Space and Pluralism

Can Contemporary Cities Be Places of Tolerance?

Edited by

Stefano Moroni and David Weberman

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E-mail: ceupress@press.ceu.edu
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224 West 57th Street, New York NY 10019, USA
Tel: +1-212-547-6932
Fax: +1-646-557-2416
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Part III: Case Studies and Policies

Pluralism in Private Spaces: Homeowners Associations, Clubs, Shopping Malls

Stefano Moroni and Francesco Chiodelli

> Although the right to exclude others from your dinner party may be close to absolute, your right to exclude customers from your restaurant is limited by antidiscrimination laws. Deciding when interests become moral claims—and when moral claims become legal claims—requires considered judgment about our most fundamental values; it requires us to define the contours of the good society. Yet we live in a society characterized by deep divisions on fundamental values. This means that we need to combine normative commitment with respect for difference—not exactly the easiest thing to accomplish.
>
> —J. W. Singer, 2008

1. Introduction: Pluralism and Space[1]

Pluralism may be defined as the coexistence of multiple conceptions of what constitutes the good life or what renders life pleasant and worth living. Various conceptions of the good differ, for instance, in terms of religious beliefs, cultural interests and lifestyles. Modern cities have been the prime loci of concentration of different ideas about how life should be lived. The situation becomes more complex, however, when it comes to contemporary cities. Today a cosmopolitan outlook and public tolerance are no longer—if they ever were—the automatic by-products of the large city environment. Quite the opposite has emerged: instances of intolerance

[1] This essay is the result of the combined research activity undertaken by the two authors. The final written version of sections 2 and 3.2 can be attributed to Francesco Chiodelli, and that of sections 3.1 and 4 to Stefano Moroni. We are grateful to David Weberman for his comments.

are on the rise everywhere, a trend that prompts a concerted effort to rediscuss the connection between pluralism and urban spaces.

Usually when we talk of space and pluralism, most of the attention is directed toward *public spaces*. This chapter focuses on the importance of delving into the issues of pluralism in the ambit of *private spaces*, given that it is here that an increasing proportion of daily life and social interaction is played out in the urban realm: in the last few decades certain types of private space—such as shopping malls and homeowners associations—have assumed roles that were hitherto the province of public space.

2. Two Preliminary Questions: Types of Spaces and Types of Rules

To tackle the issue of urban pluralism we must first and foremost spotlight a *typology* of the spaces involved (§ 2.1) and the *rules* that concern them (§ 2.2) (Chiodelli and Moroni 2014).

2.1. Types of Urban Spaces

Urban spaces can be divided, according to ownership, into *public spaces* (the owner is the state, at various levels: central state, local government, etc.) and *private spaces* (the owner is a private legal person, whether an individual, a company, an association, etc.). This simple reduction into two categories, without any further specification, proves insufficient when dealing with the complex issue of urban realities. It is therefore necessary to break these two categories down into a set of subcategories. In particular, with reference to private spaces, we suggest three subcategories. First, *simple private spaces*: namely, private spaces typically for individual use, applying principally to private houses (e.g., detached houses). Second, *complex private spaces*: that is, private spaces whose use is conceded only to a specific group of people, usually an association or club—typical of various forms of "contractual communities,"[2] such as homeowners associations, cohousing complexes, housing cooperatives, proprietary com-

[2] "Contractual communities are territory-based organisational forms (i.e., tied to a specific tract of land) in which members join on the basis of a contract signed by all. More precisely, the contract establishes a set of commitments and rights for its members. Among those commitments is respect for the rules of cohabitation (rules governing the use of property and spaces, and conduct and general procedures pertaining to it), along with the obligation to pay some kind of monetary contribution to ensure the proper functioning of the contractual community. Among the rights entailed by the members is the availability of a package of services in return" (Brunetta and Moroni 2012, 9).

munities, etc. (what makes such cases "complex" as such is not simply the joint use of a given space by several individuals, but chiefly the fact that there is a private contract in force, a binding agreement endorsed explicitly by members, that establishes the entitlements and duties pertaining to the use of the space in question [Boudreax and Holcombe 1989; Brunetta and Moroni 2012]). Third, *privately owned collective spaces*: that is, private spaces accessible to the public, such as bars, restaurants, hotels, shopping centers and cinemas.

2.2. Types and Levels of Regulation

Types of regulation. Generally speaking, there are two types of restrictions relevant to the use of space. The first type consists in *restrictions of access*, that is, restrictions that apply before entering a place (i.e., a priori); in this case, access is denied to distinct categories of individuals on the basis of certain characteristics or intentions. The second type consists in *restrictions of conduct*, that is, restrictions applied after entering somewhere (i.e., a posteriori); in this case, specific rules of conduct are introduced to regulate users' behavior.

Levels of regulation. Both public actors and private actors may introduce rules of access and rules of conduct concerning the use of the spaces they own. The public actor can furthermore introduce metarules regarding the possible rules of access and rules of conduct that the private actor can put in place. In other words, both public and private actors can introduce rules concerning the use of the spaces they own (i.e., first-order rules), but the public actor can also introduce metarules (i.e., second-order rules) concerning the legitimate establishment of private rules.

3. The Thorny Issue of Pluralism in Private Spaces

Let us now look at what obligations and limits apply to the public actor in introducing metarules for the management of spaces under private ownership, and what rights and limits apply to the private actor for rules of access and conduct relative to privately owned spaces.[3] In this regard, the

[3] The complementary but different problem of the regulation of *public spaces* has already received wide attention. Normally, only those activities that generate significant negative consequences are excluded. The problem in this case is how to decide which consequences are negative ones. For interesting discussions, see, for example: Ellickson 1996; Mitchell 1997, 2003; Baron 2006; Laurenson and Collins 2007; Blomley 2009.

kind of spaces that raise most problems are those we have termed *complex private spaces* (§ 3.1) and *privately owned collective spaces* (§ 3.2). *Simple private spaces* do not usually raise any significant issues because a wide range of access and conduct restrictions are generally permitted: "One's home allows an individual to have an unregulated forum for free expression and self-realization.… The home [is] a precious sanctuary of individual liberty and self-expression" (Fleming 2006, 600–601).

3.1. Complex Private Spaces

Here the issue of pluralism is a difficult one. This kind of space is sometimes likened to public space, particularly when it covers a large tract of land—as occurs with certain kinds of large homeowners associations[4]—yet it nevertheless remains privately owned space. Does this mean that the range of freedom in introducing rules is like that in simple private spaces? Applying the preceding categories, we turn to two issues: *rules of access* (§ 3.1.1); and *rules of conduct* (§ 3.1.2).

3.1.1. Rules of Access

Here we will first take account of the problems related to the rules of admission concerning access to contractual communities for permanent residents—for example, through the purchase of a house in a homeowners association. Considering the issue of rules of access, we are immediately faced with the question of whether a homeowners association, for instance, can choose its members on the basis of skin color or of religion in the same way as when we decide who can live with us in our homes. In essence, homeowners associations are residential spaces owned privately. The right of exclusion is intrinsic to the notion of private property. Yet the rule is generally that homeowners associations *cannot* apply restrictions to access on the basis of race, color or religion. In the United States, court rulings and laws have endorsed this position (beginning with the seminal Supreme Court case *Shelley v. Kraemer*, 1948; see Siegel 1998).

Nevertheless, it is not always easy to determine when some form of discrimination has occurred. Should we accept the selection of those eligible for access on the basis of *other* criteria (other than race, color or religion)? For instance, cohousing is based on so called "elective

[4] Some private communities in the United States number over 50,000 inhabitants (Brunetta and Moroni 2012).

neighbourliness,"[5] that is, on the basis of empathic affinities.[6] Similarly, retirement communities in the United States apply an age threshold for admission (a retirement community is a particular form of contractual residential community devised for elderly people[7]). These restrictions are of a different type: should they be allowed?

It should be pointed out that homeowners associations wishing to screen applicants on the basis of religion, skin color or race, can do so without explicitly stating their selection criteria in their community charter. Screening occurs indirectly in some instances: for example, on the basis of services existing in a given community (Strahilevitz 2006),[8] as in the case of the Ave Maria community in Florida founded for the purpose of establishing an all-Catholic residential community. Although the criteria were not explicitly stated, the place, organization and services were exclusively intended for radical Catholics (Reilly 2005). For example, Catholic symbols are displayed in many civic spaces, newsagents cannot sell pornographic literature, and the sale of contraceptives is banned throughout the township (Bollinger 2009).

Another element worth noting is that admission criteria are typical of many types of clubs and associations oriented to particular types of social groups (e.g., Boy Scouts, the Rotary Club, etc.). The admission criteria applied by many such clubs would be considered discriminatory if applied by a homeowners association. One example is provided by *Boy Scouts of America v. Dale* (2000) in which the US Supreme Court recognized the right of an association to choose its members on the basis of its values and its charter, appealing to the so-called "freedom of expressive association" for legitimacy.[9] The case in question involved the expulsion of an assistant scoutmaster due to his homosexuality. *Boy Scouts of America v. Dale*,

[5] On cohousing, see Fenster 1999; Williams 2005; McCamant et al. 2011; Chiodelli and Baglione 2014.

[6] Consider also what happens with residential cooperatives (Maldonado and Rose 1996).

[7] The access criteria vary from community to community—some have fixed-admission thresholds for both spouses, others for only one of the spouses, some ban children as permanent residents, etc. On retirement communities, see: McHugh et al. 2002; Lucas 2004; McHugh and Larson-Keagy 2005; McHugh 2007).

[8] In this respect, Strahilevitz (2006, 454) introduces the idea of *exclusionary club goods*. An exclusionary club good is "a collective good that is paid for by all members of a club, at least in part because willingness to pay for the good in question functions as an effective proxy for other desired membership characteristics."

[9] According to the US Supreme Court, the freedom of expressive association is not limited to associations formed specifically to express a particular message or viewpoint. On the contrary, it is extended to any association simply engaged in expressive activity.

shows how the right to associate for political expression "can require a right to exclude" (Rahe 2002, 546). In practice, this emerges as a sort of "right to discriminate."

Regardless of considerations concerning the content of the Supreme Court's ruling, one may ask in formal and logical terms: should such a "right to discriminate" be applicable by homeowners associations, too? Consider again the case of the Ave Maria community: it is easy to argue that its purpose too is to uphold certain specific (Catholic) values. The presence of an atheist or gay member would be contrary to the foundation's basic message. Does it follow, then, that the Ave Maria community—and others like it—should be allowed to choose their residents on the basis of religion or sexual preference?

As affirmed by Rubenfeld (2002, 1161),

> the truth is that virtually every antidiscrimination law could be found to violate the "freedom of expressive association" just as the "liberty of contract" could be found to be transgressed by virtually every commercial and labor law. This is because antidiscrimination laws are nothing other than laws regulating association, and virtually every association engages in some form of expression, whether it be public or private.[10]

Thus far, we have pondered the question of the access of a fixed member of a residential contractual community. Problems somewhat similar also crop up in the case of occasional access for nonmembers. The question is whether a contractual community can decide on nonmember access in the same way as we decide who can or cannot enter our homes. Sometimes homeowners associations are considered different from single homes in this respect, for instance, as regards the free access of nonmembers to the community's streets. In other words, the problem is sometimes posited differently according to whether it involves a single dwelling (e.g., a detached house) or a number of dwellings united in a homeowners association. But how can we justify this difference?

3.1.2. Rules of Conduct

Other problems concern the rules of conduct introduced by a homeowners association, an issue that has provoked much controversy. Such guidelines involve the lifestyles and behavior of the community's residents. Upon the purchase of his/her unit, the new owner automatically becomes a member of the residential association. The problem of the legitimacy of imposed

[10] On this topic, see also Rubenfeld 2000.

rules varies according to whether such rules are explicitly included in the *declaration of covenants, conditions and restrictions* or in the regulations imposed by the board of the residential association.

Restrictions contained in the declaration: scope and limits of the original contract. From a purely "contractual/consent" point of view the question is fairly simple. The contract that entails the acceptance of the *declaration* is voluntarily signed by the owners, and accordingly the restrictions contained therein are largely legitimate even if they curtail certain individual rights such as free speech. As Ellickson (1982, 1528) observes, the original membership in a homeowners association is more voluntary than the original membership in a city; therefore, an association's (private) constitutive contract should be allowed to include certain substantive restrictions usually not allowed in a city charter.[11] Inasmuch as it is an explicit contract, knowingly and voluntarily entered upon, one can reasonably hold that the *declaration* must be honored by all residents—and actually the US courts tend to ensure that the obligations contained in the *declaration* are respected.

This position has, however, come under fire. A first kind of criticism—which we might say has an "internal" nature—highlights that some circumstances might challenge the cogency and legitimacy of the obligations contained in the *declaration*; for example: first, a lack of completely consensual consent (the purchaser may not have entirely understood the organizational aspects of the residential association); second, a lack of good faith (the vendor may have deliberately withheld information); third, a lack of real alternatives (in certain areas, houses may have only been available in homeowners associations) (Frug 1982; Alexander 1988, 1989, 1999; Brower 1992; Fleming 2006).

Another kind of criticism—which we might call "external"—indicates that not all the obligations contained in the *declaration* are to be considered absolute: in the bargaining process, real estate vendors and purchasers, landlords and tenants, "have the right to demand various things from each other; however, the framework of a free and democratic society requires some demands to be taken off the table. Some demands are out of line" (Singer

[11] Referring to the United States, Ellickson (1982, 1528) presents this example: "If a group of orthodox Jews set up a condominium and stipulated by original covenant that males were required to wear yarmulkes in common areas on holy days, a court should enforce that original covenant in deference to the unanimous wishes of the original members. An identical 'public' regulation would, of course, violate the first amendment's ban on establishment of religion, and perhaps a number of other constitutional guarantees."

2008, 153–54). Instead of assuming that all rules limit freedom, we should recognize that contracts must be subject to regulations that set minimum standards: "Law shapes social relations, and to avoid unjust and oppressive power relationships, it must rule certain kinds of contractual arrangements as out of bounds" (ibid., 156). For instance, in the United States, the Freedom to Display the American Flag Act (2005) forbade contractual communities from banning the display of the American flag.

While all these criticisms are relevant (and might suggest the possibility of certain limits on contractual freedom, or, at any event, some margin for the judicial revision of contracts), they do not cancel the fact that the very existence of a unanimous contract is an ineliminable difference between cities and homeowners associations. Cities have involuntary members when they are first formed—members who did not sign any kind of contract; by contrast, membership in a residential contractual community derives from a signed contract (Ellickson 1982; Foldvary 1994; Epstein 1997). This factor inevitably leads to certain differences.

Restrictions made by the board of the homeowners association: scope and limits of majoritarian procedures. Further problems arise regarding decisions later made by the homeowners association's board, that is, the elective management body. Owners are under an obligation to abide by the decisions made by the board since the purchase agreement includes membership in the residential association and the obligation to respect the board's decisions. In this respect, the homeowners association functions like a private government. All the owners are part of it and may stand for election to the board. The board decides, for example, on the use of collective spaces, on certain activities conducted in private spaces, and on the buildings' architectural features.

According to some authors, this does not mean that *every* decision of the board is automatically legitimate. The right to a majority decision must be safeguarded, as presupposed by the existence of the contractual community's self-governance. However, some authors deem it reasonable to envisage certain forms of protection for owners who find themselves in the minority opposed to the board's decisions. As Sterk (1997, 341) observes: In every situation in which majority rule is the main procedure for decision making, societies have introduced specific legal constraints to protect minorities; it would be surprising if homeowners associations, which are a case of residential private government, were the only exception. Some scholars believe that this precaution has today become more necessary in light of greater discretional powers given to boards (French 1992)—owing to the fact that the norms laid down in the *declaration* are

unlikely to encompass all the complex situations that may arise in the course of a contractual community's existence (Sterk 1997).

Complex issues emerge particularly when the situation involves certain basic rights—which in some countries, such as the United States, are recognized as constitutional rights—that are held to ensure pluralism. Take the display of political signs (billboards, etc.) on private property, for instance, on the front lawn of a freestanding house. Can, in these cases, the contractual community boards forbid such displays (as they have occasionally done)? (Fleming 2006).

Some writers maintain that restrictions on the board's power are justified by a peculiarity of homeowners associations. One mechanism in favor of disgruntled minorities within the community is the "exit" option: whoever does not accept the decisions taken and the rules imposed may leave the association. Alas, the cost of leaving the homeowners association is very high. Quitting a homeowners association is not like leaving a chess club. The economic costs are steep (given that for many a home is one of their most significant investments), but so are the functional and emotional ones. As Alexander writes: in certain cases

> it is insufficient merely to provide a legal permission to exit. For exit from a group might be very costly. One might have to forfeit property. One might have to move. One might need to acquire information about available alternatives to one's current way of life, and what sacrifices one would have to make to choose them. (If, for example, all land belonged to gated communities of different flavors, exiting one would require joining another). (2002, 627–28; see also Sterk 1997)

In the end, both at the level of the *declaration* and at the level of the boards' decision, the cited problems allude to an issue of greater scope: can certain fundamental (constitutional) rights like freedom of speech be upheld within a homeowners association? Certain fundamental, constitutional rights obtain—for instance, in the United States—for public spaces and for public activities. An extension of this principle both totally and unconditionally to every kind of activity and space, in particular the private ones, seems neither feasible nor advisable.[12] Such an extension would effectively annul the

[12] In the United States over the last few decades many court rulings have covered this issue (Kennedy 1995; Rishikof and Wohl 1996; Siegel 1998; Chadderdon 2006; Bollinger 2009). In some specific cases, certain (constitutional) rights were extended to residential contractual communities. This happened when the Supreme Court introduced the "functional equivalence" principle, or recognized the existence of a "symbiotic relation" (a sufficiently close nexus between public authorities and private activities). In the former case (see *Marsh v. Alabama*, 1946) a private residential place—namely, the company town of

distinction between public and private actors (Epstein 1997; Rahe 2002). At the same time, however, certain rights (e.g., freedom to express one's political or religious views) seem so crucial as to require safeguarding even within homeowners associations (Fleming 2006).

3.2. Privately Owned Collective Spaces

Another difficult case is raised by privately owned collective spaces which, although privately owned, nevertheless provide an acknowledged service to many people. Here too we divide our discussion into *rules of access* (§ 3.2.1) and *rules of conduct* (§ 3.2.2). We focus particularly on shopping malls, because here certain problems arise in the most manifest and disruptive way.[13]

3.2.1. Rules of Access

A first question concerns control over the individual lease agreements within the mall (Staeheli and Mitchell 2006). The first type of access under supervision therefore concerns the kind of functions or institutions that

Chickasaw, Alabama, owned and operated by the Gulf Shipbuilding Corporation—was declared equivalent to a public municipality; the right of free expression was upheld there, too. (The case originated when Grace Marsh was convicted of criminal trespass for distributing religious literature on the street of Chickasaw.) In the latter case (see *Burton v. Wilmington Parking Authority*, 1961) it was decided to extend (constitutional) rights also to those private activities whose function depended on direct involvement of the public authorities. (The case arose when an African American patron was excluded from a restaurant on the basis of race. The crucial point of the Supreme Court's decision was that the restaurant leased the premises from an agency of the state, the Wilmington Parking Authority). For the symbiotic relationship theory, see also *Jackson v. Metropolitan Edison Co*., 1974. For some scholars, these two cases should not be extended to residential contractual communities in general, and are instead (rare) exceptions (see Fleming 2006; Bollinger 2009). As regards *Marsh*, the Supreme Court stated that Chickasaw possessed all the characteristics of an American town: "[T]his language set the bar very high for courts to find that a private entity assumed all ... of the traditional public functions in a given locality to merit a finding of state action" (Fleming 2006, 590). Only very few (large) homeowners associations possess *all* the characteristics of a traditional town. And as regards *Burton*, the problem is that there are many cases (e.g., homeowners associations) where there is no direct involvement or partnership with public actors. (Subsequently, these issues were dealt with by the upper courts of the individual states in the United States and generated a great deal of debate: see, for example, the decision of the New Jersey Supreme Court in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*, 2007; for more on this, see Franzese and Siegel 2008).

[13] Similar problems arise for private university campuses and office complexes.

are accorded access: in a word, malls select their tenants. But this issue is less problematic from our perspective, so we focus on the more complex set of problems regarding the limitations on patrons accessing the mall (the users and consumers).

Shopping malls and similar places usually apply no explicit restrictions of access to specific categories of the public.[14] In some cases (such as in the United States), however, restrictions have been established. According to Staeheli and Mitchell (2006, 986), shopping centers try to limit access in order to attract a specific kind of public, namely a consuming public; in this sense, the spaces of the mall are cleansed of those individuals whom the "legitimate" public finds worrying or offensive. And they observe: Mall owners usually argue that they have the right to exclude certain individuals from their shopping centers. They refer to the fact that the mall is private property and claim that forcing them to allow everyone to enter would be a "tacking" of their rights (ibid., 985).

Should a collective private place impose any form of restriction to access on the basis of race, color, or religion, it would likely find itself facing opposition for discrimination. Nevertheless, in other cases, it is not easy to draw a clear line between acceptable and inacceptable discrimination. Is it acceptable, for instance, to bar someone from a shopping center according to how he/she is dressed? (Banning according to dress is common in most discotheques, which, like shopping malls, are private spaces for collective use which draw large numbers of people for consumption and socialization.) Is it correct to bar certain categories of people from shopping centers because they "disturb" the shopping "atmosphere," for example, beggars? And what about the limits sometimes imposed on the ways and times that teenagers and young people can enter the mall (Freeman 1998)?

In conclusion, the problem here concerns the basic criteria for establishing which types of access can legitimately be restricted, and the reasoning that governs whether there should be distinctions between spaces of the same type (say, between a shopping mall, a discotheque, or a restaurant).

[14] Some commentators assert that exclusionary measures are mainly indirect and psychological (e.g., placement of malls in areas that can be accessed only by car, or the presence of private uniformed guards). See, for example, Goss 1993.

3.2.2. Rules of Conduct

Problems similar to those concerning access restriction attach to attempts to control conduct.[15] In particular, problems arise about freely expressing opinions in a shopping center or organizing an assembly, distributing political leaflets, seeking signatures for a petition, etc. Some of these activities are usually not allowed in malls. Mall owners rely on the status of the shopping center as private property to limit assembly and speech (Staeheli and Mitchell 2006, 988). The regulation of behaviors in the mall is justified on the basis of a responsibility of individuals in shopping centers not to disrupt other members of the public who are there for consumption (ibid., 987).

The issue is not trivial. For instance, in the United States the issue has been at stake for several decades (McPheron 1996; Sisk 2007; Weinberg 2009). The US Supreme Court has intervened on several rulings. Generally speaking, the Court recognized that there is no automatic constitutional right to free speech in a shopping mall (Sack 2005). As a result, malls may regulate the manners and times of political activities. Usually the only political events tolerated are those not interfering with the businesses in the mall. Such political activities are subject to regulation (such as confinement to specific areas).

It is interesting to note how the US Supreme Court (in *Amalgamated Food v. Logan Valley Plaza*, 1968) initially extended the right to free speech to malls on the basis of the concept of "functional equivalence" (originally formulated in 1946 in the *Marsh v. Alabama* case regarding a residential contractual community: see again, note 12). The Court found that shopping malls had become the "equivalents" of city centers, and that, given their role in the social life of the community, free speech had to be safeguarded in such places (Askin 1998).

It is obvious that shopping malls have become increasingly important focal points of social aggregation and socialization for ever larger swathes of the population (Crawford 1992; Perlette and Cowen 2011). However, shopping malls are *not* simply city centers: they remain privately owned spaces.[16] Not surprisingly, successive suits (e.g., *Lloyd v. Tanner*, 1972)

[15] Here we will focus on the rules that categorically prohibit (or oblige) certain forms of behavior, and not on the advice or recommendations that often appear, for example, in malls on signs and notices displayed on the premises (for this, see Williamson 2002).

[16] As Sisk (2007, 1190) writes: "Saying that a private shopping center constructed and operated for commercial profit on privately-owned property is the equivalent of a

challenged the use of the concept of "functional equivalence" in the case of shopping malls. In *Hudgens v. NLRB* (1976) the Supreme Court confirmed that *Amalgamated Food v. Logan Valley Plaza* had been overruled.[17]

The general issue regarding the use of private spaces for collective activities is as follows: to what extent can its right to govern use of a private space be removed from the owner without undermining the very concept of ownership? In the case of shopping centers, there is another more specific question: is it legitimate that sui generis rules be applied to malls that differ from those applied to other types of collective private spaces? It is generally accepted that in ordinary shops, bars and cinemas, certain activities (e.g., political activities) may be limited. So, are there sufficient grounds to distinguish these from malls, simply because they have become central places of social life of much of the public?

4. Conclusion: Two Perspectives

Although pluralism in cities is undeniably desirable (Sennett 1992; Florida 2005 and 2007), it is not always clear how it can be promoted. This holds in particular for private spaces, where it frequently conflicts with other values, particularly contractual freedom and the right of exclusion implicit in the concept of private property. Basically, two possible ethical

public commons or town square does not make it so." The fundamental difference is this: "the downtown main street, the town square, the municipal plaza, the public commons, etc. *are* public properties, owned by the government, paid for by the taxpayers, maintained by government employees, and formally dedicated by the community to public use." On the contrary, "the private shopping center is *none* of these things… The … shopping mall is operated by a private landowner engaged in commercial enterprise and dependent upon the patronage of costumers for its economic survival." Moreover, "private shopping centers do not exercise quintessentially sovereign powers, that is, they do not assume governmental authority over others" (ibid., 1192). And he concludes: "When we look beyond purported similarities in appearance between a shopping center and a town square to the most pertinent question of exercise of powers by a private landowner versus those of a municipality, the incomparability of the two becomes plain" (ibid., 1192).

[17] The individual states are entitled to impose more rigid legislation in this matter (see the US Supreme Court decision in *Pruneyard Shopping Center et al. v. Robins et al.*, 1980). The New Jersey Supreme Court, for instance, gave individuals the right to exercise free expression in large shopping centers, subject to reasonable conditions set by the shopping centers (*Coalition Against War in the Middle East v. J.M.B. Reality Corp*., 1994).

perspectives are available.[18] Here we consider two viewpoints that are versions of "liberalism" in the wider sense that recognize the centrality of the individual and the necessity of clearly identifying and delimiting the state's role and powers. (Obviously, outside of a liberal-democratic perspective many of the aforementioned problems can perhaps be resolved, but this occurs simply because many value conflicts at the core of our analysis go unnoticed.) The first perspective is an extreme version of "liberalism as neutrality" (§ 4.1) and the second one a particular form of "liberalism as pluralism" (§ 4.2).

4.1. First Perspective: Priority to Certain Forms of Freedom

If we assume that certain forms of freedom (in particular, contractual freedom and the right to exclude others from private property) are intrinsic and basic values, it is undesirable to limit them even when doing so would foster greater pluralism in certain (private) spaces.[19]

In this case, the right to exclude others is recognized as a fundamental aspect of property rights. It is the most important stick in the bundle of property rights.[20] Note that this position does not deny the value of pluralism as such, but simply assigns it second place after certain individual freedoms. This is the standpoint adopted by libertarians, for example. Libertarianism accepts in a radical way the notion of state "neutrality" toward conceptions of the good life. In this case the state is something like a minimal, neutral umbrella for different persons and incommensurable lifestyles. As Robert Nozick writes (1974, 312), the libertarian state is *a framework for utopias*, a place where individuals are free to voluntarily join together to realize their substantive idea of the good life, but where no one can impose his own utopian ideal.

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[18] It is important to underscore that these perspectives are *ethical*, not simply *legal* or *juridical*. While the latter point of view assumes certain constitutional principles and looks for the best interpretation or implementation of them, the former puts under scrutiny even (specific) constitutional values.

[19] "The logic of contract and exchange should not be suppressed or deflected by any claim of freedom of speech" (Epstein 1997, 52).

[20] "Indeed, it is difficult to conceive of any property as private if the right to exclude is rejected" (Epstein 1997, 22). "The institution of ownership gives people the right to exclude, not because they will invariably exercise it, but so that they can select those individuals to whom they will extend permission to enter their property. The right to exclude is good against the world, and permission then isolates those individuals who are entitled to use the property subject to whatever terms and conditions the owner chooses to impose" (ibid., 36). See also Rahe 2002.

From this perspective no particular problems arise regarding the different cases (e.g., individual vs. groups of houses joined in association; expressive associations vs. nonexpressive associations; residential complexes vs. commercial complexes; shopping malls vs. other types of private spaces). Contractual freedom and right of exclusion are always preeminent, *making all cases identical*—or at least ethically indistinguishable from this viewpoint.

This perspective is not without its problems. As Alexander (2002, 627) writes, liberalism as neutrality can be consistent with "everyone's living very illiberal lives" for individuals might choose communities in which association, speech, religion, etc., are regimented. As regards homeowners associations, consider also the paradox suggested by Brower (1992, 219): The autonomy of some individuals entails joining other like-minded individuals in homogeneous associations and these associations must suppress the individualism of its members to defend the particular nature of the association itself.

4.2. Second Perspective: The Priority of Pluralism

If, on the other hand, pluralism is considered to be an intrinsic and basic value, then it is possible to limit certain types of rights—especially contractual freedom and the right of exclusion from private property—in order to safeguard it. One might also see this position as defending the idea that the individual right to free speech and other similar rights have priority over contractual freedom and the right of exclusion implicit in the idea of private property. The point here is that "more speech is better" (Chemerinsky 1998). In this case, "the attempt to muddy the distinction … between the public sphere and private property essentially means curtailing rights to private property in favor of other rights such as free speech" (Rahe 2002, 527).

Note that this case does not necessarily deny the importance of freedom of contract and of private property. Rather, their value would no longer be seen as primary and absolute. This type of position is adopted, for instance, by those who defend the idea of tolerance (not as "neutrality" but) as "respect" or "recognition" (Galeotti 2002). It is generally in line with the perspective of "liberalism as cosmopolitism" (Waldron 1992) in which the liberal values pluralism, diversity and openness. In other words, this conception of liberalism admits to being itself a vision of the good, a specific way of life. On this view, a liberal society is one that provides its members with a large menu of ways of life from which to choose, and therefore has within it a plurality of thoughts, ideas, religions, associations, etc. (Alexander 2002, 630).

In this second case—in the attempt to control and partially limit freedom of contract and private property with the aim of fostering free speech and pluralism—various additional problems arise.[21] First, do we need to distinguish between a single house and a housing complex forming a residential contractual community? And should we treat them in a different way, introducing antidiscriminatory rules only for the latter, for example? And if so, how can this be done? The suggestion of a different *scale* or *size* seems somewhat lame as a criterion with which to work.[22] Second, should we make a distinction between "expressive associations" on the one hand, such as the Rotary Club, the Boy Scouts, etc., and "residential associations" on the other, such as various kinds of homeowners associations? And here again, should we treat them in different ways, with antidiscrimination rules only in the latter, while allowing discriminatory choices to remain in the former? Here too it is no easy matter to find a valid way to distinguish the two cases. Third, should we make a distinction between spaces devoted to a specific function such as homes, and spaces devoted to other functions such as shopping malls? If so, do we treat them differently in terms of antidiscrimination laws? Further, should we differentiate between collective private spaces, such as between a discotheque and a shopping mall? Should we apply different antidiscrimination rules here as well? Again it is hard to find a good way to distinguish different cases.

That said, just because it is not easy to establish such distinguishing criteria does not mean it is impossible, though the entire question is more complex than it is generally considered to be.

In conclusion, the purpose of this essay is not to take either of the directions mentioned or to propose a middle path[23] or a third alternative.[24]

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[21] If pluralism were the only value in question, the issue would be simpler, but if other albeit secondary values come into play then the problem arises of identifying distinct cases among them.

[22] As Epstein (1997, 51) writes: "When two or more individuals combine their rights, they do not gain any additional advantage over third persons, but, by the same token, their combined efforts should not subject them to any additional obligations either. The rights and duties of both A and B are, so to speak, conserved against the world."

[23] As regards homeowners associations, a middle-path position could defend the idea of including a "bill of rights" in the fundamental charter (see, for instance, French 1992). Another middle-path position could defend the idea that trust law can curb abusive homeowners association power (see, in particular, Reichman 1976): in other words, once the homeowners association is transformed, by analogy, into a "trust," the developer or the board becomes a "trustee"—the trustee is subject to a number of specific duties: the duty of loyalty, the duty of impartiality, the duty to provide reasonable care, etc.

The objective has been to show that the problem of pluralism becomes particularly complex, once the *spatial aspect* of various circumstances (Chiodelli and Moroni 2014), especially regarding *private space*, is taken into account.

As Reichman (1976, 306) writes: "The residential private government's main function of regulating essentially private matters would only be distorted by the introduction of public law restraints.... The power of the homeowners' association to control property-related matters in planned communities should be restrained only by the body of law responsible for its creation—private law."

[24] An alternative view could focus on the idea that certain rights (such as the right to free speech) are "systemic rights" (analogous terms include "collective rights," "social rights," "structural rights") and hence quite different from other more traditional individual rights. As systemic rights, certain rights need specific attention and defense. See, for instance, Fleming (2006), who writes: "An individual voter's ability to contribute to the marketplace of ideas, or her opportunity to be influenced by that very same marketplace, should not be stifled simply because she chooses to live in a community governed by a homeowners association. A voter's role in the proper functioning of our democratic system of government is equally important regardless of her home address" (ibid., 603). Another alternative approach could focus on an "institutional theory of rights." See, for instance, Hills 2003. Hills defends an "institutional theory of rights" as more attractive than the traditional "anticoercion theory of rights." In this perspective, "the purpose of rights is not to protect individuals from coercion but rather to ensure that individuals are coerced by the right sort of institution" (Hills 2003, 144). "Institutional theories define rights as rules that allocate preemptive jurisdiction to institutions ... based on that institution's likelihood of making decisions appropriate to the social sphere in which it operates" (ibid., 188).

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