

## Shopping in the Public Realm: A Law of Place

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*Through a case study based in Bristol, this article explores how the 'law of place' has transformed multiple heterogeneous city centre spaces into a single homogeneous and commodified privately owned retail site. Drawing on de Certeau, Lefebvre, and humanistic geographers including Tuan, the article explores how law facilitates spatial and temporal enclosure through conventional understandings of private property, relying on techniques of masterplanning, compulsory purchase, and stopping up highways. It suggests that the law of place draws on binary spatial and conceptual distinctions to apparently separate places from spaces, applying different legal rules either side of an often invisible boundary line. The article questions this legally facilitated spatial and conceptual enclosure, particularly as it restricts spatial practices within the public realm. It concludes by rejecting an urban 'right to roam' as insufficiently transformative, calling for a broader interpretation of Lefebvre's 'right to the city' instead.*

'The measure of a city's greatness is to be found in the quality of its public spaces, its parks and squares.' John Ruskin

In September 2008, David Mowatt, a Quaker, was handing out leaflets in a newly developed retail area in Bristol known as Quakers Friars inviting people to attend a debate between the manager of this new retail development and a Quaker economist advocating alternative models of

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wealth creation.<sup>1</sup> On seeing him, a private security guard instructed Mr. Mowatt to stop leafleting, explaining that he was on private property where such activities were prohibited. The security guard directed him to a nearby public highway, the Horsefair, where Mr. Mowatt was able to continue handing out his leaflets instead. Standing outside the friary building in Quakers Friars, Mr. Mowatt was conscious of a newly created sense of place. The complex had been built in the thirteenth century for Dominicans, purchased as a Meeting House by the Quakers in the seventeenth century, and was the place where William Penn (who established the Quaker colony of Pennsylvania) had married.<sup>2</sup> Having been sold to Bristol City Council by the Quakers in the mid 1950s to raise funds, and having recently been used as a Council Registry Office, the friary building was, prior to the redevelopment, widely agreed to be in desperate need of improvement. Few Bristolians would have disagreed with the Council's assessment that these buildings 'sit in an austere and beleaguered environment surrounded by large areas of car parking and the ugly backs of Broadmead's shops.'<sup>3</sup> In fact many now believe that it has been 'splendidly preserved'<sup>4</sup> as a luxury restaurant, a Brasserie Blanc. Nevertheless, a Quaker inviting people to a debate on alternative models of wealth creation, itself a longstanding Quaker concern, leafleting at Quakers Friars, a historically, spiritually, and culturally situated site, was required to stop. The new private owners, through their security guard, were empowered to control use and restrict access onto their land.

This relationship between property and place has been a consistent concern for academics and practitioners in relation to urban law and governance.<sup>5</sup> The concept of place has also been the subject of a long-standing and still growing literature in its own right.<sup>6</sup> Attempting to translate the link between property and place into practice, practitioners and academics

- 1 I am very grateful to David Mowatt for telling me of his experience and clarifying some aspects of Quaker history and practice in Bristol: see <<http://www.youtube.com/watch?v=8FfL0diNQxw>>.
- 2 H. Brown and P. Harris, *Bristol England: City of a Thousand Years* (1964) 26, 82, 106.
- 3 Bristol City Council, *Scheduled Ancient Monuments in Bristol* (2004).
- 4 'BT looks at those buildings which were saved from the bulldozer' *Bristol Evening Post*, 9 February 2009.
- 5 Including, but not limited to: D. Mitchell, *The right to the city: Social justice and the fight for public space* (2003); L. Staeheli and D. Mitchell, *The People's Property? Power, Politics and the Public* (2007); N. Blomley, *Law, Space and the Geographies of Power* (1994); A. Amin and N. Thrift, *Cities: Reimagining the Urban* (2002); A. Philippopoulos-Mihalopoulos (ed.), *Law and the City* (2009); D. Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (1998); D. Harvey, *Social Justice and the City* (1973); B. de Sousa Santos, 'Law, State and Urban Struggles in Recife, Brazil' (1992) 1 *Social & Legal Studies* 235–55.
- 6 Multiple literatures here include M. de Certeau, *The Practice of Everyday Life* (1984); D. Massey, *For Space* (2005); D. Harvey, *Justice, Nature & the Geography of Difference* (1986); J. Allen, D. Massey, and A. Cochrane, *Rethinking the Region* (1998); T. Cresswell, *In/Out of Place* (1996).

working in architecture, planning, and urban design have developed the idea of the ‘public realm’ as a popular and pragmatic synonym to convey the importance of extending design principles to public space. From being for many decades ‘SEP’ (‘someone else’s problem’),<sup>7</sup> the concept of the public realm and its role at the heart of urban regeneration was propelled into national policy by the momentum accompanying the publication of Richard Rogers’s *Urban Taskforce Report: An Urban Renaissance*.<sup>8</sup> Urban designers and government departments now routinely emphasize their belief that ‘spaces are more important than the buildings themselves in terms of the quality of an urban environment’<sup>9</sup> and that places ‘matter much more than either individual buildings or vehicular traffic’.<sup>10</sup>

In focusing on this link between property and place, and in particularly focusing on a spatially conceived public realm, urban designers, geographers, planners, and others acknowledge a scale that is often neglected in law: a focus on place. While law is well versed in working within spatially defined jurisdictions, a ‘law of place’ acknowledges that the site of regulation may shift from the national, local or individual level to a more amorphous scale, delineated on an ad hoc basis by developers, local authority officials or regulators. In particular, one significant aspect of a law of place (or more precisely, a ‘law of places’) is to create new legally delineated and characterized geographical units that combine individual properties, roads, and squares, as well as residential, office, and cultural spaces into a single, spatially defined unit. Having delineated these often very localized places, regulators, officials or individual owners are, as a result of conventionally conceived property rules, able to apply a series of legal rules to aggregate a collection of previously heterogeneous and diverse sites into a single unified and homogenous legal whole. This delineation and characterization of a site is central to a law of place.

7 F. Tibbalds, borrowing from Douglas Adams’s *Hitchhikers Guide to the Universe*, “‘Places’ matter most’ in *Public Space: The Management Dimension*, eds. M. Carmona et al. (2008) 34.

8 Urban Task Force, *Towards an Urban Renaissance* (1999) 71.

9 J. Rouse, evidence to the Select Committee on Transport, Local Government and the Regions, Third Report, *Public Spaces: The Role of PPG 17 in the Urban Renaissance*, *Minutes of Evidence*, HC (2001–02) 238–III, 384–399, at 386.

10 F. Tibbalds, ‘Places matter most’ in *Urban Design Reader*, eds. M. Carmona and S. Tiesdell (2007) 9; Department of the Environment, Transport and the Regions (DETR), *Our Towns and Cities: The Future – Delivering an Urban Renaissance* (2000); Department of Communities and Local Government (DCLG), *Transforming Places; Changing Lives: Taking Forward the Regeneration Framework* (2009); HM Government, *World class places: The Government’s strategy for improving quality of place* (2009); DCLG, *Preparing Design Codes: A Practice Manual* (2006) 66; Department of the Environment (DoE), *Managing Urban Spaces in Town Centres: Good Practice Guide* (1997); DCLG, *Planning for Town Centres: Guidance on Design and Implementation Tools* (2005); DCLG, *Planning Policy Statement 6: Planning for Town Centres* (2005).

This analysis of the law of place draws on a distinction between place and space. There is, as de Certeau begins:

a distinction between space (*espace*) and place (*lieu*) that delimits a field. A place (*lieu*) is the order (of whatever kind) in accordance with which elements are distributed in relationships of coexistence ... A place is thus an instantaneous configuration of positions. It implies an indication of stability ... A *space* exists when one takes into consideration vectors of direction, velocities and time variables.<sup>11</sup>

Similarly for Tuan, a humanistic geographer, place can be distinguished from space by envisaging a sense of space as an open arena of action and movement while place invites stopping, resting, and becoming involved. While space is amenable to the abstraction of spatial science and economic rationality, place is amenable to discussions of things such as 'value' and 'belonging'.<sup>12</sup> In short, as Carter et al succinctly summarize: 'place is space to which meaning has been ascribed'.<sup>13</sup>

The exploration of a law of place presented here draws on this distinction between an abstract realm of *space* and an experienced and felt world of *place*. In particular, it relies on the idea of place as delimited and separated out from space. As this article explores in the Bristol context, the delineation, characterization, and commodification of 'retail-led' development sites flourishing in city centres within the United Kingdom and worldwide relies on the separation of a place for consumers inside. This legal separation is premised on a 'sense of place' articulated as a unitary vision even though, on the ground, multiple senses of place will coexist. Despite this inherent multiplicity, it is the developer-led, articulated sense of place that is able to rely on legal mechanisms to subdue other multiple, heterogenous, and diverse senses of place into submission. In Bristol, for example, where the objective is to facilitate the shopping experience aimed at (in Bristol's case) the 'highest number of ABC1s outside London'<sup>14</sup> with this short-hand demographic code for the highest three social grades, the developer's sense of place (articulated in two dimensions on the 'master plan', in three dimensions on the ground, and legally through the prohibition of certain types of behaviour) emphasizes that the development 'is a direct response to this affluence'.<sup>15</sup> Uses that facilitate the shopping experience are promoted, uses that restrict it are prohibited. As a result, throughout Quakers Friars and its associated retail development Cabot Circus, 'visitors' are now unable to walk a dog, play a guitar, take a photograph or smoke a cigarette in places

11 de Certeau, op. cit., n. 6, p. 117.

12 Y.F. Tuan, *Space and Place: The Perspective of Experience* (1997).

13 E. Carter, J. Donald, and J. Squires, *Space and Place: Theories of Identities and Location* (1993) xii. This argument is contested by a significant academic community including, notably, Massey, op. cit., n. 6.

14 'The Circus Come to Town' *Retail Week*, 3 October 2008.

15 'Hard Sell' *Guardian*, 24 October 2008.

previously understood as being in the public realm. The concern here is about more than the ability to leaflet or even to protest, but whether in these now private, previously public, spaces local residents and citizens still have 'the right to play and to recreate, and the most encompassing right to "be" in the city as a totality'.<sup>16</sup>

This segmentation and segregation is achieved by the ability of law of place to distinguish between legal regimes either side of (an often invisible) dividing line. It is these boundaries, and the conceptual distinctions that turn on them that underpin a law of place (and might be said to distinguish it from a 'law of space' where no such boundaries apply). As this article will explain, this spatial, conceptual, and experiential separation is effected legally by a series of transformative mechanisms beginning with the grant of planning permission and orders for compulsory purchase and the stopping up of highways. Once the physical site is redeveloped, the grant of long leases, often for 250 years, from the public authority freeholder to the private developer coupled with a conventional understanding of the indices of private property makes the enclosure spatially, legally, and temporally complete. The participants in this public-private regeneration project, working with the developer's consultants agree the masterplan, fixing the previous cultural, aesthetic, and experiential diversity into a unitary documentary form. Once agreed and constructed, the cooperation is frozen in time and the developer's day-to-day management and vision of the site, underpinned by their property rights prevail. As one corporate architect working for a leading urban regeneration company writes: 'It is the combined vision of developer and architect that creates places', where a 'historic brand' adds value to urban regeneration.<sup>17</sup>

Such separation and commodification has been foreseen by analysts concerned with place, notably Lefebvre who identified 'abstract space, space represented by elite social groups as homogeneous, instrumental and ahistorical in order to facilitate the exercise of state power and the free flow of capital'.<sup>18</sup> Abstract space becomes concrete, he believed, only in a practical use, in building activities that unfold in and through 'parcels'. In particular, Lefebvre developed a tripartite distinction between the 'conceived, perceived, lived triad', distinguishing between spatial practices, representations of space, and representational spaces,<sup>19</sup> all of which provide a conceptual lens through which it is possible to explain how space is socially produced. Adopting the broad framework of this approach, this

16 A. Kirby, 'The production of private space and its implications for urban social relations' (2008) 27 *Political Geography* 74, 91.

17 Paul Davis & Partners (Architects), 'How an historic brand adds value to urban regeneration' available at <[www.osaka-saisei.jp/symposium/files/ej-saisei2\\_4.pdf](http://www.osaka-saisei.jp/symposium/files/ej-saisei2_4.pdf)>.

18 E. McCann, 'Race, Protest and Public Space: Contextualising Lefebvre in the U.S. City' (1999) 31 *Antipode* 163, 164.

19 H. Lefebvre, *The Production of Space*, tr. D. Nicholson-Smith (1991) 40.

article is primarily concerned with the second of these projects, exploring how (rather than why) a sense of place is first envisaged and then implemented through expertise and legal rules producing space within the structure and form of urban governance and spatial planning regimes.<sup>20</sup> Yet, ultimately, all three categories are produced by law, some spatial practices (the ability to leaflet, for example) are prohibited, while the representation of space is fundamentally affected by the way in which the citizen is here defined by the role of consumer,<sup>21</sup> rendered unidimensional in locations characterized by a unitary vision and sense of place, a feat that is partially at least achieved by legal means.

To develop this argument, the article begins with an overview of the Bristol case study, before exploring the legal mechanisms that enable the delineation and unitary characterization of a previously heterogeneous and diverse city-centre site. It explains how the difference between public and private property remains significant, noting the embryonic development of claims for 'public property ownership' as something distinct from private ownership. Lastly, the article explores the potential of Lefebvre's 'right to the city' and the way in which the law of place could become sensitive to the spatial location of sites. It suggests that we should conceptually and legally separate control of space and place from ownership, arguing that these concepts are not necessarily inextricably intertwined.

#### CASE STUDY: CABOT CIRCUS AND QUAKERS FRIARS

Bristol is the largest city in the south-west of England and one of the eight 'core cities' outside London.<sup>22</sup> In 2000, resolving to expand the existing Broadmead shopping centre, Bristol City Council held a 'development competition' to determine which private developer would be given the contract to redevelop the city centre. Ultimately, the only entrants, two publicly listed London-based companies,<sup>23</sup> joined forces just days before the date of the decision to 'win' the contract and subsequently formed a consortium (the 'Bristol Alliance') to carry out the project.<sup>24</sup> The Alliance worked in partnership with the City Council, itself the major freeholder in

20 C. Butler, 'Critical Legal Studies and the Politics of Space' (2009) 18 *Social & Legal Studies* 313, 315.

21 Z. Bauman, *Liquid Modernity* (2000).

22 Office of the Deputy Prime Minister (ODPM), *Making it happen: Urban renaissance and prosperity in our Core Cities – A Tale of Eight Cities* (2004); ODPM, *Our Cities Are Back: Competitive Cities Make Prosperous Regions and Sustainable Communities – Third Report of the Core Cities Working Group* (2004).

23 Land Securities and Hammerson.

24 'Top developers in alliance to expand Bristol's Broadmead' *Retail Week*, 29 September 2000.

this part of the city centre, submitting an application for planning permission in August 2002.<sup>25</sup> It applied for a retail-led regeneration project that provided for a flagship department store, a new 2,650-space car park, 15 major stores and around 110 other new shops, offices, and 260 city-centre apartments (including a relatively low level of 5–10 per cent affordable housing). After the Secretary of State declined to call the permission in,<sup>26</sup> Bristol City Council granted the application in June 2003, subject to conditions and a planning gain agreement.<sup>27</sup> This paved the way for a compulsory purchase order (CPO) by the City Council<sup>28</sup> and a ‘stopping up’ order by the Government Office of the Southwest converting specified public highways into the fabric of the redevelopment scheme (thereby becoming private property) in 2003 in November 2003.<sup>29</sup> The Council as the major freeholder then granted the developer 250-year-long leases over both the properties it already owned and those it had compulsorily acquired on the site.<sup>30</sup>

With the three sets of permissions (planning, compulsory purchase, and stopping up) and the long leases in place, the Bristol Alliance regenerated the city centre, building a new retail development known as Cabot Circus.<sup>31</sup> The site is based on principles of open architecture with a semi-permeable roof for the central shopping area and has won a series of awards for retail and environmental design.<sup>32</sup> The Alliance also redeveloped the adjoining area of Quakers Friars<sup>33</sup> aiming first, to use it to link and integrate the existing

- 25 Application 02/02929/P/C (relating to parts A and C of the master plan, the street blocks around Penn St. and Newfoundland/Bond St. and the street block around Tollgate House and River St., respectively).
- 26 The Secretary of State must consider whether to review (call in) the grant of planning permission. This was required by Circular 15/93 Town and Country Planning (Shopping Directions) England and Wales, no. 2 Directions 1993, now replaced by Circular 02/09: The Town and Country Planning (Consultation) (England) Direction 2009.
- 27 Planning gain agreements are concluded under s. 106 of the Town and Country Planning Act (TCPA) 1990. They encapsulate the benefits the local authority has been able to negotiate ‘in return’ for the planning permission, for example, affordable housing, landscaping or highways provision.
- 28 Broadmead Expansion, Bristol Compulsory Purchase Order 2003. The CPO was confirmed by central government in 2005.
- 29 Stopping-up of Highways (City of Bristol) (No SW4) Order 2003.
- 30 See, for example, Land Registry BL107690 for Plot 16, Broadmead, BL107694 Quakers Friars Building, and BL108634, main retail area and adjoining land Cabot Circus, Bristol.
- 31 This followed an acrimonious local debate after the developer’s initial decision to call the area ‘Merchant’s Quarter’, which offended a wide range of residents given Bristol’s historic association with slavery: ‘History behind’ *Bristol Evening Post*, 29 November 2006.
- 32 ‘Cabot Circus wins best shopping centre award’ *Bristol Evening Post*, 6 December 2008.
- 33 See 02/04493/F/C (relating to Part B of the masterplan, the street block around Quakers Friars), Application 05/01282/F, and Stopping Up order for Quakers Friars.

Broadmead shopping area with Cabot Circus and second (and significantly for the purposes of this article), as an open area characterized by the Alliance at different stages of the development as a ‘continental style piazza with restaurants and cafes’<sup>34</sup> or even a ‘civic square’.<sup>35</sup>

## FROM MULTIPLICITY TO UNIFORMITY

A central feature of the law of place in the public realm is the way in which it imposes uniformity on what was previously understood legally, socially, and geographically as a site of multiplicity and diversity. Individual properties, streets, squares, residential, retail, office, and cultural spaces are rolled up into a single site. This site is portrayed through and by a masterplan, which underpins the construction and implementation of the site and itself becomes a significant participant in the negotiation and governance process.<sup>36</sup> There are three legal mechanisms in particular which effect this transformation: the grant of planning permission, compulsory purchase, and highway stopping up orders.

### 1. *Planning permission and the masterplan*

Conventionally planning law is premised on the application of planning rules to individual developments<sup>37</sup> rather than explicitly addressing places in their own right. Since its origins in the first half of the twentieth century, however, United Kingdom planning law and policy has increasingly moved beyond being a regulator of land and property uses to become a coordinator of a wide range of policies and actions that influence spatial development.<sup>38</sup> While this shift reflects in part the development of European spatial planning,<sup>39</sup> the ‘creation of Britain’s own brand of spatial planning’ was

34 ‘Thumbs up for 500m Shops Plan’ *Bristol Evening Post*, 8 May 2001.

35 ‘Broadmead’s bright plans to revitalise Bristol’s biggest shopping centre have moved a step forward’ *Bristol Evening Post*, 8 August 2002.

36 This conceptualization is a key feature of actor-network-feature, explored in the legal context by M. Valverde, ‘Taking Land Use Seriously: Toward an Ontology of Municipal Law’ (2005) 9 *Law Text Culture* 34, and H. Carr and D. Cowan, ‘Actor-network Theory, Implementation, and the Private Landlord’ (2008) 35 *J. of Law and Society* 149.

37 The lynchpins of planning law are sections 55 and 57 of the Town and Country Planning Act 1990.

38 V. Nadin, ‘The emergence of the spatial planning approach in England’ (2007) 22 *Planning Practice and Research* 43, at 43.

39 M. Derek and R. Jacques, ‘Influencing the Development of European Spatial Development’ in *European Spatial Planning*, ed. A. Faludi (2002) 46; G. Giannakourou, ‘The Europeanisation of National Spatial Planning Policies’ in *The Progress of European Spatial Planning*, eds. C. Bengs and K. Bohme (1998) 30.



grounded in New Labour's avowed aims to increase local democracy and involvement whilst also speeding up an often contested mix of regeneration, infrastructure, and housing provision.<sup>40</sup>

One mechanism to translate planning, architecture, and construction visions for regeneration into documentary form is the masterplan, a technique widely advocated in planning policy statements<sup>41</sup> though not a legal requirement.<sup>42</sup> Masterplans benefit developers by testing and validating development options early on with both private and public sector partners, resolving design and technical difficulties at the outset and reducing the risk of confrontational negotiations at a late stage.<sup>43</sup> As with all maps, masterplans are 'a mechanism of representation/distortion of reality' in their scale, projection, and symbolization.<sup>44</sup> In representing a site of multiplicity and difference on a single document, they lose something in their translation.

Masterplans are also transformative in that their drawing up is a partial proxy for the planning process itself. Wright, a planning consultant employed by the Bristol Alliance in preparing the Broadmead masterplan (which provided for the construction of what is now Cabot Circus and the revitalized Quakers Friars), maintains that it was the benefit of an 18-month 'extensive pre-application dialogue' with the local authority and stakeholder and citizen panel groups that facilitated the process of granting planning permission so that the outline planning application made in the August was approved by the Council in the December of 2002.<sup>45</sup> Yet, while the process may speed up development and regeneration, it also reduces a heterogeneous, multiple, and complex urban area to a single documentary vision. The developers (and their consultants) frame the terms of the debate and present a vision on which 'the public' are consulted.

In Bristol, for example, while a range of events were held, their content was limited. First of all residents were invited to write in with their comments on the draft planning strategy in 2001, which was also submitted for consideration to the Broadmead Advisory Group, including Bristol City Council, the Chamber of Commerce, the Bristol Civic Society, the Bristol Cultural Development Partnership, and bus company FirstGroup. This draft strategy was then supplemented by developer-funded, consultant-led

40 N. Gallent, 'Strategic-Local Tensions and the Spatial Planning Approach in England' (2008) 9 *Planning Theory & Practice* 307, 309; DCLG, *PPS 12: Creating strong safe and prosperous communities through Local Spatial Planning* (2008).

41 For example, ODP, *PPS 6: Planning for Town Centres* (2005) 30; DCLG, *PPS 3: Housing* (2006).

42 *R (on the application of Littlewood) v. Bassetlaw DC* [2009] Env.L.R. 21.

43 G. Wright, 'Masterplanning – visions and parameters' (2003) 31 *J. of Planning and Environment Law* 27, at 33.

44 B. de Sousa Santos, 'Law a Map of Misreading: Towards a Postmodern Conception of Law' (1987) 14 *J. of Law and Society* 279, at 283.

45 Wright, *op. cit.*, n. 43, p. 33.

workshops held for 48 people ‘to represent the inhabitants of Bristol’,<sup>46</sup> with the consultants also organizing a ‘one day’ citizens forum<sup>47</sup> for a select group. Exhibitions held for a fortnight before<sup>48</sup> and after<sup>49</sup> the blueprint was unveiled came with the caveat that ‘[i]mages are for illustrative purposes only. They do not represent actual architecture.’ This same limitation was included in the glossy brochure with integral feedback form that was handed out to the public at large.

After this ‘focus group’ approach, the official planning consultation took place once site notices were displayed and the application was publicized in the *Bristol Evening Post* leaving local residents the conventional twenty one days to respond.<sup>50</sup> No planning inquiry was held to determine the merits of the development scheme, since the Office of the Deputy Prime Minister decided ‘in record time’<sup>51</sup> not to call the applications in. Even when consulted, many participants felt their concerns were ignored<sup>52</sup> and when local community groups involved in the stakeholder process requested assistance to explain to their residents what the proposals involved, both the Bristol Alliance and the City Council’s Planning Committee rejected the request.<sup>53</sup> Meanwhile, in contrast to the deluge of journalistic support for the redevelopment in the *Bristol Evening Post* (owned ultimately by the Daily Mail General Trust plc),<sup>54</sup> one observer noted with concern how the development was ‘being quietly processed through the system, with very little public awareness of what it entails.’<sup>55</sup> Ultimately of course, the planning process required the local authority to determine a planning application that they had been involved in developing. As the House of Lords has confirmed, this dual role is legally permissible.<sup>56</sup>

46 ‘400m revamp for city shops’ *Western Daily Press*, 2 February 2001.

47 ‘Thumbs Up for 500m Shops Plan’ *Bristol Evening Post*, 8 May 2001.

48 ‘New look at 500m scheme for shops’ *Bristol Evening Post*, 21 April 2001.

49 ‘Broadmead’s bright’ *Bristol Evening Post*, 8 August 2002.

50 Town and Country Planning (General Development Procedure) Order 1995/419, Article 8, provides for a minimum of 21 days. Some site notices were erected to allow a few extra days, though the consultation period ran from August to September, over much of the school summer holidays.

51 ‘Waiting with bated breath’ *Estates Gazette*, 17 May 2003.

52 ‘Trust me, I’m an architect’ *Bristol Evening Post*, 4 July 2007; ‘Extension of Broadmead would jam city traffic’ *Bristol Evening Post*, 14 December 2002.

53 ‘Alliance’s funding plea’ *Bristol Evening Post*, 8 August 2003; ‘Protesters Call For Broadmead Delay’ *Bristol Evening Post*, 20 December 2002.

54 Through their subsidiary Northcliffe Media. This group also owns *all* of Bristol’s other newspapers: the *Western Daily Press*, *Metro* (free), *Bristol Observer* (free), and *Venue*.

55 ‘City Centre Planning Needs Malling’ *Western Daily Press*, 10 September 2002.

56 *Regina v. Secretary of State for the Environment, Transport and the Regions*, [2003] 2 AC 295.

## 2. *Compulsory purchase*

Supplementing the authority to determine planning applications and central to modern urban regeneration schemes is the power of compulsory purchase which, although complex, essentially enables a public authority to identify the building or land it wishes to acquire compulsorily, obtain an order from the relevant Secretary of State,<sup>57</sup> and pay compensation as calculated.<sup>58</sup> When exercising this power it is said to be ‘immaterial by whom the local authority proposes that any [authorized] activity or purpose . . . should be undertaken or achieved’,<sup>59</sup> although it is held to be axiomatic that acquisitions cannot be made solely to benefit a private individual. As the European Court of Human Rights has confirmed: ‘a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest”.’<sup>60</sup> Local authorities cannot simply use their compulsory purchase powers to enhance someone’s personal profit; they must establish such action ‘in the public interest’.

Yet, unless there is no possibility of private profit at all, this formulation does no more than raise the question of ‘how much’ public benefit is required, since from Victorian times until today it has been widely accepted that projects can, in the words of the Law Commission, be ‘essentially commercial’ or ‘mixed public and commercial’<sup>61</sup> and still be legitimate exercises of expropriation, particularly in the context of economic development. The question for courts and regulators has been how to draw a bright line between compulsory purchase for a commercial project justified in the public interest and the simple transfer of property from A to B. The modern solution is to place extraordinary emphasis on the development scheme or plan, assuming that a single coherent document encapsulates broader societal objectives thereby itself providing the public interest justification for compulsory acquisition. It is here that the masterplan becomes the proxy for the public interest upon which compulsory purchase is justified.

It is the plan, the scheme of development, that is central here. This presents the vision of place that the local authority and the private developer have negotiated between them. Once such a public-private partnership produces a coherent, unitary development scheme, this vision is reified in documentary form that itself provides the justification for the grant of planning permission as well as any consequential powers of compulsory purchase and stopping up of highways. This is the premise of s. 226 of the Town and Country Planning Act 1990, the key compulsory purchase

57 Acquisition of Land Act 1981.

58 Land Compensation Act 1961.

59 s. 226(5) TCPA 1990.

60 *James v. United Kingdom* (1986) 8 E.H.R.R. 123, 40.

61 Law Commission, *Towards a Compulsory Purchase Code: (1) Compensation*, Consultation Paper no. 165 (2002) 98.

provision in the regeneration context which empowered local authorities to requisition land ‘suitable and required in order to secure the carrying out of development, redevelopment or improvement’. Before the 2004 reforms, local authorities were reluctant to use these powers because of a ‘common misconception’<sup>62</sup> that the provision could only be invoked if the planning scheme was already in existence. To clarify this point, the 2004 the Planning and Compulsory Purchase Act reworded the section to enable local authorities to compulsorily acquire the property if they ‘*think* that the acquisition will facilitate the carrying out of development, redevelopment or improvement’.<sup>63</sup> This ‘radical change’<sup>64</sup> was to help acquiring authorities assemble land more quickly for new major infrastructure projects.<sup>65</sup> Following the *Urban Renaissance* report<sup>66</sup> and the subsequent White Paper,<sup>67</sup> the aim was now to escalate urban regeneration.

Coherence is central *within* the scheme here as Lord Nicholls explained in *Waters v. Welsh Development Agency*: compulsory purchase ‘is an essential tool in a modern democratic society. It facilitates planned and orderly development’.<sup>68</sup> If compulsory purchase of the buildings that stand in a scheme’s way is not permitted, the consistency of the plan is compromised. This echoes the position in the United States where, in the hugely contested majority decision in *Kelo v. New London*, Justice Stevens held a ‘taking’ of private property to be justifiable in the public interest if the project for which the property is taken ‘would be executed pursuant to a “carefully considered” development plan’.<sup>69</sup> The plan acquires totemic status: it is both justification and effect.

In Bristol, for example, the local authority compulsorily acquired and then demolished Tollgate House, a property located ‘at the gateway’<sup>70</sup> of the scheme. The acquisition was required in order to integrate the shopping centre with the junctions of the motorway as it was presumed that many of the shoppers visiting the centre would arrive by car. The envisaged retail centre could be created only once this property had been demolished allowing the site to link in with the motorway. It was the plan and the vision that justified the City Council’s compulsory purchase in the first place and once the buildings was acquired and demolished the plan could be imple-

62 G. Sector, ‘Planning for the 21st century – Part 2’ [2004] *New Law J.* 154.7152(1697).

63 Planning and Compulsory Purchase Act 2004, s. 99.

64 DTLR, *Compulsory Purchase and Compensation: Delivering a fundamental change* (2001) Appendix, para. 1.9.

65 DETR, *Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report* (2000) Appendix, para 1.4.

66 Urban Task Force, op. cit., n. 8.

67 DETR, op. cit., n. 10.

68 *Waters v. Welsh Development Agency* [2004] 2 All E.R. 915, 915.

69 *Kelo v. New London* 545 U.S. 469 (2005).

70 ‘CPOs in sight for 37-acre Bristol Alliance scheme’ *Estates Gazette*, 12 February 2005.

mented. When ultimately, after a disputed valuation, the former owners of Tollgate House were awarded £4.5 million in compensation<sup>71</sup> this bill was, presumably, met by the Bristol Alliance since according to conventional commercial practice, the consortium had previously entered into an indemnity agreement with the Council to ensure that the estimated £60 million needed to acquire properties both compulsorily and by agreement would be provided by the developer.<sup>72</sup> The plan and the compulsory purchase were linked from the outset, integrated with the agreement between the private developer and the public authority.

### 3. *Stopping up*

Coherence and unification is also achieved through a public authority's powers of stopping up roads, again often premised upon the implementation of planning permission.<sup>73</sup> Under s. 247 of the Town and Country Planning Act, local authorities may apply to the Secretary of State for Transport for a 'stopping-up' order to enable development granted planning permission to be carried out. In practice such an application is very rarely denied.<sup>74</sup> Once a road is stopped up, the surface which had been vested in the Highways Authority<sup>75</sup> reverts to the original owner to be kept or alienated as they wish. While there is authority that any stopping-up order should have regard to any 'direct adverse effects',<sup>76</sup> in practice it is the planning permission, the scheme, that justifies the stopping up. These were linked together in the notice given for the stopping-up orders in the *London Gazette*. While this is the correct publication to use, it is little known, and in Bristol no attention was paid to the highways aspect by the local press, while the inquiry into the approval of the stopping-up orders was combined with the inquiry on compulsory purchase. These developments consequently took some cyclists by surprise when they were required by security guards to walk, rather than ride, their bicycles to cycle racks for storage over areas that had previously been public highways.

71 *Ridgeland Properties v. Bristol City Council* [2009] UKUT 102 (LC).

72 Bristol City Council, *Central Support Services Sub Committee Report of the Director of Central Support Services*, 18 December 2002.

73 Provision for stopping up also exists under s. 118 of the Highways Act 1980 (which is not premised on the requirement of planning permission but on a finding that the highway is (a) unnecessary or (b) can be diverted so as to make it nearer or more commodious to the public).

74 D. Farrand, 'More than a mere road' *Estates Gazette*, 18 October 2008, 2.

75 As a result (for instance) of dedication under s. 38 of the Highways Act 1980.

76 *Vasiliou v. Secretary of State for Transport* (1991) 61 P. & C.R. 507, TCPA 1971 s. 209(1).

#### 4. *A commodification of place*

As these three sub-sections have explained, it is the public-private collaboration imposing legal and geographical uniformity that transforms a previous disparate and varied development site into a single regeneration scheme. This commodification reflects the popularity of these public-private partnerships in town centres where regeneration funds privately available are publicly lacking. Once the development scheme has been conceptualized and reduced to documentary form, investors can be found to redevelop city centre sites that otherwise would continue their apparent decline. Yet this comes at a price as Kingsnorth writes: 'Place = Profit. The equation is a simple one'.<sup>77</sup> The pact between the local authority and the developer trades space for private investment, a bargain that has deep-seated implications. It ensures that once acquired, the asset is now fungible, capable not simply of being sold but also of being converted into an alternative piece of commercial property of equal value. For the developer at least, as Madanipour notes, the land no longer has any symbolic value: 'it is now more the exchange value in the market that determines their interest'.<sup>78</sup> Translated across city centres throughout the country, here is an expression of Harvey's claim that 'the coercive power of competition between places for capitalist development' has become increasingly emphatic, thereby providing 'less leeway for projects of place construction that lie outside of capitalist norms'.<sup>79</sup> The proxy for the (rarely mentioned) private profit is the city's retail ranking, with the developer proudly heralding any improvement (as in Bristol<sup>80</sup>) in league table performance.

Specifically, once envisaged and constructed, these places are commodified and made fungible, with individual developers regenerating multiple different urban sites. The London-based developers Grosvenor, for instance, own or are involved in joint ventures at the Springside in Edinburgh, the Tithebarn in Preston, the Grand Arcade in Cambridge, and Liverpool One. They value these and other 'assets' at £2.54 billion.<sup>81</sup> Land Securities, one of the developers making up the Bristol Alliance, meanwhile also owns Cardiff St. David's 2, Gunwarth Quays in Portsmouth, Princesshay in Exeter, and the Trinity Quarter in Leeds, valuing their property portfolio at £4.32 billion.<sup>82</sup> City centres have become assets, facilitated by the aggregative qualities of the law of place.

The neo-liberal orthodoxy consequently remains prevalent in modern regeneration schemes and their emphasis on public/private cooperation by a

77 P. Kingsnorth, *Real England: the Battle Against the Bland* (2008) 181, at 196.

78 A. Madanipour, *Public and Private Spaces of the City* (2003) 189.

79 Harvey, *op. cit.*, n. 6, p. 298.

80 'Shopping centre openings propel city ranks' *Retail Week*, 27 January 2009.

81 'Grosvenor Announces Improved Results for 2009', Grosvenor press release, 15 April 2010.

82 Land Securities, *Land Securities Annual Report 2009* (2009) 39.

small number of well resourced property companies. The approach maintains the spirit of the ‘there is no alternative’ Thatcherite approach to regeneration premised on urban development corporations, enterprise zones, and urban development grants<sup>83</sup> with the dominance of ‘neo-corporatist’ and ‘neo-liberal’ ideologies.<sup>84</sup> Yet here, unlike in those few areas still designated as urban development corporations (UDCs) with their explicitly weakened planning controls, the local authority is a partner unlikely to voice its dissent or opposition to the developers’ construction plans. This thus puts them in a very different position from those local authorities in UDC areas who have provided an influential focus for dissent in the face of liberalized planning rules.<sup>85</sup> The state continues to produce the conditions privileging key players for principles of liberal private property and individual entrepreneurialism to flourish,<sup>86</sup> with this state-initiated ‘Robin Hood in reverse’<sup>87</sup> relying on commodification, unification, and enclosure to transform public space into private places.

## DISTINGUISHING BETWEEN PUBLIC AND PRIVATE THROUGH THE LAW OF PLACE

One marked aspect of the law of place is an understanding of boundaries as lines on the ground (whether visible or not) capable of making binary distinctions. As both lawyers and geographers concerned with understanding place explain, such rigid documentary distinctions are empirically difficult to maintain.<sup>88</sup> Nevertheless, having marked the city centre shopping area as separate, law then facilitates its characterization, allowing private owners to implement *their* sense of place, prioritizing it legally above other competing

83 S. Tiesdell and P. Allmendinger, ‘The New Right and Neighbourhood Regeneration’ (2001) 16 *Housing Studies* 311; P. Loftman and B. Nevin, ‘Prestige Projects and Urban Regeneration in the 1980s and 1990s: a review of benefits and limitations’ (1995) 10 *Planning Practice and Research* 299.

84 J. Punter, ‘Design-led regeneration? Evaluating the design outcomes of Cardiff Bay and their implications for future regeneration’ (2007) 12 *J. of Urban Design* 375, at 375.

85 For a recent legal example, see *R (on the application of Buglife – The Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation* [2009] EWCA 29.

86 N. Blomley, ‘Legal Geographies – Kelo, Contradiction and Capitalism’ (2007) 28 *Urban Geography* 198, at 201.

87 I. Somin, *Robin Hood in Reverse. The Case against Economic Development Takings*, Policy Analysis series no. 535 (2005), cited by S. Crow, ‘Compulsory purchase for economic development: an international perspective’ (2007) *J. of Planning & Environment Law* 1102, at 1104.

88 Massey, *op. cit.*, n. 6, p. 64; N. Blomley, ‘Flowers in the bathtub: boundary crossings at the public-private divide’ (2005) 36 *Geoforum* 281; and see Walker LJ in *Skerritts of Nottingham Ltd v. Secretary of State* [2001] Q.B. 59, 67.

visions within an apparently homogenous site. In practice, given the prevailing development model in urban regeneration, the effect of this is to create a fundamental difference between public and private property even though both are ostensibly in the public realm.

The reasons these boundaries literally become fault-lines is because, as Waldron notes, '[o]ne of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where.'<sup>89</sup> Boundaries perform spatial and conceptual work in distinguishing between private property and public land. In particular, since the House of Lords decision in *DPP v. Jones* in 1998,<sup>90</sup> a broad set of activities are explicitly permissible on the highway including talking, playing, collecting donations, handing out leaflets, singing, listening, queuing, sketching or taking a photograph as long as they can come within the rubric of 'reasonable use'.<sup>91</sup> In particular, freedom of speech (providing no nuisance is caused<sup>92</sup>) is protected here in a way that it is not on other private land: the highway is always 'public'.<sup>93</sup> On the highways at least there then is an analogy (if no more than this) with the contested public forum doctrine<sup>94</sup> famously proclaimed by Judge Roberts in the United States for streets and parks in *Hague v. CIO*,<sup>95</sup> thereby allegedly introducing an 'expressive topography'<sup>96</sup> for free speech. Certainly, Brian Haw, campaigning against government policy on Iraq, was perfectly at liberty to live on the pavement at Parliament Square (as long as he had the necessary authorization<sup>97</sup>) since, as Gray J recently held in his careful, spatial analysis of the site, the demonstration neither caused an obstruction nor gave rise to any fear that a breach of the peace might arise.<sup>98</sup> The concern was public licensing rather than an evaluation of private property rights.<sup>99</sup>

89 J. Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Rev.* 295, at 296.

90 *DPP v. Jones* [1999] 2 AC 240.

91 *id.* at p. 254 per Lord Irvine.

92 *Hubbard v. Pitt* [1976] Q.B. 142, *Church of Jesus Christ of the Latter-Day Saints v. Price* [2004] EWHC 3245.

93 *Jones*, *op. cit.*, n. 91, p. 268.

94 R. Post, 'Between Management and Governance: The History and Theory of the Public Forum' (1987) 34 *UCLA Law Rev.* 1713.

95 *Hague v. CIO* 307 U.S. 496 (1939) at 515–16.

96 T. Zick, 'Space, Place and Speech: The Expressive Topography' (2005–06) 74 *George Washington Law Rev.* 439.

97 Under s. 132 Serious Organised Crime and Police Act 2005, *R (on the application of Haw) v. Secretary of State for the Home Department* [2006] Q.B. 780, more recently see *Hall and Haw et al. v. Mayor of London* [2010] EWCA Civ 817.

98 (2002) 146 S.J.L.B. 221.

99 Though the two are closely related, see M. Valverde, 'Police science, British style: public licensing and knowledges of urban disorder' (2003) 32 *Economy and Society* 234.



In contrast, once off the highway and on private property then, as generations of property students have learned, the rule established by *Entick v. Carrington* in 1765 still prevails. Without a licence, ‘every invasion of land, be it ever so minute, is a trespass’.<sup>100</sup> Similarly, once over the threshold, a visitor may not exceed the limits of their licence. *The Calgarth* confirmed in 1927 that ‘[w]hen you invite a person into your house to use the staircase, you do not invite him to slide down the banisters’.<sup>101</sup> This distinction means that stepping over a boundary, which may or may not be visible, can transform what is permitted into something that is not, particularly if by crossing over the threshold you are entering private property. This ‘absolutist dogma’<sup>102</sup> still prevails today.

This binary spatial and normative distinction is clearly illustrated in the ‘civic square’ at Quakers Friars, where once there was a highway and now ‘visitors’ can no longer take a photograph, smoke a cigarette,<sup>103</sup> ride a bike, use a skateboard or walk a dog.<sup>104</sup> 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,<sup>105</sup> and are otherwise excluded. Individuals have been escorted from the premises by private security guards for taking photographs,<sup>106</sup> protesting about imports from Israel<sup>107</sup> or lurching as a zombie as part of a ‘protest against over-consumerisation and the homogenisation of city centres’.<sup>108</sup> As David Mowatt found, he could hand out leaflets on the Horsefair, a public highway, but not on the ‘piazza’ or ‘civic square’ that now forms the heart of Quakers Friars. This privatization of previously public space has restricted the ability of citizens simply ‘to be’ in their city centre, both through the legal effects of privatization and by the monotony of the physical infrastructure. There is at Cabot Circus and Quakers Friars no playground or community hall, no skate park or bandstand. There is provision for cafes and restaurants but no urban picnic area, arts centre or a table to play chess. There is no community garden,

100 per Lord Camden CJ in *Entick v. Carrington* (1765) 19 How. St. Tr. 1029, 1066.

101 per Scrutton LJ in *The Calgarth* [1927] P 93, 110.

102 K. Gray and S.F. Gray, *Elements of Land Law* (2008, 5th edn.) 1261. For an extensive and erudite exposition of the law, see ch. 10.

103 With one exception: Raymond Blanc, the owner of the Brasserie Blanc, insisted that his diners be able to smoke on his ‘outdoor dining terrace’ (‘No Smoking at Cabot Circus’ *Bristol Evening Post*, 30 September 2008).

104 ‘Cabot Circus takes softly, softly approach to smokers’ *Bristol Evening Post*, 29 September 2008.

105 ‘Broadmead’s £11m facelift ready for Valentine’s day’ *Bristol Evening Post*, 10 February 2009.

106 ‘Cabot Circus photograph security ridiculous’ *Bristol Evening Post*, 6 May 2009.

107 ‘Gaza protesters lie “dead” in Bristol shop doorways’ *Bristol Evening Post*, 19 January 2009.

108 See <[http://www.crawlofthedead.com/crawls/info/zombies\\_rise\\_up\\_invalidate\\_cabot\\_circus/](http://www.crawlofthedead.com/crawls/info/zombies_rise_up_invalidate_cabot_circus/)>.

museum or place of worship. The monotony of these newly privatized but previously heterogeneous public places converges notions of citizenship and public space into one discourse, where ‘shopping areas are reserved for shoppers only and . . . consumption is the basis of citizenship’.<sup>109</sup> Outside, at least, the rest of Bristol with its galleries, parks, river, and historic buildings awaits.

This sharp contrast between public and private, was suggested by Lefebvre. He contrasted ‘state space (*espace étatique*)’ with:

space generated by ‘private’ interests [where the] . . . aim is to make it appear homogenous, the *same* throughout, organized according to a rationality of the identical and the repetitive that allows the state to introduce its presence, control and surveillance in the most isolated corners . . . The relation between private ‘interests’ and public powers sometimes involves a collusion, sometimes a collision. This creates the paradox of a space that is both homogenous and broken (*l’espace homogène brisé*).<sup>110</sup>

In Bristol, there is both collusion and collision. Law facilitates the ability of the private developer to develop a homogenous place, based on their monotonous (retail-led) vision for the site. The state and the private sector *collude* in the homogenization. Yet this private space abruptly ends at the boundary, it *collides* with the more heterogeneous and diverse public places outside.

This formulation is persuasive in the case of David Mowatt, who had only to step over a boundary to a public highway to continue handing out his leaflets, yet is it an overly simplistic suggestion both geographically and legally when applied more broadly? Can a boundary be drawn separating public from private places? Certainly there is a clear elision between public and private in the new orthodoxies of criminal justice and the application of the government’s anti-social behaviour and respect agenda.<sup>111</sup> As Bottomley and Moore write:

the doubled movement of enclosure and privatisation must be understood as part of a broader pattern of regulation and control, which has affected our access to all urban space, including non-enclosed and non-privatised ‘public space’

since here ‘surveillance patterns are not only the products of a certain level of technology, but also of new forms of partnership between public and private agencies.’<sup>112</sup> In the sphere of security it does not matter particularly whether the land is privately or publicly owned as growing CCTV coverage,

109 M. Voyce, ‘Shopping Malls in Australia: The end of public space and the rise of “consumerist citizenship”?’ (2006) 42 *J. of Sociology* 269, at 282.

110 H. Lefebvre, ‘Space and the State’, excerpted in N. Brenner, *State/Space: A Reader* (2003) 85.

111 Anti-social Behaviour Act, Part 4 (ss. 30–36).

112 A. Bottomley, and N. Moore, ‘From Walls to Membranes: Fortress Polis and the Governance of Urban Public Space in 21<sup>st</sup> Century Britain’ (2007) 18 *Law & Critique* 171, at 194.

enforcement of anti-social behaviour orders (ASBOs), and a culture of security and control<sup>113</sup> will characterize the space in any case.

Certainly there is no automatic assumption that smoking, dog walking, protesting or other activities would necessarily be permitted in a publicly owned retail site even though such prohibitions do not appear to have been implemented in the Broadmead site, adjacent to Cabot Circus, which is now in its second Business Improvement District (BID) phase.<sup>114</sup> Here behaviour is also monitored since there are analogous constraints on the use of publicly owned public spaces as well. In BIDs the aim is still retail consumption and those that manifestly do not fit that model, in particular the homeless or the 'anti-social', are frequently 'moved on' thereby displacing the anti-social behaviour as it is conceived, somewhere else.<sup>115</sup> Yet BIDs are located in public places, generally affecting public property, attempting to discipline heterogeneity into uniformity through a democratic decision by the delineated ratepayers rather than a wholesale conversion into private property. BIDs are still a public project, located outside the reductive context of private law and it is because these BIDs operate in public places that the concerns about behaviour by BID managers and operatives can be more easily aired and publicly discussed. Once located in the enclosed space (both spatial and conceptual) of private property, such discussion is much harder to pursue outside the sphere of criminal law or human rights which override the public/private distinction.

Analogously, the government has issued a list of activities that it believes public bodies should not prohibit through by-laws. It has advised against, for example, restricting assemblies through the use of by-laws since existing regulation under the Public Order Act 1986 makes this inappropriate.<sup>116</sup> The government has also stated that by-laws prohibiting filming, photography, glue sniffing, loitering, persistent canvassing, leafleting, pigeon feeding, and spitting would not be confirmed, since these acts do not themselves merit criminal sanction. If a public authority cannot prohibit these acts through by-laws, should they then be able to achieve them as a property owner instead? Certainly there are differences, including the fact that by-laws can be enforced by criminal sanction in the case of breach. Nevertheless, as with BIDs, comparison with by-laws at least provides a forum for discussion

113 C. Norris and M. McCahill, 'CCTV: beyond penal modernism?' (2006) 46 *Brit. J. of Criminology* 97–118.

114 In Bristol, the first Broadmead BID was one of the 22 pilot projects supported by the Office of the Deputy Prime Minister in 2003 and was subsidized by a £250,000 grant from the South West Regional Development Agency. Broadmead ratepayers have implemented two successive BIDs, funding the upgrading and improvement of the street architecture and retail environment, linking it to but also differentiating it from Cabot Circus and Quakers Friars.

115 A. Minton, *The Privatisation of Public Space* (2006).

116 See <<http://www.communities.gov.uk/localgovernment/360902/byelaws/localgovernmentlegislation/guidancenoteslist/>>.

within public law, the context in which citizenship is usually, legally, construed. Such an ability to debate marks a difference in approach to private and public ownership as well as use.

For property and public lawyers, a further, perhaps more fundamental question is whether public ownership differs qualitatively from private ownership and whether, as an owner, a public body can exercise the rights of ownership, particularly as regards exclusion, alienation, and use, in exactly the same way as a private owner, or whether there is something distinctive about public property ownership over and above public use.<sup>117</sup> Legally, this is still an embryonic point. Certainly, it is broadly accepted that public bodies who own property are required to exercise the indices of ownership subject to principles of public law.<sup>118</sup> More significant, however, is Laws J's first-instance decision in *Fewings v. Somerset County Council* where he held that it was 'a sinew of the rule of law' that for public bodies, 'any action to be taken must be justified by positive law' and that it is 'critical to distinguish between the legal position of the private landowner and that of a land-owning local authority'.<sup>119</sup> This view has found widespread support, with a purposive approach of local authority ownership building on this principle upheld by the Court of Appeal.<sup>120</sup> More recently, Laws LJ has held that it is 'obviously correct' that government property is held for the public good; 'nothing could be more elementary'. In a case concerning a peace camp at Aldermaston Atomic Weapons Research Establishment, he found 'no analogy' between a private landowner's grant of general rights to go into a controlled area in which he could limit his 'own legitimate interests' and the Secretary of State's which could not be so limited.<sup>121</sup>

If this is correct, then property-owning public authorities are in a different position from private landowners: they can do only that which they have discretion to do,<sup>122</sup> and must take a purposive approach, a restriction that does not apply to the private sphere.<sup>123</sup> This approach is also implicit in the

117 Compare Macpherson who interpreted public property as 'corporate private property': see 'The Meaning of Property' in C. Macpherson, *Property: Mainstream and Critical Positions* (1978) 5.

118 D. Feldman, 'Property and Public Protest' in *Property and Protection: Essays in Honour of Brian Harvey*, eds. F. Meisel and P. Cook (2000) 31; *Cinnamon v. British Airports Authority* [1980] 1 W.L.R. 582, 591; *R. v. Brent LBC, ex parte Assegai* (1987) 151 LGR 891; *Leicester CC v. Wheeler* [1985] AC 1054, 1065; *Wandsworth LBC v. A* [2000] 1 W.L.R. 1246, 1255; *R v. Wear Valley District Council, ex parte Binks* [1985] 2 All E.R. 699.

119 *Fewings v. Somerset County Council* [1995] 1 All E.R. 513, 524.

120 *R v. Somerset County Council ex p. Fewings* [1995] 1 W.L.R. 1037, and see *R. v. Sefton MBC ex p. British Association of Shooting & Conservation Ltd* [2001] Env. L.R. 10. A distinction might be drawn between the Crown and local authorities in this context, see *R. v. Secretary of State for Health* [2000] H.R.L.R. 400.

121 *Tabernacle v. Secretary of State for Defence* [2009] EWCA Civ 23.

122 G. Nardell, 'The Quantock hounds and the Trojan horse' [1995] *Public Law* 27.

123 In housing, there has historically been some suggestion that public housing is to be managed and governed in a different way from private, 'social' housing, see D.

1906 Open Spaces Act confirming that parks and green spaces acquired by local authorities are held by them on public trust, a principle also established in the common law<sup>124</sup> and, according to Devlin LJ in *Blake v. Hendon*, equally applicable to art galleries and libraries.<sup>125</sup> It is then possible to suggest, albeit tentatively, that public ownership itself has a different quality to private ownership, and that in exercising the orthodox rights of ownership, public bodies must take further considerations on board. They can perhaps be constrained from promoting such a singular understanding of place as private owners are able to. Consequently there is here a slight but possibly embryonic distinction to be made between private and public ownership that supplements the very clear distinction already emphasized between private property and the highways (whether private or public<sup>126</sup>).

### A RIGHT TO THE CITY?

This discussion of the privatization of urban, public space raises the question whether there might be, as Lefebvre has suggested, a ‘right to the city’, enabling individuals to ‘fully enjoy urban life with all its services and advantages’ while also ‘taking part in the management of cities’.<sup>127</sup> While the right has been criticized for being under-developed by academics and theorists,<sup>128</sup> practical formulations have been promulgated in the 2004 *World Charter on the Right to the City*,<sup>129</sup> proposed by a network of international NGOs, the 2001 *City Statute* in Brazil in 2001,<sup>130</sup> and the 2006 *Montréal Charter of Rights and Responsibilities*. Each of these documents has wide-ranging aims, including a ‘social function of property’ in the case of the *World Charter* articulating that ‘[t]he public and private spaces and properties belonging to the city and to the citizens should be used in such a way as to prioritise the social, cultural and environmental interest’.<sup>131</sup> Central to each of

Cowan and M. McDermot, *Regulating Social Housing: Governing Decline* (2006) 48–57.

124 There is a long line of cases holding that parks are held on public trust: see *Hall v. Beckenham Corpn* [1949] 1 K.B. 716; *Waverley Borough Council v. Fletcher* [1996] Q.B. 334 where the local authority, not the finder, were held to be the owner of the disputed brooch; *The Churchwardens and Overseers of Lambeth Parish Appellants v. The London County Council Respondents* [1897] AC 625.

125 *Blake v. Hendon* [1962] 1 Q.B. 283.

126 *Jones*, op. cit., n. 91, p. 268.

127 E. Fernandes, ‘Constructing the “Right to the City” in Brazil’ (2007) 16 *Social & Legal Studies* 201, at 208.

128 M. Purcell, ‘Excavating Lefebvre: The right to the city and its urban politics of the inhabitant’ (2002) 58 *GeoJournal* 99.

129 Available at <<http://v1.dpi.org/lang-en/events/details.php?page=124>>.

130 Federal Law no. 10.257; Fernandes, op. cit., n. 127; N. Pindell, ‘Finding a Right to the City: Exploring People and Community in Brazil and the United States’ (2006) 39 *Vanderbilt J. of Transnational Law* 435.

131 Article II(3).

the documents is an emphasis on participation: broadly the aim is, consistent with Lefebvre, to facilitate ‘an urbane, a full, a rich, and a diverse life.’<sup>132</sup>

One place to start is with reasonable access and use, for as Marcuse writes, ‘while the right to the use of public space is perhaps a small part of that right to the city, it is a key component’.<sup>133</sup> Certainly, there appears to be a growing acceptance that use of public space is central. In London, the Conservative Mayor, Boris Johnson, has launched his *Manifesto for Public Space: London’s Great Outdoors*. He aims:

to ensure that access to public space is as unrestricted and unambiguous as possible. The needs of different users and age groups can be accommodated through intelligent design. With proper consideration at the outset of safety issues, the usage of public spaces can be extended well into the evening without the need for unnecessary barriers.<sup>134</sup>

Specifically, the Mayor documents and praises one development in London that runs against the conventional public-private regeneration process. In its redevelopment of a 67-acre site behind Kings Cross station, Camden Council has countered the trend of total privatization by retaining responsibility for the highways in the development and, more significantly, is to ensure that the squares and walkways in the redevelopment will be governed by the Council’s by-laws, rather than determined by the private developers’ conventional property rights.<sup>135</sup> Disputes are anticipated, with one potential proposal that Camden control the adopted highways, while Argent, the developer, remains responsible for a set number of events in the public space. Evidence suggests that the public authority and the private developer have rather different ‘visions of place’, with the local authority here unwilling to hand over control in the way that Bristol City Council and others have done. The arrangement in Camden may be no panacea but it at least points to a possible new template, acting as a ‘hybrid’ agreement between the public authority and the private developer, providing a focus for discussion and, ideally, transparent dispute resolution.<sup>136</sup>

This change of direction in Camden appears to be responding to a groundswell of concern. To British lawyers, the most familiar and erudite arguments for change were put forward by Gray and Gray in their highly

132 P. Marcuse, ‘The Threat of Terrorism and “The Right to the City”’ (2005) 32 *Fordham Urban Law J.* 767.

133 *id.*

134 Mayor of London, *A Manifesto for Public Space: London’s Great Outdoors* (2009) 8.

135 It seems that public by-laws cannot straightforwardly attach to private property, per Neuberger LJ, who suggested that by-laws affecting private land over which no highway ran might breach Article 1, Protocol 1 of the 1950 European Convention on Human Rights in the absence of appropriate compensation: *R. (on the application of Richards) v. Pembrokeshire County Council* [2004] EWCA 100 1000. Such incompatibility does not seem to be envisaged by s. 35 of the Highways Act 1980 which makes provision for by-laws concerning conduct and timing after the conclusion of a walkways agreement.

136 Minton, *op. cit.*, n. 115.

influential call for the recognition of ‘quasi-public’ space. They were motivated by the 1995 decision in *CIN Properties Ltd v. Rawlins*<sup>137</sup> where the common law had confirmed the ability of:

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.

Gray and Gray were clearly perplexed that when ‘a ruling of such feudal resonance emerged from the English Court of Appeal the decision attracted – quite extraordinarily – virtually no comment or criticism of any kind’. As they asked: ‘[c]an it really be the case that an insidious culture of exclusion – which has the potential to become a dominating social phenomenon of the years ahead – has already begun to take hold of us?’ Taking up this challenge, they argued that areas of the public realm should be designated as ‘quasi-public space’ if there is ‘dedication to public use’, where ‘private property which has been made the subject of an open invitation to the public and which therefore becomes private property having an essential public character’. Arguing for a ‘reasonable access rule’ for quasi-public premises, Gray and Gray premised their call on an exceptionally thorough review, concluding that:

[t]hroughout the common law world the conceptual apparatus of property has been slowly infiltrated by the idea that the owner of quasi-public premises may exclude members of the public only on grounds which are objectively reasonable and rationally communicable. Any contrary approach entails, ultimately, an unacceptable derogation from centrally important notions of civil liberty.

They sought a shift from an ‘arbitrary exclusion rule’ towards a ‘reasonable access rule’ as inevitably involving a more subtle gradation of the exclusory powers inherent in land ownership and a more careful taxonomy of the land.<sup>138</sup> The article met with widespread support and while their claims fell on stony ground in *Appleby v. United Kingdom* in 2003, there have been some tantalizing judicial dicta indicating that reform might come one day.<sup>139</sup> Even in *CIN* itself, Balcombe LJ recognized that the courts ‘may have to be

137 *CIN Properties Ltd v. Rawlins* (1995) 69 P. & C.R. D36. In 1997 the Court of Appeal’s decision was unsuccessfully challenged: *Mark Anderson and Others v. United Kingdom*, Application No. 33689/96 [1998] E.H.R.L.R. 218.

138 S. Gray and K. Gray, ‘Civil Rights, Civil Wrongs and Quasi-Public Space’ [1999] E.H.R.L.R. 46, at 101; see, also, K. Gray and S. Gray, ‘Private Property and Public Propriety’ in *Property and the Constitution*, ed. J. McLean (1999) 15; Gray and Gray, op. cit., n. 102, p. 1330; A. Grear, ‘A tale of the land, the insider, the outsider and human rights’ (2006) 23 *Legal Studies* 33, at 50; J. Rowbottom, ‘Property and participation: a right of access for expressive activities’ [2005] E.H.R.L.R. 186.

139 In his dissent in *Mark Anderson*, Judge Maruste called for an acknowledgement that times have changed, and that public authorities should carry out a balancing interest, regulating ‘how the privately owned *forum publicum* was to be used in the public interest’: (2003) 37 E.H.R.R. 38 at para. O17, and see May LJ in *Porter v. Commissioner of Police for the Metropolis* [1999] All E.R. (D) 1129.

ready to adapt the law to new social facts where necessary'.<sup>140</sup>

Such a cultural shift has led to a significant change in access to rural and coastal land in the United Kingdom through the 'right to roam'.<sup>141</sup> This provides that:

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 damaging any wall, fence, hedge, stile or gate, and (b) he observes the general restrictions in Schedule 2 and any other restrictions imposed in relation to the land under Chapter II . . .

These Schedule 2 restrictions include driving or riding:

any vehicle other than an invalid carriage, using a vessel or sailboard or bathing in or on any non-tidal water, lighting a fire or doing any act which is likely to cause a fire or having with him any animal other than a dog and so on.

Essentially they codify regulators' understandings of reasonable use within in a rural context. They formulate and implement a legislatively mediated sense of place for rural sites.

By creating a right of access and (reasonable) use, these interventions have acknowledged the spatial location of some sites, notably hills and mountains, open country, and coastal paths. There was judicial authority here, reflecting the inherent 'stuckness' in land.<sup>142</sup> Cozens Hardy J refused in 1895, for example, to grant injunctions to prevent a clergyman from delivering 'lectures, addresses or sermons upon the foreshore',<sup>143</sup> while in 1902, Buckley J was not prepared to prevent (hypothetical) nurserymaids from wheeling their perambulators on the sands or children playing on the rocks.<sup>144</sup> There has also been a strand of judicial spatial sensitivity where areas have been appropriated for the purposes of recreation.<sup>145</sup>

It would clearly be possible to 'map' urban areas in a similar way to those mapped for the right to roam under the 2000 Countryside and Rights of Way Act. Were public spaces to be transformed into 'access areas' analogous with these rural and coastal sites, the regulatory grant of access could reflect an increasingly widespread belief that excluding some citizens from what would otherwise be public places is to deny the very multiplicity and 'shared realm of encounter and exchange'<sup>146</sup> that public places provide. Any interpretation of legal rules that diminishes access to streets, squares or parks thereby restricts access to public places, imposing social limitations as well as spatial ones. This spatial separation of society, implemented in part through legal

140 *CIN*, op. cit., n. 137.

141 Countryside and Rights of Way Act 2000 and Marine and Coastal Access Act 2009.

142 J. Wightman and N. Jackson, 'Spatial Dimensions of Private Law' in *Current Legal Issues 2002: Law and Geography*, eds. J. Holder and C. Harrison (2002) 35.

143 *Llandudno Urban Council v. Woods* [1899] 2 Ch 705, 709.

144 [1905] Ch 614, 622.

145 *Regina (Beresford) v. Sunderland City Council* [2004] AC 889 per Lord Walker.

146 Madanipour, op. cit., n. 78, p. 204.



mechanisms, means that ‘exclusion represents exile’<sup>147</sup> at a minimum for the homeless, the mentally ill, the anti-social or ‘strangers’ however defined.<sup>148</sup> Certainly, there is a growing sense that these types of spatial separation and delineation of places are likely to accelerate homogeneity and division<sup>149</sup> particularly important in urban contexts, where public places present life ‘passed outside the life of family and close friends’. It is here that diverse, complex social groups have through the ages been brought into ineluctable contact, as Sennett describes in his lament the *Fall of Public Man*.<sup>150</sup> This is a familiar theme, that cities are about otherness and interactions with strangers where differences emerge. As Young explains, because by definition:

a public space is a place accessible to anyone, where anyone can participate and witness, in entering the public one always risks encounter with those who are different, those who identify with different groups and have different forms of life.<sup>151</sup>

In public, Cooper notes, the ‘people we engage with, whether in a friendly or a hostile manner, are strangers’. We do not know them personally.<sup>152</sup> By restricting access to places, we are also restricting access to people. Spatial exclusion contributes to and can exacerbate social exclusion.

Any provisions for ‘reasonable’ use of these mapped (urban) places would of course be context and place specific. As Millie notes:

understandings of anti-social behaviour are very much dependent on people’s behavioural expectations for a particular space and time . . . what is regarded as social is also determined by social and cultural norms of aesthetic acceptability.<sup>153</sup>

‘Good’ or ‘anti-social’ behaviour is determined by the vision of place, most famously by the banning of wearing ‘hoodies’ from some shopping centres. If the conceptualization is unitary with, for example, the space devoted to consumerism rather than citizenship, and implemented by a single owner in any area that was previously heterogenous and diverse, then behaviours that in other contexts (both temporal and spatial) might have been considered a normal incident of urban life, such as walking a dog, playing a guitar for pleasure, skateboarding or taking a photograph, fall outside this private and

147 C. Reich, ‘The Individual Sector’ (1991) 100 *Yale Law J.* 1409, at 1438; K. Gray, ‘Equitable Property’ (1994) 47 *Current Legal Problems* 157, at 175.

148 L. Staeheli and D. Mitchell, “‘Don’t Talk with Strangers’”: Regulating Property, Purifying the Public’ (2008) 17 *Griffith Law Rev.* 531.

149 D. Mitchell, ‘The End of Public Space? People’s Park Definitions of the Public, and Democracy’ (1995) 85 *Annals of the Association of Am. Geographers* 108; A. Minton, *Ground Control: Fear and Happiness in the Twenty-First-Century City* (2009).

150 R. Sennett, *The Fall of Public Man* (1974).

151 I. Young, *Justice and the Politics of Difference* (1990) 240.

152 D. Cooper, ‘Regard between strangers: diversity, equality and the reconstruction of public space’ (1998) 18 *Critical Social Policy* 465, at 473.

153 A. Millie, ‘Anti-Social Behaviour, Behavioural Expectations and an Urban Aesthetic’ (2008) 48 *Brit. J. of Criminology* 379–94.

unitary vision and are here envisaged and designated as inappropriate. Currently, the signs that adorn the side of the buildings at the entrance to the retail-led developments make these prohibitions graphically clear. A publicly mediated discussion of use depends on disparate visions of place, and some way would need to be found to mediate these different visions.

Even with such a scheme, however, the right to the city could go further. For there are good reasons to suggest that rights of access and use, while they might alleviate some of the symptoms, nevertheless fail to deal with the underlying concern. Enshrining the legal, social, and cultural status of a visitor seems to be rather a weak form of a right to the city. As Mitchell explains in the context of Vixen Tor, a locally significant site on Dartmoor, by itself the introduction of a right of access and use as encapsulated in the right to roam 'fails to rise to the challenge of defining a radical new version of the public interest in rural space but rather produces a timid and politically expedient response'. Rejecting this regulated access and use as incapable of challenging 'heroic' conceptions of ownership, Mitchell calls for a broader conceptualization arguing that we should focus on the possibilities of commons, which provide 'a new opportunity to review how publics and their claims should be included within the landscape'. They provide the opportunity for:

a reinvigoration of the messy but rich, disorganized but intense social life that commons represent: consideration of the needs of others, the recognition of interdependency, and moral and social relationships that are not mediated by the dictates of an absentee landlord.<sup>154</sup>

This is a persuasive call to arms and there is no reason why landscape should be limited to rural scenes; the European Convention on Landscape explicitly makes provision for both.<sup>155</sup> Along with the possibilities arising from the legal and conceptual development of commons,<sup>156</sup> these explorations also begin to suggest that it is possible to discern a distinction between participation in management and ownership. We need not automatically correlate property with place (or space).

As this article has explained, the assumption is that because the law of place enables a developer to delineate and amalgamate a previously heterogeneous set of properties into a single privately owned site that this then also encloses space into place. This is how the law of place appears to operate. And yet, there is no ineluctable reason why this should be the case. Private property need not equate to private space. Nor need public property equate to public space (we cannot demand entry to 10 Downing Street, for example). In practice, a more nuanced approach is required, which reflects

154 J. Mitchell, 'What Public Presence? Access, Commons and Property Rights' (2008) 17 *Social & Legal Studies* 351.

155 Council of Europe, European Landscape Convention (2000) Art. 1(a).

156 N. Blomley, *Unsettling the City: Urban Land and the Politics of Property* (2003); E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (2002); J. Acheson, *The Lobster Gangs of Maine* (2004).

both a site's spatial and social context. To implement these types of distinctions, however, we need to recognize that there is a difference between ownership of the *space* or the *place* and the *land*.<sup>157</sup> There are multiple ways to achieve such a cultural and legal shift; it requires at base simply an appreciation that space and land are separate, not inextricably intertwined. Such conceptual separation has happened time and again: it underpins, for example, the requirement to apply for planning permission in the first place, as this is not an automatic incident of ownership in the United Kingdom. Similarly, listed buildings must be preserved and the environment protected. The ability to harm a site deemed worthy of historic conservation or to damage biodiversity even if only in situ, is not, in the United Kingdom at least, part of the landowners' conventional 'bundle of sticks'.<sup>158</sup>

There is no conceptual reason why the exclusive control of space should be inextricably intertwined with ownership. Space could be deemed common so that permission to exclude would have to be sought (as permissions for planning, listed building development, and environmental harm have to be sought). It would reverse the common understanding of exclusion as a fundamental incident of property.<sup>159</sup> While automatic exclusion has been seen by some courts and theorists as fundamental, ultimately property is 'not a *thing* but rather a *relationship* which one has with a thing',<sup>160</sup> where 'the content of ownership interests . . . is an imprecise and fluctuating product of cultural assumptions and, as such, is presupposed by legal regulation'.<sup>161</sup> Cultural shifts have happened before and they will happen again. This need not lead to administrative overloading; decisions could be made on a site-by-site basis with 'groups of use' for administrative ease.<sup>162</sup> There could, for example, be no right of access to a private home, a determinable right of access to individual shops,<sup>163</sup> while open access would be perpetuated for a piazza or square. Individual determinations could be decided at national or

157 For a legal argument that is opening up, see *Secretary of State for the Environment v. Meier* [2009] 1 WLR 2780; *Hall and Haw*, op. cit., n. 97, and s. 384 of the Greater London Authority Act 1999.

158 Nor is compensation payable after the fact: compare *Lucas v. South Carolina Coastal Council* 505 US 1003 (1992) with *Trailer & Marina (Leven) Ltd v. Secretary of State for the Environment, Food and Rural Affairs* [2005] 1 WLR 1267. This compares with property that is physically taken which is deemed to be an expropriation and so compensable and protected under Article 1, Protocol 1 of the 1950 European Convention on Human Rights.

159 T. Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Rev.* 730; T. Honoré, 'Ownership' in *Oxford Essays in Jurisprudence (First Series)*, ed. A.G. Guest (1961).

160 K. Gray and S. Gray, 'The Idea of Property in Land' in *Land Law: Themes and Perspectives*, eds. S. Bright and J. Dewar (1998) 15.

161 J.W. Harris, *Property and Justice* (1996) 64.

162 As, for example, in planning law's Town and Country Planning (Use Classes) Order 1987/764.

163 A tentative attempt at such a distinction seems to be implicit in Judge LJ's judgment in *Porter v. Commission of Police for the Metropolis* 1999 WL 852129 (unreported).

local level or a combination of both, perhaps through the planning system itself. Such a transition might be politically easier if management of common spaces are now interpreted as falling within the remit of the ‘big society’ recently promulgated as the new, big political idea.<sup>164</sup>

As a report on the urban realm by CABE, the Commission on Architecture and the Built Environment, succinctly asks: ‘what are we scared of?’<sup>165</sup> Clearly differences of opinion over visions of place will arise and it is important not to over-romanticize the benefits of multiplicity. Aggressive and chronic ‘mis-use’ of space,<sup>166</sup> however contentious the characterization, alienates many, particularly families with children, the elderly, and single women.<sup>167</sup> Yet urban designers are skilled in designing for multiplicity and heterogeneity, enabling skateboarders to hone their skills close to shoppers or permit public noticeboards, playgrounds or ‘speakers corners’ in piazzas set out for cafés. The aim for designers is not automatically to design out risk and potential interactions but instead to create a place where ‘the discrepancies between the views of the people using that space are not too disparate’.<sup>168</sup> Key here is Lefebvre’s first category of ‘spatial practices’, the ability to use the city ‘in its totality’. Spatial practices also produce and reproduce space.<sup>169</sup> A similar notion is expressed by de Certeau in his understanding of space as ‘practiced place’.<sup>170</sup> In this way, as Borden describes, ‘urban space is a continual reproduction, involving not just material objects and practices, not just codified texts and representations, but also imaginations and experiences of space’.<sup>171</sup> Office workers, shoppers, and children at play create places just as much as the professional planners, architects, and designers. To those who use urban cores as a basis for parkour, buildings are jumping-off points or stepping stones; it is the external aspect, the curvature, the lineament that matters rather than the activities inside. City streets are turned into urban playground. Characterizing urban places as private property alters how places are used and how they are lived (in Lefebvre’s terms, affecting both spatial representations and representational spaces).

This is a significant lesson for lawyers. A geographical, social, and cultural understanding of place emphasizes that law’s role here extends beyond the grant of planning permission and the physical construction of the built environment. To ignore the ongoing legal mediation and construction

164 Conservative Party, *Invitation to Join the Government of Britain* (2010).

165 D. Rowe, *What are we scared of?* (2005) 19.

166 R. Ellickson, ‘Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning’ (1996) 105 *Yale Law J.* 1165.

167 For a Bristol example, see ‘Thank goodness for the Christmas lights’ *Bristol Evening Post*, 15 November 2008.

168 Rowe, op. cit., n. 164.

169 Lefebvre, op. cit., n. 19, p. 33.

170 de Certeau, op. cit., n. 6, p. 117.

171 I. Borden, ‘A Performative Critique of the City: The Urban Practice of Skateboarding, 1958–1998’ excerpted in *City Cultures Reader*, eds. M. Miles et al. (2003) 291.

of place and space would legally freeze sites in time to the date when consent is granted. The site may be physically constructed but law continues to mediate spatial practices and representations, even through prohibitions. ‘Flashmobbing’,<sup>172</sup> for example, where protestors enter the site as apparently ordinary shoppers yet, once congregated, act on a given signal and ‘flashmob’ by, for instance, drawing their lightsabres and engaging in spirited battle<sup>173</sup> or spontaneously dancing to Michael Jackson’s song *Thriller* in a choreographed routine,<sup>174</sup> is legally produced by the licence/trespass binary since conventional protestors would be denied access at the entrance to the site. The participants in these activities are part protestors, part artists; the law has created a new type of public spectacle through prohibition. Indeed, the restriction (whether real or perceived) at the site itself mediates action beyond as well since these spectacles, once recorded on video and uploaded onto the internet, provide inspiration for other activists elsewhere. Flashmobbers can benefit from time-space compression to challenge the thesis and practice of universal commodification.

The ‘right to the city’ thus allows us to challenge the ‘law of place’ and claim back the ‘law of space’. If we do not do so, segmentation will continue. These development projects are growing in size to create, both physically and legally, ‘cities within cities’ as in Stratford, East London which will encapsulate over 170 acres developed for the Olympics<sup>175</sup> or the creation of ‘Tesco towns’, where limits on out-of-centre shopping towns now incentivize retailers to develop entire communities through ‘supermarket-led mixed-use development proposals’. This has social as well as spatial implications as Lefebvre foresaw:

social space then becomes a *collection of ghettos* for the elite, for the bourgeoisie, for the intellectuals, for the foreign workers etc. These ghettos are not simply juxtaposed, they are hierarchized in a way that represents spatially the economic and social hierarchy, dominant sectors and subordinate sectors.<sup>176</sup>

There are some remarkably low-key ways to try to encourage such a change. In Bristol, for example, the most striking feature about the retail development at Cabot Circus is the *non*-participation. Many residents are refusing to consume in the way those objectifying them as ABC1s expected them to. Just as the site is spatially, culturally, and historically situated, so are the locals. Given the inexorable logic of capitalism, the centre will have to change. Already, local shops have replaced some of the ‘high-end’ multiples that failed to thrive and the ‘softly, softly’ approach of the security guards to some of the flashmobbers indicates that perhaps the centre

172 I am very grateful to Tom Hayes for explaining flashmobbing to me.

173 <<http://www.youtube.com/watch?v=LN81suhhnVE>>.

174 <<http://www.youtube.com/watch?v=GangaYPo0kM>>.

175 A. Minton, ‘These cities within cities are eating up Britain’s streets’ *Guardian*, 15 December 2009.

176 Lefebvre, *op. cit.*, n. 110, p. 95.

managers were just grateful to have some visitors there at all. As Harvey writes of Lefebvre, ‘the city is an *oeuvre* – a work in which all its citizens participate’,<sup>177</sup> yet residents can choose how and where to participate. If they will not participate, then the city itself will not ‘work’.

## CONCLUSION

This article has explored the transformation of urban space into a private place. Legal and spatial enclosure takes place through the mechanisms of planning permission (particularly ‘masterplanning’), compulsory purchase, and stopping up highways. This combination of law and geography delineates and distinguishes private from public property and private property from the highway, causing abrupt junctures to modern spatial practices, even though these practices continue to create places long after the granting of planning permission and development construction. The law of place encapsulates both the initial separation and enclosure and the spatial and conceptual distinctions that continue to characterize acts when visitors to a city central retail development step over a barely visible, but legally relevant, line. The law of place includes the prohibition of an act permitted outside, even when such differentiation fundamentally undermines any ‘right to the city’.

For lawyers these binary distinctions between different sides of the line draw on often unstated assumptions of the delineation of autonomy entailed in the conventional property ownership model.<sup>178</sup> Yet there is no logical inevitability that the law of property and the law of space or place should coincide in this respect. While place and space may differ,<sup>179</sup> they are not wholly separate; a demarcation between urban space and private places raises profound questions. Modern critical geographical scholarship has rejected a binary distinction between place and space, stressing the networked and interrelated quality of spatial and social relations, emphasizing multiplicity over a proclaimed authenticity, and developing a relational understanding of place.<sup>180</sup> A critical understanding of the ‘law of place’ both in urban contexts and beyond needs to consider the mechanisms and the implications of confining space to place. Lawyers need to join other scholars in exploring and considering the transitions from ‘space to place and back again’.<sup>181</sup>

177 Mitchell, *op. cit.*, n. 5, p. 17.

178 Blomley, *op. cit.*, n. 116, p. 5.

179 Tuan, *op. cit.*, n. 12 and de Certeau, *op. cit.*, n. 6.

180 Massey, *op. cit.*, n. 6 and Cresswell, *op. cit.*, n. 6.

181 Harvey, *op. cit.*, n. 6, p. 291.