

DAVID HOCKNEY AND THE WOLFENDEN REPORT

USING ART AS A LENS TO UNDERSTAND THE SOCIAL REALITY OF LAW

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INTRODUCTION

David Hockney's art has been widely interpreted as chronicling the "everyday life of ordinary people."¹ To the extent Hockney does that, it also chronicles a legal context. Hockney's own homosexuality forms the basis for art that can be read as legal story, distilling an image of the world around him that reflects it as it is experienced rather than its pure aesthetics.² His work in the early sixties intentionally engages with homosexuality as a source of tension in British society.³ Concurrent to debate following the release of the Wolfenden Report in 1957 recommending the decriminalisation of private acts of homosexual behaviour, his work reflects the function of both specific law and the legal system more broadly in shaping homosexual temporalities. Hockney's work in this period is an excellent example of how art can be seen as a reflection of the social reality of law, and thus, how it can help us understand law's social consequences. This dissertation evaluates how Hockney's work examines the homosexual experience throughout the early sixties, during a time of accelerated discussion on homosexual law reform, and how this work reflects law of the past and law into the future. The social reality of law that art demonstrates therefore utilises a broader temporal understanding of the effect on law on homosexuals.

Firstly, I will explain Desmond Manderson's *Danse Macabre* as a model for this kind of analysis.⁴ This involves understanding both law and art as existing within temporal contexts, as having clear relationships to the past, present and future. To assess these relationships, death and pain provide markers of how the law applies consistent principles and enforcement mechanisms to affirm normative perspectives in society.

These normative perspectives demonstrate how legal violence has historically framed homosexuals as legal subjects outside of its prescriptive normative values. This has led to the criminalisation of homosexuality, the death of homosexuals and a continued legacy rooted in the belief of homosexuality as being a source of otherness and a threat to a perceived moral core of law. The private sphere is incorporated into law to affirm matrimonial models of legal relationship, initially through active criminalisation of divergent domestic spheres, and then through continued internalisation of a vision of matrimonial relationship and the heteronormative family. Violence itself transitions through law, from the death penalty to suicide from

¹ "Kitchen Sink Painters" Tate <www.tate.org.uk>

² Chris Stephens "Play within a Play" in Christ Stephens and Andrew Wilson *David Hockney* (Tate Publishing, London, 2017) at 12-21; Deborah Solomon "David Hockney, Contrarian, Shifts Perspectives" *New York Times* (online ed, 5 September 2017)

³ Peter Webb *Portrait of David Hockney* (Collins, London, 1990) at 33

⁴ Desmond Manderson *Danse Macabre* (online ed., Cambridge University Press, Cambridge, 2019)

legally sponsored shame and into contemporary law and the denial of homosexuality as an equal form of sexuality allowing complicity in certain forms of violence.

This understanding can then be applied to the social environment of the early sixties, using submissions to the Wolfenden Report as well as Hockney's personal background. These provide alternative perspectives on how violence in law as discussed by Robert Cover is manifested in society, as necessary for righteous moralism or as destroying homosexual involvement and acceptance in society. Hockney challenges this, and attempts to imagine pathways forward, imagined futures, for law to follow. These do not disregard social reality, rather they frame themselves within the temporal legal story to understand what law has taken away and how it may be restored. This temporality provides the ability to understand how paintings can continue to have value in commenting on law from prior to and after the arts creation in reflecting legal social reality.

The interplay of art and law is complex, the propagandic function of Hockney's work and presenting an imagined future not only reflect current law, but challenge it towards reform, and so they can reflect and inform each other. For this dissertation, however, understanding art as a reflection allows for clearer examination of homosexual temporality. While this work focuses on homosexual men, and men who have sex with men, this analysis has implications for broader queer identities. The scope of this project is limited due to how Hockney identified himself.⁵ Broader social consequences of law have had wide ranging implications for all queer people, but the law has intervened differently in others' lives and sexualities. For example, lesbianism was not criminalised as homosexuality between men was.⁶ References to homosexuality and homosexuals throughout can be taken to referring to men who have sex with men, but this does not exclude the principles and method of the discussion from other queer identities and queer artists.

MANDERSON'S METHODOLOGY: INTERPRETING THE SOCIAL LIFE OF LAW THROUGH ART

In order to understand how law within a social reality is reflected in art, and how they speak to each other in a temporal understanding I will be utilising a method of analysis based on the work of Desmond

⁵ Deborah Solomon "David Hockney, Contrarian, Shifts Perspectives" *New York Times* (online ed, 5 September 2017)

⁶ Charlotte Knight and Kath Wilson *Lesbian, Gay, Bisexual and Trans People (LGBT) and the Criminal Justice System* (online ed, Palgrave Macmillan, London) at 42

Manderson in *Danse Macabre*.⁷ Manderson utilises temporality as a tool in order to understand social connection to law and anchors temporality in death.⁸ I will look at death, as Manderson does, as well as pain, both with reference to their corresponding and enabling concept of morality.⁹ Manderson describes temporality as “concerned with the way in which a sequence of events, a kind of history, is physically experienced by those who live through them or experience them.”¹⁰ As this dissertation will show, law and art do not occur in isolation. The contexts in which they are formed, viewed, and interpreted are extended across time, and in writing this in 2021 about work being made in the early sixties, we can see how our temporal understanding continues to shift and develop, providing new perspectives on art, law, and society.

UNDERSTANDING HOW LAW AND ART EXIST, BROADLY, IN A TEMPORAL REALITY

For Manderson, the imaginative process involved in interpreting art gives space to consider the artwork in new social contexts, and with the perspective of the viewer. This may fold in the viewer’s individual experience, developed academic discourse and current social convention. He draws attention to temporality as an analytical tool to incorporate what Mieke Bal calls the afterlife of the image.¹¹ For the viewer this means potentially radically changing the artwork, particularly when viewing it in a social context that is a development of the one in which the work was created. As art is a creative endeavour, creativity continues in the interpretation of artwork, allowing the viewer to have a personal relationship with the art and place it within a broader temporality. Works often function “as a production of a narrative that would necessarily be new or different, as a result of the pictorial gesture folded into the viewer’s compulsion to read.”¹² Manderson thinks of art as having a unique electrical ability to bridge the gap from its period of creation to our current perception.¹³ If art were limited or bound to a historical moment, it would deny the viewer’s legitimate experience of it as a reflection of their own consciousness and history. The painting exists in the present moment as much as it did when an artist declared it ‘finished,’ but – and this is key – because time

⁷ Manderson, above n 4

⁸ Manderson, above n 4 at 2

⁹ Robert Cover “Violence and the Word” (1986) 95 Yale Law Journal 1601

¹⁰ “Overview: temporality” Oxford Reference <www.oxfordreference.com>

¹¹ Manderson, above n 4 at 8

¹² Manderson, above n 4 at 8

¹³ Manderson, above n 4 at 8

is embedded in the work, the viewer experiences it within their own relationship to that passage of time.¹⁴ As Bel notes, art may undergo a complete transformation in how it impacts a viewer.¹⁵ This has significant impacts for understanding law and society.



FIG. 1.1 - Gustav Klimt, *Jurisprudence*, 1903–7. Oil on canvas, 430 cm × 300 cm, Destroyed, in Desmond Manderson *Danse Macabre* (online ed., Cambridge University Press, Cambridge, 2019) at 127

Manderson demonstrates this in his interpretation of Gustav Klimt's *Jurisprudence* (see fig. 1.1). *Jurisprudence* was commissioned for the Great Hall of the University of Vienna.¹⁶ He provides context for a temporal understanding with texts written close in time to the production of the artwork, Sigmund Freud's *Interpretation of Dreams* and, in particular, an Austrian production of Aeschylus' *Orestia*, originally performed in 458BC.¹⁷

The painting depicts a man at the centre, an abstract octopus like form engulfing him, cornered by three women, and further swirling dark weather forms, with *Nuda Veritas*, *Justitia* and *Lex* in the background watching. *Orestia* tells the story of a cycle of vengeance for the killing of a daughter by her father, avenged by her mother, who is killed by her son Orestes, who we find pursued by Furies attempting to avenge the murder of his mother. The cycle is only broken when Pallas Athene intervenes and creates a trial court to

¹⁴ Manderson, above n 4 at 7

¹⁵ Manderson, above n 4 at 8

¹⁶ Manderson, above n 4 at 129

¹⁷ Manderson, above n 4 at 135

stop the cycle of vengeance.¹⁸ The three women circling the man can be seen depicting the Furies, with the principle values of the court in the back watching on rather than being the ones to deal justice.¹⁹ Manderson suggests this is as a subversion of the original story; the court does not dispense justice, it just provides license for the Furies to continue to deal out vengeance.²⁰ The principles of justice are not impotent, they are simply shielding themselves and the legal order from its “grubby” violence.²¹ This references the aesthetic idealisation of justice as a means of legitimising the systems of violence that it creates at its centre.

The law is not the medium with which justice is dealt, Klimt suggests; it only protects the violence of law from rebuke. Manderson considers the Sovereign, the police, and the criminal to understand this intuitively, affirming each other’s perspective on the violence and mirroring it “on the flesh of the abject body.”²² Klimt’s painting affirms Robert Cover’s conception of the law as enacted onto flesh through its visual representation of a Greek story on the creation of the court.²³ Manderson goes on to read *Jurisprudence* as a prelude to Nazi Concentration camps, particularly following the British use of them in the Boer War, as the paintings suggesting legal systems allow a suspension of law itself, to give the sovereign unfettered ability to act out its violence.²⁴ When Karl Kraus condemned the painting on its first public exhibition as bringing “the majesty of law into disrepute,” this did not represent a failure on Klimt’s part, but rather the establishment rejecting a critique that sought to expose the legal system rather than glorify it. The three principles of law, receding into the back of the painting represent the painting they wanted, but their diminishment demonstrates for Manderson an understanding of the legal order that persists in its applicability in contemporary detainment, like Guantanamo Bay, by suspension of legal rights.²⁵

Supplemented with later work, like Hans Kelsen’s *Pure Theory of Law* and George Agamben’s *State of Exception*, Manderson presents *Jurisprudence* as a living document and canvas for our interpretation.²⁶ Manderson uses supplementary texts to develop a functional understanding of the law as a part of temporality. I use Manderson’s own jurisprudential perspective, Robert Cover’s *Violence of the Word*, and

¹⁸ Manderson, above n 4 at 137

¹⁹ Manderson, above n 4 at 137

²⁰ Manderson, above n 4 at 137

²¹ Manderson, above n 4 at 137

²² Manderson, above n 4 at 142

²³ Manderson, above n 4 at 4; Cover, above n 9, at 1605

²⁴ Manderson, above n 4 at 140-141

²⁵ Manderson, above n 4 at 144

²⁶ Manderson, above n 4 at 139 and 126

Gerald Postema's *Time in Law's Domain* to paint a picture of the legal interface with communities' temporal existence.

Like art, law is embedded in a political context and in social experience. Law does not develop as a linear inevitability of what has come before it, it develops and changes as its experienced and shaped in time. Gerald Postema suggests that law has a "developmental path into the future which can be predicted," but that is only true as to the entrenched structures of law, which demand change within its own formats, to uphold its own legitimacy.²⁷ In substantive content, however, Manderson rejects a "reductive, objective, and linear," evaluation of the law where you consider the past as a legal history, rather than evaluating it in its social, temporal dimension.²⁸ When law is applied within predictable structures, it may be vulnerable to disruption, as a Judge may tweak its interpretation, Police policy may shift in practice. This demonstrates law being developed from its past so as to exist in the specific present context even when the strict word of law is not revised, something which HLA Hart calls the "momentary legal system."²⁹ As the moment exists within the temporally extended legal system it forms part of the validating history which gives weight to the anticipation of law in the future.³⁰ These moments form part of an extended exposure to law which informs temporal experience.

The "momentary legal system" means that law is pulled between being a response to the past, and a hope to affect the future, while art is a response to the past, that can only be seen in the context of the future. Both "are late for a rendezvous with a world that has turned without them. On the other hand, they strive to shape a future that they will never live to see."³¹ When we are placing ourselves within our temporal timeline of the progression of law and society, we are beholden to our experience of the past, and what it may suggest about the future. Being open to looking back on law and art, with a broader knowledge of what preceded it and what followed from it means that we can understand what art can say about law in a social reality in a way that is more useful for the contemporaneous viewer. This includes the explicit use in art of time and visual tension to mimic tension in temporalities relating to legal protections. Death becomes an important part of our temporal perspectives because it represents the end, the ultimate creation of and release of tension. The legacy of law internalises our temporality of death once removed in its explicit forms. Death has featured extensively in art that speaks to law; the man at the centre of *Jurisprudence* may not be dead yet but the vengeful story of law suggests its coming.

²⁷ Gerald Postema "Time in Law's Domain" (2018) 31 Ratio Juris 160 at 160

²⁸ Manderson, above n 4 at 15

²⁹ Postema, above n 27, at 164

³⁰ Postema, above n 27, at 171

³¹ Manderson, above n 4 at 13

DEATH AS A CORNERSTONE OF OUR TEMPORAL UNDERSTANDING



FIG. 1.2 - Michelangelo Buonarroti, *Pietà*, 1498–9. Carrara marble, 174 cm × 195 cm, St Peter's Basilica, Vatican City, in Desmond Manderson *Danse Macabre* (online ed., Cambridge University Press, Cambridge, 2019) at 6

Manderson considers that when we are before the law, before time and before art, these are all simply ways of being before death.³² A person is inevitably going to meet death, as we are “it’s loyal subjects.”³³ In this section, I will outline the presence of death in art, as the predestined end of temporal perspectives, and as a tool of the law. Through the tenderness of Michelangelo’s *Pietà* (see fig. 1.2)) in comparison to the violence in Rafael Cauduro’s *7 Crímenes* (see fig. 1.3 and 1.4 Manderson demonstrates how law is reflected in art, and builds an understanding of the social realism of law alongside the projected artifice that upholds legal legitimacy.³⁴ To explain the intersection of death and pain in law and art, Manderson builds on a Foucauldian insight that “if punishment became less painful to the physical body, it was because authority received a greater return by focusing its energies on discipline and control than on merely scrawling its

FIG. 1.3 - Rafael Cauduro, *Represión* from *7 Crímenes*, 2007–9. Mural, various materials, Suprema Corte de Justicia de la Nación, Mexico City, in Desmond Manderson *Danse Macabre* (online ed., Cambridge University Press, Cambridge, 2019) at 196

³² Manderson, above n 4 at 19

³³ Manderson, above n 4 at 19

³⁴ Manderson, above n 4 at 212

power on individual bodies.”³⁵ As discussed below, this has impacts for the legal social context of homosexuality as the removal of the death penalty in 1861, gives way to the internalisation of death through



FIG. 1.3 - Rafael Cauduro, Represión from 7 Crímenes, 2007–9. Mural, various materials, Suprema Corte de Justicia de la Nación, Mexico City, in Desmond Manderson *Danse Macabre* (online ed., Cambridge University Press, Cambridge, 2019) at 196

suicide. Klimt in *Jurisprudence* suggests a transformation of the continued omni-presence of death in the law as a tool of maintaining control, while law maintains a rational, and legitimising, façade.³⁶

Manderson understands the inevitability of death in *Pietà* outside of legal systems. It juxtaposes the body of Christ with a young Madonna, reinforcing that it was the moment of his birth that confirmed his death.³⁷ One affirms the other, both for Christ and everyone else. However, in *7Crímenes*, death is part of the process of living, it emerges throughout the murals as internalised in the subjects of the law through fear and in the legal system through its discipline.³⁸

³⁵ Kevin Shoemaker “The Problem of Pain in Punishment” in Austin Sarat *Pain, Death and the Law* (online ed., University of Michigan Press, 2001) at 24

³⁶ Offences Against the Person Act 1861 at s 61; Brian Lewis *Wolfenden’s Witnesses* (Palgrave Macmillan, London, 2016) at 211; Sarat, above n 35, at 2; Manderson, above n 4 at 137

³⁷ Manderson, above n 4 at 5-7

³⁸ Manderson, above n 4 at 203

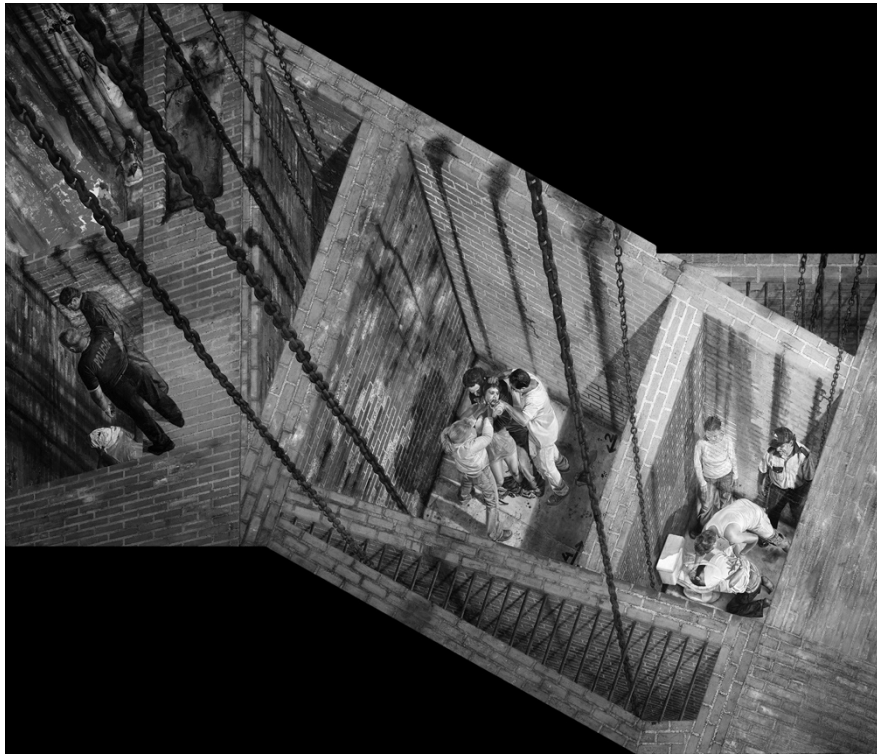


FIG. 1.4 - Rafael Cauduro, *Tortura* from *7Crímenes*, 2007–9. Mural, various materials, Suprema Corte de Justicia de la Nación, Mexico City, in Desmond Manderson *Danse Macabre* (online ed., Cambridge University Press, Cambridge, 2019) at 204

Accordingly, Manderson interprets Cauduro’s discomfiting realism as a means of breaking through the aesthetics that law uses to hide death.³⁹ In its inevitability, and therefore its overwhelming influence of temporality, death “makes law matter.”⁴⁰ The murals cover the walls of a large stairwell used by judges in the Mexican Supreme Court and track a story from skulls, through a series of crimes to repression, and finally to guardian angels, but even the fantasy of angels cannot be entirely separated from the violence that cascades down the stairs.⁴¹ The sections *Tortura* (*torture*) and *Represión* (*Repression*) both feature law enforcement on the cusp of violence, with *Tortura* being especially compelling for depicting police in the process of torture.⁴² The crimes occur with the implicit consent of the law, “or at least its connivance.”⁴³ The abuse, or utilisation, of law, shown in the halls of the pinnacle of the legal system “invites anger and shame rather than pride, arrogance or even confidence,” which Manderson suggests may be to invite Judges to use more social realism in their judgements.⁴⁴ As a critique of the violence of the law, Cauduro situates

³⁹ Manderson, above n 4 at 212

⁴⁰ Manderson, above n 4 at 4

⁴¹ Manderson, above n 4 at 204

⁴² Manderson, above n 4 at 196 and 204

⁴³ Manderson, above n 4 at 212

⁴⁴ Manderson, above n 4 at 212

himself within the legacy of Mexican mural paintings, which were critical for the government following the Mexican Revolution as propaganda for the increasingly authoritarian government.⁴⁵ This puts the legacy of violence and death in law on show; the very same law that almost walks through the halls of the Supreme Court, acting to validate the death that has and will occur outside those walls. Law can create death, the murals remind us, as well as death giving law weight.

As an example of the violence and law, Robert Cover discusses why a defendant who has been sentenced walks out of the court room, seemingly with their consent.⁴⁶ The prisoner walks performatively or even civilly but only because of the “overwhelming array of violence ranged against him,” which the historical legacy of law to follow through on its threat to kill must compound.⁴⁷ In the face of legal violence, if the prisoner were to resist, not only would it bring the bounds of death closer, they would have to disregard the immediate threat of violence. The legal processes shift the understanding of death as a future inevitability to a present potential. In this way, we see how the law defines the temporal experience of the prisoner. Cover suggests that in the interpretation of law, the legacy of a fatal past and the fatal future suffocates the present moment for those finding themselves subject to law. Like Klimt, Cover is telling a story about law, Manderson considers analysis of art to involve art’s textualization, similarly the violence Cover writes on can be visualised.⁴⁸ Art visually lays bare the threat of non-compliance in *Tortura* and the legal model of Cover as internalised across legal actors and subjects as part of the legal system itself.

This section has begun examining the interrelation of death with art and law, as represented or visualised in art and law. We will see in Hockney’s work a different approach to death, but one that still carries through an understanding of death as a suspension of temporal existence. As noted with Manderson’s analysis of *Pietà*, from birth, a person is inevitably going to meet death.⁴⁹ In Cauduro’s work, Manderson outlines an extreme example of art placing death at the centre of the legal system, as a critique of the law and of the artifice that hides death. The next section expands this analysis to examine pain. We will see that pain and death can be usefully operated as a means of legitimising legal structures. Cover especially explores pain as it is within the moment of the application of law, and in the interpretation of law.

PAIN IN LAW AND IN ART

⁴⁵ Manderson, above n 4 at 196-198

⁴⁶ Cover, above n 9, at 1607

⁴⁷ Cover, above n 9, at 1607

⁴⁸ Manderson, above n 4, at 132

⁴⁹ Manderson, above n 4, at 19

This section, analysis pain as a tool in law. Cover focuses on pain, as well as death, to describe the violence of law. Manderson uses Cover to help understand and explain the prevalence of death and pain in law, and correspondingly its reflection in art.⁵⁰ Manderson uses the iconography and messaging of art to a critique and analyse law.

There are those who experience pain, which Cover says are those who understand law the most. For Cover, religious martyrs who undergo torture and live, are the paradigm example for understanding law. That is because, as Cover explains, the torturer does not seek information. Instead, torturers crush the martyr's normative world and reconstructs one in which they are dominated. That the martyr survives and has not succumbed to death is, for the martyr, a miraculous experience. For them, the continued existence of any normative world – even one in which they are dominated - remains is a miracle. The martyr is a paradigm experience of law, because their normative world was crushed, (re)constructed and continues.⁵¹ They will not only have felt “the terms of the tyrant’s law,” but resist it and look beyond it.⁵² They will advocate for the “projection of an imagined future upon reality,” which constructs a prescriptive normative view of what the future of legal violence should be as a rejection of what that legal violence has been.⁵³ It is temporal and normative law that is bound to pain and death. It threatens the perspective of communities outside that view and uses pain (like criminal convictions, legal interpretations, and sentencing as well as the psychological toll of being subject to law) to dominate and reconstruct the normative view of those communities.⁵⁴ As Austin Sarat contends, law makes both death and pain “visible in order to legitimate itself or provide grounds for its judgments.”⁵⁵

Similarly, Cover says that “judges deal pain and death”.⁵⁶ And even if judges, and those who enact their roles in legal institutions, know they deal in pain, their roles within the institution of violence inhibit their fuller appreciation of it. In fact, that is what makes law different from art. Where legal interpretation is associated with the imposition of violence, artistic interpretation is not.⁵⁷ Interpreting arts does not use

⁵⁰ Manderson, above n 4, at 4

⁵¹ Cover, above n 9, at 1605

⁵² Cover, above n 9, at 1604

⁵³ Cover, above n 9, at 1604

⁵⁴ Cover, above n 9, at 1604

⁵⁵ Sarat, above n 35, at 14

⁵⁶ Cover, above n 9, at 1609

⁵⁷ Cover, above n 9, at 1609

violence to impart meaning and in this way, art can help articulate violence of law in ways that law cannot. Cauduro's murals draw attention to legal violence.⁵⁸ Placing the murals in the Supreme Court uses violence as the bridge between the legal institutions and their ability to influence.⁵⁹ When the violence of law is used to target a specific group that sits outside of the normative perspective that law is protecting, as will be discussed in the next section, we can see why Cover notes that we consider communities that survive the persistent violence of law to be miraculous.⁶⁰

Law represents experienced violence and pain for communities that it targets. As the social experience of the law is inherently connected to pain, transformed or changing law can be read more directly onto the representation of pain in those communities' art. This is the temporality of pain, that the representation of pain in art can be seen as evolving with its existence in changing society and reflects that our understanding of law imparting pain develops its representation. Manderson's explains both *Jurisprudence* and *7Crímenes* as an artistic interpretations that give form to the artist's feeling within the social reality of the law.⁶¹ While those works incorporate violence into the imagery explicitly, the ability to view art with its "afterlife," and within its broader context means that intentionality in the absence of pain can also be part of communicating that social reality of law, as we will see with Hockney and images of intimacy rather than violence. With the "afterlife" of the image, considering the immediate context of the arts creation situates the work within the history of law and allows us to read some of the immediacy of pain without disregarding legal history since its creation. In this way, we can orient art in a legal context and re-interpret it as a lived reality, and a projection of an imagined future upon reality in a visual medium. Art can be viewed a marker for seeing the continuing legacy of pain in law.

This afterlife in art entrenches this representative function, which ensures that the legacy of painful law is not forgotten. Even if the specific legislation could be totally erased without residual effects on subsequent legislation, it would not erase the legacy of law's pain within law's self-validating legal mechanisms. Sarat suggests that this is the legacy of the visibility of pain that law had used, as well as predictability of the bounds in which law develops for Postema.⁶² The performance of law has already done its damage, and that damage becomes foundational to the temporal perspective of the damaged community in the constructed the normative worldview that persists.

⁵⁸ Manderson, above n 4, at 195

⁵⁹ Cover, above n 9, at 1601

⁶⁰ Cover, above n 9, at 1603

⁶¹ Manderson, above n 4, at 126-156 and 195-238

⁶² Sarat, above n 35, at 14 and Postema, above n 27, At 160

Law facilitates the application of pain, which individuals suffer. Manderson uses Cover's insight to re-interpret art in context, which reinforces the legacy of that pain and its temporal relationship to law. Art is useful in understanding the temporal role of pain and death in law because both law and art deal with aesthetics. There is also a representative function of law as pain for legal subjects which furthers the aesthetics of law and art. This is important for the internalisation of that pain that allows law to control after reducing literally painful forms of discipline. The internalisation of death and pain can be reflected across a wide variety of communities, and below I will apply this understanding of the interplay of law and art to Hockney's work. Before this, I will contextualise both Hockney and the law regarding homosexual behaviour, to understand how Hockney sits with an extended exposure of law to homosexual temporality.

CONTEXTUALISING THE PERIOD

To understand how Hockney's paintings communicate the social reality of law relating to homosexuality, it is important to understand a timeline of legal developments and how he fits into that timeline. To situate Hockney's paintings in a legal context, I will be using submissions to the Wolfenden Report to demonstrate the normative perspective of law and the behaviour of legal actors in positioning that law in society. This is similar to Manderson's use of *Orestia* to interpret *Jurisprudence* – Klimt visually demonstrated a mythological story that fed into cycles of vengeance in the legal system. Here, the Wolfenden Report submissions provide perspectives from inside the legal society, which Hockney has internalised and responded to in his paintings. Those perspectives follow jurisprudential conceptions of death and pain in the law, as above and in turn provide lenses for understanding the art. While he does it in a visually different way to Klimt and Cauduro, Manderson's methodology, as applied here, demonstrates how Hockney's paintings better understand law and society through a homosexual temporality.

A BRIEF HISTORY OF LEGISLATION ON HOMOSEXUAL BEHAVIOUR

Legislation criminalising homosexual behaviour has a long history in the United Kingdom. The earliest reference to punishment for homosexuality, the articulation of buggery as a crime became a feature of law in 1553 and remained, relatively unchanged until the passing of the Sexual Offences Act 1967.⁶³ Buggery was considered a serious offence, and punishment included the death penalty.⁶⁴ This put the crime level

⁶³ Knight and Wilson, above n 6, at 36

⁶⁴ Knight and Wilson, above n 6, at 38

with rape and treason, as a serious threat to the stability of the state and society. The most common punishment was rooted in humiliation, a crowd pelting debris at the criminal, and this persisted until 1816.⁶⁵ Both the death penalty and humiliation as punishment can be seen as directly supporting Cover's assessment above of the law as having literally used death and pain as tools in its normative mission.

Following the removal of capital punishment for buggery in 1861,⁶⁶ the next significant change was the inclusion of a new crime, gross indecency, in the Criminal Law Amendment Act 1885.⁶⁷ This included a largely indeterminate range of behaviour, giving judges wide jurisdiction to follow current moral understandings and manufacture a significant amount of precedent beyond the legislation. For example, in *R v Hunt* the crime was explicitly extended to behaviour in which men did not touch each other but made lewd gestures across the room.⁶⁸ The Sexual Offences Act 1956 subsection is titled *Unnatural Offences*, which gives an indication on the thoughts of legislators and drafters as to homosexuality.

The next section focuses on the legal history in the 1950s prior to the release of the Wolfenden Report in 1957. The Wolfenden Report is important because it is a landmark turning point towards reform.⁶⁹ As it instigated an invigorated conversation in Britain as to reform and occurred immediately prior to Hockney's work unpacking homosexuality and reform, submissions to the report are invaluable to understand the sociolegal environment that Hockney responds to in his work in the sixties. This sets up the practical analytical lens to analyse law and its social repercussions.

SUBMISSIONS TO THE WOLFENDEN REPORT

Brian Lewis categorises Submissions to the Report according to the role of the individual, as Law Enforcers, Medical Practitioners and Scientists, Homosexuals and Christians, Moralists and Reformers. Of particular importance is the Law Enforcers because of their role in enforcing law as violence. They are at the interface of theoretical law and social reality. Homosexual submissions are also invaluable, for their perspective on the lived situation in the fifties. Police, magistrates and judges' submissions affirmed that the law around homosexual behaviour was rooted in morality that gives legitimacy to the legacy of death and pain in law. The medical profession and science bolstered the legitimacy of this idea by allowing degrees of "truth" to

⁶⁵ Knight and Wilson, above n 6, at 37

⁶⁶ Offences Against the Person Act 1861 at s 61

⁶⁷ Criminal Law Amendment Act 1885 at s 11

⁶⁸ *R v Hunt* (1950) 2 All ER 291

⁶⁹ Brian Lewis *Wolfenden's Witnesses* (Palgrave Macmillan, Hampshire, 2016) at 4; Knight and Wilson, above n 6, at 45

mask moralism, creating an imaginary legal objectivity.⁷⁰ The sincerity with which legal actors below describe their positions frames their subjective moral concerns as objective harms, which is informed by science that could be described as misleading if not incorrect.⁷¹ The submissions show how law enforcement is violent, projecting their imagined future onto reality.

The Departmental Committee on Homosexual Offences and Prostitution released the Wolfenden which recommended that “homosexual behaviour between consenting adults in private should no longer be a criminal offence,” in 1957, suggesting that legislation criminalising that behaviour be repealed.⁷² This would go on to be a cornerstone of legislative reform efforts until the Sexual Offences Act 1967 was passed. In submissions, the Home Office and Department of Public Prosecutions took the opinion that those who exhibited their behaviours discretely and privately would be unlikely to come before police anyway, but that the law needed to take a strong stance on the behaviour that they found to be deplorable, notably public sexual activity and the risk of seduction of heterosexuals and children.⁷³ What Lewis describes as a “stench of police corruption,” which Committee Chair Sir John Wolfenden acknowledged as requiring the “avoidance of public toilets” for fear of false entrapment, dilutes this agenda.⁷⁴ Moral concerns appeared to be a thin veil for police to use of the law as a tool for their own career progression as normative enforcers of public values who prevent the continuance of degrading moralism caused by homosexuality.⁷⁵ Magistrates, Judges and other legal actors took stances that were based on a balance of defending the private or domestic sphere from state intervention with almost universal condemnation of homosexuality. The Law Council managed to, as we will see below, pursue that condemnation to the extent of denying the existence of a private sphere for homosexuals.⁷⁶

Typically, legal actors opinions were intensely negative. Director of Public Prosecutions, Sir Theobald Mathew disputed the need to change the law and agreed with the notion that homosexuality was “potentially

⁷⁰ Michel Foucault *The History of Sexuality, Volume 1* (8th ed, Penguin, Melbourne, 2008) at 54

⁷¹ Leslie Green describes the subjective/objective interplay in Leslie Green “Should Law Improve Morality?” (2013) 7 *Criminal Law and Philosophy* 473 at 474; the basis of study of homosexuality was largely pathological rather than social, which continued to view homosexuality as a problem to be cured even if reasons to cure were moral, creating a feedback loop. While paradigms in social studies were shifting to consider homosexuality outside of the disease and deficiency model, literature persisted into the late sixties dealing with homosexuality as a deviance for treatment. See Chris Waters “The homosexual as a social being in Britain, 1945-1968” in Brian Lewis (ed) *British Queer History* (Manchester University Press, Manchester, 2013) at 190

⁷² Lewis, above n 69, at 9

⁷³ Lewis, above n 69, at 14

⁷⁴ Lewis, above n 69, at 14

⁷⁵ Lewis, above n 69, at 207-208

⁷⁶ Lewis, above n 69, at 41

harmful both to the community and to the individual,” noting later that boys and young men “should be taught that those habits are dirty, degrading and harmful, and the negation of decent manhood.”⁷⁷ It supports the view that morality in law provides the basis for an “objective harm,” which is, in fact, a deeply subjective understanding of what constituted harm.⁷⁸ It also demonstrates a moral panic as to the influence of homosexuality as a corrupting force on both individuals and the state. There was consistent fear that homosexuality was a corrupting force, particularly that it threatened the sanctity of masculinity following the end of World War II. Ultimately, the arguments against reform were typically predicated on some fear of the abstract moral heart of Britain and the corruption of young men.⁷⁹

The Magistrates’ Association concluded that the law should be updated and be brought in line with Europe.⁸⁰ However, it also returned to moral concerns, noting that homosexual practices were “undesirable and dangerous,” even if it was not consistent with other “evils” like adultery for it to be criminalised conduct. This logical inadequacy in the law prior to reform is demonstrative of a homophobic perspective. Whether or not the judiciary agreed with the conduct being of a criminal nature, and it was only 41 of 74 votes in favour of the Association supporting reform, it is clear that the law had been validating some bias against homosexuals to fulfil a moralising function.⁸¹ The Magistrates’ Association went on, suggesting that it was not until the age of 30 that homosexual conduct be allowed, well above the age of consent for heterosexual relations, pulling again on the moralistic fear of homosexual corruption.⁸²

Members of the judiciary featured several times in their individual capacity as judges. The Lord Chief Justice of England, Rt. Hon. Lord Goddard supported removing gross indecency as a crime, but thought that the 400 year legacy of criminalising buggery should be upheld as it was “horrible and revolting,” practiced by “such a depraved creature that he ought in my opinion to be put out of circulation.”⁸³ He admits that is not logical, but then draws a distinction between men who find “satisfaction in good looking youths to the extent of masturbation,” and “buggers,” which is a distinction that, certainly with a contemporary understanding, appears to draw inappropriate conclusions (although he accepted that this opinion again

⁷⁷ Lewis, above n 69, at 38 - 40

⁷⁸ Leslie Green describes the subjective/objective interplay in Green, above n 71, at 474

⁷⁹ Lewis, above n 69, at 104

⁸⁰ Confirming fears from the Home Office that Britain was falling behind to the detriment of their reputation as leaders of legal thinking. See Patrick Higgins *Heterosexual Dictatorship* (Fourth Estate, London, 1996) at 3

⁸¹ Lewis, above n 69, at 52

⁸² Lewis, above n 69, at 52

⁸³ Lewis, above n 69, at 68

may be wrong).⁸⁴ When read in its entirety, the picture from the top of the judiciary is an excellent example of embedded fear, misgivings and logical fallacies that impacts both personal perspectives and the background of knowledge that inform legal decisions.

However, this perspective was not universally shared throughout the judiciary. Some submissions from judges outlining different perspectives. Mr Justice Hallett was hesitant for the State to intervene in moral issues that do not create real detriment to the community, and Mr Justice Donovan wanted to regard private, consensual sexual activity of all adults beyond the scope of the criminal law.⁸⁵ This is consistent with enforcement being an issue that was very dependent on enforcers attitudes, in that it appears that there was inconsistency in recourse dependent on local constables and magistrates.⁸⁶ Judges like Hallett and Donovan differ from Goddard and the Magistrates' Association in rejecting judicial thinking of Lord Patrick Devlin's "legal moralism," from what they understand their role to be.⁸⁷ However, Goddard, as well as other judges, demonstrate a persistent trend towards legal moralism for those that opposed reform. When Goddard accepts logical inconsistency in his perspective, as Chief Justice, it demonstrates that parts of the law were actively engaged in moral mediation that was prepared to supersede adherence to consistent legal principles.

This is consistent with other representative bodies of the legal profession, including the General Council of the Bar who unanimously agreed that "the practice of homosexuality is, under any circumstances, objectionable and an evil to society both on ethical grounds and for other reasons," although those other reasons are not clearly listed.⁸⁸ In an interview with the Committee representing the Council, Mr R.E. Seaton, who Higgins described as an "extremely vicious homophobe," gave further detail to the Council's misgivings on reform.⁸⁹ He denied the hardship and injustice experienced resultant of homosexual criminalisation, and insisted that very few people involved in the offending were naturally homosexually inclined and notes that "in all such cases harm is in fact done."⁹⁰

⁸⁴ Lewis, above n 69, at 68

⁸⁵ Lewis, above n 69, at 69-70

⁸⁶ Knight and Wilson, above n 6, at 44

⁸⁷ Christian Joppke "Islam and the legal enforceability of morality" (2014) 43 Theory and Society 589 at 590

⁸⁸ Lewis, above n 69, at 42

⁸⁹ Higgins, above n 80, at 66

⁹⁰ Lewis, above n 69, at 48

This is partially based on the idea of the “seduction thesis.”⁹¹ Seaton contends that those who become involved in homosexuality are actually heterosexuals who have found themselves led astray by sexual deviants, implying that homosexuality itself is not the issue, but that the active perversion of those who ordinarily wouldn’t engage in indecent behaviour is the criminal issue.⁹² This is an unrealistic conception of homosexuality, and ignored the existence of other consent law and assault law to mitigate coercion concerns. It relied on the idea of a scientifically backed deviance (legitimising truth) creating the potential for behaviour that extends out of individual deviance and into a social wrong requiring legal intervention.

What’s missing from this narrative about ‘corruption’ is that there is no specificity as to the harm, and it is clear that Seaton’s perspective, a representative one of the Council, is rooted in either a deep misunderstanding of the sexual experience or an intense hostility towards homosexuals. One suspects the later, especially when Seaton suggests that “the average man of today has no less horror of his son becoming homosexual than had his father,” in response to the idea that public opinion on homosexuality was changing.⁹³ Seaton embeds intergenerational temporality into his hostility, returning to periods of active legal violence. It is worth noting that three lawyers were interviewed as supplementary to the Council’s written submission, and that Mr R. Ormond presented arguments for reform, so while Seaton’s perspective is held out to be representative of a large portion of barristers, it is also likely indicative of his individual perspective and practice.⁹⁴ For Seaton, moral perspective tends to overrule an understanding of the law as a reflection of public interests, even if he is willing to twist logic to make it appear otherwise, and Seaton is clear that even if public opinion were changing, that the change was “a deplorable thing and one which ought, as far as possible, to be stopped.”⁹⁵ The Council’s general submission does not make a final decision as to their stance on removing the sections from law, due to divergence of opinion, and instead make recommendations as to penalties and procedure.⁹⁶ While Seaton tends towards legal moralism, the Council relies on the idea of optimising the law and being “harm” specific in response to compensates for this, but again that harm is itself non-specific.

The Council of the Law Society, who opposed reform and wanted to retain both buggery and gross indecency, are more prepared to cite specific concerns.⁹⁷ Particularly, they believe that the main threat is

⁹¹ Lewis, above n 69, at 14

⁹² Lewis, above n 69, at 48

⁹³ Lewis, above n 69, at 46

⁹⁴ Lewis, above n 69, at 49

⁹⁵ Lewis, above n 69, at 47

⁹⁶ Lewis, above n 69, at 42

⁹⁷ Lewis, above n 69, at 40

corruption of others (particularly youth) and the spread of venereal disease, bringing up the fairly common moral fears and presentation of homosexual behaviour as degrading and dirty.⁹⁸ The Law Society try to answer the question as to why actions in private should be within the legal sphere with the use of discriminatory science to inform understandings of harm.

Their main argument is made through Bentham's rules for criminal law and analysing the retention of the law against those standards.⁹⁹ Bentham's first rule is that the evil be so great as to counterbalance the pain suffered by being subject to the criminal law, which the Law Society deal with in the moral concerns above. On Bentham's rule that it should not impair the privacy and confidence of domestic life, the Law Society argue that two males living together cannot constitute a "domestic life," to deny the existence of a private realm to impede and manage to construct an argument that avoids Justice Hallett's concerns. When we consider the first of Bentham's rules, the Law Society's perspective was rooted in a disregard for any pain that could be experienced by homosexuals. Simply, homosexuals have no capacity to feel legitimate pain, no private life and no domesticity. Like Seaton, this rationale re-supposes harm regarding homosexuality as existing only to wider social morality to avoid justifying a dubious moral position.

There is a clear suspension in the minds of those who apply the law of the immediacy of the pain that law which they were unwilling to reform causes, as well as forgetting the legacy of pain that persists into the lives of those who find their lives fraught by the fear of law. Both judges and lawyers have an interpretive function in the law, which Cover described as dealing in pain and death, and the entrenchment of hostility towards homosexuals, for an element of their being that they have no reasonable prospect of making subservient to the law, is a clear expression of the dealing in pain. These perspectives went on to have significant impacts on homosexuals, invoking the role of death and pain in the law's enforcement.

THE WOLFENDEN REPORT, ITS CREATION AND REFLECTION OF HOMOSEXUAL PAIN

These attitudes of legal actors had very real fatal and painful consequences. In 1952, approximately 4000 men appeared in court on homosexual behaviour charges, and 1069 men were in prison.¹⁰⁰ This represents considerable intrusions on the liberty of those men. Impediment on liberty is a violent act, Cover notes incarceration as being predicated on the threat of legal violence, the potential for law's violence reinforces the internalisation of shame that law is associating with homosexuality. In *R v Hunt*, the judge makes clear

⁹⁸ Lewis, above n 69, at 40-41

⁹⁹ Lewis, above n 69, at 40

¹⁰⁰ Knight and Wilson, above n 6, at 44

through his language that the moralism of the judiciary is reinforcing and attributing shame. He describes the acts that brought two men before the court as “disgusting,” and “filthy,” and believed that they should be “thoroughly ashamed of themselves.”¹⁰¹ Of note from the case, is that one of those, as a result of being charged, had lost his occupation, which begins to touch on the ability for the law to create consequences beyond simply the courtroom. The intrusion into the liberties of others that homosexuality posed for the rest of society, which I would strongly suggest is minimal if not entirely imagined, pales in comparison to the pain that law projects onto those criminalised. Contrary to the Law Society’s use of Bentham above, the privacy and security of the domestic environment is significant to homosexuals. Safety and security in the domestic sphere allow for expression and development of a person’s sense of self, which I discuss below, is essential to a genuine sense of “life.”

There were very few submissions from homosexuals to the Committee, largely on the basis that they required a very specific kind of homosexual (educated, ‘naturally homosexual’ and similar in class) to legitimise their perspective.¹⁰² The strongest connections to death and pain as a result of the ongoing legacy of those features of law are noted in one of those submissions noting the prevalence of suicide and blackmail.¹⁰³ For a 19 year old University student noted in one submission, “a lifetime of persecution and ridicule from his fellows had led to a sense of isolation, of which suicide seemed to him the natural sequel.” Other suicides including that of Alan Turing, who infamously committed suicide following conviction and subsequent treatment of hormonal injections, grimly affirm continuance of death in the homosexual experience.¹⁰⁴ This acute sense of isolation from this and other submissions from homosexuals for reform are suggested in Hockney’s works to diminish in an environment free from the fear of the law.¹⁰⁵

In his submission to the Committee, Peter Wildeblood, a man only just released from prison on a sentence for 18 months for gross indecency, questions the role of criminal prosecution, noting a violent police arrest, and an alleged conversation with police that cited gross indecency as being an easy crime to catch and convict, providing better statistics for officers personally and for units. In light of the this and the pain it causes:¹⁰⁶

¹⁰¹ *R v Hunt*, above n 68

¹⁰² Lewis, above n 69, at 203

¹⁰³ Lewis, above n 69, at 211

¹⁰⁴ Alan Turing was credited with saving thousands of lives and playing a significant role in the end of the Second World War. Lewis, above n 69, at 3 and 288; Knight and Wilson, above n 6, at 44

¹⁰⁵ Lewis, above n 69, at 211

¹⁰⁶ Lewis, above n 69, at 208 - 210

“The shadow of fear is a terrible thing; it cripples a man’s character and distorts his moral sense. Set us free, and we can at least try to order our lives with decency and dignity; leave us in this shadow, and we shall continue to be bitter, secretive and warped, a persecuted faction incapable of good.”

Wildeblood is clear in his assertion that the discrimination of people based on their homosexuality causes harm to their sense of self and their character. Far more harm than is generated by homosexuality itself. When the law is functioning as a dealer of pain, in its violent arrests, prison or death sentences, it extends that pain into the community widely, to subjugate communities and reinforce its own power. Entrapment behaviour, in particular agent provocateurs, appear to demonstrate a usage of the law rooted in the expression of power, rather than in the protection of public safety. The conviction of Alan Turing can be traced back to him making a complaint to police of a break-in to his home, which turned out to have been committed by someone he had been sexually involved with.¹⁰⁷ Police pursued gross indecency charges against Turing rather than the burglary.¹⁰⁸ It likely built on the pattern of isolating behaviour, a social and psychological devastation, cyclically compounded using legal actors’ subjective morality regarding homosexuality as a deviance, creating law to affirm that isolation, and using that isolation to continue to blindly develop their subjective moralism into supposedly objective harms and into law.

The hard law and legislation at the time of the Report was the product of that normative and affirming cycle, with the consequence of decimating homosexual’s freedoms and careers, but also served as a reminder as to the systems and priorities the law was upholding. Hockney pulls from isolation, and compares it with his own experiences, particularly in the liberal environment of art school, to provide commentary on the social environment being created by law.

HOCKNEY’S IMAGINED FUTURE

Above I have outlined Manderson’s methodology and considered submissions to the Wolfenden Report as communicating perspectives as part of legal temporality. As Manderson used *Orestia*, the next section will apply the perspectives of legal temporality in the analysis of Hockney’s work. Both Hockney’s work and the submissions occur within a legal timeline and can be used to situate law within social reality. Hockney presents an alternative imagined future, borrowing from Cover’s understanding of the role of law. In

¹⁰⁷ Knight and Wilson, above n 6, at 44

¹⁰⁸ A similar thing can be realised with Oscar Wilde and the collapse of a libel suit against someone attempting to ruin his career, which ultimately ended up convicting him of homosexuality. Ellen Crowell “Queer” (2018) 46 *Victorian Literature and Culture* 816 at 817

particular, he explores the homosexual experience of internalising death, domesticity, and deviancy as the legacy of law's domination by pain. First, however, I will introduce Hockney to further contextualise the submissions, and to understand the background that Hockney brings to art and law.

INTRODUCING DAVID HOCKNEY

*"Homosexuals are often charming and friendly people and many of them are well known to be of artistic temperament."*¹⁰⁹

David Hockney is a British artist, born in Bradford in 1937, and began study at the Royal College of Art in 1959.¹¹⁰ His cohort at the Royal College were incredibly influential in British art, particularly in Pop Art, and included Ron Kitaj, Allen Jones, Derek Boshier and Peter Philips, who would be shown in the influential *The Young Contemporaries* Exhibition in 1961.¹¹¹ This period in British art is known for an expansion into popular culture, American iconography and expanding the exploration of the boundaries of fine art.¹¹² Traditional art style and values still held considerable power across the art world, but Hockney created subversive works, pushing against those values as a tool for his work to legitimise alternative perspectives. Helen Little notes that in work regarding sexuality, class and behaviour, he was able to "harness the language of dominant abstract painting of the time and subvert its high-art values by associating it in the world around him."¹¹³ His early work, prior to beginning at the Royal College are referential to the Kitchen Sink School.¹¹⁴ The School was a form of social realism, and chronicled the "everyday life of ordinary people."¹¹⁵ As such, Hockney's paintings continued into his career to provide a window into law and society.

¹⁰⁹ Lewis, above n 69, at 110

¹¹⁰ Webb, above n 3, at 25

¹¹¹ Webb, above n 3, at 42

¹¹² "Pop Art" Tate <www.tate.org.uk>

¹¹³ Helen Little "Demonstrations of Versatility" in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 32

¹¹⁴ "David Hockney: Star of Contemporary Art" (21 July 2020) Barnebys <www.barnebys.com>

¹¹⁵ "Kitchen Sink Painters" Tate <www.tate.org.uk>



FIG. 2.1 – David Hockney, *Nude*, 1957, Oil on board, 122 cm x 184 cm, The David Hockney Foundation, in “Nude 1957” David Hockney Foundation <thedavidhockneyfoundation.org>

This is possibly best seen in his 1957 work *Nude* (see fig. 2.1), which also pulls on an emotional reality typical of the “drab working class” subject matter of the movement.¹¹⁶ Including working class subject matter, the environment that he came from in Bradford, demonstrated his awareness of the broad spectrum of British Society and a deviation away from the subject matter that had dominated traditional art. This awareness extended into the broad spectrum of homosexuality. While the Wolfenden Report concerned itself with a very narrow conception of what a good homosexual looked like, Hockney had a different view of homosexuality.

Works like *The Cha Cha That was Danced in the Early Hours of 24th March* (see fig. 2.2) embrace femininity and homoeroticism outside the utilitarian sexuality of the good homosexual submissions to the Report describe. Similarly *Sam Who Walked Alone by Night* (see fig 2.3) touched on a “category of homosexual”

¹¹⁶ “Kitchen Sink School” (2009) Oxford Reference <www.oxfordreference.com>

someone who we might consider now to be Transgender or gender non-conforming, rather than homosexual.¹¹⁷



FIG. 2.2 – David Hockney *The Cha Cha that was Danced in the Early Hours of 24th March 1961, 1961*, Oil on canvas, 173 cm x 154 cm, Private Collection, in “The Cha Cha that was Danced in the Early Hours of 24th March 1961, 1961” David Hockney Foundation <thedavidhockneyfoundation.org>

This category was constructed to try delineate homosexuals from one another, to exclude most homosexuals from participation in the Report.¹¹⁸ Wildeblood’s submission noted that “it seems unjust to treat them as a social menace, although they may admittedly be a social nuisance.”¹¹⁹ Hockney is able to push through the bounds of elitism in law and society that reform was being attempted to be performed within, and into the social environment in which the law was having consequences. Sir John Wolfenden himself noted that for Englishmen, the existence of “Outs” made them safe as “Ins,” which is clearly reflected in how submissions spoke of homosexuals. But Hockney worked very specifically to bring “outs”

¹¹⁷ David Hockney *David Hockney* (2nd ed, Thames & Hudson, London, 1978) at 61

¹¹⁸ Lewis, above n 69, at 203

¹¹⁹ Lewis, above n 69, at 206

and the associated the private life that is hidden by exclusion to the front of the consciousness of the viewer.¹²⁰ In this way, art not only reflects what has already been a projection of an imagined future into his present but attempts to create a new future.



FIG. 2.3 – David Hockney *Sam Who Walked Alone by Night*, 1960, 107 cm x 50.5 cm, Private Collection, in “Sam Who Walked Alone by Night” Artnet <www.artnet.com>

Hockney specifically noted that he was trying to create images with a partly propagandising function, and, to do so, he wanted his art to reflect the homosexual experience that he and his peers were having.¹²¹ While Hockney found himself in a liberal environment that allowed him to create sexually charged works with relative freedom, as the Wolfenden Report shows, Britain remained extremely conservative.¹²² We know, from the release of the Wolfenden Report just prior to his time at the Royal College, that experiences like his as a homosexual were still in the early stages of entering public consciousness, alongside law punishing homosexuals. While his formative sexual experiences were largely during the period where reform was being discussed more openly after 1957, the experiences of homosexuals in the fifties and prior had being

¹²⁰ Quote of Sir John Wolfenden in Lewis, above n 69, at 1

¹²¹ Hockney, above n 117, at 68

¹²² Chris Stephens “Play within a play” in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 15

laid out in the Report and informed his perspective on sexuality and the power of the law. Hockney was incentivised to produce work that contributed to that conversation in ways that he felt important.

While other artists were looking towards America for inspiration in its new consumer culture, Hockney was interested in the relative sexual liberation of California and New York. Research in the United States suggested that homosexuality was more widespread than had previously been thought, and queer cultures were gaining identities that were becoming more open.¹²³ There was active denial that Britain would have the same rates of homosexuality.¹²⁴ Certainly, the absence of visual media that had even implicit reference to homosexuality was limited, which may have given the illusion to those on the outside of an absence of



FIG. 2.4 – David Hockney *Life Painting for a Diploma*, 1962, Oil, charcoal on paper on canvas, 180 cm x 180 cm, Private Collection, in Christ Stephens and Andrew Wilson *David Hockney* (Tate Publishing, London, 2017) at 14

homosexuals.¹²⁵ America produced a visual language that was different to what was being provided in Britain. American *Physique Pictorial* magazines that he found in London expressed the male form in a way that ascribed a sexual identity (see *Life Painting for a Diploma*, fig. 2.4). This came into Britain through shops like Vince's Men's Shop, which formed social hubs for people to have a visual gateway into a more outward expression of a sexualised male identity.¹²⁶ As Cover suggested that law was “an imagined future projected upon reality,” Hockney felt encouraged to project a new future. Not only was he referencing the existing

¹²³ Lewis, above n 69, at 166

¹²⁴ Lewis, above n 69, at 113

¹²⁵ This absence was not accidental. Aside from cultural sensitivities, Members of Parliament and Prime Minister at the commission of the Report, Winston Churchill preferred testing public opinion with legislation to restrict public discourse in journalism on homosexuality to decrease its presence. Higgins, above n 80, at 4

¹²⁶ Shaun Cole “Queers and Mods: Social and Sartorial Interaction in London’s Carnaby Street” in Kimberly A. Miller – Spillman, Andrew Reilly and Patricia Hunt-Hurst *The Meaning of Dress* (third ed, Bloomsbury Publishing, New York, 2012) at 214 – 22

legal environment of Britain, but also the prospects of new visual media and the perceived sexual liberation of America.

While Hockney himself did not claim to be a Pop Artist, he drew from popular culture consistently to incorporate the visual language of the post-War era to speak to public consciousness.¹²⁷ This included the use of celebrity, particularly Cliff Richards, who is featured in *We Two Boys Together Clinging* (see fig 2.5), which could be considered a homosexual appropriation of the new brand of idolisation that was developing around female celebrity and the unattainability of homosexual relationships as “public” entities as celebrity was.¹²⁸ Similarly, the use of text in his work drew from pop art conventions, continuing his association of high art principles with iconography that felt familiar to the public in order to create a sense of familiarity with the social taboo of homosexuality. He furthers his relationship to familiar imagery through reference to artists like Francis Bacon, who worked in the fifties prior to reform discussion. Where Hockney makes stronger visual references to Bacon, like in *My Brother is Only Seventeen* (see fig. 2.6), and where he compares specifically different imagery to Bacon, we can understand Hockney’s internalisation of the legal system.¹²⁹



FIG. 2.5 – David Hockney *We Two Boys Together Clinging*, 1961, Oil on board, 121.9 cm x 152.4 cm, Art Council Collection, Southbank, in “We Two Boys Together Clinging” Art UK <www.artuk.org>

¹²⁷ Chris Stephens “Play within a Play” in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 20

¹²⁸ Emmanuel Cooper *The Sexual Perspective: Homosexuality and Art in the last 100 years in the West* (2nd ed, Routledge, London, 1994) at 269

¹²⁹ Webb, above n 3, at 49

Hockney is an artist who engages with homosexuality in a way that is inextricably linked to the law. As discussed above, law makers and enforcers viewed homosexuality as a moral proposition. Debate was grounded in an understanding of where legal power lay and what it sought to protect and the pain that law is prepared to deal in order to support its normative position. Hockney is keenly aware in his work of the challenge of two dimensional artwork to depict the world and his later large format multi-panel landscapes explicitly deal with landscapes “as experienced bodily in time.”¹³⁰ However, this can also be effectively read into his figurative works from of the late fifties and sixties as he depicts the homosexual experience as it is in spite of law and what it would look like without the weight of the death, pain and morality that the law injects into the temporal experience of homosexuals.

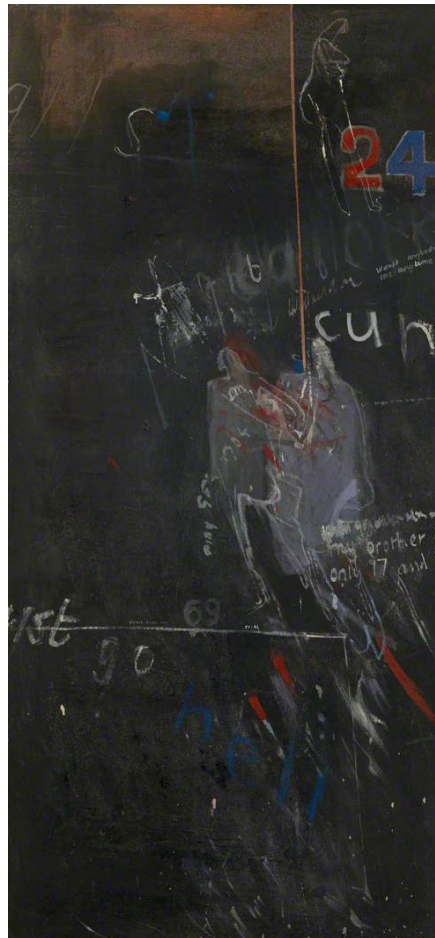


FIG. 2.6 – David Hockney *My Brother is only Seventeen*, 1962, Oil and mixed media on board, 151.1 cm x 74.9 cm, Royal College of Art, in “My Brother is only Seventeen” Art UK <www.artuk.org>

¹³⁰ Chris Stephens “Play within a play” in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 12



(From left to right) FIG. 2.7 – David Hockney *Domestic Scene: Notting Hill*, 1963, Oil on canvas, 183 cm x 183 cm, Private Collection, in “1937 – Today” The David Hockney Foundation <www.thedavidhockneyfoundation.org>

FIG. 2.8 - David Hockney *Domestic Scene: Los Angeles*, 1963, Oil on canvas, 152 cm x 152 cm, Private Collection, in “1937 – Today” The David Hockney Foundation <www.thedavidhockneyfoundation.org>

FIG. 2.9 - David Hockney *Domestic Scene: Broadchalke, Wilts*, 1963, Oil on canvas, 183 cm x 183 cm, University of Michigan, in Christ Stephens and Andrew Wilson *David Hockney* (Tate Publishing, London, 2017) at 52

Hockney's work is open to a wide range of interpretations, and these ways are derived from the unique perspective of the spectator, leading to potentially contradictory impressions. For Hockney, this is not a failure of articulation, but part of the value of the medium of painting that is consistent with Manderson's creativity in interpretation.¹³¹ Applying Manderson's method of critique, allows us to engage with our own temporality, and understand the works within its broad social context. In Hockney's three *Domestic Scene* paintings from 1963 (see fig. 2.7-9), Hockney resists the temptation to delve into the dark visual themes of *Jurisprudence* and *7Crímenes*. But Hockney does engage with the temporal markers of death and pain. As Manderson notes, utopia is as much a tool of critique as dystopia.¹³²

In death, Hockney demonstrates an awareness of internalisation of death outside of the influence of the death penalty, considering pain and other forms of violence in the law as tools of control that allow death to be both literally excluded and implicitly threatened in its system. He then presents an alternative concept of homosexual domesticity in resistance to that internalisation. This can be compared with the work of Francis Bacon in the fifties, who explores the internalisation of death and pain far more vividly. He uses

¹³¹ Martin Hammer “Hockney as Philosophical Painter” in Christ Stephens and Andrew Wilson *David Hockney* (Tate Publishing, London, 2017) at 212

¹³² Manderson, above n 4, at 134

the “collapse in the West of the metanarrative of God,” with imagery of tension and sexuality, to comment on the potentially violent and dark existentialist experience of the homosexual community.¹³³

Hockney specifically contrasts this existentialism with works that release tension and provide ambiguous space to allow the identities of the characters in the paintings to breathe. By contrasting tension with domestic imagery, he demonstrates awareness that the potentially reformatory period is revolutionary for the experience of tension depicted in Bacon’s work. This uses the “afterlife of the image,” thinking about Bacon’s paintings as statements that speak to both the current moment in law, and the subsequential application of pain that it facilitated.¹³⁴ We can do the same thing with Hockney, understanding his paintings place within legal history. Specifically, in legislation that moderated the form of the family, and in understanding of male sexuality and deviancy, Hockney’s work is representative of the perspective on pain in law that persists. *Domestic Scene, Broadchalke, Wilts* and its engagement with domesticity and *My Brother is only Seventeen* and *Cleaning Teeth, Early Evening (10PM) W11* (see fig. 2.10), dealing with more ominous imagery, can be viewed to understand the consequences of the law’s normative violence and pain. Particularly when viewed alongside submissions to the Wolfenden Report, the paintings situate themselves within homosexual temporalities as markers of what has and hasn’t changed in law.



FIG. 2.10 – David Hockney *Cleaning Teeth, Early Evening (10PM) W11*, 1962, Oil on canvas, 183 cm x 122 cm, Astrup Fearnley Collection, in Christ Stephens and Andrew Wilson *David Hockney* (Tate Publishing, London, 2017) at 45

¹³³ Rina Arya “The Animal Surfaces: The Gaping Mouth in Francis Bacon’s Work” (2017) 30 *Visual Anthropology* 328 at 329

¹³⁴ Manderson, above n 4, at 8

DEATH IN HOCKNEY'S WORK: COMPARISON WITH FRANCIS BACON

David Hockney is renowned for his use of bright colours, bold examination of his subject matter and his ability to reach those who are normally excluded from high art spaces.¹³⁵ His work is deliberately accessible. As Little notes, Hockney intentionally subverts artistic expectations. When examining Hockney's relationship with death in his works, it must be looked at under the lens of that subversion. Manderson's critiques of *Jurispudence* and *7Crímenes* looks at the paintings in their respective academic (The University of Vienna Grand Hall) and legal (Mexican Supreme Court stairwell, particularly used by judges) locations, attributing corresponding intellectualism.¹³⁶ Hockney's work, however, is not location specific, and uses broader imagery to speak to the wide potential audience who could engage with the works. Hockney avoids using death in explicit imagery, and instead provides his own "projection of an imagined future upon reality," of law that does not intervene into the home or understand homosexuals as deviants, consequentially resisting explicit reference to the internalisation of death from legal temporality.¹³⁷ Images of what are preludes (or at least indicating the potential) of crimes, created with tenderness and domesticity in the *Domestic Scenes* paintings, are propaganda aligning both the future that Hockney wants and the reality that he experiences.

Hockney's work can be read against Francis Bacon, however, to understand how and why Hockney decentralises literal death in his work. Bacon had worked extensively throughout the fifties prior to Hockney.¹³⁸ Hockney was very aware of Bacon, borrowing from him in technical elements and developing stylistically from Bacon's abstraction of the human form.¹³⁹ Bacon engages with death more directly than Hockney, both aesthetically and thematically. Bacon's work can be read to reference Friedrich Nietzsche's assertion that "God is dead," and the end of enlightenment.¹⁴⁰ Beyond the death of God, legal structures create the criminalised context and existentialism that Bacon's work and identity deal with.

¹³⁵ Chris Stephens "Play within a play" in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 12

¹³⁶ Manderson, above n 4, at 129 and 212

¹³⁷ Cover, above n 9, at 1604

¹³⁸ Michael Peppiatt *Francis Bacon in the 1950s* (Yale University Press, Norwich, 2006) at 14

¹³⁹ Webb, above n 3, at 49

¹⁴⁰ Arya, above n 133, at 330



FIG. 3.1 – Francis Bacon *Man in Blue IV*, 1954, Oil on canvas, 198 cm x 137 cm, Museum Moderner Kunst Stiftung Ludwig, in “Man in Blue IV” Francis Bacon <www.francis-bacon.com>



FIG. 3.2 – Francis Bacon *Two Figures*, 1953, Oil on canvas, 152.5 cm x 116.5cm, Private Collection, in “Two Figures” Francis Bacon <www.francis-bacon.com>

THE EXISTENTIALIST

One of Bacon's focuses was an examination of "queer deviance," instances where homosexuals could identify one other through deviation from strict social norms.¹⁴¹ The best example of this is possibly in his *Men in Blue* series (see fig. 3.1), a series of paintings of lone men in suits in a bar, each painting ambiguous in whether it is the same man, or a new one, being picked up for sex by a similar process and homogenising the men.¹⁴² They avoid identifying details and focus on anonymity and public intimacy that was being clamped down on by the law in the Post-War period.¹⁴³ Gregory Salter considers this to be a costume, which aligns with an idea from Patrick Higgins, of the regulation of sexual crime being "an elaborate charade."¹⁴⁴ The costume of the blue suit is about playing the same game as law; where law performs within the bounds of its own structure, homosexuals were being forced to try stay as much within that normative perspective as possible. Law no longer needed to use death as an explicit punishment, because legal structures internalised the legacy of death within homosexuals in their clothing and public appearance.¹⁴⁵ Aside from suicide and violence directed towards homosexuals by non-legal actors, Salter noted that "perpetual emergence" tempered the gay existence for Bacon and other homosexuals.¹⁴⁶ The idea that homosexuals were not ever living as themselves represents not the death of the physical person, but continued undignified internalisation of a fatal risk that law created.

Hockney's work speaks to life lived as oneself. In *Domestic Scenes, Broadchalke, Wilts* he de-sexualises the figures to present a scene of domesticity, which begins a continued theme of couples throughout his career.¹⁴⁷ The men maintain a uniform, white t-shirt and blue jeans, but this removes the formalism of the suit, and situates the couple in their own home. This makes the painting maintain normalcy and moves the image of men from the lone anonymous individual, to feeling less about the tension of rejecting your "self" as is present in Bacon. In the *Domestic Scenes*, law dominates rather than punishes the individual, even if the

¹⁴¹ Dominic Jones "Queer Juxtapositions in the Art of Francis Bacon and Lilliput Magazine" (2020) 21 Visual Culture in Britain 275 at 290

¹⁴² Gregory Salter "Francis Bacon and Queer Intimacy in Post-War London" (2017) 18 Visual Culture in Britain 84 at 89

¹⁴³ Salter, above n 142, at 90

¹⁴⁴ Salter, above n 142, at 92 and Higgins, above n 80, at 4

¹⁴⁵ Kevin Shoemaker "The Problem of Pain in Punishment" in Austin Sarat *Pain, Death and the Law* (online ed., University of Michigan Press, 2001) at 24

¹⁴⁶ Salter, above n 142, at 97

¹⁴⁷ See *Portrait of an Artist (Pool with Two Figures)* (1972), *My Parents* (1977), *Mr and Mrs Clark and Percy* (1970-1) and more

relationships depicted now fall within heteronormativity. The *Domestic Scenes* avoid using imagery of homosexual's falling outside the law sponsored conception of domestic relationships, for example the femineity of *Sam Who Walked Alone at Night*. The internalisation of pain in law persists although it becomes acceptable for some homosexuals to assimilate themselves with heteronormative forms of relationships. Hockney does not necessarily endorse this, he wanted to propagandise homosexuality and question the Reports intention to reform internalised fear. Sam is not pictured here, possibly because "reform" is not interested in reforming outside of the predictable structures of law, here matrimonial relationships.¹⁴⁸ The matrimonial relationship model will be discussed later as a continuing source of internalisation of legal legacy into contemporary legislation.

Also distinguishing all three *Domestic Scenes* from Bacon is the location. The rooms have the props of domesticity, rather than walls or floors, and Hockney does this intentionally to reference the order of which we perceive our spaces and to highlight the feeling and emotionality of a room.¹⁴⁹ The lack of determinate space does not register in the same way as it does in Bacon's work, where the space behind feels cold and indeterminate. Salter notes that Bacon struggled with the idea of having a home.¹⁵⁰ His father kicked him out of home for wearing his mother's underwear aged 15, and Salter reads the *Men in Blue* series alongside James Baldwin's novel *Giovanni's Room* (1956), where a man struggles with the frustrations of constant intervention from his heterosexual world constraining his homosexual relationship.¹⁵¹ Salter suggests that law complicates the 'home' as part of the queer experience to ensure that "home" is situated in the heterosexual. Rather than existing in homosexual parts of themselves, they return "home" to other lives. In *Two Figures* (see fig. 3.2), Bacon paints two men during sex, with a sheer curtain indicating both a desire for privacy in the home and an invasion of it.¹⁵² Even the painting itself struggled with its home environment, at its original showing the gallerist half-hid the painting for fear of it provoking a police raid.¹⁵³

Like Bacon, Hockney uses curtains in the *Domestic Scenes*, but we are within the space delineated by the curtains. He used curtains because "they are always about to hide something or about to reveal something."¹⁵⁴ Concealment is used in the reverse to the *Men in Blue* paintings and *Two Figures*, because

¹⁴⁸ Postema, above n 27, at 160

¹⁴⁹ Andrew Wilson "Pictures with people in" in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 53-54

¹⁵⁰ Salter, above n 142, at 96

¹⁵¹ Salter, above n 142, at 86 and 96

¹⁵² Salter, above n 142, at 84

¹⁵³ Salter, above n 142, at 84

¹⁵⁴ Webb, above n 3, at 75

Hockney demonstrates the potential for privacy and the protection of the self rather than its degradation. We're inside the space, and the space maintains its security whilst retaining a connection outside, suggesting a less hostile world. The act of concealment in *Two Figures* has heightened stakes, their behaviour is criminal, up to life imprisonment, and the voyeuristic viewer has the power to intervene and destroy their intimacy and their home with law.¹⁵⁵ This destruction is a loss of security, the threat of the legal code that remains steeped in the blood of its past pulling someone out of the private space into the hostile public. It ensures awareness that even if law is not killing you, that it is prepared to destroy you publicly and dominates you privately. The *Domestic Scenes* suggest new domesticated safety that provides respite from the public dimension, while, even post-reform, internalisation of heteronormativity retains private legal domination. That fear requires intense perseverance in the face of domination, possibly, as in *Two Figures*, the respite can only come in the moment in which the normative view cannot be accommodated by concealment, sex.

Bacon, in *Study after Velázquez's Portrait of Pope Innocent X* (see fig. 3.3), examines the death of God and the internalisation of legal violence.¹⁵⁶ For Bacon, his violent relationship with Peter Lacy and the collapse of his personal belief in God, imbued his personal and sexual identity with existentialism.¹⁵⁷ Within the context of an abusive relationship, Bacon's experience of his sexuality becomes consistent with the abusive nature of law. Domination in the private space could be seen physically manifested in his relationship, externalising the underlying risks depicted in *Two Figures*, although without legal actors. Pulling together the insecurity of "home" as place for homosexual identity and the literal violence of the law, Bacon demonstrates the legal order as ruining personal dignity.¹⁵⁸ The scream itself is a reductive expression, "depersonalising" by presenting the figure as singularly emotional.¹⁵⁹ Bacon projects onto the Pope his own reduction by law into a legal subject, as Foucault considers law on sexuality does.¹⁶⁰ Screaming is therefore not just anger or resentment, but a purely distilled existentialist question. Bacon strips the Pope of adornments of his position to "desecrate" his stature and equalises the Pope as vulnerable as any other legal subject.¹⁶¹ Particularly, Bacon de-aestheticizes the Pope's power, and suggests just a man in a costume, and projects his own subjugation onto a man representing dominant power.¹⁶² Without markers of prestige, Bacon and the Pope

¹⁵⁵ Including imprisonment for life. Sexual Offences Act 1956 at Schedule 2 Part 1 s 3(a)

¹⁵⁶ Arya, above n 133, at 329

¹⁵⁷ Salter, above n 142, at 88

¹⁵⁸ Salter, above n 142, at 97

¹⁵⁹ Arya, above n 133, at 330

¹⁶⁰ Foucault, above n 70, at 43

¹⁶¹ Arya, above n 133, at 330

¹⁶² Quoting Hugh M. Davies in Arya, above n 133, at 330

are not so different; both are now dealing with the death of their God, and without gilded trappings to preserve a sense of self, they both find themselves grappling with screaming existentialism, leaving no room for other expression.¹⁶³ With the loss of his faith, parallels can be drawn to Cover's example of the perseverance of a martyr, although unlike them, Bacon's shows that his normative perspective has been crushed and law's assertion of his identity as a deviant reconfigures a perspective back together.¹⁶⁴



FIG. 3.3 – Francis Bacon *Study after Velázquez's Portrait of Pope Innocent X*, 1953. Oil on canvas, 153cm x 118cm, Des Moines Art Center in "Iconic Study After Velázquez's Portrait Of Pope Innocent X, 1953 On Display" Francis Bacon <www.francis-bacon.com>

The trauma of this process for Bacon comes from the loss of a validating belief system in God, the guidance for the martyr, something which was being reflected in law. The Church of England Moral Welfare Council and the Roman Catholic Advisory Committee on Prostitution and Homosexual Offences and the Existing Law recommended decriminalising homosexual behaviour in private, but submissions of legal actors like Sir Theobald Mathew divorced their moralistic arguments from their Christian Doctrine origins.¹⁶⁵ Bacon's former faith could no longer provide solace in repentance and the law had confirmed itself as being about

¹⁶³ Arya, above n 133, at 330

¹⁶⁴ Cover, above n 9, at 1605

¹⁶⁵ Lewis, above n 69, at 6 (Church of England Moral Welfare Council), 242 (Roman Catholic Advisory Committee) and 38-40 (Sir Theobald Mathew)

its own power and moralism. He intentionally uses the public impropriety of having a gaping mouth with the raw existentialism of screaming to force the viewer to consider how the publicly destroyed homosexuality in the *Men in Blue* paintings, strips the private self to what the law has created as an “abject” body.¹⁶⁶ Screaming is a failure of the dignity that law traditionally prescribed to the Pope and which is fearfully emulated by the public, as in *Men in Blue*, but juxtaposed with the depiction of screaming, law, even a closed mouth, retains the weight of existentialist interrogation.

That stands in contrast to Hockney’s work in *Domestic Scenes*, *Notting Hill*, the *Domestic Scene* with the most disconnect between the two partners. Hockney was trying to communicate a more general, normal and domestic view of homosexual relationships, resisting law’s attempt to destroy community bonds through normative violence.¹⁶⁷ This included modelling his friends and images from magazines, to pull together his visual world and present it as a natural occurrence rather than as a scandalised one.¹⁶⁸ Like *Two Figures*, the couples in Hockney’s works have a homosexual identity in relation to each other, however, law does not appear to threaten them. Rather than exploring “queer deviance” as a method of discussing identity as Bacon does, Hockney explores the couple as finding identity in each other and in their domesticity. Law allows the private space to move on from screaming existentialism, but the three *Domestic Scenes* all show the homosexual existence within a pattern familiar to law’s own normative perspective. We will see this below in more detailed discussion of law allowing homosexuals access to the sanctity of matrimonial relationships, but in terms of the individual, the internalisation of law provides identification with law’s normative values which helps to extinguish individual existentialism while degrading community association.

While Bacon and Hockney approach the internalisation of death from two very different angles, these angles reflect the work being on either side of the Wolfenden Report. Their vastly different approaches demonstrate the dichotomy of dystopic and utopic presentations of legal order in art.¹⁶⁹ The use of aesthetics can be very political, and Manderson notes that the gilded and aesthetic forms of law that obscure its self-legitimising violence can be used in art to create juxtaposition from analogous gilded aesthetics to violent imagery.¹⁷⁰ While Klimt does this simultaneously in *Jurisprudence*, Hockney situates his work within a broader artistic and social context to juxtapose aesthetics and violence, allowing his work to maintain a

¹⁶⁶ Arya, above n 133, at 337

¹⁶⁷ Cover, above n 9, at 1603

¹⁶⁸ Andrew Wilson “Pictures with people in” in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 53

¹⁶⁹ Manderson, above n 4, at 134

¹⁷⁰ Manderson, above n 4, at 135

propagandising function. Accordingly, he has broad social appeal, and it explains, in part, why he was lauded even in this early stage of his career.

Paintings like the *Domestic Scene* series can be read as innocent portraits of the kind of potential domesticity he witnessed in homosexuality. Simultaneously, Hockney can also express reverence for the work of his predecessors like Bacon, both in technical elements, and in subject matter. Bacon's use of existentialism allows the paintings to be embedded in the hostility of law and the death of the self. In the absence of the death penalty, the law proved it could maintain its legacy of death in assaults on the ability to self-realise. Particularly in the sense of safety in the private sphere, *Two Figures* shows an intention to remove a home for the homosexual identity and force people out into a heteronormative society. Salter describes the law as requiring a kind of "second society," for homosexual identity, but while the *Men in Blue* series touches on the public elements of that society, there is still a visual focus on its isolating quality.¹⁷¹ Hockney contrasts this with a sense of safety in the domestic sphere and a familiarity which imagines the homosexual experience as being connected to the outside world without the hostility of law. Hockney continues this exploration of the rejection of isolation in works that deal with pain, both in domesticity and within sexual interactions.

PAIN AND HOCKNEY'S WORK WITHIN THE LEGACY OF LAW ON HOMOSEXUAL BEHAVIOUR

During the early sixties and prior to the legalisation of private homosexual behaviour, pain was at the fore of the homosexual experience. Hockney's paintings speak, through both more direct imagery and through propaganda, to acknowledge how homosexuality was placed within a broader sociosexual environment. The law sponsored and facilitated environment can be seen reflected in legislation governing the form of the family unit as well as legal actors understanding of homosexual sex.

THE FAMILY MAN

As noted previously, the idea of home and domesticity comes through in Hockney's work frequently. As well as their characters dignity, in resistance to legal existentialism, the imagery speaks to the heteronormative family structure provided in law. The Wolfenden Report notes concerns frequently as to

¹⁷¹ Salter, above n 142, at 92

the sanctity of the family unit if the law was reformed.¹⁷² There is a strong association between those references to the idea that a defective home contributes to homosexuality, and particularly that homosexuality represents a deviation from “normal family life” which “form the basis of much of our social structure.”¹⁷³ Through to 1977, the Law Lords suggested that the court needed to remain “vigilant,” in order to protect children from the unhappiness and severance from normal life that exposure to homosexuality would induce.¹⁷⁴ The *Domestic Scenes* series resists this, portraying couples in home environments that have iconography of the typical home. His move towards domestic images and realism shows an intention to use the paintings to de-scandalise homosexual relationships as relationships that are more consistent with the depiction of stable families that medical professionals thought were required for raising appropriately socially conditioned children.¹⁷⁵ Matrimony and the proximity of relationships to a matrimonial relationship derived from canonical law characterises the basis for legal relationships in the family.¹⁷⁶ Homosexual relationships clearly sit outside of this and after World War II, there was a persistent belief in the need for the state to intervene in sex in order to support a procreative function for the good of society and the moral culpability of homosexuals for failing to support this task.¹⁷⁷

Law’s intervention into family structures has manifested itself with wide ranging consequences. For example, the Civil Partnership Act 2004 provided a legal relationship that allowed same-sex couples to enjoy most of the legal benefits of marriage. The Act conferred the rights of marriage across almost the entire spectrum of law, including matrimonial property rights and child adoption but did differ in some important respects.¹⁷⁸ Importantly, the law remained steadfast in a denial of the sexuality of the couple. Unlike marriage, the Act did not require a sexual relationship, which could be read as a reflection of historical denial of homosexuality as a valid form sexuality.¹⁷⁹ Most obviously, a civil partnership continued to not be “marriage.” It was not until 2013 that the Marriage (Same Sex Couples) Act 2013 was passed finally allowing equal access to the institution of marriage. This represented a final push over the line for

¹⁷² Lewis, above n 69, at 41, 106, 128-129, 133, 171 etc.

¹⁷³ Lewis, above n 69, at 171

¹⁷⁴ Stephen Cretney *Same Sex Relationships: from odious crime to gay marriage* (Oxford University Press, Oxford, 2006) at 10

¹⁷⁵ Lewis, above n 69, at 133

¹⁷⁶ Foucault, above n 70, at 38

¹⁷⁷ Lewis, above n 69, at 40, 78 and 106; Chris Waters “The homosexual as a social being in Britain, 1945-1968” in Brian Lewis (ed) *British Queer History* (Manchester University Press, Manchester, 2013) at 193; Michael Warner “Introduction: Fear of a Queer Planet” (1991) 29 *Social Text* 3 at 10

¹⁷⁸ Cretney, above n 174, at 28

¹⁷⁹ Cretney, above n 174, at 33

legislation in recognising homosexual couples within the context of the matrimonial concept that had defined decades of pain in the exclusion of same-sex couples from the traditional legal marker of family. The “othering” effect was not an accidental feature of the Civil Partnership Act 2004; legislators specifically wanted the legal recognition to be to the exclusion of the social institution of marriage.¹⁸⁰ They found “gay marriage” to be an inherently contradictory term, one that turned its back on the origins of the matrimonial concept in Christianity.¹⁸¹ There persisted to be a reticence to consider homosexuality as compatible with long held conceptions of family. A conjugal model of marriage, that relies on a “natural” sexuality to affirm the relationship as a biological state to be recognised in law harks back to discussion of homosexuality as an unnatural inversion.¹⁸² Like the Civil Partnerships Act 2004, this argument denies the foundation of homosexuality, a sexual attraction, having sex, that is the same in all facets bar procreative. Criminalisation of gross indecency and buggery and the refusal to reach parity on the age of consent until 2001 affirmed homosexuality as dirty, diseased, and fundamentally different to heterosexuality in law, leading into the same-sex marriage debate in Britain and across Britain’s former colonies who forcefully inherited the matrimonial foundation of family.¹⁸³

While same-sex marriage in Britain today enjoys relatively high approval ratings, not all homosexuals are satisfied with it as heteronormative indoctrination.¹⁸⁴ Hockney did not find marriage to be an enticing concept in and of itself. He believed that it’s about property rather than a deepening of an emotional relationship, a criticism of the idea of the naturality of marriage itself as well as heterosexual gatekeeping of a legal construct.¹⁸⁵ The fifties and the early sixties featured complicated relationships with masculinity in the domestic sphere. For example, Bacon’s paternal rejection in 1925 and comments on the role of fathers in submissions to the Report, that they were to have assertive dominion over their sons to the exclusion of too aggressive a female influence, reinforces that male relationships were not considered typical sources of warmth and familial intimacy.¹⁸⁶ When men explored feminine characteristics (like Bacon) or were seen as subservient to mothers and wives, it was a clear (and supposedly psychologically backed) failure of the

¹⁸⁰ Cretney, above n 174, at 16

¹⁸¹ Cretney, above n 174, at 16

¹⁸² Rex Adhar “Finding true essence of marriage” (8 April 2013) Stuff <www.stuff.co.nz>

¹⁸³ Sexual Offences (Amendment) Act 2000 at s 1

¹⁸⁴ From a YouGov Poll commissioned by Pink News, see Nick Duffy “Tory voters back Northern Ireland equal marriage, as Theresa May faces pressure” (27 June 2018) PinkNews <www.pinknews.co.uk>; Jason J. Hopkins, Anna Sorensen and Verta Taylor “Same-Sex Couples, Families, and Marriage: Embracing and Resisting Heteronormativity” (2013) 7 *Sociology Compass* 97 at 98

¹⁸⁵ Deborah Solomon “David Hockney, Contrarian, Shifts Perspectives” *New York Times* (online ed, 5 September 2017)

¹⁸⁶ Salter, above n 142, at 86; Lewis, above n 69, at 49, 103, 134, 159 and 175

family and the matrimonial model.¹⁸⁷ Hockney consistently rejected this in his painting of couples, including in *Chris Isherwood and Don Bachardy* (see fig. 4.1) in the year of the decriminalisation of homosexual behaviour.¹⁸⁸ As part of this Hockney reduced the use of the male nude as in *Domestic Scenes*, *Notting Hill* and *Los Angeles* to present male intimacy within the context of their complex relationships (alongside his heterosexual friend's relationships).¹⁸⁹

Hockney benefits from the normalisation of homosexual coupledness following reform. The focus on procreancy following World War II and Hockney's own understanding of marriage as a property construct notes matrimonial relationships as serving a purpose in economic and legal productivity. Below I discuss laws hiding of parts of homosexuality, but Hockney's depictions of a new form of acceptable homosexuality is lucrative. *Portrait of an Artist (Pool with Two Figures)* (see fig. 4.2) held until 2019 the record for the most expensive painting sold at auction by a living artist, at USD90,300,000 and depicts a relationship at its end.¹⁹⁰ The painting demonstrates a part of coupledness that is essential to its legal commitment, hesitancy, and heartbreak, at its failure. Hockney's former lover, rigid in his suit, staring at the temptation of both the water and the swimmer straddles the line between matrimony as a dominating and desexualising force and the freedom of sexual liberation that Hockney aspired to in California following his departure from Britain in 1964.¹⁹¹ The new terrain of the private swimming pool, rare in Britain, provides a new imagined future that pivots away from domesticity as the only possible form of acceptable homosexuality.¹⁹² Before this, however, British legal understanding of homosexuality as deviancy dimly colours Hockney's representations of sexuality.

¹⁸⁷ Lewis, above n 69, at 159

¹⁸⁸ Sexual Offences Act 1968

¹⁸⁹ Helen Little "Towards Naturalism" in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 80

¹⁹⁰ Jonathon Jones "David Hockney's \$90.3m painting reminds us what great art looks like" *The Guardian* (online ed, 19 November 2018)

¹⁹¹ Chris Stephens "Sunbather" in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 67

¹⁹² Chris Stephens "Sunbather" in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 67



FIG. 4.1 – David Hockney *Chris Isherwood and Don Bachardy*, 1968, Acrylic on canvas, 212 x 303.5 cm, Private collection, “Exploring the Love Letters of Christopher Isherwood and Don Bachardy” The Met Museum <www.metmuseum.org>



FIG. 4.2 – David Hockney *Portrait of an Artist (Pool with Two Figures)*, 1972, Acrylic on canvas, 213.5 cm x 305 cm, Private Collection, in “David Hockney’s Portrait of an Artist (Pool with Two Figures)” (12 December 2018) Christies <www.christies.com>

THE DEVIANT

In contrast to Hockney's work which depicts homosexuality as "normal" along heteronormative lines, he explores art depicting supposed deviancy. Particularly, when looking at sexuality specifically, his work does not shy from the reality of the sexual experience. *The Cha Cha That was Danced in the Early Hours of 24th March* demonstrates social reality by representing experienced joy, an important part of his homosexuality, but other works examine what occurs on the fringes of homosexuality where it cannot be incorporated into a heteronormative model of relationship.¹⁹³ Particularly in sexual assault, Hockney's work engages with the concerns of homosexuality as a "corrupting" and violent force, suggesting that ambiguity between violence and sex is a reflection of law's violent creation of "deviancy". Excluding sexuality from the matrimonial model of homosexual relationships in law, the Civil Partnership Act 2004 demonstrates a shift from pre-1967 punishment of homosexuality to its denial. This denial can be demonstrated in law enforcement comments in submissions to the Report and contemporary studies on male sexual assault in Britain.¹⁹⁴ This affirms that pain remains within legal temporality on homosexual behaviour; as the death penalty became complicit in suicide, law retains some complicity in sexual violence.

Cleaning Teeth, Early Evening (10PM) W11 (1962) supplements the comical act of the figures embraced in a 69 position with toothpaste replacing their genitals, with vicious teeth and one of the figures chained to the bed, Vaseline poking out from underneath, suggesting the sexual act is primed to go further.¹⁹⁵ Hockney himself drew a clear distinction between the intrigue of bondage and sexual acts of sadism, and *Cleaning Teeth* engages with that line with ambiguity.¹⁹⁶ This is a convention that can be seen in Bacon's work as well, with *Two Figures* using photos of wrestlers as reference for sex alongside facial features of himself and Peter Lacy to reference ambiguity between violence and sex in private.¹⁹⁷ One of the darkest of his works, and one that borrows technically from Bacon extensively, is *My Brother is only Seventeen*. It features two men walking away into a dark void, with graffiti from the Earls Court Underground lavatories, including the name of the painting, dealing with public sex, unlike *Two Figures*.¹⁹⁸ The title ominously hints at a world of sexual education that frames homosexuality as deviant and forces it into alternative spaces, and possibly

¹⁹³ Helen Little "Demonstrations of Versatility" in Christ Stephens and Andrew Wilson David Hockney (Tate Publishing, London, 2017) at 34

¹⁹⁴ See Lewis, above n 69, at 13-102; Aliraza Javard "Poison Ivy: Queer Masculinities, Sexualities, Homophobia and Sexual Violence" (2018) 15 European Journal of Criminology 748

¹⁹⁵ Webb, above n 3, at 64

¹⁹⁶ Webb, above n 3, at 64

¹⁹⁷ Salter, above n 142, at 86

¹⁹⁸ Webb, above n 3, at 36

plays on the fears of lowering the age of consent for homosexual behaviour to the same as girls for fear of corrupting boys.¹⁹⁹ *My Brother is only Seventeen* creates an abstracted image of social reality, rather than the imagined future of the *Domestic Scenes*. Police and judges railed against public sex in submissions, often for fear of molestation for respectable men who found themselves in those settings at the wrong time.²⁰⁰ Homosexuals could victimise respectable men in those spaces, but otherwise the spaces appear to have been considered dens of depravity by consent of those there. The suggestion of violence in *Cleaning Teeth* and *My Brother is only Seventeen* features in the perspective of legal actors; that public cruising spaces are spaces where violence may occur, but with a warped sense of victimisation and attribution of responsibility. Submissions commenting on the promiscuity of homosexuals as compared to heterosexuals reinforces this perspective.²⁰¹ Here, Hockney's works reference a perspective of violence in sex is a part of the "beastliness" "depraved creatures" are engaged in."²⁰² Law protected the public from witnessing homosexual behaviour before protecting victims from actual violence. The idea that homosexual men may find themselves, through promiscuity or public cruising, victims to assault as a kind of inevitability has proven to be persistent.

"Most males who that are fondled or sodomised are males that want to be sodomised." – Sexual Assault Service Provider on male sexual assault victims.²⁰³

Given the narrative that homosexuals are depraved, police have had a difficult history with male victims of sexual assault. Issues include passive attitudes towards victims, under reporting, the pressure on victims to support the same hegemonic ideas of masculinity that informed divisions in the legitimacy of homosexual men, as well as police playing an active role in re-traumatising victims through the legal process.²⁰⁴ In responses to questions regarding the circumstances of male rape and sexual assault, police considered that those exploring their sexuality may find themselves in "rape" situations that are accidental or incidental to that exploration.²⁰⁵ Further comments about "homosexual males making themselves vulnerable," reinforce the idea that public cruising is behaviour that exposes men to assault, imparting responsibility for violence

¹⁹⁹ Lewis, above n 69, at 263

²⁰⁰ Lewis, above n 69, at 54 and 58

²⁰¹ Lewis, above n 69, at 104 and 169

²⁰² Lewis, above n 69, at 68

²⁰³ Michelle Lowe "Male sexual assault survivors: lessons for UK services" (2018) 10 Journal of Aggression, Conflict and Peace Research 181 at 182

²⁰⁴ Aliraza Javard *Male Rape, Masculinities and Sexualities* (online ed. Palgrave Macmillan, Hampshire, 2018) at 200, 207-209; Lewis, above n 69, at 115

²⁰⁵ Javard "Poison Ivy: Queer Masculinities, Sexualities, Homophobia and Sexual Violence", above n 194, at 760

that occurs onto the victim.²⁰⁶ Perceptions of gay men as predatory and corrupting from submissions to the Report run parallel to contemporary police enabling the diminishment of violence against homosexuals as a deviant class.²⁰⁷ Statistics citing 72% of perpetrators as self-identifying or victim identified as heterosexual complicate understandings of this kind of sexual violence as being about a deviant pact between homosexuals, undermining police understandings that imply homosexuals find themselves in circumstances their own community makes dangerous.²⁰⁸ *My Brother is only Seventeen* depicts two people heading into the unknown and if something went wrong, legal actors would extrapolate from historical perceptions of deviancy to presume consent.



Gasp, November 17

FIG. 4.3 – Rob Tennent *Gasp, November 17*, 2018, photography in Rob Tennent *Come Back to Bed* (Robert Brown, Auckland, 2018)

Accordingly, the general “lifestyle” that one officer cited as creating victimisation can be reflected in the ambiguity of *Cleaning Teeth* as an imagined future of the law prior to reform, of depravity and moral collapse.²⁰⁹ If there was an issue of depravity, or sexual violence, Hockney plays with the idea of police indifference and a willingness to read ambiguity as an acceptable margin of error homosexual men make.

²⁰⁶ Javard “Poison Ivy: Queer Masculinities, Sexualities, Homophobia and Sexual Violence”, above n 194, at 762

²⁰⁷ Abigaël Candelas de la Ossa “‘Talk, listen, think’: Discourses of agency and unintentional violence in consent guidance for gay, bisexual and trans men” (2016) 27 *Discourse and Society* 365 at 377; Lewis, above n 69, at 13, 99, 145 etc.

²⁰⁸ Candelas de la Ossa, above n 207, at 377

²⁰⁹ Javard “Poison Ivy: Queer Masculinities, Sexualities, Homophobia and Sexual Violence”, above n 194, at 762

The law refuses to intervene or mitigate that violence, which reinforces danger as a cyclical part of the homosexual experience.²¹⁰ Aliraza Javard explains that these concerns of lifestyle and promiscuity as creating the impression of “deserving victims” or homosexuals having some culpability in their victimhood is related to heteronormative values that are manufactured, in part, by law.²¹¹ This creates a temporal mistrust of law which further alienates homosexuals from legal services that may have protective value.²¹² Contemporary legal systems continue to demand that homosexuality look as much like legal matrimonial relationships as possible, or become complicit in violence that continues to occur on the “deviant” fringe, as the violence and domination depicted in *Jurisprudence* and Cover’s essay suggest.²¹³ Hockney has a legacy in art that contemporarily engages with sexual assault, for example in the photographic work of Rob Tennent in *Come Back to Bed* (see annex 18.0) which similarly pulls on the aesthetic ambiguity of sex that confuses the otherwise relatively simple boundaries of consent.²¹⁴ The legal system creates, in its active and passive victimisation of homosexuals, the afterlife of both *My Brother is only Seventeen* and *Cleaning Teeth* in the context of the embedding biases and pain from law at the time of the paintings’ creation in current law.

CONCLUSION

Art provides a useful lens for understanding how law interacts with and constructs society, and this is particularly true for laws regulating homosexuality as it is predicated on social relationships. Manderson demonstrates that artistic interpretation engages with law, as law is fundamental to the construction and analysis of art. This may require creative analysis. However, Hockney’s work demonstrates that art reflects law in social reality, demonstrating both legal attitudes towards homosexuality and broader principles of legal control, whether it is physical or internalised. As a reflection of human experience, art incorporates pain as a connector between the artist and the viewer, between art and law. Paintings like *Domestic Scenes: Broadchalke, Wilts*, *Pieta* and *Jurisprudence* use and develop alternative perspectives on how and who experiences pain. When the law creates pain, works like *Jurisprudence* or *My Brother is only Seventeen* reflect that pain as a normative feature of law. Meanwhile, the *Domestic Scenes* create alternative visions for the future in

²¹⁰ Javard “Poison Ivy: Queer Masculinities, Sexualities, Homophobia and Sexual Violence”, above n 194, at 762

²¹¹ Javard “Poison Ivy: Queer Masculinities, Sexualities, Homophobia and Sexual Violence”, above n 194, at 762

²¹² Jamie S. Frankis and Paul Flower “Public Sexual Cultures: A Systematic Review of Qualitative Research Investigating Men’s Sexual Behaviors with Men in Public Spaces” (2009) 56 *Journal of Homosexuality* 861 at 883

²¹³ Frankis and Flower, above n 211, at 881; the framing of homosexuality as promiscuous and innately risky in public media, supported by police above, causes continual misrepresentations of the role of consent and risk in public sex. See Candelas de la Ossa, above n 207, at 374 and 377

²¹⁴ Rob Tennent *Come Back to Bed* (Robert Brown, Auckland, 2018)

response to current reality; refusing to accept law's imagined reality of the present as a certain. Hockney's work understands the early sixties and homosexual temporality as a product of that violence, and the homosexual as a legal subject forced to assimilate or accept subjugation. *Domestic Scenes* imagine a world of assimilation within the legally constructed family while in Hockney's later work, like *Pool with Two Figures* he reflects progress beyond reform in 1967. His works prior continue to be invaluable in understanding how law, even reform, entrenches certain elements of violence in society and how those elements may be predictable into the future. Examining Hockney's work as living documents allow us to understand law at that time, and how we relate to and think of contemporary law.

Submissions to the Wolfenden Report may read contemporarily as jarring and out of touch, but they speak to things unsaid in legal canon. They cut through formalities of law to reveal power that is expressed through violence. Hockney also works through formality. He reflects and reinterprets the pain felt by Bacon, Turing and others, who succumbed to the pressures of a legal order, but presents a new potential future for his wide audience. The imagined future Hockney presents navigates violence and questions the values that underpin legal domination that occurs privately and publicly. Following the early sixties in Hockney's work, his imagined future develops within the context aspirational American sexual liberation, while remaining engaged with and reflective of law in society. While the suited man looks longingly into the pool in *Portrait of an Artist (Pool with Two Figures)*, a work from 1966 possibly best presents the future as liberation, *Peter Getting Out of Nick's Pool* (see fig. 4.4). Following from works like the *Domestic Scene* paintings, *Cleaning Teeth* and Bacon's *Two Figures*, it signifies a development of homosexual identity, not disregarding the persistent legacy of legal violence, but focusing on the figure in the pool without so much of the burden of legal violence.



FIG 4.4 - David Hockney *Peter Getting Out of Nick's Pool*, 1966, Acrylic on Canvas, 152 cm x 152 cm, Walter Art Gallery, in "Peter Getting Out of Nick's Pool" National Liverpool Museums <www.liverpoolmuseums.org.uk>

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