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## Ordering (and Order in) the City

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# ARTICLES

## ORDERING (AND ORDER IN) THE CITY

Nicole Stelle Garnett\*

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The walls of the Palazzo Pubblico in Siena, Italy, are graced with Ambrogio Lorenzetti’s striking frescos contrasting the effects of “good government” and “bad government” on fourteenth-century city life. In the city under good government, men work to repair stately buildings, women socialize in the streets, and merchants sell their wares in a busy marketplace. In the city under

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bad government, the buildings are crumbling, men stand idle (save one crafting weapons), bandits terrorize the innocent, and the bodies of murder victims lie in the streets.<sup>1</sup> The goals of urban policy, it appears, have not changed in over six hundred years.

Over the past two decades, however, the conventional wisdom about how to achieve these goals in American cities has been turned on its head. After years of attributing the problems of urban decay and disorder to intractable “root causes,” city officials now embrace “root solutions” that seek to eliminate these problems directly, regardless of their causes.<sup>2</sup> A primary catalyst for this change was the articulation in 1982 of the “broken windows” hypothesis by George Kelling and James Q. Wilson.<sup>3</sup> This now-familiar theory is that uncorrected manifestations of disorder, even minor ones like broken windows, signal a breakdown in the social order that accelerates neighborhood decline.<sup>4</sup> The response to this theory, and to a growing disillusionment with modern policing practices generally,<sup>5</sup> has been a proliferation of policies focusing on public order, such as former Mayor Rudolph Giuliani’s “quality of life” and “no tolerance” programs, as well as ubiquitous “community policing” efforts.<sup>6</sup>

Broken windows policies have generated a vast legal literature, most of which focuses on *police* efforts to restore order by enforcing criminal laws. This scholarship falls into two broad, and overlapping, categories: First, “social norms” scholars argue that order-maintenance policing strategies are needed to

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1. Effetti del Buon Governo, Ambrogio Lorenzetti, 1337-1340, fresco, Palazzo Publico, Siena; Effetti del Cattivo Governo, Ambrogio Lorenzetti, 1338-1340, fresco, Palazzo Publico, Siena. Ironically, while the former remains in nearly pristine condition, large sections of the latter have crumbled away over the years. See Ambrogio Lorenzetti’s Frescos in the Sala dei Nove, Palazzo Publico, Sienna, <http://www.tulane.edu/~tluongo/Lorenz/> (last visited Aug. 10, 2004).

2. See, e.g., WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 126-27, 161 (1990) (distinguishing between “root causes” of and “root solutions” to urban disorder).

3. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

4. *Id.* at 31-32.

5. The influence of the *Broken Windows* piece can hardly be overstated. See, e.g., WILLIAM D. VALENTE & DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW 835 (4th ed. 1992) (noting that the director of the U.S. Department of Justice’s National Institute of Justice has observed that Wilson and Kelling’s article “has had a greater impact than any other article in serious policing”); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 580 (1997) [hereinafter Livingston, *Police Discretion*] (“*Broken Windows* stimulated a flurry of scholarship on the subject of order maintenance.”). Still, it would be overly simplistic to suggest that this magazine article alone revolutionized urban policing policy. Rather, the piece grew out of, and complemented, a growing body of literature supporting older, “hands-on,” policing practices. See *infra* notes 41-46 and accompanying text.

6. See generally, e.g., COMMUNITY POLICING: RHETORIC OR REALITY (Jack R. Greene & Stephen D. Mastrofski eds., 1986); GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996); Livingston, *Police Discretion*, *supra* note 5.

shore up important nonlegal social controls.<sup>7</sup> As Dan Kahan has observed, “[c]racking down on aggressive panhandling, prostitution, open gang activity and other visible signs of disorder may be justifiable on this ground, since disorderly behavior and the law’s response to it are cues about the community’s attitude toward more serious forms of criminal wrongdoing.”<sup>8</sup> Second, and in response, criminal procedure scholars concentrate primarily on the constitutional questions raised by the discretion afforded police officers by order-promoting criminal laws.<sup>9</sup>

Largely missing from the academic debate about these developments is a discussion of the complex and important role of property regulation in order-maintenance efforts.<sup>10</sup> To be fair, broken windows scholarship concentrates primarily on policing strategies that are, in a sense, property regulations: they seek to restore order by regulating public places—streets, parks, etc.<sup>11</sup> But

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7. See, e.g., SKOGAN, *supra* note 2, at 65-84; Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996) [hereinafter Ellickson, *Controlling Chronic Misconduct*]; Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) [hereinafter Kahan, *Social Influence*]; Dan M. Kahan, *Social Norms, Social Meaning, and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998) [hereinafter Kahan, *Social Norms*]; Tracey L. Meares, *Drugs: It’s a Question of Connections*, 31 VAL. U. L. REV. 579, 589-93 (1997); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC. REV. 805 (1998) [hereinafter Meares & Kahan, *Law and (Norms of) Order*]; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999). On social norm theory generally, see, for example, ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998).

8. Kahan, *Social Influence*, *supra* note 7, at 351.

9. See, e.g., David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1063-64 (1999) (characterizing the legal commentary on order-maintenance policies as “the New Discretion Scholarship”); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 294 (1998) (asserting that order-maintenance policies are “a loosely grouped set of initiatives in the area of crime and punishment”); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) [hereinafter Kahan & Meares, *Coming Crisis*] (predicting “demise” of the constitutional rules designed to “delimit the permissible bounds of discretionary law-enforcement authority”); Livingston, *Police Discretion*, *supra* note 5, at 591-672 (surveying criminal procedure cases relating to police discretion to maintain public order).

10. *But cf.* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1101-22 (2002) (discussing ways that property regulation can be used to control crime).

11. For example, the anti-gang-loitering law invalidated by the Supreme Court in *City of Chicago v. Morales* had “zoning” characteristics; it was enforced only in “areas in which

traditional *private* property regulations also affect order-maintenance efforts in important, and understudied, ways. This Article attempts to fill that property law gap in the public-order puzzle by tackling the complicated relationship between property regulation and order-restoration efforts.

Property regulations shape the order of American cities in two very different ways. First, some—housing and building codes and nuisance laws—target the physical (and related social) disorders that signal, and contribute to, urban decline. Second, others—zoning laws—define and construct the proper ordering of urban land uses. It is hardly surprising that city officials eager to curb disorder have seized upon the first, “disorder-suppression” function of property regulation. Social scientists have long linked property conditions with community health.<sup>12</sup> (Put most simply, the presence of an “eyesore” is a negative indicator of neighborhood health,<sup>13</sup> as Wilson and Kelling’s precursor to spiraling disorder—the broken window—suggests.) Furthermore, constitutional rules governing police discretion limit, for good or ill, a community’s ability to curb disorder through flexible criminal laws such as loitering and vagrancy prohibitions.<sup>14</sup> Property regulation offers vast enforcement flexibility without raising the same constitutional concerns, making it all the more attractive to city officials.

American property regulations, however, do far more than suppress disorder. Our most significant form of land-use regulation, Euclidean zoning, also reflects a longstanding value judgment that the appropriate way to order different land uses is to separate them from one another into single-use zones.<sup>15</sup>

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the presence of gang members ha[d] a demonstrable effect on the activities of law abiding persons in the surrounding community.” *City of Chicago v. Morales*, 527 U.S. 41, 48-49 (1999) (quoting Chicago Police Department General Order 92-4); *see also* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 408 (2001) (noting that Chicago used zoning characteristics to defend the ordinance). Other communities explicitly apply zoning principles to public streets. The Supreme Court recently ruled that a public housing authority could use trespass laws to exclude troublemakers. *Virginia v. Hicks*, 593 U.S. 113 (2003). Portland, Oregon, and Cincinnati, Ohio, have adopted similar ordinances that exclude individuals from designated “drug exclusion zones” as a consequence of a drug arrest within the zone. *See* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1430-31 (2001) (discussing drug exclusion zone policies); Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 129 (2002) (same); *see also* *Johnson v. City of Cincinnati*, 310 F.3d 484, 488 (6th Cir. 2002) (invalidating Cincinnati ordinance); *State v. James*, 978 P.2d 415 (Or. Ct. App. 1999) (rejecting double-jeopardy challenge to Portland ordinance). On the order-maintenance policing/zoning connection, *see* generally Ellickson, *Controlling Chronic Misconduct*, *supra* note 7.

12. *See, e.g.*, SKOGAN, *supra* note 2, at 4 (noting large volume of research on building abandonment and vandalism); *see also infra* notes 52-62 and accompanying text.

13. *See infra* notes 52-62 and accompanying text.

14. *See infra* note 49; *see also, e.g.*, *Morales*, 527 U.S. 41 (invalidating Chicago’s Gang Congregation Ordinance as unconstitutionally vague).

15. *See, e.g.*, JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 13.3.2 (2001) (“The most basic form of zoning separates residential, commercial, agricultural, and

City officials schooled in this ideology may naturally tend to equate ordered land uses with the absence of disorder.<sup>16</sup> They also may be wrong. As Jane Jacobs observed many years ago, “There is a quality even meaner than outright ugliness or disorder, and this meaner quality is the dishonest mask of pretended order, achieved by ignoring or suppressing the real order that is struggling to exist and to be served.”<sup>17</sup> In other words, as I have suggested elsewhere, when property is *over-* or *misregulated*, property regulations may impede efforts to restore a vibrant, healthy, and organic public order.<sup>18</sup>

This Article begins, in Part I, with an overview of the “order-maintenance revolution” generally, and its connection with property regulation specifically. This Part discusses ways that local governments employ the tools of property regulation to suppress physical disorder (and the social disorders associated with it), such as the aggressive use of regulatory inspections and public nuisance lawsuits to eliminate harmful land uses<sup>19</sup> This Part further demonstrates that many city officials have long treated—and continue to treat—order-construction regulations (i.e., zoning laws) as another convenient weapon against the social disorders targeted by broken windows policies.

Part II examines whether this longstanding tendency to equate property regulations’ disorder-suppression and order-construction functions may prove counterproductive. The focus on curbing disorder comes at the same time that increasing numbers of land-use scholars, urban planners, and government officials are coming to endorse the view that some of our urban problems stem from land-use regulations demanding the wrong kind of “order.”<sup>20</sup> That is, as Jacobs warned, the apparent “disorder” of a busy city neighborhood frequently makes it safer—and better—than a deserted, but “orderly,” one. This Part examines arguments that the prevailing system of land-use regulation—zoning—may devastate city neighborhoods by stifling the entrepreneurial energies of inner-city residents and precluding the diversity of uses needed for a healthy street life. It concludes with a case study of zoning in New York’s East Harlem, where efforts to use land-use reform to revitalize a struggling community are underway.<sup>21</sup>

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industrial uses. Often called *Euclidean zoning* . . . such zoning is relatively rigid, focusing on separation of different uses.”).

16. See *infra* notes 99-108 and accompanying text.

17. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 15 (1961).

18. Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191 (2001) [hereinafter Garnett, *On Castles*].

19. See *infra* notes 63-93 and accompanying text.

20. See *infra* notes 153-59 and accompanying text.

21. See MANHATTAN CMTY. BD. #11, *NEW DIRECTIONS: A 197-A PLAN FOR MANHATTAN COMMUNITY DISTRICT #11* (1999), [http://www.east-harlem.com/cb11\\_197A\\_index.htm](http://www.east-harlem.com/cb11_197A_index.htm) (last visited Sept. 26, 2004) [hereinafter *NEW DIRECTIONS*]; N.Y. City Dep’t of City Planning, *East Harlem Rezoning Proposal—Approved: Public Review Process* (2002), <http://www.nyc.gov/html/dcp/html/eastharlem/eastharlem4.html> (last visited Sept. 26, 2004); see also *infra* notes 174-90 and accompanying text.

Part III of this Article turns to an important question: what if the traditional assumption that order-construction regulations serve to suppress disorder is correct? The broken windows hypothesis rests on the assumption that government efforts are needed to reinforce private norms of order. If a broken window sends a social signal that the community does not care about property maintenance, fixing the broken window will send the opposite signal. The community will begin to care about such things; windows will not remain broken, and property conditions will improve. If loitering gang members signal that a community does not—or cannot—address gang lawlessness, dispersing congregations of gang members signals that gang activity will not be tolerated.<sup>22</sup> The use of property regulations to suppress disorder, as discussed in Part I, should theoretically serve a similar norm-enforcing function.

The claim underlying the regulatory reforms discussed in Part II of this Article is a very different one—namely, that the development of the economic and social climate necessary to make city neighborhoods healthy, vibrant places can be hindered by property regulations imposing the *wrong kind of order*. But city officials and residents weary of disorder may greet with significant suspicion the claim that the familiar order constructed by zoning laws is unrelated, or even harmful, to disorder-suppression efforts. These understandable anxieties reinforce strong public-choice impediments to needed legislative reform. The remainder of Part III discusses why overcoming such residents' fears and politicians' resistance may offer the best hope for struggling city neighborhoods.

Untangling the order-construction/disorder-suppression equation is no small task. Thus, Part IV of this Article concludes with a practical suggestion about how to implement meaningful land-use reforms despite significant cultural and institutional resistance to them. Specifically, I suggest that local officials foster neighborhood-level discussions of land-use reforms, perhaps in the community-policing forums that have become central to the order-maintenance agenda. These discussions are unlikely to lead to a radical overhaul of the rules governing urban land uses. Indeed, the results may strike those most convinced by the arguments set forth in Parts II and III of this Article as frustrating baby steps. Nevertheless, the ground-level reality in most cities—resistance to reform, diverse neighborhoods with equally diverse regulatory tastes, and the risks of unexpected consequences—make the case for neighborhood-by-neighborhood regulatory reform a strong one.

#### I. THE NEW POLICING AND PROPERTY REGULATION

As briefly outlined above, property regulations serve two overlapping order-maintenance functions. First, some aim to suppress disorder. And,

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22. See, e.g., Kahan, *Social Influence*, *supra* note 7, at 351; Kahan, *Social Norms*, *supra* note 7, at 614-15.

second, others order land uses in a particular way, namely by segregating them from one another. This Part focuses on disorder suppression, the first function of property regulation. I briefly review the current focus in urban policy on curbing disorder, including property-related disorder, before discussing some of the various ways that local officials now seek to employ property-regulation tools to achieve these goals. While this Part is primarily descriptive, this description sets the stage for a discussion in Part II of potential perils of order-construction regulations.

### A. *The Order-Maintenance Revolution*

For most of American history, vagrancy, public drunkenness, and related laws served as the primary legal check on the constellation of problems now thought of as urban “disorders.” These laws empowered local officials to “keep the peace” in a number of ways, including, importantly, by arresting individuals thought to breach it.<sup>23</sup> After their establishment in the latter half of the nineteenth century, municipal police forces became the primary regulators of public order, and vagrancy-type laws their primary legal enforcement mechanism.<sup>24</sup> Indeed, prior to the “constitutional revolution” of the late 1960s, the majority of arrests made were for nonviolent “victimless” public-order offenses: in 1960, more than half of all arrests were for vagrancy, public drunkenness, or disorderly conduct; even as late as 1969, one in four arrests was for public drunkenness.<sup>25</sup>

Much has been said about the enforcement of legal sanctions against disorderly behavior by police officers; from this vast literature, several important themes emerge. First, arrests were not the primary means used by police officers to “keep the peace.” As James Q. Wilson described in his classic, *Varieties of Police Behavior*, “To the patrolman, the law is one resource among many that he may use to deal with disorder, but it is not the only or even the most important : . . . he approaches incidents that threaten order *not in terms of enforcing the law but in terms of ‘handling the situation.’*”<sup>26</sup> Most of the time, officers likely chose to “handle the situation” informally, by, for example, telling brawling drunks to “break it up,” asking surly teenagers to move along, etc.<sup>27</sup>

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23. See, e.g., Livingston, *Police Discretion*, *supra* note 5, at 595 (noting that, before the constitutional procedure reforms of the 1960s and 1970s, police were given broad authority to keep order and that “[m]ost states had loitering, drunk and disorderly, and vagrancy statutes” to aid them in this task).

24. Ellickson, *Controlling Chronic Misconduct*, *supra* note 7, at 1200-01.

25. HOWARD M. BAHR, *SKID ROW: AN INTRODUCTION TO DISAFFILIATION* 227 (1974).

26. JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 31 (1968) (emphasis in original).

27. Many excellent examples of this informal police-public interaction can be found in *id.* and in Egon Bittner’s classic study, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699 (1967).



Second, the police had vast discretion to decide when to arrest an individual for a breach of the peace,<sup>28</sup> and the available legal sanctions provided an important “backup” to these informal order-maintenance efforts.<sup>29</sup> As Wilson and Kelling observed in their *Broken Windows* essay,

Until quite recently . . . the police made arrests on such charges as “suspicious person” or “vagrancy” or “public drunkenness”—charges with scarcely any legal meaning. These charges exist not because society wants judges to punish vagrants or drunks but because it wants an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed.<sup>30</sup>

Egon Bittner’s famous study of the police on skid row, for example, noted the “restricted relevance of culpability”: many individuals encountered by a patrol officer likely were technically guilty of a public-order offense; arrests occurred only when an officer decided to remove the “person whose presence [was] most likely to perpetuate the troublesome development.”<sup>31</sup>

Finally, enforcement of public-order laws, and undoubtedly police order-maintenance efforts generally, did not always conform to contemporary ideas of “justice.” Even strong proponents of order-maintenance policing acknowledge this ugly history.<sup>32</sup> For example, Robert Ellickson acknowledges that public-order laws “had long been disproportionately enforced against poor people and members of racial minorities. In the mid-1960s, many police departments were lily-white and heavily staffed with officers who were insensitive, and sometimes brutal, in handling vagrants and arresting non-white

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28. See, e.g., Livingston, *Police Discretion*, *supra* note 5, at 595 (noting that vagrancy-related statutes had “the effect . . . of conferring a remarkable amount of discretion on the local police” and that “[m]any citizens were rendered almost perpetually subject to arrest pursuant to catchall vagrancy laws”); William J. Stuntz, *Crime Talk and Law Talk*, 23 REVS. AM. HIST. 153, 157 (1995) (“Prior to the 1960s, vagrancy and loitering laws made it possible for police to arrest pretty much anyone, or at least anyone on the street: the laws were so broad as to plausibly cover anything anyone might do in public.”). Important early examinations of the discretion problem include Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543 (1960) and Wayne LaFave, *The Police and Nonenforcement of the Law—Part I*, 1962 WIS. L. REV. 104.

29. See, e.g., Bittner, *supra* note 27, at 703 (describing how police used threat of law enforcement to back up nonlegal order-maintenance action); Harcourt, *supra* note 9, at 344 (alleging that “[t]he order-maintenance strategy also depends on arresting people on meaningless charges,” and that “[w]hat makes the system work is the availability of broad criminal laws that allow the police to take someone off the streets because they look suspicious”).

30. Wilson & Kelling, *supra* note 3, at 35.

31. Bittner, *supra* note 27, at 709, 713.

32. See Kahan & Meares, *Coming Crisis*, *supra* note 9, at 1159-71; Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES 1, 3-30 (Tracey L. Meares & Dan M. Kahan eds., 1999) [hereinafter Meares & Kahan, *Paradox*]; see also, e.g., Livingston, *Police Discretion*, *supra* note 5, at 647 (arguing that vagueness doctrine should play a more limited role with respect to the new generation of order-maintenance laws).

arrestees.”<sup>33</sup> Wilson’s 1968 study of police behavior confirms how patrol officers’ stereotypes and suspicion of “outsiders” resulted in racial discrimination, at times leading to underenforcement of public-order laws against minorities and at other times leading to overenforcement.<sup>34</sup>

In 1956, Caleb Foote’s critique of Philadelphia’s public-order enforcement regime presaged the radical deregulation of our urban public spaces.<sup>35</sup> After observing hundreds of criminal vagrancy proceedings in Philadelphia, Foote cited a magistrate who condemned vagrancy laws as the “garbage pail of the criminal law.”<sup>36</sup> Foote concluded that the only possible justification for this system—the fact that “its flexibility gives the police a residual discretionary power to control suspicious persons”—was an “illusory” one that permitted the “substitution of harassment for the more difficult job of obtaining the evidence necessary to convict criminals . . . [and] encourage[d] superficial and inefficient police work.”<sup>37</sup> Foote’s influential article could only have been welcomed by the police reformers who, for half of a century, had argued that patrol officers’ entanglements “on the beat” with minor “victimless” crimes—vice, public disorder, and vagrancy—served little purpose and spawned corruption, unequal enforcement, and public resentment.<sup>38</sup> Within a decade, Foote’s skepticism of apparently standardless enforcement of vagrancy laws was rendered moot, both by cases invalidating such laws on “vagueness” grounds<sup>39</sup> and by police reforms downplaying officers’ traditional peacekeeping and crime-prevention functions.<sup>40</sup>

The story of the rapid disillusionment with the latter reforms, which transformed police officers from peacekeepers into crime-fighters and replaced foot patrols with patrol cars backed up by an elite force of detectives, has been ably told elsewhere.<sup>41</sup> In short, by the time the *Broken Windows* essay was

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33. Ellickson, *supra* note 7, at 1209.

34. See WILSON, *supra* note 26, at 39-46 (discussing officers’ tendency to view certain groups of individuals as “troublemakers”).

35. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

36. *Id.* at 631.

37. *Id.* at 648.

38. See KELLING & COLES, *supra* note 6, at 70 (discussing reform-era policing strategies).

39. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 167 (1972) (citing Foote).

40. See generally, e.g., KELLING & COLES, *supra* note 6, at 80-85; Livingston, *Police Discretion*, *supra* note 5, at 565-73 (describing the transformation of the American police function from public-order maintenance and social service provision to “crime-fighting”); Mark H. Moore & George L. Kelling, “*To Serve and Protect*”: *Learning from Police History*, PUB. INT., Winter 1983, at 49 (arguing that the modern police force’s “goal is the control of crime, not maintaining public order or providing constabulary services”).

41. See, e.g., KELLING & COLES, *supra* note 6, at 85-89 (describing collapse of reform-era policing strategies by the 1970s).

published in 1982, rising crime rates<sup>42</sup>—and fear of crime and urban disorder<sup>43</sup>—had laid the groundwork for new experimentation with “old-style” order-restoration strategies. Thus, just as soon as one revolution in policing philosophy had ended in triumph, another “quiet revolution” began to refocus police efforts on maintaining order.<sup>44</sup> And arguments favoring these strategies, which emphasize the need to reinforce social norms that check disorder,<sup>45</sup> appear to have carried the day. While former New York City mayor Rudolph Giuliani’s aggressive “quality of life” campaign is perhaps the best-known example, order-maintenance policies have won a place of respect in government agencies throughout the country.<sup>46</sup>

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42. See, e.g., PAUL S. GROGAN & TONY PROSCIO, *COMEBACK CITIES* 152 (2000) (“Out-of-control crime was the nearly universal expectation for the inner city. Any other positive trend there . . . was sharply hemmed in by the prospect of continued crime and, just as important, an all-but-unshakable fear of crime.”); Livingston, *Police Discretion*, *supra* note 5, at 568 (noting that crime rates rose dramatically during the 1960s and 1970s, and then stubbornly remained at these unprecedented levels despite increases in police expenditures).

43. By the end of the 1980s, many of those who could do so simply chose to avoid urban public spaces. See, e.g., KELLING & COLES, *supra* note 6, at 40-60. During this time, I remember being told by my grandmother not to take my purse to downtown Kansas City, Missouri. She was quite certain that it would be snatched away immediately.

44. See HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* 13 (1990); George L. Kelling, *Police and Communities: The Quiet Revolution*, in *PERSPECTIVES ON POLICING*, at 1 (Nat’l Inst. of Justice, U.S. Dep’t of Justice, Report Series No. 1, 1988); see also KELLING & COLES, *supra* note 6, at 102-07 (“We must move away from the use of reactive, 911 policing and return to a model of policing in which basic strategies are aimed at crime prevention and order maintenance.”).

45. For comprehensive treatments of the “social influence” justification for order-maintenance policing, see, for example, Kahan, *Social Influence*, *supra* note 7, at 367-73. The available empirical evidence weakly supports the crime/disorder connection. See POLICE FOUND., *NEWARK FOOT PATROL EXPERIMENT* 122-24 (1981) (concluding that regular foot patrols did not reduce crime but lowered citizens’ fears of crime); SKOGAN, *supra* note 2 (connecting neighborhood disorder, crime, and urban decline); ROBERT TROJANOWICZ, *AN EVALUATION OF NEIGHBORHOOD FOOT PATROLS IN FLINT, MICHIGAN* 85-87 (1982) (finding that increased foot patrols reduced crime and resulted in a significant increase in citizen satisfaction); Kahan, *Social Influence*, *supra* note 7, at 367-68 (linking New York’s order-maintenance policing to drop in crime rate); Albert J. Reiss, Jr., *Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion*, *LAW & CONTEMP. PROBS.*, Autumn 1984, at 83 (positing a direct link between crime and disorder); Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 *LAW & SOC’Y REV.* 163, 169, 176 (1988) (finding negative correlation between enforcement of disorderly conduct and drunk driving laws). *But see* Harcourt, *supra* note 9, at 300-09 (asserting that little social science evidence supports broken windows theory of deterrence); Lawrence W. Sherman, *Attacking Crime: Police and Crime Control*, in 15 *MODERN POLICING, CRIME AND JUSTICE* 159, 198-99 (Michael Tonry & Norval Morris eds., 1992) (arguing that systematic enforcement of laws against minor crimes may increase crime and harm community relations).

46. See, e.g., JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE* 212 (1986) (asserting that community policing is “the wave of the future”); Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*, 33 *CRIME & DELINQ.* 6 (1987) (arguing that “[t]he direction of change in policing has turned an important corner” toward problem-oriented, crime-prevention, and order-

### B. Property Regulation as Disorder Suppression

The “order-maintenance revolution” also has produced thousands of pages of academic commentary, much of which focuses on the questions raised by police efforts to curb disorder in public places.<sup>47</sup> This debate about the appropriate scope of police authority,<sup>48</sup> such as the continued viability of the “vagueness” doctrine, is an important one.<sup>49</sup> But it fails to take sufficient

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maintenance strategies); Livingston, *Police Discretion*, *supra* note 5, at 577 (“Today, hundreds of police departments across the country . . . are experimenting with both community and problem-oriented policing.”). A complete explication of the distinctions between the myriad policies falling under the “order-maintenance” umbrella—community policing, problem-oriented policing, quality-of-life policing, broken windows policing, zero tolerance, etc.—is beyond the scope of this Article. For a description of some of the many distinctive strategies, see, for example, Livingston, *Police Discretion*, *supra* note 5, at 573-91; see also Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1527-38 (2002) [hereinafter Kahan, *Reciprocity*] (describing order-maintenance policing, church-police collaboration, and selective privatization).

47. See Kahan, *Reciprocity*, *supra* note 46, at 1527 (characterizing “strict enforcement of ‘public order’ laws” as “the most famous, and most controversial, technique associated with the New Community Policing”); Livingston, *Police Discretion*, *supra* note 5, at 592 (noting that “the advent of the ‘new policing’ raises the question whether police can be authorized, within constitutional constraints, to perform the order maintenance tasks that communities might designate”).

48. See Livingston, *Police Discretion*, *supra* note 5, at 564 (“[W]hatever the future of community policing itself, the new focus on problems of disorder . . . will lead—as it already has led—to more contention over the proper bounds of police authority.”). Much of this commentary has focused upon a central difficulty with this particular order-restoration antidote—namely, that public “peace keepers” were historically armed with sweeping (and, as Foote’s article shockingly illustrated, essentially unreviewable) discretion to enforce vague laws criminalizing breaches of the “public order,” such as vagrancy, loitering, public drunkenness, and curfew laws. See, e.g., William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 560 (1992) (noting the “stunning breadth” of “old-style loitering and vagrancy laws”).

49. Professors Dan Kahan and Tracey Meares, in particular, have argued that judicial skepticism toward discretionary enforcement of loitering laws and other order-maintenance devices is outdated. They observe that minority communities exercise increasing levels of political power—and have used that power to promote an increased emphasis on order-maintenance. See Kahan & Meares, *Coming Crisis*, *supra* note 9, at 1159-71; Meares & Kahan, *Paradox*, *supra* note 32, at 3-30; see also, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994) (arguing that “a misguided antagonism toward efforts to preserve public safety,” leading to underpolicing of inner-city communities, is a substantial problem plaguing African Americans); Livingston, *Police Discretion*, *supra* note 5, at 647 (arguing that vagueness doctrine should play a more limited role with respect to the new generation of order-maintenance laws). *But see*, e.g., Margaret A. Burnham, *Twice Victimized*, in URGENT TIMES, *supra* note 32, at 63-69; Cole, *supra* note 9, at 1061 (arguing that “the new discretion scholars underestimate the continuing threat of racial discrimination in the administration of criminal justice”); Alan M. Dershowitz, *Rights and Interests*, in URGENT TIMES, *supra* note 32, at 33-39; Harcourt, *supra* note 9, at 299 (citing statistics demonstrating that disproportionate numbers of African Americans are arrested for vagrancy and suspicion); Carol S. Steiker, *More Wrong than Rights*, in URGENT TIMES, *supra* note 32, at 49-57. The Supreme Court has thus far refused to abandon its skepticism toward laws that grant the

account of other weapons in the order-maintenance arsenal.

Importantly, the standard debate tends to disregard the ways in which government choices about the uses of property also dramatically affect an urban environment without raising the same constitutional concerns about police discretion. Consider the following example from one of the nation's most troubled cities: The city of Detroit has demolished more than twenty-eight thousand houses since 1989. The city's popular young mayor, Kwame Kilpatrick, campaigned on a promise to raze five thousand vacant and dilapidated houses in his first year of office; he has since turned his sights on some of the empty downtown skyscrapers. "This is where drug dealers stash their drugs, this is where people stash guns, this is where girls get abused," explains Kilpatrick.<sup>50</sup> Other city leaders are similarly concerned about abandoned property. In a survey of the two hundred most populous American cities conducted several years ago by John Accordino and Gary T. Johnson, sixty-nine percent of respondents rated abandoned property as a significant problem for their cities. The number was even higher—ninety-five percent—for northeastern cities.<sup>51</sup>

It is hardly surprising that cities prioritize demolition.<sup>52</sup> Social scientists have long considered abandoned or deteriorating property to be a signal of serious neighborhood decline.<sup>53</sup> Blighted properties contribute to a city's economic problems by discouraging neighborhood investment,<sup>54</sup> depriving the city of tax revenue,<sup>55</sup> lowering the market value of neighborhood property,<sup>56</sup>

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police broad discretion to define and control behaviors that may threaten the public peace. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999) (invalidating Chicago's Gang Congregation Ordinance on vagueness grounds).

50. See Jodi Wilgoren, *Detroit Urban Renewal Without the Renewal*, N.Y. TIMES, July 7, 2002, at A10. The authors of a recent study of the property abandonment problem echoed Mayor Kirkpatrick by observing that "crooks, killers, and losers tend to infest areas with dead buildings, like maggots on a carcass." John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301, 303 (2000); see also ROBERT W. BURCHELL & DAVID LISTOKEN, *THE ADAPTIVE REUSE HANDBOOK: PROCEDURES TO INVENTORY, CONTROL, MANAGE, AND REEMPLOY SURPLUS MUNICIPAL PROPERTIES* 15 (1981) (observing that abandoned property serves as "a clubhouse for all of the deleterious elements in the neighborhood").

51. See Accordino & Johnson, *supra* note 50, at 311.

52. See *id.* (describing demolition efforts); James L. Dunn, Jr., *Bureaucracy and the Bulldozer*, GOVERNING MAG., July 1994, at 22 (same).

53. See Susan D. Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods: A Case Study of the Effects of the Dual Housing Market*, in *THE CULTURAL MEANING OF URBAN SPACE* 139, 140 (Robert Rotenberg & Gary McDonogh eds., 1993) ("Empty buildings, weedy lots, quantities of unsavory litter, and angry graffiti suggest profound maladies.").

54. See Accordino & Johnson, *supra* note 50, at 303.

55. See *id.*; Benjamin P. Scafidi et al., *An Economic Analysis of Housing Abandonment*, 7 J. HOUSING ECON. 287, 288 (1998).

56. See Accordino & Johnson, *supra* note 50, at 303; Greenbaum, *supra* note 53, at 143.

and increasing the cost of business and homeowner insurance.<sup>57</sup> Furthermore, blight has a “multiplier” effect; deferred maintenance of one building reduces the incentives for neighbors to continue upkeep efforts.<sup>58</sup> Abandoned and deteriorating properties also lead to serious social problems, as Wilson and Kelling tacitly acknowledged in the title of their article.<sup>59</sup> Wesley Skogan’s study of the crime-disorder connection found that inner-city residents consistently cite physical decay as one of the most significant “disorders” plaguing their communities, for obvious reasons.<sup>60</sup> Abandoned buildings are “magnets for crime,” places that serve as criminals’ hangouts or staging areas.<sup>61</sup> (One study conducted in Austin, Texas found evidence of illegal activities in eighty-three percent of unsecured abandoned buildings.<sup>62</sup>)

### 1. Disorder suppression through regulatory inspections

Property regulations designed to suppress disorder by authorizing the inspection of private property conditions provide leaders like Mayor Kilpatrick with the legal tools to attack this blight. Not surprisingly, therefore, a number of cities have stepped up regulatory inspections of private property in an effort to address disorder related to property decline. The most ambitious of such efforts are multiagency enforcement “sweeps” of struggling neighborhoods that include property inspections among a range of disorder-suppression devices.<sup>63</sup>

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57. Accordino & Johnson, *supra* note 50, at 303.

58. See, e.g., Greenbaum, *supra* note 53, at 140-41; William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. CRIM. JUST. 481, 481 (1993) (arguing that “processes of social and physical decay feed on one another, setting distressed neighborhoods on a downward spiral”).

59. See Wilson & Kelling, *supra* note 3, at 32 (observing that “[s]ocial psychologists and police officers” generally “tend to agree that if a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken”) (emphasis added).

60. See SKOGAN, *supra* note 2, at 37; Accordino & Johnson, *supra* note 50, at 306 (finding that city administrators believe that abandoned property has a highly negative effect on neighborhood vitality and crime prevention efforts).

61. See, e.g., Spelman, *supra* note 58, at 482.

62. Researchers found evidence of drug use (nineteen percent of buildings); sex and prostitution (twenty percent); stolen property (eight percent); as well as vandalism (approaching one hundred percent). *Id.* at 488-89. Thirty percent of the unsecured properties had been used as youth “hangouts”; squatters were living in seven percent of the houses. *Id.* Nor was crime confined to the abandoned properties themselves; police received 3.2 times as many drug calls, and twice as many theft and violent crime calls from blocks with unsecured buildings as from otherwise comparable blocks in the same neighborhood. *Id.* at 489.

63. See, e.g., Doug Caruso, *Finance Chief Sounds Budget Alarm*, COLUMBUS DISPATCH, Aug. 19, 2000, at 1C (noting that Columbus, Ohio’s mayor adopted a program of “neighborhood code enforcement and maintenance sweeps”); Editorial, *Improving Code Enforcement*, HARTFORD COURANT, Dec. 11, 2002, at A14 (discussing New Britain, Connecticut’s Multi-Agency Response to Community Hotspots (“MARCH”) program); City of Albuquerque, Residential Code Enforcement, at <http://www.cabq.gov/planning/pages/codenforce/rescode.html> (last visited Sept. 26, 2004) (describing Albuquerque, New Mexico code enforcement coordination with other city agencies); City of Phila. Dep’t of Streets,

For example, in May and June of 2003, Tampa, Florida's "Operation Commitment" sent dozens of police officers, drug and prostitution counselors, and property inspectors through the city's worst neighborhoods. One such "sweep" netted seven felony arrests and 122 code violations.<sup>64</sup> Other recent enforcement sweeps targeted crime-ridden neighborhoods in Atlanta, Houston, Omaha, and San Antonio. In each case, local officials asserted an order-maintenance justification for their actions.<sup>65</sup> Candidates in recent mayoral races in Dallas, Detroit, and Indianapolis made election promises to step up enforcement sweeps.<sup>66</sup>

The housing and building inspectors included in these sweeps—and the codes that they enforce<sup>67</sup>—are not well regarded. Inspectors have long been

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Streets & Walkways Education and Enforcement Program, at <http://www.phila.gov/streets/sweep.html> (last visited Sept. 26, 2003) (describing Philadelphia's "S.W.E.E.P." program); Executive Office of Pub. Safety, Community Policing Program Overview, at <http://www.state.ma.us/ccj/cp.htm> (last visited Sept. 26, 2004) (describing Massachusetts's funding of community policing efforts, including code enforcement); Fort Lauderdale Police Dep't, Code Team, at <http://ci.flaud.fl.us/police/codeteam.html> (last visited Sept. 26, 2004) (describing role of Fort Lauderdale, Florida "Code Team" effort).

64. Tamara Lush, *East Tampa Crime Sweep Includes Counselors*, ST. PETERSBURG TIMES, May 13, 2003, at 6B.

65. See Erin Grace, *Neighbors Hope to See Eyesores Go*, OMAHA WORLD HERALD, Apr. 30, 2003, at 1B (sweeps "respond to resident concerns about litter, junk and overall neighborhood appearance"); Jonathan Heller, *Escondido Targets Housing Violations*, SAN DIEGO UNION-TRIB., Nov. 3, 2001, at NI-1 (describing a sweep of a neighborhood that has fallen victim to the "broken window theory"); Joe Holley, *Reclaiming Their Streets*, SAN ANTONIO EXPRESS-NEWS, Feb. 25, 2001, at 1A ("Once the 'worst neighborhood in the city,' Indian Creek is becoming livable again . . ."); Flori Meeks, *City Targets Code Violators on Long Point*, HOUS. CHRON., Oct. 18, 2000, at 1 ("Houston's neighborhood protection division recorded 192 municipal code violations . . . when it conducted a sweep of the properties along Long Point Road."); Michael Pearson, *Raising Lowe Lane*, ATLANTA J.-CONST., Nov. 3, 2002, at E1 (noting that "the upcoming sweeps are designed to arrest the creeping degeneration that leads to crime").

66. See Editorial, *Broken Windows Are a Clue to Livability*, INDIANAPOLIS STAR, Jan. 18, 2002, at A14 ("The best cure for the broken-window syndrome is a municipal administration conscientiously enforcing zoning laws and safety, health and housing codes. Fortunately for Indianapolis, Mayor Bart Peterson has made enforcement one of his top priorities."); Cameron McWhirter, *Archer Tries to Balance Budget and Re-Election*, DETROIT NEWS, Mar. 4, 2001, at 1A (noting that former Detroit mayor Dennis Archer "outlined an aggressive citywide clean-up this spring that will include a week-long Clean Sweep [and] increased code enforcement"); Colleen McCain Nelson, *City Trains Sights on Neighborhood Blight*, DALLAS MORNING NEWS, May 6, 2002, at 1A (noting that Dallas mayor Laura Miller "proposed the idea of neighborhood sweeps during her campaign").

67. Technically, building codes deal prospectively with new construction (design, materials, construction techniques, etc.). Codes governing the condition of premises after construction are called, variously, "safety codes," "health codes," and "housing codes." See ROBERT C. ELLICKSON & VICKI BEEN, *LAND USE CONTROLS* 530 (2d ed. 2000); H. Laurence Ross, *Housing Code Enforcement as Law in Action*, 17 LAW & POL'Y 133, 134 (1995) ("Housing codes differ from building codes in that they are not primarily concerned with structure and materials but rather with function and condition.").

condemned as corrupt and ineffective.<sup>68</sup> The handful of available studies conclude that code enforcement is spotty, complaint-driven, and arbitrary, and also that inspectors are not up to their appointed tasks of combating urban blight and guaranteeing minimal housing standards.<sup>69</sup> Furthermore, a substantial economic literature indicts building and housing codes for contributing to the property-abandonment problem discussed above and for reducing the stock of affordable housing.<sup>70</sup> City regulators, however, apparently do not share this dim view of their jobs. In Accordino and Johnson's study discussed above, one hundred percent of the respondents listed code enforcement as the best way to deal with property blight.<sup>71</sup>

These regulators obviously have powerful incentives to overstate the importance of their jobs.<sup>72</sup> But, when housing codes are treated as only one of the various weapons in the order-maintenance arsenal, some of the perceived "weaknesses" of the code enforcement system begin to look like strengths. For example, while it is true that inspection regimes are primarily complaint-driven (and necessarily so, because many code violations are not visible from the outside of a building<sup>73</sup>), community-policing theory encourages citizen input into law-enforcement efforts, especially to identify problems that government

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68. See STEPHEN R. SEIDEL, *HOUSING COSTS AND GOVERNMENT REGULATIONS* 88 (1978) (discussing reports documenting widespread corruption in New York City's Building Department); see also JOHN A. GARDINER & THEODORE R. LYMAN, *DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION* (1978); PETER D. SALINS & GERARD C.S. MILDNER, *SCARCITY BY DESIGN: THE LEGACY OF NEW YORK CITY'S HOUSING POLICIES* 42 (1992) (discussing corruption in the administration of New York City's housing code).

69. See Stephen J. Polaha, *Housing Codes and the Prevention of Urban Blight—Administrative and Enforcement Problems and Proposals*, 17 VILL. L. REV. 490 (1972) (questioning effectiveness of inspections); Sarah H. Ramsey & Fredrick Zolna, *A Piece in the Puzzle of Providing Adequate Housing: Court Effectiveness in Code Enforcement*, 18 FORDHAM URB. L.J. 605 (1991); Ross, *supra* note 67; Lawrence W. Sherman, *Policing Communities: What Works?*, in COMMUNITIES AND CRIME 343 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986) (questioning effectiveness of inspections); Spelman, *supra* note 58, at 492 (noting that "most housing inspection agencies are driven by individual complaints" and that "the need to handle complaints is so great that inspectors have no time to deal with underlying causes or even with dangerous conditions that do not generate citizen complaints").

70. See generally, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 470-74 (4th ed. 1992) (attributing shortage of affordable housing to housing codes); SEIDEL, *supra* note 68, at 73-75, 77, 90; Eli M. Noam, *The Interaction of Building Codes and Housing Prices*, 10 J. AM. REAL EST. & URB. ECON. ASS'N 394 (1983); Ramsey & Zolna, *supra* note 69, at 605-06 (reviewing literature); Peter D. Salins, *Reviving New York City's Housing Market*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY 53, 54-55 (Michael H. Schill ed., 1999) (blaming New York City's housing shortage in part on overly complex building regulations); Michael Walden, *The Effects of Housing Codes on Local Housing Markets*, 15 J. AM. REAL EST. & URB. ECON. ASS'N 13 (1987).

71. See Accordino & Johnson, *supra* note 50, at 309.

72. See *id.* (noting that most of the surveys were completed by building inspectors with obvious incentives to exaggerate their effectiveness).

73. See Ross, *supra* note 67, at 141.



officials may overlook.<sup>74</sup> More aggressive code enforcement fits neatly into this “problem solving” approach to identifying and addressing disorder, and a number of cities have incorporated it into community-policing efforts through programs asking citizens to identify problem properties.<sup>75</sup>

Previous code enforcement studies have also criticized the “thickness” of the regulatory code book. Lawrence Ross observed, for example, “the inspector’s quandary is created by the fact that the housing code is both voluminous and ideal.”<sup>76</sup> A housing inspector may see the “thickness” of the code as a strength: it gives her the significant bargaining power that comes with the authority to issue citations carrying significant fines at virtually any time.<sup>77</sup> Thus, inspections often represent the first step toward nuisance remediation.<sup>78</sup> Inspectors may encourage owners to make cosmetic improvements that enhance a neighborhood’s appearance and deter crime,<sup>79</sup> or in more serious cases, may close a building that fails to pass inspection until it is code-compliant.<sup>80</sup> When buildings are simply beyond repair—or the cost of

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74. “Problem-oriented policing” strategies can be traced to the work of Herman Goldstein, an early critic of reform-era policing. Goldstein argued that police should devote more time to proactively identifying and addressing community problems. See GOLDSTEIN, *supra* note 44, at 14. “Community policing” tactics incorporate Goldstein’s problem-oriented approach, but also stress the importance of close community-police partnerships. See Livingston, *Police Discretion*, *supra* note 5, at 575-76 (discussing distinctions between “problem-oriented” and “community” policing); see also, e.g., KELLING & COLES, *supra* note 6, at 159 (arguing that “[c]ommunity policing also acknowledges the reliance of police on citizens, in multiple senses: for authority to police neighborhoods, for information about the nature of neighborhood problems, and for collaboration in solving problems”).

75. For example, Phoenix residents are encouraged to call a twenty-four-hour hotline to report code violations and vacant properties occupied by drug dealers, illegal aliens, or prostitutes. See Dunn, *supra* note 52, at 22; see also Accordino & Johnson, *supra* note 50, at 310 (describing other similar efforts).

76. See Ross, *supra* note 67, at 141; see also ELLICKSON & BEEN, *supra* note 67, at 529 (“A building code is a technical document with a level of difficulty that at times may rival that of the Internal Revenue Code.”).

77. For a colorful account of this dynamic in action, see Peter Perl, *Building Inspector with a Bulletproof Vest*, WASH. POST MAG., June 27, 1999, at W08.

78. See Accordino & Johnson, *supra* note 50, at 307.

79. Accordino and Johnson found that a number of cities permit inspectors to levy nuisance fines, but waive them if the owner promises to make such improvements. *Id.* Forty-three percent of the cities in their survey also provide cosmetic improvements to vacant buildings, such as lawn mowing, facade painting and hanging curtains, in an effort to make these properties look occupied. The cost of these improvements is imposed as a lien on the improved property. *Id.* at 309; see also Dunn, *supra* note 52, at 22 (discussing Baltimore’s “Building Blocks” program). Pittsburgh, Pennsylvania instituted a public shaming program in 1997; inspectors post signs identifying the owners of the most dilapidated properties. Accordino & Johnson, *supra* note 50, at 310.

80. See Flatford v. City of Monroe, 17 F.3d 162, 165 (6th Cir. 1994) (after finding hazardous conditions, inspector evacuated building and posted condemnation notices); Phillips v. Mezera, No. 00-C3348, 2001 U.S. Dist. LEXIS 24879, at \*11-12 (N.D. Ill. Oct. 31, 2001) (noting that local ordinance permitted city to condemn property for housing code violations without court order). While the Due Process Clause requires the government to notify an owner before closing or demolishing buildings for code violations, courts have

compliance too high—they can be demolished, sometimes with the “consent” of a property owner desperate to avoid tens of thousands of dollars in ongoing fines.<sup>81</sup>

Furthermore, building closures resulting from aggressive inspections may eliminate criminal “hangouts” and disperse concentrations of crime.<sup>82</sup> Even using code violations as a pretext for removing troublemakers is likely to escape review.<sup>83</sup> For example, a few years ago, the city of San Bernadino, California, conducted a series of housing code enforcement “sweeps” in a low-income area. As the Ninth Circuit observed, the “sweeps were massive undertakings, with city officials, police, firefighters, and housing code inspectors descending on the area to inspect dozens of pre-selected buildings.”<sup>84</sup> Over a six-month period, the city closed and evicted the tenants from ninety-five buildings.<sup>85</sup> The property owners sued, alleging that the city

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generally upheld summary closure (and even demolition) in “emergency” situations. *See Flatford*, 17 F.3d at 168 (finding that government officials were entitled to qualified immunity from a due process claim arising out of summary closure of plaintiff’s building because inspector reasonably determined that an emergency situation existed); *see also Freeman v. City of Dallas*, 186 F.3d 601, 606 (5th Cir. 1999) (“Because there were no exigent circumstances, the warrantless seizure and destruction of plaintiff’s property was unreasonable and a violation of the Fourth Amendment.”), *overruled in part on other grounds*, 242 F.3d 642 (5th Cir. 2001) (en banc). Lawrence Ross’s three-city study of code-enforcement practices suggests that building closures are rare and that most code violations are remedied through negotiation between inspectors and property owners. *See Ross, supra* note 67, at 149-57. A more aggressive approach might be expected, however, if inspections are considered part of a broader order-maintenance strategy.

81. When property owners do not consent to the demolition of nuisance properties, the administrative or judicial procedures required to secure legal authority to demolish a building can be time-consuming and costly. *See Accordino & Johnson, supra* note 50, at 309-11; Spelman, *supra* note 58, at 492. The postinspection procedure in Dallas, Texas, where aggressive building code sweeps are frequent occurrences, illustrates the “nuisance removal” function of inspections. When code violations are uncorrected following an inspection, the inspector refers the matter to the Urban Rehabilitation Standards Board. The Board, in turn, may hold a hearing to determine whether a building is an “urban nuisance,” in which case the Board is empowered to take various remedial measures, including ordering repairs, receivership, vacating of buildings, demolition, and civil penalties of up to two thousand dollars per day against noncompliant property owners. *See Freeman*, 186 F.3d at 603 (citing DALLAS CITY CODE, ch. 27, art. II, § 27-8).

82. *See Spelman, supra* note 58, at 492-93. In an unguarded moment, a student of mine—a former police officer in a large midwestern city—told me that officers in some “marginal” precincts would enlist building inspectors to close down buildings inhabited by drug dealers, gang members, and other “troublemakers.” The police viewed the closures as a way to prevent further neighborhood decline by forcing these individuals to find somewhere else to live, hopefully outside of the community.

83. Even if it were illegal, of course, pretext would unquestionably be difficult to prove. *See, e.g., Phillips*, 2001 U.S. Dist. LEXIS 24879, at \*8 (finding that plaintiff stated a cause of action for discriminatory enforcement of housing codes and citing city manager’s alleged statement that plaintiff “rent[ed] to gangbangers . . . [who] are selling drugs from that house”).

84. *See Armendariz v. Penman*, 75 F.3d 1311, 1313 (9th Cir. 1996) (en banc).

85. These closures placed the building owners in a “precarious position.” They needed

“trumped up” a building code emergency to force the eviction of tenants with criminal records and gang affiliations.<sup>86</sup> A panel of the Ninth Circuit rejected the plaintiffs’ primary constitutional claim,<sup>87</sup> reasoning that even if the city “faked” the emergency justifying the sweeps, the city’s actions were not arbitrary because “the reduction in crime by relocating criminals and reducing urban blight bears a rational relation to the public health, safety and general welfare.”<sup>88</sup> A divided en banc court affirmed.<sup>89</sup>

Finally, and importantly, inspectors conducting “regulatory” searches and seizures are governed by different Fourth Amendment standards than are police officers enforcing the criminal law. An inspector need only demonstrate that “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling” in order to obtain an “administrative” search warrant; warrantless inspections are permitted in “emergency situations.”<sup>90</sup> As a result, building inspectors may be permitted to go places that police officers could not.<sup>91</sup> Once there, inspectors can

to repair the buildings to secure city permission to reopen them. But they alleged that the code-violation notices were so vague as to be unhelpful and that the eviction of their tenants deprived them of the income needed to conduct repairs. Furthermore, the clock was ticking—the four-plex buildings were nonconforming uses in an area zoned for duplexes; the properties would lose this preferred status if they remained vacant for more than 180 days. *Id.* at 1314.

86. *Id.* at 1314-15.

87. *Armendariz v. Penman*, 31 F.3d 860, 867 (9th Cir. 1994).

88. *Id.* at 867. The panel reached this conclusion over the vigorous dissent of Judge Trott, who argued:

The action cannot be justified as a means to control crime. If criminals are living in the units, the police should arrest them . . . . If crime . . . is rampant, the police should put a stop to it. The city cannot simply start throwing innocent people out of private property to reduce crime in a troubled neighborhood. A contrary rule is simply unimaginable.

*Id.* at 872 (Trott, J., dissenting); *cf.* *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (holding that property regulation violates substantive due process only when “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare”).

89. *Armendariz*, 75 F.3d at 1313.

90. *See Camara v. Mun. Court*, 387 U.S. 523, 539 (1967); *see also Griffin v. Wisconsin*, 483 U.S. 868, 878 n.4 (1987) (articulating administrative reasonableness standard for regulatory searches); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320 (1978) (same). *See generally* WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 3.9 (3d ed. 2000) (reviewing administrative inspections doctrine). The Supreme Court has further suggested that “warrants should normally be sought only after entry is refused.” *Camara*, 387 U.S. at 539. The en banc Fifth Circuit has arguably gone further, holding that administrative warrants are not required if the inspectors could have satisfied the “administrative reasonableness” standard. *See Freeman v. City of Dallas*, 242 F.3d 642, 651 (5th Cir. 2001) (finding that warrantless seizure of building did not violate the Fourth Amendment because “evidence of municipal code violation had already been obtained” and administrative warrant would provide no additional protection of property rights).

91. A decade ago, after a series of shootings in the notorious Robert Taylor Homes, the Chicago Public Housing Authority instituted a policy of warrantless law enforcement “sweeps” of twelve public housing buildings. The sweeps were triggered by certain “preconditions,” such as random gunfire or intimidation at gunpoint. During the sweeps,

accomplish goals that the Supreme Court has suggested that police officers sometimes may not, i.e., forcing individuals viewed as threats to the public order to “move along.”<sup>92</sup> Furthermore, inspectors during code enforcement “sweeps” are often accompanied by police officers, purportedly for the inspectors’ protection. Once lawfully present inside a building, the officers may then seize evidence in “plain view,” arrest individuals on outstanding warrants, or perhaps catch them committing crimes during the inspection.<sup>93</sup>

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Housing Authority police searched all of the residential units in the targeted buildings for weapons. A federal district court subsequently invalidated the sweep policy as inconsistent with the Fourth Amendment, finding that the Authority failed to establish the exigency necessary to overcome the warrant requirement. *See Pratt v. Chi. Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (invalidating sweeps as inconsistent with Fourth Amendment warrant requirement); *see also* Vincent Lane, *Public Housing Sweep Stakes: My Battle with the ACLU*, 69 POL’Y REV. 68 (1994) (describing sweeps and events leading up to them). The court left undisturbed, however, a consent decree that permitted the Authority to inspect units for health and safety violations. *See Herring v. Chi. Hous. Auth.*, 850 F. Supp. 694, 696 (N.D. Ill. 1994) (noting that in “*Summeries v. Chicago Housing Authority*, No. 88-C-10566 (N.D. Ill.) . . . [t]he district court eventually entered a Consent Decree . . . [that] permitted the CHA to conduct inspections to identify and remove unauthorized occupants and to inspect the condition of the housing units, subject to the CHA’s minimizing its intrusion on the rights of its residents”). Those inspections, as described by the Chicago Housing Authority chairman, accomplished many of the same goals as the police sweeps: “We sent in a team of people to identify physical deficiencies in each unit. . . . Very often, during that process, they ran across drugs, contraband, weapons, and other illegal items.” *See Lane, supra*, at 69.

92. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41 (1999) (invalidating Chicago’s Gang Congregation Ordinance, which authorized police to order loitering gang members to “disperse and remove themselves from the area”). This use of “regulatory” inspections to accomplish law enforcement goals illustrates an irony in the Court’s Fourth Amendment canon. The regulatory inspections doctrine rests on the presumption that investigatory searches intrude more on privacy interests than regulatory ones. William Stuntz has observed, “The regulatory state does not usually snoop around in people’s bedrooms, and the privacy content of what police can find there is plausibly distinguishable from the kinds of information the state seeks for regulatory purposes.” William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1061 (1995). *But see* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 89 (1989) (arguing that diminished privacy interests do not support administrative search doctrine). But the Chicago Housing Authority acting as the regulatory state did snoop in people’s bedrooms. According to Authority Chairman Lane, the inspectors “looked under beds to see if the tiles were loose [and] . . . in the closets to make sure there were no leaks.” Lane, *supra* note 91, at 69.

93. While regulatory “sweeps” may tempt police officers to use the inspectors to gain access to places and information that would otherwise be off limits, *see, for example, Jones v. City of Youngstown*, 980 F. Supp. 908, 916 (N.D. Ohio 1997) (holding that police/inspector cooperation suggested that “inspections were a pretext for conducting warrantless searches for drugs without probable cause”), the reasons for police to be present during a sweep are usually more complex than simple bad-faith collusion. The multiagency cooperation encouraged by community policing strategies often places police officers in what Professor Debra Livingston has called their “community caretaking” role. *See Debra Livingston, Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (1998). When inspectors descend upon a dangerous neighborhood to conduct a “sweep,” it is likely true that they need police protection and *also* that the police can

## 2. Disorder suppression through property litigation

State and local governments also are seeking to tackle the problems associated with abandoned and neglected property through “public nuisance” lawsuits. The public nuisance cause of action, which enables a court to award equitable relief for “an unreasonable interference with a right common to the general public,” has proven to be a remarkably flexible one.<sup>94</sup> A number of cities have established public nuisance task forces which solicit citizen input about property problems, dedicated one or more prosecutors solely to public nuisance cases, and even created “problem properties courts.”<sup>95</sup> Publicly prosecuted nuisance suits frequently target properties that are used for criminal activities, particularly drug trafficking or prostitution;<sup>96</sup> many proceed after code enforcement efforts fail.<sup>97</sup> Some cities have also taken steps to encourage community groups to *privately* prosecute public nuisance actions, a few going so far as to eliminate legislatively the primary obstacle to these private prosecutions, namely, the standing requirement that a private individual suffer a “special injury,” distinct from the public’s injury, to seek injunctive relief

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“piggyback” on an inspection to conduct law enforcement functions that they might otherwise be unable to perform. In such a situation, the Fourth Amendment likely has little to say about their presence. Even *if* the “administrative” motive for an inspection is purely pretextual, the Court has stated that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Whren v. United States*, 517 U.S. 806, 813 (1996). Furthermore, the Court has upheld warrantless inspections of junkyards for stolen goods—despite the fact that the “inspections” were conducted by police officers searching for evidence of criminal conduct. *New York v. Burger*, 482 U.S. 691 (1987). In rejecting a Fourth Amendment claim in that case, the Court observed that “a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions.” *Id.* at 712 (emphasis in original).

94. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

95. *See, e.g., Armandariz v. Penman*, 75 F.3d 1311, 1313 (9th Cir. 1996) (en banc); City of Fort Collins, Public Nuisance Ordinance, at <http://fcgov.com/cityattorney/public-nuisance.php> (last visited Sept. 26, 2004) (providing information about Fort Collins, Colorado’s “public nuisance” hotline); City of Fremont, Report a Hazard/Nuisance, at <http://www.ci.fremont.ca.us/PublicSafety/ReportAHazard/default.htm> (last visited Sept. 26, 2004); Press Release, Mayor Slay’s Neighborhood Life Initiatives (Apr. 23, 2002), at <http://stlcin.missouri.org/release/getpressdetails.cfm?Auto=387> (last visited Sept. 26, 2004) (describing St. Louis, Missouri’s “Problem Properties and Public Nuisance Crime Strike Force” and creation of “Problem Properties Court”).

96. *See* Div. of Criminal Justice, State of Conn., Nuisance Abatement Unit, <http://www.csao.state.ct.us/What%20We%20Do/nuisance.htm> (last visited Sept. 26, 2004).

97. *See, e.g.,* City of San Diego, Code Enforcement Unit, at [http://genesis.sannet.gov/infospc/templates/attorney/code\\_enforcement.jsp](http://genesis.sannet.gov/infospc/templates/attorney/code_enforcement.jsp) (last visited June 13, 2004). Connecticut’s Multi-Agency Response to Community Hotspots, or M.A.R.C.H., Program illustrates a coordinated, community-policing approach to the nuisance problem. Through M.A.R.C.H., residents may “alert their Community Policing Officers to nuisance properties”; the police department uses this information to prepare a list of problem properties. Nuisance Abatement prosecutors then “assemble a team of . . . inspectors” to inspect the property; if the property owners fail to respond, prosecutors may pursue a nuisance action in housing court. *See* Div. of Criminal Justice, State of Conn., *supra* note 96.

against a public nuisance.<sup>98</sup>

### C. Order Construction as Disorder Suppression

But the property regulations at local governments' disposal do not simply target disorderly property conditions. On the contrary, for the better part of the past century, our dominant form of property regulation—Euclidean zoning—has addressed the spatial separation of different land uses rather than property conditions. That is, the point of ubiquitous zoning laws is to put “everything in its place,” to segregate economic from noneconomic activities, rich from poor, etc.<sup>99</sup>

Reasoning from first principles, there is no particular reason to equate the two functions of property regulation—disorder suppression and order construction. That is, the “order” imposed by American zoning laws is not necessarily the same thing as the absence of the physical and social disorders targeted by broken windows tactics like code enforcement and public nuisance suits. For example, zoning laws might declare a nonconforming use, such as a corner grocery store in an older residential neighborhood, a “disorder,”<sup>100</sup> but surely only a fool would equate the corner store with the open-air drug markets or brazen gang intimidation that have come to epitomize urban chaos. Nor would most city officials see the store, which likely provides a valuable service to nearby residents, as the same kind of disorder as chronic street nuisances such as aggressive panhandlers or the “squeegeemen” famously targeted by Mayor Giuliani in New York City.<sup>101</sup>

Nevertheless, urban policymakers have long seen order-construction regulations as an important bulwark against social disorder. As Richard Chused

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98. See, e.g., M.S. Enkoji, *Californians Get Say in Cases Involving Those Convicted of Nuisance Laws*, SACRAMENTO BEE, Oct. 29, 2002, 2002 WL 102376866. For a thorough discussion of the “special injury” requirement, see *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 712 P.2d 914 (Ariz. 1985) (enjoining soup kitchen as public nuisance). Some cities, especially in California, have successfully enjoined gang-related activity as a public nuisance. While these latter efforts have met with bitter criticism in academic journals, courts have turned away constitutional challenges to the practice. See, e.g., Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998) (discussing and criticizing anti-gang nuisance actions); see also, e.g., Livingston, *Police Discretion*, *supra* note 5, at 640 (suggesting that “[c]ivil injunctions may offer . . . an option for dealing with some public order problems, most notably the problems posed by gangs who have adopted particular neighborhoods as their turf”).

99. See CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* (1977); see also GERALD E. FRUG, *CITY MAKING* 144 (1999) (discussing Perin and city land-use policy).

100. See, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 694-96 (1973) (discussing potential benefits of small grocery store in residential enclave).

101. See Ellickson, *Controlling Chronic Misconduct*, *supra* note 7, at 1175-84 (discussing “chronic street nuisances”).

persuasively argued in a recent article, the Progressive-era proponents of zoning were “positive environmentalists” who firmly believed that “changing surroundings would change behavior.”<sup>102</sup> In the zoning context, these beliefs translated into the argument that carefully ordered land uses—the separation of commercial and industrial establishments from residences and, importantly, the segregation of single-family homes from all other uses—would curb the social disorders plaguing crowded American cities. For example, in its amicus brief in the landmark *Euclid* case, the National Conference on City Planning argued:

[T]he man who seeks . . . an orderly neighborhood . . . assum[es] that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. This assumption is indubitably correct. The researches of physicians and public health students have demonstrated the importance of our physical environment as a factor in our physical health, mental sanity and moral strength; and the records of hospitals and criminal courts amply support these conclusions. . . . Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself.<sup>103</sup>

Anecdotal evidence suggests that the current focus on disorder suppression reinforces this traditional view in the minds of many city officials. For example, a number of cities include zoning violations among the “disorders” targeted during code enforcement sweeps.<sup>104</sup>

City officials’ concerns about the legal vulnerability of order-maintenance policing innovations make the use of order-construction regulations to suppress disorder all the more attractive. In 1999, the Supreme Court invalidated a Chicago law that authorized police officers to order congregations of gang members to “disperse and remove themselves from the area.”<sup>105</sup> Other cities’ efforts to limit aggressive panhandling, sleeping in public spaces, etc., also

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102. Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 601 (2001).

103. Brief of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association, and the Massachusetts Federation of Town Planning Boards, at 29-30, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 31).

104. See, e.g., Melia Bowie, *Crackdown a Sign of Hard Times*, ST. PETERSBURG TIMES, May 11, 2003, at 1; *Business Violations Found in Sweep*, BOSTON GLOBE, June 20, 2003, at B2; Martin J. Chávez, *Albuquerque Mayor Chávez Celebrates First Anniversary of Community Enforcement and Abatement Task Force*, U.S. MAYOR ARTICLES, Apr. 28, 2003, [http://www.usmayors.org/uscm/us\\_mayor\\_newspaper/documents/04\\_28\\_03/albuquerque\\_B\\_P.asp](http://www.usmayors.org/uscm/us_mayor_newspaper/documents/04_28_03/albuquerque_B_P.asp) (last visited Sept. 26, 2004); Dan Thanh Dang, *A Battle Is Won, Another Starts*, BALTIMORE SUN, May 30, 2000, at 1B; Lili LeGardeur, *City Official Enjoys Cleaning Streets*, NEW ORLEANS TIMES-PICAYUNE, Aug. 24, 2000, at 4; Tish Osborne, *2nd Code Enforcement Officer Helps City Crack Down on Zoning Scofflaws*, TAMPA TRIB., June 9, 2002, at 2; John F. Street, *Philadelphia’s Neighborhood Transformation Initiative: Restoring Vitality to the City of Brotherly Love*, U.S. MAYOR ARTICLES, Apr. 15, 2002, [http://www.usmayors.org/uscm/us\\_mayor\\_newspaper/documents/04\\_15\\_02/philadelphia.asp](http://www.usmayors.org/uscm/us_mayor_newspaper/documents/04_15_02/philadelphia.asp) (last visited Sept. 26, 2004).

105. *City of Chicago v. Morales*, 527 U.S. 41 (1999) (invalidating Chicago’s Gang Congregation Ordinance as unconstitutionally vague).

have been invalidated—and sharply criticized as inhumane.<sup>106</sup> Yet city officials can proceed virtually assured that regulations ordering private land uses will not be questioned by courts (and are far less likely to be challenged in the court of public opinion). As a matter of federal constitutional law, it is well established that nonconfiscatory land-use regulations are subject to rational basis review—that is, they will be upheld if the court is satisfied that some conceivable government interest justifies the governmental policy.<sup>107</sup> Indeed, so great is the discretion afforded the government-*qua*-property-regulator that Debra Livingston, a community-policing expert, cites regulatory measures (like closing abandoned buildings) as evidence of the proposition that many order-maintenance policies do not raise legal issues at all.<sup>108</sup>

## II. RETHINKING THE DISORDER-SUPPRESSION/ORDER-CONSTRUCTION EQUATION

All of this suggests that efforts to seize upon the tools of property regulation to curb the disorders targeted by order-maintenance policies will

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106. See *Loper v. N.Y. City Police Dep't*, 999 F.2d 699 (2d Cir. 1993) (enjoining enforcement of antibegging statute); *Berkeley Cmty. Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1089-92 (N.D. Cal. 1995) (preliminarily enjoining Berkeley's antisolicitation ordinance); *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) (invalidating statute prohibiting accosting for the purpose of begging), *rev'd and remanded*, 38 F.3d 1514 (9th Cir. 1994); see also Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991); Fay Leoussis, *The New Constitutional Right to Beg—Is Begging Really Protected Speech?*, 14 ST. LOUIS U. PUB. L. REV. 529 (1995); Cynthia R. Mabry, *Brother Can You Spare Some Change—And Your Privacy Too?: Avoiding a Fatal Collision Between Public Interests and the Beggar's First Amendment Rights*, 28 U.S.F. L. REV. 309 (1994); Jonathan Mallamud, *Begging and the First Amendment*, 46 S.C. L. REV. 215 (1995); Nancy A. Millich, *Compassion Fatigue and the Homeless: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255 (1994).

107. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding early zoning law); see also Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 941 (2003) (discussing standard of review); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 602 (1998) (same); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607 (1988) (same). Theoretically, a property owner has the right to challenge a property regulation as an "inverse condemnation" or "regulatory taking" requiring monetary compensation, but actions resulting in less than a total deprivation of all economic value are subject to ad hoc judicial review that strongly favors the government. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (finding that regulation resulting in total deprivation of all economic value constituted categorical taking). *But see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330-32 (2002) (finding that "temporary" taking of all value for thirty-two months was subject to ad hoc review); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (articulating multifactor balancing test for nontotal takings). See generally DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 121-22 (2002) (discussing ad hoc takings analysis).

108. See Livingston, *Police Discretion*, *supra* note 5, at 584 (discussing building closures and other "ameliorative measures" and asserting that "[s]uch measures . . . raise few issues within the traditional scope of legal scholars' concerns").



continue. The evidence linking abandoned and dilapidated property to crime and disorder and, importantly, the relative lack of judicial oversight of the government-*qua*-property-regulator makes property regulations all the more attractive to policymakers. But this discretion places the onus on political actors to examine critically how property regulations affect efforts to restore order, and life, to urban communities. Herein lies a danger: city officials who reflexively view property regulation as a convenient weapon against disorder may tend to discount the significant economic and social costs that such a policy imposes.

Consider, for example, the range of explanations offered for the property "blight" problem discussed above. Along with racial dynamics, suburban sprawl, urban disinvestment, housing "filtering," and high property taxes,<sup>109</sup> economists have indicted numerous government policies that aim to eliminate blight. For example, housing and building codes are targeted as outdated and overly burdensome,<sup>110</sup> thus suggesting that the costs of regulatory sweeps may ultimately outweigh their benefits.<sup>111</sup> Other government land-use policies, especially a now-discredited urban renewal program<sup>112</sup> and the construction of

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109. See, e.g., E.M. BRIGHT, TAKING WITHOUT COMPENSATION IN LOW-INCOME AREAS: TURNING TRAGEDY INTO OPPORTUNITY (1995) (discussing taxes); BURCHELL & LISTOKEN, *supra* note 50, at 15 (discussing sprawl); W. GRIGSBY ET AL., THE DYNAMICS OF NEIGHBORHOOD CHANGE AND DECLINE 48 (D. Diamond & J.B. McLoughlin eds., 1987) (discussing race); D. MEYERS, HOUSING DEMOGRAPHY: LINKING DEMOGRAPHIC STRUCTURE AND HOUSING MARKETS (1990) (discussing sprawl); David Arsen, *Property Tax Assessment Rates and Residential Abandonment*, 51 AM. J. ECON. & SOC. 361 (1998) (discussing taxes); Greenbaum, *supra* note 53, at 139-43 (discussing race and literature on "invasion-succession model" of urban decline); Scafidi et al, *supra* note 55, at 290 (discussing taxes). Interestingly, many cities continue to view the acquisition of properties through tax foreclosures as an important antidote to the abandoned property problem. See Accordino & Johnson, *supra* note 50, at 307; Dunn, *supra* note 52.

110. See, e.g., STEPHEN R. SEIDEL, HOUSING COSTS AND GOVERNMENT REGULATIONS (1978); see also *supra* note 70.

111. Professor Michael Schill once commented to me that, in his view, housing code sweeps were "homelessness creation programs."

112. See, e.g., BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 16 (1985) (noting that planners believed that the existing cities were obsolete and that "[t]o replace the obsolete city with this new vision would mean tearing down much of what was there"); LEWIS MUMFORD, FROM THE GROUND UP 226-29 (1956) (arguing that clearance was the only solution to cities' problems); JOHN C. TEAFORD, THE ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA 105 (1990) (characterizing the "eradication of slums" as the "ultimate dream of planners"); Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 808 (1991) ("The numbers of jobs created and the amount of private sector investment generated by the program were below hopes and expectations of its proponents . . . [and] the human toll caused by displacement and the destabilization of nearby residential communities casts doubt upon the efficacy of subsidized site assembly . . ."). Sadly, in many places, urban renewal likely made things worse. Bulldozers destroyed intact and fairly stable communities and scattered residents to the winds to make way for buildings and housing projects that most urban planners now consider to be completely antithetical to healthy community life. And these were the successes. In many cities, renewal created little but rubble. As of 1965,

limited access highways,<sup>113</sup> also backfired—as evidenced by the fact that decades later, some government officials seek to tackle blight by undoing them. For example, the federal “Hope VI” program provides funds to demolish urban-renewal-era public housing projects and replace them with low-rise, mixed-income projects built in the “new urbanist” style currently championed by many planners.<sup>114</sup> Other cities are seeking to renew and reconnect neighborhoods by tearing down elevated highways.<sup>115</sup>

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the Kosciusko Project in St. Louis, Southwest Temple Project in Philadelphia, and Camden Industrial Park in Baltimore had been vacant since 1956, and the Ellicott District Project in Buffalo and Lake Meadows Project in Chicago since 1952. *Urban Renewal Wastelands: Cities' Development Is Suffering as Bulldozed Acres Lie Idle and Untaxed*, NATION'S BUS., Apr. 1965, at 86-87. Rubble-strewn wastelands in St. Louis and St. Paul earned such less-than-affectionate nicknames as “Hiroshima Flats” and “Superhole.” Roger Montgomery, *Improving the Design Process in Urban Renewal*, in URBAN RENEWAL 454, 456-66 (James Q. Wilson ed., 1966). Although most of the land condemned for urban renewal eventually was developed, many cities' problems with vacant properties can be traced directly to the program's failures. See, e.g., FRIEDEN & SAGALYN, *supra*, at 15-60. On urban renewal, see generally, for example, FRIEDEN & SAGALYN, *supra*, at 15-38; CHARLES N. GLAAB & A. THEODORE BROWN, A HISTORY OF URBAN AMERICA (3d ed. 1983); ZANE L. MILLER & PATRICIA M. MELVIN, THE URBANIZATION OF MODERN AMERICA: A BRIEF HISTORY (1973); TEAFORD, *supra*, note 113, at 44-80; URBAN RENEWAL, *supra*.

113. Large-scale freeways ripped through neighborhoods, forcibly uprooting thousands of residents. Furthermore, because limited access highways eliminate cross-streets to decrease congestion and delay, such roads inevitably divide and devastate previously intact communities. Even elevated highways, which allow for underpasses, cast a deadly shadow upon previously vibrant streets. For a poignant description of the destructive effects of one freeway project, see, for example, ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 523-25 (1974) (describing the decline of Brooklyn's “Finn Town” following construction of the Gowanus Parkway: “[T]he avenue was cast forever into darkness and gloom, and its bustle and life were forever gone . . . . Moses' steel and concrete, ‘lifted into the air’ above a neighborhood for the convenience of motorists driving through the neighborhood to get somewhere else, had destroyed the neighborhood.”).

114. On the myriad of problems (physical and social) plaguing public housing, see Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497 (1993). On Hope VI, see generally U.S. DEP'T OF HOUS. & URBAN DEV., WHAT IS HOPE VI?, at <http://www.hud.gov/offices/pih/programs/ph/hope6/index.cfm> (last visited Sept. 26, 2004); Patrick E. Clancy & Leo Quigley, *Hope VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y 527 (2001); Michael S. FitzPatrick, *A Disaster in Every Generation: An Analysis of Hope VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421 (2000).

115. The best known example of such a project is Boston's mammoth Central Artery/Tunnel Project, or “Big Dig,” which will replace the city's elevated six-lane Central Artery with an eight-to-ten-lane underground freeway—thus clearing the way for the redevelopment of the land currently occupied by the freeway. See, e.g., DAN MCNICHOL & ANDY RYAN, THE BIG DIG (2000); PETER VANDERWARKER, THE BIG DIG: RESHAPING AN AMERICAN CITY (2001); Boston Globe, *Beyond the Big Dig*, at [http://www.boston.com/beyond\\_bigdig/](http://www.boston.com/beyond_bigdig/) (last visited Sept. 26, 2004); Mass. Turnpike Auth., *The Big Dig*, at <http://www.bigdig.com> (last visited Sept. 26, 2004). The project has been widely criticized for delays and over a billion dollars in cost overruns. See, e.g., Raphael Lewis & Sean P. Murphy, *Artery Errors Cost over \$1B*, BOSTON GLOBE, Feb. 9, 2003, at A1. San Francisco demolished the never-completed Embarcadero freeway after the structure was damaged in the 1990 earthquake in an effort to give new life to a section of previously moribund

Furthermore, the renewed emphasis on curbing disorder, including property-related disorder, comes at the same time that many land-use scholars and urban planners are of the view that the order-construction regulations may contribute to urban decline. This view can be traced to Jane Jacobs's insight, repeated quite often these days in law reviews, architectural magazines, and planning journals, that *people* make city streets feel safe and vibrant.<sup>116</sup> Thus the law can help ensure healthy streets by fostering a diversity of land uses that ensure people have reason to be on the street throughout the day and night. In contrast, land-use policies that separate economic and noneconomic activities may devastate city neighborhoods by precluding the diversity that gives them life.

According to this view, our prevailing system of land-use regulation is an urban villain. If the Jacobs critique is correct—and increasing numbers of experts have come to endorse it—then city officials make a serious mistake when they proceed on the traditional assumption that properly ordered land uses suppress social disorder. Public nuisance suits and regulatory sweeps can board up broken windows, but they cannot fill vacant lots and empty storefronts. What's more, there are reasons to believe that order-construction regulations may keep those lots and storefronts empty, and, consequently, undercut disorder-suppression efforts themselves. The remainder of this Part discusses two theoretical cases in which this may be so—the first made by enterprise-zone enthusiasts in the early 1980s and the second by the new urbanist planners who currently find themselves in vogue. It concludes with a case study of an ongoing land-use reform effort in New York's East Harlem.

#### A. *Fostering Economic Vitality Through Deregulation: Enterprise Zones*

The assertion that overly burdensome regulations impede the social and economic prospects of poor people has become standard fare in moderate-left to libertarian-right circles. This claim is an attractive one—indeed, one that I have endorsed<sup>117</sup>—both because it rings true (everyone has heard a red-tape

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waterfront property. See, e.g., Robert Campbell, *Bay Watch*, BOSTON GLOBE, May 14, 2002, at E1 (“Boston planners can learn a lot from the good, bad, and ugly of San Francisco public spaces[.]”). And Milwaukee has begun demolishing a number of elevated freeways that divided and destroyed communities during the urban renewal period. See JOHN O. NORQUIST, *THE WEALTH OF CITIES: REVITALIZING THE CENTERS OF AMERICAN LIFE* 160-65 (1998); MILWAUKEE DEP'T OF CITY DEV., *PARK EAST REDEVELOPMENT PLAN*, at <http://www.mkedcd.org/parkeast> (last visited Sept. 26, 2004); Julie A. Penman, *The Park East Is Down. Now What?*, MILWAUKEE J. SENTINEL, Sept. 28, 2003, at J1.

116. See *infra* notes 166-73 and accompanying text.

117. See Garnett, *On Castles*, *supra* note 18, at 1216-19 (arguing that home business regulations may impede welfare reform efforts); Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 217-28 (2001) [hereinafter Garnett, *The Road from Welfare to Work*] (advocating relaxation of rules banning informal “jitney” van services).

horror story<sup>118</sup>) and because it suggests that government can renew our urban cores and empower our poorest citizens simply by stepping aside. Perhaps the most comprehensive case for a deregulatory urban policy was made in the early 1980s by proponents of so-called “enterprise zones.” Enterprise zones have a diverse intellectual pedigree, having been proposed by a socialist, almost immediately championed by a luminary of the British Conservative Party, and imported to the United States by a scholar at a conservative think tank.<sup>119</sup> The idea originated with Peter Hall, a socialist professor of geography at Reading University.<sup>120</sup> Hall returned from a visit to Asia in the late 1970s impressed with the level of industry generated by the free market economies of Hong Kong and Singapore and convinced that economic deregulation might work similar miracles in Britain’s depressed areas.<sup>121</sup> Hall therefore proposed that Britain establish a limited number of “freeports”: “[s]mall, selected areas of inner cities would simply be thrown open to all kinds of initiatives, with minimal control.”<sup>122</sup> He described his policy as “an essay in non-plan,”<sup>123</sup> based upon “fairly shameless free enterprise” where “bureaucracy would be kept to the absolute minimum.”<sup>124</sup>

Soon after Hall unveiled his proposal in 1977, leading spokesmen of the then-opposition British Conservative Party began to champion it.<sup>125</sup> These Conservatives outlined a bold plan for limited zones within which “the Queen’s writ shall not run.”<sup>126</sup> Within these zones, planning laws and rent and wage

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118. My favorite one is the tale of the “muffin lady”—Linda Fisher, a former welfare recipient and single mother who sought to pull herself out of poverty by selling home-baked muffins door-to-door. Fisher learned to her surprise that her home business was illegal for various reasons (including a too-small oven). She was only able to return to baking after the local volunteer fire department made its oven available to her. Katherine Shaver, *For “The Muffin Lady,” Some Home-Baked Troubles*, WASH. POST, Feb. 13, 1997, at A1. Fisher’s initial misfortune ultimately turned out to be a blessing in disguise, as it led to appearances on national television, a cookbook, and offers to franchise her business. Carole Sugarman, *Muffin Makeovers: Recipes and Reflections from Linda Fisher, Rebuilding Her Life One Batch at a Time*, WASH. POST, Feb. 17, 1998, at E1.

119. Michael Allan Wolf, *Enterprise Zones: A Decade of Diversity*, 4 ECON. DEV. Q. 3, 4 (1990).

120. STUART M. BUTLER, ENTERPRISE ZONES: GREENLINING THE INNER CITIES 2 (1981).

121. See Wolf, *supra* note 119, at 4.

122. See Peter Hall, *The British Enterprise Zones*, in ENTERPRISE ZONES: NEW DIRECTIONS IN ECONOMIC DEVELOPMENT 179, 180 (Roy Green ed., 1991) [hereinafter ENTERPRISE ZONES] (quoting PETER HALL, GREEN FIELDS AND GREY AREAS (Papers of the RTPI Annual Conference, Chester, 1977)).

123. See BUTLER, *supra* note 120, at 96 (quoting Hall). Hall’s reference to “nonplan” refers to a 1969 article, Peter Hall et al., *Nonplan: An Experiment in Freedom*, 26 NEW SOC’Y 435-43 (1968). See Hall, *supra* note 122, at 179.

124. *Id.*; see also BUTLER, *supra* note 120, at 97 (describing the details of the “Freeport” proposal, which included no customs regulations or wage or price limitations, a drastic reduction in taxes, and limited social services).

125. BUTLER, *supra* note 120, at 95, 98-102.

126. *Id.* at 99 (quoting Sir Keith Joseph, Chief Spokesman on Industrial Matters for the Conservative Party).

controls would be virtually eliminated (save for basic health and safety standards), local and national governments would be required to sell all of the land that they owned, entrepreneurs would enjoy significant tax relief, and, finally, government subsidies would be eliminated.<sup>127</sup> When the Conservatives swept into power in 1979, the strong British parliamentary system enabled the new leadership to establish a watered-down version of these enterprise zones with little trouble.<sup>128</sup>

The enterprise-zone idea soon struck the fancy of American economist Stuart Butler, who used his post at the conservative Heritage Foundation to spread the free market gospel on this side of the Atlantic.<sup>129</sup> Butler's case for enterprise zones relied heavily on the works of Jane Jacobs and David Birch. From Jacobs, Butler drew the idea of the successful urban neighborhood as an organic entity bound together by complex social relationships.<sup>130</sup> From Birch, an MIT economist, he found support for his claim that small businesses would fuel any successful renewal effort.<sup>131</sup> The goal of enterprise zones, Butler asserted, was "[t]he creation of employment for inner city residents" generally and a new entrepreneurial class of residents in particular.<sup>132</sup> To accomplish this goal, Butler argued, the federal government should offer federal tax relief in exchange for sweeping property deregulation by state and local governments.<sup>133</sup>

Butler's indictment of the regulatory status quo was a sweeping one, but he singled out zoning rules as "very costly in social and employment terms."<sup>134</sup> He argued that zoning harms poor communities in two ways. First, zoning laws preclude mixed-use patterns of development that are "an essential element in the[] stability and vitality" of poor neighborhoods; and second, they impose unnecessary compliance costs on small businesses and providers of low-cost housing.<sup>135</sup> In asserting that the elimination of zoning laws could fuel inner-city renewal, Butler relied upon Bernard Siegan's study of land-use patterns in Houston, Texas—the only large U.S. city without zoning laws. Siegan argued that the lack of zoning in Houston helped to create an entrepreneurial class in low-income neighborhoods. Siegan quoted, for example, Houston's planning

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127. *Id.* at 102 (describing the proposal of Sir Geoffrey Howe, M.P., who was to become Chancellor of the Exchequer in the Thatcher government).

128. Within a year of its ascendancy, the Thatcher government set up six five-hundred-acre zones within which businesses enjoyed a reduced tax burden and relatively minor (compared to the early proposals) relaxation of local regulations governing land use. *See* BUTLER, *supra* note 120, at 103; David Boeck, *The Enterprise Zone Debate*, 16 *URB. LAW.* 71, 76 (1984).

129. Wolf, *supra* note 119, at 5.

130. BUTLER, *supra* note 120, at 32.

131. *Id.* at 66-67.

132. *See id.* at 139.

133. *Id.* at 143-50, 155-56.

134. *Id.* at 54.

135. *Id.* at 54-56.

director for the proposition that

The mixed land use pattern that is found in some sections of the city [because of the absence of zoning] should, therefore, not be viewed as bad. In a lower income area, the availability of car-repair services, eating establishments, bars and such service outlets makes for an “attractive” neighborhood in the sense of convenience for a group that has low mobility. The ability to establish a business in one’s garage or home contributes to easy entry of individuals into the economic system.<sup>136</sup>

The idea implicit in this statement—that zoning rules would impede low-income individuals’ efforts to start businesses—was therefore at the heart of the original enterprise-zone proposal.

Although the idea garnered early bipartisan support,<sup>137</sup> and the strong endorsement of President Ronald Reagan (who made enterprise zones the centerpiece of his urban agenda),<sup>138</sup> enterprise zones did not become a part of federal policy until Congress enacted the Empowerment Zone and Enterprise Communities Act in 1993.<sup>139</sup> Despite federal legislative inaction (or perhaps because of it) state and local governments quickly seized upon the idea, and, within a decade, established literally hundreds of enterprise zones across the nation.<sup>140</sup> Along the way, however, the deregulatory aspects of the early enterprise zones fell by the wayside. Although both the Reagan administration and model legislation circulated by the American Legislative Exchange Council recommended that state and local governments minimize regulatory barriers to low-income entrepreneurs, including price and rent controls, minimum-wage provisions, and zoning and building codes,<sup>141</sup> these reforms

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136. *Id.* at 56.

137. The enterprise zone quickly found a champion in then-Representative Jack Kemp, who, together with Representative Robert Garcia of the South Bronx, introduced legislation early in 1980 that would have implemented many of the fiscal incentive aspects of Butler’s proposal. *Id.* at 132-33; Wolf, *supra* note 119, at 5.

138. See generally BUTLER, *supra* note 120, at 138 (noting that candidate Reagan made clear that the enterprise zone would be crucial to his urban policy); Boeck, *supra* note 128 (including a complete description of early federal legislative proposals).

139. See Omnibus Budget Reconciliation Act of 1993, 26 U.S.C. §§ 1391-1397D (1993), amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 951-52, 111 Stat. 788, 885 (1997).

140. Wolf, *supra* note 119, at 5; see also Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 509 (1997) (noting that enterprise zone laws were enacted by three-quarters of the states in the 1980s, leading to creation of at least five hundred zones). Additionally, hundreds (probably thousands) of other development incentives dot the land, the result of a rapidly proliferating “economic war” among state and local governments seeking to lure businesses away from their existing locations. See, e.g., KENNETH P. THOMAS, *COMPETING FOR CAPITAL* 159 (2000) (estimating that total state and local government tax incentives and subsidies exceed \$50 billion annually); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 382-89 (1997) (describing common tax incentives); Clayton P. Gillette, *The Law and Economics of Federalism: Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 479 (1997) (same).

141. See 7 AMERICAN LEGISLATIVE EXCHANGE COUNCIL, *THE SOURCE BOOK OF*

were rarely enacted into law.<sup>142</sup> Instead, state and local—and, until very recently, federal—efforts have concentrated almost exclusively on providing fiscal incentives to locate new businesses within enterprise zones.<sup>143</sup> Examples of regulatory relief are rare and tend to be procedural in nature, such as efforts to manage or reduce red tape by streamlining permit application processes at “one-stop permit shops” or establishing a “regulatory ombudsman” to field questions from frustrated applicants.<sup>144</sup>

Similarly, the federal “Empowerment Zone” legislation ultimately enacted in 1993 contains no regulatory concessions, but instead relies upon a combination of tax incentives and government subsidies to spur investment in inner cities. Each of the lucky “Empowerment Zone” and “Enterprise Community” designees receives a sizable federal grant<sup>145</sup> and qualifies for roughly a dozen different federal tax breaks.<sup>146</sup> It was not until the creation of federal “Renewal Communities” in 2001 that Congress incorporated deregulation into an enterprise-zone-type policy. The federal law creates forty geographically based Renewal Communities within which significant federal tax incentives are available. To qualify for these incentives, state and local governments must agree to waive or reduce at least four of the following regulations—occupational licensing requirements, zoning restrictions on home-based businesses, zoning restrictions on child-care centers or schools, permit requirements for street vendors, and franchises or other restrictions on

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AMERICAN STATE LEGISLATION: CHILDREN, FAMILY, NEIGHBORHOOD, COMMUNITY: AN EMPOWERMENT AGENDA 74-83 (1991); Boeck, *supra* note 128, at 139-43 (describing the Reagan administration’s support for regulatory reform at the state and local level).

142. See Wolf, *supra* note 119, at 5; see also Briffault, *supra* note 140, at 510 (2000) (noting that “regulatory relief is now a minimal component of enterprise zone programs”); Franklin J. James, *The Evaluation of Enterprise Zone Programs*, in ENTERPRISE ZONES, *supra* note 122, at 225, 232 (claiming that “the concept of extensive deregulation as a development incentive is defunct and indefensible”).

143. See Wolf, *supra* note 119, at 5-6 (finding that tax incentives—including property tax reductions or exemptions, sales tax concessions, and employment tax credits for hiring certain targeted employees—form the backbone of most enterprise zone policies).

144. See Rodney A. Erickson & Susan W. Friedman, *Comparative Dimensions of State Enterprise Zone Policies*, in ENTERPRISE ZONES, *supra* note 122, at 155, 164 (finding that “very little regulatory relief was being granted by the states” and that “the regulatory relief that has been offered tends to be procedural rather than substantive, and is usually in the form of one-stop permits, fast-tracking, and fee reductions”); James, *supra* note 142, at 232 (noting that “some state programs have called for streamlined regulatory processes as an incentive for business investment”).

145. See, e.g., 42 U.S.C. § 1397f(a)(2)(B) (2000) (appropriating Social Security Block Grant funds for Round I empowerment zone/enterprise community designees).

146. See U.S. DEP’T OF HOUS. & URBAN DEV., TAX INCENTIVE GUIDE FOR BUSINESSES IN THE RENEWAL COMMUNITIES, EMPOWERMENT ZONES, AND ENTERPRISE COMMUNITIES (2001), available at <http://www.cdvc.org/pdf/incentive.pdf> (last visited Sept. 26, 2004) (listing tax incentives, including Empowerment Zone Employment Credit, Work Opportunity Tax Credit, Welfare-to-Work Credit, and Tax Exempt Facilities Bonds); see also 26 U.S.C. § 1394 (2000) (tax-exempt facility bonds); *id.* § 1396 (Empowerment Zone Employment Credit).

competition. for businesses providing public services, including taxicabs, jitneys, cable television, or trash hauling.<sup>147</sup>

Even considering the regulatory relief mandated by this new federal policy, however, the enterprise-zone concept has strayed far from its *laissez faire* roots. Indeed, the progeny of Butler's enterprise-zone proposal frequently result in more government intervention in economic affairs, not less.<sup>148</sup> Most zones require administrative structures to "manage" the zones.<sup>149</sup> These minibureaucracies are usually, in keeping with current trends, "public-private partnerships,"<sup>150</sup> which administer zone funds, provide loans and venture capital, facilitate land assembly for new projects, and provide a forum that enables the "public participation" mandated by federal and state laws.<sup>151</sup> While some studies suggest that interventionist management strategies correlate positively with enterprise-zone success,<sup>152</sup> the current zones are certainly a far cry from Hall's "essay in non-plan."

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147. 26 U.S.C. § 1400E(d)(3).

148. See Richard C. Elling & Ann Workman Sheldon, *Determinants of Enterprise Zone Success: A Four State Perspective*, in ENTERPRISE ZONES, *supra* note 122, at 136, 136 (observing that most state enterprise zones "establish a more active or *interventionist* governmental presence"). As case in point, the Baltimore Empowerment Zone boasts that it is "more of a strategic intervention than a program." See Empower Baltimore Mgmt. Corp., Implementing Organization, at [http://www.baltimoreempowermentzone.com/aboutebmc\\_implementing.html](http://www.baltimoreempowermentzone.com/aboutebmc_implementing.html) [hereinafter Implementing Organization] (last visited Sept. 26, 2004). For example, federal law establishes a competitive application process for coveted "Empowerment Zone" status. To "compete" for a zone designation in their jurisdiction, local governments must submit a "Strategic Plan" developed in accordance with four principles—"strategic vision for change," "community based partnerships," "economic opportunity," and "sustainable community development"—and reflecting five elements—"vision and values," "community assessment," "goals," an "implementation plan," and a "strategic planning process." See U.S. DEPT OF HOUS. & URBAN DEV., BUILDING COMMUNITIES TOGETHER: URBAN APPLICATION FORMS, available at <http://www.hud.gov/nofa/ez/urbanforms.pdf> (last visited Sept. 26, 2004).

149. Briffault, *supra* note 140, at 510; see also Michael Brintnall & Roy E. Green, *Framework for a Comparative Analysis of State-Administered Enterprise Zone Programs*, in ENTERPRISE ZONES, *supra* note 122, at 75, 79 (reviewing management structures of state enterprise zones).

150. See, e.g., Brintnall & Green, *supra* note 149, at 79-80 (noting that "[p]ublic-private cooperation is of course central to the enterprise zone concept"). See generally E.S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS (2000) (examining the "increasingly common" phenomenon of public-private partnerships).

151. The administrative apparatus of an empowerment zone can be quite elaborate. For example, the Baltimore Empowerment Zone is managed by the nonprofit Empower Baltimore Management Corporation. Over fifty individuals, representing a "broad cross-section of community stakeholders," serve on Empower Baltimore's managing bodies, the Board of Directors and the Advisory Council. Six smaller community organizations called "Village Centers" further "bring a broad cross section of existing organizations into an umbrella entity to provide oversight and implement selected strategies within [their] geographic area[s] and develop the larger vision/strategy for their neighborhood[s]." Implementing Organization, *supra* note 148.

152. See Elling & Sheldon, *supra* note 148, at 136, 147-49 (finding that "staffing" is the best predictor of enterprise zone success, as measured by firm investment).



B. *Zoning for Diversity: Jane Jacobs and the New Urbanism*

While enterprise-zone enthusiasts' calls for land-use deregulation in inner cities are all but forgotten, a growing number of scholars, planners, and architects have rediscovered Jacobs's objection to zoning laws' segregation of land uses.<sup>153</sup> These individuals, particularly the new urbanists who (somewhat tenuously) claim Jacobs as their founder,<sup>154</sup> target American suburbia, which, they contend, is stultifying precisely because zoning laws prohibit a healthy mix of residences and businesses.<sup>155</sup> The new urbanists champion dense, "mixed-use" neighborhoods, where homes are situated within walking distance of stores, restaurants, and parks.<sup>156</sup> They assert that commercial establishments enhance a neighborhood by giving residents a place to go on foot and ensuring that people will be outside, mingling amongst each other. As Philip Langdon observes, "[T]he tavern, the cafe, the coffee shop, the neighborhood store . . . have been zoned out of residential areas . . . . As informal gathering places have been banished, many opportunities for making friendships and pursuing common interests have disappeared."<sup>157</sup>

The new urbanists' ideal is the pre-World War II American city: a place with a "traditional" main street and city center.<sup>158</sup> And, indeed, they are best

153. See FRUG, *supra* note 99, at 150 (noting that "a number of architects and urban planners have begun exploring ideas like those advanced by Jacobs" and that "[t]heir work [is] collectively labeled 'the new urbanism'").

154. The new urbanists' claim that their planning theory embodies Jacobs's thinking is complicated by the fact that, unlike Jacobs, new urbanists are in no way proponents of an "organic" order. Rather, new urbanists insist upon a carefully constructed land-use scheme, albeit one that differs dramatically from the one constructed by Euclidean zoning. For a thoughtful critique of the new urbanists' planning agenda, see Vicki Been, *Comment on Professor Jerry Frug's The Geography of Community*, 48 STAN. L. REV. 1109, 1112-14 (1996) [hereinafter Been, *Comment*] ("The end result may be a uniformity that is just as, or even more, stultifying than the current predictability in suburban design. The grid-pattern may become the standard, rather than the cul-de-sac, but the opportunity to improve upon both grid-patterns and cul-de-sacs through the 'laboratory' of multiple local governments will be lost.").

155. In a popular antisuburbs diatribe, James Howard Kuntsler proclaims: [Zoning law's] chief characteristics are the strict separation of human activities . . . . After all, it's called *zoning* because the basic idea is that every activity demands a separate zone of its very own . . . . It soon becomes obvious that the model of the human habitat dictated by zoning is a formless, soulless, centerless, demoralizing mess. It bankrupts families and townships. It causes mental illness. It disables whole classes of decent, normal citizens. It ruins the air we breathe. It corrupts and deadens our spirits.

JAMES HOWARD KUNTSLER, *HOME FROM NOWHERE* 110-12 (2000).

156. See, e.g., Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1090-94 (1996) (describing the "new urbanism"). The term "mixed use"—a favorite of the new urbanists, is also attributable to Jacobs, who wrote of it as one of the conditions for vibrant city life. See JACOBS, *supra* note 17, at 198.

157. PHILIP LANGDON, *A BETTER PLACE TO LIVE: RESHAPING THE AMERICAN SUBURB* 15-16 (1994).

158. See PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS* 21 (1993) (praising "the traditional American town" as alternative to suburban sprawl); ANDRES DUANY ET AL.,

known for their attempts to recreate these communities from scratch, in places like Celebration and Seaside, both in Florida. As a result, new urbanists face accusations that they are nothing more than developers of high-end cutesy (or creepy) suburban enclaves. The foundational planning principle of new urbanism, however, is an *urban* one—namely, that relatively dense, mixed-use development is necessary for healthy community life.<sup>159</sup> Indeed, in contrast to the new urbanists, Jacobs herself took care to limit her critique of modern planning principles to large cities, expressly declining to extend it to suburbs.<sup>160</sup>

Jacobs viewed the segregation of uses as particularly problematic for urban communities because they are so dependent on a healthy street life. Anyone who has ever visited the downtown areas of many major American cities after business hours has observed her insight in action. Because they are places where people work, but do not live, the downtown areas of cities like Kansas City (my hometown) are eerily deserted as soon as the clock strikes five. For this reason, many recent (and ongoing) city redevelopment plans seek to promote a more vibrant downtown nightlife by encouraging both residential infill projects and higher concentrations of entertainment venues.<sup>161</sup>

Streets in other parts of major cities are similarly deserted for another reason: many poor communities are places where people live, but no longer where they work. A crisis of economic stagnation deprives our poorest neighborhoods of the commercial activity that might promote a healthy street life. In his comprehensive study of Chicago's "Black Belt," sociologist William Julius Wilson illustrates this problem with poignant interviews. One former resident recalled, "[There were all kinds] of stores up and down Sixty-third

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SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 10-11 (2000) (praising prewar patterns of development); THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY x (Peter Katz ed., 1994) (asserting that the first two decades of the twentieth century are "now coming to be regarded as a watershed era in the history of urban design").

159. See, e.g., FRUG, *supra* note 99, at 151 (summarizing principles of new urbanism); Todd W. Bressi, *Planning and the American Dream*, in THE NEW URBANISM, *supra* note 158, at xxv, xxx (describing the core principles of new urbanism); see also CONG. FOR THE NEW URBANISM, CHARTER OF THE NEW URBANISM, available at <http://www.cnu.org/aboutcnu/index.cfm?formaction=charter&CFID=6129393&CFTOKEN=18892760> (last visited Sept. 26, 2004) (stating that "neighborhoods should be diverse in use and population").

160. JACOBS, *supra* note 17, at 16 ("I have concentrated on great cities, and on their inner areas . . . I hope no reader will try to transfer my observations into guides as to what goes on in towns, or little cities, or in suburbs which are still suburban . . . To try to understand towns in terms of big cities will only compound confusion.").

161. See, e.g., Downtown Council of Kansas City, Mo., Home Page, at <http://www.downtownkc.org> (last visited Sept. 26, 2004); Downtown Dev. Res. Ctr., Downtown Columbus Home Page, at <http://www.downtowncolumbus.com> (last visited Sept. 26, 2004); Indianapolis Downtown, Inc., Indianapolis Downtown, Inc. Celebrates 10 Years: Downtown's Future Looks Bright, at <http://www.indydt.com/10thannivrelease.html> (last visited Sept. 26, 2004).

Street, and it was, you know, a fun place. Then when I came back in the seventies, it was like . . . barren.”<sup>162</sup> A current resident, an elderly woman, similarly worried, “It’s not safe anymore because the streets aren’t. When all the black businesses and shows closed down, the economy went to the dogs. The stores, the businesses, the shows, everywhere was lighted.”<sup>163</sup> Wilson notes that the number of businesses in the South Side neighborhood of Woodlawn declined from over eight hundred to fewer than one hundred, and that most of the remaining businesses are “tiny catering places, barber shops, and thrift stores.”<sup>164</sup> As the economic decline progressed, public spaces once filled with busy shoppers have become the “turf” for gang members and drug dealers, a reality which forces law-abiding citizens to choose between moving (if economically possible) and remaining behind closed doors.<sup>165</sup>

Curbing disorder may be a necessary prerequisite to economic renewal in many urban communities.<sup>166</sup> But the indirect economic benefits of order-maintenance policies are by no means guaranteed. The new urbanists, however, offer a number of ways that comprehensive land-use reforms can simultaneously promote economic vitality and stifle disorder. First, to the extent current land-use regulations prohibit the mixed-use environments that

162. WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 5 (1996).

163. *Id.* at 4-5.

164. *Id.* at 5.

165. See Meares & Kahan, *Law and (Norms of) Order*, *supra* note 7, at 823 (arguing that disorder drives law-abiders from a neighborhood or forces them to avoid the streets). The California Supreme Court described such an atmosphere of fear when it upheld the use of public nuisance laws to control gang activity in the Rocksprings neighborhood of San Jose, California:

Rocksprings is an urban war zone. . . . The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents’ vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang’s illegal activities or tells police where drugs may be hidden.

*People ex rel. Gallo v. Acuna*, 929 P.2d 596, 601-02 (Cal. 1997) (affirming trial court order enjoining gang members from engaging in conduct constituting a “public nuisance” in the Rocksprings area of San Jose, California). Prior to enacting the ordinance at issue in *Morales*, the Chicago City Council heard similar testimony about life in some Chicago neighborhoods. For example, eighty-eight-year-old Susan Mary Jackson testified, “I am scared to go out in the daytime . . . I don’t go to the store because I am afraid.” *City of Chicago v. Morales*, 527 U.S. at 101 (Thomas, J., dissenting). Another long-time resident similarly testified,

I have never had the terror that I feel every day when I walk down the streets of Chicago. . . . I get intimidated on a daily basis, and it’s come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that.

*Id.*

166. See GROGAN & PROSCIO, *supra* note 42, at 152-53 (discussing the “staggering benefit” of order restoration and asserting that the “pace and scale of the urban rejuvenation is therefore intimately connected to the rise in public safety”).

foster healthy street life, “zoning for diversity” (to again borrow a term from Jacobs)<sup>167</sup> can help reinvigorate the economic and social climate of poor communities. As Neal Katyal observes, “many current zoning practices disregard or even work against crime prevention goals.”<sup>168</sup> Encouraging the coexistence of residential and commercial land uses may give people reason to leave their homes and mingle on the sidewalks. And increasing the number of law-abiding users of the sidewalks may check the disorder caused by the criminal element that currently “controls” too many urban public spaces.

Second, the new urbanists argue for changes to land-use regulations that they think currently favor building designs that are antithetical to public safety. For example, many zoning laws require buildings to be set back away from streets and fronted with significant numbers of parking spaces, thus precluding the development of an attractive “street wall” and limiting the opportunity for informal surveillance of the street by building occupants.<sup>169</sup> Modern planning codes also favor wide residential streets without sidewalks, discouraging pedestrian uses of public spaces.<sup>170</sup> These and other factors encourage people to remain inside their homes, or—if they are not residents—to drive through, rather than linger in, a neighborhood. When this occurs, would-be informal monitors of disorder are converted to disinterested passers-by, much as the reform-era reliance on patrol cars extricated the beat officer from intimate involvement in community life.<sup>171</sup> Thus, new-urbanist-favored design standards—especially sidewalks, on-street parking or rear parking lots, shallow building setbacks, and front porches—may minimize crime.<sup>172</sup> These “traditional” designs may themselves encourage informal social interaction that fosters urban vitality and a healthy community life.<sup>173</sup>

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167. See FRUG, *supra* note 99, at 149 (observing that Jacobs “urged America’s cities to replace ‘zoning for conformity’ with ‘zoning for diversity’”).

168. Katyal, *supra* note 10, at 1108.

169. See, e.g., *id.* at 1109 (discussing building setbacks and sidewalks). Architects and planners promoting the concept of “defensible space” have argued that planning codes should reflect the crime-control potential of urban design since the mid-1970s. On defensible space, see generally HENRY CISNEROS, DEFENSIBLE SPACE: DETERRING CRIME AND BUILDING COMMUNITY (1995); OSCAR NEWMAN, DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN (1972); BARRY POYNER, DESIGN AGAINST CRIME: BEYOND DEFENSIBLE SPACE (1983); Sally E. Merry, *Defensible Space Undefended: Social Factors in Crime Control Through Environmental Design*, 16 URB. AFF. Q. 397 (1981).

170. See FRUG, *supra* note 99, at 150-54.

171. I am indebted to Bruce Khula for this point.

172. See Katyal, *supra* note 10, at 1109.

173. The new urbanists’ arguments about the need for proactive incorporation of community-friendly building designs in poor communities have also influenced the federal government’s massive overhaul of public housing. The federal “Hope VI” program, see *supra* note 114, funds the demolition of distressed units and the development of mixed-income projects to replace them. See, e.g., Patrick E. Clancy & Leo Quigley, *Hope VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL’Y 527 (2001) (describing the program). Between 1996 and 2002, the U.S. Department of Housing and Urban Development funded the demolition of 49,828 public housing units. See

### C. A Test Case in East Harlem

New York City has embraced zoning reform as part of an effort to improve the area of Manhattan known as East or “Spanish” Harlem.<sup>174</sup> This primarily Latino community is one of the city’s poorest.<sup>175</sup> For over a decade, Community Board Eleven, which represents East Harlem, has examined economic development and land-use policy in the area. The community’s land-use problems are immediately apparent. Located in a city with a “perpetual” housing crisis,<sup>176</sup> East Harlem is a primarily residential community that lost more than half of its residents and many thousands of its residences (over sixteen thousand housing units) in the latter half of the twentieth century.<sup>177</sup> In large part because East Harlem was the “beneficiary” of a great deal of urban-renewal attention, the area has the highest concentration of public housing units in the city. Forty percent of residents live in public housing, most in now-discredited “towers-in-a-park”-style projects on “superblocks.”<sup>178</sup> An additional twenty-two percent of the residential units are in private,

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U.S. DEP’T OF HOUS. & URBAN DEV., HOPE VI DEMOLITION GRANTS: FY 1996-2002 (August 2003), at [http://www.hud.gov/offices/pih/programs/ph/hope6/grants/demolition/2002master\\_dem.pdf](http://www.hud.gov/offices/pih/programs/ph/hope6/grants/demolition/2002master_dem.pdf) (last visited Sept. 26, 2004). Some replacement units have been, or will be, incorporated into new mixed-income developments like Chicago’s Northshore Village, which is located on the site of the notorious Cabrini-Green housing project. See Robert Sharoff, *In Chicago, an Attempt to Upgrade a Neighborhood*, N.Y. TIMES, Sept. 10, 2000, at K7. New urbanist architects and developers have played a large role in these “revitalization projects,” including providing design guidelines and training for HUD employees charged with implementing the program. See *Hope VI Funds New Urban Neighborhoods*, NEW URB. NEWS, Jan./Feb. 2002 (“The Congress for the New Urbanism (CNU) was instrumental in providing design guidelines and training for HUD in implementing the program. Architectural firms garnering the most Hope VI work have been CNU members.”). The latest round of HUD Hope VI grants, for example, went almost exclusively to funding new-urbanist inspired “traditional neighborhood” developments. *Id.*; see also The Cmty. Builders, Inc., *Hope VI Projects*, at [http://www.communitybuilders.org/what\\_we\\_do/hopevi\\_projects.htm#pdv](http://www.communitybuilders.org/what_we_do/hopevi_projects.htm#pdv) (describing various Hope VI projects that are “patterned on the principals [sic] of New Urbanism,” including “architectural detailing” and “landscaped boulevards, public parks and pedestrian walks”).

174. Thanks go to my student, Scott Bibb, for telling me about this effort. Unless otherwise indicated, all information about East Harlem is taken from the materials listed at NEW DIRECTIONS, *supra* note 21.

175. See Manhattan Cmty. Bd. #11, Demographic & Social Economic Profile, [http://www.east-harlem.com/cb11\\_197A\\_demographic.htm](http://www.east-harlem.com/cb11_197A_demographic.htm) (last visited Oct. 18, 2004) (noting that 1990 unemployment rate in East Harlem (sixteen percent) was nearly twice that of New York City as a whole, and that median income was less than fifty percent of metro area income).

176. See Michael H. Schill & Benjamin P. Scafidi, *Housing Conditions and Problems in New York City*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY, *supra* note 70, at 11.

177. The rate of housing loss in East Harlem outpaces that of New York City, see Manhattan Cmty. Bd. #11, *supra* note 175, which has a higher than average rate of loss (approximately fourteen thousand units per year) than other major cities. See Salins, *supra* note 70, at 53-55.

178. See Manhattan Cmty. Bd. #11, *supra* note 175.

government-subsidized buildings. Home ownership rates are among the lowest in a city of renters.<sup>179</sup> And, despite a citywide housing crunch, East Harlem has a higher concentration of vacant housing than the rest of New York City.<sup>180</sup>

The second-most-prevalent land use in East Harlem (after public housing) is vacant property.<sup>181</sup> About twenty-five percent of land in East Harlem is vacant or contains deteriorated buildings. As with public housing, many vacant lots are a hangover from the urban renewal era; over eighty thousand square feet (nearly two acres) of property is officially categorized as “urban renewal property,” meaning that it has been vacant since it was condemned some thirty-odd years ago for urban renewal projects that never materialized. The City of New York itself owns nearly one hundred vacant properties in the area, most obtained either for urban renewal or in tax foreclosures.<sup>182</sup> Less than nine percent of East Harlem property is used for commercial enterprises, and street-level commercial activity is hindered by the prevailing land uses: The high-rise public housing projects on superblocks discourage foot traffic, in part because developers eliminated cross streets to create public housing sites. And the flow of commercial traffic is further disrupted by a number of large health care institutions in the community. Not surprisingly, East Harlem can hardly be described as a “vibrant” community. Community Board member Debby Quinones recently quipped that “when you get off the subway in East Harlem, it’s like you’re in the Stone Age.”<sup>183</sup>

The Community Board’s decade-long examination culminated in a formal rezoning proposal, which the City Planning Commission endorsed and the City Council approved, with a few minor changes, on June 24, 2003.<sup>184</sup> The new zoning scheme seeks to increase community vitality in three ways. First, most

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179. See *Introduction: Housing Policy in the New Fiscal Environment*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY, *supra* note 70, at 2 (noting that “over 70 percent of all housing in New York City is renter occupied, compared to only 59 and 38 percent in Chicago and Philadelphia respectively”).

180. See DENISE PREVETI & MICHAEL H. SCHILL, THE STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS 2003, at 6, 18 (compiling data on 2002 New York City vacancy rates by neighborhood, and noting that citywide vacancy rate was 2.9% and that East Harlem vacancy rate was 4.3%), available at [http://www.law.nyu.edu/realestatecenter/CREUP\\_Papers/State\\_of\\_the\\_City/Chapter%201.pdf](http://www.law.nyu.edu/realestatecenter/CREUP_Papers/State_of_the_City/Chapter%201.pdf).

181. As of 1995, 937 of the 3823 lots (nearly twenty-five percent) in East Harlem were classified as “vacant land” by the Department of City Planning. High-rise public housing units comprise one-third of the total block area of the community. See Manhattan Cmty. Bd. #11, Land Use, [http://www.east-harlem.com/cb11\\_197A\\_landuse.htm](http://www.east-harlem.com/cb11_197A_landuse.htm) (last visited Oct. 18, 2004).

182. See SALINS & MILDNER, *supra* note 68, at 142 (quantifying New York City’s *in rem* portfolio of housing units obtained through tax foreclosures).

183. See Miriam Kreinin Souccar, *El Barrio: Left Behind and Angry*, CRAIN’S N.Y. BUS., Jan. 13, 2003, at 20.

184. See N.Y. City Dep’t of City Planning, *supra* note 21. East Harlem’s zoning had not been comprehensively changed since 1961. N.Y. City Dep’t of City Planning, East Harlem Rezoning Proposal—Approved: Rezoning Objectives, <http://home.nyc.gov/html/dcp/html/eastharlem/eastharlem1.html> (last visited Sept. 26, 2004).

of East Harlem was formerly zoned "R7-2," a designation that requires relatively deep setbacks and significant amounts of off-street parking.<sup>185</sup> As the Community Board's formal request noted, this designation was consistent with the area's "tower-in-the-park" projects. But it discouraged commercial activity and prevented the creation of a "street wall" appropriate for an urban area. The Planning Commission thus recommended a new residential zoning designation that permits shallower setbacks to encourage the development of a physical infrastructure that enlivens the community.<sup>186</sup> Second, the rezoning eliminates most off-street parking requirements in the area's "commercial overlays," where limited commercial activity is permitted in residential zones. As the Planning Commission acknowledged, these requirements imposed a regulatory burden on small businesses;<sup>187</sup> they also resulted in the dedication of large sections of the community to unsightly (and potentially dangerous) parking facilities. Third, the rezoning also adds a new commercial overlay along one block of 116th Street.<sup>188</sup>

The rezoning may work. Central Harlem is said to be undergoing a "second renaissance," with high-end retail establishments opening weekly along West 125th Street and professionals renovating old brownstones (and building new ones). Proponents of the zoning changes clearly hope that they will help East Harlem join the renaissance. Of course, the zoning reforms are hardly a purist's dream. The new scheme actually *increases* the number of different zoning designations from eleven to fourteen. With the important exception of eliminating off-street parking requirements in commercial overlays, no effort was made to eliminate regulatory barriers to entrepreneurial activities by area residents. Those who seek to start a business must run a daunting regulatory gauntlet that begins with the headache-inducing task of deciphering which activities are permitted in the different overlay zones. For example, property on some streets is zoned C1-5, but on others C2-5. And, on others, C1-5 and C2-5 designations occur on opposite sides of the same street. (This is actually an improvement; there previously were five different overlay designations in the area.<sup>189</sup>) Commercial activity continues to be prohibited on

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185. See Manhattan Cmty. Bd. #11, *supra* note 181 ("The R7-2 zoning districts has [sic] a high open space ratio (OSR) and requires parking for one half of the new units built.").

186. See N.Y. City Dep't of City Planning, *supra* note 184.

187. See N.Y. City Dep't of City Planning, East Harlem Rezoning Proposal—Approved: Proposed Zoning Changes Affecting Use, <http://home.nyc.gov/html/dcp/html/eastharlem/eastharlem3b.html> (last visited Sept. 26, 2004) ("C1-5 and C2-5 commercial overlays are proposed to replace existing C1-4 and C2-4 commercial overlays throughout the rezoning area. This eliminates commercial parking requirements that could burden some commercial uses and provides more flexibility for new commercial uses.").

188. *Id.*

189. The foregoing description of East Harlem's zoning scheme comes from N.Y. City Dep't of City Planning, East Harlem Rezoning Proposal—Approved: Existing Zoning, <http://home.nyc.gov/html/dcp/html/eastharlem/eastharlem2gr.html> (last visited Sept. 26, 2004).

most east-west streets. The most significant change—the adoption of a new residential zoning classification for much of the area—takes advantage of the Planning Code’s provision for “contextual” zones (i.e., special classifications suited for the “context” of a neighborhood). Such neighborhood-specific zoning classifications have themselves been criticized for impeding development efforts.<sup>190</sup>

That said, public-choice factors likely make the kinds of comprehensive deregulation advocated by Stuart Butler in the 1980s or the tightly controlled reforms of today’s new urbanists a near impossibility.<sup>191</sup> Local governments have demonstrated a particularly strong attachment to zoning despite decades of criticism from all sides.<sup>192</sup> Not only does local officials’ significant interest in maintaining their broad authority over land-use regulation make them resistant to change,<sup>193</sup> but the number of politically powerful groups with similarly strong interests in the regulatory status quo suggests that any proposal of comprehensive land-use reform would open up a Pandora’s box of interest group politics.<sup>194</sup> East Harlem’s success within the existing framework of

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190. See Salins, *supra* note 70, at 62, 68 (recommending that the city eliminate most special zoning districts and rules).

191. I myself am skeptical about the wisdom of the new urbanists’ plan to replace zoning laws with detailed design standards.

192. See Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2174 (2002) (noting that zoning has “weathered profound societal, political, and ideological shifts on the Court and in the American polity”). For a sampling of the academic criticisms of zoning, see, for example, RICHARD F. BABCOCK, *THE ZONING GAME* (1966); RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985); WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* (1985); ROBERT FISHMAN, *BOURGEOIS UTOPIAS* 4 (1987); FRUG, *supra* note 99; MARTIN A. GARRETT, JR., *LAND USE REGULATION* (1987); DANIEL R. MANDELKER, *THE ZONING DILEMMA* (1971); ROBERT NELSON, *ZONING AND PROPERTY RIGHTS* 173 (1977); CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* (1977); RUTHERFORD H. PLATT, *LAND USE AND SOCIETY* (1996); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972); *ZONING AND THE AMERICAN DREAM* (Charles M. Haar & Jerold S. Kayden eds., 1989); see also, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 46 (1981).

193. See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) (characterizing the power to regulate land use as the “most important local regulatory power”); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 92-93 (1999) (discussing local governments’ traditional dominant role in land-use regulation); Nicole Stelle Garnett, *Trouble Preserving Paradise*, 87 CORNELL L. REV. 158, 181 (2001) [hereinafter Garnett, *Trouble Preserving Paradise*] (discussing public-choice arguments on why local governments avoid surrendering power to regulate land use).

194. See, e.g., BABCOCK, *supra* note 192; WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 229-31 (2001) [hereinafter FISCHER, *HOMEVOTER HYPOTHESIS*] (discussing “homeowner anxieties” and preference for open-space zoning); FISCHER, *supra* note 192; William W. Buzbee, *Sprawl’s Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 367, 373-78 (2000) (describing the interests involved in the



zoning, in other words, may represent a textbook example of the "second best" principle in action.

### III. PROPERTY REGULATION AND NORMS OF ORDER

These public-choice impediments to comprehensive regulatory reform undoubtedly are reinforced by the traditional assumption that order-construction regulations themselves suppress disorder. The theoretical foundations of order-maintenance policies would seem to support this assumption. Social norms scholars argue that *government intervention* is key to order restoration. They posit that public efforts are necessary first steps toward reinvigorating the informal social controls that check disorder and crime.<sup>195</sup> Thus, it is easy to see why city officials would assume that public nuisance suits and code enforcement sweeps fit within a broken windows policy manual. By using nuisance suits and code enforcement to remediate property blight, government officials seek to signal to other property owners that neglect and abandonment will not be tolerated in a community, no matter how poor. And efforts to encourage private groups to file public nuisance suits empower community members to make their own statement that certain property conditions and uses are simply unacceptable. It is hardly surprising, therefore, that policies promoting public nuisance suits by community groups frequently speak in terms of community empowerment. The Philadelphia District Attorney's Nuisance Task Force promises, for example, that it will "work in partnership with citizens like you" to "help you eliminate a nuisance in your neighborhood and give you back what has wrongfully been taken from you—the peaceful enjoyment of your home, your street, your community."<sup>196</sup>

But the claims supporting changes in order-construction regulations, discussed in Part II, do not mesh neatly with standard broken windows theory. On the contrary, they rest on the assumption that government intervention to promote order is a *problem*, not a solution, in our cities. A similar argument was made about police efforts around the time that Wilson and Kelling articulated the broken windows hypothesis. Proponents of "depolicing" argued that a *decreased* police presence was needed because communities became too dependent upon official police protection and ceased to engage in private policing measures, including "preventive surveillance," local dispute settlement, and similar forms of self-help.<sup>197</sup> Depolicing theory is in keeping

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"smart growth" debate); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 394-409 (1977) (discussing homeowner and developer influence over land-use law).

195. See, e.g., sources cited *supra* note 7.

196. See Pub. Nuisance Task Force, Phila. Dist. Attorney's Office, Community Guide to Nuisance Enforcement (n.d.) (on file with author).

197. See Donald Black & M.P. Baumgartner, *On Self-Help in Modern Society*, in DONALD BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 193, 195-99 (1980).

with the standard law and economics literature on deterrence, which suggests that high levels of law enforcement will present a moral hazard problem. That is, private citizens will have inadequate incentives to take private steps to deter and condemn crime and disorder.<sup>198</sup> Just as depolicing proponents argued that public efforts to control crime and disorder backfire, advocates of “deconstructing” the order of city land uses assert that government intervention to impose order stands in the way of organic forces that help check disorder.

The perceived success of order-maintenance policies would seem to suggest that depolicing theory was wrongheaded, and that social norms scholars correctly emphasize the importance of relatively vigorous government disorder-suppression policies. Perhaps it follows, therefore, that relaxing order-construction regulations might lead to more disorder, not less. This possibility might lead some city residents to be wary of proposals to deconstruct city land uses. As Skogan aptly observes, while Jacobs offers an order-maintenance justification for mixed-use environments, the premise of her work actually is that we have a taste for *disorder* in urban environments.<sup>199</sup> For this reason, even critics of the order constructed by zoning laws tend to favor tightly controlled regulatory changes, rather than the radical deregulation proposed by early enterprise-zone enthusiasts. For example, while Katyal advocates using land-use laws to encourage a diversity of land uses, he also warns that “these strategies carry costs and cannot be implemented until those costs have been weighed against crime reduction and other benefits.”<sup>200</sup> Similarly, Jerry Frug asserts that current land-use laws should be scrapped and replaced with an equally detailed code favoring mixed-use environments.<sup>201</sup>

Other scholars go so far as to cite the lack of (or laxly enforced) rules segregating land uses in poor minority neighborhoods as evidence of “environmental racism.” Jon Dubin asserts that “[r]esidents deprived of zoning protection are vulnerable to assaults on the safety, quality, and integrity of their communities ranging from dangerous and environmentally toxic hazards to more commonplace hazards, such as vile odors, loud noises, blighting appearances, and traffic congestion.”<sup>202</sup> The answer, according to Dubin, is to

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198. See, e.g., Omri Ben-Shahar & Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions Against Crime*, 11 J.L. ECON. & ORG. 434, 435-36 (1995); Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1193 (1994); Keith N. Hylton, *Optimal Law Enforcement and Victim Precaution*, 72 RAND J. ECON. 197, 201-02 (1996).

199. See JACOBS, *supra* note 17, at 238 (asserting that the “strange and unpredictable uses and peculiar scenes” are a strength of healthy city life); SKOGAN, *supra* note 2, at 7 (describing Jacobs as an “urban utopian” who “claim[s] that a measure of disorder is actually good for us”).

200. Katyal, *supra* note 10, at 1109.

201. See FRUG, *CITY MAKING*, *supra* note 99, at 145-55 (proposing alternatives to current land-use regulations); Been, *Comment*, *supra* note 154, at 1112-14 (expressing concern that the new urbanist agenda may result in the overregulation of land uses).

202. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 742 (1993).

strengthen order-construction regulations in poor neighborhoods and to use these regulations to suppress the physical disorder that plagues these communities.

These critiques thus suggest that the land-use reforms outlined in Part II might do more harm than good. But, in so doing, the critiques also disregard the significant social and economic costs imposed by order-construction regulations. For example, it may be true that low-income entrepreneurs, if freed from the regulatory straightjacket imposed by the order-construction regime, might open the types of business establishments sometimes equated with urban decay. These businesses, such as auto repair businesses, pawn shops, "hole-in-the-wall" restaurants, hair salons, etc., likely are attractive to individuals with limited education and training. But when confronted with a community where a run-down bodega remains the only viable business, a policymaker must ask whether this lone commercial establishment signals total hopelessness, or, on the contrary, shows that at least *someone* is trying to make a go of it there. Before using the Dubin critique as a reason to resist regulatory reform, the policymaker must further consider whether the addition of a new bodega, hair-braiding salon, or auto repair business might lead to less disorder, not more, by generating the foot traffic that Jacobs and the new urbanists argue fosters healthy and safe street life, by filling previously vacant storefronts, etc.

Obviously, regulatory reforms that abandon or relax the order constructed by zoning rules, thus inviting these questions, entail risk. But, they also offer the hope—perhaps, the best hope—for true renewal in struggling urban communities. Moreover, for the reasons discussed in the remainder of this Part, these reforms can be reconciled with the social norms justifications for the order-maintenance agenda. Indeed, deconstructing our cities may prove crucial to success of that enterprise.

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Both Dubin and Yale Rabin have suggested that such zoning practices sometimes are racially motivated. *See id.*; Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101 (Charles M. Haar & Jerold S. Kayden eds., 1989); *see also* ROBERT D. BULLARD, *INVISIBLE HOUSTON: THE BLACK EXPERIENCE IN BOOM AND BUST* 63-70 (1987) (discussing the problems attributable to commercial enterprises in Houston's (unzoned) African-American residential neighborhoods); Been, *Comment, supra* note 154, at 1113 (noting that "[n]ot all land use is bad, and not all zoning is misguided or harmful to the poor and to minorities. Indeed, it is ironic that one of the major forms of expulsive zoning that poor African American and Hispanic neighborhoods complain about is the mixing of uses—the very 'improvement' that forms one of the cornerstones of the new urbanism"). There is a substantial "environmental justice" literature examining whether undesirable land uses are sited in minority neighborhoods or poor and minority families are attracted to those neighborhoods because of lower property values. On this related "chicken and egg" problem, *see* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *YALE L.J.* 1383 (1994); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1 (1997); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 *YALE J. ON REG.* 195 (1997).

### A. City-Suburb Competition

First, any effort to weigh the relative costs and benefits of reforming land-use laws to encourage diversity of uses must include the reality of city-suburb competition. It may be true, as Jacobs argues, that some Americans have a taste for urban life. But it is indisputable that, over the past half-century, major cities have declined as first residents and then businesses left for greener suburban pastures. Although there are many reasons for this decline,<sup>203</sup> a major culprit is the structure of local government law, which encourages the development of “metropolitan areas” with major cities ringed by many dozens, if not hundreds, of independent municipalities. Economist Charles Tiebout influentially predicted that, within this system, municipalities will “compete” for residents by offering attractive packages of goods and services.<sup>204</sup>

Central-city governments recognize this fact, and have long tried to compete with suburbs for development and investment. For example, the “new” empowerment/enterprise-zone strategies discussed above are just the tip of the competition iceberg. The current economic development landscape is characterized by a dizzying array of subsidized financing, tax abatements, infrastructure improvements, and other “goodies.”<sup>205</sup> Regulatory concessions

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203. Possible contributors include white flight (and racism), aging infrastructure, changes in the nation’s economic base, incompetent city governments, and Americans’ preference for open spaces. See, e.g., WILSON, *supra* note 162, at 3-50 (1996) (discussing economic causes of inner city poverty); Briffault, *supra* note 193, at 11 (discussing causes of central cities’ downward spiral); Buzbee, *supra* note 193, at 60-70 (1999) (discussing “sprawl’s harms”); Garnett, *Trouble Preserving Paradise*, *supra* note 193, at 178 (discussing American housing preferences).

204. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

205. Consider the extremes to which state and local governments have proven willing to go in the past decade. A California municipality sought to pay the owner of valuable commercial real estate a \$38 million condemnation award in order to sell the property to the wholesale giant Costco, Inc., for \$1. See *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001). To attract a new NASCAR racetrack, Kansas amended its urban redevelopment law to allow NASCAR to qualify for tax increment financing, declared part of economically depressed Wyandotte County a “major tourism area,” condemned a large portion of a blue-collar neighborhood to make way for a new auto racetrack, and exempted the racetrack from all property taxes for thirty years. *Kansas ex rel. Tomasic v. Unified Gov’t of Wyandotte County/Kansas City*, 962 P.2d 543, 549-50 (Kan. 1998). Alabama sought to attract a Mercedes-Benz plant by offering to acquire and improve the factory site, buy 2500 of the vehicles produced, and train and pay the salary of workers for one year. Ivan C. Dale, Comment, *Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247, 253 (2002) (describing several incentive packages). A Michigan incentives package offered to a paper recycling mill cost the state \$2.4 million *per job*. *Id.* And Amarillo, Texas, mailed a check for \$8 million to each of 1300 companies around the country; each company was invited to cash the check in exchange for a commitment to create seven hundred new jobs in the city. See Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, REGION, Mar. 1995, <http://minneapolisfed.org/pubs/ar/ar1994.cfm> (last visited Sept. 26, 2004) (noting that “[w]hat is so remarkable about these . . . initiatives is that

are sometimes included in a “package” of incentives, especially to encourage the redevelopment of contaminated “brownfields.”<sup>206</sup> Unfortunately, the available empirical evidence suggests that fierce intergovernmental competition renders these strategies—which seek to attract larger employers to a city—ineffective.<sup>207</sup>

If cities are to compete successfully, their leaders must do more than offer economic incentives. Importantly, they must recognize that role that local power over land-use policy—a local government’s “most important local regulatory power”<sup>208</sup>—plays in city-suburb competition.<sup>209</sup> The standard account of city-suburb competition provides that local government power over land use leads inevitably to a tragedy-of-the-commons situation within a metropolitan area.<sup>210</sup> Each suburban government, viewed as coequal in the eyes of the law,<sup>211</sup> jealously guards its authority to regulate land use so as to maximize local tax revenues (and resident satisfaction).<sup>212</sup> More affluent suburbs tend to accomplish these goals with exclusionary zoning techniques that freeze out new development, pushing it to the urban fringe.<sup>213</sup>

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they are not remarkable”).

206. See generally Michael Allan Wolf, *Dangerous Crossing: State Brownfields Recycling and Federal Enterprise Zoning*, 9 FORDHAM ENVTL. L.J. 495 (1998).

207. See, e.g., INST. ON TAXATION & ECON. POLICY, MINDING THE CANDY STORE: STATE AUDITS OF ECONOMIC DEVELOPMENT 35-41 (2000) (summarizing fifteen state audits that show development incentives are generally ineffective); Enrich, *supra* note 140, at 390-405 (1996) (summarizing economic evidence and concluding that “[f]rom the states’ collective vantage point, the net effect of the incentive competition is, in fact, far worse than zero-sum. For, although the states can expect to achieve no overall gain in business activity or jobs, they do incur a very substantial loss of tax revenues”); Franklin J. James, *Economic Development: A Zero-Sum Game?*, in URBAN ECONOMIC DEVELOPMENT 157, 161 (Richard D. Bingham & John P. Blair eds., 1984) (“There is no convincing empirical evidence that urban economic development as currently practiced is more than a zero sum game.”); Schill, *supra* note 112, at 810 (1991) (“Another reason for the limited usefulness of economic development incentives is their ubiquity. Since many jurisdictions offer these benefits they cease to generate an advantage for any particular locale.”). *But cf.* Gillette, *supra* note 140, at 452-78 (1997) (questioning argument that incentives are usually a net loss for the offering jurisdiction).

208. Briffault, *supra* note 193, at 3.

209. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 506-28 (1991) (arguing that local governments use land-use regulations to compete for residents); see also FISCHER, *supra* note 192, at 214-20 (analyzing land-use powers in the twenty-five largest U.S. cities).

210. See, e.g., Garnett, *supra* note 193, at 163 (reviewing literature).

211. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 349 (1990) (noting that “local government law does not distinguish within the category of municipal corporation between city and suburb”).

212. *Id.* at 366 (linking suburban autonomy and local land-use regulation); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1134-35 (1996).

213. See FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 194, at 229-31 (attributing sprawl to “homeowner anxieties” and preference for open-space zoning); Briffault, *supra* note 212, at 1135-36 (noting that affluent communities use exclusionary zoning to preserve

Communities located on that fringe, recognizing their competitive advantage, encourage development by relaxing zoning laws. Increased sprawl—and urban disinvestment—inevitably results from this pattern of exclusion and invitation.<sup>214</sup>

In order to compete effectively, city governments must play to their land-use strengths. To the extent that city neighborhoods have *any* competitive land-use advantage over suburban ones, it likely is that some Americans do in fact have a taste for diverse urban environments. In other words, city residents should hope that Jacobs was right, and that the downfall of urban neighborhoods was caused by policies designed to make their land uses more orderly and *suburban*.<sup>215</sup> Unfortunately, many city officials fail to consider whether their longstanding order-construction regulatory policy hamstrings their ability to compete. For example, while many cities use “urbanness” to promote downtown redevelopment,<sup>216</sup> some cities continue to experiment with large-scale projects that seek to incorporate “suburban-office-park” developments into their urban environments.<sup>217</sup> It seems unlikely that downtown sites will prove the most attractive for large-scale developers. The suburban and exurban alternatives have too many advantages: more responsive public officials, less traffic, easier access to major highways, better schools, fewer land assembly problems, etc.<sup>218</sup> The problem of assembling a parcel of land large enough for even a small-scale development is itself enough to deter new entrants, unless the local government is willing to exercise the costly (fiscally and politically) power of eminent domain.<sup>219</sup>

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their high tax bases); Jerry Frug, *supra* note 156, at 1083-84 (describing use of exclusionary zoning).

214. See FISCHER, *supra* note 192, at 55 (attributing “‘leap frog’ pattern of development” to exclusionary zoning in central suburbs that forces new development to outer-ring suburbs with more favorable political climates); FRUG, *supra* note 99, at 17-25 (attributing the decline in central-city fortunes to city powerlessness over, among other things, extraterritorial land uses); Briffault, *supra* note 212, at 1135 (attributing development pattern to exclusionary zoning in affluent communities).

215. See JACOBS, *supra* note 17, at 16 (“We are in enough trouble already from trying to understand big cities in terms of the behavior, and the imagined behavior, of towns.”).

216. See *supra* note 160.

217. For example, Omaha, Nebraska, has spent hundreds of millions of dollars to redevelop its riverfront from an abandoned brownfield into the headquarters of ConAgra, Inc. and main campus of Gallup University (the polling organization). See Lively Omaha, Riverfront Update, at <http://www.livelyomaha.org/whatsnew/riverfront/update.htm> (last visited Sept. 26, 2004).

218. See, e.g., Been, *Comment*, *supra* note 154 (discussing economic motivations for suburban sprawl); Buzbee, *supra* note 193, at 63-68 (discussing causes and benefits of suburban sprawl).

219. For example, although twenty-five percent of the land in East Harlem is vacant, most of the vacant properties are small lots of less than five thousand square feet; only a handful are classified “large assemblages” (more than ten thousand square feet). See Manhattan Cmty. Bd. #11, City-Owned Vacant Property, [http://www.east-harlem.com/cb11\\_197A\\_cityowned.htm](http://www.east-harlem.com/cb11_197A_cityowned.htm) (last visited Sept. 26, 2004). See generally Garnett, *supra* note 107.

Cities will not find it easy to sell their urban life. In fact, new urbanist developers may recreate dense, mixed-use neighborhoods in the suburbs that are in many ways *better* than their older urban counterparts (i.e., safer, with better schools and new, low-maintenance buildings). Still, it seems reasonable to assert that cities should concentrate on being urban, because a city is likely to be better at being urban than at being suburban.<sup>220</sup> And, despite the significant obstacles to effective competition, the 1990s happily saw many urban success stories—Central Harlem, once a symbol of urban despair, is now, as noted above, undergoing a “second renaissance” attributed in large part to the federal Empowerment Zone program;<sup>221</sup> Chicago’s notorious Cabrini-Green housing projects are being replaced with upscale condominiums;<sup>222</sup> and the dot-com phenomenon transformed San Francisco’s Mission District.

Unfortunately, it remains a cold, hard reality that many of the communities that have suffered the most from the spiral of urban decline can never hope for this kind of a boom.<sup>223</sup> East Harlem might expect a renaissance like that experienced by Central Harlem. It enjoys the benefit of geography, since it is located on Manhattan Island, just north of the wealthy Upper East Side.<sup>224</sup> But consider, in contrast, the development prospects of Chicago’s Englewood neighborhood. Englewood was one of the communities featured in Wilson’s comprehensive study, discussed above, of Chicago’s “Black Belt.” It also earned a stop on former President Clinton’s “New Markets” tour, which sought to highlight communities that had not shared in the prosperity of the 1990s.<sup>225</sup> The population of Englewood is ninety-six percent African-American, and nearly forty-four percent of residents fall below the federal poverty line.<sup>226</sup>

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220. This conclusion might be seen to follow from a variant of the economic theory of comparative advantage. See Economist.com, Economics A-Z, at <http://www.economist.com/research/Economics/alphabetic.cfm?TERM=COMPARATIVE%20ADVANTAGE#COMPARATIVE%20ADVANTAGE> (last visited Sept. 26, 2004) (describing the theory of comparative advantage as follows: “[I]t pays countries to trade because they are different. It is impossible for a country to have no comparative advantage in anything. It may be the least efficient at everything, but it will still have a comparative advantage in the industry in which it is relatively least bad”).

221. See Upper Manhattan Empowerment Zone Dev. Corp., Home Page, at <http://www.umez.org/home.htm> (last visited Sept. 26, 2004).

222. See, e.g., Sharoff, *supra* note 173, at K7.

223. See generally WILSON, *supra* note 162 (chronicling life on Chicago’s South Side).

224. Of course, such gentrification has its costs, especially the displacement of long-term residents. On the link between land-use policy and gentrification, see, for example, Dubin, *supra* note 202, at 768-72.

225. See, e.g., David E. Sanger, *Fighting Poverty, President and Speaker Find a Moment of Unity*, N.Y. TIMES, Nov. 6, 1999, at A10.

226. See SBC, YELLOW PAGES: ENGLEWOOD, ILLINOIS 2, at <http://sbcsmaryellowpages.com/pages/documents/20571.pdf> (last visited Sept. 26, 2004) (listing racial population statistics for Englewood); Chi. Tribune, 2000 Census Database: Wages and Workforce, at <http://www.chicagotribune.com/classified/realstate/chi-020515census-income,0,1933037.formprofile> (last visited Sept. 26, 2004) (stating that 43.8% of Englewood residents fall below the poverty line).

Crime is a problem, although rates fell steadily in the 1990s, after the city of Chicago began a comprehensive community-policing effort in the Englewood community.<sup>227</sup>

In places like Englewood, the need to reconsider the longstanding assumption that ordered land uses suppress disorder is a policy imperative. Englewood likely will never gentrify. Chicago has invested substantial resources toward redeveloping Englewood (parts of the community fall in a Federal Empowerment Zone as well as a state enterprise zone).<sup>228</sup> One major retail development project—complete with a new urbanist design—is planned for the area’s main thoroughfare.<sup>229</sup> Government intervention might succeed in attracting a few projects like this retail center, which is located on land that the city acquired and donated to the developer. But, these projects likely cannot turn a community around on their own. Furthermore, the prospect of being “saved” by an outsider may generate resentment by residents.<sup>230</sup> And, successful redevelopment projects frequently raise concerns about the displacement that accompanies gentrification.<sup>231</sup> An economic renewal promoted by land-use reforms that seek to unleash the entrepreneurial energies of local residents is not only the most realistic hope for places like Englewood, but it might prove to be a more organic and sustainable one as well.

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227. See *Crime and Community Policing, by the Numbers*, CHI. REP., Dec. 1999, at <http://chicagoreporter.com/1999/12-99/1299capsgraphics.htm> (last visited Sept. 26, 2004). The Englewood community made national headlines a few years ago when two young boys, ages seven and eight, were charged with the first-degree murder of another child. The charges were subsequently dropped. Joshua Howes, *Englewood Leaders Urge City to Create Jobs*, CHI. TRIB., July 29, 2003, at C2.

228. See Howes, *supra* note 227, at C2 (noting that, in 1999, Chicago mayor Richard Daley announced \$256 million in public and private projects to revitalize the Englewood community).

229. See David Roeder, *Englewood Project Has Backing of Big Names*, CHI. SUN-TIMES, May 30, 2002, at 49.

230. See Howes, *supra* note 227, at C2 (reporting community leaders are resentful that most of the construction on the project is being done by outside firms and employees).

231. Some observers have claimed that the revival of downtown Cincinnati—spurred on by two new professional sports stadiums—and the city’s concerted efforts to redevelop the black neighborhood known as Over-the-Rhine fueled racial tensions that led to the 2001 riots. See Wesley Hogan, *Cincinnati: Race in the Closed City*, 32 SOC. POL’Y 49 (2001) (describing city redevelopment efforts and attributing racial tensions to “economic apartheid”); Michelle Cottle, *Boomerang: Did Integration Cause the Cincinnati Riots?*, NEW REPUBLIC, May 7, 2001, at 26 (noting that “Cincinnati has spent the last decade trying to turn this pocket of urban poverty into a place where upper-income white folks come to eat, drink, shop, and even live”); Louis Uchitelle, *Long Before Recent Unrest, Cincinnati Simmered*, N.Y. TIMES, May 1, 2001, at A16. *But see* Heather MacDonald, *What Really Happened in Cincinnati*, CITY J., Summer 2001, at 28 (rejecting “gentrification” as cause of the race riots). For a recent and thoughtful (partial) defense of land-use policies that lead to gentrification, see Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405 (2003).



### B. *The Norms of Work*

Second, order-maintenance proponents argue that government must take steps to reinvigorate the social norms that check physical and social disorder in poor urban communities. But police efforts to suppress disorder are not the only effective means of accomplishing that important goal. On the contrary, reforming order-construction regulations can also bolster positive norms of order, both by making the physical environment more conducive to private monitoring<sup>232</sup> and, equally importantly, by eliminating regulatory barriers to economic (especially entrepreneurial) activity in poor communities.

While social norms scholars blame the chaos plaguing inner-city communities on the government's failure to enforce basic standards of decency through the criminal law, other social scientists connect the persistent poverty, crime, and disorder in poor urban neighborhoods with the lack of a "culture of work."<sup>233</sup> For example, most inner-city residents endorse the importance of individual initiative and hard work.<sup>234</sup> But, people's faith in the efficacy of such initiative may be undermined unless it is based on an observable reality.<sup>235</sup> As a result of chronic joblessness, in other words, inner-city residents develop what psychologists would term "negative self-efficacy"; they wish to achieve success through work, but become so discouraged by the reality of their community that they cease to believe that it is possible to do so.<sup>236</sup> The economic effects of this phenomenon parallel the social-influence effects of urban disorder. Just as visible disorder discourages law-abiders by signaling that a community tolerates lawlessness,<sup>237</sup> widespread unemployment signals that economic prospects are dim and disheartens job seekers.

The lack of a "culture of work" resulting from chronic joblessness contributes to social disorder. As Wilson observes, work "constitutes a framework for daily behavior and patterns of interaction because it imposes

232. See, e.g., Katyal, *supra* note 10, at 1108-09.

233. See WILSON, *supra* note 162, at 51-86.

234. *Id.* at 67 (noting that nearly all of the respondents in the Urban Poverty and Family Life Study (the source of Wilson's data) stated that "plain hard work" is important for getting ahead).

235. See, e.g., CHARLES A. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, at 180 (1984) ("The principal ongoing incentive has been *faith that investments do pay off*, based on what has happened to other people.") (emphasis in original); WILSON, *supra* note 162, at 66 (discussing how economic isolation contributes to "ghetto-related cultural traits").

236. See MIRIAM EREZ & P. CHRISTOPHER EARLEY, *CULTURE, SELF-IDENTITY, AND WORK* 99 (1993); Marta Tienda & Haya Stier, *Joblessness and Shiftlessness: Labor Force Activity in Chicago's Inner City*, in *THE URBAN UNDERCLASS* 135 (Christopher Jencks & Paul E. Peterson eds., 1991); see also Albert Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 *AM. PSYCHOLOGIST* 122 (1983) (discussing self-efficacy theory); Schill, *supra* note 114, at 502-22 (1993) (discussing theories explaining why concentrated poverty may lead to a lack of perceived self-efficacy).

237. See, e.g., Kahan, *Social Influence*, *supra* note 7, at 369 (noting that "[v]isible disorder is a self-reinforcing cue about the community's attitude toward crime").

disciplines and regularities.”<sup>238</sup> But “where jobs are scarce . . . many people eventually lose their feeling of connectedness to work in the formal economy; they no longer expect work to be a regular, and regulating, force in their lives.”<sup>239</sup> Work determines where we are going to be and when we are going to be there; the lives of those without regular employment become less coherent, not just economically, but socially as well. In one of the earliest studies of the effects of long-term unemployment, Marie Jahoda, Paul F. Lazarsfeld, and Hans Zeisel chronicled how Depression-era unemployment affected the small industrial community of Marienthal, Austria.<sup>240</sup> The study demonstrated that prolonged and overwhelming unemployment devastated the cultural life of the community. Residents who once participated wholeheartedly in community and political life “lost the material and moral incentives to make use of their time” and “drift[ed] gradually out of an ordered existence into one that is undisciplined and empty.”<sup>241</sup> The same phenomenon occurs in inner-city communities. The study which formed the basis of Wilson’s work in Chicago found that unemployed men and women ““were consistently less likely to participate in local institutions and have mainstream friends [that is, friends who are working, have some college education, and are married] than people in other classes.””<sup>242</sup>

Furthermore, sociological and psychological evidence suggests that persistent unemployment makes it more difficult for parents to reinforce norms favoring law-abiding behavior. This story is a familiar one. When a community lacks appropriate “role models”—when children observe that drug dealing and gang membership are the easiest paths to success and respect—parents find it more difficult to inculcate mainstream values. This is particularly true if the parents themselves are jobless.<sup>243</sup> As Wilson observes:

The more often certain behavior such as the pursuit of illegal income is manifested in a community, the greater will be the readiness on the part of some residents of the community to find that behavior “not only convenient but morally appropriate.” They may endorse mainstream norms against this behavior in the abstract, but then find compelling reasons and justifications for

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238. See WILSON, *supra* note 162, at 73.

239. *Id.* at 52.

240. MARIE JAHODA ET AL., *MARIENTHAL: THE SOCIOGRAPHY OF AN UNEMPLOYED COMMUNITY* (1971).

241. WILSON, *supra* note 162, at 73-74 (discussing study).

242. *Id.* at 65; see also Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 AM. POL. SCI. REV. 286, 292 (1993) (connecting poverty and lack of political participation).

243. See Mary Corcoran et al., *The Association Between Men’s Economic Status and Their Family and Community Origins*, 27 J. HUM. RESOURCES 575, 592 (1992) (connecting parents’ welfare dependency and children’s achievements); Martha S. Hill & Greg J. Duncan, *Parental Family Income and the Socioeconomic Attainment of Children*, 16 SOC. SCI. RES. 39, 48-49 (1987) (arguing that parental success improves their “role model function” among children).

this behavior, given the circumstances in their community.<sup>244</sup>

Chronic joblessness has also been linked with the breakdown of the family, which itself correlates with self-destructive behavior among young people.<sup>245</sup>

Most social scientists, moreover, argue that the “sprawl” phenomenon discussed above has resulted in a “spatial mismatch” between low-income inner-city residents and low-skilled service jobs in the suburbs.<sup>246</sup> Because city residents lack information about available jobs<sup>247</sup>—as well as a reliable way to get to them<sup>248</sup>—these jobs are, as a practical matter, unavailable. Thus, Wilson and others have suggested that neighborhood jobs and businesses are critical to reestablishing the “culture of work” that reinforces public order. The recollections of older inner-city residents about their neighborhood’s better days support this conclusion.<sup>249</sup> These residents tend to connect the loss of social order in their communities to the decline of economic activity. They recall a time when their community was safe and healthy, precisely because local businesses made it—as Jacobs would predict—vibrant. In other words, rethinking how land-use regulations may affect the availability of *legitimate* alternatives to criminal entrepreneurship may serve a function similar to dispersing loitering gang members and excluding drug dealers from troubled communities—that is, enhancing the social norms that keep disorder in check.

### C. *The Social Influence Effects of Law Avoidance*

Third, order-construction regulations, like all land-use regulations, are

244. WILSON, *supra* note 162, at 70.

245. See, e.g., Greg J. Duncan & Saul D. Hoffman, *Teenage Underclass Behavior and Subsequent Poverty: Have the Rules Changed?*, in THE URBAN UNDERCLASS, *supra* note 236, at 155, 157; Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 AM. J. SOC. 348 (1987); Mark Testa & Marilyn Krogh, *The Effect of Employment on Marriage Among Black Males in Inner-City Chicago*, in THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS 59-95 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995).

246. On the spatial mismatch hypothesis, see generally PAUL A. JARGOWSKY, *POVERTY AND PLACE* (1996); Richard Arnott, *Economic Theory and the Spatial Mismatch Hypothesis*, 35 URB. STUD. 1171, 1171-72 (1998); Harry J. Holzer, *The Spatial Mismatch Hypothesis: What Has the Evidence Shown?*, 28 URB. STUD. 105, 107 (1991); Keith R. Ihlanfeldt & David L. Sjoquist, *The Effect of Job Access on Black and White Youth Employment: A Cross-Sectional Analysis*, 28 URB. STUD. 255, 256 (1991) (reviewing literature); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL’Y DEBATE 371 (1994); John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 26-47 (1989); Schill, *supra* note 112, at 798-808 (1991); Brian D. Taylor & Paul M. Ong, *Spatial Mismatch or Automobile Mismatch? An Examination of Race, Residence, and Commuting in US Metropolitan Areas*, 32 URB. STUD. 1453 (1995).

247. See, e.g., CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 123 (1992).

248. See Garnett, *The Road from Welfare to Work*, *supra* note 117, at 217-28.

249. See *supra* notes 162-65 and accompanying text.

routinely disregarded; enforcement usually is sporadic and complaint-driven.<sup>250</sup> For the reasons set forth above, residents of poor communities have much to gain from reforming these regulations. The cost of complying with the regulations may price many would-be entrepreneurs out of the market. For this reason, the residents also have the most to lose from these regulations' enforcement. It is reasonable, therefore, to expect high levels of law avoidance and low levels of enforcement in poor communities. Poor entrepreneurs have an economic incentive to disregard these rules; their neighbors, understanding this incentive (and operating under it as well) may be less motivated to report regulatory infractions.

It is important to consider this probability in light of the negative social-influence effects of widespread, visible law avoidance. Put simply, social-influence theory predicts that people will be law-abiding when they perceive that their neighbors are obeying the law.<sup>251</sup> This is one way in which depolicing advocates may have erred; the private deterrence measures that they advocated—neighborhood watch groups, bars on windows, etc.—may signal the prevalence of crime and thus “erode deterrence by emboldening law-breakers and demoralizing law-abiders.”<sup>252</sup> Similarly, widespread regulatory avoidance may send mixed signals about community members' attitudes toward complying with the law generally. The broken windows hypothesis itself suggests that relatively minor legal infractions (e.g., vandalism and public drunkenness) can create an environment that fosters more serious crime.<sup>253</sup>

The broken windows hypothesis also suggests that law avoidance alone may not warrant legal reforms. After all, the decriminalization of minor (and

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250. See, e.g., PLATT, *supra* note 192, at 296 (“Zoning has particularly been criticized for procedural inadequacies: lax enforcement, favoritism, lack of consistency with planning, and excessive rigidity in some cases and undue flexibility in others.”); Eric T. Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1, 1 (1985) (“The enforcement of land use restraints . . . is often haphazard. Municipalities usually do not check a property for ordinance and code violations unless someone files a complaint or requests an inspection.”); Garnett, *On Castles*, *supra* note 18, at 1228 (noting that zoning enforcement is notoriously lax and frequently complaint-driven); Richard A. Wexler, “A Zoning Ordinance Is No Better than Its Administration”—*A Platitude Proved*, 1 J. MARSHALL J. PRAC. & PROC. 74, 75 (1967); R.F. Babcock, *The Chaos of Zoning Administration*, ZONING DIG., Dec. 1960, at 1.

251. See, e.g., Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval, and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980). The term “social influence” describes a commonplace phenomenon—that our behavior is shaped by, and frequently conforms to, our perceptions of others' behavior. See, e.g., Kahan, *Social Influence*, *supra* note 7, at 352; see also, e.g., ELLIOT ARONSON, *THE SOCIAL ANIMAL* 6 (7th ed. 1995) (defining “social influence”); DAVID J. SCHNEIDER, *INTRODUCTION TO SOCIAL PSYCHOLOGY* 306 (1988) (same).

252. Kahan, *Social Influence*, *supra* note 7, at 387.

253. See, e.g., Livingston, *Police Discretion*, *supra* note 5, at 581 (describing theory that “neighborhood disorder is linked both to fear and more serious crime”); see also SKOGAN, *supra* note 2, at 1-84 (purporting to provide empirical support for the crime-disorder connection).

likely prevalent) public-order offenses like public drunkenness contributed to the disorder plaguing many urban communities.<sup>254</sup> When the negatives of regulatory avoidance are considered together with the positives of the reforms discussed above, however, the case for legal reform becomes much stronger. Hopefully, these reforms would not simply legalize innocent disorder, but rather would stimulate the social and economic activity necessary for healthy, and orderly, community life. If so, changing the law to recognize the land-use realities of poor neighborhoods (e.g., many women are paid to care for children in their homes) might actually do more to reinforce norms favoring law-abiding behavior more than the regulatory status quo.

#### D. Diffusing the “Us v. Them” Perception

Finally, and importantly, order-maintenance proponents repeatedly confront the argument that broken windows tactics unfairly single out minority communities and their residents. While it is likely true, as Tracey Meares and Dan Kahan have forcefully argued elsewhere, that poor minority communities have the most to gain from order-restoration efforts,<sup>255</sup> it is also true that minorities continue to be more distrustful of police efforts in their communities than white Americans.<sup>256</sup> The linking of well-publicized police abuses—such as the notorious Abner Louima case<sup>257</sup>—to broken windows policing understandably heightens these concerns.<sup>258</sup> For this reason, order-maintenance proponents caution against policing tactics that single out minority communities for extreme measures, such as law-enforcement “crackdowns” that send “‘warriors’ to intervene . . . as strangers” into a community on a one-time basis.<sup>259</sup> Such efforts may backfire by alienating those that they seek to assist.<sup>260</sup> Community policing seeks to diffuse these tensions by encouraging

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254. See generally KELLING & COLES, *supra* note 6, at 43-49 (attributing growth in urban disorder in part to decriminalization of drunkenness).

255. See, e.g., Meares & Kahan, *Paradox*, *supra* note 32, at 21 (arguing that “the worst consequence of the ongoing commitment to the 1960s conception of rights may be its disempowering effect on inner-city communities”); see also George L. Kelling, *A Policing Strategy New Yorkers Like*, N.Y. TIMES, Jan. 3, 2002, at A23 (citing poll data suggesting that African-American and Hispanic New Yorkers support order-maintenance policing to greater extent than whites).

256. See, e.g., RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 25-28 (1997).

257. Abner Louima is a Haitian-American who was sexually brutalized by several New York City police officers following his arrest. Dan Barry, *Officer Charged in Man’s Torture at Station House*, N.Y. TIMES, Aug. 14, 1997, at A1; see Harcourt, *supra* note 9, at 378-80 (linking Louima case and rise of police brutality charges generally to New York City’s order-maintenance policing).

258. See, e.g., Burnham, *supra* note 49, at 63, 63-69; Harcourt, *supra* note 9, at 377-81.

259. KELLING & COLES, *supra* note 6, at 96-97 (warning against sweeps and crackdowns where “‘warriors’ intervene . . . as strangers” in a neighborhood).

260. See, e.g., MICHAEL S. SCOTT, *THE BENEFITS AND CONSEQUENCES OF POLICE CRACKDOWNS* 16-17 (2003) (noting that “crackdowns can worsen police-community relations and thereby undermine police legitimacy”), available at <http://>

residents to work with police to identify and prioritize community problems.<sup>261</sup> As Livingston observes, “The police look to the community in formulating police initiatives; broad authorization, at the neighborhood level, is deemed essential to involving the police significantly in efforts to lessen disorder problems.”<sup>262</sup> It remains the case, however, that resulting order-maintenance policies occasionally place police officers in an adversarial position with members of the very community identifying the targeted “disorders.”

The land-use reforms outlined in this Article represent another opportunity to dispel these tensions. These legal reforms seek to bolster social norms not by recriminalizing disorder, but rather by eliminating regulations that may stand in the way of a healthier economic and social climate in our poorest communities. This richer, more constructive, understanding of the public-order puzzle—one that includes more than efforts to crack down on disorder—could further broaden community support for order-restoration efforts generally.<sup>263</sup>

#### IV. LAND-USE REFORM AS A COMMUNITY-POLICING ISSUE

Thus far, this Article has explored how property regulation affects efforts to restore order in America’s urban cores. The Article has sought first to illustrate how property regulations are being used to suppress the physical decline linked to social disorder and second to examine the implications of local officials’ natural tendency to equate the particular order constructed by zoning laws with the absence of disorder. Importantly, Parts II and III of the Article suggest reasons that the zealous enforcement of order-construction regulations may ultimately impede, rather than augment, order-maintenance efforts. But, even if untangling the disorder-suppression/order-construction equation is a good idea, the above discussion makes clear the significant cultural and institutional impediments to legal reforms along these lines.

For all the reasons outlined above, the deconstruction of city land uses may prove critical to order-restoration efforts in some poor communities. Therefore, it is imperative for city officials and community leaders to explore ways to overcome the impediments to implementing such reforms. The broad trend in local government law toward the devolution of authority to “sublocal” institutions<sup>264</sup> presents interesting opportunities to accomplish that important goal. Sublocal evaluations of the order-construction/disorder-suppression equation are particularly appropriate in light of the fact that large cities tend to be made up of numerous distinctive urban enclaves. It therefore is reasonable

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[www.cops.usdoj.gov/mime/open.pdf?Item=964](http://www.cops.usdoj.gov/mime/open.pdf?Item=964) (last visited Sept. 26, 2004).

261. See, e.g., Livingston, *Police Discretion*, *supra* note 5, at 575-84.

262. *Id.* at 564.

263. Such support is widely acknowledged to be critical to the success of these efforts. See, e.g., Livingston, *Police Discretion*, *supra* note 5, at 565-91 (discussing order-maintenance policies).

264. See generally, e.g., Briffault, *supra* note 140.

to believe that the residents' regulatory "tastes" vary from neighborhood to neighborhood. In fact, several scholars have elsewhere used neighborhood distinctiveness to advocate devolving certain decisions about land-use regulation to neighborhood institutions similar to the now-popular "business improvement districts," which themselves have been enlisted to help implement the order-maintenance agenda.<sup>265</sup>

Short of creating new neighborhood institutions with legislative authority over land use, one possibility is to broaden the agenda of the community-policing discussions that have become central to formulating order-maintenance policies in most cities. These discussions could provide a forum within which community members consider how land-use regulations shape the order of urban neighborhoods. As discussed above, community-policing theory encourages local residents to work with police to identify and target disorders that impede community renewal. Community policing is not perfect—indeed, even its strongest proponents admit that, in some cases, it "has come to mean all things to all people."<sup>266</sup> Ideally, however, community-policing efforts begin with discussions asking community members to identify problems that traditional law enforcement strategies may overlook or discount. And, one benefit of this model is that, theoretically, everything is on the table, including priorities that traditionally were not classified as "law enforcement" problems.<sup>267</sup>

Not surprisingly, in light of the evidence linking property disorder and crime discussed above, community-policing efforts have led to the increased use of disorder-suppression regulations in some communities. For example, when Baltimore, Maryland, instituted a formal community-policing program a decade ago, residents of the struggling Boyd Booth neighborhood immediately identified property decay and abandonment as a priority. As a result of discussions with Boyd Booth residents, state and local officials provided funds for boarding up vacant housing, erecting fences, improving lighting, and

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265. See GEORGE W. LIEBMANN, *THE LITTLE PLATOONS: SUB-LOCAL GOVERNMENTS IN MODERN HISTORY* 143 (1995); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998) (arguing for retrofitting residential community associations to urban neighborhoods); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 343-46 (1993); Robert Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 866-67 (1999) (arguing for the devolution of land-use regulation to community groups in inner-city areas). On business improvement districts, see generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 370 (1999). Such a solution may be unnecessary given the extent of neighborhood input into local land-use decisions even absent the additional layer of "urban federalism." See, e.g., Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 893-909 (1983).

266. See KELLING & COLES, *supra* note 6, at 158.

267. See *id.*; Livingston, *Police Discretion*, *supra* note 5, at 575-77 (discussing community-policing theory and practice).

making cosmetic improvements in the neighborhood. A local public interest group helped residents pursue public nuisance actions against drug houses and take legal actions against negligent landlords. And the neighborhood association established a summer jobs program that focused on cleaning public spaces.<sup>268</sup> After these reforms, crime decreased dramatically in the community, and residents testified that they no longer feared leaving their homes.<sup>269</sup>

Thanks to the ascendancy of community-policing practices, these citizen-government discussions now are being carried out in hundreds of poor neighborhoods throughout the country.<sup>270</sup> And there is no reason why disorder suppression should be the only subject on the table. Just as Boyd Booth residents prioritized property abandonment, residents elsewhere could be encouraged—as part of broader discussions about order-maintenance priorities—to consider the ways in which order-construction regulations shape their neighborhoods, for good and ill. This is precisely what happened in East Harlem. While the effort there was not formally part of a “community policing” program, the recent land-use reforms there grew out of broader discussions about various priorities, including the need to restore the “quality of life” for area residents and residents’ own recognition that some order-construction regulations drained the area of needed vitality.<sup>271</sup> As a result, community leaders identified order-construction regulations that stood in the way of renewal and proposed reforms to city regulators who embraced them.

Including the subject of land-use reform in community-policing discussions elsewhere could empower residents to critically examine how order-construction and disorder-suppression regulations shape the order of their neighborhoods. Implementing the results of such discussions would require local legislative action. But, hopefully, if community discussions generated a formal land-use reform proposal, city officials would endeavor to overcome the significant public-choice impediments to changing the order-construction regime, as they did in response to the East Harlem proposal. Furthermore, the results of neighborhood-by-neighborhood examinations of the order-construction/disorder-suppression equation might serve to educate legislators about the need for urban land-use reform.

What types of reforms might this process produce? Neighborhood distinctiveness likely means that the results of such discussions would vary dramatically from neighborhood to neighborhood. Some communities might risk radical deregulation; others might fear the disruption of even minor regulatory reforms. Still, the East Harlem experience suggests the types of regulations that inner-city residents might view as problematic. As noted above, residents there did not opt for radical deregulation; rather, they

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268. The foregoing description comes from KELLING & COLES, *supra* note 6, at 197-98.

269. *Id.* at 198.

270. See Livingston, *Police Discretion*, *supra* note 5, at 577 (discussing the prevalence of community policing).

271. See NEW DIRECTIONS, *supra* note 21.



advocated a relatively narrow set of reforms—a new commercial overlay zone, the reduction of off-street parking requirements for businesses in commercial overlays generally, and shallower setbacks in residential zones. The supporting documents submitted to the city indicted the former regulations for standing in the way of healthier, more orderly, community life.<sup>272</sup>

Other communities might identify similarly counterproductive regulations. Consider, for example, how order-construction regulations shape Chicago's Englewood community. Most of Englewood is zoned "R-3" or "R-4," both general residential districts allowing a mix of single and multifamily dwellings; churches, convents, libraries, day-care centers, and community homes are also permitted.<sup>273</sup> The commercial establishments—restaurants, bars, food stores, etc.—that Jacobs and others argue serve as "informal meeting places" and foster healthy community life are prohibited in these zones.<sup>274</sup> These types of establishments are permitted only along major thoroughfares, spaced approximately eight blocks apart.<sup>275</sup> To the extent that such establishments once existed in Englewood's residential districts as nonconforming uses, many have since been eliminated by amortization rules.<sup>276</sup> Those that remain operate under restrictions designed to make it difficult for them to continue operating: buildings may be repaired but not altered or enlarged,<sup>277</sup> a temporary abandonment of the use results in the loss of the right to operate, etc.<sup>278</sup>

Home occupations are permitted in Englewood's residential zones, but several occupations that low-skilled individuals might find attractive, such as automobile repair, work in barber and beauty shops, catering, contracting and landscaping work, and light "piecemeal" manufacturing work, are expressly prohibited.<sup>279</sup> Even permitted occupations are strictly limited to work that is "accessory and secondary to the use of a dwelling for residential purposes."<sup>280</sup> The business may comprise no more than ten percent of the floor area of the home, or three hundred square feet, whichever is greater;<sup>281</sup> exterior buildings, such as garages, may not be used (even for storage purposes).<sup>282</sup> In a poor

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272. *See id.*

273. CHI., ILL. ZONING CODE §§ 7.3-7.4 (2004) (listing permitted uses).

274. *Id.* § 7.3-6 (listing uses permitted in R-6 residence district, but excluded from R-1 through R-5 districts).

275. *See* Dep't of Zoning, City of Chi., Chicago Zoning Maps (on file with author).

276. *See* CHI., ILL. ZONING CODE § 6.5-4 (1969) (providing that nonconforming uses in residential structure are to be eliminated within fifteen years of enactment); *see also id.* § 6.4-8(5) (establishing amortization schedules for nonconforming uses in commercial structures located in residence districts, which vary from twenty-five to sixty years).

277. CHI., ILL. ZONING CODE §§ 6.4-1, 6.4-2 (2004).

278. *Id.* § 6.4-4. A nonconforming use may be changed to a different type of nonconforming use, provided that the intensity of the business does not increase. *Id.* § 6.4-7.

279. *Id.* § 4-380-070(a).

280. *Id.* § 4-380-060(b).

281. *Id.* § 4-380-060(g).

282. *Id.* § 4-380-060(f).

community, where few have the luxury of space, these limitations alone likely will prevent many individuals from working at home. And further restrictions make it difficult even for those with the space to do so: residents may not hire any employees to work in the business,<sup>283</sup> alter their home in any way to accommodate it,<sup>284</sup> “display or create any external evidence of the operation of the home occupation,”<sup>285</sup> or welcome more than ten patrons per day.<sup>286</sup>

Could changes in this regulatory landscape that admittedly make it appear less orderly help create social and economic conditions that would bolster order-maintenance efforts? A strong argument can be made that these order-construction regulations are antithetical to the social and economic climate necessary for healthy urban life. Substantial restrictions on home businesses may impede the entrepreneurial efforts of residents who cannot afford commercial office space. These regulations may also lower the level of activity in residential neighborhoods. While this fact is generally used to justify limits on home businesses, it might also be seen as negative. After all, as Jacobs argued, social and commercial activity helps guarantee that urban neighborhoods remain vibrant and safe. Home business patrons might provide essential “eyes on the street” to keep disorder in check; home business entrepreneurs may bolster healthy norms of work.<sup>287</sup> Similarly, traditional zoning rules treat “nonconforming uses”—such as businesses in residential zones—as “disorders” to be eliminated over time, as illustrated by the Chicago zoning regulations discussed above. While the goal of these regulations is to impose uniformity (and thus to restore order), these restrictions may prove counterproductive because they tend to discourage upkeep and lead to the physical decline of buildings. They may also deprive neighborhoods of much-needed social activity and commercial vitality.<sup>288</sup>

Finally, by virtue of the community’s location on Manhattan Island, the most dense urban center in the United States, the preexisting regulatory scheme in East Harlem likely allowed more mixing of commercial and residential uses than most zoning codes permit. Virtually all of the north-south streets, and a handful of east-west streets, are designated commercial “overlay” zones. In less dense, more typical, communities, such as Englewood, simply designating “mixed-use” zones might address urban problems by increasing the amount of

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283. *Id.* § 4-380-010(a).

284. *Id.* § 4-380-060(c), (e).

285. *Id.* § 4-380-060(d).

286. *Id.* § 4-380-110(a).

287. See Garnett, *On Castles*, *supra* note 18, at 1216-19 (discussing need for regulatory reform in welfare-reform context); *id.* at 1222-28 (discussing communitarian arguments for home businesses).

288. See, e.g., Arthur Ientilucci, *Pigs in the Parlor or Diamonds in the Rough? A New Vision for Nonconformity Regulation*, ZONING NEWS, Apr. 2003, at 1 (arguing that traditional regulation of nonconformities, which aims to eliminate them, may contribute to neighborhood decline and recommending regulatory flexibility).

street-level activity in a neighborhood.<sup>289</sup> Some communities might also identify public property regulations, especially ubiquitous restrictions on street vending, as an impediment to community renewal.<sup>290</sup>

#### CONCLUSION

The physical/geographic order imposed by zoning has long been equated with the absence of the social disorders targeted by order-maintenance efforts. This Article has explored various reasons to question whether, in some cases, the opposite may be true, i.e., whether zoning rules might actually impede efforts to eliminate the social disorders plaguing many urban communities. The order constructed by our prevailing system of land-use regulation arguably deprives many urban neighborhoods of the economic and social vitality that is critical to true renewal: mixed-use environments tend to encourage healthy informal social interaction that itself suppresses disorder; single-use zones discourage it. Order-construction regulations also may contribute to the dire economic situation in many inner-city communities by pricing many would-be entrepreneurs out of the market: while such “bootstrap capitalists” might provide hopeful examples for their neighbors, their absence can itself lead to despair that fosters disorder.

Of course, a community wary of disorder may resist changes to the order constructed by zoning laws. This is an understandable, if unfortunate, impulse. Yet the East Harlem experience demonstrates that such resistance can be (imperfectly) overcome when community leaders themselves come to view land-use laws as impediments to community development. Perhaps the types of discussions that led to the reforms in East Harlem could be integrated into the community-policing forums that are central to implementing the broader order-maintenance agenda. Such discussions would encourage more communities to consider how the ordering constructed by land-use regulations affects efforts to reduce physical and social disorder in our cities. At the very least, the current focus on restoring order in our cities hopefully will present opportunities to ask what the “public order” is—and to critically reevaluate how our property regulations shape it.

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289. The growing number of cities which have designated “mixed-use” zones reflects the new urbanists’ growing influence. *See, e.g.*, City of Albuquerque, Mixed-Use Zoning Proposals, at <http://www.cabq.gov/planning/pages/devprocess/muzone.html> (last visited Sept. 26, 2004); CITY OF COLORADO SPRINGS, MIXED-USE ZONING AND STREET STANDARDS (2001), <http://www.springsgov.com/units/planning/CurrentProj/CompPlan/CodeExecSum.pdf> (last visited Sept. 26, 2004); FORT WORTH S. INC., MIXED-USE ZONING IN THE CITY OF FORT WORTH: A GUIDE TO FORT WORTH’S MIXED-USE ZONING CLASSIFICATIONS, <http://www.fortworthsouth.org/mixeduse.html> (last visited Sept. 26, 2004); Steve Lewis, *Zoning Trends: The Mixed-Use Puzzle*, RETAIL TRAFFIC, May 1, 2002, at [http://retailtrafficmag.com/ar/retail\\_zoning\\_trends\\_mixeduse/](http://retailtrafficmag.com/ar/retail_zoning_trends_mixeduse/) (last visited Sept. 26, 2004).

290. *See, e.g.*, Regina Austin, “An Honest Living”: *Street Vendors, Municipal Regulation, and the Black Public Square*, 103 YALE L.J. 2119, 2122-25 (1994).