

# DIY Urbanism: Property and Process in Grassroots City Building

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# **DIY URBANISM: PROPERTY AND PROCESS IN GRASSROOTS CITY BUILDING**

CELESTE PAGANO\*

*In recent years, a range of grassroots interventions have claimed and shaped the use of urban space. Community gardens, unsanctioned public art, temporary crosswalks, miniature lending libraries—these projects and more have been termed “guerilla urbanism,” “tactical urbanism,” or “insurgent uses of public space.” I choose the term “DIY” or “Do-It-Yourself” urbanism to describe these phenomena in order to emphasize their bottom-up and often ad hoc nature. Accomplishing a variety of aims and existing on a fluid spectrum of legality, DIY urbanist interventions share in common an orientation toward community engagement in changing the use of common urban space.*

*This Article is the first to examine the trend from a legal perspective. Because many DIY urbanist interventions are at least initially illegal, they raise thorny issues of law and legitimacy. This Article first situates DIY urbanism in the context of other contemporary trends in urban development, then tackles questions of legitimacy, legality, and democracy that these projects raise. DIY urbanist actions, even when illegal, strengthen civic values, enhance community, and may serve to remedy deficits in existing democratic processes. Ultimately, the acceptance of DIY urbanist actions into the mainstream canon of urban development tools reflects the inherent flexibility in property law and other legal regimes that have developed to protect the enduring values of community despite shifting societal circumstances.*

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## I. INTRODUCTION

In recent years, grassroots interventions have claimed and shaped the use of urban space. The diverse range of projects encompasses some that are large and ambitious: abandoned factories find new productivity as urban farms;<sup>1</sup> overlooked school buildings become community-sponsored libraries;<sup>2</sup> art spaces fill abandoned storefronts that would otherwise stand vacant;<sup>3</sup> even temporary “town halls” pop up on vacant lots.<sup>4</sup> Smaller projects also abound: guerilla gardens bloom on formerly blighted median strips;<sup>5</sup> miniature lending libraries offer books from unused phone booths;<sup>6</sup> skate parks take form under freeway overpasses;<sup>7</sup> parking spaces become temporary urban parks;<sup>8</sup> informal seating arrangements offer respite to passersby;<sup>9</sup> temporary bike lanes materialize on pavement.<sup>10</sup>

These projects and others like them are loosely linked under a variety of titles, including “DIY [u]rbanism,”<sup>11</sup> “tactical urbanism,”<sup>12</sup>

1. Emma Mustich, *Visions of Post-Industrial Milwaukee*, SALON (Jan. 7, 2012, 11:00 AM), [http://www.salon.com/2012/01/07/visions\\_of\\_post\\_industrial\\_milwaukee/](http://www.salon.com/2012/01/07/visions_of_post_industrial_milwaukee/).

2. Naomi Nix & Peter Nickeas, *Near West Side School Field House Torn Down Despite Community Protests*, CHI. TRIB. (Aug. 17, 2013), [http://articles.chicagotribune.com/2013-08-17/news/chi-whittier-school-chicago-fieldhouse-protest\\_1-whittier-elementary-school-gema-gaete-field-house](http://articles.chicagotribune.com/2013-08-17/news/chi-whittier-school-chicago-fieldhouse-protest_1-whittier-elementary-school-gema-gaete-field-house).

3. Diane Cardwell, *Luring Artists to Lend Life to Empty Storefronts*, N.Y. TIMES, Oct. 13, 2009, at A24.

4. MIKE LYDON, 2 TACTICAL URBANISM: SHORT-TERM ACTION, LONG-TERM CHANGE 29 (2012), available at [http://issuu.com/streetplanscollaborative/docs/tactical\\_urbanism\\_vol\\_2\\_final](http://issuu.com/streetplanscollaborative/docs/tactical_urbanism_vol_2_final).

5. *Id.* at 16. Guerilla gardening is gardening activity on any land that users have appropriated for that purpose without legal possession or license. *Id.*

6. *See id.* at 46.

7. Nate Berg, *The Rise and Fall of Oakland's Bordertown Skate Park*, ATLANTIC CITIES (Sept. 19, 2011), <http://www.theatlanticcities.com/arts-and-lifestyle/2011/09/skate-park-oakland/128/>.

8. Blaine Merker, *Taking Place: Rebar's Absurd Tactics in Generous Urbanism*, in INSURGENT PUBLIC SPACE: GUERRILLA URBANISM AND THE REMAKING OF CONTEMPORARY CITIES 45, 45–46 (Jeffrey Hou ed., 2010).

9. Sarah Goodyear, *An Ode to New York's Glorious DIY Sidewalk Seating Culture*, ATLANTIC CITIES (Feb. 28, 2013), <http://www.theatlanticcities.com/neighborhoods/2013/02/ode-new-yorks-glorious-diy-sidewalk-seating-culture/4817/> [hereinafter *Sidewalk Seating*].

10. *How to Build a Better Block*, THE BETTER BLOCK, <http://betterblock.org/how-to-build-a-better-block/> (last visited Oct. 24, 2013) [hereinafter *Better Block*].

11. Joni Taylor, *DIY Urbanism: Themes*, D.I.Y URBANISM (Feb. 17, 2010, 4:17 AM), <http://diyurbanism.blogspot.com/2010/02/themes-it-is-much-quoted-fact-that-by.html>.

12. LYDON, *supra* note 4, at 1.

“guerilla urbanism,”<sup>13</sup> “user-generated urbanism,”<sup>14</sup> “insurgent urbanism,”<sup>15</sup> “pop-up urbanism,”<sup>16</sup> and “insurgent [use of] public space.”<sup>17</sup>

Purely expressive motives underlie some of these interventions, such as art installations that invite commentary about the urban spaces they inhabit. Other actions have chiefly utilitarian goals, such as growing food to meet community needs. Though their goals may differ, these interventions all share two features. First, they use or appropriate urban space for common, as opposed to private, use. Thus, in contrast to squatters who claim property for exclusive use, DIY urbanists seek to create spaces to be shared in common. Second, DIY urbanist projects share an orientation toward changing the character of urban space, either directly or by inviting further community action or participation. Some illegal DIY actions represent deliberate forms of protest, such as intentional law breaking in pursuit of specific societal changes.<sup>18</sup> Though some of the characteristics of certain DIY urbanist actions overlap with other protest movements, including the Occupy movement, DIY urbanist interventions are distinct from broader acts of protest in that their specific goal is to change the use of space in cities, as opposed to effecting changes in other laws and policies.<sup>19</sup> Although several valuable articles have been written about discreet strands of what I term DIY urbanism, most notably urban gardening<sup>20</sup> and street art,<sup>21</sup> this Article is

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13. Jeffrey Hou, *(Not) Your Everyday Public Space*, in *INSURGENT PUBLIC SPACE: GUERRILLA URBANISM AND THE REMAKING OF CONTEMPORARY CITIES*, *supra* note 8, at 1, 14.

14. Bmilligan, ‘*User-Generated Urbanism*,’ *FREE ASS’N DESIGN* (June 9, 2010), <http://freeassociationdesign.wordpress.com/2010/06/09/user-generated-urbanism/>.

15. James Holston, *Spaces of Insurgent Citizenship*, in *MAKING THE INVISIBLE VISIBLE: A MULTICULTURAL PLANNING HISTORY* 37, 53 (Leonie Sandercock ed., 1998).

16. LYDON, *supra* note 4, at 1.

17. Hou, *supra* note 13, at 13.

18. *See infra* Section II.C.

19. *See infra* Section II.C. In fact, “Occupy” protestors sometimes sought both. *See* Karen A. Franck & Te-Sheng Huang, *Occupying Public Space, 2011: From Tahrir Square to Zuccotti Park*, in *BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC SPACE* 3, 17–18 (Ronald Shiffman et al. eds., 2012).

20. Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 *URB. LAW.* 225, 229 (2010); Patricia E. Salkin & Amy Lavine, *Regional Foodsheds: Are Our Local Zoning and Land Use Regulations Healthy?*, 22 *FORDHAM ENVTL. L. REV.* 599, 616 (2011); Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 *TUL. L. REV.* 231, 233–34 (2012).

21. Randall Bezanson & Andrew Finkelman, *Trespassory Art*, 43 *U. MICH. J.L.*

the first piece of academic legal writing to describe other contemporary DIY urbanist phenomena and the first piece of any kind to explore the legal and political role of the trend overall.

DIY urbanist interventions exist along a curiously fluid spectrum of legality. Some interventions proceed with the permission of the private landowners or public entities that control the spaces used, and some bear the imprimatur of groups of urban planning professionals working in cooperation with city officials, activists, business owners, and artists.<sup>22</sup> Other actions are outright illegal in that they involve trespass or vandalism, or violate local zoning and building codes.<sup>23</sup> In this paper, I use the term “DIY”—short for Do-It-Yourself—urbanism to encompass the broad range of phenomena described above, and the term “guerilla” urbanism to distinguish a subcategory of DIY interventions that break laws, ignore regulations, or skirt democratic processes.

The legal character of DIY urbanist actions can change: some actions with illegal origins gain formal legal status later. Innovations that find purchase become embraced by local governments, like a once-illicit urban garden now maintained by the City of New York’s Parks Department.<sup>24</sup> And some projects, having gained formal legal status, lose it again. When the creators and advocates of Bordertown Skate Park, located in a California Transportation Authority (CalTrans) right-of-way, organized, they managed to negotiate with and secure a sublease from the City of Oakland to use the land as a park.<sup>25</sup> Three years later, however, the lease expired and the city elected not to renew it.<sup>26</sup>

Part II of this Article provides the background necessary to understand the genesis and goals of the current DIY urbanist trend.

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REFORM 245, 247 (2010); Jamison Davies, *Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 ME. L. REV. 27, 28 (2012); Jesse Merriam, *Painting Black Spaces Red, Black, and Green: The Constitutionality of the Mural Movement*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 2, 2 (2011).

22. See, e.g., LYDON, *supra* note 4, at 34–35, 37.

23. See, e.g., *id.* at 16, 34; Sarah Goodyear, *Painting Your Own Crosswalk: Crime or Civic Opportunity?*, ATLANTIC CITIES (June 5, 2013), <http://www.theatlanticcities.com/commute/2013/06/painting-your-own-crosswalk-crime-or-civic-opportunity/5791/> [hereinafter *Painting Crosswalk*]; Marc Lefkowitz, *Lydon, Roberts on the Future of Tactical Urbanism*, GREEN CITY BLUE LAKE (May 31, 2013, 4:00 PM), <http://www.gcbl.org/blog/2013/05/lydon-roberts-on-the-future-of-tactical-urbanism>.

24. LYDON, *supra* note 4, at 16.

25. Berg, *supra* note 7; Memorandum from Dep’t Pub. Works to Patrick D. O’Keeffe, City Manager (Sept. 7, 2010), available at [http://emeryville.granicus.com/MetaViewer.php?view\\_id=2&clip\\_id=350&meta\\_id=20089](http://emeryville.granicus.com/MetaViewer.php?view_id=2&clip_id=350&meta_id=20089).

26. Berg, *supra* note 7.

First, it traces the history of the new urbanism movement as a reaction to the shortcomings of earlier generations of urban planning. Next, it examines the role of small, bottom-up interventions as both a complement to the new urbanist vision and a reaction to some of the movement's weaknesses. Third, it describes some of the goals achieved by DIY urbanist interventions, whether chiefly expressive, chiefly instrumental, or (as occurs most often) a combination of the two.

Part III then explores questions of legitimacy, or normative acceptance by the surrounding community. Whether a particular DIY urbanist intervention gains acceptance or approbation turns less on the legality of the action and more on the nature of the act and the character of the space used. Innovations that make new public use of unused or underused urban space tend to endure whether they are originally legal or not. The most successful of these interventions then gain formal legal status and may even be replicated elsewhere. This reflects existing legal theories about legitimacy and legality, which suggest that, where the normative acceptability and legality of an action diverge, it is the law, and not the activity, that is likely to change.<sup>27</sup>

But DIY urbanist interventions, particularly those of questionable legality, also push us to confront basic questions of the democratic process. If people want a new crosswalk, artwork, or some other amenity in a publicly-owned space, why not simply petition City Hall? If urban gardens have value, why not have community gardeners, instead of unlawfully entering on land to which they do not have legal possession, simply band together to purchase or lease their own land? Is it ever acceptable to break the law instead of pursuing change through the channels provided by the democratic process and the marketplace? If so, why? Do we embrace trespass, vandalism, and a disregard for zoning and building codes whenever an activist or a group feels that an urban space could be put to better use—and if not, where do we draw the line?

Part IV tackles these questions of legality, concluding that although these illegal uses of urban land may initially perform an end-run around the democratic process, overall, DIY urbanist acts promote and strengthen democracy in several ways. First, by involving citizens in creating change at the grassroots level, they foster civic values and strengthen communities. Second, DIY urbanist actions done illegally

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27. See Mark A. Edwards, *Acceptable Deviance and Property Rights*, 43 CONN. L. REV. 457, 459 (2010).

often point to—and may even take steps to remedy—deficits in the democratic process.<sup>28</sup>

Though DIY urbanist interventions vary in their aims, forms, legality, and levels of community acceptance, what they have in common is a grassroots nature and an impulse toward expression and engagement. They embody a “bottom-up” approach to urban design. In contrast to large urban development designs implemented by governments, urban planners, or large developers, often to the detriment of vulnerable communities, DIY urbanism represents a grassroots democratic ideal of citizen participation.<sup>29</sup> They create so-called “spaces of insurgent citizenship,” countering an orientation toward the state as the only legitimate avenue for activities of citizenship.<sup>30</sup> In fact, people engage in citizenship in many ways not mediated by the state.<sup>31</sup> Bottom-up city building, including the DIY urbanism described in this Article, allows for that to happen.

The Article concludes by noting that, to the extent that interventions (whether legal or illegal) are not useful to the community or are inappropriate for the landscape, they are adequately managed by the imposition of community norms. Because, on balance, DIY urbanist interventions improve cities and enhance democracy, tactics that are innovative and experimental, but have not yet gained widespread acceptance, are often still worth trying, and in some cases preserving, even if they have illegal origins.

## II. A BRIEF HISTORY OF THE NEW URBANISM AND THE DIY RESPONSE

*“City building that has a solid footing produces continual and gradual change.”*

—Jane Jacobs<sup>32</sup>

### A. A Brief History of the New Urbanism

Healthy cities are built gradually, by accretion, as people make decisions about how to use the space in which they live. “The form of

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28. See Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1933 (2005).

29. See MATT HERN, COMMON GROUND IN A LIQUID CITY: ESSAYS IN DEFENSE OF AN URBAN FUTURE 56, 131 (2010).

30. See Holston, *supra* note 15, at 39.

31. See *id.* at 47–48.

32. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 293–94 (1961).

[a] city,” wrote influential urban planner Edmund Bacon, “is determined by the multiplicity of decisions made by the people who live in it.”<sup>33</sup> It is an essential condition of what Christopher Alexander has called “wholeness” that such decisions be made “piecemeal” such that neighborhood growth and change occur gradually, over time.<sup>34</sup> DIY urbanists making modest alterations to the physical environment improve cities in this incremental manner and strengthen the fabric of local community.

From the 1920s through the mid-twentieth century, American urban planning followed a series of movements and ideals that, while proposing several different spatial configurations for human settlements, shared a common faith in the deterministic effects of the physical environment.<sup>35</sup> The differing utopian visions were all grounded in the belief that planning itself could alleviate intractable social problems, and that an architect or planner could create utopian social conditions by building things the right way.<sup>36</sup>

Some planners proceeded from a distinctly anti-urban bias, building their visions around the ideal of pastoral, natural settings.<sup>37</sup> The bias was understandable, arising as a reaction to the fetid conditions of many cities during the rise of industrialization. The rapid influx of workers into cities during the Industrial Revolution had spurred the private construction of entire neighborhoods of dangerous tenement housing—cramming twenty or more families into a building on one lot—in an effort to squeeze the greatest possible financial return out of valuable real estate.<sup>38</sup> These buildings lacked adequate sanitation and were prone to burning down in fires, making them singularly unhealthy places to live.<sup>39</sup> City air was also notoriously polluted from burning coal.<sup>40</sup> A

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33. EDMUND N. BACON, *DESIGN OF CITIES* 13 (2nd ed. 1974).

34. CHRISTOPHER ALEXANDER ET AL., *A NEW THEORY OF URBAN DESIGN* 32 (1987) [hereinafter *A NEW THEORY*]. “[T]he piecemeal character of growth [is] a necessary precondition of wholeness.” *Id.*

35. See Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 700, 729, 769 (1993).

36. Holston, *supra* note 15, at 37, 41–43.

37. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 122–23 (1999).

38. JILL GRANT, *PLANNING THE GOOD COMMUNITY: NEW URBANISM IN THEORY AND PRACTICE* 30 (2006); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 116 (1985); Aoki, *supra* note 35, at 706.

39. Aoki, *supra* note 35, at 705–06, 712.

thick layer of coal dust and smog that settled over London for a two-week period in 1952 killed 12,000 people, and reports describe air so darkened by coal dust that persons walking on the street in daylight had to grope along the walls to find their way.<sup>41</sup> The physical dangers of crowded slums and the perceived moral degeneracy ascribed to successive waves of immigrants who lived in them fueled middle-class perceptions of cities being dirty, bad, and dangerous places to live.<sup>42</sup>

It is no surprise, then, that planners and architects presented a series of alternatives to city life with the goal of moving people to the country. Most famously, English planner Ebenezer Howard proposed “Garden Cities”—small central cities with satellite towns in a pastoral setting, each with housing, a defined town center, and enough industry to provide the residents with employment—as a healthful alternative to the crowded squalor of the cities.<sup>43</sup> Howard’s original vision was one of a cooperative community where the presence of the garden and shared commons would encourage association, not exclusivity.<sup>44</sup> The Garden City was also intended to provide a variety of housing types, including some suitable for the poor.<sup>45</sup> Some of the first towns built on Howard’s model became meccas for radicals of all kinds, including feminists and suffragists.<sup>46</sup> Residents lived in cooperative housing or in flats designed specifically for single women, a radical departure from prevailing land uses at the time.<sup>47</sup> Parts of the Garden City idea spread further but were diluted in form to make them suited for a broader market.<sup>48</sup> Adopting Howard’s physical model in the absence of its accompanying political

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40. JACKSON, *supra* note 38, at 69.

41. PETER BRIMBLECOMBE ET AL., THE BIG SMOKE: FIFTY YEARS AFTER THE 1952 LONDON SMOG 21, 30, 33 (2005), available at <http://history.lshtm.ac.uk/BigSmokeNS.pdf>; Andrew Hunt et al., *Toxicologic and Epidemiologic Clues from the Characterization of the 1952 London Smog Fine Particulate Matter in Archival Autopsy Lung Tissues*, 111 ENVTL. HEALTH PERSP. 1209, 1209 (2003). A similar fate also afflicted Pittsburgh during this era. Lawrence Conway, ‘Hell with the Lid Taken Off’: *The Pictures of Bygone Pittsburgh and its Residents Choking Under Clouds of Thick Smog*, MAIL ONLINE (June 7, 2012, 4:04 AM), [www.dailymail.co.uk/news/article-2155742/Hell-lid-taken-The-pictures-bygone-Pittsburgh-residents-choking-clouds-smog.html](http://www.dailymail.co.uk/news/article-2155742/Hell-lid-taken-The-pictures-bygone-Pittsburgh-residents-choking-clouds-smog.html).

42. Aoki, *supra* note 35, at 715, 736.

43. GRANT, *supra* note 38, at 38; Aoki, *supra* note 35, at 716–18.

44. GEORGE MCKAY, RADICAL GARDENING: POLITICS, IDEALISM & REBELLION IN THE GARDEN 34–35 (2011).

45. *Id.* at 33–34.

46. *Id.* at 34.

47. *Id.* at 35–36.

48. *Id.* at 39–40.

vision, developers gave us socially and economically isolated suburbs of winding roads and cul-de-sacs that are familiar throughout much of the country today.<sup>49</sup> Market forces drove the development of streetcar suburbs and comfortable, satellite communities around U.S. cities; this did little to alter the housing choices available to the poor.<sup>50</sup>

Even as Howard's Garden Cities caught the imaginations of developers in England and North America, France's Charles-Édouard Jeanneret, better known as Le Corbusier, advocated rebuilding Europe under a different model, the "Radiant City."<sup>51</sup> Driven by a belief in the power of technology to solve social ills, Le Corbusier proposed housing people in enormous vertical towers set amid acres of gardens and countryside. These would promote efficient circulation of people and give all residents ample access to light and air, replacing the unhealthy and crowded conditions then prevalent on urban streets.<sup>52</sup>

Other planners championed different improvements to ailing cities, not all of them turning away from the city itself. Daniel Burnham and other planners who became part of what is now known as the City Beautiful movement advocated clearing away mixed-use, high-density "slums" to make way for grand tree-lined avenues and stately civic facilities (theaters, libraries, city halls, and museums).<sup>53</sup> These ideas influenced urban planners and resulted in many of the grand public buildings, boulevards, and plazas seen in U.S. cities today.<sup>54</sup> The majestic architecture of City Beautiful, however, did little to improve the lives of the urban poor who, once evicted from crowded, substandard housing, moved into whatever other crowded, substandard housing remained available.<sup>55</sup> One critic later attributed to Burnham a "social myopia" because he "seemed to assume that placing impressive

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49. GRANT, *supra* note 38, at 37–40. Another important part of Howard's original project was land reform that would allow the socialization of the benefits of his plan; this element was omitted in most iterations of Garden-City-inspired developments. *Id.* at 37.

50. *See id.* at 14, 39, 41; Aoki, *supra* note 35, at 736–37.

51. ROGER TRANCIK, FINDING LOST SPACE: THEORIES OF URBAN DESIGN 27 (1986) (employing the French term "La Ville Radieuse" when discussing the "Radiant City").

52. Aoki, *supra* note 35, at 730. Delayed until technological advances made the skyscraper possible, Le Corbusier's towers eventually took hold, but in a form far from what he had envisioned. *Id.* at 731–32.

53. *Id.* at 709–11. Keith Aoki attributes this motive to both Frank Lloyd Wright (in the horizontal Broadacre City) and Le Corbusier (in the vertical Radiant City). *Id.* at 733.

54. JACOBS, *supra* note 32, at 24, 93.

55. *See Aoki, supra* note 35, at 704, 711–12, 805.

exteriors on a town would work to cure internal social problems,” which did not prove to be the case.<sup>56</sup>

By the mid-twentieth century, the modernist International Style of massive, ahistorical monoliths with no decorative flourishes had become the dominant accepted form of architecture.<sup>57</sup> In addition, following World War I, a new generation of architects came into the profession who, having worked for the government to develop housing for workers in industries supporting the war effort, had a new receptiveness to the idea of large government interventions in housing markets.<sup>58</sup> Thus, vertical towers like those envisioned by Le Corbusier became the preferred model for public housing.<sup>59</sup> The same tower design, of steel and glass instead of concrete, became the model for large office buildings.<sup>60</sup> Rather than being set in bucolic pastoral surroundings, these towers often ended up surrounded by other towers and asphalt and parking lots.<sup>61</sup> Broad, empty plazas came to dominate the spaces around mid-century office towers and earlier Beaux Arts landmarks alike.<sup>62</sup> Where they went unused, the vast expanses of vacant plazas and parks that resulted from planners’ various top-down efforts became “vice traps and death traps,” lacking urban vitality and filling the void with crime.<sup>63</sup>

More recently, urban planning has evolved in response to criticisms of earlier trends, as voiced by Jane Jacobs and the ideas of Christopher Alexander and others.<sup>64</sup> In her seminal 1961 book, *The Death and Life of Great American Cities*, Jacobs advocated a now-familiar urban ideal of socially and economically vital cities with safe sidewalks promoting contact between neighbors, bustling parks attracting a variety of users, and neighborhoods characterized by a network of lively, mixed-use streets and public spaces.<sup>65</sup> Yet in the very first sentence of that book, Jacobs also very clearly signaled a battle: “This book is an attack on

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56. *Id.* at 711.

57. *Id.* at 775, 789, 819.

58. *Id.* at 720.

59. *Id.* at 731–32, 732 n.125.

60. *Id.* at 732.

61. *Id.*

62. See JACOBS, *supra* note 32, at 24–25, 89–90; Aoki, *supra* note 35, at 732.

63. JACOBS, *supra* note 32, at 3–4.

64. ALEXANDER ET AL., A NEW THEORY, *supra* note 34, at 2–3; JACOBS, *supra* note 32 at 3–4.

65. JACOBS, *supra* note 32, at 35, 111, 129.

current city planning and rebuilding.”<sup>66</sup> She posed her vision as a counterpoint to decades of centralized urban planning that had come before.<sup>67</sup>

Since then, in development circles, the new urbanism movement has coalesced to develop “compact, mixed use, walkable, and relatively self-contained communities” using “traditional architecture and building patterns that facilitate walking and that create strong urban identities.”<sup>68</sup> On the surface, the new urbanist vision of vibrant, mixed-use city neighborhoods accessible to pedestrians and transit as well as to cars does in many ways resemble Jacobs’s urban ideal. Developers and political leaders motivated by new urbanist principles have unquestionably created some very pleasant places to live and work, and have taken steps to reverse some of the negative side effects of earlier generations of planning.<sup>69</sup> Yet the very new urbanism movement that was spurred by the writings of Jacobs and others has evolved to develop features very much at odds with her vision. In her critique of the then-prevalent trends of urban development, Jacobs also took on the sheer scale of planning and the upheavals generated by “[c]ataclysmic money pour[ing] into an area in concentrated form.”<sup>70</sup> Meanwhile, new urbanism has often led to the top-down imposition of grand plans, developer-driven, large-scale changes, and sudden massive influxes of cash.<sup>71</sup> In many cases, entire new communities have been designed and developed using new urbanist principles.<sup>72</sup> These large developments have had mixed impacts, some in direct conflict with the stated goals of the movement.<sup>73</sup> The Charter of the Congress for New Urbanism, a statement of principles set forth by some of the chief proponents of new urbanism, encourages development for environmental sustainability.<sup>74</sup> However, developers’ embrace of new urbanist principles has frequently

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66. *Id.* at 3. The declines Jacobs described also coincided with the growth of suburbia, enabled by the rapid development of the Interstate Highway System. See Celeste Pagano, *Proceed with Caution: Avoiding Hazards in Toll Road Privatizations*, 83 ST. JOHN’S L. REV. 351, 357 (2009).

67. JACOBS, *supra* note 32, at 3.

68. GRANT, *supra* note 38, at 3.

69. *Id.* at 6.

70. JACOBS, *supra* note 32, at 293.

71. See, e.g., GRANT, *supra* note 48, at 88, 99.

72. See, e.g., *id.* at 88.

73. *Id.* at 88–89.

74. Congress for the New Urbanism, *Charter of the New Urbanism*, CNU (2001), [http://www.cnu.org/sites/files/charter\\_english1.pdf](http://www.cnu.org/sites/files/charter_english1.pdf).

led to the creation of new towns and suburbs, often on greenfields or drained wetlands, where the movement's trend towards smaller lots does not outweigh the environmental harms of the energy consumption generated by large houses and long commutes.<sup>75</sup> Like the Garden City-inspired developers of an earlier generation, new urbanist developers sacrifice pieces of their original vision in order to economically (and profitably) accommodate the rest.

The impacts of these developments on central cities are nothing new. The growth of suburban communities has long generated negative externalities—unintentional, harmful costs not borne by the suburbs themselves—on their core cities, even as residents of the suburbs have continued to enjoy the amenities their core cities provide.<sup>76</sup> Federal programs, including the Interstate Highway System, federally-insured home mortgages, and the home-mortgage interest deduction, encouraged and subsidized the development of middle-class suburbs.<sup>77</sup> At the same time, state laws enabling local exclusionary zoning and a lack of viable public transportation kept those suburbs largely closed to low-income people.<sup>78</sup> Together, these factors contributed to white flight (and later, middle-class flight of all races) from inner cities, accelerating the collapse of core city neighborhoods and hardening regional segregation along racial and economic lines.<sup>79</sup> Suburbs, even those with pedestrian-oriented design and traditional styles of architecture, are suburbs nonetheless. Whether they feature sprawling arrays of car-centric strip malls and housing developments or charming towns crafted

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75. GRANT, *supra* note 38, at 190–91; Charles M. Haar & Michael Allan Wolf, *Planning and Law: Shaping the Legal Environment of Land Development and Preservation*, 40 ENVTL. L. REP. 10419, 10419 (2010). The most famous example of an entirely new urbanist development is Seaside, Florida, which served as the location for the movie *The Truman Show*. See Jim K., *Seaside at 30: Conference at ND on New Urbanism, Sept. 29th-Oct. 1st*, LAND USE PROF BLOG (Sept. 23, 2011), [http://lawprofessors.typepad.com/land\\_use/2011/09/seaside-at-30-conference-at-nd-on-new-urbanism-sept-29th-oct-1st.html](http://lawprofessors.typepad.com/land_use/2011/09/seaside-at-30-conference-at-nd-on-new-urbanism-sept-29th-oct-1st.html).

76. See Laura Schatz, *Decline-Oriented Urban Governance in Youngstown, Ohio*, in *THE CITY AFTER ABANDONMENT* 87, 90–91 (Margaret Dewar & June Manning Thomas eds., 2013) (describing suburban flight as contributing to the decline of Youngstown, Ohio); Jan Blakeslee, “White Flight” to the Suburbs: A Demographic Approach, *FOCUS: INST. FOR RES. ON POVERTY*, Winter 1978–79, at 1 (describing “white flight” to the suburbs and its effect on cities).

77. Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 334–35 (1999).

78. Aoki, *supra* note 35, at 761–62; McFarlane, *supra* note 77 at 334–35.

79. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 66–67, 69–70, 73–74 (1993); Aoki, *supra* note 35, at 761–62.

with pedestrian-friendly town squares and carefully-rendered historicism by new urbanists, suburbs can contribute to economic inequality and segregation, resource depletion, traffic, and environmentally unsustainable patterns of development and transportation.<sup>80</sup> As one critic observed, “Making suburbs pretty does not undo injustice or stop sprawl.”<sup>81</sup>

Further, although the Charter of the Congress for the New Urbanism affirms an ideal that “neighborhoods should be diverse in use and population” and dutifully notes a problem in society’s “increasing separation by race and income,” another real consequence of new urbanism in practice is the perpetuation of racial and income segregation.<sup>82</sup> “[T]he movement’s focus on the built environment masks deeper issues of social equity and power,” replicating old power structures rather than challenging them.<sup>83</sup> The most famous new urbanist developments are suburban enclaves creating a lifestyle for purchase by the well-to-do, in a pleasant environment devoid of industry, group homes, or other land uses out of synch with their sanitized version of urban life.<sup>84</sup> Even new urbanist mixed-use developments located in traditional center city neighborhoods can have a gentrifying effect. By commodifying a certain type of urban experience and making it available as a product only to the thin market segment that can afford it, new urbanist developments create pockets of affluence far beyond the reach of ordinary working people.<sup>85</sup> In a pointed example, when one of the employees of a community group developing small-scale urban amenities in Portland, Oregon, was asked if she lived in the neighborhood, she replied, “No I don’t. It’s too expensive. None of us really do.”<sup>86</sup>

Large-scale new urbanist projects thus replicate the errors of previous generations of deterministic planners, with whom they share a faith in top-down planning as the answer to urban problems. Both the

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80. GRANT, *supra* note 38, at 49–50.

81. *Id.* at 6.

82. Congress for the New Urbanism, *supra* note 74.

83. GRANT, *supra* note 38, at 188–89 (quoting Richard Milgrom, *Seventh Generation*, 151 PLANNERS NETWORK, Spring 2002, at 2).

84. *Id.* at 27, 187.

85. *Id.* at 27; *see also* Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505, 539 (2012).

86. HERN, *supra* note 29, at 130 (quoting Hindi Iserhott, organizer for the City Repair project in Portland) (internal quotation marks omitted).

new urbanists and earlier generations of planners believed that by implementing building and zoning code changes and building certain kinds of developments, planners could alleviate long-standing societal problems plaguing cities.<sup>87</sup> Reformers in the Garden City, Radiant City, City Beautiful, and new urbanist movements thus have in common the flaw that their plans, at least as implemented, leave no practical room for the poor. Per one critic, Le Corbusier and Burnham shared the misconception that by eliminating the blighted conditions in which poor people lived, one could eliminate poverty and its attendant problems.<sup>88</sup> The planners' utopias were never realized.<sup>89</sup> Where Garden City, Radiant City, and City Beautiful proponents would have cleared large swaths of dense urban neighborhoods leaving the low-income former residents nowhere to go, new urbanism as it is actually practiced either creates places where the poor cannot afford to live or gentrifies the areas where they are such that few low-income individuals can long afford to remain.

DIY urbanism proposes a series of small, alternative strategies to bring about change in cities in ways that, while gradual, may prove vital to long-term change in neighborhoods.<sup>90</sup>

### *B. The DIY Response*

DIY urbanism has arisen in part as an alternative to, and in part to fill gaps left by, these broader trends in development spurred by the new urbanism movement.<sup>91</sup> In order for vibrant cities to develop, some processes need to begin from the bottom up. Many failures in urban development policy rest on the flawed assumption that only experts can determine what a neighborhood needs.<sup>92</sup> It is no wonder, then, that engaged citizens and "experts" so often distrust each other.<sup>93</sup> Expert planners too often approach neighborhoods with preconceived strategies designed to benefit outside constituents or to counter

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87. GRANT, *supra* note 38, at 51–52, 199.

88. Aoki, *supra* note 35, at 711, 735.

89. *Id.* at 735.

90. LYDON, *supra* note 4, at 2, 7.

91. James Rojas, *Latino Urbanism in Los Angeles: A Model for Urban Improvisation and Reinvention*, in *INSURGENT PUBLIC SPACE: GUERRILLA URBANISM AND THE REMAKING OF CONTEMPORARY CITIES*, *supra* note 8, at 36, 44.

92. JOHN MCKNIGHT & PETER BLOCK, *THE ABUNDANT COMMUNITY: AWAKENING THE POWER OF FAMILIES AND NEIGHBORHOODS* 107–08 (2010).

93. RANDOLPH T. HESTER, *DESIGN FOR ECOLOGICAL DEMOCRACY* 6 (2006).

perceived urban ills.<sup>94</sup> Successful community development initiatives proceed from the perspective of leveraging a neighborhood's strengths, using its gifts, rather than honing in on its perceived deficits.<sup>95</sup>

DIY urbanist interventions allow for resident-driven changes to happen at the small scale. DIY urbanist activities bloom precisely because community members decide to use their gifts.<sup>96</sup> Thus, allowing legal and physical spaces for DIY urbanism is all the more important in urban areas that have experienced decline, as the actions taken by residents allow them to focus on their capabilities rather than on the areas' weaknesses.

Urbanists who promote grassroots change eschew overly planned, awkward public spaces in favor of spaces that people actually use—what urban activist and author Matt Hern calls “common,” as opposed to simply public, spaces.<sup>97</sup> The division between private space and various kinds of public space is a continuum, not a dichotomy; within the continuum are many different physical, legal, and sociological variants.<sup>98</sup> Private spaces are controlled by individuals and entities who may decide who uses the space and how.<sup>99</sup> The most private of spaces, the home, is the place from which we can exclude anyone and may engage in nearly any activity we like.<sup>100</sup> Parks and clubhouses located in gated communities and pedestrian plazas in privately-owned outdoor malls, though they may bear some of the physical marks and may allow some of the same uses as some public spaces (walking, congregating, even play), are definitively private. They are closed to those segments of the public and those activities that their owners choose to exclude.<sup>101</sup> The

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94. Patience A. Crowder, “*Ain’t No Sunshine*”: *Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 626–27 (2007).

95. MCKNIGHT & BLOCK, *supra* note 92, at 118–19.

96. PETER BLOCK, *COMMUNITY: THE STRUCTURE OF BELONGING* 12 (2008).

97. HERN, *supra* note 29, at 59.

98. BENJAMIN SHEPARD & GREGORY SMITHSIMON, *THE BEACH BENEATH THE STREETS: CONTESTING NEW YORK CITY’S PUBLIC SPACES* 29 (2011). Authors Benjamin Shepard and Gregory Smithsimon provide a valuable typology of nine different types of public space, depending on factors like who controls the space and who is excluded from it. *See generally id.* at 28–50.

99. *Id.* at 30.

100. *See Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013).

101. SHEPARD & SMITHSIMON, *supra* note 98, at 30. Another interesting note: some privately-owned spaces are actually common. Occupy Wall Street took advantage of such a space in Zuccotti Park. Nyceve, *FOIA Request Reveals Zuccotti Park Owners Brookfield Properties Heavily Taxpayer Subsidized*, DAILY KOS (Nov. 1, 2011, 6:35 AM),

same is often true of the spaces surrounding large buildings in cities.<sup>102</sup> Urban plazas may be publicly or privately owned, open to a broad segment of the public, or open only to those whom the private landowner chooses to welcome. Physical markers alone do not always communicate the private or public status of different urban plazas.

Urban streets, sidewalks, and parks are ostensibly public.<sup>103</sup> The government-owned park is an example of the most public of public spaces described in Shepard and Smithsimon's typology, as it is owned by the government and excludes no one.<sup>104</sup> But even these are not all what HERN would call "common."<sup>105</sup> Public parks, plazas, and boulevards may be spectacular to behold and win awards for landscape design even as their physical configurations, or the methods of policing them, discourage people, or certain people, from lingering or congregating.<sup>106</sup> They may bear no physical or cultural connectivity to the surrounding neighborhood.<sup>107</sup> Additionally, few public spaces are actually conceived and constructed in common by neighbors working together.

Common spaces are places that are welcoming to all and are actually used by people who may not know each other, and who in fact differ from one another in race, culture, age, or socioeconomic status.<sup>108</sup> Though we tend to think of urban "commons" as a feature distinct to colonial times, where residents of small New England towns grazed their livestock on a commons in the middle of the town, the idea of commons is as important for urban life today as ever.<sup>109</sup> "Without common land no social system can survive," Christopher Alexander wrote.<sup>110</sup> He

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<http://www.dailykos.com/story/2011/11/01/1032061/-FOIA-requests-reveals-Zuccotti-Park-owners-Brookfield-Properties-heavily-taxpayer-subsidized#>. Per a deal with the city, the owner of Zuccotti Park had to keep it open. *Id.*

102. SHEPARD & SMITHSIMON, *supra* note 98, at 71.

103. *Id.* at 30.

104. *Id.* at 29.

105. See HERN, *supra* note 29, at 59.

106. BLOCK, *supra* note 96, at 159; Marc L. Roark, Homelessness, Place, and Identity: How Individuals Use Space to Project Identity in the Face of City Gentrification 4–5, 15 (unpublished grant proposal) (on file with author).

107. *Id.*

108. HERN, *supra* note 29, at 56.

109. ANNA MANTZARIS, THE FREEDOM TRAIL: BOSTON: A GUIDED TOUR THROUGH HISTORY 12 (2010).

110. CHRISTOPHER ALEXANDER ET AL., A PATTERN LANGUAGE: TOWNS, BUILDINGS, CONSTRUCTION 337 (1977) [hereinafter A PATTERN LANGUAGE].

identified two specific social functions served by common land.<sup>111</sup> First, common spaces allow people to feel comfortable outside of their private territory and thus these spaces connect people to the larger social system; and second, common land serves as a meeting place.<sup>112</sup> Modern life provides fewer opportunities for people to speak face-to-face, and truly public space—that is, common space—is dwindling.<sup>113</sup> Yet communication and dialogue are an essential component of community engagement, making it essential to retain places where dialogue can occur.<sup>114</sup>

Commons do not arise solely by government fiat. Rather, they are created by the people who use them as they appropriate space for public use. A New York City movement called “Reclaim the Streets” provided a particularly assertive example of this when they staged elaborate dance parties at intersections with the express intention of claiming the streets for use by the people.<sup>115</sup> Great public spaces are participatory—created and stewarded, not simply admired, by their users.<sup>116</sup> DIY urbanists who leave physical marks/changes on public space, or subtly shift the uses of them, likewise expand the commons. For example, courts have upheld city ordinances asserting the primacy of sidewalks for walking and passage, making it illegal to sit or lie down on sidewalks.<sup>117</sup> Actions such as the placement of sculptures, plantings, or benches on sidewalks directly confront that primacy by taking a portion of the space away from walking or passing functions and rededicating it to beauty or leisure. Placement of decorative elements (e.g., yarnbombs on existing street fixtures; flower plantings in abandoned newspaper boxes or parking meters) challenges the dominant frame indirectly by inviting pause, observation, and joy.

Instead of large-scale developments that ignore or erase local connection to history and culture, small DIY projects can embrace what some call “cultural planning,” involving local communities and

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111. *Id.*

112. *Id.* at 337–38.

113. *Id.* at 337.

114. BLOCK, *supra* note 96, at 15. Block states that to create change we need to change the conversation. *Id.*

115. SHEPARD & SMITHSIMON, *supra* note 98, at 128–29.

116. HESTER, *supra* note 93, at 385.

117. *Roulette v. City of Seattle*, 97 F.3d 300, 306 (9th Cir. 1996) (upholding a city ordinance that forbids sitting or lying down on public sidewalks); *see also* Nicholas Blomley, *Colored Rabbits, Dangerous Trees, and Public Sitting: Sidewalks, Police, and the City*, 33 URB. GEOGRAPHY 917, 929 (2012).

traditions.<sup>118</sup> An excellent example of using both common space and local tradition is a renovated laneway in Vancouver, British Columbia.<sup>119</sup> In revitalizing a narrow alleyway between two buildings and incorporating murals and plantings added by local residents, the DIY-style project created a vibrant place useful to the community.<sup>120</sup>

DIY urbanist interventions also foster community. Most urban development work is done by professional urban planners, architects, consultants, and designers, with perfunctory levels of community input built into the process.<sup>121</sup> While some designers depart from the usual process with radically citizen-oriented planning, meaningful community input into project selection and design from the early stages of a project is rare.<sup>122</sup> Top-down programs intended to involve communities on the local level can fail simply because there is no community buy-in.<sup>123</sup> If no one local sustains and maintains a project, it fades away. For example, a nonprofit organization called Gateway Greening supports almost all of the community gardens in St. Louis, but it gets more requests for support than it can fulfill.<sup>124</sup> In selecting which projects to support, Executive Director Gwenne Hayes-Stewart seeks those that are backed by community involvement: “‘If it is not grassroots, and if money is top down, it is not going to work. Residents are tired of being told what is good for them.’”<sup>125</sup> An unworked garden squanders labor and resources. This is in keeping with the history of social innovations: innovations

118. See HERN, *supra* note 29, at 69; Colin Mercer, Cultural Planning for Urban Development and Creative Cities 8 (2006) (unpublished manuscript), available at [http://www.academia.edu/773280/Cultural\\_planning\\_for\\_urban\\_development\\_and\\_creative\\_cities](http://www.academia.edu/773280/Cultural_planning_for_urban_development_and_creative_cities).

119. HERN, *supra* note 29, at 56, 59.

120. *Id.* at 56.

121. BLOCK, *supra* note 96, at 160; HERN, *supra* note 29, at 69. For an example of civic engagement in public space, see ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 6 (1993) (describing nightly debates in the public square in Bologna, Italy).

122. Organizer and author Peter Block describes a radically different process used by designers Ken Cunningham and John Spencer, a process in which citizen input forms the base of the design. BLOCK, *supra* note 96, at 159–60. In order for this to work, Cunningham and Spencer incorporate many community-building and conflict resolution techniques into the meetings they facilitate. *Id.* at 161. However, Cunningham and Spencer’s design process is the exception, not the rule. *Id.* at 162.

123. *Id.* at 24; Laura Lawson & Abbilyn Miller, *Community Gardens and Urban Agriculture as Antithesis to Abandonment: Exploring a Citizenship-Land Model*, in THE CITY AFTER ABANDONMENT, *supra* note 76, at 17, 33.

124. Lawson & Miller, *supra* note 123, at 33.

125. *Id.* (quoting Gwenne Hayes-Stewart, Executive Director of Gateway Greening).

imposed from above, even with substantial capital investments, may fail, and many innovations that begin small and grow slowly become large movements that bring about great social change.<sup>126</sup> So too, when citizens generate small interventions in their physical space, their stake in the matter is high, and such projects can endure.

Thus, another new form of community activism is arising in the face of what many see as a permanent shift toward a more cooperative, localized, and grassroots sharing economy.<sup>127</sup> Encompassing a wide variety of associations and activities, the sharing economy promotes local community with a focus on local abundance.<sup>128</sup> Abundance-centered community organizing focuses on the gifts already present in the people, history, and structures of the existing place and works to increase satisfaction through participating in cooperative creative processes.<sup>129</sup> DIY forms of urbanism fit into this emerging model of placemaking, providing new ways for people in a modern, tech-connected world to also engage with the physical space of the community in which they live.<sup>130</sup> DIY urban interventions create needed space for connection and dialogue within communities.

A bottom-up form of city-building creates what anthropologist James Holston calls “spaces of insurgent citizenship.”<sup>131</sup> Holston and other planning scholars eschew the centralized, state-centered planning of many cities, contending that an impulse toward central planning arises from an orientation toward the state as the only legitimate avenue for activities of citizenship.<sup>132</sup> In fact, people engage in citizenship in many ways not mediated by the state; bottom-up building, including the DIY urbanism described in this Article, allows for that to happen.<sup>133</sup>

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126. BLOCK, *supra* note 96, at 25–26. The Grameen Bank is a prime example of the latter. *A Short History of Grameen Bank*, GRAMEEN BANK, [http://www.grameen-info.org/index.php?option=com\\_content&task=view&id=19&Itemid=114](http://www.grameen-info.org/index.php?option=com_content&task=view&id=19&Itemid=114) (last updated Jan. 1, 2013).

127. JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 2–3 (2012).

128. *Id.*

129. MCKNIGHT & BLOCK, *supra* note 92, at 65–66; *see also* Lia Ghilardi, *Cultural Planning for Place Making Part 2*, URB. TIMES (Aug. 6, 2010), <http://urbantimes.co/2010/08/cultural-planning-place-making-part-2/> (discussing a focus on local cultural assets).

130. LYNDA H. SCHNEEKLOTH & ROBERT G. SHIBLEY, PLACEMAKING: THE ART AND PRACTICE OF BUILDING COMMUNITIES 1 (1995).

131. Holston, *supra* note 15, at 39.

132. *Id.* at 39–40.

133. *See* ORSI, *supra* note 127, at 3; Holston, *supra* note 15, at 48; ROBERT PUTNAM,

Human social life includes contradiction, ambiguity, and indeterminacy;<sup>134</sup> allowing some flexibility or breathing room in how we allow people to use their urban spaces enables those natural features of an evolving society to thrive. Spaces can be made flexible, so that many environments can serve more than one purpose; creative use of abandoned or underused pockets of urban space can make way for adaptation, which in turn enhances both democratic and ecological resilience.<sup>135</sup> City Beautiful proponents believed that a properly-planned urban environment could itself instill civic values; DIY urbanists invert this by practicing civic engagement in their creation of small spaces for daily interaction.<sup>136</sup> Practicing civic engagement thus engenders civic engagement.

On a more practical note, some small-scale interventions are necessary simply because large-scale changes are expensive. The City Beautiful movement eventually lost steam because the pressing need for road, transit, and sewer infrastructure left limited funding available for grand concourses, libraries, and the like.<sup>137</sup> Today, those infrastructure projects are crumbling, and state and local governments are scrambling to pay for basic services; large-scale centralized redevelopment is not in the immediate plans of most cities.<sup>138</sup> Small-scale urban projects, again, work around that deficiency. As noted by Memphis Mayor A. C. Wharton:

Too often, cities only look to big-budget projects to revitalize a neighborhood . . . . There are simply not enough of those projects to go around. We want to encourage small, low-risk,

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BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 16–18 (2000).

134. Holston, *supra* note 15, at 46.

135. HESTER, *supra* note 93, at 8, 256.

136. Aoki, *supra* note 35, at 711; Taylor, *supra* note 11; Emily Badger, *The Street Hacker, Officially Embraced*, ATLANTIC CITIES (May 7, 2012), <http://www.theatlanticcities.com/neighborhoods/2012/05/street-hacker-officially-embraced/1921/>.

137. Aoki, *supra* note 35, at 711.

138. Omer Kimhi, *A Tale of Four Cities—Models of State Intervention in Distressed Localities Fiscal Affairs*, 80 U. CIN. L. REV. 881, 882 (2012). The 2013 Report Card for America's Infrastructure disseminated by the American Society of Civil Engineers gives the nation an overall grade of D+, citing “a significant backlog of overdue maintenance” and a “pressing need for modernization” of infrastructure. Am. Soc’y of Civil Eng’rs, *2013 Report Card for America’s Infrastructure*, ASCE (2013), <http://www.infrastructurereportcard.org/a/documents/2013-Report-Card.pdf>.

community-driven improvements all across our city that can add up to larger, long-term change.<sup>139</sup>

All of this goes to say that cities need small-scale change. Of course it is possible for a city or a private developer to institute small-scale changes in a top-down fashion, and some do.<sup>140</sup> These interventions can be successful, as when the Times Square Alliance commissions artists and architects to design community-building uses of the space.<sup>141</sup> But many of these changes are market-driven and located in already-gentrified areas or in downtown entertainment districts appealing to tourists and suburbanites, places where the cost of housing and cultural amenities is out of reach for the majority of urban residents.<sup>142</sup> A greater number of projects, each more localized to a particular neighborhood, can be conceived and realized through the engagement of local citizenry, especially in out-of-the-way corners of cities that, while not being regional destinations, can develop into focal nodes for healthy neighborhoods.<sup>143</sup> Thus, allowing some flexibility for community members to engage in these smaller improvements allows for healthy innovation throughout a city, so that its development may proceed in a gradual and continual way appropriate to the local setting and population.

### C. Aims of DIY Urbanism

Though some of the DIY urbanist interventions considered in this Article are purely expressive and others are chiefly utilitarian or instrumental, most perform dual functions—they communicate a message about a specific need in a community and simultaneously move

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139. Press Release, Memphis Mayor's Innovation Delivery Team, Mayor Wharton Announces New Initiatives in Neighborhood Econ. Vitality Plan (Nov. 10, 2012) (internal quotation marks omitted), available at <http://www.innovatememphis.com/wp-content/uploads/2013/01/MEM-Press-Release-Nov10.pdf>.

140. See, e.g., *Public Space Projects*, TIMES SQUARE, <http://www.timessquarenyc.org/about-the-alliance/public-space-projects/index.aspx> (last visited Oct. 22, 2013); S.F. Planning Dep't, *San Francisco Parklet Manual*, PAVEMENT TO PARKS 2 (Feb. 2013), [http://sfpavementtoparks.sfplanning.org/docs/SF\\_P2P\\_Parklet\\_Manual\\_1.0\\_FULL.pdf](http://sfpavementtoparks.sfplanning.org/docs/SF_P2P_Parklet_Manual_1.0_FULL.pdf).

141. *Public Space Projects*, *supra* note 140.

142. HERN, *supra* note 29, at 46. Times Square itself is, of course, the ultimate U.S. tourist destination for domestic and international visitors alike. Valer Murray, *America's Top Tourist Attractions*, FORBES (May 20, 2010, 4:40 PM), <http://www.forbes.com/2010/05/20/top-tourist-attractions-lifestyle-travel-magic-kingdom-disneyland-times-square.html>. With regard to the development of such centers, see generally McFarlane, *supra* note 77, at 332–33.

143. ALEXANDER ET AL., A PATTERN LANGUAGE, *supra* note 110, at 243–45.

toward filling that need. Through interventions like temporary crosswalks where it is dangerous to cross the street, DIY urbanists seek to demonstrate how they think their urban environments could be improved.<sup>144</sup> The projects thus push city dwellers to confront basic questions of land use: How should we shape our cities? How should we manage the balance between the needs of people on foot and the needs of people in cars? What vision of urbanism is best suited for *this* corner, *this* block, or *this* neighborhood?

The expressive elements of DIY urbanism arise from an impulse toward creating physical spaces for people to pause and interact with each other in the city.<sup>145</sup> They encourage connection, dialogue, and engagement with public space and other members of our communities, and therefore enhance democracy.<sup>146</sup> In an increasingly disconnected society in which public life is undergoing an alarming erosion, these interventions represent a powerful contemporary counterforce.<sup>147</sup>

Some DIY urbanist interventions are, above all, a form of expression. The intervention *is* the message. Rather than relying solely on words on paper (or pixels on a screen) to convey ideas about how urban space should be used, tactical urbanists communicate by showing.<sup>148</sup> DIY urbanist artworks aim precisely to generate discussion. Such was the impact of one sculpture that appeared on a Seattle street corner.<sup>149</sup> Following the example of dozens of cities around the world that have participated in “CowParade,” an exhibition of fiberglass sculptures of cows painted or decorated by local artists or businesses, Seattle created its own spin-off, “Pigs on Parade,” in 2001 and again in 2007.<sup>150</sup> The pig exhibit in Seattle, like much public art, was not without

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144. Goodyear, *Painting Crosswalk*, *supra* note 23.

145. See HERN, *supra* note 29, at 56.

146. *Id.* “[T]he health of public space is closely tied to the health of democratic life: they require one another.” *Id.*

147. Hou, *supra* note 13, at 6.

148. See Merker, *supra* note 8, at 49 (demonstrating that tactical urbanism involves using public space to seek change).

149. Hou, *supra* note 13, at 1.

150. Sara McGrath, *Seattle History of a Pig, a Piggy Bank, and Pigs on Parade*, EXAMINER (May 7, 2009), <http://www.examiner.com/article/seattle-history-of-a-pig-a-piggy-bank-and-pigs-on-parade>; *Our Story*, COW PARADE, <http://www.cowparade.com/our-story/> (last visited Oct. 24, 2013) (discussing how there have been over fifty cities worldwide that have staged CowParade events since 1999, including Chicago, New York City, Tokyo, Brussels, Buenos Aires, Boston, Paris, and Milan). CowParade spin-offs have ranged widely, including Baltimore’s “Crabtown Project,” Vancouver’s “Orcas in the City,” Sedona, Arizona’s “Javelinas on Parade,” and dozens of others. Rob Hiaasen & Glenn McNatt,

controversy.<sup>151</sup> One night, someone weighed in on the controversy in a uniquely expressive way by installing an eight-foot long metal pig on a public sidewalk.<sup>152</sup> Intended as an anti-consumerist statement mocking the “Pigs on Parade” event, the artwork also used public space in an illegal way, flouting the city’s requirement of a deposit before placing art on the sidewalk.<sup>153</sup> In this case of expressive intervention, one unsanctioned sculpture of a pig made a more pointed social statement, and spurred a wider discussion, than could have been achieved by a written article or letter to the editor alone.

Another type of expression that has become more pervasive in recent years is spontaneous memorials.<sup>154</sup> Simple handmade crosses memorialize the victims of car accidents;<sup>155</sup> so-called “ghost bikes”—stripped-down bicycles painted entirely white—mark street corners where cyclists have been killed by motor vehicles;<sup>156</sup> mounds of teddy bears, flowers, notes, and candles turn the sites where children have

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*Feasting on Crab Sculptures by the Bushel*, THE SUN (Balt.), Jan. 22, 2005, (Telegraph), at 1A; James Church, *Orcas in the City-Vancouver 2004*, PBASE.COM, [http://www.pbase.com/jachurch/orcas\\_in\\_the\\_city](http://www.pbase.com/jachurch/orcas_in_the_city) (last visited Oct. 24, 2013); *Javelinas on Parade*, PBASE.COM, <http://www.pbase.com/wailee6/javelinas> (last visited Dec. 8, 2013). Seattle was not alone in selecting porcine civic representation; fiberglass pigs have also visited Bath, England; Cadiz, Kentucky; Cincinnati, Ohio; and Lexington, North Carolina. MICHAEL WHITE, INTERNATIONAL MARKETING BLUNDERS: MISTAKES MADE BY COMPANIES THAT SHOULD HAVE KNOWN BETTER 95 (2002); Carole L. Philipps, *Smoked and Aged—Country Kind of Ham—Kentucky Celebrates Its Own Pig Gig*, CINCINNATI POST, Sept. 9, 2000, at 1D; Ian Curcio, *Pigs Decorate Uptown Lexington*, LIVABILITY (June 29, 2012), <http://livability.com/Lexington/nc/attractions/pigs-decorate-uptown-lexington>; *Pigs on Parade in Bath*, BBC (May 23, 2008, 6:10 AM), [http://news.bbc.co.uk/cbbcnews/hi/newsid\\_7410000/newsid\\_7415400/7415462.stm](http://news.bbc.co.uk/cbbcnews/hi/newsid_7410000/newsid_7415400/7415462.stm). My home at the time I wrote this piece, Oklahoma City, shares with Edmonton, Alberta, and Buffalo, New York, the common distinction of having honored the North American bison—though only Edmonton referred to the animal by its proper name. DAVID DARY, STORIES OF OLD-TIME OKLAHOMA 9 (2011); John Intini, *Watch Out—Edmonton Wants Your Bison*, MACLEAN’S, Aug. 13, 2001, at 8; Jaclyn Asztalos, “*Herd About Buffalo*” *Raising Money for Roswell*, WKBW.COM (Nov. 1, 2010), <http://www.wkbw.com/news/local/Herd-About-Buffero-Raising-Money-for-Roswell-106438823.html>.

151. Hou, *supra* note 13, at 1.

152. *Id.*

153. *Id.*

154. Amanda Reid, *Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause*, 92 NEB. L. REV. 124 (2013).

155. Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 47 (2005).

156. Anne Gulland, *Watchdog Warns Government over Poor Data on Road Deaths*, 338 BMJ 1167, 1167 (May 2009).

fallen to gun violence to places of remembrance;<sup>157</sup> and larger more elaborate displays of objects, signs, and memorabilia accumulate at areas near mass tragedies or disasters.<sup>158</sup> Spontaneous memorials can be unattractive.<sup>159</sup> Roses individually wrapped in cellophane do not compose lovely displays; stuffed toys left in urban environments quickly accumulate grime; photos and written notes smear and fade in the rain. But despite the arguable shortage of aesthetic value of the displays, the use of public space for DIY memorials serves multiple human values.<sup>160</sup> First, the displays dignify and honor the person or people killed by fulfilling the deep-seated human longing to be remembered.<sup>161</sup> They serve a healing purpose for survivors.<sup>162</sup> In addition, spontaneous memorials often become places of communal gathering, “vital spaces for a participatory and inclusive democracy,” where a wide variety of community members can participate in the speech activity of leaving signs or memorabilia to express their hope of preventing similar tragedies in the future.<sup>163</sup> The sight of a roadside memorial or ghost bicycle where a pedestrian or cyclist has been killed is sobering. In addition to memorializing the individual, the display raises the viewer’s awareness of a problem in their immediate surroundings—People are being killed by guns (or by cars) *here*, right here, on the streets that you travel—and may spur action—Let us, as a community, do something about that.<sup>164</sup> The existence of these communal spaces allows individuals, including groups like children “who might not otherwise ‘speak’ in a public forum,” to express their individual voices through their own contributions of drawings, notes, and memorabilia.<sup>165</sup> Memorial spaces can even allow for dialogue when the voices do not agree.<sup>166</sup>

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157. Karen A. Franck & Lynn Paxson, *Transforming Public Space into Sites of Mourning and Free Expression*, in *LOOSE SPACE: POSSIBILITY AND DIVERSITY IN URBAN LIFE* 132, 144 (Karen A. Franck & Quentin Stevens eds., 2007).

158. *Id.* at 135.

159. Reid, *supra* note 154, at 145.

160. *Id.* at 138.

161. McClurg, *supra* note 155, at 40, 46–47.

162. *Id.* at 45; Reid, *supra* note 154, at 138–42 (describing the role of roadside memorials in the bereavement process).

163. Franck & Paxson, *supra* note 157, at 137, 140, 145, 152.

164. *See id.* at 145–46; Reid *supra* note 154, at 137–38, 177.

165. Franck & Paxson, *supra* note 157, at 150.

166. *Id.* at 152.

In another purely expressive intervention, from 2005 to 2006, a group of artists launched what they called Object Orange, in which the artists selected abandoned Detroit houses “whose most striking feature [was] their derelict appearance” and caked every square inch of their facades (including any remaining doors and windows) with a thick layer of bright orange paint.<sup>167</sup> In a city with over 30,000 abandoned homes in various states of disrepair, the artists’ stated purpose was “to accentuate something that has wrongfully become part of the everyday landscape.”<sup>168</sup> The Object Orange artists are part of a movement of contemporary artists who do not see art as a sphere separate from the rest of social life, but rather approach their work from a stance of activism, using art as cultural activism. These artists engage in urban intervention with a view toward the relationship between the artist and the (collective) audience.<sup>169</sup> Eschewing private galleries and instead inserting art into public space where people will interact with it as they go about their daily lives is central to the message of so-called “cultural hijackers” who combine art and social action while shaping “user-generated cit[ies].”<sup>170</sup> Other artistic interventions may be less overtly political in their purposes. The phenomenon of “yarnbombing” involves encasing urban objects—bike racks, statues, tree branches—in colorful custom-knit wraps.<sup>171</sup> The effect is immediately aesthetic, as the resulting “yarnbombs” add color and interest to the urban space.<sup>172</sup> Although the artists who create the yarn installations may express a preference for keeping art in the community where people will see it,

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167. Andrew Herscher, *Detroit Art City: Urban Decline, Aesthetic Production, Public Interest*, in *THE CITY AFTER ABANDONMENT*, *supra* note 76, at 64, 74–75 (quoting a manifesto of Object Orange’s predecessor group, “Detroit Demolition Disneyland”).

168. *Id.* at 69, 75 (quoting another “Detroit Demolition Disneyland” manifesto) (internal quotation marks omitted).

169. *Id.* at 67. Using a similar tactic, citizens in Miami tackled pervasive weeds springing up in vacant lots and dilapidated sidewalks with the medium of spray paint. Michael Miller, “Weed Bombing” Transforms Downtown’s Urban Blight into Psychedelic Bling, *MIAMI NEW TIMES* (Nov. 25, 2011, 9:30 AM), [http://blogs.miaminewtimes.com/riptide/2011/11/weed\\_bombing\\_transforms\\_downto.php](http://blogs.miaminewtimes.com/riptide/2011/11/weed_bombing_transforms_downto.php). Using startling neon shades of orange, pink, lime, and blue, the self-titled “weed-bombers” simultaneously transform the offending vegetation into eye-catching streetscapes and make a pointed commentary about the lack of maintenance of city property. *Id.*

170. Ben Parry, *Preface*, in *CULTURAL HIJACK: RETHINKING INTERVENTION* 5, 8 (Ben Parry et al. eds., 2011) (internal quotation marks omitted).

171. Tracey Taylor, *Inside the Mind of an (Anonymous) Yarn Bomber*, *BERKELEYSIDE* (July 20, 2010, 10:00 AM), <http://www.berkeleyside.com/2010/07/20/inside-the-mind-of-anonymous-yarn-bomber/>.

172. *See id.*

the yarnbombs do not express goals beyond those achieved by the presence of the art itself.<sup>173</sup>

Other more purely instrumental motives drive some uses of urban space. In Detroit, where tens of thousands of residential lots are vacant, many residents have taken control of lots adjacent to their own homes, using the expanded space for home additions or outbuildings or swimming pools or gardens.<sup>174</sup> Some of this happens legally, through a city program that transfers title to homeowners for consolidation, and some illegally.<sup>175</sup> In those instances, residents responded to abandonment by taking control of and remaking the environment as private space.<sup>176</sup> These individual, instrumental uses of private land, including illegal squatting in its various forms, are distinct from the more public-oriented actions that are the focus of this paper. When, in contrast, residents turn vacant neighborhood lots into community gardens, the motive is still instrumental—the new possessors do intend to use the land for a productive use—but not necessarily exclusive, because they invite other members of the community to participate in the garden. Chiefly instrumental uses occur on public land as well. When skateboarders in Oakland construct parks for their own use in the space under freeway overpasses, practical motives—the need for a place to skate—likely outweigh any desire to make a statement about the status of skateboarding or parks or public space.

Given the public nature of the spaces used, even those urban interventions with a strong utilitarian component are often intended, at least in part, as expressive. The goals of some urban gardens, for

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173. *See id.* This quote from one anonymous yarnbomber is revealing:

I like yarn bombing visually—knitting looks so good on a harsh metal pole in an impersonal urban environment. I love being able to change a street with color, it's a surprising power. Politically I like art being out on the street instead of in a more elite setting. . . . Also it gives people a lot of pleasure, especially little kids, an overlooked audience for art. . . . I like to see yarn bombing with a little content to it; I like to see knitting that is a comment on the art and history of the great art and craft of knitting. . . . We like to put up a bunch at once so that it is more of an art show and pedestrians can stroll among them. Like a knitting forest. . . . I'd like to start putting yarn bombs next to art galleries as a little comment.

*Id.*

174. Margaret Dewar & June Manning Thomas, *Introduction*, in *THE CITY AFTER ABANDONMENT*, *supra* note 76, at 7, 9.

175. *See id.* One census tract in the Brightmoor neighborhood, in which 56% of the residential lots stood vacant, nearly 250 lots had been so used or consolidated. *Id.* at 8–9.

176. *Id.* at 9.

example, include the straightforward utilitarian aim of providing fresh produce to city dwellers.<sup>177</sup> But many guerilla gardening interventions have expressive aims, both aesthetic and political, with projects designed to beautify ugly streetscapes with tidy landscaping, to bring weedy lots to bloom with attractive flowers, to “introduce more greenery” into concrete urban environments, and “to raise awareness” for a wide range of social and environmental issues.<sup>178</sup> These include “sustainable food systems, urban storm-water management, improving neighborhood aesthetics, and the power of short-term, collaborative local action.”<sup>179</sup> Other DIY urbanist interventions grapple with large urban issues of transportation, abandonment and decay, and gentrification.<sup>180</sup> Each of these initiatives adopts a local strategy to generate dialogue and solutions for greater regional or even global problems.

Larger, more formal projects like the Build a Better Block project also have a mix of utilitarian and expressive goals.<sup>181</sup> In Better Block interventions, groups of local activists reimagine a few blocks of urban landscape by temporarily transforming them into vibrant, walkable urban spaces.<sup>182</sup> Volunteers create temporary landscaping and build seating and bike racks; local retailers and artists fill abandoned storefronts with temporary “pop-up [shops]”; and existing businesses spill out onto the sidewalk with extra seating and landscaping.<sup>183</sup> The pop-up shops, the artists, and the civic groups that participate do so not for the money to be made that weekend but to demonstrate possibilities: They show the wider community what can be done, whether on the demonstration block or another like it, to create pockets of vitality in the city.<sup>184</sup> In Dallas, the temporary transformations of the first Build a Better Block project included closing a full lane to vehicle traffic and replacing it with landscaping and a bike lane painted with temporary

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177. Lawson & Miller, *supra* note 123, at 19.

178. LYDON, *supra* note 4, at 16; *see, e.g.*, HERN, *supra* note 29, at 56.

179. LYDON, *supra* note 4, at 16.

180. *See, e.g.*, Schatz, *supra* note 76, at 87, 92, 95, 99 (explaining how Youngstown community members take matters into their own hands to implement large-scale urban solutions); *see also* Aoki, *supra* note 35, at 700.

181. *See* LYDON, *supra* note 4, at 13.

182. *Better Block*, *supra* note 10.

183. *Id.*

184. *See id.*

cornstarch-based paint.<sup>185</sup> Similar projects have now taken place in dozens of cities nationwide and one abroad.<sup>186</sup>

### III. QUESTIONS OF LEGITIMACY

Whether a particular DIY urbanist intervention gains acceptance with the surrounding community turns largely on the utility of the use and the contested or uncontested nature of the space in which it occurs. The community's acceptance, in turn, ends up influencing the legality of the act. Guerilla urbanists whose illegal acts become embraced by the wider community succeed in altering property regimes—they change, in some way, the relationships between people in the community with respect to their rights to urban space.

#### *A. Normative Acceptance of DIY Urbanist Acts*

Whether a DIY urbanist intervention is formally legal turns on questions of property law and municipal regulation. Whether a particular intervention is normatively acceptable to the surrounding community, however, is a broader matter. Normative acceptance of DIY urbanist acts depends on the nature of the space used and on the purpose or utility of the action, and whether the use interferes with the preexisting beneficial use by another user or group of users in the same space.<sup>187</sup> In space with little competing actual use—termed here underused or uncontested space—DIY urban interventions will often be viewed as legitimate and endure with wide normative acceptance whether or not they are legal.

Uncontested space, in the context of this Article, is any easily accessible urban place, whether privately or publicly owned, that no one is actively using. Some privately-owned spaces are uncontested because they are underused or because they were abandoned by those who have legal title.<sup>188</sup> Cities that have seen rapid population decline often have a surfeit of abandoned properties, defined by sociologists as properties that are no longer being used or maintained by the owner, and (eventually) on which property taxes are not being paid.<sup>189</sup> In some

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185. LYDON, *supra* note 4, at 13; *see also* *Better Block*, *supra* note 10.

186. Andrew Howard, *Prototyping Cycle Tracks in Auto Dominated Cities*, THE BETTER BLOCK (July 16, 2013), <http://betterblock.org/prototyping-cycle-tracks-in-auto-dominated-cities/>.

187. *See, e.g.*, LYDON, *supra* note 4, at 12.

188. Dewar & Thomas, *supra* note 174, at 9.

189. *Id.* at 7–9; Margaret Dewar, *What Helps or Hinders Nonprofit Developers in*

cases, these properties may be subject to foreclosure by the local government entities that hold tax liens, and, if unsold at auction, remain public property.<sup>190</sup> Thus, though title may rest in private hands one day and in public hands the next, if the city fails to exercise stewardship or transfer ownership to someone who will, the character of a property as abandoned—and the character of the space as uncontested—stays the same.<sup>191</sup>

In uncontested space, the nature of a DIY urbanist intervention matters in establishing whether it will face normative approval. Most likely to gain community acceptance are DIY urban interventions that reclaim uncontested space in new, instrumental ways available to all—for example, miniature lending libraries, street furniture providing a place to sit, and urban gardens.<sup>192</sup> These uses raise few objections whether they are legal (as with an amenity on one’s own land or on a lot used by permission) or illegal (as with amenities placed in abandoned phone booths, on sidewalks, or on vacant lots). By tacit acquiescence or by active participation in the use, the community demonstrates acceptance of the project.<sup>193</sup>

The usefulness and beauty of the act matters. In one Detroit census tract with over a thousand vacant lots in 2010, twenty of those lots had been transformed to gardens and another 166 had become sites of illegal dumping.<sup>194</sup> Both actions are technically illegal (trespass law applies to the vegetable-planter and the couch-dumper alike) and both are technically instrumental (a place to put garbage is a “use,” albeit an

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*Reusing Vacant, Abandoned, and Contaminated Property?*, in *THE CITY AFTER ABANDONMENT*, *supra* note 76, 174, 177.

190. Dewar & Thomas, *supra* note 174, at 9.

191. In Detroit, as noted elsewhere, the city has allowed many of these properties to transfer to private hands by selling them at a low price to adjoining landowners who expand their property. *Id.*

192. See LYDON, *supra* note 4, at 16, 25, 46; Hou, *supra* note 13, at 13. Jeffrey Hou defines reclaiming as “adaptation and reuse of abandoned or underutilized urban spaces for new and collective functions and instrumentality.” Hou, *supra* note 13, at 13. Where these reclamations involve physical alterations to the environment, they can comprise the most successful and transformative examples of DIY urbanism. *See id.*

193. *See, e.g.*, Goodyear, *Sidewalk Seating*, *supra* note 9. *See generally* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 148 (2010) (discussing the strategy of acquiescence in outlaw property actions); Nicholas Blomley, *Flowers in the Bathtub: Boundary Crossings at the Public-Private Divide*, 36 *GEOFORUM* 281, 285–86 (2004) [hereinafter *Flowers in the Bathtub*].

194. Dewar & Thomas, *supra* note 174, at 9.

unglamorous one; this is why landfills make money).<sup>195</sup> But one use is normatively acceptable because the activity enhances the community, while the other activity is seen as a sign of blight.<sup>196</sup>

Because beauty is subjective, the use of uncontested spaces for expressive activities can face tension. Purely expressive interventions, particularly artistic or personal expressions, are often rejected or at the very least controversial.<sup>197</sup> The same activity that might be seen as artistic expression by some is seen as blight by others. At one extreme lies graffiti, a purely expressive form of intervention in urban space.<sup>198</sup> Despite a strong counter-current embracing street art, graffiti is still considered by many a negative form of vandalism indicative of blight.<sup>199</sup> Unsanctioned murals and artistic expressions like yarnbombing are similar—appreciated by some as street art, they are disparaged by others as “mere [graffiti]” or worse.<sup>200</sup> Even legal activities that are purely expressive encounter resistance. Murals can draw criticism, even when painted legally with the permission of the property owner.<sup>201</sup> Art is subjective; though many will appreciate its presence, the content of murals often generates controversy.<sup>202</sup> Of yarnbombing, one critic rather colorfully wrote: “It gets wet and grimy after the first rain storm, insulating perfectly functional handrails and bike racks in a tube of mildew and mold. And for what—covering up perfectly attractive tree trunks with twee stripes?”<sup>203</sup>

195. See, e.g., Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351, 365 (2000) (explaining that on privately owned vacant lots, gardeners may face prosecution for trespass).

196. In Detroit, the city tolerates both beneficial and harmful illegal land uses by neither “interfer[ing] with [residents’] stewardship and takeover of property without ownership,” nor enforcing blight codes or antidumping laws. Dewar & Thomas, *supra* note 174, at 9–10.

197. Herscher, *supra* note 167, at 72.

198. Marisa A. Gómez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 634, 648 (1993).

199. *Id.* at 634–35.

200. *Id.* at 650 (“Graffiti has been called everything from destructive vandalism to art.”); Sara Johnson, *Urban Trends We Hope Die in 2013*, ATLANTIC CITIES (Dec. 31, 2012), <http://www.theatlanticcities.com/arts-and-lifestyle/2012/12/urban-trends-we-hope-die-2013/4240/> (quoting Amanda Erickson) (describing yarnbombing as a nuisance).

201. See, e.g., Phil Sneiderman, *Group Protests Graffiti at Furniture Warehouse*, L.A. TIMES, Apr. 21, 1990, at B3 (explaining that community members protested commissioned murals).

202. See Gómez, *supra* note 198, at 650.

203. Johnson, *supra* note 200 (quoting Amanda Erickson).

Detroit's Heidelberg Project provides an even starker example of the tension faced by purely expressive DIY urban interventions.<sup>204</sup> There, artist Tyree Guyton installed an assemblage of found objects and some paintings on a group of abandoned properties on and around Heidelberg Street.<sup>205</sup> As with the Object Orange, the artist's purpose was to draw attention to the abandonment—of lots, of houses, of cars, of personal property.<sup>206</sup> Views of the normative value of the Heidelberg Project were sharply divided: neighbors complained that the installations were eyesores and junk even as the artist gained acclaim and visitors streamed to the site.<sup>207</sup> Expressing the height of this dichotomy, the City of Detroit responded to the neighbors' complaints by bulldozing those of the installations that were on city-owned foreclosed properties around the same time that the city council awarded Guyton a "Spirit of Detroit" award for his artistic achievements.<sup>208</sup> Expressive uses thus hold a much more ambivalent normative frame than widely-accepted instrumental uses open to all.

Some forms of DIY urbanism so serve human values that they are resistant to removal. This is particularly true of spontaneous roadside memorials.<sup>209</sup> Though the displays are banned in several states and are sometimes removed by authorities, the larger displays tend to reappear in various forms.<sup>210</sup> Some cities have chosen to retain aspects of DIY memorials at the sites of mass tragedies. At the site of the Murrah Building bombing in Oklahoma City, as the beautifully designed and landscaped official memorial was being constructed, planners originally intended to clear away the messier spontaneous memorials that had formed after the tragedy.<sup>211</sup> After objection from the community, the designers instead left a section of fence known as the "Memorial Fence," where to this day visitors pause to leave photos, notes, and objects.<sup>212</sup> After the annual Oklahoma City Memorial Marathon, many runners pin their race numbers to the fence in tribute to victims and

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204. Herscher, *supra* note 167, at 71.

205. *Id.*

206. *Id.* at 73–74.

207. *Id.* at 72.

208. *Id.*

209. See McClurg, *supra* note 155, at 47–48.

210. *Id.* at 44–45, 47.

211. Franck & Paxson, *supra* note 157, at 147.

212. *Id.* at 143, 145, 147; U.S. NAT'L PARK SERV., *Self-Guided Tour—Oklahoma City National Memorial*, <http://home.nps.gov/okci/planyourvisit/self-guided-tour.htm> (last visited Nov. 9, 2013).

survivors of the tragedy.<sup>213</sup> This example perfectly captures the purpose of the DIY aspect of the memorials and demonstrates its wider acceptance.

In some cases, even unpopular activities may face little community opposition when performed in uncontested space. Skateboarding faces less general approval than other forms of exercising, in part because it is practiced mostly by teenagers and young people who may be viewed with suspicion, and because skateboarding is noisy and, at its worst, can damage railings and other improvements to public space.<sup>214</sup> Therefore, many cities ban skateboarding in certain public places.<sup>215</sup> But the Bordertown Skate Park actually garnered community approval.<sup>216</sup> This may have had a great deal to do with the fact that, in using space under a freeway overpass, the skaters had found a location that no one else was using.<sup>217</sup> The park faced less opposition than most skateboarding activities precisely because it was located in an uncontested space.<sup>218</sup> Similarly, user-generated takeovers of the space under overpasses have taken place in cities around the world, such as when groups of Tai Chi practitioners gather with drummers to perform their daily exercise under an overpass in Beijing.<sup>219</sup> The quest for approval to use space under freeways may entail numerous legal barriers, but fewer normative ones.<sup>220</sup> Yet when they use plazas shared with other segments of the public, users like skateboarders garner more complaints—even if they are skating in places where they have a legal right to be.

Instrumental interventions appear to raise serious problems of legitimacy only when they take place in truly contested space, space that more than one group of users claims. Where space is contested, a new use of the space is likely to face normative disapproval, whether the new

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213. *Where Is My Treasure?*, MILE MARKER BLOG (Apr. 18, 2013), <http://milemarkerblog.com/tag/okc-memorial-marathon/>.

214. Chihsin Chiu, *Streets Versus Parks: Skateboarding as a Spatial Practice in New York City*, 38 ENVTL. DESIGN RES. ASS'N 101, 105 (2007), available at [http://www.edra.org/sites/default/files/publications/EDRA38-Chiu\\_1.pdf](http://www.edra.org/sites/default/files/publications/EDRA38-Chiu_1.pdf).

215. See Bezanson & Finkelman, *supra* note 21, at 266.

216. Berg, *supra* note 7.

217. See *id.*

218. See *id.*

219. Caroline Chen, *Dancing in the Streets of Beijing: Improvised Uses Within the Urban System*, in INSURGENT PUBLIC SPACE: GUERRILLA URBANISM AND THE REMAKING OF CONTEMPORARY CITIES, *supra* note 8, at 21, 21, 24, 27.

220. See, e.g., Berg, *supra* note 7; see also Chen, *supra* note 216, at 27.

use is technically legal or illegal.<sup>221</sup> This is also true whether the contested space is public or private.<sup>222</sup> New users face disapproval where they quite legally make use of public space in a way that infringes on the use of others. Contested uses of public parks provide a good example. Recently, the City of Santa Monica, California, considered a proposal to ban or regulate paid group exercise classes in a popular park.<sup>223</sup> The park had become such a popular destination for fitness enthusiasts that the presence of numerous instructors, students, and their equipment made local residents feel that insufficient space remained for them and their children.<sup>224</sup> The City of Austin, Texas, already has a similar ordinance.<sup>225</sup> Exercise is generally a welcome activity in a public park; only when a park becomes so crowded that other neighbors find their use disturbed does the activity lose general acceptance.

In another example, when activists paint crosswalks, use cones to build traffic bump-outs, or paint temporary bike lanes on busy roadways that they believe should be made safer to cyclists and pedestrians, they co-opt a space already used by cars. The space is not vacant. The needs of the various groups of users of the space—pedestrians, cyclists, and drivers—conflict, and they may need to be mediated through more traditional democratic processes.<sup>226</sup> In contested space, temporary space-appropriating strategies like citizen-painted crosswalks, Critical Mass bike rides, and Better Block demonstration projects serve then as a catalyst for community action and open negotiation with planning and traffic authorities.<sup>227</sup> Some result in enduring change, but many do not.

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221. See Edwards, *supra* note 27, at 486.

222. See, e.g., SHEPARD & SMITHSIMON, *supra* note 98, at 41–42, 149–50 (demonstrating that people disapprove changes in public and private space).

223. *Fitness Boot Camps May Get the Boot in Santa Monica, Calif.*, NAT'L PUB. RADIO (Jan. 15, 2013, 5:47 PM), [www.npr.org/templates/transcript/transcript.php?storyid=169414500](http://www.npr.org/templates/transcript/transcript.php?storyid=169414500).

224. *Id.*

225. *Commercial Use of Dedicated Parkland*, AUSTINTEXAS.GOV, <http://www.austintexas.gov/departments/commercial-use-dedicated-parkland> (last visited Oct. 23, 2013).

226. Goodyear, *Painting Crosswalk*, *supra* note 23 (describing two different city responses to crosswalks painted by citizens).

227. *Better Block*, *supra* note 10; Goodyear, *Painting Crosswalk*, *supra* note 23; *About Critical Mass*, CHI. CRITICAL MASS, <http://chicagocriticalmass.org/about> (last visited Nov. 10, 2013).

*B. Legalization of Normatively Acceptable Acts*

Normatively acceptable acts of guerilla urbanism sometimes become formally legalized.<sup>228</sup> This reflects larger patterns at work in the evolution of law in general and of property law in particular.<sup>229</sup> In his recent piece, *Acceptable Deviance and Property Rights*, Mark Edwards provides a helpful four-quadrant rubric that conceptualizes acts along two axes: legal/illegal and normatively acceptable/unacceptable.<sup>230</sup> Edwards posits that “[w]here the legality and social acceptability of behavior diverge, some deviance is socially acceptable” and enforcement is rare.<sup>231</sup> Thus, breaking the laws in those small ways constitutes acceptable deviance.

Acts of acceptable deviance from the law tend not to draw enforcement.<sup>232</sup> To cite two of Edwards’s examples, motorists driving a few miles an hour above the speed limit or, in the real property context, musicians performing on busy street corners, are unlikely to face sanction.<sup>233</sup> This is certainly true in DIY urbanism. Interventions may violate a variety of laws, but do so in a way that elicits neither an outcry from the neighbors nor the intervention of legal authorities. Throwing Frisbees in the park and “defacing” property by removing weeds may be technically illegal but normatively acceptable or even welcomed behavior. This is particularly true of actions that beautify land. Though gardening on a roadway median may violate a regulation against defacing public property, and trespassing to garden on a vacant lot may violate rights to private property, the action does not draw a strong negative reaction, and the laws are typically not enforced.<sup>234</sup>

In the rarer instances where DIY actions consisting of “acceptable deviance” have been enforced, it is often the enforcement, not the initial action, which draws criticism. One notorious example in the DIY urbanism context was the Giuliani administration’s crackdown on illegal urban gardens in New York City.<sup>235</sup> There, the city’s bulldozing of urban

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228. See, e.g., Edwards, *supra* note 27, at 491–92.

229. See *id.* at 459.

230. *Id.* at 461.

231. *Id.* at 457, 461.

232. *Id.* at 461.

233. *Id.* at 461–62, 485.

234. The danger in having a large swath of human activity technically illegal but generally accepted is that this leaves room for selective or discriminatory enforcement. *Id.* at 486.

235. *N.Y.C. Env'tl. Justice Alliance v. Giuliani*, 214 F.3d 65, 67 (2d Cir. 2000).

gardens in order to make way for more lucrative land uses spurred a lawsuit attempting to enjoin the destruction.<sup>236</sup> Though the plaintiffs ultimately lost that legal battle, they did win public sympathies, and the next mayoral administration changed course on the issue.<sup>237</sup> In a similar way, when New York City attempted to evict guerilla gardeners from an unused lot that it owned but had not maintained, citing fear of liability, public sympathies rested squarely with the gardeners.<sup>238</sup> After all, they had transformed a trash-strewn eyesore into a space that served multiple human values by creating a space of beauty, community, connection with the outdoors, and healthy food production.<sup>239</sup> The government was seen as worse than useless.<sup>240</sup> These exceptional instances of enforcement occur; however, overall, where behavior is formally illegal but normatively acceptable, enforcement is rare.<sup>241</sup>

Edwards also notes that in some contexts where law and normative acceptance diverge, “it is ultimately the law, rather than the behavior, that changes.”<sup>242</sup> Actions that are de jure illegal but viewed as legitimate and normatively acceptable by the community often become legal.<sup>243</sup> As Edwards’s model predicts, as various tactics adopted by DIY urbanists spread, more eventually become legitimized, finding their way into the mainstream urban development canon such that legal means to replicate them become available.<sup>244</sup> While the Bordertown Skate Park’s acceptance by the local community rested on the uncontested nature of the space, the lack of normative disapproval in turn made it possible for the project to gain supporters and become (temporarily) legitimized.<sup>245</sup>

Some DIY urbanist interventions, both legal and illegal, end up having a transformative effect, becoming city-sanctioned or private-

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236. *Id.*

237. *Id.* at 68; Michael Saul, *500 Gardens Saved in City Housing Deal*, N.Y. DAILY NEWS, Sept. 19, 2002, at 6 (discussing how Mayor Giuliani insisted that the land should be developed for housing, but in 2002, Mayor Bloomberg signed an agreement that protected 500 community gardens).

238. Amanda Suutari, *The Community Gardening Movement in New York City: The First Decade*, ECO TIPPING POINTS PROJECT, <http://www.ecotippingpoints.org/our-stories/indepth/usa-new-york-community-garden-urban-renewal.html> (last visited Oct. 24, 2013).

239. *Id.*

240. *See id.*

241. Edwards, *supra* note 27, at 485.

242. *Id.* at 459.

243. *See, e.g., id.* at 491–92.

244. *Id.* at 500.

245. Berg, *supra* note 7.

sector-sponsored projects with formal government approval. The organizers of the first Better Block project initially sought city approval, but when that failed to materialize, went ahead with the weekend-long event as planned.<sup>246</sup> Similar events now happen annually in dozens of cities, some in conjunction with more recognized groups like the Urban Land Institute and city governments.<sup>247</sup>

Some temporary demonstration projects become permanent fixtures, enveloped in the more formal property law mechanisms of government regulation and market success. For example, PARK(ing) Day began as one brief 2005 event that spawned an international movement toward turning on-street parking spaces into parks.<sup>248</sup> In the original action, a San Francisco-based collective called Rebar built a temporary park, complete with sod, a bench, and a potted tree, within the lines of one on-street parking space, inviting passersby to make use of the transformed space.<sup>249</sup> The event lasted only two hours, the length of time allowed on the parking meter.<sup>250</sup> But the video and photos posted from it struck an immediate chord, and have inspired hundreds of imitators, to the point that PARK(ing) Day is now “celebrated” annually with parking-space-based interventions in cities around the world.<sup>251</sup>

Some PARK(ing) Day inspired innovations have become so successful as to become permanent.<sup>252</sup> The City of San Francisco now allows residents to apply for permits to convert one or two parking spaces to semi-permanent “parklets.”<sup>253</sup> Additionally, several cities have instituted formal programs through which local business owners can sponsor the construction of a parklet in the parking spaces in front of their businesses.<sup>254</sup> Typically featuring a platform at sidewalk level with

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246. *Better Block*, *supra* note 10; Robyn Ross, *Building a Better Block in Oak Cliff*, TEX. OBSERVER (Dec. 18, 2012, 1:20 PM), <http://texasobserver.org/building-a-better-block-in-oak-cliff>.

247. *See, e.g.*, Better Block OKC, *This Saturday! BBOKC in the Farmers Market District!*, BETTER BLOCK OKC (May 1, 2013), <http://www.betterblockokc.com/this-saturday-bbokc-in-the-farmers-market-district/> (promoting the 2013 Better Block in Oklahoma City, supported by sponsorship from a local car dealer).

248. LYDON, *supra* note 4, at 15; Merker, *supra* note 8, at 45–46.

249. Merker, *supra* note 8, at 45.

250. *Id.*

251. *Id.*

252. *See generally* LYDON, *supra* note 4 at 15, 20.

253. Badger, *supra* note 136.

254. *Id.* at 20.

inviting seating and vegetation, the parklets sometimes bear signage indicating that they are public property and that one does not have to patronize the neighboring businesses to use the amenities.<sup>255</sup> These have been such a success and are now replicated in enough cities that Rebar now produces a modular unit called a “Walk-let” as a parking-space-sized installation available for purchase.<sup>256</sup> The phenomenon has traveled a full spectrum of acceptance, from a quirky intervention of uncertain legality, to a movement embraced by citizens and activists worldwide, to city policy widespread enough to spur the development of a market-ready product.<sup>257</sup> Even where PARK(ing) Day interventions have not led to a formal mechanism for adopting the changes long-term, organizers continue to put their energies into creating these temporary, tiny urban oases, doing so in parking spaces instead of on private property precisely to invite the public to consider the best use of urban space.<sup>258</sup> And the success of these miniature public parks has in turn inspired larger park-making efforts.<sup>259</sup>

Another initially-guerilla effort that has gained wide acceptance is Depave—a Portland, Oregon group that removes unnecessary paving to decrease stormwater runoff and to create new parks and gardens.<sup>260</sup> As described in *Tactical Urbanism*:

Depave began as an unsanctioned, self-organized neighborhood effort in 2007, but has blossomed into an influential non-profit organization that has received grants from the U.S. Environmental Protection Agency, the Oregon Department of Environmental Quality, Patagonia, and the Multnomah Soil and Water Conservation Districts. It is also supported by many other businesses, organizations, government departments and schools. Depave therefore provides a great example of how short-term unsanctioned initiatives can become sanctioned, long-term efforts within a very short amount of time.<sup>261</sup>

Like many other good ideas that have bubbled up from guerilla urbanists, “depaving” has gained wide enough acceptance to receive

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255. *Id.*

256. *Walklet*, REBAR, <http://rebargroup.org/walklet> (last visited Oct. 22, 2013).

257. See Merker, *supra* note 8, at 46–47.

258. *Id.* at 49.

259. LYDON, *supra* note 4, at 41.

260. *Id.* at 23.

261. *Id.*

grants from both governmental entities and private corporations and can now be replicated in other cities.<sup>262</sup>

Ultimately, this exploration of legitimacy reveals that the kinds of interventions that gain general acceptance reflect deeply-rooted historical patterns in property law. The law of adverse possession, for example, has proceeded on the theory that unused land represents lost utility.<sup>263</sup> Under this idea, if an owner does not care for a property enough to use it, instead of letting the land lie fallow and the borders unprotected, then title should eventually pass to the one who actually has possession and makes productive use of the land.<sup>264</sup> While instances of squatting on an urban lot continuing long enough to meet the requirements of an adverse possession statute are rare, the same principles and values that underlie adverse possession turn public sympathies (and in some cases, government policy) in favor of productive users of land.<sup>265</sup>

Conversely, crowds of exercise classes in Santa Monica and skateboarders in plazas join Edwards's street preachers and day laborers in the "legal-but-normatively-unacceptable" quadrant of Edwards's rubric.<sup>266</sup> As Edwards predicts, the next step is often for the activity in question to be banned or regulated.<sup>267</sup>

Finally, uses of space that are both formally illegal and normatively unacceptable tend to disappear. DIY urbanist activities that face normative disapproval, whether because of the controversial nature of the acts or the contested nature of the space on which they occur, tend to fade with time.<sup>268</sup> So-called "yarnbombs" do indeed fade, tatter, and

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262. *Id.*

263. Walter Quentin Impert, Comment, *Whose Land is it Anyway?: It's Time to Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447, 448 (2001).

264. *Id.* This is, of course, problematic for environmentally sensitive pieces of land. The best use of a coastal wetland, for example, might indeed be no direct use at all, to preserve ecological resources and to protect inland communities from flooding. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 884 (1994) (explaining that the law of adverse possession operates at the expense of environmental protection). I refer to the roots of adverse possession doctrine here only to expose the workings of one of the common values underlying both DIY urbanism and Anglo-American property law generally. See Impert, *supra* note 263, at 448.

265. LYDON, *supra* note 4, at 11–23 (describing different DIY projects that focus on putting public spaces to a better use); Impert, *supra* note 263, at 448 (explaining that adverse possession law encourages a productive use of land).

266. Edwards, *supra* note 27, at 460–61, 486.

267. *Id.* at 462.

268. See Johnson, *supra* note 200; Sneiderman, *supra* note 201 (describing how property

eventually get removed with time, and unwanted street art gets painted over. Likewise, expressive interventions intended primarily to spark debate—like the Seattle pig sculpture and ghost bikes—tend to be temporary.

DIY urbanists using space in illegal ways can change the formal law in modest but meaningful ways, as the initial lawbreaking leads to a new conception of the space as property. When the illegal uses gain community acceptance, their legal status changes—new municipal programs arise, permits are granted for previously-forbidden activities, rights to land are transferred by lease or sale, regulations are relaxed, exceptions are drafted, and the new uses may even be appropriated for commercial purposes.<sup>269</sup> These adjustments may appear routine, in hindsight, but each represents a legal and sociological shift in a property regime.

Property law regimes succeed where they effectively balance stability and flexibility. One essential purpose of property law is certainly to provide stability in the expectation that others will honor one's legitimate claims to property to provide a stable basis for investment.<sup>270</sup> However, the history of American property law has been that of a series of adjustments and expropriations, large and small.<sup>271</sup> To successfully live in communities, people also need to know that there will be adequate and appropriate avenues for adjustment and response when such adjustments are needed. In times of transition and uncertainty, such assurances are even more important.<sup>272</sup> Thus, where it may be necessary to institute pollution controls to preserve the health of a community, or to regulate floodplain development to prevent

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owners paint over graffiti).

269. See, e.g., Lawson & Miller, *supra* note 123, at 29–30 (describing how government programs assist urban gardeners with obtaining legal permission to use vacant lots).

270. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1 (8th ed. 2011); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 *CORNELL L. REV.* 531, 552 (2005); Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 347 (1967); see also Carol M. Rose, *Property as the Keystone Right?*, 71 *NOTRE DAME L. REV.* 329, 330–31 (1996).

271. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 *UTAH L. REV.* 1, 1 (2000) [hereinafter *Property and Expropriation*]. For more on the need for flexibility in property law, especially during times of transformation, see PEÑALVER & KATYAL, *supra* note 193, at 138–40; Nestor M. Davidson, *Property's Morale*, 110 *MICH. L. REV.* 437, 441 (2011); Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 *FORDHAM L. REV.* 1607, 1658 (2010); Edwards, *supra* note 27, at 500; Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577, 578–80 (1988).

272. Davidson, *Property's Morale*, *supra* note 271, at 441.

catastrophe downstream, a stable legal regime provides both a transparent rulemaking process and mechanisms such as compensation or grandfathering regimes for softening the burden of those regulations on the individuals whose property is affected.<sup>273</sup> Moreover, flexibility in response to challenges preserves a greater security of expectation that life in a physical space, or in a community, will continue to be livable for all.

Property law also reflects the reality that those owning property in communities bear some obligations to one another.<sup>274</sup> Property regimes consider many values beyond those encompassed in the expectations of individual owners; the institution of property protects community values as well as individual investments.<sup>275</sup>

DIY urbanists who are finding their own ways to implement local change represent part of a broader reorientation toward community that is happening in urban areas. Residents are acting to ensure that in addition to owning or renting individual plots of land, they “actually own some stake of the communities in which [they] live.”<sup>276</sup> An embrace of DIY urbanism, then, rejects a valuation of land based solely on an individual’s security of expectations in its use and enjoyment, and instead values its location in the physical, cultural, and social place in the community.

Public space is increasingly subject to forces of privatization, whether by outright ownership transfer or by increasingly restrictive regulation of the activities that may occur within the space.<sup>277</sup> DIY

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273. Rose, *Property and Expropriation*, *supra* note 271, at 15–16, 18–19, 21, 23. Recent times have brought other disruptions: market failures that destroy the value of people’s investments; physical forces that alter their land; or rapid social and economic changes that undermine members’ places in the community. These, too, call for responses handled with fairness and transparency.

274. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 753 (2009). Modern property theorists recognize a stronger norm of community obligation at work in a wide range of common law doctrines and legislative enactments that govern property rights. *Id.* at 774.

275. *Id.* at 754, 780.

276. Josh O’Conner, *Conventional Planning vs. “Tactical Urbanism,”* URB. TIMES (Apr. 16, 2012), <http://urbantimes.co/magazine/2012/04/coventional-planning-vs-tactical-urbanism/>. The author intended this chiefly as a nod towards a trend in planning that encompasses local culture as opposed to just mass-market solutions. *Id.*; see also Josh O’Conner, *Top Built Environment Trends from 2012*, URB. TIMES (Dec. 28, 2012), <http://urbantimes.co/magazine/2012/12/top-built-environment-trends-from-2012/> (discussing how new residents moving into cities seek “a more nuanced and socially connected sense of place—even if they have to provide it themselves”).

277. SHEPARD & SMITHSIMON, *supra* note 98, at 54.

urbanist interventions push back against the segmentation of privatized space. They take space that is subject to conversion into policed or privatized space and reestablish it as open to the public. Interventions as simple as benches reclaim or appropriate space in a way that essentially creates a commons. Police often seek to prevent the encroachment of private activities (e.g., sleeping) into public space.<sup>278</sup> DIY urbanists turn this on its head by seeking to expand the public realm.<sup>279</sup> As they do this, DIY urbanists bring needed flexibility to the related endeavors of building cities and balancing property rights. Land, particularly the shrinking arena of urban land truly accessible to the public, carries with it values beyond those imposed by markets; DIY urbanist interventions recapture space for the realization of those values. The eventual acceptance of many illegal DIY urbanist acts signals the successful creation of new common property.

#### IV. DISOBEDIENCE AND DEMOCRACY

Up until now, this Article has not addressed the challenge to the rule of law that is raised by illegal DIY acts. A significant subset of DIY urbanist actions—including, arguably, the most transformative ones—are done guerilla-style, skirting regular democratic and market processes.<sup>280</sup> Rather than approaching a private landowner and negotiating to use the land, bringing a proposal before a city council and requesting money to fund it, petitioning the school board and accepting the results, or bringing a plan before a zoning board or building department and obtaining permission before building, guerilla urbanists simply act.<sup>281</sup> In this they appear to embody the credo: better to ask for forgiveness than permission.

At first blush, this might appear troubling. Part of living in a democracy means that sometimes we need to obey laws that we do not particularly like.<sup>282</sup> At least in theory, citizens of a democracy contract to abide by the ground rules of elected representation and due process,

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278. *Flowers in the Bathub*, *supra* note 193, at 284.

279. See LYDON, *supra* note 4, at 11–13, 15–17, 19–21 (describing various DIY projects that aim to expand public space).

280. *Id.* at 7.

281. Hou, *supra* note 13, at 15.

282. ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 18, 48 (1968). Of course, a great deal of political philosophy has been devoted to debating this very proposition. See, e.g., HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 395 (Penguin Books 1983) (1854).

accepting that in this process sometimes our own preferences will not prevail.<sup>283</sup> Despite this, some guerilla urbanist interventions perform an end-run around zoning and building codes; even placing a bench on a sidewalk may violate a stricture against erecting structures in a public right-of-way. Other actions violate the sanctity of private property, which has been described as foundational to democracy.<sup>284</sup> Guerilla urbanism, to the extent it disregards legal processes, might appear a dangerous form of anarchy, the first step on a slippery slope to people erecting homes on the front lawns of their vacationing neighbors. Zoning and building codes, park regulations, and the like exist (at least in part) to enforce order.<sup>285</sup> Permitting some illegal activity to persist might be seen as unraveling the threads of order and replacing them with an “anything goes” philosophy of urban land use.

Additionally, plenty of community groups manage to legally institute bottom-up changes in their urban environments. The community gardening movement, for example, is well established in many U.S. cities.<sup>286</sup> Some city and state entities have established formal procedures through which neighbors may acquire leases on or title to vacant properties for community gardening purposes; not all gardens have illegal roots.<sup>287</sup> In cities with many vacant properties, then, it should at least in theory not be difficult to legally access one on which to plant a community garden. In another example, artists’ groups wishing to take over vacant storefronts collaborate with cities and nonprofits to coordinate leases with commercial landlords.<sup>288</sup> And of course, those who own property or can obtain the permission of property owners can perform all sorts of interventions, from a sidewalk-fronting miniature lending library at the foot of one’s own lawn to house-sized murals

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283. FORTAS, *supra* note 282, at 48.

284. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 17 (2d ed. 1998) (citing JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 380 (Peter Laslett ed., 2d ed. 1967)); Rose, *supra* note 271, at 332–33 (providing a helpful exposition of these theories).

285. ELY, *supra* note 284, at 113–14, 150–51.

286. Lawson & Miller, *supra* note 123, at 20.

287. See, e.g., *id.* at 29–30, 34 (Michigan and St. Louis). On the other hand, it could just as well be argued that the roots of modern community gardening as a whole began as a venture in guerilla urbanism, just as innovations like the Better Block project, PARK(ing) Day, and Depave have done more recently.

288. See, e.g., Cardwell, *supra* note 3; Brianna Watts-EI et al., *Arts on South*, WHY? PUB. MEDIA COMMONS, <http://www.whyy.org/hamiltoncommons/artsonsouth.html> (last visited Oct. 20, 2013).

adorning the walls, at least to the extent that zoning and building codes and homeowners' association regulations permit.<sup>289</sup> These and many other legal forms of DIY urbanism originate at the grassroots level but proceed through legal channels to accomplish the community aims.

All of this raises two related sets of questions. First, why do some DIY urbanists act in ways they know to be illegal or, at the very least, with indifference to the possible legality or illegality of their acts? Why do some gardeners simply plant on underused strips of land, instead of seeking owner or city permission? Is all guerilla urbanism spurred by individualist, anarchist impulses and nothing more? Second, does the illegal nature of guerilla urbanist actions serve any purpose in society? How do the illegal ways that people use space relate to the formal mechanisms of law, and do their illegal acts serve any legitimate purpose in a democracy?

As it turns out, many instances of DIY urbanist lawbreaking point to flaws in democratic processes in cities.<sup>290</sup> Additionally, regardless of the reasons for the illegality of the action, many acts of DIY urbanism are in fact democracy-enhancing.<sup>291</sup> Though they avoid formal governmental processes, well-executed DIY urbanist interventions actually strengthen the conditions needed for healthy local democracies.<sup>292</sup> They create spaces for community. They simultaneously demonstrate possibilities for use of urban space and point to the democratic deficiencies that prevent localized innovations from happening through legal channels.

Before confronting questions of illegality, it is helpful to know *why* people elect illegal rather than legal channels for their activity. In examining various forms of DIY urbanism and comparing those achieved through formal channels with those done illegally (or done without awareness of or regard for their potential illegality), a few patterns emerge. These patterns reflect existing literature about why people obey the law, what laws people obey, and what laws people break.<sup>293</sup> Reasons people break the law start with the practical: simple ignorance of the law is one; the unlikelihood of enforcement is another.<sup>294</sup> Public spaces are subject to myriad picayune regulations to

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289. Thanks to Jess Owley for providing the lovely example of the library maintained at the foot of a lawn in Milwaukee, Wisconsin.

290. See Markovits, *supra* note 28, at 1902.

291. *Id.* at 1936–37.

292. *Id.*

293. See, e.g., FORTAS, *supra* note 282, at 14–15; Edwards, *supra* note 27, at 460.

294. Edwards, *supra* note 27, at 462. See generally Adam L. Alter et al., *Morality*

which most of us are blissfully unaware. For example, it is illegal to throw a Frisbee in all but one park in Vancouver—and there, the activity requires a permit.<sup>295</sup> The behaviors proscribed by these regulations, while illegal, are widely accepted; the regulations therefore are routinely violated and rarely, if ever, enforced.<sup>296</sup> Did the architects at Rebar violate any regulation when they laid down sod, a potted tree, and a bench, turning a metered parking space into a “parklet” for two hours?<sup>297</sup> Perhaps. More to the point: did they care? Probably not. It was unlikely that this act would result in any great sanction.

Just as people routinely disobey regulations that they do not know (or are not certain) exist, DIY urbanists will favor illegal methods when enforcement is unlikely. How likely are DIY urbanists to face criminal sanction and prosecution? As predicted by the Edwards model above, enforcement is unlikely when the illegal act is normatively acceptable.<sup>298</sup> Or, as stated succinctly by a poster on the Guerilla Gardening web forum, in response to a newbie’s question about legality: “There’s a simple rule to follow though: assume it’s forbidden, but ignored/accepted, as long as you only *improve* the site, and don’t attract too much (negative) attention.”<sup>299</sup> The gardener dispatching this advice was, of course, describing a normatively acceptable behavior taking place on uncontested space. We can be sure that, had these activists been planting their shrubbery on someone’s front lawn, “negative attention” and possible criminal sanction would have swiftly followed.

Though some DIY urbanist acts may arise merely from ignorance of the law or the unlikelihood of enforcement, most guerilla urbanists choosing to circumvent legal channels are in fact responding to democratic deficits in their cities.<sup>300</sup> In some cases, the appropriate

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*Influences How People Apply the Ignorance of the Law Defense*, 41 LAW & SOC’Y REV. 819, 819 (2007).

295. HERN, *supra* note 29, at 65–66 (mentioning a conversation with former Parks Board Commissioner, Spencer Herbert).

296. Chantal Eustace, *Frisbee Toss a Vancouver Parks No-No; Except When Players are at Queen Elizabeth and then They’d Better Watch that They Don’t Start Singing and Playing Guitars*, VANCOUVER SUN, Sept. 8, 2007, at B5.

297. Merker, *supra* note 8, at 45–46.

298. *Supra* Part III.B.

299. Egregius, Comment to *Legality of Planting*, GUERRILLAGARDENING.ORG. (July 21, 2008, 5:28 PM), <http://guerrillagardening.org/community/index.php?topic=1156.0> (responding to a question about the legality of planting).

300. LIZ RICHARDSON, *DIY COMMUNITY ACTION: NEIGHBOURHOOD PROBLEMS AND COMMUNITY SELF-HELP* 182–83 (2008).

channels for gaining permission simply do not exist.<sup>301</sup> Further, the channels that do exist are a poor fit for the small, eclectic projects DIY urbanists conceive.<sup>302</sup> In other cases, broken systems of local governance have blocked people's access to solutions for local problems, and they turn instead to self-help.<sup>303</sup>

Cities may in fact have good reasons to wish to rein in some DIY urbanist actions. DIY urbanists and their local municipalities often fail to work together effectively because new actions may raise health and safety concerns and expose cities to new liability. City public works officials have opposed the grafting of fruit-bearing branches onto ornamental pear and plum trees because fallen, rotting fruit poses a slip-and-fall hazard.<sup>304</sup> And of course, the fear of lawsuits is valid, as thousands of people sue cities for personal injuries each year.<sup>305</sup> New York City attempted to evict guerilla gardeners from an unmaintained vacant lot owned by the city for the same reason, citing fear of liability.<sup>306</sup> When the City of Oakland declined to renew the lease for the Bordertown Skate Park, it cited the inadequacy of the skaters' engineering plans and their failure to meet certain bonding requirements.<sup>307</sup> Other legitimate concerns of cities are the need to consider the cost of ongoing maintenance of any installation, and the potential for objections from neighbors, particularly with respect to artwork, which tends to be controversial.<sup>308</sup>

As a result of all of these perfectly good reasons from the city's point of view, gaining permission from local government before taking on a DIY initiative can be an outsized hassle, involving astonishing amounts of red tape, precisely because of the legitimate concerns cities may have.

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301. *Id.* at 207.

302. Erick Villagomez, *Claiming Residual Spaces in the Heterogeneous City*, in *INSURGENT PUBLIC SPACE: GUERRILLA URBANISM AND THE REMAKING OF CONTEMPORARY CITIES*, *supra* note 8, at 81, 82.

303. *See* Richardson, *supra* note 300, at 184.

304. Patricia Leigh Brown, *Tasty, and Subversive, Too*, N.Y. TIMES, May 12, 2013, at 15; Lonny Shavelson, *Guerilla Grafters Bring Forbidden Fruit Back to City Trees*, THE SALT (Apr. 7, 2012, 7:00 AM), <http://www.npr.org/blogs/thesalt/2012/04/07/150142001/guerrilla-grafters-bring-forbidden-fruit-back-to-city-trees>.

305. *See, e.g.*, *Wilson v. City & Cnty. of S.F.*, 344 P.2d 828 (Cal. Dist. Ct. App. 1959); *Calder v. City & Cnty. of S.F.*, 123 P.2d 897 (Cal. Dist. Ct. App. 1942); *Morrissey v. City & Cnty. of S.F.*, 286 P. 433 (Cal. Dist. Ct. App. 1930).

306. Suutari, *supra* note 238.

307. Berg, *supra* note 7.

308. Schindler, *supra* note 20, at 259–60; Sniderman, *supra* note 198; Berg, *supra* note 7.

One early experience of the Vancouver Public Spaces Network (VPSN) exemplifies this.<sup>309</sup> The group targeted a trash-strewn alley consisting of broken asphalt bordered by graffiti-covered walls, located steps from a public transit stop used by many in the community.<sup>310</sup> VPSN volunteers intended to resurface the lane with interlocking removable pavers bordering a grassy strip and to paint over the graffiti with murals.<sup>311</sup> Despite their noble intentions, one activist recalls contact with the city as “frustrating and discouraging.”<sup>312</sup> The city initially approved the project as a temporary installation only—and then only if the group would purchase a \$1 million insurance policy at an approximate cost of \$3,000 (CAN) for the temporary pavers.<sup>313</sup> Eventually, the city allowed the project to continue under the city’s own liability insurance, and VPSN installed the pavers, planted grass, and “invited the community and passersby to paint murals to cover the graffiti” with donated paint.<sup>314</sup> The project was an instant success, and local families and children got involved and even added plantings along the edges of the lane.<sup>315</sup> However, the city had approved only a temporary installation, citing liability issues, and the improvements were slated for removal.<sup>316</sup> Only after an overwhelming show of public support including a petition, media response, and emails did the city agree to keep and, eventually, maintain the laneway improvements.<sup>317</sup> Activists observing VPSN’s experiences in repairing one tiny alleyway could be forgiven for wanting to sidestep such hassles, or for thinking that a big-city government is simply too big to allow local people to accomplish small things. For projects even smaller than VPSN’s Laneway Project—for example, a

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309. *About VPSN*, VANCOUVER PUB. SPACE NETWORK, <http://vancouverpublicspace.ca/index.php?page=about> (last visited Oct. 22, 2013) (discussing how the Vancouver Public Space Network is a grassroots organization that encourages and executes creative projects to enhance the urban environment).

310. HERN, *supra* note 29, at 56 (discussing the actions of the Vancouver Urban Design Forum, although the actions were in fact completed by the Vancouver Public Space Network); E-mail from Adam Vasilevich to Tami Jo Hines (Sept. 6, 2012, 11:37 AM) (on file with author); *About VPSN*, *supra* note 309 and accompanying text.

311. HERN, *supra* note 29, at 56; E-mail from Adam Vasilevich, *supra* note 310; *About VPSN*, *supra* note 309 and accompanying text.

312. E-mail from Adam Vasilevich, *supra* note 310.

313. E-mail from Carl Johannsen, Coordinator, Vancouver Urban Design Forum, to Dave Rieberger, City of Vancouver (June 1, 2006, 9:04 AM) (on file with author).

314. E-mail from Adam Vasilevich, *supra* note 310.

315. *Id.*

316. HERN, *supra* note 29, at 56; E-mail from Adam Vasilevich, *supra* note 310.

317. HERN, *supra* note 29, at 56.

miniature lending-library set up in a long-defunct phone booth—the effort to pursue the proper legal processes might not be worth it.<sup>318</sup>

A city cannot be so focused on protecting the public treasury from lawsuit that it forgets to protect its public from the ongoing degradations inherent in being surrounded by derelict strips of unused urban space. Here, the problem is that the process for protecting cities has grown too cumbersome and too complex to manage small things. There must be a balance between the need for flexibility in cities with the need for protection from liability.

Other reasons people skirt formal channels may in fact point to problems inherent in the available democratic or market channels. Much of the innovation in urban development ushered in by DIY urbanists, whether legally or illegally, may in fact be a response to broken systems of distribution and governance. Where formal, legitimate regimes fail to meet the needs of a community, the DIY urbanist steps in. Where democratic deficits and broken channels of access keep people from bringing their concerns to the attention of the city at all, they institute DIY urbanist actions as a species of self-help.<sup>319</sup>

Some people may not perceive themselves as having access to official channels. Beyond the concern that pursuing permission through formal channels will be too much of a hassle and involve more bureaucracy than the creators of small projects can manage, they may simply perceive that they do not have access to such channels at all. Though VPSN was just a fledgling organization at the time of the laneway project, it consisted of relatively well-educated individuals who tried official channels first.<sup>320</sup> Some groups—youth with skateboards or foreign-born urban gardeners—might perceive even greater barriers.

Research shows a link between legality and perceptions of legitimacy.<sup>321</sup> Nestor Davidson provides a helpful exposition of psychological research showing

a person is more likely to act if doing so is consonant with the perceived procedural fairness of the system through which those actions will be mediated. Psychological research also supports

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318. LYDON, *supra* note 4, at 46.

319. See PEÑALVER & KATYAL, *supra* note 193, at 147; Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 142, 145 (2013).

320. E-mail from Adam Vasilevich, *supra* note 310; *About VPSN*, *supra* note 309.

321. Davidson, *Property's Morale*, *supra* note 271, at 465 (discussing TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (1990)).

the intuition that some people . . . will refuse to play—if they think that the rules are not fair.<sup>322</sup>

There is, too, a reluctance to invest in the political process where people see themselves shut out of it. In one extreme example, city leaders in the town of Bethel, Vermont, refused to hold meetings to follow up on community needs after Hurricane Irene and even kicked a citizen-initiated response center out of City Hall.<sup>323</sup> In frustration, citizens set up their own response centers.<sup>324</sup>

Finally, some break the law out of a desire to protest. In those cases, DIY urbanist actions are a form of democratic disobedience even where the actions do not entirely resemble classic civil disobedience embodied in, for example, lunch counter protests of the Civil Rights Movement.<sup>325</sup> Classic political disobedience includes the choice to accept the resulting sanctions for one's actions.<sup>326</sup> An obvious recent example of open protest is the Occupy movement, where some groups elected to camp illegally in public spaces.<sup>327</sup> The recent wave of protest-oriented occupations has its historical precedents: a veteran's camp in Washington D.C. during the Great Depression;<sup>328</sup> the occupation that led to the creation of Berkeley's People's Park;<sup>329</sup> and the takeover of university buildings during the anti-Vietnam protests.<sup>330</sup> Guerilla urbanists do not easily fit this open protest model when they rely on the cover of darkness to install illegal crosswalks and roadway medians.<sup>331</sup> And yet some DIY urbanist actions do take the form of open protest. Targeted occupations have included a movement by a Chicago parents' group who took over a school outbuilding and turned it into a community library in order to prevent its destruction, and actions by groups who have openly occupied foreclosed homes in order to protest

322. *Id.* (footnote omitted).

323. *Vermont: The Small Town State*, ST. OF THE RE:UNION, at 22:14–22:34, <http://stateofthereunion.com/vermont-the-small-town-state> (last visited Oct. 20, 2013).

324. *Id.* at 22:58–23:26. One of those town leaders was later voted out of office. Brent Curtis, *Irene's Influence Felt at Bethel Town Meeting*, RUTLAND HERALD, Mar. 7, 2012, available at NewsBank, Rec. No. 703069864.

325. See PEÑALVER & KATYAL, *supra* note 193, at 2.

326. See, e.g., FORTAS, *supra* note 282, at 47–48, 53.

327. LYDON, *supra* note 4, at 42.

328. John McArdle, *The Other March on D.C.*, ROLL CALL, Feb. 8, 2005, at 1.

329. Anonymous, *So Long, People's Park*, NAT'L REV., Aug. 26, 1991, at 18.

330. Jeremi Suri, *Two Days in October*, 93 J. OF AM. HIST. 992, 993 (2006).

331. See Peter Callaghan, *Tacoma Getting Cross Over Rogue Pedestrian Safety Acts*, NEWS TRIB., June 30, 2013, at 1.

what they saw as abusive bank practices.<sup>332</sup> In addition, some initially less-confrontational DIY uses of urban space later generated larger protest movements. This happened in the late 1990s when New York City's Giuliani administration instituted a policy of bulldozing community gardens to make way for more profitable forms of development, spurring both a protest movement and a lawsuit.<sup>333</sup>

But even many more modest acts of guerilla urbanism are performed with similar motives of dissent from the status quo, as small but significant acts of protest to existing rules and order. This often happens where the expression is precisely intended to challenge the norms for use of the public space.<sup>334</sup> Some activists, sensing a shrinking and impoverishment of physical public space, have purposely laid claim to public space in new ways in order to reclaim it for public use.<sup>335</sup> Object Orange's painting of the crumbling facades of abandoned buildings involved deliberate trespass and, in a strictly formal sense, vandalism.<sup>336</sup> The gardeners who "surreptitiously graft fruit tree branches onto purely ornamental trees" in San Francisco represent a movement toward using soil and open space for productive agriculture, not only ornamental purposes.<sup>337</sup>

In those cases, DIY urbanist actions comprise democratic disobedience—lawbreaking that points out democratic deficits.<sup>338</sup> As such, they embody legitimate forms of protest.<sup>339</sup> Peñalver and Katyal describe a process by which lawbreaking will "demonstrate the range of imaginative legal possibilities beyond the parameters of existing democratic debate"; an eventual legal process will then formalize new norms.<sup>340</sup> Markovits suggests that some lawbreaking can actually support the democratic process "by correcting democratic deficits in law

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332. Les Christie, *Occupy Protesters Take Over Foreclosed Homes*, CNNMONEY (Dec. 6, 2011, 8:22 PM), [http://money.cnn.com/2011/12/06/real\\_estate/occupy\\_movement\\_spreads/](http://money.cnn.com/2011/12/06/real_estate/occupy_movement_spreads/) (discussing the "Occupy Our Home" movement); Nix & Nickeas, *supra* note 2.

333. *N.Y.C. Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 67 (2d Cir. 2000).

334. *See, e.g., Merker, supra* note 8, at 46.

335. *See* BENJAMIN SHEPARD & RONALD HAYDUK, FROM ACT UP TO THE WTO: URBAN PROTEST AND COMMUNITY BUILDING IN THE ERA OF GLOBALIZATION 197–201 (Benjamin Shepard & Ronald Hayduk eds., 2002); *see also* Brown, *supra* note 304, at 15, 18.

336. Herscher, *supra* note 167, at 76.

337. *See* Brown, *supra* note 304, at 18.

338. *See* Markovits, *supra* note 28, at 1933.

339. *Id.* at 1935.

340. PEÑALVER & KATYAL, *supra* note 193, at 141.

and policy that inevitably threaten every democracy.”<sup>341</sup> On a local level, we see this happening again and again with the best ideas from DIY urbanism. Whether legal or illegal, to the extent they are useful and legitimate uses of their urban space, many interventions gain wide acceptance and even become enfolded into city regulatory and administrative processes.<sup>342</sup> The DIY urbanists’ actions thus “force[] shifts of entitlements and laws” in the same way that other property lawbreakers have done.<sup>343</sup>

Illegal property behavior can promote resource use that promotes wider human values. Peñalver and Katyal have suggested that an illegal use of property may be normatively justified when the lawbreaker “places a higher value on the property in question than the true owner and there is some obstacle to a consensual transfer between the parties.”<sup>344</sup> Guerilla urbanism quite frequently meets both requirements: the new users signal that they place a value on the space, yet obstacles prevent the use of normal, formal channels from capturing that value. The true owners, conversely, might signal the low value they place on their own urban property through abandonment—failure to maintain a building or lot, pay property taxes, or use the property in a way that benefits anyone in the community. This sends a message about the value of the land and in turn a message about the owner’s perception of the value of the larger community. Where urban land lies unused or underused, there is a deficit in value; the entire community suffers the deficit until and unless the land is used in a way that captures its ability to promote human values. DIY urbanists who use abandoned land or other uncontested, underused urban spaces bring a greater value to the community.

The second half of Peñalver and Katyal’s formulation supposes obstacles to a transaction or other consensual arrangement that would correct the deficit in value.<sup>345</sup> In the case of DIY urbanism, the essential breakdown or failure that stymies the correction of deficits in value may be caused by market forces or by the actors’ exclusion (or perception of exclusion) from the normal channels of decision-making. By working

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341. Markovits, *supra* note 28, at 1902.

342. See, e.g., Lawson & Miller, *supra* note 123, at 29–30 (describing how government programs assist urban gardeners with obtaining legal permission to use vacant lots).

343. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1098 (2007).

344. *Id.* at 1145.

345. PEÑALVER & KATYAL, *supra* note 193, at 128.

around the system, DIY urbanists lessen the immediate impacts of these failures and push communities toward corrective actions.

DIY urbanist actions are democracy enhancing for several reasons. First, by involving citizens in creating change at the grassroots level, they foster civic values and strengthen communities. Second, DIY urbanist actions done illegally often point to (and may remedy) deficits in the democratic process caused by governance problems, by income inequality, and by a view of property that is a poor fit for complexities of urban community life.

## V. CONCLUSION

At their best, great cities enable people to exercise and expand their human potential: economic, expressive, and social. This requires design for what people actually do—visionary ideas rooted not in sweeping aesthetics but in the daily experiences of people's lives.<sup>346</sup> But *ex ante* design cannot accomplish everything in an evolving physical and social environment; the physical and legal structures of a city must also account for flexibility.

DIY urbanist interventions—both legal and illegal—are doing tremendous things to improve our cities and are adequately managed by the usual processes of imposing community norms. As we have seen, legitimacy or normative acceptability of DIY urbanist interventions naturally limit their abuse.<sup>347</sup> To the extent they are inappropriate for the context or normatively unacceptable within the larger community, DIY urbanist interventions—whether legal or illegal—have a tendency to disappear over time.<sup>348</sup> Artists themselves may decide to remove art; the subversive Seattle pig made its statement then vanished just as suddenly and mysteriously as it had appeared. Neighbors may remove tattered yarn. Cornstarch crosswalks wash away in the rain. Users abandon pop-up parks that no longer serve a purpose.

Meanwhile, those interventions embraced by or viewed as legitimate by the larger community often remain and sometimes even gain formal recognition. The best of these become models for urban improvement and are replicated elsewhere. Through DIY urbanism, this absorption of new kinds of improvements into the planning lexicon occurs

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346. HESTER, *supra* note 93, at 283–84.

347. *See supra* Part III.A.

348. *See, e.g.*, LYDON, *supra* note 4, at 17, 29.

organically, instead of through the top-down imposition of fully realized plans.

The market also intervenes to put an end to some DIY urbanist acts. In a neighborhood experiencing an increase in property values, a storefront pop-up shop may give way to a long-term paying tenant, or a previously vacant lot may find a buyer. To some, allowing the market to end a good thing is distressing. Advocates for artists are unhappy when a previously rent-free artist's space is re-leased to a paying tenant at market rent, pushing the hapless artist out of the space.<sup>349</sup> Proponents of more parkland in Miami hold a jaundiced view of the developer who built a "park" with only a three-year lease; critics expect that he is simply using the park to get some value from the land until the real estate market recovers enough to make the space attractive for a more lucrative use.<sup>350</sup> But for advocates of vibrant cities, perhaps such developments are not an entirely bad thing. Each of these interventions accomplished the temporary goal of stanching the bleeding in an area that was otherwise limping towards blight. Empty storefronts and trash-strewn vacant lots are actual harms to an area; even temporary improvements help arrest the neighborhood's decline.

Where needed, successful interventions can and should be protected from market incursions in order to preserve the greater (non-monetary) value in the property. This happens when a city purchases the land under community gardens and transfers them to the nonprofits managing the gardens.<sup>351</sup> Where interventions are successful, cities should pick them up and work to support them, making them legal and permanent. Gardens cannot any longer be viewed as mobile and temporary, able to be dotted here and there on the urban map at will, because gardens are inextricably tied to the people who tend them.<sup>352</sup>

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349. See Amanda Erickson, *Paris's Beloved, Legal Artist Squatter Community in Peril*, ATLANTIC CITIES (May 13, 2013), <http://www.theatlanticcities.com/arts-and-lifestyle/2013/05/pariss-legal-artist-squatters-say-their-liveliehood-peril/5574/>.

350. Laura Morales, *Brickell to Make Use of Temporary Park*, MIAMI HERALD, Dec. 14, 2008, at 4GR. The more troubling aspect of this project was its use of \$200,000 of the City's Community Reinvestment Act funds, which perhaps itself points to a democratic deficit. *Miami CRA 2011 Annual Report*, MIAMI CMTY. REDEVELOPMENT AGENCY 9 (2011), available at <http://www.miamicra.com/seopwcra/docs/2011%20Annual%20Report%20formatte%20d2.pdf>.

351. See Bill Weisbrod, *Ownership Transfer a Milestone for Community Gardens*, BRONX TIMES (July 18, 2011), [http://bxtimes.com/stories/2011/29/bronxtimes-yn\\_bronx\\_times-28-gardens.html](http://bxtimes.com/stories/2011/29/bronxtimes-yn_bronx_times-28-gardens.html).

352. Lawson & Miller, *supra* note 123, at 37.

For revitalizing areas where there is a risk that such common spaces will be lost to developers, one solution is urban land trusts to protect common resources. This requires thinking of parks and gardens as part of urban infrastructure. This represents a shift from a narrow focus on maximizing economic return (and tax revenues) from each individual parcel of land to a broader view of the municipality of values and returns to the wider community. So too with demonstration projects: Where they succeed, cities should take steps to implement them permanently. The cornstarch bike lanes and colorful sidewalk seating of the Better Block project might produce some great video footage, but it may take the intervention of the city itself to translate those images to lasting change.

There still remains a need for developers to do big things. Criticisms of large-scale urban development projects have often focused on their disparate impacts on vulnerable communities.<sup>353</sup> It is unquestionably true that big planning projects (both of the old urban renewal variety and the newer new urbanism) have displaced poor communities through gentrification and have exacerbated spatial patterns of segregation.<sup>354</sup> But it is also true that large-scale projects have brought renewed economic activity to many central cities, revitalizing downtowns and creating successful commercial and entertainment districts that have given a much-needed boost to cities and regions.<sup>355</sup> Large-scale developments will doubtlessly remain in the toolbox of city building into the future.

But cities also need vibrancy in the spaces between. We should not underestimate the value of small interventions. For example, studies show that the existence of a community garden increases the value of neighboring properties.<sup>356</sup> Additionally, when a neighborhood is in decline, a small intervention early on may prevent a downward spiral more effectively than would a large injection of money or resources after a “vicious circle” of decline has already been set in motion.<sup>357</sup>

Much of what DIY urbanists accomplish is too small to attract the involvement of City Hall. Official involvement may in fact hinder more than help the community. Society is dynamic; norms about what people

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353. See GRANT, *supra* note 38, at 99.

354. *Id.*; Aoki, *supra* note 35, at 805, 826.

355. See, e.g., GRANT, *supra* note 38, at 92.

356. See generally Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 241 (2008).

357. Aoki, *supra* note 35, at 802–03.

want and where they want things develop faster than cities can keep up with, and the creativity of citizens who actually inhabit a space may produce something that public officials would not have envisioned. Therefore, there needs to be a way for the residents of cities to do small things to shape and improve their environments.<sup>358</sup> This could perhaps be envisioned as yet another task of city government—through a newly-imagined Office of Small Things, perhaps—but experience shows that even in attempts to act in ways that are small and local, city government often gets stuck in navigating its own overlapping web of regulations. Rather than take this tack, we would do better to tolerate a little disorder to make way for the experimentation on which healthy cities thrive.

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358. Badger, *supra* note 136 (proposing a “flexible” permit scheme for pop-up restaurants and other DIY urbanist interventions).