# GRAFFITI AND THE CONSTITUTION: A FIRST AMENDMENT ANALYSIS OF THE LOS ANGELES TAGGING CREW INJUNCTION

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## I. INTRODUCTION

*I paint because I have no choice. After being an ink-stained graffiti writer in the streets of Los Angeles for more years than I care to disclose, the choice of making marks on surfaces with some sort of tool is out of my hands. I only have (some) control in choosing which surfaces I will use.*

*I paint the world around me and the world inside me. I mix up the ingredients and put down the impressions I get while it's all still hot and fresh . . . I give it to you raw. Crime transformed into art. An obsessive addiction transforming into another manifestation of the same addiction. I paint because I have no choice.*

—Cristian Gheorghiu, a.k.a. "Smear"[1]

In 2008, a group of taggers[2] known as the Metro Transit Assassins ("MTA") painted a giant "MTA" tag in the Los Angeles riverbed that was visible from downtown office buildings and freeways. The three-story-high tag extended for half a mile along the riverbed and used an estimated four

1. Complaint at 15, People *ex rel.* Trutanich v. MTA, No. BC 440034 (Cal. Super. Ct. filed June 21, 2010), 2010 WL 2563383.

2. This Note uses the terms graffiti writers and "taggers" interchangeably.

hundred gallons of paint.[3] The government projected that it would cost $3.7 million to clean up the tag, including taking the necessary precautions to contain the toxic paint and runoff during cleanup.[4] A graffiti historian explained that the tag was "definitely a statement, . . . [t]o do something that big and bold it takes organization."[5] Seven alleged MTA members were arrested in 2009 for the tag. During the arrests and ensuing searches, law enforcement found specialized tools that enable such large-scale, logistically difficult tagging: high-pressure fire extinguishers filled with paint.[6]

In response to the riverbed tag and a multitude of other MTA graffiti vandalism throughout Los Angeles, the Los Angeles City Attorney filed a complaint in July 2010 seeking a civil injunction against MTA and its members.[7] If granted, the injunction would, among other things, prohibit possession of graffiti tools, prohibit public association with other members of MTA, prohibit profiting from graffiti, and impose a curfew on MTA members.[8] First Amendment challenges to the injunction have already begun: in May 2011, the American Civil Liberties Union ("ACLU") filed defense motions containing First Amendment challenges to the injunction, but they were denied by the Los Angeles Superior Court.[9] In August 2011, the California Court of Appeals denied defense motions challenging the Superior Court ruling.[10]

The story of one alleged member of MTA highlights the conflicts between rights of individuals—both taggers and property owners—and community rights,[11] as well as between art and vandalism.[12] Cristian Gheorghiu, better known by his tagging moniker "Smear," is a thirty-four-year-old man who began his art career and gained notoriety as an illegal tagger on the streets of Los Angeles.[13] Now, he creates his art legally on

3. Richard Winton, *7 Alleged Members of L.A. Tagging Crew Arrested*, L.A. TIMES, Jan. 29, 2009, at B1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See generally* Complaint, *supra* note 1 (seeking injunctive relief against MTA tagging crew).

8. *Id.* at 22–23.

9. Carol J. Williams, *Anti-Graffiti Gang Injunction Moves Forward in Court*, L.A. TIMES (May 27, 2011, 5:28 PM), http://latimesblogs.latimes.com/lanow/2011/05/anti-graffiti-gang-injunction-moves-forward-in-court.html.

10. Press Release, Office of the City Attorney, Court of Appeal Denies Legal Challenges to Landmark Graffiti Injunction (Aug. 8, 2011), *available at* http://atty.lacity.org/stellent/groups/electedofficials/@atty_contributor/documents/contributor_web_content/lacityp_015326.pdf.

11. These rights will be specified and developed throughout this Note.

12. *See* Richard Winton, *Graffiti Artist's Past Is Tagging Behind Him*, L.A. TIMES, Mar. 15, 2011, at A1.

13. *Id.*

canvases that are displayed around the world and sell for up to $2500 each. Although he continued tagging illicitly when he first began creating his canvas paintings, Gheorghiu claims that he no longer commits graffiti vandalism and, instead, focuses only on creating his legal art on canvas.[14]

Gheorghiu was previously affiliated with the MTA tagging crew and was one of the men arrested for the L.A. riverbed tag, though charges were never filed against him.[15] He is also a named defendant in the injunction. If the injunction is granted and Gheorghiu remains a named defendant, he will be bound by its terms.[16] This will bar him from selling any photographs of illegal graffiti that depict his moniker as well as any images he used to tag on city walls.[17] Gheorghiu currently "advertises his work as 'crime transformed into art,'" indicating that he purposely uses the notoriety he gained as an illegal graffiti vandal to profit in his current legal artistic endeavors.[18] He and his audience recognize that his art career is based on his identity as an "outlaw."[19] The injunction would also make it a crime for Gheorghiu to possess many of the tools he uses to create his legal art because some of them qualify as "graffiti tools."[20]

Gheorghiu is currently subject to probation terms, including some that are very similar to the proposed injunction provisions. He was arrested in March 2011 for a probation violation, allegedly for possessing graffiti tools[21] and posting photographs of his illegal graffiti on his website.[22] If the injunction is granted, such arrests may be commonplace for taggers who often moonlight as legitimate artists. From a policy standpoint, shutting down the legal aspects of taggers' careers would seem to drive them back into full-time tagging—leading some to question the rationality of this approach.[23]

The City Attorney's Office characterizes Gheorghiu's career and

14. *Id.*

15. *Id.*

16. *See* Complaint, *supra* note 1; Winton, *supra* note 12.

17. This indicates that otherwise legal reproductions of prior illegal art would fall into this prohibition. *See* Winton, *supra* note 12; Richard Winton & Andrew Blankstein, *'Smear' Graffiti Artist Arrested*, L.A. TIMES (Mar. 16, 2011, 4:59 PM), http://latimesblogs.latimes.com/lanow/2011/03/smear-graffiti-artist-arrested.html.

18. Winton, *supra* note 12.

19. *Id.*

20. Complaint, *supra* note 1, at 22–23. *See also* Winton, *supra* note 12; Winton & Blankstein, *supra* note 17.

21. Winton & Blankstein, *supra* note 17.

22. Richard Winton, *Graffiti Artist Smear Sentenced for Violating Probation*, L.A. TIMES, Mar. 25, 2011, at AA3.

23. *See* Winton, *supra* note 12 (explaining that some people view the injunction as punishing artists who have stopped illegally tagging and have legitimized their art).

others like it as "profiting from . . . crimes," and also as unfair competition against legitimate, law-abiding artists.[24] A local gallery owner characterizes the injunction as "persecut[ion]" of a young artist.[25] The ACLU characterizes it as unconstitutional restriction of an artist's expression.[26] This Note examines which, if any, of these statements is accurate through a First Amendment analysis of the proposed injunction. In Part II, this Note discusses the factual backdrop of the tagging injunction, including an overview of graffiti in Los Angeles and specifically the MTA tagging crew. Part III explains the history and procedure of using civil injunctions to combat public nuisances—specifically, criminal street gangs. Part IV explains the relevant First Amendment doctrine, including freedom of speech, freedom of association, and overbreadth and vagueness. Finally, Part V analyzes the First Amendment implications of each provision, anticipates possible challenges, and recommends changes to strengthen the injunction against constitutional challenges. Part VI concludes.

## II. GRAFFITI OVERVIEW

### A. GRAFFITI IN LOS ANGELES

Los Angeles is known for its graffiti culture, characterized by gang graffiti, ethnic murals, and hip-hop tagging.[27] Graffiti has evolved from mere vandalism, to political communication,[28] to art that is now displayed and sold in museums and galleries worldwide.[29] The term "graffiti" is conventionally defined as "unauthorized writing or drawing on a public surface"[30] and "describes everything from random scrawls to mural work."[31] Although graffiti is often associated with gangs, a significant amount of graffiti is created by graffiti writers who are not affiliated with a criminal street gang.[32]

Most graffiti is done on private or government property without permission, and it creates removal costs for the city, taxpayers, and individual property owners, as well as causing secondary, noneconomic

24. *See id.*
25. *Id.*
26. *Id. See also* Winton & Blankstein, *supra* note 17.
27. Marisa A. Gomez, Note, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 639 (1993).
28. *Id.* at 637.
29. *Id.* at 641.
30. *Graffiti Definition*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/graffiti (follow "2) graffiti (noun)" hyperlink) (last visited Nov. 16, 2011).
31. Gomez, *supra* note 27, at 639.
32. *Id.* at 643–44.

effects on communities. In the past few years, the city of Los Angeles has allocated $7 million of its yearly budget to graffiti removal.[33] In addition to economic costs, some theorists believe that graffiti has additional secondary costs, such as decreased aesthetics and increased crime.[34] It also may incite fear in communities, because many people associate graffiti with gangs, even if many graffiti writers are not affiliated with gangs.[35] Graffiti also harms the autonomy right of the individual property owner whose property is tagged without his permission. Thus, the popular argument that graffiti is a "victimless crime" because no one is harmed fails to capture the economic and secondary harm caused by graffiti, particularly the harm to an individual property owner.[36]

### B. THE MTA TAGGING CREW

A tagging crew is a group of individual graffiti writers, commonly referred to as taggers, who affiliate with one another for the purpose of creating graffiti.[37] Membership in a crew facilitates tagging because it may provide a lookout or accomplice, or it may simply deter other taggers from writing over the tagger's work.[38]A tagging crew is unlike a typical street gang because it is nonviolent, nonterritorial, and primarily motivated by a desire for fame and recognition.[39] Fame and recognition are often a product of how prolific a crew or a tagger is—in other words, how many tags they put up.[40]

The MTA tagging crew is an elite and prolific tagging crew based in Los Angeles but allegedly active nationwide.[41] According to the government complaint, individual taggers are not admitted to the MTA crew until they have "devote[d] a substantial amount of time, expense, and risk in order to become notorious, recognized, and famous within the graffiti sub-culture."[42] MTA has "strict standards regarding membership"

33. Kate Linthicum, *Attempt to Slash Los Angeles Graffiti Removal Budget Sparks Criticism*, L.A. TIMES, Jan. 8, 2011, at AA1.

34. *Can the Can*, THE ECONOMIST, Nov. 22, 2008, *available at* http://www.economist.com/node/12630201?story_id=12630201. The "broken windows theory" posits that graffiti and other vandalism that decreases the appearance of a community lead to higher crime rates.

35. Gomez, *supra* note 27, at 654.

36. *See* Matthew Newton, *Art Crime: Graffiti Wars*, THE CRIME REPORT (Feb. 22, 2010), http://www.thecrimereport.org/archive/art-crime-graffiti-wars (discussing whether graffiti is a victimless crime and noting that the question is a contentious argument).

37. Gomez, *supra* note 27, at 645–46.

38. *Id.* at 646.

39. *Id*. at 645–46.

40. *Id.* at 646.

41. Complaint, *supra* note 1, at 7.

42. *Id.* at 8.

and probably places the most value on whether a tagger is "prolific."[43]

## III. INJUNCTION OVERVIEW

### A. ENJOINING PUBLIC NUISANCES[44]

Injunctions are a well-established method of combating public nuisances.[45] "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[46] An injunction is a civil order prohibiting certain conduct and holding an enjoined individual criminally liable for contempt of court if he or she violates the order.[47] A party seeking an injunction must establish a "prospect of great and irreparable injury and the absence of a plain, adequate and speedy remedy at law."[48] An injunction may be granted against a public nuisance if the interference with community rights is both substantial and unreasonable.[49] To be substantial, the alleged nuisance must cause "significant harm," which is "definitely offensive, seriously annoying or intolerable."[50] To be unreasonable, the gravity of the harm caused must outweigh the social utility of the alleged nuisance, based on an objective community-wide standard.[51] Legislatures also use statutes to criminally control public nuisances.[52] But unlike a statute, which must be designed as a law of general application, an injunction is issued based on past and threatened future actions by a specific individual or group that interfere with community rights.[53]

In *People v. Acuna*, the California Supreme Court explained the delicate balancing of community and individual rights involved in

43. *Id.*

44. This section is meant to provide a basic overview of the background and principles of enjoining public nuisances. The procedural details involved in obtaining an injunction are outside the scope of this Note.

45. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

46. CAL. CIV. CODE § 3480 (West 2011).

47. CAL. CIV. PROC. CODE § 525 (West 2011).

48. *Acuna*, 929 P.2d at 602 (internal quotation marks omitted).

49. *Id.* at 604.

50. *Id.* at 605 (quoting RESTATEMENT (SECOND) OF TORTS § 821F cmts. c & d (1979)).

51. *Id.*

52. *Id.* at 606. California defines a nuisance as

> [a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any . . . river . . . or any public park, square, street, or highway.

CAL. CIV. CODE § 3479 (West 2011).

53. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762 (1994).

enjoining a public nuisance.[54] The court emphasized the role of community rights in ensuring individual rights, saying, "the security and protection of the community is the bedrock on which the superstructure of individual liberty rests."[55] Thus, while an injunction may burden the rights of one individual or group, it nevertheless protects the rights of the entire community. This in turn actually bolsters individual rights overall—resulting in a net benefit to both individual and community rights.

### B. INJUNCTIONS AGAINST GANGS AND TAGGING CREWS

The injunction against the MTA tagging crew is the first of its kind against a tagging crew but is based on a model that has been used against criminal street gangs since the 1980s.[56] A gang injunction is a court order against a criminal street gang justified on the theory that the gang is a public nuisance.[57] Los Angeles began using civil injunctions to control criminal street gangs in the 1980s.[58] As of November 2011, there were thirty-seven gang injunctions in Los Angeles, enjoining fifty-seven different gangs.[59] Other cities around the country, including Chicago and Sacramento, have followed the Los Angeles model and implemented similar injunctions. Specific injunction terms vary, but typical provisions in a gang injunction impose a curfew, prohibit public association with known gang members, and order enjoined gang members to stay away from certain locations.[60] A gang injunction applies within a defined "Safety Zone," which typically covers the territory of the street gang—ranging from a few blocks to a few miles.[61]

An injunction is granted through a civil proceeding, so it is subject to lower procedural standards than those required in a criminal proceeding. For example, to prove that a gang is a public nuisance, the government must satisfy only a clear and convincing evidence standard[62]—not a beyond a reasonable doubt standard, which would be required in a criminal

54. *See Acuna*, 929 P.2d at 603–05.

55. *Id.* at 603.

56. Some past gang injunctions included "no graffiti" provisions, but the nature of the group enjoined—a criminal street gang versus a tagging crew—makes the present tagging injunction unique.

57. *About Gang Injunctions*, OFFICIAL WEBSITE OF THE L.A. POLICE DEP'T, http://www.lapdonline.org/gang_injunctions/content_basic_view/23424 (last visited Nov. 16, 2011).

58. ACLU FOUND. OF S. CAL., FALSE PREMISE FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH 1 (1997).

59. *About Gang Injunctions*, *supra* note 57.

60. OFFICE OF THE L.A. CITY ATTORNEY, THE CITY ATTORNEY'S REPORT: GANG INJUNCTIONS: HOW AND WHY THEY WORK 5 (2009), *available at* http://atty.lacity.org/stellent/groups/electedofficials/@atty_contributor/documents/contributor_web_content/lacityp_006877.pdf.

61. *Id.*

62. *Id.* at 8.

trial.[63] Moreover, the injunction may be granted through an ex parte proceeding.[64] There are, however, certain procedural safeguards to protect the rights of defendants, including a requirement that the gang must be served before an injunction can be granted (thus, in theory, providing notice to gang members that they are defendants) and a requirement that an individual must have notice that he is subject to the injunction in order to be prosecuted for contempt.[65]

Gang injunctions have continuously faced constitutional challenges since they were first implemented. Challengers, including the ACLU, have called the injunctions overbroad and, in particular, have taken issue with the burdens the injunctions place on associational rights.[66] Prosecutors and courts have relied on certain actions by criminal street gangs, such as intimidation, trespassing, graffiti, illegal drug use and sales, and violence,[67] which combine to create a public nuisance, to justify the burden the injunctions place on the gang members' constitutional rights. In a huge victory for prosecutors and other supporters of gang injunctions, the California Supreme Court declared two challenged provisions of a gang injunction, including a "Do Not Associate" provision, constitutional in the 1997 *Acuna* case.[68]

The proposed injunction against MTA differs from a typical gang injunction because it is exclusively directed at graffiti rather than the broader span of gang behavior, its terms are broader, and the past and threatened future crime it is based on is predominantly nonviolent. The safety zone in the MTA injunction spans all of Los Angeles, unlike the safety zone in a gang injunction, which typically encompasses only a specific neighborhood. Moreover, graffiti is the central purpose of the tagging crew—unlike gang graffiti, which is a peripheral activity of the gang. Finally, unlike gang crime cited in gang injunctions, which typically includes violence, intimidation, and drug use and sales, the crime cited in the tagging injunction is graffiti vandalism.

63. Once a defendant is charged with contempt for violating the injunction, there are some greater procedural safeguards, including that the standard of proof becomes beyond a reasonable doubt, the prosecution must prove that the defendant had actual notice of the injunction, and there is a trial by jury. *Id.* at 12.

64. Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 213, 261 (1994).

65. OFFICE OF THE L.A. CITY ATTORNEY, *supra* note 60, at 9, 12.

66. Press Release, ACLU of S. Cal., ACLU/SC Opposes Troubling Provisions of L.A. District Attorney's Proposed Gang Injunction in South Los Angeles (Jan. 14, 2009), *available at* http://www.aclu-sc.org/releases/view/102924.

67. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 601 (Cal. 1997) (describing the neighborhood occupied by the enjoined gang as "an urban war zone").

68. *Id.* at 602.

The history of gang injunctions and the distinguishable features of the MTA tagging injunction set the stage for a new constitutional battle between prosecutors and challengers.

### C. THE TAGGING INJUNCTION TERMS

The requested injunction against the MTA tagging crew includes the following terms: (1) "Do Not Associate," (2) "No Graffiti," (3) "No Graffiti Tools," (4) "No Trespassing," (5) "Obey Curfew," (6) "Stay Away From the Following Locations," (7) "No Firearms, Ammunition, Dangerous or Illegal Weapons," (8) "Do Not Obstruct, Resist, or Delay any Peace Officer," (9) "Do Not Profit from Unlawful Acts," and (10) "Obey All Laws."[69]

The injunction cites state law as support for its causes of action. First, it seeks to enjoin the tagging crew as a nuisance, defined by California law as

> [a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any . . . river . . . or any public park, square, street, or highway.[70]

The City also requests monetary damages to compensate for harm caused by the public nuisance.[71] Second, the City seeks to enjoin tagging as an act of unfair competition.[72] A remedy of injunctive relief for unfair business practices is specifically provided for in California law.[73]

## IV. FIRST AMENDMENT OVERVIEW

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech,"[74] which has been interpreted to guarantee strongly-protected rights to both speech and association. The level of protection afforded to a particular instance of speech or association depends, in part, on the nature of the speech or association, the nature of the regulation, and the location where it occurs. This section discusses

69. Complaint, *supra* note 1, at 22–24.

70. CAL. CIV. CODE § 3479 (West 2011). A public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." *Id.* § 3480.

71. Complaint, *supra* note 1, at 26 (pursuant to CAL. PENAL CODE § 186.22a(c) (West 2011)).

72. *Id.*

73. *See* CAL. BUS. & PROF. CODE §§ 17203–17204 (West 2011).

74. U.S. CONST. amend. I.

aspects of the freedom of speech and the freedom of association doctrine implicated by the tagging injunction, including the overbreadth and vagueness doctrines.

### A. FREEDOM OF SPEECH

Freedom of speech is a fundamental, but not an absolute, right.[75] Historically, the protection of speech was motivated, at least in significant part, by a desire to protect the press and individuals engaging in political speech from suppression by the government.[76] Today, courts and theorists recognize that free speech is protected for more than its role in democracy: the underlying rationale now includes discovering truth, advancing personal identity and autonomy, and promoting tolerance in society.[77] This section analyzes the most plausible ways in which to bring graffiti within the protection of the First Amendment—specifically, as art or as conduct that is considered communicative in the circumstances.

#### 1. Obtaining First Amendment Protection for Graffiti

Graffiti, the ultimate target of all of the injunction provisions, will likely receive First Amendment protection as art, as conduct that is communicative in the circumstances, or as both.

##### a. Protecting MTA's Graffiti as Art[78]

Art is traditionally considered to fall within the scope of protected First Amendment expression,[79] though courts have not announced a bright-line standard for what qualifies as art and how much protection it receives.[80] Some rationales for protecting art include: "our 'cultural life,' just like our native politics, 'rests upon [the] ideal' of governmental viewpoint neutrality,"[81] and "art 'may affect public attitudes and behavior

75. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 925 (3d ed. 2006).

76. *Id.* at 927.

77. *Id.* at 925–30. Some people distinguish among these rationales by describing some as "intrinsic" and others as "instrumental." *E.g.*, *id.* at 929. The distinction is not sharp, and though these two broad categories may track the classic rationale, the doctrine does not distinguish between them. The rationales are not strictly part of the canonical doctrine but are useful to understand it.

78. "Art" defies definition. *See* Thomas Adajian, *The Definition of Art*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 2007), http://plato.stanford.edu/entries/art-definition/. When this Note refers to "art," it means an image, mark, or symbol created for purposes of expression or aesthetic interest.

79. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602 (1998) (Souter, J., dissenting) ("It goes without saying that artistic expression lies within this First Amendment protection."). *See also* Brooklyn Inst. of Arts & Scis. v. New York, 64 F. Supp. 2d 184, 199 (E.D.N.Y. 1999).

80. This may be because protection of art departs from the origins of protected speech because art does not always obviously express an idea in propositional form.

81. *Finley*, 524 U.S. at 603 (Souter, J., dissenting) (quoting Turner Broad. Sys., Inc. v. FCC, 512

in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.'"[82]

The lingering uncertainty regarding First Amendment treatment of art was illustrated in *Bery v. City of New York*, in which several artists sought an injunction on First Amendment grounds against enforcement of a licensing requirement that prevented them from selling their art on New York streets.[83] The district court initially ruled against the artists on the grounds that visual art did not receive full First Amendment protection, particularly if it is nonpolitical. On appeal, the Second Circuit reversed, explaining that "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection," and, moreover, that "written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories."[84] Thus, the expressive nature of art was ultimately still recognized and protected by the court.

First Amendment protection for art is now well-established doctrine, but it can be useful to examine previous theories and rationale that helped frame current doctrine. Some people frame the rationales for protecting art through the familiar, though somewhat artificial, distinction of "intrinsic" versus "instrumental" speech value.[85] In this context, "intrinsic" rationale focuses on the artist, while "instrumental" rationale focuses on the audience.[86] One explanation of the "intrinsic" rationale is that art "involves the speaker's search for a highly personal truth and interpretation of the self and its view of the surrounding world."[87] The protection of art is somewhat analogous to the protection of religion, in that both presume protection, whether or not the art or religious practice is recognized by mainstream culture.[88]

The government concedes, in fact argues, that MTA's graffiti is art and that it is intended to be seen by others—describing MTA members as

U.S. 622, 641 (1994)).

82. *Id.* at 602 n.1 (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952)).

83. Bery v. City of N.Y., 97 F.3d 689 (2d Cir. 1996).

84. *Id.* at 695.

85. Recall that this distinction tracks rationales behind protecting speech, but is not reflected by any doctrinal difference in treatment. *See infra* note 77.

86. Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437, 453–54, 474 (1999). *See also* Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996).

87. Kurzweg, *supra* note 86, at 455.

88. *Id.* at 475–76.

"artistic,"[89] explaining that MTA members "seek out certain locations . . . where [their] work will be seen by other taggers,"[90] and explaining that MTA members "attempt to leave a lasting impression on the largest possible audience."[91] The artistic element of graffiti has also been recognized by an audience that purchases depictions of graffiti as art.[92] Although this outside recognition is not necessary or dispositive in determining whether MTA's graffiti is protected, it strengthens MTA's argument for First Amendment protection, particularly because of the government's own concessions.

b. Protecting MTA's Act of Creating Graffiti as Communicative Conduct

In addition to, or in lieu of, graffiti receiving First Amendment protection as art, the act of tagging itself may receive First Amendment protection.[93] Some acts, which are not typically communicative, may be carried out in a way that makes them communicative and, thus, receive First Amendment protection.[94] For example, a court could reject the argument that graffiti is art and instead determine that graffiti contains no communicative element and is meant only to vandalize and indiscriminately harm property. If, then, a tagger comes before the court, argues that his act of creating graffiti is a statement of his political beliefs, and provides evidence that he only defaces phone booths because he wants to symbolize his opposition to government wiretapping, the court must determine whether the conduct is protected.

The standard for analyzing combined speech and conduct was announced in *United States v. O'Brien*. In *O'Brien*, the defendant was criminally convicted for burning his draft registration card, but he challenged his conviction because he was burning the card in protest of the war in Vietnam; thus, he argued, his conduct was protected communication.[95] The Court determined that a statute punishing anyone "who forges, alters, *knowingly destroys*, *knowingly mutilates*, or in any manner changes" draft cards was not on its face directed at speech because the act of burning the cards is typically non-communicative, and the

89. Complaint, *supra* note 1, at 8.
90. *Id.* at 2.
91. *Id.* at 10.
92. Winton, *supra* note 12.
93. For the sake of this analysis, think of graffiti as having two elements: the act of creating it (for example, the act of spray painting a wall) and the result it produces (for example, the actual image left on the wall). The previous section analyzed the *result*, while this section analyzes the *act*. This distinction is useful for the sake of analysis but is not reflected in doctrine.
94. United States v. O'Brien, 391 U.S. 367, 376 (1968).
95. *Id.* at 375–76.

purpose of the statute was to protect the proper functioning of the selective service system.[96] The Court acknowledged, however, the defendant's argument that his act of burning his card was expressive because he was communicating his opposition to the war but stated that "even on the assumption that the alleged communicative element in [defendant's] conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity."[97] The Court announced what is, in effect, an intermediate scrutiny standard of review for laws of general application affecting "'speech' and 'nonspeech' elements . . . combined in the same course of conduct."[98] Such a regulation must be constitutionally within the government's power, must further an "important or substantial government interest" unrelated to the suppression of speech, and must create no greater a burden on First Amendment freedoms than is "essential" to further the important or substantial government interest.[99] Thus, the Court in *O'Brien* held that, although there was some First Amendment protection for the defendant's conduct, the prohibition on burning draft cards survived the First Amendment challenge because it furthered the important government interest in administering the draft and was not broader than necessary to do so.[100]

The *O'Brien* analysis does not create protection for all ordinarily noncommunicative conduct simply because a defendant may argue that in one instance regulation of the conduct incidentally burdens speech under the First Amendment. In *Arcara v. Cloud Books, Inc.*, the Court upheld a statute that authorized closing a bookstore because it was used as a "place

96. *Id.* at 370, 375. ("A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records."). Note that the defendant in *O'Brien* may have had a stronger argument than the Court acknowledged, though, because this statute was actually duplicative. Another statute already prohibited many "abuses" of the cards and required possession of the card at all times. Thus, the Court of Appeals's holding that this regulation specifically banning burning the cards "singl[ed] out persons engaged in protests for special treatment," *id.* at 371, does seem a plausible basis for concluding that the statute was on its face directed at speech. This was specifically rejected by the Court, however.

97. *Id.* at 376.

98. *Id. See also* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) ("[B]urning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct.").

99. *O'Brien*, 391 U.S. at 376–77. Under more recent doctrine, this is actually stronger than necessary. Intermediate scrutiny requires some "narrow tailoring" but does not demand that a government regulation be "essential" to substantially furthering its goal. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 301 (2000) (applying the "essential" standard).

100. *O'Brien*, 391 U.S. at 382.

for prostitution and lewdness."[101] The bookstore owners argued that enforcement of the statute interfered with their First Amendment right to sell books. The Court distinguished *O'Brien*, stating that "[t]he defendant in *O'Brien* had, as respondents here do not, at least the semblance of expressive activity in his claim that the otherwise unlawful burning of a draft card was to 'carry a message' of the actor's opposition to the draft,"[102] but that "unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression."[103] In short, the statute was directed at only prostitution and lewdness, which contained no element of expression protected under the First Amendment, and the operation of the bookstore was not itself a communicative act.[104]

This line of cases is relevant to the tagging injunction because it provides a second argument supporting First Amendment protection for graffiti. Even if a court determines that graffiti itself is not protected—and the injunction is not directed at speech—MTA can argue that its act of creating the graffiti is protected under *O'Brien*.

This Note will analyze the injunction provisions under the assumption that there is some First Amendment protection for graffiti—because the image produced is recognized as art, or because the act of tagging receives protection. This affects the applicable standard of review—a critical step in the analysis—that will be discussed throughout.

### 2. Identifying First Amendment Standards of Review to Analyze the Injunction

The level of scrutiny applied in a First Amendment analysis generally depends on the extent to which the regulation is directed at content, although other variables are involved as well. Because a main goal of the First Amendment drafters was to protect unpopular or minority political views from suppression by the government, a content-based restriction is presumptively unconstitutional and receives strict scrutiny, while a content-neutral restriction receives only intermediate scrutiny.[105] To be content neutral, a regulation must not discriminate based on viewpoint or ideology,

101. Arcara v. Cloud Books, Inc., 478 U.S. 697, 698 (1986).
102. *Id.* at 702.
103. *Id.* at 705.
104. *Id.* at 706 ("[W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien* . . . .").
105. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 657–59, 662 (1994).

subject matter or topic, or speaker identity.[106] This section will discuss how the analysis of whether a regulation is content neutral varies when the regulation is an injunction or is directed at "secondary effects" of speech.

a. Directed at Speaker Identity?: Content Neutrality and Injunctions

An injunction, by its nature, is directed at speaker identity because it singles out a specific party or group based on that party's past and threatened future violation of the law. Unlike a statute, it is not designed to apply to the general public. Thus, to determine whether an injunction is content neutral, the court must examine only "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'"[107]

In *Madsen v. Women's Health Center*, an injunction applied only to a group communicating an anti-abortion message, not to anyone communicating a pro-abortion message, so defendants argued that it was content based. The Court rejected this argument, however, because "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."[108] Nevertheless, the Court applied a heightened time, place, and manner scrutiny because the normal time, place, and manner scrutiny was "not sufficiently rigorous."[109] This heightened scrutiny examined "whether the challenged provisions of the injunction burden[ed] no more speech than necessary to serve a significant government interest."[110] The Court did not explain its rationale for applying heightened scrutiny to injunctions despite explicitly saying that the injunction was content neutral, but one possible explanation could be the injunction's content-based appearance.

In his dissent, Justice Scalia argued that an injunction is potentially more dangerous to free speech than a statute and advocated strict scrutiny review of all injunctions directed at speech, whether or not they are facially content based.[111] He first argued that an injunction "lends itself just as readily [as a statute] to the targeted suppression of particular ideas" because it restricts a viewpoint, even if it is not facially content-based, by targeting

106. CHEMERINSKY, *supra* note 75, at 934–35.

107. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762–63 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

108. *Id.* at 763.

109. *Id.* at 765.

110. *Id.*

111. *Id.* at 792 (Scalia, J., dissenting) ("And the central element of the answer is that a restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is *at least* as deserving of strict scrutiny as a statutory, content-based restriction.").

a specific group.[112] He also suggested that individual judges may let personal bias cloud their judgment, and "[t]he right to free speech should not lightly be placed within the control of a single man or woman."[113] Finally, Justice Scalia pointed out that the unconstitutionality of an injunction can only be raised when it is first issued because the collateral bar rule (in some jurisdictions) prevents a defendant from raising the issue later during a prosecution for violating the injunction.[114]

Neither the majority opinion nor Justice Scalia's dissent in *Madsen* are clearly rooted in precedent, nor do they clearly explain the rationale behind their proposed standards.[115] But the injunction-specific analysis announced by the *Madsen* majority still applies to the MTA tagging injunction.

b. Secondary Effects Carve-Out to Content-Based/Content-Neutral Distinction

The Court also established a narrow carve-out to the general content-neutral/content-based distinction when a regulation primarily targets the secondary effects of protected speech. In *City of Renton v. Playtime Theatres, Inc.*, a zoning law prohibiting adult theaters in designated areas of the city appeared to be facially content based—based on then-prevailing doctrine—because it only applied to theaters showing a particular type of film.[116] The Court reviewed it as a content-neutral time, place, and manner restriction, however, because its purpose was to control the secondary effects caused by the theaters, such as crime and decreased quality of life and property values, rather than to suppress the films based on their X-rated content.[117] Thus, the regulation was "justified without reference to the content of the regulated speech."[118]

112. *Id.* at 793 (Scalia, J., dissenting).

113. *Id.* (Scalia, J., dissenting).

114. *Id.* at 793–94 (Scalia, J., dissenting).

115. Some possible reasons—not reflected in the opinion—include a desire to burden abortion or a concern about the lower procedural safeguards of injunctions.

116. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986).

117. *Id.* at 48.

118. *Id.* (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). The zoning ordinance's designation as a time, place, and manner regulation allowed the Court to apply the intermediate time, place, and manner standard of review—rather than strict scrutiny, as Justices Brennan and Marshall preferred. Some members of the Court explicitly stated that the "content-neutral" designation in *Renton* was "something of a fiction" because "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 448–49 (2002) (Kennedy, J., concurring). Thus, according to them, the *Renton* ordinance that singled out movie theaters playing a certain type of movie was content based but should still be reviewed under intermediate scrutiny because zoning restrictions fall within an exception to typical doctrine. *Id.* Justice Souter suggested creating a new "First Amendment label" specific to zoning ordinances: "[I]f we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-

To illustrate (or test) this theory, consider the following thought experiment: instead of adult-themed videos, the theaters play anarchist independent films and documentaries that draw viewers who loiter on the sidewalks doing drugs and sometimes run through the surrounding streets making noise at late hours, scaring residents and patrons, and committing petty crimes. This causes an overall increase in crime and a decrease in property values and quality of life, similar to that alleged in *Renton*. Following the analysis applied in *Renton*, the city could similarly enact zoning restrictions prohibiting theaters showing anarchist independent films—clearly highly protected political speech—from being located in certain areas and call the restrictions content neutral because they are aimed at the secondary effects of the films, not their content.[119] This "secondary effects" analysis has been criticized as an "end run around the First Amendment" because it too easily allows the government to avoid strict scrutiny of facially content-based regulations by providing a "secondary effects" justification for the regulation.[120] It is, however, still good law but has been distinguished and limited by subsequent cases.[121]

Once a regulation has been fit into this secondary effects category, it is reviewed under a time, place, and manner standard of review, which is easier to meet than a strict scrutiny standard of review.[122] To survive a time, place, and manner review, a regulation must be "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[123] In *Renton*, the zoning ordinance was upheld because it was designed to serve the significant government interest in "preserv[ing] the quality of urban life,"[124] and it "allow[ed] for reasonable alternative avenues of

based regulation that it poses." *Id.* at 457 (Souter, J., dissenting).

119. Of course, the factual backup for this position would be far more strongly contested than when X-rated films are involved. This hypothetical is designed simply to make the conceptual point that the Court's idea of secondary effects is not incoherent, as some continue to think.

120. CHEMERINSKY, *supra* note 75, at 937 (quoting Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291, 317 (1996) (contending that this approach confuses the content-based analysis with an analysis of whether there is a sufficient government purpose)).

121. *E.g.*, Boos v. Barry, 485 U.S. 312, 320–21 (1988); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–30 (1993).

122. *Renton*, 475 U.S. at 50 ("The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication."). Note that one of the reasons for creating this "secondary effects" category was probably to enable the Court to uphold the regulation without saying that preventing a decline in property values was a compelling state interest, which would be required to withstand a strict scrutiny review. The Court has been reluctant to consider government fiscal considerations to be compelling. *See* Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

123. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

124. *Renton*, 475 U.S. at 50 (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).

communication" because the theaters could be located elsewhere in the city.[125]

This secondary effects doctrine relates to the analysis of the MTA injunction because the government could argue that the injunction is not targeting the graffiti itself or its content (analogous to the films shown in *Renton*) but only the secondary effects of that graffiti, such as increased crime or decreased property values. This is probably a weak argument for the government, but it is useful to note for doctrinal completeness.

3. How Location Affects the Free-Speech Analysis

The location where the speech occurs also affects the analysis and level of review. Certain government-owned properties are "public forums," and the government has some obligation to make them available for speech, based on the nature of the property and its past use as a public forum.[126] Areas such as streets and parks, "which by long tradition or by government fiat have been devoted to assembly and debate," are "quintessential public forums."[127] Any regulation directed at content in a traditional public forum is reviewed using a strict scrutiny standard.[128] A content-neutral time, place, and manner regulation, on the other hand, is reviewed under the typical time, place, and manner standard of review,[129] which is generally considered a form of intermediate scrutiny.[130] The Court also recognizes some "limited" public forums, which are not traditional public forums, where the government could exclude all speech but has instead voluntarily chosen to open them for speech purposes.[131] Private property is never a public forum under the First Amendment, and private property owners are not required to allow free speech of others on their property.[132] On private property or on government property that is not a

125. *Id.* at 53. The alternative channels of communication in *Renton* were the 520 acres of land (approximately 5 percent of the city) that the theaters were permitted to be in despite the zoning provision. *Id.* at 53–54.

126. CHEMERINSKY, *supra* note 75, at 1126–27.

127. *Perry*, 460 U.S. at 45.

128. *Id.*

129. *Id.* (Time, place, and manner regulations must be "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

130. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984) (describing a traditional time, place, and manner review as "little, if any, different" from *O'Brien* standard of review, as typically applied).

131. CHEMERINSKY, *supra* note 75, at 1137.

132. *Id.* at 1124. *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 . . . ."). *But see* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (illustrating the proposition that state laws can, to a limited extent, press private property into forum service of certain kinds without violating the U.S. Constitution). The *Pruneyard* doctrine does not seem

traditional or a limited public forum, it is permissible to exclude some or all speech, even if the exclusion is based on content.[133]

Even within a traditional public forum, speakers do not have unrestricted access to all surfaces for all uses. In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, challengers wanted to post flyers on utility poles and argued that, because utility poles are located in a traditional public forum (a street), they are part of the forum and are a protected vehicle for communication.[134] The Court rejected this argument, saying "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted."[135] The challengers in that case "fail[ed] to demonstrate the existence of a traditional right of access" to the utility poles.[136] Similarly, here, it is unlikely that MTA will be able to demonstrate a traditional right of access to the walls and surfaces on which they tag, no matter where they are located. Although taggers may have the right to stand and communicate on the sidewalk, as it is a traditional public forum, they do not have the right to use the physical surface of the sidewalk as the medium for their communication.

The possible free-speech challenges to the injunction, as well as the merits of these arguments, will be discussed in Part V.

### B. FREEDOM OF ASSOCIATION

Based on the numerous associational challenges brought against gang injunctions, the tagging injunction is very likely to face associational challenges. The Court has recognized two main categories of association: instrumental association (namely, association for the purpose of expression) and intimate association.[137]

The right to "instrumental" association is designed to protect and implement other primary First Amendment rights, such as freedom of

applicable, however, to the use of private property by a tagger.

133. *Perry*, 460 U.S. at 49 ("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.").

134. Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 813 (1984). To understand this doctrine, distinguish between a location for communication—for example, standing in a street—and a physical medium for communication—for example, painting on the actual surface of the street. In *Vincent*, the challengers argued that they had a right to post flyers on utility poles because the poles were located in a public forum.

135. *Id.* at 814.

136. *Id.*

137. Roberts v. U.S. Jaycees, 468 U.S. 609, 617–20, 622 (1984).

expression. It encompasses association for the purpose of "a wide variety of political, social, economic, educational, religious, and cultural ends."[138] The primary instrumental claim concerns the need to implement political speech through association. This protection of instrumental association illustrates the belief that the freedom of speech is strengthened when more than one voice joins together to communicate a message.[139] Indeed, it is hard to imagine that political speech can even proceed without substantial associational activities.

Courts do not indiscriminately afford protection to any group claiming instrumental association for the purpose of communication, however. They examine the activities and nature of the specific group claiming an instrumental association function to determine whether the instrumental goal concerns communication. For example, in *People v. Acuna*, the California Supreme Court explicitly stated that members of an enjoined street gang did not associate for instrumental expression purposes.[140] Therefore, the court did not even continue to review the challenged "Do Not Associate" provision because the association rights it allegedly burdened were not protected. On the other hand, in *Roberts v. United States Jaycees*, the Court recognized instrumental association for communication by a male-only community group and analyzed a statute mandating the acceptance of female members as one burdening the group's right to instrumental association.[141]

Like most Constitutional protections, the protection of instrumental association for speech is not absolute, but any government action that burdens it is reviewed under a strict scrutiny standard. A restriction on instrumental association for expression may be constitutional if it serves "compelling state interests, unrelated to the suppression of ideas," and there is no "significantly less restrictive" alternative.[142] In *Roberts*, a state's interest in ending gender discrimination against women was compelling

138. *Id.* at 622.

139. NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (internal citations omitted)). *See also* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("The right of 'association,' like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful." (internal citations omitted)).

140. People *ex rel*. Gallo v. Acuna, 929 P.2d 596, 608 (Cal. 1997).

141. *Roberts*, 468 U.S. at 622–23.

142. *Id.* at 623.

and unrelated to the suppression of speech.[143] The Court noted that the requirement to allow female members did not interfere with the group's stated purpose or communication.[144] Moreover, there was no less restrictive alternative because the only way to serve the compelling state interest of ending gender discrimination was to completely ban discriminatory membership practices based on gender.[145] Anything less than a complete ban would continue to allow gender discrimination and, thus, fail to accomplish the compelling state interest.

The "intimate" right to association protects some intimate relationships for their importance to an individual's personal ideals and beliefs, rather than the communication of those ideals and beliefs to others.[146] Intimate association is defined very narrowly, and relationships in this category are typically characterized by "such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[147] Rather than a bright-line definition, this category is recognized by a series of factors to consider, including "size, purpose, policies, selectivity, [and] congeniality" of the group.[148] For example, in *Roberts*, the Jaycees were not protected under an intimate association theory because they were "large and basically unselective groups."[149] They only excluded based on age or gender, and otherwise "new members [were] routinely recruited and admitted with no inquiry into their backgrounds."[150] Like instrumental association, any restriction on intimate association is reviewed under a strict scrutiny standard of review.[151]

In addition to the two traditionally recognized categories of protected association described above, courts have acknowledged the existence of a "general" association category. The Court has limited protection of this general right to association, however, and applies only rational basis review

143. *Id.* at 623–24. Note that a Fourteenth Amendment equal protection analysis would apply only intermediate scrutiny to gender-based distinctions, but this First Amendment analysis applied strict scrutiny. This distinction falls outside the scope of this Note but highlights how challengers of government action should strategically consider all possible avenues to determine the one most favorable to their positions. Despite this, the Court said that promoting gender equality was a compelling interest.

144. *Id.* at 620–21.

145. *Id.* at 627–29.

146. *Id.* at 618–19.

147. *Id.* at 620.

148. *Id.* at 619–20.

149. *Id.* at 621.

150. *Id.*

151. *See id.*

to infringements of it.[152] In *Dallas v. Stanglin*, an ordinance restricted admission to certain dance halls based on age. Challengers of the ordinance attempted to establish greater protection for "general" association, specifically, a right of minors to associate with people younger than fourteen or older than eighteen in a dance hall. The court rejected the argument that there should be any special protection for this association and upheld the ordinance under rational basis review.[153] Courts reviewing gang injunctions have not upheld any general, *Stanglin*-like right of association for gang members.[154]

The Court often upholds regulations limiting or prohibiting association for the purpose of committing or promoting illegal acts or for the purpose of depriving others of their constitutionally protected rights.[155] In *Scales v. United States*, the Court upheld a conviction based on the Smith Act, which prohibited membership in a group with the purpose to overthrow the government but required specific intent to accomplish the group's goals through violence.[156] Although the Act burdened association by prohibiting membership in a group with expressive associational purposes, it only did so if the individual had the specific intent to commit an otherwise illegal act—government overthrow through violence—and thus it was upheld.[157]

Courts have rejected arguments that criminal street gangs engage either in protected instrumental or intimate association. In *People v. Acuna*, the California Supreme Court described an enjoined gang as "a loosely structured, elective form of social association,"[158] not "formed 'for the purpose of engaging in protected speech or religious activities,'"[159] thus defeating an instrumental association argument. It further refined the

152. City of Dall. v. Stanglin, 490 U.S. 19, 25 (1989).

153. *Id.* at 25.

154. *See, e.g.*, People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 608–09 (Cal. 1997); *In re* Englebrecht, 79 Cal. Rptr. 2d 89, 94–96 (Ct. App. 1998).

155. *E.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (explaining that "[t]he freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights").

156. Scales v. United States, 367 U.S. 203, 228–30 (1961). *Noto v. United States*, 367 U.S. 290 (1961), is a companion case to *Scales*, but it simply adopts the constitutional analysis found in *Scales* and overturns the petitioner's conviction on evidentiary grounds. Note that, by analogy to "crime speech," this is association speech. It is analogous to a categorical exclusion from First Amendment protection but is analyzed in a somewhat different way.

157. *See Scales*, 367 U.S. at 229–30. Some people might describe this case as creating a categorical exclusion, but it can also be described as simply subjecting a particular regulation to rigorous scrutiny, which it withstood. This Note does not argue whether either description is correct but points them out as logical possibilities.

158. *Acuna*, 929 P.2d at 609.

159. *Id.* at 608 (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544 (1987)).

definition of intimate association relationships as "those existing along a narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization's fundamental values, against which even the state is powerless to intrude."[160] Although the enjoined gang in *Acuna* had some features supporting an argument of intimate association, such as common values among members or personal enrichment from the relationships, they were insufficient to satisfy the narrow requirements for protected intimate association.[161] This case is informative in predicting how the tagging injunction will likely be treated in the courts, but the differences between criminal street gangs and tagging crews, discussed below, make it necessary to conduct an independent analysis.

The possible associational challenges to the injunction, as well as the merits of these arguments, will be discussed in Part V.

### C. VAGUENESS AND OVERBREADTH

Some injunction provisions will also likely be challenged as vague or overbroad.

#### 1. Vagueness

A law is vague "if a reasonable person cannot tell what speech [or association] is prohibited and what is permitted."[162] The vagueness doctrine is mainly concerned with providing adequate notice of prohibited conduct to defendants and avoiding arbitrary or discriminatory enforcement by law enforcement.[163] A challenged provision must be considered in the context it is used, and the court will demand only "reasonable specificity."[164] In *Acuna*, enjoined gang members challenged an injunction provision prohibiting association with "known" gang members as vague because it was unclear who the other person's gang membership must be "known" to.

160. *Id.* at 609. Challengers of gang injunctions have also argued that the "Do Not Association" provisions burden protected familial association. In both *Acuna* and *Englebrecht*, the courts determined that, although the injunctions incidentally burdened familial association because relatives were often members of the same gang, the provisions did not violate gang members' First Amendment right to association because it burdened no more association than necessary, and anything less restrictive would be ineffective. This familial association argument is not applicable to the MTA injunction because, unlike criminal street gangs, there is no evidence that tagging crews are typically family affairs.

161. *Id. See also In re* Englebrecht, 79 Cal. Rptr. 2d 89, 94–96 (Ct. App. 1998) (following *Acuna*'s holding that a nonassociation provision in gang injunction is constitutional, despite changed factual circumstances including a larger safety zone and enjoined gang members residences located within the safety zone).

162. CHEMERINSKY, *supra* note 75, at 941.

163. *Acuna*, 929 P.2d at 611–12.

164. *Id.* at 612.

The court implied a personal knowledge requirement and sustained the challenged provision, indicating that a vagueness review of an injunction is somewhat deferential and a court will imply terms as necessary and possible to uphold an otherwise valid injunction,[165] though the restrictions are, in theory, tighter for free speech and other fundamental rights claims.

2. Overbreadth

A law is overbroad "if it regulates substantially more speech than the Constitution allows to be regulated," or if the challenger can prove that it would be unconstitutional if applied to others not before the court.[166] The latter aspect of the overbreadth doctrine reflects a concern about stifling protected speech based on a speaker's fear that his or her speech may be prohibited by an overbroad regulation.[167]

The overbreadth doctrine is a limited one, characterized by the Court in *Broadrick v. Oklahoma* as "strong medicine," to be used "only as a last resort."[168] A regulation is only struck down as overbroad if it is "substantially overbroad" and cannot be cured through a limiting construction.[169] Moreover, courts may partially invalidate only the overbroad section of a regulation and let the rest stand.[170] The Court in *Broadrick* also noted that the overbreadth doctrine weakens as the target of a regulation moves from pure speech to conduct, particularly conduct that is already prohibited under criminal law.[171]

Gang members' overbreadth challenge of an injunction in *Acuna* was rejected.[172] The court first noted that the overbreadth doctrine was a limited one, and then went on to emphasize the differences between injunctions and laws of general application.[173] An injunction only applies to specific

165. *Id.* at 613.

166. CHEMERINSKY, *supra* note 75, at 943.

167. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

168. *Id.* at 613.

169. *Id.* at 613, 615.

170. *Id.* at 613.

171. *Id.* at 615 (noting "at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct").

172. People *ex rel.* Gallo v. Acuna, 929 P.2d. 596, 611 (Cal. 1997).

173. *Id.* at 610.

defendants, who have the opportunity to appear in court.[174] It does not apply to ordinary citizens unconnected to the enjoined defendants, and therefore overbreadth concerns are minimized.[175]

## V. PREDICTING, ANALYZING, AND PREPARING FOR POSSIBLE FIRST AMENDMENT CHALLENGES TO THE INJUNCTION

The injunction against the MTA tagging crew will likely face First Amendment challenges in court.[176] The main goal of the injunction, taken as a whole, is to protect public and private property by eliminating illicit graffiti by MTA taggers in Los Angeles. The protection is not against messages but against unwanted markings of any kind, whether or not they are communicative. The markings are all, from the viewpoint of an unwilling private or public property owner, unwanted defacement. Thus, the injunction aims to protect the autonomy right that is violated by putting graffiti on a privately owned wall—if the property owner objects to graffiti on his wall, its presence violates his autonomy.

The wording of the government's complaint already suggests several state interests served by the injunction in general, in addition to simply preventing graffiti vandalism. These include: protecting residents from fear and insecurity caused by graffiti vandalism, protecting the appearance and property values of the city, preventing millions of dollars of graffiti removal costs, and protecting legitimate, law-abiding artists from unfair competition from taggers.[177] One of the most difficult aspects of this analysis is determining what standard of review applies to each provision, so this part will specify the applicable standards of review and whether the government interest served must be compelling, important, or just minimally rational.

This part examines the possible First Amendment challenges and likely outcomes and recommends modifications to the provisions to help

174. *Id.* at 610–11.

175. *Id.*

176. The injunction easily meets the "state action" requirement because it was filed by the City Attorney and will be carried out by police officers. For First Amendment challenges faced by gang injunctions, see for example *id.* at 608–11 and *In re Englebrecht*, 79 Cal. Rptr. 2d 89, 94–96 (Ct. App. 1998).

177. Complaint, *supra* note 1, at 3. The first substantive paragraph of the complaint states

> Graffiti is a costly and pervasive problem affecting all residents, property owners, and businesses within the City of Los Angeles. The graffiti epidemic is fueled by a sub-culture that values personal fame and recognition over the property rights of others. Graffiti vandals mark, etch, paint, spray, inscribe, or affix their name or moniker wherever and whenever they can in pursuit of this fame, destroying the quality of life that law-abiding residents are both entitled to and desire within their neighborhoods.

*Id.* at 2.

them better withstand these challenges.[178] This analysis proceeds in the order that the provisions appear but excludes several provisions that have only attenuated First Amendment implications.[179]

### A. THE "DO NOT ASSOCIATE" PROVISION

The "Do Not Associate" provision prohibits "[s]tanding, sitting, walking, driving, riding, gathering or appearing anywhere in public view or in any place accessible to the public, with any Defendant or any known member of the MTA crew."[180] There are exceptions for attending class or worship services.[181] In support of this provision, the government alleges that MTA members "organize and conduct meetings where members discuss the direction, philosophies, and goals of the crew."[182] The government also contends that MTA taggers work together in groups of two or more to execute tags, enabling them to have lookouts and protection from rivals or simply to create larger and more complex tags.[183]

Any challenge to this provision must first establish that MTA members engage in protected intimate or instrumental association. This will likely be an uphill battle based on the history of courts upholding association clauses in gang injunctions.[184] If MTA can establish one of these two key categories of association, the court will apply a strict scrutiny standard of review and, thus, provide MTA a better chance of a successful challenge.

MTA will likely argue that they engage in protected instrumental association for communication because the purpose of the group is to create graffiti. The government specifically states that MTA members associate in order to better accomplish their graffiti, and the government concedes that MTA's graffiti is expressive.[185] The association of crewmembers may provide a lookout, protection from rival taggers, or the ability for a tagger to create larger tags more quickly. On the other hand, while MTA's

178. Some provisions are left out of this analysis because they do not raise significant First Amendment concerns.

179. In particular, this Note will not analyze the following three provisions: no firearms, ammunition, dangerous or illegal weapons; do not obstruct, resist, or delay any peace officer; and obey all laws.

180. Complaint, *supra* note 1, at 22 (requesting a "Do Not Associate" provision in the Prayer for Relief).

181. *Id.*

182. *Id.* at 8.

183. *Id.* at 11.

184. *See supra* text accompanying notes 160–61.

185. *See supra* text accompanying notes 89–91. Considerations of enlarging or strengthening an individual's voice are rooted in political speech—but current First Amendment doctrine is not limited by it.

association may make tagging easier or safer, it does not necessarily enlarge or strengthen a tagger's voice or message, as intended by the original doctrine of instrumental association for political speech. Although it may take more time, effort, and risk for a solo tagger to accomplish a large tag, the tagger can still probably reach the same result and accomplish the expression without the association of a crew.[186]

MTA may also try to establish intimate association based on the selective nature of membership in MTA and the highly personal nature of each tagger's work. Recall that intimate association is characterized by such attributes as relative smallness, a high degree of selectivity, and seclusion from others in critical aspects of the relationship.[187] In order to satisfy the extremely narrow interpretations of intrinsic association shown in gang injunction cases,[188] MTA will have to provide facts showing that their association actually supports, strengthens, and enriches each individual's calling. The government repeatedly refers to the MTA tagging crew as "selective" and explains that, unlike a typical street gang that accepts almost any member, MTA does not admit a tagger to the crew until the tagger is already well known and prolific in the street art world.[189] MTA members have similar callings or compulsions to tag, like Smear.[190] Standing alone, the selectivity of the crew may not be enough to establish intimate association, but in combination with the argument of protected association for expression, there is at least a plausible theory for MTA to advance—if not for absolute protection against the injunction, at least for strict scrutiny of the provision.

Even if MTA proves it engages in instrumental or intimate association, the injunction provision may succeed if the government proves that MTA associates solely for the purpose of committing crime or depriving others of their rights.[191] The *Acuna* and *Englebrecht* courts did not reach this line of analysis perhaps because members of criminal street

186. *See* Kovacs v. Cooper, 336 U.S. 77, 88–89 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").

187. Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984). *See also supra* text accompanying notes 146–50.

188. Keep in mind that these cases were only decided at the state level. Until the U.S. Supreme Court rules on this (if ever), some might consider the California interpretation of gangs' protected association rights too restrictive.

189. Complaint, *supra* note 1, at 8.

190. *Id.* at 13.

191. *See supra* text accompanying notes 155–57. This may fall into a crime/association exclusion, which might cause MTA to fail to establish it is pursuing protected association. The intricacies of this exclusion are beyond this Note, but the adjudicative outcome would be the same.

gangs often live in the same community or are even family members and, therefore, associate outside of gang activities.[192] In contrast, MTA is not territorial—membership is based on a tagger's skill and reputation, not the tagger's address—so it is possible that taggers *only* congregate for the purpose of planning or executing tags. Thus, the outcome would be similar to *Scales*—in which association was solely for the purpose of crime—and the provision would be upheld. The main weakness of this argument is the difficulty of proving that MTA members *only* associate for the purpose of committing crimes or depriving others of their rights and not *also* for lawful, protected purposes such as to further an artistic movement.

Assuming that MTA is able to establish some form of protected association, the "Do Not Associate" provision will then be reviewed under a strict scrutiny standard. The government must prove that the provision serves a compelling state interest unrelated to suppressing ideas, and that there is no significantly less restrictive alternative to accomplish the compelling state interest.[193] The government's strongest interest is protecting the autonomy of property owners to exclude graffiti from their property.[194] Preserving the appearance and property values of a community are also legitimate state interests but may not be "compelling" to survive a strict scrutiny analysis. While the Court has acknowledged that "keep[ing] the streets clean and of good appearance" is a legitimate government interest in *Schneider v. New Jersey*, it was insufficient to justify an ordinance banning all distribution of leaflets on streets.[195] Similarly, "attempting to preserve the quality of urban life," including protecting property values, qualifies as a substantial, though not compelling, government interest.[196] Finally, while protecting residents from fear and insecurity is a legitimate state interest, it probably does not qualify as

192. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 608–09 (Cal. 1997); *In re* Englebrecht, 79 Cal. Rptr. 2d 89, 94–96 (Ct. App. 1998).

193. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). Note that this is a somewhat weakened form of the less restrictive alternative inquiry because only a "significantly" less restrictive alternative must be used—not a slightly less restrictive one.

194. *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.").

195. *See* Schneider v. New Jersey, 308 U.S. 147, 162 (1939). But the Court noted that this was because there were less restrictive ways of preventing litter, such as punishing someone caught throwing a leaflet on the ground. *See also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 549–50 (1981) (Stevens, J., dissenting) ("[Graffiti] is an inexpensive means of communicating . . . to large numbers of people; some creators of graffiti have no effective alternative means of publicly expressing themselves. Nevertheless, I believe a community has the right to decide that its interests . . . in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places.").

196. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 60, 71 (1976)).

significant or compelling unless there is a direct threat.[197] Thus, protecting a property owner's autonomy right is the most likely compelling state interest.

The biggest hurdle for the government will probably be proving that there are no significantly less restrictive alternatives to serve the government interest.[198] The provision currently applies to all public association between members of MTA in all of Los Angeles, subject to very limited exceptions.[199] This is far more restrictive than the association provisions in gang injunctions, which apply only within a specified and limited "Safety Zone."[200] Moreover, its relation to the stated government interest is more attenuated than in a gang injunction. Criminal street gang members congregate for the purpose of bullying and intimidating community members. Their very association creates a direct problem of intimidation and fear that the state aims to fix by its "Do Not Associate" provision. In contrast, MTA's public association is simply a step towards the commission of their crime of graffiti—if that. Association may not even be necessary for the crime to be committed, so banning it may not actually serve the stated government interest.[201] Thus, the provision should probably be more narrowly tailored, as suggested below.[202]

This provision may also be attacked on vagueness grounds. Because the *Acuna* court upheld a virtually identical provision against vagueness

197. *See* Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1062 (9th Cir. 2002).

198. This is probably a situation in which the less restrictive alternative analysis and overbreadth analysis coincide. The provision is overbroad because it covers too many associational situations—not too many persons. Courts do not necessarily describe the two analyses as one, but both are used to invalidate government regulation as part of a more general narrowing requirement.

199. The wording of the provision does not seem to restrict private association among MTA members. *See* Complaint, *supra* note 1, at 22.

200. Note, though, that when the defendant in *Englebrecht* argued that the injunction he was charged with violating was unconstitutional in part because the "[t]arget [a]rea" was significantly larger than that in the injunction upheld in *Acuna*, the court said that "the relative size is not determinative." *In re* Englebrecht, 79 Cal. Rptr. 2d 89, 95 (Ct. App. 1998). It reiterated the *Madsen* standard, that the inquiry is whether the injunction burdened "no more speech than necessary to serve a significant government interest." *Id.* at 95 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)). The government presented evidence that the taggers commit vandalism throughout Los Angeles and are not territorial in support of its argument for an expansive safety zone. *See* Complaint, *supra* note 1, at 3–4, 7, 10, 14.

201. Also, there are other compelling state interests, such as protecting police officers, which may not be served by this provision. The government alleges that members of MTA used a mass text message to alert each other in advance that search warrants would be executed the following day. The "Do Not Associate" provision does not prohibit all communication between crew members, only that which takes place in public. Therefore, such law enforcement leaks would not be solved by this provision.

202. *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.") (citing Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808–10 (1984)).

challenges, this provision will probably also withstand a vagueness challenge.[203]

In order to better survive constitutional scrutiny, the "Do Not Associate" provision should be amended to be less restrictive and less broad. In particular, a specific intent requirement should be added or implied, as it was in *Scales*, to only prohibit association with the intent to commit, plan, or further graffiti vandalism.[204] To prove intent, law enforcement could either prove that enjoined taggers took a clear preparatory step or show prior acts and some modus operandi. Alternatively, this provision could be combined with the "Obey Curfew" or "Stay Away" provisions to only prohibit association at certain times or in certain places that indicate a higher likelihood of tagging. If some of these tailoring suggestions are adopted, the "Do Not Associate" provision will likely survive constitutional attack.

### B. THE "NO GRAFFITI" PROVISION

The "No Graffiti" provision prohibits "[d]amaging, defacing, marking, etching, painting, spraying, inscribing, affixing, or in anyway applying any word, figure, mark, design, or symbol to any public or private property of another."[205] As discussed above, graffiti is often considered valueless vandalism by the government and some members of the general public, while the hip-hop culture views it as art and self-expression. The fact that graffiti likely falls within both descriptions still affords it presumptive protection.

The language of the provision indicates that the government intended to prohibit communicative or artistic graffiti, not merely destruction of property, because, although it begins by describing the prohibited acts as "damaging" and "defacing," it goes on to specifically prohibit "applying any word, figure, mark, design, or symbol."[206] Moreover, throughout the Complaint the government stresses the artistic vocation of the taggers, which almost automatically leads to recognizing the communicative status

203. *See supra* text accompanying notes 163–65. But some may argue that the state gang injunction cases are less protective than they should be under the First Amendment, and that if this ever reached the U.S. Supreme Court, the vagueness limitation may eventually be tightened.

204. *See supra* text accompanying notes 155–57. Some gang injunction challengers have suggested that association should only be banned if there is intent to further the interests of the gang. This has been rejected in the past, but the many differences between ordinary street gangs and tagging crews justify an intent requirement here. *See, e.g.*, People *ex rel.* Totten. v. Colonia Chiques, 67 Cal. Rptr. 3d 70, 80 (Ct. App. 2007); People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 616–17 (Cal. 1997).

205. Complaint, *supra* note 1, at 22 (requesting a "No Graffiti" provision in the Prayer for Relief).

206. Consider an alternative: the provision could simply prohibit all "graffiti" in order to be less facially directed at speech. But it might then be more susceptible to vagueness challenges.

of the graffiti and, thus, awards it presumptive protection. The Complaint explains that all members of MTA "consider graffiti vandalism a calling," and quotes a tagger, "Smear," describing his artistic compulsion to tag.[207] Even if the language of the provision only mentioned "defacement," the provision would still be directed at speech because the government has conceded in the complaint that MTA's defacement (graffiti) is expressive.[208] Moreover, the tagger's act of tagging probably qualifies for First Amendment protection under *O'Brien*, though the expressive nature of the graffiti, and the provision's directed-at-speech status is probably sufficient to establish protection without reaching an *O'Brien* analysis.

The "No Graffiti" provision is probably content neutral, following the Court's reasoning in *Madsen*.[209] The *Madsen* standard for content neutrality is "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'"[210] The MTA injunction provision clearly prohibits any kind of marking or defacement by an MTA tagger and does not single out certain content. Although MTA may argue that the provision is content based because it singles out communication based on speaker identity, *Madsen* announced that speaker identity regulations are treated differently in an injunction from a law of general application.[211] Challengers may argue that the provision is nonetheless viewpoint or subject-matter based because MTA taggers share the same point of view or tag about the same subject matter. This argument would require supporting evidence, which is not presently available. Moreover, a court would likely treat this objection the same as the speaker identity challenge in *Madsen* and attribute it to the nature of an injunction, thus rendering the argument immaterial.

Even if the provision is content based, the government may argue that it fits within the secondary effects carve-out and, therefore, should be reviewed as content neutral. The government has cited the effects of graffiti, such as decreased quality of life and property values, negative impacts on business, and increased fear and insecurity among residents.[212]

207. Complaint, *supra* note 1, at 13. *See also supra* text accompanying note 1.

208. On the other hand, if this were a law of general application and the text only referred to defacing private property, it would probably not be directed at speech. The difference here is that although the property owners do not care whether the marks are expressive or not, the Complaint specifically acknowledges that MTA's graffiti is expressive—thus, it receives First Amendment protection.

209. *See supra* text accompanying notes 108–10.

210. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762–63 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). *See supra* text accompanying note 107.

211. *Id.*at 762–63. *See supra* text accompanying note 108–07.

212. Complaint, *supra* note 1, at 11–12.

If accepted, this characterization would lead to an intermediate time, place, and manner standard of review—which the government would, of course, prefer. The weakness of this argument is that these "secondary effects" of graffiti are more akin to "primary effects"—they are far more direct effects of graffiti than crime and decreased property values were in relation to the adult theaters in *Renton*. Specifically, interference with property rights, including the physical integrity of property and the right to control it, is a primary—not secondary—effect of the graffiti. A court would probably decline to apply an "end run" secondary effects analysis in this situation[213] and, instead, treat the cited effects as the same as the main target of eliminating graffiti itself.

The "No Graffiti" provision is probably not content based and, thus, would be reviewed under a heightened time, place, and manner level of scrutiny, as announced in *Madsen*. The *Madsen* standard required that the provision must "burden no more speech than necessary to serve a significant government interest."[214] To ensure a complete analysis, however, this Note will analyze the provision under a strict scrutiny standard and specify any issues that could lead to a different outcome under a time, place, and manner review. A strict scrutiny review requires the provision to serve "compelling state interests, unrelated to the suppression of ideas," with no "significantly less restrictive" alternative.[215]

The government will likely be successful in establishing a compelling state interest of protecting personal property and autonomy rights of property owners and demonstrating that the "No Graffiti" provision is narrowly tailored to serve this compelling state interest. This particular provision applies to all possible types of graffiti done on "public or private property of another." Anything less restrictive would fail to substantially serve the compelling state interest. For example, if etching was allowed but painting was not, it would still fail to protect the property rights of individuals whose property was defaced by etching without their consent. Alternatively, if the provision only prohibited graffiti on government property, it would not serve the interests of private property owners.[216] Moreover, this provision does not prohibit taggers from tagging on their own property or on other surfaces that do not infringe on the property rights of others, so it leaves open alternative means of communication.[217] The

213. *See supra* text accompanying note 120.

214. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

215. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

216. And vice versa. Note that on government-owned property, the government has a similar right to autonomy. For a good discussion of narrow tailoring and less restrictive alternatives, see *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

217. Notwithstanding any applicable local zoning ordinances.

government also mentions that MTA taggers sometimes vandalize legitimate murals.[218] A legitimate mural receives First Amendment protection as art. Thus, the government has a legitimate interest in preventing MTA taggers from interfering with the lawful mural artist's fundamental right of expression.[219]

Although this provision is the most clearly facially directed at speech, it is also probably one of the strongest provisions in the face of constitutional challenges. It is a well-established principle that the rights of each individual in society must be balanced against the rights of others and the community as a whole. The burden placed on the First Amendment rights of taggers here is narrowly tailored to achieve the compelling state interest of protecting property rights, and therefore, this provision will likely stand without any adjustment. If the government somehow succeeds in fitting this provision into the *Renton* secondary-effects carve-out, it will be even easier to satisfy the time, place, and manner standard. Moreover, any change in the wording to make the provision less facially directed at speech would probably be ineffective because it would still be directed at speech as applied, thus still subject to strict scrutiny and vagueness challenges.

### C. THE "NO GRAFFITI TOOLS" PROVISION

The "No Graffiti Tools" provision prohibits "[p]ossessing, purchasing, furnishing, transporting, or entering any commercial establishment with the intent to purchase, any aerosol spray paint container, or other graffiti tool."[220] A "graffiti tool" is anything "which can be used to mark, etch, paint, spray, inscribe, or affix any word, figure, mark, design, or symbol to private or public property.[221] This provision is designed to implement the "No Graffiti" provision. It may be difficult to catch a tagger while he or she is committing the act of vandalism, so the "No Graffiti Tools" provision enables law enforcement to use the possession of graffiti tools to catch taggers, rather than having to catch them in the act. Even though this is not facially directed at speech like the "No Graffiti" provision, it is a mechanism whose purpose is directed at speech, so it triggers a similar analysis. If this were a law of general application that incidentally burdened speech, it would be analyzed using rational basis review; however, given its

218. Complaint, *supra* note 1, at 22–23.

219. *See In re* Kay, 464 P.2d 142, 149 (Cal. 1970) ("Nonetheless, the state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion.").

220. Complaint, *supra* note 1, at 9.

221. *Id.*

role in the overall injunction, it is directed at speech rather than at the possession of tools alone.

The review of this provision will begin by tracking that of the "No Graffiti" provision. If the "No Graffiti" provision is content neutral, then this provision will be content neutral as well and will be reviewed under a *Madsen*-type heightened time, place, and manner scrutiny. If both are content based, both will receive strict scrutiny. This provision serves the same compelling state interests as the "No Graffiti" provision. Where the analysis becomes dissimilar is in determining whether the provision is a narrowly tailored means of achieving the state interest.

The "No Graffiti Tools" provision will probably fail a constitutional challenge because it is not narrowly tailored. Many members of MTA produce legal artwork, and this provision completely prohibits them from creating their legal art because it bans possession of all tools necessary to do so. The impact this provision would have on their lives is demonstrated in the arrest of the tagger, "Smear," for possession of "graffiti tools" in violation of a probation term similar to this injunction provision.[222] Smear no longer commits illegal graffiti, but this injunction term would prohibit him from creating his legal art as well.[223] This lack of narrow tailoring will likely cause the provision to fail if no modifications are made.

There are many ways the "No Graffiti Tools" provision could be modified to strengthen it against First Amendment challenge. The recent treatment of Smear's probation term provides one idea for how to improve this injunction provision—Smear is now permitted to possess art tools at his art studio, art shows, and the place where he teaches but nowhere else.[224] This tailoring resembles that of the curfew provision, which allows taggers out at night only for legitimate, organized activities.[225] Similarly, the "No Graffiti Tools" injunction provision could allow taggers to possess art tools only for legitimate, organized activities. It could also be strengthened by an intent requirement—prohibiting only possession of tools with intent to use them for vandalism but allowing mere possession. This would track California Penal Code section 594.2, which prohibits possession of specified graffiti tools "with the intent to commit vandalism or graffiti."[226] Alternatively, the provision could include an affirmative defense, allowing an enjoined individual caught with graffiti tools to

222. *See supra* note 21 and accompanying text.
223. *See supra* note 14 and accompanying text.
224. *See* Winton, *supra* note 22.
225. *See infra* text accompanying note 233.
226. CAL. PENAL CODE § 594.2 (West 2011).

defend an injunction violation charge by proving that he possessed them for legitimate use, for example, by providing evidence of access to an art studio. Finally, the provision could be limited to only prohibiting certain graffiti tools that are unlikely to be used for legal art, such as modified fire extinguishers filled with paint.[227] In sum, the government should modify this provision now in one of these suggested ways, so that it will better withstand future constitutional challenges.

### D. THE "NO TRESPASSING" PROVISION

The "No Trespassing" provision prohibits "[b]eing present in or on the property of another person or public entity, that is not open to the general public, except (1) when carrying prior written consent of the owner, owner's agent or person in lawful possession of the aforementioned property on his or her person, or (2) in the presence of and with the voluntary consent of the owner."[228] In support of this provision, the government contends that MTA members frequently trespass on private and government property in order to tag.[229]

This provision is probably not directed at speech or content and, therefore, would be evaluated—and upheld—using rational basis review. Enjoined gang members challenged a similar provision in *People v. Acuna*,[230] a 2010 California Court of Appeals case (with a different defendant of the same name) than the 1997 California Supreme Court *Acuna* case. Gang members in the 2010 *Acuna* case argued that the no trespassing provision infringed on their familial association rights. The government provided evidence that the gang members "[took] advantage of other people's property to commit crimes" and to hide out, do drugs, or run from police.[231] The court upheld the provision, stating that the requirement to obtain written permission to be in a house unaccompanied did not implicate any protected instrumental or intimate First Amendment association.[232]

This provision will probably be upheld without any revision because it is very similar to the provision upheld in *Acuna*. Moreover, the taggers not only trespass but also tag private property while trespassing, creating an even stronger argument for the provision than the government had in the

227. *See supra* text accompanying note 6.
228. Complaint, *supra* note 1, at 23 (requesting a "No Trespassing" provision in the Prayer for Relief).
229. *See id.* at 9.
230. People *ex rel*. Reisig v. Acuna, 106 Cal. Rptr. 3d 560, 580 (Ct. App. 2010).
231. *Id.* at 580.
232. *See id.*

gang injunction context.

### E. THE "OBEY CURFEW" PROVISION

The "Obey Curfew" provision prohibits "[b]eing present in public view, in a public place or in any place accessible to the public, between the hours of 10:00 p.m. on any day and 5:00 a.m. of the following day."[233] It contains exceptions for employment, "lawful entertainment event[s],"[234] and emergencies. In support of this provision, the government argues that MTA taggers "will often engage in graffiti vandalism under the cover of darkness in order to avoid detection."[235]

This provision is probably not directed at speech or content, and therefore would be analyzed and upheld using rational basis review. Rational basis review requires only that the provision be rationally related to achieving a legitimate government interest. Here, the government has provided evidence that graffiti is often done at night, so the curfew is rationally related to the legitimate goal of protecting property by preventing graffiti.[236]

A similar curfew provision was upheld against vagueness and overbreadth challenges in the 2010 *Acuna* case.[237] That court's reasoning compared a curfew provision that had been struck down on vagueness grounds in *People ex rel. Totten v. Colonia Chiques*[238] to the updated and more specific language used in *Acuna*.[239] The comparison shows the evolution that these injunction provisions have undergone as they have withstood or fallen to various constitutional challenges. The provision in *Colonia Chiques* was unconstitutionally vague because it simply prohibited "being outside" during certain hours, without defining "being outside" more specifically, and because it similarly did not sufficiently define its

233. Complaint, *supra* note 1, at 23 (requesting an "Obey Curfew" provision in the Prayer for Relief).

234. *Id.* A "lawful entertainment event" is limited to events that take place at "commercial establishment[s]" and require the payment of admission. *Id.*

235. *Id.* at 11.

236. Challengers may argue that the provision is not rationally related to the government interest because in the winter it gets dark before the curfew time, or because graffiti occurs during the day as well. *See* Gomez, *supra* note 27, at 681–82. But rational basis review does not require that the government solve the entire problem but instead allows a step by step approach. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

237. *Reisig v. Acuna*, 106 Cal. Rptr. 3d at 580–82. Defendants in *Acuna* also challenged the curfew as infringing on their constitutional freedom of movement and their Fourteenth Amendment "right to remain in a public place for a lawful purpose." *Id.* at 581–82.

238. People *ex rel.* Totten v. Colonia Chiques, 67 Cal. Rptr. 3d 70, 82–84 (Ct. App. 2007).

239. *Reisig v. Acuna*, 106 Cal. Rptr. 3d at 580–82.

exception for a "legitimate meeting or entertainment activity."[240] The language used in the provision upheld in *Acuna* was more specific, and the language in the MTA injunction provision mirrors that. The injunction provision specifies what is prohibited—being in public view, a public place, or a place accessible to the public—and further defines its exceptions, and, thus, it would likely withstand a vagueness challenge.

### F. THE "STAY AWAY" PROVISION

The "Stay Away" provision appears to respond directly to MTA's L.A. riverbed tag by prohibiting enjoined taggers from "being present on or in any cemented-over portion of the Los Angeles river bed."[241] It also prohibits "[b]eing afoot upon any freeway or any and all property between the freeway and the freeway boundary wall," and "being present on or in any property owned or operated by Los Angeles County Metropolitan Transportation Authority."[242] It contains exceptions when necessary to fulfill court orders and for emergencies.[243] The government, throughout its complaint, provides examples of graffiti vandalism targeted at freeways, buses, and the Los Angeles riverbed.[244]

This provision is probably not directed at speech or association, so it would need to satisfy rational basis review, which requires only that a provision be rationally related to achieving a legitimate government interest. Here, the legitimate government interest is preventing graffiti vandalism on specified government property, and keeping taggers known to target those areas away from them is rationally related to achieving the goal. The elements relating to the freeway and the Los Angeles riverbed will likely survive without any adjustment because there is likely no legitimate reason (aside from emergencies) for being afoot in those two areas.

Challengers could try to trigger a stricter standard of review by arguing that the part of the provision ordering taggers to stay away from Metropolitan Transportation Authority-owned property is directed at association and is overbroad. It may be directed at association because banning enjoined taggers from public transportation may burden their association if they cannot travel to and from associational opportunities.

240. *See id.*; *Colonia Chiques*, 67 Cal. Rptr. 3d at 83–84.

241. Complaint, *supra* note 1, at 23 (requesting a "Stay Away From the Following Locations" provision in the Prayer for Relief).

242. *Id.*

243. *Id.*

244. *See, e.g.*, *id.* at 2–3.

But it is more likely a regulation of general application, and any effect on association is incidental—thus drawing only rational basis review. Moreover, whether association is even affected is a factual inquiry specific to each enjoined tagger, because those with substitute modes of transportation would not be burdened. If the provision is directed at protected association, the compelling state interests are preventing graffiti vandalism and saving the city money in clean-up costs. The provision is probably not narrowly tailored because it prevents all use of Metropolitan Transportation Authority public transportation, rather than just preventing, for example, loitering there. The provision might also be overbroad if it regulates more activity than is constitutionally allowed.[245]

In sum, however, the entire provision is probably not directed at association and, thus, will be reviewed under—and withstand—a rational basis review.

### G. THE "DO NOT PROFIT FROM UNLAWFUL ACTS" PROVISION

The "Do Not Profit From Unlawful Acts" provision prohibits "[r]eceiving or accepting any currency, fees, royalties, real property, or other consideration . . . for the sale or transfer of materials, memorabilia, or other property that depicts a photograph of unlawful graffiti vandalism containing any variation or representation of the sellers name or moniker, or . . . representation of the crew MTA.[246] The government frames the prohibited acts as "capitaliz[ing] on . . . unlawful marketing and ill-gotten fame for the graffiti vandal."[247] Moreover, the government claims that allowing taggers to capitalize on their reputation creates an incentive for people to tag because there is "a direct causal relationship between unlawful acts of graffiti and increased employment opportunities and profit . . . ."[248] According to the government, this harms legitimate artists because they cannot compete with the taggers' ill-gotten notoriety.[249]

This provision is likely directed at speech and content because it only prohibits photographs depicting certain things from being sold. A tagger could sell a photograph of an original painting he made that did not contain his moniker or any reference to MTA but cannot sell the same photograph

245. A challenge should not be based on overbreadth alone, however, because the court has expressly limited use of the overbreadth challenge to egregious situations. *See supra* text accompanying notes 168–71.

246. Complaint, *supra* note 1, at 24 (requesting a "Do Not Profit from Unlawful Acts" provision in the Prayer for Relief).

247. *Id.* at 3.

248. *Id.* at 14.

249. *See id.* at 15.

if it is signed with his tagging moniker. Because of this content-based distinction, it will be reviewed under a strict scrutiny standard.[250]

The government already emphasized that this provision serves a compelling interest of preventing criminals from profiting from their crime and protecting legitimate artists from unfair competition. Preventing criminals from profiting from crime has been recognized as a compelling state interest.[251] Protecting against unfair competition has been recognized as a significant government interest, so the government may be successful in convincing a court that it is compelling.[252]

This provision is probably narrowly tailored because it only applies to photographs of crime, which are specifically profitable because of the crime. In comparison, a California "Son of Sam" law seizing all of a convicted felon's profits from books and movies about his crime was struck down because it was not narrowly tailored,[253] following a Supreme Court case on a similar New York law.[254] The main weakness in the California law was that it burdened too much speech. Even though the law contained an exception for a "passing mention" of crime and only applied to criminals who were actually convicted of felonies, it applied to works that discussed a crime but were not actually made more profitable because of that crime.[255] By analogy, the injunction provision would mimic the overturned Son of Sam law if it prohibited all of the tagger's otherwise legitimate artwork done in a graffiti-like style, merely because the artwork "referenced" the crime of graffiti. As it stands, the injunction provision actually only applies to a very narrow category—the sale of photographs of illegal graffiti that depict the tagger's moniker or "MTA." A tagger could even take photographs of his illegal graffiti and use it in his portfolio to gain future employment, as long as he does not sell the actual photographs.[256]

The efficacy of this provision is questionable based on its narrow scope. For example, a tagger may commit numerous acts of graffiti vandalism but never personally take a photograph. If someone else (not an accomplice) follows his work and posts photographs of it on the Internet, including his moniker, the tagger gains fame and notoriety for his work.

250. Remember that photographs are communicative, even if not propositional in form.

251. Keenan v. Super. Ct. of L.A. Cnty., 40 P.3d 718, 727 (Cal. 2002) (citing Simon & Schuster, Inc. v. Members of the N.Y State Crime Victims Bd., 502 U.S. 105, 119 (1991)).

252. *See* CPC Int'l, Inc. v. Skippy, Inc., 214 F.3d 456, 461–62 (4th Cir. 2000).

253. *Keenan*, 40 P.3d at 731–32 (using the term "overinclusive").

254. *Id. See Simon & Schuster*, 502 U.S. at 122–23.

255. *Keenan*, 40 P.3d at 732.

256. The Complaint notes that most taggers keep a portfolio full of photographs of their graffiti.

This is allowed because the provision only prohibits the tagger himself from selling photos of his moniker. The tagger then begins creating legitimate art on canvas and signs his moniker to the work. The sale of this work would not be prohibited by the provision, although the tagger would still be profiting from the marketing benefits of his illegal act and, thus, unfairly competing with artists who never gained notoriety from illegal graffiti. The government could increase the provision's effectiveness by broadening its scope to prohibit the sale of any depictions of a tagger's moniker or any reference to or depictions of his illegal graffiti in marketing materials (including his portfolio). But although this would likely be more effective in achieving the government interest, it would also be weaker in the face of constitutional challenges—and questionable as a policy matter given that it could completely eliminate the tagger's legal artistic outlet and actually drive taggers back to illegal graffiti.

In sum, the government probably does not need to change the wording of this provision in order to satisfy constitutional scrutiny but should consider whether it is even worth including based on the limited effect it will have as it is and the limited options the government has to improve its efficacy.

## VI. CONCLUSION

The MTA tagging injunction is likely to face constitutional challenges even greater than those faced by gang injunctions because its reach spans all of Los Angeles and its target (graffiti) is protected speech. But the injunction is well situated to combat and withstand those challenges because of the strong state interests served. The government should, however, preemptively make a few modifications to certain provisions before they are required to do so by the court. If the changes suggested in this Note are made before a constitutional challenge is adjudicated, the injunction will strike a balance between protecting the fundamental rights of individual property owners, individual taggers, and the community.