretical predictions of optimal deterrence: to maintain political power and control, the government, often as part of a broader social project of political propaganda and wide-ranging censorship, sets the punishment for this particular act of vandalism at a maximal level, with the expected punishment far exceeding the market value of the damaged property.<sup>144</sup>

Characterizing vandalism as a socially positive form of protected speech that should be punished less harshly than acts of private vandalism is less clear if the social or political message is *not* immediately clear from the act of vandalism itself and is only indirectly motivated by political or social concerns. These acts of vandalism may include destructive acts, such as slashing a bike tire or throwing a brick through a storefront window. Many forms of graffiti itself are principally destructive in nature. Indeed, many graffiti writers refer to themselves as “bombers,” conceiving of themselves as “typographic terrorists” engaged in a hostile reclamation of urban public spaces, and are not particularly concerned with how other non-writers react or respond to what they do.<sup>145</sup> These individualized acts of destruction may be emblematic of a more general sense of anger or frustration deeply felt within a community and may not be particularly upsetting to those who agree or sympathize, on some level, with the general sentiments conveyed by these destructive acts of vandalism.<sup>146</sup> In fact, these highly visible destructive acts of protest may provide important signals to those in political power that something is profoundly wrong in a community, that the people who reside in that community are unhappy, restless, and feel largely neglected by the government, and more broadly, by society.<sup>147</sup> Albeit criminal, destructive acts of vandalism may appear the only viable means by which to communicate feelings of dissatisfaction and resentment to the political powers that be.<sup>148</sup> Unlike resistance art, however, which is much more

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143. See, e.g., John Lennon, *Assembling a Revolution: Graffiti, Cairo and the Arab Spring*, 20 CULTURAL STUD. REV. 237 (2014).

144. See generally LYMAN G. CHAFFEE, POLITICAL PROTEST AND STREET ART: POPULAR TOOLS FOR DEMOCRATIZATION IN HISPANIC COUNTRIES (1993).

145. See LEWISOHN, *supra* note 104, at 19 (“[M]any graffiti writers . . . do not want to be considered as artists. They’re out to destroy; they’re out to make a mess; they find the term ‘art’ offensive. They look down on art and are happy to be known primarily as vandals.”); see generally Theo Kindynis, *Bomb Alert: Graffiti Writing and Urban Space in London*, 58 BRIT. J. CRIMINOLOGY 511, 512 (2018).

146. See Cohen, *supra* note 61 (discussing malicious vandalism).

147. See, e.g., Ivan Krastev, *From Politics to Protest*, 25 J. DEMOCRACY 5 (2014) (arguing that protest represents an effective strategy of citizen empowerment in the age of globalization where the power of citizens derives mainly from an ability to disrupt); see also David I. Hanauer, *The Discursive Construction of the Separation Wall at Abu Dis*, J. LANGUAGE & POL. 301, 306 (2011) (“Graffiti, through its unrequested interjection within the public domain, is always an inherently political act.”).

148. See, e.g., Jeffrey D. Fisher & Reuben M. Baron, *An Equity-Based Model of Vandalism*, 5 POPULATION & ENV’T. 182 (1982) (proposing that the core motive underlying acts of vandalism is perceived inequity: perceived violations of norms of fairness in social or environmental arrangements); Sylvia Warzecha DeMore, Jeffrey D. Fisher & Reuben M. Baron, *The Equity-*

obviously linked to a particular social or political movement, the message conveyed through destructive acts of vandalism is not particularized and is only indirectly political or social insofar as it serves a symbolically expressive function, conveying a dissatisfaction with the status quo to those in power (assuming, of course, that such acts do not go unnoticed). Because the social or political message associated with the act is not immediately clear, the analogy to pure speech is attenuated. And thus, the positive externality is lower compared to explicit acts of resistance art, which implies, in turn, that the justification for reduced criminal sanctions for destructive acts of “resistance art” is relatively weaker.<sup>149</sup>

Another key difficulty that arises in characterizing vandalism as a socially positive form of protected political speech, one that complicates any discussion of political speech for that matter, is speech that, although political, can also be described as hateful, threatening, or abusive. Under the Supreme Court’s First Amendment jurisprudence, only speech that poses an imminent danger of unlawful action, where the speaker has the intention to incite such action, and there exists the likelihood that this will be the consequence of the speech, may be lawfully restricted.<sup>150</sup> “[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.”<sup>151</sup> To be clear, the First Amendment does *not* protect behavior that crosses the line into threats of violence or harm against specific individuals, or that creates a pervasively hostile environment for vulnerable persons.<sup>152</sup> The same limitation applies to resistance art. Hence, a swastika painted upon the home of a Jewish person is not resistant art—there is no First Amendment right to engage in targeted threats of intimidation or abuse.<sup>153</sup> But, this does not answer the surely more difficult question: what if a swastika is placed, not upon private property readily associated with a Jewish

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*Control Model as a Predictor of Vandalism Among College Students*, 18 J. APPLIED SOC. PSYCHOL. 80 (1988) (testing equity-based model of vandalism).

149. See Strahilevitz, *supra* note 119; see also Eric Rasmusen, *The Economics of Desecration: Flag Burning and Related Activities*, 27 J. LEGAL STUD. 245, 253–55 (1998).

150. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 572–73 (1942) (unanimously sustained a conviction under a statute proscribing “any offensive, derisive or annoying word” addressed to any person in a public place under the state court’s interpretation of the statute as being limited to “fighting words”—i.e., words that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”).

151. *R.A.V.*, 505 U.S. at 393 (emphasis omitted).

152. See *id.*; see also *Planned Parenthood v. Am. Coal. of Life Activities*, 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003).

153. See, e.g., *Virginia v. Black*, 538 U.S. 343, 544 (2003) (holding that “true threats” of violence that are directed at a person or group of persons that have the intent of placing the target at risk of bodily harm or death are generally unprotected under the First Amendment); see also *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (establishing “true threat” doctrine).

person, but is, instead, placed in a traditional public forum for all to see. This symbol clearly expresses the social or political view of a minority that may be without access to other means of communication. There is no doubt that this act conveys a very specific ideological message. But, is this truly resistance art?

To answer this question, a court should consider if the vandal is a person without access to other means of communication who is expressing a statement to advance a political or social self-interest that is *not* hateful, threatening, or abusive in nature. A swastika put up on a public wall clearly fails this test, because the symbol is patently hateful and immediately invokes historical acts of horrendous violence against the Jewish people. But the message conveyed by other symbols may be less obvious and require a judgment call by the court. In the end, the purpose of this analysis, of course, is not to determine if the act should go unpunished, but, rather, only to establish if the act of vandalism qualifies as resistance art and is, therefore, deserving of a lesser criminal sanction, one that is minimal compared to other forms of private vandalism, or if the act of vandalism constitutes hate speech and should, therefore, be punished relatively severely compared to acts of private vandalism (as is presently the case in some states).<sup>154</sup>

### *B. Vandalism as a Harm to Society*

Compared to creative acts of resistance art, not only do purely destructive acts of vandalism send a weaker or noisier signal of dissatisfaction to those in political power, but such acts of vandalism may also give rise to significant “broken windows” effects that offset, or negate entirely, any positive externality related to the act’s expressive function.

#### 1. The Broken Windows Theory of Crime

Under the “broken windows” theory of crime, visible signs of decay and abandonment in urban communities act to heighten physical and social disorder, which, in turn, can translate into elevated levels of criminal activity by encouraging local residents to minimize public interactions and to reduce social control efforts.<sup>155</sup> This collective withdrawal results in a larger volume of unregulated physical areas in which illegal activities, such as drug-dealing or prostitution, can take root and flourish.<sup>156</sup> Vacant or poorly-maintained properties that are the product of limited access to private capital are a signal to would-be offenders that few residents are actively concerned with controlling

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154. See *supra* notes 30–31.

155. See Kelling & Wilson, *supra* note 8, at 31; SKOGAN, *supra* note 8; see also KELLING & COLES, *supra* note 8.

156. See, e.g., Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603 (1999); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); see also BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).

crime in the neighborhood, thereby decreasing the perceived likelihood of detection among this set of would-be offenders. It is a visible signal that the community is vulnerable to, or has already surrendered, its public space to criminality and other forms of anti-social behavior.<sup>157</sup> It is not so much the broken window that is important, as it is the message that the broken window communicates to potential criminal outsiders: a disordered environment conveys apathy and a general unwillingness on the part of the community to defend against criminal invasion.<sup>158</sup>

Under the broken windows theory of crime, low-level, quality-of-life offenses, such as vandalism, generate significant negative externalities, not only in the form of higher crime rates, but also, indirectly, in the form of lower property values and tax revenues.<sup>159</sup> Advocates of the “broken window theory” often perceive vandalism as one of the most important, if not the most important, quality-of-life offense that must be reduced to bring about a corresponding reduction in total crime, including more serious or violent crime; indeed, vandalism is the very act after which the theory is named.<sup>160</sup> In New York City, for example, former Mayor Ed Koch’s enthusiastic adherence to the broken window theory promoted an aggressive anti-graffiti campaign in the early 1980s, resulting in “the buff”—a chemical wash for subway trains that dissolved the graffiti paint.<sup>161</sup> In 1995, then-Mayor Rudolph Giuliani made a crackdown on vandalism the centerpiece of an aggressive anti-crime agenda, setting up the Anti-Graffiti Task Force as a multi-agency initiative to combat the perceived problem of graffiti vandals in New York City.<sup>162</sup> That same year Title 10-117 of the New York Administrative Code banned the commercial sale of aerosol spray-paint cans to children under the age of eighteen.<sup>163</sup>

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157. See, e.g., Steve Herbert & Elizabeth Brown, *Conceptions of Space and Crime in the Punitive Neoliberal City*, 38 ANTIPODE 755 (2006); SKOGAN, *supra* note 8.

158. See, e.g., Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, 17 NEB. SYMP. ON MOTIVATION 237 (1969); see also L.A., CAL. MUN. CODE ch. IV, art. 14, § 49.84.1(C) (2010), [http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles\\_ca\\_mc](http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc). (“[T]he spread of graffiti often leads to violence, genuine threats to life, and the perpetuation of gangs, gang violence, and gang territories.”); see generally SNYDER, *supra* note 108.

159. See, e.g., Mark Obrinsky & Debra Stein, *Overcoming Opposition to Multifamily Rental Housing* (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. RR-07-14, 2007), [https://www.jchs.harvard.edu/sites/default/files/rr07-14\\_obrinsky\\_stein.pdf](https://www.jchs.harvard.edu/sites/default/files/rr07-14_obrinsky_stein.pdf).

160. See, e.g., KELLING & COLES, *supra* note 8; see generally WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC* (1998).

161. See JOE AUSTIN, *TAKING THE TRAIN: HOW GRAFFITI ART BECAME AN URBAN CRISIS IN NEW YORK CITY* (2001).

162. See *id.*

163. See N.Y.C., N.Y. ADMIN. CODE § 10-117(c) (1995), <http://www.nyc.gov/html/nograffiti/html/legislation.html>. The law also required that merchants who sell spray paint either lock the cans in a case or display the cans behind a counter out of the reach of potential shoplifters. See *id.*

To the extent that broken window effects do, in fact, exist, the overall magnitude of these negative effects likely exceeds any positive expressive effect that a destructive act of vandalism might possess.<sup>164</sup> Hence, destructive acts of vandalism, which do not qualify as resistance art, should be punished, under a broken windows theory of crime, relatively more severely than acts of private vandalism that, by definition, do not possess such effects.

## 2. The Suboptimal Provision of Access

This subsection argues that the intentional destruction of public goods, or goods traded upon the basis of access and not ownership, such as access to a bike in a bike-sharing system, should be punished relatively harshly compared to other acts of public and private vandalism. The justification for enhanced criminal penalties in this case is more convincing than that provided under the broken windows theory of crime, because, arguably, the existence of negative externalities rests on stronger theoretical footing. This subsection begins by considering the impact of vandalism on bike-sharing systems.

A bike-sharing system is a service in which bicycles are made available for “shared” use on a short-term basis for a small fee.<sup>165</sup> Many bike-sharing systems allow people to borrow a bike from a “dock” and return the bike to another dock belonging to the same system. Docks are special bike-racks that release a locked bike only if the user enters the correct payment information.<sup>166</sup> Although many agree that the benefits of such systems justify their adoption, some observers have criticized bike-sharing systems for too often failing to reach low- or moderate-income urban communities.<sup>167</sup> While some companies, such as New York CitiBike, have responded to this criticism by offering discounted membership programs in an effort to increase affordability,<sup>168</sup> the lack of geographical inclusiveness may indicate not so much weak local consumer demand, but more an unwillingness on the part of providers of bike-sharing systems to enter into communities with relatively high rates of vandalism (to the extent that there exists a negative correlation between vandalism rates and low- or moderate-income communities).<sup>169</sup>

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164. As discussed in Part IV, the empirical validity of the broken windows theory is still very much uncertain. *See infra* note 192.

165. *See, e.g.*, Elliot Fishman, *Bikeshare: A Review of Recent Literature*, 36 *TRANSPORT REVS.* 92 (2016).

166. *See id.*

167. *See, e.g.*, NACTO, *BIKE SHARE IN THE U.S.: 2017 6–8* (2017), <https://nacto.org/wp-content/uploads/2018/05/NACTO-Bike-Share-2017.pdf>.

168. *See* MICHAEL KODRANSKY & GABRIEL LEWENSTEIN, *CONNECTING LOW-INCOME PEOPLE TO OPPORTUNITY WITH SHARED MOBILITY* (2014), [https://www.itdp.org/wp-content/uploads/2014/10/Shared-Mobility\\_Full-Report.pdf](https://www.itdp.org/wp-content/uploads/2014/10/Shared-Mobility_Full-Report.pdf).

169. *See, e.g.*, STEVEN HOWLAND ET AL., *NAT’L INST. TRANSP. & COMMUNITIES, BREAKING BARRIERS TO BIKE SHARE: INSIGHTS ON EQUITY FROM A SURVEY OF BIKE SHARE SYSTEM OWNERS AND OPERATORS* (2017), [https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1138&context=trec\\_reports](https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1138&context=trec_reports).

Anecdotally, some companies have explicitly cited vandalism rates as the reason for discontinuation of services in certain geographic locations. The Hong Kong bike-sharing company, GoBee, for example, abandoned operations in the Belgian city of Brussels and the French cities of Lille and Reims, after approximately eighty to ninety percent of its fleet in those cities had been damaged in some way.<sup>170</sup> “We must face up [to] the sad reality that a minority bent on destruction does not share our vision on mobility, and we can no longer support the financial and moral costs of the repairs,” GoBee said in a public statement.<sup>171</sup> This statement echoes one of the principal claims set forth in this Article: that there exists a threshold, in terms of the financial costs of vandalism, beyond which a company like GoBee, which provides a good that trades on the basis of access, and not ownership, can no longer remain economically viable.

This claim is illustrated by means of a simple example: suppose that a bike can be purchased at a cost of \$12. There are three people, *A*, *B*, and *C*, each of whom is assumed to benefit from having access to a bike: the value to *A* is \$14, the value to *B* is \$7, and the value to *C* is \$6. Under a system of private ownership, only *A* would purchase a bike as the benefit, \$14, exceeds the cost, \$12. Neither *B* nor *C* would purchase a bike, because the cost of the bike, \$12, exceeds the benefits, \$7 and \$6, respectively, of bike ownership. Now, suppose that a system of shared use is instituted wherein *A*, *B*, and *C* all agree to share access to a single bike, and the cost of this shared access is divided equally among the three of them. Under this system of shared ownership, *A*, *B*, and *C* all share and use the bike and enjoy the corresponding benefit.<sup>172</sup> Because *B* and *C* now have access to a bike and *A* pays less for such access, this system of shared ownership is social welfare-improving compared to a system of private ownership.

Assume that this shared bike is typically left in one of several docking stations all of which are easily accessible by the public, and that defenseless as such, this bike is the target of vandalism that results in \$12 of property damage and, in turn, raises the operating expenses of the bike-sharing program from \$4

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170. Geert De Clercq, *Bike Share Firm Gobee Quits Brussels, Lille over Vandalism*, REUTERS (Jan. 10, 2018, 8:44 AM), <https://www.reuters.com/article/europe-bikesharing-vandalism/bike-share-firm-gobee-quits-brussels-lille-over-vandalism-idUSL8N1P53WJ>. Gobee meanwhile continues to provide bike-sharing services in Paris, and the Italian cities of Florence, Turin, and Rome, where only one to six percent of the fleet suffers from vandalism. *See id.*

171. *Id.*; *see also* Luz Lazo, *Theft and Destruction of Dockless Bikes a Growing Problem*, WASH. POST (July 1, 2018), <https://www.washingtonpost.com/news/dr-gridlock/wp/2018/07/01/theft-and-destruction-of-dockless-bikes-a-growing-problem/?arc404=true> (“Less than a year after dockless bike-share systems arrived in [Washington, D.C.], the colorful bikes are being stolen and vandalized in growing numbers, with one city official saying that some companies have lost up to 50 percent of their fleets.”).

172. Note that the low-income gain from the cost-savings of sharing expensive assets, because ownership represents a more significant barrier to consumption than access. *See* Samuel P. Fraiberger & Arun Sundararajan, *Peer-to-Peer Rental Markets in the Sharing Economy* (N.Y. Univ. Stern Sch. of Bus., Research Paper No. 15-19, 2017).

to \$8 per person.<sup>173</sup> If the user fee is set equal to the individual cost per person of \$8, then this system of shared ownership is now beneficial only for A, and not B and C, and the program would, therefore, be discontinued as there is no one with whom A can share access. This discussion is summarized in Table 1.

**Table 1.** Goods Traded Based Upon Access

<i>Citizens</i>	<i>Benefit of Access</i>	<i>Cost of Ownership</i>	<i>Cost of Shared Access</i>	<i>Cost of Vandalism</i>
A	14	12	4	8
B	7	12	4	8
C	6	12	4	8

Under these assumptions, what is the “optimal” punishment for vandalism of the shared bike? Adopting the approach suggested under existing law, the punishment for this offense would be set equal to the economic value of the property vandalized—the private harm.<sup>174</sup> Accordingly, the expected punishment in this example is \$12. This approach is simple and straightforward to implement, but also ignores the larger external social cost generated by this specific act of vandalism. Under a system of shared ownership, social welfare is equal to  $\$15 = (\$10 + \$3 + \$2)$ .<sup>175</sup> Under a system of private ownership, by contrast, social welfare is only equal to  $\$2 = (\$2 + \$0 + \$0)$ .<sup>176</sup> Hence, shared ownership increases total social welfare by  $\$13 = (\$15 - \$2)$ . By increasing the operating expenses of the bike-sharing system such that the service is no longer economically feasible, vandalism directly causes the loss of a social welfare-improving program. The optimal punishment must include this loss: the total social harm of vandalism must include, in addition to the private harm sustained by the bike-sharing company itself (i.e., \$12), the total social welfare-gain lost (i.e., \$13, for an optimal punishment of \$25).

In this hypothetical example, the public harm of vandalism exceeds the private harm. Although vandalism results in direct damages to the private company that owns the individual shared bikes, these acts of vandalism are also experienced more broadly by the entire community, as a negative externality, for the costs of vandalism render the provision of bike-sharing services financially unprofitable. In this way, the actions of, perhaps, a relatively small number of vandals has the potential to impact, not only the individual owners of the property damaged or destroyed, but also, more importantly, the entire community as well. A service that provides a shared benefit to many people may no longer be profitable as a result of the private actions of a small number of people motivated by possibly nothing more than a wanton delight in the

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173. This cost figure includes observable security measures undertaken to prevent vandalism.

174. In this example, enforcement costs are set equal to zero for the sake of exposition.

175. Social welfare is calculated as the sum of the individual benefit of having access to the bike minus the fee paid for such access. Thus, social welfare under a system of shared ownership is:  $(\$14 - \$4) + (\$7 - \$4) + (\$6 - \$4)$ .

176. Likewise, social welfare under a system of private ownership is:  $(\$14 - \$12) + (\$0 - \$0) + (\$0 - \$0)$ .

damage or destruction of property. Under the theory of optimal deterrence, the expected punishment for vandalism of bicycles made available to the community as part of a bike-sharing system must explicitly account for this broader harm to society: it is not sufficient to consider only private harm, because the magnitude of the private harm will tend to be significantly lower than the magnitude of the public harm incurred if a bike-sharing program (or some other type of good traded on the basis of access) is no longer provided in the community. In other words, excluding social harm from the determination of the optimal punishment results in inefficiently too many acts of vandalism and may increase operating expenses for private companies in the access economy past the threshold at which point the provision of the good or service is still economically feasible.

Next, consider the case of a public good. Again, there exists a threshold, now in terms of political support, beyond which the provision of the public good is no longer politically viable. To illustrate this claim by means of a simplified example, suppose that flowers and trees are to be planted in a jurisdiction at a cost of \$2 per person. There are four people in this jurisdiction, *A*, *B*, *C*, and *D*, each of whom is assumed to benefit from this neighborhood beautification initiative: the value to *A* is \$2, the value to *B* is \$4, the value to *C* is \$8, and the value to *D* is \$12. Suppose further that the flowers and trees are the targets of vandalism that results in \$1 of damage per person and raises the effective costs of the neighborhood beautification program from \$2 to \$3 per person. Under a majority-rule system of government, assume that a policy is enacted into law *only if* a majority of the voters will be made better-off under the proposed law. In this example, *A*, *B*, and *C* are voters; *D* is not. For both *B* and *C*, the cost of the beautification plan, \$3, is less than the benefits, \$4 and \$8, respectively, implying that both *B* and *C* are better off with the provision of this public good. Because *B* and *C* represent a majority of the voting population, this community investment plan enjoys the political support of a majority of voters and would be enacted into law under the modeling assumptions made here.

Suppose that there is an exogenous change in the rate of vandalism such that damages resulting from acts of vandalism increase from \$1 to \$3 per person, increasing the per capita costs of the beautification program from \$3 to \$5 per person. As a result, the proposed policy is now beneficial only to *C*, and not *A* or *B*, and the program would, therefore, not proceed forward due to a lack of political support. This discussion is summarized in Table 2.

**Table 2.** Provision of Public Goods

<i>Citizens</i>	<i>Benefit of Access</i>	<i>Cost of Access</i>	<i>Cost of Vandalism</i>	<i>Effective Cost of Access</i>	<i>Higher Cost of Vandalism</i>	<i>Higher Effective Cost of Access</i>
<i>A</i>	2	2	1	3	3	5
<i>B</i>	4	2	1	3	3	5
<i>C</i>	8	2	1	3	3	5
<i>D</i>	12	2	1	3	3	5

Under these assumptions, what is the “optimal” punishment for the deliberate damage or destruction of this public investment in the infrastructure

of the community? Under state and federal law, the punishment for this offense would be set approximately equal to the private economic cost of vandalism. This approach, however, ignores the total social costs of vandalism. If the cost of vandalism is \$3 per person, then the net social welfare gain of the beautification program is \$6.<sup>177</sup> By increasing the amount of tax revenue needed to fund this public investment, the higher costs of vandalism result in the loss of political support for an otherwise social welfare-improving public investment. The optimal expected punishment for vandalism must include or otherwise incorporate this social-welfare loss, which is larger the greater the number of disenfranchised individuals, such as *D*, who would continue to benefit from the public investment in the community despite the higher rates of vandalism.<sup>178</sup>

In response to the increased rate of vandalism, the government provides the public good, not just to *C* and *D*, but rather to nobody. Nobody in the community can enjoy the benefit of more flower and trees, even though *C* and *D* would still be willing to pay for this public investment in the community. Under this simple model of government decision-making, higher rates of vandalism suboptimally results in no public good provision whatsoever: not a single person in the jurisdiction enjoys the benefits of the public good. Assuming certain structural constraints, the government cannot replicate the efficient outcome by simply providing the public good to a subset of voters (in this example, *C* and *D*). Here, the public good is assumed to be funded by means of a constant tax that applies equally across all taxpayers in the jurisdiction. The government cannot levy differential taxes to *C* and *D* on the basis of varying underlying preferences with respect to the public good; it must tax everybody at the same rate—a structural constraint that deprives a minority of voters a public benefit that they would otherwise be willing to pay for. Moreover, even if differential taxation was feasible, the benefits of the beautification plan are non-excludable, which might make *C* and *D* less willing to support this public investment to the extent that *C* and *D* perceive *A* and *B* as wrongly or unfairly “free-riding” upon the costly contributions of actual taxpayers.<sup>179</sup>

Thus, vandalism is, again, experienced more broadly by an entire community, as a negative externality. A public good that provides a collective benefit to many people is no longer provided to anyone as a direct consequence of the private actions of a possibly quite small number of people. Under the theory of optimal deterrence, the expected punishment for vandalism of public goods must explicitly account for this more general harm to society: it is not

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177. Social welfare is calculated as the sum of the individual benefit of the public investment in the community minus taxes paid and the cost of vandalism. Thus, social welfare under a system of public investment is:  $(\$2 - \$2 - \$3) + (\$4 - \$2 - \$3) + (\$8 - \$2 - \$3) + (\$12 - \$2 - \$3) = (-\$3 - \$1 + \$3 + \$7) = \$6$ .

178. There are likely to be many such individuals in low- and moderate-income communities.

179. See generally James Alm et al., *Why Do People Pay Taxes?*, 48 J. PUB. ECON. 21 (1992).

enough to consider only private harm. Excluding social harm in the calculation of the optimal punishment results in inefficiently too many acts of vandalism and may increase costs past the threshold beyond which the provision of a public good is politically feasible.

#### IV. PUNISHING PUBLIC VANDALISM CORRECTLY

The principal claim set forth in this Article is that the social impact of vandalism must be fully factored into the expected punishment for this offense. As noted in Part I, some state statutes do, in fact, impose enhanced penalties for certain types of property damage, including, for example, damage to buildings owned by religious institutions or schools, cemeteries, war memorials, and property belonging to a public utility. Arguably, these enhanced penalties reflect a recognition on the part of state governments that such acts of vandalism tend to result in harm, not only to the legal owners of the property vandalized, but also to the broader public as well: deliberate damage or destruction to a cemetery, for instance, adversely impacts not only those with family buried therein, but the general public as well who tend to view such an act as an egregious desecration of a holy place. Rather than identifying, somewhat arbitrarily, certain acts of public vandalism as uniquely deserving of enhanced penalties, this Article contends that the punishment for vandalism under state and federal law should consider the social impact of *all* acts of vandalism, and that such consideration should not be limited, by statute, to only a small, predefined subset of certain types of property damage. Recall, for example, that under Indiana state law, a person who damages property belonging to a school or community center is charged with institutional mischief, an offense that is punished more severely than ordinary criminal mischief.<sup>180</sup> But, why not enhanced penalties for vandalism to public safety vehicles as under Minnesota state law?<sup>181</sup> Why not cemeteries or war memorials? There is no reason to believe that the people of Indiana are, on average, any less harmed by damage to cemeteries than are the people of New Jersey. Likewise, there is no reason to believe that public utilities are more important to the people of Georgia than they are to the people of Colorado. The differing, idiosyncratic treatment of public vandalism evident in these statutes is more likely the product of historical artifact or mere chance than varying preferences or underlying differences in the theoretical conception of the offense—in all likelihood, there is no general motivating principle that explains why certain public institutions are singled out for enhanced penalties and others are not.

This Article suggests that the process used to select enhanced penalties (or reduced penalties) for certain acts of vandalism should be expressly informed by some general theory of criminal punishment and provides, as an illustrative template, a taxonomy of vandalism offenses that is grounded in the economic theory of optimal deterrence. Instead of selecting a subset of targets, seemingly arbitrarily, where the public harm tends to be large, the approach advocated for

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180. See IND. CODE § 35-43-1-2 (2019).

181. See MINN. STAT. § 609.595 (2019).

here is to consider the social impact of any act of vandalism regardless of the type of property damaged or destroyed. Of course, it may be useful to have certain “per se” categories where significant social harm is presumed, such as damage to a gravestone. But these categories should serve only as useful proxies in a more general consideration of social impact that is conducted for *all* acts of vandalism. If there is significant social harm, such as in the case of a shared or public good, then the act of vandalism should be punished more severely compared to acts of private vandalism. Likewise, if there exists significant social benefit, such as in the case of street art or resistance art, then the act of vandalism should be punished less severely compared to acts of private vandalism. It is not the exact magnitude of the punishment for each category of offense that is important so much as it is the ordinal ranking of such punishments.

#### A. A Taxonomy of Acts of Public Vandalism

An act of public vandalism can be categorized, not only by the marginal social costs of deterrence, but also by the presence of negative or positive externalities. For example, while resistance art and the deliberate damage or destruction of goods traded upon the basis of access are both relatively costly to prevent or deter, resistance art is assumed to generate positive externalities as an alternative form of ideological expression, whereas the vandalism of goods traded upon the basis of access is assumed to generate negative externalities insofar as these destructive acts may result in the suboptimal provision of such goods. Likewise, while both street art and resistance art are assumed to generate positive externalities, the marginal social cost of deterring street art is relatively lower, on average, because works of street art are generally much more time-consuming and labor-intensive to complete than are works of resistant art that can often be completed in less than a minute with nothing more than a can of aerosol spray-paint or a broad-tipped indelible marker.<sup>182</sup> This categorization of acts of public vandalism is summarized in Table 3<sup>183</sup>:

**Table 3.** Categories of Public Vandalism

	<i>High Deterrence Costs</i>	<i>Low Deterrence Costs</i>
<i>Negative Externalities</i>	Shared Goods, Public Goods	Defacement
<i>Positive Externalities</i>	Resistance Art	Street Art

The suggested hierarchy of degrees of punishment for the categories of public vandalism listed in Table 3 is provided in Table 4:

182. See LEWISOHN, *supra* note 104.

183. These categories are not necessarily mutually exclusive. Certain works of the anonymous England-based street artist, Banksy, arguably, constitute both street art and resistant art insofar as these works convey social or political messages in a humorous manner that brings life or joy to otherwise mundane urban spaces. See, e.g., BANKSY, WALL AND PIECE (2007).

**Table 4.** Degrees of Punishment for Public Vandalism

	<i>High Deterrence Costs</i>	<i>Low Deterrence Costs</i>
<i>Negative Externalities</i>	First-Degree	N/A
<i>Positive Externalities</i>	Third-Degree	Second-Degree

Note that the economic theory of optimal deterrence implies that acts of defacement (e.g., damage to artwork) should be punished the most severely among the four categories of public vandalism listed in Table 3, as this category of public vandalism is characterized by both relatively low marginal social costs of deterrence and large negative externalities.<sup>184</sup> A prototypical example of defacement is the intentional damage or destruction of valuable artwork. In general, the theft of artwork is a crime of financial gain, where the art tends to be stolen for the purpose of resale or to be held for ransom (sometime referred to as “art-napping”), and is attractive to potential offenders because works of art are often extremely valuable yet weigh very little, making transport relatively cheap and discrete.<sup>185</sup> Vandals of valuable artwork, on the other hand, are usually not motivated by financial gain and, in many instances, have been diagnosed with serious mental disorders.<sup>186</sup> As noted in Part II, the cost of deterring the criminally insane is high. If this potential offender is not deterred by a credible threat of punishment, then the supply of offenses with respect to this individual is perfectly (or highly) inelastic, implying that the marginal cost of deterrence is infinite (or very large) and increasing expected punishment for an additional deterrent effect is never (or only rarely) socially cost benefit-justified.

Hence, one potential explanation for why, in practice, this category of public vandalism has not been punished as severely as Table 3 would suggest is that the motivations of such offenders are often irrational (or, at very least, do not reflect a desire for financial gain) and, therefore, are generally inapplicable to the economic model of optimal deterrence, which is squarely based upon the notion that individuals will respond rationally to incentives.<sup>187</sup> Because this Article deems this particular category of public vandalism exceptional and comprised mostly of irrational actors, or actors who are otherwise not feasibly deterred by changes in the level of expected punishment, this category of public vandalism is excluded from the hierarchy of degrees of punishment set forth in Table 4.<sup>188</sup>

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184. See *supra* Part II.A.

185. See Cameron Skene, *Art Theft Ranked as Fourth-Largest Criminal Enterprise*, NAT’L POST, Sept. 1, 2007.

186. See DARIO GAMBONI, *THE DESTRUCTION OF ART: ICONOCLASM AND VANDALISM SINCE THE FRENCH REVOLUTION* 206 (1997).

187. See, e.g., Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 81 (2011) (using economic theory of crime to understand the decision to act corruptly as a product of rational decision-making).

188. In general, the punishment for this offense will depend upon how the criminally insane are treated within a given criminal justice system.

### B. The Broken Community Theory of Punishment

Table 4 proposes that an act of vandalism that generates significant negative externalities should, compared to other acts of public vandalism, be punished the most severely, as vandalism in the first degree, which includes the vandalism of goods traded upon the basis of access or public goods.<sup>189</sup> This particular category of public vandalism raises a number of important public policy considerations. To start, recall that the broken windows theory of crime posits that future crime is deterred if physical signs of disorder, created by acts of vandalism such as broken windows, are reduced. Under this theory, an act of vandalism, such as breaking a window, implies not only a private harm to the owner of the property vandalized, but also results in a broader public harm to the surrounding community as well in the form of higher crime rates (and, indirectly, in the form of lower property values and tax revenue).<sup>190</sup> It is this broader social harm that leads proponents of the broken windows theory to argue in favor of relatively harsh punishment for otherwise low-level quality-of-life offenses.<sup>191</sup> The empirical evidence, however, in support of the proposition that disorder, when left unpunished, causes crime is decidedly mixed.<sup>192</sup> Because the empirical validity of the broken windows theory is still unknown, this Article suggests that it would be unwise to suggest or contend that the expected punishment of quality-of-life offenses, such as vandalism, should be punished relatively harshly on this basis alone.

As an alternative justification for enhanced penalties, Part III argued that certain acts of vandalism may produce costs that preclude the provision of goods traded based upon access, and not ownership. Using bike-sharing systems as a prototypical example, it was shown how a relatively high incidence of vandalism in a community might increase operating expenses such that it is no longer profitable for bike-sharing companies to provide such services in the community, and cited anecdotal evidence to that effect.<sup>193</sup> Like bike-sharing services, the targets of first-degree vandalism contemplated in Table 4 are investments that have been made, either privately or publicly, in a local

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189. This ranking assumes that, on average, the social harm of such acts of vandalism exceeds the difference between the social cost of deterring street art and the social cost of deterring such acts of vandalism.

190. See Kelling & Wilson, *supra* note 8.

191. See *id.*

192. See, e.g., Anthony A. Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-analysis*, 52 J. RES. CRIME & DELINQUENCY 567 (2015) (finding that aggressive order maintenance strategies that target individual disorderly behaviors do not generate significant crime reductions); see also Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637 (1999); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006); Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 BRIT. J. CRIMINOLOGY 531 (1999); see also *Ecko.Complex LLC v. Bloomberg*, 382 F. Supp. 2d 627, 628–30 (S.D.N.Y. 2005) (finding that graffiti is not inherently threatening enough to satisfy the *Brandenburg* standard).

193. See *supra* Part III.B.2.

community with the specific intention of improving or enhancing its physical appearance or infrastructure. A genuine good faith effort to invest positively in an otherwise neglected publicly accessible urban space, however, can be discouraged by vandals whose actions increase the costs of investment such that it is no longer financially or politically feasible, thus spoiling this potential benefit for everybody else. In other words, acts of vandalism increase the cost of such investment, either financially or politically, and at some point, renders the return on the investment sufficiently low as to make the investment no longer financially or politically worthwhile.

As discussed, acts of public vandalism are more elastic with respect to changes in the probability of detection or in the term of incarceration than with respect to changes in the level of observable security measures.<sup>194</sup> Compared to theft, observable efforts intended to prevent acts of public vandalism are relatively limited, and more costly; public goods or goods traded upon the basis of access, by their very nature, tend to be more accessible to the public than private property, which is often less accessible and easier to defend. In most situations, acts of public vandalism cannot be feasibly *prevented* by means of observable security measures; rather, such acts must be *deterred* by means of higher expected criminal punishment. A relatively large expected criminal punishment for acts of public vandalism, however, implicates what this Article terms the “broken community theory of punishment.” This theory of punishment posits that injecting a sufficiently large number of people with no, or minimal, prior criminal history from a community into the criminal justice system as punishment for the commission of low-level, quality-of-life offenses, such as vandalism (or marijuana possession), causes a breakdown of cohesion and social control within that community, and that this community-wide breakdown of social control, in turn, causes further crime, such as vandalism.<sup>195</sup> Under the broken windows theory of crime, disorder causes crime, and crime causes further social disorder and crime.<sup>196</sup> Under the broken community theory of punishment, by contrast, punishing disorder causes crime, and crime causes further punishment of disorder.

A somewhat similar idea has been expressed most starkly by Professor Alexander who contends that the mass incarceration of people of color over the past fifty years is “a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”<sup>197</sup> Whether or not this accurately describes the criminal justice system is certainly debatable, but what is surely correct is that a criminal record gives rise to a host of future problems related to employment, housing, education,

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194. See COOTER & ULEN, *supra* note 53.

195. See Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215 (2001) (arguing that strong communities are also necessary for commerce and trade).

196. See Kelling & Wilson *supra* note 8.

197. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (rev. ed. 2012).

public benefits, voting rights, and so forth.<sup>198</sup> Moreover, a person with a criminal record is more likely to receive a longer prison sentence if convicted again for another criminal offense.<sup>199</sup> Given the negative consequences of a criminal record, the mass punishment of low-level offenses, especially by youthful offenders, runs the risk of creating, as Professor Alexander describes, a “permanent undercaste” in which future upward mobility is severely constrained and the lure of criminal gain becomes increasingly harder to resist.<sup>200</sup> As a larger number of people in a community are injected into the criminal justice system and suffer the adverse effects of having a criminal record, the community, as a whole, suffers as well, and, in particular, becomes less cohesive and more vulnerable to criminal invasion in precisely the same manner as envisioned under the broken windows theory of crime.<sup>201</sup>

For the broken community theory of punishment to hold true with respect to the criminal punishment of vandalism, the set of potential offenders must be relatively large.<sup>202</sup> If there exists only a small subset of potential offenders, then punishing this subset, perhaps even quite harshly, is unlikely to have significant broken community effects: these effects are likely to surface only if the subset of offenders constitutes a significant proportion of the total population. Given the large range of motivations for vandalism, the set of potential vandals is likely to be large, especially in a community that is blighted and perceives itself as effectively disenfranchised. Although this is, ultimately, an empirical question, if the number of people who commit, and are criminally punished for, vandalism of public goods, or goods traded upon the basis of access, is considerable and the level of criminality remains persistent over time, then this raises the following key question: is the community actually made better off by investment in its infrastructure or physical appearance? At some point, the

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198. See, e.g., JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); see also ALEXANDER, *supra* note 197, at 6–7; Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201 (2013) (examining rejection of job applicants based upon criminal record).

199. See, e.g., Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303 (1997).

200. ALEXANDER, *supra* note 197, at 6–7; see also PAUL STREET, *THE VICIOUS CIRCLE: RACE, PRISON, JOBS, AND COMMUNITY IN CHICAGO, ILLINOIS, AND THE NATION* (2002).

201. See Jack R. Greene & Ralph B. Taylor, *Community-Based Policing and Foot Patrol: Issues of Theory and Evaluation*, in *COMMUNITY POLICING: RHETORIC OR REALITY* 195 (Jack R. Greene & Stephen D. Mastrofski eds., 1988).

202. An additional assumption that must hold true is that vandalism does not subside over time after the initial investment has been made and social norms evolve. In the case of bike-sharing programs, there is some evidence that “eventually, the bikes become part of everyday life, people start using them every day,” and “[v]andalism just peters out.” Angus McNeice, *Vandalism a Bump in Road for Bike-Sharing*, CHINA DAILY U.K. (Apr. 3, 2018), <http://www.chinadaily.com.cn/a/201804/03/WS5ac3404da3105cdcf6516069.html>. As Euwyn Poon, co-founder and president of Spin, attests: “Initially, when the service was brand new, there was some loss and vandalism . . . However, that has decreased dramatically as bike-share has become more ingrained in the public infrastructure.” Lazo, *supra* note 171.

community itself might reasonably insist: either stop punishing us for acts of vandalism in an effort to safeguard the investments made in our community, or just stop making these investments in our community in the first instance.<sup>203</sup> That is, a community may be better-off in a world without certain capital investment than in a world with such investment and criminal punishment for intentional damage or destruction to this investment.

With respect to vandalism, the broken community theory of punishment posits that locking people up for acts of public vandalism does more collective harm than good insofar as the social benefits of increased investment in the community are offset by the social costs of injecting a significant number of people, typically young people, into the criminal justice system. Although investment in urban space may be indicative of a genuine intention to make the local community better-off, making arrests and putting people in jail in a similarly well-meaning effort to safeguard the physical appearance of such investment against deliberate damage or destruction, if sufficiently extensive in scope, may, ultimately, have the contrary effect of corroding social bonds and leaving the community, as a whole, worse-off, with its cultural fabric frayed and shared sense of interconnection disrupted and unbalanced. This is certainly not to suggest that investments in the physical appearance or infrastructure of low- or moderate-income urban communities represents the type of purposeful social control that Alexander links with mass incarceration. Rather, it is merely to suggest that investment in urban infrastructure, coupled with criminal punishment for the intentional damage or destruction of that infrastructure, may not always be social welfare-improving.

In fact, the absence of enhanced penalties for the deliberate damage or destruction of public goods, or goods traded upon the basis of access, or the ad hoc manner in which state laws currently approach such vandalism, suggests that these concerns have been taken into account by state and federal governments. The lack of punishment for acts of vandalism that generate social harm, or the willingness to do so only unevenly, suggests a recognition on the part of enforcement authorities that vandals are often youngsters, acting primarily out of boredom or playfulness or a youthful need for peer acceptance, who often have no, or minimal, prior criminal history,<sup>204</sup> and that there is no need to alter dramatically the life trajectory of these young people for the worse, and, in turn, the communities in which these young people reside, by subjecting them to the criminal justice system and all of the ensuing negative collateral consequences. Hence, despite the significant social harm, governments should keep the expected punishment for acts of public vandalism relatively low in tacit

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203. A similar contention can be made with respect to the stop-and-frisk policing strategy. A community that is the focal point of such a policing strategy might, at some point, reasonably insist: either stop punishing us for low-level offenses in an effort to deter more serious crime in the community or just reduce the police presence in the community.

204. See HOWARD N. SNYDER ET. AL., BUREAU OF JUSTICE STATISTICS, ARREST DATA ANALYSIS TOOL (2014) (showing that the criminal offense of vandalism is largely committed by adolescents, predominantly male, between the ages of twelve and nineteen), <https://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm>.

acknowledgement of the fact that young people often deserve a second chance, and that it is better for the community, as a whole, to suffer some amount of vandalism than it is to have the local jail full with youthful offenders.<sup>205</sup>

A negative consequence of this punitive approach, however, is less investment in the infrastructure or physical landscape of urban communities than would otherwise be the case under a punitive approach that more fully incorporates the social harm of acts of vandalism into the level of expected punishment. Given this observation, this Article poses the following question: should vandalism of public goods, or goods traded upon the basis of access, be punished more severely to spur investment in urban communities? Ultimately, this is an empirical question left open as a topic for future research. Likely, the answer will depend upon several factors that are likely to vary across time and space. The untested hypothesis proposed here, however, is that as goods and services are increasingly traded upon the basis of access rather than ownership. Urban communities that might otherwise run the risk of exclusion from this access economy may benefit significantly from vandalism laws that punish certain acts of vandalism with significant negative social impact more harshly, as vandalism in the first degree, not under a broken windows theory of crime, but, rather, under the suboptimal provision of access theory set forth above.

#### CONCLUSION

The principal claim advanced in this Article is that the social impact of vandalism must be fully factored into the expected criminal punishment for vandalism. This Article suggested that an act of vandalism may have a positive social impact, either as street art or as a form of protected speech, or a negative social impact as costs that preclude the provision of access. Generally, public vandalism cannot feasibly be *prevented* by means of observable security measures; rather, such acts must be *deterred* by means of higher expected criminal punishment. A relatively large expected punishment, however, implicates what this Article has termed “the broken community theory of punishment” that argues in favor of relatively minimal punishment for vandalism. A negative consequence of this punitive approach, however, is less investment in the infrastructure or physical appearance of certain urban communities than would otherwise be the case under a punitive approach that more fully incorporates social impact into the expected punishment for this offense.

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205. See generally Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003) (arguing that juveniles should not be held to same standards of criminal responsibility as adults, because adolescents’ decision-making capacity is diminished, they are less able to resist coercive influence, and their character is still undergoing change).