The Nature and Value of Public Space

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Many people share the intuition that there is something special, and especially valuable, about public spaces, such as parks and libraries, beaches and squares. In what follows, my plan is to explore that intuition and, ultimately, to try to vindicate and defend it. Central to my account will be the idea that public space is doing something quite different than private space. According to many common views, private property and public space are interchangeable tools that can be picked up and used in order to achieve goals — human flourishing or the maximization of welfare — that we can understand independently of any form of legal regulation of space.

I am going to suggest that this is not the right way to think about public space at all. Rather, I will try to show that public space does something entirely different than private property. Private property is about allowing moral equals to engage in the sorts of valuable activities, relationships, and forms of life that are constituted by the idea of yours and mine, the idea of one person being in charge of others in respect of some part of the social or physical world. As I have argued elsewhere, the existence and value of our capacities to relate on terms of equality as neighbours, as host and guest, as giver and receiver of gifts, or as participants to market exchange, are grounded on the existence of private property. Something similar, but also quite different, is true of public space. Public space is constitutive of its own set of valuable activities, relations, and

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forms of life, and is valuable because and insofar as it plays a role in making them possible.[1] But the relevant activities, relationships, and forms of life are in the case of public space distinctive because they all involve a particular kind of sharing. Public space is, I'll suggest, the public's space, which means that each member of the public shares it with each other member of the public. Permissible use of public space is therefore conditioned on a norm that proscribes any use that amounts to a claim to private control of the space. Where private property involves one person being in charge of others, public space involves nobody being in charge of anyone else, but instead all of us together entitled to determine how our space is to be used. The difference between private property and public space, we might say, is not merely in the identity of the rightholder and the uses they choose to make with what they have; rather private property and public space are different sorts of things, which play different (if complimentary) roles in a democratic society.

1 Some Kinds of Space

It will be helpful to begin by clarifying what I mean by 'public space.' Examples of public space are easy to conjure: parks, streets, libraries, and squares all stand out. Notice right away, though, that you can't identify public space merely empirically. There are private parks, private roads, private libraries, private squares. What makes a space public is rather the legal norms that govern behaviour in it. Let's examine some norms for use of space.

One obvious contrast is private property, where some private person gets to determine the permissibility of others' entering the space and interacting with it in certain ways. It is this fact that creates a justificatory problem about

[1] I use the phrase "activities, relationships, and forms of life" throughout what follows, and I mean it to include a really wide variety of interactions between moral equals. The point here, as in the case of private property, is that these interactions are partly constituted by the rights and duties of the parties to them. The three different terms are meant to emphasize that these interactions can sometimes look relatively individualistic (sitting on a bench, going for a run, enjoying nature), sometimes clearly involve relations with others (having a picnic, playing baseball), and sometimes invoke a syndrome of both of those rising to the level of an ongoing recognizable large-scale feature of a given society (the morning gathering at the off-leash dog run, the entire idea of 'spending the afternoon at the park'). My view is that public space is necessary for all of these things. Importantly, my claim is not that these are valuable interactions that we need the tool of public space in order to efficiently be able to enter into. Rather, the idea is that public space is good because it constitutively enables a certain form of egalitarian relation, and these interactions are, in effect, the particular instantiations of that form that are available in our social world.

private property. I think this problem can be solved,[2] but that's not our concern here. The important point is just the contrast in the governing norms. In private property, some private person is in charge of others' actions in the space; in public space, none is – no private person can decide when and under what circumstances others can use the public park or the public road.

But that some space is not private property does not mean that it is public property: there are other categories into which space that is not held as private property might fall.[3] Two stand out. One is a commons, or negative community, where there are no rights in respect of the space, so that anyone is free to do whatever they like there and cannot be said to wrong anyone in their use of the space. Public space is not a commons – certain uses of public space wrong others. The tort of public nuisance exemplifies this idea, by making it a wrong for any person to interfere with the public highway in such a way as to make it impassable. More broadly, it seems that I would have a complaint if you were to attempt to exclude me from the park or library,[4] or damage the swing set or baseball diamond. But these thoughts are unavailable if there are no rights in the space as there would be in the case of a commons.

Another idea is that of space held in common – a positive community.[5] There's an intuitive appeal to this option, since it looks like there's some sense in which a group that has space in common holds it 'together,' some sense in which they all have it. But developing this thought takes some care. First, notice that the basic case of space in common is, in effect, the juridical converse of a commons. 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; in (the basic case of) a positive community each person has a claim-right that no other person use the space along with a power to waive her right, so nobody has a privilege to use the space unless they secure the waiver of all others' rights. In

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[2] Christopher Essert, "Property and Homelessness" 44 Philosophy & Public Affairs 266 (2016); Christopher Essert, "Property Wrongs and Egalitarian Relations" in Miller and Oberdiek, eds. *Civil Wrongs and Justice* (OUP 2019).

[3] For different ways to carve up the conceptual space here see, prominently, JW Harris, *Property and Justice* 85-99 (1996); Jeremy Waldron, *The Right to Private Property* 37-46 (1988); CB MacPherson, *Property: Mainstream and Critical Positions* 4-6 (1978).

[4] *Batty v City of Toronto,* 2011 ONSC 6862. More on this case below.

[5] The negative and positive terminology is Puffendorf's: *The Law of Nature and Nations*, Book IV, Chapter IV, §2.

effect, each member of the community has a veto on any use by any other member. This is not a good description of the way that we normally think about public space: I do not need your (or anyone's) permission to walk down the street, lounge in the park, or go to the library.

But, as I said, we should look more carefully. From at least as far back as Locke, treatments of positive community have seen a requirement of universal consent to any individual use as unworkable.[6] This suggestions that the members of the community need to settle on, as GA Cohen puts it, some other "appropriate procedure" to determine permissible uses.[7] It's not at all clear if or how this suggestion can work, as Locke wanted it to, for justifying private property against the background assumption that *all* space is held in common. But it seems more plausible when it comes to particular bits of space within an already-existing political community.[8] Indeed, the common law presents a variety of examples of space held in common by groups of private persons, such as joint tenancy, tenancy in common, condominiums, corporate property, and so on. Cohen's idea seems to raise the possibility that the community could choose any procedure it wanted to, and the variety of legal forms of common ownership might seem to confirm that thought.

That's not quite right, though. The formal idea of space being held in common brings with it, at least in the public case, a particular form that any norm of permissible use must take. Remember the bounds within which such a norm must fit. On the one hand, as we saw above, each of us is free to use public space without leave of anyone else. And often my rightful use will make your rightful use impossible: if I am on the swing when you want to use 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, we also saw that 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. To find space between the wrong of public nuisance and the permissible exclusion that arises when I use the space myself, I want to suggest, we should say that in the former case, but

[6] As Locke put it, under such a regime, "men in general would have starved, notwithstanding the plenty God had provided them with": *Two Treatises of Government,* Book II, §28.

[7] GA Cohen, *Self-Ownership, Freedom, and Equality* 84 (1995).

[8] Locke, *Two Treatises of Government,* Book II, §35. And see A John Simmons, *A Lockean Theory of Rights* 237 (1994).

not the latter, I act as thought I have the right to exclude you. That is, a wrongful use is one that amounts to a claim to be entitled to exclude everyone else, which is to say a claim to be entitled to treat the space as private property. I'll further suggest that this leads to the attractive idea that the permitted use of public space is that use that is consistent with like use by other members of the public, and that prohibited use is that use that amounts to a private appropriation of the space.[9]

2 Legal Treatment Of Public Space

To draw out the suggestion I made in the previous paragraph, I want now to look at some of the legal material about the permissible use of public space. Consider public nuisance, which occurs when one person blocks the use of the public highway, making it impossible for others to pass.[10] Put that way, the gist of the tort seems overinclusive, since any use of space prevents at least some uses by others: when I am walking *here*, you need to walk somewhere else. As one English court put the point:

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[9] Although it isn't our concern here, this same basic formal structure applies to co-owned private space as well. The basic norm for the permissible use of private space is that that each co-owner can use the space in any way they please so long as their use does not amount to "practically an exclusion" of the other: *Munro v Toronto Railway* (1902), 4 O.L.R. 36, 40 (Div Ct); and see Harris, *Property and Justice*, at 100. One co-owner does not wrong another merely by using the space, the wrong only arises when one purports to be entitled to determine the permissibility of the other's use, which is to say to be entitled to exclude the other, inconsistent with their equal status as owners. Properly developing that thought would, I think, amount to a theory of co-ownership in the common law. The difference between the two cases lies in the difference between public and private more generally. In the private case, co-owners are sharing on a voluntary basis with others that are largely of their choosing and may generally use their property for their own shared private purposes. (An increasingly concerning phenomenon in some contemporary societies is the virtually unchecked expansion of these kinds of arrangements: see Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (1994).) In the public case, the property is shared with the public, which is to say necessarily each member of the political community in their capacity as member of the political community. Thus the space must be governed according to an ideal of public purposes.

[10] My discussion of public nuisance here follows the account offered in Jason Neyers, "Reconceptualizing the Tort of Public Nuisance" 76 Cambridge Law Journal 87 (2017), to which I am indebted. Neyers spends some time discussion the proposition that, in English law, the tort of public nuisance applies to the public's use of the public highway — the road — as well as to the public's use of navigable waterways and to the public right of piscary (i.e. fishing in tidal waters). There are some early American cases that found public nuisances where defendants had interfered with the use of a park or square: see, e.g., *Watertown v Cowen*, 4 Paige 510 (NY Chancery 1834), *Rung v Shoneberger,* 2 Watts 23 (Pa 1833). My purpose here is not primarily doctrinal, so I won't explore these points. But the account I'll develop will suggest that interference with the use of the public highway is merely a subset of the broader category of interference with the public's rightful use of public space. Whether this gives reason to rethink the application of the tort in English law or other common law systems is not a question I have space to discuss.

> As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way: but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and wagons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel.[11]

This kind of interference by one with another's use cannot be, and is not, a wrong. The reason is that such interferences are a necessary result of the right of all members of the public to use the public highway:

> The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.[12]

But as this last passage suggests, the idea that each member of the public has an equal right to the use of public space generates not only the idea that de facto interferences with the use of others are not wrongful but also the idea that interferences that go beyond that – interferences that are "only obtainable by disregarding" the equal right of others – are wrongs.

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[11] *Herring v Metropolitan Works*, 19 CB (NS) 510, 525, cited in *Harper v GN Haden and Sons, Ltd*, [1932] 1 Ch D 298, 312.

[12] *Harper, ibid* at 320. As the law of nuisance tells us, private property is also about 'give and take' (and 'live and let live': *Bamford v. Turnley* (1860) 3 B&S 62). The parallels here importantly indicate the way that in both cases the law insists on a kind of systematic reciprocity, but the two cases are different because while in private property it is private in-charge-of relations that are systematized, in public space it is, in effect, their absence.

I suggested above that those uses should be understood as, in effect, amounting to appropriations of public space for private purposes. The same court saw this point:

> 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*.[13]

Creating an interference with the use of public space by other members of the public that goes beyond the sorts of interferences that each member of the public must put up with as a matter of "give and take," as a necessary implication of their own claim to use amounts to private appropriation. The explanation for this is just the formal structure of private ownership: private ownership comes into view conceptually when we recognize the difference between holding and having, between factual or empirical use and a claim to use as of right.[14] One private person's claim to use space as of right, that is, to have a right to determine how others may use it, is a claim to have private property in it.[15]

A more recent case illustrates the point. Several years ago, when the Occupy movement was at its peak, a group of protesters occupied a park in downtown Toronto, building semi-permanent structures and, in effect, living in the park. 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, the Court's reasoning echoed the analysis above. The central thought was that private permanent structures exclude other members of the public from the park in a way that does not merely amount to the kind of give and take consistent with the equal right of all members of the public

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[13] *Harper*, *ibid* at 308, emphasis added.

[14] Kant, *Metaphysics of Morals* §§ 1-9 (6:245-57); Macpherson, *Property* at 3.

[15] Within a political community, there is just no conceptual space between public use and private use. Either the governance of the space is up to everyone, or it isn't. That is, once we see that public use is the use that can permissibly be made by each member of the public consistent with each other member making the same use, we see that any use that exceeds that is wrongful. And it is wrongful because, in making it impossible for other members of the public to use the space as members of the public, it, as the *Harper* court put it, removes the space from the public. So a private person's removal of space from the public just amounts to making it private.

to use the park. Regardless of one's degree of sympathy to the protesters' message, it seems that the court properly understood the nature of the rights in public space when, in enforcing the City's order to vacate the park, it said that the protesters were claiming a "monopoly over the use of the Park," and that they had "appropriated public land to their exclusive, private use."[16]

Putting this all together, a single idea seems to emerge from both our reflection on the nature of public space and from the law about its permissible use. Since each member of the public is entitled to use public space, any use that amounts to a claim to have a right to determine permissible use as against others is wrongful. But merely factual use, which rests on no such claim, is permissible, even if it has the effect of making other factual use by other persons less convenient.[17] Members of the public can thus be said to be permitted to use public space when their use is public, which is to say consistent with other members of the public making their own like use. Conversely, what is prohibited is anything that amounts to an appropriation of public space for private use. Call this the *public use standard.* To further explore this set of ideas, I'll turn to consider the distinctive value of public space so conceived.

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[16] *Batty v City of Toronto,* 2011 ONSC 6862 at [97], [108]. In her discussion of the Occupy Toronto case, Kohn critiques the decision as one that relies on a notion that the sovereign gets to decide how to use public space and thus 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." On my view, Kohn makes two mistakes here. First, the erection of the tent is a form of privatization not because of any ordinance but because it amounts to a claim to an entitlement to decide how the space on which it sits will be used even as against other members of the public. (On the role of the ordinance, see below.) And second, this can be seen by the very fact that those who erected the tent purport to have the capacity to invite others in, even though inviting someone into a space is only something you can do if you have the power to exclude them. See Margaret Kohn, "Privatization and Protest: Occupy Wall Street, Occupy Toronto, and the Occupation of Public Space in a Democracy" 11 Perspectives on Politics 99, 103 (2013).

[17] The concept of 'factual use' that I allude to here played an important role in the so-called Franciscan Controversy, the dispute between the Franciscan Order, principally defended by William of Ockham, and Pope John XXII. The question in controversy was whether or not eating food was consistent with the Franciscans' vow of poverty. The Pope argued that it was not, since eating food destroys it and only an owner can have a right to destroy food. Ockham argued that the Franciscans' use was merely factual or licit and did not depend on any property right. This is an interesting and difficult question, the best discussion of which is in Brian Tierney, *The Idea of Natural Rights* (1997). Luckily, we need not resolve it here, since use of space does not consume it or destroy it, and the argument that use requires ownership depends on the idea that use is consumptive or destructive.

3 What Public Space is For

There are many discussions of the value of public space, in many different academic contexts and many different vernaculars. So it is not possible to do anything like a comprehensive review of them. But it is possible, I think, to identify a couple of different prominent lines of thought.

The first is that public space is valuable because and insofar as it lets us come together to act as a community. There is a range of ideas here, but the basic thought is that there are valuable activities, relationships, and forms of life that are made possible in part by a space that allows groups of people to convene, mingle, and act jointly. The most obvious and somewhat basic version of this idea is an image of a public park. In my neighbourhood we have what I understand as something close to the ideal park. It has a soccer field, a baseball diamond, and a basketball court, as well as larger open spaces for less organized activities. There is a small swimming pool in the summer and a skating rink in winter, as well as a playground, a sandbox, a community pizza oven, and a wide array of seating, including benches, rocks, grass, and so on, some in the sun, some in the shade. In short, it is a great place to spend an afternoon. And so that is what people do there. Importantly, one never knows what is going to be happening at the park, which neighbours you'll see there, what activities might be going on. The pleasures of participating in large scale activities are available, as well as more solitary pursuits. Importantly, these blend into each other: you might go there for a quick game of catch and end up playing in a baseball game with friends, neighbours, and strangers. There are farmers' markets, outdoor movies, children's soccer leagues, and all manner of one-off community events. It is a wonderful place to be.

This idea of coming together in public is not limited to what happens in a park. Not all public space is for leisure. 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.[18] Another version of the same idea is that public space is uniquely valuable as a site of assembly and protest. Indeed, there is a plausible case to be made that some public space is

[18] Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property" 53 University of Chicago Law Review 711, 774 (1986).

a necessary requirement of a right of free expression and in particular a right of free assembly.[19] While this is not the place to examine the constitutional doctrines around these issues, the basic idea is clear: 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 space "would certainly deny the very foundation of the freedom of expression."[20] And the case for free assembly is even clearer. 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 that he thought necessary for the functioning of a democratic state, itself understandable from a certain angle as the abstract realization of the idea of coming together.[21]

Another important sort of public space 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's also a space where different members of the public can come together, to participate in group activities such as book clubs, to children's reading circles, and, increasingly, all manner of clubs and groups not necessarily related to reading at all. A recent discussion of libraries characterizes these sorts of experience in terms of "camaraderie [and] the joy of watching people who hardly know one another turn their neighbourhood into a community."[22]

A second idea of public space emphasizes, rather than that polite ideal of coming together in public space, the inherently conflictual nature of the

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[19] See, e.g., John D Inazu, "The First Amendment's Public Forum" 56 William & Mary Law Review 1159 (2015).

[20] *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 136 at 155 (per Lamer CJC).

[21] Rose, "Comedy of the Commons" at 779.

[22] Eric Klinenberg, *Palaces for the People: How Social Infrastructure Can Help Fight Inequality, Polarization, and the Decline of Civic Life* 31 (2018). For another discussion of libraries that explicitly locates them as public spaces whose value fits into this first account of the value of public space see Lisa M Freeman and Nick Blomley, "Enacting Property: Making space for the public in the municipal library" 37 EPC: Politics and Space 199 (2018).

interactions that take place there. Iris Marion Young 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.[23]

Young's thought is that what happens in public space is sometimes that we are *forced* together, and that that is 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 jurisprudence, for example, on the importance of public space as a site for labour picketing, which can often be quite confrontational. More generally, though, 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,[24] and their role in getting us out of our 'comfort zone' is surely part of the value of these public spaces.

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 an important set of interactions *as such*.[25] 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 as a necessary feature 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

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[23] Iris Marion Young, *Justice and the Politics of Difference*, 240 (1990).

[24] Klinenberg, *Palaces of the People* at 45: "You rarely see a police officer in a library, but libraries are places where people attend to one another, regardless of what else they are doing. … public 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."

[25] Kant, *Metaphysics of Morals,* 6:352.

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 make the two dependent on the third in a way that is inconsistent with equal freedom: roughly, you and I could not meet to talk 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. [26]

Although Ripstein would not put the point this way, we might say that we need public roads in order to ensure that each property owner is able to participate in the valuable activities, relationships, and forms of life that private property makes possible. That is, property gets its justification from the way that it constitutively enables us to be hosts and guests, givers and receivers of gifts, participants in market exchange, and so on. Without property, I've argued, we would be unable rightfully to participate in these and other phenomena that seem central to our conception of our social world and our place in it. But these forms of relationship all require that we – you and I – can actually meet and interact, so the possibility of free participation in these activities, relationships, and forms of life requires not only private property but also public roads. A crucial part of the argument here is that the roads themselves cannot be private – we each need to have the capacity to move from place to place as a matter of right, and the only way to guarantee such a right to everyone as a matter of right is to make it a matter of public right, that is, the public's right. Thus public streets are necessary in order to allow us to relate on the sorts of terms that we ought to relate on.

Can an argument of the same sort be made for parks, squares, and libraries? I think it can, although some work will be required. To start, we should notice that the argument for streets that Ripstein provides, matched with the claims about public nuisance introduced above, suggests that there is something pretty specific that streets are for, namely, getting around. But we do not experience our streets as merely public rights of way. That was how they were traditionally conceived in English law, where a person who was on the public

[26] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009), 243-52.

highway doing anything other than "passing and repassing" — that is, coming and going — could be said to be committing a wrong.[27] But recent jurisprudence has recognized 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.[28]

In other words: our roads are not *merely* roads. Generally speaking, we are permitted to just stand around on the street and use the space without any actual intention or plan to get anywhere at all. The public space of the streets is being used not only for people to get from one place to another in order to interact, but also for any type of interaction that itself takes place in public.

For this third characterization of the value of public space, the point is the general and formal one that certain forms of interaction between moral equals need to be able to take place in space that is not privately owned.[29] The right way to understand this thought in general, I think, is along the lines of the idea that we sometimes have reason to want to participate in certain activities on 'neutral ground,' as it were, space that is not exclusively under the control of any of the participants (or, indeed, anyone else). When you invite me to dinner at your home, part of what makes the experience the valuable one it is for both of us is that it is your home and that you are hosting me.[30] By contrast

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[27] *Harrison v Duke of Rutland*, [1893] 1 QBD 142. Many roads in England are actually public rights of way located on private property, so the law was that someone who was on the road doing anything other than passing and repassing was exceeding the terms of their right of way and thereby trespassing.

[28] *Director of Public Prosecutions v Jones and another*, [1999] 2 All ER 257, 262-63 (HL). Consistent with the discussion above, the House of Lords held (at 286) also that the public does not have a *jus maniendi* – a right to remain – on the public highway, and that uses that are not passing and repassing could only count as permissible if they did not "interfere unreasonably with the lawful use by other members of the public for passage along it."

[29] An important part of Ripstein's presention involves the role of public markets. The thought is that the possibility of fair market exchange between equals seems to require that there be space that is not owned by anyone in order for the exchange to truly take place on terms of equality. I am sympathetic to this thought, but there are some worries about it and I don't think it's necessary for my broader argument, so I leave it to one side.

[30] Essert, "Property Wrongs and Egalitarian Relations."

when you invite me to a picnic in the park, something rather different is taking place: we are both jointly participating in an activity that uses public space in a public way. We relate as equals here because the space is not mine (as against your) or yours (as against me) but rather ours (and everyone else's, too). When we pass one another on the street, we need to negotiate the terms of our passage — who has the right of way — without the possibility of recourse to the idea that one or the other of us gets to make the decision, since neither of us has any better claim than the other to the road.[31] Or again, in the park or the public square, part of the nature of all of the activities, relationships, and forms of life that take place there is precisely that they take place subject to the fact that nobody has any better claim than anyone else to determine how the space may be used, and so a kind of negotiation with other potential users over permissible use is a necessary element of any use. As members of the public, we all have an equal say in how the space is to be used. We share the land (and the park bench, and 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 on public space have a kind of radically 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 these interactions on terms of equality, with none superior to nor subordinate to any other.

As the last couple of paragraphs are (hopefully) making clear, my view is that these three different accounts of the value of public space are all basically the same account, viewed from different angles. The first account sees public space as valuable because of a certain set of activities and relationships that are formed in public space and require public space for their realization; the emphasis in describing this set of activities and relationships is on a group of ideas of cooperation and coming together. But the suggestion from the last paragraph is that part of what makes this coming together valuable is that it is coming together in space that is not owned by anyone. Similarly, the second account sees the value of public space in the ways that we are sometimes forced together in it. Again, the thought must be that these forcings are grounded in the very fact that nobody owns the space: it is just because nobody controls

[31] AJ Julius, "Independent People" in Kisilevsky and Stone, eds, *Freedom and Force: Essays on Kant's Legal Philosophy* 91 (2017).

the space that nobody can tell anyone else to leave it and so must confront difference, diversity, and conflict. The third account then joins the first two together, by showing us that what matters is the very possibility of interaction in space that is not privately owned by anyone, and thus is able to encompass the first two, since both the relevant instances of coming together and of being forced together are just ways of acting together in space in which nobody has a claim against any other that the other does not equally have agains them, which is to say interacting in public space.[32]

4 Public Space and Public Use

The idea that it is important and valuable for members of a society to be able to interact on terms of equality is, of course, not an original one. But relating as equals takes many different forms, and on a view about the nature and purpose of a legal system in a democratic society to which I am drawn, the different parts of the legal system each give rise to, shape, and protect relations of equality in different facets of the social world. Tort law allows us to relate as equals in respect of our persons, and contract in respect of our voluntary interactions. Private property, on one view, allows for yet another set of egalitarian relations, involving the parts of our lives that require private control in respect of spaces, things, and some other impersonal abstract relations. In each of these cases — and many others — the law's distinctive role is, as I said above, to partly ground these relations and their value, since in each of these cases the possibility of relations among equals requires a set of legal rights to ensure that we can relate on rightful terms rather than according to the terms of our particular powers. So different sets of legal norms ground different sorts of egalitarian activities, relations, and forms of life.

[32] Here 'everybody' must mean 'members of the political community.' My park is shared with other Torontonians (or Ontarians or Canadians), but not with Americans. 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 enter into 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 actually a plausible upshot of my view, as it tracks the intuition we seem to have that we have some kind of quasi-ownership stake in the public spaces of our own community that we do not have in the public spaces of other political communities. Were I to hear that my local park was being privatized, I would have plausible grounds for a kind of resentment. Were I to hear the same about Central Park, I would have a kind of general indignation about the destruction of some valuable thing in which I had no stake.

What I want to suggest now is that value of public space is grounded in part on the norm of public use — the norm that says that permissible use of public space is just that use that is consistent with like use by other members of the public and so does not amount to a claim for private control over the space. I already alluded to the argument at the end of the previous section. The basic thought is just that the activities, relationships, and forms of life that we recognize as distinctive of public space are only possible insofar as and because public space is governed by the public use norm. The public use norm is required for the sort of egalitarian interaction that we identify with public space and its value, so we cannot properly realize this type of interaction in any other kind of space.

I suggested above why I think we cannot realize the value of these interactions in private space. When we are on private space, there is always some person who is in charge of the space and so entitled to set the terms of our activities. So our picnic is one that can only take place subject to her whim; we are only able to engage in expressive activity to the extent that she allows us; we need not be confronted with the presence of the socially different unless she wants us to be. In short, all of our interactions are subject to her control. Of course it is a genuine and important question why this kind of private control over space is ever justifiable. My thought, defended elsewhere, is that it is, for reasons that are structurally just the same as the reasons that public space is valuable: namely, that there is an important set of valuable activities, relations, and forms of life that require private property for their realization.[33] But whether that is right or not is presently beside the point, because the claim here is that there is a *different* set of valuable activities, relations, and forms of life that cannot be properly realized on private space.

The idea that private space is anathema to the value of these interactions might suggest that we might be able to realize them under a variety of alternative options. But I do not think this is right, for reasons I've already alluded to. In a commons, or negative community, there are essentially no rules at all about the use of space: anyone is free to do whatever they are able to do in the space. We saw above that such a situation does not fit our experience of public space:

[33] If you think that argument is wrong, one possibility might be that you think, in a way, that all space is public space in my sense.

the law of public nuisance, as well as a broader set of intuitions, suggests that we can wrong others by certain uses of public space. The normative story about the value of public space explains this: in a negative community, nobody has any rights to the use of the space, which means that how the space is to be used is a matter of the particular powers of the population. In short, the strong will decide what happens and where. But this is inconsistent with a commitment to equality. The value of public space depends on our each having an equal claim to it. Each of us is equally entitled to use the public road to get where we want to get; saying that you ought to have priority because you are bigger or stronger or you think your needs are more important is inconsistent with that.[34] A negative community effectively replicates the problem with a world entirely governed by private property, replacing (defective) right with strength.

The problem with a positive community is slightly different. In (the pure case of) a positive community, remember, each person has a right that no use is made of the space, so nobody has any liberty to use the space without first securing the permission of all others. There seems to be a kind of equality in such an arrangement, although we might wonder how robust that equality is: after all, it seems as though permissible uses will still be a matter of particular powers, it will just be that different powers will matter. Where in the commons the strong will decide, in the positive community, the popular and persuasive would be unduly advantaged. Moreover, it seems that, at best, in a positive community only some severely restricted set of interactions would be permissible. Whereas we saw above that an important part of the value of public space is that it is a place where unpopular things can happen and unpleasant interactions can take place, in a positive community the only permitted activities will be those that in effect appeal to the lowest common denominator across the society. So the importantly open quality of public space interactions would be unavailable.

The attraction of the idea of a positive community, of course, is that it seems in some sense to realize the basic thought that the space is everyone's. The pure

[34] I take it that this is a way to explain the moral indignation that arises when we see someone speeding, running stop signs, cutting into traffic, etc, in a way that does not personally endanger us: someone who acts in these ways can straightforwardly said to be taking themselves to be entitled to see their own need to get where they are going as more important than anyone else's.

case, though, belies this thought — some will be able to secure consent for their activities and others will not. In Part I, I mentioned Cohen's idea that an 'appropriate procedure' is thus required to govern shared space. What I've tried to argue that 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'll discuss some more specific procedures that, as I understand them, 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. This marks a formal 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. Put differently, this is why public space is *the public's space*, since in effect the public is the name of *the organization of all the members of society*. Exactly what that means, how a public is constituted, and so on, are 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.[35] The public needs to act in the public interest, which is just to say not in the private interest of any particular member of it, and so public space must be used consistent with this idea.

In the light of these considerations, it should be easy to see why only space understood in terms of the public use standard can properly realize the value of public space. Once again, recall that that norm allows each person or group of people to make whatever use of the space they want to, so long as it is consistent with others' being able to make their own uses. Conversely, any use that amounts to a claim to be able to determine the permissibility of others' uses — a claim to private control — cannot be permitted. This norm ensures that each person has an equal claim to public space in the sense that each is free to try to use the space as she pleases, 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 I can be prevented from certain uses — parking in

[35] This is the source of the thought I mentioned above (and also argued for by Ripstein in *Force and Freedom* at 254) that all space that is not private is public: either the space is governed by some subset of the members of the society, in which case it is private, or it is governed by all of them, in which case it is public.

that spot, playing baseball on that diamond, sitting on that bench or at that table — by your doing the same thing. But your use is of course limited by the public use standard, which means that you can only park there / play there / sit there temporarily, and that eventually I'll be able to do the same. Moreover, and I think this is important too, at least many of these cases create the conditions for interactions with strangers of a sort that seem distinctively valuable in a democratic society and hard to replicate elsewhere. Perhaps in some cases you ought to let me join your game of baseball or share the bench with you, allowing (or forcing) us to interact on terms of equality, with neither of us entitled to determine the permissibility of the other's actions.

The ballet of public space[36]— 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 norm: we each come 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 radical egalitarianism, where we must negotiate the terms of our interactions as equals. We should 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 or the other of us in charge 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, by contrast, nobody is in charge. The value of public space lies in the activities, relationships, and forms of life that depend on this norm.[37]

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[36] To re-purpose Jane Jacobs' term: *The Death and Life of Great American Cities* 50 (1961).

[37] I should say here that various public spaces 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."

5 Applications

I want to turn now to some questions of application of this framework. I'll consider three: the role of permits in the use of public space; the wrong of privatization of public space and its management; and the question of spaces that are legally privately owned but held out as in some sense public, including shopping malls and so-called Privately Owned Public Spaces.

5.1 Permits and Procedures

One element of our normal experience in public space might seem at odds with the analysis I am offering here. Roughly, what I have in mind here is a permit. There are many obvious uses of public space that might seem to count as violations of the norm of public use as I've described it here that become permissible once the users secure some kind of permit. I am able to reserve the local baseball diamond or to block the street off for a block party or parade. In many municipal parks there are barbecues and sheltered picnic areas that can be reserved, and many national park systems have provisions in place to reserve camping sites for overnight camping.

On reflection, it's not hard to see how this phenomenon fits into the account of public space I am offering here. The essential point is that public space is the public's space, and so the public is permitted to make decisions about the use of the property, subject to the requirement that such decisions be made for public rather than private purposes.[38] This abstract idea then needs to be brought to bear on the abstract idea of the public use standard. We've seen already that it's not determinate in the abstract what counts as a permissible public use of public space and what counts as the wrongful private misappropriation of public space. We think, that is, that it's permissible for me to sit on the grass in the park for the afternoon, but impermissible for me to build a permanent shelter there. The role of the law in regulating the use of public space is, among other things, to draw determinate lines to answer these kinds of questions. And, as always, different jurisdictions could draw different

[38] Not all the land owned by the state counts as public space in my sense. Indeed a great deal of state-owned land does not – courthouses, government ministries, and so on. I take it that the regime here is more formally similar to private ownership, except that the state stands in the place of the owner. We must do this, when we do it, for public reasons. There are interesting questions about how to draw lines here but I will leave them for another occasion.

lines in answering the same question: 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. And so on. I take it that, again, the only real limit in the regulation of public space is that the public not authorize what amounts to private appropriation.

Any system of permits is clearly just a version of this type of public regulation of public space. The requirement that the system of permitting be public would set some obvious constraints on it: a baseball league that gets a permit to reserve the neighbourhood 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. Again, the details would be up to the jurisdiction in question, so long as 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. We need to share public space, and one way we can share it is by having rules about who uses what when subject to certain procedures. If that is what permits do, then use under the permit counts as public use even if it has a kind of exclusionary effect during its course. (That is: while I have the permit to use the diamond, there is a sense in which it is up to me who gets to play; but that is only because we decided that for this limited time I would have that capacity, and assuming the permit was not for an indefinite period and met the other requirements mentioned above, my use under the permit is formally no different than my merely factual use in sitting on the grass or the bench or driving down the road.)

5.2 Privatization

The public use standard says that public space must be used in a way that is consistent with equal use by all members of the public, and therefore prohibits any use that amounts to a claim to determine the permissibility of other's uses. Violations of this norm can thus be understood as attempts at a kind of private taking 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 way 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. Plausibly we can think of someone who parks in public space without a permit in the

same way.[39] Interesting and difficult questions about the permissibility of the use of public space will often turn on 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?[40] What about the closure of the public way for filming a movie? Or the use of a public pool for lessons offered by a for-profit organization? Some of these questions, of course, will be addressed by the applicable regime of permitting use of public space in a given jurisdiction. As I suggested in the previous section, though, while there is a wide scope for discretion in terms of democratic decisionmaking 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 at least plausibly be read as consistent with this, requiring as they do that permitted private uses be temporary, limited in scope, and so on.

More egregious violations of the norm of public use are harder to find, but they are still there for those who look. 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.[41] 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. In English law this allowed for public access to the oceans as a source of food, but in modern times the recreational value of beaches and oceans is clearly part of the story as well. A well-run beach is a unique and special form of public space. If some jurisdiction has chosen, as again most have, to recognize the beach as public soace, then an attempt by a private landowner to deny access to the beach amounts to a private appropriation and is wrongful for that reason.[42]

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[39] Ripstein, *Force and Freedom* at 262.

[40] For a good discussion of a case 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 Law Review Footnote Forum 107 (2015).

[41] Kathleen Sharp, "It's Your Beach. Don't Let Them Hog It" *New York Times*, July 21, 2018, A21; Nellie Bowles, "Court Opts Out of Ambivalent Billionaire's Surfer Fight" *New York Times,* October 2, 2018, B5.

[42] This is a bit simplified, since in the relevant case 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 tortious

A distinct, but importantly related phenomenon, is the privatization of public space. There are many reasons to object to privatization of public functions, and the privatization of public space is just one among many instances of the pernicious contemporary phenomenon. The analysis here does suggest a particular way to view the problem in the spatial case, one that fits with a set of views about the problem with privatization of other forms. My basic claim here can be put simply as follows: public space is valuable because public space allows us to relate on terms of equality as members of the state in a way that nothing else can. Only public space, that is, can allow us to realize the various activities, relationships, and forms of life that we identify as the things that make our public streets, squares, parks, beaches, libraries, and so on, valuable parts of a democratic society. That means that privatization of these spaces is not merely a matter of changing their management structure. Instead it is a matter of radically and completely remaking them — a private square or private park is, normatively, a completely different space than a public square or public park, because the former is owned by someone, and that person is in charge of others in respect of the space.[43]

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wrong (usually nuisance: *J Lyons & Sons v Wilkins (No 2),* [1899] 1 Ch 255). The same principle clearly applies in this case: by preventing the access of the public to the public's space, the private landowner is committing a wrong against the public.

[43] Some theorists claim that the choice between private property and public space is simply a matter of efficiency or effectiveness in delivery of services — see e.g. Richard Epstein, "On the Optimal Mix of Private and Common Property" 11 Social Philosophy and Policy 17 (1994) — but that's not at all the right way to think about things. A private entity as such is constitutionally incapable of providing a public space, since that private entity is in charge of the space, which makes the relevant forms of public interaction impossible in the space. That's not to say private property isn't valuable. But the value of private property and the value of public space are two distinct values, and the move from one to another is not merely a matter of efficiency. Privatizing public space is worrisome insofar as it puts a private person in charge of others in respect of the interactions taking place in a space where none was in charge of anyone else. This account of the problem of privatization thus echoes those accounts of privatization of other traditional public services as problematic as a matter of political philosophy and not merely efficiency: see Sharon Dolovich, "How Privatization Thinks: The Case of Prisons" in Freeman and Minow, eds, *Government by Contract: Outsourcing and American Democracy* (2009); Nikil Saval, "Uber and the Ongoing Erasure of Public Life" *The New Yorker* online: <https://www.newyorker.com/culture/dept-of-design/uber-and-the-ongoing-erasure-of-public-life>; works by Chiara Cordelli. In all of these cases, I take it, the idea is that the role of the public is not merely as a deliverer of something that could be delivered by anyone, but rather that the institutions in question are doing some fundamentally public thing that nothing else can do in quite the same way. And many people think that the public provision of these services is a core part of the role of the state in a democracy.

5.3 Publicization of Private Property

[*Removed for UCLA-Oxford-Toronto workshop: a section about spaces that are legally private but plausibly are experienced as public, and what this account says about how they should be governed. I'm happy to discuss this in Q&A.*]

6 Public Use and (In)Justice

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? I've argued elsewhere that private ownership is to be justified by reference to its capacity to uniquely realize a set of valuable activities, relationships, and forms of life. I've said, more precisely, that a system of property can only be justified if each person within its jurisdiction is entitled as of right to enough private property to ensure them adequate access to a sufficiently wide range of those activities, relationships, and forms of life to be able to relate to everyone else in the jurisdiction on terms of equality (in respect of property). Something similar is true of public space: its value, I have argued here, rests on its capacity to uniquely realize its own set of valuable activities, relationships, and forms of life. And 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 that rather everyone should have relatively equal access to relatively equal public spaces in order to allow them to participate in public space as equals.

Leaving the realm of ideal theory, though, we confront another obvious and pressing issue when it comes to the use of public spaces. 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.

Recent litigation in Canada 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.[44] It's 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 norm, as we saw above in discussion of the Occupy Toronto case. But matters seem more difficult when the occupant of the structure is homeless, and I am inclined to think that the Canadian courts have been correct in holding these prohibitions to be unconstitutional because they unduly infringe on the rights to security of the person of the affected homeless claimants. Given a prohibition on such structures, the claimants had no choice but to sleep in the open, and doing so imposes considerable risks to health and, indeed, life.

But suppose we set that particular feature of the case aside, and focus more directly on the apparent conflict between the needs of the homeless for private property and the public use norm. Does the importance of parks really stand on the same level as the importance of ensuring a home for each member of the society? I am inclined to think it does not, and that the spatial metaphor in that sentence helps to see why. Although public space is necessary for and constitutive of a variety of important activities, relationships, and forms of life, the activities, relationships, and forms of life that private property is necessary for and constitutive of seem to me to be, in an important sense, more basic and thus prior. Without space of one's own, the range of activities that are utterly unavailable as a matter of right becomes close to all-encompassing, whereas a life without public space would be bad, but not with the same degree of urgency. Moreover, the democratic values that public space is necessary for also seem to come into view only once we have secured the more basic value of private property. All that said, the problem with homelessness is obviously — obviously! — not caused by the oversupply of public space, but rather by the unjustifiable distribution of private property. A truly just legal system would solve that problem as well as ensure a sufficient supply of public space to realize its distinctive value in a society of equals.

[44] The leading case is *Victoria (City) v Adams*, 2009 BCCA 263. There are parallel US cases, too.