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# Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms and the Local Food Movement

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**UNPERMITTED URBAN AGRICULTURE:  
TRANSGRESSIVE ACTIONS, CHANGING NORMS, AND  
THE LOCAL FOOD MOVEMENT**

SARAH SCHINDLER\*

Introduction .....	369
I. Growing Interest in the Sustainable Urban Local Food Movement.....	371
II. Laws, Norms, and the Actions They Restrict .....	373
A. Examples of Local Food-Related Laws and Norms That Are Being Violated .....	374
B. Justifications for Property Laws and Norms That Prohibit Local Food-Related Practices .....	384
C. Evolution of Property Laws and Norms .....	385
III. The Value of Transgression.....	387
IV. Governmental Action: Steps Forward.....	391
Conclusion.....	395

INTRODUCTION

Roberta keeps four chickens in her backyard. Bob snuck onto the vacant lot next door, which the bank foreclosed upon and now owns, and planted a vegetable garden. Vien operates an occasional underground restaurant from his friends' microbrewery after beer-making operations cease for the day. The common thread tying these actions together is that they are unauthorized; they are being undertaken in violation of existing laws and often norms. In this Article, I explore ideas surrounding the overlap between food policy and land use law, specifically the transgressive<sup>1</sup> actions that people living in urban and suburban communities are undertaking to further their local food-related goals.<sup>2</sup> I

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1. “[T]ransgressive behavior is likely to be seen as deviant, that is, in violation of the rules and norms set by dominant groups.” Byron Miller, *Book Reviews*, 88 ANNALS ASS’N AM. GEOGRAPHERS 737, 737 (1998) (reviewing TIM CRESSWELL, IN PLACE/OUT OF PLACE: GEOGRAPHY, IDEOLOGY, AND TRANSGRESSION (1996)).

2. See generally AMORY STARR, CULTURAL STUDIES, CRITICAL METHODOLOGIES, LOCAL FOOD: A SOCIAL MOVEMENT? (2010), available at

assert that while governmental and societal acceptance and normalization of currently illegal local food actions is likely needed for the broader goals of the local food movement to succeed, there are some limited benefits to the currently unauthorized nature of these activities. These include transgression serving as a catalyst for change and as an enticement to participate—in part because it can reduce costs associated with formal governmental processes.

In Part I, I touch briefly upon reasons for the increasing interest in urban agriculture<sup>3</sup> and local food.<sup>4</sup> In Part II, I discuss the existence of laws and norms<sup>5</sup> that prohibit and discourage many urban agricultural practices and describe various ways that these behavioral constraints are being violated in pursuit of local food-related goals. I discuss justifications for the existence of laws and norms that prohibit urban agricultural practices but explain why many of those behavioral constraints appear ripe for change. In Part III, I examine whether there is any value in the transgressive nature of these actions. To aid that analysis, I situate these transgressive actions within the broader context of the unpermitted use of public and private space for the purpose of “bettering” or improving one’s community.<sup>6</sup> Finally, in Part IV, I

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<http://www.sagepub.com/dicken6/Additional%20Resources%20for%20Geography/Sage%20articles/starr.pdf> (considering whether the local food movement constitutes a social movement).

3. By “urban agriculture,” I mean as distinct from traditional, rural agricultural pursuits; thus, urban agriculture includes undertakings in suburban areas as well as more dense cities. See RENÉE JOHNSON ET AL., CONG. RESEARCH SERV., THE ROLE OF LOCAL FOOD SYSTEMS IN U.S. FARM POLICY 13 (2013), available at <http://www.fas.org/sgp/crs/misc/R42155.pdf> (“USDA reports that, in 2007, there were about 859,300 metropolitan farms in the United States, accounting for about 40% of all U.S. farms and about 40% (\$115.7 billion) of the total value of U.S. agricultural production.”).

4. “The term ‘locally or regionally produced agricultural food product’ means any agricultural food product that is . . . (I) . . . transported . . . less than 400 miles from the origin of the product; or (II) the State in which the product is produced.” Consolidated Farm and Rural Development Act, 7 U.S.C. § 1932(g)(9)(A)(i) (2012); cited with approval in STEVE MARTINEZ ET AL., U.S. DEP’T OF AGRIC., LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES, at iii (2010), available at <http://www.ers.usda.gov/publications/err-economic-research-report/err97.aspx#.UwE3SkJdWec> (acknowledging that although there is no consensus on a definition of “local” or “local food systems” in terms of the geographic distance between production and consumption, defining “local” based on marketing arrangements, such as farmers selling directly to consumers at regional farmers’ markets or to schools, is well recognized).

5. Laws and norms are both rules, but the former derive from governments, while the latter derive from “social forces.” ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 127 (1991); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1661 (1996) (noting that norms exist when group members are obligated, under certain conditions, to do something or face sanction).

6. The few scholars who have discussed this broader movement refer to it by many names: unauthorized spatial interventions, democratic spatial process, guerilla or

propose factors that local governments could consider in deciding whether and how to allow these currently unauthorized behaviors, and I address the sociopolitical context in which these actions are being taken.

#### I. GROWING INTEREST IN THE SUSTAINABLE URBAN LOCAL FOOD MOVEMENT

Recently, many people have become interested in the idea of an alternative food system, locavorism,<sup>7</sup> and the ways that underused urban and suburban space can be put toward productive, food-related uses.<sup>8</sup> There are a number of reasons for this rise in interest.<sup>9</sup>

Some find value in knowing who grew their food, or base part of their identity on growing it themselves as a form of self-sufficiency.<sup>10</sup> This idea of identity is also clearly tied to what local food is not: many consumers want to disassociate themselves from the harms they associate

user-generated urbanism, or DIY (do it yourself) urban design. See Gordon C.C. Douglas, *Do-It-Yourself Urban Design: The Social Practice of Informal 'Improvement' through Unauthorized Alteration*, CITY & COMMUNITY 1, 2 (2013), available at <http://onlinelibrary.wiley.com/doi/10.1111/cico.12029/pdf>; Celeste Pagano, *DIY Urbanism: Property and Process in Grassroots City Building*, 97 MARQ. L. REV. (forthcoming 2014); *Adaptive Metropolis: User Generated Urbanism*, U.C. BERKELEY C. ENVTL. DESIGN, <http://laep.ced.berkeley.edu/adaptivemetropolis/site/themes-topics/> (last visited Mar. 9, 2014).

7. “Locavore” was chosen as the Oxford University Press “word of the year” in 2007. “*Word of the Year*” *Mania!*, OUPBLOG (Nov. 15, 2007, 8:30 AM), <http://blog.oup.com/2007/11/woty/> (defining it as “a person who endeavors to eat only locally produced foods”).

8. See Michael Pollan, *The Food Movement, Rising*, N.Y. REV. BOOKS (June 10, 2010), <http://www.nybooks.com/articles/archives/2010/jun/10/food-movement-rising/?page=2> (“What is attracting so many people to the movement today . . . is a much less conventional kind of politics, one that is about something more than food. The food movement is also about community, identity, pleasure, and, most notably, about carving out a new social and economic space removed from the influence of big corporations on the one side and government on the other.”).

9. See, e.g., Sara S. Metcalf & Michael J. Widener, *Growing Buffalo's Capacity for Local Food: A Systems Framework for Sustainable Agriculture*, 31 APPLIED GEOGRAPHY 1242, 1250 (2011) (listing benefits of urban agriculture, including “local food production, carbon sequestration, soil regeneration, phytoremediation, stormwater management, groundwater filtration, micro-climate improvements, reconnecting with community, recreation or sheer beauty”) (internal citations omitted); Kristin Choo, *Plowing over: Can Urban Farming Save Detroit and Other Declining Cities? Will the Law Allow It?*, A.B.A.J. (Aug. 1, 2011, 2:50 AM), [http://www.abajournal.com/magazine/article/plowing\\_over\\_can\\_urban\\_farming\\_save\\_detroit\\_and\\_other\\_declining\\_cities\\_will/](http://www.abajournal.com/magazine/article/plowing_over_can_urban_farming_save_detroit_and_other_declining_cities_will/) (noting that cities are “embracing agriculture . . . as a means to combat a host of urban woes—hunger, air pollution and the proliferation of derelict, crime-ridden abandoned properties”).

10. See Claude Fischler, *Food, Self and Identity*, 27 SOC. SCI. INFO. 275, 275 (1988) (concluding that “[f]ood is also central to our sense of identity”). Pollan, *supra* note 8.

with industrial agricultural practices, including harm to public health and the environment.<sup>11</sup> There is a sense that some of these harms can be alleviated incrementally as more people grow their own food or have access to food that is grown locally.<sup>12</sup>

Others see urban agriculture as a way to build social capital and community.<sup>13</sup> In contrast to mowing the lawn, which is often a solitary, loud activity, gardening—especially in the front yard—often encourages neighbors to stop by and ask what is being planted.<sup>14</sup> Further, gardeners often share their harvest with their neighbors, building a community through vegetable and fruit exchanges.

For others, urban agriculture is efficient; it is a way to put underused or unused land to a more productive use.<sup>15</sup> Unlike grass, which often has little utility<sup>16</sup> and requires a number of resources to maintain, urban gardening can provide food.<sup>17</sup> Similarly, a Saturday morning, downtown farmers' market can bring foot traffic to an otherwise ghostly business district. These practices are especially useful in areas that are food deserts—those lacking grocery stores or other establishments at which to

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11. See Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 49 (2008) (arguing that because the industrial model of food is “impartial,” the “desire to have a connection with one’s food provides the impetus for many people to buy local food”); see generally Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict between Local Governments and Locavores*, 87 TUL. L. REV. 231 (2012) (discussing public health harms—including food insecurity, food deserts, and obesity—and environmental harms—including the oil-intensive nature of industrial agriculture, monocropping, and animal welfare).

12. See, e.g., Mia Shirley, *Food Ordinances: Encouraging Eating Local*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 511, 518 (2013) (“Increased reliance on local, sustainable food sources can help reduce the environmental damage caused by the current U.S. food production system.”).

13. See, e.g., Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 541 (2006) (describing community gardens as fostering “collaborative relationships and social networks among residents of different racial and generational identities”).

14. See generally Sarah B. Schindler, *Banning Lawns*, 82 GEO. WASH. L. REV. (forthcoming 2014) (discussing lawns and gardens), available at [http://communityassociations.net/wp-content/uploads/2013/07/banning\\_lawns.pdf](http://communityassociations.net/wp-content/uploads/2013/07/banning_lawns.pdf).

15. See, e.g., John E. Mogk et al., *Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties in the City of Detroit: Benefits, Problems and Proposals for a Regulatory Framework for Successful Land Use Integration*, 56 WAYNE L. REV. 1521, 1531–32 (2010) (“When vacant land becomes clean, productive, and more attractive to existing and new residents through agriculture, the city’s housing values will benefit and, in turn, its tax base.”).

16. While grass can have great utility by providing a place to play or relax, grass is often not used in this way, and is instead unused and ornamental. Schindler, *supra* note 14, at 4–5, 10–11.

17. *Id.* at 18–19.

purchase whole, healthy foods<sup>18</sup>—and to individuals and communities that are food insecure.<sup>19</sup> Finally, a robust local food movement can enhance the local economy, contributing to job creation and an increase in property values.<sup>20</sup>

## II. LAWS, NORMS, AND THE ACTIONS THEY RESTRICT

Human behavior is constrained in a number of ways. Lawyers and legal scholars often focus most heavily on the law because they are most familiar with it,<sup>21</sup> but there are other important forms of constraint, including norms, economics—including markets and incentives—and architecture, or physical features of the environment.<sup>22</sup> Further, these forms of constraint often overlap with one another.<sup>23</sup> Due to the limited space and nature of this Article, I only discuss laws and norms because those two forms of behavioral constraint are most related to one another and most relevant to the local food-related actions that will be discussed below.<sup>24</sup>

More specifically, I focus here on *local* laws and norms. Although much of the discussion of food policy is centered at the state or federal

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18. See Renee E. Walker et al., *Disparities and Access to Healthy Food in the United States: A Review of Food Deserts Literature*, 16 HEALTH & PLACE 876, 876 (2010) (reviewing studies on the impact of food deserts).

19. See *Food Security in the U.S., Overview*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us.aspx#UoLC4pR4acI> (last updated Sept. 4, 2013) (“Food security means access by all people at all times to enough food for an active, healthy life.”). Food insecurity may be due to poverty and/or physical access to food. See World Food Summit, Nov. 13–17, 1996, *Rome Declaration on World Food Security*, 13–17 (Nov. 13, 1996), available at <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM>.

20. See generally Anthony L.I. Moffa & Stephanie L. Safdi, *Freedom from the Costs of Trade: A Principled Argument against Dormant Commerce Clause Scrutiny of Goods Movement Policies*, 20 N.Y.U. ENVTL. L.J. (forthcoming 2014) (emphasizing local food movements’ roles in addressing global climate change); Nina Mukherji & Alfonso Morales, *Zoning for Urban Agriculture*, ZONING PRAC., Mar. 2010, at 1, 5 (noting urban agriculture “has the potential to create jobs” and “provide large-scale job training”). See also *id.* at 7 (noting that gardens “can increase home values and give the neighborhood character and identity”).

21. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1042 (2002) (“[T]he instinctive reaction of many lawyers is to focus on legal rules, without thinking about [another form of] the constraint.”).

22. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–63 (1998) (defining these terms).

23. *Id.* at 663.

24. “[L]egal doctrine also reflects social norms as it reinforces them.” Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 89 (1987).

level,<sup>25</sup> local land use regulations often dictate the extent to which a person can engage in local food-related behaviors. And, although a number of progressive local governments have begun to adopt ordinances that promote sustainable, green, environmentally friendly practices,<sup>26</sup> in many parts of the country, urban agricultural activities are strictly forbidden or curtailed.<sup>27</sup> In these communities, where property laws and norms have not yet evolved to allow for urban agriculture, some citizens knowingly and routinely violate existing laws and norms in furtherance of the goals of the local food movement.<sup>28</sup>

*A. Examples of Local Food-Related Laws and Norms That Are Being Violated*

First, individuals who grow fruits and vegetables in urban and suburban areas often violate food production regulations in a number of ways. For example, some growers plant on property that they do not own—typically, underused city-owned property, such as medians or the planting strip between the sidewalk and the street.<sup>29</sup> In other instances, growers plant on vacant lots, which may be owned by the municipality, perhaps through a tax foreclosure process; by a derelict or absent private owner; or by a bank after a mortgage foreclosure.<sup>30</sup> Shrinking cities, such

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25. See, e.g., Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008); Smita Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 YALE HUM. RTS. & DEV. L.J. 403, 407 (2010) (finding that “states occupy a central and critical role in ensuring the right to food”); Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 FOOD & DRUG L.J. 371, 371 (2002).

26. Schindler, *supra* note 11; see, e.g., *Sustainable Food Program*, CITY PORTLAND, OR. PLAN. & SUSTAINABILITY, <http://www.portlandoregon.gov/bps/41480> (last visited Nov. 19, 2013).

27. See generally Metcalf & Widener, *supra* note 9, at 1245 (noting that “for some, urban farms are seriously transgressive,” and quoting online comments describing negative normative views of urban agriculture); Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002) (discussing outdated zoning schemes); Schindler, *supra* note 11, at 233 (“Throughout the country, antiquated land use ordinances restrict homeowners and renters from undertaking practices such as raising chickens for eggs, planting gardens in front of their homes, or selling produce they have grown.”).

28. Choo, *supra* note 9 (“[U]rban food growers and agricultural businesses operate under a cloud of extralegality, waiting for the law to catch up.”).

29. See SEATTLE, WASH., MUN. CODE § 11.14.475 (1979) (defining planting strip); Douglas, *supra* note 6, at 10 (describing “guerrilla greening” as the practice of “tending neglected road medians or vacant lots to create flourishing gardens”).

30. See Metcalf & Widener, *supra* note 9, at 1242 (“The logic of returning the land to its inhabitants has anticipated the emergence of voluntary ‘guerilla gardening’ of neglected spaces as a way to overcome property bounds, largely because the property is

as Cleveland and Detroit, have seen a marked increase in such activities, in part due to the number of newly vacant lots close to or within residential areas.<sup>31</sup>

The law governing this form of urban agriculture is relatively straightforward. Generally, absent permission or an agreement to the contrary, individuals cannot grow food on public property or property owned by someone else. This rule embodies the heart of private property ownership: the right of the owner to exclude others.<sup>32</sup> Property norms bolster this legal framework, engendering widespread contempt for trespass, squatting, stealing, and using something that is owned by another without paying for it.<sup>33</sup>

Although it seems counterintuitive, individuals also often violate laws by growing and planting on private property that they actually own. This is because a number of municipal ordinances prohibit an individual from growing fruits and vegetables—or engaging in permacultural activities<sup>34</sup>—on her property.<sup>35</sup> Some of these laws take the form of local

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devalued in areas that are neglected.”). *See also What We Do*, SMILING HOGSHEAD RANCH, <http://smiling-hogshead-ranch.tumblr.com/whatwedo> (last visited Mar. 9, 2014) (“We Are A Community Group Planting Plants And Ideas At A Previously Underutilized Space In New York City. Our Goals Include Demonstrating Appropriate Technologies As Functional And Educational Tools, Regeneration Of Strong Urban Ecology And Building Cohesive Community Through Fun, Outdoor Interaction.”).

31. *See* Michael Tortorello, *Finding the Potential in Vacant Lots*, N.Y. TIMES, Aug. 3, 2011, [http://www.nytimes.com/2011/08/04/garden/finding-the-potential-in-vacant-lots-in-the-garden.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/04/garden/finding-the-potential-in-vacant-lots-in-the-garden.html?pagewanted=all&_r=0) (calling Cleveland’s 20,000 abandoned lots an “ecosystem . . . an ecological experiment spread over some 3,600 acres”); Mark Bittman, *Imagining Detroit*, N.Y. TIMES OPINIONATOR (May 17, 2011, 8:30 PM), [http://opinionator.blogs.nytimes.com/2011/05/17/imagining-detroit/?\\_r=0](http://opinionator.blogs.nytimes.com/2011/05/17/imagining-detroit/?_r=0) (describing the rise of urban gardens in Detroit attributable to the city’s “intelligent” policies, including its “adopt-a-lot” program).

32. For a discussion of the fundamental nature of the right to exclude, see generally STEVEN J. EAGLE, REGULATORY TAKINGS § 7.2 (1996 & Supp. 1999), and DWIGHT MERRIAM & FRANK MELTZ, THE TAKINGS ISSUE 199–228 (1999). *See also* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693, 1699 (2012) (discussing the fundamental nature of the right to exclude).

33. EDUARDO MOISES PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS 10–12 (2010) (describing “[t]he overridingly negative view of property lawbreakers in popular consciousness” and “the broadly negative view of property lawbreakers that prevails among lawyers and lay people alike”). But, Peñalver and Katyal also recognize that there is simultaneously an underlying cultural embrace of these lawbreakers. *Id.* at 12.

34. Jonathan Earle, *Rumblings from the Word of Food: Permaculture on Eleuthera Island*, 7 GASTRONOMICA: J. FOOD & CULTURE 2 (Summer 2007) (defining permaculture as self-sufficient, sustainable agriculture); LeGene Quesenberry, *Ecotourism: A Hyperbolic Sustainable Development Technique*, 9 DICK. J. ENVTL. L. & POL’Y 473, 498 (2001) (defining permaculture as a type of agriculture that does “not undermine the capacity for successful crop production in the future”); *see also* Amy Silverstein, *The Hippies vs. Code Enforcement*, DALL. OBSERVER (Oct. 24, 2013),



nuisance control or weed ordinances, which limit the height of vegetation or the type of plants that can be planted in an area.<sup>36</sup> These restrictions are often interpreted to require property owners to maintain a neat, mowed lawn and to prohibit vegetable gardens in front yards.<sup>37</sup> Certain localities also have bans on gardening or farming in specific residential zoning districts, or only permit expressly stated uses and omit gardening from the stated uses.<sup>38</sup>

Powerful norms support these restrictions. In the United States, there exists a pervasive norm in favor of what has been called the “industrial lawn”—a neat, green, mowed, fertilized, watered, often non-native monocrop of grass.<sup>39</sup> Indeed, lawns—the largest irrigated crop in the United States and a major consumer of potable municipal water—are sometimes the prevailing norm, even in communities with severe water shortages.<sup>40</sup> At the same time, in many localities norms

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<http://www.dallasobserver.com/2013-10-24/restaurants/the-hippies-versus-code-enforcement/> (discussing homeowners who implemented a permacultural landscape in violation of city codes).

35. See, e.g., BEDFORD, OH., CODE § 1341.19 (2012) (“No vegetable gardens shall extend beyond the front building line of the house.”); Schindler, *supra* note 11, at 239 (discussing existing bans on vegetable gardens and produce); Silverstein, *supra* note 34 (chronicling the enforcement of an agricultural ban by the city of Arlington).

36. See, e.g., HENRICO COUNTY, VA., CODE § 10-137(b) (2012) (“The owner of occupied residential real property shall cut the grass or lawn area of less than one-half acre on such property when growth of such grass or lawn area exceeds 12 inches in height.”); LONG BEACH, CAL., MUN. CODE § 8.56.030 (1984) (requiring the owners or controllers of property within the city to keep property free of weeds and declaring noncompliance to be a public nuisance). See also Mukherji & Morales, *supra* note 20, at 4 (observing that “landscaping rules that require all lawn vegetation to be below a certain height stymie urban agriculture”).

37. Schindler, *supra* note 11, at 234 (describing neighborhood uniformity and aesthetic demands for neat front lawns); Schindler, *supra* note 14; see also TACOMA, WASH., MUN. CODE § 8.30.040(C)(2) (2013) (declaring the following to be a public nuisance: “[o]vergrown, uncultivated, unkempt, or potentially hazardous vegetation of any type, including, but not limited to, shrubs, brush, trees, weeds, blackberry vines, and grasses over one foot in height or length that poses a threat to public health, safety and welfare, including vegetation which may harbor rodents or transient activity”).

38. See Schindler, *supra* note 11, at 239–45 (describing different types of bans on vegetable gardens and produce on private residential property).

39. See Schindler, *supra* note 14; Asmara M. Tekle, *Lawns and the New Watershed Law*, 95 MARQ. L. REV. 213, 215 (2011) (defining the industrial lawn as one that “must be treated with artificial fertilizers, pesticides, and herbicides”).

40. See Ian Lovett, *Arid Southwest Cities’ Plea: Lose the Lawn*, N.Y. TIMES Aug. 12, 2013, at A10; *Conserving Water*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/greenhomes/ConserveWater.-htm#landscaping> (last updated Dec. 19, 2012) (suggesting that outdoor uses, and mainly irrigation, consume up to 30 percent of the water supply in the U.S.).

disfavor native plants, permaculture, or xeriscaping.<sup>41</sup> Finally, norms suggest that the home is a consumptive, not a productive space.<sup>42</sup> Thus, using the home to produce things like food is viewed as a disruption of and deviation from the norm.<sup>43</sup>

Individuals also violate laws and norms by raising animals for food within city limits. For example, many urban and suburban dwellers have taken to raising chickens for their eggs, bees for their honey, goats for their milk, and even larger animals, like pigs, for their flesh—all within the confines of their residential properties.<sup>44</sup> Zoning ordinances often prohibit people from keeping “farm animals” such as these in residential areas, or limit their numbers or restrict them to lots of a certain size.<sup>45</sup> These ordinances are often remnants of traditional Euclidean zoning,

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41. See Schindler, *supra* note 14; Tekle, *supra* note 39, at 224–30 (discussing how the social norms surrounding lawns lead to “resistance to neighbors who dare to stray from the Industrial Lawn in pursuit of alternative landscapes”).

42. Lindsay Naylor, *Hired Gardens and the Question of Transgression: Lawns, Food Gardens and the Business of ‘Alternative’ Food Practice*, 19 *CULTURAL GEOGRAPHIES* 483, 485 (2012) (describing “the consumptive space of lawns and the productive space of food gardens” and “the notion that residential property is a consumptive space with a lawn landscape; residents purchase goods, including food, outside the neighborhood and consume them at home”).

43. *Id.* at 488 (noting that a disruption of the “consumptive lawn landscape for vegetable production has been viewed as transgressive”).

44. See, e.g., KATHERINE H. BROWN & ANNE CARTER, *CMTY. FOOD SEC. COAL., URBAN AGRICULTURE AND COMMUNITY FOOD SECURITY IN THE UNITED STATES: FARMING FROM THE CITY CENTER TO THE URBAN FRINGE* 3 (2003), available at <http://www.foodsecurity.org/PrimerCFSCUAC.pdf> (describing the activities that constitute urban agriculture); Kathryn A. Peters, *Current and Emerging Issues in the New Urban Agriculture: A Case Study*, 7 *J. FOOD L. & POL’Y* 297, 328–43 (2011) (discussing examples of municipal regulation of the keeping of animals); Julie M. Slabinski, Comment, *From Wasteland to Oasis: How Pennsylvania Can Appropriate Vacant Urban Land into Functional Space via Urban Farming*, 22 *WIDENER L.J.* 253, 253–54 (2012) (defining and describing the popularity of urban farming); Erika Riggs, *Urban Farming Growing in Popularity*, *PORTLAND PRESS HERALD*, Nov. 28, 2011, <http://www.pressherald.com/realestate/Urban-farming-growing-in-popularity.html> (describing an increased interest in urban farming as coinciding with the economic downturn and providing examples of municipal codes that allow the keeping of animals on urban lots).

45. See, e.g., AURORA, COLO., *MUN. CODE* § 14-8(a)(11) (2013) (prohibiting livestock within the City, except in agricultural zones); WHEATON, ILL., *CITY CODE* § 14-1, -99 (2013) (prohibiting the keeping of “livestock or other similar animals” within city limits, subject to narrow exceptions like authorized fairs, circuses, zoos, and animal parks, and female chickens for “4-H or similar educational project[s]”); SEATTLE, WASH., *MUN. CODE* § 23.42.052, (B), (D) (2013) (“Cows, horses, sheep and other similar farm animals are permitted only on lots of at least 20,000 square feet. The keeping of swine is prohibited, except for miniature potbelly pigs.”).

which sought to separate uses from one another that were viewed as incompatible, such as agricultural and residential uses.<sup>46</sup>

Norms with respect to urban livestock vary greatly from locality to locality. In some communities, there exists a strong norm against animals within city limits. Such a norm finds support from the nuisance rationale for bans on urban livestock: many view the animals as dirty, smelly, and likely to attract pests and predators.<sup>47</sup> Elitist views of what is proper in a residential community could also be at play; backyard chickens and home gardens have, at various times, been associated with low income families and recent immigrants.<sup>48</sup> At the same time, these norms have already shifted in some communities, sometimes in advance of a shift in laws; some localities maintain bans on microlivestock in the face of local opposition.<sup>49</sup> In these communities, it may be considered trendy or sustainable to raise animals on a small residential lot as a way to avoid

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46. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–90 (1926); Schindler, *supra* note 11, at 251 (discussing the role of Euclidean zoning in prohibiting urban agricultural practices). These ordinances are often founded in nuisance reasoning as well. *See, e.g.*, STAMFORD, CONN., CITY CODE § 111-6 (2012) (“No person shall keep any rooster in such location that the crowing thereof shall be annoying to any person occupying premises in the vicinity.”); *see also* Mogk et al., *supra* note 15, at 1535–49 (discussing potential nuisance issues associated with urban agriculture, including raising livestock within city limits).

47. Patricia E. Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, 34 ZONING & PLAN. L. REP. 1, 3–4 (2011) (“Many communities across the country have enacted zoning and land use measures to effectively balance the desire to maintain small numbers of poultry for food or pets against concerns relating to noise and odors.”). *But see* Mukherji & Morales, *supra* note 20, at 6 (asserting that “a limited number of chickens or bees rarely causes a nuisance”).

48. Schindler, *supra* at note 11, at 259 (“Although it is now fashionable in some circles to keep chickens in the backyard or plant a large vegetable garden in the front, these practices were historically identified with low-income families and recent immigrants.”). *See* GILDA L. OCHOA, *BECOMING NEIGHBORS IN A MEXICAN AMERICAN COMMUNITY: POWER, CONFLICT, AND SOLIDARITY* 114 (2004).

49. In many communities, citizens have petitioned their local elected officials to modify what they see as outdated anti-urban livestock ordinances and to allow them to keep backyard chickens. Despite the push, these attempts often fail. *See, e.g.*, NASHVILLE, TENN., SUBSTITUTE ORDINANCE NO. BL2011-47 (effective Jan. 23, 2012) (eight districts opted out of an ordinance to allow the keeping of chickens in urban areas); Kevin Hardy, *City Council Balks on Ordinance Allowing Chickens in Chattanooga*, TIMES FREE PRESS, Jul. 10, 2013, <http://www.timesfreepress.com/news/2013/jul/10/chattanooga-council-balks-on-chicken-ordinance/> (urban chicken ordinance failed by six to three vote of the city council); Jim Harger, *Grand Rapids Will Begin Enforcing Backyard Chicken Ban This Week*, MICH. LIVE (Sept. 30, 2010, 11:01 AM), [http://www.mlive.com/news/grand-rapids/index.ssf/2010/09/grand\\_rapids\\_will\\_begin\\_enforc.html](http://www.mlive.com/news/grand-rapids/index.ssf/2010/09/grand_rapids_will_begin_enforc.html) (discussing a failed proposed backyard chicken ordinance).

some of the ills associated with purchasing animal products created by industrial agricultural operations.<sup>50</sup>

In addition to limitations on urban agriculture and animal husbandry, many localities have restrictions on food retailing and consumption. These laws target methods of food distribution, including farmers' markets and farm stands—two prevalent ways to obtain local food products—as well as pop-up restaurants.<sup>51</sup> Farmers' markets allow those who grow food to come together in a common location—often on public property or in a community gathering space, such as a church or temple—and sell their products directly to the public. In contrast, farm stands are often located on the property of the person who grows the food. While there has been an “explosion” in the number of urban and suburban farmers' markets in recent years, farm stands—though fairly common in rural, agricultural areas—are still rare in more urbanized residential neighborhoods.<sup>52</sup> Both of these retailing locales can increase consumers' ability to participate in the local food movement.<sup>53</sup>

While there are many restrictions on direct sales of food to consumers based on health and safety rationales,<sup>54</sup> there are also property

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50. Josie Garthwaite, *Urban Garden? Check. Now, Chickens*, N.Y. TIMES GREEN BLOG, (Feb. 7, 2012, 4:22 PM), <http://green.blogs.nytimes.com/2012/02/07/urban-garden-check-now-chickens/> (noting that urban-dwellers concerned with the origin of their food are proposing ordinances to enable them to lawfully raise animals like backyard chickens).

51. The term “pop-up restaurants” or “pop-up dinners” refers to eateries that are typically temporary and take place in non-traditional, and sometimes illegal, locations, such as private homes or on the sides of streets. Frank Bruni, *The Now-You-See-It Restaurant*, N.Y. TIMES, Jan. 5, 2011, [http://www.nytimes.com/2011/01/05/dining/05temp.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/05/dining/05temp.html?pagewanted=all&_r=0) (providing examples of pop-up restaurants and defining them as eateries that “squat for just days or weeks in locations already furnished and equipped”). As pop-ups are somewhat distinct, they will be discussed separately. See *infra* notes 61–69 and accompanying text. For information about farmers' markets and farm stands, see generally NEIL D. HAMILTON, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* 22 (1999).

52. Mary Jane Angelo et al., *Small, Slow, and Local: Essays on Building a More Sustainable and Local Food System*, 12 VT. J. ENVTL. L. 353, 366 (2011) (noting a dramatic increase in numbers of farmers' markets); Matthew V. Bradshaw, *The Rise of Urban Agriculture: A Cautionary Tale—No Rules, Big Problems*, 4 WM. & MARY BUS. L. REV. 241, 254 (2013) (“As of mid-2011, there were 7,175 farmers' markets operating throughout the United States, which represented a 17 percent increase from 2010 and a 309 percent increase since 1994.”); Patricia E. Salkin & Amy Lavine, *Regional Foodsheds: Are Our Local Zoning and Land Use Regulations Healthy?*, 22 FORDHAM ENVTL. L. REV. 599, 617–19 (2011) (discussing farm stands).

53. Neil D. Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States*, 1 DRAKE J. AGRIC. L. 7, 13 (1996) (“Studies indicate that farmers' markets can play an important role in strengthening local food systems.”).

54. These regulations are beyond the scope of this essay. For a discussion of health- and safety-related restrictions on direct sale of food to consumers, see Ryan Almy, *State v. Brown: A Test for Local Food Ordinances*, 65 ME. L. REV. 789, 794

restrictions on these forms of sale. Although most localities generally now permit farmers' markets, there are still a number of limitations on when, where, and how they may be operated. For example, in some jurisdictions they are only permitted in certain zoning districts or are only allowed after obtaining a conditional use permit.<sup>55</sup> Farm stands are generally not as legally acceptable as farmers' markets—especially in urban and suburban areas, where they are often prohibited by zoning ordinances that limit commercial uses in residential areas.<sup>56</sup>

Although they are increasing in popularity, it is unclear whether there is sufficient, widespread buy-in from the various relevant communities to support the existence of a pervasive norm in favor of farmers' markets. However, the rapidly growing number of farmers' markets suggests that this behavior is becoming more prevalent, and thus norms could develop later. For example, anecdotally, in some communities, if a person buys vegetables or meat at Walmart instead of the farmers' market, there may be social sanctions in the form of gossip

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(2013) (describing the state's interest in defining and regulating "which foods are proper for human consumption in the name of public safety"); Bradshaw, *supra* note 52, at 261–63 (describing health and safety concerns that motivate agricultural regulations like food labeling and inspection); Ross H. Pifer, *The Agriculture, Communities and Rural Environment Act: Protecting Pennsylvania's Agricultural Operations from Unlawful Municipal Regulation*, 15 DRAKE J. AGRIC. L. 109, 113 (2010) (identifying regulations that unlawfully restrict agricultural operations as threats to the continued viability of those operations).

55. See generally ALHAMBRA, CAL., CODE ORDINANCES § 23.60.020–.040 (effective 1986) (classifying a farmers' market as a use that may not be commenced before securing a temporary use permit and describing conditions that must be satisfied for the grant of such a permit); CORONA, CAL., MUN. CODE § 17.98.030 (effective 1978) (classifying a farmers' market as an event that requires a special use permit and describing the criteria for granting such a permit); FORT COLLINS, COLO., LAND USE CODE art. 4, div. 20(B)–(C) (effective 1998) (not including farmers' markets in the list of uses permitted in the Community Commercial-Pourde River District and disallowing all uses not explicitly permitted); JESS ANNA SPEIER & JILL E. KRUEGER, FARMERS' LEGAL ACTION GROUP, INC., UNDERSTANDING FARMERS' MARKET RULES (2006), available at <http://www.flaginc.org/topics/pubs/arts/FarmersMarket.pdf>. See also Salkin & Lavine, *supra* note 52, at 618–19 ("While some ordinances permit farmers['] markets in certain zoning districts, other cities specify the exact location of farmers['] markets. Farmers' market ordinances commonly include licensing and operational restrictions, such as hours of operation and limits on the size of vendor stands.").

56. AMANDA RHOADS ET AL., PORTLAND MULTNOMAH FOOD POL'Y COUNCIL, THE DIGGABLE CITY 8 (2006), available at <http://www.portlandoregon.gov/bps/article/122595> ("Retail sales and service uses are not allowed in many of the zones where agriculture is either an allowed use or can be allowed as a conditional use."); Stephanie A. Maloney, Note, *Putting Paradise in the Parking Lot: Using Zoning to Promote Urban Agriculture*, 88 NOTRE DAME L. REV. 2551, 2578 (2013) ("Regulations that deter . . . urban agriculture are often nonspecific and obsolete restrictions on retail and commercial activities in certain zones, particularly residential zoning districts.").

or dirty looks.<sup>57</sup> One reason for the growing preference for farmers' markets might be the belief among many consumers that food purchased there is better or healthier than that purchased from other, more conventional purveyors.<sup>58</sup> Further, many derive social benefits from farmers' markets, which may satisfy a

desire to feel more connected to community, as well as to know where our food is grown. Farmers' markets can be a regular meeting place for neighbors to meet and interact. There also seems to be a desire to feel a connection with the people who grow our food and to know where and how our food is produced.<sup>59</sup>

Because farm stands are not as common or widespread in urban and suburban areas—either because they are not permitted or because not enough people grow food in these areas and have enough left over to share—the norms surrounding them do not seem to have progressed even as far as those surrounding farmers' markets.<sup>60</sup>

A final form of transgressive property-based behavior that relates to new forms of urban agriculture concerns secret suppers and pop-up restaurants.<sup>61</sup> Although these differ from the transgressive actions examined above, they are also related, novel, growing in popularity, and raise interesting legal and policy questions. Pop-up dinners can take

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57. The author has had personal experience with this, having lived in locavore centers like San Francisco, California; Portland, Oregon; and Portland, Maine.

58. Bradshaw, *supra* note 52, at 254 (noting this consumer perception, “[w]hether founded in reality or not”).

59. Angelo et al., *supra* note 52, at 366.

60. See *Local & Organic FAQ's*, UNIV. CAL. COOPERATIVE EXTENSION, <http://ucanr.edu/sites/ceplacerrhiculture/EatLocal/FAQs/> (last visited Nov. 26, 2013) (describing California's detailed regulations of certified and non-certified markets and more recent legislation that “has expanded options for growers” at farm stands). *But see* Deborah Franklin, *The Psychology of the Honor System at the Farm Stand*, NAT'L PUB. RADIO (June 11, 2012, 11:10 AM), <http://www.npr.org/blogs/thesalt/2012/06/11/154750001/the-psychology-of-the-honor-system-at-the-farm-stand> (describing successful use of honor system payment tills at rural roadside farm stands). There are also concerns about traffic and parking when traditionally commercial uses are introduced to residential areas. See Sarah Henry, *Urban Homesteader Challenges City on Sale of Edibles*, BERKELEYSIDE (Apr. 15, 2011, 9:30 AM), <http://www.berkeleyside.com/2011/04/15/urban-homesteader-challenges-city-on-sale-of-edibles/> (noting that laws aim to “protect the quality of residential communities from traffic and parking problems”).

61. Pop-up restaurants relate to local food to the extent that the chefs choose to make localism a focus of their meals, which many do. See, e.g., Sarah Henry, *Pop-up Restaurants Are Popping Up around Town*, BERKELEYSIDE (Apr. 29, 2011, 9:00 AM), <http://www.berkeleyside.com/2011/04/29/pop-up-restaurants-popping-up-around-town/> (noting that pop-ups are marketed towards locavores and those who are “hungry for outside-the-box restaurant experiences”).

many different forms. They can be private (by invitation of the chef only), semi-private (by invitation or word of mouth through a friend of a friend), or public (advertised events listed on social media such as Facebook, Twitter, Instagram, or in another public forum).<sup>62</sup> The meals may be served in a private home, an abandoned industrial space, a public park, or an existing restaurant or retail establishment after (or in some cases during) that business's normal operating hours.<sup>63</sup> Pop-up chefs often embrace the local food movement by foraging local ingredients—from mushrooms to ramps to periwinkles—and sourcing local produce and meat. Some of them also aim to extend the goals of the local food movement by bringing local food to more diverse populations.<sup>64</sup>

Pop-up restaurants seem to span the spectrum of legality, with the extent of transgressiveness depending mostly on local ordinances and the characteristics of a particular event. Some factors to consider in assessing legality include: the degree of privateness (whether specific invitations were issued to individuals or whether the event was open to the general public), whether commercial uses or home businesses are prohibited in the zone where the supper is being served, whether the food is cooked or prepared in a licensed facility or commercial kitchen, whether the food is served in a licensed or existing restaurant, and whether the owners have

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62. See Interview with Jessica Sheahan & Vien Dobui, Chefs, Công tử Bội Vietnamese Pop-up Noodle Rest., in Portland, Me. (Oct. 5, 2013); Yelena Finegold, *Restaurant Day Worcester: Pop-Up Cafe*, KICKSTARTER, <http://www.kickstarter.com/projects/1749933502/restaurant-day-worcester-pop-up-cafe> (last visited Feb. 16, 2014) (a successful Kickstarter—an online fundraising tool—campaign to have a pop-up café using local ingredients from the farmers' market “so people can easily replicate dishes”); *Rogue Café*, FACEBOOK, <https://www.facebook.com/roguercafe> (last visited Nov. 20, 2013) (a potential customer must “like” the webpage in order to become a “member” and may subsequently receive an invitation to a private pop-up event); Tracey Taylor, *Pop-up Spot Rogue Café Goes Private to Comply with Law*, BERKELEYSIDE (July 25, 2012, 4:02 PM), <http://www.berkeleyside.com/2012/07/25/pop-up-spot-rogue-cafe-goes-private-to-comply-with-law/> (“Rogue Café, a pop-up brunch spot held on weekends in a Berkeley backyard, has chosen to become a private event after a Berkeley story prompted a visit by the city’s health department.”).

63. Gregory Dicum, *At Pop-Ups, Chefs Take Chances with Little Risk*, N.Y. TIMES, Feb. 12, 2010, at A25B (describing how, two nights a week, “Lung Shan[,] an unremarkable Chinese restaurant . . . becomes Mission Street Food, one of a number of pop-up restaurants that have opened in the Bay Area over the last couple of years in spaces not normally used for fine dining”); Taylor, *supra* note 62 (noting that the pop-up restaurant Rogue Café is located in a backyard in a residential neighborhood).

64. Interview with Sheahan & Dobui, *supra* note 62; Henry, *supra* note 61. In contrast, some pop-ups are conducted by chefs who are already famous and who charge large sums for one-off dinners in interesting locations; their goals may focus more on tapping into an underground subculture of “hipness” or creativity than on local food. See, e.g., Adam H. Graham, *World’s Best Pop-Up Restaurants*, DEPARTURES (Jul./Aug. 2012), <http://www.departures.com/articles/worlds-best-pop-up-restaurants> (describing how a famous chef quickly sold out of tickets for a pop-up restaurant held at a famous monument).

obtained any temporary operational permits.<sup>65</sup> While some municipalities provide for temporary permitting for pop-up restaurants, those permits are seen by many as too expensive or burdensome to obtain, and once a permit is issued, there are often associated limitations on how and where the food can be prepared and served.<sup>66</sup> Further, pop-up chefs may want to use ingredients that they have grown, foraged, or slaughtered themselves, but the current health and safety codes do not always allow for those practices.<sup>67</sup>

With respect to norms, again, it seems as though it is too soon for a pervasive norm to have developed. However, to the extent people know about pop-up dinners, they seem to be generally supportive.<sup>68</sup> This rather novel phenomenon has been abundantly covered in the popular press, and anecdotally, many of these dinners tend to sell out, showing that they are popular with local food aficionados (affectionately known as “foodies”).<sup>69</sup>

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65. See BERKELEY, CAL., MUN. CODE § 23C.16.010(C) (2013) (No home occupation which includes customer visits may be allowed in certain residential districts.); RAHWAY, N.J., CODE § 217-1, -2 (2013) (codifying Ord. No. O-13-12, which expanded the definition of “retail food establishment” to include temporary restaurants.). Some localities have amended their ordinances to encourage, with some restrictions, these activities. See, e.g., OR. REV. STAT. § 624.490 (2013) (allowing the operation of temporary restaurants after payment of a reduced licensing fee); Jill Wendholt Silva & Joyce Smith, *KC’s Trendy Pop-Up Restaurants Raise Questions with Regulators*, KANSAS CITY STAR, Sept. 5, 2012, <http://www.kansascity.com/2012/09/05/3799225/kcs-trendy-pop-up-restaurant.html> (describing the Kansas City Health Department’s efforts to respond to and regulate pop-up restaurants, including revision of permitting requirements, application of Food Code requirements, and menu and preparation review by Department staff).

66. See generally OR. ADMIN. R. 333-150, -157 (2012).

67. See, e.g., 9 C.F.R. § 302.1 (2013) (stating that meat processing and slaughter facilities must be inspected by the USDA to sell products to retailers); FLA. STAT. ANN. § 502.091(1) (West Supp. 2014) (“Only Grade ‘A’ pasteurized milk and milk products, ice cream, and frozen desserts, and cheese made from pasteurized milk shall be sold at retail to the final consumer or to food service establishments.”); OR. ADMIN. R. 333-150 (standards for meat, fish, shellfish, eggs and milk products that are sold from restaurants).

68. See *infra* note 69.

69. See, e.g., Silva & Smith, *supra* note 65; Graham, *supra* note 64; Henry, *supra* note 60; Taylor, *supra* note 62. See also Interview with Sheahan & Dobui, *supra* note 62.



*B. Justifications for Property Laws and Norms That Prohibit Local Food-Related Practices*

There are many legitimate reasons and explanations for these property laws and norms that I have examined in previous work.<sup>70</sup> The most important of these is the existence of Euclidean zoning.<sup>71</sup> In 1926, when the U.S. Supreme Court upheld the constitutionality of comprehensive zoning, it legitimized patterns of development that intentionally segregated different uses from one other in an attempt to protect single-family homes.<sup>72</sup> This pattern of zoning resulted in the separation of residential and agricultural uses, thereby cementing in code the idea that food production was not a proper use in a neighborhood reserved for homes. The ideas behind Euclidean zoning still carry force and continue to prohibit agricultural and light industrial uses (including commercial kitchens) from existing in many residential areas.<sup>73</sup>

Further, the protection and promotion of property values is a key driver behind land use decisions and the existence of zoning ordinances.<sup>74</sup> According to Professor Bill Fischel's Homevoter Hypothesis, homeowners elect local government officials who will vote for laws that maintain property values and will vote against those that do not.<sup>75</sup> Thus, local governments tend to discourage or forbid activities thought to decrease property values. Similarly, deviance from a norm can also result in a decrease in property values.<sup>76</sup> This is in part because the existence of a norm suggests an expectation of compliance with the norm, and property values are often connected to an expectation of stability.<sup>77</sup> The combination of powerful norms and the tendency of local

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70. Schindler, *supra* note 11, at 246–61 (describing reasons for urban agriculture bans, including Euclidean zoning, nuisance prevention, promotion of public health, inertia, aesthetics, and economics).

71. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (holding that a municipality may constitutionally enact zoning regulations that segregate different land uses from each other).

72. *Id.* at 394.

73. Schindler, *supra* note 11, at 246–53.

74. See JESSE DUKEMINIER ET AL., PROPERTY 938–39 (7th ed. 2010).

75. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES 4–6 (2001).

76. Schindler, *supra* note 14, at 7–11, 23 (describing the norm in favor of front lawns, and noting that “property value is tied to lawns due, in part, to the historic expectation of lawns. But this is not because the lawn norm is inherently good or valuable; it is because no one wants to deflect from the norm for fear of social sanctions (and because the norm has likely resulted in some having a true preference for lawns)”).

77. See ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167 (1991) (“Members of a close-knit group develop and maintain norms

elected officials to enact policies that further or protect those norms could explain why some local food-related laws are slow to change.

### *C. Evolution of Property Laws and Norms*

Despite the justifications for prohibiting local food-related practices, both the law and the norms appear ripe for change. Although the two are interrelated, “[l]egal rules do not perfectly shape or perfectly reflect social norms.”<sup>78</sup> Laws and norms evolve at different times, and perhaps for different reasons.<sup>79</sup> In this instance, norms surrounding urban agriculture are beginning to change in some progressive municipalities as well as in shrinking cities that are reconsidering what to do with large amounts of newly vacant land.<sup>80</sup> For example, in Detroit, which has large amounts of underused vacant space within its urban boundaries, one researcher noted that “direct observation of gardening activity and increasing evidence of urban agriculture may stimulate an IMBY—In My Back Yard—sort of imitative response over time, a domino effect potentially reflecting the inverse of the contested ‘broken window’ contagion theory.”<sup>81</sup> Norms often evolve through this form of educational or informational campaign.<sup>82</sup>

Further, behaviors that follow norms, even if those behaviors are illegal, rarely trigger legal enforcement.<sup>83</sup> This suggests that normatively acceptable illegal actions will not be punished, which implies that the

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whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.”).

78. Sterk, *supra* note 24, at 89.

79. See generally Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 958–59 (1996) (explaining that laws shape norms). *But see* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000) (noting that “the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm” and suggesting that law is not always successful at changing norms).

80. See Lynda L. Butler, *The Pathology of Property Norms: Living within Nature’s Boundaries*, 73 S. CAL. L. REV. 927, 932 (2000) (“[H]umans must continually reassess their impact on the foundation ecosystem in defining their norms, rules, and standards.”).

81. Metcalf & Widener, *supra* note 9, at 1246.

82. Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors that Harm the Environment*, 61 DUKE L.J. 1111, 1112, 1118–19 (2012) (discussing the role of information in norm campaigns). *But see* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1713 (1996) (noting that norm change is difficult, in part due to information lag and coordination problems).

83. Mark A. Edwards, *Acceptable Deviance and Property Rights*, 43 CONN. L. REV. 457, 461 (2010). In the context of the local food behaviors discussed above, localities often will only enforce in response to a complaint from a neighbor.

laws are not necessary and should be changed.<sup>84</sup> And, as Professor Mark Edwards observed in his article about “acceptable deviance,” property rights tend to evolve in response to changes in norms.<sup>85</sup> Thus, to the extent that property-related local food norms are already shifting, local ordinances will likely follow.

One explanation for this emerging norm shift might be that these restrictions may have been put in place to control activities associated with lower class individuals, and thereby exclude them. While such exclusionary tactics were always wrong, now that those with political power and education are undertaking these actions, the exclusionary rationale completely collapses. However, in many parts of the country, there are still strong norms that reject urban agriculture and local food-related behaviors. In those localities, and especially if the norms are deeply embedded, the law might need to lead.<sup>86</sup>

In addition to the fact that some norms are already beginning to change, law and norms also appear ripe for change because property law generally has a tendency to reward behavior that is efficient and that furthers use of property.<sup>87</sup> Property law has evolved in a way that encourages the use of property for its highest and best use, and it discourages people from sleeping on their rights or committing waste on a piece of property.<sup>88</sup> Here, one could argue that many transgressive local food behaviors make efficient use of property: some pop-up restaurants serve dinner from stores that typically close prior to dinner time; guerilla gardeners plant in medians and vacant lots because they see those activities as bettering their communities by using underused property that

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84. This is similar to “desuetude” in criminal law: if a law has not been enforced for an extended period of time, it lacks effect. BLACK’S LAW DICTIONARY 513 (9th ed. 2009); *see also* Mukherji & Morales, *supra* note 20, at 2 (explaining that local zoning practice can make urban agriculture difficult, but that “[f]requently, these policy barriers are unintentional”).

85. Edwards, *supra* note 83, at 473.

86. *See* Schindler, *supra* note 14, at 23–24 (discussing the resistance of embedded norms to natural change); Sunstein, *supra* note 79, at 910 (“Some norms are obstacles to human well-being and autonomy. It is appropriate for law to alter norms if they diminish well-being.”).

87. *See, e.g.*, Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 763–64 (1975) (“[T]he legal system itself . . . has been strongly influenced by a concern . . . with promoting economic efficiency.”).

88. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967). *See also* David de Meza & J. R. Gould, *The Social Efficiency of Private Decisions to Enforce Property Rights*, 100 J. POL. ECON. 561, 561 (1992) (“The standard economic justification for the institution of private property rights is that it facilitates the socially efficient exploitation of resources.”). *But see* Saul Levmore, *Property’s Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 181 (2003) (contrasting the traditional, “optimistic” view that property rights evolve to promote efficiency with a more political explanation for the evolution of property law).

is otherwise going to waste. Seeing value in these behaviors, some municipalities have begun entering into or facilitating low-cost or nominally free leases or licenses with individuals and non-profits to farm vacant land.<sup>89</sup> Further, by creating permissive ordinances that allow for urban agricultural practices, local governments would allow land to be used more efficiently.<sup>90</sup>

### III. THE VALUE OF TRANSGRESSION

This Article has asserted that individuals are currently undertaking a number of unpermitted activities to aid in the furtherance of local food-related goals, but that formal acceptance of these activities is likely given the emerging shift in norms. However, this Part will consider whether there is anything inherently beneficial in the currently transgressive nature of these actions—viewing transgression as both a means and an end—and whether normalizing these actions through formal governmental acceptance might be in any way detrimental. For example, some sociological data find a connection between creativity and deviance;<sup>91</sup> might there be a risk that without the deviance, society would develop less creative interventions? Or rather, *must* these actions become legal in order to legitimize the goals of the local food movement? Generally, it seems that transgressive local food-related behavior is beneficial to the extent that it (1) acts as a catalyst for change and innovation and (2) entices supporters of the local food movement to actively participate in that movement.

Property law and those who study its evolution are no strangers to unauthorized behavior. Indeed, transgressive actions may have more import in the context of property law than other areas of the law because property law has a tendency to get stuck in old patterns, and thus needs to be “shock[ed]” from time to time.<sup>92</sup> Professors Eduardo Peñalver and

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89. Choo, *supra* note 9 (describing Seattle’s P-Patch program, where plots “are leased through a nonprofit land trust”).

90. Of course, society makes exceptions to this basic efficiency rationale all the time if there are social harms or negative externalities associated with the use. Therefore, this argument can be independent of the bottom line question of whether unregulated activities are socially harmful.

91. Don Wells et al., *Creative Deviance: A Study of the Relationship between Creative Behavior and the Social Construct of Deviance*, 40 C. STUDENT J. 74, 74–76 (2006) (describing deviance as “the braking [sic] of explicit and implicit social rules by individuals within society” and finding that “[w]hile conformity requires compliance with convention, creativity necessitates a defiance of what is expected and what has previously been done”).

92. This might be one explanation as to why local food-related property laws still lag behind the rapidly evolving norms; they have not yet been sufficiently shocked. See PEÑALVER & KATYAL, *supra* note 33, at 16 (“Although we do not dispute the value of

Sonia Katyal have expressly acknowledged that some of the activities described in this Article fall under their rubric of “property outlaws.”<sup>93</sup> These actions also fall into the “user-generated urbanism” movement, wherein people challenge expected uses of space through unauthorized actions.<sup>94</sup> As one scholar noted, the “lack of faith in the ability of industry and government institutions to provide for its citizens has given rise to a parallel movement of community organizers constructing landscapes of self-sufficiency and social support.”<sup>95</sup> Transgressive local food-related actions meet these definitions because they violate established property laws in furtherance of underlying goals that seek to enhance the local food movement.

Research suggests that transgression *qua* transgression in the context of property law does have some benefits. For example, Peñalver and Katyal note that property disobedience has, in many cases, encouraged legal innovation and bolstered the rule of law.<sup>96</sup> Similarly, social science literature suggests that some people engage in transgressive actions to pursue functional improvements and civic-minded goals, which are then sometimes co-opted and embraced by the governing authority.<sup>97</sup> This form of property lawbreaking may be considered useful when it is viewed as socially acceptable. For example, Edwards states that lawbreaking “can protect important community values embedded within property law regimes, such as norms of sharing, utilizing natural resources to feed one’s family, [and] interacting with one’s community in public spaces.”<sup>98</sup> Thus, while the transgressive actions can support and further values that the community views as important but that are not yet protected by the law, the transgression may

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stability in property entitlements . . . the long-term health of this system depends on its ability to respond dynamically to changing economic and social conditions.”). *See also* Peggy B. Johnson, *The Takings Issue in the Local Government and Watershed Context*, 1995 DET. C.L. REV. 17, 31 (1995) (“Many things considered harmful today were once legal and commonplace.” (quoting Joe Sax, uncited source)).

93. PEÑALVER & KATYAL, *supra* note 33, at viii–ix (discussing property lawbreakers and noting that “urban community gardeners take over vacant lots to beautify the city and create a sense of shared ecological responsibility”).

94. *See generally* Douglas, *supra* note 6, at 2 (defining the subcategory of do-it-yourself urban design as “small-scale and creative, unauthorized yet intentionally functional and civic-minded ‘contributions’ or ‘improvements’ to urban spaces in forms inspired by official infrastructure”). This includes actions undertaken by citizens like painting bike lanes or crosswalks where they seem to be needed without going through any formal municipal request or approval processes.

95. Metcalf & Widener, *supra* note 9, at 1245.

96. PEÑALVER & KATYAL, *supra* note 33, at ix.

97. Douglas, *supra* note 6, at 11–13.

98. Edwards, *supra* note 83, at 499 (citing PEÑALVER & KATYAL, *supra* note 33, at 1186).

eventually catalyze legal change such that the law would also support and further those values.

The value of transgression for purposes of property law notwithstanding, people undertake transgressive interventions for a number of more personal reasons as well: as a form of protest, activism, or civil disobedience, furthering political goals; as a form of art and expressive activity; and to gain fame or notoriety.<sup>99</sup> To the extent that people find value in and feel rewarded by these pursuits, they may be enticed to participate. One can see elements of each personal justification behind transgressive local food-related actions. Broadly, local food activities often seek to make people aware of social concerns like food insecurity and to bring more local food to food insecure areas. As various segments of society participate in these transgressive actions, they can serve as a form of bottom-up community-building, and thus promote broader political and social goals. More specifically, guerilla gardening activities often have an aesthetic and beautification purpose and express the idea that underused vacant land should be used more productively.<sup>100</sup> In the context of pop-up restaurants, many chefs want to engage in secret suppers to gain notoriety before opening a new restaurant,<sup>101</sup> or those who are already established may want to try out new dishes in a spontaneous, more creative environment.<sup>102</sup>

Another important, straightforward benefit to transgressive behavior is that it is often easier and less expensive than going through formal legal channels; there are fewer barriers to entry, which may be especially important for members of underserved or underrepresented communities. The legal scholarship addressing the intersection of transgression and the evolution of property law tracks most closely to the sociology and urban studies literature when one views transgressive local food activities as functional actions, undertaken as a way to address a community need while avoiding the perceived expense and bureaucracy of going through official municipal channels.<sup>103</sup> “There is widespread frustration with the bureaucracy of planning processes and a common feeling that the city does not or would not do it right anyway, so it is better when ‘the people’

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99. Douglas, *supra* note 6, at 4–6.

100. *Id.* at 6 (“Guerilla gardening . . . and unauthorized street improvements are direct responses to the perceived neglect of some spaces.”).

101. Interview with Sheahan & Dobui, *supra* note 62.

102. See, e.g., Gabe Ulla, *Chefs Weigh In: The Pros and Cons of Pop-Up Restaurants*, EATER (Sept. 14, 2012), <http://eater.com/archives/2012/09/14/chefs-weigh-in-the-pros-and-cons-of-popups.php>.

103. Douglas, *supra* note 6, at 9 (describing a group in Toronto that created an unofficial bicycle lane in two nights for 80 dollars); *id.* at 10 (describing a “driving motivation toward simply improving the city . . . where the city or other power that be should but cannot or will not do so”).

do it.”<sup>104</sup> For example, transgressive interventionists may view productive vegetable gardens as an improvement over unproductive lawns or vacant parcels; people can share the food they grow with members of their community through farm stands, enhancing the ability of others to eat locally produced foods; and chefs create pop-up restaurants because they believe that it would be too expensive to invest in a full restaurant lease, including licensing and permitting fees, while they are still building a name for themselves and figuring out the appropriate market and price points. Transgression is thus sometimes viewed as the only way to achieve one’s goals; those who do not own property—which in this setting would include those who wish to grow vegetables but are not landowners and those who wish to operate restaurants but do not have the funding to start their own—are often “reluctant, or simply financially unable, to initiate costly civil litigation or to assert effective political pressure to stake their claims.”<sup>105</sup> Thus, in this context, transgression may entice people to participate who otherwise would not, believing that they could not.

Finally, there is a superficial element of adventure and exclusivity in engaging in a subversive or illegal activity, such as attending an underground restaurant or gardening under cover of night alongside an abandoned rail spur.<sup>106</sup> Indeed, research confirms that some who participate in transgressive interventions consider their actions to be “fun” or a “thrill,” and the transgression likely contributes to those feelings.<sup>107</sup> Accordingly, and perhaps paradoxically, the transgressive nature of the action may actually make it *more* likely to be undertaken.<sup>108</sup>

Synthesizing this analysis, two primary benefits to the unauthorized nature of these actions are: (1) transgression as a catalyst and (2) transgression as an enticement to participate. First, Peñalver and Katyal suggest that property outlaws act as “catalysts for needed legal reform.”<sup>109</sup> Thus, the value of the transgression itself is perhaps only helpful in this regard until it has spurred the necessary legal change. To the extent that transgressive behavior results in changed norms or in lawmakers recognizing a need for change, it would seem that the goal is

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104. *Id.* at 12.

105. PEÑALVER & KATYAL, *supra* note 33, at 14.

106. *See, e.g.*, Clare Trapasso, *Guerrilla Garden on Abandoned Long Island City Train Tracks to Go Legit*, N.Y. DAILY NEWS (Nov. 12, 2013, 6:04 PM), <http://www.nydailynews.com/new-york/queens/guerilla-gardeners-legit-article-1.1514689> (describing a guerilla garden in Long Island City, Queens).

107. Douglas, *supra* note 6, at 13.

108. However, those feelings seem to be more on the part of the patrons than the chefs, many of whom are more concerned with being able to do what they want, as inexpensively as they can. Interview with Sheahan & Dobui, *supra* note 62.

109. PEÑALVER & KATYAL, *supra* note 33, at 12.

normalization and legitimization through law. Once the transgression has served its role as catalyst, its value is no longer clear. Second, transgression could entice some people to participate in the local food movement because it avoids the cost and perceived bureaucracy associated with authorized governmental channels, and it can function as a form of self-help for those who feel that the law is unresponsive to their needs. Further, transgression entices participation because of the individual and expressive values that some find in unpermitted behaviors. However, to the extent that the transgressive nature of an activity is what is most appealing to some, there may be a real risk that normalizing that activity may decrease participation in it, thereby stymieing the goals of the local food movement. Indeed, as tends to happen when something fringe becomes mainstreamed, the movement could become co-opted and sanitized by corporate interests more concerned with making money than pursuing the benefits of local food.<sup>110</sup> Other than these two elements, there does not appear to be anything inherently helpful about the transgressive nature of the local food activities described in this Article. And, by expressly authorizing some or all of these local food-related actions, we lend them legitimacy, which is important if the broader goals of the local food movement are to be accepted by society writ large.<sup>111</sup>

#### IV. GOVERNMENTAL ACTION: STEPS FORWARD

As discussed above, the law in this area will likely follow the evolving norms. The most straightforward, traditional land-use approach to addressing the transgressive urban foods behaviors discussed in this Article might be for a municipality to simply permit them conditionally.<sup>112</sup> However, when cities allow activities, but only via a detailed conditional use permit or licensing process, many people still feel that obtaining a permit is too time consuming, burdensome, or expensive and thus may continue to operate without a permit or decide

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110. See *supra* Part I (listing benefits of urban agriculture, including enhancing the economy, creating jobs, and increasing property value).

111. Further, it is possible that even more people will engage in these activities if they are legal and become mainstream instead of fringe. This, of course, is an argument that has been used by some against the legalization of other behaviors that were, at one time, viewed by some as transgressive, including marijuana use and anti-sodomy laws. These arguments are not necessarily supported by empirical data. See, e.g., Eric W. Single, *The Impact of Marijuana Decriminalization: An Update*, 10 J. PUB. HEALTH POL'Y 456, 466 (1989) ("The available evidence indicates that the 'decriminalization' of marijuana possession had little or no impact on rates of use.").

112. Indeed, some cities have begun to do this. See, e.g., OAKLAND, CAL., PLANNING CODE § 17.35.01(L10) (2011) ("Crop and Animal Raising is only permitted upon the granting of a Conditional Use Permit.").



not to participate at all.<sup>113</sup> So, while allowing these activities via a low-cost permit or license is better than banning them completely, localities should think more broadly about how to allow certain activities, while either removing barriers to entry or respecting their transgressive nature. Perhaps it is possible to reduce the risks of harm while still allowing some measure of freedom and not taking away from the “outsider appeal” of these actions.

In pursuit of this end, a municipality could consider a move toward land use deregulation in the context of urban agriculture and local food productions, at least with regard to restrictions on the use of private property. For actions on public property, like median planting, the government might want to consider a free licensing or land transfer program, or at least some degree of prosecutorial discretion or regulatory forbearance.<sup>114</sup> A lack of enforcement could function as norm-establishing behavior (especially in areas where these norms are not yet changing) that precedes a change in the law. This is important because some of these actions are currently only illegal because municipalities do not yet have programs in place to deal with their changing landscapes;<sup>115</sup> newly vacant land in residential zones must be treated differently than inhabited, functional, residential lots.<sup>116</sup> The emergence of new behaviors that do not neatly fit within the confines of a standard Euclidean residential zone, yet still may provide more benefit than harm to that community, have not yet been accounted for in most cities’ zoning ordinances.<sup>117</sup>

The loosening of these property restrictions on urban agriculture is consistent with a broader trend in land use law about which I have written previously: the decline of Euclidean zoning.<sup>118</sup> Many local

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113. Schindler, *supra* note 11, at 288 & n.292 (stating, “Though CUPs provide a locality with more control over the use, they also typically involve even greater barriers to entry than as-of-right permits because they are typically quite expensive” and citing cost of CUPs).

114. See, e.g., *P-Patch Community Gardens*, SEATTLE DEP’T NEIGHBORHOODS, <https://www.seattle.gov/neighborhoods/ppatch/> (last visited Feb. 24, 2014).

115. See Mukherji & Morales, *supra* note 20, at 2 (noting that barriers to urban agriculture are often unintentional).

116. See Metcalf & Widener, *supra* note 9, at 1246 (describing a task force in Buffalo, a city with large amounts of vacant urban land, that discussed the idea of “lease agreements with the city for use of vacant lots”).

117. Interview with Colleen Hanlon-Smith, Exec. Dir., Me. Fed’n of Farmers’ Mkts., in Portland, Me. (Oct. 26, 2013) (explaining that farmers’ markets are often unintentionally restricted due to unrelated property rules regarding street closures and permits).

118. Schindler, *supra* note 11, at 294–95; Sarah Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 COL. L. REV. 471, 481, 530, 548 (2012).

governments are moving away from the traditional Euclidean model, where different uses are separated from one another, and toward mixed-use zoning, smart growth, transect-based planning, and form-based codes.<sup>119</sup> And while historically, property law has been described as being primarily concerned with the individual and the promotion of individual rights,<sup>120</sup> zoning has historically focused more on the benefits (and harms) of a given use on the relevant community. But the answer to the question of what is in the best interest of the community is changing, both based on location, and on changes in our views of morality and welfare over time. Further, some progressive property scholars assert that property rules exist in part to support community well-being and to provide access to resources for underserved members of the community.<sup>121</sup> Transgressive local food actions support this progressive property view and simultaneously rebel against it, for the Euclidean norms these actions resist also drew heavily upon communitarian property conceptions, though rooted in a different time.

The tension between individual and community values is expressed not only through property and zoning law, but through an actor's individual belief systems as well. Those who are undertaking these transgressive actions may seem to be expressing a libertarian philosophy, albeit one slightly different than the standard, small business view of libertarianism.<sup>122</sup> The keeper of illegal backyard chickens does not

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119. See, e.g., Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOKLYN L. REV. 571, 571 (2013) (“Thanks to the growing influence of the new urbanists—a group of architects and urban-planning professionals who promote the development of mixed-land-use neighborhoods—‘transect zoning’ is becoming the zoning reform *du jour*.” (internal citation omitted)).

120. See generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–28, 171–72 (1974); *Human Rights*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/hum-rts> (last visited Feb. 15, 2014) (“[E]ach individual had to be free from threats to life and liberty, whilst also requiring what Locke presented as the basic, positive means for self-preservation: personal property.”). See also Butler, *supra* note 80, at 932–33 (noting that property norms “reflect a strong ‘societal preference for individualism and autonomy’” (quoting Sterk, *supra* note 24, at 90)). But see Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. (SPECIAL ISSUE) 743 (2009).

121. See, e.g., Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1110, 1117–18; Eric T. Freyfogle, *Book Review*, 29 LAW & HIST. REV. 327, 327–28 (2011) (describing some progressive property scholars as those “who see property chiefly as a tool used by communities to foster their overall welfare”).

122. See Edwards, *supra* note 83, at 474 (describing Professor Joseph Singer's “castle conception” of property rights, “which views restrictions on free use of private property as presumptively illegitimate” (citing Joseph Singer, *How Property Norms Construct the Externalities of Ownership* 2 (Harvard Law Sch. Pub. Law Research,

believe the government should have control over the type of pet she chooses to harbor on her private property; the front-yard gardener does not think that she should run the risk of a fine or jail time for choosing to plant vegetables instead of grass; the pop-up chef believes that he should be able to hunt wild game or forage for vegetables and snails, and then serve those items to members of the public who are paying to eat his food.<sup>123</sup> But the “locavore liberal” arguing for deregulation in the context of property rules seems to be espousing a more progressive form of libertarianism: one that is underpinned by communitarian motives.<sup>124</sup> While these behaviors benefit the individual, they also benefit the broader community—for all the reasons discussed earlier<sup>125</sup>—and further the broader political and social goals of the local food movement. Thus, while Peñalver says that his view of property focuses on its social nature and “reject[s] the frequently static, individualist conception of property rights favored by many property libertarians,”<sup>126</sup> I assert that these transgressive local food-related actions effectively further both libertarian and communitarian property principles.<sup>127</sup>

So, when determining whether and how to revise their property laws to address urban agriculture, perhaps local governments could consider whether the currently transgressive practice at issue is supported by communitarian motives and whether its legalization would help build community. To the extent that the answer is yes, restrictive laws could be loosened or enforcement could be withheld. Property law regularly makes “choices” such as these. As Professor Laura Underkuffler, a prominent progressive property scholar noted, “[t]he state—in creating

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Working Paper No. 08–06, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1093341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093341))).

123. Some libertarians might not look so kindly, however, upon the person planting vegetables on city- or bank-owned property, as a minimalist libertarian political philosophy views the legitimate functions of government as scarcely more than protecting private property (and bodily integrity). See, e.g., EPSTEIN, *supra* note 120, at 331–34; NOZICK, *supra* note 120, at 26–28.

124. See Michael L. Wells, *Race-Conscious Student Assignment Plans after Parents Involved: Bringing State Action Principles to Bear on the De Jure/De Facto Distinction*, 112 PENN ST. L. REV. 1023, 1024 n.3 (2008) (“Libertarians vigorously defend the primacy of the individual over the community and squarely reject the communitarian critique. But many liberals seek to have it both ways, holding that one can begin from individualistic premises and nonetheless give great weight to communitarian values.” (citation omitted)). Perhaps, however, some pop-up chefs’ activities and desires are more in line with traditional small business libertarianism.

125. See *supra* Part I.

126. PEÑALVER & KATYAL, *supra* note 33, at 15–16.

127. Cf. John M. Kang, *The Irrelevance of Sincerity: Deliberative Democracy in the Supreme Court*, 48 ST. LOUIS U. L.J. 305, 311 (2004) (“The communitarian approach stands at the opposite pole from the libertarian approach. It prioritizes the community’s moral commitments and norms of civility over the individual rights of the speaker.”).

and enforcing property rights—makes deliberate, binding, and final choices about who shall enjoy and who shall not. It *necessarily and affirmatively* grants the acquisitive claims of some people, and denies the same claims of others.”<sup>128</sup> Thus, making the choice to deregulate in some areas or to not enforce laws in others would merely be furthering the existing role of property law in support of social values.

#### CONCLUSION

Property law is “a dynamic institution that is broadly reflective of evolving community values as opposed to a fixed set of natural entitlements;”<sup>129</sup> it is fundamentally concerned with evolution and change.<sup>130</sup> While in some areas of the law instability might be destructive and cause unrest, in the context of property, it is “necessary to prevent the entire edifice from becoming outdated.”<sup>131</sup> Further, violations of property law are viewed by some as morally different than illegal action in other areas of law.<sup>132</sup> The transgressive use of property to further local food goals is a new, emerging use of property. It challenges our existing property laws and norms, and thus it is consistent with our view of property law as evolutionary.

As our conceptions of harm change, our thoughts about appropriate and efficient uses of property change. Some cities are confronting population growth in areas that lack sufficient food-based infrastructure; people are living in food deserts without adequate access to grocery stores or fresh food. Other cities are shrinking and must consider how to put formerly residential property, which now lies vacant and blighted, to productive use. Further, a resurgent interest in self-sufficiency and homesteading, coupled with a corresponding rise in suspicion of and distaste for industrial agriculture, has led people to want more unfettered

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128. Laura Underkuffler, Lecture, *When Should Rights “Trump”? An Examination of Speech and Property*, 52 ME. L. REV. 311, 321 (2000).

129. PEÑALVER & KATYAL, *supra* note 33, at 15; cf. Donna M. Byrne, *Locke, Property, and Progressive Taxes*, 78 NEB. L. REV. 700 (1999); Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525 (2007); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002).

130. Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539 (2006) (“[T]he exact composition of these property rights represents a societal balance of interests, which should be subject to constant re-evaluation and revision in light of current needs and norms.”).

131. PEÑALVER & KATYAL, *supra* note 33, at 12.

132. *Id.* at 9 (“[V]iolations of property rights differ in morally significant respects from other sorts of legal wrongs.”); see also Edwards, *supra* note 83, at 498 (describing actions of settlers in the American west as “heroic”).

use of their private property for food production and consumption purposes. As these real-world concerns confront cities and homeowners, we can expect to see additional changes in property norms and laws surrounding local food issues.<sup>133</sup> To the extent that these currently transgressive actors push us toward those changes, they have achieved an important goal.

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133. See, e.g., Eric T. Freyfogle, *Eight Principles for Property Rights in the Anti-Sprawl Age*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 777, 785–86 (discussing the evolution of property rights and norms).