Journal of Human Rights and the Environment, Vol. 3 No. 2, September 2012, pp. 254–272

Property paradigms and place-making: a right to the city; a right to the street?[1]

Antonia Layard
Professor of Law and Geography, Birmingham Law School, UK

The author explores the 'right to the city' as a rhetorical device and political strategy aimed at reformulating our conception of inclusion in city cores through the lens of the 'right to the street'. Although the 'right to the city' is an imaginative, rhetorical claim for justice, existing legal provisions related to the philosophy of 'localism' provide avenues for a progressive reformulation of 'streets' as being more than routes for traffic and commerce: as places for 'roots', habitation, walking and dwelling which city dwellers can be empowered to use and manage as 'their streets' and thereby to formulate a new, inclusory conception of 'public property'.

Keywords: *right to the city, right to the streets, localism, highways, place, habitation, use and appropriation, management and participation*

The Right to the City movement is one of the most vibrant campaigns today. Linked to, but distinct from, the disparate strands of the Occupy protests which have temporarily physically occupied central urban spaces, adherents aim to challenge the ways in which cities are currently organized and run. As one website explains:

> Right to the City was born out of desire and need by organizers and allies around the country to have a stronger movement for urban justice. But it was also born out of the power of an idea of a new kind of urban politics that asserts that everyone, particularly the disenfranchised, not only has a right to the city, but as inhabitants, have a right to shape it, design it, and operationalize an urban human rights agenda.[2]

This 'right' is not one that would be recognized by most human rights lawyers. It is not, as things stand, legally enforceable. Nor is the reference to urban justice broken down into classical categories of distributive or restorative justice. As presented, the right is more an exclamation than a carefully worked out academic complaint. This may rile some lawyers, yet it expresses a 'felt' injustice[3] rather than a legal 'fact'. As Lefebvre, the writer regarded as the touchstone of this right-claim, wrote in 1967, just before the Parisian 'Interruption' of 1968, '…the right to the city is like a cry and a demand…The right to the city cannot be conceived of as a simple visiting right or as a return to traditional cities. It can only be formulated as a transformed and renewed right to urban life'.[4]

1. I am grateful to the comments from two anonymous referees and particularly to Anna Grear on an earlier version of this paper. It was written as part of an ESRC Fellowship on Localism, Law & Governance (ESRC ES/J004642/1).
2. <http://www.righttothecity.org/index.php/about> accessed 1 July 2012.
3. A Grear, 'Human Rights, Property and the Search for "Worlds Other"', this volume.
4. H Lefebvre, *Writings on Cities* (Wiley-Blackwell, London 1996) 158.

This paper seeks to outline the right to the city as a concept that is well known to urban theorists, critical geographers and political scientists yet is less familiar to lawyers. As well as considering the appropriateness of referring to the claim as a right, the analysis offers some critiques of it, particularly as raised by the questions: 'whose right, whose city?' It suggests that the archetypal understanding of the right to the city is heroic, focusing on iconic sites in city cores, particularly in the context of protest. This is an important political formulation, yet the argument presented here is that any right to the city (however formulated) should not be limited to paradigmatic public spaces in city centres. In fact, this argument suggests that the 'right' is perhaps more achievable in less iconic urban neighbourhoods, particularly in local residential streets. Specifically, it is argued that there are real possibilities for implementing the claims inherent in the right to the city rhetoric through new neighbourhood planning developments in England and Wales under the Localism Act 2011.

To explore these points this article will consider the role of highways in English law. The reason for focusing on highways is threefold. First, highways were, in the leading decision of *DPP v Jones*[5], characterized by Lord Irvine as 'public places', distinct from private property, where a broad range of activities can be carried out. Streets and, in particular, pavements, are understood as being available for public use. The second reason is that highways form a large and ubiquitous proportion of public space both in city centres and in urban residential neighbourhoods. If the right to the city is to start anywhere, it may well be fruitful to try to 'reclaim the streets'. The third reason is that the right to the city can be rendered more concrete, but this requires a legal articulation of the precise property paradigms that underpin city spaces and streets are one place to start.

In particular, this article suggests that attempts to assert rights to the city and to reclaim the streets are often resisted on two grounds. The first is that roads are to be understood primarily as corridors for travel. The second, and the more important for the purposes of this argument, is that streets are often assumed to be the property of the local authority, so that property paradigms are central to how to understand streets. Reconceiving streets as *res universitatis* rather than as *res publicae* (to use the Roman categories revived by Rose) may help us to understand what and whom (for the two are intimately linked) streets are for. In this sense, implementation may be about phenomenology, about claiming the social, physical and legal space, as much as positive rights. The provisions are already there to be used.[6]

1 THE RIGHT TO THE CITY

1.1 A political claim

The 'right to the city' is frequently said to be underdetermined[7] and is certainly not a conventional human right. The touchstone for the claim lies in the writings of Lefebvre, who suggested that it should enable individuals 'fully' to 'enjoy urban life with all its services and advantages' while also 'taking part in the management

5. (1999) 2 AC 240.
6. In particular Traffic Regulation Act 1984 s 29 for play streets, the Transport Act 2000 s 268 for home zones and the Localism Act 2011.
7. M Purcell, 'Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant' (2002) 58 GeoJournal 99.

of cities'.[8] Rooted in 'la vie quotidienne', Lefebvre's formulation also had a practical turn. The right, he thought, should 'modify, concretize and make more practical the rights of the citizen as an urban dweller (citadin) and user of multiple services'.[9] Lefebvre connected the 'right' with a solidarity of contribution based on 'inhabitance' rather than on formal citizenship.

In developing the 'right' Lefebvre drew on the longstanding classical literature on cities particularly the writings of More, Plato and Aristotle,[10] suggesting that the 'good life' could be realized in the City.[11] Lefebvre aimed to make the links between philosophy and 'urban life' more explicit, drawing on the notion of a 'right' without articulating it clearly in philosophical terms. In a sense, the right to the city is agonistic, reflecting conflict and antagonism rather than a more rational, communicative philosophy[12] that underpins existing participation rights in the built environment. It consequently sits uneasily with our current understandings, perhaps even offering a different ontological framework. It is a challenge, a cry, rather than a legally enforceable claim. Its advocates see benefits, however, in using the term 'right'.

While the right has no legal standing, practical formulations have been promulgated in the 2004 World Charter on the Right to the City[13] (proposed by a network of international NGOs), the European Charter for the Safeguarding of Human Rights, the 2001 City Statute in Brazil in 2001[14] and the 2006 Montreal Charter of Rights and Responsibilities. Each of these documents has wide-ranging aims, including an emphasis on the 'social function of property' in the case of the World Charter. This states that the 'public and private spaces and properties belonging to the city and to the citizens should be used in such a way as to prioritise the social, cultural and environmental interest'.[15] It is this social function of property (rather than a civil function which the rhetoric of rights might suggest) that is both productive and controversial. Nonetheless, the Charter is not yet in force and international agencies do not intend to promote a new international legal instrument. Instead, UN Agencies, including UNESCO and UNHABITAT, aim to encourage cities to develop the idea from best practice reports and toolkits.[16]

While the 'right to participate in urban life' may consequently sound unduly vague to legal ears, it is often disaggregated into two parts: 'use and appropriation' and 'management and participation'. In property terms, this implicates a 'right' of access to city spaces (which can be restricted by the law of trespass) and a 'right' to manage them. Thus the right to the city observes that cities as places are more than a collection of privately owned

8. E Fernandes, 'Constructing the "Right to the City" in Brazil' (2007) 16 Social & Legal Studies 201, 208.
9. Cited in M Purcell, n 7.
10. Aristotle, *The Politics* (Penguin, London 1992); Plato, *The Republic* (Penguin, London 2003); T More, *Utopia* (Penguin, London 2003).
11. H Lefebvre, n 4.
12. S Bond, 'Negotiating a "Democratic Ethos": Moving Beyond the Agonistic – Communicative Divide' (2011) 10 Planning Theory 161.
13. <http://www.planningnetwork.org/01_news/World_Charter_on_the_Right_to_the_City.pdf> accessed 2 July 2012.
14. Federal Law no 10.257; see E Fernandes, n 8; N Pindell, 'Finding a Right to the City: Exploring People and Community in Brazil and the United States' (2006) 39 Vanderbilt J of Transnational Law 435.
15. Article II (3).
16. *Urban Policies and the Right to the City: Rights, responsibilities and citizenship* (UNESCO, UN-Habitat, Paris, 2008).

properties. To understand how the right to the city challenges current urban governance draws on a further observation by Lefebvre, that space is socially, spatially and legally constructed. It is important to understand what this implies. While 'construction law' is a well-recognized category of reference, this conventionally refers to the initial development of buildings and places, planning, highways and contract law. It is, most accurately, 'law for the construction industry'.[17] To say, however, that cities are *legally constructed* also means that their use and urban life is controlled by many legal interventions (and non-interventions) including highways law, criminal and public order law, tort law and in particular property law. Right to the city advocates are challenging precisely these everyday legal (social and spatial) constructions of cities. In Harvey's words '[t]he right to the city is not merely a right of access to what already exists, but a right to change it after our heart's desire'.[18]

This is why the claims for use and participation implicated by the right to the city discourse are not adequately met by existing legal provisions such as planning and/or environmental assessment provisions.[19] Because participation rights have been so closely tied into these procedures, once permission is granted for the physical construction or initial installation, publicity and participation provisions are highly limited.[20] Plan-making and applications for planning, environmental impact assessment and pollution control consent are an event, which participation can focus on. Once the plan is completed or the permission is granted, there are almost no provisions for ongoing participation by residents in urban spaces. The developments are built, the roads constructed, the plans implemented. For developers, their lawyers, planners and highways professionals, the necessary documents are obtained and filed away.

And yet the space is still legally constructed. Property owners manage their properties, controlling uses and excluding outsiders within the remits of property and public law. Vehicles drive on the roads regulated by highways, criminal and tort law, It is this *ongoing* social construction of spaces that right to the city advocates challenge and which could deploy certain existing provisions to reorganize the use of streets.[21] This echoes Lefebvre's formulation of the right to the city by dwelling on everyday life (Lefebvre's '*law vie quotidienne*') as the 'central pivot', meaning that 'those who go about their daily routines in the city, both living in and creating urban space, are those who possess a legitimate right to the city'.[22]

Admittedly, pitching a 'right to the city' at the neighbourhood level may be less high profile than campaigners currently might wish. Yet it is a pragmatic approach, echoing Lefebvre's suggestion:

> that the purpose of radical critique is to 'open a path to the possible, to explore and delineate a landscape that is not merely part of the "real", the accomplished, occupied by existing social, political, and economic forces'. For Lefebvre the 'real' was the existing capitalist

17. J Uff, *Construction Law* (Sweet & Maxwell, London 2009).
18. D Harvey, 'The Right to the City' (2003) 27 International Journal of Urban and Regional Research 939, 940, 939.
19. Augmented now under the umbrella of the Aarhus Convention 1998. See particularly: The Town and Country Planning (Environmental Impact Assessment) Regulations 2011(SI 1824).
20. *R (on the application of Edwards and another) v Environment Agency* [2008] 1 WLR 1587.
21. Traffic Regulation Act 1984 s 29 for play streets; the Transport Act 2000 s 268 for home zones; and the Localism Act 2011.
22. M Purcell, 'Citizenship and the Right to the Global City: Reimagining the Capitalist World Order' (2003) 27 International Journal of Urban and Regional Research 564, 577.

> city, and the possible was what he called 'urban society', a virtual object that is both a horizon toward which we must move and also something that is always already here, present in our everyday lives, even if it is inchoate, emerging, and difficult to see.[23]

In light of this, making everyday (neighbourhood) life central to claims for a right to the city would seem to have much to recommend it.

Yet to attempt to capture the claims for a right to the city within existing legal provisions requires a change of mindset. It necessitates a reconsideration of our understandings of property, particularly our sense of public property (however this might be defined). If implemented on a more local, neighbourhood scale, any right to the city could be a communal right rather than an individual entitlement, facilitated by existing neighbourhood planning and highways provisions. This would not require new legislation. Instead, initiatives would engage with place rather than property, acknowledging the two as distinct. While this is new conceptual and physical territory, it often (as will be explained) appropriates legal provisions that already exist but are rarely used to create more liveable places.

Localism could, for example, mean that locals, whether at the local authority or neighborhood level could be responsible for managing (and be enabled to use) *their* streets for communal activities (such as childrens' play, street parties or 'home zones') as much as for thoroughfares. City inhabitants could appropriate these spaces and participate in their management. While this would not work for all roads, it is important to remain alive to material distinctions between streets, for although current highways law includes all highways as part of a single network, there is a commonsense distinction between an arterial route and a residential street, with most falling on a spectrum between the two. Access will always be required and routes for travel should be kept clear, yet 'reclaiming' quieter streets or closing some roads to traffic on Sundays (echoing Spanish and Colombian practices of *Ciclovia*)[24] is not practically impossible to do. Where local authorities are sympathetic (as in Bristol, for example)[25] successful home zones, street parties and 'playing out' sessions are already regularly achieved. Residents have at least partially reclaimed 'their' streets.

1.2 Is the 'right to the city' a right at all?

As formulated by 'right to the city' advocates, the right does not fit into any neat category of the traditionally conceived human rights. Indeed, some lawyers may bristle at the framing of this claim as a right: why call it a right at all if it is no more than a moral claim? Yet it is the framing of the claim as a right which encapsulates the pain of exclusion and frustration at an inability to engage as a citizen with urban spaces. To suggest that language should be limited so that only legally enforceable rights can call upon the term 'right' implies a positivistic worldview that does not sit easily with action in the streets. Calling on the language of rights is a part of the process that facilitates translation from moral claims to legal rights (as the 'right to gay marriage' debate clearly illustrates). This is rhetoric, not case-law,

23. This is taken from Mark Purcell's blog <http://pathtothepossible.wordpress.com/> accessed 2 July 2012.
24. For details of Ciclovia see <http://www.8-80cities.org/Car_Free_Sundays.html> accessed 7 June 2012.
25. <http://www.bristol.gov.uk/page/events> last accessed 20 July 2012.

drawing directly on the language of rights in order to articulate a physical, social, spatial claim.

Central to these workings of the right to the city is a sense of a new paradigm that challenges social and political structures, particularly the exercise of property rights. Lefebvre argued that the traditional city is the focus of social and political life, wealth, knowledge and arts; an œuvre in its own right. He suggested, however, that as practiced, the city's use value is overwhelmed by the exchange value resulting from the commodification of urban assets.[26] This is a theme continued by advocates today. As Harvey writes: 'We live in a society in which the inalienable rights to private property and the profit rate trump any other conception of inalienable rights you can think of'.[27] It is the shaping of urban spaces by the pursuit of profit through the deployment of property rights that reduces the city as a whole.

Clearly, in both its formulations and its objectives, the right to the city requires some re-thinking from lawyers. First, as just noted, it is largely rhetorical (although as this analysis will show, some of the right's aims might be achieved by drawing on existing legal mechanisms). Secondly, the right challenges property rights and requires a more thorough problematizing of what we mean by 'city property', public property and public space. Thirdly, legal constructions of citizenship tend to be international, regional (in Europe for instance) or national and apart from voting in local elections, ideas of sub-national citizenship are rarely explored. Working with a 'right to the city' consequently entails a re-scaling, re-territorialization and re-orientation of citizenship[28] introducing the idea of multiple citizenships (which may or may not be not be neatly nested into each other).

Despite the need for re-imagination from lawyers, there is scope to use existing laws to advance the right to the city and the ability to reclaim the streets as everyday places. The aspirational nature of the claim, local re-scaling and concern with property rights can be coupled with an emphasis on everyday practice. This insight is evocative in the current political context of localism, a political ideology that emphasizes local governance over parts of cities.[29] Both localism and the right to the city, as discourses, engage with property rights, attempting to balance interests in collective place-making with the individual ownership of sites. Streets can be re-imagined by those who use them, the citizens, advancing localized use and management as the 'right to the city' would suggest. The largely dormant existing legal provisions[30] can be reclaimed. Is it inappropriate, therefore, in this context, to use the terminology of rights? Are these assertions merely moral claims?

In the case of the right to the city, both 'right' and 'city' are re-imagined. Both terms draw on discourse as much as on legal provisions. The right to the city may well represent a process of transition, but the imagining at its heart may in one sense be true of all rights. Rights are, as Douzinas writes, semiotic: 'As symbolic constructs, rights do not refer to things or other material entities in the world. Rights are pure combinations of legal and linguistic signs, and they refer to more signs, words and images, symbols and fantasies … "I have a right" is used as synonymous to "I want" or "I demand" and if enough pressure is put behind the demand, it becomes

26. H Lefebvre, n 4.
27. D Harvey, n 18.
28. M Purcell, n 7.
29. Considered further in Part 2.3.
30. Traffic Regulation Act 1984 s 29 for play streets; the Transport Act 2000 s 268 for home zones; and the Localism Act 2011.

a legal right'.[31] While lawyers may object to the framing of these claims as rights, this is a discourse that resonates, in particular, by challenging the use of 'property rights' with calls for 'rights' to involvement in place-making and urban life.

1.3 The right to the city: use and appropriation

In articulating the right to the city, academics and activists have drawn on Lefebvre to identify two broad strands, the first of which is the right to use or 'appropriate' the city, often emphasized as being an alternative to exchange value. Here, as Purcell writes, 'Marx's use value/exchange value distinction is central to [the] idea of appropriation. The right to appropriation is the right to define and produce urban space as property, as a commodity to be exchanged on the market'.[32] Unfettered exchange suppresses the 'city as oeuvre'[33], 'the city as a creative product and context for the everyday life of its inhabitants'.[34] It is in this context that the right to use public spaces is understood as important, 'a small part of that right to the city' yet a 'key component'.[35] This use value in the city is in some senses straightforward to achieve within conventional legal thinking. For, while the trespass/licence binary (either you have a licence to be on land or you are a trespasser) is still fundamental to some (particularly conservative) understandings of property, access has been granted to semi-public urban and suburban sites in some jurisdictions.[36] In England and Wales, under the right to roam, such access is also now widely accepted in a rural context.[37] Yet while the cultural elevation of the act of disobedience in the Kinder Scout trespass[38] has translated access-use (if not all uses) of iconic rural sites into accepted practice, there is no equivalent right to roam in city cores in England and Wales.

Indeed, everyday practices, as well as recent disputes over protests, clearly illustrate that the right to use public space is not accepted in English urban contexts. With the increasing rolling up of city centres into large privately owned enclaves of many, many acres (in the case of Stratford City, 180 acres),[39] enclosed in a single plan, city cores are accessible only to 'visitors', not citizens. Lawfully accessible only under licence as actual or potential consumers, in many English city centres visitors are now unable to walk a dog, play a guitar, take a photograph or smoke a cigarette in places otherwise understood to be, and presented as being, in the public realm.[40]

31. C Douzinas, *The End of Rights* (Hart, Oxford 2003) 254 and 255.
32. M Purcell, n 7, 578.
33. H Lefebvre, n 4, 172–3.
34. M Purcell, n 7, 578.
35. P Marcuse, 'The Threat of Terrorism and 'The Right to the City'' (2005) 32 Fordham Urban Law J 767.
36. S Gray and K Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' [1999] EHRLR 46; K Gray and S Gray, 'Private Property and Public Propriety' in J. McLean (ed), *Property and the Constitution* (OUP, Oxford 1999) 15; A Grear, 'A Tale of the Land, the Insider, the Outsider and Human Rights' (2006) 23 Legal Studies 33; J Rowbottom, 'Property and Participation: a Right of Access for Expressive Activities' [2005] EHRLR 186.
37. In England, Countryside and Rights of Way Act 2000 and Marine and Coastal Access Act 2009.
38. <http://www.nationalparks.gov.uk/press/history.htm> accessed 2 July 2012.
39. A Minton, *Ground Control: Fear and Happiness in the Twenty-First Century City* (Penguin, London 2012).
40. A Layard, 'Shopping in the Public Realm: The Law of Place' (2010) 37 Journal of Law & Society 412.

Even the freedom of assembly and to protest is limited in urban public spaces once the protest becomes more than transitory and is deemed 'disproportionate'.[41] In England, the decision of *Appleby v UK*[42] has increasingly been used against occupations of apparently public or semi-public land, evicting student sit-ins at University College London and the School of African and Oriental Studies[43] as well as Occupy protestors from the Bank of Ideas[44], St Paul's[45] and peace campaigners from Parliament Square.[46] At the very best, there is a curtailed, 'proportionate' right to non-obstructive protest in the absence of landowner consent.[47]

Further, for activities for which there is no recognized and protected right (the abilities, for example, to play, to picnic, to take photographs, ride a bike or simply to be an urban *flâneur*), no requirement of proportionality is imposed upon the landowner. Invoking rules of trespass (through the use of CCTV, security guards and the use of demarcating street furniture) facilitates the enclosing of public spaces on the basis of property principles, certainly if the space is privately owned. Here, then, the right to use the city is about more than the ability to leaflet or even to protest. In these now private, previously public, spaces local residents and citizens do not always have the freedom to use the space as they might wish unless the property owner consents. This limits 'the right to play and to recreate, and the most encompassing right to "be" in the city as a totality'.[48]

As lawyers know and as writers drawing on Lefebvre's work (including Castells[49], Harvey and Purcell) explain, it is property law's expression of property rights that limits access to and use of the city. These critics consequently argue for the 'right to appropriation' in the city in order to 'confront capital's ability to valorize urban space, establishing a clear priority for the use value of urban residents over the exchange value interests of capitalist firms'. They resist the 'appropriation networks' of property owners that rework 'control over urban space, resisting the current hegemony of property rights and stressing the primacy of the use-rights of inhabitants'.[50] One of the aims of the right to the city is to challenge the primacy of property rights and the enclosure achieved by the requirement for visitors to enter and act 'under licence'.

1.4 The right to the city: management and participation

These restrictions on any right to use or appropriate do not bode well for the second strand of the right to the city: the right to management or participation. Participation allows citizens (urban inhabitants) to access all decisions that produce urban space. Yet when cities are reduced to a collection of properties, it is difficult, within current

41. *City of London Corp v Samede* [2012] 2 All ER 1039.
42. (2003) 37 EHRR.
43. *Appleby* was pleaded in argument in *Haw*, but not considered in the judgment.
44. *Sun Street Property Ltd v Persons Unknown* [2011] EWHC 3432.
45. *Samede*, n 41.
46. *R (Gallestegui) v Westminster CC* [2012] EWHC Admin 1123.
47. *Samede*, n 41.
48. A Kirby, 'The Production of Private Space and its Implications for Urban Social Relations' (2008) 27 Political Geography 74, 91.
49. M Castells, *The Urban Question: a Marxist Approach* (MIT Press, Cambridge 1977).
50. M Purcell, 'Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant' (2002) 58 GeoJournal 99, 103.

privatized, atomized conceptions of property, to introduce provisions that facilitate participation in decision-making. After all, one of the hallmarks of property ownership is the owners' 'agenda-setting power'.[51] Property law, even for 'public property' (however this is defined) continues to emphasize the will of the landowner.[52] It is the landowner that can imagine the use of the space and set the agenda. The singular approach that property rights adopt is difficult to calibrate with more multiple, diverse and dynamic claims for what might be considered public space.

The right to the city does not claim the ability to re-order private properties, in the sense of private homes or businesses. Instead, in its claims for participation, it engages with the management of public space. As critical geographers have argued, the city and any public space within it are created by an ideology that prioritizes property rights over other social interests.[53] Public space is seen as the focus of an inherent and ongoing struggle as people compete over the shape of the city and access to the public realm.[54] And yet legally there is no category of public space in England and Wales. Laws of place are the accumulation of laws of property, mixed with limited public law duties and a concern for human rights protection (in practice requiring an analysis of proportionality). If public space is not legally protected or even legally recognized, then there is no dedicated institutional structure through which inhabitants of the city can participate. What there is, although this is limiting and frustrating for many, is the possibility of public consultation (if not always participation in any meaningful sense)[55] in planning processes.

With the introduction of the 2011 Localism Act and the legal recognition and spatial juridification[56] of neighbourhoods, city inhabitants are being called upon to plan for their neighbourhood. Neighbourhood planning provides a new route for *ad hoc* groups (neighbourhood forums in cities or possibly new urban parish councils) to walk 'their' streets, determining where new development might take place. While the legal controls stay in place, this provides some opportunity for locals to 'shape the place', including envisioning 'their' local public spaces. This comes with the caveat that residents, practitioners and policy-makers at all scales need to be aware of the 'local trap' whereby residents make neighbourhoods in their own image.[57]

It is here that there is a kernel of possibility for neighbourhoods, initially through governance, to lay a claim to streets as 'their' public property. Yet, while they are silent on property paradigms, these neighbourhood planning practices call into question what we mean by public property such as highways. Who owns the streets? Who can imagine them and set their agenda? If local groups wish to introduce planting or

51. L Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 University of Toronto Law Journal 275.
52. Samede, n 41; *Secretary of State for the Environment, Food and Rural Affairs v Meier and others* [2009] 1 WLR 2780.
53. D Harvey, *Justice, Nature and the Geography of Difference* (Wiley-Blackwell, Oxford 1996); N Blomley, *Unsettling the City: Urban Land and the Politics of Property* (Routledge, London 2004).
54. D Mitchell, *Right to the City*, see n 63; S Low and N Smith, *The Politics of Public Space* (Routledge, New York 2005).
55. S Arnstein, 'A Ladder of Participation' (1969) 35 JAIP 216.
56. A Layard, 'Law and Localism: the Case of Multiple Occupancy Housing' (2012) Legal Studies (forthcoming).
57. M Purcell, n 7; A Layard '"Shaping the Place" and the Ability to Exclude: Housing and Localism in England' in M Diamond and T Turnipseed, *Housing Community and Identity* (Ashgate, Farnham 2012).

traffic calming measures on their streets in order to reclaim the streets for children's play and adult sociability, this may now be within their grasp if, and this is a significant if, the local authority as highways authority (and apparent owner of the road) agree.

The question is whether these rights over the streets can now be re-scaled, either through localism or through a situated right to the city. Neighbourhood planning practices could provide opportunities for city inhabitants slowly to reclaim some measure of control over 'their' streets through a culture, if not a clearly defined legal regime, of localism. If such rights were re-scaled, streets might be 're-claimed' as long as travel was still provided for, even if the local authority did not agree. It raises the question 'whose streets are they anyway?' Ultimately, this may bring about a re-thinking of property paradigms, particularly for public property, by asking 'which public' it belongs to. These are institutional changes as much as new legal provisions. Yet the right to the city has (as the UNESCO toolkits demonstrate) long been about creating opportunities to advance policy and political projects. The right to the city may in practice be dependent not on legal implementation but on sufficient and strategic articulation by 'savvy actors within civil society' who are alert to such opportunities.[58] While this may privilege some communities over others, if the phenomenology of street ownership changes at a local authority level, there is real scope for expansion. In the context of neighbourhood planning there is consequently real potential for practical innovation to re-form inhabitants' city experiences.

2 HIGHWAYS

2.1 Reclaiming streets

In his piece *No Ball Games*, painted on a wall in Mill Hill East, North London, the graffiti artist Banksy presents an ethereal image of children with their arms raised waiting to catch a non-existent ball.[59] The air is empty, while the children play in front of a concrete wall in front of a red 'no ball games' sign. What makes this scene particularly poignant is that play streets, while always contested, were once a common sight in London.[60] The 1938 Street Playgrounds Act gave children, rather than cars, priority. While the Street Playgrounds Act was repealed in 1960,[61] similar provisions lie dormant in the 1984 Traffic Regulation Act, largely forgotten and unused.[62] Reclaiming the streets for play is legally possible, just as it is for regular street parties or community events.

Banksy's piece captures the incredible decline in 'playing out', and in the number of children making friends and creating networks in their streets before and after school, playing games and creating communities. Traffic is only one reason for the decline in outside play. Others include parental concerns over letting children out

58. S Parnell and E Pieterse, 'The "Right to the City": Institutional Imperatives of a Developmental State' (2010) 34 International Journal of Urban and Regional Research 146–62.
59. <http://www.artofthestate.co.uk/banksy/Banksy-london-september-2009.htm> accessed 2 July 2012.
60. There were 750 play streets throughout England and Wales at the highpoint in 1963, see Playstreets in London timeline, available at <http://www.londonplay.org.uk/file/1333.pdf> accessed 2 July 2012.
61. By the Road Traffic Act 1960.
62. Section 29.

to play due to traffic and perceived threats from strangers; children adopting parent's inactive lifestyles and being ferried about by car; increased TV viewing and computer use, and educational practices which have put teachers under pressure to concentrate on children's literacy and numeracy skills at the expense of physical development.[63] There is clear evidence that outside play is declining and that it is qualitatively different from inside play. In particular, it is rare for children not to be physically active when they are outside.[64] Most urban children, however, no longer have the choice.

In a few locations 'home zones' have been introduced to redesign streets to both calm traffic and provide a better balance between liveability and travel. Here residential streets are designed to be shared by pedestrians and vehicles (hence, also called shared space) according to principles similar to Dutch *woonerfen*.[65] Again, these changes are legally possible under the Transport Act 2000.[66] Research on pioneer home zones has found that while parents are not entirely certain that streets are safer, they are more lenient in these spaces in allowing their children outside to play.[67]

Generally, however, playing on the street is no longer a commonplace of British urban childhood experiences. Streets are maintained as part of the traffic network, not protected as places. For children this means that streets are only very rarely places to play.[68] Football kickabouts and other games are susceptible to prosecution under the Highways Act.[69] Street playing has been the subject of anti-social behaviour orders,[70] continuing a legacy whereby children were first criminalized for playing in the streets in the 1930s.[71] Commentators have argued that 'a collision between adults' and children's shared environment is inevitable when respect is not given to children's perspectives'[72] with modern day children inhabiting 'spaces within an adult-constructed world', outlawed from public spaces and effectively corralled within institutions specially designated for them such as schools[73] and dedicated playgrounds.[74]

It is not, however, just children who are excluded from streets. When streets are imagined as being primarily for cars, the sociable, the bored, the lonely and the vulnerable rarely have public spaces in which to congregate in their immediate community. The emphasis on using streets for flow rather than as places, for routes rather

63. J Doherty and M Whiting, 'All About Tackling Childhood Obesity' (2004) 322 Nursery World 113.
64. L Brady et al, *Play and Exercise in Early Years: Physically Active Play in Early Childhood Provision* (National Children's Bureau for DCMS, London 2008).
65. M Biddulph, 'Evaluating the English Home Zone Initiatives' (2010) 76 Journal of the American Planning Association 199.
66. Section 268.
67. Biddulph, n 67.
68. Cul-de-sacs lend themselves better to play than conventional roads.
69. Section 161(3).
70. R Edwards, 'Children face prosecution for playing ball games in street' *The Telegraph*, 15 August 2008 <http://www.telegraph.co.uk/news/uknews/2565392/Children-face-prosecution-for-playing-ball-games-in-street.html> accessed 7 June 2012.
71. *Playstreets in London Timeline* <http://www.londonplay.org.uk/file/1333.pdf> accessed 20 July 2012.
72. S Elsley, 'Children's Experience of Public Space' (2004) 18 Children & Society 155.
73. J Ennew, 'Time for Children or Time for Adults?' in J Qvortrup et al (eds), *Childhood Matters: Social Theory, Practice and Politics* (Avebury, Aldershot 1994) 127 cited by Elseley, n 72.
74. Though some, particularly older children, may prefer to play further away from home, especially if there are not many other children their age in their streets.

than roots, is fixed both spatially and socially, by legislation. Once streets are subject to a 'network management duty'[75] where obstructions (whether people or things) are to be removed, a dynamic creation of place becomes more difficult. Local residents are required to apply weeks in advance for 'street closure notices', to engage in consultation procedures and to abide by health and safety practices should they want to use their street for children's play or for a street party.

Traffic-centred practices effectively deny, or severely limit, understandings of streets as public spaces – an understanding that was historically evident when there was less traffic on the roads. Certainly, the distinction between fixity and mobility should not be over-stated. It is in practice difficult to disaggregate the use of streets for travel and as public spaces. They are both. Streets intersect literally and figuratively so that the two understandings and uses of streets are not necessarily incommensurable: 'walking around is fundamental to the everyday practice of social life'. There is a relationship between walking, embodiment and sociability with places created as we discover connections, sites and vistas through our walks to work, home or in open space.[76]

Fundamental to legal regulation and policy-making on streets is our imagination of these spaces. It is possible to imagine streets as being both corridors for movement and spaces for congregation. While localism suggests sedenterism, a better understanding may be habitation, which takes into account both dwelling and wayfaring as 'the fundamental mode by which living beings inhabit the earth'.[77] Landscapes are no longer to be separated from human experience or to be seen as purely visual – instead, they are part of a world of movement, relationships, memories and histories.[78] As Bender writes from an anthropological perspective, 'by moving along familiar paths, winding memories and stories around places, people create a sense of self and belonging … being on-the-move … always involves a degree of being in place'.[79]

Place and movement are not oppositions, they are intertwined. Streets could demonstrate both these attributes. In particular, by clearing streets of cars on some days or for some hours, networks of mobility for children and the more vulnerable might be enhanced. Creating places can also create movement. It is this mixing of movement and practice that can create practices of 'citizenship', of becoming a citadin. De Certeau was one theorist to suggest that repeatedly using space, including by walking, creates a sense of belonging to the city. He suggested that the possibilities of daily use of urban spaces are what create a sense of belonging to the city. De Certeau suggested that belonging is a sentiment that is built up and grows over time as a result of everyday life activities and use of spaces. This is for de Certeau 'a theory of territorialization' through spatial tactics: 'space is a practical place. Thus, the street geometrically defined by urban planning is transformed into a space by walkers'.[80]

75. See below Section 2.2.
76. J Lee and T Ingold, 'Fieldwork on Foot: Perceiving, Routing, Socializing' in S Coleman and P Collins (eds), *Locating the Field: Space, Place and Context in Anthropology* (Berg, Oxford 2006).
77. T Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (Routledge, New York 2011) 12.
78. S Feld and K Basso (eds), *Senses of Place* (School of American Research Press, Santa Fe 1996).
79. B Bender, 'Landscapes on-the-move' (2001) 1 Journal of Social Archaeology 75, 85.
80. M de Certeau, *The Practice of Everyday Life* (University of California Press, London 1984).

This appears to be true for children as much as adults. As Spilbury et al write: 'in the street, particularly in the nooks and crannies of public space not under the watchful gaze of adults, children may thus begin forming a public identity and establish their own selfhood and independence'.[81]

Despite this material understanding of lines and places as interwoven, governance and legislation does not always allow for this complexity. Streets are regulated as highways, with local authorities subject to a 'network management duty', both empowered and required to remove obstructions (whether these are builders' skips, broken down cars or people). The dual approach to streets has broader links with the city, echoing Castells' distinctions between cities as spaces of flows and spaces of places, with separate spatial logics. In England and Wales today, highways are very much governed by the 'logic of flows'. This choice is exercised partly as a result of highways law and, as the Occupy litigation illustrated, also partly as a result of the highway authority being conceived of as the property owner of the streets.[82] Property paradigms also matter.

2.2 The regulation of streets

The governance of streets is underpinned by three central pieces of legislation: the Highways Act 1980, the Road Traffic Management Act 2004 and the Road Traffic Regulation Act 1984. These create a dual system. Motorways and trunk roads are managed by the Highways Agency, while other streets, roads and highways are governed by district or county councils as local highway authorities.[83] Yet while this dual governance system reflects the material differences between arterial routes and neighbourhood streets, legal provisions understand *all* streets, arterial roads and motorways alike, as being corridors for traffic.

There is no statutory definition of a highway, it is assumed. In common law, a highway has been conventionally understood as 'a way'. This way should lead somewhere. There is no *jus spatiandi* or right to wander at will at common law[84] and even the legislative right to roam[85] does not create a highway. In some case-law this right is in the nature of an easement[86] even though there is no dominant tenement[87] (unless the kingdom is the dominant tenement).[88] At common law, 'street' means a thoroughfare, which is not necessarily a highway.[89] Conversely, legislatively, one central definition of a street includes a highway.[90] Technically, however, this is not hugely important in the day-to-day management of traffic because all roads are subject to the 'network management duty' where local authorities *qua* highway authorities are

81. J C Spilsbury et al, 'We Don't Really Get To Go Out in the Front Yard – Children's Home Range and Neighbourhood Violence' (2005) 3 Children's Geographies 79, 81.
82. *Samede*, n 4.
83. The Greater London Authority in London.
84. *Re Ellenborough Park, Re Davies* [1955] 3 All ER 667, 686.
85. Countryside and Rights of Way Act 2000 and Marine and Coastal Access Act 2009. The National Parks and Access to the Countryside Act 1949 also provides for public access to the open country by agreement or order.
86. *Dovaston v Payne* (1795) 2 Hy Bl 527.
87. *Rangeley v Midland Rly Co* (1868) 3 Ch App 306, 310.
88. *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, 872.
89. *Barnes v Cadogan Developments Ltd* [1930] 1 Ch 479.
90. New Roads and Street Works Act 1991 s 48(1).

required 'so far as may be reasonably practicable' to secure 'the expeditious movement of traffic' on all road networks in their locality.[91] Streets are imagined (by highways law and governance), therefore, and as noted above, as corridors for traffic rather than places. Consequently, highways legislation emphasizes the promotion of flow and throughput on all roads even though material experiences of roads suggest that motorways are very different from residential streets. Yet they are all in the same category for highways purposes.

Similarly, this assumption that streets exist for the passage of vehicles is exemplified by the rules on contributory negligence in tort law. If pedestrians are hit by a motorized vehicle, even if the driver was negligent, any damages may be reduced on principles of contributory negligence if they are considered to be 'jaywalking'. People on the street are 'out of place' and 'in the way'. They are held to have 'actively contributed to the accident itself'[92] or to have 'put themselves in danger'.[93] While a driver is expected to anticipate such negligence or 'follies'[94] and to be aware of 'vulnerable pedestrians', including children,[95] the presumption is that pedestrians have to use reasonable care when crossing the road. Streets are not places to linger.

It was not ever thus. While roads were built for fast-moving traffic (including horses on turn-pike roads, for example) on non-arterial streets the initial 'rules of the road' often presumed more equality. In Iowa in 1935, for example, the first case on this point, *Wine v Jones*, saw the court holding 'as a matter of law that a pedestrian could cross the street anywhere; that the rights of wayfarers and drivers of motor vehicles in the use of the streets were reciprocal.'[96] This is no longer the case. Now regulation and governance order behaviour so that the rules of the road are such that pedestrians and drivers alike expect clear roads with no obstructions. It is common practice for pedestrians to thank drivers for stopping if their child unexpectedly runs out into the road even while the parent's heart is hammering in their chest. Children are not expected to be in the road. They are 'out of place'.[97]

In common law, some protection has been given to highways as a 'public place', although this means the pavement rather than the street. In *DPP v Jones* protestors at Stonehenge were prosecuted for criminal trespass for being alleged to be an obstruction on the pavement. Rejecting this, Lord Irvine gave an important judgment leading the House of Lords' rejection of any conviction: 'Provided … activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass'. Lord Irvine spelled out that friends stopping to chat, children playing on the pavement, charity workers collecting donations or protestors would all not be trespassing on the pavement as long as (and this is the crucial part) they are 'reasonable and non-obstructive'.[98] As long as protestors were non-obstructive their activities were not trespass.

91. Section 16(1) 'the network management duty' Traffic Management Act 2004.
92. *Clifford v Drymond* [1976] RTR 134 cited in *Satnam Rehill v Rider Holdings Limited* [2012] EWCA Civ 628.
93. *Rebecca Ann Smith v The Chief Constable of Nottinghamshire Police* [2012] EWCA Civ 161.
94. *Lang v London Transport Executive and Another* [1959] 1 WLR 1168.
95. *Qamili v Holt & Anr* [2009] EWCA Civ 1625.
96. DC Vanzante, 'The "Care" Required of a Jaywalker' 5 (1955–1956) Drake L Rev 35.
97. T Cresswell, *In/Out Place* (University of Minnesota Press, Minneapolis 1996).
98. *DPP v Jones* 2 AC (2005) 240, 257.

More recent litigation on protests and the highway, however, particularly with respect to tented protests at Parliament Square Gardens and by Occupy have resulted in litigation taking a more restrictive view of what even a non-vehicular highway may be used for, with a more expansive approach taken to obstruction.[99] These decisions uphold Blomley's thesis of the power of the logic of pedestrianism on pavements (let alone streets) where movement is promoted over stopping. Blomley catalogues the practices of engineers, authorities and courts to demonstrate how the 'role of the authorities, using law as needed, is to arrange these bodies and objects to ensure that the primary function of the sidewalk is sustained: that being the orderly movement of pedestrians from point a to point b'.[100]

If movement is the priority, then anything which impedes movement is an obstruction. Consequently, not only does highways legislation require permission for static objects that are placed in the highway but people too can be an obstruction, which local authorities are under a duty to prevent.[101] On this view, when Occupy protestors were camped outside St Paul's, they, as much as their tents and other equipment were the obstruction. Anyone wanting to introduce an obstruction onto the highway must either have a statutory right (such as statutory undertakers and some others, but essentially linked to networked services including sewerage, cabling and electricity). Anyone who does not have a statutory right is required to obtain permission to 'obstruct', even if it is 'their' road.

2.3 Streets as property

Yet this raises the question: who do streets belong to? Conventionally, a way, a highway or street would constitute an estate in land. While probably not an easement (without a dominant tenement), they are perhaps more akin to an interest in the land than estate. Recently, however, the 'vesting' of a highway in a highways authority (now under s 263 Highways Act 1980) is understood by many in practice to confer ownership rights (and rites). Consequently, as well as being sites of governance, streets are understood by some (though not all) as property.

Certainly the language of ownership has so far not been central to disputes over roads, where liability for maintenance has been more significant. Even if a road was initially set out as a private road, once used by the public it was consequently dedicated, and if dedicated, the parish within which it was located became liable for its repair,[102] because the inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish.[103]

Highway ownership is a question that in some senses has long been resolved by convention. As Lady Arden recently held in *Regina (Smith) v Land Registry (Peterborough)*: 'There is a long-standing saying "once a highway, always a highway". English law has since at least the time of Bracton in the 13th century regarded "the King's highway", now the Queen's highway, as incapable of ownership by any person

99. *Samede*, n 41.
100. N Blomley, *Rights of Passage: Sidewalks and the Regulation of Public Flow* (Routledge, Abingdon 2011) 3.
101. 1980 Highways Act, s 130.
102. *The Queen v The Inhabitants of the Township of Bradfield (1873–74)* LR 9 QB 552.
103. *The King v The Inhabitants of Leake* (1833) 5 Barnewall and Adolphus 469, 110 ER 863.

other than the King or Queen.'[104] This points to the practical reality that ownership of most highways is lost in the mists of time. Highways, moreover, are acknowledged as a specific form of land, not susceptible to adverse possession.[105] For a long time ownership was less of a concern than maintenance, with a system of local parish labour introduced in the Middle Ages (not abolished until the Highway Act 1835)[106] and the creation of Turnpike Trusts which financed road creation and maintenance by charging tolls to users. Yet how are highways owned? In *Smith*, Lady Arden held that two elements can be distinguished, which might (but might not) be understood as being the interest and the estate respectively. The first element is that 'a highway is both a public right to pass over a defined route' while the second is 'the physical land or other property over which the right is exercised'.[107] And yet the vesting is purpose specific, once the purpose expires so does the vesting. Courts have framed this in terms of a 'limited estate'[108] or a 'determinable fee simple',[109] a characterization which appears to confer some notion of an estate on the Highway Authority.

A similar approach was taken, though without any reference to these authorities, by Lord Neuberger in *Samede*, where he held that the Occupy protestors' rights could not prevail against the City of London's 'will of the landowner'. He approved the assumption made by Lindblohm J at first instance that the City had ownership of the land around St Paul's since it had been mapped as highways and so, according to s 263, vested in the City in its capacity as Highways Authority. In the case of protests this question of ownership matters because simply by virtue of being the Highways Authority, without any demonstration of ownership, the City of London were able to evict the protestors from 'their' site under the procedural eviction provisions of CPR 55 (as long as the protestors' human rights to protest and assemble were not infringed). While the land was framed as 'public' in the decision, the 'will of the landowner' could otherwise be implemented in a completely conventional way.[110]

Yet this leaves unanswered the question of what we mean by public property. Lord Neuberger did not clarify this in *Samede*. Instead, echoing his judgment in *Hall*, where he referred to 'public property',[111] Lord Neuberger used the term 'public land'[112] although, as in *Hall*, he left this term undefined. The simplest explanation of this term is that the land is public because the site is owned (via the 1980 Act) by a public body.[113] Yet in land law the conventional understanding of estates and interests, principles of registration, easements, covenants, mortgages and the like, make no distinction with regard to whether an owner is conceived of as being public or private. There may be implications in human rights law (if the owner is a public authority human rights are certainly engaged) and there may be public law duties

104. *Regina (Smith) v Land Registry (Peterborough)* [2010] QB 413, 417.
105. Ibid and *Bromley London Borough Council v Morritt* (1999) 78 P & CR D37.
106. The liability of inhabitants of the parish was abolished by s 38 of the Highways Act 1959.
107. *Smith*, n 106, 418.
108. *Rolls v Vestry of St George the Martyr, Southwark* (1880) 14 Ch D 785, 797.
109. *Tithe Redemption Society v Runcorn Urban District Council* [1954] Ch 383.
110. In particular there was no specific requirement of proportionality.
111. *Mayor of London v Hall* [2011] 1 WLR 504 para 69.
112. *Samede*, n 41.
113. The term 'public land' is very rarely used in legislation. It occurs in s 48 of the 2003 Anti Social Behaviour Act in the context of graffiti removal, where it is defined very similarly to conventional definitions of a 'public place' discussed in more depth below. Public land is defined as 'land to which the public are entitled or permitted to have access with or without payment (including any street to which the public are so entitled or permitted)' s 48(12) ASBA 2003.

that attach to a public landowner.[114] In the familiar taxonomies that lawyers work with, however, particularly in *Samede* with regard to the ability to exclude under CPR 55, no distinction is made based on the identity of the owner.

Legally, a highway would certainly be a 'public place' for a wide array of purposes, including for public order offences, as a site for charities collections or as a location for a dangerous dog.[115] Certainly, as understood on the ground, the site is classic public space. And yet, in England and Wales, unlike, for example, the United States with its protection of 'public forums', the concept of public space takes no recognizable legal form.[116] Public space simply has no clear legal protection whether the landowner is a private individual or a public body.[117]

Even if we did understand streets to be public property, there are further distinctions to be made. Drawing on Roman law, Rose elaborates some of these, noting how the Romans distinguished between different types of public property.[118] One form was *res nullius*, things belonging to no one, such as abandoned property, fish or game, things awaiting appropriation. A second category was *res communes*, things open to all by their nature such as the oceans and the air. Roads fell into the third Roman category of *res publicae:* things belonging to the public and open to the public by operation of law. According to Rose, the chief justifications for *res publicae* were based on flow and throughput, whether military (in the case of Roman roads) or commercial (as, today, under the more modern American public trust doctrine).

Interestingly for critiques of private property and of the neoliberal construction of the city, Rose suggests that this understanding of roads as *res publicae* 'works hand in glove with a regime in which most resources are the subject of private property. Indeed, open public access to commercial lanes would make little sense without an underlying regime of private property and trade. The openness of trade routes presumes that the users of these routes have their own incentives to trade, and that those incentives come in large part from private ownership'.[119] In this, *res publicae* act as a conduit through which private property can pass and be created. Roads are networks for commerce. This understanding of *res publicae* suggests that commerce has long shaped urban spaces. It is not a new phenomenon.

Yet, if categorizing property is a matter of social, cultural or political choice, then conceptualizing highways as places might also form a different type of public property. Roads might be understood as *res universitatis*, property belonging to a group in its corporate capacity. This is equivalent to Macpherson's notion of public property as 'corporate private property' and for the Romans captured the ownership of public facilities such as theatres and race-courses, and which can still be seen reflected in attitudes towards the ownership of public buildings today. As neighbourhood forums take on institutional form (although this is still embryonic), *res universitatis* is an

114. This point is explored more fully in A Layard, n 40.
115. Including Criminal Justice Act 1988, sections 12–16 and 137 (and see *Harriot v DPP* [2005] EWHC 965); Criminal Justice Act 1967, s 5; offences under Parts 4 and 5 of the Anti-Social Behaviour Act 2003; Charities Act 2006, s 45 and Dangerous Dogs Act 1991, s 10.
116. This is different in a rural context. The right to roam over mapped areas of countryside and coastal paths raises rather different understandings of what and who land might be for, see A Layard, n 40.
117. R Post, 'Between Management and Governance: The History and Theory of the Public Forum' (1987) 34 UCLA Law Rev 1713; K Gray and S Gray, n 36.
118. C Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age' (2003) 66 Law & Contemp Problems 90.
119. Ibid.

alternative way to understand streets, leaving it for local groups to determine whether they are public facilities or highways or a combination of both.

Understanding streets as *res universitatis* would itself depend on how streets are imagined, as conduits for travel or as public spaces for congregation. As Roman law demonstrates, the rule can fit the form if the form is clearly envisaged. While imagining highways as places with access, rather than simply as corridors for travel, would not work for every street, for some residential urban roads this can be done. It has been done in Bristol, for example.[120] The Roman conceptual categories also demonstrate that the domination of streets (both literally and legally) by cars is only one possible understanding of streets as public property.

The conceptualization of the streets, and the right to the city, is about the interaction of law, practice, imagination and phenomenology. In streets reconceived as 'community assets' rather than highways, a child playing in the street might not be considered anti-social or dangerously 'out of place',[121] and even if the local authority did not agree, neighbourhoods could assert their claims to bring *their* vision of *their* streets to life.

3 CONCLUSION

Whatever form of property streets take, it is the scale of ownership and governance that becomes central. Certainly residents can apply for permission for 'playing out' or to hold street parties and display community spirit. The 1984 Traffic Regulation Act still enables local authorities to facilitate this because under s 29 the 'traffic authority may make an order prohibiting or restricting the use of the road by vehicles, or by vehicles of any specified class, either generally or on particular days or during particular hour'.[122] Yet what this means in reality is that local neighbourhoods have to obtain local authority permission. Residents would also still need to do this if they wanted to create a 'home zone' on their street.[123] As one newspaper columnist plaintively asked at a time of national celebration, why are adult residents not permitted to close their street, to set up tables with food, bring out musical instruments or play a game of cricket? 'Why is it not possible just to park a car at either end of a small street with a make-shift sign saying 'road closed'?'[124] In Bristol this is done on a regular basis (with permission from the Council).[125] While elsewhere the answer is to blame 'red tape',[126] this is perhaps merely the outward manifestation of more fundamental property paradigms and the juridical construction of the road solely as a highway that should not be obstructed.

The questions of scale implied by the analysis offered here were always fundamental to road maintenance. In the eighteenth and nineteenth centuries when highways regulation came into widespread force, the duty to repair highways prima facie fell upon the inhabitants of the parish within which those highways lay, and the duty

120. See Groups such as Playing Out <http://playingout.net/> and Streets Alive <http://www.streetsalive.org.uk/> accessed 2 July 2012.
121. T Cresswell, n 97.
122. Section 29.
123. Section 268 of the Transport Act, 2000.
124. P Johnston, 'It's the end of the road for the street party' *The Telegraph* 28 March 2011.
125. <http://www.bristol.gov.uk/page/events> accessed 20 July 2012.
126. Ibid.

was enforceable by indictment.[127] If land was extra-parochial no liability would accrue.[128] According to the summary in *Austin's Case*, Hale held that in a case concerning an indictment for erecting of posts and rails in a highway, the parish where the highway is ought to repair it of common right but that '*sed quære*, why not the county? as in the case of common bridges'.[129] Similarly, it seems that even in parishes it was often common practice for townships within the parish to do their own repairs.[130] It was only in 1959 that liability for maintenance fell to the local authority *qua* highways authority, rather than the neighbourhood or the parish.

In an age of national road tax there is no necessary reason to scale governance and ownership of highways to the local authority rather than the neighbourhood. As long as networks are maintained on arterial roads with some negotiation and compromise on minor roads there is no ineluctable reason why neighbourhoods could not manage their own streets. The right to the city, for children and adults, and the right to the street, could be reclaimed. This would raise important questions about the scale of governance and what we mean by public property as well as question our understandings of streets as being both for movement and resting. By understanding place-making and property paradigms in a localist context, it may become possible to reclaim both the city and the street.

127. *R v Great Broughton Inhabitants* (1771) 5 Burr 2700; *R v Leake Inhabitants* (1833) 5 B & Ad 469.
128. *The Queen v The Inhabitants of Central Wingland* (1876–77) LR 2 QBD 349.
129. *Austin's Case* (1672) 1 Vent 189 per Hale J.
130. *The Queen v The Inhabitants of the Township of Ardsley* (1877–78) LR 3 QBD 255.