

## **Appropriation Art, Labor, and the Law:**

### **From an Aesthetics of Administration to an Administration of Aesthetics**

“Birdtalk. Non sequitur. Gobbledygook. Jokes. Oxymorons. ‘Psychic Jiu-Jitsu.’”<sup>1</sup> These are the words that Richard Prince used to describe comments the artist had left on various Instagram accounts he’d stumbled upon in 2014. Prince liked the images he’d found, and felt he needed to respond to them in his own way. [FIG. 1] Not content, however, with simply playing the role of social media participant, Prince took the additional steps of screen-capturing the newly-commented posts, enlarging them, ink-jet printing them onto canvas, and selling them for large sums of money through his New York gallery. [FIG. 2] No longer were the appropriated posts merely the stuff of digital disposability. Now they were art. His art. [FIG. 3] *New Portraits*, Prince called them.

[FIG. 4] In one case, Prince copied an Instagram image that had originally been taken by photographer Donald Graham. *Rastafarian Smoking a Joint*, however, was apparently already “art,” given that Graham had won an award for it, and furthermore sold the picture in limited-edition prints through his Paris gallery. [FIG. 5] Needless to say, upon learning of it, Graham was not exactly thrilled with Prince’s intervention. Graham would eventually file a copyright infringement lawsuit against the artist at the end of 2015.

One of the remarkable things about *Graham v. Prince* is the degree to which art world and public media pundits have declared Prince’s wholesale hijacking to be a meta-critique of the original picture, and indeed of social media at large, and likewise a bona-fide artistic gesture. As New York art critic Jerry Saltz opines, it’s what Prince “does in the comments field that is truly

brilliant...delving as deep as he ever has into privacy, copyright, and appropriation, twisting images so that they actually seem to undergo some sort of sick psychic-artistic transubstantiation where they no longer belong to the original makers.”<sup>2</sup> Leaving aside Saltz’s own gobbledygook here, it’s important that Prince demonstrates, if even through a surrogate like a bedazzled art critic, that his Instagram paintings are *transformative*. As is likely known to the audience here, copyright infringement cases involving appropriation art over the past two decades have increasingly hinged upon the purpose and character of the reuse, and the degree to which new works transform their originals, adding additional meanings, insights, and understandings.

How did we get here? How could it be that user comments are now being offered to argue for the fair use copying of an entire Instagram image with next to no other obvious formal alteration apparent? We would do well to recall that twenty-five years ago, artist Jeff Koons lost a fair use bid despite circumstances that weighed more in his favor than Prince’s do now. [FIG. 6] In *Rogers v. Koons* (1992), Koons appropriated in toto a black-and-white photo as the basis for a series of life-size, painted wood sculptures; he expressed artistic intentions beyond Prince’s mere self-affirmation; his sale of the three works would most likely have never interfered with the market value of Rogers’s image in any significant way. And yet a New York court—the same New York court in which *Graham v. Prince* will play out—ruled the Koons was, when all was said and done, a copyright infringer.

The opinion in *Rogers v. Koons* came just at the cusp of a major shift in fair use interpretation. Judge Pierre N. Leval’s 1990 essay, *Toward a Fair Use Standard*, would have a profound effect on fair use determinations in subsequent years.<sup>3</sup> Since its publication, which introduced the notion of transformative fair use into copyright jurisprudence, creative

appropriation has enjoyed a legal rethink. Attitudinal shifts within judiciaries, then, are part of what marks the difference between appropriation art lawsuits two-and-a-half decades ago and now. [FIG. 7] And after all, it may just be that at least a few federal judges here and there use social media too, and see the same content, such as memes—memes often built upon appropriated, copyrighted materials—that we all do.

But basing legal defenses on emerging or current social or cultural practices can be tricky, which may explain why memoranda of law in support of appropriation art often appeal to history—to legal precedent yes (it’s very important), but also to the history of artistic avant-gardism. To read a Prince defense brief is to read a who’s who of appropriation art history: [FIG. 8] Duchamp, [FIG. 9] Picasso, [FIG. 10] Warhol, [FIG. 11] Levine, [FIG. 12] and Koons have all been invoked in order to historicize and thus legitimize the offending work. One has to wonder, however, if in this case, a slightly different art history might be more appropriate. What if we were to summon the artistic tendencies active just prior to the emergence of postmodern appropriation art in the 1980s, that is, to Conceptual Art of the 1960s and 70s?

Art historian Benjamin Buchloh’s text *Conceptual Art 1962-1969: From the Aesthetic of Administration to the Critique of Institutions* (also published in 1990) provides a rigorous analysis of experimental art practices from that period, which may assist in my endeavor here. For Buchloh, Conceptual Art represented “the most rigorous investigation of the conventions of pictorial and sculptural representation and a critique of the traditional paradigms of visibility” since World War II.<sup>4</sup> [FIG. 13] As an example, here is Mel Bochner’s *Working Drawings and Other Visible Things on Paper Not Necessarily Meant To Be Viewed as Art*, a collection of notes, drawings, and other ephemera, collated into binders from Bochner’s own materials as well as

those from other artists and friends. [FIG. 14] In many respects the antithesis of the schlocky, bright imagery that characterized earlier Pop Art, Conceptual Art eschewed the visually seductive aspects of optically-oriented expression in favor of banal presentation. We might say that Conceptual Art advocated for the discursive over the sensual, the idea over the aesthetic.

[FIG. 15] Here is Joseph Kosuth's perhaps most well-known work, *One and Three Chairs*, pretty much an illustration of semiotics 101; and in an example of Conceptual Art that invites viewers to consider art as a legal construction, [FIG. 16] Robert Morris's *Document (Statement of Aesthetic Withdrawal)*.

Now, Conceptual Art would take on many forms and operate in many modes. Yet I present these few examples here to emphasize just how important language and the written word were to its formation, and to try to posit a link between these practices and Prince's recent iterations of a kind of "text" art. We also encounter other key similarities between Conceptual Art and Prince's *New Portraits*: a reliance upon vernacular photography, an attenuation of handicraft, and a matter-of-fact, re-presentation of everyday reality (i.e., the use of the literal over the referential). Buchloh would describe these features as an *aesthetics of administration*, which, within the context of Conceptual Art (at least in its better moments), took on a positive—which is to say critical—quality. Understood as nothing less than the radical interrogation of modernity's visual culture and its attendant implications, the aesthetics of administration launched an assault on the privileging of visibility and even perception per se; it undermined art as hermetic and self-reflexive, it revealed art's implicit institutional hierarchies; it debunked art's ideological appeal to the transcendent. Through an emphasis on linguistic and didactic

expression, the aesthetics of administration brought Duchamp's project—the idea of art as socially and politically relational and contingent—to full fruition.

Might Prince's *New Portraits* inherit the legacy of a conceptual, critical, aesthetics of administration? The re-presentation of the Instagram interface, “as is,” further aided by the rather rudimentary addition of Prince's actual comments, point in that direction. And as the artist's court brief in *Graham v. Prince* states,

Prince's work uses [Graham's] image *as it has been incorporated within a social media post*... This key difference, reflected in the addition of Instagram visuals and text surrounding the photograph, conveys a message sharply different from Graham's: a commentary on the power of social media to broadly disseminate others' work, the vanity of social media, its pervasiveness and sexualized nature, and people's need to receive “likes” and “comments.”<sup>5</sup>

From this perspective, Prince's appropriation sure sounds like it's transformative.

But let's not get ahead of ourselves here. Let us, rather, spend a bit more time unpacking this term “administration.” Among other things, it conjures up images of the bureaucratic blues: the office cubicle, the shuffling of paperwork, the tedious management of schedules and budgets. To engage in administration is to engage in decidedly non-creative labor. For Buchloh, Conceptual Art's less successful stagings meant that an aesthetics of administration reaffirmed the means-ends rationality of an inescapable “administered world,” [FIG. 17] as cultural critic Theodor Adorno once remarked. In this formulation, administration takes on an insidious quality, describing the rationalist and instrumentalizing processes of social control pervasive in all spheres of life, including in the production of art. It's difficult to find an example that better

embodies the alienation that is part and parcel of an aesthetics of administration than Terry Gilliam's 1985 film *Brazil*, here. [FIG. 18]

Yet one of the limitations of Buchloh's essay, as well as Adorno's concern over an administered world, simply involves the element of time. This is to say: much has changed since Adorno diagnosed advanced capitalism in Western society in the mid-twentieth century, and indeed much has changed even in the last three decades since Buchloh's meditation on the aesthetics of administration in Conceptual Art. His writing comes at the end of the 1980s, as accounts of the postmodern moment are trying to make sense of the breakdown between historically-separated high and low culture. For Buchloh (as well as Adorno), avant-garde practices were those that continued to resist the mechanisms of a capitalist culture industry. But in the twilight of the twentieth century, what exactly would constitute "avant-garde" practice? Such a question is made all the more challenging by a collapse of distinction not only between high and low art, but between the producer and the consumer. Here I quote curator Nicolas Bourriaud, whom I believe captures the sentiment nicely:

In our daily lives, the gap that separates production and consumption narrows each day...the consumer customizes and adapts the products that he or she buys to his or her personality or needs. Using a remote control is also production, the timid production of alienated leisure time: with your finger on the button, you construct a programme... While the chaotic proliferation of production led conceptual artists to the dematerialization of the work of art, it leads postproduction artists towards strategies of mixing and combining products. Overproduction is no longer seen as a problem but as a cultural ecosystem.<sup>6</sup>

It is worth noting Bourriaud's profession here, for there seems to be nothing more anxiety-inducing for contemporary art curators than the overdetermined term *curation* itself. Now a buzzword dislodged from art contexts (but nonetheless remaining "arty"), the "curatorial" has come to encompass just about any activity that entails the selection and expression of personal prerogative: from music playlists to lunch menus, travel destinations to dating services. To curate is to assert one's authorial subjectivity in a bid for authenticity. And so in an age of infinite variety and micro levels of customization—increasingly carried out through screen interfaces—what we are witnessing is less an aesthetics of administration, than an administration of aesthetics. The new activities of creative labor involve the manipulation of data: the arrangement of photos; the batch compression of video footage; the automation of audio events in a sequence; or more simply, the use of filters in SnapChat, or, with Richard Prince's Instagram, the removal of some users' comments in favor of his own. It is as if we're all Duchamp now, setting upon the readymade products of the world in willful acts of artistic declaration. And in almost every case, it is an articulation and proclamation of the self.

It is at this point that Conceptual Art and Prince's work part ways. For if one of the imperatives of Conceptual Art was to question the privileged position of the author, Prince seeks to further align himself with it. His use of text—the "birdtalk" as he calls it—is nothing more than code for what he makes plain in the press release for the *New Portraits* series. [FIG. 19] In the self-written statement, Prince reveals what his intentions are. [FIG. 20] "What's yours is mine." This isn't the first time that Prince has expressed a cavalier attitude about the sources from which he appropriates. In a statement issued just after his last legal debacle (which also involved copying Rasta images), *Cariou v. Prince*, the artists wrote the following:

Like most images I work with they weren't mine. I didn't know anything about Rastas. I didn't know anything about their culture or how they lived. I had plenty of time to find out. What I went with was the attraction. I liked their dreads. The way they were dressed...gym shorts and flip-flops. Their look and lifestyle gave off a vibe of freedom.

Maybe I'm wrong about the freedom but I don't give a shit about being wrong.<sup>7</sup>

So when Prince's defense team in *Graham v. Prince* claims that his painting represents "a commentary on the power of social media," or when Jerry Saltz states that Prince delves "into privacy, copyright, and appropriation," what is really being implied is the reassertion of authorial sovereignty—the work is "about" not so much the power of social media or appropriation in a generic sense but the power of Richard Prince to take from social media as he pleases. Yet let me be clear: a work of art about copyright infringement does not inoculate it against it being a copyright infringement.

Whenever I come across defenders of Prince's brand of appropriation, taken together with the ways in which the artist has positioned his work in statements, interviews, and depositions, I cannot help but recall a political cartoon I saw just before the 2016 Presidential election. [FIG. 21] The cartoon alludes to disenfranchised voters smitten by Trump's messaging, who may soon regret backing a candidate who does not have their interests at heart. Even more simply, the cartoon suggests that trouble visits those who do not take care to think through the implications of their actions. It is a critique of anti-intellectualization. I am not in favor of the anti-intellectualization of art (I guess I align myself with the Conceptualists). As we continue to perform our cultural lives through an administration of aesthetics, as images technically available for capture float all around us, as the lines between labor and leisure further dissolve, it is incumbent upon us to really think through our ideas given the creative potential at our fingertips.



## Notes

1. See <https://www.gagosian.com/exhibitions/richard-prince--june-12-2015>.
2. Jerry Saltz, "Richard Prince's Instagram Paintings Are Genius Trolling," <http://www.vulture.com/2014/09/richard-prince-instagram-pervert-troll-genius.html>
3. Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* Vol. 103 (1990): 1105-1136
4. Benjamin H. D. Buchloh, "Conceptual Art 1962-1969: From the Aesthetic of Administration to the Critique of Institutions," *October* Vol. 55 (Winter, 1990): 105-143
5. "Memorandum of Law in Support of Defendant's Motion to Dismiss the Plaintiff's Corrected, Amended Complaint," *Graham v. Prince* (2016), <https://www.plainsite.org/dockets/download.html?id=237163529&z=840eeb32>
6. Nicolas Bourriaud, *Postproduction/Culture as Screenplay: How Art Reprograms the World*, trans. Jeanine Herman (New York: Lukas & Sternberg, 2002) 39-45.
7. See <https://www.gagosian.com/exhibitions/richard-prince--may-08-2014>.

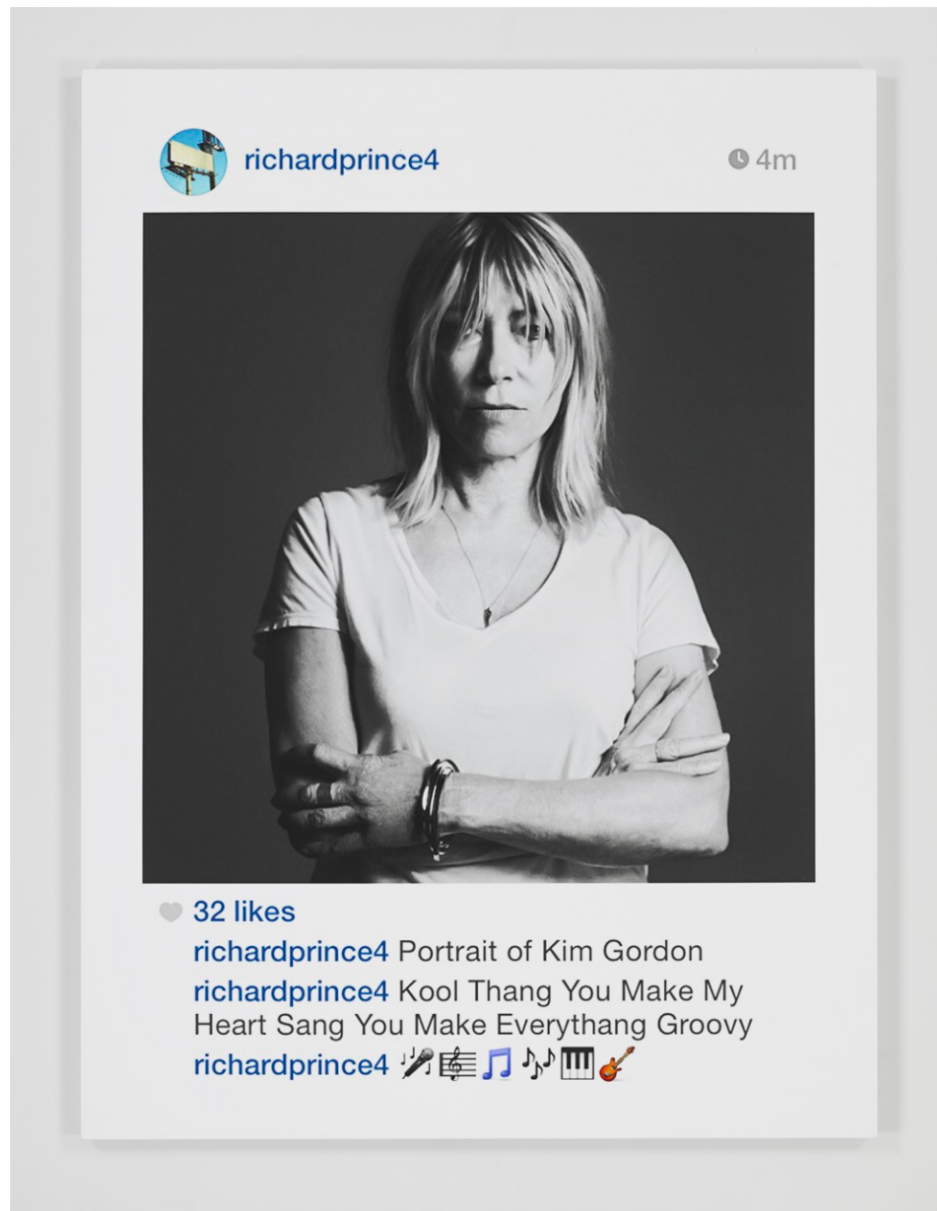


Figure 1.



Figure 2.

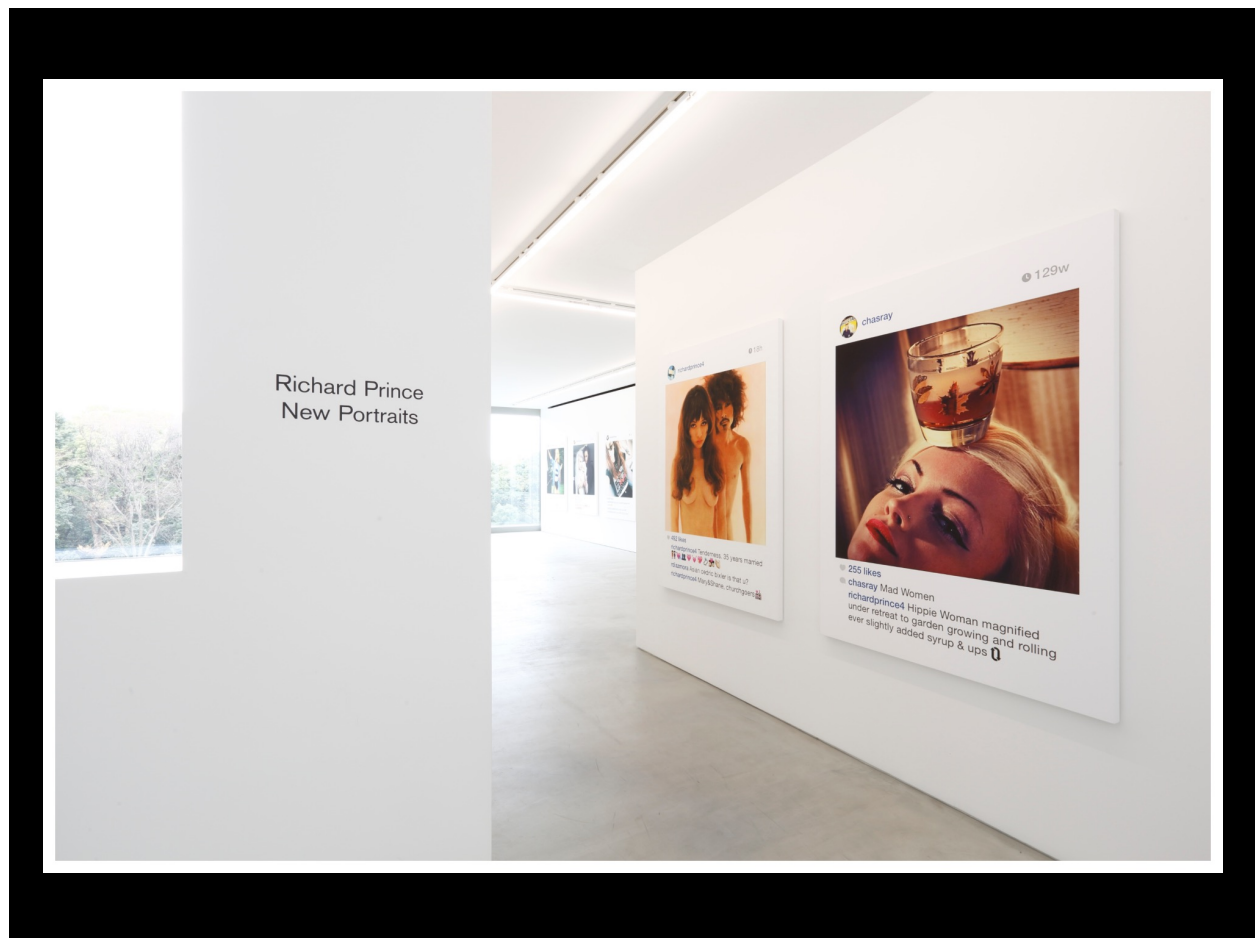


Figure 3.



Donald Graham, *Rastafarian Smoking a Joint*, 1996

Figure 4.



Figure 5.



LEFT: Art Rogers, *Puppies*, 1980; RIGHT: Jeff Koons, *String of Puppies*, 1988

Figure 6.



Figure 7.





Marcel Duchamp, *Fountain*, 1917

Figure 8.



Pablo Picasso, *Guitar, Sheet Music, and Glass*, 1912

Figure 9.



Andy Warhol, *16 Jackies*, 1964

Figure 10.



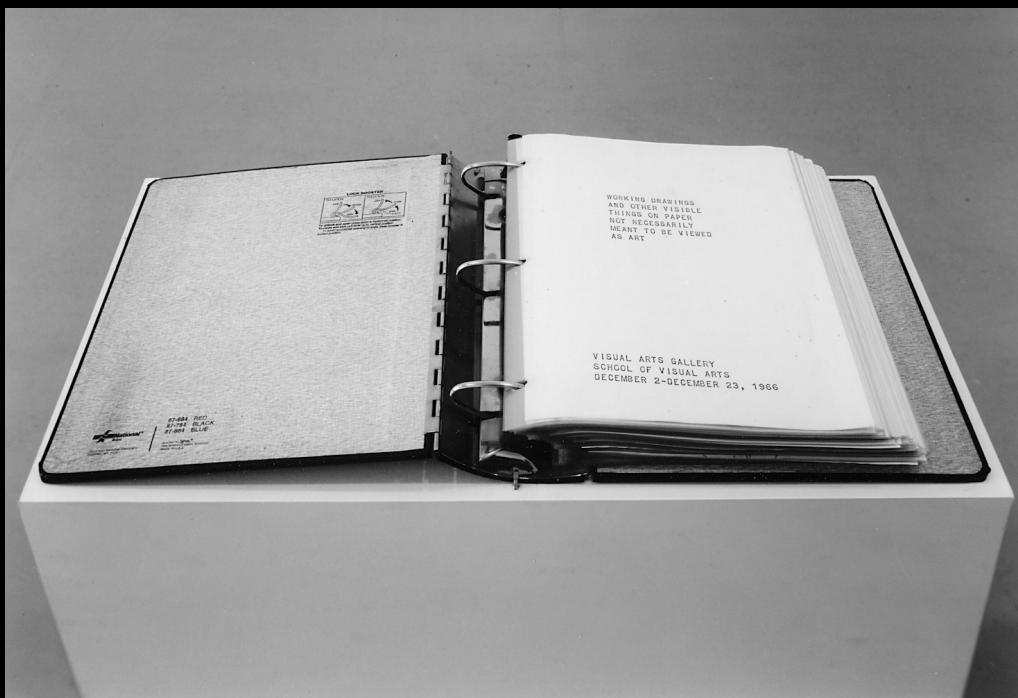
Sherrie Levine, *After Alexander Rodchenko*, 1984

Figure 11.



Jeff Koons, *Michael Jackson and Bubbles*, 1988

Figure 12.



Mel Bochner, *Working Drawings and Other Visible Things on Paper Not Necessarily Meant To Be Viewed as Art*, 1966

Figure 13.



Mel Bochner, *Working Drawings and Other Visible Things on Paper Not Necessarily Meant To Be Viewed as Art*, 1966

Figure 14.



Joseph Kosuth, *One and Three Chairs*, 1965

Figure 15.





Figure 16.



Terry Gilliam, *Brazil*, 1985

Figure 17.



Terry Gilliam, *Brazil*, 1985


Figure 18.

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New Portraits.

In 1984 I took some portraits.  
 The way I did it was different. The way had nothing to do with the tradition of portraiture.  
 If you wanted me to do your portrait, you would give me at least five photographs that had already been  
 taken of yourself, that were in your possession (you owned them, they were yours), and more importantly . . .  
 you were already happy with.  
 You give me the five you liked and I would pick the one I liked. I would rephotograph the one I liked and that  
 would be your portrait. Simple. Direct. To the point . . .

Foolproof.

Figure 19.

The photos you took were stored in the phone. And when you wanted to see them, they appeared on a grid. The best part, you could send a photo immediately to a friend, to an e-mail, to a printer . . . or, you could organize your photos, like my daughter had, and post them publicly or privately.

When worlds collide.

I asked my daughter more about Tumblr. Are those your photos? Where did you get that one? Did you need permission? How did you get that kind of crop? You can delete them? Really? What about these "followers." Who are they? Are they people you know? What if you don't want to share? How many of your friends have Tumblrs?

What's yours is mine.

My daughter's "grid" on Tumblr reminded me of my *Gangs* I did back in '85 . . . where I organized a set of nine images on a single piece of photo paper and blew the paper up to 86 x 48. The gangs were a way to deal with marginal or subsets of lifestyles that I needed to see on a wall but not a whole wall. Each gang was its own exhibition. Girlfriends, Heavy Metal Bands, Giant Waves, Bigfoot Trucks, Sex, War, Cartoons, Lyrics . . . were all rephotographed with slide film, and when the slides returned, they were "deejayed" and moved around on a custom-made light box until the best nine made the cut. The "cut" was then taped together (the edges of the

Figure 20.



Figure 21.