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The S.U.V. model of citizenship: floating bubbles, buffer zones, and the rise of the "purely atomic" individual

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Abstract

Recent United States Supreme Court decisions concerning protest outside health clinics that provide abortions, coupled with a new wave of "aggressive panhandling" ordinances being adopted by American cities, indicate that Courts and lawmakers are creating a new model of citizenship. This model is marked by a radical individualism and extreme libertarianism based on transformed property relations. Courts are finding that individuals have an innate "right to be left alone" in public space – a strong departure from early jurisprudence which restricted that right to be left alone to private property. These recent decisions and laws suggest the development of a model of citizenship quite at odds with the cosmopolitan, associational citizenship theorized and promoted by many political theorists.

Keywords: Citizenship; Legal geography; Protest; Rights

Capitalist democracy presupposes the juridical individual. We may now be witnessing this individual's apotheosis.

Marx (1973, pp. 163–164) argued that as social relations were more and more defined as a "money relation," "the ties of personal dependence, of distinctions of blood, education, etc. are in fact exploded, ripped up … and individuals *seem* independent … free to collide with one another and to engage in exchange within this

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freedom....'' Laws of property, coupled with ideologies of individualism and freedom, combine to construct *economic* subjects that are ''free agents,'' equal before the law, stripped bare of mutual obligation and dependency, left to sink or swim, apparently, on the basis of their own merits and their own talents. On the streets of the city, however, this freedom, this ''economic'' relationship, and especially this ''collid[ing] with one another'' is as frightening as it is lonely: it is defined, for many, by an almost abject sense of insecurity. In turn, law has responded to this insecurity, and in the process a new kind of juridical individual seems to be in formation, one that is not just autonomous in its own body but is in fact surrounded by a moving zone of autonomy – something like a personal bubble of inviolable private property – that putatively will protect it from ''collisions,'' or that will assure that all ''collisions'' are either voluntary, or more importantly, winnable.

This essay examines the rise of this new kind of individual and the space that it occupies. Both this individual and the space it occupies are incipient, only now in formation. The purpose of the essay is thus to examine some trends in law, focusing on the United States, and to spell out their implications for the formation of an individual who doesn't just *seem* independent, but, at least in the eyes of the law, really is.

Hill v. Colorado: innovations in the spaces of privacy

In 2000, by a 6–3 margin, the US Supreme Court upheld the State of Colorado's ''bubble law'' (*Hill v. Colorado*, 2000). Seeking to protect citizens' ''access to health care facilities for the purpose of obtaining medical counseling and treatment,'' this law not only made it illegal to ''knowingly obstruct, detain, hinder, impede, or block another person's entry or exit from a health care facility'' (Colo. Rev. Stat., § 18-9-122 (2) (1999)). It also held that:

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility (Colo. Rev. Stat., § 18-9-122 (3) (1999)).

The law creates two kinds of bubbles. First, it establishes a one-hundred-foot radius buffer zone around health clinic entrances. Second, within that buffer zone, it establishes an eight-foot floating bubble around each person who enters, a bubble that cannot be pierced for the purposes of politically charged conversation, leafleting, ''education,'' and so forth.[1] The legislative history of the bill, and even the

[1] The metaphors of ''bubble'' and ''buffer'' are not my own. They are the main terms used by law-makers, journalists, activists, and judges to describe the new spatial politics of protest. As a number of commentators on this paper have noted, the spatial metaphor of a ''bubble'' is in and of itself interesting, given that the notion of a ''bubble'' in this context is one of inviolability and protection – rather like the figure of the ''boy-in-the-bubble'' in 1970s made-for-TV movies, a boy who lives in a sealed bubble that keeps all germs out to protect his fragile immune system – but in other senses a bubble is nothing if not fragile, liable to be popped at any moment. There is probably much to be said about the nature of this metaphor, but that is a task for a different paper.

most basic awareness of abortion politics in the US, make it clear that this bill was designed as a means to regulate the militant, sometimes violent, protest outside health care facilities where abortions are performed. A key tactic of anti-abortion activists in the 30 years since abortion was legalized in the US has been engaged in what they call "sidewalk counseling," which usually entails rushing up to women entering clinics, pleading with and shouting at them, shoving photographs of what they claim are aborted fetuses into their hands and faces, and so forth (for a more sympathetic description, see Lee, 2002).

But Colorado's law did not outlaw *anti-abortion protesters* from approaching within eight feet of any person in a bubble. Instead it outlawed approach by *all* protesters. If it had done the former, it surely would have been struck down as a "content-specific" ban, which, as the Supreme Court has ruled in a string of cases stretching back to the early 20th century, can only be done in the most extreme of circumstances and in the most limited way. Rather, restrictions on protest in the "public forum" (see Mitchell, 1996, 2003a) must be "content neutral." The broad reach of the Colorado law was meant to achieve that content neutrality. That broad reach was why the law was opposed not only by anti-abortion activists, but also by the AFL-CIO which worried about its effects on striking health care workers and by People for the Ethical Treatment of Animals, which sometimes protests against medical research on animals conducted in health care facilities (Chen, 2003, p. 31, n. 3). In terms of earlier Court jurisprudence on protest in the public forum, however, "the statute's breadth was its *saving feature*" (Chen, 2003, p. 33, original emphasis). Because it was content neutral, the Colorado law was seen by the Court to be a reasonable, narrowly tailored "time, place, and manner" restriction on free speech (*Hill v. Colorado*, 2000, 725). And, the Court ruled, the law served a compelling state interest in that it sought to "protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her" (*Hill v. Colorado*, 2000, 724).[2]

The dissenters in the case (Justice Anthony Kennedy and Justice Antonin Scalia, who was joined by Justice Clarence Thomas), together with legal scholars from across the political spectrum, questioned the majority's decision in *Hill* on a number of grounds. Justice Scalia argued that the decision's breadth was less its saving grace than its Achilles heel because it outlawed so much speech (*Hill v. Colorado*, Scalia dissenting, see also Chen, 2003); Justice Kennedy complained that "protest," "counseling," and "education" were imprecise terms and that "no custom, tradition, or legal authority gives these terms the specificity required to sustain a criminal prohibition on speech" (*Hill v. Colorado*, Kennedy dissenting, 773). Kennedy further argued that the eight-foot floating protective bubble was unworkable in practice and therefore vague (*Hill v. Colorado*). But, especially, the dissent (joined later by a chorus

[2] The language here is a conscious echo by the Court, as we will see, of a 1921 decision regulating labor pickets, *American Steel Foundries v. Tri-City Labor Council* (1921). That case is analyzed more fully in Mitchell (1996).

of law scholars) complained that in *Hill* the Court radically expanded the doctrine of "the unwilling listener" and thereby created a whole new kind of privacy in public space, a kind of privacy that might have profound effects on the possibilities for political discourse in the public forum (*Hill v. Colorado*, Scalia dissenting, 748–754; Kennedy dissenting, 771–772; Lee, 2002; Maffett, 2001; Nauman, 2002; Zych, 2001).

Before *Hill*, the Court had fairly consistently held that in a public forum,[3] it was the responsibility of the *listener* to avoid unwanted messages: it was up to them to avert their eyes or to step out of earshot (*Cohen v. California*, 1971; *Erznoznik v. City of Jacksonville*, 1975). By contrast, when listeners were "trapped," for example in their own homes, they did not have to be subject to unwanted messages. "Captive audiences" had the "right to be left alone" (*F.C.C. v. Pacific Foundation*, 1978; *Frisby v. Schultz*, 1988). The quintessential case (*Frisby*, 1988) concerned picketing on a street – a public forum – outside a private residence. Here the Court held that such picketing could be regulated because the message it imparted could not be avoided. The audience was captive since it was "figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing [it is] left with no ready means of avoiding the unwanted speech" (*Frisby*, 1984, 487). Protest had "no right to force speech into the home of an unwilling listener" (*Frisby*, 1984, 485).

Before *Hill* the Court's jurisprudence made it clear that protecting the rights of "unwilling listeners" was a significant state interest *when those listeners were in their own homes*. They had a reasonable expectation of privacy. However, in public, no such expectation of privacy existed, and it was up to the unwilling listener to avoid speech that bothered her or him. The distinction it made between the public forum and the private home "was one of the few fairly 'bright lines' in the Court's 'captive audience' analysis…" (Nauman, 2002, p. 807). With *Hill*, individuals could now carry this "right to be left alone" as they traveled through public space. That "bright line" no longer existed. Indeed, the majority was explicit on this point. It argued that the right to be left alone was one of the "most comprehensive of rights and the right most valued by civilized men" (*Hill*, 2000, 716, quoting *Olmstead v United States*, 1928, 478, Brandeis dissenting).[4] Further, the Court ruled that "while the freedom to communicate is substantial, 'the right of every person to be left alone' must be placed in the scales with the right of others to communicate" (*Hill*, 2000, 718, quoting

[3] The Court defines a public forum as public property on which free speech, petitioning, leafleting, demonstrations, and so forth have "traditionally" taken place. The prime examples are public sidewalks, streets, and parks. Governments may regulate the time, place, and manner of speech in such forums, but only if such regulation is "content neutral" and "narrowly tailored" to serve a specific and compelling government interest (that is, it has to be the least restrictive means to achieve the government's aim). In traditional public forums the presumption is that regulation is likely to be unconstitutional, and therefore courts are required to subject any regulation to "strict scrutiny," meaning that the burden of proof of constitutionality resides with the government and not with those being regulated.

[4] After quoting Brandeis on how important the right to be left alone is, the Court immediately muddied the waters with a footnote that reads: "This common law 'right' is more accurately characterized as an 'interest' that States can choose to protect in certain situation" (*Hill*, 2000, 717, n. 24, citing *Katz v. United States*, 1967). It is unclear what function this note plays in the Court's decision other than to provide clear insight into how the current Court thinks about rights – and their mutability – in general.

Rowan v. Post Office Dept., 1970, 738). "It is that right" to be left alone, the Court argues, "as well as the right of 'passage without obstruction' that the Colorado statute legitimately seeks to protect" (*Hill*, 2000, 718).

In fact, in their brief before the Court, attorney for Colorado had specifically denied that the state was seeking to protect the "right to be left alone," prompting Justice Scalia to complain, with some justification, that the right to be left alone the Court said the state sought to protect, "is not only completely *different* from the interest that the statute specifically sets forth; it was explicitly *disclaimed* by the State in its brief before this Court, and characterized as a 'straw interests' *petitioners* served up in the hope of discrediting the State's case" (*Hill*, 2000, 750, Scalia dissenting, original emphasis). Scalia therefore argues that in *Hill* the Court once again revved up what he calls the "ad hoc nullification machine" that, in his view, operates to annul the rights of anti-abortion protesters whenever laws and injunctions restricting their actions come before the Court (*Hill*, 2000, 741; *Madsen v. Women's Health Center*, 1994, 753, Scalia concurring in part, dissenting in part).

While Scalia may be correct, it is more plausible to argue instead that the majority is beginning to craft a new standard for protest and other political engagement in public space, a standard for which the proximate cause may be violence and potential violence outside health centers that provide abortions, but which in fact codifies a new expectation for all of *civic* space.[5] This new standard suggests not so much that there can be no expectation of *privacy* in public space,[6] but that there can be no expectation of *publicity* there. In *Hill*, the Court argues that the Colorado statute is constitutional because:

> Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so (*Hill*, 2000, 723).

Within the hundred-foot buffer zone, then, individuals are surrounded by an eight-foot floating bubble that another may enter for the purposes of communication (political, commercial, or otherwise) only at the individuals' behest: in public space people can now travel in an eight-foot bubble of privacy.

This is a striking legal innovation, and is one of potentially limitless expansiveness, as I will suggest below. But to see how it may be expansive, and why it is plausible to suggest that it establishes a new legal foundation for a new kind of citizenship (a citizenship based on, and protective of, the fully privatized juridical individual), it is important to delve a bit more deeply into the logic of the Court's decision in *Hill*. During the 1990s, the Court decided two cases that were similar, but that concerned injunctions against protesters rather than statutory laws. In *Madsen v.*

[5] The plausibility of this argument is given added force by the Court's recent decision in *Virginia v. Hicks* (2003), which will be analyzed at the end of this paper.

[6] The Court *does* hold in other circumstances that there can be no expectation of privacy in public space. The nature of this contradiction is also explored below.

Women's Health Center (1994), the Court upheld the validity of no-protest "buffer zones" but restricted their size so that they did not burden "too much" speech. The Court recognized that women patients and employees *inside* a health center or their homes were, by circumstances, a "captive audience" and so found limits on noise levels and appropriate sized buffer zones outside residences and clinic entrances (in the latter case 36 feet) to be reasonable "time, place, and manner restrictions" on protest activity. At the same time, the Court specifically invalidated a 3000-foot "no approach" zone arguing that it was impossible "to justify a prohibition on *all* uninvited approaches" and that "[t]he 'consent' requirement" – the requirement that protesters could approach an individual only with that individual's explicit consent – "alone invalidates this provision" since "it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic" (*Madsen v. Women's Health Center*, 1994, 774, original emphasis). A large "no approach zone" was unconstitutional.

In *Schenck v. Pro-Choice Networks of W. New York* (1997), the Court again sustained the use of stationary buffer zones and again invalidated the portion of an injunction that created a 15-foot floating bubble around clinic employees and patients. An injunction had banned protest "within fifteen feet of any person or vehicle seeking access or leaving" four health clinics in the Buffalo area. The Court said of the floating bubble: "We hold here that because this broad prohibition 'floats' it cannot be sustained…" (*Schenck v. Pro-Choice Networks of W. New York*, 1997, 377). Moreover, the 15-foot floating zone made *any* protest practically impossible because (a) the sidewalk outside of one of the clinics was only 17 feet; and (b) the movement of two or more persons entering or leaving a clinic could make it impossible for a protester to comply with the injunction even if he of she tried, since by remaining 15 feet from one person, the protester might inadvertently enter the "bubble" of another. And, further, the Court suggested, in its review of lower court decisions on the case, that when a District Court upheld the 15-foot floating bubble, its reasoning ("to protect the right of the people approaching and entering the facilities to be left alone" [*Schenck v. Pro-Choice Networks of W. New York*, 1997, 383]), did not "accurately reflect our First Amendment jurisprudence in this area" since "[a]s we said in Madsen … 'as a general matter, we have indicated that in public debate our citizens must tolerate insulting, even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment'" (*Schenck v. Pro-Choice Networks of W. New York*, 1997, quoting *Boos v. Barry*, 1988, 322).

Why then – or, as importantly, *how* – did the Court uphold just such a "float" and just such a "right to be left alone" in *Hill*? First, the Court noted that the Colorado law was a statute, not an injunction. Injunctions need to be more carefully examined than statutes because they are made by fiat, involve only one branch of the government, and are necessarily directed at specific individuals or groups rather than the population as a whole. Statutes, by contrast, express the will of the majority, which should be accorded some deference (*Hill v. Colorado*, 2000, 727). Second, the Court placed special significance on the phrase, "No person shall *knowingly* approach another person within eight feet…" (Colo. Rev. Stat., § 18-9-122 (3) (1999), emphasis added). This clause, presumably, indemnified protesters from accidentally entering an individual's floating bubble: protesters could not be held

responsible if they *unknowingly* moved only seven feet away (thinking it was eight and thus trying to abide by the law); and they could not be held responsible if while trying to stay eight feet from one person, they accidentally moved within eight feet of another. This clause distinguished *Hill* from *Schenck*, since under the terms of the injunction at issue in the latter, the protesters *could* be held responsible for such inadvertent transgressions (*Hill v. Colorado*, 2000, 727).

Third, the Court held that at eight feet, under normal circumstances, a person could speak to another in a normal tone of voice and still be heard (*Hill v. Colorado*, 2000). In fact, the authors of the Colorado law experimented on just this issue, moving around a hearing room at the capitol, measuring distances and checking on audibility, finally determining that eight feet was the proper distance (Lee, 2002, p. 394; Soraghan, 2000, A9). Whereas in *Madsen* and *Schenck*, the Court had found 15-foot floating bubbles to be too large, in *Hill* they agreed with the Colorado legislature that eight feet was just right. Though the eight-foot bubble made it impossible to approach such a person and hand her or him a leaflet, the Court declared that nothing in the statute "prevent[s] a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept" (*Hill v. Colorado*, 2000, 727). In fact, fourth, the Court noted more generally that there was nothing in the statute that disallowed *stationary* protesters from carrying out their protest. Protesters could not "knowingly approach" others without permission; but they did not have to move if an individual seeking access to a health center entered *their* eight-foot bubble. In *Schenck* that was not the case: protesters were liable no matter who approached whom (*Hill v. Colorado*, 2000).

Finally, whereas *Madsen* and *Schenck* targeted specific – anti-abortion – protesters, as noted already the Colorado statute regulated *all* political speech. For the Court,

> The fact that the coverage of a statute is broader than the specific concerns that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute.... Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive (*Hill v. Colorado*, 2000, 730–731).

This is where matters get truly interesting: what the Court is validating, with only some hesitancy, is a truly broad-based reconfiguration of civic interaction, one that covers "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries" – anyone with a message to impart. Against all these, the Court has declared, individuals in public space have an essential right to be left alone.

Nauman (2002) argues that the Court's decision can be read to have quite broad, or much narrower, implications. The broad implications are scary; the more narrow ones are troubling – at least for those of us who care about public space as political space. Interpreted broadly, Nauman (2002, p. 806) suggests, the Court's "recognition that individuals have an enforceable right to be left alone in a public forum ... broadens 'where' this interest applied" by taking the private (the rights of the home), public. In particular, the Court "substantially lessen[ed] the burden on

unwilling listeners to avoid unwanted speech in a public forum'' and moved that burden to speakers, making them responsible for helping ''unwilling listeners'' avoid their speech (Nauman, 2002). As such, the decision ''runs the … risk of establishing a 'heckler's veto,' in which the audience possesses the power to prohibit speech that is does not want to hear simply by being present'' (Nauman, 2002, p. 809). The Colorado statute was merely the specific regulatory means by which this new right to be left alone in public was accomplished.

More narrowly, the decision can be interpreted as a refinement (rather than an outright expansion) of the ''captive audience'' doctrine. ''In this sense, the statute merely requires demonstrators … not to behave in a manner that makes it impossible for the listener to avoid the speech unless this listener consents. Thus, by standing still and not 'forcing' speech on an unwilling listener, a protest will not violate the statute'' (Nauman, 2002, p. 811). In this regard, Nauman suggests, *Hill* represents a reasonable balancing act between the rights of protesters and the rights of others not to be bothered by the protesters. Nauman (Nauman, 2002, p. 813) recognizes that the imprecision of the Court's decision in *Hill* leaves open the possibility that ''[i]f the government truly has the ability to protect unwilling listeners in a public forum to the same extent that the government may protect the home from verbal and visual assault, there is left a broad government power to restrict speech that may have few limits.'' But drawing on two lower-court decisions as well as *Hill*, he argues that the result is that better direction has been given to governments to more narrowly tailor floating bubble laws:

> For states wishing to draft statutes using the ''floating buffer zone'' concept, these opinions seem to establish some fundamental guidelines. First, the size of the zone cannot be too great, and probably eight feet is the most appropriate distance. However, narrowing the size of the zone does not alone guarantee constitutionality. Second, the statute must only restrict affirmative acts of the speaker, such as approaching a patient. Punishing speakers who merely stand still and continue to communicate their message will be seen as impermissible, as it will put too much power in the hands of the listener to cut off speech. Thirdly, the government must apply reasonable standards with which one can measure their compliance with the statute, which is best accomplished by providing an element of *scienter* [i.e. a ''knowingly'' clause] (Nauman, 2002, p. 819).

This more narrow result is troubling because the Court made it clear that establishing such ''floating buffer zones'' is not limited to instances of controlling anti-abortion protest.

Indeed, the majority is clear in *Hill* that the right to be left alone ''can also be protected in [other] confrontational settings'' (*Hill v. Colorado*, 2000, 717). It supports this point by quoting extensively from a 1921 case concerning labor picketing:

> In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the rights of others to enjoy the same privilege. We are a social people, and the accosting by one another in

> an inoffensive way and an offer by one to communicate and discuss information with a view of influencing the other's action, are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustified annoyance and obstruction which is likely soon to savor of intimidation (*American Steel Foundries v. Tri-City Central Trades Council*, 1921, 204, quoted in *Hill v. Colorado*, 2000, 717).

The "right to be left alone" is coupled with "the right of free passage" and together they can be advanced by even narrowly drawn "floating bubbles." As we shall shortly see, such bubbles have indeed been extended outward from the doors of health facilities. As numerous commentators note, the Court expends no effort on saying what makes medical facilities necessarily different from other, potentially confrontational settings. And as its reliance on the 1921 labor case indicates (which in any event was not decided on explicitly First Amendment grounds), it presumably does not think it should be so limited.

While legal scholars have seized on this issue, the question of over-breadth, and a set of technical issues related to how the "right to be left alone" might now legally be defined and enforced, no one has commented on the form of citizenship – and the nature of civic, or public space – that it both presupposes and reinforces.

Public space, property, and civic engagement

The nature of public space in part defines the nature of citizenship. It shapes modes of engagement, the visibility of alternative politics, and the possibility for unscripted (that is involuntary) interactions. It provides a "space of engagement" within which the public (or various publics) comes to recognize themselves. It provides a material basis for the public sphere.[7] However, outside the law review literature (which in any event is overwhelmingly concerned with *constitutional* rather than *democratic* implications of law and court decisions), little research has been conducted into how laws – specific laws, suites of laws, regimes of legal regulation – shape access to public space and therefore the kinds of political actions that are either legally possible or just part of normal, everyday life.[8]

[7] The literature on this issue is vast. Besides Habermas's (1989) foundational text, and the important debates on political philosophy it helped spawn (e.g. Calhoun, 1992; Fraser, 1990, 1997), there is a small cottage industry in geography concerned with the materiality of public space and its importance to democracy and citizenship (see Brown, 1997; Howell, 1993; Kilian, 1998; Marston, 1990; Mitchell, 1995, 2003b; Staeheli, 1996 and the special double issue of *GeoJournal* (Vol. 58, 2002) on "Rights to the City.").

[8] Both on my own and working with Lynn Staeheli, I have tried to explore some of these issues. In doing so, it has been striking to see how few resources – particularly empirically grounded resources – there are in geography and related fields for understanding the dialectical relationship between law, the nature of space, and political possibility (see Mitchell, 2003a, 2003b, 2004; Mitchell & Staeheli, 2004). Of course, the work of Blomley (1994, 2003) is foundation for any study of this sort.

Similarly, the growing literature on the relationship between urban space and forms of citizenship (e.g. Isin, 2000) is not yet well-grounded in the actual legal and social exigencies of city life, operating too often on the normative, idealist plain defined by the political philosophy discourse. Much of this literature seeks to outline what a cosmopolitan citizenship *might* look like – what ought to be struggled towards – but does so without reflecting on how legal inventions, like the expansion (or refinement) of the right to be left alone in the *Hill* case, might in fact be creating a regime of urban space that is quite at odds with the normative aspirations of cosmopolitanism. Where political theorists seek to outline a form of citizenship based on a respect for difference that also "encourages people to act collectively" (Beauregard & Bounds 2000, p. 252), and that values what Rocco (2000) calls "associational spaces," the legal structures that govern actually existing society written in state capitols, city halls, and the chambers of Congress, and reshaped in myriad court decisions, might in fact make such association, collective action, and cosmopolitanism all but impossible to achieve.[9]

The importance of the issues at stake should not be minimized. City spaces are those places where the public comes together in its diversity, and where, presumably, the interaction of *difference* helps create the possibility for democratic transformation. This is the argument Young (1990) makes in her paean to city life built on a foundation of difference in public space in *Justice and the Politics of Difference*. There she writes: "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. The group diversity of the city is most often apparent in public space" (Young, 1990, p. 240). Furthermore, "[p]olitics, the critical activity of raising issues and deciding how institutional and social relations should be organized, crucially depends on the existence of spaces and forums to which everyone has access" (Young, 1990, p. 240). But the creation of buffer zones and floating bubbles seems to be mitigating exactly this ideal. Or perhaps more accurately, it is promoting a form of *access* to public spaces and forums that radically transforms possibilities for *association* in them.

Of course this phenomenon – of promoting access to public space while transforming the nature of association in it – is not restricted to the legal process. For 15 years now geographers and others have been debating about the "end of public space" through privatization processes ranging from the development of malls and festival marketplaces (Crilley, 1993; Davis, 1990; Goss, 1993, 1996, 1999; Sorkin, 1992; Zukin, 1991) to the creation of Business Improvement Districts (Mitchell & Staeheli, in press; Zukin, 1995) and park conservancies (Katz, 1998, 2001) that outsource everything from maintenance to policing, to the rise of gated suburbs (Low, 2003; Mackenzie, 1994), each of which shape interaction – association – through an ethos of commodification and privacy, tying the right to be left alone closely to the right to spend. The result, as Crilley (1993, p. 153) rightly put it, helps

[9] Though not dealing directly with law, Garber (2000) provides a quite nuanced and helpful discussion for understanding the relationship between normative public spheres and actually existing public spaces.

create an "illusion of a homogenized public" by minimizing or otherwise controlling "the social heterogeneity of the crowd, [and] substituting in its place a flawless fabric of white, middle class work, play and consumption…." Closed circuit television and other sophisticated surveillance technologies (Fyfe & Bannister, 1998; Norris & Armstrong, 1999), coupled with a general rise of what Smith (1996) calls middle and upper class "revanchism" that has targeted homeless and other marginalized people for "zero tolerance" policing (see McArdle & Erzen, 2001), reinforces this trend towards promoting access (for some) to public space by closely regulating the form that association may take.

But what sets the legal innovations typified by the *Hill* case apart from these other moves towards reconstructing publicly accessible space, is that Courts seem to be legitimating what are in essence personal, traveling zones of autonomy. We can now take our privacy with us into public space in ways we could not before; we retain a *legal* "right to be left alone" even in the most public of spaces. Or, to put the matter in different terms, what seems to be happening, through the expansion and refinement of the right to be left alone, is an important – and startling – innovation in *private property* that significantly amplifies the sorts of transformations of property uncovered in the "privatization" literature just surveyed. In its geographical sense private property is a parcel of territory over which the property-holder possesses a "right to exclude." This is why it matters deeply when the key spaces of public access and association are on private property, like a mall or festival marketplace: the rules of exclusion are different than they are on public property.

Private property – privately held geographical space – is more than mere possession (as in personally owning some commodity, like a car or a TV); it is a bundle of rights that imply some set of *duties* on the part of others, like the duty to stay out of private property without the property-holder's permission to enter.[10] The liberal philosopher and legal scholar Waldron (1988, p. 39) suggests that "[i]n a private property system, a rule is laid down that, in the case of each object, the individual person whose name is attached to that object is to determine how that object shall be used and by whom. His decision is to be upheld by society as final." The notion of control over how an object, privately held, is to be used, is behind the "right to be left alone" that the Court long ago declared so essential for people "trapped" in their residences. The Court's promotion of this right to be left alone functioned precisely to assure that a property owner's "decision is … upheld by society as final." By contrast, public property is organized on a different basis. Commonly accessible public (that is state-owned) property, like streets, sidewalks and parks, in urban capitalist societies, functions somewhere between what Waldron (1988, pp. 40–41) calls "collective" property and what he calls "common" property. Collective property is governed by "by a sovereign authority, which determines the rules of property, … retain[s] control of … resource[s] …, and [does not] allow … resource[s] to be controlled exclusively by any private organization" (Waldron, 1988, p. 41). What is crucial here, of course, is what kind of sovereign the state is and how it makes its decisions: indeed, there is a rather long

[10] A good discussion of theories of rights, including an updated concept of rights as duties – linking duties to a substantive sense of rights as titles – can be found in Jones (1994).

litany of cases debating the degree to which a state's activities as a sovereign can be separated from its actions as a landlord (see Mitchell, 2004). In common property, "rules are organized on the basis that each resource is in principle available for the use of every member [of a collectivity] alike. In principle, the needs and wants of every person are considered, and when allocative decisions are made, they are made on a basis that is in some sense fair to all" (Waldron, 1988, p. 41). Rules of publicly accessible public property are made by a sovereign, presumably beholden to democratic decisions and vetted, often, through a process of judicial review. Much First Amendment jurisprudence centers precisely on the issue of how well the sovereign does at assuring that the "wants and needs of every person" are taken into account. The Supreme Court calls this "balancing."

Such a balancing is in part based on common law precedent. When the Supreme Court first recognized the right to protest in public space it did so by basing its decision on common law, and arguing, in effect that the streets and parks functioned *as if* they were common property for which the state was no more than "trustee." "Wherever the title of the streets and parks may rest," the Court argued in *Hague v. CIO* (1939, 515), "they have immemorial been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." The question for authorities – the representative of the sovereign – then, was how to balance competing claims to public space held in trust as a common resource.[11] But by now promoting a right to be left alone in public space, the state is simultaneously promoting the privatization of a common resource: it is changing the relationship between public property as collective and as common property, in Waldron's terms. It is promoting a new property regime (to use Blomley's [2003] phrase) in which common property – public space – is no longer so much held in trust for assembly, communicating thoughts, and so forth, but instead parceled out, albeit temporarily, to individual "owners" as they move through it. To the degree that I have a right to be left alone, then to that degree I can exclude you from the space around me (up to eight feet, say). "One of the functions of private property rules, particularly so far as land is concerned," Waldron (1993, pp. 310–311) argues, "is to provide a basis for determining who is allowed to be where…. The rules of property give us a way of determining, in each case, who is allowed to be in [a] place, and who is not…. An individual who is in a place where he is not allowed to be may be removed, and he may be subject to civil or criminal sanctions for trespass or some other similar offence." It matters greatly, therefore, whether the "organizing idea" (Waldron, 1988, p. 42) of a property system in general, and of specific properties in particular, is one of private or common property – or something else altogether. It matters because it determines not only the rules of *access* to property, but also the forms of *association* that may take place on it. It determines the quality of civic engagement and through that the content of citizenship (see Isin, 2002).

[11] Critiques of how this balancing act has been performed can be found in Mitchell (2003a, 2003b) and Mitchell and Staeheli (2004). The point here is not to pursue criticism of how rights-balancing has been performed, but to question what happens when the scales upon which the balancing takes place are radically transformed.

Where much normative, progressive political theory seeks out a form of association based on solidarity – or at least in which difference is valued for its own sake because it is the root of any non-oppressive collective – civic engagement based on social practices defined primarily by private property – the right to be left alone – is, at root fundamentally individualistic, privatizing, indeed, libertarian. As Ryan (1995, p. 401) explains, libertarianism holds that "we are essentially self-owning creatures; our bodies, our thoughts, our actions, and whatever we can create by employing our efforts on things we have either acquired in an unowned state or have acquired from their prior owner are ours outright…. The only restraint upon our ownership of ourselves is that which stems from everyone else's proprietorship in themselves." We have full sovereignty over ourselves and what is ours. This is a liberatarianism appropriate to a neo-liberal world order in which property ownership – titles – is the base for all other, superstructural, social relations (cf. De Soto, 2000). There is no such thing as society, as Margaret Thatcher famously asserted, only individuals, property titles, and the entitlements that property titles confer on individuals. "Since all persons are the sole proprietors and outright owners of themselves, there is one legitimate form of social cooperation and many illegitimate forms. The legitimate form is based on voluntary exchange; the illegitimate forms are in one way or another extractive" (Ryan, 1995, p. 401).

Under a private property regime, and the legal rules established to support it, civic engagement should be entirely voluntary (and hence the right to be left alone truly is the "most comprehensive of rights and the right most valued by civilized men"). Thus the right to exclude becomes paramount, even in what are putatively commonly held properties. Waldron (1993) has made a withering argument about how in a "libertarian paradise" where all property is private, the result will necessarily be *un*freedom for some. This is because, in fact territorial property is finite, and public property is the only place for those without ownership of (or use rights to, in the case of renters) some piece of private property to perform necessary actions. But it also promotes unfreedom because it eliminates the possibility for *chance* that must be at the root of any true freedom. Under the guise of complete liberty, it eliminates the possibility of agency – the possibility of being swayed or transformed by that which one does not want or expect.

It does this by eroding the necessary distinction between public and private. Some theorists of citizenship (e.g. Holton, 2000, p. 189) argue that "insisting" on a public–private divide creates an emaciated form of citizenship (by, for example, excluding emotions from forms of behavior deemed "public"), but this concern misses the point. The problem is not that the divide exists, but rather the conditions under which it exists, and what happens when it disappears. What happens when the private *becomes* the public, when the right to exclude expands from the home to commonly accessible space, or when that right exists as a new spatial practice that allows you to always and everywhere keep those you do not want to encounter out of your own personal "bubble" of privacy? What does it mean when a public space comes to be governed by rules formerly reserved for private property?

Bubble law extensions

These questions are being raised regularly in city councils and state capitols around the U.S. and answered daily on the streets of American cities. In the wake of a series of court decisions largely upholding on First Amendment grounds beggars' rights to panhandle, cities have turned to limiting behaviors associated with panhandling rather than panhandling itself. In cities both small (Palo Alto, CA, Syracuse, NY,[12] Evanton, IL) and large (San Francisco, Chicago, Miami), a new wave of legislation is being proposed and often enacted that outlaws "aggressive" panhandling. In Evanston, for example, legislation passed in 2001 makes it illegal to "impede" the progress of a person when asking for a handout; unlike the abortion protesters in *Hill*, it is up to a beggar to stay out of the way of an on-coming pedestrian that he or she wants to communicate with. As the pedestrian passes, the beggar can only ask for a handout once; asking twice is considered aggressive. In addition, begging is outlawed near bus stops, on buses or trains, within 10 feet of an automatic teller machine or bank entrance, or "near" outdoor cafes (whose tables are often, though not always, on public property) (Cox, 2001). Unlike in Baltimore, Cincinnati or Berkeley, the Evanston City Council did not outlaw all begging after dark.

Many laws like Evanston's are based on model laws developed by right wing urban policy consortiums like the Center for the Community Interest (CCI), which boasts that it has advised more than 50 cities on "quality of life" issues and in the drafting of anti-panhandling legislation (www.communityinterest.org/overview.htm). CCI argues that its model aggressive panhandling law merely regulates the time, place, and manner of begging. But as with the Colorado health facilities initiative, what is important are the implications of such regulations. CCI's model ordinance defines aggressive as follows:

1. Approaching, speaking to, or following a person in a manner to cause fear of bodily harm, or to actually cause harm to person or property.
2. Asking for a handout a second time.
3. Touching a person without consent "in the course of soliciting."
4. Blocking or interfering with a person or vehicle in any way "including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact."
5. Making threatening gestures.
6. Following a person "with the intent of asking that person for money or other things of value."
7. "Speaking in a volume unreasonably loud under the circumstances."
8. Begging people who are waiting in line (www.communityinterest.org/backgrounders/panhandling.htm).

[12] In Syracuse, a strong opposition to the law organized by local anti-poverty activists led to its eventual defeat, a rare hiccup in the march of anti-aggressive panhandling legislation across American cities.

In addition, the model code holds that, no person shall:

1. Beg within 20 feet of public toilets, payphones, ATMs, banks, check-cashing businesses, or "valid vendor location," or within six feet of the entrance of any other building.
2. Solicit an operator of a motor vehicle for the sale of goods or performance of a service (purveyors of requested emergency services excepted).
3. Offer to reserve a parking space or direct people to a public parking space.
4. Beg while under the influence of drugs or alcohol.
5. "… solicit by stating that funds are needed to meet a specific need" when that need does not exist, the beggar already has funds to cover cost of the need, or the beggar doesn't "intend" to use the money for that need.
6. Beg on any public transportation vehicle, at any stop or station, or in any public parking lot.
7. Beg "in a group of two or more persons" (Cox, 2001).

Every city already has laws against harassment, intimidation, and assault, so that is not what is at stake here (those parts of the aggressive panhandling laws are merely redundant). Rather the anti-aggressive panhandling laws are designed to create a public geography in which non-indigent people can move unhindered by panhandlers, and therefore in which they can experience a kind of urban "freedom [that is] greatest in an empty volume," as Sennett (1994, p. 310) has put it: "the ability to move anywhere, to move without obstruction, to circulate freely."

This "empty volume," is, of course, quiet: now not just outside homes or health clinics, where an audience is captive, but even on bustling city streets, laws often require that some people on the street – beggars – not speak "in a volume unreasonably loud under the circumstances." It is not the *listener's* responsibility to avoid unwanted speech; it is the speaker's responsibility to assure that avoidance is easy. The Colorado health clinic law had a *scienter* clause that clearly increased its constitution legitimacy in the eyes of the Court and legal commentators: a protester could not "knowingly" enter the space of another, and so the responsibility for helping unwilling listeners avoid one's speech could not be held hostage to fortune. But the model aggressive panhandling law makes it illegal only to *unreasonably* cause a pedestrian or vehicle to "take evasive action." But these are exceptionally slippery terms: what is unreasonable? Who decides? What constitutes an evasive action? Having to step a foot or two out of the way? Having to roll up a window? And just how does a beggar impart to a passer-by the message that he or she would like a handout? The beggar cannot stand in front of a pedestrian and ask, cannot follow once the pedestrian has passed, and cannot speak "unreasonably" loudly as the pedestrian goes by. The answer, according to CCI, is that beggars must always be "passive" (www.communityinterest.org/backgrounders/panhandling.htm).[13] The

[13] And what about begging a person sitting on a low wall or a bench eating lunch – as happened to me the day before I wrote these words? Can a beggar approach without permission? The answer from CCI seems to be "no" (though it is less explicit on this point) since it breaks the rule of "passivity."

right to be left alone in public space, in other words, means that *some people* must repress their (otherwise perfectly legal) agency. It means that any (non-indigent) pedestrian can travel the city in his or her own bubble of privacy.

Or, more accurately, a (non-begging) person in the city can exercise something like private property control over public space as she or he moves through the city. Beggars, like protesters, must be invited into the private space of the individual, even when that individual is in public space. What is new is that this property right, this "right to exclude," is no longer rooted in specific clearly demarcated spaces (as with traditional private property) but instead "travels." We can carry it with us wherever we go.[14] Individuals in public space now resemble the Space Shuttle entering the atmosphere or a speed boat plowing through a lake: the shuttle (or boat) creates a bow-wave that pushes air (or water) out of its way, and travels in something like a vacuum; and for some distance behind it, the wake keeps the vacuum from being filled. Similarly, armed with new anti-aggressive panhandling laws, (non-indigent) people plowing through the streets of the city can push beggars out of the way (it is *they* who must not hinder *your* progress; *they* who must take evasive action), and provision in the laws against "following" assure that the vacuum thereby created will not immediately be filled.

For many cities, of course, this is not enough. The second part of the model ordinance in effect zones public space into a series of "begging" and "no begging" zones, just as the Colorado ordinance created specific "protest" and "no-protest" zones around health clinic entrances.[15] Such zoning of public space ensures that encounters with those with whom we may disagree, be different from, not like, or not want to meet, are kept at a distance, and all our interactions with them are entirely *voluntary* (*we* must seek out protesters; *we* must approach panhandlers; *we* can spend all our lives without ever encountering the unpredictable). We can – and indeed we seem to want to – live in a world quite at odds with the image of public space and democracy at the heart of contemporary radical democracy theory. For such volunteerism is anti-urban and anti-public. It is a private ethos writ large; privacy expanded to the scale of the globe – and it makes social relations, in Marx's (1987, p. 96) pithy phrase, "purely atomic." Purely atomic social relations mark the eclipse of the civic; civic space becomes an illusion, little more than a representation of public life that no longer exists. Purely atomic relations, reinforced through bubble laws, represent the apotheosis of the individual.

[14] Perhaps more accurately, what is new here is the degree to which such autonomous zones exist. The *American Steel Foundries* case discussed above created severe restrictions on the actions of labor picketers, restrictions that over the course of the 20th century were in fact severely eroded, to the degree that a Congressional investigating committee in the 1940s could suggest, not entirely accurately, but not entirely inaccurately either, that even by then Courts would strike down similar restrictions on picketing as unconstitutional (see Mitchell, 1998). To the degree these restrictions existed (and to the degree they are now being revived, Mitchell, 2003a), they do not yet create a "bubble" around passers-by, pedestrians, or other citizens.

[15] For more on protest and no-protest zones, see Mitchell (2003a) and Mitchell and Staeheli (2004).

Virginia v. Hicks: "Public" space, private interests, and state power

The apotheosis of the individual is, of course, deeply contradictory, for if courts are finding that, at least as far as protest and begging are concerned,[16] there can be no expectation of publicity in public space; in other contexts they are finding that there can be no expectation of privacy there either.

Property, as the right to exclude, requires the organized violence of the state for its enforcement. As Blomley (2000, 2003) argues, state violence is as effective when it is implied as when it is used, when it remains a threat behind social practices more than a certain dictator of them. The knowledge that property owners can call on the police to enforce their right to exclude is as important in structuring social relations as the actual act of calling the police. Private property is a function of public power. The right to exclude implies security against the dangers of the public world and one of the state's roles is to enforce this.

Yet at the same time, private property's power to exclude also serves as an important limit on public, state power. While private property is not the only determinant of the geography of the "right to be left alone" (that is, privacy) in contemporary capitalist states like the U.S., it is a predominant one. A renter or homeowner can refuse entry to the police or other agents of the state, a refusal that can only be denied in limited (though growing) circumstances. Warrants must be produced; reasons given. The "right to be left alone" thus means security of a different sort – the security of privacy and the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," as the Fourth Amendment to the Constitution puts it.

But what happens when the private goes public, when the kinds of privacy expected in private property are now demanded in public space? The answer to this question is by no means straightforward. On the one hand, courts have consistently found that the right to be free from unwarranted searches and seizures is far less in public space than in private. For example, cars operating on public streets can be searched on the basis of probable cause, and in some cases (especially concerning suspected drug use or dealing) can be seized without warrant or trial. And, despite its decision in *Hill*, the Court has been fairly clear in a range of different circumstances that in public space, people can have no real expectation of privacy.

Surveying a range of cases, law scholar Elizabeth Paton-Simpson (2000, p. 313) concludes that in the US, "once reasonable people venture outside the safety of their own homes, they must expect that they will be followed, filmed, investigated and spied upon, by any person for any purpose." Recent cases concerning both private and state surveillance (e.g. *United States v. Vazquez*, 1998; *C'Debaca v. Commonwealth*, 1999) have voided, or severely limited, any right to privacy on public streets or similar public property.[17] "[A]ll courts that have considered

[16] Aggressive panhandling laws have been upheld in several cases. The leading case is *Roulette v. City of Seattle* (1994).

[17] Other cases have voided these rights in publicly accessible private property like malls.

application of the Fourth Amendment to cameras aimed at public streets or other areas frequented by a large number of people have declared that such surveillance is not a search, on the grounds that any expectation of privacy one might have in these areas is unreasonable'' (Slobigin, 2002, p. 236). As Slobigin (2002) goes on to show on considerable detail (drawing on the wealth of geographic and other research on the subject), while there may be no expectation of privacy in public space, the panoptic gaze of surveillance cameras and CCTV systems nonetheless radically transforms public social life (see Norris, Moran, & Armstrong, 1998; Norris & Armstrong, 1999). As Jeffrey Rosen (2001, p. 38) has argued, the effect of CCTV in Britain (where it is both most advanced and most studied), serves a primary function of ''enforce[ing] social conformity'' (quoted in Slobigin, 2002, p. 248). Public life, including but not limited to the public actions of protesters, beggars, and other ''non-conformists,'' is now significantly shaped not only by the *expectation* that there is no privacy in public space, but by the *reality* of technology that assures such an expectation is fulfilled.

Of course (and this is why the answer to the question is not straightforward) such an expectation of transformed social behavior is tied closely to evolving notions of property rights. Whereas historically the right to private property has been understood as a bulwark against those who would violate the right to be left alone, now, more and more, the right to private property is understood always to be part of a system of social relations, the tending of which is crucial to the protection of any individual's private property interest. To put all that in simpler terms, private property – the economic values it contains, the social values it represents – exists within a regime of property relations: individual values are a function of social practices (Blomley, 2003; Breitbach & Mitchell, 2003; Mitchell & Staeheli, in press). To protect individual private property interests, therefore, property owners seek to control the activities and behaviors of their neighbors. This is the basis for restrictive covenants and homeowners association (MacKenzie, 1994) as well as for the invention of zoning and Business Improvement Districts (Zukin, 1995). Such need to control others' activities on surrounding property (whether public or private) is deeply internalized by property owners (both residential and commercial) who perceive their own economic and social security as constantly under threat by non-conforming activities on surrounding properties (Low, 2003). One solution to this perceived threat is gated suburbs (Low, 2003); another is their urban equivalent, CCTV systems backed by BID-funded security patrols (Davis, 1990; Mitchell & Staeheli, in press; Zukin, 1995).

On the one hand, then, surveillance in public space (and courts' sanctioning of it) represented an erosion of privacy (or at least the *anonymity* that makes non-conformance possible: Slobigin, 2002). On the other hand, surveillance in public space (made possible by controlling access as with gated suburbs, by technology as with CCTV, and by defining community as a community of property as with homeowners' associations and BIDs), represents an *extension* of private interests, often into public space. The simultaneous erosion and extension of private interests, while seemingly contradictory, is in fact mutually confirming.

Such a mutual confirmation became clear at the end of the Supreme Court's 2003 term, in the case *Virgina v. Hicks* (2003).[18] In 1997, the City of Richmond deeded the public streets and sidewalks of the Whitcomb Court public housing complex to the Richmond Redevelopment and Housing Authority (RRHA). In doing so it ordered RRHA "to 'privatize' these streets in an effort to combat rampant crime and drug dealing," as Justice Antonin Scalia put it in his decision for a unanimous Court (*Virginia v. Hicks*, 2003, 2194). The deed required RRHA to close the streets and to post signs saying "NO TRESPASSING PRIVATE PROPERTY." People who were not residents or employees of the housing project could now only use the streets and sidewalks if they could "demonstrate a legitimate business or social purpose for being on the premises" (*Virginia v. Hicks*, 2003, 2195). If they could not, then they could be arrested for trespassing. A man by the name of Kevin Hicks was arrested several times for trespassing at Whitcomb Court, and under a Housing Authority rule was barred from ever entering the complex again. His last conviction – for breaking this "barment" – was eventually overturned by the Virginia Supreme Court. It and a lower court had ruled that the streets and sidewalks of the project were a traditional public forum and so Hick's had a right to be on them.

The US Supreme Court overruled the Virginia Court. Writing for the Supreme Court, Scalia argued that since Hicks had been barred from the grounds of Whitcomb Court (as a result of his earlier arrests), his final arrest (the one at stake in the decision, and which was prompted by Hicks's attempt to deliver diapers to his children who lived in the complex) was not for engaging in any sort of First Amendment activities, but rather for breaking the terms of the order against him not to enter the complex. "It is Hicks' non-expressive *conduct* – his entry in violation of the notice-barment rule," Scalia (*Virginia v. Hicks*, 2003, 2199) wrote, "not his speech for which he is punished as a trespasser." On such narrow grounds perhaps there was some validity to the Courts' decision.

But Scalia did not stop there. He had a larger target in sight. "Most importantly, both the notice-barment rule and the 'legitimate social purpose' rule apply to *all* persons who enter the streets of Whitcomb Court, not just those who seek to engage in expression. The rules apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct" (*Virginia v. Hicks*, 2003, 2199). If, in *Hill*, Scalia saw the breadth of the ordinance prohibiting expressive activities on public streets outside health clinics as little more than a smokescreen, now he saw the breadth of rules limiting *social* activity on the public streets outside a housing complex as a saving grace. Not only drug dealers, but also soccer players, not only loiterers, but also bird watchers, are barred from hanging out on the streets unless they have a "*legitimate* business or social purpose," the determination of which is left to the semi-public RRHA.

The *New York Times* (Editorial, 2003, A26) heralded the decision as a sound one: "The ruling gives the poor a right the rich have long had: to keep loiterers, and

[18] The next three paragraphs reprise and extend an analysis I published as an opinion piece in the *Syracuse Post-Standard* "Alas, Even Public Space is at Risk," 22 June, 2003. A much fuller treatment of the case can be found in Mitchell (2004).

potential criminals, out of their homes." This is not even close to right. What the decision does is allow public governments to deed public property to other public and semi-public agencies (like redevelopment authorities, housing authorities, ball park districts, and so forth) and then let those other authorities declare, by fiat, that public property is in fact private, and that all those without a *legitimate* business or social purpose can be barred. This is the ethos of the gated suburb gone public, and since the Court made no effort to distinguish the streets around a public housing complex from any other street – like those in an entertainment district developed by a city's redevelopment agency, or those in a ballpark district reconditioned in advance of the first game played in a new downtown stadium – it likely won't be long before cities grab hold of this precedent and use it as a new tool to advance that "right the rich have long had" (the right to be left alone). The Court has clearly sanctioned the extension of private property rights – backed by the full power of the state – into public property, opening up new avenues for the further remaking of urban into suburban space. The streets of the city become ever more like the halls of the mall. And the *New York Times*, speaking for its wealthy, propertied, and of course, *liberal*, readership heartily endorses this development.

Conclusion: the S.U.V. model of citizenship

Despite the contradictions so central to the decisions of various justices, and the switching sides such contradictions require, the reasoning in *Hill* and *Hicks* are of a piece. Instead of understanding public space to be "agonistic" and "associational" and the citizenship that forms in it as being a product of the collective actions of people, American Courts, led by the Supreme Court, are codifying a model of public life that is the antithesis of public space. We are, each and every one of us, radically individual, completely "free agents" to use Marx's term. As free agents, we are "free to collide with one another and engage in exchange." But *we do not want to collide with one another*; we want to move freely through public space, encased in an impregnable bubble of property (made real through law), and watched over by a network of surveillance cameras, their operators, and the state. We want – and expect – to feel safe at all times.

American courts, in other words, are pushing towards a model of citizenship that matches the cars we drive. The rise of the sports utility vehicle (S.U.V.) over the past decade and a half has been attributed to any number of factors (and cannot only be explained in terms of consumer choice), but a central factor has been the sense of inviolability that a couple tons of steel and fiberglass can instill. Cocooned in a sealed chamber, behind tinted glass, with the temperature fully controlled, and the GPS system tracking, and sometimes dictating, our every turn, our every stop and start, we are radically isolated from each other, able to communicate only through the false connectedness of the cell phone. We ride high and sovereign; we are masters of space; we are safe against all who might intrude, all who might stand in our way (and against the weather, too). That this is a false security has been amply shown in traffic accident statistics; that this is a false (or rather deeply regressive) isolationism has

been proven in the way that the large consumption of raw materials and fuel the S.U.V. society requires makes us, in fact, even more radically connected to others in the world. But never mind: *that* kind of connectedness (where "individuals *seem* independent," but really aren't) is only a connectedness of the most abstract and distant kind (the deployment of troops around the world and the starting of wars notwithstanding). In our S.U.V.'s and with our S.U.V. citizenship, *that* kind of connectedness can always be banished beyond the shell of the Ford Explorer or the eight-foot bubble we now carry with us when we climb down out of the driver's seat and are forced to walk. We are now, truly, the liberal, autonomous subject. We own ourselves and no one can intrude upon us without our permission.

Developing an argument by the conservative political philosopher Robert Nozick, Waldron (1988, p. 398) writes:

> To say I own myself is to say that nobody but me has the right to dispose of me or to direct my actions. *I* have rights to do these things (though I must not harm others in doing so; that is, I must not exercise my self-ownership in a way that violates theirs), and those rights are exclusive of anyone else's privilege in this regard, for they are correlative to others' duties to refrain from interfering with what, in this sense, I own (original emphasis).

The sort of bubble laws legitimated in *Hill* coupled with the push towards aggressive panhandling laws like the ones outlined above, seek to protect just this kind of self ownership. The "right to be left alone" is at the heart of this kind of self-ownership. It imposes on *others* a set of duties (not to approach within eight feet without being invited in; not to "impede" another's progress by asking for a handout; not to attempt to wash the windshield of my Lincoln Expedition while I am idling at a stoplight). And the sort of wholesale property legitimized in *Hicks* cements such self-ownership (of some) by assuring that my rights really are "exclusive of anyone else's privilege."

Just as S.U.V.s have transformed the conditions of accessibility to country and city (opening up at least the possibility of going "off road" while also making white middle and upper class citizens feel safe in the city; increasing problems of traffic and parking through sheer expansion of *volume*), so too do aggressive panhandling laws, decisions like *Hill* and perhaps preeminently *Hicks* transform accessibility to public space and therefore transform both what it is and what kinds of citizenship can develop within it. As attractive as is the vision of associational and agonistic citizenship that progressive scholars seek to theorize, any such theorizing must be set against the reality of *this* kind of citizenship-in-formation. Such theorizing must take seriously the degree to which laws and Court decisions – the frameworks through which modes of being citizens are put into practice – are tending away from associative forms of interaction and more towards constructing Sennett's "empty volume." Or really, what the courts seem to be constructing, and thus what theorists of citizenship need to pay close attention to, is a dual empty volume: the empty volume immediately surrounding the individual and defined either by law or a couple tons of steel; and the empty volume that this law- and steel-encased individual now can travel through, a space made empty on the one hand by the scurrying, fleeing dance of those who might see a need to impede your progress

(to make a political point or to ask for a handout) but who now can't, and on the other by those who have simply been barred altogether from being in the space (in the name of your comfort, your safety).

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