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Managing the Urban Commons

Nicole Stelle Garnett

Notre Dame Law School, ngarnett@nd.edu

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ARTICLE

MANAGING THE URBAN COMMONS

NICOLE STELLE GARNETT[†]

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INTRODUCTION

In July 2010, following failed labor negotiations and facing a mounting budget crisis, the Oakland, California, Police Department fired eighty police officers and announced that it would no longer respond to reports of certain crimes, including burglary, vandalism,

[†] Professor of Law, Notre Dame Law School. I thank Tricia Bellia, Peg Brinig, Richard Garnett, Mark McKenna, and participants in the Symposium on New Dimensions in Property Theory, jointly sponsored by the *University of Pennsylvania Law Review* and the University of Pennsylvania Law School. I also received valuable feedback on a previous draft at a faculty workshop at the George Washington University Law School. Mistakes are my own.

theft, and a host of low-level offenses.¹ Oakland is not the only community to have limited—or considered limiting—police services in response to local budget woes. Cities across the country—small and large, urban and suburban—have been forced to scale back the size of their police forces. While some have joined Oakland in explicitly pairing budget cuts with service cuts,² others have vowed to redouble their efforts to stretch scarce resources even further. Upon assuming office, for example, Chicago Mayor Rahm Emanuel asked his police chief to freeze hiring and cut \$190 million from his budget.³ Emanuel, however, assured an anxious public that he “remain[ed] committed to putting more officers on the streets,” insisting that the budget cuts would come from the central office bureaucracy.⁴ Currently, the Chicago Police Department has over 1400 unfilled positions.⁵

For obvious reasons, reductions in police force size and service levels raise serious questions about public safety, especially in major cities. These reductions also bring to the surface questions about policing priorities, including the debate over so-called “order-maintenance policing” policies, which have, over the past few decades, refocused police resources on restoring order in urban public spaces following years of relative neglect.⁶ An important catalyst for this “order-maintenance revolution” was the 1982 publication of James Q. Wilson and George Kelling’s influential essay, *Broken Windows: The Police and Neighborhood Safety*, which urged urban leaders to reassert authority over, and restore order to, urban public spaces.⁷ But it is fair to say that, by the time Wilson and Kelling published *Broken Windows*, many

¹ See, e.g., Lori Preuit & Kris Sanchez, *Suffer These Crimes in Oakland? Don't Call the Cops*, NBC BAY AREA (July 13, 2010, 12:17 PM), <http://www.nbcbayarea.com/news/local/Suffer-These-Crimes-in-Oakland-Dont-Call-the-Cops-98266509.html> (providing a partial list of the forty-four situations to which Oakland police will no longer respond).

² Kevin Johnson, *Home Burglarized? Fill Out a Form; Cutbacks Force Police to Curtail Calls for Some Crimes*, USA TODAY, Aug. 25, 2010, at 1A.

³ *Emanuel Vows Police Budget Cuts Won't Hurt Safety*, CBS CHI. (Aug. 31, 2011, 2:48 PM), <http://chicago.cbslocal.com/2011/08/31/emanuel-vows-police-budget-cuts-wont-hurt-safety>.

⁴ *Id.*

⁵ *Id.*

⁶ See NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 9-17 (2009) (recounting the history of the “order-maintenance revolution”).

⁷ James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 29-38.

Americans had already concluded that the “comedy of the commons”⁸ was not funny anymore. A dramatic decline in decorum in urban public spaces—combined with an equally dramatic economic disinvestment in American cities—led to disillusionment with the laissez-faire approach to public space management that had dominated urban policy since the 1960s.⁹ Moreover, a colorable case can be made that the renewed attention to the quality of life in urban public spaces helped spur the unexpected urban resurgence of the past few decades.¹⁰

At least since the publication of Garrett Hardin’s 1968 article *The Tragedy of the Commons*,¹¹ most policymakers and social scientists have assumed that resources held in common—including the urban commons of sidewalks, streets, and parks—are doomed to exploitation.¹² These same social scientists and policymakers also have become sharply divided over how to prevent the commons from descending into tragedy. Some join Hardin in asserting that centralized, governmental control of the commons is necessary.¹³ Others argue that privatization is the simplest and most effective way to avoid the tragedy of the com-

⁸ Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986). The “comedy of the commons” postulates that defining certain property as “public” could create “infinite ‘returns to scale’” and create wealth for all. *Id.*

⁹ See GEORGE KELLING & CATHERINE COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 70-108 (1996) (discussing the collapse of laissez-faire policing strategies); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1209-17 (1996) (discussing the causes and effects of deregulation of urban public spaces).

¹⁰ See, e.g., Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1286-93 (2006) (arguing that urban resurgence is attributable in part to increasing demand for the consumer amenities and opportunity for social interactions that cities provide).

¹¹ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹² See, e.g., Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 60 (2011) (“The quality of a neighborhood commons—of its street life, sidewalks, open spaces, and public parks—might begin to decline through increasing demands by different users and uses of the space.”); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 364 (2010) (noting that cities do not typically leave dumpsters near urban parks or sidewalks because it will invite people to abuse the dumpsters and dispose of their negative-value assets in them).

¹³ This view pervades the literature on environmental regulation. See, e.g., WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* 148-52 (1977) (linking commons theory in the environmental context to the work of Thomas Hobbes); George C. Coggins, *Regulating Federal Natural Resources: A Summary Case against Devolved Collaboration*, 25 ECOLOGY L.Q. 602, 604 (1999) (reaffirming the need for a strong governmental role in natural resource management).

mons because (to borrow from Henry Smith) exclusion is a more effective means of resource management than governance.¹⁴ But in recent years, economists and property theorists, led most prominently by Nobel Laureate Elinor Ostrom, have challenged the axiomatic proposition that the commons inevitably descends into tragedy or that “un-owned” property is doomed to overuse.¹⁵ While Ostrom’s work suggests that cooperative management of common-pool resources is not only possible but also can arise organically, other scholars have emphasized the undertheorized and underappreciated benefits of shared ownership. For example, Hanoch Dagan and Michael Heller’s 2001 article, *The Liberal Commons*, demonstrated that joint ownership arrangements, with elements of both private and commons property, can have significant benefits over individual ownership.¹⁶

Over the past several decades, discussions about the appropriate tools of commons management have played out in a particularly illuminating way in policy debates about the management of urban public spaces. Urban public spaces are not a pure commons per se, as they have owners (i.e., local governments). However, political and constitutional limitations placed on those owners dramatically curtail the extent to which they control those spaces, resulting in streets, parks, and sidewalks very strongly resembling commons. These public-space management discussions tend to map themselves neatly onto theoretical debates about commons resource management. Some commentators urge, à la Hardin,¹⁷ that government coercion is needed to restore

¹⁴ See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S467 (2002) (arguing that governance and exclusion are the two extremes of a spectrum of rules with different types of property rights falling between them).

¹⁵ See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 14 (1990) (arguing that individuals in a commons are not “inevitably caught in a trap from which they cannot escape” and insisting that the ability to avoid a tragedy of the commons “varies from situation to situation”) (emphasis omitted); see also John Tierney, *The Non-Tragedy of the Commons*, N.Y. TIMES (Oct. 15, 2009, 12:41 PM), <http://tierneylab.blogs.nytimes.com/2009/10/15/the-non-tragedy-of-the-commons> (arguing both that “too often . . . commons ended up in worse shape once they were put under the control of distant bureaucrats,” and, based on Ostrom’s research, that a lack of government interference can actually preserve resources).

¹⁶ See Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 581-87 (2001) (maintaining that the cooperation, room for autonomy, and right to exit inherent in an “ideal” liberal commons produce less overuse, underinvestment, and waste than individual ownership).

¹⁷ See Hardin, *supra* note 11, at 1247 (extolling the virtues of coercion).

order to the urban commons: *Broken Windows* is of this ilk, as are portions of Robert Ellickson's work on public-space zoning.¹⁸ Others urge the privatization of urban public spaces to transform them into something akin to Dagan and Heller's "liberal commons."¹⁹

On the ground in American cities, these theoretical arguments have been translated into concrete policies, including policing strategies (for example, order-maintenance and community policing) and urban development strategies (for example, business improvement districts (BIDs)). The former clearly instantiates the view that successful commons management depends on government coercion, and the latter represents a conviction that the quasi privatization of the commons is advisable. While, legally, the management of urban common spaces remains the purview of the police, quasi-privatization mechanisms such as BIDs also perform public-space management functions, especially the funding of infrastructure improvements and supplemental public services. The much celebrated (and debated) urban rebound of the past two decades suggests that this compromise has been partially successful, insofar as success is measured by a resurgent urban population base and the renewal of central-city neighborhoods.²⁰

¹⁸ See Robert C. Ellickson, *supra* note 9, at 1220-22 (proposing a hypothetical system of red, yellow, and green zoning—with each zone governed by a different degree of government intervention—in order to ban or allow activities, such as panhandling and bench squatting).

¹⁹ Dagan & Heller, *supra* note 16; see also Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 87-88 (1998) (urging the creation of "Neighborhood Improvement Districts" as a "mandatory-membership organization of property owners" empowered to decide distribution of public goods within the neighborhood); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 833 (1999) (arguing that state governments should pass legislation to "allow self-governance [by neighborhood associations] in these neighborhoods, through new collective private ownerships").

²⁰ See, e.g., Patrick A. Simmons & Robert E. Lang, *The Urban Turnaround* (analyzing the urban population increase in thirty-six U.S. cities throughout the 1990s), in 1 REDEFINING URBAN AND SUBURBAN AMERICA 51, 51 (Bruce Katz & Robert E. Lang eds., 2003); Rebecca R. Sohmer & Robert E. Lang, *Downtown Rebound* (contending that, while most central cities are "losing population to their surrounding metropolitan area, . . . most downtowns within those central cities are gaining a larger share of metropolitan statistical area population"), in 1 REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, *supra*, at 63, 63; see also Glaeser & Gottlieb, *supra* note 10, at 1288-93 (arguing that the urban resurgence since the 1980s was caused by falling crime rates, rising income, and a higher demand for amenities like museums and restaurants). *But cf.* Richard C. Schragger, *Rethinking the Theory and Practice of Local Econom-*

This is an opportune time to reexamine the commons-management questions raised by these policies. As this Article's opening anecdote suggests, the current economic crisis is forcing cities to scale back law enforcement efforts, and it is limiting the financing available to fund sublocal investments in urban public spaces. It is possible that these pressures will lead the current urban-commons compromise to unravel, resulting in less public regulation of urban public spaces, more pressure for private regulation, or both. Using these tensions as a starting point, this Article will draw upon the literature on commons-space management from multiple disciplines—especially law, economics, and sociology—to reflect critically upon the optimal regulation of urban public spaces and the possibility of cooperative commons management arising in the absence of government regulation.

This Article proceeds in three parts. Part I briefly outlines the commons debate. It focuses particularly on arguments that either coercive regulation or privatization is necessary for efficient commons management and on Ostrom's work suggesting that cooperative management regimes may arise organically. Part I also argues that the lessons from the literature can be fruitfully applied to the question of urban public-space management. Part II describes the evolution of the regulation of the urban commons, with an emphasis on the connections between these theoretical arguments and urban policy innovations in recent decades. Drawing upon legal and social science literatures, Part III analyzes whether greater privatization or cooperative management of urban public spaces is advisable or possible. The Article concludes by asking whether the lessons of urban space management can be exported to questions of commons management in other contexts.

I. THE URBAN COMMONS "PROBLEM"

In his influential 1968 article, *The Tragedy of the Commons*, Garrett Hardin argued that coercive government regulation is necessary to prevent the degradation of common-pool resources, because individual resource appropriators receive the full benefit of their use and bear

ic Development, 77 U. CHI. L. REV. 311, 323-31 (2010) (challenging the assumption that redevelopment efforts are causally linked to the urban resurgence).

only a share of their cost.²¹ Analogizing to game theory, the tragedy of the commons is a prisoner's dilemma.²² Since no individual has the right to control or exclude others, each appropriator has a very high discount rate and little incentive to efficiently manage the resource in order to guarantee future use. In Hardin's words,

[T]herein is the tragedy. Each man is locked into a system that compels him to increase his [use] without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.²³

Hardin's conclusion that coercive, centralized government regulation represents the only way to avoid tragic overuse of commons resources is embedded in many concrete public policies, including environmental regulations and many of the order-maintenance policies reviewed below.²⁴

In contrast, the conventional wisdom among many economists and legal scholars holds that privatization, not regulation, is the most effective solution to the problem of the commons. The stylized and elegant version of the argument, set forth in the work of Harold Demsetz, suggests that privatization internalizes the costs of resource appropriation, thereby creating incentives to use resources more efficiently.²⁵ Subsequent commentators have refined Demsetz's account. Robert Ellickson emphasizes the benefits of privatization for resource uses with small and medium geographic effects, but questions whether regulation may be necessary to police larger-scale effects.²⁶ Henry Smith highlights the benefits of the exclusion right (a central tenet of private property ownership) over other governance-based methods of resource

²¹ Hardin, *supra* note 11, at 1244. This was not an original insight. See, e.g., ARISTOTLE, *POLITICS* bk. 2, ch. 1, § 10 (Jeffrey Henderson ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1944) ("Property that is common to the greatest number of owners receives the least attention . . ."); H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124, 135 (1954) ("Wealth that is free for all is valued by none because he who is foolhardy enough to wait for its proper time of use will only find that it has been taken by another.").

²² See OSTROM, *supra* note 15, at 3-5.

²³ Hardin, *supra* note 11, at 1244.

²⁴ See OSTROM, *supra* note 15, at 12-13 (reviewing literature regarding privatization as a policy alternative to avoid the tragedy of the commons).

²⁵ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) ("[P]roperty rights develop to internalize externalities when the gains of internalization become larger than cost of internalization.").

²⁶ Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327-35 (1993).

management; exclusion, he argues, is a low-cost way of preventing resource dissipation—at least when the costs of parcelization and risks of incursion are relatively low.²⁷

A. *Cooperative Commons Management:
Preconditions and Benefits*

The classic regulation–privatization dichotomy has been refined and challenged numerous times, including, most influentially, by Elinor Ostrom, who was awarded the Nobel Prize in Economics in 2009.²⁸ In her classic book, *Governing the Commons*, Ostrom documents several examples of longstanding common-pool resource regimes that have succeeded with neither privatization nor pervasive centralized regulation.²⁹ Ostrom argues that effective appropriation strategies can arise, even among heterogeneous appropriators, under certain conditions, including shared norms of appropriation, delineation of the universe of permitted appropriators, congruence between the appropriation rules and local conditions, effective monitoring by accountable individuals, and clearly defined boundaries.³⁰ Ostrom calls into question the efficacy of external attempts to regulate resources characterized by these conditions. Indeed, she argues that some of the institutional failures that she has studied result from ill advised central regulation that displaces or disregards preexisting cooperative regulatory regimes.³¹

Ostrom's optimism is not unbounded. She does not suggest that all communities will achieve optimal commons regulation without government intervention. On the contrary, the successful commons-

²⁷ See Smith, *supra* note 14, at S475-77 (arguing that because exclusion “prevents the ‘rest of the world’ from undertaking many uses,” it represents a more cost-efficient alternative to having to “contract with every possible invader”).

²⁸ Louis Uchitelle, *2 U.S. Social Scientists Share Nobel in Economics*, N.Y. TIMES, Oct. 13, 2009, at B1.

²⁹ In some cases, these regimes have existed for over half a millennium. See OSTROM, *supra* note 15, at 62-65 (discussing the formal establishment of an association to achieve regulation over the use of common resources in Törbel, Switzerland, in February 1483); *id.* at 69-82 (discussing the Spanish *huerta* irrigation systems, which date back to at least the mid-fifteenth century).

³⁰ *Id.* at 90-101.

³¹ In one example, residents of a Sri Lankan fishing village had agreed upon an elaborate set of appropriation rules regulating when particular residents' nets would be used to catch fish. When later legislation codified “criteria for allocating access to the water,” it led to a breakdown of the formerly-agreed-upon rules and, arguably, an unfair distribution of the returns from fishing. *Id.* at 149-57.

management regimes that she describes all depend on government enforcement to some extent. Some of them are effectively *governmental*: that is, they exercise authority akin to limited-purpose local governments.³² At least some of her examples, like the special water districts of Southern California, actually are special purpose local governments. It follows that Ostrom's characterization of these districts as cooperative is somewhat odd, given that they developed as a result of litigation spanning more than a decade.³³

Moreover, as Dagan and Heller observe, Ostrom's success stories all depend upon limitations on rights of alienation, in order to preserve continuity among the pool of appropriators.³⁴ Dagan and Heller criticize Ostrom and her allies for failing to "consider that the price of their commons successes—which require locking people together in static communities—may be too dear, particularly for those who place a high value on individual liberty."³⁵ They build a case for property regimes that not only preserve the right of exit, but also capture the benefits of shared resources through internal governance mechanisms. This "liberal commons"³⁶ (or "governance property")³⁷ is, in Carol Rose's words, "commons on the inside, property on the outside."³⁸ That is, the resource in question is not a pure commons, open to all, but rather is owned by a finite number of people who manage and exclude outsiders from its use. Dagan and Heller argue that such regimes—which, under their taxonomy, include marital property, condominiums, partnerships, and close corporations—are "ideal" modes of

³² *Id.* at 58-88 (discussing forestry and irrigation regimes). On special purpose local governments, see RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 269-77 (7th ed. 2009). See also *Ball v. James*, 451 U.S. 355, 367-70 (1981) (upholding the constitutionality of a property-based voting scheme that governed a local entity in charge of delivering untreated water and selling electricity to hundreds of thousands of people in Arizona); OSTROM, *supra* note 15, at 129-36 (discussing the process for forming groundwater districts).

³³ See OSTROM, *supra* note 15, at 111-26 (discussing the groundwater litigation in Southern California).

³⁴ Dagan & Heller, *supra* note 16, at 566.

³⁵ *Id.*

³⁶ *Id.* at 553.

³⁷ In this Symposium, Gregory Alexander refers to these forms of ownership as "governance property." See generally Gregory Alexander, *Governance Property*, 160 U. PA. L. REV. ##### (2012).

³⁸ Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998).

organization that “enable[] a limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource, while also ensuring autonomy to individual members who retain a secure right to exit.”³⁹

B. *Urban Public Space as a Commons*

Dagan and Heller’s work also illuminates a central problem in discussions of commons regulation—namely, the lumping together of unowned resources (true commons) with those that are owned by limited groups of people who exercise rights of both governance and exclusion (their “liberal commons” examples, as well as, arguably, the common pool resources Ostrom studied). Obviously, effective management of a true open-access resource is far more difficult than management of a “liberal commons,” as no individual or group of individuals has the right to exclude others from using a resource. Additionally, the fact that many resources commonly considered to be held “in common” (e.g., national parks and forests) are actually state-owned⁴⁰ further complicates the taxonomic difficulties plaguing discussions of commons management tools.⁴¹

Before beginning a discussion of urban public spaces as a commons problem, it is necessary to make the case that urban public spaces *are* commons. In the technical legal sense, they arguably are not. Local governments own most city streets, sidewalks, and parks, either outright or as public easements that encumber the fee simple titles of abutting property owners. These local governments manage these assets and assert their ownership rights in various ways. For example, parks are frequently off-limits after dark; protestors, paraders, and street vendors must secure permits; traffic regulations are ubiquitous; and entire streets may be closed for any number of reasons (for example, routine repairs, enabling neighborhood festivals, assuring the safety of paraders or runners, or promoting urban development).⁴²

³⁹ Dagan & Heller, *supra* note 16, at 553.

⁴⁰ See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 40 (1988) (defining state-owned resources as “collective property”).

⁴¹ The public trust doctrine even further complicates the reality of a pure commons concept. See generally, e.g., Michael Seth Benn, Comment, *Towards Environmental Entrepreneurship: Restoring the Public Trust Doctrine in New York*, 155 U. PA. L. REV. 203 (2006).

⁴² For example, in the summer of 2011, New York City closed thirteen underused street segments in areas such as the South Bronx for several hours a day to create “play

That said, the scope of a local government's "ownership" rights over the urban commons is far less extensive than, say, the federal government's rights over the national parks, forests, and military bases. A long string of Supreme Court decisions upholding the constitutionality of public space regulation has dramatically curtailed local governments' control over appropriators of urban public space.⁴³ While the precedential weight of many of these Warren Court-era decisions has been limited by subsequent rulings,⁴⁴ these cases continue to dramatically limit local governments' rights of exclusion and governance.⁴⁵ The First Amendment protects expressive activity in public spaces, although a local government may impose content-neutral, reasonable time, place, and manner restrictions on it.⁴⁶ The vagueness doctrine dramatically curtails the degree of discretion a city can vest in police officers to regulate public spaces.⁴⁷ And other constitutional doc-

streets," which "created an atmosphere like a block party, except the play streets were devoted to exercising . . ." Blair Kamin, *How to Correct Chicago's Open Space Shortage: 10 Ideas That Could Help City's Park-Poor Neighborhoods Away from the Lakefront*, CHI. TRIB. (Oct. 14, 2011, 10:30:06 PM), <http://featuresblogs.chicagotribune.com/theskyline/2011/0/how-to-correct-chicagos-open-space-shortage-10-ideas-that-could-help-citys-park-poor-neighborhoods-a.html>.

⁴³ See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165, 171 (1972) (invalidating a city vagrancy ordinance on due process-related grounds and suggesting that the Constitution protects the right to "loaf"); *Powell v. Texas*, 392 U.S. 514, 531-35 (1968) (upholding a prohibition of public drunkenness, but questioning whether such laws might be invalid criminalizations of "a mere status").

⁴⁴ See Dan M. Kahan & Tracey L. Meares, *Twenty-Seventh Annual Review of Criminal Procedure—Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1167 (1998) (showing that many Warren Court-era standards now frustrate the policies designed to fix social problems that had been identified by the Warren Court); Stephen F. Smith, *Taking Lessons from the Left?: Judicial Activism on the Right*, 1 GEO. J.L. & PUB. POL'Y 57, 62 (2002) (noting the Rehnquist Court's retrenchment from the Warren Court's constitutional criminal procedure jurisprudence).

⁴⁵ In contrast to the criminal sphere, the scope of a local government's authority over economic regulations—including regulations of public spaces such as limits on street vending—is broad because such government decisions are subject to rational basis review. See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 107-09 (1949) (giving great deference to local legislators in regards to laws governing public advertising).

⁴⁶ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1127 (3d ed. 2006) (summarizing permissible restrictions on speech in public fora).

⁴⁷ See *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (citing "too much discretion to the police" and "too little notice to citizens who wish to use the public streets" as reasons for striking down an antigang ordinance for vagueness).

trines—including the right to travel,⁴⁸ freedom of association,⁴⁹ and the Eighth Amendment’s prohibition of cruel and unusual punishment⁵⁰—limit local governments’ abilities to exclude individuals, including excessive or irresponsible appropriators, from the urban commons. This reality was highlighted in 2002, when the Sixth Circuit invalidated a Cincinnati ordinance banning persons previously arrested for drug offenses from the “public streets, sidewalks, and other public ways” of any designated “drug-exclusion zone[.]”⁵¹ The City of Cincinnati argued that the ordinance was necessary to restore order in neighborhoods plagued by drugs.⁵² The court, however, ruled that the ordinance violated the excluded individuals’ First Amendment rights of association.⁵³ Other lower courts have invalidated ordinances imposing juvenile curfews,⁵⁴ penalizing aggressive panhandling,⁵⁵ and prohibiting sleeping in public places,⁵⁶ on a variety of constitutional grounds. And, as Carol Rose has argued, our legal tradition has long treated certain kinds of public spaces, including roads, as “inherently public.”⁵⁷

⁴⁸ See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935, 944-49 (9th Cir. 1997) (invalidating a juvenile curfew on right-to-travel grounds).

⁴⁹ See, e.g., *Cradle of Liberty Council, Inc. v. City of Philadelphia*, No. 08-2429, 2012 WL 947008, at *9-15 (E.D. Pa. Mar. 21, 2012) (affirming a jury finding that a resolution that attempted to evict the Boy Scouts from a city-owned building for violating a municipal nondiscrimination law violated the group’s right to expressive association).

⁵⁰ See, e.g., *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) (holding that a law criminalizing sitting, lying, or sleeping on public streets or sidewalks violated the Eighth Amendment’s prohibition on cruel and unusual punishment), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

⁵¹ *Johnson v. City of Cincinnati*, 310 F.3d 484, 487 (6th Cir. 2002) (internal quotation marks omitted).

⁵² *Id.* at 502.

⁵³ *Id.* at 505-06.

⁵⁴ E.g., *Nunez v. City of San Diego*, 114 F.3d 935, 940-44 (9th Cir. 1997).

⁵⁵ See *Loper v. NYPD*, 999 F.2d 699, 706 (2d Cir. 1993) (invalidating an anti-panhandling statute on freedom of speech grounds); *Berkeley Cmty. Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1094-95 (N.D. Cal. 1995) (same), *vacated in part*, 966 F. Supp. 941 (N.D. Cal. 1997) (approving a stipulated settlement repealing the offending ordinance).

⁵⁶ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554, 1583 (S.D. Fla. 1992) (enjoining Miami’s “pattern and practice of arresting homeless people for the purpose of driving them from public areas” on Fourth Amendment, Eighth Amendment, due process, and right-to-travel grounds).

⁵⁷ See Rose, *supra* note 8, at 770-71 (connecting the public nature of roads to national economic development).

In other words, although urban public spaces are not unowned, they are effectively open-access and are thus much closer to a pure commons than either Ostrom's common-pool resource regimes or Dagan and Heller's "liberal commons." As Ellickson has observed, the open-access nature of urban public spaces makes them "classic sites for tragedy."⁵⁸ And many of our cities' public spaces indeed descended into tragedy in the middle decades of the twentieth century, when out-of-control crime rates and pervasive disorder became expected, and many Americans simply chose to avoid the urban commons whenever possible.⁵⁹

II. URBAN PUBLIC-SPACE MANAGEMENT: A SHORT EVOLUTIONARY HISTORY

Nothing about the condition of urban public spaces in the early 1980s lent itself to optimism. Public authorities essentially had abandoned the task of managing the urban commons. Moreover, urban public spaces had none of the characteristics that Ostrom suggests would make them amenable to cooperative regulation: they were not "property on the outside, commons on the inside."⁶⁰ They had neither clearly defined boundaries nor a stable, limited pool of appropriators. Frequent appropriators had no legal right to exclude outsiders or to sanction those who violated accepted norms of appropriation. Since anyone could appropriate the commons at any time, without restriction, classical economic theory would have predicted a rush to the resource, with each appropriator seeking to maximize the benefit of the appropriation before the depletion of the resource by others. Theoretically, the lack of a right to exclude dramatically increases the likelihood that the commons would become tragic.⁶¹ Yet, to the surprise of many, order has been restored to the urban commons over the last few decades—thanks in large part to the confluence of two distinct policy

⁵⁸ Ellickson, *supra* note 9, at 1168 (internal quotation marks omitted).

⁵⁹ See, e.g., PAUL S. GROGAN & TONY PROSCIO, *COMEBACK CITIES: A BLUEPRINT FOR URBAN NEIGHBORHOOD REVIVAL* 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.").

⁶⁰ Rose, *supra* note 38, at 155.

⁶¹ See OSTROM, *supra* note 15, at 34-35 (summarizing the nature of collective-action problems).

developments that represent opposite poles in the debate over what constitute appropriate tools for commons-space management.

A. *The Re-Regulation of the Urban Commons*

Until the latter half of the twentieth century, the governance of urban public spaces—in commons-regulation terms, the control of public-space appropriators—was the primary focus for municipal police forces. Laws criminalizing vagrancy, loitering, and public drunkenness gave police officers vast discretion in deciding whether to arrest individuals for breaches of the peace.⁶² While most order-maintenance efforts were undoubtedly informal,⁶³ the availability of legal sanctions for breaches of the public order provided an important back up to informal order-maintenance efforts.⁶⁴ Indeed, prior to the “constitutional revolution” of the late 1960s, a large number of arrests were for public-order offenses.⁶⁵ Unfortunately, the old commons-regulation regime frequently targeted minorities and the poor, resulting in uneven and discriminatory enforcement,⁶⁶ while the legal system often

⁶² See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 595 (1997) (“Many 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) (reviewing LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993)) (“Prior to the 1960s, vagrancy and loitering laws made it possible for police to arrest pretty much anyone . . .”).

⁶³ See JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 31 (1968) (explaining that the patrolman “approaches incidents that threaten order not in terms of enforcing the law but in terms of ‘handling the situation’”) (emphasis removed).

⁶⁴ See Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 702-03 (1967); Wilson & Kelling, *supra* note 7, at 35 (arguing that society can benefit when police have “the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed”).

⁶⁵ See HOWARD M. BAHR, *SKID ROW: AN INTRODUCTION TO DISAFFILIATION* 227-28 (1973) (recounting statistics showing that, during the 1960s, public drunkenness, disorderly conduct, and vagrancy accounted for a substantial percentage of arrests).

⁶⁶ See, e.g., David Cole, *Twenty-Eighth Annual Review of Criminal Procedure—Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1060 (1999) (asserting that the police’s “abuse of the criminal law to reinforce racial subordination” influenced the Court’s rulings in the 1950s and 1960s); Ellickson, *supra* note 9, at 1209 (noting that public-order laws “had long been disproportionately enforced against poor people and members of racial minorities”).

turned a blind eye to the myriad injustices perpetrated in the name of public order.⁶⁷

Disillusionment with traditional methods of controlling the conduct of public-space appropriators eventually led to the deregulation of urban public spaces. The Warren Court's "criminal procedure revolution" accelerated this deregulation, but these changes also were in keeping with modern policing theory, which held that "on the beat" enforcement of public-order crimes served little purpose and spawned corruption, unequal enforcement, and public resentment.⁶⁸ By the early 1970s, reforms downplaying officers' role as public-space regulators had largely eliminated the public-order enforcement regime.⁶⁹

The costs of local governments' decisions to abandon the urban commons management role quickly became apparent, as crime rates rose despite burgeoning law enforcement budgets, and chaos seemed to take hold in many urban public spaces.⁷⁰ Thus, by the time *Broken Windows* was published in 1982, rising crime rates—and fear of crime and urban disorder—had laid the groundwork for new experimentation with "old-fashioned" order-management strategies. These order-restoration strategies have generated two heated academic debates: The first of these debates concerns the core claim of the so-called "broken windows" hypothesis, which posits that disorder causes crime.⁷¹ The second concerns the civil-liberties risks implicated by the

⁶⁷ See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 604-09 (1956) (recounting judicial abuses during summary proceedings in the Philadelphia magistrates' courts).

⁶⁸ See KELLING & COLES *supra* note 9, at 73-74 (characterizing the reputation of the police before progressive reforms took hold as one of "brutality, inefficiency, and corruption").

⁶⁹ See generally *id.* at 80-85 (reviewing the history of police reform); Livingston, *supra* note 62, at 565-68 (describing the professionalization—and simultaneous retreat from neighborhood policing—of the police, from the late nineteenth century to the 1970s).

⁷⁰ See, e.g., KELLING & COLES, *supra* note 9, at 85-89 (describing the collapse of reform-era policing strategies); Livingston, *supra* note 62, at 568 (describing citizen and political frustration with crime rates that began to rise rapidly during the 1960s).

⁷¹ See WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 65-84 (1990) (finding a causal connection between disorder and robbery rates, specifically, that "[p]erceived crime problems, fear of crime, and actual victimization all [are] limited to social and physical disorder" in a given urban area); see also GEORGE L. KELLING & WILLIAM H. SOUSA, JR., *DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS* 6-9 (2001), available at http://www.manhattan-institute.org/pdf/cr_22.pdf (attributing a dramatic decline in crime in New York City to an aggressive misdemeanor arrest policy); Hope

vesting of the police with increased authority in managing public spaces.⁷² Order-maintenance policies are both numerous and diverse. Some policies, such as former New York City Mayor Rudolph Giuliani's famous "quality of life" campaign and the anti-gang ordinance at issue in *City of Chicago v. Morales*, directly target perceived "disorders"—gang members, squeegeemen, turnstile jumpers, etc. In other words, these policies reflect the assumption that coercive government regulation is needed to control the commons.⁷³ Other policies, especially ubiquitous "community policing" efforts, seek to build stronger relationships between police officers and the citizens whom they have sworn to pro-

Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 256-59 (2005) (analyzing data from New York City and finding that an aggressive misdemeanor or arrest policy led to a decrease in incidents of violent crime). *But see* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 59-78 (2001) (challenging Skogan's findings—"that neighborhood disorder had a statistically significant relationship with the level of robbery victimization"—and reinterpreting the data to show that no support exists for the broken windows hypothesis); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 287-300 (2006) (casting doubt on the accuracy of both the Kelling and Sousa and the Corman and Mocan New York City studies); *see also* Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637-39 (1999) (finding that disorder was correlated with robbery in a Chicago study, but questioning even a weak causal connection between disorder and other serious crime).

⁷² *See generally* URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES (Tracey L. Meares & Dan M. Kahan eds., 1999) (containing essays by authors—including Margaret Burnham, Alan Dershowitz, Carol Steiker, and Tracey Meares and Dan Kahan—engaging in a debate over the proper scope of police empowerment, as contrasted with legal safeguards protecting individual rights); Kahan & Meares, *supra* note 44, at 1159-71 (highlighting how the same inner-city minority communities that fought aggressive community policing policies in the Civil Rights Era as tools of white oppression now support such measures as tools for building safer neighborhoods). I leave both of these debates to the side here, each for slightly different reasons. As for the first, whether order-maintenance strategies effectively control crime is not on point, since, the strategies are accepted to be no worse than the laissez-faire approaches they recently supplanted. *See* HARCOURT, *supra* note 71, at 59-78 (finding no relationship between community "disorder" and crime rates). As for the second, the risks of abuse attendant to coercive government regulation are real, but they also extend far beyond the realm of public-space regulation.

⁷³ *See, e.g.*, Norimitsu Onishi, *Police Announce Crackdown on Quality-of-Life Offenses*, N.Y. TIMES, Mar. 13, 1994, at 33 (explaining that behind Giuliani's campaign was "the idea that leniency toward these minor infractions . . . raises fears and leads to greater crimes").

tect.⁷⁴ They accomplish this both through policing techniques—for example, foot and bike patrols—that ensure more frequent, informal interactions and through solicitation of citizen input about policing priorities.⁷⁵

Community policing practices are closely intertwined with order-maintenance efforts for at least two reasons. First, foot and bike patrols maximize officers' ability to monitor and control disorder and to prevent serious crime before it occurs.⁷⁶ Second, when citizens are asked to help shape policing priorities, they frequently prioritize the elimination of "prevalent and low-key troubles"⁷⁷—loitering, vandalism, prostitution, and street gangs: the public-space "disorder[s]" at the heart of the order-maintenance agenda.⁷⁸ Community-policing proponents argue that, by enlisting input from citizens regarding police priorities, police can help reinforce appropriate norms of public-space allocation and may also catalyze shifts in deviant norms.⁷⁹ As Ostrom emphasizes, shared norms of appropriation are critical to the success of commons regulation because they take certain appropriation strategies off the table and limit the likelihood of opportunistic behavior.⁸⁰ In the open-access world of the urban commons, broadly shared norms among repeat appropriators are particularly important.

⁷⁴ See Livingston, *supra* note 62, at 563-64 ("In community policing, the community, rather than police professionalism and the law, becomes a principal source of legitimation for many police efforts directed at ameliorating disorderly conditions.")

⁷⁵ See *id.* at 575-78 (describing the police tactics used under the community policing umbrella).

⁷⁶ See MICHAEL J. PALMIOTTO, COMMUNITY POLICING: A POLICE-CITIZEN PARTNERSHIP 99 (2011).

⁷⁷ Livingston, *supra* note 62, at 578 (quoting DAVID H. BAYLEY, POLICE FOR THE FUTURE 106 (1994)) (internal quotation marks omitted).

⁷⁸ See *id.* at 573-78 (arguing that citizen input has "become synonymous with a particular new focus on the quality of life in public places").

⁷⁹ See, e.g., Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1866-68 (1999) (focusing on the utility of deputizing juveniles as private criminal law enforcers in order to "create an environment in which juveniles can efficiently signal to each other their own contempt for criminality" and therefore effectuate crime reduction); Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1360-61 (2007) (concluding that police officers' speaking to a community in approachable terms, such as religious language, may facilitate communication and agreement between the community and the police).

⁸⁰ OSTROM, *supra* note 15, at 35-57.

B. *The Partial Privatization of Public Spaces*

During the period in which order-maintenance policies proliferated, local governments also began to address public-space management through partial private ordering. These reforms flow from a very different assumption than the order-maintenance efforts that accompany them—namely, the neoclassical economic assumption that the simplest means of managing the commons is *privatization*, not coercive regulation.⁸¹ These mechanisms—especially BIDs and, to a lesser extent, tax increment financing (TIF)⁸²—enable property owners in a community to overcome the free-rider problems that plague voluntary commons-management efforts. They do so primarily by vesting property owners with special powers of taxation and empowering them to spend the revenues raised at the sublocal level.⁸³

BIDs are a ubiquitous element of the urban landscape. They also are the clearest instantiation of the assumption that private ordering should address the management problems plaguing the urban commons. Although BIDs trace their roots to the special assessment, a mechanism for financing public infrastructure that has existed for centuries,⁸⁴ they did not exist in their current form before 1975, with

⁸¹ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (Papers & Proc.) 347 (1967).

⁸² I leave TIF to the side for present purposes, as it is fairly debatable whether it, in fact, represents a privatization effort in the same way that BIDs do. TIF earmarks revenue growth within a sublocal territorial area (usually called a TIF district) for reinvestment within the area. While TIF funds are, like BID funds, frequently used for public-space management (especially for investment in new public-space infrastructure), property owners are not given any additional powers of taxation or formal rights of governance as in the BID model. See Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 67-69 (2010) (explaining the structure of TIF funds and discussing their relation to tax laws); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 512-14 (1997) (describing the operation of TIFs).

⁸³ Richard Briffault, *A Government for Our Time: Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 409-14 (1999).

⁸⁴ See Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUD. 201, 204 (1983) (noting that the first sustained American appearance of the special assessment occurred at the end of the eighteenth century); cf. ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 630 (3d ed. 2005) (“Special assessments appeared as early as 1250, when an English statute apportioned by acreage the costs of repairing a seawall around Romney Marsh.”).

the vast majority of BIDs today being formed between 1990 and 2010.⁸⁵ While state and local laws authorizing the creation of BIDs and regulating their details vary significantly, most BIDs share a few core characteristics. BIDs are, broadly speaking, territorial subdivisions of a city in which property owners are empowered to levy, and obligated to pay, special assessments to fund supplemental public services.⁸⁶ BIDs are public-private hybrids and are perhaps best analogized to special purpose local governments,⁸⁷ but their day-to-day operations tend to be managed by private, nonprofit corporations.⁸⁸ Many statutes authorizing the creation of BIDs also authorize (or even require) cities to contract with these entities to manage BID operations.⁸⁹ Moreover, as Richard Briffault has observed, BIDs almost universally conceive of themselves as private entities, rather than as arms of the local government.⁹⁰ BIDs also share some characteristics with the private residential community associations that are ubiquitous in the suburban landscape, including, notably, the fact that BID governance structures almost universally privilege property ownership—sometimes to the total exclusion of residents who do not own property within a BID’s boundaries.⁹¹

Unlike residential community associations, however, BIDs do not generally exercise formal regulatory authority.⁹² BIDs’ functions vary

⁸⁵ See Richard Briffault, *The Business Improvement District Comes of Age*, 3 DREXEL L. REV. 19, 19 (2010) (stating that the first BID in the United States was the Downtown Development District of New Orleans—established in 1975—and maintaining that “2010 mark[ed] the completion of two decades of . . . the BID movement”).

⁸⁶ See Richard Briffault, *supra* note 83, at 377-87 (providing an overview of the operation, formation, and legal background of BIDs).

⁸⁷ Indeed, courts have relied on this analogy to reject constitutional challenges to BID governance structures that favor property owners. See, e.g., *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 103-04 (2d Cir. 1998) (holding that because a BID had a “limited purpose” its management association was exempt from one-person, one-vote requirements and that the “special purpose” government exception to equal suffrage did not apply because the district’s activities did not “disproportionately affect narrow classes of persons within the district”).

⁸⁸ See Briffault, *supra* note 83, at 409-14 (discussing the governance functions of BIDs and explaining that “[b]usinesspeople, especially landowners, generally dominate the membership of the BIDs’ managing boards”).

⁸⁹ *Id.* at 409-14.

⁹⁰ *Id.* at 410.

⁹¹ *Id.* at 412-13 (explaining that boards of BID administrative bodies sometimes require “a majority of . . . members to be property owners, businesses [and] persons having an interest in property in the district” (internal quotation marks omitted)).

⁹² See *id.* at 394-409 (describing the four broad categories of BID activities: physical improvements, traditional municipal services, social services, and business-mentor pro-

significantly according to both local needs and, importantly, available resources. The larger, better-funded BIDs, such as Philadelphia's Center City and University City Districts, collaborate closely with local government officials and invest significant resources in a wide range of quasi-governmental services. Both of these large BIDs hire their own security forces, fund local infrastructure improvements and supplemental sanitation services, operate outreach programs for the homeless, promote local businesses, engage in advisory land-use planning efforts, and sponsor special social and cultural events.⁹³ In contrast, some BIDs struggle to collect any revenue at all, even though they are legally empowered to tax area property owners.⁹⁴

As a recent illuminating series of case studies of Philadelphia's BIDs illustrates, public-space management is the top priority of all BIDs, large and small, rich and poor.⁹⁵ Wealthier BIDs seek to accomplish this goal in more ambitious and resource-intensive ways. For example, the Center City District employs over one hundred individuals who are charged with keeping sidewalks clean and clear of debris, as well as a large cadre of Community Service Representatives who, among other tasks, use special handheld devices to survey each block in the BID boundaries to ensure that problems with public spaces are

grams); Nicole Stelle Garnett, *Governing? Gentrifying? Seceding? Real-Time Answers to Questions about Business Improvement Districts*, 3 DREXEL L. REV. 35, 38-43 (2010) (warning that "the closer that BIDs come—in structure and function—to general purpose local governments, the more vulnerable they are to equal protection challenges.").

⁹³ See Göktuğ Morçöl, *Center City District: A Case of Comprehensive Downtown BIDs*, 3 DREXEL L. REV. 271, 279-81 (2010) (discussing the expansive current functions of the Center City District, which include "transportation, land-use planning, streetscape and infrastructure improvements, social services for the homeless, and operation of a community court"); Thomas J. Vicino, *New Boundaries of Urban Governance: An Analysis of Philadelphia's University City Improvement District*, 3 DREXEL L. REV. 339, 350-51 (2010) (examining the budget for the University City district, as well as the different types of activities funded by it, including infrastructure improvements and public safety initiatives); CENTER CITY PHILA., <http://www.centercityphila.org/> (last visited Apr. 15, 2012) (listing news events, as well as office, retail, and residential space advertisements); UNIV. CITY DIST., <http://www.universitycity.org/> (last visited Apr. 15, 2012) (providing information regarding restaurants, activities, accommodations, community service, and other events and listings).

⁹⁴ See Garnett, *supra* note 92, at 41 (arguing that "[m]any of Philadelphia's BIDs appear to be fairly anemic institutions that have difficulty collecting assessments at all").

⁹⁵ See generally Symposium, *Business Improvement Districts and the Evolution of Urban Governance*, 3 DREXEL L. REV. 1, 109-372 (2010).

promptly addressed.⁹⁶ Some of the Community Service Representatives are part of a specially trained Homeless Action Team which seeks to “get the homeless off downtown streets and into safe environments with any necessary social services.”⁹⁷ The Center City District, in collaboration with the University City District, even runs a court that addresses quality-of-life offenses and assigns offenders to community service.⁹⁸ Both have also invested millions of dollars in street lighting, beautification, and other public infrastructure improvements.⁹⁹ While BIDs with limited resources find it difficult to accomplish anything at all, public-space management efforts of a far more basic and mundane nature remain their top, and often only, priority. Philadelphia’s Germantown Special Services District, for example, has effectively no budget—having long since given up on collecting the special assessments owed by local property owners—but does what it can to remove trash from neighborhood parks and sidewalks.¹⁰⁰

C. *The Public-Space Management Compromise*

Taken together, order-maintenance policing and BIDs can be understood as reflecting a compromise between proponents like Hardin, who believe coercive government regulation represents the only means to prevent overuse of open-access resources, and neoclassical economists like Demsetz, who understand privatization as the solution to the same problem. Over the last few decades, police officers have reassumed regulation of conduct by public-space appropriators.¹⁰¹ Po-

⁹⁶ *Safe: Community Service Representatives*, CENTER CITY PHILA., <http://centercityphila.org/about/CSRs.php> (last visited Apr. 15, 2012).

⁹⁷ *Id.* As I have previously written, these homeless-relocation efforts represent a common, and controversial, public-space-management technique. See Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1085-88 (2005) (explaining that much of the controversy centers on the perception that these services work to keep the homeless out of the sight of the other members of the community).

⁹⁸ Morçöl, *supra* note 93, at 281.

⁹⁹ *Beautiful: Overview*, CENTER CITY PHILA., <http://www.centercityphila.org/about/Beautiful.php> (last visited Apr. 15, 2012).

¹⁰⁰ See Garnett, *supra* note 92, at 46 (describing an “experiment” performed by the Germantown Special Services District, through which it confirmed that the Philadelphia Parks Department is slow to respond to complaints about the accumulation of trash in Germantown parks).

¹⁰¹ See KELLING & COLES, *supra* note 9, at 148-56 (discussing policing tactics employed in New York City in the 1990s and commenting positively on the reclamation of public space brought about by those tactics).

lice use a variety of devices to accomplish this task. Some strategies—for example, aggressive misdemeanor arrests¹⁰²—are more *Leviathan*-esque than others—for example, community policing. At the same time, new sublocal institutions like BIDs have vested private property owners with the power to coercively raise the funds needed to maintain public spaces. BIDs clearly reflect an understanding that property owners are better situated than occasional public-space appropriators (and even renters) to make decisions about public-space management. But BIDs do not go so far as to invest owners with any of the other traditional tools of management that attend private ownership—or even “liberal commons” or “governance property” regimes—such as the right to exclude outsiders and establish formal governance rules.

There is little question that fiscal constraints may force local governments to scale back these strategies. This reality is most clear in the policing context, where massive budget cuts and resulting reductions in the police force in urban police departments undoubtedly place pressure on personnel- and resource-intensive strategies, including order-maintenance policing efforts.¹⁰³ But the fiscal constraints on BIDs and other quasi-privatization efforts in cities are real: because BID assessments are frequently keyed to property values, their ability to raise revenue through special assessments fluctuates along with the real estate market.¹⁰⁴ Business owners are also more likely to approve additional assessments in better economic times and, as discussed below, are unlikely to do so when property values are depressed. And because BIDs depend on revenue raised through debt and upon state and local transfer payments, the looming cloud of state and municipal insolvency also limits available resources.¹⁰⁵ Anecdotally, the dissolu-

¹⁰² See KELLING & SOUSA, *supra* note 71, at 6-10 (analyzing the effects of “broken windows policing,” Mayor Giuliani’s aggressive misdemeanor arrest policy); Corman & Mocan, *supra* note 71, at 259-61 (same); Harcourt & Ludwig, *supra* note 71, at 287-300 (same).

¹⁰³ See *supra* notes 2-3 and accompanying text.

¹⁰⁴ See, e.g., Briffault, *supra* note 83, at 389-94.

¹⁰⁵ For examples of the challenges facing the state and municipal levels, see Jon Hilsenrath & Neil King Jr., *Bernanke Rejects Bailouts: Fed Chief Says State and Local Governments Shouldn’t Expect Federal Loans*, WALL ST. J., Jan. 8-9, 2011, at A2. See also Tracy Gordon, *Buy and Hold (On Tight): The Recent Muni Bond Rollercoaster and What It Means for Cities* 2-5 (Sept. 19, 2011), available at http://www.brookings.edu/~media/Files/rc/papers/2011/0919_muni_bonds_gordon/0919_muni_bonds_gordon.pdf (noting that “uncertainty remains” in the municipal bond market after the financial crisis, but that “widespread municipal bankruptcies and defaults have not come to pass”); Richard

tion of a handful of BIDs throughout the United States reflect these realities, but many other BIDs undoubtedly are struggling financially.¹⁰⁶

III. THE FUTURE OF URBAN COMMONS MANAGEMENT

If the current financial constraints on local governments prove to be short lived, the urban commons compromise may well emerge unscathed. However, given the structural impediments to state and municipal fiscal reform—notably, pension obligations and labor relations¹⁰⁷—the current financial constraints may persist, even if the

Posner, *State and Local Government: The Fiscal Crisis*, BECKER-POSNER BLOG (Dec. 19, 2010, 5:02 PM), <http://www.becker-posner-blog.com/2010/12/state-and-local-government-the-fiscal-crisisposner.html> (maintaining that the financial crisis “caused a sharp decline in state tax revenues, which [were] 12 percent below their pre-downturn levels,” and discussing different proposals to ameliorate the situation).

¹⁰⁶ See, e.g., Michael Clark, *Atlantic City Special Improvement District Dissolves*, PRESS ATLANTIC CITY (N.J.), Apr. 18, 2011, available at 2011 WLNR 765521 (describing the dissolution of a nineteen-year-old BID in Atlantic City and the subsequent transfer of assets to the state’s Casino Reinvestment Plan Authority); David Garrick, *Escondido: City Eliminates Downtown Merchant Fees*, N. COUNTY TIMES (Cal.), Sept. 16, 2011, http://www.nctimes.com/news/local/Escondido/article_9333c90a_a8ee_5fff_9a7b_89b1cfd2a6667.html (reporting on the dissolution by the City Council of Escondido of a twenty-two-year-old BID due to economic woes). The financial pressures on TIF districts, which rely directly on property taxes and municipal bonds backed by them, are even more severe. See Kay James, *Dells Officials Told City’s TIF Districts Short of Repaying City for Bonds*, PORTAGE DAILY REG. (Wis.), Sept. 24, 2010, http://www.wiscnews.com/portagedailyregister/news/article_42f37c7a-c860-11df-9db2-001cc4c002e0.html?mode=story (reporting on a TIF district’s inability to repay its municipal bonds and averaging the city’s debt at nearly \$20,000 per resident); Joseph Ruzich, *Riverside Considers Raising Taxes*, CHI. TRIB., June 6, 2007, at 4 (noting that the failure of a TIF plan resulted in calls to raise taxes on businesses and residents); Elisha Sauers, *City Needs to Borrow Another \$10M*, CAPITAL (Md.), May 20, 2011, available at 2011 WLNR 10113020 (characterizing the \$2 million in payments Annapolis owes to its TIF custodian as a “crushing expense”).

¹⁰⁷ See, e.g., *Role of Public Employee Pensions in Contributing to State Insolvency and the Possibility of a State Bankruptcy Chapter: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 41 (2011) (statement of Joshua Rau, Associate Professor of Finance, Kellogg School of Management, Northwestern University) (“Using valuations consistent with financial economics, . . . the already-promised part of these unfunded liabilities actually amounts to over \$3 trillion.”); Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 388 (2010) (explaining how those structural impediments can be overcome with the help of state intervention); see also PEW CTR. ON THE STATES, *THE WIDENING GAP: THE GREAT RECESSION’S IMPACT ON STATE PENSION AND RETIREE HEALTH CARE COSTS* 1-2 (2011), available at http://pewcenteronthestates.org/uploadedfiles/Pew_Pensions_retiree_benefits.pdf (estimating that unfunded state pension liabilities as of, in most cases, June 2009, were between \$1.26 and \$2.4 trillion depending on the discount rate applied, an increase of 26% over the previous

economy fully recovers in relatively short order. Thus, this is an opportune time to consider whether, where, and how effective regulation of the urban commons may arise with limited government intervention.

A. Increased Privatization

More extensive privatization represents one possible response to the fiscal limitations facing local governments. Even the complete privatization of public spaces is not unprecedented. Salt Lake City transferred title of Temple Square, its city's central public square, to the Church of Jesus Christ of Latter-Day Saints in 1999; the transfer—and the Church's subsequent imposition of rules of conduct governing visitors to the square—spawned significant controversy.¹⁰⁸ Similar, less celebrated transfers occur on a relatively routine basis as part of “development agreements” between cities and private developers.¹⁰⁹ As Ellickson has observed, Laredo, Texas, and municipalities in St. Louis County, Missouri, routinely privatize street segments to enable homeowners to set up street associations empowered to levy assessments.¹¹⁰

year); Girard Miller, *Benefits, Bankruptcy, and Baloney*, GOVERNING (July 8, 2010), <http://www.governing.com/columns/public-money/state-retiree-Benefits-Bankruptcy-and-Baloney.html> (“Retirees’ claims would be the most difficult benefits to set aside in a municipal bankruptcy . . .”); Mary W. Walsh, *A Path is Sought for States to Escape Debt Burdens*, N.Y. TIMES, Jan. 21, 2011, at A1 (discussing structural and political constraints, including insolvent state pension funds, preventing states and local governments from declaring bankruptcy as a way to solve their financial difficulties).

¹⁰⁸ The city initially retained a public easement for the surface that expressly empowered the Church to restrict access of anyone “engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct.” *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1117-18 (10th Cir. 2002). The Tenth Circuit invalidated this restriction on First Amendment free-speech grounds, reasoning that the reservation of the easement preserved the status of the encumbered property as a public forum upon which it could not limit speech. *Id.* at 1131-34. Subsequently, the City transferred the easement to the Church; a challenge to that transfer on Establishment Clause grounds was rejected. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1258-61 (10th Cir. 2005).

¹⁰⁹ See John C. Crees, Note, *The Right and Wrong Ways to Sell a Public Forum*, 94 IOWA L. REV. 1419, 1435-39 (2009) (providing examples of issues that prevent municipalities from privatizing public fora). In development agreements, a developer and local government agree to a negotiated package of regulatory and development concessions in order to streamline a development process. Alejandro E. Camacho, *Mustering the Missing Voice: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions* (pt. 1), 24 STAN. ENVTL. L.J. 3, 22 (2005).

¹¹⁰ Ellickson, *supra* note 19, at 91.

And, of course, millions of Americans voluntarily live in planned residential communities where commons spaces are privately owned and governed by residential community associations.

Economist Robert Nelson has proposed the wide-scale adaptation of residential community associations to urban neighborhoods.¹¹¹ Nelson asserts that the benefits and effectiveness of this “liberal commons” model greatly surpass those of government regulation: enabling urban communities to secure these advantages could dramatically improve the quality of life in urban neighborhoods.¹¹² Nelson’s privatization proposal is quite radical, as it includes a transfer of the right to exclude outsiders to property owners.¹¹³ As he colorfully observes,

Many inner city residents would like to exclude criminals, hoodlums, drug dealers, truants, and others who often undermine the possibilities for a peaceful and vital neighborhood existence. . . .

There is no physical or other practical reason why an inner city neighborhood could not become a gated neighborhood. . . .

. . . Inner city neighborhoods should have the right to establish land use and other controls, including building neighborhood walls, if necessary, to maintain neighborhood quality.¹¹⁴

Ellickson’s proposal for Block Improvement Districts (BLIDs) is more modest. Ellickson shares Nelson’s concerns that urban residents—especially the residents of poor, inner-city neighborhoods—are systematically disadvantaged by their inability to overcome collective action problems and that some steps toward privatization would help these residents to organize in order to better address neighborhood problems, including the maintenance of urban public spaces.¹¹⁵ Ellickson’s proposed BLIDs, however, more closely approximate BIDs for residential communities than the residential community associations

¹¹¹ See ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 301-03 (2005) (proposing that if owners of housing in inner-city areas created what he terms “Neighborhood Associations in Established Neighborhoods,” then they “might well experience a large increase in their individual wealth”); Nelson, *supra* note 19, at 866 (suggesting that urban community associations may help security).

¹¹² Nelson, *supra* note 19, at 866.

¹¹³ *Id.*

¹¹⁴ *Id.* at 865-67.

¹¹⁵ See Ellickson, *supra* note 19, at 92-95, 97-98 (explaining how the proposed BLID entities would be structured, the incentives-based logic behind their structure, and some suggested functions with which they would be entrusted).

and gated communities championed by Nelson. For example, Ellickson argues that BLIDs should concentrate primarily on supplemental public services;¹¹⁶ he questions Nelson's more expansive proposal, instead suggesting that most BLIDs should have only limited regulatory authority over private land-use controls.¹¹⁷

Additional privatization might well improve the efficiency of urban public-space governance, result in more orderly public spaces, and even increase residents' quality of life. It would also, however, raise a host of philosophical, practical, and legal difficulties. Philosophically, both residential community associations and BIDs have been the subject of extensive controversy, with critics asserting, among other things, that these institutions are illiberal (because they privilege property ownership) and exacerbate existing economic disparities between wealthy and poor communities.¹¹⁸ Extending the model as far as Nelson suggests would increase those concerns and would raise additional ones—especially the implications of formally closing the public-space commons. As Carol Rose has argued, there is a long tradition in Anglo-American law of protecting certain public spaces from privatization precisely because they are “most valuable when used by indefinite and unlimited numbers of persons—by the public at large.”¹¹⁹

Practically, privatization poses a complex institutional design problem.¹²⁰ It would also likely require state-enabling legislation, the enactment of which would involve a host of public choice difficulties. Moreover, the current situation in the real estate market, with large percentages of American property owners “underwater” on their mortgages,¹²¹ likely dramatically reduces the attractiveness of privatization as a commons governance device. The depressed real estate mar-

¹¹⁶ See *id.* at 97 (suggesting that a BLID's articles of incorporation should authorize the provision of services on the “life safety,” “sanitation,” and “beautification” fronts).

¹¹⁷ *Id.* at 97-100.

¹¹⁸ Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16.

¹¹⁹ Rose, *supra* note 8, at 774.

¹²⁰ To begin, consider the difficulty of defining the boundaries of the privatized space and the appropriate universe of “owners” of this space.

¹²¹ See, e.g., Mamta Badkar, *The 13 States Still Drowning in Underwater Mortgages*, BUS. INSIDER (Nov. 30, 2011), <http://www.businessinsider.com/12-states-with-mortgages-underwater-q3-negative-equity-2011-11>; *Half of Commercial Mortgages to Be Underwater: Warren*, CNBC (Mar. 29, 2010), http://www.cnbc.com/id/36085517/Half_of_Commercial_Mortgages_to_Be_Underwater_Warren.

ket both diminishes the likelihood that owners would agree to financing new public services voluntarily through special assessments and the likelihood that they would have the resources available to pay those special assessments if imposed.

Finally, and perhaps most importantly, there are significant legal barriers to privatizing the urban commons. The Equal Protection Clause prohibits, in most cases, the allocation of voting rights by property ownership; therefore, a law investing property with the powers of exclusion and governance over public spaces would be constitutionally suspect. Indeed, courts rejecting one-person, one-vote challenges to BIDs' governance structures have specifically relied on the fact that BIDs do not exercise formal "governmental" authority.¹²² Although privatization via complete transfer of public spaces to private individuals presumably would not raise Equal-Protection voting concerns, some courts have expressed First Amendment anxieties over the potential closure of a public forum.¹²³

B. *Cooperative Management of the Urban Commons*

Assuming that increased privatization is unlikely, it becomes necessary to explore whether, and under what circumstances, cooperative management of the urban commons is possible. There are many reasons for pessimism about these questions. After all, a primary catalyst for the public-space-management devices described above was dismay over the apparent chaos reigning in unregulated public spaces. Moreover, the likelihood of cooperative management of the urban commons ought to be particularly low.¹²⁴ Urban public spaces have few of the characteristics that Ostrom linked with successful common-pool resource-management regimes. Despite these formidable obstacles, many urban communities successfully manage their sidewalks and parks with very little government intervention.

Insight into why—and where—these successes arise can be found in multiple academic disciplines. The legal literature pays a great deal

¹²² See *Kessler v. Grand Cent. Mgmt. Ass'n*, 158 F.3d 92, 105, 108 (2d Cir. 1998) (finding that a BID's responsibility for its core functions was secondary to the city's and thus it did not have sufficient authority to constitute a governmental entity).

¹²³ See *Crees*, *supra* note 109, at 1436-39 (discussing case law in which courts have struggled to balance property rights in newly privatized land, and the residual rights of the public to free expression, based on easements retained by local governments after sale).

¹²⁴ See *supra* Section I.A.

of attention to the role of informal social norms as rules of conduct in the regulation of commons.¹²⁵ Shared norms were among Ostrom's predictors of successful commons management.¹²⁶ Logically, when other predictors are not present, norms become particularly important. Any minimally observant person understands that norms play a dominant role in managing common spaces. To borrow from an example that I have used elsewhere, I retrieve my recycling bins from the end of the driveway, remove my children's toys from the yard, and shovel snow from my sidewalk, not because I am under a legal obligation to do so (although I undoubtedly am), but because the norms in my neighborhood require it.¹²⁷ These norms are actually quite nuanced: tricycles are routinely tolerated on the sidewalk, but larger bicycles and wagons are not; on the morning after a heavy snow, it is acceptable to shovel only a small path before leaving for work, but it is expected that the remaining snow will be cleared promptly at the end of the workday; and neighbors allow a one-day grace period for retrieving the recycling bin, after which the gossip begins. As Ellickson has argued, private norms are frequently the superior regulatory mechanism for public spaces; legal rules—such as those codified in many order-maintenance policies or those in Ellickson's hypothetical public-space zoning regime—represent second-best alternatives when informal regulatory mechanisms fail.¹²⁸

Of course, informal regulatory mechanisms frequently *do* fail, either because antisocial, rather than positive, norms are dominant in a community, or because community members find it difficult to organize and enforce positive social norms (or both). This threat of regulatory failure is why the order-maintenance literature focuses extensively on whether government intervention can shift norms.¹²⁹ It is also why

¹²⁵ See generally ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 191-208 (1991) (discussing how the practices of high-seas whalers in the eighteenth and nineteenth centuries "powerfully illustrate how nonhierarchical groups can create welfare-maximizing substantive norms").

¹²⁶ See *supra* Section I.A.

¹²⁷ Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL RTS. J. 183, 185-86 (2009).

¹²⁸ See Ellickson, *supra* note 9, at 1243-46 (inquiring into whether "city hall" or "civil society" is a better candidate for managing the norms of public spaces).

¹²⁹ See Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2479-81 (1997) (supporting policing theories that keep valuable and fragile social support networks intact); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1527-30, 1535-38 (2002) (contrasting

so many order-maintenance policies seek to overcome obstacles to informal community organization in order to catalyze private efforts to control our urban public spaces.¹³⁰

Norms are a necessary, but not sufficient, input into successful collective action. Successful informal management of the urban commons requires both positive social norms of public-space appropriation and a high level of social capital, which Robert Putnam classically refers to as “social networks and the norms of reciprocity and trustworthiness that arise from them.”¹³¹ Communities that have access to these two important inputs also have the ability to organize informally to address local problems, including the management of the urban commons. In sociological terms, these communities have high levels of “collective efficacy.”¹³² It is hardly a surprise that communities with high levels of collective efficacy are safer, more orderly, and more socially cohesive than those with low levels of collective efficacy.¹³³ All this, in a sense, is a fancy way of stating the obvious. It is hardly surprising that socially cohesive communities find it easier to get organized and address neighborhood problems like management of the urban commons. The difficulty is that, for a host of reasons, many urban communities are not socially cohesive. Moreover, these reasons tend

authoritarian policing, which alienates the citizenry, with “New Community Policing,” which builds consensus and support for law and order); Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1612-19 (2002) (retelling how police officers and religious leaders worked to hold prayer vigils and providing a model for public-private alliances); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 812 (1998) (“Law enforcement policies should have as a goal the promotion of social organization . . .”).

¹³⁰ However, even the latter actually may rely upon coercive government enforcement of positive social norms. See Garnett, *supra* note 127, at 193-98 (suggesting that community policing efforts depend upon norm enforcement rather than norm entrepreneurship).

¹³¹ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF THE AMERICAN COMMUNITY* 19 (2000). Social capital is the subject of a voluminous and somewhat contentious literature, and Putnam’s formulation is itself contested by other social scientists. See, e.g., DAVID HALPERN, *SOCIAL CAPITAL* 1-40 (2005) (reviewing literature on the topic). Putnam’s “lean and mean” formulation, however, suffices here.

¹³² See Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918 (1997) (defining collective efficacy as “social cohesion among neighbors combined with their willingness to intervene on behalf of the common good”).

¹³³ See *id.* at 923 (finding a correlation among collective efficacy, intensity of local social ties, and social organizations, level of neighborhood services, and low violent crime rates).

to have feedback effects on one another: disorder in public spaces increases residents' fear of victimization, residents who fear victimization are less likely to leave their homes to enter the public square and interact with their neighbors, and residents who do not know their neighbors are unlikely to trust and collaborate with them in order to address neighborhood problems.¹³⁴

The trick is to identify the conditions that interrupt this cycle of dysfunction, then enable neighbors to coordinate their norm-enforcement efforts among themselves. Here, the insights of urban sociologists prove particularly useful. Sociologists point to a number of factors that predict relatively high levels of collective efficacy, even in the face of demographic factors that tend to suppress it. To begin, collective efficacy increases as average residential tenure and levels of homeownership increase.¹³⁵ For all of the reasons discussed above, homeowners have significant financial incentives to address neighborhood problems. It seems reasonable to assume that residential stability probably increases the likelihood that neighbors will get to know, and grow to trust, one another.¹³⁶ Longer-term residents have incentives to address issues of public-space management, as well, since the problems attendant to mismanagement affect their daily quality of life. Thus, long-term residents (and especially homeowners) are more likely than short-term residents to behave responsibly like "owners" of urban public spaces.

In addition to residential tenure, other neighborhood structural factors may influence levels of collective efficacy and, therefore, the possibility of an effectively managed urban commons. Land use patterns also apparently influence the likelihood of cooperative commons management. Contrary to the now-popular view of Jane Jacobs (who extolled the virtues of mixed private land use),¹³⁷ there is evidence that mixed-land-use neighborhoods have lower levels of collective efficacy

¹³⁴ See GARNETT, *supra* note 6, at 129-40 (discussing the effects of the "fear of crime" phenomenon as well as ways in which order-maintenance policies have attempted to alleviate it).

¹³⁵ See Sampson et al., *supra* note 132, at 921.

¹³⁶ Homeownership similarly increases the length of residential tenure since the transaction costs of moving are significantly higher for owners than for renters.

¹³⁷ See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 46 (1961) ("Stores, bars, and restaurants, as the chief examples, work in several different and complex ways to abet sidewalk safety.").

than do exclusively residential neighborhoods.¹³⁸ Compared to inhabitants of exclusively residential blocks, those on blocks with commercial land uses report that they know their neighbors less well and are less likely to trust them to intervene in a neighborhood problem; they also feel that they themselves have less control over neighborhood events.¹³⁹ The reasons are not entirely clear, but it may be that the foot traffic generated by commercial land uses impedes residents' ability to determine who "belong[s]" in their community.¹⁴⁰ Commercial land use also increases the likelihood that strangers, including deviant ones, will cross porous neighborhood boundaries.¹⁴¹ While longer residential tenure is an important predictor of collective efficacy, even short-term residents have a higher stake in maintaining the public space in their community than do strangers, who are unlikely to share local norms of conduct and are more likely to behave irresponsibly, as they have no longer-term interest in neighborhood health.

At a more micro level, the architectural literature on "defensible space" suggests that building design can increase positive feelings of territoriality and encourage residents to assert ownership over public spaces. The catalyst for this literature was Oscar Newman's classic study of the design of public housing projects. Newman argued that, by enabling informal monitoring of public spaces, certain architectural features of housing projects could reduce crime rates.¹⁴² Subsequently, many urban planners and architects—including, most recently, the self-styled "new urbanists"—have urged greater integration of these

¹³⁸ See GARNETT, *supra* note 6, at 64-67 (discussing literature that calls Jacobs's assertions into question).

¹³⁹ See, e.g., Stephanie W. Greenberg et al., *Safety in Urban Neighborhoods: A Comparison of Physical Characteristics and Informal Territorial Control in High and Low Crime Neighborhoods*, 5 POPULATION & ENV'T 141, 149-54 (1982) (correlating commercial land use and crime rates); Ralph B. Taylor et al., *Street Blocks with More Nonresidential Land Use Have More Physical Deterioration: Evidence from Baltimore and Philadelphia*, 31 URB. AFF. REV. 120, 121-22 (1995) (explaining that nonresidential uses remove residents that could have helped manage the block and introduces strangers to the area).

¹⁴⁰ RALPH B. TAYLOR, HUMAN TERRITORIAL FUNCTIONING 185 (1988); see also *id.* (arguing that commercial land use arrangements "can create 'holes' in the fabric of resident-based territorial control" and "gaps in the residents' territorial control").

¹⁴¹ See, e.g., Greenberg et al., *supra* note 139, at 161 (attributing lower crime rates in certain neighborhoods to their lower "flow of outsiders").

¹⁴² See OSCAR NEWMAN, DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN 5-11 (1972) (illustrating architectural features that enable surveillance by nearby residents of semipublic spaces).

features into both public and private redevelopments, as well as land use regulations.¹⁴³

The policy implications of these two land-use factors are unclear. As I have discussed in detail in previous work, there are high costs associated with excluding commercial land uses from urban neighborhoods, including a reduction in the vitality of city life that is attractive to some would-be residents.¹⁴⁴ The costs of mandating certain architectural requirements through land use regulations also are quite high, and include a risk that increased building costs will dampen investment in urban developments.¹⁴⁵ As a predictive matter, however, an understanding of the features correlated with a likelihood of successful commons management is a valuable planning tool for city officials in a world of limited resources.

CONCLUSION: TOWARD A CROSS-COMMONS PERSPECTIVE

Like the fisheries and water systems that were the focus of Ostrom's classic work, the urban commons is a precious resource for city dwellers. It is also, like all open-access resources, vulnerable to exploitation. That exploitation, however, is not inevitable. This Article has sought to illustrate that the urban commons need not descend into tragedy—even at times when resources for coercive government regulation are in short supply. As Ostrom's account teaches, however, not all common pool resources can be managed cooperatively. Thus, this Article might be seen as an extension of her efforts to identify the preconditions for successful commons management. In fact, experience with the urban public commons suggests that Ostrom's account may be overly pessimistic—that, at least with respect to open-access resources with fixed locations (e.g., streets and sidewalks), cooperative management without excessive propertization is possible.

An important next step, beyond the scope of the current inquiry, would be an analysis of these preconditions that extends beyond the urban commons. For example, it would be useful to consider whether

¹⁴³ See generally Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (applying Newman's theory that architecture, urban design, and legal or emotional ownership of real estate can decrease crime rates).

¹⁴⁴ See GARNETT, *supra* note 6, at 90-100 (arguing that urban areas should use zoning to highlight the benefit of living in an urban environment).

¹⁴⁵ See *id.* at 180-88 (using Milwaukee and Chicago as examples evidencing the relationship between regulators and developers).

the preconditions and policies for successful management of the urban commons also predict the successes and failures of commons that are not fixed, physical spaces. In the context of intellectual property and the digital commons, for example, scholars have engaged in extensive debate over issues similar to those raised in this Article. Some scholars champion the possibility of cooperative commons management¹⁴⁶ and question whether creative content has become “over-pertertized.”¹⁴⁷ Others claim that strong intellectual property rights are necessary to guarantee innovation.¹⁴⁸ Still others call for additional regulation of digital content on the Internet.¹⁴⁹ Although a full discussion of these issues is beyond the scope of this Article, given the substantial overlap in the themes characterizing these debates, a cross-commons analysis of policy innovations in the two very different domains could yield important insights about the problem of the commons generally.

¹⁴⁶ Lawrence Lessig argues that the Internet fits squarely within Carol Rose’s view that “some kinds of property . . . should be open to the public.” LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 86 (2001) (quoting Rose, *supra* note 8, at 713). According to Professor Lessig, the Internet was built upon two kinds of commons, and moved into a third, which resulted in an “increase [in] the value of controlled resources by connecting them with free resources.” *Id.* at 85. He also advances several reasons why he believes the commons of the Internet should be regulated. *See id.* at 85-99. For an excellent, recent discussion of this problem, see Michael J. Madison et. al, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010), and the responses included in the volume.

¹⁴⁷ *See generally* JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 179-204 (2008); MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 23-48 (2008)

¹⁴⁸ *See, e.g.*, ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 1-27 (2011) (discussing this debate and outlining a defense of intellectual property); Peter S. Menell, *Intellectual Property and the Property Rights Movement*, *REGULATION*, Fall 2007, at 36 (discussing the property rights debate in intellectual property).

¹⁴⁹ *See, e.g.*, David F. Fahrenthold, *SOPA Protests Shut Down Web Sites*, *WASH. POST* (Jan. 18, 2012, 9:00 AM), http://www.washingtonpost.com/politics/sopa-protests-to-shut-down-web-sites/2012/01/17/gIQA4WY16P_story.html (discussing various websites that protested proposed Internet privacy regulations).

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