

**Forcing the empties back to work? : ruinphobia and the bluntness of law and policy**

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# Forcing the empties back to work?

## *Ruinphobia and the bluntness of law and policy*

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### Introduction<sup>1</sup>

*“There should be no such thing as waste land”*  
Sir Dudley Stamp<sup>2</sup>

Any discussion of transience and permanence in urban development engages deeply embedded cultural assumptions about utility and progress in the built environment. We wish to draw these assumptions out into the open, and to do so by examining the origins and features of an embedded anti-ruination reflex in urban law and policy. In this paper we explore some of the ways in which these deep assumptions manifest themselves and also offer up some thoughts on how well law and policy’s tools fare in their resulting campaigning against emptiness and degeneration.

We start by considering the connotations of ‘ruins’ – a physical and symbolic state of affairs that is emblematic of the ‘badness’ of dis-use, and the withdrawal of human care and concern for structures and communities which they frame and enable. As we will see, the ruin is the dark image in the mind of some (whilst also the beguiling prospect of others). Whilst we might instinctively think of ruins as crumbling castles or the meagre masonry of archaeological remains, the ‘ruin’ label has also been applied recently to the empty shops, part built housing estates, abandoned building sites and redundant factories and office blocks that we might walk past daily in any UK town or city. These, it is said, are the “New Ruins”<sup>3</sup>.

### ***Ruinphilia and ruinphobia: why law is trying to force empties back to work***

This paper has its origins in the first author’s research into the valorisation of contemporary ruins by certain groups: principally so called ‘urban explorers’, scavengers for scrap metal and urban aesthetes of a certain type who find a beauty in scenes of dereliction, ruin and emptiness. We are said<sup>4</sup> to be near the crest of a recurrent cultural cycle in which ruins from time to time erupt into

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<sup>1</sup> In case the reader is wondering – the surfeit of footnotes is intentional, the aim being to juxtapose a main text and its relatively tidy synoptic formulation of ruinphobia as a cultural impulse, with its alien alter-ego, the mess and complexity of the array of law and policy measures that in aggregate articulate that aversion to ruination.

<sup>2</sup> Quoted in Barr, J. (1969) *Derelict Land*, Pelican: Harmondsworth, page 19.

<sup>3</sup> For example by Hatherley (2011) *A Guide to The New Ruins of Great Britain*, Verso: London.

<sup>4</sup> By Bradley Garrett, in Garrett, B.L. (2010) ‘Review – “Ruins of Modernity” by Hell and Schönle’, *Environment & Planning D: Society & Space*, **29** 378-379 at page 378.

public consciousness and – to a degree – become fetishized there, as an object of sublime fascination<sup>5</sup>. This cultural ‘moment’ was recently typified by Tate Modern’s *Ruin Lust* exhibition<sup>6</sup>.

There is however now, something of a turn away from ‘ruin porn’<sup>7</sup>, certain prominent ruin-lovers have recently announced themselves to be ‘no longer’ fascinated by ruins, and have been dismissive of those still working in this area<sup>8</sup>. In short, ruinophilia has culturally overheated, and angry Detroit residents (the Mecca for urban explorers) now wear T-Shirts ridiculing their city’s desolation tourists<sup>9</sup>. There has also been a backlash from scholars working in critical urbanism and political economy (take for example the special issue of the *International Journal of Urban and Regional Research* in early 2014) who argue that contemporary processes of disuse and urban centre ‘failure’ must be seen in their socio-economic context, as by-products of the incessant flows of investment finance and the structural deformities of capitalism, rather than accepted and celebrated through a Romantic aesthetic lense<sup>10</sup>. Thus, they argue, “what is needed within academic contributions to the ruinology literature is deeper understanding and articulation of the wider contexts within which ruination occurs”<sup>11</sup>.

With this debate in mind the first author presented a paper at a humanities dominated ruinology conference in the Spring of 2014<sup>12</sup>, arguing that in all of the talk of ruinophilia, something far more potent was being overlooked, that of an embedded *ruinphobia* – an aversion to ruins – buried at the heart of urban law and policy and their related commercial and civic drivers. Law and policy are also a cultural milieu, but – unlike art and aesthetics – are areas which few scholars working in ruinology have any acquaintance with<sup>13</sup>. Accordingly ruinphobia has received scant attention in ruin scholarship to date.

This paper therefore calls for a comprehensive analysis of the anti-ruin (and pro-utilisation) agenda that operates at the heart of urban policy, and of its expression in applicable legal concepts and practices.

Culturally we have a love-hate relationship with ruins. But mostly – for all the current talk of ‘ruin lust’ – our relationship is more hate than love. Yes, we can point to ruin-love at the heart of

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<sup>5</sup> See for example the recurrent co-option of urban exploration photography of abandoned buildings that is paraded on a regular basis in the Daily Main, with an odd mix of fascination, schadenfreude, repulsion and nostalgia.

<sup>6</sup> 4<sup>th</sup> March – 18 May 2014: <http://www.tate.org.uk/whats-on/tate-britain/exhibition/ruin-lust>

<sup>7</sup> See for example, Strangleman, T. (2013) “Smokestack Nostalgia”, “Ruin Porn” or Working Class Obituary: the role and meaning of deindustrialised representation’, *International Labour and Working Class History*, **84**, 23-37; and Mullins, P. (2012) ‘The Politics and Archaeology of “Ruin Porn”’, *Archaeology and Material Culture* blog essay at: <http://paulmullins.wordpress.com/2012/08/19/the-politics-and-archaeology-of-ruin-porn/>

<sup>8</sup> For example Edensor, T. (2005) *Industrial Ruins: space, aesthetics and materiality*, Berg: Oxford; Garrett, B.L. (2011) ‘Assaying history: creating temporal junctions through urban exploration’ *Environment & Planning D: Society & Space*, **29**(6) 1048-1067.

<sup>9</sup> See <http://www.loveittodeathapparel.com/product/ruin-porn-shirt>. For an account of Detroit’s resurrectionists; see also <http://www.bbc.co.uk/news/magazine-22803975>

<sup>10</sup> To be fair to the ruinphiles, their aesthetically inclined engagement with the ruins of the early 21st century has not been entirely devoid of political critique, with – for example - Hatherley’s 2011 study of the aspirations, architecture and places characteristic of the New Labour era and its ‘new ruins’.

<sup>11</sup> Martin, D. (2014) ‘Towards a Political Understanding of New Ruins’, *International Journal of Urban and Regional Research*, **38**(3) 1037-1046 at page 1037.

<sup>12</sup> ‘Big Ruins: The Aesthetics and Politics of Supersized Decay’, University of Manchester, 14 May 2014: [http://www.criticalheritagestudies.gu.se/digitalAssets/1479/1479930\\_cidral-conference.pdf](http://www.criticalheritagestudies.gu.se/digitalAssets/1479/1479930_cidral-conference.pdf)

<sup>13</sup> See for example the recent review of the field by DeSilvey, C. & Edensor, T. (2013) ‘Reckoning With Ruins’, *Progress in Human Geography*, **37**(4), 465-485.

Enlightenment culture, but that infatuation with classical ruins – the trope of the much vaunted tumble of stones on the skyline – is the exception rather than the rule.

Ruination is actually regarded in most gazes<sup>14</sup> as a negative, as part of a discourse of dereliction. It is a state (and a process) to be resisted, and for a mixture of reasons that most of us, for most circumstances hold dear – order, productivity, dwelling, value, recycling, safety, infection control and crime fighting.

Within this dark image of contemporary ‘failure’, the ruin is figured as an agentive force, stalking the city. It is there in prevailing talk of the ‘death of the highstreet’. Somehow, it is asserted that (although it is never made clear exactly how) the ruin calls to us invoking us or others to do violence to the built environment. It tantalises us with its playful possibilities and with the strange insights that an empty or decaying building can present. It invites us to disassemble the object ‘building’ – to see it as process and heterogeneous matter rather than a stable, a temporal fixity. It foregrounds a notion of urban-entropy, something that can be but barely kept at bay by desperately finding ways to encourage the utilisation of buildings and scrubland plots that might otherwise fall into ruination, and unleash their urban blight.

The ruin is a provocative mix of time and matter – it shows us simultaneously the longevity and the ephemeral nature of buildings. It also holds a mirror up to our relationship with their constituent matter, destabilising our perception of, and reaction to the building as a whole, and the building as an assemblage. It is also paradoxically both a lawless prospect – and yet strangely *of* the law.

To pursue these points let’s dwell for a moment at the threshold of *The House of Usher*. Let us imagine that we are standing there with Edgar Allan Poe’s unidentified narrator as he looks upon the bleak vista, scrutinising the building before him and searching out its sublime import:

“more narrowly the real aspect of the building. Its principal feature seemed to be that of an excessive antiquity [...] yet all of this was apart from any extraordinary dilapidation. No portion of the masonry had fallen; and there appeared to be a wild inconsistency between its still perfect adaptation of parts and, the crumbling condition of the individual stones”<sup>15</sup>

But what if we re-contextualise the scene, replacing Poe’s intimated ruin-lust sublime with a workaday ruinphobia? Then - perhaps - our narrator is the occupant’s tax adviser, come to advise the decrepit titular owner upon demolition or a creative ruination ruse to avoid Business Rates. Perhaps he has come to disassemble the building, totting up as he looks on, how many stone blocks, lead pipes and copper cupolas the House of Usher will yield when levelled. Perhaps he has come from the local council and will shortly serve legal notice upon the owner, commanding corrective works under the Building Act 1984. Perhaps he has come from next door, alleging recourse against Usher under the common law principles of Private Nuisance, for damage sustained by his own property caused by this decaying structure. Perhaps he is a local councillor concerned about the adverse effects of this dereliction upon the amenity of the neighbourhood, and is contemplating the scene with a view to producing a report to his Council’s cabinet in favour of action being ordered under Section 215 Town & Country Planning Act 1990. Perhaps he is the local crime prevention officer attending to warn the owner that the degenerating condition of his place is a magnet to crime. Perhaps he is an insurance broker, steeling his nerve before breaking the news to his client

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<sup>14</sup> Used in the Foucaultian sense, as a ‘way of seeing’ (Berger, J. (1972) *Ways of Seeing*, BBC/Pelican: London) indicative of a particular perspective and set of power-knowledge practices.

<sup>15</sup> Allan Poe, E. (2003 [1839]) ‘The Fall of the House of Usher’ in *The Fall of the House of Usher and Other Writings*, Penguin Classics: London. pp. 90-110, at page 93.

that policy premiums are now prohibitively expensive, on account of the recent decline of this once stately house.

*The Fall of the House of Usher* is fiction, it is just a story. It is presented as an entertainment – predicated on the assumption that there is a willing audience for tales that summon the prospect of standing, contemplating the degeneration of a ruinous building, and getting some unsettling thrill from vicariously doing so, whilst reading the story in the safety of our own warm, cosy and familiar homes. But, much as we might enjoy TV crime shows and their grizzly exceptionality, we do so only from a safe distance: we only want ruination in controllable amounts<sup>16</sup>, too much or its occurrence at a time and place not of our choosing is cause for a different type of unsettling – one that calls for action, intervention and eradication of the ruin.

In the next portion of this paper the reader will notice a sudden lurch of terminology, for ‘ruin’ is a phrase rarely used in the law and policy sphere that steers this anxious professional gaze. Instead talk is of ‘dereliction’, ‘dilapidation’ and ‘dangerous structures’. The scale also shifts somewhat. Yes, there are legal powers and policy drivers that target individual – building-level – ruins, but often those interventions are triggered by the ruin’s relationship with its surrounding environment. Thus, it is often that the ruin is out of keeping with its surroundings that is the determinative factor, unless it is in danger of falling down, in which case then what matters is its proximity to humans (if any). Thus, the ruin is a *negative*, and we mean by that not simply that it is undesirable, we also mean that it is viewed as an aberration to local order, quality, safety and neighbourhood aesthetics. It is (as Mary Douglas put it in relation to dirt) “matter out of place”<sup>17</sup>.

And furthermore, ruination (again – known in law and policy circles by a different name: ‘dereliction’) is seen as having contaminative properties, a contagion character which will spread within the neighbourhood if unaddressed. The local ruin thus becomes an ‘eyesore’, a portal for bad things to enter the neighbourhood – economic decline, falling house prices, squatters, drug dealers, vandals etc. Think of the urban simulation game *Sim City*, and the way that city blocks start to fail – domino like – when the urban rot sets in. The toleration of ruins within the urban body, is tantamount to leaving a cancerous cell untreated. Left unchecked it will infect its surroundings. The cancer will spread. The family of medicines to be applied to these urban blotches all begin with ‘R’: regeneration, redevelopment, reconstruction, repurposing.

We can trace some of this anxiety to public health campaigns, and the concerns that lay behind them<sup>18</sup>. The sanitation drives of the late 1800s sought to root out real infection within the body of our cities, but the anxiety runs wider. Take for instance Section 215 of the Town and Country Planning Act 1990, which gives local authorities power to order a landowner to tidy up land, if (in their view) it is in a condition which is “detrimental to the amenity of the area”. This is not a public- or environmental health power, it is a power concerned with the aesthetic contagion effects that unsightly – and in particular abandoned or otherwise unworked land or buildings – may pose to the character and fortunes of its surrounding neighbourhood. It is a fear of someone concluding that dreaded assessment, *‘there goes the neighbourhood!’*

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<sup>16</sup> For Edmund Burke, the exhilarating properties of the sublime required an ultimate safety – in our case the exceptionality or rarity of the classical ruin, rather than the ubiquity of any modern ones, for “terror is a passion which always produces delight when it does not press too close.” (Burke, E. [1757] (1958) *A Philosophical Inquiry into the Origin of our Ideas of the Sublime and Beautiful*, Routledge & Kegan Paul: London, ed. Boulton, J.T.: page 42).

<sup>17</sup> Douglas, M. (2002 [1966]) *Purity and Danger: An analysis of concepts of pollution and taboo*, Routledge Classics: London at page 44.

<sup>18</sup> See for example, Wohl, A.S. (1977) *The Eternal Slum: Housing and social policy in Victorian London*, Edward Arnold: London.

Thus, we find that individual ruins are – in the municipal gaze – viewed relationally, and at a scale greater than that of the individual building or its component parts. What matters – what unsettles – is the ruin’s possible contagion effect upon its surroundings. And so, we find ourselves contemplating the ‘nightmare’ of block, ward or city level ruination. The abandoned suburbs of Detroit, the cleared swathes of the North West of England, unproductive property excised – tumour like – to promote the health of the neighbourhood, as so called “housing market renewal”<sup>19</sup>. We find also an insistent concern to ensure that ‘meanwhile spaces’ uses can be found for all property, lest vacant town centre units fester and become infected with ‘dereliction’, spreading their socio-economic contagion into the surrounding streets.

Thus – through all this - we find ourselves gazing at ruins that are too ubiquitous to cope with; too overwhelming to be safely assimilated within an otherwise functioning Urbis: these are ruins that *threaten* us, and the policy reflex is that ‘something must be done’ about them.

### **Characterising ruinphobia and its expression in law and policy**

We will now examine three features of the ruinphobic gaze and show how law and policy is woven into each aspect: the ruin as contagion, the ruin as wasted space, and the ruin as wasted matter.

#### **i) The ruin as contagion**

The notion of ‘ruination-as-contagion’, is a policy inflected fear typified in the so-called ‘broken windows’ theory of urban crime. Broken windows theory first appeared in a 1982 paper by James Wilson and George Kelling<sup>20</sup>. It then became increasingly influential in urban policy around the turn of this century, inspiring – amongst other things – the UK’s Clean Neighbourhoods and Environment Act 2005. The theory states that maintaining the urban environment in good order, will prevent vandalism and other low level crime that would otherwise create the physical preconditions for local degeneration into greater levels of more serious crime. As Wilson and Kelling put it:

“Consider a building with a few broken windows. If the windows are not repaired, the tendency is for vandals to break a few more windows. Eventually, they may even break into the building, and if it's unoccupied, perhaps become squatters or light fires inside. Or consider a pavement. Some litter accumulates. Soon, more litter accumulates. Eventually, people even start leaving bags of refuse from take-out restaurants there or even break into cars.”

In part Wilson & Kelling’s argument (later developed to a book length treatment in Kelling & Coles<sup>21</sup>), drew on Oscar Newman’s 1972 book *Defensible Space*<sup>22</sup>, in which he had argued influentially for a spatial attitude towards crime prevention, namely that the design and maintenance of neighbourhood spaces could reduce local crime – what would in the last decade become labelled

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<sup>19</sup> The Housing Market Renewal programme ran 2002-2011. A report commissioned by the incoming coalition government in 2010 pointed to the policy’s unintended consequence of wholesale demolition drives that blighted areas, locking them into decline, rather than lifting them out of it, fuelled by area-clearance targets, exhibiting “...an obsession with demolition over refurbishment...” HM Government (2010) *Housing Market Renewal 2002-2011, funding review statement*.

<sup>20</sup> Wilson, J.Q. & Kelling, G.L. (1982) ‘Broken Windows: the police and neighbourhood safety’, *The Atlantic*, **249** (3) 29-38.

<sup>21</sup> Kelling, G.L. & Coles, C.M. (1998) *Fixing Broken Windows: restoring order and reducing crime in our communities*, Free Press: New York.

<sup>22</sup> Newman, O. (1972) *Defensible Space: crime prevention through urban design*, Macmillan: London.

‘anti-social behaviour’. Thus, for these environmental criminologists, dereliction – no matter how minor – was both a signifier of a lack of concern for social order, and also a catalyst for further degeneration, unless the slide towards ruination was arrested at an early stage. By this interpretation toleration of any fraction of ruination (i.e. a broken window) is a slippery step towards community break-down and lawlessness.

The broken windows theory has increasingly been the subject of empirical critique – for example Bernard Harcourt and Jens Ludwig’s five city comparative study<sup>23</sup> finding no evidence to support a clear causal link between, on the one hand, an attentiveness to arresting the early stages of ruination and targeting of petty crime, and of reduction in neighbourhood criminality. However, the ‘theory’ remains a powerful influence upon policy makers, and their supposition of a link between dereliction and urban crime.

## ii) The ruin as wasted space

Embedded within broken windows theory is an instinctive belief that abandoned, unloved or unmaintained space will become a beacon for lawlessness. But there is a further way in which ruins ‘offend’ right-thinking municipal sensibilities, and this is that they represent a waste of space. This anxiety (which also shares some ‘contagion’ concerns, but seems to run even deeper), appears to channel a strange mix of urban aesthetics, the Protestant work ethic, foundational 17th century philosophical principles of property ownership and pragmatic anxieties about the financial stability of municipalities.

John Locke, writing in 1689 in his *Two Treatises of Government*, equated ownership with the application of labour and capital to land<sup>24</sup>. Land – and ownership of it – was ‘won’, title was created by effort, and in response to God’s command that humans should cultivate wilderness<sup>25</sup>. Locke’s principle became very influential in the development of US law (as a justification for colonial appropriation of *Terra Nullis*<sup>26</sup> via exploration, survey and enclosure), and had some (lesser) influence upon English Law where land had been handed out many centuries before pursuant to the Norman Conquest and Feudal seigneurial privileges and obligations which in turn had embodied potent assumptions about the use and upkeep of land<sup>27</sup>; something which still reverberates today in the

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<sup>23</sup> Harcourt, B.E. & Ludwig, J. (2006) ‘Broken Windows: new evidence from New York City and a Five-City social experiment’, *University of Chicago Law Review*, **73** 271- 320.

<sup>24</sup> A the origins of the concept ‘culture’, as embodied within ‘agriculture’, show worked land to be rendered as released from nature, and placed into the realm of human dominium via cultivation.

<sup>25</sup> “God commanded...And hence subduing or cultivating the earth, and having dominion, we see are joined together. The one gave title to the other.” And “whatsoever then he removes out of the state of nature [...] he hath mixed his labour with, and joined it with something that is his own, and thereby makes it his property.”(Locke: Chapter V).

<sup>26</sup> A legal concept ascribing no prior ownership to aboriginal lands found not to be already the subject of individuated property rights (or physical cultivation).

<sup>27</sup> Feudalism entailed the conditional grant of rights to use land, these conditions embodying fealty to the grantor – for instance to a ‘Lord of the manor’ – such that in return for the grant, certain produce of the land (along with military service) would be provided by the recipient (a vassal). As the vassal rarely had any other income source, he thus had to cultivate the land in order to live, both to provide his own subsistence, and to satisfy the fealty terms of the grant (known as a ‘fee’). The prospect of weeds, livestock or other contagion spreading from poorly maintained land to neighbour’s plots led to a focus for law upon the adequacy of stewardship (which in an agricultural context presupposes active uses, for no-use of law would see it fall back into nature’s ‘wild’ clutches).

tort of waste<sup>28</sup> and the notion of ‘dilapidations’ liability for outgoing tenants for any lack of careful stewardship to land or buildings<sup>29</sup>.

Less attention has been paid to developing Locke’s argument to situations in which the ‘cultivation’ (here meant as any use or care that keeps nature from reasserting itself through processes of ruination) stops altogether. Neither US nor English law copes well with the ambiguity caused by the cessation of use and action upon land – but ultimately abandonment can lead (albeit in a convoluted way) to loss of ownership. Examples of this would include the doctrines of *bona vacantia* (that property for whom no owner can be identified passes by law to the Crown<sup>30</sup>), *adverse possession*<sup>31</sup> (which provides that in certain circumstances a squatter can acquire the property rights of an owner who has not actively re-asserted their ownership) and the *Crichel Down Rules* (which embody the principle that if a state body ceases its use of a property asset acquired using compulsory powers, then it must be offered back to the original owner – before selling it to anyone else).

The idea of passive, non-occupatory and essential *absent* ownership (such as we may see in the ‘land banking’ of derelict premises, held as investments in the hope of them becoming the scene of profitable redevelopment at some indeterminate point in the future) is something that both the law – and increasingly municipal authorities – have struggled to cope with both conceptually and politically. Indeed the prevailing climate has become distinctly frosty as far as absentee, non-utilising property owners are concerned<sup>32</sup>. This is due in part to the campaigning work of the influential charity *Empty Homes*<sup>33</sup> which since 1992 has been drawing attention to the UK’s empty homes ‘problem’<sup>34</sup> and lobbying for policy initiatives to encourage those homes back into beneficial use, through a mixture of ‘carrot’<sup>35</sup> and ‘stick’. On the stick side, local authorities now have to identify,

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<sup>28</sup> The principle of liability for poor stewardship goes back to the 1278 Statute of Gloucester, and has occasional modern repercussions, like for example *Mancetter Developments –v- Garmanson and Givertz* [1986] Q.B. 1212, CA.

<sup>29</sup> As a contract law issue, as a breach of a tenant’s standard lease covenant requiring a demised property to be kept in repair by the tenant (often with an express allowance for ‘fair wear and tear’ – that part of ruination that cannot be held at bay).

<sup>30</sup> Principally property forming the estate of persons dying without having made a will and now have no apparent heirs, and the residual property of any company that has been dissolved (and therefore has ceased to exist).

<sup>31</sup> This now requires 10 years unopposed squatting, followed by no opposition to the squatter’s claim within 2 years of being notified of it (see the Sch 6, paras 1 to 5 of the Land Registration Act 2002). Prior to 2002, title would be lost simply via a squatter occupying unopposed for 12 years, the time limit for bringing a repossession claim. Adverse possession (at least pre 2002) embodied a ‘use it or lose it’ principle: see, for example Stake, J.E. (2000-2001) ‘The Uneasy Case for Adverse Possession’, *Georgetown Law Journal* **89**: 2419-2474.

<sup>32</sup> And, as the property market has started to recover, there are signs that developers are keen to co-opt members of the public as empty premises ‘spotters’ as they search for refurbishment opportunities, for example <http://www.youspotproperty.com> which offers a promise of a £20 gift voucher for the reporting of suitable empties.

<sup>33</sup> <http://www.emptyhomes.com/>

<sup>34</sup> In 2012 there were 635,000 empty homes in England (and of these 216,000 had been empty for longer than six months). Department for Communities and Local Government (2012) *Announcement – Increasing the number of available homes*, DCLG: London, 7 November. Available at: <https://www.gov.uk/government/policies/increasing-the-number-of-available-homes/supporting-pages/empty-homes>

<sup>35</sup> For example, proposing a reduction in VAT on housing renovation and repair work from 20% to 5% to incentivise developers to take steps to turn ‘landbanked’ houses into liveable homes.



record and act in response to empty dwellings<sup>36</sup>, they also have powers to require works to render derelict properties safe<sup>37</sup> and/or to make an empty property secure against entry<sup>38</sup>. Since April 2013 they have been entitled to set an 'empty homes premium' of up to 150% of the normal Council Tax charge, for substantially unfurnished homes left vacant for more than two years<sup>39</sup>. The coalition Government claim these as amongst "a range of measures to bring empty homes into use", a policy thrust which also included appointing TV personality George Clarke as its empty homes adviser<sup>40</sup> in April 2012 following his 2011 Channel 4 series on empty homes, *The Great British Property Scandal*<sup>41</sup>. Speaking of Clarke's appointment, Communities Minister Andrew Stunnell signalled his government's ruinphobia thus:

"I am delighted that George Clarke has agreed to work with us as we pull out all the stops to end the national scandal of empty homes. For every two families needing a home, there's a property standing empty – properties that, all too often attract squatters, vandalism and fly-tipping. That's why over the past year, I've made £150 million available to bring these homes back into use."<sup>42</sup>

The consensus that empties must be put back to work is fuelled by this assumption that something is wrong if these places are left idle. An empty is both a waste of the potential for a 'good' use (i.e. being part of stock of housing in use and meeting local need<sup>43</sup>) and an incitement to a 'bad' use, one which – once allowed to establish itself - will have a contagion effect, with travellers, squatters<sup>44</sup>, vandals, drug users<sup>45</sup>, ravers<sup>46</sup> moving if someone more desirable is not quickly interposed.

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<sup>36</sup> Ultimately having power to order them back into productive use via Empty Dwelling Management Orders issued under Part 4 of the Housing Act 2004, for properties shown to have been vacant for 2 years or more and not presently being advertised for sale or rental.

<sup>37</sup> Under the Building Act 1984.

<sup>38</sup> Via the Local Government (Miscellaneous Provisions) Act 1982.

<sup>39</sup> In a related measure under the Finance Act 2012, the 50% Council Tax relief previously applicable for second homes was withdrawn from April 2013, leaving local authorities freedom to charge up to 100% for such properties.

<sup>40</sup> See Wilson, W. (2013) *Empty Housing - Commons Library Standard Note SN03012*, House of Commons Library: London. Available at: <http://www.parliament.uk/business/publications/research/briefing-papers/SN03012/empty-housing>

<sup>41</sup> <http://www.channel4.com/programmes/the-great-british-property-scandal>

<sup>42</sup> Department for Communities and Local Government (2012) *Announcement - George Clarke appointed empty homes adviser*, DCLG: London, 11 April. Available at: <https://www.gov.uk/government/news/george-clarke-appointed-empty-homes-adviser>

<sup>43</sup> And emptiness is increasingly a problem of affluent areas – a recent survey has shown that the London Borough of Kensington & Chelsea is 11<sup>th</sup> in a national list of local boroughs with the highest rates of empty homes. Blackpool and Bradford's empties may attain them a higher ranking in these charts, but Kensington & Chelsea's emptiness problem is a function of it being the UK's *most* affluent borough, and as such very attractive to wealthy foreign investors, buying up very expensive properties to cash in on London's soaring property values, rather than to occupy them as homes, a non-use that is now attracting the attention of H.M. Treasury, with plans being developed to curb tax incentives favouring this absenteeism. See for example Herrmann, J. (2014) 'The ghost town of the super-rich: Kensington and Chelsea's 'buy to leave' phenomenon', *Evening Standard*, 21 March. Available at: <http://www.standard.co.uk/lifestyle/london-life/the-ghost-town-of-the-superrich-kensington-and-chelseas-buytoleave-phenomenon-9207306.html>.

<sup>44</sup> Squatting in residential buildings in England became a criminal offence in September 2012, under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, an owner must be able to show that they live in the property or that they intend to do so in order to be able to seek police enforcement of owners' rights under this legislation. Owners of empty commercial property have been lobbying for equivalent criminalisation of squatting in commercial buildings, as they have become the increasing focus of squatters' attention since the squatting of residential buildings came into effect, see for example Powley, T. (2012) 'Squatters target

There is also – at policy level – a concern that empty buildings<sup>47</sup> and inactive development plots are economically inefficient (and morally repugnant<sup>48</sup>) – for the locality (as development there would lead to an increase in jobs) and for the country as a whole (if the site was active it would contribute to national tax revenues, reduce dependence upon imports thus shoring up the UK's balance of payments and contributing towards the UK's GDP). This 'economic regeneration' agenda can be seen as the basis for many re-use encouraging law and policy initiatives throughout the last 100 years, setting up a mix of regeneration promoting public agencies<sup>49</sup>, powers of land acquisition<sup>50</sup> and financial incentives<sup>51</sup>, all with the aim of returning derelict former industrial sites to productive use.

But it is the importance of taxable occupation that perhaps is the most compelling driver of ruinphobia. As the fate of Detroit and other US cities afflicted by waves of housing foreclosures and subsequent residential abandonments has shown, there is a municipal cost to managing 'empties', and these premises do not contribute towards the municipal revenue base. Thus costs increase but incomes shrink in the face of these new ruins. A U.S. study of the costs faced by eight Ohio municipalities in 2008<sup>52</sup> identified 25,000 of vacant and abandoned properties, costing \$15 million in annual municipal stewardship and with those properties representing a lost \$49 million annual contribution towards municipal property tax revenues across those eight cities.

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commercial buildings', *The Financial Times*, 4 November. Available at: <http://www.ft.com/cms/s/0/8c5d7a00-2510-11e2-a6aa-00144feabdc0.html#axzz3KHqJnGTR>

<sup>45</sup> Giving rise to another set of regulatory powers – this time aimed at *denying* usability to properties which acquire anti-social uses, such as drug taking in 'crack houses' (as originally provided for under the Anti-Social Behaviour Act 2003, and now under the Anti-Social Behaviour, Police and Crime Act 2014).

<sup>46</sup> See sections 63-67 of the Criminal Justice and Public Order Act 1994 and its powers to prevent or break up unlicensed 'raves', events that originated in empty warehouses and other late 1980s abandoned commodious structures found by the inventive - new-use finding - thinking of event promoters, and inventiveness now characteristic of cannabis farmers and their adaptation of derelict warehouses, basements, attics and so forth to drug cultivation.

<sup>47</sup> And also empty rooms *within* otherwise occupied buildings – with the so called 'bedroom tax' capping housing benefit for homes deemed to have too many bedrooms for the number of current occupants. The policy intent being to incentivise occupants to 'down-size', thereby releasing larger properties for occupancy by larger families who can 'fully' inhabit and utilise it. A claimant's housing benefit is reduced by 14% to reflect one 'spare' bedroom, and 25% for two or more. Politically controversial (particularly given the lack of linkage to the offer of alternative, 'downsizing' accommodation in the social housing sector), the policy has been defended by the Department of Work and Pensions on the grounds that "It is a fair policy that is saving the taxpayer more than £1m a day": McSmith, A. (2014) 'Bedroom tax to be abolished as coalition is rocked by Lib Dem-Labour alliance' *The Independent*, 5 September. Available at:

<http://www.independent.co.uk/news/uk/politics/coalition-rocked-by-bedroom-tax-revolt-9715640.html>

<sup>48</sup> "Desolate, unkempt land may not be only a symptom of obsolescence, it may also be the cause of it" Ministry of Housing and Local Government (1963) *New Life for Dead Lands – derelict acres reclaimed*, HMSO: London, page 2.

<sup>49</sup> For example the English Industrial Estates Corporation, the Land Authority for Wales and the Welsh Development Agency, English Partnerships, Urban Development Corporations, Regional Development Agencies, the Homes & Communities Agency.

<sup>50</sup> For example powers the Secretary of State's power to acquire land under the English Industrial Estates Corporation Act 1981.

<sup>51</sup> For example Derelict Land Grant in the 1980s, and more recently enhanced capital allowances claimable for works carried out to rehabilitate contaminated sites and return them to productive use.

<sup>52</sup> ReBuild Ohio (2008) *\$60 Million and counting: the cost of vacant and abandoned properties to eight Ohio cities*, ReBuild Ohio: Columbus, Ohio. Available at: [http://www.greaterohio.org/files/policy-research/FullReport\\_Nonembargoed.pdf](http://www.greaterohio.org/files/policy-research/FullReport_Nonembargoed.pdf)

In the UK, a significant portion of business taxation is actually levied upon business property<sup>53</sup>. This area of the tax system is far less visible to most of us than VAT (sales tax) or income tax. But, Business Rates represent the second largest outgoing (after labour costs) for many UK businesses<sup>54</sup>. As such, they are both a major cost to businesses, and also a major source of revenue for national government<sup>55</sup> (a portion of the Business Rates is channelled back to the local authority who administer their collection). This tax is levied upon the assessed value of the property, not upon its actual productivity. Until 2008 a tax relief applied to 'empty' commercial premises<sup>56</sup>, but during the 'boom' years of the early 2000s the then Labour government saw this relief as inefficient<sup>57</sup>, as encouraging empty buildings to be held back (land-banked) rather than being swiftly put to use, and prior to the 2007-2008 crash, there was indeed considerable demand for such accommodation. But by the time the withdrawal of the 'empty premises' relief came into effect in April 2008<sup>58</sup>, the crash had hit and many properties were falling vacant, with the prospect that they would remain empty and unwanted (through no intention or fault of their owner) for the foreseeable future. Pleas from the property industry led to a short postponement to this reform<sup>59</sup>, but thereafter Business Rates became payable upon empty commercial premises, with allowance for only short periods of relief to acknowledge short-term 'churn' related void periods<sup>60</sup>.

But this change to 'empty rates' law and policy, had an unexpected effect: because it was implemented into a now recessionary climate. Rather than motivating an increased pace of re-use and gainful occupancy, it actually spurred a sharp increase in the demolition of vacant factories and offices (Business Rates are payable upon buildings, but not vacant land)<sup>61</sup> and instances of intentional use-denying 'ruination'<sup>62</sup> (for this tax is only payable upon buildings that are presently capable of gainful occupation) via the removal of roofs, heating and electrical or other use-enabling services. The change of law and policy even spurred a range of faux 'uses' of ostensibly empty properties, such as a charity that rendered buildings 80% Business Rates exempt by 'occupying' them by siting small wi-fi transmitters at a property, which would transmit crime prevention messages to the immediate vicinity.<sup>63</sup>

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<sup>53</sup> With National Insurance, Income Tax and VAT in aggregate accounting for 60% of UK national tax revenue, Business Rates may seem small at 4.4% but it is second only to Corporation Tax (7.4%) as a direct, non-consumption related, business tax, source: Browne, J. & Roantree, B. (2012) *A Survey of the UK Tax System – IFS Briefing Note BN09*, Institute for Fiscal Studies: London. Available at: <http://www.ifs.org.uk/bns/bn09.pdf>

<sup>54</sup> If the business occupies properties which it owns outright. If the business' premises are leased by them, then that rental cost is likely to be the second highest cost after labour, but with Business Rates a significant third highest cost. Business Rates approximately equates to just under 50% of the assessed rentable (thus 'rateable') value of each property.

<sup>55</sup> £26.2 Billion p.a. according to 2012-13 Treasury forecasts quoted in Browne & Roantree (2012: 5).

<sup>56</sup> Empty offices and shops paid only 50% of the Business Rates liability (after an initial 3 months at 100% relief) and empty factories and warehouses got 100% exemption throughout their period of emptiness.

<sup>57</sup> The coalition government estimated that the 'empty rates' reforms would increase the Treasury's Business Rates tax take by £950 million p.a.

<sup>58</sup> Introduced via the Rating (Empty Properties) Act 2007.

<sup>59</sup> Between April 2009 and March 2011, the concession was applicable to empty property with a rateable value below £18,000 p.a.

<sup>60</sup> Thus commercial premises such as offices and shops now must pay Business Rates after three months of emptiness; whilst industrial premises (factories and warehouses) must pay it after six months of emptiness: see Regulation 4 of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008.

<sup>61</sup> See for example Thompson, J. (2008) 'Buildings destroyed after rate relief abolished', *The Independent*, 13 August. Available at: <http://www.independent.co.uk/news/business/news/buildings-destroyed-after-rate-relief-is-abolished-892966.html>

<sup>62</sup> Known in the property industry as "constructive vandalism".

<sup>63</sup> In *Public Safety Charitable Trust –v- Milton Keynes Council (and others)* [2013] EWHC 1237, the High Court eventually ruled that the transmission of these messages was insufficient to justify the operator's claim to exemption from 80% of Business Rates on the basis that the properties were being "wholly or mainly used for

Another tactic, that predates the 2008 law changes but which is even more important now, is encouraging the ‘meanwhile’ occupancy of dormant buildings by charities (as charities are exempt from Business Rates<sup>64</sup>). Thus the high street has filled with ever more charity shops, in the war against dereliction.

And it is not just the spectre of Business Rates that makes property owners fear their empties. Empty spaces generate no income, no contribution towards paying off lenders or shareholders, and insurance premiums are considerably greater for unoccupied properties<sup>65</sup>, or for properties that lack essential security and utility services. In short, empty commercial premises are becoming increasingly expensive to own, and there are powerful incentives to address their dereliction at an early stage, often by way of erasure of the building before ruination can take hold.

### iii) The ruin as wasted matter

So, Government policy tends to echo a societal impression that derelict buildings are a waste of space – that the space that they (incompletely) occupy could, and should be used in some other way – or that the empty space within them should be brought into use via policy and law.

There is something similar at play regarding the matter comprising the ruin itself. This nagging feeling that a ruin is a waste of matter, is of long standing vintage. Historically derelict buildings were routinely recycled, their remaining elements appropriated as building materials to be incorporated in new buildings. Poggius Bracciolini surveying the desolation of Rome’s Capitoline hill in 1430, found only remnant stones left there after centuries of opportunistic pillage, and remarked (giving a glimpse of both the Renaissance’s new-fangled nostalgia for the Classical era, and of the age-old drive to put space to use) that:

“the forum of the Roman people, where they assembled to enact their laws and elect their magistrates, [is] now enclosed for the cultivation of pot-herbs, or thrown open for the reception of swine and buffaloes.”<sup>66</sup>

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charitable purposes” under the 2008 Regulations, with Justice Sales at paragraph 34 of his judgment shedding light on the judicial use-assumption thus: “it is reasonable to infer that Parliament intended that the substantial mandatory exemption from rates for a charity in occupation of a building should depend upon the charity **actually making extensive use** of the premises for charitable purposes, [...] **rather than leaving them mainly unused**” (emphasis added by the authors); however in another recent High Court case, *Sunderland City Council –v- Stirling Investment Properties LLP* [2013] EWHC 1413, the housing of one Bluetooth transmitter within an otherwise empty 1,500 square metre warehouse was held to be sufficient to constitute rateable occupation – and therefore if carried on for a six week period (a period set by Regulation 5 of the 2008 Regulations as the defining threshold for a substantive duration of use) and thereafter stopped, sufficient to create a further three months exemption from Business Rates due to the premises falling empty by the cessation of that short period of a notionally rateable use.

<sup>64</sup> The mandatory exemption for qualifying charitable uses is 80%, with the potentiality for a discretionary 20% further relief from the local authority.

<sup>65</sup> Often standard building insurance policies for residential or commercial properties become void if a property is left unoccupied for more than a few weeks, and specialist ‘vacant property’ insurance is needed instead, see for example ‘Home owners leave properties without sufficient insurance’, Gammell, K. (2012) *The Telegraph*, 12 May. Available at:

<http://www.telegraph.co.uk/finance/personalfinance/insurance/buildingsandcontent/9259888/Home-owners-leave-properties-without-sufficient-insurance.html>

<sup>66</sup> Poggius Bracciolini, 1430 *De Varietate Fortunæ* quoted in Low D.M. (ed) ([1789] 1976) *Gibbon’s The Decline and Fall of the Roman Empire*, Book Club Associates: London, page 889.

The few remaining fragments of the imperial forum are now protected as a UNESCO designated World Heritage Site, curated as a de-cluttered space, the pragmatic appropriations of these ruins having been cleared away (except, that is, for the array of Medieval and Renaissance buildings – themselves UNESCO designated – that were built after Bracciolini's sojourn on the then derelict hillside, and which colonised much of the former ruinscape, in the centuries following his visit).

But to call this opportunistic physical utilisation of these ruins 'pillage' or 'desecration' is to place a modern judgment on what must have seemed an entirely innocent, and efficient engagement with local available – and portable – materiality, and the pragmatic appropriation of 'spare' space to use. Indeed, Roman buildings frequently incorporated *Spolia*, building materials – even recognisable structural or decorative elements – taken from the remains of earlier buildings. Once we start to look, we see such appropriations – the onward lives of ruin-fragments – more widely distributed than we might expect, such as salvaged ships timbers now repurposed as the joists of now quaint tumble-down ancient pubs.

These instances of matter from different eras becoming enmeshed in strange (but ubiquitous) time-straddling assemblages has recently been helpfully theorised by Nadia Bartolini<sup>67</sup> (2013), as a human-driven 'brecciation' that disrupts our too-neat ideas of historical and lithographical sequencing. We thus actually see buildings moving across time, shedding elements, receiving others, eventually declining and being reduced to their constituent matter: a pile of disassembling building elements. And at this point of eventual demolition we find this focus upon matter-utility reasserting itself, for in the pro-recycling culture of the last 30 years we have seen increasing focus upon the re-use potential of construction materials: the imposition of taxes upon the winning of virgin aggregate<sup>68</sup>, taxes imposed upon the costs of landfilling wastes<sup>69</sup> (including demolition wastes) rather than reusing them; and the requirements of the Site Waste Management Plan Regulations 2008<sup>70</sup> which required waste minimisation in building, refurbishment and demolition projects.

There is something quite eternal about this re-embrace of 'urban mining' – a (re)emergence of a purposeful de-constructive gaze, widespread prior to the Twentieth century, in which old buildings would be purchased as source of the building materials from which the 'new' would – phoenix-like – rise, in a quiet flurry of architectural salvage, a new stately pile then rising from the ruin's heap. Thus the materials – rather than the buildings per se – became the permanent fixtures, their sequence of constitutive forms being the more temporary aspect.

We see an echo of this de-constructive gaze in the recent metal theft crime wave<sup>71</sup>, in which the built environment is read opportunistically, indeed elementally. Metals are traced, and pilfered from the – often still live – body of the building, taken for their scrap value and in the act of ripping out small lengths of gas or water pipe, wiring or roof flashing letting in prematurely the natural elements, unleashing their ruination upon the fabric of the wounded building. Some talk of this pillage as akin to the Barbarians' sacking of Rome towards the end of the Roman Empire, the victors stripping lead, gold and copper from the roofs of the conquered city. But perhaps what is odd (and yet timeless) in

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<sup>67</sup> Bartolini, N. (2013) 'Rome's pasts and the creation of new urban spaces: brecciation, matter and the play of surfaces and depths', *Environment and Planning D: Society and Space*, **31**, 1041-1061.

<sup>68</sup> See the Finance Act 2001, Section 16 and the Aggregates Levy (General) Regulations 2002.

<sup>69</sup> See the Landfill Tax Regulations 1996 and the Finance Acts, and note the exemptions there aimed at encouraging land reclamation and other use-enabling activities.

<sup>70</sup> Repealed in 2013 as part of the Coalition Government's 'Red Tape Challenge' de-regulation drive, but the segregation of site wastes and a parasitic economy of recyclers formed by the 2008 Regulations now endures as common/best trade practice.

<sup>71</sup> See Bennett, L. (2008) 'Assets under attack: metal theft, the built environment and the dark side of the global recycling market', *Environmental Law & Management*, **20**, 176-183.

that sacking, is the methodical manner in which it was planned (its scope bounded by the parameters of a Papal Bull specifying what could – and could not – be extracted as the spoils of war). Where there's money there's method. The city is constantly made and remade, via the intersection of individual and group ideas of utility and beauty, the dominant criteria for both finding expression in the dry heart of urban law and policy (if we care to look for it).

### **Transience, Permanence or Entropy?**

Urban development is about how places, their buildings and their uses change over time. All things change, all things fall apart and all law and policy can do is try to affect the speed at which this occurs. Tim Edensor<sup>72</sup> has (drawing on the work of Tim Ingold<sup>73</sup>) sought to construct a definition of ruination that embraces such processualism. For Edensor ruination is what happens when the necessary processes of care that hold a building together are withdrawn. As Stephen Cairns and Jane M. Jacobs have recently shown, time is always running out for a building<sup>74</sup>.

From a processualist perspective nothing can be fully stabilised or preserved and buildings are merely an impression of stability consequent upon the 'snap-shot' effect of a single observation of the swirl of matter, energies and ideas that comprise a building *across time*. Edensor restricts his argument to the finitude of the building itself, but an equivalent entropy can be ascribed to any set of *uses* of a building, because patterns of uses are dependent upon patterns of people and societies, businesses and associations which all change over time and ultimately fall apart, because of the mortality of their members, their fragile interconnections and contingent dependencies. Thus both the health of a building, and the health of its protagonists, frame any use, holding it in place only so long as it can resist the forces that will ultimately pull it apart.

The expected life of an 'average' commercial office block may be as low as 25 years, with the anticipation that it will need to be demolished and rebuilt (or at least extensively refurbished) thereafter to keep up with market expectations. Funding costs for its construction will be amortised over no longer than this projected 'commercial' lifespan. Any profit from the building beyond 25 years will thus be a bonus: but remember that holding property is not cost free even if all financing costs secured upon it have been discharged.

There are investors who specialise in buying up casualty (or 'investment') properties – places that have already reached obsolescence. We have already seen that the stakes have been raised more highly against them – both in dwellings ('empty homes' initiatives) and commercial premises ('empty rates'). Such 'casualty' investors try to leave their properties 'as is', minimising expenditure upon them, and hoping for a turn of good fortune (an upturn in the local market conditions, or maybe a re-zoning or an adjacent development scheme) that will suddenly make their derelict building a lucrative asset, to be sold at a tidy profit. But holding such property (unless demolished) will be expensive, mitigated only if the building has 'listed'<sup>75</sup> status (because Business Rates are then not payable upon it)<sup>76</sup>.

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<sup>72</sup> Edensor, T. (2011) 'Entangled agencies, material networks and repair in a building assemblage: the mutable stone of St Ann's Church, Manchester', *Transactions of the Institute of British Geographers*, **36**(2), 238-252.

<sup>73</sup> For example, Ingold, T. (2004) 'Buildings' in Harrison, S., Pile, S. and Thrift, N. eds *Patterned Ground: entanglements of nature and culture*, Reaktion: London, 238-40.

<sup>74</sup> Cairns, S. & Jacobs, J.M. (2014) *Buildings Must Die: A perverse view of architecture*, MIT Press: Cambridge, MA.

<sup>75</sup> A system of control, whereby the carrying out of works requires prior authorisation by the local planning authority if the building has been designated as 'Listed' on account of its special architectural or historic interest.

<sup>76</sup> Although there are general powers available to local authorities under the Building Act 1984 empowering them to require works to dangerous buildings, they are steered by the Planning (Listed Buildings and

Empty buildings are a liability – both in terms of Business Rates, security, insurance and maintenance costs, and also as a potential source of occupiers’ liability should anyone – whether lawful visitor or trespasser – be harmed there by the declining state of the premises<sup>77</sup>. Thus whilst the market assumes a decline towards obsolescence, the law assumes care and stewardship throughout. A currently worthless, and landbanked, building cannot truly be left entirely ‘unattended’, no matter how much the owner might wish to do so. Like animals, property has to be shepherded, lest it otherwise come to harm, or cause harm.

### **Is ruinphobia forcing empties back to work, or are law’s tools blunt?**

“When important properties in the middle of high streets are empty it pulls down the attractiveness and desirability of the street. The problems associated with empty properties are considerable. They attract vandalism and increase insecurity and fear. And this all reduces the value of surrounding businesses and homes. So the decision to leave a property empty is not just a private matter for the landlord. It affects us all. Innovative solutions could add value to not just the individual properties but to the surrounding area.”<sup>78</sup>

This quote is from Mary Portas’ 2011 report into the ailing health of our high streets, it typifies the embedded assumptions of ruinphobia and its fetish of occupation and utilisation. Portas notes that 15,000 town centre stores closed between 2000 and 2009, with one in six shops now empty. Many of these empties are the victims of structural change, town centre based retail spending fell 7% between 2000 and 2011, with further decline forecast thereafter. These places are unlikely to ever be resurrected as shops<sup>79</sup>. Portas’ words embody the assumptions – and fear – of the knock on effects of emptiness, under-utilisation and unresisted ruination on ‘the high street’. Portas also invokes an array of familiar sounding policy reflexes: including disincentivising landlords from leaving retail units empty; introducing new powers to create ‘Empty Shop Management Orders’; and calling for local authorities to take over sites where necessary. Portas’ is thus a familiar call for a war on ‘empties’ and their ruinous effects.<sup>80</sup>

But this paper has shown how even the best (pro-utilisation) intentions of urban law and policy can have unintended consequences – whether in increased demolitions, ‘constructive vandalism’<sup>81</sup> or token occupancy (and/or the onward march of the charity shop). There are clear limits to what the regulatory ‘stick’ can bring about – it can define what is not allowed, but it cannot directly procure that which is desired. We remain in an era of ‘weak’ planning, an era that can nudge – but not direct – owners towards utilisation of their properties.

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Conservation Areas) Act 1990 towards compulsory acquisition of the listed building being the main threat if they are not satisfied with the way in which its owner is managing it. This – given local authority financial constraints in practice may deter many local authorities from enforcement action against empty listed buildings.

<sup>77</sup> Occupiers’ Liability Acts 1954 (protecting lawful visitors) and 1984 (protecting trespassers).

<sup>78</sup> Portas, M. (2011) *The Portas Review: An Independent Review into the Future of Our High Streets*, page 35. Available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6292/2081646.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6292/2081646.pdf)

<sup>79</sup> More recent comments from Planning Minister Nick Boles’ (October 2013) suggest that the coalition government may now be resigned to the need for repurposing the high street’s empties, rather than saving these retail cores: <http://www.telegraph.co.uk/news/uknews/10221373/The-traditional-high-street-is-dead-says-minister-as-he-suggests-shops-could-become-homes.html>

<sup>80</sup> Conversely, for some retail ‘ruin porn’ see: [www.deadmalls.com](http://www.deadmalls.com).

<sup>81</sup> By an owner, in order to render the property uninhabitable and therefore exempt from Council Tax or Business Rates.

Much of the foregoing has focussed upon the regulatory dimension – but it has also given a glimpse of fiscal pressures and consequences. There is another area of law that we can productively consider – as it also embodies an assumption about the desirability of law and policy encouraging the continuation of a property’s use, and the struggle of law and policy to keep pace with occupiers’ evolving views of transience and permanence. In looking at this issue – rights of business lease renewal - we are able to glimpse the tension between law and policy’s slow adjustment to a more rapidly changing market tastes regarding transience and permanence.

In 1954, Parliament enacted the Landlord & Tenant Act – an act that included a range of security of tenure rights for both residential and commercial tenants. In the 1950s, most businesses were owner-occupied, passed down between successive generations and based upon local points of presence, around which customer loyalty cohered. At the time, shopping centres and industrial estates were being built, rising from the rubble of post war reconstruction. The rise of these consolidated business premises (and the institutional investor (principally pension funds) enabling such high cost/long term schemes) were altering the geography and power-balance of urban centres. Against this background it was felt by the Government that statutory protection was needed for commercial tenants. The protection that was granted was the right of automatic renewal of commercial leases at the end of their stated contractual duration, unless the landlord had a qualifying reason that justified him refusing renewal. The assumption of the Act, was that through successive renewals businesses would remain trading at their present bases indefinitely.

However, circumstances changed. In the late 1960s the property industry successfully lobbied for freedom to ‘contract-out’ of the renewal rights that the Act would otherwise automatically confer upon the parties. That contracting-out process initially entailed application for a court order to approve the waiver of the tenant’s renewal rights, but in 2004, in recognition of the increased volume of contracting out, the rules were further revised<sup>82</sup>, allowing the parties to contract-out without any court involvement. The rising popularity of contracting out reflected the shrinking average length of commercial leases. The standard ‘institutional’ letting of a building or suite for the full 25 year period of its anticipated life gave way to ever shorter leases, principally driven by a desire for flexibility by occupiers. Few tenants now wanted to be anywhere indefinitely. This tenant-driven journey towards ever shorter leases marks a seismic shift in the way that property is viewed by occupiers, with the British Property Federation noting (in 2004<sup>83</sup>) that whilst 90% of leases (by aggregated value) were let on 20 or 25 year terms in 1990, by 2002 that proportion had dropped to less than 25%, with the average lease length around 6.8 years. More recent data<sup>84</sup> suggests that this trend has continued across the last 10 years, with more than 50% of new leases granted in 2012 being between 1 and 5 years in length<sup>85</sup>, and with fewer than 6% of new leases over 10 years duration or more. The average length of leases in 2013 was 5.8 years. Thus, tenants are no longer seeking the comfort of a stable, enduring (and near ‘permanent’) base. And yet the 1954 Act provisions, remains in place conferring lease renewal rights upon tenants as an embodiment of a sixty year old reading of the temporalities of business occupancy.

### ***Temporary is the new permanent: law and policy’s temporalities and the struggle to catch up***

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<sup>82</sup> By the Regulatory Reform (Business Tenancies) (England & Wales) Order 2003.

<sup>83</sup> British Property Federation (2004) *Response to ODPM’s Consultative Paper on Commercial Property Leases and Upward Only Rent Review Clauses*, BPF: London.

<sup>84</sup> IPD, BPF & Strutt & Parker (2013) *IPD Lease Events Report 2013*, IPD: London

<sup>85</sup> Without weighting by value this percentage (50%) would actually be 80%, indicating that by simple frequency, few tenants are taking new leases that show long-term commitment.



This headlong commercial rush towards transience, is difficult for urban law and policy to get its head around. In the ruinphobic reflex, transience equates to instability and a lack of proper attachment to land, for short term occupation is not 'proper' occupation in the law's gaze. Property is meant to be static, dependable and unchanging. Property law characterises 'real property' by its solidity and enduring nature. It has the ability to transmit rights and burdens across many generations<sup>86</sup>. Perhaps some of the fault lies with the temporalities<sup>87</sup> of urban law and policy – that they are still locked in the realm of inter-generational, or at least 'life-of-the-building' timescales.

We face a future in which the prevailing appetite is for the embrace of only short-term commitment to occupancy and use. That is a future that all of us are trying to come to terms with – whether as developers trying to work out how to recoup project costs over ever shorter periods, funders wanting to reduce pay-back periods to reduce exposure to the whim of tenants who will not sign up for the full duration of the 'classic' payback period, or tenants hedging in the face of an uncertain future.

'Meanwhile' use still seems to assume that it is an interim to something more durable that will come along afterwards. But what if meanwhile becomes forever? We still seem to have a gut feeling that implies that 'fixing' the city centre 'problem' is about getting back towards a stability/longevity of use. But is that just because it's how things used to be? What's actually wrong with a sequence of short term adaptive uses? What is law and policy fearing in an eternal 'short-term'? In a way that's what we already have with charity shops - a species of supposedly *transient* 'meanwhile' use that has become *permanent* (through a combination of surplus retail premises, Business Rates exemptions for charities and higher insurance premiums for empty shops than for occupied ones).

And lurking in the background - in this fear of meanwhile becoming permanent - is (we think) ruinphobia, that belief that only a long-term commitment to land, ownership and a stable use brings physical upkeep, sustainable employment and tax revenues, healthy property values and perception of a high standard of living.

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<sup>86</sup> Take for example the liability experienced by a householder for failing to honour an obligation to repair the chancel of his local church, an obligation first imposed upon his property in the 1500s, shortly after Henry VIII's dissolution of the local monastery that had – up until that time – handled the task, see: *Parochial Church Council of the Parish of Aston Cantlow –v- Wallbank* [2003] UKHL 37 and <http://www.dailymail.co.uk/news/article-1094403/Pay-500-000-God-help-say-couple-forced-medieval-law-foot-church-repairs.html>

<sup>87</sup> Here 'temporality' is used in two senses – both as an awareness of the passage of time, and more specifically in acknowledgement that law attaches to familiar-sized moments – phases of use.