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## Public, by Necessity

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David Dana\* & Nadav Shoked\*\*

Protest movements are often indistinguishable from a physical place in the public imagination. Consider Tiananmen Square in Beijing, Tahrir Square in Cairo, the lunch counters and streets of Greensboro, Selma, Montgomery, and other strongholds of the Jim Crow South. The Chinese and Egyptian Democracy movements of recent years and the American Civil Rights Movement of the 1950s–1960s are inseparable from the images of those places; the history and role of those movements can hardly be invoked without naming those locations. Another example from the United States, and one central to our analysis here, is that of the Occupy Wall Street movement, the movement that literally occupied that street through its encampment at Zuccotti (formerly Liberty) Park in the heart of New York City’s financial district.

Place—a particular, physical place—can be so important to a protest movement because sometimes location is essential to a movement’s goal of reaching the constituencies it must engage and persuade. For example, by going into Southern lunch counters, the Civil Rights protesters were able to reach white Southerners where they lived and press upon them the need for change. Equally as important, by taking their protest to the lunch counters, and enticing a harsh local Southern response, the protesters were able to attract media attention and garner the Northern public support necessary for

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\*\* Associate Professor of Law, Northwestern University School of Law. This Article was written for the Law, Peace, and Violence Symposium hosted by the *Seattle Journal for Social Justice* in Spring 2014. We are grateful to the editors at the Journal and to Yxta Murray for organizing the symposium and inviting us to participate, and to all the participants for their input. We also benefitted from comments received at the 2014 Association for Law, Property, and Society Conference

its eventual triumph.<sup>1</sup> Protests against Jim Crow would not have carried the same expressive power had they been confined to already-integrated venues.

In the case of Occupy Wall Street, the protest movement had many aspirations—even if of debatable coherence—but its overarching call to arms was the claim that political power in the United States had been hijacked by the economic elite, the so-called “one percent,” and especially the financial industry. Occupy Wall Street’s narrative was that public policy was subservient to that financial elite, resulting in a financial bubble whose bursting led to the recession of 2008. Following the recession, those same banking interests, according to Occupy Wall Street, were the primary, if not sole, beneficiaries of the public funds spent to resuscitate the national economy.

To make its point, to express its essential message, Occupy Wall Street had to be in Wall Street—at the doors of the people and institutions it was claiming had all the power and from whom concessions had to be obtained if any change were to be attained. Without the visuals of the protesters’ presence right next to the titans of finance, the press—a press that intensely watches the financial industry—would not take heed, the sounds and sights of Occupy protesters would not be shown around the country, and debate over the dominion of the one percent would not be fostered.

Moreover, to be successful in this regard, Occupy Wall Street had not only to be located on Wall Street, but it had to be on Wall Street for a substantial time. The duration of a protest in a particular place can be vital to a movement—as exemplified by the histories from Beijing, Cairo, and the Jim Crow South. A brief demonstration against the capital of American

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<sup>1</sup> For a history of the sit-ins and why they were ultimately highly effective in prompting national debate and legislation, see generally, e.g., M.J. O’BRIAN, *THE JACKSON WOOLWORTH’S SIT-IN AND THE MOVEMENT IT INSPIRED* (2013); MELODY HERR, *SITTING FOR EQUAL SERVICE: LUNCH COUNTER SIT-INS, UNITED STATES, 1960S* (2010).

finance could be dismissed as a passing annoyance; a lasting protest could not be as readily ignored. Furthermore, to the extent the movement aspired at showcasing an alternative, supposedly more egalitarian form of social existence, it was imperative to do so at the footsteps of the major banks whose form of social control it sought to displace.

Yet property law—with some elements drawn from constitutional law—prevented Occupy Wall Street from expressing its message as powerfully as it needed to. Occupy Wall Street had only three potential spots for protesting at Wall Street itself: a public park that was too tiny to be the site of a major protest; Chase Plaza, which was purely private space under New York law and thus thought to be out of the question; and Zuccotti Park, a privately owned public space (POPS), created when a special permission was granted by the city for construction of a taller-than-otherwise-permitted skyscraper on the site.<sup>2</sup> Consequently the encampment was established there, in Zuccotti Park, and after it persisted for a while, public attention skyrocketed; Occupy Wall Street received massive press coverage and opinion commentary, some favorable, some not, but all in service of the movement's goal of generating debate over the question of concentrated economic and political power in the United States. But soon thereafter, city authorities dismantled the encampment, and arrested a number of activists. As a result, press coverage of the movement—and arguably the movement

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<sup>2</sup> We draw our factual account of Occupy Wall Street heavily from several sources, including the collection of essays and accounts in ROLAND V. ANGLIN ET AL., *BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC SPACE* (Rick Bell et al. eds., 2012); THOMAS OLEASEN, *THE RELATIONSHIP BETWEEN SOCIAL MOVEMENT AND PLACE* (2012), available at <http://www.specialer.sam.au.dk/stat/2012/20051133.pdf>; Christine Verbitzsky, *The Occupy Wall Street Movement and The Constitution*, 29 *TOURO L REV.* 1003 (2012).

itself—nearly disappeared.<sup>3</sup> Without an ability to protest in a particular place, on Wall Street, Occupy Wall Street wilted.

Since the participants in the encampment who were removed and arrested were charged with trespass, the actions of Occupy Wall Street, and the authority of the city to have it removed, were litigated in court. During the ensuing litigation, the New York court refrained from even considering the protest movement's need to be, and to stay, where it was. The court did not engage in a balancing of competing values: the interest of the private owner but also the interest of the protest movement. Rather, it simply allowed the private landowner and the City to remove Occupy Wall Street. It thereby affirmed their power to shut down the protest movement altogether.<sup>4</sup> The court's analysis was based on a plausible reading of American property and constitutional law. The analysis was consistent with American law's focus on individual "speech" and not on collective speech, or "assembly." Such a focus often leads courts to conclude that expressive values are protected as long as protesters can speak somehow and somewhere, even if that means that the only avenues open to them are the posting of letters (or, these days, emails) to Congress or highly constrained gatherings in sites removed from symbolically-laden locations linked to the protest's meaning.

Thus the court was not wrong in its reading of American law. We will contend here, however, that this approach embraced by American law is

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<sup>3</sup> See Nicholas S. Brod, *Rethinking A Reinvigorated Right To Assembly*, 63 DUKE L.J. 155, 157–58 (2013); Dylan Byers, *Occupy Wall Street Is Over*, POLITICO, (Sept. 17, 2012), <http://www.politico.com/blogs/media/2012/09/occupy-wall-street-is-over-135781.html> (showing how press coverage of income inequality dropped after the Occupy Wall Street encampment was removed).

<sup>4</sup> For more information regarding the New York court's perfunctory decision in *People v. Nunez*, as well as the New York ACLU's brief arguing for deeper consideration of the constitutional issues, see *People v. Nunez (Challenging trespassing arrests of Occupy Wall Street protesters at Zuccotti Park)*, NYCLU.ORG, <http://www.nyclu.org/case/people-v-nunez-challenging-trespassing-arrests-of-occupy-wall-street-protesters-zuccotti-park> (last visited Oct. 9, 2014).

wrong. American law, in particular American law of trespass, needs to be reconceptualized to allow room for effective protests that can prompt and sustain the kind of debate a thriving democracy needs. Specifically, we argue for the recognition of a defense against a trespass claim where the unauthorized entrants to private property were engaged in a protest that in order to be effective, *had* to be located in *that* exact place. That space, while private by formal ownership rules, must be treated, for this and only this limited purpose, as *public by necessity*. To make this argument, we draw on the social science literature emphasizing the centrality of place for protest movements, and we join other property law scholars in critiquing, and offering a vision that differs starkly from, some recent property law scholarship that reifies the right to exclude as the quintessence of property in land.

We also draw, however, on current trends in American law. That is, our proposal is not disconnected from the structure and principles of American law: we build on important strands in both federal constitutional law and state property law. For example, recently four justices of the Supreme Court sought to reject the traditional form of constitutional analysis that ignores the importance of particular places for certain protests.<sup>5</sup> Elsewhere, some states' property laws recognize a balancing of public and private values in determining the scope of the private landowner's right to exclude, and our project can be seen as an extension and refinement of that approach.<sup>6</sup>

We suggest intensifying the tentative moves made by some such courts. The doctrinal proposal we accordingly develop—and more generally, our argument for making place important in understanding the rights of protesters—has implications extending well beyond the specific example of Occupy Wall Street. Our analysis has implications for protests on other

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<sup>5</sup> *McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014). The case will be discussed in Part II, *infra*.

<sup>6</sup> *See, e.g., State v. Shack*, 277 A.2d 369 (N.J. 1971).

publicly owned private lands like Zuccotti Park, on common areas in private common interest communities, on private land that is open to the public for some purposes such as shopping malls, on generally “closed” or access-restricted private land, and, indirectly, even on purely public land. Thus for example our argument should be kept in mind when considering the contemporary example of protests against the real estate developments and other initiatives of private universities that are redrawing urban landscapes through the use of public powers,<sup>7</sup> or of protests at industrial farming facilities or nuclear plants, which are often isolated from any public space where effective protest could take place.<sup>8</sup>

Such examples proliferate since many traditionally governmental powers that used to be wielded by public employees in public spaces are now privatized and conducted by private corporations on private land. Protest in public space facing public actors is therefore simply ineffective in an era of sweeping privatization. In localities that have adopted a school vouchers scheme, for example, a protest that previously would be directed at a public school on public land must, by necessity, be directed at a private school on private land. As more activities that were once public are being managed by private entities—as more private actors become public—more space that was once private is now by necessity public, for certain protest purposes.

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<sup>7</sup> For example, New York law has been interpreted to allow Columbia University to use eminent domain to vastly extend its geographical footprint into the historically poor and minority neighborhood of Washington Heights on the theory that Columbia, although an elite private institution, will be serving a civic purpose by providing public good and public amenities via the expansion. *See generally* *Kaur v. New York State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010).

<sup>8</sup> Under current law, efforts to effectively protest near nuclear plants have been thwarted through the application of trespass law. *See, e.g.*, Christine Legere, *Activists Found Guilty of Trespassing at Pilgrim Nuclear Plant*, CAPE COD ONLINE (Mar. 21, 2014), <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20140321/NEWS11/140329929/0/NEWS39>.

It is important not to mischaracterize this critique or proposal we offer as overly radical. We do not believe that the current law allows for no effective protest. Our point is simply that, as in the Occupy Wall Street case, current law might at times unnecessarily deter effective protest. We also do not question the focus and importance of the law of trespass. The tort's concern is and should continue to be the private landowner's interests: even under our proposal, as will be seen, the scope and duration of protest even on private land that is "public by necessity" would never be unlimited.

The Article is organized as follows: Part One provides a brief overview of the relevant legal scholarship and other academic literature that forms the background for our proposal. Part Two traces the role of place and protest in American constitutional law, and critiques the law for at best inconsistently acknowledging the importance of place for effective protest. Part Three explicates the tool employed by property law to exclude protesters—the trespass tort—and illustrates how our proposal for extending protesters' rights to a place can be established within it. Finally, Part Four engages some possible objections to our proposal.

#### I. PROTEST AND PLACE IN THE ACADEMIC LITERATURE

The necessity for effective, meaningful protest to be located on specific sites, even when those sites are privately owned by third parties, has not been a thoroughly analyzed in the academic literature, either outside legal academia or within it. Granted, in the fields of urban studies, geography, sociology, and critical theory, there has been an increased recognition of the centrality of "place" for communities, especially urban communities, and for some social movements. Yet this literature, as described below, largely does not address the legal aspects and implications of that insight.

Within legal academia, the public necessity of enabling protest on specific private land has received limited direct attention. But much of the work in the property field has evolved in a way that seems inconsistent with, or even antagonistic to, any claim that private landowners should be

deprived of a right to prevent unpermitted entry onto their land. Recent academic commentators, most notably the highly influential Thomas Merrill and Henry Smith, have sought to place the owner's right to exclude and the corresponding absolutist conception of trespass at the core of what property in land means.<sup>9</sup> Naturally, this stance has generated opposition from other prominent scholars, such as Joseph Singer, Gregory Alexander, and others,<sup>10</sup> who remain loyal to the legal realist tradition that perceived property as a bundle of diverse rights and social obligations—and not simply as an individualistic right to exclude. This Article builds on their work and extends their central argument to the problem of protest, thereby reinforcing the critique of the exclusion-essentialist conception of property. In order to do so, this Part reviews the work by these legal academics, after first briefly surveying the relevant works in other academic fields.

“Place”—or, rather, the importance of particular places for community and individual self-definition and politics—is an overarching theme of much recent literature in social sciences and humanities.<sup>11</sup> The centrality of place has been recognized specifically in the context of social movements. As one commentator notes, “scholars in geography and sociology regularly

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<sup>9</sup> See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1002 (2004); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734 (1999).

<sup>10</sup> See generally Joseph Singer, *Democratic Estates*, 94 CORNELL L. REV. 1009 (2009); LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009); LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Jedediah Purdy, *A Freedom-Promoting Approach to Property*, 72 U. CHI. L. REV. 1237 (2005); Eduardo M Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 863–64 (2009); Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517 (2003).

<sup>11</sup> See generally, e.g., HARM DE BLIJ, *THE POWER OF PLACE: GEOGRAPHY, DESTINY, AND GLOBALIZATION'S ROUGH LANDSCAPE* (2nd ed., 2010); DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* (13th ed., 1992).

attend to the implications of theories of place for social movements and activism.”<sup>12</sup> Scholars in geography, sociology, and related disciplines argue that

[a] discussion of the role of the geographic environment—the power of place—in cultural and social processes can provide another layer in the understanding and demystifying of the forces that effect [sic] and manipulate our everyday behavior. It should be read in addition to, rather than instead of, wider discussions of the interaction between social groups.<sup>13</sup>

Writing in this tradition, Danielle Endres and Samantha Senda-Cook distinguish between protests that gain their power from a specific place because the place has a pre-existing meaning as a site of historic protest and social change, such as the National Mall in Washington, DC, and protests that gain power from a specific place precisely because that place is associated with an established power or practice the protesters seek to challenge.<sup>14</sup> They explain that “place (re)constructions can function rhetorically to challenge dominant meanings and practices in a place,” as, for example, when supporters of greater bike transportation take over a busy lane used by drivers to underscore the need for space for bikers and the dominance of car-oriented transportation policies.<sup>15</sup>

Employing an ethnographic or case-study approach, this literature on the role of place in protest is largely descriptive. For example, geographer Tim Cresswell details at length the story of the “Greenham” women—women who camped outside a United States military base in the United Kingdom for years to protest the United Kingdom’s cooperation with US military

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<sup>12</sup> Danielle Endres & Samantha Senda-Cook, *Location Matters: The Rhetoric of Place in Protest*, 97 Q. J. SPEECH 257, 258 (2011).

<sup>13</sup> TIM CRESSWELL, IN PLACE OUT OF PLACE: GEOGRAPHY, IDEOLOGY, AND TRANSGRESSION 11 (Minn. Archive ed., 1996).

<sup>14</sup> See Endres & Senda-Cook, *supra* note 12, at 259.

<sup>15</sup> *Id.* at 258.

programs involving cruise missiles.<sup>16</sup> Cresswell explains how the women's encampment, in the rolling hills of the verdant English countryside next to a large military base, outraged local officials and residents and garnered sustained media coverage—some negative, some positive.<sup>17</sup> By virtue of their physical location, which in and of itself challenged the United Kingdom's role in American military efforts, and thanks to the long duration of the protest, the women were able to have a major cultural impact in the United Kingdom.<sup>18</sup>

Such literature is largely uninterested in the law: neither in the law's positive role, nor in its desirable role. Given the researchers' training and audience, the case studies are inattentive to the particular legal contexts and proceedings and how law did or did not mediate the conflicts. This literature unquestionably does express one normative message: the confinement of protests to generic zones—sites especially designated for public protest—is undesirable, as it “ignores (or perhaps recognizes) the strength that place can have for the success of an argument” and “make[s] it possible to confine protest and free speech so that ruptures can be avoided entirely.”<sup>19</sup>

Turning to the legal academic literature, one finds little addressing the specific problem of the form of protest on private lands that is of interest to this Article, but finds much work expounding on the importance of maintaining a private right of exclusion. In a series of important articles about the nature of property law itself, Merrill and Smith, together and

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<sup>16</sup> See CRESSWELL, *supra* note 13, at 97–145.

<sup>17</sup> See *id.* at 137–44.

<sup>18</sup> See *id.* The cruise missiles were eventually removed by virtue of a treaty between the United States and what was then the Soviet Union, and not by any explicit action of the UK government, but the controversy within the United Kingdom over the missiles perhaps facilitated the removal as well.

<sup>19</sup> Endres & Senda-Cook, *supra* note 12, at 277. See also Don Mitchell & Lynn A. Staeheli, *Parsing the Fine Geography of Dissent in America*, 29 INT'L J. URB. & REG. RES. 796, 796–813 (2005).

separately,<sup>20</sup> have articulated a forceful vision of “property” at odds with the bundle of sticks or bundle of rights metaphor, which envisioned the rights embedded in real property as various, variable, and socially contingent.<sup>21</sup> They sought to reclaim the *res*—the physical parcel itself—as the essential core of what property means.<sup>22</sup> Building on this emphasis on the *res*, they argued that the defining attribute of property in land was the right of owners to physically exclude others, all others: the whole world.<sup>23</sup> Because exclusion from the *res* defines the essence of property, it follows that protection from trespass must be automatic and hence absolute.<sup>24</sup> Trespass is, in Merrill and Smith’s terminology, an exclusion regime, not a governance regime that entails balancing of different parties’ claims and societal interests on a case-by-case basis.

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<sup>20</sup> This summary of Merrill and Smith’s work is based on Merrill & Smith, *supra* note 9; Henry E. Smith, *Minding the Gap in the Relationship Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009); Merrill, *supra* note 9. There are differences between Merrill’s and Smith’s approaches as they have evolved over time. See Henry E. Smith, *The Thing about Exclusion* (Harvard Public Law Working Paper No. 14-26, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2449321](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449321). But they cohere in endorsing a powerfully exclusion-essentialist conception of property.

<sup>21</sup> The bundle of rights metaphor is famously associated with Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

<sup>22</sup> The most forceful argument for reorienting our idea of property away from the bundle of rights metaphor and back to the thing itself was made in Henry E. Smith, *Property As the Law of Things*, 125 HARV. L. REV. 1691, 1704 (2012)

<sup>23</sup> See Henry E. Smith, *Exclusion versus Governance Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002); see also Thomas W. Merrill, *Trespass, Nuisance and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985). For other scholars who have articulated an exclusion-essentialist conception of property, albeit one that differs slightly from Merrill’s and Smith’s, see, e.g., Larissa M. Katz, *Exclusion and Exclusivity in Property Law* (Legal Studies Research Paper Series No. 08-02, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1126674](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126674); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) (reviewing THOMAS MERRILL & HENRY SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2012)).

<sup>24</sup> *Id.*

Merrill and Smith mostly believe that the law descriptively fits their exclusion essentialism conception of property in land. But their claims are normative and not just descriptive. They argue that information costs justified historically and still justify an absolute right to exclude the whole world from the *res*, with trespass as the enforcement mechanism. An exclusion regime with hard-and-fast trespass prohibitions requires less case-by-case evaluation of information and equities, and is thus more efficient.<sup>25</sup> However, while Merrill and Smith frame their argument as normatively rooted in the efficiency concerns typical of law and economics discourse, their argument also has a decidedly moral tinge. They argue that the information costs-based imperative and conventional morality are mutually reinforcing in enshrining an exclusion-centric conception of property in land:

[W]e argue that the critical feature of property rights—that they are in rem rights imposing duties of abstention on all other members of the relevant community—requires that property rights be regarded as moral rights. The nature of property as a coordination device among unconnected and anonymous actors, mediated through stereotyped things, requires that property rights command widespread respect. This respect can only be provided by some version of morality that treats violations of possession, theft, trespasses, and other gross interferences with property as wrongs subject to widespread disapprobation. This moral code—whatever its origins and whatever its justification—is backstopped by criminal and civil legal enforcement and by self-help. But it is implausible to imagine that legal enforcement or self-help, either alone or in combination, is sufficient to sustain a system of property rights without such a system of morality.<sup>26</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> Thomas E. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1852–53 (2007).

This position has not gone unchallenged. The exclusion essentialist conception of property, with its focus on an absolute enforcement of prohibitions against intrusions, has been criticized both doctrinally and normatively. It has been assailed as failing to capture the complexity of trespass law, let alone of other areas of property law.<sup>27</sup> Similarly the information costs rationale for the exclusion essentialism conception of property can easily be questioned in an era when information regarding a parcel can be digitized and readily accessed.<sup>28</sup>

More affirmatively, scholars such as Singer and Alexander argue that private law does and should embody social obligations, and in particular, a shared commitment to human flourishing.<sup>29</sup> In this account, it is plainly wrong to regard as trespassers, under the common law, the African-Americans who conducted lunch counter sit-ins in racially segregated restaurants.<sup>30</sup>

But while Alexander and Singer use the lunch counter sit-in example of protest, their focus is not on the conflict between the entrants' expressive need to protest on private land and the owners' private property rights. Rather they promote the idea that anti-discrimination principles and/or the human need for public self-constitution should trump, or be understood as modifying, otherwise applicable private property protections. It is not their goal to construct a doctrinal argument generally applicable to the tension between the needs of protesters to be in specific locations for effective protest and the private landowners' rights to exclude. Similarly, while

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<sup>27</sup> Adam Mossoff, *The False Promise of the Right to Exclude*, 8 *ECON J. WATCH* 255, 257–58 (2011).

<sup>28</sup> A similar argument is made by STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 32 n. 32 (2004).

<sup>29</sup> *E.g.*, Alexander, *supra* note 10, at 765; Joseph William Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611 (1988).

<sup>30</sup> Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 *IOWA L. REV.* 1257, 1290–91 (2014). *See generally* Joseph W. Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 *NW. U. L. REV.* 1283 (1990).

Singer constructs a powerful “reliance interest” argument for limiting the right to exclude where there is a pre-existing relationship between the landowner and the parties the landowner now seeks to exclude,<sup>31</sup> no such relationship, or ensuing reliance interest, is at work in most cases involving the collision between protesters and private property owners.<sup>32</sup>

The two progressive property scholars whose work does directly implicate the question of protest on private land—Eduardo Peñalver and Sonia Katyal—argue that expressive trespasses such as the lunch counter sit-ins can usher in productive changes in the law and social practice generally. They do note that property law may over-deter expressive flouting of claimed private property rights.<sup>33</sup> But they do not address the law of trespass in particular, or argue for any particular doctrinal modifications of trespass or other property laws. Indeed, if anything, they are concerned that weakening the owners’ right to exclude protesters would rob protesters of their expressive power: that power derives precisely from the sanctions for trespass that attracts attention to the protesters (when, for example, they are arrested). Peñalver and Katyal celebrate (to an extent) “property outlaws” because they are outlaws. Without the strong boundaries set by trespass they will not be outlaws.<sup>34</sup>

At the same time, these scholars and other supporters of a “progressive” conception of property clearly endorse a general principle that “property law should establish the framework for a kind of social life appropriate to a free and democratic society.”<sup>35</sup> This principle, we believe would

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<sup>31</sup> Singer, *supra* note 29, at 611–15.

<sup>32</sup> One exception would be aggrieved employees who “trespass” onto their employer’s premises to protest the treatment of employees, or employer opposition to unionization.

<sup>33</sup> EDUARDO M. PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 213–14 (2010).

<sup>34</sup> *See id.* at 32–35, 139–40.

<sup>35</sup> Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009).

unquestionably support an argument for allowing protest on private property under some circumstances. We make that argument in this Article. Though it has not been adequately addressed in the literature to date, the facilitation of protest that can attract attention and prompt discourse enabling political change is a necessary element of a framework “appropriate to a free and democratic society.”<sup>36</sup>

## II. PROTEST AND PLACE IN AMERICAN CONSTITUTIONAL LAW

Before we can make our argument for shifting the law in accordance to allow protest on private property under some circumstances, we must present the law in its current state. Specifically, we must explain why a shift in trespass law is needed. This Part will be dedicated to that task. It will review the current treatment of protesters invading land they do not own. That treatment, as will become apparent, is extremely hostile—even in the supposedly easier case of protesters on public land. American law as it stands today is insensitive to the insights of the non-legal literature respecting the importance of place to speech and to those of the progressive property literature regarding the limited reach of the rights of ownership.

### *A. Freedom of Speech in Private Spaces*

As far as the specific case of speech on private land is concerned, American law has taken a decisive turn towards the absolutist, exclusion-centric, protection of property rights—at least as far as constitutional law goes. In dismissing in an almost offhand manner the constitutional freedom of speech claim of the Zuccotti Park protesters, whose plight launched this Article’s discussion, the New York court merely reflected the legal attitude as it now stands in America.<sup>37</sup> This subsection will survey the emergence

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<sup>36</sup> *Id.*

<sup>37</sup> See generally *People v. Nunez*, 943 N.Y.S.2d 857 (N.Y. Crim. Ct. 2012)

and development in American constitutional law of this hostile approach towards speech on private land.

The demands made by the Zuccotti Park protesters present a simple legal problem. Such protesters are asking for a constitutional protection—the protection extended to free speech—not against a public entity, but against private parties. They are asking the owner of Zucotti Park, not the government of New York or New York City, to respect their freedom of speech rights. Ordinarily, American law holds that constitutional protections only apply where there is “state action.”<sup>38</sup> That is to say, an individual can raise a valid constitutional complaint only against the government.<sup>39</sup> Thus, while the protesters could have demanded that the government allow them to protest in the tiny public park nearby, they could not demand the same from the private owner of Zuccotti Park. Technically speaking, when the owners of Zuccotti Park relied on trespass remedies to remove the protesters, they enforced a legal tool from private law in order to protect a private interest. Seemingly, no state action was involved.<sup>40</sup>

At an earlier time, the United States Supreme Court was willing to overlook the absence of such state action in extending free speech protection to protesters. In fact, the Court believed that the nature of the place—rather than the nature of the place’s owner—determined whether public action, justifying constitutional protections, was involved. In *Marsh v. Alabama*, the Court held that, in a company town, the private corporation

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<sup>38</sup> The Civil Rights Cases, 109 U.S. 3 (1883) (respecting the Fourteenth Amendment); *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973) (respecting the First Amendment). An obvious exception is the Thirteenth Amendment, which explicitly applies to private action. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

<sup>39</sup> *Id.*

<sup>40</sup> This is, at best, only technically true. In actuality, the state was inevitably involved. The state employs its powers—through the police or the courts—to enforce the owner’s trespass claim. Without such state backing, the owner’s trespass claim is meaningless. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 18–20 (1948).

owning the streets could not employ the trespass tort to abridge freedom of expression and religious rights.<sup>41</sup> Consequently, the company could not exclude a number of Jehovah's Witnesses who undertook to distribute religious literature in the streets. When later, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Court extended this ruling to protect protesters in a private shopping mall, it read *Marsh* to imply that "under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held."<sup>42</sup> In accordance, the Court decided in that case that a privately held mall was the "functional equivalent" of a public street or business district, and thus should be treated as such.<sup>43</sup>

These Court decisions were based on the quasi-public nature of the place where trespassers sought to exercise their rights of speech. The streets in a company town or in the mall were too public-like to be treated as private space. But in *Logan Valley*, the Court mentioned another justification for opening the mall to the protesters. It wasn't only that the mall resembled a public street and was thus important as an arena for speech for the public in general; the mall also held specific importance to that one particular group of protesters. Since these were employees demonstrating against a business in the mall, there was no other location where their protest could be truly effective. Thus, the Court felt compelled to open that space to them.<sup>44</sup>

Four years later, the Court began to retreat from its earlier rulings expanding the freedom of speech into private spaces such as malls. It limited the *Logan Valley* holding to that case's facts precisely by restricting free speech rights to cases where the specific private space was necessary

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<sup>41</sup> *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

<sup>42</sup> *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 316 (1968).

<sup>43</sup> *Id.* at 319.

<sup>44</sup> *Id.* at 321–23.

for the particular protest.<sup>45</sup> The Court explained in *Lloyd Corporation v. Tanner* that the decision in *Logan Valley*

was carefully phrased to limit its holding to the picketing involved, where the picketing was “directly related in its purpose to the use to which the shopping center property was being put,” . . . with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available.<sup>46</sup>

The *Lloyd* decision was thus meant to, and did, curb the allowable realm for speech on private space. Yet it did so in a manner that was acutely aware of the importance of specific locations for particular messages. The rule as it emerged from *Lloyd* and *Logan Valley* was that a location’s status as private space was no defense against free speech when that speech was directed at activities taking place in that location. This approach mirrors the insights of the non-legal literature expounding on the importance of specific locations for certain forms of speech, as reviewed in Part I. Yet, unfortunately, the Supreme Court abandoned this attitude within a few years after handing down its decision in *Lloyd*.

In 1976, the Court announced that its own rulings expanding the reach of freedom of speech into private properties had gone too far—even after *Lloyd* had already curbed much of their original range. In *Hudgens v. National Labor Relations Board (NLRB)*, the Court completed the move it only partially made in *Lloyd*. It outright overruled the *Logan Valley* decision.<sup>47</sup> *Logan Valley*, the Court reasoned, was based on a misunderstanding of the Constitution and the Court’s earlier rulings. The Justices explained that beyond the very specific and rare circumstances of *Marsh v. Alabama*—that is to say, outside of company towns—there is no

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<sup>45</sup> *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 563 (1972) quoting, *Logan Valley*, 391 U.S. at 320 n. 9.

<sup>46</sup> *Id.*

<sup>47</sup> *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976).

basis for applying the constitutional protection of speech where state action is absent.<sup>48</sup> That federal holding still stands today.

A handful of states rejected this new attitude. Based on their own constitutions, they continued to abide by the spirit of decisions such as *Logan Valley*. These states still hold that entrants to certain private spaces—such as malls—can avail themselves of free speech protections. Yet state courts (and legislatures) base their decisions on the quasi-public nature of those spaces (i.e., the primary justification in the *Marsh* and *Logan Valley* decisions), rather than on the importance of a location for a particular form of speech (the *Lloyd* rationale).<sup>49</sup> Hence, even in states extending a liberal interpretation to freedom of speech privileges, these privileges are only enforced in private spaces that closely resemble public spaces. Accordingly, most states limit the application of the doctrine to shopping malls and sometimes universities. The nature of the speech, and its relationship to a specific location, is irrelevant in all these states. Even the state that has adopted the most radical interpretation of freedom speech rights, New Jersey, which went as far as to protect such rights in spaces owned by a homeowners association—since they resembled traditional public spaces—

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<sup>48</sup> *Id.* at 518.

<sup>49</sup> *E.g.*, *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979) *aff'd sub nom.* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590 (Mass. 1983) (allowing limited freedom of speech right for candidates to solicit nominating signatures in reasonable and unobtrusive manner at shopping center mall); *Alderwood Assocs. v. Washington Env'tl. Council*, 635 P.2d 108 (Wash. 1981) (same) *but* *Waremart, Inc. v. Progressive Campaigns, Inc.*, 989 P.2d 524, 527 (Wash. 1999) (holding the right only applies to malls, not to smaller stores, since malls resemble traditional downtown); *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994); *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (extending freedom of speech to university's property when the university devoted that property to public use).

noted that if the association gives the owner other places to protest, the restriction on speech can persist.<sup>50</sup>

In sum, by the time the Occupy Wall Street movement came along, the opening that American law used to offer for protest on private space when that space held particular importance for the specific protest had closed. In retrospect, this development should not have been surprising; the Supreme Court has also refused to acknowledge the importance of place for speech in the supposedly far easier case of protest on public, rather than private, space. We turn to review the jurisprudence respecting this latter case now.

### *B. Freedom of Speech in Public Space*

Earlier in this Part we stated that the Occupy Wall Street protesters' legal standing was precarious because they chose to protest on the private space—Zuccotti Park—rather than the nearby tiny public park. However, while they may have been extended more legal leeway had they been protesting in the public park, it is far from clear that the city, as the owner of that public space, would not have been able to limit their right to protest even there.<sup>51</sup> This observation lends more urgency to this Article's core insight regarding the law's failure to address the needs of protesters.

Even before it curbed the right to protest on private spaces in the *Hudgens* decision, the Supreme Court had demonstrated its disregard for the importance of place for speech in decisions allowing the government to

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<sup>50</sup> *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 46 A.3d 507, 519 (N.J. 2012); *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 103 A.3d 249, 258 (N.J. 2014) (“To assess the reasonableness of the Board’s restriction [on speech], we consider whether convenient, feasible, and alternative means exist for [plaintiff] to ‘engage in substantially the same expressional activity.’”) (internal citation omitted).

<sup>51</sup> Indeed, the New York court refusing to block the ejection of the protesters assumed *arguendo* that the private owner must treat Zuccotti Park as if it was a public space for First Amendment purposes, and still ruled against the protesters. *Waller v. City of New York*, 933 N.Y.S.2d 541, 544 (N.Y. Sup. Ct. 2011).

limit speech in purely public spaces. For example, in *Adderley v. Florida*,<sup>52</sup> the Court was faced with the case of students who protested at the jailhouse where other students who had tried to integrate theaters were being detained. In his majority opinion, Justice Black emphatically rejected the trespassers' claim that "this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate'" for a right to protest arrests.<sup>53</sup> He explained that the claim's

major unarticulated premise [is] the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and *wherever* they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on . . . We reject it again.<sup>54</sup>

This statement reflects an incisive dismissal of the claim that a specific place may be required for effective protest—as the jailhouse clearly was for protesting the arrests of those held there. Black's pronouncement was made in reliance on an array of Court decisions permitting government to limit protest even in public spaces normally opened to the public—like streets or plazas in front of jails or courthouses—to prevent interferences with their normal use.<sup>55</sup> These cases apply a general rule that has become central to American freedom of speech jurisprudence. Government, even if not allowed to completely ban speech, may adopt reasonable regulations of speech, pertaining to the manner, time, and place, allowed for the speech.<sup>56</sup> This rule was used against Occupy Wall Street protesters throughout the

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<sup>52</sup> *Adderley v. Florida*, 385 U.S. 39 (1966).

<sup>53</sup> *Id.* 47–48 (internal citations omitted).

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> *E.g.*, *Cameron v. Johnson*, 390 U.S. 611, 616 (1968); *Cox v. State of Louisiana*, 379 U.S. 559 (1965).

<sup>56</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

nation who were camping, unlike their New Yorker brethren, in public spaces.<sup>57</sup>

This formula hinders place-specific protest. The equation of place regulation with the regulation of time and manner obscures the special standing that place may hold for protest. It also obscures the tendency of place regulation to burden some protests more than others. By closing a space to protesters, government is interfering with protest that is place-specific to that place. The allowance for reasonable place regulation of specific sites is an allowance for the targeting of specific protesters, in contrast to the requirement that non-content-neutral regulation of speech be subject to strict scrutiny.<sup>58</sup> A Supreme Court decision from the past spring illustrated this problem, and four Justices expressed unease about it. In *McCullen v. Coakley* the Court struck down a state law erecting a buffer zone, where protest was prohibited, in the public space surrounding abortion clinics.<sup>59</sup> The Justices in the majority concluded that the buffer zone was not a reasonable time, manner, and place restriction and hence rejected it.<sup>60</sup> Agreeing with this result but repudiating this mode of analysis, a dissenting Justice Scalia reckoned that the regulation should have been analyzed as a content-based restriction, rather than as a time, manner, and place restriction. He insisted that the buffer zone law was targeting a specific speech.<sup>61</sup> Because the law solely applied to protest in the vicinity of abortion clinics, it inevitably addressed anti-abortion protest. Scalia's

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<sup>57</sup> *City of Chicago v. Alexander*, 2014 IL App (1st) 122858 (Ill. App. Ct. Dec. 23, 2014); *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1123–24 (E.D. Cal. 2012); *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 241 (D. Conn. 2012); *Davidovich v. City of San Diego*, No. 11-cv-2657 WQH-NLS, 2012 WL 439642, at \*7 (S.D. Cal. Feb. 10, 2012); *Occupy Tucson v. City of Tucson*, No. CV-11-699-TUC-CKJ, 2011 WL 6747860, at \*8 (D. Ariz. Dec. 22, 2011); *Freeman v. Morris*, No. 11-cv-00452-NT, 2011 WL 6139216, at \*1 (D. Me. Dec. 9, 2011).

<sup>58</sup> *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

<sup>59</sup> *McCullen v. Coakley*, 134 S.Ct. 2518 (2014).

<sup>60</sup> *Id.* at 2534.

<sup>61</sup> *Id.* at 2543 (Scalia, J., concurring).

insight is almost undeniable. Anti-abortion protest is most effective when taking place in front of a clinic. It is a speech for which a specific location is necessary. That location is critical only for that specific protest. Thus, while ostensibly all forms of speech were prohibited there, the law could not genuinely be characterized as neutral between different topics of speech.

The majority declined this reasoning, explaining that the state targeted not the speech but its effect.<sup>62</sup> Hence, the speech prohibition would have been upheld had it been more reasonable. Although this reasoning and result is inattentive to the realities of protest and the insights of the non-legal literature reviewed in Part I, it undeniably reflects the consistent attitude of American freedom of expression law, as seen in this Part.

American law has reached this result—whereby constitutional jurisprudence is wholly insensitive to the import of place for protest—due to yet another, seemingly unrelated doctrinal development: the downplaying of the right of assembly in favor of a right of association. The First Amendment protects not only the freedom of speech, but also the freedom of assembly.<sup>63</sup> Unlike the former, which can be read narrowly as referring to an activity that is individual at heart, the latter is clearly a communal right, and contains an undeniable spatial aspect. The right to assemble is by definition the right of people to come together and congregate in a specific location.<sup>64</sup> Furthermore, in light of its placement in the Bill of Rights and the historical circumstances of its adoption, there is little doubt that the constitutional right of assembly was intended to refer to the right of communal protest.<sup>65</sup> Nonetheless, in the twentieth century the right to

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<sup>62</sup> *Id.* at 2531.

<sup>63</sup> The “right of the people peaceably to assemble[.]” U.S. CONST. amend. I.

<sup>64</sup> The Oxford Dictionary defines the verb “assemble” as follows: “gather together in one place for a common purpose.” OXFORD DICTIONARY 94 (2nd ed., 2005).

<sup>65</sup> Other rights contained in the First Amendment, surrounding the right to assemble, unquestionably deal with protest-serving activities: freedom of speech, and also the right to petition the government. In the struggle with England leading to independence,

assemble has been mostly used as the constitutional basis for a related, yet different, right: the right of association.<sup>66</sup> The Warren Court established the right of association in order to expand the protection afforded to political rights to organize.<sup>67</sup> But by de-mooring the right of political association from its limited origins in the communal right to meet for protest, this move lessened the constitutional case for a right to protest in specific places. The right to assembly has lost most of its luster and is rarely effectively relied on by protesters.<sup>68</sup> Protesters are thus left to rely on the right to free speech—an individual rather than communal right, and a right whose association with a specific place can always be challenged.

As already seen, the Supreme Court has proven particularly prone to challenge this association.<sup>69</sup> American constitutional law does not, in 2014, offer promising avenues for action on behalf of those arguing for greater protection for the place-related rights of protesters to assemble—whether they seek to express their aversion to abortion clinics or to Wall Street. Yet we believe that the problem of the Protesters in Zuccotti Park can be solved regardless. Constitutional law might offer them little aid. Property law, to which we turn now, recommends a much more promising attitude.

### III. PROTEST AND PLACE IN AMERICAN PROPERTY LAW

Part I of this Article put forward the normative case on behalf of the Occupy Wall Street protesters and others. It stressed the insight, prevalent in the social sciences, that often a particular location is necessary for protest

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assemblies—both formal such as the Continental Congress and informal such as the acts of street mobs and protesters—played a key role.

<sup>66</sup> For a general, and excellent, discussion of the issue, see Brod, *supra* note 3 (noting that it has been 30 years since the Supreme Court authored an opinion that rested on the Assembly Clause).

<sup>67</sup> See generally *NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>68</sup> The Occupy Wall Street cases on which this Article draws present a clear example. For more, see Brod, *supra* note 3, at 153–58.

<sup>69</sup> See *Hudgens*, 424 U.S. at 518; *Adderley*, 385 U.S. at 47–48.

in light of the protesters' specific message. Part II surveyed American constitutional law, and discovered that it does not extend any protection for such protesters. Nonetheless, theirs is not a lost cause in American law. They have no recourse in the legal protection of speech; but, paradoxically, the legal protection of property should have come to their rescue. For, as we shall see in this Part, property law can, and should, absolve such protesters of liability for trespass in light of its own doctrines.

As mentioned earlier, and assumed throughout the discussion, the tort of trespass is the legal tool by which property law protects the owner's right to his or her property.<sup>70</sup> For those committed to reading property as first and foremost the right to exclude, trespass, as the practical embodiment of the right, is thus the key element of this body of law. Accordingly, authors such as Merrill and Smith stress that trespass is a particularly robust tort.<sup>71</sup> The elements a plaintiff must prove in a trespass suit are indeed minimal. She or he must solely demonstrate that the defendant intentionally entered land that the defendant did not hold a right to possess.<sup>72</sup> The plaintiff/owner need not even prove that any harm was suffered as a result of said entrance.<sup>73</sup>

Yet the trespass tort also recognizes a defense. An entrance to the land of another will not constitute trespass when that entrance is privileged.<sup>74</sup> The existing common law recognizes at least three categories of privileged

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<sup>70</sup> See *supra* note 20 and accompanying text.

<sup>71</sup> See Merrill & Smith, *supra* note 9, at 394.

<sup>72</sup> *Bayou Fleet P'ship v. Clulee*, 150 So. 3d 329, 334 (La. Ct. App. 2014). The intent requirement is minimal: it is satisfied when the intruder acted willfully. As one court explained:

Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness.

*Phillips v. Sun Oil Co.*, 121 N.E.2d 249, 250–51 (N.Y. 1954).

<sup>73</sup> *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997).

<sup>74</sup> *E.g.*, *Mueller v. Allen*, 128 P.3d 18 (Utah Ct. App. 2005).

entrance: necessity, invitation, and public policy.<sup>75</sup> We argue that a normatively sensitive reading of these should cover, as privileged, the entry to private land of protesters whose protest is tied to that specific place that they enter. We argue that law privileges the entrance of the Occupy Wall Street protesters to Zuccotti Park because, for them, that place is public by necessity.

#### *A. Necessity Defense*

The necessity defense appears as the natural doctrinal resting point for the protection for protesters suggested in this Article; after all, we title the interest meriting protection—as well as this Article itself—public by necessity. Yet in light of the current elements of the necessity defense in the common law, this specific defense is not a suitable grounding for protecting protesters, and we do not believe that it should be.

Necessity privileges an entry into the land of another, when, among other things, such an entrance is necessary in order to prevent imminent physical harm and there is no other, legal, manner of averting that harm.<sup>76</sup> The quintessential example for the application of the necessity defense is the case of a ship docking in a privately held pier in its effort to evade a storm.<sup>77</sup> The sailor is faced with the imminent danger of drowning and the only way to avert this harm is by docking in the private space. Hence, his or her entry to the pier is privileged by necessity (though he or she might be liable for damages to the pier caused by the entry).<sup>78</sup>

Protesters have recently tried to rely on this same argument.<sup>79</sup> They claimed that their entry to private land was privileged through necessity,

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<sup>75</sup> JOSEPH W. SINGER, PROPERTY 34–49 (3d ed. 2010).

<sup>76</sup> U.S. v. Schoon, 955 F.2d 1238, 1239–40 (9th Cir. 1991).

<sup>77</sup> E.g., Ploof v. Putnam, 71 A. 188 (Vt. 1908).

<sup>78</sup> E.g., Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

<sup>79</sup> E.g., Schoon, 955 F.2d at 1239–40 (protesting US aid to a repressive regime at the IRS); United States v. Scranton, 25 F. Supp. 2d 1131 (D. Idaho 1997) *aff'd*, 165 F.3d 920

because their protest in that location was the only way to avert imminent harm. Thus, for example, entrants argued that protesting against the presence of a nuclear plant will avert nuclear war (or nuclear accidents). Such claims are routinely denied since it is hard for protesters to establish that they meet the requirements, noted above, for the necessity defense. There is no proof that the relevant danger—for example, nuclear war—is imminent,<sup>80</sup> or that the trespassing act will avert it—that due to the protest nuclear operations will be halted.<sup>81</sup> Even if all these requirements are somehow met, the plaintiff/owner could still argue that there were other ways to avert the harm—for example by lobbying government or challenging the activity in court and thereby stopping the protested activity.<sup>82</sup>

The hostile position of the courts in these cases is understandable. The claimants request that the courts accept as fact a hypothetical—and often,

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(9th Cir. 1998) (protesting logging by trespassing in a forest); *United States v. Katzberg*, 201 F.R.D. 50, 53 (D.R.I. 2001) (protesting nuclear warfare at a naval base); *United States v. Turner*, 44 F.3d 900 (10th Cir. 1995) (protesting at an abortion clinic).

<sup>80</sup> *United States v. Kelly*, No. CR10-5586BHS, 2010 WL 4857795 (W.D. Wash. Nov. 22, 2010) *aff'd*, 676 F.3d 912 (9th Cir. 2012) (“Defendants have not established the existence of imminent harm at the time they attempted to symbolically disarm nuclear weapons kept at the Bangor base”).

<sup>81</sup> *E.g.*, *United States v. Sued-Jimenez*, 275 F.3d 1, 7 (1st Cir. 2001) (“Appellants offered no evidence to support their claim that their trespassory protests will result in a change of U.S. Naval policy so that the bombing and ammunition testing in Vieques will cease.”); *United States v. May*, 622 F.2d 1000 (9th Cir. 1980), *cert. denied*, 449 U.S. 984 (1980).

<sup>82</sup> *E.g.*, *Scranton*, 25 F.Supp.2d at 1134, *aff'd*, 165 F.3d 920 (9th Cir. 1998) (determining that there was no necessity to trespass since the Defendant could have pursued administrative or judicial remedies to cure each alleged environmental violation cited); *Katzberg*, 201 F.R.D. at 53 (explaining that defendants need not have trespassed since they could have written to their congressman, written editorials to be published in the newspaper, distributed pamphlets discussing their cause, or picketed in a public space); *Zal v. Steppe*, 968 F.2d 924, 929 (9th Cir. 1992) (noting the necessity defense was unavailable to abortion protestors because legal alternatives existed to achieve their goal of persuading women not to have abortions); *United States v. Maxwell-Anthony*, 129 F.Supp.2d 101, 105 (D.P.R. 2000).

slightly ludicrous—chain of events. If they are to avoid these futile exercises and still rule for the protesters, courts will have to relax the requirements for the necessity defense in general. For example, they will have to omit the requirement that the danger to be averted must be imminent, or that no other way to avert it be possible. Any such change to the doctrine will affect not only the case of protesters, but also that of other trespassers. Thus, for example, sailors will be protected against trespass claims by owners of piers even if they chose to dock there when the threat of the storm was not imminent, or even if there were other piers open to the public that they could have resorted to. There may or may not be a normative case for such a general lessening of the necessity defense. Our discussion, or the predicament of protesters in general, has very little bearing on this issue. Thus, we are not well placed to endorse here such a reform of the laws.

While we argue for protecting protesters against trespass claims, and although we rely on the word necessity in so doing, we do not believe that the necessity defense is the adequate answer to the plight of protesters. The reason is rather simple: we are not arguing that the protest is necessary, as the claimants seeking this defense have. Rather, we argue that the place is necessary for the protest—whatever the merits or potential results of that protest. This argument cannot establish a valid necessity defense, but it can be relevant under the other defenses to trespass.

#### *B. Invitation Defense*

An entry to another's land is privileged, and therefore not a trespass, when the entrant was invited by the owner or possessor of that land.<sup>83</sup> Stated this way, the invitation defense is little more than a technical way to reach the obvious result: a licensee is not a trespasser. But the invitation defense

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<sup>83</sup> *Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003).

has a more expansive role. The common law has consistently held that the invitation shielding the entrant from a trespass claim need not be explicit.<sup>84</sup> As a result, a host of entrants and activities to whose presence an owner did not consent are held to have received an invitation.

The intuitive rationale behind the invitation defense is that, if an owner opened land to a person, he or she cannot later on claim that the person is a trespasser. Based on this rationale, courts have held that once an owner opens land to the public at large, even if only for certain purposes—say, shopping or dining—he or she concedes the right to fully define the contours of that invitation.<sup>85</sup> There is a stark difference, in this respect, between the owner opening the land to an individual invitee and the owner opening the land to the general public. When a residence's owner invites a friend for dinner, the friend is privileged when entering the residence and dining there. The entry will no longer be privileged if the friend unilaterally decides to also stay for the night. Conversely, if an owner opens his or her store to the public, a person entering the store with no intention of buying anything is privileged even though he or she entered for a purpose different from that for which she was invited.<sup>86</sup>

This broad notion of invitation to the public has served the common law to force innkeepers and common carriers to serve all customers.<sup>87</sup> It is the justification for public accommodation laws that privilege the entrance of all individuals to businesses into which they were not invited due to their race.<sup>88</sup> It is the basis for the right of a reviewer to be at the restaurant even

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<sup>84</sup> *E.g.*, *Martin v. Fid. & Cas. Co. of N.Y.*, 421 So. 2d 109, 111 (Ala. 1982).

<sup>85</sup> *See Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982) (presenting an extreme application of this principle).

<sup>86</sup> *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1351 (7th Cir. 1995).

<sup>87</sup> *See generally* Singer, *supra* note 30.

<sup>88</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (codified at 42 U.S.C. §§2000a-a6 (2006)).

though the owner may not desire his or her presence.<sup>89</sup> Furthermore, in the eyes of at least two circuit courts of appeals,<sup>90</sup> it is this privilege born of the explicit invitation that shields investigative reporters when they enter a business. As held in those cases, even though investigative reporters commit fraud in order to enter the business—they deceive the owner into thinking they are consumers or employees—their entrance is privileged through invitation.<sup>91</sup>

The rule in all these cases is simple. Once an owner opens her land to the public, his or her ability to exclude does not disappear. However, his or her ability to freely pick and choose among public members or public activities is highly constrained. The same reasoning should apply to the protest cases. Once an owner engages in a public activity on her land, one that affects or seeks to affect public policy or decision-making, he or she cannot resist the entrance of members of the public who desire to contest his or her role. An owner of land quartering a political party or association, a lobbying group, an organization exercising financial or policing powers traditionally held by public bodies, or an entity playing an inflated role in the nation's life has entered the public domain. And by throwing herself into the public realm she invited others to engage her in the public discourse she is promoting.

An analogy can be found in the law of libel. A public figure cannot avail herself of libel laws to shield her reputation or feelings from critical publications to the same extent that a private citizen can.<sup>92</sup> By entering the public arena, an individual implicitly renounces some of the legal rights he or she otherwise enjoys so that the freedom of speech rights of others be respected and a thriving political arena persist. The case of private land on which public activity takes place is very similar. When using her land as the

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<sup>89</sup> *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1351 (7th Cir. 1995).

<sup>90</sup> *Id.*; *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

<sup>91</sup> *Id.*

<sup>92</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

focal point for public policy-making, the owner renounces some of the property law protections that otherwise cover the land. That owner chose to create a situation whereby the only way to effectively protest a certain public policy is to demonstrate on her land. She cannot then turn around and claim that she did not invite the protesters.

Thus, protesters demonstrating against a specific activity taking place on the land enjoy, based on the logic of the common law invitation cases alone, a defense against trespass claims. The specific case of the Occupy Wall Street protesters is even more compelling. The common law's rule respecting the broad invitation into public spaces perceives spaces as located not on a private/public dichotomy, but along a private/public continuum.<sup>93</sup> There are purely private spaces—like the home—where an invitation is construed narrowly (recall the example of the dinner invitation). There are purely public spaces—like the public park—where the invitation is construed broadly; the invitation to enter these spaces is almost all encompassing. In between, there are places that are private yet open, to differing degrees, to the public. In such spaces the owner does not enjoy the freedom to limit her invitation as she may when entry to her house is involved.<sup>94</sup> Zuccotti Park was such a quasi-public space and more. It was formally declared, by the city and the owner, as a quasi-public space.<sup>95</sup> Recall: it was a privately owned public space (POPS). The owner herself dedicated it to public use. The owner herself announced that it was open to the public in the broadest sense of the words open and public.<sup>96</sup>

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<sup>93</sup> *Desnick*, 44 F.3d at 1351 (providing a similar argument made by Judge Posner).

<sup>94</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

<sup>95</sup> *People v. Nunez*, 943 N.Y.S.2d 857, 861 (N.Y. Crim. Ct. 2012). For more on the regulation of such places, see City of New York Zoning Resolutions 37-50-37-70 (N.Y. 2007-2011), available at <http://www.nyc.gov/html/dcp/pdf/zone/art03c07.pdf>.

<sup>96</sup> As a POPS, the Park had to remain open 365 days a year, 24 hours a day, seven days a week. *Nunez*, 943 N.Y.S.2d at 861.

Even more so than when they enter typical private spaces into which members of the public have been invited, such as stores or restaurants, the entry of individuals into POPS should enjoy a broad privilege. At the very least, when they enter in order to protest the public activities of owners of the POPS, or those closely associated with them, such entrants must be viewed as if they were invitees.

### *C. Public Policy Defense*

Protesters should be shielded from trespass claims in certain cases through the invitation defense to trespass. Furthermore, there are still additional good reasons to privilege such protesters under the final category of privileged entries: those that serve public policy. Public policy “is a catch-all category for intrusions that are privileged because significant public policies override private interests in exclusive possession.”<sup>97</sup> Often, these public policies are used to augment the privilege extended by law based on invitation. That is to say, the invitation granted by the owner to certain members of the public will be interpreted broadly, beyond the owner’s own intent, due to public policies.

Hence, for example, a landlord cannot block her tenants from inviting guests,<sup>98</sup> or the migrant workers he or she houses on the land from having service providers visit.<sup>99</sup> Even if the lease or license between the owner and the occupant of the land explicitly states otherwise, due to public policy considerations in protecting weak occupants, the owner will be viewed as if he or she did invite the occupant’s guests. The public interest in an invigorated democratic arena, where public policies can be questioned and debated effectively, similarly requires that the invitation extended by an owner who engages in public policy making be interpreted broadly.

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<sup>97</sup> SINGER, *supra* note 75, at 39.

<sup>98</sup> *Williams v. Lubbering*, 63 A. 90, 91 (N.J. 1906).

<sup>99</sup> *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

Indeed, in the case of a POPS, government has come very close to actually stating that it believes there is a public interest in keeping that space open. A POPS was created because the relevant local government required it in exchange for development rights. When making this requirement the city expressed its determination that due to the expanded private activity that will take place following the development, more public spaces will be needed. Added workers will need more access to space and dining areas; added visitors will need more recreational amenities.<sup>100</sup> Added public concerns will need more room for protest.

The public policy grounds for privileging an entry to land by protesters of an activity taking place there, alongside the invitation that such protesters should be viewed as enjoying in light of such policy grounds, should cover the Zuccotti Park protesters. Whether or not the federal or state constitutions protect them (and as seen in Part II, they mostly do not), American property law, in light of its own logic and doctrines, should not afford a right of action in trespass against them. Constitutional law might be out of sync with the current normative understanding of the importance of place for effective speech. There is no reason for property law to stumble into the same pitfall.

#### IV. POSSIBLE OBJECTIONS TO PROPERTY LAW'S PROTECTION OF PROTEST AND PLACE

There are several possible objections to our proposed defense in trespass cases. These are (A) that the defense is too vague; (B) that the defense will excessively intrude upon the sphere of autonomy that, as a normative matter, property law should protect and that, as a historical matter, it has protected; and (C) that the defense is beside the point, in that it does not

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<sup>100</sup> See generally, e.g., Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991).

directly tackle the constriction of rights to protest on public lands by means of allowable reasonable time, place, and manner restrictions.

*A. The Inconsistency/Indeterminacy Objection*

In order to prove the defense of public by necessity, a protester will need to convince a court that a protest needed to be in a particular location (and in certain instances that it also needed to last for a certain duration in that location). The question of whether a protest was necessary in this sense is unavoidably wholly fact-based, and one for which there might be no irrefutably correct answer. Judges and juries will have to make case-specific determinations if our proposal were adopted. There is certainly the possibility that courts will reach different decisions regarding similar protest contexts, engendering inconsistency within the case law. Ex ante indeterminacy will result for the relevant parties (protesters, landowners, police, and city officials) as to how any given court in any given case will respond to trespass prosecutions.

This concern is a valid one, yet it is far from determinative. After all, courts constantly operationalize property law doctrines that are far more fact-specific—and indeed that are far more amorphous in their legal terms—than the defense of public, by necessity. The essence of the test for nuisance, for example, is whether an interference with another’s property was “unreasonable,” and the reasonableness inquiry can entail the balancing of a wide array of factors<sup>101</sup>. If Anglo-American courts have been able for centuries now to handle nuisance litigation, we trust that they will also be able to manage a trespass doctrine slightly nuanced through a public by necessity doctrine.

Moreover, the public by necessity defense will be valuable not only thanks to the results it may produce, but also precisely thanks to the

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<sup>101</sup> See *DUKEMINIER ET AL., PROPERTY* (8th ed., 2014) 782–86 (describing the law of nuisance).

contentious litigation and factual disputes it will inevitably generate. It is valuable to require courts to openly address the question of the need for location-specific protest, even if they often get the answer “wrong” or arrive at an array of irreconcilable answers. For one thing, litigation in which the public by necessity issue is openly and meaningfully aired could itself become a tool for educating the public, at least as long as the trials receive media coverage. Under current trespass doctrine, with its extremely circumscribed necessity defense, there is almost nothing for courts to adjudicate, almost no place for expert or specialized testimony, and almost no reason the trial, if there is one, should not be over as soon as it begins. As the experience of the environmental justice movement teaches, litigation itself can be a boon to a movement’s efforts to draw attention to an issue even when the courts ultimately find against the movement litigants.<sup>102</sup>

*B. The Property Rights/Autonomy/Public Order Objection*

One of the most powerful objections to the public by necessity defense is that it would trample on private property rights by allowing long-term protests on private land against the adamant wishes of the landowners. In considering this objection, however, it is important to analytically distinguish between (1) the claimed harm to the landowners arising from their ideological or philosophical displeasure that protesters are on their land, and (2) the claimed harms from other actions attributed to the protesters, such as filth and public health hazards (as was claimed with regard to the Occupy Wall Street protesters) or harassing patrons and other

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<sup>102</sup> The environmental justice movement entailed complex litigation, which in almost all cases ended up not resulting in a judgment in favor of the environmental justice litigants. Still, litigation was extremely valuable for the movement. See generally, e.g., Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 Fordham Urb. L.J. 523 (1994).

guest of the landowner (as has been a concern with anti-abortion protesters on public land).

The first kind of harm will inarguably be inflicted in some cases in the interest of allowing effective protest. However, in practice the number of such cases will be very limited. This harm is most keenly felt when the protesters are allowed entry into land that is decidedly private—land that is not open at all to the public, for example, a private residence. Yet it is hard to imagine many instances where the only effective protest would need to be located on the land that is the site of a house; most major protests that are likely to invoke the public by necessity defense would be directed at retail, industrial, educational, or business institutions and their practices and influence, rather than at individuals in their individual, private homes. Although our law largely treats all private property the same for purposes of trespass law, there is no question that the normative case for a right to exclude is most robust in properties that are or resemble private homes. The discussion of the invitation defense to trespass in Part III illustrated as much. Thus the privacy concerns raised by our proposal might well be overblown.

The second kind of harms a landowner might suffer through protesters' rights is even less troubling. True, protesters may breach the peace or inflict property damages, but many laws other than trespass protect landowners from such dangers, and the introduction of a public by necessity defense in no way would preclude those laws' application. Protesters can be cited and fined, or even arrested, for littering or destroying property, or for assault, even if they are allowed to protest on the private land

In this respect, our seemingly transformative proposal in fact marks a return to a historical practice respecting criminal (rather than civil) trespass liability. Historically, the law protected private property rights but was reasonably forgiving toward peaceful intrusions across property lines. In the common law, as it came over to the American colonies from Britain, criminal trespass was an offense that required not only non-permissive

entering of another's land but also some breach of the peace. It was not an automatic offense triggered by non-permissive entry.<sup>103</sup> Moreover, even well into the twentieth century, criminal trespass in certain states was understood as non-permissive entry accompanied by an affirmative breach of the peace.<sup>104</sup>

Legal and social historians have not provided a full account of why criminal trespass laws tightened in the United States so much that by the late twentieth century, the typical state law required only non-permissive entry for a finding for criminal trespass. But whatever the original reasons for the change, we think that at least in the context of protest the old criminal trespass rule struck a good balance between protection of the interests of non-landowners and the interests of landowners. Our public by necessity defense would re-strike that balance: landowners would not be empowered to automatically use the force of the state against non-permissive entrants, but only where there was no necessity for the protest on private land or where the intruders caused harm beyond the intrusion itself.

*C. The Property Law Is the Wrong Venue Objection*

Another possible objection to our proposal is that it engages the wrong doctrinal field—private law, the law of trespass, rather than public law, the First Amendment rights of speech and assembly. The bulwark protections for protest in the United States have always been the latter. Accordingly, the conventional move in legal discourse indeed has been to seek to privilege

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<sup>103</sup> See, e.g., *In re Appeal No. 631 (77)*, 383 A.2d 684, 685 (Md. 1978) (“A mere trespass to real property is not a crime at common law unless it amounts to a breach of the peace.”). The common law did not prevent the landowner from bringing a civil suit against the trespassers, and neither would our proposal, even if the defense of public by necessity were applicable.

<sup>104</sup> For example, in *Bouie v. City of Columbia*, 378 U.S. 347, (1964), the United States Supreme Court overturned the conviction of civil rights protesters for criminal trespass on the grounds that, when they were arrested, the criminal trespass law of South Carolina required damage to property in addition to proof of a non-permissive entry.

protest by characterizing private land as “public” in a constitutional sense. Once that move is made, the argument becomes that First Amendment rights apply to allow protest on the private public forum, as discussed in Part II(B). But as reviewed there, the case law is now hostile to the characterization of private land as public for constitutional purposes. More generally, constitutional law has adopted a host of mechanisms limiting protesters’ access to lands of all types.

Therefore we think that reforming private, property, law might be a more promising way to bring about change, ultimately, in public, constitutional law. The state law of trespass operates free of even indirect influences of the United States Supreme Court,<sup>105</sup> and state courts might be more likely to be open to innovation in this realm even in the absence of any federal law encouragement. In addition, as is always the case with reforms in state law, the presence of 50 jurisdictions as potential first adopters of the suggested public by necessity defense is a major practical advantage.

Finally, while the cost of tackling property law rather than constitutional law is that the doctrines respecting government’s ability to regulate the place, time, and manner of speech remain largely intact, indirect change might ensue. If the defense of public by necessity were adopted and as a result law becomes more accommodating of location-specific protest on private or semi-private land, a strong argument for greater room for location-specific protest on public land will inevitably emerge. Precisely because the usual assumption would be that protest should be accommodated to a greater extent on public land than on private land, the public by necessity defense would be a powerful rhetorical basis for

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<sup>105</sup> See generally *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that state law may limit owners’ rights under trespass law to promote free speech without giving rise to a federal takings claim).

rethinking the equation of place restrictions with time and manner restrictions.

## CONCLUSION

Unitary exclusion-centric theories notwithstanding, property law inevitably involves some balancing of competing private and public interests. In the case of trespass and location-specific protest, that balance has been missing or at least heavily biased towards private interests. We argue for a public by necessity defense to establish a better balance, a balance that while still prioritizing the rights of owners, will recognize that both the history of our legal system and the normative concerns of our democratic system require that certain expressive entries to specific lands be privileged.