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## The Nature and Value of Public Space (With Some Lessons from the Pandemic)

Christopher Essert

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## THE NATURE AND VALUE OF PUBLIC SPACE (WITH SOME LESSONS FROM THE PANDEMIC)

*Christopher Essert\**

*Many people share the intuition that there is something unique and uniquely valuable about public space. That intuition is often latent, but some of the policies put in place in the early days of the COVID-19 pandemic, especially during the pre-vaccine period when being outside was generally safer than being inside, brought it to the surface, along with a series of important questions about the role of public space in a democratic society. In this Article, I offer an account of the nature and value of public space. I argue that public space is a unique site for people to come together as members of the public, a place to interact in space that no private person is in charge of. Public space is unique in being a space where no private person can tell others how they may act. As such it realizes a distinctive form of democratic egalitarianism, allowing and requiring us to determine how we can and must relate as equals in space. Seeing public space as democratic and egalitarian in this way is important for conceiving of the proper form of its regulation, as we can see by recalling various pandemic-related regulations. Thinking through some of those pandemic-related regulations, as well as other more familiar parts of the legal regime regulating public space, can help us to see more clearly the value of public space in a democratic society.*

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## INTRODUCTION

Many people share the intuition that there is something special, and especially valuable, about public space. Questions about the proper use of public space and its regulation are always present, but in the summer of 2020, early pre-vaccination responses to the COVID-19 pandemic had the effect of pushing more of us into public spaces and bringing these questions to front of mind. Take the use of beaches. Before COVID vaccines became widely available, many municipalities and even states closed their beaches altogether, where others kept them open with new pandemic-specific rules put in place.<sup>1</sup> Some people found these rules to be entirely appropriate,

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1. See, e.g., Nicholas Reimann, *Florida Breaks Record for New Coronavirus Cases*, *Forbes* (June 11, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/06/11/florida-breaks-record-for-new-coronavirus-cases/#7ae8eb9d6d2c> [https://perma.cc/Y6YF-T7CZ]; Nicholas Cousineau, *Opinion: Florida Beaches Need to Close Through Summer Season*, *ORACLE* (June 22, 2020), <http://www.usforacle.com/2020/06/22/florida-beaches-need-to-close-until-august-off-season/> [https://perma.cc/28YU-BCXW]; Amir Vera & Randi Kaye, *Jacksonville Beaches Reopen in Florida as States Begin Easing Stay-At-Home Restrictions*, *CNN* (Apr. 19, 2020), <https://www.cnn.com/2020/04/17/us/jacksonville-florida-beach-reopen/index.html> [https://perma.cc/5XJ8-L7PV].

where others objected on the basis of their own assessment of pandemic-related risk. Others still raised concerns that were different, that seemed to be grounded on the fact that the beaches themselves were, as public space, special. One commentator quoted in a *New York Times* article on Florida beaches put it this way: “The beach is sort of this sacred space, almost, for Florida . . . A lot of people who grew up here think of it as, ‘That’s my beach.’”<sup>2</sup> And the same dynamics played out in respect of other public spaces, like streets and parks.<sup>3</sup> More generally, in places where schools, workplaces, shops, and restaurants were closed, we wondered: was it okay to go outside to the park, or to take a walk on the street? Once pandemic-specific rules about the use of public space began to emerge — rules that asked us to stay out of the park, or to refrain from using amenities like playgrounds, or to stay six feet from others — a new set of questions came with them. Did these rules apply to everyone equally? Did they benefit some more than others? As the early stages of the pandemic receded and more familiar forms of socializing in private spaces like bars, restaurants, and others’ homes became possible again, the intense demand for public space started to tail off. But some of the pandemic-era innovations in the use of public space have remained, and, more importantly, so have the questions of principle. Public space is an essential part of our societies, and we need a framework to think about how it ought to be created, regulated, and used.

This Article argues that the idea of public space itself can provide us with just such a framework. Specifically, public space is a distinctive kind of thing with its own internally generated regulative norm. In short: public space is the public’s space. It is for doing things as members of the public, in ways that are consistent with each other member of the public being able to use the space in like ways.

In the basic case, this means that you cannot prevent me from walking down the street or sitting on a bench in the park or other such uses of public space. But by the same token, whatever I am doing in public space must not prevent you from being able to use it, so I cannot build a wall across the middle of the street; nor can I chop up the bench to make a fire. All of these cases are governed by the same basic idea, an idea that says that we must use public space in ways that are public rather than private. According to that

2. Patricia Mazzei et al., *Frustrated by Crowds, Coastal States Weigh What to Do About Beaches*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/04/30/us/newsom-beaches-california-coronavirus.html> [<https://perma.cc/XF84-52TT>].

3. See, e.g., Joseph Goldstein & Corey Kilgannon, *Balmy Weekend Presents a Challenge: New Yorkers Rushing to Parks*, N.Y. TIMES (May 2, 2020), <https://www.nytimes.com/2020/05/02/nyregion/weather-parks-nyc-nj-coronavirus.html> [<https://perma.cc/6T2G-DMGG>]; Adam Tuss, *Debate Over Closing Streets for Exercise*, NBC WASH. (Apr. 8, 2020, 6:07 PM), <https://www.nbcwashington.com/news/local/debate-over-closing-streets-for-exercise/2268444/> [<https://perma.cc/SAB8-4N4J>].

idea, if my use of public space is best construed as private, which is to say a use that treats the space as if it were my own private property, then in using the space that way I am committing a wrong. If you attempt to prevent me from walking down the street or sitting on the bench, if you are acting as though you are entitled to determine whether or not I may use public space, you commit that sort of wrong. And conversely, if I use the public space in ways that prevents you from using it, I commit the same wrong. The norm that explains this structure is what this Article calls the “public use standard”: each member of the public is free to use public space in a way that is consistent with any other member of the public using space in a like way, and, conversely, prohibited from using that space in a way that constitutes private appropriation.

The norm regulating the permissible use of public space has a familiar character that we can helpfully think about in terms of an ideal of democratic equality.<sup>4</sup> According to that ideal, we are each, as members of a democratic society, fundamentally one another’s equals, in the sense that none is the superior nor inferior of any other. A society that meets this ideal of democratic equality is the opposite of a hierarchical or caste society in which one group of people is legally defined as above or below another. Although it is very clear that contemporary societies all too often fail to meet this ideal, it is also clear that many take themselves to be governed by it.<sup>5</sup> When the ideal is applied to space, the public use standard emerges. A person who violates the standard, as I would were I to take myself to be entitled to chop up the park bench to use as firewood, can be understood to be setting themselves up as entitled to use the space in a way that others could not, as superior to those others (in respect of that space and its use).

As this Article will demonstrate, the use of public space in a contemporary society is most typically governed by a variety of actual legal rules of various sorts, including constitutional norms, federal and state laws, and municipal bylaws. But in practice, those rules are often indeterminate. Consider the basic case of a park. Park bylaws usually prohibit certain activities, while permitting a wide range of others. However, while bylaws may clearly state which uses are permitted, they do not typically specify how to deal with conflicts *between* these permissible uses. The bylaws thus fail to address a key issue. For example, I cannot play baseball on the field where you are flying a kite. But both you and I are, in principle, entitled to use the space

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4. See generally Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999) (articulating and defending an ideal of democratic equality).

5. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“[A]ll men are created equal.”); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.). (“[E]very individual is equal before and under the law.”).

for our own purposes. To resolve the conflict, we need to engage in a very basic kind of democratic deliberation, to try to figure out a way that,<sup>6</sup> as members of the public, we can both use the space in ways that are consistent with our relating to one another as equals. Perhaps I can use the space today and you can use it tomorrow; perhaps we can divide the field in halves; perhaps we can figure out a third activity that we would like to do together. This simple — or even simplistic — example can be a kind of microcosm of a lot of our thinking about public space. In public space, we meet as members of the public and thus are presented with a site at which we can act together as equals, a site at which we can enact democratic equality. Moreover, public space is unique in its capacity to allow us to do this. In contemporary societies, all space is either public or private, and in private space there is always some private person who is, as a matter of law, entitled to determine how others may act in it, and thus is, in a sense, in charge of others in that space. They are the one who decides what uses of a space will or will not be permitted.<sup>7</sup> The point is that, in public space, we can relate as equals in a way that we cannot do in private space: the space is the public's space and we, the public, need to determine how to use it in a way that is consistent with each member of the public being able to regard it as equally theirs, and so as equally ours.

The idea that public space is a site of democratic equality has a range of implications that are worth exploring. Some are about the norms that govern public spaces. Regardless of whether those norms are legally abstract and vague and in need of on-the-ground democratic negotiation, or whether they are more legally determinate, in order to be valid these norms must be understandable as more-or-less concrete realizations of the abstract public use standard. Another set of issues has to do with decisions about what public spaces we have, where they are located, and what they look like. It is an all-too-obvious fact about contemporary societies that the quality and quantity of public spaces within them are not equally distributed across the society. While these questions are always relevant, the intense demand for public space during the (early stages of the) pandemic and the associated innovations it generated in our use of public space: we were all outside, taking walks, and using parks, walking and biking in spaces normally filled with cars, and eating meals on the sidewalk. These practices and others all

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6. See generally Seana Valentine Shffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (arguing that legal standards, as opposed to rules, are valuable in a democratic society in virtue of the way that they require such a society's members to engage in deliberation as to their application, and thus to reflect on important political and moral ideas).

7. This is why private ownership presents a familiar problem of justification within a democratic society. I happen to think that problem can be solved, but that is not our present concern. See *infra* note 13 and accompanying text.

implicate the idea of public space, and that idea can help us to think about how they can be conducted rightfully, on terms of equality.

In what follows, this Article will show how the familiar and attractive idea that public space is the public's space can help us to think about how we ought to regulate the public space that we have, what sorts of public spaces we ought to have, and how we ought to locate and maintain them. These lessons are both timely and timeless. Public spaces were put under pressure by, especially, the early stages of the pandemic and its effects; but that pressure might have revealed systematic gaps in our thinking about public spaces and in the attention that they have been given by our legal and political institutions. Indeed, on the account this Article offers, these questions will never not be important: public space is an essential part of a democratic society, something that every such society needs. We will always have reason to think about it and reason to improve it. The following Article will provide some tools to do so.

Part I begins by characterizing the nature of public space more precisely. Sometimes private space is contrasted with space held as "*a commons*," which is to say space that is no one's. But public space is not a commons in that sense, because in a commons my use of the space cannot wrong you, whereas, as we have seen, that is not true in public space. Other times, private space is contrasted with space held "*in common*," which is to say space that is everyone's. But the basic case of space held in common is space that I must have the unanimous consent of all to use, and that is not how public space works: I do not need anyone's consent to sit on the park bench or walk down the street. As the common law has long recognized, particularly through the tort of public nuisance, public space is governed by a norm that says, first, that I need nobody's leave to use public space — and so it is not held in common in the classic sense of that term — and, second, that my use must not amount to a private appropriation of the space, that is, that it must allow other members of the public, as equals, to use the space in a way that is like mine. In other words, public space is seen by the common law as embodying something like the public use standard.

Parts II and III turn, with this idea of the public use standard in hand, to articulating the distinctive value that public space brings to a democratic society. Part II considers and critiques some prominent accounts of the value of public space. The first sees public space as about coming together in large groups to do things as community, about camaraderie, collective action, and the second sees it as about encountering difference, about being pressed to engage with members of the community that one might not otherwise meet. Simplified, the first is about doing stuff together with those we know and the second is about doing stuff together with those we do not. Neither view is quite right but, drawing on a tradition that traces to the legal and political philosophy of Immanuel Kant, we can see a perspective from which both of

them are partly correct. This leads to Part III, which shows how public space is about doing things as members of the public, in public. Sometimes these things are done with friends and family and sometimes they are done with strangers. Sometimes they are pleasant and sometimes they are more difficult. But what they all have in common is that, because they are happening in public space, they have a particular character grounded on the fact that none is in charge of the space where they take place and thus none can unilaterally determine the terms on which they happen.

Part IV turns to a range of more practical questions about public space, and suggest some ways in which my account helps us to think through those questions. It begins with a discussion of familiar ways we use parks and streets, as well as some of the different ways we did those things during the early parts of the pandemic. Next it shows how the account sheds light on the way that systems of permits — to reserve a baseball field in the park or construct a patio on the side of a public street — ought to operate. It then moves to some broader questions about the different kinds of public spaces that we need in democratic societies, about the relationship between public space and the trespass remedy, and on the conflict between the notion of public space and the demands imposed by widespread homelessness.

Part V considers some questions raised by this framework about cases that seem on the borderline between private and public space. There are two different kinds of borderline cases that deserve sustained attention. On the one hand are privately-owned spaces that are open to the public, like malls, coffee shops, and so on. On the other hand are so-called “privately owned public spaces” or POPS, such as the plazas in front of office towers. In each of these cases, we can see how we ought to regard these spaces as public in an important sense and thus subject to the public use standard that applies to “normal” public space.

The Article concludes with some thoughts generated by this analysis about the relationship between public space and private property.

## I. KINDS OF SPACE

To begin an inquiry into public space, we need to think more precisely about what public space is, about how public space differs from other kinds of space. Examples of public space are easy to conjure: parks, streets, libraries, and squares all stand out. But it is also easy to see that we cannot identify public space empirically. A public library might not feel very different from the library inside a private university. Cars operate in the same way on public roads and private roads. Private parks, like Gramercy Park in Manhattan, are (if you can manage to get inside) quite a bit like public parks. The difference between public spaces and these empirically similar non-public spaces lies in the norms that govern them. To bring this point



out, we can examine how public space compares with some other kinds of space.

### A. Private Space

The contrast between private and public space will be important in what follows, so I will begin there, with an example referenced throughout. Imagine a public park, with whatever variety of activities you take to be paradigmatic of such a space: people sitting or walking, birdwatching or reading, playing impromptu or organized games or sports, picnicking, and so on. Now imagine that a generous local billionaire buys a large plot of land, landscapes it to look just like the park you just imagined, and personally invites each person in the neighborhood to come and use this plot just in the same way that they would use the public park. Call this “Private Park.” How does it compare to the public space of the park you began with?

The difference is in the nature of the norms governing the use of the spaces. Private Park is private. That means that it has an owner — the generous billionaire — who is in charge of the space, who gets to determine the permissibility of others’ entering the space and interacting with it in certain ways.<sup>8</sup> In fact this was already implicit in saying that they “invite each person” to use Private Park: the space is theirs, and they are letting others use it. But their use of it is necessarily on their terms, in that there is nothing stopping them from changing their mind, banning some activities or even some individuals, or closing the space to guests altogether. Whatever happens there happens subject to their control, and, as we will see below, this partly determines its nature.<sup>9</sup>

In private space, the owner is in a position that, at least on the surface, allows them to be, in a way, in charge of others, because it allows them to decide how others may act in that space. How the space will be used is a question that is up to the owner, rather than others. It is this fact that creates a kind of justificatory burden about private ownership. What gives this person the right, as it is sometimes said, to tell others what they can or cannot do on a part of the earth?<sup>10</sup> There have been many different attempts to

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8. The situation is the same if the park is owned privately by a private group or organization.

9. One might worry about this characterization of private space on the grounds that certain private spaces — shops, malls, casinos, hotels, and so on — seem somehow less under the control of their owners than, perhaps, homes or private offices do, in that there seems to be a wide scope for non-owners to enter them. I will address this concern in Part V. To preview: those spaces are all, in various ways, public accommodations, which means that they are held out as public space, that their owners invite the public to treat them as if they were public space. To explain that idea in full, of course, we need to know what public space is.

10. See GERRARD WINSTANLEY, *THE TRUE LEVELLERS’ STANDARD ADVANCED: OR, THE STATE OF COMMUNITY OPENED, AND PRESENTED TO THE SONS OF MEN* (1649) (“And if the

answer this question, some referring to the labor an owner (or some predecessor) put into cultivating the land,<sup>11</sup> others to the benefits generated by the system of private ownership as a whole,<sup>12</sup> still others to some kind of connection between private property and the owner's "personality."<sup>13</sup> Each of those views has well-known problems. On my view, the way to respond to this burden is by seeing how the rights of ownership are constitutive of a variety of egalitarian activities and relationships that are central parts of the lives of beings like us. That is, property helps to make up a large part of our social world that is both necessary to our lives as we understand them and morally attractive. Without an institution of private property rights meeting certain regulative constraints, we could not relate to one another as equals in respect of these parts of the social world. That would be a problem, and solving that problem is private property's job.<sup>14</sup> As important as the question is as a matter of social philosophy, whatever the correct approach to private ownership is — that is, whatever turns out to be the theory on which it is defensible, if defensible it actually is — need not concern us here. All these views share, to a greater or lesser degree, a commitment to the central and essential fact about private property, namely that, at least in the first instance, when some space is private, some private person has the right to determine the permissibility of others' actions in respect of the space in question within the bounds of the law. A full picture of the law of private property includes various exceptions and qualifications of that fact, but the basic idea is clear and fundamental.

The present point is just this: that is *not* how public space works. No private person is entitled to determine what others may or may not do in public space. You might not like the way I am walking down the street or approve of the game I am playing the park, but that is simply neither here nor there in respect of whether or not I am legally permitted to do those

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Earth be not peculiar to any one branch, or branches of mankind, but the [i]nheritance of all, [t]hen it is [f]ree and [c]ommon for all, to work together, and eat together.”); FIVE MAN ELECTRICAL BAND, *Signs, on SIGNS* (Lionel Records 1971).

11. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (Macpherson ed., Hackett 1980) (1689).

12. See DAVID HUME, A TREATISE OF HUMAN NATURE Bk. III, Pt. II (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 2d ed. 1978) (1739); Jeremy Waldron, ‘To Bestow Stability Upon Possession’: Hume’s Alternative to Locke, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW I (James Penner & Henry Smith eds., 2014).

13. See G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 41 (Allen Wood ed., Cambridge Univ. Press 1991) (1821); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

14. I set out these arguments and defend them in more detail in Christopher Essert, *Property and Homelessness*, 44 PHIL. & PUB. AFF. 266 (2016) [hereinafter *Homelessness*]; Christopher Essert, *Property Wrongs and Egalitarian Relations*, in CIVIL WRONGS AND JUSTICE (Paul B. Miller & John Oberdiek eds., 2020).

things. It is in virtue of this legal difference that public and private space differ. Private spaces have private owners who get to decide what others will do there; public spaces do not.

### B. Negative Community and Positive Community

Although the contrast with private space is the most salient and important to our understanding the nature and value of public space in a contemporary democratic society, we can further advance things by comparing public space with two other somewhat ideal types of normative organization of space. On the one hand is *a commons*, or negative community, which is in effect the name for a space that nobody owns. On the other hand, is space held *in common*, or a positive community: a space owned by everyone, in some sense, together. To avoid the confusion likely to be engendered by using those similar but different names, I will use the terms “negative community” and “positive community,” which I borrow from Samuel von Pufendorf’s discussion in his *Law of Nature and Nations*.<sup>15</sup>

In a negative community there are no rights in respect of the space. Anyone is free to do what they like there (subject to non-space-related prohibitions on bodily harm and the like) and cannot be said to wrong anyone in their use of the space. In Hohfeld’s helpfully precise terminology, we could say that, in a negative community, there are no claim-rights in respect of the space and everyone has a privilege to use the space however they see fit.<sup>16</sup> There are some affinities between public space and a negative community. I do not need anyone’s leave to walk down the street or go to the park, so it looks, in a way, like others have no rights in respect of my use of public space. But looks can be deceiving. More sustained thought reveals that there are uses of public space that wrong others. It would be wrong for me to physically bar you from the library, to destroy the swing set in the park, or to build a permanent structure on the sidewalk in front of my house.

The common law’s clearest recognition of this fact is in the classical understanding of the tort of public nuisance, which says, paradigmatically, that when one person blocks the use of the public highway, making it impossible for others to pass, they commit a wrong.<sup>17</sup> Put that way, the tort

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15. SAMUEL VON PUFENDORF, *THE LAW OF NATURE AND NATIONS* 532 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688); see also J.W. HARRIS, *PROPERTY AND JUSTICE* 85–99 (1996); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 37–46 (1988).

16. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 33 (1917).

17. See Jason Neyers, *Reconceptualizing the Tort of Public Nuisance*, 76 *CAMBRIDGE L.J.* 87, 93–114 (2017) (providing rights-based account of English law of public nuisance); Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 *J. TORT L.* 1, 9–10 (2011) (describing “core cases” of public nuisance). The tort of public nuisance is now understood to have a much

seems overinclusive, since every use of space prevents some others. When I am walking here, you need to walk somewhere else, but that fact does not give rise to any wrong. As one court in the United Kingdom has put it, everyone has “a right to the free and uninterrupted use of a public way,” but (therefore) equally a “right for a proper purpose to impede and obstruct the convenient access of the public through and along the same.”<sup>18</sup> But each member of the public must have equal access to public space, so rightful use must be use that each person can systematically realize. Thus the “law relating to the user of highways is in truth the law of give and take,” such that interferences that are “only obtainable by disregarding” the equal right of others are wrongs.<sup>19</sup> Disregarding the equal right of others in this context amounts to acting as though one is entitled to determine how those others may act, in effect, appropriating the public space for private purposes: “A permanent obstruction erected in a highway without lawful authority is necessarily wrongful and constitutes a public nuisance at common law, *as it in fact operates as a withdrawal of part of the highway from the public.*”<sup>20</sup> That is, since private space is space in which one person gets to determine how others may act, a person who acts as though they get to determine how others may act in public space is therefore treating public space as if it were their private space (thus “withdrawing” it from the public).

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wider ambit and to be of particular interest in environmental litigation. *See generally* Mary Garrells, *Raising Environmental Justice Claims Through the Law of Public Nuisance*, 20 VILL. ENV'T. L.J. 163 (2009); Matthew Russo, *Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives*, 2018 UNIV. ILL. L. REV. 1969 (2018). On the view I am defending here, that can be made sense of if we expand the scope of the tort to protection of public property, rather than merely public space, and embrace a conceptualisation of the atmosphere, environment, and so on, as public property, along the lines of the view defended by Sax. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). *See also* David Bullock, *Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant, and Causation Problems*, 85 MOD. L. REV. 1136 (2022) (offering a recent attempt to expand the scope of the tort to protect public property in the context of climate change litigation).

18. *Herring v. Metro. Bd. of Works*, [1865] 19 C.B. (N.S.) 510, 525 (UK).

19. *Harper v. G.N. Haden & Sons, Ltd.*, [1932] Ch. 298, 320 (UK).

20. *Id.* at 308 (emphasis added). To head off a possible confusion, I should note that when I am standing in any spot, public or private, there is a sense in which I have made it impermissible for you to stand in that same spot, since to do so you would have to commit battery in moving me aside. A private owner gets to determine the permissibility of standing in their space in a different way, that is, just by saying so. (You wrong a guest in just the same way as an owner if you push the one or the other out of the way to get their spot.) The claim in the text is that a defendant in a public nuisance case acts as though they can decide, by their say so and not their mere physical presence, what others can do in the space. As we will see, the border between those two categories can be blurry, but conceptually they are entirely distinct.

Conversely, the presence of the public nuisance wrong might suggest that public space is a positive community. There is an intuitive appeal to this option, since it looks like there is some sense in which a group that has space in common has it “together,” some sense in which they all have it. But developing this thought takes some care. In (the basic case of) a positive community each person has, in Hohfeldian terms, both a claim-right that no other person use the space and a power to waive that right; therefore, nobody has a liberty to use the space unless they secure the waiver of all others’ rights. In effect, each member of the community has a veto on any use by any other member. This is not a good description of public space: I do not need anyone’s permission to walk down the street, lounge in the park, or go to the library.

But we should look more carefully. It may seem that individual private use of the resources in a positive community could become permissible if we could find, as political philosopher G.A. Cohen put it, an “appropriate procedure” to ensure that such use is approved by all.<sup>21</sup> Cohen’s suggestion about a procedure seems to raise the possibility that a community could choose any procedure it wanted to, and the variety of legal forms of co-ownership might seem to confirm that thought. But that is not quite right. Our reflections so far suggest that the idea of public space itself brings with it a particular form that any norm of permissible use must take. On the one hand, as we saw above, each of us is free to use public space without leave of anyone else. This is often true even when my rightful use will make your rightful use impossible: if I am on the swing when you want it you need to wait until I am done; if I am blocking the intersection you need to wait for me to clear it before you drive through. On the other hand, it is possible for me to wrong you by excluding you from using public space in some ways, as in the case of public nuisance.

The space between the wrong of public nuisance and the possibility of permissible exclusion highlights how in the former, but not the latter, I act as though I have the right to determine how you (and others) may use the space. In slightly more everyday terms: I wrong other members of the public when I act like our shared public space is mine, rather than all of ours. When something is mine, it is up to me how you may act in it. In contemporary legal systems, I can have something as mine by owning it, by having a private property right in it. This means that I wrong you when I act like our public space is my private space.<sup>22</sup> That suggests that a wrongful use of public

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21. G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 84 (1995).

22. As everyone who has taken a Property course knows, there are other kinds of property rights beyond ownership. Many property theorists would be happy to say that something is mine when I am a legal tenant, for instance, or perhaps when I hold certain other so-called lesser interests. But the details of that are outside our present area of concern. Nothing turns

space is one that amounts to a claim to be entitled to treat the space as private property. Put differently, we might say that it is ok if my use of public space happens to interfere with your use, but that I cannot purport to be entitled to prevent your use as a matter of right. Members of the public can be said to be permitted to use public space when their use of it is public rather than private, which is to say consistent with the equal right of other members of the public to make their own like use. Conversely, what is prohibited is anything that amounts to an appropriation of public space for private use, to privatization. Call this the *public use standard*. The public use standard is constitutive of public space: public space is space to which it applies, space that is properly governed by it.

The public use standard says that use of public space is permissible when that use is public rather than private, which is to say consistent with any other member of the public using the space in a similar way. So, my merely being in public space is entirely permissible, even when the fact that I am in public space prevents you from being in that bit of it: I do you no wrong by sitting on the bench so that you have to find another one, or by driving my car down the street forcing you to slow down. But my use of the space is wrongful — a violation of your right as a member of the public to use public space — when it can be construed as appropriating it, which is to say when I can be understood as using the space as if it were my own, as if it were up to me how you could use it. Destroying the park bench is an example: in destroying it, I act as though it is up to me to decide that you will no longer be able to use it. Constructing a permanent structure in the public road is similar. Rather than blocking your path temporarily by using the road in my own vehicle, by building onto the road I would be acting like the road was mine, and that it was up to me what you could do there.

## II. WHY PUBLIC SPACE?

Given this account of what public space is, we are in a position to ask, and eventually to answer, the following question: what good is it? As I have said, it is clear that many of us share the intuition that public space is a valuable part of a democratic society. That intuition is sometimes latent, but it came to the surface during the early stages of the COVID-19 pandemic. I will discuss some of the forms of regulation of public space that became common especially in the summer of 2020 below. But before the COVID circles and quiet streets and sidewalk dining, there were more than a few instances of public space being closed altogether with limited exceptions for essential

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on that question here and that the argument is not affected by my simply talking about ownership as a stand-in for private property rights more generally.

uses.<sup>23</sup> On any view, in the face of the kind of public health emergency that the early part of COVID constituted, such closures were permissible. Yet even then, we saw various attempts to recreate the value of public space by using online tools,<sup>24</sup> or by using the air space over our streets and our voices or instruments to join together in public.<sup>25</sup> And as these lockdowns grew in length, it became clear that these rather pale imitations of public space were going to be insufficient to allow us the kinds of interactions in public that make public space so important. The case of the beach closures with which I began is a clear illustration of this thought, and an equally clear manifestation of the basic intuition about the value of public space.

How, then, should we understand the distinctive value of public space? There are a few different ways to answer to this question. One says that there is nothing special about the publicness of public space, that we have public space as one tool among many, including private property, to use to make the best possible use of a particular bit of the earth's surface. Another family of views takes a different approach, and claims that there is something distinctive about the publicness of public space, that there is something valuable about it being public space as such. There are various versions of that view, but they all share the single idea that there is something that public space does for us that nothing else could do. This Part defends just such a view.

### A. Public Space Instrumentalism

Property theorists in the common law world spend surprisingly little energy thinking about public space.<sup>26</sup> And what little work there is tends to take what we can think of as an instrumentalist approach. On such a view,

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23. You might have seen the viral video compiling clips of Italian mayors telling citizens hanging out in public spaces to go home. Angela Giuffrida, *'This is Not a Film': Italian Mayors Rage at Virus Dodgers*, GUARDIAN (Mar. 23, 2020), <https://www.theguardian.com/world/2020/mar/23/this-is-not-a-film-italian-mayors-rage-coronavirus-lockdown-dodgers> [<https://perma.cc/XN46-4D9N>].

24. To say, as I do here, that the internet is not a substitute for public space is not to deny the plausible thought that the internet might be an additional kind of public "space" that ought to be governed according to its own version of the public use standard. I take it that was the original idea of the internet. See Olivia Solon, *John Perry Barlow: Will Dream of Open Internet Die with its Founding Father?*, GUARDIAN (Feb. 8, 2018), <https://www.theguardian.com/technology/2018/feb/08/john-perry-barlow-open-internet-dream-dying> [<https://perma.cc/2HD3-5GAZ>].

25. See Alan Taylor, *Music and Encouragement from Balconies Around the World*, ATLANTIC (Mar. 24, 2020), <https://www.theatlantic.com/photo/2020/03/music-and-encouragement-from-balconies-around-world/608668> [<https://perma.cc/H82J-UXYP>].

26. Things are much different in civilian legal systems, which have a much more well-developed understanding of public ownership. See, e.g., Giorgio Resta, *Systems of Public Ownership*, in COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES 216, 217–20 (Michele Graziadei & Lionel Smith eds., 2017).

the theorist assumes that both private and public control of space are aimed at the same value. Then the question about whether some particular space ought to be public or private is simply a question of efficiency, a question of whether private or public control will maximize the relevant value.<sup>27</sup> A variety of familiar questions arise in this framework, concerning tragedies of the commons, deadweight losses, and so on.

I will not argue at length against this kind of view. My goal here is to present an alternative picture in positive terms. But it is worthwhile to notice how this instrumentalist view is unable to make much sense of the point with which we began, what seems to me to be the pervasive intuition that public space is special, that the loss of public space through privatization is a serious and significant problem and not merely a matter of efficiency. That is, we do not tend to think to ourselves that it is simply an open question, a matter of some sociological investigation or econometric calculation, whether we ought to have a private person or organization in charge of our roads, parks, streets, and so on.<sup>28</sup> Or, at least, not all of us do. It is certainly arguable that such an attitude is behind the massive privatization of public spaces that has taken place in most western societies over the past generation.<sup>29</sup>

A prominent set of recent examples involves attempts by a private landowner to prevent access to the public beaches on the California coast south of San Francisco.<sup>30</sup> In many jurisdictions dating at least back to ancient Rome, the law has treated at least some portion of the coast — usually defined by reference to the mean high-water mark, although the details need not detain us — as public space.<sup>31</sup> Medieval English law allowed for public access to the oceans as a source of food,<sup>32</sup> but in modern times the recreational value of beaches and oceans is clearly part of the story as well. As the flood of news stories on the closing of beaches during the pandemic demonstrated, a well-run beach is a unique and special form of public space.<sup>33</sup> If some jurisdiction has chosen, as most have, to recognize the

27. See Richard Epstein, *On the Optimal Mix of Private and Common Property*, 11 SOC. PHIL & POL'Y 17, 17 (1994); see also Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711–12 (1986).

28. See *infra* Section II.D.

29. See generally BRETT CHRISTOPHERS, *THE NEW ENCLOSURES: THE APPROPRIATION OF PUBLIC LAND IN NEOLIBERAL BRITAIN* (2018).

30. See Kathleen Sharp, *It's Your Beach. Don't Let Them Hog It*, N.Y. TIMES, July 21, 2018, at A21; Nellie Bowles, *Court Opts Out of Ambivalent Billionaire's Surfer Fight*, N.Y. TIMES, Oct. 2, 2018, at B5.

31. See *Shively v. Bowlb*, 152 U.S. 1 (1894).

32. Which was important enough that the tort of public nuisance extended to cover it. See Neyers, *supra* note 17.

33. See e.g., Adriana Gomez Licon, *More Florida Beaches Announce Closures as Virus Cases Rise*, U.S. NEWS (June 28, 2020, 9:50 PM), <https://www.usnews.com/news/best-states/florida/articles/2020-06-28/more-florida-beaches-announce-closures-as-virus-cases->



beach as public space, then an attempt by a private landowner to deny access to the beach amounts to a private appropriation,<sup>34</sup> and our reaction to such an appropriation seems not to be merely to ask about efficiency, but instead to think that something special and uniquely valuable is being taken or destroyed.

A Canadian case illustrates the same point. A group of protesters took over a park in downtown Toronto, building semi-permanent structures and, in effect, living there. The court's reasoning, in finding that the City of Toronto was within its rights to remove the protesters, notwithstanding that their occupation amounted to a kind of protected expression, echoes the analysis here. Private permanent structures exclude other members of the public from the park in a way that does not amount to the kind of give and take consistent with the equal right of all members of the public to use the park. Rather, as the court put it, the protesters were claiming a "monopoly over the use of the Park," and had "appropriated public land to their exclusive, private use."<sup>35</sup>

Privatization of public spaces is not merely a matter of changing their management structure. The value of private property and the value of public space are distinct, and the move from one to another is not merely a matter of efficiency. Privatizing public space is problematic insofar as it puts a private person in charge of others with respect to the interactions taking place in a space where nobody was in charge of anyone else. This account of the problem of privatization thus echoes those accounts of privatization of other traditional public services — education, law enforcement, public

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rise [<https://perma.cc/5J25-BGAZ>]; Hannah Fry, *Cities Race to Close Beaches for Fourth of July Holiday as Coronavirus Surges*, L.A. TIMES (July 2, 2020, 6:20 PM), <https://www.latimes.com/california/story/2020-07-02/southern-california-beaches-closed-for-july-4th> [<https://perma.cc/577J-N38Y>].

34. This is simplified, since the wrong is not strictly speaking enclosure of public space but rather denial of effective access to it. The common law however has long recognized that among the rights of private property owners is the right to physically access the land, and that interference with the right of access is a tort — private nuisance. See *J. Lyons & Sons v. Wilkins* (No. 2), [1899] 1 Ch. 255 (UK) (holding that by preventing the access of the public to the public's space, the private landowner is committing a wrong against the public).

35. *Batty v. City of Toronto*, [2011] O.T.C. Uned. 6862 (SC) para. 97, 108 (Can.). Margaret Kohn critiques this decision as relying on a notion that the sovereign gets to decide how to use public space so that "erecting a tent in a park is a form of privatization because it violates ordinances that prohibit camping. This is true even if the tent is a large yurt that houses a library and has a sign inviting anyone to come in, read a book and talk about political issues." See Margaret Kohn, *Privatization and Protest: Occupy Wall Street, Occupy Toronto, and the Occupation of Public Space in a Democracy*, 11 PERSP. ON POL. 99, 103 (2013). On my view, the erection of the tent is a form of privatization not because of an ordinance but because it amounts to a claim to an entitlement to decide how the space on which it sits will be used. Those who erected the tent purport to have the capacity to invite others in, but inviting someone into a space is only something you can do if you have the power to exclude them.

transportation — as problematic as a matter of political philosophy and not merely efficiency.<sup>36</sup> In all of these cases the role of the public is not merely as a deliverer of something that could be delivered by anyone, but rather as an institution doing some fundamentally public thing that nothing else can do in quite the same way.

We should see, then, if we can find a way to vindicate the thought that public space is distinctively valuable, that there is some special good that it realizes in a democratic society. There have been a few attempts to do so.

### B. Coming Together

The first idea claims that public space is valuable because and insofar as it lets us come together as a community. There is a range of ideas here, but the basic thought is that there is something good about a space that allows groups of people to convene, mingle, and act jointly. Think of a (pre-pandemic) public park, where people might play, together or alone, on the soccer field, baseball diamond, or basketball court, or perhaps larger open spaces for less organized activities. Or imagine children playing in the playground or sandbox, with adults chatting, reading, or just relaxing nearby on benches, rocks, or grass in the sun or the shade. One never knows what is happening at the park, which neighbors you will see there, what activities might be going on. The pleasures of participating in large scale activities are available, as well as more solitary pursuits. And they blend into each other: you might go there for a catch with your kid and end up playing in a baseball game with friends, neighbors, and strangers.

This idea of coming together in public is not limited to what happens in a park. Not all public space is for leisure. Property theorist Carol Rose, drawing on Adam Smith, notices that public space is necessary for the kind of “truck, barter, and exchange” that makes up much commercial activity.<sup>37</sup> Another version of the same idea is that public space is uniquely valuable as a site of assembly and protest. Some public space is a necessary requirement of a right of free expression and a right of free assembly. While this is not the place to examine the constitutional doctrines around these issues, the basic idea is clear enough. The protection of free expression requires that there be places where individuals are able to engage in expressive activity beyond their own homes, since limiting permissible expression to private

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36. See Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 128–47 (Jody Freeman & Martha Minow eds., 2009); Nikil Saval, *Uber and the Ongoing Erasure of Public Life*, *NEW YORKER* (Feb. 18, 2019), <https://www.newyorker.com/culture/dept-of-design/uber-and-the-ongoing-erasure-of-public-life> [<https://perma.cc/KMC2-HPWE>].

37. Rose, *supra* note 27, at 774 (citing ADAM SMITH, *WEALTH OF NATIONS* 13 (Modern Library 1934) (1776)).

space “would certainly deny the very foundation of the freedom of expression.”<sup>38</sup> The case for free assembly is even clearer.

Another important public space that exemplifies this claim is the public library. While reflexively we might think of libraries as a place to get books, many contemporary librarians view the role of the public library rather differently. Users of the public library find there a space — an indoor, heated space — that is open to all, where anyone is free to surf the internet, think quietly, read the newspaper, or work on their homework. It is also a space where different members of the public can come together, to participate in group activities such as book clubs, children’s reading circles, and, increasingly, all manner of groups not necessarily related to reading at all. A recent discussion characterizes these sorts of experiences in terms of “camaraderie [and] the joy of watching people who hardly know one another turn their neighborhood into a community.”<sup>39</sup>

This way of thinking about public space, it is worth mentioning, played a very prominent role in discussions around public space and the pandemic. When many of the alternative spaces in which we gather and in which we are able to meet in groups were closed, when we had nowhere to go but our homes, public space seemed to gain importance. People want to be out in the world with other people. There is something quite important going on here, as we will see below.

### C. Encountering Difference

A second idea of the value of public space is offered by political theorist Iris Marion Young, who denies that our experience of the public realm is actually one of “unity and mutual understanding”:

Because by definition a public space is a place accessible to anyone, where anyone can participate and witness, in entering the public one always risks encounter with those who are different, those who identify with different groups and have different opinions or different forms of life . . . . This helps account for their vitality and excitement.<sup>40</sup>

Young’s thought is that what happens in public space is sometimes that we are (figuratively, not literally or coercively) forced together, and that that is

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38. *Comm. for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139, 155 (Can.).

39. ERIC KLINENBERG, *PALACES FOR THE PEOPLE: HOW SOCIAL INFRASTRUCTURE CAN HELP FIGHT INEQUALITY, POLARIZATION, AND THE DECLINE OF CIVIC LIFE* 31 (2018); *see also* Lisa M. Freeman & Nick Blomley, *Enacting Property: Making Space for the Public in the Municipal Library*, 37 ENV’T & PLAN. C: POL. & SPACE 199 (2018). Again, you might worry here that public libraries are important primarily as a space for those who have nowhere else to go. This is a specific instance of a broader phenomenon, which I will discuss in the Conclusion.

40. IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 240 (1990).

what is good about it. Obviously the idea that public space and free speech are closely linked is again relevant here, since the value of free speech does not lie in the fact that we necessarily want to hear it. There is a great deal of writing, for example, on public space as a site for labor picketing, which can often be quite confrontational.<sup>41</sup>

More generally, Young rightly emphasizes the importance of public space for the possibility of meeting with those who are not obviously one's friends. These encounters with difference are clearly a prevalent part of the way we experience parks and streets and libraries. As sociologist Eric Klinenberg puts it:

[P]ublic institutions with open-door policies compel us to pay close attention to the people nearby. After all, places like libraries are saturated with strangers, people whose bodies are different, whose styles are different, who make different sounds, speak different languages, give off different, sometimes noxious, smells. Spending time in public social infrastructure requires learning to deal with these differences in a civil manner.<sup>42</sup>

The role of public spaces in getting us out of our "comfort zone" is surely part of their value.

#### D. A Wider View

A third idea of the importance of public space relates to these two, but is framed in more formal terms. This is the Kantian idea that public space is necessary for the possibility of interactions in space on terms of equality *as such*.<sup>43</sup> Legal and political philosopher Arthur Ripstein's discussion of roads in *Force and Freedom* is a helpful illustration of the idea. Ripstein argues that a system of private ownership requires a system of public roads. The argument is simple: without a system of roads, each person would be "landlocked" in their particular parcel of land, unable to come and go without the permission of a neighbor. On Ripstein's account, this would be an unjustified limitation on our equal freedom. It would make the possibility of voluntary interactions between two persons dependent on the goodwill of third parties, and so makes the two dependent on the third in a way that is inconsistent with equal freedom. Roughly, you and I could not meet to talk

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41. See, e.g., *Pepsi-Cola Can. Beverages (West) Ltd. v. R.W.D.S.U.*, Local 558 [2002] 1 S.C.R. 156, 161–62 (Can.). But see, e.g., *Senn v. Tile Layers Protective Union*, Local No. 5, 301 U.S. 468 474–75 (1937). See also Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2081–83 (2018).

42. KLINENBERG, *supra* note 39, at 38. I take Klinenberg to mean "civil" in the sense of "polite," but as the discussion below will show, it really means "civic."

43. Immanuel Kant, *The Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 6:352 (Mary J. Gregor trans., 1999) (1791).

or to do anything else, without the permission of my neighbor and your neighbor and everyone else who lived between you and me. Public roads solve this problem by ensuring that there is a path that I can take from me to you that is not under anyone else's control.<sup>44</sup>

Ripstein's central claim, more precisely, is that public roads are necessary in order for us to participate in private interactions, since we could not get together at your place unless I can get from my place to yours. But public space enables more than simply that kind of private interaction. While there have been times in which the law viewed public streets as mere rights of way, such that the public's right was to "pass and repass" and such that any lingering could count as a wrong, we do not now think of our roads that way.<sup>45</sup> Instead, we recognize that "the public highway is a public place, on which all manner of reasonable activities may go on," including such "ordinary and usual activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book."<sup>46</sup> The public space of the streets is being used not only for people to get from one private place to another in order to interact, but also for any type of interaction that itself takes place in public. The same point applies more forcefully to other public spaces, like parks, squares, and so on. The point of these public spaces is to be a place for public activities and public interactions.

Consider again the various paradigmatic uses of public space introduced above. There is an important sense in which what makes them the things that they are is, at least in part, that they take place in space that is not privately owned. When you invite me to dinner at your home, part of the nature of our activity rests on the fact that we are in space that is yours. When you invite me to a picnic in a park, we are doing something quite different (even if we are eating the same meal): part of the nature of this activity rests on the fact that the space is not mine (as against you) or yours (as against me) but rather ours (and everyone else's, too). Think back to the example of Private Park. Our picnic there would be something different again because we would be eating only with the leave of the owner. The owner's rightful control over the space and what happens within it would change the nature

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44. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 243–52 (2009).

45. See *Harrison v. Duke of Rutland*, [1893] 1 QBD 142, 160 (Eng.). To be clear, the historical trend here is not monotonic. As Maureen Brady has noted, streets in colonial America were viewed much more as we view our streets now, as akin to squares or parks. See Maureen E. Brady, *The Failure of America's First City Plan*, 46 URB. LAW. 507, 518 (2014) (characterizing streets in seventeenth century New Haven as "both access corridors and places of social engagement").

46. *Dir. of Pub. Prosecutions v. Jones & Another*, [1999] 2 All ER 257, 262–63 (UK HL).

of our activity, because it would be up to them whether and under what circumstances it took place — they could think and talk about it as “that picnic I let you have,” or “the picnic I hosted,” or even in some cases perhaps, “my picnic.”

You might think that a picnic is a picnic in virtue of its being (roughly) a meal eaten on a blanket outdoors, such that there are no grounds to distinguish these cases. I do not deny that there is a familiar perspective — the one we take in, say, menu planning — from which these are both just picnics. But our choices in how to draw lines in situations like this depend on the purposes of our inquiry. Here is an analogy. Major League Baseball and Little League Baseball are both, in a familiar sense, baseball. But there are differences in their rules, which, from another perspective, make them different games. And this second perspective might be the one that matters, depending on what kinds of questions we are interested in answering, such “which bats may be used?” or “who is eligible to play shortstop?” The same thought applies here. For present purposes — understanding the nature and value of public space — what matters is not the familiar perspective from which these are both just picnics, but rather the perspective from which, because they take place in spaces governed by norms that are, formally, entirely different, they are different kinds of things. More generally, activities and interactions should, for present purposes, be understood to be partly constituted by the rules that govern them, and in particular the rules governing the space in which they take place.<sup>47</sup> I will therefore set the other perspective to the side in what follows.

In public space, part of the nature and the good of the activities and interactions that take place there is precisely that nobody has any better claim than anyone else to determine how the space may be used, so that a kind of negotiation with other potential users over permissible use is a necessary element of any use. Remember the comment about the Florida beaches with which we began: it is true, in a sense, that each Floridian can say of the beach, “that’s my beach”: it is not theirs in the way that something they own privately is, but rather it is theirs as a member of the public.<sup>48</sup> As members of the public, we each have an equal say in how space is used.<sup>49</sup> We share

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47. See Christopher Essert, *What Makes a Home: A Reply*, 41 L. & PHIL. 469, 479–80 (2022).

48. Mazzei et al., *supra* note 2.

49. Here “everyone” must mean “members of the political community.” My park is shared with other Torontonians (or Ontarians or Canadians), but not with American visitors. So, when an American friend and I go to the park, there is, on my account, a sense in which they are my guest, and a sense in which we cannot engage in the same kinds of valuable interactions as I can with other members of my political community. (A picnic with my neighbour is not the same as a picnic with my American friend.) I think this is a plausible upshot of my view, as it tracks an intuition that we have some kind of quasi-ownership stake in the public spaces

the land (and the park bench, the baseball diamond, and the tables at the library), and part of sharing is determining how to resolve conflicting uses on an ongoing basis. In other words, the interactions that take place in public space have a kind of radically democratic egalitarian character to them: since none has any right to the space in question that others do not also have, the parties must negotiate the terms of their interactions on terms of equality, with none superior nor subordinate to any other. That is, when members of the public interact in public space, they must “accept the obligation to justify their actions by principles acceptable to [one another] . . . in which they take mutual consultation, reciprocation, and recognition for granted.”<sup>50</sup>

This formal idea of interaction in public space thus is able to incorporate the insights of the first and second accounts of the value of public space. The first sees public space as valuable because of its role enabling certain kinds of cooperation and coming together. But part of what makes those comings together valuable is that they are comings together in space that is not owned by anyone. The second account sees the value of public space in the ways that we sometimes encounter difference in it. Again, the thought must be that these encounters are grounded in the very fact that nobody owns the space: it is just because nobody controls the space that nobody can tell anyone else to leave it and so must confront difference, diversity, and conflict. What matters is not merely any particular substantive use, but rather the very possibility of interaction on terms of equality in space that is equally available to everyone. (I should emphasize that on this formal view, solitary activities, just as much as joint interactions taking place in public space, must be understood relationally since their nature depends on the egalitarian relations between participants and other members of the public. Even if nobody else knows what I am doing in public space, I am only able to do it under the guise of the public use standard.)

### III. RELATING AS EQUALS IN PUBLIC

The fact that they take place in public space is constitutive of public activities and their value. Only public space, governed by the public use standard, can make them available. The Private Park case shows why private property is inadequate: the owner of the space is in charge of it, and so

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of our own community that we do not have in the public spaces of other political communities. If I heard that my local park was being privatized, I would have grounds for a kind of resentment. Were I to hear the same about Central Park, I would more aptly feel indignant about the destruction of some valuable thing in which I had no stake. Of course, other democratic, constitutional, or perhaps cosmopolitan values will mean that, although my American friend has no standing to participate in the democratic formation of the norms governing my park, it would be wrong to exclude them from it.

50. Anderson, *supra* note 4, at 313.

entitled to set the terms of any activity or interaction taking place within it. We can picnic, play baseball, engage in expressive activity, or encounter difference only to the extent that the owner lets us. Whatever we do in Private Park is subject to their control. In such space we cannot participate in those activities and interactions whose nature and value depend on their taking place in space that is not under the control of any private person. In Private Park, we can interact only as guests, not as members of the public.

The idea that private space is anathema to the value of these interactions might suggest that we could be able to realize them under a variety of alternative options. But we cannot. It should be clear that in a negative community, where I am free to take over the space if I have the strength to do so, we could not relate through any idea of democratic equality such as we see in public space. Public space is, as we've seen, somewhat like a positive community. The attraction of that idea is that it seems to vindicate the thought that the space is everyone's. But the pure case belies this — some will be able to secure consent for their activities and others will not.<sup>51</sup> I mentioned Cohen's idea that an "appropriate procedure" is thus required to govern shared space. What I have tried to argue is that, at least in the public context, there is only one form that such a procedure could take, namely the form of a realization of the public use standard. Below I will discuss some more specific procedures that, on my account, need to fall under that form. But now I want to note the centrality of the idea of the public to this analysis. Public space is not merely shared space, it is space shared by *everyone*, and necessarily so. The public is what it is not because of its size but because of the generality in the determination of who is a member.

This marks a distinction from any other form of shared space, since any other form of shared space, no matter how large or well-governed, must be, on my view, private. This means that it would be unable to realize the form of egalitarian relation that we understand to be central to the value of public space, since an important element of that relation is that it is one that applies to everyone in the society *as such*. Put differently, this is why public space is the public's space, since the public is the name of the organization of all the members of society relating as equals *qua* members of society. The idea is not that each of us has, as a private person, some interest in the space and

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51. In a pure positive community, since everyone has a right that no others use any object or space without consent, all uses of space would be permissible only through a strict (unanimity-requiring) consensus-seeking process. It is doubtful that such consensus would be reachable in any but the most limited set of cases. As Finnis notes, unanimity is "far beyond the bounds of practical possibility in the political community." See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 231–33 (2d ed. 2011). But even in that small set of cases, the decisions reached would be, arguably unavoidably, biased in favor of a particular group of members of the community, namely those who are more persuasive, eloquent, popular, or so on.



that all of those private interests must be collected and amalgamated, but rather that each of us is at the same time a private person and a member of the public, able in that latter capacity to think and act as a member of the public, according to what Rousseau famously called the general will.<sup>52</sup> Exactly how a public is constituted is outside my scope here, but I take it that I can appeal nevertheless to the idea of the public understood at least in this thin sense. The public needs to act in the public interest, which is just to say not in the private interest of any particular member or group of members of it, so public space must be used consistent with this idea.

In the light of these considerations, we can see why only space governed according to the public use standard can realize the value of public space. Each member of the public has an equal claim to public space in the sense that each is free to try to use the space as they please, and cannot be prevented from doing so as a matter of right by others. That “as a matter of right” qualification is important. It means that, while the fact that you are presently using the space — parking in that spot, playing baseball on that diamond, sitting on that bench or at that table — might mean that I am factually unable to do so, you cannot claim an entitlement to determine the permissibility of the use of the space according to your say-so. Your use is limited by the public use standard, which means that you are permissibly able to use only so long as your use is consistent with others making like use. These typical uses have that structure exactly: by sitting or playing or parking in the normal way, you claim no entitlement to determine as a matter of right when I may play, and your use presumes that I am equally entitled to the same use at a different time.

Moreover at least many of these cases create the conditions for interactions with strangers of a sort that seem distinctively valuable in a democratic society. Perhaps in some cases you ought to let me join your game of baseball or share the bench with you, allowing (or requiring) us to interact on terms of equality, with neither of us entitled to determine the permissibility of the other’s actions. We might understand such apparently mundane interactions as small-scale acts of democratic politics, where we engage in acts of “collective self-determination by means of open discussion among equals,” in our status as members of the public, to decide how we ought to govern ourselves in public space.<sup>53</sup> From this point of view, public

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52. Jean-Jacques Rousseau, *The Social Contract*, Bk. II, Ch. 6, para. 9, 10, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch ed. & trans., Cambridge Univ. Press 2d ed. 2019) (1762); see also Kant, *supra* note 43, at 6:311, 6:314.

53. See Anderson, *supra* note 4, at 313. The importance of public space to democracy was also emphasized by Frederick Law Olmstead, who viewed his parks as a site for the mingling of the classes with an eye to the promotion of the sort of social ethos necessary for the functioning of a democratic state. See Rose, *supra* note 27, at 779.

space looks distinctively valuable as a site for the realization of a very abstract idea of democratic equality, according to which none is the superior nor subordinate of any other. By using public space according to the public use standard, we make our status as equals real in a very direct and clear way, as we decide how we are to live together in space in a way that is consistent with none being in charge of any other.

The ballet of public space<sup>54</sup>— people passing and repassing on the streets, walking their dogs, picnicking, playing baseball in the park, standing on a streetcorner soapbox to criticize the government or predict the end of the world, taking turns sitting on benches or sharing tables in the library — depends on the public use standard. Each member of the public comes to the park, or the square, or the street, or the library, entitled to use the space, but not in any way that others are not equally entitled. We thus bring ourselves into a site of what we might call radical democratic egalitarianism, where we are often required to negotiate the terms of our interactions as equals. I call this radical egalitarianism because we interact as equals, directly, as it were, rather than mediately through a set of rights that sometimes place one private person in charge of others, but that are justified because each has an equal set of entitlements, or because these positions are open to all equally, or some other more complex feature. That is, with respect to our bodies, we are equals not in the sense that we need to negotiate the terms of how they are to be used, but rather because you're in charge of yours and I'm in charge of mine. Here, no private person is in charge. The value of public space lies in the activities, relationships, and forms of life — in short, the myriad essential elements of a democratic egalitarian society — that depend on this norm.<sup>55</sup>

#### IV. PUBLIC SPACE IN PRACTICE

The democratic egalitarian character of public space and its value provide us with a set of ideas that we can use to think about a range of important questions of policy. I will consider a few in this section. Some will be drawn from the early days of the pandemic, when, as I have said, questions about public space seemed more salient, and others will be more timeless. For all

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54. Here, I am drawing on JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 50 (Vintage Books ed., 1992) (1961).

55. Any particular public space might serve a variety of values. What I want to establish is the distinctive value of these spaces' publicness. National parks are a good thing, in part, because they preserve the natural environment, animal habitats, and so on. Supposing that these are goals that the state ought to pursue, there seems to be no direct reason to pursue them through public space: we might more effectively pursue them by imposing a set of stringent constraints on the use of private property. That said, I would not be the first to suggest that public ownership of natural spaces can allow for a distinctive way to relate to the members of one's political community. See WOODY GUTHRIE, *This Land is Your Land* (Folkways Records 1944).

of these practical questions, our guiding light will be the abstract idea of public space: when creating and regulating it, we need to ensure that public space is capable of doing the job only it can do, allowing members of the public engage in public activities, to relate to one another as equals.

Let me be clear, though: to say that public space is constituted by the egalitarian ideal of the public use standard does not commit me to quietism or any kind of pollyannish naivete.<sup>56</sup> It is quite obvious that the public spaces we have are not, on the ground, anything like the kind of egalitarian spaces that they ought to be, that, as elsewhere, there is wide gulf between the ideal that I am describing here and the reality of public space in our lives. That is a problem, obviously. But it is not a problem for the account: it is a problem for our societies. The failure of our public spaces to meet their egalitarian standard is a failure of these spaces to be the sorts of spaces that they are meant to be, and thus a failure of our societies to take advantage of the possibility of cultivating, fostering, and promoting distinctive kinds of egalitarian relations in public space. In short: the egalitarian conception of public space precisely shows us what is so wrong about the public spaces that we have, and provides a way of thinking about what we need to do to make them better.<sup>57</sup>

### A. Regulating Public Space

Let us begin with parks and streets. Some kinds of public spaces are for particular activities, a point I will elaborate on below. But these two sets of examples are better understood as allowing for a wider and more open set of

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56. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958) (criticizing the same attitude of quietism).

57. Beyond the COVID-19 policies, the summer of 2020 also highlighted a different set of issues about the use and regulation of public space. It is quite clear that laws about access to and use of public space are, in many places and, in particular, the United States, enforced quite unequally across racial differences. A theme of the Black Lives Matter protests taking place across the US that summer was the way that some seem to take themselves (and are seen by the law as) entitled to use public spaces in a way that others are not. See Sarah M. Nir, *How 2 Lives Collided in Central Park*, *Rattling the Nation*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html> [<https://perma.cc/Q6TF-CCQ4>]; Taja-Nia Henderson, *Living While Black: How Black People are Policed Just for Being in Public Spaces*, TEEN VOGUE (July 8, 2020), <https://www.teenvogue.com/story/living-while-black-racism> [<https://perma.cc/6EEM-5NWV>]; Caroline Rhude, *My Life in Public Spaces: How my Race Colors the Way in Which the World Reacts to Me*, LAIST (July 10, 2020), <https://laist.com/2020/07/10/race-in-LA-how-my-race-colors-life-in-public-spaces.php> [<https://perma.cc/DA3P-UX4W>]. While exploring this in detail is outside the scope of this Article, and deserves significant discussion of its own, we can see that, the egalitarian ideal of public space that I am offering here provides one, although certainly not the only, way to see the wrongfulness of these racialized enforcement practices. Public space is the public's space, and differential enforcement communicates the opposite. It therefore cannot be permitted.

public activities. As I have suggested, the public use standard is meant to guide the resolution of (potential or actual) conflicts between these activities. There is significant value in the members of a democratic society being required to work out, in real time, a way for them to pursue their independent projects in a way that is consistent with their equality. This is a very common phenomenon: I want to play baseball where you want to fly a kite, so we need to figure out a way to work through the question of who will get to decide what happens when we are at the park at the same time. It is easy to see that a range of options might work here — we could try division in space, or division in time, or perhaps we both do some third thing together. In the spring of 2020, one site at which this point emerged quite clearly was the sidewalk. Everyone started taking walks. And, early on, we did not know quite how safe it was to walk close to a stranger, even outside. So, in many places, a norm developed that called for giving others a wide berth in passing, to maintain a social distance, perhaps by stepping briefly into the roadway. And for the most part, this worked out fine. While some people always insist on keeping to their path and never giving way, most of us understood the way in which this norm did require a kind of give-and-take that is quite consistent with the core of the public use standard, and so most of us acted accordingly. This was an informal and unformalized expression of the idea of democratic negotiation that is sometimes realized in public space.

But many questions about the use of public space are more complicated than this one, and on-the-ground case-by-case negotiation is not the best way to solve them. So, instead we have rules: bylaws and regulations. Almost all public parks and public streets are governed by a set of more or less determinate rules, setting out what counts, for that space, as a use of it that is consistent with like use by others. It is hard to know where to draw the line between cases where we can leave the question of what is consistent with the public use standard for case-by-case determination and where we need to set more specific rules.<sup>58</sup> Certainly complexity plays a part here. Let us extend the example above. It is simple enough for two or more pedestrians to negotiate the shared use of a public way, even in the context of social distancing. But when other forms of transportation — like bikes and especially cars — are added to the picture, things become more difficult. It is probably for these reasons that this period also saw the emergence of so-called quiet streets, where either lanes of traffic or entire roads that are normally open to cars are converted to the exclusive use of pedestrians and

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58. See Pierre Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379, 379–80 (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 42–43 (1977) (describing this common problem across the legal system about rules, standards, principles, etc.).

bicyclists.<sup>59</sup> By setting clear rules about the space available to pedestrians and cyclists, some of the problems about conflicts among members of the public can be avoided. As the pandemic developed and car traffic rebounded, many of these sorts of programs seem to have fizzled out. I will not say any more about that: while there are many reasons to think these sorts of programs are a good idea, it is not clear that the idea of public space itself can help us here.<sup>60</sup>

More abstractly, both the creation of rules for the use of public space and their application by officials must be done for public purposes, and should strive to ensure the fullest possible realization of the egalitarian relations constituted by public space. The rules about what can and cannot be done in the park or street must meet this standard, as must the actions of the officials who enforce them. But even this requirement is very indeterminate, and can admit of different rules in different circumstances. Here a tent is permitted during the day, there it is not. One may park on the street on these days but not on those. These spaces are open for free where those require a small payment. And so on: a brief look at the municipal bylaws of any major city in North America discloses a wide range of such rules, and comparison across jurisdictions multiplies its size. In all cases, the rules must not allow any private person to control the activities of others in the space, and they should at the same time aim for the greatest realization of public space's distinctive value that is possible in the context.

## B. Permits in Public Space

Another phenomenon worth thinking about here is a system of permits, where, having applied for a permit, I am able to do something that would, absent the permit, constitute private appropriation. I am able to reserve the local baseball diamond or to close the street off for a block party or parade. In some municipal parks there are barbecues and sheltered picnic areas that can be reserved, and some national park systems have provisions in place to reserve camping sites for overnight camping. It is not hard to see what is going on here. The public can choose to let private persons use its space so long as such uses are consistent with the space remaining the public's

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59. See Courtney E. Martin, *Slow Streets are the Path to a Better City*, CURBED (May 19, 2020, 11:00 AM), <https://www.curbed.com/2020/5/19/21258662/oakland-slow-streets-closures-social-distancing> [<https://perma.cc/MMX4-EQ9V>]; Johnny Diaz, *Cities Close Streets to Cars, Opening Space for Social Distancing*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/us/coronavirus-street-closures.html> [<https://perma.cc/AXN5-CLB6>].

60. Although it is also not clear that it cannot: we might wonder if the fact that drivers each need much, much more public space than cyclists or pedestrians is itself a reason internal to the idea of public space to pursue policies that limit the space cars can take up in favor of pedestrians and cyclists.

space.<sup>61</sup> As such, we have limits on such things as the time that such uses are allowed or their physical size. More broadly, a baseball league that gets a permit to reserve the neighborhood diamond on Sunday afternoons would need to hold its membership open to the public (even if subject to (non-discriminatory) restrictions on age or ability). A permit to block the street for a parade could not be given to a group perpetrating a discriminatory message about the use of public space. The details would be up to the jurisdiction in question, subject to the requirement that the permitting process could be comprehensible as a form of regulation of the use of public space according to the abstract norm of public use.

I have suggested a couple of times that violations of the public use standard can be understood as attempts at a kind of private appropriation of something that is the public's. This is true for small scale violations: a restaurant that attempts without a permit to enclose part of the public sidewalk in front of it to create a patio is wronging the public by attempting to take for its private purposes space that is held by the public for its public use, that is, attempting to privatize public space.<sup>62</sup> So is someone who builds a permanent structure in the public park, or, who through non-physical means, including forms of intimidation, purports to determine who may use the public space. To return to a case I have mentioned already, those who purport to have the right to control access to public beaches are committing another version of this same wrong.<sup>63</sup> Interesting and difficult questions about the permissibility of the use of public space will often turn on the interpretation of this distinction. Does a private organization's use of the park for a days-long ticketed concert amount to an appropriation of public space for private purposes?<sup>64</sup> What about the closure of the public way for filming a movie, construction or delivery vehicles parked in bike lanes, the use of a public pool for lessons offered by a for-profit organization, or valet parking stands on the street in front of a restaurant? Some of these questions, of course, will be addressed by the applicable by-laws or regime of permitting use of public space in a given jurisdiction. As I suggested above,

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61. This is the formal parallel of the idea that a private person can consent to another's use of their person, but that some things that cannot be consented to because they are inconsistent with the status of the consenting agent.

62. See *Harper v. GN Haden and Sons, Ltd.*, [1932] Ch. 298, 308 (U.K.) ("A permanent obstruction erected in a highway without lawful authority is necessarily wrongful and constitutes a public nuisance at common law, as it in fact operates as a withdrawal of part of the highway from the public.").

63. See Sharp, *supra* note 30; see also Andrew W. Kahrl, *Free the Beach*, BOS. REV. (May 21, 2018), <http://bostonreview.net/class-inequality-race/andrew-w-kahrl-free-beach> [<https://perma.cc/RT6X-WVFM>].

64. See Thomas Honan, *These Parks Are Our Parks: An Examination of the Privatization of Public Parks in New York City and the Public Trust Doctrine's Protections*, 18 CUNY L. REV. F. 107, 107–09 (2015).

though, while there is a wide scope for discretion in terms of democratic decision making about what counts as public use of public space, the decision must be structured by the abstract prohibition against appropriation of public space for private purposes. Most permitting regimes can plausibly be read as consistent with this, as they require permitted private uses to be temporary, limited in scope, and so on.

In this context, we can explore one phenomenon that arose during the early stages of COVID-19, but seems like it may be here to stay in many places, namely the proliferation of sidewalk and street-side patios outside of restaurants in urban contexts. In many cities, including the one I live in, the early days of COVID-19 saw a push to allow restaurants and bars to set up patios on public sidewalks and streets.<sup>65</sup> Before vaccines were widely available — and even after they arrived — sitting outside was safer than sitting inside. So even when indoor dining was prohibited, patio dining was permitted. And then many jurisdictions decided to allow restaurants and bars, following a permitting process, to open patios on sidewalks and on the sides of public streets, typically where cars would park. It is easy to see why this was popular: when there was nowhere else to eat, these patios provided a venue. But the appeal was evidently deeper than that, given that the practice of such patios has persisted even as indoor dining has become possible and, at least in some places, is on its way to becoming permanent.<sup>66</sup>

How should we think about these programs? On the one hand, they are a clear instance of a permitting system, in that they allow (or I guess I should say permit) private parties to use public space on a quasi-exclusive basis. If you are not a customer of the bar or restaurant, then you aren't meant to sit on the patio, and it is easy to surmise how certain members of the society — those with financial means, those with the inclination to dine out — will be more advantaged by these programs than others. And the scope of the

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65. See Rob Ferguson, *Ontario Restaurants and Bars Now Allowed to Expand Outdoor Dining and Drinking Spaces*, TORONTO STAR (July 3, 2020), <https://www.thestar.com/politics/provincial/2020/07/03/ontario-restaurants-and-bars-now-allowed-to-expand-outdoor-dining-and-drinking-spaces.html> [https://perma.cc/LW4W-RKGP]; Fritz Hahn, *To Expand Dining Options, Restaurants Take to the Streets*, WASH. POST. (July 10, 2020, 11:20 AM), [https://www.washingtonpost.com/goingoutguide/to-expand-dining-options-restaurants-take-to-the-streets/2020/06/24/fb8ac7b6-b617-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/goingoutguide/to-expand-dining-options-restaurants-take-to-the-streets/2020/06/24/fb8ac7b6-b617-11ea-aca5-ebb63d27e1ff_story.html) [https://perma.cc/5FGD-94NB].

66. For the details of the Toronto program, see *Caf TO – Outdoor Dining*, CITY OF TORONTO, <https://www.toronto.ca/business-economy/business-operation-growth/business-support/covid-19-cafeto/> [https://perma.cc/2TGU-25T2] (last visited Oct. 24, 2022). For the New York City program, see *Open Restaurants*, N.Y.C. DOT, <https://www1.nyc.gov/html/dot/html/pedestrians/openrestaurants.shtml> [https://perma.cc/V462-XWTF] (last visited Oct. 24, 2022) (“Due to the success of the emergency Open Restaurants Program during COVID-19, New York City is working to create a permanent Open Restaurants program.”).

exclusivity here seems pretty broad: whereas I can typically reserve the baseball diamond for the afternoon, here the patio spaces are dedicated to the private use for much of the summer.

Still, these are arguably differences of degree rather than of kind: as the comparison above suggests, we do permit certain kinds of exclusivity in these permitting regimes — our local Little League can use the park’s diamond exclusively most nights over the summer — and, as I will discuss in the next Section, we have many public spaces that are intended for particular uses which may appeal to some members of the public more than others. I think the most pressing question specific to these programs might be about the nature of the public space that is turned over to the private parties. On the one hand, sidewalks are arguably among the most open and democratic public spaces; on the other, curbside parking spaces already, it is worth saying explicitly, privilege a certain subclass of the public over others. And it also seems relevant that a particular bit of space can be used by more members of the public as a patio than as a parking space — four or six can sit in the space of a single car, so arguably the patio is a more public use of public space. Finally, we probably should not discount the more ephemeral and intangible effects of these patios, as they arguably — or at least in my experience — can have the effect of generating a kind of positive externality, what we might call a “buzz,” that makes the experience of public space more dynamic and exciting, perhaps even more public, in a way that extends beyond the patios themselves. A street with patios is one that seems obviously to more fully realize the kinds of coming-together and encountering difference in public space that we discussed in Part II. All that said, as these programs do seem potentially here to stay, it might be worth exploring, as some cities seem to be, the potential that these spaces might serve the value of public space even more effectively by being transformed into a variety of non-profit, fully public uses, as in the conversion of parking spaces to parkettes and the like.<sup>67</sup>

### C. Constructing Public Spaces

When it comes to questions of what public spaces we should have, where they should be, and what they should be like, a related but distinct set of ideas must be taken into account. Although the idea of public space is formal, public space as we experience it is not. Public space is not typically an empty wilderness. Rather, it is something that we need to construct, to achieve, both physically and normatively. To ensure that all members of the

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67. See CBC News, *Cabbagetown Turned a Parking Space into Parkette to Support Local Business*, CBC (July 3, 2022), <https://www.cbc.ca/news/canada/toronto/cabbagetown-parkscape-toronto-1.6509387> [<https://perma.cc/3WWD-22HC>].



public can interact as equals in public space, the state must provide physical conditions that make this possible. Public streets, libraries, and parks must not be sites merely for the physically or neurologically typical to move, read, or play, but must provide spaces, materials, and facilities sufficient to ensure usability by everyone on terms of equality.<sup>68</sup> And the same is true for physical location: public space must be physically located across a society to ensure that each member of the public has a degree of access to a sufficiently wide range of different kinds of public space to allow them to understand themselves as the equal of each other member of the public in respect of their access to their shared space. Putting good parks in rich areas and bad parks in poor areas is not consistent with seeing all the public space as shared by all members of the public.<sup>69</sup>

Implicit in these examples is another point. Different public spaces are suited to different kinds of public activities. A state can and should impose regulations that recognize this. In all cases, the regulations must strive to ensure that the members of the public using the space can relate on terms of equality and that none can determine the permissibility of another's use. But just what that means will depend on the context. The physical and normative conditions that make a good park are different than those that make a good library and different again than those that make a good street. Moreover, different instances of these various types can and should be differently built, to allow for a variety of kinds of interactions across smaller and larger geographic areas. This park is for reading and walking, that one for

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68. Another COVID-specific example here: the circles painted or chalked onto the ground in parks, set up so that only members of one family or bubble could socialize together. These were, clearly, a significant restriction on the permissibility of using public space. But, from the point of view of the degree of scientific knowledge available during the summer of 2020, one can see their justification and see how clearly it fits into the egalitarian account of public space I have offered. These circles provided a rule about the use of park space that applied in the same way to each member of the public, so that disputes over use can be resolved on terms of equality in that none has a claim to the use of the space that others do not also have. They did so, importantly, at the same time that they allowed for what was thought at the time to be the maximum safe use of the space. Because there was a relatively high degree of uncertainty around what did and did not count as safe use of public space like a park, some members of the public — the young, the healthy or at least those who took themselves to be healthy, those with high risk tolerance — felt entitled to use the space in ways that others — the elderly, those with compromised immune systems — reasonably understood as exclusionary, they saw those using the park as claiming that their use was to be allowed. In other words, if the park was monopolized by those who seemed at the time to be foolish risk takers, more responsible members of the public were left unable to use it; by contrast if rules are imposed that govern use to make riskier behavior impermissible, the space becomes more available for use in a manner that is consistent with the public use standard.

69. See Nina Lakhani, *Millions of American Lack Access to Quality Parks, Report Reveals*, GUARDIAN (May 20, 2020), <https://www.theguardian.com/environment/2020/may/20/park-inequality-access-coronavirus-wellbeing> [<https://perma.cc/BBZ3-8Y57>].

skateboarding and baseball, another for young children, and yet another for large group picnics. Here again the abstract idea of public space structures the form of activities and interactions that are permissible but allows for a wide range of variation in its realization.

To illustrate these ideas more concretely, notice that, while I have concentrated here mostly on parks and streets, beyond these cases lies a whole variety of other kinds of public spaces that are necessary for a whole variety of other public activities. Think about public education or public transportation, public museums and art galleries, public monuments and memorials, and even the sites of government themselves. The identification of a space as for one or another of these activities, and the associated imposition of regulation to that end are both within the scope of the permissible public purposes I have in mind here and can be thought to be effective to the extent that they promote egalitarian relations appropriate to the sort of public activity in question. And, as the previous example suggests, there are also difficult questions about which sorts of public spaces should be favored, and how to choose among options if we cannot have all the public space we want. These are important questions, but for the most part cannot be answered by the idea of public space itself: instead they turn on a range of other political and legal considerations that we cannot explore here.

#### **D. Trespassing in Public Space**

This broadened conception of a public space, including government buildings, schools, and so on, introduces another important question, about the relationship between public space and the trespass remedy. It is generally taken for granted that public authorities are entitled to exercise the trespass remedy, which is to say to demand that individual persons leave some space on pain of being held to be liable in trespass (civilly or even criminally).<sup>70</sup> But on the account I am offering here, we have reason to question this. Trespass makes sense in respect of private property because the entire point of private property is to give the private owner the capacity to determine how others may act on the property, whether they may come or go, and so on, a capacity “to exclude anyone at all for any reason.”<sup>71</sup> But in public space, as I have stressed, there is no person who has the capacity to tell others how they may or may not act; indeed, the egalitarian account of public space offers just the opposite picture. As the discussion of bylaws above suggests, there is nothing inconsistent with the egalitarian picture of public space with

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70. *See, e.g.*, Trespass to Property Act, R.S.O. 1990, T.21 (Can.); N.Y. PENAL L. § 140.00(5), 140.05.

71. *Uston v. Resorts Int’l Hotel Inc.*, 89 N.J. 163, 170 (1982).

creating specific, determinate rules about what activities may or may not take place there. It is, in short, perfectly permissible to have rules that prohibit certain activities (playing baseball) in certain public spaces (the legislature; the mayor's office; the library). The point now is just this: those rules are justified on the basis of the purpose of public space. When someone violates one of those rules, they can be asked to stop their activity or even to leave the space in question, but such demands will be grounded on the purpose of the allocation of the public authority over the space and thus responsive to the familiar public-law restrictions on the exercise of public power. In other words, public power is not unconstrained in the way that private owners' power over the private property seems to be, so the exercise of the trespass remedy needs always to be subject to public law review on the grounds of the reasonableness of its exercise.<sup>72</sup> That sounds like a mouthful, but it is a familiar idea: the security guard at the legislature cannot simply demand that you leave on the grounds that he is in charge, nor can the legislators. You have, at least in the abstract, just as much a right as they do to be there. At the same time, of course, exclusions can be justified on the very grounds in question. The security guard can demand that you leave the legislature because it has closed for the evening, because public purposes limit who may access certain areas where sensitive business is conducted, or so on.

### E. Sleeping in Public Space

Those considerations lead helpfully into the consideration of another major issue that arises in thinking about the regulation of public space. In many contemporary societies, where homelessness is running unchecked and largely unaddressed, the only place that the homeless are free to be is public space. This is, quite obviously, a moral catastrophe, and, as I have argued elsewhere, the justification of any private ownership of space is conditioned on the state's ensuring that each member of the society is provided with some space of their own so as to make homelessness impossible.<sup>73</sup> But that is not the world we live in, and much of the on-the-ground advocacy on behalf of the homeless has focused on the need of the homeless to use public space. Litigation has centered on the constitutionality, in the face of homelessness, of municipal rules prohibiting the erection of permanent and semi-permanent structures, notably including tents, in public parks. It is easy to see why those rules are in place and normally justified: the erection of such a structure in a park is close to a paradigmatic violation of the public use standard, as we saw above.

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72. What standard of review would apply in different public law regimes is a question I leave to the side.

73. See *Homelessness*, *supra* note 14, at 290.

But matters seem more difficult when the occupant of the structure is homeless. I am inclined to think that the courts have been correct to be sharply critical of these prohibitions,<sup>74</sup> but we need to think carefully about the explanation. One reaction to the reality that the homeless are often required to be in public space because they have nowhere else to be is to argue that we ought to shape and regulate our public spaces to accommodate the homeless.<sup>75</sup> As important as addressing the problem of homelessness is, we should note that this sort of approach is very much non-ideal with respect to what it can offer the homeless, what it can do to our public spaces, and its effect on our public understanding of these issues. With respect to the first point, the simple fact of the matter is that, however lax our regulation of public space usage by the homeless could be, the homeless would still be homeless and as such unable to enjoy all the important things that those with homes are able to enjoy. That is, private space, too, uniquely makes possible a wide range of important and valuable activities and relations, and the best explanation of the wrong of homelessness locates it in the way that the homeless are unable to access these goods and the consequent inequality.<sup>76</sup> In short, allowing the homeless to use public space does not come close to solving homelessness. With respect to the second point, which is to say the effect of relaxing the application of the public use standard in the face of homelessness, my central point has been that public space is uniquely valuable and that, to maintain that value, some regulation of that space according to the public use standard is necessary. The question that homelessness poses to us is about how to approach this conflict. Regarding the third point, it is not, I think, inappropriate to notice the way that suggestions that the homeless be able to use public space more freely tend to let the state off the hook in terms of its failure to address the massive injustice of homelessness while at the same time creating a rhetoric that cheapens public space and that may thereby tend to lead to our losing sight of its central value and failing to devote sufficient attention and resources to it.

Interestingly, though, as we press down into the details of the judicial decisions on these questions, one can see how courts aim to attend to these kinds of considerations. A rule that says that one cannot build a permanent structure in the park seems more reasonable, on public law grounds, and thus easier to justify, than a rule that says one cannot set up a tent for the night. Sleeping in a tent overnight is in many cases hard to characterize as inconsistent with the possibility of use by others of the space in question, and

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74. See, e.g., *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019); *Victoria (City) v. Adams*, [2009] 313 D.L.R. (4th) 29 (Can. B.C. C.A.).

75. See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 315 (1991).

76. See *Homelessness*, *supra* note 14.

so might be thought to be a reasonable use of the space that is consistent with the public use standard. COVID arguably made the presence of the homeless in public spaces more salient — since the risk of transmission in shelters was high enough to cause many people who would otherwise have used them to sleep outside instead — and, at least arguably, in the early days might have shifted the risk calculation in the direction of permissibility.<sup>77</sup> But I do not think any new principles apply here: the question — a difficult one, to be sure, is about how to reconcile the proper value of the use of public space with the state’s failure to meet its obligations in respect of homes.

This raises a more abstract issue that is raised by this phenomenon, which ties these practical questions back to the broader issue of the nature and justification of public space. Policies that tend to incentivize the homeless into sleeping in parks seem to disclose a certain attitude toward public space according to which it is simply the leftover space into which the state can freely dump whatever policy problems it cannot effectively deal with. The sidewalk patios are a bit like this, too. In each case, there is a question about how to pursue some important public purpose, a purpose that is arguably not directly tied to the nature and value of public space. The instrumentalist conception of public space that I noted, and rejected, earlier, suggests that public space, lacking any distinctive value of its own, might be a good spot to do stuff that is better done on private space if the costs and benefits happen to turn out in the relevant way. But this treating of public space as a dumping ground degrades its value, both practically — by literally putting things into public space that the state refuses to deal with elsewhere — and, just as important, in principle, as it obscures the way in which public space is distinctively valuable and appropriate for distinctively public activities. There is much to say here, and further work, outside our present context, is needed to fully explore these intricacies.

## V. QUASI-PUBLIC SPACES

I want in this Part to consider a slightly different set of questions from those we have been looking at so far. The account of public spaces I have offered here might seem to exclude some kinds of spaces that we think of, at least to some degree, as public. I have in mind two slightly different sorts of spaces. First, shopping malls and other privately owned spaces that are “held open to the public.” And second, so-called privately owned public spaces (“POPS”) such as plazas in front of office towers. Both of these types of

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77. See Estair Van Wagner & Alexandra Potamianos, *Cities Must End Homeless Camp Evictions During the Coronavirus Pandemic*, CONVERSATION (June 9, 2020, 10:18 AM), <https://theconversation.com/cities-must-end-homeless-camp-evictions-during-the-coronavirus-pandemic-139285> [<https://perma.cc/7S28-XVQW>].

spaces can be understood as public spaces, in a way, although they are strictly speaking privately owned. In this part I will explore that claim.

### A. Open to the Public

According to a view one finds in at least a subset of the discussions of public space in the literature on urban planning or sociology, my understanding of public space counts as cramped and underinclusive.<sup>78</sup> These discussions privilege in their thinking about public space not its legal status but something like our experience of a space. They are thus inclined to count as public a set of spaces that are, strictly speaking, legally private, such as shopping malls. In this Part I will show how my account of public space suggests an approach to these phenomena. The basic idea is that these spaces are held open to the public for public use and that therefore the public ought to be able to so use them.

The common law has long recognized certain privately owned and operated businesses as so-called public accommodations. Since the Middle Ages, innkeepers have been under an obligation to let an available room to anyone who offered to pay for one, and common carriers to carry the goods of any who asked and paid.<sup>79</sup> One relatively well-accepted explanation for this rule is that “the business of an innkeeper is of a quasi public character,” that a common carrier is “in the nature of a public officer.”<sup>80</sup> The application of this type of rule depends on the nature of the service provided: an innkeeper must provide an inn to anyone who asks, a farrier must shoe the horse of anyone who needs their services, and so on. Whatever the service is, the traditional rule was that “one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the Public,” which is to say, “one who assumed a public office was bound to perform the duties of such office, and to perform them properly.”<sup>81</sup> We can then apply this idea to something like a shopping mall. The argument takes two steps. First, we recognize that a mall is, like many other businesses, held open to the public, so that its owner cannot refuse the custom of any

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78. For example, see MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* (2004).

79. See *White’s Case* (1558) 73 Eng. Rep. 343 (K.B.); see also Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies, Part I*, 11 COLUM. L. REV. 514, 515 (1911); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1307–10 (1996). There are some who reject this account of public accommodations; while I do not have the space to discuss this, I suspect alternative explanations of the core of this doctrine could, *mutatis mutandis*, be extended to the case of malls in a way parallel to the treatment I propose below.

80. *De Wolf v. Ford*, 86 N.E. 527, 529 (N.Y. 1908); *Ansell v. Waterhouse* (1817) 6 M & S 385 (UK). To the same effect, see *R v. Ivens* (1835) 173 Eng. Rep. 94, 96.

81. *Lane v. Cotton* (1701) 88 Eng. Rep. 1457, 1465; Burdick, *supra* note 79, at 521.

particular patron. The second step of the argument is more centrally related to the rest of this Article, and rests on the claim that the purpose of a mall is to allow the public access for use, basically, as public space. As one court put the point in discussion of this issue, when it comes to a mall, “access by the public is the very reason for its existence.”<sup>82</sup> Moreover, the public is invited not merely to shop but to do quite a bit more — wander the common spaces, hang out, drink coffee, walk for exercise or to soothe a crying baby. In effect, to treat the common spaces of the mall like they are a public street or square.<sup>83</sup>

Put more directly, the claim is this: malls are held open to the public for public use as a form of public space. They are, if you like, doubly public accommodations. While innkeepers are filling a public office and performing a public service, and thus bound by a different set of standards than mere private owners, the operator of mall is distinctive in that the content of the service they are providing is itself public: they are inviting the public to use their privately owned space as if it were public space. This invitation, made as it is to the public, brings with it an obligation to provide their public service properly. And in this context that means a severe restriction on their right to exclude those users doing things of the sort that are typical of public space. Importantly, both forms of publicness are necessary. An entirely private space that looks like a public space but is not open to the public (like Private Park) should not be treated as public space. Conversely an inn is open to the public but not as a public space. Just as in the case of genuine public space, what uses are permitted will depend on the nature of the space. The basic thought in the case of a mall is that a mall is like a street, which means that activities appropriate to a public street (such as those listed above and crucially including a wide range of expressive activity) would be permissible, but activities better suited to a park (like sports or picnics) likely would not.

Bringing these thoughts to bear onto the doctrine more directly can illuminate the problems that arise in the caselaw as follows. Earlier, I mentioned that taking the public use standard seriously means that the tort of trespass ought not to apply to public space in the normal way: rather than public authorities having the power to invoke trespass for any reason or no reason at all, as private owners do, public authorities must do so only for public purposes properly tied to the reasons for which they have control over

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82. *Schwartz-Torrance Inv. Corp v. Bakery & Confectionary Workers’ Union, Loc. No. 31*, 394 P.2d 921, 924 (Cal. Sup. Ct. 1964); *see also Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. Sup. Ct. 1979).

83. To the same effect, *see N.J. Coal. Against War in the Middle East v. JMB Realty Corp.*, 650 A.2d 757, 761, 772–73 (N.J. 1994).

the land. In short, they need to have at least a rational basis for doing so.<sup>84</sup> If malls and other spaces held out to the public are, as I argue, to be treated as public space, the same analysis should apply to them. That means that any given such space is entirely permitted to have rules about how it may or may not be used, but such rules must be tied properly to the nature and purpose of the space. Mall owners cannot, therefore, invoke the trespass remedy, as the Canadian Supreme Court memorably put it, “in all its pristine force,”<sup>85</sup> but should be able to provide at least a rational basis for any rules excluding certain kinds of uses of their space. Put differently, we might say that owners of spaces held out as open to the public “have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises,” a duty which applies “to all property owners who open their premises to the public,” because such owners “have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.”<sup>86</sup> A rule that says that baseball cannot be played in a shopping mall should meet that standard, since even mall owners can exclude anyone if they “disrupt the regular and essential operations” of the space,<sup>87</sup> but a rule prohibiting peaceful labor picketing should not.<sup>88</sup> And, as I noted last paragraph, this calculus would apply differently in the case of other spaces held open to the public, like stores or cafes.<sup>89</sup>

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84. See *supra* Part IV.A.

85. *Harrison v. Carswell*, [1976] 2 S.C.R. 200, 206 (Can.).

86. *Uston v. Resorts Int’l Hotel Inc.*, 89 N.J. 163, 173 (1982). The reference to discrimination here invokes a set of considerations beyond the scope of this Article. In brief, the wrongfulness of discriminatory exclusion from public spaces is overdetermined: it is not going to be justified on the analysis in the text above, and it is going to be unjustified on the basis of a more general norm prohibiting state discrimination.

87. *Id.* (citing *State v. Schmid*, 84 N.J. 535, 566 (1980)) (quoting Princeton University Regulations on solicitation). The *Uston* case is about the exclusion of a blackjack card counter from a casino, and it is at least arguable that the permission to exclude can cover a case such as that.

88. This is a way of understanding the holding in *PruneYard* that “There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.” See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

89. See *Ralphs Grocery Co. v. United Food & Com. Workers Union Loc. 8*, 290 P.3d 1116 (Cal. 2012) (declining to extend the rule about expressive activity in malls, in part by noting that a grocery store differs from a mall in precisely this respect). This point could be developed further to vindicate the thought that a sort of private business including (but not limited to) cafés and bars counts as a kind of public space, as suggested by elements of Habermas’ theory of the public sphere. See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., MIT Press 1989) (1962). See also



This explanation brings with it an important qualification. The public's permission to treat a mall as if it were public space — and thus a permission to engage in a variety of public activities — rests on the owner's holding the space out as open to the public. This is not a matter of the subjective intentions of the owner; rather it is a matter of applying the abstract idea to the particular way in which the space is or is not presented as open to the public, as public, with reference to objective features such as open doors, no restrictions on entry, and so on. But this invitation to the public is, itself, revocable: a mall owner can freely and non-wrongfully change its hours, or close it in emergencies, or tear the mall down and replace it with a private home.<sup>90</sup>

### B. Privately Owned Public Spaces (POPS)

I said that malls and similar spaces are subject to the public use standard only because their private owners hold them open to the public and that an owner can freely decide to change the use of their space and make it entirely private. But there are other private spaces that are open to the public that are not like that. An increasingly prominent phenomenon in many urban centers is the so-called POPS. As I will use the term here, I mean it to invoke spaces, such as the squares in and around office buildings and condominiums, which are created by private developers either as part of a *quid pro quo* with a public agency, typically a municipal government body, according to which the developer is allowed to build beyond the default planning requirements of a location in exchange for setting some land aside that is open to the public, or more directly as a condition of any building in certain areas.<sup>91</sup>

These spaces are like malls in that they are privately owned land that is open to the public. Unlike malls, however, their being open to the public is not optional, in the sense that it is not a choice of the private owner. A mall is held open to the public as public space, and while it is so held open members of the public cannot be excluded and (I argued) they ought to be

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RAY OLDENBURG, *THE GREAT GOOD PLACE: COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS, AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY* 32 (1999) (identifying the sociological idea of a “third place”). These sorts of spaces are, we could say, held open to the public to use for a certain set of public activities, in particular various forms of discussion and debate. The argument here would suggest that patrons of such establishments should have a wide latitude to engage in even unpopular forms of speech, while nevertheless being prohibited from, say, playing basketball.

90. Many of the mall cases involve claims based on freedom of speech or expression. These cases might raise other constitutional issues — issues about the possibility that constitutional values might somehow apply to relations between private persons, the idea that is sometimes referred to as “horizontality” — that we cannot explore here.

91. For an example of the former, see N.Y.C., N.Y., ZONING RES. art. 3, ch. 7, § 37-70 (2007); for an example of the latter, see S.F., CAL., PLANNING CODE, art. 1.2, § 138 (2021).

able to treat it as if it were public space. But the holding open to the public of the space is an exercise of the mall owner's private authority, and there is nothing stopping the mall owner from exercising that authority differently, and closing the mall to the public or tearing it down. By contrast, a POPS is open to the public because it is required by the operation of the relevant legal regime. That is, the owner of the POPS does not have a choice as to whether or not the space is open to the public. Thus, a POPS should be seen to count as genuinely public space in the sense that I am concerned with here, which is to say that its use ought to be governed by the public use standard. The difference between a POPS and a more traditional public space, like a publicly owned park, is just the difference between the state carrying out its public function through its own means and the state requiring some private persons to carry out those public functions for it, in effect deputizing them as public officials.

One point this analysis brings out clearly is that public space and private property are not, strictly speaking, opposing categories. Some genuinely public spaces are on private property.<sup>92</sup> What matters here is that the space is, as a matter of law, meant to be open to the public, and not that it is privately owned. Thus if the space, as many are, is designed to act like a public park or square, then it should be treated by the law as a public park or square. That means the private owners should not be entitled to exclude those they deem undesirable, that restrictions on expressive activity should be impermissible, and so on.<sup>93</sup> Relatedly, municipalities ought to require as conditions of these sorts of arrangements that the physical structure of the spaces effectively communicates to the public their openness, so that the members of the public who are said to have rights in these spaces can properly understand the existence of those rights. That is, fences and other forms of exclusionary design should be discouraged or forbidden, and inclusive design should be encouraged. The point is that a member of the public ought to be able to know by looking at the space that it is meant to be a public space, since it is their space, as a member of the public, and to

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92. Many such spaces are created by the practice whereby a private owner "dedicates" some land for public use as a street, square, or park by creating what is in effect an easement in favor of the public for the use of the land but retaining the underlying title. See JOSEPH K. ANGELL, THOMAS DURFEE & GEORGE F. CHOATE, *TREATISE ON THE LAW OF HIGHWAYS* § 132 (2d ed. 1868). At common law, a similar result could also be reached by prescription, where members of the public used some space as a public way — that is, consistent with the public use standard rather than for their own exclusive private purposes — for a sufficient period.

93. The New York Zoning regulations do go some distance to imposing requirements along these lines. But in many cases the practice does not meet the ideals of the theory. See generally Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. 1093 (2018) (offering a comprehensive discussion of these issues, and POPS more generally); Winnie Hu, *Please, Don't Have a Seat*, N.Y. TIMES, Nov. 8, 2019, at A22 (detailing a discouraging recent survey of the situation on the ground).

require them to investigate its status fails to allow them to relate as an equal to those members of the public (the developers, say) who know the status of the space.<sup>94</sup>

#### CONCLUSION: DISTRIBUTION OF PUBLIC SPACE AND PRIVATE SPACE

To close, I want to consider one upshot of the analysis here that is harder to resolve. An important feature of this analysis is that public space and private property cannot be viewed as interchangeable means for the achievement of a single end. Rather, they do two different things, and help to realize two different sets of values. The difficulties I want to mention here revolve around the question of how to weigh these values against one another. In short: there is only so much space to go around. What are we to do with it, what should be private, and what should be public? A state is obligated to ensure that each person has sufficient private property in order to ensure their ability to relate to everyone else in the jurisdiction on terms of equality (with respect to property). Something similar is true of public space: its value, I have argued here, rests on its capacity to uniquely realize a more radical form of democratic equality. I suggested that these things are valuable because of the special way they contribute to an ideal of democratic equality. This suggests that we need public space to be created, distributed, organized, and so on in a way that aims to ensure this egalitarian ideal. That means, in simpler terms, that we cannot just put the nice parks in the rich areas, but rather that everyone should have relatively equal access to relatively equal public spaces in order to allow them to participate in public space as equals.

Still, questions persist. If the state is obligated to provide “enough” private property and “enough” public space, how is it to decide how to balance its provision of each? The claim that private property and public space do different things, that they enable different kinds of valuable interactions, means that there is no *a priori* way to answer this question. Different states can make (and have made) different permissible choices. That said, there may be reasons to prefer additional provision of public space over private property. For one, it seems plausible to suppose that the benefits of public space continue to increase as the amount of it increases in a way that does not hold for private property. The more parks and libraries and museums we have, the more valuable public activities we can engage in; the billionaire’s fifth home does not seem to generate as compelling of a moral return. For another, a society richer in public space than private property might prevent the sort of retreat of the rich to private property leading to a lack of political attention to public space as well as be more likely to produce interactions

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94. See generally INTERBORO, THE ARSENAL OF EXCLUSION AND INCLUSION (2017).

among classes and, in turn, the sort of egalitarian ethos that many think is central to a properly functioning democracy. The increased demand for public space during and after the pandemic has helped to bring these questions to the surface and has helpfully generated a range of conversations about them. However these questions are to be approached, the hope is that a clear understanding of the nature and value of public space such as offered here can only help to resolve them more clearly.