

KYLE MAGEE:* AD-BUSTING, EXCLUSION AND THE URBAN ENVIRONMENT¹

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I INTRODUCTION

This is an article about freedom of communication, and how it is essential to democracy and the inclusive city.² This struggle for democratic speech is highlighted by the case of Kyle Magee, a Melbourne activist.

Australia is a liberal democracy that prides itself on its ability to protect citizens without a formal Bill of Rights embedded in its Constitution.³ Citizens rely principally on common law freedoms developed over hundreds of years by the judiciary. In recent times the High Court has recognised some implied constitutional rights to political freedoms. Among the implied rights is a right to political communication, which covers actions as well as speech.⁴

Political communication generally takes place in the public sphere. The ‘public sphere’ includes both physical public spaces and the media.⁵ However, the public sphere is crowded with commercial messages. Therefore, although there may be a right to speak within these spaces, the ability to do so is virtually non-existent without large financial resources.

1 *Infinite thanks to Kyle Magee who not only inspired this paper, but also generously gave his time to speak to the authors at length about his philosophies.

This paper is based on a conference paper “‘Toucher Upper” Magee: Ad-Busting, Exclusion and the Urban Environment’ presented at *Keeping the Fire: Cultural Integrity, Wild Law and Economic Development* (University of Wollongong, 2010).

2 A Parliamentary Committee report entitled ‘A Right to Protest’ found that there was ‘a strong community expectation that a right to protest should be acknowledged as a fundamental principle of Australian society.’ Joint Standing Committee on the National Capital and External Territories (1997) *A Right to Protest* p xv in Max Spry ‘What is Political Speech? *Levy v Victoria*’ Research Note 2 1997–8, August 1997, Parliament of Australia Parliamentary Library.

3 George Williams ‘The Victorian Charter of Human Rights and Responsibilities: Origins and Scope’ (2006) 30 *Melbourne University Law Review* 880–904, 883. Australia is now the only democratic nation in the world without one.

4 This doctrine emerges from the decisions in ACT, Nationwide News, Lange and Levy. Most relevant for this article is the Levy case, which deals with the issue of political communication.

5 The ‘Agora’ in Ancient Greek and Roman societies (the birthplace of democracy), was the open space in the centre of town where free male citizens were able to debate political ideas. The media has been theorised by Habermas and others as a substitute for the Agora in large, modern cities, where the number of citizens makes direct conversation in public spaces difficult.

In March 2010, the authors met Kyle Magee in a hot Melbourne laneway. As we shared a coffee, we found that we held a common concern about the rapid corporatisation of the urban environment, and the declining space for free, open speech within it. Magee was generous in sharing his philosophy and experiences with the authors, and it is these and our subsequent research that form the heart of this article.

Magee asserts that the dominant economic system, capitalism, results in power imbalances and environmental destruction. This analysis is supported by a number of cultural theorists, such as Henri Lefebvre.⁶ One antidote to the domination of corporate power, Magee argues, would be a free and open media, where speech in public spaces is not confused with a barrage of commercial messages.⁷ Magee is passionate in his desire for free speech in public space and is compelled to act to achieve this, even though his activism – blanking out advertising messages in public spaces – has been to his detriment. It has resulted in repeated incarceration and other restrictions on his freedom, including exclusion from the CBD of Melbourne while on bail. Magee has been prepared to break the law and take responsibility for the consequences of that law breaking in order to enhance the freedom of others. In the courts he has been found guilty of criminal damage via his act of refacing corporate advertising. However, currently awaiting an appeal on his most recent conviction, he has put down his brush, and turned his attention to the *Victorian Charter of Human Rights and Responsibilities*⁸, and its provisions supporting free speech. Magee argues that the *Charter* grants him a right to ‘converse’ with a billboard by applying paint to its surface. He asserts that if those judging him can convince him that his actions are wrong, and that there are better ways to pursue his goals, he will cease painting over advertisements in the city.

II INTRODUCING KYLE MAGEE

Kyle Magee has been painting billboards since he was 21, about 6 years ago. Magee began by donning work person’s clothes in an attempt to avoid arrest. More recently he has deliberately taken to painting over transport shelters in locations and at times when he will be quickly caught. He also paints using easily removed water-based paints. He does this because his actions are

6 Henri Lefebvre, *The Production of Space* (Donald Nicholson-Smith trans, Blackwell, 1991).

7 Global Liberal Media Please at <<http://globalliberalmediaplease.net/>> accessed 15/01/11. Magee is in favour of what he calls ‘empowered democracy.’ He states: ‘free and open media accountable to, and somewhat controlled by the public is just one thing necessary for [empowered democracy]. other things necessary would be an active, engaged and enlightened public, [and] citizen control over the political agenda’

8 *Charter of Human Rights and Responsibilities Act 2006* (Vic) S15(2).

‘largely symbolic’⁹ and are designed to remove the advertisement from view, not to cause actual damage to a billboard. His last act caused a total of \$40.17 worth of damage, however he was fined \$500.¹⁰ Magistrate Mealy’s sentence was light compared with some previous ones, which had denied Magee bail on the grounds that he might ‘re-offend.’ Considering the small amount of damage caused, one might ask the question ‘How could [incarceration for this offence] happen?’¹¹ It appears the symbolism of Magee’s acts, and the chance that others may choose to join him, pose a far greater threat than the monetary value of damage caused.¹²

Magee’s acts are inherently political. Each time he takes brush in hand he is metaphorically taking on the corporations which he sees as contributing to the domination of the world by capitalist forces. He sees capitalism as ‘the largest impediment to world democracy’.¹³ Advertising creates false needs that distract the population from important issues such as poverty and environmental destruction.¹⁴ The media, dominated by wealthy corporations, also has the power to define what is reported.¹⁵ Power to have a say, particularly in public spaces, must be wrestled back from these corporations in order for people to make informed decisions about their political choices. Without an informed citizenry, democracy is empty rhetoric.

Magee’s attack on billboards is part of a protest that he finds impossible to ignore. He compares walking away from his response to capitalism as similar to walking away when witnessing a rape:

... just as someone who believes that rape is total (sic) abhorrent would be seen as contradicting themselves by failing to intervene on a rape occurring in front of them, i cannot allow myself not to try to physically intervene with the practice of advertising, even if i will surely fail and only put myself in the line of harm.¹⁶

The punishment metered out to Magee since his first arrest has been significant. He has been sentenced 28 times, spent 157 days in jail, and 30 days in remand.¹⁷

9 Magee explains that although largely symbolic, his actions have a practical dimension. This is because the removal of even one ad from public space reduces the number by one, and also may encourage others to join him.

10 *Delaney v Magee* Unreported judgment No A10288537 Melbourne Magistrates’ Court 14 February 2011.

11 Justice Forrest *Re Kyle Magee* [2009] VSC 384 at 19.

12 Further, Magee refuses to be apologetic or plead insanity, arguments that previous solicitors have suggested to him. These issues will be discussed in a future article due to the word limit.

13 Kyle Magee ‘Global Liberal Media Please’ at <<http://globalliberalmediaplease.net/>> accessed 14 March 2011.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 *Re Kyle Magee* [2009] VSC 384.

He has given up his Art/Science degree in part because of the difficulty of studying while in jail, and bail conditions which obliged him to live in the Western suburbs of Melbourne, while he needed to travel to Clayton in the outer East to attend class. Further, the restrictions on his movement through the CBD meant that he would be breaching his bail conditions when changing trains in the city on the way to university.

III WHAT IS PUBLIC SPACE?

Something has gone wrong. Something has shifted away, away from what it means to live our lives together in public, away from a sense of the city as an open, inclusive community.¹⁸

Access to public space in the city is becoming an increasingly pressing issue. More than half the world's population now live in urban settings. While this is a world-wide trend, it is particularly true in Australia.¹⁹ Australia is highly urbanised, with more than two thirds of the population living in major cities.²⁰ This trend continues as cities, such as Melbourne, sprawl ever-outward and upward, growing at a rate which has outstripped many predictions. Increasing population can amplify pressure on public space as there is greater competition for its use.²¹ But what exactly is public space, and why is it significant for freedom of expression?

Public space is not always as straight forward a concept as it might at first appear. Section 3 of the *Summary Offences Act 1966* (Vic) defines a public place as: 'any open place to which the public whether upon or without payment for admittance have or are permitted to have access ...'²² This embraces places like roads and footpaths (even if they are on private property), parks and gardens, railway stations, places of worship, premises licensed under the *Liquor Control Reform Act 1998* (Vic), and sporting grounds.²³ Many of the examples of public space given in the *Summary Offences Act* are quasi-public places.²⁴ Some quasi-public places are constructed and designed through public-private partnership arrangements. In Melbourne, an example of quasi-public space is the publicly built but privately operated Federation

18 Jeff Ferrell, *Tearing Down the Streets: Adventures in Urban Anarchy* (Palgrave, 2001) 1.

19 Ironically, as Australia is typically associated with rural lifestyles in books, film and other cultural iconography.

20 68% in 2006 – <<http://www.abs.gov.au>>.

21 The McCaughey Centre (2009) 'The Contribution of Public Land to Melbourne's Liveability' The Victorian Environmental Assessment Council Melbourne.

22 *1966* (Vic) s 3 (definition of 'public place' para (o)). The Melbourne City Council *Activities Local Law 2009* has the same definition of 'Public place' as the *Summary Offences Act*: See Definitions s 1.11.

23 *Summary Offences Act 1966* (Vic) s 3 (definition of 'public place' paras (a)–(c), (g), (l), (m)).

24 *1966* (Vic) s 3 (definition of 'public place').

Square – controlled and policed in part by corporations and private security rather than the State. At times this results in regulations that limit activities which are lawful elsewhere, like the banning of photography at Southbank, Melbourne.²⁵ In this context it becomes clear that more important than the pressure placed on these spaces by increasing, diverse usage by citizens is the tussle between public and private (or commercial) forces. Privatisation has resulted in shrinkage of public space, as more and more areas are controlled by private interests. Increasing areas fall within the ambit of corporate regulators, which calls into question whether such spaces can be defined as ‘public’ at all.

IV SYMBOLISM, FREEDOM OF EXPRESSION AND THE SIGNIFICANCE OF PUBLIC SPACE

The historical significance of public spaces for freedom of expression can be traced to the ancient Greek Agora or Roman Forum. These public spaces had political significance as they were the centre of a town where citizens gathered to hear messages from those in power, or to voice their own opinions. Building on the concept of the public sphere as a space for free political debate is Jürgen Habermas’ *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*.²⁶ Habermas argues that the coffee houses of the 17th and 18th centuries provided a space for members of the public to gather and share opinions. He calls this the ‘public sphere’:

By ‘public sphere’ we mean first of all a domain of our social life in which such a thing as public opinion can be formed. Access to the public sphere is open to all citizens. A portion of the public sphere is constituted in every conversation in which private persons come together to form a public.²⁷

In ‘Expanding Media Market, Shrinking Public Space’ Dasegowdanakoplu writes that the political conversations discussed by Habermas are important because:

... any society that claims to be democratic has to have informed public making political choices. The public has to know what is going on and the options that they should weigh debate and act upon. If they are wrongly or inadequately

25 C Egan (2006) ‘Picture This: City Puts Photo Ban in the Frame’ 30 July *The Age* accessed online 02/08/08 at <<http://www.theage.com.au/>> Similar regulations exist in cities such as Sydney, where photography is banned at the Opera House and Bondi Beach See: L Schwartzkoff, ‘Photographers Rally to Fight New Permit Regulations’, *The Sydney Morning Herald* (Sydney), 30 August 2010, 6; J Tovery, ‘Photographers Draw a Line in the Sand Over Picture Permits’, *The Sydney Morning Herald* (Sydney), 12 August 2010, 3.

26 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger trans, Polity Press 1992).

27 Ibid 49.

informed the political choices they may make may not be in the best interest of democracy.’²⁸

The political conversation is increasingly constricted by powerful media corporations. A small number of these dominate the cultural space in the west. This influence been recently exposed via the UK phone hacking scandal. Lance Price, formally Tony Blair’s Director of Communications, goes so far as to describe media mogul Rupert Murdoch as the twenty-fourth member of the British cabinet affecting government decisions even though physically he was not present in the cabinet room.²⁹ There are now calls for an enquiry into media practices in Australia.³⁰

Magee mirrors Habermas’ expression of the importance of open political communication in public space. Further, Magee argues that the significance of free and independent media is so great, that it ought to be constitutionally protected:

I believe that the lasting solution to all of humanity’s major problems lies in improved global democracy if it lies anywhere. Democracy requires a truly liberal public media, one equally accountable to all...A free media, a media equally accountable to all people and dedicated to the dissemination of vital information, is so fundamental to democracy that ...it must be constitutionally mandated, publicly funded, protected sufficiently from improper government interference, broken into several independent bodies and be administered by democratically elected officials.³¹

For Magee, while the media remains controlled by the advertisers that fund it, its liberation must begin in public spaces, those spaces which have historically symbolised free expression and are today often used to herald a release from tyranny.³² It is within public space where Magee feels he can engage in direct action against the advertising giants:

The act of creating a physical barrier between advertising and...public space ... is a non-violent, symbolic expression of objection.’³³

28 Poornananda Dasegowdanakoplu (2004) ‘Expanding Media Market, Shrinking Public Space’ accessed online 17/02/2011 at: <<http://www.istr.org/conferences/toronto/workingpapers/dasegowdanakoplu.poornanda.pdf>>.

29 Lance Price is also the author of *Where Power Lies: Prime Ministers versus The Media* (Simon and Schuster, 2010). See: Lateline ABC broadcast 18 July 2011: ‘... if the Labour government gave Rupert Murdoch an easy ride in terms of his commercial interests, then the News International papers would give the government an easy ride in terms of their support of what Tony Blair was doing and his program as prime minister.’

30 Shane McCloud ‘Brown Pushes for Media Inquiry’ ABC *The World Today* 14 July 2011.

31 <<http://www.globalliberalmediaplease.net>>.

32 For a recent example, see the protests in Libya and Egypt, where the people have taken to the streets in protest over the military rule of the countries’ dictators.

33 Interview spiel at <www.globalliberalmediaplease.net>.

Although Magee concedes that unless his methods become more widespread they are unlikely to be anything more than just symbolic:

i paint in a way that causes the least amount of ‘damage’ to the ‘property’ of the advertising companies.

the minimal damage gives the legal system less beside-the-point justification for any punishment i receive and emphasises that the painting is mostly symbolic rather than practical – it would really only become practically significant if the number of people engaging in the activity increased, and even then it wouldn’t be the way advertising was ultimately removed from public space, that would happen when they stopped being replaced, after an act of parliament that prohibited them.³⁴

Henri Lefebvre was a philosopher who engaged closely with the importance of space for the emancipation of the population from the domination of capitalism. Lefebvre’s voluminous oeuvre develops a Marxist philosophy on the right to the city. Perhaps the culmination of these is *The Production of Space* which argues that citizens have a right not just to the physical space of the city, but a right to represent themselves within that space.³⁵ Lefebvre went as far as to say that the failure of socialism could be based on its founders’ inability to create a truly socialist space:

Change life! Change Society! These ideas lose completely their meaning without producing an appropriate space. A lesson to be learned from soviet constructivists from the 1920s and 30s, and of their failure, is that new social relations demand a new space, and vice-versa.³⁶

Lefebvre’s philosophy broke with the modernist design maxim ‘form follows function’,³⁷ recognising that space influences activities within it as much as the other way around. Thus, a space devised to create citizens as hostages to capitalism will likely only see this system thrive within it. One ideal vision of a capitalist space would be one saturated with corporate advertising, with few areas designed for public protest. Within this city, the free market determines which voices can shout loudest.³⁸

34 <<http://globalliberalmediaplease.net>>.

35 Lefebvre, above n 6.

36 Ibid 59.

37 Originally from the theory of functionalist architect Louis Sullivan (Sullivan (1896) ‘The Tall Office Building Artistically Considered’ viewed online at: <<http://academics.triton.edu/>> on 19 July 2011.

38 Larry Rohter ‘Billboard ban in São Paulo angers advertisers’ New York Times Tuesday December 12 2006 Accessed at <<http://www.nytimes.com/>> on 17/03/2011.

V FREEDOM OF POLITICAL COMMUNICATION: *LEVY v VICTORIA*

The importance of protest for democracy has been recognised by the High Court of Australia. During the 1990s, a number of rights were found to exist within the constitution. These rights are known as ‘implied rights’ as they are not within the wording of the constitution, but arise out of the nature of a representative democracy. Among these implied rights is the right to political communication, first articulated in the *Australian Capital Television Case*.

The High Court there struck down legislation designed to limit political advertising in the run up to an election. Chief Justice Mason held that: ‘The efficacy of representative government depends ... upon free communication ... between all persons, groups and other bodies in the community.’³⁹ His honour further stated: ‘[I]n a representative democracy public participation is a central element of the political process.’⁴⁰ The majority judgments did not confine the implied right to matters immediately connected to government affairs. However the decision has not been much expanded in subsequent cases.

The result of the court’s decision in *ACT* was to allow a wealthy, powerful litigant, namely a television station, free speech. The High Court undertakes a balancing act in its interpretation of implied rights. It weighs up the competing interests in the community and prioritises them. If ‘free speech’ is likely to lead to physical harm then the court will not allow it to prevail. Similarly where the property rights of a corporation or citizen are threatened by activists the High Court is most likely to prioritise the interests of the property holder. As Mason CJ points out; ‘[T]he concept of freedom of communication is not an absolute. The guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public.’⁴¹

Activist litigants have not been as successful as Australian Capital Television in claiming the protection of the right to political communication. In *Levy v State of Victoria*⁴², an animal rights activist argued against the validity of a law which prevented him from entering an area restricted to those holding a hunter’s licence. Laurie Levy argued that his actions in collecting dead and injured ducks and protected wildlife was a form of political communication, as the dead animals were used in a protest on the steps of the Victorian parliament.

39 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 108–9.

40 *Ibid.*

41 *Australian Capital Television v Commonwealth* at 142.

42 *Levy v State of Victoria* (1997) 146 ALR 248.

The High Court found in favour of Levy in deciding that his actions did count as a form of political communication: Toohey and Gummow JJ held that protected communication ‘could extend to conduct’,⁴³ and McHugh J held that communication ‘is not limited to verbal utterances’ and can include ‘signs, symbols, gestures and images’.⁴⁴ However, the court found that the right to free political communication could be limited by laws which serve a ‘legitimate purpose’. Chief Justice Brennan held:

A law which prohibits non-verbal conduct for a legitimate purpose other than the suppressing of its political message is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose. Such a law prohibiting or controlling the non-verbal conduct, if it be reasonable in extent, does not offend the constitutional implication.⁴⁵

In Levy’s case, it was found that the Victorian law which prohibited Levy from entering the area during duck shooting season had the legitimate purpose of protecting safety in a dangerous environment, and was therefore valid.

Following *Levy*, it could be argued that Magee’s conduct in painting over advertisements is a form of political communication, and thus protected under the implied freedom in the constitution. However, it would be up to the court to consider whether the law preventing wilful damage in the *Crimes Act 1958* (Vic)⁴⁶ serves a legitimate purpose important enough to override the right to political communication.

VI A NEW BRAND OF FASCISM™

... [C]orporations which market themselves so aggressively, which are so intent on stamping their image on everybody and every street, ... they build up a reservoir of resentment ... People resent the destruction of culture and its replacement with these mass-produced corporate logos and slogans. It represents a kind of cultural fascism.⁴⁷

As American economist David Korten states: ‘Corporations have emerged as the dominant governance institutions on the planet, with the largest among them reaching into virtually every country of the world and exceeding most governments in size and power.’⁴⁸ The corporation’s influence is of such

43 Per Toohey and Gummow at 75.

44 Per McHugh at 107.

45 Per Brennan CJ at 10.

46 Here, the *Crimes Act* enhances private property rights, in this case, protecting the rights of *Adshel* to make a living over Magee’s right to free political communication.

47 T Brissell in N Klein, *No Logo: No Space, No Choice, No Jobs* (2000) 287.

48 David C Korten, *When Corporations Rule the World* (Kumarian Press Bloomfield and Berrett-Koehler Publishers, 2nd ed, 2001) 60.

vastness that it is an institution in its own right,⁴⁹ exceeding the influence of traditional institutions like organised religion. Indeed, the corporation is a religion, in and of itself. The golden arches of McDonald's for instance are more recognised worldwide than the Christian cross.⁵⁰ Recently, the global effects, influence and reach of multinationals in the global economy was reiterated, when a handful of American companies played significant roles in bringing about the 2008 Global Financial Crisis.⁵¹ For many countries, the Global Financial Crisis was the most severe economic downturn since the Great Depression. Shock waves throughout the Western world are still being felt at time of writing. Given its clear globalised nature, power and influence, the multinational corporation is undoubtedly one of the most powerful institutions in human history.

With the extent of power that major corporations hold in the globalised economy, and in our everyday lives, they have become the targets of social unrest and rebellion. Nike cofounder, Phil Knight, acknowledges the effects of corporate hegemony. Knight recognised that '... there's a flip side to the emotions we generate and tremendous well of emotions we live off of. Somehow, emotions imply their opposites and at the level we operate, the reaction is much more than a passing thought.'⁵²

There is much research which has critiqued unfettered globalised capitalism.⁵³ The literature shows that while people of affluent countries aspire towards 'financial stability', this has damaged their relationships with families and friends, personal fulfilment, the biosphere, mental and physical health, and freedom.⁵⁴ The latter dimension – the limitation on freedom – is a significant

49 David C Korten, *When Corporations Rule the World* (Kumarian Press Bloomfield and Berrett-Koehler Publishers, 2nd ed, 2001).

50 E Schlosser, *Fast Food Nation: The Dark Side of the All-American Meal* (2001) in J McGarth, 'How McDonald's Works', *How Stuff Works* <<http://money.howstuffworks.com/mcdonalds.htm/printable>> (at 29 September 2010).

51 R Garnaut and D Llewellyn-Smith, *The Great Crash of 2008* (2009).

52 P Knight in D Katz, *Just Do It: The Nike Spirit in the Corporate World* (1994) in N Klein, *No Logo: No Space, No Choice, No Jobs* (2000) 287.

53 This has also been reflected in popular culture. See for example: *American Beauty* (S Mendes, DreamWorks, 1999); *The Corporation* (M Achbar and J Abbott, Big Picture Media Corporation, 2003); E Clark, *The Real Toy Story: Inside the Ruthless Battle for Britain's Youngest Consumers* (2007); *Fight Club* (D Fincher, Regency Enterprises, 1999); C Hamilton and R Denniss, *Affluenza: When Too Much Is Never Enough* (2005); N Klein, *No Logo: No Space, No Choice, No Jobs* (2000); N Wolf, *The Beauty Myth: How Images of Beauty Are Used Against Women* (1st ed, 2002); *The Matrix* (A Wachowski and L Wachowski, Village Roadshow Pictures, 1999). *McLibel: Two People Who Wouldn't Say Sorry* (F Armstrong and K Loach, Spanner Films, 2005).

54 See, specifically: E Clark, *The Real Toy Story: Inside the Ruthless Battle for Britain's Youngest Consumers* (2007); C Hamilton and R Denniss, *Affluenza: When Too Much Is Never Enough* (2005); N Klein, *No Logo: No Space, No Choice, No Jobs* (2000); N Wolf, *The Beauty Myth: How Images of Beauty Are Used Against Women* (1st ed, 2002).

negative impact, which is regularly set aside by believers in the liberating powers of uninhibited capitalism. But as Clive Hamilton and Richard Denniss explain, rather than freeing us, corporate success relies on passive consumers:

[d]espite the barrage of advertising that rises to tell us otherwise, the more materialistic we are the less free we are. Why? Because we must commit more of our lives to working to pay for our material desires. And the more acquisitive we are the more our desires and the means of satisfying them are determined by others. Acquisitive people derive their sense of identity and their imagined place in society from the things they own, yet the symbols that confer that self-worth and status are at the whim of external forces – of fashion. Materialism thus robs us of autonomy.⁵⁵

VII MEDIA SATURATION AND RESISTANCE IN PUBLIC SPACE

... At a time when there are more means of facilitating discourse than ever before, less real communication is taking place ...⁵⁶

Although there is no debate that people, particularly in the city, are exposed to myriad advertising messages in a day, there is some debate over the exact number.⁵⁷ Estimates vary from around 150 to 5000 ad messages. One study in London used a device to record the number of ads a person was exposed to in the city in a 45 minute period and found that the number was 130 – equalling up to 3,500 in a day.⁵⁸ The majority of ads viewed when walking through the city are not sought out by the person viewing them, but enter the airspace uninvited, via billboards, sms, spruikers, signs – even brand names on clothing and other objects such as cars or handbags. Public space becomes cluttered with private messages all saying the same thing – buy.⁵⁹

But although public spaces could just as fittingly be called ‘corporate spaces’, replete with capitalist design and imagery, the city’s citizens are not passive receptacles. The reaction of many to the saturated environment is to switch off, or to fight back. A few media-literate citizens have devised formats to rally against the bombardment of public spaces with advertising. One group, known

55 C Hamilton and R Denniss, *Affluenza: When Too Much Is Never Enough* (2005) 15.

56 David Slayden and Rita Kirk Whillock (eds), *Soundbite Culture: The Death of Discourse in a Wired World* (Sage Thousand Oaks, 1999) (ix).

57 This number would be dependent on where a person is living and other factors, such as gender, as some studies have shown (see Britt, Stuart Henderson, Stephen C. Adams and Allan S. Miller, ‘How Many Advertising Exposures per Day?’ (Dec. 1972) *Journal of Advertising Research*, 3–9, for example).

58 <<http://www.guardian.co.uk/media/2005/nov/19/advertising.marketingandpr>>.

59 On a channel ten news broadcast this evening it was announced that Melbourne transport company, Metro, is to start a trial of advertising billboards on the outside of its train carriages. Ten News broadcast 19 July 2011.

as ‘Adbusters’,⁶⁰ subvert the meaning of advertising by altering its imagery or text. Essential to Ad-busting is the intention to make a political statement or present a social critique. Some forms which ad-busting can take include: the alteration of an existing image or advertisement, the obstruction or damage of a billboard used to display a corporate or political message, the adaption of a corporate or government website; the tweaking of a corporate logo, or a graffitied message: ‘... the practice is itself a cutting and pasting of graffiti, modern art, do-it-yourself punk philosophy and age-old pranksterism’.⁶¹

In *No Logo: No Space, No Choice, No Jobs* Naomi Klein explains that Ad-busters believe that citizens ‘... should have the right to talk back to the images they never asked to see.’⁶² Further, she theorises this activism as a form of ‘culture jamming’. Culture jamming derives its name from citizen’s band radio slang, where ‘jamming’ involves an interruption to the airwaves.⁶³ Christine Harold explains that jamming is ‘a rhetorical process of intervention and invention, which challenges the ability of corporate discourses to make meaning in predictable ways.’⁶⁴ She writes that jammers are the ‘political heirs’ of the Situationists, a group of avant-garde artists and theorists working from the 1950s onwards, which included Guy Debord and Henri Lefebvre. Klein states: ‘Culture jamming baldly rejects the idea that marketing – because it buys its way into our public spaces – must be passively accepted as a one-way information flow’.⁶⁵ Klein explores the connections between Ad-busting and public spaces, asserting that the clout of capitalist multinationals and the dominance of private property ownership in capitalist society ‘... has successfully devalued the right to free speech by severing it from the right to be heard.’⁶⁶ As a result, it has brought about the privatisation of public space. Thus, public space in which to exercise free speech ‘... is meaningless if the commercial cacophony is at a point that no one can hear you.’⁶⁷

Although Magee himself does not identify as an Ad-buster, he shares many of their sentiments. His strategies are perhaps more closely aligned with the Situationists, who were ‘decidedly opposed to parody’,⁶⁸ preferring methods

60 <<http://www.adbusters.org/>> accessed 3 March 2011. Ad-busting is also known as: ‘citizen art’; ‘guerrilla art’; ‘subvertising’; ‘hacktivism’; and, ‘culture jamming’. In addition, its practitioners are sometimes called: ‘billboard artists’; ‘vigilante censors’; ‘hacktivists’; ‘toucher-uppers’; and, ‘culture vultures’.

61 N Klein, *No Logo: No Space, No Choice, No Jobs* (2000) 282.

62 Ibid 280.

63 Christine Harold (2004) ‘Pranking Rhetoric’: “Culture Jamming” as Media Activism’ (2004) 21(3) *Critical Studies in Media Communication* 189–211.

64 Ibid 192

65 Klein Op cit 280.

66 Ibid.

67 Ibid 284.

68 Harold Op Cit 192.

that broke completely with those of the marketers, rather than simply reinterpreting them.

VIII BERLEI, BUGA-UP, AND AUSSIE BILLBOARD BANDITRY

What is the worse crime? To vandalise the paper sheeting on an advertising hoarding, or to meekly accept the right of wealthy corporations to promote carcinogenic products to children?⁶⁹

Although the legal reaction to Magee has been a zero tolerance, ‘broken windows’⁷⁰ response, billboard banditry has a celebrated history in Australia. Actions by those refacing billboards have at times been met with sympathy from members of the judiciary, and impacted on public opinion toward advertising in public spaces.

Born in 1978 at a meeting in Sydney’s city morgue, BUGA-UP (Billboard Utilising Graffitists Against Unhealthy Promotions) was a spin-off of MOP-UP (Movement Opposed to the Promotion of Unhealthy Products).⁷¹ MOP-UP – formed by citizens concerned about tobacco and alcohol advertising – had members from many well-respected professions such as doctors, educators and health care workers. At the first meeting, strategies to end the advertising of unhealthy products were discussed. These included sending letters to regulatory bodies, demonstrating and lobbying government. Some members of the group felt that these methods were not direct enough, and stated that they were not there to ‘write letters.’⁷² These people suggested that a more immediate technique should be mobilised – and BUGA-UP was formed.

Simon Chapman, a professor at Sydney University Medical School, and founding member of BUGA-UP, describes BUGA-UP’s legacy as ‘profound’ and ‘pivotal’ in shifting attitudes toward cigarette advertising: ‘The group’s direct messages helped move the focus of tobacco control beyond individual models of tobacco use, and firmly onto a set of objectives that required governments to act to control the tobacco industry’s marketing activities.’⁷³

In ‘Civil Disobedience and Tobacco Control: The Case of BUGA-UP’ Chapman describes the activities of BUGA-UP. He writes that:

69 Simon Chapman quoting the classic BUGA-UP argument for refacing billboards in ‘Civil Disobedience and Tobacco Control: The Case of BUGA-UP’ (1996) 5 *Tobacco Control* 179–185.

70 ‘Broken Windows’ theory was developed by James Wilson and George Kelling in 1982 in their article entitled ‘Broken Windows’ (Atlantic Monthly, March 1982). The authors postulate that if petty crime is not address immediately, more serious crime will follow.

71 Ibid 179.

72 Ibid.

73 Ibid.

... tight-knit groups would often organise well-planned, night-long raids in which hundreds of boards were regularly sprayed ... In most cases, sprayers tried to change advertising slogans by the careful alteration of words or lettering ... Whenever possible, humour was used.⁷⁴

Although often cheered on by passers-by, about thirty BUGA-UP activists were taken to court over ten years of operation. Most were charged with wilful damage, and pleaded guilty. Dr Chesterfield-Evans was one BUGA-UP activist who chose to plead not guilty, invoking the defence of necessity. He likened tobacco advertising to witnessing someone tipping cholera into a water supply, and argued that the law attempting to stop him preventing harm was 'trivial' by comparison to the damage caused by encouraging people to smoke.⁷⁵ Although unsuccessful, these cases were reported by the media, and at times were met with a compassionate judgment. For example, Justice Loveday in sentencing BUGA-UP offenders held:

I have the utmost sympathy for you, or any person doing what he thinks can be done to remedy the matter...The commission of this crime was of the highest idealistic nature.⁷⁶

The actions of BUGA-UP, although not immediately successful in terms of changing the law with respect to the refacing of billboards, have been largely credited with the overhaul of legislation that regulates cigarette and alcohol advertising.

In 1993, Magistrate Pat O'Shane dismissed charges against four women who refaced a Berlei bra billboard in Sydney. The ad contained an image of a woman being sawn in half, accompanied by the caption: 'You'll always look good in Berlei'. The four students added the words 'Even if you're mutilated' to the billboard.

Magistrate O'Shane gave these reasons for dismissing the charges, which she did under her powers of discretions for first time offenders:

Women are subjected to violence daily, if not hourly, if not by the minute. It is no accident in a society dominated by males that we get this kind of advertising ... It is no accident that we do not see similar depictions of men being disembodied, dismembered and it is no accident, therefore, in fact it flows indeed, that we have laws ... to protect the property of a male-dominated society. The real crime in this matter was the erection of these extremely offensive advertisements. Let nobody be under any misapprehension about it. And what redress does 51% of the population have? Absolutely none. Not only because of that male dominance ... but also because of the massive power that is exercised through huge financial

74 Ibid.

75 Ibid 181. Magee's response to advertising echoes that of Dr Chesterfield-Evans.

76 Ibid 182.

resources. It is an absolute outrage and I am enraged to find myself in a position where I have to deal with four women who have taken the action they did ... which they felt justified in taking and I don't for one moment accept that they were engaged in some kind of idealistic prank. We have a very, very sorry society indeed when these women can be brought before this court for this sort of thing in the light of the depictions which I find in the photograph of that particular advertisement. We live in a society in which at least one, and possibly more judicial officers can state to the world that the law will condone violence towards women. What sort of world are we creating for ourselves? Ladies, you are excused.⁷⁷

By contrast to the BUGA-UP campaign, the students' actions did not result in conviction, but also did not put an end to sexist outdoor advertising. O'Shane's judgement was reported in the press as the decision of a bitter, angry and biased woman.⁷⁸

IX TRANSPORT SHELTERS, 'ADVERTISING SHELTERS' AND THE SIGNIFICANCE AS A TARGET FOR THE ACTIVIST

One of Melbourne's iconic landmarks, the public transport shelter, has not been immune to encroaching advertising. The Heritage Council of Victoria describes the classic Melbourne shelter as a 'picturesque pavilion', made of painted green timber, and based on Edwardian domestic architectural design.⁷⁹ It has a pitched roof, glass windows, and a bench inside.⁸⁰ The walls of the tram shelter meet with its foundation.⁸¹ The shelters fitting this design were built between 1912 and 1927, and the remaining few are preserved in affluent Melbourne suburbs.⁸²

Citizens sometimes use the shelters for unintended purposes: The shelter can be a meeting place for youth, a place to sleep and stay out of the cold for the homeless, and a place for drunks to sober up before catching the first morning transport home. However, traditional tram and bus shelters are being replaced with 'advertising-funded street furniture.'⁸³ Customers are granted the right to seating, shelter and lighting in exchange for being subjected to advertising through its panelling. The advertising shelters, built and maintained by

77 Magistrate O'Shane cited in Scott Beattie and Elizabeth Beal (Law Oxford University Press, 2007) *Connect and Converge: Australian Media and Communications* 2008.

78 *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164

79 Heritage Council of Victoria, Victorian Government, *Tram Shelter* (c2008) <<http://vhd.heritage.vic.gov.au/places/heritage/2089>> (at 22 September 2010).

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 <<http://www.adshel.com.au/who/about>> website accessed 15/01/11.

agencies such as 'Adshel'⁸⁴, provide minimal seating and defence against the elements in comparison to the old style transport shelter. The short and narrow metal seating is sometimes obstructed by metal armrests which act as a deterrent against the homeless using the seating as a bed. The glass panelling of the advertising shelter also deters 'undesirable' populations by destroying the privacy once offered by the tram shelter's wooden walls.⁸⁵

This transformation of the transport shelter into a vehicle for advertising makes it a symbolic target for the Ad-buster or political graffitist attempting to return it to its former usage. In Magee's case, the bus shelters he liberates are also significant in their location opposite the Melbourne Courts.

X MAGEE, HUMAN RIGHTS AND THE ENVIRONMENT

... [E]cological devastation, resource depletion, overpopulation...make the push for better global systems the central concern for every compassionate human.⁸⁶

In 'Practices of Urban Environmental Citizenships: Rights to the City and Rights to Nature in Toronto'⁸⁷ Liette Gilbert and Catherine Phillips explore the connection between environmental and citizenship rights. Drawing on the works of Henri Lefebvre they argue that 'rights to nature' are a part of citizenship rights and that environmental concerns are 'embedded in practices of citizenship (and vice-versa) rather than...separate realms or additional typologies of civil, social, or political rights.'⁸⁸ Although Lefebvre writes that nature and the city can be seen as existing in 'a dialectical relation and conflicted opposition',⁸⁹ he also argues they are connected. Urban existence, for Lefebvre, is a result of the destruction of the 'natural' environment, which now exists as a commodity, pre-packaged and sold to adventure-seeking urban dwellers.⁹⁰ The emancipation of the city from the capitalist project of homogenisation and commodification, therefore, would also result in the freeing of the 'natural' environment.

Gilbert and Phillips' considerations of the connections between performed citizenship rights and environmental rights sit comfortably with Magee's

84 Adshel were the aggrieved party in Magee's case. See <<http://www.adshel.com.au/>> for more details on the transformation of the transport shelter.

85 M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan, trans, 1991) [trans of: *Surveiller et punir: Naissance de la Prison* (first published 1973)].

86 Magee 'Global Liberal Media Please' <<http://globalliberalmediaplease.net/>>.

87 Liette Gilbert and Catherine Phillips (2003) 7(3) 'Practices of Urban Environmental Citizenships: Rights to the City and Rights to Nature in Toronto' *Citizenship Studies*.

88 Ibid 314.

89 Henri Lefebvre 1970 cited in Gilbert and Phillips Op Cit 316.

90 Ibid.

project. Like Lefebvre, Magee shares a neo-Marxist philosophy that deplors the commodification of the urban environment, and sees advertising as creating desires for objects which are not needed. The unquenchable desire for newer objects, propelled by advertising, in turn creates vast amounts of waste – in the discarding of ‘obsolete’ or superseded objects and in the production and transportation of un-needed items.

When interviewed by police for painting over a transport shelter, Magee was asked why he had done so. He replied that:

...[I]n a sane society, advertising would be considered completely unnecessary and insulting, would be ineffective, and would not be tolerated. As things are today, I believe advertising is generally effective in its creator’s aims – through perversion of art and abuse of psychology it can succeed in disrupting the sound decision making of its targets. Amongst its innumerable negative effects, it saturates and alienates, corrupts our natural tendency towards critical analysis, encourages materialism, and undemocratically gives greater voice to those that can pay for it.⁹¹

Magee argues that if advertising were to release its stranglehold on the media, a free and democratic dialogue could take place, where citizens would be concerned about problems in the world such as poverty and environmental destruction, rather than be caught up in a festival of consumption (which contributes to, rather than addresses, these problems).

Gilbert and Phillips’ argue that rights in theory are different to rights as they are experienced by the citizens of a society that professes to grant them. Because rights discourse can rarely be equated with lived experiences, they argue that citizenship must include a combination of rights defined on paper, and rights as performed by the members of a society. For Gilbert and Phillips, rights are reaffirmed through a process of ‘directly contesting the shortcomings of democratic governance.’⁹²

Performative citizenship is not something outside of constitutional citizenship; rather it is a set of actions, practices and claims that reveal the gap between an assumed equality of individual citizens within a self-governing nation-state and aspirations for appropriate or even alternative forms of governance.⁹³

The performance of citizenship rights acts as resistance to the neo-liberal tendency to reduce spaces of democracy through ‘decentralization, ... privatisation, ... and individualisation.’⁹⁴ Performative citizenship involves

91 Magee ‘Police Interview Spiel’ at <<http://globalliberalmediaplease.net/2010/04/interview-spiel/>> accessed 16 February 2011.

92 Gilbert and Phillips *Op Cit* 313.

93 *Ibid* 314..

94 *Ibid* 15 drawing on Brodie (2000).

a process of ‘questioning, affirming, negotiating, and enacting [rights].’⁹⁵ Magee’s act of ‘creating a physical barrier between advertising and the public space’⁹⁶ is such an act of performative citizenship, asserting his right to freedom of expression where this has been hampered by commercial interests.

XI MAGEE’S CLASH WITH THE LEGAL SYSTEM

Kyle Magee has repeatedly mobilised his paintbrush against corporate advertising to obstruct the messages that he sees as antithetical to democracy and liberal media. Capitalist society and the legal system that supports it have responded stereotypically to his protest. As a result, he has been pathologised, misrepresented by lawyers, ignored by judges, jailed, and excluded from the Melbourne CBD.⁹⁷

Although Magee’s ‘offending’ has been seen as ‘particularly low on the scale of criminal activity’⁹⁸ – the damage caused to the bus shelter in his latest act being estimated at \$40.17 – the transgression inherent in his activities has led to his being jailed, and when released on bail, excluded from the city streets.

During his court appearance on the 29th of September, 2010, Magee attempted to explain his philosophy to Magistrate Mealy. Magee explained that he deliberately paints when and where he does in order to be caught. He paints at 9.30am on a weekday over advertising on a bus stop on the corner of Williams and Lonsdale streets in the central CBD. This corner is in the middle of the court district, and is directly outside the County, Supreme and Magistrates’ Courts. There are always many police and security present at this location, thereby assuring his quick arrest. This ensures that Magee’s painting will cause the least amount of damage while still making his point.

Magee’s focus is very specific, he wants reform to the law so that the media is protected from domination by commercial interests. Magee does not rebel against the law in general, nor does he resist arrest, avoid court hearings or punishment. In some ways, apart from his refacing of billboards, he could be described as a ‘model citizen’.

In this sense, he presents a conundrum for the judiciary. He is intelligent, white and middle-class – the kind of offender who might escape incarceration

95 Gilbert and Phillips Op Cit 314.

96 Ibid.

97 For the purposes of this paper, the perimeters of the Melbourne CBD are the same as those described in *Re Kyle Magee* [2009] VSC 384, 27(2) (Forrest J): the area bordered by the streets Latrobe, Spring, Flinders and Spencer.

98 Per Forrest J in *Re Kyle Magee* [2009] VSC 384, 27(2).

in different circumstances. But at the heart of the Australian legal system is the privilege given to property rights over all others, including free speech – indeed the right to property is one of the few express rights in the Constitution.⁹⁹

XII THE BAIL ACT AND RESTRICTION OF MOVEMENT IN PUBLIC SPACES

If a risk is to be taken, it should be in favour of personal freedom. (John Cain, Victorian Parliament Hansard, 5 May 1977)

When the *Bail Bill* was introduced to the Victorian Parliament in 1977, its purpose and effects were debated. The Bill's purpose was not only to modernise the existing law in relation to bail, and to ensure that accused persons attended court, but was also based on the principles that persons are entitled to a presumption of innocence and a 'prima facie right to bail'.¹⁰⁰

In any consideration of a Bill concerning bail it is necessary to start with the proposition that persons accused or charged with criminal offences are, under our system, deemed to be innocent until they are proven guilty...they ought not be punished by being kept in custody prior to the determination of their guilt or innocence by a court. Custody is the most serious form of punishment that our courts can inflict on a person...it should not be used prior to the determination of the accused person's guilt or innocence without excellent cause. John Cain, 5 May 1977 at 8803

Although the introduction of the *Bail Act* was accompanied with high hopes for a greater level of justice for the accused, this has not always been the result. Magee was refused bail in 2009, and was incarcerated for two months while seeking an appeal in the Supreme Court. Even though Magee's activities were seen as 'particularly low on the scale of criminal activity',¹⁰¹ the possibility of his re-offending overrode his prima facie right to bail. As Justice Forrest commented in allowing Magee's appeal:

how could this happen? What appears to be a relatively minor offence has resulted in a citizen being incarcerated for over two months, and dependent on this court for a grant of bail, [and] incarcerated for a further period of roughly two months... (Forrest J; *Re Kyle Magee* [2009] VSC 384, 6.)

Therefore, in Magee's case, the *Bail Act* did not protect his right to freedom, but has erred on the side of the protection of private property. This is a distortion of the principles underlying the *Bail Act*.

99 *Commonwealth of Australia Constitution Act 1901* Section 51 (xxxi).

100 MP Maclellan at 8257 28 April 1977.

101 Forrest J; *Re Kyle Magee* [2009] VSC 384, 19.

XIII FREEDOM OF EXPRESSION IN *THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC)*

[A]s...i was planning on taking a human rights argument to the highest courts, i'd have to show respect to the courts by ceasing to 're-offend' for them to take the case seriously...¹⁰²

While the refacing of advertisements in public spaces can be framed within the offence of criminal damage, there are often strong political motivations behind such actions, for example those accused in the BUGA-UP and *Berlei* cases. In these cases, there was some recognition by the judiciary of the concept of 'political graffiti'. This concept is further bolstered by the recently enacted *Victorian Charter of Human Rights and Responsibilities*.

Section 15(2)(d) of the *Victorian Charter of Human Rights and Responsibilities* states:

Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether...(d) by way of art; or (e) in another medium chosen by him or her.

If this section of the Act were to be read in isolation, Magee's painting would be legal as it is an expression of his political values. Indeed, in his latest judgement, Magistrate Mealy concluded that Magee's actions did constitute political expression. However, as George Williams writes, the Charter does not provide 'absolute' rights. Rights can be limited 'where the circumstances justify it.'¹⁰³ The right is limited by, amongst other things, a need to preserve 'public order.'¹⁰⁴ In Justice Mealy's judgement, he asserts that 'the Accused has alternatives' in promoting his political views – speaking at public forums, writing letters, and marching with placards.¹⁰⁵ These solutions smack of those abandoned by members of BUGA-UP, who found them ineffective in comparison to the direct action of targeting billboards. However, as is the case with the actions taken by BUGA-UP, it may be many years before Magee's message alters public perception and the legislative process. Until that time he will be subjected to the processes of the law.

102 <<http://globalliberalmediaplease.net/2010/05/>> (accessed 15/01/11).

103 George Williams, 'The *Victorian Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 MULR 880–905.

104 The *Law Handbook* Online: <<http://www.lawhandbook.org.au/>>.

105 *Delaney v Magee* per Magistrate Mealey.

XIV CONCLUSION

The law locks up the man or woman
Who steals the goose from off the common
But leaves the greater villain loose
Who steals the common from off the goose.

– 17th century protest against English enclosure.

This article has explored, drawing on the case of Kyle Magee, the importance of free political communication to a functioning liberal democracy, a key aspect of an inclusive city. Magee's case highlights the inadequacy of the law to give equal rights to political speech to those without the financial resources to pay for them. Even in cases where the High Court has implied this right, it ironically has resulted in further freedom to those who have the money to pay for political advertising.¹⁰⁶ Thus far, the *Victorian Charter of Rights and Responsibilities* has also proved unsuccessful in protecting individual rights to free speech, though the Supreme Court Appeal in Magee's case is still pending.

It is within this climate that Magee's protest against capitalist advertising becomes central to the parameters of political communication. Within public space it is essential to a functioning democracy that all citizens can have their voices heard, particularly where traditional media spaces are controlled by a few multinationals. Magee's courageous and unselfish actions have drawn attention to how difficult it is to be heard above the commercial din of the city streets. By the performance of his citizenship 'rights' in these painterly acts of resistance, Magee produces a space for an alternative voice. It is hoped that the legal system will value this need above the corporate howl.

106 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

