5

Nonegalitarian Coercion

The previous chapter showed how laws that govern public property subject unhoused persons to two unique forms of double domination. First, others exert control over unhoused persons' opportunities to obey these laws. Second, people experiencing homelessness must make nonegalitarian trade-offs to comply with laws that regulate public property.

This chapter explains why unhoused persons suffer these forms of domination. It demonstrates why the State has more power to regulate and police unhoused persons compared to people with access to housing, which will be referred to as "nonegalitarian coercion."[1] This disparity exists because the State can more justifiably prohibit and police need-alleviating conduct that occurs on public property than on private property.[2]

Nonegalitarian coercion constitutes a form of domination that shapes how laws that govern public property operate differently for unhoused persons. For people with access to housing, these laws function more like typical crimes that proscribe positive acts and that limit freedom minimally. In contrast, for unhoused persons, laws that govern public property operate more like crimes of omission that impose affirmative duties to act and that restrict liberty significantly.[3] Unhoused persons have a positive duty to secure access to a private place to alleviate their needs lawfully.[4] They suffer domination because others exert control over whether they fulfil that duty and avoid coercion, and because they must make nonegalitarian trade-offs to obey the law.[5] This chapter's concluding parts elucidate why the State can more easily regulate and police unhoused persons than people with access to housing and explain why it constitutes a form of vertical domination.

[1] This argument was first advanced in Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 *Queen's LJ* 297 at 319–23.
[2] *Ibid.*
[3] *Ibid.* at 307–10.
[4] *Ibid.*
[5] *Ibid.* at 309–10.

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5.1 THE ROLE OF PUBLIC PROPERTY

Public property's role and the justifications for protecting it help explain why the State has more power to regulate and police unhoused persons compared to people with access to housing. Although there are many descriptions of "public property," this chapter adopts Michael Robertson's definition.[6] According to Robertson:

> Public property is a type of common property that is owned by the State, but to which the general public has a broad right of access. The strong right to exclude non-owners, which the State enjoys with respect to state property (private property owned by the State), does not exist with public property, although the State, as owner, can still make rules to manage the public access efficiently, equitably, and safely.[7]

Public property has two notable characteristics. First, individuals lack a private power to exclude others on public property.[8] Second, individuals have a general right of access to public property, subject to regulations that govern its use.[9] Jeremy Waldron observes that public property encompasses places that are "fairly accessible to everyone" and "where anyone may be," such as streets, sidewalks, parks, public squares, and beaches.[10] For public property to operate as a truly open-access space, all community members must be able to share its use.

Public property fulfils several fundamental roles within society. First, it serves an important communal and social function.[11] Public places such as parks, streets, and beaches allow for commerce, the free exchange of ideas, recreation, social gatherings, and relaxation.[12] Carol Rose explains that public property's value stems from the fact that each individual's presence can reinforce a sense of community, solidarity, and togetherness.[13] There is also a connection between the role of public property and the instilment of civic virtue.[14] Public property's communal nature incentivizes individuals to learn to live together despite their conflicting interests and expectations.[15]

[6] Michael Robertson, "Common Property *Redux*" (2016) 49:2 *UBC L Rev* 563 at 608.
[7] *Ibid.*
[8] *Ibid. See also* Crawford Brough MacPherson, "The Meaning of Property" in Crawford Brough MacPherson (ed.), *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) at 5.
[9] Sarah Hamill, "Private Rights to Public Property: The Evolution of Public Property in Canada" (2012) 58:2 *McGill LJ* 365 at 400–01.
[10] Robertson, "Common Property *Redux*" at 608. Quoted portions in Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991–92) 39 *UCLA L Rev* 295 at 298. The list of places that fall within the definition of public property are cited in Robertson, "Common Property *Redux*."
[11] Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property" (1986) 53:3 *U Chi L Rev* 711 at 777–78.
[12] *Ibid.* at 778–79.
[13] *Ibid.*
[14] Carol Rose, "Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age" (2003) 66 *L & Contemp Prob* 89 at 98–99.
[15] Rose, "The Comedy of the Commons" at 775–78.

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Second, public property furthers certain democratic values.[16] Free access to public property allows for organized demonstrations against the State and other entities, promotes freedom of speech, and fosters freedom of association.[17] The US and Canadian supreme courts have also recognized that public property advances these types of values that are important for a democracy.[18]

Third, public property safeguards liberty outside of one's home. It ensures that individuals can use open-access spaces without being subject to others' exclusionary power or agenda-setting authority.[19] Public property helps guarantee that persons can freely travel between locations and engage in certain conduct in the public sphere without the risk of interference by others.[20] Individuals would constantly be subject to others' power of exclusion if all land were privatized.[21] Rightsholders could refuse to let others pass through their land.[22] Without public property, individuals who attempt to leave their private property would face horizontal domination as they could constantly be excluded from others' land.[23] Public property thus promotes liberty in the public sphere because it neutralizes the horizontal domination that would exist if all land were privatized.[24]

5.2 JUSTIFICATIONS FOR REGULATING PUBLIC PROPERTY

5.2.1 *General Justifications for Regulating Public Property*

The open-access nature of areas such as parks, streets, public squares, and beaches generates certain risks related to public property's communal value. Individuals share similar goals and desires when using these spaces.[25] But they also have opposing expectations about how public property can and should be used.[26] Each

[16] *Ibid.* at 777–79; Anna di Robilant, "Common Ownership and Equality of Autonomy" (2012) 58 *McGill LJ* 263 at 274–75; Robert Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning" (1996) 105 *Yale LJ* 1165 at 1173; Margaret Kohn, *Brave New Neighbourhoods: The Privatization of Public Space* (New York: Routledge, 2004) at 2–3.

[17] Rose, "The Comedy of the Commons" at 778–79.

[18] In the United States, *see Hague* v. *Committee for Industrial Organization*, 307 US 496 (1939); *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 US 672 at 679 (1992); *Frisby* v. *Schultz*, 487 US 474 at 488–89 (1988); Stacey Schesser, "A New Domain for Public Speech: Opening Public Spaces Online" (2006) 94:6 *Cal L Rev* 1791 at 1807. In Canada, *see Committee for the Commonwealth of Canada* v. *Canada* [1991] 1 SCR 139 at 167–68; *Montréal (City)* v. *2952–1366 Québec Inc.*, 2005 SCC 62 at para. 68, cited in Sarah Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58 *McGill LJ* 365 at 395.

[19] MacPherson, "The Meaning of Property" at 5.

[20] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009) at 238–39, 255–56.

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid.*

[25] Skolnik, "How and Why" at 303.

[26] *Ibid.*

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person's rational attempt to derive the greatest benefit from public property can lead to collectively irrational outcomes; namely, the decline of public property's shared value for all.[27]

Garrett Hardin famously referred to this collective action problem as a "tragedy of the commons."[28] Hardin summarized: "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all."[29] Hardin argued that different forms of mutual coercion are necessary to prevent a tragedy of the commons.[30] These include a private property scheme, taxation, and laws that govern public property.[31] These forms of mutual coercion help prevent congestion, overexploitation, rivalry between users, and usages of public property that decrease its shared value or limit others' liberty to use these spaces on equal terms.[32]

Some contend that the State must regulate public property to prevent a tragedy of the urban commons.[33] Robert Ellickson and Robert Teir argue that laws that govern public property promote individual freedom because they allow people with opposing expectations to use public space on equal terms.[34] They suggest that when the State does not enforce such laws, public property's value will decline, which discourages individuals from using it.[35]

Sheila Foster contends that a tragedy of the urban commons can occur from regulatory slippage.[36] The term "regulatory slippage" implies that local governments underenforce laws that regulate public property, or increasingly tolerate acts that undermine its collective value.[37] Lax enforcement standards can lead to public property's congestion and overexploitation.[38] Congestion and overexploitation can

[27] *Ibid.* at 304; Elinor Ostrom, *Governing the Commons* (Cambridge University Press, 1990) at 5. Ostrom's original quote is: "individually rational strategies lead to collectively irrational outcomes" (*ibid.*).

[28] Skolnik, "How and Why" at 304; Garrett Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243 at 1244.

[29] Hardin, "The Tragedy of the Commons" at 1244.

[30] *Ibid.* at 1247–48.

[31] *Ibid.* at 1247.

[32] Sheila Foster and Christian Iaione, "The City as a Commons" (2016) 34:2 *Yale L & Pol'y Rev* 281 at 288; Brett Frischmann, "An Economic Theory of Infrastructure and Commons Management" (2005) 89:4 *Minn L Rev* 917 at 984.

[33] Sheila Foster, "Urban Informality as a Commons Dilemma" (2009) 40:2 *U Miami Inter-Am L Rev* 261 at 267–71.

[34] Ellickson, "Controlling Chronic Misconduct" at 1174; Robert Teir, "Restoring Order in Urban Public Spaces" (1997–98) 2 *Tex Rev L & Pol* 255 at 288–89.

[35] Ellickson, "Controlling Chronic Misconduct" at 1174.

[36] Sheila Foster, "Collective Action and the Urban Commons" (2011) 87:1 *Notre Dame L Rev* 57 at 59–61. *See also* Abraham Bell and Gideon Parchomovsky, "Of Property and Antiproperty" (2003) 102:1 *Mich L Rev* 1 at 8–9; Lee Anne Fennell, "Agglomerama" (2014) 2014:6 *BYU L Rev* 1373 at 1380–81.

[37] Foster, "Collective Action and the Urban Commons" at 67; Foster and Iaione, "The City as a Commons" at 298–99.

[38] Foster and Iaione, "The City as a Commons" at 298–99.

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produce rivalry between users, and may lead some persons to avoid public property.[39]

Similarly, George Kelling and Catherine Coles posit that underenforcement can result in a tragedy of the urban commons.[40] In their view, enforcement failure leads to a rise of suboptimal norms on public property that prevent or discourage others from using it.[41] A tragedy of the commons occurs when underenforcement allows suboptimal norms to displace optimal ones, such that public property's shared value declines.[42]

5.2.2 *Specific Justifications for Regulating Public Property*

These accounts highlight that public property's shared value will deteriorate when "anything goes" in these spaces.[43] These same accounts illustrate how the State must regulate public property to safeguard its collective worth and ensure that all persons can enjoy its use on equal terms. Canadian and US courts have decided that the State (including local governments) can justifiably regulate public property for these reasons.[44] Judicial decisions affirm that there are several justifications for laws that govern public property.

First, courts acknowledge that the State can regulate public property to promote sanitation and safety.[45] For example, in *Abbotsford (City)* v. *Shantz*, the British Columbia (BC) Supreme Court recognized that a homeless encampment created certain public health and safety risks due to violence and the accumulation of garbage and human waste.[46] In the Supreme Court of California decision

[39] *See, e.g.*, Foster, "Collective Action and the Urban Commons" at 68; Teir, "Restoring Order in Urban Public Spaces" at 274 (describing how some individuals avoided Thompkins Square Park when there was a tent encampment).

[40] George Kelling and Catherine Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Touchstone, 1996) at 19–22.

[41] *Ibid.*

[42] *Ibid.*

[43] Rose, "Romans, Roads, and Romantic Creators" at 99.

[44] Andrew Liese, "We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law" (2006) 59:4 *Vand L Rev* 1413 at 1421; Maria Foscarinis, Kelly Cunningham-Bowers, and Kristen Brown, "Out of Sight – Out of Mind: The Continuing Trend toward the Criminalization of Homelessness" (1999) 6:2 *Geo J Poverty L & Pol'y* 145 at 152–56.

[45] *See, e.g.*, *Davison* v. *City of Tucson*, 924 F Supp 989 at 991 (D Ariz 1996); *Aitken* v. *City of Aberdeen* (WD Wash 2019); *Sanchez* v. *City of Fresno*, 914 F Supp (2d) 1079 at 1113 (ED Cal 2012); Nicholas May, "Fourth Amendment Challenges to Camping Ordinances: The Government Acquiescence Doctrine as a Legal Strategy to Force Legislative Solutions to Homelessness" (2008) 8:1 *Conn Pub Int LJ* 113 at 115.

[46] *Abbotsford (City)* v. *Shantz*, 2015 BCSC 1909 at paras. 19, 274. On sanitation problems in certain homeless encampments, *see, e.g.*, Alene Tchekmedyian, "Blaze at Homeless Encampment in San Diego County May Have Exposed Firefighters to Hepatitis A," LA Times (September 25, 2017), www.latimes.com/local/lanow/la-me-ln-hepatitis-firefighters-20170925-story.html [perma.cc/Q9RZ-TG5G]; Lizzie Johnson, "Complaints of Syringes and Feces Rise Dramatically in SF," SF Gate (November 2, 2016), www.sfgate.com/bayarea/article/Complaints-of-syringes-human-waste-rise-10459969.php [perma.cc/F99J-QSRN].

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Tobe v. *City of Santa Ana*, the court observed that the city could prohibit camping on public property to promote sanitation and public health.[47] The court explained: "Adoption of the ordinance was clearly within the police power of the city, which may 'make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws'."[48] Other US courts agree on these points.[49]

Second, courts acknowledge that cities can regulate public property to protect its aesthetic quality, foster its attractiveness, and promote the city's economic vitality.[50] In the *Adams* decision, the BC Court of Appeal concluded that the city can prohibit camping on public property to maintain "the environmental, recreational and social benefits of urban parks" and protect "the economic viability of adjacent areas."[51] The Court remarked that the city of Victoria "bears the responsibility to the public to preserve public places for the use of all."[52] In the US Supreme Court decision *Clark* v. *CCNV*, the Court upheld the constitutionality of a federal law that banned camping in national parks not designated for that purpose for similar reasons.[53] The majority concluded that certain acts that occur on public property discourage others from using it.[54] In *Joyce* v. *City and County of San Francisco*, the court affirmed that the State can enact laws that protect public property to promote economic vitality.[55] In that case, the city estimated that homelessness resulted in an estimated loss of $173 million in sales.[56] The court recognized that the city had constitutional authority to regulate public property and to prohibit acts such as camping, urinating, and defecating.[57]

Third, the State can regulate public property to solve coordination problems and promote efficiency.[58] Courts uphold laws that prohibit individuals from obstructing streets and sidewalks so that pedestrians and goods can move efficiently between

47 *Tobe* v. *City of Santa Ana*, 9 Cal (4th) 1069 at 1109 (Sup Ct 1995).
48 *Ibid.*
49 *Joel* v. *City of Orlando*, 232 F (3d) 1353 at 1358–59 (11th Circ 2000); *Joyce* v. *City and County of San Francisco*, 846 F Supp 843 at 860 (ND Cal 1994).
50 *Joyce* v. *City and County of San Francisco*, 846 F Supp 843 at 860 (ND Cal 1994); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 US 789 at 805 (1984).
51 *Victoria (City)* v. *Adams*, 2009 BCCA 563 at paras. 119–21. The laws were ultimately struck down as unconstitutional due to overbreadth, but the justification for regulating public property was accepted in rejecting arbitrariness arguments.
52 *Ibid.* at para. 4.
53 *Clark* v. *Community for Creative Non-Violence*, 468 US 288 at 296 (1984).
54 *Ibid.*
55 *Joyce* v. *City and County of San Francisco*, 846 F Supp 843 at 846 (ND Cal 1994).
56 *Ibid.*
57 *Ibid.* at 860.
58 See Blomley's analysis in Nicholas Blomley, "How to Turn a Beggar into a Bus Stop: Law, Traffic and the 'Function of the Place'" (2007) 44 *Urb Stud* 1697 at 1700–02. On coordination problems, see Joseph Raz, "Justification and Authority" (1985) 14 *Phil & Pub Aff* 1 at 17.

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places.[59] These laws are also upheld because they minimize congestion and optimize the flow of traffic on public ways.[60]

5.3 NONEGALITARIAN COERCION

The State has more power to regulate and to police unhoused persons compared to people with access to housing. This disparity exists for the following reasons. The justifications for regulating need-alleviating conduct on public property either do not apply to private property or are outweighed by the protection of individual interests within the home.[61] Housing safeguards individuals against laws that regulate their most basic human acts.[62] People experiencing homelessness lack that protection. For this reason, the State has more power to regulate and police their basic human acts.

Nonegalitarian coercion is comprised of two components: nonegalitarian regulation and nonegalitarian enforcement. Nonegalitarian regulation refers to how the State can enact laws that govern unhoused persons disparately because they lack private property rights.[63] Nonegalitarian enforcement, on the other hand, implies that law enforcement has more power to police unhoused persons for that same reason.

5.4 NONEGALITARIAN REGULATION

5.4.1 *The State's Greater Capacity to Regulate Unhoused Persons*

Nonegalitarian regulation occurs because the same act affects interests differently when done on public property as opposed to private property. This distinction is exemplified by how the law prohibits some conduct in public spaces yet permits it in private.[64] Nearly every city prohibits defecation on public property yet allows individuals to defecate at home in their bathroom. The State forbids sexual activity on public property yet permits it on private

[59] Christine Bella and David Lopez, "Quality-of-life – At What Price? Constitutional Challenges to Laws Adversely Impacting the Homeless" (1994) 10 *J Civ R and Econ Dev* 89 at 111–12; *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 US 672 at 682–83 (1992); *Roulette* v. *City of Seattle*, 97 F (3d) 300 at 302 (9th Circ 1996); *Justin* v. *City of Los Angeles* (CD Cal 2000) 2000 WL 1808426. This last decision cited in Farida Ali, "Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California" (2014) 21:2 *Geo J Poverty L & Pol'y* 197 at 225.

[60] *One World One Family* v. *City and County of Honolulu*, 76 F (3d) 1009 at 1014 (9th Circ 1996); *White* v. *City of Laguna Beach*, 679 F Supp (2d) 1143 at 1152–54 (CD Cal 2010); *Roulette* v. *City of Seattle*, 97 F (3d) 300 at 308 (9th Circ 1996).

[61] Skolnik, "How and Why" at 319–23.

[62] *Ibid.*

[63] *Ibid.*

[64] Joel Feinberg, *Offense to Others* (Oxford University Press, 1985) at 39–40.

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property.[65] Many cities ban camping on public property, but individuals can lawfully erect tents in their living rooms.[66]

The State can justifiably prohibit certain acts that take place on public property to preserve its collective value and to safeguard liberty outside of one's home. In contrast, private property's role and value are different. Unlike public property, private property is not an open-access space. It does not allow for large-scale interaction between strangers with shared and conflicting interests.[67] Nor does private property aim to promote certain democratic, communal, and civic values that are integral to the open-access nature of public property.[68]

Private property fulfils a different role. By insulating individuals from public life and forced interactions with others, it protects interests such as liberty, autonomy, privacy, and personhood.[69] In many senses, private property is a refuge from public property and the public sphere. Public property and private property's distinct roles – and the different interests that they foster – explain why the State can justifiably prohibit certain acts on public property but not on private property.[70] There are three reasons for this.

First, certain justifications for prohibiting an act on public property cannot apply to private property.[71] The State regulates public property to solve coordination problems and increase the efficiency of public ways.[72] Such justifications underpin laws that prohibit individuals from sitting or camping on sidewalks.[73] These same justifications could not support a law that regulates how individuals sit or camp within their homes because it is not an open-access space that requires efficiency and cooperation between persons. Instead, rightsholders set the agenda of their private property and can exclude others from it. This preempts coordination problems and mitigates efficiency concerns that justify the prohibition of certain acts of public property.[74] These examples show how some justifications for proscribing a particular act on public property cannot be transposed to justify proscribing that same act on private property.[75]

Second, the justifications for prohibiting some act on public property diminish or disappear when that same act is done on private property.[76] The State can regulate sexual acts, defecation, and nudity on public property because it offends others and

[65] Richard Posner and Katharine Silbaugh, *A Guide to America's Sex Laws* (University of Chicago Press, 1996) at ch. 6.
[66] Skolnik, "How and Why" at 321.
[67] *Ibid.* at 320.
[68] *Ibid.* at 321.
[69] Margaret Jane Radin, "Property and Personhood" (1982) 34:5 *Stan L Rev* 957 at 968.
[70] Skolnik, "How and Why" at 320.
[71] *Ibid.* at 321.
[72] *Ibid.* at 322.
[73] See Section 5.2.2.
[74] Skolnik, "How and Why" at 321–22.
[75] *Ibid.* at 321.
[76] *Ibid.*

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breaches "norms about public behavior."[77] When individuals do these acts in a park, they may force unwilling observers to enter into their private domain.[78] However, these concerns largely disappear when individuals do these acts in the privacy of their homes.[79] The same is true for sanitation and public health justifications that underpin municipal ordinances. Cities prohibit public defecation.[80] Yet individuals can lawfully defecate in bathrooms within their homes – a private space that reduces sanitation concerns and mitigates public health risks. This explains why the State can justifiably prohibit public defecation and urination but can less justifiably proscribe these acts when they are done within one's home.

Two caveats are necessary here. First, to some extent, the State can justifiably regulate how people alleviate their needs within their homes. To ensure that dwellings are fit for habitation, the State can prohibit defecating and urinating in places within one's home that are not intended for that purpose.[81] The State can declare private property unfit for human habitation when it poses a significant health risk to the occupants or to others.[82] Second, the State may regulate or police certain forms of housing more than others. Public housing, for instance, may be subject to more invasive regulation and policing compared to private housing.[83] Furthermore, individuals may face more police scrutiny or enjoy less privacy in these spaces.[84] Leaving aside these circumstances, the justifications for prohibiting certain acts on public property tend to diminish or disappear when people do these same acts on private property.[85]

There is a third reason why the State can more justifiably regulate certain acts that occur on public property versus on private property. On public property, the State's interests may outweigh individual rights.[86] Yet on private property, the individual's

[77] *Ibid.*; Larry Alexander, "Harm, Offense, and Morality" (1994) 7:2 *Can JL & Jur* 199 at 211.

[78] Dennis Baker, *The Right Not to Be Criminalized: Demarcating Criminal Law's Authority* (London: Routledge, 2011) at 248. This sentence paraphrased from Baker, who explains: "Exhibitionism is a wrong not because of the natural content of the exhibit, but because *x*'s nudity forces *y* to enter *x*'s private domain . . . ."

[79] Skolnik, "How and Why" at 321.

[80] Donald Saelinger, "Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness" (2006) 13:3 *Geo J Poverty L & Pol'y* 545 at 551.

[81] Skolnik, "How and Why" at 321.

[82] *Ibid.*; *Mchanga* v. *Huang*, 2005 CanLII 2089 (QC CQ).

[83] Skolnik, "How and Why" at 321; Jeffrey Fagan, Garth Davies, and Adam Carlis, "Race and Selective Enforcement in Public Housing" (2012) 9:4 *J Empirical Leg Stud* 697 at 699–701.

[84] *See, e.g.*, William Stuntz, "Distribution of Fourth Amendment Privacy" (1999) 67:5 *Geo Wash L Rev* 1265 at 1270, 1272.

[85] Skolnik, "How and Why" at 321.

[86] *See, e.g.*, Charles Reich, "The New Property" (1964) 73:5 *Yale LJ* 733 at 771 (advancing a similar argument). Reich notes at 771: "Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done."

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rights tend to outweigh the State's interests.[87] There may be compelling justifications to prohibit and police some act on private property. However, the individual's fundamental interests in dignity, privacy, and liberty may take precedence over the State's interests in prohibiting some conduct that is done on private property.[88] Recall how private property rights strongly protect certain individual interests and confer one of the highest expectations of privacy.[89] If the State attempts to police how individuals alleviate their needs within their homes, the State will unjustifiably impact these interests. Private property rights limit the State's power to prohibit and police need-alleviating acts that are done within one's home.[90]

Nonegalitarian regulation constitutes a form of domination for various reasons. For one, the State enjoys a unilateral and largely uncontrolled power to enact laws that interfere with unhoused persons' most basic interests in ways that do not affect others. Furthermore, the nonegalitarian regulation of unhoused persons subjects them to the two types of domination discussed in the previous chapter: others' control over unhoused persons' law-abidingness and nonegalitarian trade-offs. And as discussed further in Section 5.5, nonegalitarian regulation results in disparate enforcement actions against unhoused persons that exemplify domination, and that can entrench individuals in the condition of homelessness.

5.4.2 *Privacy-Dependent Laws and Homelessness*

Nonegalitarian regulation shapes how laws that govern public property operate differently for unhoused persons. Many municipal ordinances operate like typical criminal law prohibitions for people with access to housing, but they impose the equivalent of affirmative duties to act on people experiencing homelessness.[91] Although unhoused persons have a positive duty to secure access to a private place to alleviate their needs, others exert control over whether unhoused persons can fulfil that duty – a form of domination introduced in the previous chapter.[92] In contrast, people with private property rights have free access to a default private place where they can engage in their most basic human acts. They generally do not have an affirmative duty to secure access to a private place where they can do these acts and obey laws that govern public property.[93] Instead, they must abstain from alleviating their needs in public property because they have free access to a lawful alternative.[94]

[87] *Ibid.*
[88] *Ibid.*
[89] *R* v. *Tessling*, 2004 SCC 67 at para. 22.
[90] Skolnik, "How and Why" at 322.
[91] *Ibid.* at 307–08.
[92] *Ibid.*
[93] *Ibid.*
[94] *Ibid.*; Jeremy Waldron, "Homelessness and Community" (2000) 50:4 *U Toronto LJ* 371 at 373–74 (discussing the complementarity principle, whereby laws that govern public property function differently for individuals who enjoy complementarity between public and private property).

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To illustrate this point, notice how some municipal ordinances operate differently than typical crimes. Laws that govern public property constitute privacy-dependent laws. The term "privacy-dependent law" implies that a statute proscribes a particular act on public property but permits that same act when it is done in private. Examples of privacy-dependent laws include statutes that prohibit urban camping, public urination, and loitering.

Privacy-dependent laws result in nonegalitarian regulation because they operate more like crimes of omission for unhoused persons and as crimes of commission for people with access to housing.[95] The distinction between these two categories of crimes is as follows. Crimes of commission are committed by positive acts.[96] The term "positive act" refers to actions, interventions, or affirmative conduct that worsens another's situation or sets back their interests.[97] The majority of crimes are crimes of commission. Typical examples include proscriptions against acts such as assault, theft, fraud, murder, arson, mischief, and so on. Individuals obey these laws when they abstain from the unlawful positive act.[98] Admittedly, it may be difficult for some people to refrain from certain conduct, especially where the conduct is compelled by addiction or irresistible impulses.[99] Most people, however, can abstain from committing the proscribed act to obey the law.

Laws that criminalize omissions are different. The term "omission" implies that an individual fails to fulfil an affirmative duty to act that is imposed by the law.[100] In the context of omissions liability, an individual is culpable because they failed to do a certain act that was required by law; their nonintervention is what makes their conduct morally blameworthy. Examples of affirmative duties to act include parents' positive obligations to feed and clothe their children, the affirmative duty to file a tax return, and the affirmative duty to stop at the scene of an accident that one causes.[101]

Crimes of omission tend to limit freedom more considerably than crimes of commission.[102] Crimes of omission require the individual to fulfil an affirmative

[95] On the distinction between crimes of commission versus crimes of omission, see Michael Corrado, "Is There an Act Requirement in the Criminal Law?" (1994) 142:5 *U Pa L Rev* 1529 at 1537.

[96] Andrew Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 *LQ Rev* 424 at 424; Andrew Ashworth and Eva Steiner, "Criminal Omissions and Public Duties: The French Experience" (1990) 10 *LS* 153 at 154.

[97] *See, e.g.*, Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999) at 53, 64.

[98] Randolph Clarke, *Omissions, Metaphysics, Agency, and Responsibility* (Oxford University Press, 2014) at 91–93; Graham Hughes, "Criminal Omissions" (1958) 67 *Yale LJ* 590 at 590.

[99] Deborah Denno, "Crime and Consciousness: Science and Involuntary Acts" (2002) 87 *Minn L Rev* 269 at 313; Stephen Garvey, "Dealing with Wayward Desire" (2009) 3 *Crim L & Phil* 1 at 1; Richard Boldt, "The Construction of Responsibility in the Criminal Law" (1992) 140 *U Pa L Rev* 2245 at 2248.

[100] Arthur Leavens, "A Causation Approach to Criminal Omissions" (1988) 76 *Cal L Rev* 546 at 547.

[101] Paul Robinson, "Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States" (1984) 29 *NY L Sch L Rev* 101 at 103.

[102] Ashworth, "The Scope of Criminal Liability for Omissions" at 427–28.

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duty to act but prohibit all other conduct, whereas crimes of commission proscribe a single act but permit the individual to engage in other actions.[103]

The combination of two factors explain why laws that regulate public property impose the equivalent of affirmative duties to act on unhoused persons but not on people with access to housing.[104] First, like in the context of omissions liability, individuals who must alleviate their needs cannot engage in alternate courses of action.[105] As part of the human experience, everyone must sleep, urinate, defecate, and so on.[106] When an individual must alleviate their needs as a matter of biological necessity – for instance, when they must sleep or defecate – they must do so to the exclusion of all other acts.

Second, since laws that regulate public property require individuals to alleviate their needs in private, individuals have a positive duty to secure access to a private space to obey these laws.[107] While the biological requirement to alleviate one's needs limits the range of alternate courses of action, the prohibition against alleviating one's needs on public property imposes a positive duty to secure access to a private space to comply with the law.[108]

Some privacy-dependent laws limit freedom more than others. Consider the difference between indecency laws that prohibit sexual activity on public property versus laws that proscribe sleeping or urination on public property. Indecency laws require individuals to engage in sexual activity in private. Since individuals retain the choice of whether to engage in sexual activity, they maintain the freedom to comply with indecency laws through abstention.

Statutes that proscribe sleeping or urinating on public property restrict liberty and free choice more severely. Unlike other criminal laws, a person's opportunity to obey privacy-dependent laws hinges on their opportunity to access a private space to alleviate their biologically necessary needs.[109] Since others exert control over unhoused persons' access to private property, others also exert control over whether they fulfil their positive duty to alleviate their needs in private and, ultimately, obey the law.[110]

In contrast, for people with access to housing, privacy-dependent laws function more like typical crimes of commission that proscribe positive acts. Although biological necessity requires people with access to housing to alleviate their needs to the exclusion of all other acts, they have free access to a default private place where they can shelter themselves, sleep, and urinate.[111] Access to housing helps

[103] *Ibid.*
[104] Skolnik, "How and Why" at 306–08.
[105] *Ibid.*
[106] *Ibid.*; Waldron, "Homelessness and the Issue of Freedom" at 321.
[107] Skolnik, "How and Why" at 306–08.
[108] *Ibid.*
[109] Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43 *Fordham Urb LJ* 741 at 746–50.
[110] Skolnik, "How and Why" at 306–08.
[111] Jeremy Waldron, "Property and Community: For Those Who Have Neither" (2009) 10:1 *Theor Inq L* 161 at 175–77.

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ensure that individuals are not constantly burdened with an affirmative duty to secure access to a private place to obey laws that govern public property. This explains why these laws subject unhoused persons to affirmative duties to act more frequently than people with access to housing.

To be clear, this does not mean that people with access to housing are never subject to the affirmative duty to act described above. Individuals who leave their homes must urinate, defecate, or rest, and they must still obtain permission to enter a private place to do so. Yet in comparison to unhoused persons, people with access to housing are imposed this duty far less regularly and consistently. This is especially true with respect to certain need-alleviating conduct that people with access to housing routinely do without having to secure access to a private space, such as sleeping and sheltering themselves.

Private property rights – and one's freedom to access private property – thus shape whether laws that govern public property operate more like crimes of omission versus crimes of commission. Access to housing influences whether laws that govern public property constantly subject individuals to affirmative duties to act, and whether others exert control over whether they fulfil that duty.

5.5 NONEGALITARIAN ENFORCEMENT

The second aspect of nonegalitarian coercion is nonegalitarian enforcement, meaning that officers have more discretionary power to police unhoused persons than people with access to housing – a form of vertical domination. Police discretion can result in domination for several reasons. Police discretion can be exercised arbitrarily and without adequate checks and balances.[112] Law enforcement interactions tend to be low-visibility, and many exercises of police discretion are never reviewed by courts.[113] Officers may also single out marginalized persons who lack sufficient political power, legal knowledge, or finances to contest such mistreatment.[114] There may be so many applicable laws that individuals will inevitably violate one of them, such that officers enjoy vast enforcement discretion.[115] Officers, in turn, enjoy the power to unilaterally interfere at will with individuals who break these laws. Officers may also abuse their authority and denigrate or humiliate members of the public.[116]

[112] Eric Miller, "Challenging Police Discretion" (2015) 58:2 *Howard LJ* 521 at 540.

[113] Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99:2 *Can Bar Rev* 429 at 435; Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process; Low-Visibility Decisions in the Administration of Justice" (1960) 69:4 *Yale LJ* 543 at 580–81.

[114] Josh Bowers, "Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a Pointless Indignity" (2014) 66:5 *Stan L Rev* 987 at 1038, fn. 261; Debra Livingston "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing" (1997) 97 *Colum L Rev* 551 at 592.

[115] Kim Forde-Mazrui, "Ruling Out the Rule of Law" (2007) 60 *Vand L Rev* 1495 at 1513–14.

[116] Vincent Chiao, "Discretion and Domination in Criminal Procedure: Reflections on Pettit" (2016) 15:1 *Pol, Phil & Econ* 92 at 105–06.

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Police discretion has various other characteristics that are associated with domination. Police officers and individuals are in an asymmetrical power dynamic vis-à-vis one another; a dynamic that is known to officers and individuals, and that shapes how law enforcement encounters unfold.[117] Furthermore, officers can exercise public powers that private individuals lack. The police have the power to issue fines, confiscate property, incarcerate persons, arrest people in contexts where individuals have no such authority, and charge persons with crimes and regulatory offenses.[118]

Nonegalitarian enforcement subjects people experiencing homelessness to vertical domination for three principal reasons. First, since unhoused persons must spend much of their time on public property where privacy-dependent laws are enforced, they are frequently subject to uncontrolled police discretion associated with these laws.[119] Without access to housing, unhoused persons are constantly at risk of violating laws that govern public property and facing coercion and punishment by the police.[120] People with access to housing, on the other hand, can freely alleviate their needs within their homes – the very spaces where privacy-dependent laws do not apply and are not enforced by the police.[121] Housing shields individuals against the discretionary enforcement of laws that govern public property.[122]

Second, unhoused persons are vulnerable to vertical domination because they lack physical and legal protection against police discretion. The police cannot freely access an individual's home because of the significant legal protections that private property rights afford against State intrusion.[123] Save for exigent circumstances, officers require warrants to enter someone's home or access its perimeter.[124] People experiencing homelessness lack this protection.[125] The police patrol public places, which is where unhoused persons tend to spend their time and alleviate their needs when they lack alternatives. As a result, people experiencing homelessness are vulnerable to disproportionate levels of surveillance, law enforcement encounters, and police discretion.[126]

[117] Ekow Yankah, "Pretext and Justification: Republicanism, Policing, and Race" (2019) 40 *Cardozo L Rev* 1543 at 1572–73, 1619–22.

[118] Malcolm Thorburn, "Policing and Public Office" (2020) 70:2 *U Toronto LJ* 248 at 248–49.

[119] Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2018) 35 *Windsor YB* Access Just 226 at 240; Marie-Eve Sylvestre, "Disorder and Public Spaces in Montreal: Repression (and Resistance) Through Law, Politics, and Police Discretion" (2010) 31:6 *Urb Geo* 803 at 819; Tony Sparks, "Broke Not Broken: Rights, Privacy, and Homelessness in Seattle" (2010) 31:6 *Urb Geo* 842 at 847–48.

[120] Skolnik, "Homelessness and the Impossibility to Obey the Law" at 745, 750, 786.

[121] Skolnik, "How and Why" at 322.

[122] Skolnik, "Freedom and Access to Housing" at 240.

[123] Benjamin Barros, "The Home as a Legal Concept" (2006) 46:2 *Santa Clara L Rev* 255 at 263–70.

[124] *Ibid.* at 267–68.

[125] Kevin Fitzpatrick and Brad Myrstol, "The Jailing of America's Homeless: Evaluating the Rabble Management Thesis" (2011) 57:2 *Crime & Delinquency* 271 at 275.

[126] Sylvestre, "Disorder and Public Spaces in Montreal" at 819.

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Third, police officers may exercise their discretion abusively and arbitrarily against unhoused persons. In survey studies, people experiencing homelessness report that they have been fined, arrested, or harassed by the police even though they did not violate any laws. For instance, in 2009, Bill O'Grady and colleagues conducted an empirical study comprised of survey questions and semi-structured interviews that involved 244 unhoused youth aged 16–24 in the city of Toronto.[127] One-third of the respondents who received a fine contended that they had committed no offense and that the sanction was unfair.[128] The National Law Center on Homelessness and Poverty conducted a similar survey that involved ninety unhoused adults in New York City.[129] Roughly 60 percent of the participants indicated that they experienced harassment by the police.[130] A 2014 survey study questioned 441 people experiencing homelessness in Colorado.[131] Approximately 76 percent of respondents indicated that they were harassed by the police despite having done nothing wrong.[132] Beyond harassment, citations, and arrests, many unhoused persons report that police officers confiscate or destroy their property without legal authorization or prior warning.[133] Certain judicial decisions support these findings.[134]

Furthermore, in certain studies, unhoused persons report that they were singled-out by the police because they were experiencing homelessness. In the Colorado study discussed above, nearly 86 percent of respondents stated that the police targeted them for that reason.[135] In O'Grady and colleagues' study of unhoused youth in Toronto, many respondents reported that they were fined for an offense that the police do not enforce against others, such as jaywalking.[136] A study conducted by

[127] Bill O'Grady, Stephen Gaetz, and Kristy Buccieri, "Policing Street Youth in Toronto" in Stephen Gaetz, Bill O'Grady, Kristy Buccieri et al. (eds.), *Youth Homelessness in Canada: Implications for Policy and Practice* (Toronto: Canadian Homeless Research Network, 2013) at 339–40; Bill O'Grady, Stephen Gaetz, and Kristy Buccieri, "Can I See Your ID? The Policing of Youth Homelessness in Toronto" (2011) Homeless Hub at 44, https://homelesshub.ca/sites/default/files/CanISeeYourID_nov9.pdf [perma.cc/2QWT-Q3S2].

[128] O'Grady, Gaetz, and Buccieri, "Policing Street Youth" at 345.

[129] National Law Center on Homelessness and Poverty, "Serving and Protecting? Survey Results on Homeless New Yorkers' Experience with Law Enforcement" (November 2018), https://homelesslaw.org/wp-content/uploads/2019/02/serveandprotect2018.pdf [perma.cc/M9BN-H7C8].

[130] *Ibid.* at 5.

[131] Tony Robinson and Allison Sickels, "No Right to Rest: Criminalizing Homelessness in Colorado" (April 2015) at 33, https://wp-cpr.s3.amazonaws.com/uploads/2019/06/homelessness-study.pdf [perma.cc/8T9E-AK5A].

[132] *Ibid.* at 9.

[133] *Ibid.* at 44; Coalition on Homelessness, "Punishing the Poorest: How the Criminalization of Homelessness. Perpetuates Poverty in San Francisco" (June 2015) at 2, www.cohsf.org/Punishing.pdf [perma.cc/NM26-9F68].

[134] *See, e.g.*, *Lehr* v. *City of Sacramento*, 624 F Supp (2d) 1218 (ED Cal 2009); *Lavan* v. *City of Los Angeles*, 797 F Supp (2d) 1005 (CD Cal 2011); *Sanchez* v. *City of Fresno*, 914 F Supp (2d) 1079 at 1111 (ED Cal 2012); *Pottinger* v. *City of Miami*, 810 F Supp 1551 at 1555–56 (SD Fla 1992); *Tobe* v. *City of Santa Ana*, 9 Cal (4th) 1069 at 1122 (Sup Ct 1995).

[135] Robinson and Sickels, "No Right to Rest" at 9.

[136] O'Grady, Gaetz, and Buccieri, "Policing Street Youth" at 345.

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the Quebec Human Rights Commission concluded that unhoused persons are socially profiled and frequently receive fines for committing offenses that were rarely enforced against others, such as lying across a park bench rather than sitting at it.[137] These examples illustrate how unhoused persons are vulnerable to the prospect of unilateral interference by the police, and to the nonegalitarian enforcement of laws that govern public property.

5.6 CONCLUSION

This chapter demonstrated why the State has more power to regulate and police unhoused persons compared to people with access to housing. It showed why the State can more justifiably regulate and control certain acts that occur on public property than on private property. It explained why unhoused persons experience two forms of nonegalitarian coercion that produce domination: nonegalitarian regulation and nonegalitarian enforcement. And it elucidated how nonegalitarian coercion constitutes a unique form of domination that affects people experiencing homelessness. More specifically, nonegalitarian coercion subjects unhoused persons' law abidingness to others' control, requires them to make nonegalitarian trade-offs to obey the law, and contributes to discriminatory policing practices. The next chapter explores the notion of punitive entrenchment. It elucidates how and why the State can entrench individuals in the condition of homelessness, such that they experience nonegalitarian coercion and its accompanying forms of domination.

[137] Commission des droits de la personne et des droits de la jeunesse (CDPDJ), "The Judiciarization of Homelessness in Montreal: A Case of Social Profiling" (November 6, 2009) at 3, www.cdpdj.qc.ca/storage/app/media/publications/Homeless_Summary.pdf [perma.cc/D5LN-VYVE]; Justin Douglas, "The Criminalization of Poverty: Montreal's Policy of Ticketing Homeless Youth for Municipal and Transportation By-Law Infractions" (2011) 16:1 *Appeal* 49 at 58.

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