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## Public Space: Property, Lines, Interruptions

Antonia Layard

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# Public Space: Property, Lines, Interruptions

Antonia Layard\*

*This paper suggests that public space in England is dominated by property thinking, partially addressed by lines and could be more frequent if we create interruptions. It understands the legal production of public space not as a two-dimensional designation but instead as a process, or a series of processes: spatial, legal, material and, crucially, temporal, for creating spaces to call publics into being. While the paper agrees that property thinking limits our abilities to be in public, particularly on private land, and acknowledges that “lines” including rights to roam and highways are limited, it suggests that we can – and should – create interruptions to address the growing shortage of public space. The paper argues that to do this, we need to think about time as much as space in property law. We also need to think explicitly about how, when and where we might disrupt private land uses for public use, contributing to a geography of hope.*

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## I. Introduction

Public space is “the stage upon which the drama of communal life unfolds.”<sup>1</sup> Notoriously context dependent (the agora was not accessible to slaves or women) and subjected to idealization, public space can be expressive, topographical or material. It facilitates the circulation of people, things and ideas and is structural as well as embedded in place: “Public space is much more than parks and plazas. It is where the crisis bites, where needed social innovation happens, and where capitalist restructuring manifests.”<sup>2</sup>

At its heart is “publicity.” This, as Mitchel and Staeheli put it, is “the quality of publicness” or “the publicness of space.” These can be understood as “the relationships established between property (as both a thing and a set of relationships and rules) and the people who inhabit, use, and create property.”<sup>3</sup> Property is key here even though privacy in property is much better spatially protected than “publicity.”<sup>4</sup> If anything, by emphasizing the property rights of the landowner, English law operates against “the publicness of space.”

Nevertheless, the paper assumes that public space matters. As the Mayor of London’s 2010 Manifesto for Public Space put it: “Public spaces are part of what defines a city. They are the places where people come together to meet, talk, eat and drink, trade, debate or

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<sup>1</sup> Carr, Stephen et al. *Public space*. Cambridge University Press, 1992, 3.

<sup>2</sup> Public Space Between Crisis, Innovation, and Utopia | Sabine Knierbein | TEDxViennaSalon (July 17, 2015), <https://www.youtube.com/watch?v=aBGQQBhu8bU>.

<sup>3</sup> Mitchell, Don. *The people’s property?: power, politics, and the public*. Routledge, 2008, 141.

<sup>4</sup> Under Article 8 of the ECHR, spatial privacy (and the right to a family home) is, for example, legally recognized and implemented.

simply pass through.”<sup>5</sup> Similarly, Sheffield City Council writes of the importance of fun and play that are present in green open spaces.<sup>6</sup> Coming together, on land, matters. When public spaces are successful, as Carr et al write, “they will increase opportunities to participate in communal activity. This fellowship in the open nurtures the growth of public life . . . In the parks, plazas, markets, waterfronts, and natural areas of our cities, people from different cultural groups can come together in a supportive context of mutual enjoyment. As these experiences are repeated, public spaces become vessels to carry positive communal meanings.”<sup>7</sup>

To develop arguments that public space is produced through property relationships, partially realized through lines and that opportunities exist for public space “interruptions,” the paper draws on three case studies: the eviction of the Occupy protest from Pater-noster Square in 2011 (property), the Kinder Scout March of 1932 (lines) and the creation of “Sanctum,” a piece of public art by Theaster Gates in Bristol in 2015, (interruption).

The argument presented here in favour of interruptions, emphasizes the importance of working *with* property, and the potential offered both by the ownership spectrum and by improper uses of land, rather than challenging the right to exclude. Despite the extraordinary current rate of privatization,<sup>8</sup> by focusing on interruptions, the

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<sup>5</sup> Mayor of London, Manifesto for Public Space, 2009, available at [https://www.london.gov.uk/sites/default/files/londons\\_great\\_outdoors\\_-\\_mayors\\_manifesto.pdf](https://www.london.gov.uk/sites/default/files/londons_great_outdoors_-_mayors_manifesto.pdf).

<sup>6</sup> Sheffield City Council, Open Space Strategy: People, <https://www.sheffield.gov.uk/out-about/parks-woodlands--countryside/green-and-open-space-strategy/people.html> (last visited June 20, 2016).

<sup>7</sup> Carr et al, *supra* note 1, 344.

<sup>8</sup> See *infra* Part II (Property).

paper contributes to a geography of hope.<sup>9</sup> Interruptions disrupt existing uses of land creating, even temporarily, a public space where previously there was a more private use of the land. They can be artistic interventions, markets, skateboarding, road closures or squatting. Interruptions can disrupt with or without permission and can be mapped topographically, both spatially and temporally: they are slices of time and space. Crucially, despite the limitations of the property paradigm and the power of the landowner, interruptions draw on the dynamism of public space and can be created without alterations in land ownership.

Public space, in this topographical sense and one familiar to property lawyers, is distinguishable from “public address,” where a view may be expressed in a very private space yet be publicly communicated.<sup>10</sup> Undoubtedly there are links between the two,<sup>11</sup> and the boundaries between freedom of expression, social justice and even play are not fixed.<sup>12</sup> One of the greatest lessons of the critiques of private enclosure of apparently public spaces, however, has been that public space encapsulates far more than freedom of expression. This is not to suggest that procedural public spaces for free expression are not hugely significant as Benhabib, Iveson, Mitchell and others have suggested.<sup>13</sup> Yet the ability to play an instrument, a sport or set up tables and chairs or even just be in apparently public spaces is

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<sup>9</sup> Gray, Kevin. “Pedestrian democracy and the geography of hope.” *Journal of Human Rights and the Environment* 1.1 (2010): 45–65.

<sup>10</sup> Iveson has distinguished a topographical approach from a procedural understanding of public space “a space which is put to use at a given time for collective action and debate” Iveson, Kurt. *Publics and the City*. John Wiley & Sons, 2011, 3.

<sup>11</sup> Kohn, Margaret. *Brave new neighborhoods: The privatization of public space*. Psychology Press, 2004.

<sup>12</sup> Mitchell, *supra* note 3.

<sup>13</sup> Benhabib, Seyla. “Feminist theory and Hannah Arendt’s concept of public space.” *History of the Human Sciences* 6 (1993): 97–97; Mitchell, Don. *The right to the city: Social justice and the fight for public space*. Guilford Press, 2003; Iveson, *supra* note 10.

not protected in democratic terms. There is no right under the European Convention of Human Rights (ECHR), for example, to hit a cricket bat, set up an impromptu cocktail bar or just hang out with a group of friends. Public space matters for social and communal – as well as civic – reasons.

This introduction of the idea of interruptions into debates on public space is an unashamedly optimistic reading amidst genuine and very real concerns about social, cultural and physical privatization. It suggests that there are, still, measures we can take. For while critique matters, as Cooper writes: “if everything is wrong, if yesterday and tomorrow are just like today, corrupted by politics’ relentless (if far from original sin) then we may as well give up on a transformative politics.<sup>14</sup> And so, after we have first explored the restrictions of the property landscape and the limited incursions made by lines, we can look to interruptions for hope.

## II. Property

The Occupy camp at St Paul’s was an extraordinarily evocative site for a protest. In the dark, with the bells tolling and the architecture illuminated, the nylon tent city made a striking contrast to the seventeenth century, Portland stone Cathedral. Particularly in winter, the camp never looked like a particularly inviting place to spend the night. And yet the warm welcome at the Information Tent and the open admission to debates and general assemblies at Tent City University created a site that resonated as a public space.

The protest had begun outside the London Stock Exchange in close-by Paternoster Square on 15<sup>th</sup> October, 2011. Although the

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<sup>14</sup> Cooper, Davina. *Everyday utopias: The conceptual life of promising spaces*. Duke University Press, 2013, 217.



Square is physically open, and proclaimed as “public open space” by the owners (Mitsubishi Real Estate),<sup>15</sup> injunctions were sought that first day, evicting Occupy before tents were pitched.<sup>16</sup> Security guards stood around the square from October 2011 until February 2012 next to signs stating that: “Paternoster Square is private land. Any licence to the public to enter or cross this land is revoked forthwith.”<sup>17</sup>

There was no complex legal issue in Paternoster Square. Being private land, and so not subject to the Human Rights Act 1998, which governs property owned by public bodies, the protestors had no right to protest.<sup>18</sup> There is, in England, no equivalent to the idea of a “public forum.”<sup>19</sup> Once the possession order was drawn up for Paternoster Square, despite its appearance as a public space, the protestors could not legally stay. It was serendipity, or according to some, God’s will, that protestors could move across to St Paul’s Cathedral, setting up camp there instead the same day. Once at St Paul’s and on publicly owned land, the protest was more successful for a time at least.

The prevention of the protest at Paternoster Square was legally straightforward. The justification for barring the trespassers rests on

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<sup>15</sup> About Paternoster, <http://www.paternostersquare.info/about-paternoster.aspx> (last visited June 20, 2016).

<sup>16</sup> For a summary of these orders and events see para 5 of Lindblom J’s judgment in *City of London v Samede and Others* [2012] EWHC 34.

<sup>17</sup> Photograph of site on file.

<sup>18</sup> *Appleby v UK* (App No 44306/98) (2003) 37 EHRR 38. The definition of public bodies here is not always fixed and differs by context, particularly in housing, for example.

<sup>19</sup> Post, Robert C. “Between governance and management: The history and theory of the public forum.” *UCIA L. REv.* 34 (1986): 1713-1835; Zick, Timothy. *Speech Out of Doors: Preserving First Amendment Liberties in Public Places*. Cambridge University Press, 2009.

the basic presumption in English land law of the trespass/licence binary. If you have no lease or freehold, either you are on land as a visitor (with a licence) or you are a trespasser. This “absolutist dogma,” as Gray and Gray term it<sup>20</sup> was colourfully expressed in *Entick v Carrington*<sup>21</sup> where, in 1762, men associated with the Earl of Sussex had broken into Mr Entick’s home (a printer of seditious pamphlets) “with force and arms” continuing there “for four hours without his consent and against his will.” Since there was no effective warrant this was held to be a trespass. The Chief Justice was emphatic in his decision: “our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.” Without a licence, “every invasion of land, be it ever so minute, is a trespass.” As a result, if you are on (apparently) public space, you must either be there under licence or you are a trespasser, liable to be evicted.<sup>22</sup>

While early on there had been some hope for leniency in how quickly trespassers had to leave land, this was quashed in 1973 in *McPhail v Others Unknown*, where the Court of Appeal held that it had no discretion to suspend an order for possession.<sup>23</sup> This is true

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<sup>20</sup> Gray, Kevin, and Susan Francis Gray. *Land law*. Oxford university press, 2011, p1260.

<sup>21</sup> (1765) 19 Howell’s State Trials 1029 at 1066, 2 Wils KB 275 at 291, 95 ER 807 at 817.

<sup>22</sup> There are different rules for unregistered and registered land, particularly on relativity of possession, see Gray and Gray, *supra*, note 20.

<sup>23</sup> [1973] Ch. 447.

in a residential context, where homelessness and necessity are no answer (as Lord Denning had earlier held "[i]f homelessness were once admitted as a defence to trespass, no one's house could be safe").<sup>24</sup>

Since then, judges have queried whether this pre-emptory process is compatible with the European Convention on Human Rights<sup>25</sup> even holding that *McPhail* "can no longer be regarded as good law."<sup>26</sup> So far, however, no change has come. Anyone on land without permission is a trespasser and can be required to leave. These common law principles, explored through a series of squatting and protest cases, particularly in the 1970s, underpin the current Common Procedure Rules 55 (CPR 55).<sup>27</sup> Here the justification for a straightforward procedural system to regain possession, which does not require a court hearing, is "the overriding objective of enabling the court to deal with cases justly and at proportionate cost" (CPR Part 1). As a result, unless the judge has concerns about process or ownership or some other matter, he will make an order for possession without requiring the attendance of the parties (CPR Part 55 16 and 17).

These binary principles were litigated in a recreational public space context in *CIN v Rawlins* in 1995. Here the Court of Appeal

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<sup>24</sup> *Southwark London Borough Council v. Williams* [1971] Ch. 734 at 744. Social landlords are required to enable tenants to outline their personal circumstances, see the Pre-Action Protocol for Possession Claims by Social Landlords (2015), and are required to act proportionately, see *Manchester City Council v Pinnock & Ors* [2010] UKSC 45. There is also considerable anecdotal evidence of a more sympathetic approach to eviction by social landlords even for non-payment of rent.

<sup>25</sup> Notably Sir Alan Ward in *Malik v Fassenfelt* [2013] EWCA Civ 798 and to a more limited extent Neuberger L.J. in *Birmingham City Council v Lloyd*, [2012] EWCA Civ 969.

<sup>26</sup> Sir Alan Ward in *Malik*, *supra* note 25, para. 26.

<sup>27</sup> Vincent-Jones, Peter. "Private Property and Public Order: The Hippy Convoy and Criminal Trespass." *Journal of Law and Society* 13.3 (1986): 343-370.

upheld the right of the Swansgate Shopping Centre in Wellingborough to ban specified individuals from their premises in early 1990s. This was despite the fact that these decisions were made by employees of Group 4, a private security firm, who allegedly called the youths chimpanzees and were said to have attempted to have them arrested for such actions as “whistling in public.”<sup>28</sup>

Apparently so conventional that it did not even require a full law report decision, *CIN v Rawlins* might have slipped under the radar had Gray and Gray not alerted property scholars to the decision’s “feudal resonance” arguing that even “today a flicker of concern ought to be aroused by the suggestion that the common law allows one private actor, on invoking the threat of indefinite incarceration, to exile a group of citizens permanently from the centre of their home town, thereby endangering their livelihood and severely impairing their freedom to engage in the social and commercial relationships of their choice.”<sup>29</sup> Unappealed and dismissed by the European Commission on Human Rights,<sup>30</sup> it is now established that it is acceptable to exclude anyone without a licence (as long as equalities legislation is not breached).<sup>31</sup> As the ECtHR later put it in *Appleby v UK*: “a private person’s ability to eject people from his land is genuinely unfettered and he does not have to justify his conduct or comply with any test of reasonableness.”<sup>32</sup> This is why, on arrival at Paternoster Square in October 2011, the Occupy protesters faced security guards directing them off the land.

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<sup>28</sup> Gray, Kevin, and Susan Francis Gray. “Civil rights, civil wrongs and quasi-public space.” *European Human Rights Law Review* (1999): 46-102, 48. *CIN v Rawlins*, [1995] 2 EGLR 130.

<sup>29</sup> Gray & Gray, *supra*, note 28.

<sup>30</sup> *Mark Anderson and Others v United Kingdom* (Application No 33689/96).

<sup>31</sup> Primarily through the Equalities Act 2010.

<sup>32</sup> *Appleby v UK* (App No 44306/98) (2003) 37 EHRR 38

It is these property principles that underpin everyday practice, excluding people from apparently public spaces. In mainline London train stations, for example, “withdrawal of implied permission notices” have been issued to individuals who are involved in begging, shoplifting, persistent rough sleeping, alcohol related disorders or anti-social behaviour. If individuals are issued with a “WIP Order” they are banned from “entering or passing inside or outside the station for 6 months” as well as using “any chemist at [the station] for prescription purposes.<sup>33</sup> The comedian Mark Thomas has similarly been banned for life from six streets owned by the Oxford Property Group in central London. He has returned with members of the public, all wearing Shaun the Sheep masks to protest against this exclusion. While this offers opportunities for “expressive outlaws,”<sup>34</sup> it is striking that property rules are being used, rather than other forms of enforcement. This is “the public life of private law.”<sup>35</sup> The trespass/licence binary is so effective that no other legal mechanisms are needed.

When, occasionally, new public spaces are created, these are distinctive. London’s proposed Garden Bridge (from Westminster to Lambeth), for example, is to have “visitor hosts” to show people around<sup>36</sup> (even though the bridge has been and will continue to be

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<sup>33</sup> Lodge, T., *Stop British Transport Police from Making Homelessness a Criminal Offence*, <https://you.38degrees.org.uk/petitions/let-s-stop-westminster-council-from-making-homelessness-a-criminal-offence-in-london-victoria> (last visited June 20, 2016). The institutional status of Network Rail, who own these mainline stations, is complex to say the least. Network Rail, *Our Governance Structure*, <http://www.networkrail.co.uk/about-us/governance> (last visited June 20, 2016).

<sup>34</sup> Peñalver, Eduardo Moisés, and Sonia K. Katyal. "Property Outlaws." *University of Pennsylvania Law Review* (2007): 1095-1186.

<sup>35</sup> See *The Public Life of Private Law*, <https://publicprivatelaw.wordpress.com> (last visited June 20, 2016).

<sup>36</sup> Conditions of Use myths busted (Apr. 8, 2016), <https://www.gardenbridge.london/news/article/conditions-of-use-myths-busted>.

run with (national) public money as well as private funding).<sup>37</sup> The “Sky Garden” at 22 Fenchurch Street, meanwhile, has a host of restrictions, including a requirement to book ahead to visit. As Wainwright asks: “Which other parks require you to show photo ID, before passing through airport-style scanners and submitting your bags to be searched?”<sup>38</sup> This is an expression of property rights, creating a distinctive form of (apparently) public space.

Of course resistance, even if not legal, can also temporarily create public space, as Finchett-Maddock’s definition of land also makes clear: “Land denotes a use of space, a place where the practices and performances, the processes and the products of state laws and a law of resistance, can converge.”<sup>39</sup> Legal rules, practices and processes produce both permissive and non-permissive uses of property. Flashmobbers, for example, exploit the trespass/licence binary to create a spectacle. Expressive outlaws such as sit-in civil rights diners “are not interested in obtaining property for themselves, but rather are concerned with influencing the ways in which current owners use or enjoy their property rights.”<sup>40</sup> And of course, it was ever thus. As EP Thompson wrote in *Whigs and Hunters*: “Claim and counter-claim have been the condition of forest life for centuries.”<sup>41</sup> Compliance and resistance converge in land. This can create public space in a wholly different way from that which the landowner at that moment in time intended.

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<sup>37</sup> See, for example, Jack, Ian. “Why is London’s Garden Bridge worth as much as five Lancashire museums? Ask Joanna Lumley.” *The Guardian*, 13 Feb 2016.

<sup>38</sup> Wainwright, Oliver. “London’s Sky Garden: the more you pay, the worse the view.” *The Guardian*, 6 Jan 2015.

<sup>39</sup> Finchett-Maddock, Lucy. *Protest, Property and the Commons: Performances of Law and Resistance*. Routledge, 2015, 44.

<sup>40</sup> Peñalver & Katyal, *supra* note 34, at 1105.

<sup>41</sup> E P Thompson *Whigs and Hunters: The Origin of the Black Act*, Penguin, Harmondsworth, 1977, 31.

Nevertheless, the ease with which members of the public can be evicted or prevented from entering privately owned land is significant. There is a profound lack of spatial differentiation within English land law: in both a bedroom and a privately owned square, the trespass/licence binary applies. This is particularly significant given the ongoing large-scale privatisation of public land in England. Property scholars are well versed in the implications of the Enclosure Acts (starting after the Middle Ages and ending by World War 1),<sup>42</sup> yet much less familiar with the current swathe of sales of private land, both for housing (where the lack of oversight has been much criticized in Parliament) and for profit, particularly in London (where, for instance, Admiralty Arch and the Old War Office were sold in 2015 for £200million to be turned into luxury hotels).<sup>43</sup>

It is hard here to do justice to the scale of property privatisation currently underway in England. These land disposals are conventionally justified by the needs for growth and housing as well as the impacts of “austerity” framed within in a broader narrative of efficiency: “releasing surplus land would promote growth and reduce the deficit while providing homes and jobs”<sup>44</sup> or stating that the “government is a major landholder and hard-working taxpayers expect us to use these assets effectively.”<sup>45</sup> Much of the land has been released for housing (942 sites belonging to the Ministry of Defence, Department of Health, Homes and Communities Agency were sold

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<sup>42</sup> Howkins, Alun. "The use and abuse of the English commons, 1845–1914." *History Workshop Journal*. Oxford University Press, 2014.

<sup>43</sup> Ward, Victoria. "Sale of two government buildings to hotel developers "will put Queen at risk," peers warn", *The Telegraph* 10 July 2015.

<sup>44</sup> National Audit Office, *Department for Communities and Local Government Disposal of public land for new homes*, London, 2015.

<sup>45</sup> "Whitehall releasing its grip on unused public land" Gov.uk Press Release, 20 Feb 2014.

between the introduction of the *Plan for Growth* in the March 2011 Budget and March 2015).<sup>46</sup> While there is a great need for new housing, there has been profound criticism both within and outside Parliament at the Government's failure to monitor whether houses are actually being built on these sites (where payment can be contingent on later house sales).<sup>47</sup> Similarly, redevelopments of housing estates by private developers and the consequent "decanting" of social tenants, particularly in London, has privatised estates and often come with the loss of communal spaces for mixed communities.<sup>48</sup> The newly created NHS Estates Ltd, a company with a single shareholder (the Secretary of State), has sold off 179 properties between 1 April 2013 and 1 June 2015, "generating around £93.6 million of receipts for the public purse, and over £9.3 million in savings in running costs."<sup>49</sup> Reducing costs in the name of efficiency, the Government is also radically reducing their need for office space and has sold off two million square metres smaller since 2010 for £1.4 billion.<sup>50</sup> This disposal programme is continually being extended through local authorities "selected" to join the phases of the One Public Estate programme, extended at the local level "to release excess government

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<sup>46</sup> House of Commons Committee of Public Accounts *Disposal of public land for new homes Second Report of Session 2015–16*, 2016, 8.

<sup>47</sup> HM Treasury, *Treasury Minutes: Government responses on the First to the Third reports from the Committee of Public Accounts: Session 2015–16, and progress on Government Cash Management*, 2016, 7.

<sup>48</sup> For a collation of studies on this, see Watt, Paul and Minton, Anna, "London's housing crisis and its activism." *City*, 20(2) 2016.

<sup>49</sup> NHS Property Services, Property disposals, <http://www.property.nhs.uk/what-we-do/disposals> (last visited June 20, 2016).

<sup>50</sup> Local Government Association and the Cabinet Office, *One Public Estate*, London, 2015.



land and property.”<sup>51</sup> As the Government’s Estate strategy puts it: “complacency is the enemy. We need to be more ambitious.”<sup>52</sup>

As part of the divesting of local authority property portfolios, there has also been widespread privatisation of city centres. Here there is a model that is repeated throughout the country, reproducing spaces, often using similar design principles, materials and anchor tenants.<sup>53</sup> The preferred spatial and legal mechanism is for local authorities to grant long leases (generally for 250 years) to private developers. These property developers then regenerate urban cores by constructing offices and “open air malls,” using compulsory purchase, highways stopping up and planning provisions to create a “masterplan” which is then produced in built form.<sup>54</sup> These privately-owned and very large, urban retail schemes, have proliferated, transforming multiply owned city centres into unitary sites owned as parts of portfolios of multinational property companies.<sup>55</sup>

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<sup>51</sup> More local authorities set to sell government assets (Dec. 11, 2015), <https://www.gov.uk/government/news/more-local-authorities-set-to-sell-government-assets>.

<sup>52</sup> Cabinet Office, *Government’s Estate*. October 2014, 5.

<sup>53</sup> One developer, Hammerson, for example, owns or part-owns Brent Cross, London; Bullring, Birmingham; Cabot Circus, Bristol; Centrale, Croydon; Grand Central, Birmingham; Highcross, Leicester; Silverburn, Glasgow; The Oracle, Reading; Union Square, Aberdeen; Victoria Quarter, Leeds; and WestQuay, Southampton. See, Hammerson, *Annual Report 2015: Where more happens*, [http://www.hammer-son.fr/sites/default/files/rapport\\_annuel\\_2015.pdf](http://www.hammer-son.fr/sites/default/files/rapport_annuel_2015.pdf).

<sup>54</sup> Minton, Anna. *Ground Control: Fear and happiness in the twenty-first-century city*. Penguin, 2012.; Layard, Antonia. Shopping in the public realm: a law of place. *Journal of Law and Society*, 37(3), 2010, 412–441.

<sup>55</sup> See Hammerson, *supra* note 53; Land Securities, *Annual Report 2015*, <http://annualreport2015.landsecurities.com>; Grosvenor, *Annual Review 2015: Living Cities*, <http://www.grosvenor.com/downloads/annual-report-archive/grosvenor-annual-review-2015>.

These companies may call spaces “public squares” or “public realm” in their brochures yet they are very much under private control, surveilled in the first instance by security guards and CCTV rather than the police. In Bristol, for example, the semi-covered, 36 acre-retail quarter “Cabot Circus” is owned by Hammersons Plc and (now) Axa Insurance.<sup>56</sup> It includes Quakers Friars, variously named a renovated open square, public space or piazza,<sup>57</sup> which is uncovered. Yet even here “visitors” cannot smoke a cigarette, ride a bike, use a skateboard or walk a dog. Buskers and street entertainers are able to perform only when invited, for instance, on a romantic themed event on Valentine’s Day or Mothers’ Day and are otherwise excluded. Individuals have been escorted from the premises by private security guards for handing out leaflets, protesting about imports from Israel or lurching as a zombie as a “protest against over-consumerisation.”<sup>58</sup>

Such privatisation of central and local government-owned land is a clear example of accumulation by dispossession, which Harvey breaks down into four stages: privatization and commodification, financialisation, management and manipulation of crisis.<sup>59</sup> Property has, of course, long been both commodified and financialised. What is striking today is how the English austerity and housing crises have been used as justification for selling off, or giving away, publicly owned land (Harvey’s “manipulation of crisis”). It is hugely unlikely that “the public” (however defined) will ever be able to buy these

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<sup>56</sup> Land Securities, *Land Securities sells Bristol Partnership stake to AXA Real Estate for £267.8 million* (Aug. 13, 2014), <http://www.landsecurities.com/media/press-releases/1829>.

<sup>57</sup> Bristol Shopping Quarter, *Cabot Circus*, <http://www.bristolshoppingquarter.co.uk/shopping/cabot-circus-p492293> (last visited June 20, 2016).

<sup>58</sup> Layard, *supra* note 54.

<sup>59</sup> Harvey, David. *A brief history of neoliberalism*. OUP Oxford, 2005, 160–164.

sites back. The greatest advantage is that local authorities or central departments will not be responsible for the running costs, maintenance or insurance bills on these pieces of land. However, unless well negotiated (and there are few good examples here<sup>60</sup>) “the public” or public bodies will neither be able to set the agenda for a piece of land nor make decisions about access or use.

Given these swathes of privatization and enclosure, there is undoubtedly a reduction in publicly owned spaces. For property lawyers, this raises the question: does this privatisation matter?<sup>61</sup> Are property rules for public space different for public and private landowners?

In England, there is no *ex ante* distinction between public and private property in land law. Both are litigated in the same courts.<sup>62</sup> In any case, other than central and local government, there is no generic group of landowners that can easily be identified as “public.” The Crown Estate,<sup>63</sup> for instance, does not describe itself as public (“We are a business driven by a strong set of values. We mean them, we are proud of them and we are respected for them by the people we work with and in the wider community”<sup>64</sup>) yet has been found to be

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<sup>60</sup> The Kings Cross development has been better negotiated than some others, see Argent (King’s Cross), London and Continental Railways and Exel, *King’s Cross Central Access and Inclusivity Strategy*, September 2005.

<sup>61</sup> This question has also been extensively explored in the housing sector where the answer also appears to be – for a wide range of reasons – yes. See, for example, Woodward, Rachel. “Mobilising opposition: the campaign against housing action trusts in Tower Hamlets.” *Housing Studies* 6.1 (1991): 44-56 and Watt, Paul. “Housing stock transfers, regeneration and state-led gentrification in London.” *Urban Policy and Research* 27.3 (2009): 229-242.

<sup>62</sup> For a French perspective, see Jane Ball, *The Boundaries of Property Rights in English Law, Report to the XVIIth International Congress of Comparative Law, July 2006*.

<sup>63</sup> Under the Sovereign Grant Act 2011.

<sup>64</sup> <http://www.thecrownestate.co.uk/who-we-are/our-values/> (last visited July 16, 2016).

a public body in some contexts.<sup>65</sup> Similarly, Crown Lands,<sup>66</sup> religious, charitable, third sector properties and universities, are also rarely considered to be public in a conventional sense. Conversely, the newly created NHS Estate Limited, which currently owns around 10% of all NHS land, has been incorporated as a private company with the Secretary of State for Health as its sole shareholder. This is probably public (the website says obliquely: “whilst it is a Limited company it is an important part of the NHS family”). The eight, London Royal parks, managed by the Royal Parks Agency, a central government Department, on behalf of the Queen are also perhaps public, though clearly rather distinctive. The fifteen national parks in England are made up of a patchwork of public and private landowners; designation does not make land either public or private. The status is a regulatory designation introducing national park authorities to exercise management responsibilities rather than changing land ownership.

In short, these are contested dichotomies. While there are debates at the margins, fleshed out in litigation about the applicability of the Human Rights Act 1998, public land is probably best understood as central and local government property. As this paper has noted, this is increasingly reducing, both in terms of actual land owned as well as through changes to the institutions who own the sites.<sup>67</sup>

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<sup>65</sup> For example, housing, see *Crown Estate Commissioners v Governors of the Peabody Trust* [2011] EWHC 1467.

<sup>66</sup> “Land in which there is Crown or Duchy interest,” Section 293 of the Town and Country Planning Act 1990.

<sup>67</sup> The changes in classification of Housing Associations, Network Rail, schools (as academies), NHS Estate Ltd. are all instances where institutional changes might change whether we consider this to be public or private land.

If there is public land, no matter how limited, is this legally distinctive from privately owned property? Certainly there are differences on acquisition and disposal for local authorities and some restrictions on management both in statute and in the common law.<sup>68</sup> These came to light in *Fewings v Somerset CC*, where it was held that the local authority's decision to prohibit stag hunting on local authority-owned land was not for "the benefit, improvement or development of their area" as required.<sup>69</sup> These provisions are broadly worded and rarely litigated yet they are distinctive and often inter-related with the human rights provisions affecting publicly owned land (considered below).

Even if doctrinally the distinction between privately and publicly owned land is rather thin, in property practices we see real differences. All "public property" (left undefined) is subject to guidance from HM Treasury's in *Managing Public Money*. This requires that public landowners prepare an "asset register" and "asset management strategy," planning "how retained assets will be used efficiently for the organisation's core functions." Public landowners should view "value for money from the asset from the perspective of the whole Exchequer, taking account of opportunities to work with other public sector organisations to minimise the government's overall required asset base."<sup>70</sup>

Public property ownership also brings different discursive debates (about how publicly owned land should be managed or disposed of). The failed sell-off of the "Forest Estate" was a striking

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<sup>68</sup> These include "well-being powers," introduced by successive Labour Governments, before being transformed into the 'general power of competence,' symbolically located in section 1 of the Localism Act, 2010.

<sup>69</sup> Section 120(1)(b) of the Local Government Act 1972.

<sup>70</sup> HM Treasury, *Managing Public Money*, A4 15.7 2013, amended 2015.

example of the scope and vibrancy of public discussions about the proposed (and ultimately, largely failed) sell-off of publicly owned land.<sup>71</sup> At a local scale, auctions<sup>72</sup> of council-owned housing to ‘balance’ property portfolios are also often contentious. Similarly, the introduction of “public space protection orders” by local authorities or bylaws for behaviours in parks, create space for public debate and discussion as part of consultation procedures, even though any proposed restrictions could (legally) be achieved by a straightforward exercise of property rights. There are distinctive forms of “property consciousness” for publicly owned land, framed both discursively and in soft governance.

And for Occupy 2012, public land ownership *did* make a difference. It meant that once away from Paternoster Square and next to St Paul’s Cathedral, the protestors were able to engage their ECHR rights to free assembly, assembly and association on the (publicly-owned) land next to the Cathedral. While the title deeds were never publicly presented (given the history of the site, this is not unusual), the City of London’s surveyor mapped the area on which the protestors camped as a highway during the dispute. Once identified, it became the property of the highways authority (the Corporation of London).<sup>73</sup> For four and a half months, protestors were able to stay, exploiting the unwillingness of the Church authorities to bring eviction proceedings directly as well as using ECHR rights. Ultimately, eviction occurred in the conventional way. However, a combination

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<sup>71</sup> Bennett, Oliver and Hirst, David, “The Forestry Commission and the sale of public forests in England, SN/SC/5734”, *House of Commons Library*, updated 28 November 2014.

<sup>72</sup> Abido, Hadie. “Protests while police and private security protect sale of council houses” *Bristol Cable* 21 April 2016.

<sup>73</sup> *City of London v Samede and Others* [2012] EWHC 34

of property practices and human rights considerations brought Occupy that key ingredient for protests: time.

And yet public ownership does not necessarily result in public space. That is to misunderstand the property lens. As Macpherson has noted: state property is best understood as “corporate private property” where a “smaller body of persons authorized to command its citizens’ exercise a corporate right to exclude.”<sup>74</sup> There is still a body – not human, but corporate – that has the agenda-setting and implementing powers for a piece of land. This public body can invite people in and public realm teams often work hard, for example, to maximise a sites’ public offer, maintaining or opening up “desire lines,” facilitating ease of access and use. Alternatively, a public landowner – with the limited constraints discussed above – can repel a trespasser from “their” land. A public landowner can “prevail.”<sup>75</sup>

“True public realm” as something to which we should “return” to, does not then exist. Even land owned by public authorities is regulated, both legally and through practice, with the “agenda-setting” ability lying with the corporate public owner body. It this predominance of property governance in public space – though this is clearly not the only form of governance nor even necessarily the most significant one – that makes it so important to continue with topographical analyses of public space. The map may not be conclusive but it can illustrate density or paucity, enabling us to track change and ask how much physical (more) public space we want, where and when.

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<sup>74</sup> Macpherson, Crawford Brough. *Property, mainstream and critical positions*. Vol. 214. University of Toronto Press, 1978.

<sup>75</sup> *The Mayor Commonalty and Citizens of London v Samede (St Paul's Churchyard Camp Representative) & Ors* [2012] EWCA Civ 160, para 49.

### III. Lines

On the 24<sup>th</sup> April 1932, working men and women (members of the British Workers Sport Federation, BWSF) made a public trespass on Kinder Scout, the highest point in the Peak District. Walking from Blowden Bridge Quarry, the 400 or so ramblers met the Duke of Devonshire's gamekeepers. After a brief engagement ("a brief but vigorous hand-to-hand struggle with a number of keepers specially enrolled for the occasion"<sup>76</sup>), in which one gamekeeper was hurt, the trespassers continued to the peak, meeting up with other ramblers (trespassers) who had arrived from Sheffield crossing Kinder from Edale.

As they returned to the village, police accompanied by keepers arrested five ramblers, as well as one man in a separate incident, and took them to the Hayfield Lock-up. The day after the trespass, Benny Rothman and four other ramblers were charged at New Mills Police Court with unlawful assembly and breach of the peace. The six men subsequently pleaded not guilty but five of the six were found guilty and were jailed for between two and six months.

The trespass of Kinder Scout has come to be immortalized, woven in an almost hagiographic history of the English National Parks.<sup>77</sup> Andrew Robert Buxton Cavendish, the 11th Duke of Devonshire, even publicly apologised at the 70th anniversary celebration event in 2002 for his grandfather's "great wrong," talking of the "great shaming event on my family" and how "out of great evil can come great good."<sup>78</sup> Yet this was by no means the only trespass (the

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<sup>76</sup> Allison, Eric. "The Kinder Scout trespass: 80 years on", *The Guardian*, 17 April 2012.

<sup>77</sup> History of the National Parks, <http://www.nationalparks.gov.uk/students/whatisanationalpark/history> (last visited June 20, 2016).

<sup>78</sup> Hattersley, Roy. "The march of progress" *The Guardian*, 8 June 2009.



first Sheffield trespass was organized in 1907) and at the time, the larger rambler federations (including the Ramblers Association) disassociated themselves from the “stunt of a single afternoon”<sup>79</sup> by the communist BWSF. A second mass trespass of 200 people on Bradfield Moors was organized for 18 September 1932. Yet this time the police (to the fury of the gamekeepers) declined to make any arrests. As Hey notes, “the wisdom of this strategy ensured that the event was relatively peaceful and therefore starved of publicity.” After this, mass trespass “died of apathy.”<sup>80</sup> Now, however, it is often only the Kinder Scout protestors who are praised, with other trespassers, who took direct action, as well as organisers who held meetings and worked in Parliament to bring about change, left out of popular accounts.<sup>81</sup>

Finally implementing the access rights so long sought (the first formal Access to the Mountains Bill was presented to Parliament in 1888) the 2000 Countryside and Rights of Way (CROW) Act brought the right to roam. For rural landowners, this was hugely contentious (notably Madonna<sup>82</sup>). Nevertheless, spearheaded by the Labour Party, the legislation requires English Nature to map “access land” so that here, any “person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation, if and so long as – (a) he does so without breaking or

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<sup>79</sup> Hey, David. “Kinder Scout and the legend of the Mass Trespass.” *Agricultural History Review* 59.2 (2011): 199–216.

<sup>80</sup> *Ibid.* at 214.

<sup>81</sup> Stephenson, Tom, and Ann Holt. *Forbidden land: The struggle for access to Mountain and Moorland*. Manchester University Press, 1989 and Sheail, John. “The Access to Mountains Act 1939: An Essay in Compromise” *Rural History* 21(1) 2010. 59–74.

<sup>82</sup> Anderson, Jerry L. “Countryside Access and Environmental Protection: An American View of Britain’s Right to Roam”. *Environmental Law Review* 9: 2010. 241. See also Conservative opposition in *You can only be sure with the Conservatives*, The Conservative Manifesto 1997.

damaging any wall, fence, hedge, stile or gate, and (b) he observes the [specified] general restrictions” (Section 2(1)). These “general restrictions” in Schedule 2 are extensive. They include: using a vehicle, a vessel or sailboard on any non-tidal water, having with him any animal other than a dog, committing any criminal offence, lighting or tending a fire, and many more. The legislation also prohibits camping.<sup>83</sup>

Even with its extension to coastal access,<sup>84</sup> the English scheme is nowhere near as comprehensive as the Open Access Charter in Scotland, which provides “a statutory right of responsible access to land and inland waters for recreation” with very few exceptions (and generally permits wild camping).<sup>85</sup> Permission is temporary and only to land mapped as “access land.” Other than these legislative provisions, unless visitors have express or legislative permission, there is no *jus spatiandi* (the right to wander at will).<sup>86</sup> There is also a “proper” way to behave as set out in Schedule 2. As a Parliamentary research paper put it in 1999: “Few people seriously suggest that the public has the right to walk across modern farms.”<sup>87</sup> The right to roam takes away the (property) right to exclude, diluting the content, if not the fact, of land ownership<sup>88</sup> replacing it with a prescribed right of access

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<sup>83</sup> Schedule 2(1)(s).

<sup>84</sup> Marine and Coastal Access Act 2009.

<sup>85</sup> Scottish Outdoor Access Code, Part 2: Access Rights (2005), <http://www.outdooraccess-scotland.com/sites/default/files//docs/ScottishOutdoorAccessCode-Part2AccessRights.pdf>.

<sup>86</sup> *Attorney-General v. Antrobus* [1905] 2 Ch. 188.

<sup>87</sup> House of Commons Library, Research Paper 99/23 2 March 1999, Right to Roam Bill, Bill 16 of 1998–99, 9.

<sup>88</sup> Waring, Emma. “Adverse Possession: Relativity to Absolutism” in Fox O’Mahony, Lorna et al. *Moral Rhetoric and the Criminalisation of Squatting: Vulnerable Demons?* Routledge, 2014, 203. A similar point is made by Gray and Gray, *supra* note 20.

and use. Optimists have framed this as a geography of hope,<sup>89</sup> whilst others are more cautious.<sup>90</sup>

Once on the land, movement is required. For within these mapped areas of countryside, coast and commons, “roamers” are forming lines. The rights are to move, not to share in ownership. These (legally entitled) entrants move along footpaths and lanes with a physical action that has altered little over generations. Roaming is about movement, as Gros explains: “When walking it’s essential to find your own basic rhythm, and maintain it. The right rhythm is the one that suits you, so well that you don’t tire and can keep it up for ten hours.” This is why it is so difficult to walk for long distances next to another, since “when you are forced to adjust to someone else’s pace, to walk faster or slower than usual, the body follows badly.”<sup>91</sup> This physical embodiment is coupled with the topology of English terrain. Today’s network of public footpaths and bridlepaths result largely from the communication patterns of previous centuries. The boundaries around fields and personal parklands, achieved through enclosure, still shape landscapes today.<sup>92</sup> In earlier times there was much greater access to roam across land for the purposes of travel and recreation, particularly in medieval times.<sup>93</sup>

There is also a long history of illegality in access to land, whether for poaching and using the forest or simply for walking by many individuals from all social classes. The historian AJP Taylor was one 20<sup>th</sup> century trespassing rambler,<sup>94</sup> for example, while as Gray notes,

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<sup>89</sup> Gray, *supra* note 9.

<sup>90</sup> Mitchell, Jonathan. "What public presence? Access, commons and property rights." *Social & Legal Studies* 17.3 (2008): 351-367, 363.

<sup>91</sup> Gros, Frédéric. *A philosophy of walking*. Verso Books, 2014, 53.

<sup>92</sup> Shoard, Marion. *A right to roam*. Oxford: Oxford University Press, 1999.

<sup>93</sup> Gray, *supra* note 9.

<sup>94</sup> Hey, *supra* note 79, at 199-216.

“Wordsworth, Coleridge and Ruskin are well known to have roamed the Cumbrian fells.”<sup>95</sup> Rambling has long constituted a mix of trespass and licence (whether granted individually or by location) and these improprieties can have material effect. The movement – whether legal or illegal – creates practice, which can eventually take legal form.<sup>96</sup> As Barr notes, “to move and to walk ... is to participate in the creation and conduct of lawful relations.”<sup>97</sup> Physical movement creates legality (and illegality). Many of these walkers, whether on footpaths, under licence or trespassing, have created paths and passing places that shape the land we roam across today.

In his book, *Lines*, Ingold draws a distinction between travelling and wayfaring. He writes that the Inuit are wayfarers; they are continually on the move. More significantly still, they *are* their movement: “the wayfarer is instantiated in the world as a line of travel.”<sup>98</sup> Travellers, in contrast, move to reach their destination. Exercising right to roam rights, then, is predicated on flow, or, in Solnit’s phrase, “meandering.”<sup>99</sup> People are in place (and cannot be excluded) because they are moving, even though they are not necessarily focused on reaching a destination. In this, they are akin to wayfaring. While roamers may stop and have a picnic, they cannot

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<sup>95</sup> Gray, *supra* note 9.

<sup>96</sup> Barr, Olivia. “Walking with Empire”. *University of Technology Sydney, Faculty of Law Legal Studies Research Paper Series No. 2014/16*.

<sup>97</sup> Barr, Olivia. *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place*. Routledge, 2016, 3.

<sup>98</sup> Ingold, Tim *Lines: a brief history*. Routledge, 2007, 76. There is clearly much more to be said here about indigenous understandings of lines and networks in relation to land, see for example, Godden, Lee. “Communal governance of land and resources as a sustainable.” *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (2010): 385.

<sup>99</sup> Solnit, Rebecca. *Wanderlust: A history of walking*. Penguin, 2001, 7.

camp overnight or live there. They do not acquire property rights (whether estates or interests in land law terms).

A second form of line, with an emphasis on flow, is the law on highways, often considered the only true public space in urban and suburban contexts. In a core decision, *DPP v Jones* Lord Irvine confirmed that a highway (whether publicly or privately owned) is a public place, on which all manner of reasonable activities may go on as long as “these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and re-pass.”<sup>100</sup>

The law of highways has been litigated most often in recent years in protest cases yet it is quite clear that all manner of activities are, in common law, permitted on verges and pavements as long as they do not cause an obstruction. For Lord Irvine, this included “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.”

The lack of obstruction is key. As Blomley notes, engineers, administrators as well as regulators – govern pavements so that people keep moving. Pedestrianism is the priority. This is a “particular, powerful and rarely acknowledged rationality, it produces, understands, regulates and evaluates the pavement or highway.”<sup>101</sup> Duration is also significant. Lord Irvine held in *Jones* that while activities

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<sup>100</sup> *DPP v Jones* [1999] 2 A.C. 240. Such actions do not constitute a trespass and underpin later statutory intervention (in this case s14A of the Public Order Act 1986, which was being raised to defend claims that 21 protestors could not protest on the roadside verge of the southern side of the A344 near Stonehenge).

<sup>101</sup> Blomley, Nick. *Rights of Passage*, Routledge, 2013, 106.

were permitted by the common law, they are also all time limited: “the public have no *jus manendi* on a highway, so that any stopping and standing must be reasonably limited in time. While the right may extend to a picnic on the verge, it would not extend to camping there.”<sup>102</sup>

By prioritising mobility and pedestrianism over the ability to stop for more than a short period, the law of highways contributes to public spaces but only for particular moments. Returning to Ingold’s distinction between wayfaring and transport, we can see how nearly the “law of highways” very nearly became the “law of transport.” In Ingold’s understanding, “transport is destination-orientated. . . [It carries] across people and goods in such a way as to leave their basic way unaffected.” Had we been limited to a right only to “passage and reasonable incidental uses associated with passage” as Lords Slynn and Hope preferred in *DPP v Jones*, this would have been much closer to a transport line. Lord Irvine’s robust intervention, not only finding for the protestors and upholding their ability to protest on the roadside verge but also that highways are for all manner of activities, is much closer to wayfaring.<sup>103</sup> Here there is a particular type of line, where a person can “engage in an active engagement with the country that opens up along his path.”<sup>104</sup>

Public highways are also key to the third category of line considered here, human rights protected on land owned by an authority that falls within the jurisprudence of the Human Rights Act 1998.<sup>105</sup>

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<sup>102</sup> [1999] 2 A.C. 240 at 280C.

<sup>103</sup> With which Lord Clyde and Lord Hutton agreed.

<sup>104</sup> Ingold suggests that wayfaring “must” engage. Ingold, *supra* note 98, 76.

<sup>105</sup> Essentially, this includes both “pure” public authorities and bodies carrying out “public functions.” There has been much litigation and discussion on this point, see, for example, *House of Lords House of Commons Joint Committee on Human Rights The Meaning of Public Authority under the Human Rights Act Seventh Report of Session 2003–04*, *YL v Birmingham CC* [2008] AC 95 and *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587.

As discussed above in *Property*, here there is an apparent binary between “public” and “private” and we might expect to see a genuine implementation of public space. Once again, however, it is only the key Convention rights that are protected here, Article 10 on freedom of expression and Article 11 on freedom of association, and these are premised on flow and temporary use of space, rather than fixity.

While this is not the place to rehearse the legal regulation of protests (this is done excellently elsewhere<sup>106</sup>) demonstrations, which clearly produce public spaces when they are underway, are also often equivalent to lines. In particular, public processions, which concern a “body of persons moving along a route in a public place,”<sup>107</sup> produce flow rather than fixity. Organisers of processions must generally give six days notice to the police (unless they are “commonly or customarily held in the police area” or it is not reasonably practicable to give notice). Under the Public Order Act of 1986, this notice “must specify the date when it is intended to hold the procession, the time when it is intended to start it, its proposed route, and the name and address of the person (or of one of the persons) proposing to organise it.”<sup>108</sup> Deviation from that route can be a criminal offence.<sup>109</sup> Conversely, even if there is no defined route, as with a critical mass cycle ride where “there is no fixed, settled or predetermined route, end-time or destination,” this can still be a procession requiring notification.<sup>110</sup>

In mapped countryside and coastal areas and on highways, then, people can move in lines and challenge property’s right to exclude,

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<sup>106</sup> Mead, David. *The new law of peaceful protest: rights and regulation in the Human Rights Act era*. Bloomsbury Publishing, 2010.

<sup>107</sup> *Flockhart v Robinson* [1950] 2 K.B. 498.

<sup>108</sup> Public Order Act, 1986, s11(3).

<sup>109</sup> *Jukes v DPP* [2013] EWHC 195.

<sup>110</sup> *Powlesland v DPP* [2013] EWHC 3846 (Admin).

creating forms of public space. None of these legal interventions incorporate an ability to stay, even overnight. As they stand, these lines cannot by themselves produce a public space as a stage on which the drama of communal life can unfold.<sup>111</sup> Of course, it was never the drafters' intention that these interventions would create comprehensive public spaces. And so, if we assume that public space is a good thing, that property rules can be overly restrictive and that lines are partial, then we need more public spaces both in city centres and (particularly) in urban peripheries and the suburbs.<sup>112</sup> To do this, this paper suggests, we should think about interruptions *for* public space.

#### IV. Interruptions

Built as a slanted A-frame from reclaimed wooden boards, Sanctum was a space for encounter, an "intimate place of listening, in which to hear the city like never before." The venue was erected within a ruined Templar Church, in Bristol, England, and was open for 24 days, for 24 hours a day, between October 2015 and November 2015. It hosted a continuous programme of over 552 hours sound by musicians, poets and performers and while the schedule remained secret, it was free to visit day and night. Visitors were invited to bring food and drink, particularly if they wished to share it, and – given English weather in November – to dress for an outdoor performance despite being inside (as well as bringing an umbrella in case of queuing in the rain).

Sanctum was created by American artist Theaster Gates and Bristol arts producers, Situations. Contributing to Bristol's year as 2015 European Green Capital, this was Gates' first commission in the

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<sup>111</sup> Carr et al, *supra* note 1.

<sup>112</sup> Bernstein, Rebecca, et al. "There is no local here, love." *After Urban Regeneration: Communities, Policy and Place* (2015): 95.



United Kingdom. It drew on his interventions in Chicago, including the Dorchester Projects—a collection of four vacant buildings converted into community venues—as well as the Islands Savings and Loan Bank, converted into a new arts centre over three storeys. In these venues Gates' has used property and place to create "spaces of uplift." He is part of an artistic movement, influenced by the Situationists and their commitments to change<sup>113</sup> that is changing the 'rules' of public art. In these public space projects, there is a focus on disruption and slices of time, building on *détournements*, the rerouting events and images.

It is these disruptions – with or without permission – that are key to creating public spaces, even temporarily, where previously there were more private uses of land. For as *Lines* has explained, legal mechanisms can be used to enable 'the public' to come onto land, whether privately owned (if highway, rural or coastal land) or publicly owned (in the case of human rights). The public may enter – and the right to exclude is restricted – for periods of time to move, roam or march. Sanctum also used space for a period of time, again with restrictions on behaviour (admission may require waiting or a special ticket, audience members are expected to observe while artists perform) yet without explicitly requiring movement (and so it was not a line). By negotiating a lease with English Heritage, the owners of the land on which Temple Church is situated, Sanctum was able to come into being and interrupt the usual use of the land to create a stage on which the drama of communal life could unfold.

Of course it is not just artists that use tactics of disruption and slices of time to create these stages for public space. Processions, car-

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<sup>113</sup> Doherty, Claire. *Documents of contemporary art: Situation*. MIT Press, 2009.

nivals, religious events and protestors have done this for generations. Fixed public spaces also, clearly, have their own “place ballets”<sup>114</sup> and temporal patterns as Amin explains: “every public space has its own rhythms of use and regulation, frequently changing on a daily or seasonal basis: the square that is empty at night but full of people at lunch-time; the street that is largely confined to ambling and transit, but becomes the centre of public protest; the public library of usually hushed sounds that rings with the noise of school visits; the bar that regularly changes from being a place for huddled conversation to one of deafening noise and crushed bodies.”<sup>115</sup>

The point about interruptions, however, is that they explicitly use slices of time to create interventions, whether negotiating a time-limited lease or a licence (a market), only operating after dark (urban explorers) or staying as long as possible before eviction (squatters). Interruptions are intentional about their use of time and space. In each case here there is an intervention on the land – either with or without permission, whether implied or express – disrupting the normal unfolding of events with something new that a public can coalesce around.

Streets, for instance, can be used as temporary spaces to bring publics together not only for protest but also for conviviality, whether repeatedly or as a one-off. Since 1974, the city of Bogota in Colombia has introduced “Ciclovía,” blocking off streets to cars and opening them up for runners, skaters, and bicyclists. Stages are set up in city parks with collective performances and interventions.

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<sup>114</sup> Seamon, David. “Body-subject, time-space routines, and place-ballets.” *The human experience of space and place* (1980): 148–165.

<sup>115</sup> Amin, Ash. “Collective culture and urban public space.” *City* 12.1 (2008): 5–24, 7.

Street closures have travelled worldwide including to Belfast<sup>116</sup> and Bristol, where they are known as “Make Sundays Special,” aiming to enable people to “explore the streets for arts, music, street games and entertainment in the Old City and wander through the market stalls on Corn Street.”<sup>117</sup> Roads can also be closed from the bottom up. Playing Out, another Bristol based organisation, has pioneered the activation of street play in suburban and urban neighbourhoods, aiming to make it “normal” for children to play outside.<sup>118</sup> Closing streets to cars for a slice of time (in this case by a road closure order) explicitly produces public space whilst not changing ownership.

Streets can also be closed for the extra-ordinary. Artist Luke Jerram, (with permission) turned Park Street, one of the busiest roads in Bristol, into a giant 90 metre water slide. The project turned the street into a place to play for the lucky 360 that were able to slide (over 100,000 had applied). Widely hailed as innovative and, most importantly perhaps, fun, it was a project that caught the public imagination. The emphasis was on taking over space normally dedicated to traffic, replacing it with creativity. “Park and slide” needed both time and place to create this public space for intervention.<sup>119</sup>

Markets are a further way of temporarily creating public space regardless of land ownership. Markets can, as Watson notes, provide “a site for vibrant social encounters, for social inclusion and the care

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<sup>116</sup> “Video: The Ciclovía cycling revolution hits Belfast”, *Belfast Telegraph*, 16 July 2015. <http://www.belfasttelegraph.co.uk/video-news/video-the-ciclovía-cycling-revolution-hits-belfast-31379138.html>.

<sup>117</sup> Bristol City Council, Make Sunday Special, <https://www.bristol.gov.uk/museums-parks-sports-culture/make-sunday-special> (last visited June 20, 2016).

<sup>118</sup> Playing Out, <http://playingout.net> (last visited June 20, 2016).

<sup>119</sup> Luke Jerram, Park and Slide, [http://www.lukejerram.com/urban\\_slide](http://www.lukejerram.com/urban_slide) (last visited June 20, 2016).

of others, for 'rubbing along' and for mediating differences."<sup>120</sup> This is an ancient practice, as a description of Spitalfields depicts: the "dispossessed and those with no other income were always able to cry their wares for sale in London. By turning their presence into performance with their cries, they claimed the streets as their theatre – winning the lasting affections of generations of Londoners and embodying the soul of the city in the popular imagination."<sup>121</sup> Markets have long associations with specific communities and places, as well as producing haphazardness and serendipity,<sup>122</sup> both fixed in place and with itinerant sellers. While street licensing will be required, occupying space with market stalls can be negotiated through a licence or lease. Once again, the privatization of city centres leads to anecdotal stories that market pitches are these days much harder to find (with implications for urban change and gentrification).<sup>123</sup> Property underpins these trading opportunities, and if it does not, if there are improprieties here, then the rapid packing of and running by street sellers at a sign of enforcement, is yet another feature of public space.

Public assemblies, particularly protest camps, can also interrupt. Defined as two or more people assembling in a public place that is wholly or partly open to the air, these protests do not require notification and do not of themselves need to involve movement; they can be static. Assemblies can take moving or static form, with protestors

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<sup>120</sup> Watson, Sophie. "The magic of the marketplace: Sociality in a neglected public space." *Urban Studies* 46.8 (2009): 1577–1591, 1577.

<sup>121</sup> The Gentle Author "The lost cries of London: reclaiming the street trader's devalued tradition," *The Guardian*, 24<sup>th</sup> November, 2015 and Hindley, Charles. *A History of the Cries of London: Ancient and Modern*. Cambridge University Press, 2011.

<sup>122</sup> Watson, *supra* note 120, 1590.

<sup>123</sup> Gonzalez, Sara, and Paul Waley. "Traditional retail markets: The new gentrification frontier?" *Antipode* 45.4 (2013): 965–983 and Massey, Joanne. "The gentrification of consumption: A view from Manchester." *Sociological Research Online* 10.2 (2005).

given some (albeit decreasing) ability to determine the “manner and form” of their protest.<sup>124</sup> Although protest assemblies are permitted on public land, and do not even always require notification under public order provisions,<sup>125</sup> legal provisions both under the ECHR and domestic provide that they can be removed swiftly. Again, there is an emphasis – as with lines – on flow<sup>126</sup> and the regulation of crowds.<sup>127</sup>

It is also striking that if a protest becomes too settled, it transforms from a public space – an interruption to land use – to a private one. The longer protestors are in place (since 2010 in Grow Heathrow, for example, and from 2012–2015 at Runnymede) the more likely that their claims will be presented under Article 8, as a right to home, rather than the provisions on freedom of expression, assembly and association. While there have been strong tactical reasons for doing this,<sup>128</sup> this has the effect that when protests produce fixity,

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<sup>124</sup> *Tabernacle v the Secretary of State for Defence* [2009] EWCA Civ 23 per Laws LJ at paras 35 and 37. Though for restrictions in Parliament Square see Serious Organised Crime and Police Act 2005 and *R (on the application of Barda) v Mayor of London on behalf of the Greater London Authority* [2015] EWHC 3584 (Admin).

<sup>125</sup> Public Order Act 1986, s.14 (with the exceptions for specific sites, including Parliament Square, see footnote 126).

<sup>126</sup> Lord Irvine in *DPP v Jones* [1999] 2 A.C. 240 and under the ECHR litigation. The European Commission on Human Rights, for example, held that the prohibition of a three day tent protest in Norway was acceptable to maintain public order, APPLICATION/REQUÊTES N° 9278/81 & 9415/81.

<sup>127</sup> This is brilliantly explored in El-Enany, Nadine. "Innocence Charged with Guilt': The Criminalisation of Protest from Peterloo to Millbank." *Riot, Unrest and Protest on the Global Stage*. Palgrave Macmillan UK, 2014. 72-97 and *rua Wall, Illan*. "This Agitated Veil: A spatial justice of the crowd?." *Academia.edu* last accessed 16 July 2016.

<sup>128</sup> Until the recent decision in *McDonald (by her litigation friend Duncan J McDonald) v McDonald* [2016] UKSC 28, there was hope that the courts might be more sympathetic to the applicability of Article 8 to private landowners, than Articles 10 and 11. This is a legal effect of the ruling in *Appleby v UK* (see above note 32) that permits no protest on private land. There is no defence under Articles 10 and 11, while application of Article 8 to private landowners is more contested.

producing a consistent use of land (which no longer disrupts), the space is legally framed as a private, rather than a public, space. In the case of Grow Heathrow, for example, Sir Alan Ward held that the protestors “established homes on the land,” they “restored [the site] to its former attractiveness as a market garden centre with a range of glass houses which in time became their dwelling places and their homes.” As well as the Lockean overtones here, it is evident that by this time, the public nature of the protest is legally lost. The activity no longer disrupts and has formed (so the argument goes), a home. There is no longer any interruption here and fixity produces a private, rather than a public, space.

As with protests at their beginning, it is transgressive acts that are particularly disruptive, creating temporary interruptions. Street art, for instance, re-frames the character of a space. When uncommissioned, it is its lack of authorization that challenges conventional conceptualisations of space and ownership.<sup>129</sup> Urban explorers inscribe themselves into the landscape, interrogating places that are off (the public) map. They create bodily freedom through trespass.<sup>130</sup> Skateboarding also draws people together, challenging property rights and regulations on urban space. Skateboarders use their environment, transforming some of the expected functions of architecture into new ones. These “spatial appropriations” interrupt not only the expected functions of architecture (a bench, a ramp) but also

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<sup>129</sup> Young, Alison. *Street art, public city: Law, crime and the urban imagination*. Routledge, 2013.

<sup>130</sup> Garrett, Bradley L. "Undertaking recreational trespass: urban exploration and infiltration." *Transactions of the Institute of British Geographers* 39.1 (2014): 1–13, Garrett, Bradley. *Explore everything: Place-hacking the city*. Verso Books, 2013.

takes back spaces, where the appropriation offers “the chance to invert social relations and meanings and so create a kind of heterotopic space.”<sup>131</sup>

Whether with (or more often, without) explicit permission, skateboarders, street artists and urban explorers all produce spaces and networks. They understand urban environments not as fixed but as flexible, choosing initially marginal spaces for collective action, locations that provide accessibility, sociability, compatibility, and opportunities for self-expression. Their interruptions contribute to the production of public spaces either for others to watch or to participate (albeit then often with distinctive norms of conduct).

In multiple and varied ways then, these interventions can create public space (with possible synergistic effects) challenging the property norm and going much further than the legal exceptions created by *Lines*. Dewey famously defined “public” as being “called into being” by a problem. He distinguished the “state,” represented by elected lawmakers, and the “public,” the diffuse, often incoherent body of citizens who elect the state, arguing that a public does not actually exist until a negative externality calls it into being.<sup>132</sup> As arts, markets, skateboarding and other interruptions illustrate, a public can be “called into being” not just by a problem or disagreement, but also creatively, incorporated into daily routines (“owned”) and occupied by bodies, bringing a venue to life. The key point in these kinds of public space creations is the disruption, either with or with-

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<sup>131</sup> Borden, I. M. "Skateboarding, space and the city: Architecture and the body." (2001): 1-318. See also Chiu, Chihsin. "Contestation and conformity street and park skateboarding in New York city public space." *Space and culture* 12.1 (2009): 25-42.

<sup>132</sup> Dewey, John, and Melvin L. Rogers. *The public and its problems: An essay in political inquiry*. Penn State Press, 2012.

out the landowner's consent, of whatever was happening there before. These intentional creations of public spaces are dynamic and relational. They interrupt.

Interruptions can be legal or illegal, proper or improper. As Davies has emphasized, property can be understood as being "proper to," which has implications for the "proper" and "improper."<sup>133</sup> The incorporation of impropriety into property law is particularly evident in the law of adverse possession where trespass is always a precondition, both to get onto the land as well as to live there for the requisite time.<sup>134</sup> This is both improper and a liminal period, since generally "the process of property rights and land law can be seen as a movement of naming, as a method of labelling, tagging, dividing and claiming ownership."<sup>135</sup> This is true for skateboarding, street art and urban exploring as well. Such acts may be formally improper yet they are produced in part through their lack of propriety. Their lack of formal property rights characterises them, producing a particular kind of public space for a period of time.

The property power of these interruptions becomes clearer when we begin to understand property as (spatially, temporally, culturally and socially) relational. The dominant understanding of property law currently privileges the landowner's "special positionality." He has the ability to set the agenda for a given piece of land.<sup>136</sup> In Claeys words, this is: "a domain of practical discretion . . . [which] endows

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<sup>133</sup> Davies, Margaret. *Property: Meanings, histories, theories*. Routledge, 2007.

<sup>134</sup> The law on adverse possession has been much modified for registered land in England in recent years. See generally, Fox O'Mahony et al., *supra* note 88.

<sup>135</sup> Lucy Finchett-Maddock, "The changing architectures of adverse possession and a political aesthetics of squatting" in Fox O'Mahony, Lorna, David O'Mahony, and Robin Hickey. *Moral Rhetoric and the Criminalisation of Squatting: Vulnerable Demons?* Routledge, 2014, 219.

<sup>136</sup> Katz, Larissa. "Exclusion and exclusivity in property law." *University of Toronto Law Journal* 58.3 (2008): 275-315, 278 & n.9.



the owner with freedom within which to deploy the property to any of a wide range of uses."<sup>137</sup> As we also know, however, "property is a construction which we believe in, with very significant social and legal effects." It is a "floating signifier."<sup>138</sup> For modern property analysts then, we turn to understand both property rules *and* the land coupled with an understanding of space and place as relational. This moves us from positionality to spatiality in Keenan's memorable phrase.<sup>139</sup> It is in the interaction of the two that we can understand belonging, in homes, homelands and (also) public spaces.

The charge that space and place are relational (rather than having strict boundaries, in time and location) has been led by geographers who have argued that we should see space as "the product of inter-relations," the "sphere of the possibility of the existence of multiplicity" and as "always under construction . . . never finished, never made."<sup>140</sup> Similarly, planners have for decades grappled with new understandings of place, drawing on "dynamic, relational constructs, rather than the Euclidean, deterministic, and one-dimensional treatments."<sup>141</sup> Now lawyers are increasingly engaging with these writings, questioning what this means for understanding of property laws (and practices).<sup>142</sup>

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<sup>137</sup> Claeys, Eric R. "Property 101: Is Property a Thing or a Bundle?." *Seattle University L.R.* (2009) 617-650, 632.

<sup>138</sup> Davis, *supra* note 133, 18-19 and 63-64.

<sup>139</sup> Keenan, Sarah. *Subversive property: law and the production of spaces of belonging*. Routledge, 2014, chapter 3.

<sup>140</sup> Massey, Doreen. *For Space*, Sage: London, 2005, 9.

<sup>141</sup> Graham, Stephen, and Patsy Healey. "Relational concepts of space and place: Issues for planning theory and practice." *European planning studies* 7.5 (1999): 623-646.

<sup>142</sup> See in particular, Keenan, *supra* note 139, and Cooper, Davina. *Governing out of order: Space, law and the politics of belonging*. Rivers Oram, London and New York University Press, 1998.

Focusing on practices as well as the spatial, social and legal interaction on a site requires a much more contextual understanding of both space and public space. Harvey has explained how social practices and processes create spaces and it is these spaces that in turn constrain, enable and alter those practices and processes.<sup>143</sup> A privately owned retail centre is produced not only through land law rules but also through different practices and processes, focusing on long-term profitability for the developer owners, and returns to shareholders. Publicly owned land comes with its own forms of governance that are culturally, politically and spatially sensitive (10 Downing street is governed differently from Hyde Park). In Soja's words, then, this is a "socio-spatial dialectic."<sup>144</sup> (Public) space is produced by its landowners, managers, users and by the spatial features it possesses.

Of course, this still leaves a key challenge: how do we understand the relationship between mobility and boundaries? Relational thinking is hugely attractive (and important) and yet as squatters, protesters and skateboarders know all too well, eviction from someone's land, regardless of the suitability of the site, is swift and non-negotiable. *Property* has outlined this, describing Occupy's attempt to protest in Paternoster Square. Calling for a relational understanding in property (that is, land) law is still primarily normative.<sup>145</sup> Legal principles, predicated on boundaries and commodification tend to prioritise fixity over relationality. In geography, however, scholars have long argued for the importance of understanding movement,

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<sup>143</sup> Harvey, David. "Social Justice and the City." *Edward Arnold, London* (1973) 14.

<sup>144</sup> Soja, Edward W. "The socio-spatial dialectic." *Annals of the Association of American Geographers* 70.2 (1980): 207-225.

<sup>145</sup> Spatial sensitivity is more prevalent, for example, in nuisance, which is conventionally taught as the law of torts, despite being a mechanism of land use governance.

mobility or lines as well as the importance of place. Networks also inform spatial architectures. Of course, this produces a tension, between mobility and place, ownership and belonging as well as between spatially flat legal rules and resonant sites.<sup>146</sup>

For property lawyers, where boundaries and the right to exclude are so familiar, this requires new ways of understanding property, without losing an appreciation for the very real effects of eviction and dispossession, when boundaries whether spatial (a map) or temporal (a lease) are exceeded. For, property law cannot be wished away. While it might be perfectly true in phenomenological terms that airports or malls are “non places” as Augé has suggested,<sup>147</sup> in property law terms, they are still sites of ownership, bounded and created by their landowner’s agenda, regulatory intervention and the practices and processes of those who work or visit there.

The suggestion here is that by understanding public space interruptions, we can understand the role played by the property law boundary (physical, doctrinal, cultural) in producing – either permissively or prohibitively – this public space. Interruptions can either be compliant with a landowner’s agenda, using a lease or licence or gaining regulatory permission to close the road,<sup>148</sup> or they can be non-compliant, using property improperly, sometimes acquiring rights (as in adverse possession), sometimes acquiring use and creating space. If illegal, then in Finchett-Maddock’s phrasing these interventions create “a representation of an impure form of law.”<sup>149</sup>

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<sup>146</sup> Bennett, Luke, and Antonia Layard. "Legal Geography: Becoming Spatial Detectives." *Geography Compass* 9.7 (2015): 406–422.

<sup>147</sup> Augé, Marc. "Non-Places: An Introduction to Supermodernity, trans. John Howe." *London and New York: Verso* (2008).

<sup>148</sup> In Bristol this is achieved by an application for Temporary Play Street Order under the Town & Police Clauses Act 1847. It needs to be facilitated by each local authority, however, see <http://www.Playingout.net> (last visited June 20, 2016).

<sup>149</sup> Finchett-Maddock, *supra* note 39, 216–217.

Even without a formal acquisition of property rights, converting “property outsiders” into “property insiders” to use Fox O’Mahony’s phrase, people can through public space interruptions, become property users and public space producers.

More significantly still, if space is produced, by incorporating relationality and slices of time, whether on public or private land, we need to understand the roles played by race, class, age, gender as well as property rights, financial incentives and political regimes in the production of public space. A key question is “who” is public space, which is subtly different from asking “who is public space for?” Assessing London, Gehl architects noted that “it is noticeable that there are few children or elderly using the streets and limited accessibility for those with mobility impairments.”<sup>150</sup> As McCann notes, we must understand the importance of race in the production of space, noting where urban cores are designed and managed for the circulation of middle-class, white, business people to the exclusion of others.<sup>151</sup> It is this tension between the production of abstract capital space (to use Lefebvre’s term) and those operating “under the law”<sup>152</sup> who create the vibrancy of public space

Sanctum then is only one example of using temporal and spatial relationality, to create an interruption, which created a public space. It used a slice of time in a location that drew on interconnections between people, place, materials and histories to construct “an amplifier” for the city. This is a type of public art intervention aims to

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<sup>150</sup> Gehl Architects, *Towards a Fine City for People*, London 2004, 12.

<sup>151</sup> McCann, Eugene J. "Race, protest, and public space: contextualizing Lefebvre in the US city." *Antipode* 31.2 (1999): 163-184.

<sup>152</sup> Fritsvold, Erik D. "Under the law: Legal consciousness and radical environmental activism." *Law & Social Inquiry* 34.4 (2009): 799-824. For an application to urban participation, see Layard, Antonia, and Jane Milling. "Creative Place-Making: Where Legal Geography Meets Legal Consciousness."

challenge rather than confirm: “to unsettle rather than authenticate a place’s identity; disrupt rather than embellish a particular location; and contest rather than validate the design and function of public space.”<sup>153</sup> Of course urban festivals and spectacles are often implicated in being used as part of a “cultural offer” to commodify the city. There are suggestions that “city authorities tend to disregard the social value of festivals and to construe them simply as vehicles of economic generation or as ‘quick fix’ solutions to city.”<sup>154</sup> Art can be instrumentalised, commodified as part of gentrification. In Klunzman’s words: “Each story of regeneration begins with poetry and ends with real estate.”<sup>155</sup> And yet when used as part of a broader series of interruptions, both with and under the law, interruptions can disruptively create public spaces, regardless of ownership.

This matters given widespread privatisation, particularly in places under the research radar. Interruptions hold particular promise for locations at the periphery of cities, where new (sub)urban housing developments are built and very few shared spaces are constructed, even when open and communal spaces are already underprovided.<sup>156</sup> As *Property* has explained, we absolutely need to keep arguing for public ownership, both to maintain the doctrinal distinctions that do exist (particularly under the ECHR) and, more, importantly still, because public ownership provides opportunities for soft governance and the framing of discursive debates to keep the

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<sup>153</sup> Eeg-Tverbakk, P. G., Fite-Wassilak, C., Lucchetti, M., Malm, M., & Zimberg, A. (2015). *Public Art (Now): Out of Time, Out of Place*. C. Doherty (Ed.). Art/Books.

<sup>154</sup> Bernadette Quinn “Arts Festivals and the City” □ *Urban Studies* 2005 42: 927.

<sup>155</sup> Klunzman, K (2004) Keynote speech to Intereg III Mid-term conference, Lille, in: *Regeneration and Renewal*, 19 November, 2. cited in, Evans, (2005) *Measure for Measure: Evaluating the Evidence of Culture’s Contribution to Regeneration*, *Urban Studies*, 42, (5/6), 959-983.

<sup>156</sup> Bernstein, Rebecca, et al. "There is no local here, love." *After Urban Regeneration: Communities, Policy and Place* (2015): 95.

public interest (however defined) at the forefront of their disposal and management decisions. Yet we also need to move the debate forward.<sup>157</sup> Public space is a form of becoming. We need to understand public space creation as a process of actively creating spaces (spatially and temporally) to call publics into being. This is a shift for property lawyers who have conventionally focused more on boundary crossing and confrontation.

## V. Conclusion

Public space is not property. Or better put, public space is not *just* property. The *agora* was both a place and an idea. In Greek it means “a place of gathering” and the agora was the centre for both commercial and political life. The Polis was not a location in Athens; it was Athenians (taking up space).<sup>158</sup> Constructed in time and space, public space builds on spatial, social and cultural identities that resonate within individual pieces of land. This is the central tent of the “spatial turn,” evident throughout the academy, and largely indebted to the work of Lefebvre. In property law, however, if we only focus only on the landowner, rather than the land, prioritising the owner’s agenda setting ability or the right to exclude over the qualities of the site, we are missing huge opportunities to create public space.

Using interruptions to create public space requires a greater understanding by property lawyers of temporal, cultural and spatial relationality. Emphasising the significance of time to space also has very practical implications, specifically by using slices of time, leases and licences to create permissive public spaces (as well as greater

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<sup>157</sup> Iveson, *supra* note 10.

<sup>158</sup> Hannah Arendt “*The human condition.*” Chicago. Ill.: University of Chicago (1958), 198.

understanding of using non-permissive spaces over time as protesters and street artists have long done). As *Interruptions* has explored, this requires a cultural shift by all users to see themselves also as creators of public space.

Public space matters. Many reasons for public space exist, be it a pedestrian democracy, urban vitality, social cohesion or democratic renewal. It matters particularly in times of apparent austerity, when social services are cut back and provision for coming together is cut. Bauman has distinguished between mixophilia (ways in which the city prompts the feelings of attraction and tolerance toward strangers) and mixophobia (fears brought about by spatial planning that separates, isolates, and homogenizes).<sup>159</sup> When boundaries become the most important governing mechanism for public space, they produce separation, physically or by time. This matters particularly for those who do not have the financial resources to live in or visit locations well provided with parks, social amenities and cultural activities. It affects young people who often use public spaces to develop their identities at times of individual uncertainty.<sup>160</sup> It affects older people (over 80) who have the highest self-reported levels of loneliness and low quality of life.<sup>161</sup> The more we separate, the more we lose public space. Recognising this, Bauman calls on architects and planners “to assist the growth of mixophilia and minimize the occasions for mixophobic responses to the challenges of city life.”<sup>162</sup> Yet given the capital logics of development and redevelopment, this is a hard ask for these professions. Reflecting caution,

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<sup>159</sup> Bauman, Zygmunt. *Liquid modernity*. John Wiley & Sons, 2013.

<sup>160</sup> Holloway, Sarah L., and Gill Valentine, eds. *Children's geographies: Playing, living, learning*. Routledge, 2004.

<sup>161</sup> Office of National Statistics, *Insights into Loneliness, Older People and Well-being*, 2015, [http://www.ons.gov.uk/ons/dcp171766\\_418058.pdf](http://www.ons.gov.uk/ons/dcp171766_418058.pdf).

<sup>162</sup> Bauman, Zygmunt. *Liquid modernity*. John Wiley & Sons, 2013, 90.

Lorne notes that, “counter to academic and popular narratives, architects are not as powerful as is often presumed.”<sup>163</sup> While there is a trend towards engaging with spatial agency,<sup>164</sup> land ownership (and funding requirements) limit the ability of the professions here. By introducing understandings of slices of time into property law, we can navigate some of the fixed limits (physical as well as doctrinal) of the built environment.

Iveson has critiqued a topographical approach to public space on the basis that, first, such an approach focuses too much on loss and a phantom ideal and second, that this does not capture public address that is privately made. Certainly understanding public address as a spatialised form of freedom of expression matters. This is not new in the age of the internet (John Entick’s house was entered because he was a seditious pamphleteer, while it is framed as a case about the sanctity of a man’s land, today we see this much more as a case about privacy and freedom of expression).<sup>165</sup> However, maps also matter. For while it is important to challenge the popular notion that publicly owned land is automatically public space, as this paper has illustrated, doctrinal provisions (particularly on human rights), soft governance and discursive realms, do make public property distinctive and mean that privatisation has consequences. There is a huge loss of public space that we cannot wish away. A topographical approach can illustrate this.

There is then much then to be said for mapping public space in both location and time, if we understand the limits of map-making

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<sup>163</sup> Lorne, Colin. "Spatial agency and practising architecture beyond buildings." *Social & Cultural Geography* (2016): 1-20, 6.

<sup>164</sup> *Ibid.*

<sup>165</sup> See generally, Tomkins, Adam, and Paul Scott, eds. *Entick V Carrington: 250 Years of the Rule of Law*. Bloomsbury Publishing, 2015.



(much will depend on who prepares it and for what purpose). There is a growing concern about public space, with some calling have called for a map of public spaces.<sup>166</sup> Open source mapping<sup>167</sup> coupled with local authority registers, can provide maps of open and green spaces as well as statutory registers of commons and village greens.<sup>168</sup> And while the access maps for the right to roam have been much disputed, they do provide an overview of where the right can be exercised and where not.<sup>169</sup> Of course a topographical approach does not cover all understandings of public space, networks and movements are as important. Nevertheless, for those interested the legal production of public space rights or exclusions, a topographic approach (incorporating the spatial, temporal, legal and the illegal, to the extent these can be separated) remains profoundly important.

During the drafting process of the – much criticized – 1939 Access to the Mountains Act, a Home Office official is said to have complained that “far from being a straightforward matter, the balancing of the rights of public access and those of property owners was ‘one of the most difficult and keenly controversial problems that can arise.’”<sup>170</sup> This has not changed. Balancing property rights with other rights (for instance rights under the European Convention of Human Rights) or a right to public space or to the city has time and again ended in the triumph of property rights. It took the most enormous legislative effort to get the lines we have “to roam,” on the highway or to express human rights. We can and should continue to have

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<sup>166</sup> How to make our cities open and democratic | Bradley Garrett | TEDxSouthamptonUniversity (July 18, 2015), <https://www.youtube.com/watch?v=UOyJZ5owags>.

<sup>167</sup> For example, Bristol’s *Know your place* project, <http://maps.bristol.gov.uk/knowyourplace> (last visited June 20, 2016).

<sup>168</sup> Part 1 of the Commons Act 2006.

<sup>169</sup> Gray, *supra* note 9.

<sup>170</sup> Cited in Sheail *supra* note 81, 72.

those fights. They matter. We also, however, should put to one side sharp boundaries between people and place. There is progress that can be made but if we want to create more public spaces in which to come together, we need to continue to engage with the content of property law, the lines and the interruptions, both proper and improper, to create more public spaces.