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FROM COMMON LAW LOGIC-CHOPPER TO LAND-USE PLANNER: EULOGY FOR THE LAWYER AS SOCIAL ENGINEER

E. F. Roberts†

The angry Buzz of a Multitude is one of the bloodiest Noises in the World.

—The First Marquess of Halifax.*

The standard of living attained in the most advanced industrial areas is not a suitable model of development if the aim is pacification. In view of what this standard has made of Man and Nature, the question must again be asked whether it is worth the sacrifices and the victims made in its defense. The question has ceased to be irresponsible since the "affluent society" has become a society of permanent mobilization against the risk of annihilation, and since the sale of its goods has been accompanied by moronization, the perpetuation of toil, and the promotion of frustration.

—Herbert Marcuse.**

This article starts out innocently to examine the case-by-case process through which rules designed to resolve incursions into airspace were formulated. Not until a crowded urban environment made the resolution of this kind of dispute a practical necessity did the process emerge from a conceptual bog and produce clear-cut decisions. In substance, the law has concerned itself with corporations and estate planning, concerns of the well-to-do, and its only real impact on the commonalty was the backlash of the social engineering inherent in the

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** H. Marcuse, One-Dimensional Man 242 (1964).
creation of a fault-centered system of liability to subsidize the industrialization of society.

The question then arises: Has the law done much of late to improve the general environment in which people live? Nuisance doctrine and zoning laws seem efficient only in the creation of middle-class suburban retreats. The law seems concerned with the environment of a particular class—the suburbanites—but this, after all, is essentially the same class as had hitherto been estate-planning conscious. If the law has not had much direct impact upon the common man, its concentration of late on the construction of middle-class rings around the cities promises to aggravate the plight of a growing class of center-city poor and, perforce, to contribute to the cause of riots in the cities.

Thus, it is questionable, whether there is merit in the assertion that lawyers are social engineers. Have lawyers been able to organize the case system in such a way that it decides the allocation of loss in our technological era with the same remarkable clarity that distinguished the nineteenth century's fault system of liability? The attempt to allocate losses attributable to the rise in commercial aviation illustrates that modern complexities defy application of the case system's binary logic, and suggests that legislation provides the key to the future.

The lawyer-legislators have proved adept at devising fiscal and monetary schemes to maintain the level of production necessary to keep the suburban syndrome alive. In the process, however, there has been a vacuum in social engineering designed to make the environment of the poor habitable and to promise them real participation in our consumer society.

The riots in center city belie the conventional assumption that affluence necessarily will filter down to the poor, removing the cause of discontent. Indeed, the need to divert resources into center city requires more direct government intervention in the economy in the form of planning. At the same time, the locally-oriented zoning style of land-use planning seems due for an overhaul in the form of metropolitan area planning based upon considerable powers of condemnation. On their record as social engineers, do the lawyers have claim to lead the march toward a planned society? The substance of this article is that the answer is plainly no. The lawyers might be better advised to perfect their own technical competence in traditional functions and to leave the social engineering to a new body of experts, the product of a new discipline attuned to the needs of the twenty-first century.
A STUDY IN TIME AND MOTION—LEGAL RESPONSES TO AN AGE-OLD PROBLEM

A. Trespass into Space

Imagine, if you will, a charming balcony, perchance like Juliet's, overhanging a pleasant garden scene below. Lest the scene inspire non-productive reverie, let us quickly shatter the idyll by positing the further fact that the balcony protrudes into a neighbor's airspace and overhangs his garden. We have, therefore, a simple set of facts and an equally simple question: What are the neighbor's rights? It ought to be possible to evaluate rather easily the efficiency with which the lawyers, armed with these simple facts, come up with solutions.

A similar problem attracted the scrutiny of Lord Ellenborough sitting nisi prius at Westminster on Tuesday, June 20, 1815.¹ The plaintiff brought an action in trespass against his neighbor after discovering that the heedless fellow had affixed a board to his house in such a way that the board overhung the plaintiff's garden. Citing the maxim Cujus est solum, ejus est usque ad coelum as his major premise, plaintiff's counsel developed the argument that since the space over the garden, like the minerals beneath it, belonged to the plaintiff, his domain had been invaded, i.e., trespassed upon. Lord Ellenborough would have none of this:

I do not think it is trespass to interfere with the column of air superincumbent on the close. . . . I am by no means prepared to say, that firing [a gun] across a field in vacuo, no part of the contents touching it, amounts to a clausum fregit. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass quaerit clausum fregit, at the suit of the occupier of every field over which his balloon passes in the course of his voyage.²

The plaintiff was then advised to bring an action upon the case if he could prove damage.

Granting the truth of the plaintiff's maxim, wasn't the hypothetical balloonist a trespasser, since plaintiff "owned" an elongated, inverted three-dimensional pyramid of space? One answer is that the opinion was merely a humorous exercise, whose "real" holding was

that plaintiff's remedy was self-help.\textsuperscript{3} Another is that, notwithstanding the florid locutions of the property lawyers, trespass was a possessory remedy, and the trial bar understood possession only in its practical sense.\textsuperscript{4} If this was so, Lord Ellenborough's mention of an action on the case appears to have been an invitation to pursue an illusory remedy, since the harm was not to plaintiff's possession, but rather to his sense of monopolistic dominion over his territory.\textsuperscript{5}

Granting for the moment that plaintiff could prove harm, even a successful action on the case would seem to be a judicial sanction of the invasion, in effect, letting defendant purchase an inroad into his unwilling neighbor's territory. Should the aggrieved party insist upon his rights to be free from the incursion, ejectment would appear to be

\textsuperscript{3} For example, overhanging branches traditionally have been a proper problem for self-help, and not an appropriate subject of concern of the courts. Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931). \textit{But see} Bonde v. Bishop, 112 Cal. App. 2d 1, 245 P.2d 617 (1952); Ferrara v. Metz, 49 Misc. 2d 531, 267 N.Y.S.2d 823 (Sup. Ct. 1966).

\textsuperscript{4} \textit{See, e.g.,} Anonymous, Y.B. Hill. 21 Edw. 4, 74, pl. 6 (1482), where it was agreed that where \( B \) wrongfully took \( A \)'s horse, and \( C \) wrongfully took the animal from \( B \), still \( C \) was no trespasser as to \( A \) since he had not taken the horse out of \( A \)'s possession. \textit{See} 3 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 237-38 (1906). Students of property lore will also recall a case involving some fishermen who rowed their boat through a rival crew's net which nearly encircled a school of fish. The English judges refused to say that the rivals had possession because all but reducing into possession was not possession. Young v. Hitchens, 1 Dav. & Mer. 592, 115 Eng. Rep. 228 (Q.B. 1844).

For those who acquired in law school a fondness for problems of possession as illustrated by animals \textit{ferae naturae}, two recent cases may be of some interest. Commonwealth v. Agway, Inc., 210 Pa. Super. 150, 232 A.2d 69 (1967), involved a state suing for the value of fish killed as a result of defendant's stream pollution. The court refused to countenance this novel approach to pollution control because fish "running wild . . . are not the subject of property until they are reduced to possession . . ." \textit{Id.} at 152, 232 A.2d at 70. \textit{Quaere}, why should the sovereign necessarily have to "own" the fish in order to hold defendant accountable for their destruction?

In Regina v. Howlett, Times L. Rep., Feb. 5, 1968, the Court of Appeal wrestled with the question whether mussels naturally adhering to the shore can be stolen. The same reports, on Feb. 6th, reveal, per Lord Justice Diplock:

\begin{quote}
Because prosecution evidence was inadequate to show that mussels had been reduced into possession, the Court quashed the convictions . . .
\end{quote}

\begin{quote}
The prosecution had alleged that the foreshore was the property of the le Strange estate as a consequence of a grant by the Crown in 1189 . . . .
\end{quote}

The first point argued by Mr. Albery was that mussels were not capable of being the subject of larceny because of adherence to the realty, and the second was that, if they did not adhere, they were wild animals \textit{ferae naturae} incapable of being stolen until reduced into possession . . . .

Their Lordships did not think it necessary to decide whether mussels did form part of the realty.


the more productive remedy. A New York court in 1861, however, held that ejectment would not lie in the instance of overhanging eaves and gutters, for the simple reason that plaintiff had not been deprived of possession in such a way that the sheriff could escort him back into possession.\(^6\) Again it appears that the procedural system was programmed to deal only with invasions of actual possession and was not adequate to remedy intrusions into the theoretical realm of overhead space. Again the court had a helpful suggestion as to the correct avenue of approach to the problem, this time citing plaintiff to an action on the case for nuisance. But more of nuisance in a moment.

In terms of law as a Pavlovian-style discipline of rote-learned rules and appropriate intellectual responses,\(^7\) both courts cited thus far were probably right when they limited both trespass and ejectment to dealing with practical possession. Later critics, however, complained that trespass did not cover invasion of spatial territory admittedly owned by the victim. In 1887 Pollack said:

> Clearly there can be a wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern books. It does not seem possible on the principles of the common law to assign any reason why an entry at any height above the surface should not also be a trespass. The improbability of actual damage may be an excellent practical reason for not suing a man who sails over one’s land in a balloon; but this appears irrelevant to the pure legal theory.\(^8\)

Theory, it should be observed, had gained a limited victory over common sense.

The concept of the inviolate corridor in space over a fee simple was confirmed in Butler v. Frontier Telephone Co.,\(^9\) a 1906 New York decision. Butler brought an action of ejectment against a telephone company when it ran a wire through his airspace with neither permission nor authority. The company argued that although either trespass or case might lie, ejectment did not because it had not ousted plaintiff from possession. The court, however, seized the opportunity to address itself to the jurisprudential question: “What is ‘real property?’”

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would

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\(^7\) Those readers who imagine themselves Tories in the true sense of that word would do well to reflect upon modern “learning” theory as manifested in programmed instruction. See, e.g., C. Kelso, A PROGRAMMED INTRODUCTION TO THE STUDY OF LAW (1965). See also Eysenck, The Teaching Machine, ENCOUNTER, May 1966, at 7.

\(^8\) F. POLLACK, TORTS 281 (1887).

\(^9\) 186 N.Y. 486, 79 N.E. 716 (1905).
have been dispossessed pro tonto. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam ... Enlarge the beam into a bridge .... Unless the principle of usque ad coelum is abandoned any physical, exclusive and permanent occupation of space above land is ... a disseisin of the owner to that extent.10

Principle won, and the remedy was simple: "The sheriff can ... deliver occupied space by removing the occupying structure."11 Since the defendant had removed the wire before trial, however, the sheriff was spared the trouble, and thus the case might better be read as holding that trespass would lie.12

Ignoring the fact that the wire had been removed before trial, the Butler decision seems at best a Phyrre victory for theory and principle, and at worst a procedural booby trap for the unwary. Indeed, the casual reference to the sheriff is almost incredible in light of the same court's previous decision in Hahl v. Sugo.13 In that celebrated debacle, plaintiff successfully obtained an ejectment judgment upon discovering that his neighbor's building encroached upon his land. The triumph proved short-lived, however, since the sheriff returned the writ of execution unsatisfied after finding that the "intruder" was a monstrous stone wall. The plaintiff next entered equity in search of relief, but met an intellectual stone wall when the court invoked the doctrine of election of remedies.

10 Id. at 491-92, 79 N.E. at 718. This triumph of theory over pragmatism is worth pursuing. For example, A. Casner & W. Leach, Cases on Property (1951), is "conceptual" in the sense that it treats in a logical order the concepts induced from the common law's pragmatic assault on problems. C. Berger, Land Ownership and Use (1968), is more modern in its emphasis on land-use planning, but this book opens with a jurisprudential inquiry as to "what is property?" Quaere, to what extent is the case-oriented common law system being replaced by a pseudo-civil law system organized around Uniform Codes, and around doctrines like strict liability parroted by the cases? For a critique of the functional approach, see H. Marcuse, One-Dimensional Man 96-99 (1964).
11 186 N.Y. at 492, 79 N.E. at 718.
12 The real issue in Butler was one of costs, since in trespass plaintiff would not have been entitled to them if he recovered less than fifty dollars. As it was, he recovered six cents. For another episode where the battle over costs "made law," see Roberts, Negligence: Blackstone to Shaw to? An Intellectual Escapade in a Tory Vein, 50 Cornell L.Q. 191, 197 (1965).
B. The Illusory Remedy of Nuisance

Still in search of an answer to our balcony hypothetical, it may prove expedient in light of Hahl to forget Butler and backtrack to Aiken v. Benedict.\(^{14}\) There the court suggested that the correct remedy for projecting eaves was an action on the case for nuisance. Indeed, the court said that “if the defendant should be convicted, the judgment would be for damages and an abatement of the nuisance.”\(^{15}\) More helpful still, the court cited plaintiff to “2 R.S. 332 §§ 1-7, and Code, §§ 453, 454.”\(^{16}\) Ironically, according to the notes appended to the citation to the Revised Statute sections,\(^{17}\) the common law writ of nuisance described therein was abolished by one of the cited Code sections!\(^{18}\) At first blush, this is rather disconcerting.

Backtracking even further, there were two classic common-law remedies for private nuisance. The first was a writ of *quad permittat prosterne* under which the defendant was cited to show cause why the plaintiff should not be permitted to abate the nuisance.\(^{19}\) The second was by way of an assize of nuisance “in which the sheriff was commanded to summon a jury to view the premises, and, if they found for the plaintiff, he had judgment to have the nuisance abated and for damages.”\(^{20}\) Both remedies were so enmeshed with hypertechnical refinements, however, that once it was decided in Cantrel v. Church\(^{21}\) that an action of case lay wherever an assize of nuisance did, it “followed naturally that trespass on the case became the usual and established remedy for nuisance.”\(^{22}\) Indeed, Blackstone reveals that both remedies were out of use in his day, and that plaintiff had the option either to collect damages by way of case or to exercise self-help.\(^{23}\)

New York was one of the states that provided for abatement by statute,\(^{24}\) and the provision in the Revised Statutes was much like the procedure involved in the assize of nuisance.\(^{25}\) The Code abolished

\(^{14}\) 29 Barb. 400 (N.Y. Sup. Ct. 1861).
\(^{15}\) Id. at 402.
\(^{16}\) Id.
\(^{17}\) 2 N.Y. Rev. Stat. 343 § 1 (1862).
\(^{19}\) J. Joyce & H. Joyce, Law of Nuisances 520-21 (1906).
\(^{20}\) Id.
\(^{23}\) 3 Blackstone, Commentaries 222 (9th ed. 1783).
\(^{24}\) “Provision is made in many of the States for an abatement upon order of court after verdict . . . .” H. Wood, Law of Nuisances 975 (2d ed. 1883).
this "writ of nuisance," providing instead that an action might be brought "as [for] other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both." Thus, the problem of the overhanging eaves in Aiken is solved simply by an action in case, and, if plaintiff succeeds in proving his facts, an order for abatement plus damages follows. What then is one to make of the advice that this remedy "is not encouraged," and of the further testimony that "only in extreme cases" will a law court order the abatement?

This whole affair becomes more curious on reading the opinion in Kintz v. McNeal, decided in 1845 when the statutory writ of nuisance was still available in New York.

The remedies by assize of nuisance, and quod permittat propter nere have been out of use in England for two or three centuries; and this is probably the first instance in which a writ of nuisance was ever prosecuted in this state. How the parties have got on so far with this antiquated and very difficult proceeding, I am unable to say; but it has probably been by consent. The assize of nuisance is an existing remedy in Pennsylvania: but the court have found it necessary to disregard the ancient forms, and adopt the action to modern practice. . . . It is doubtful whether we have any right to modernize this remedy; and I am disposed to adopt the language of Ch. J. Eyre . . . and say, if you will have a writ of nuisance, you must follow the course marked out by the law.

Moreover, the Code provision abolishing the writ as of 1849 was presumably designed "to modernize" the remedy.

After 1849, courts of equity assumed jurisdiction in nuisance cases to enjoin private nuisances and to award damages. Interestingly enough, an analogy to trespass was cited in several cases:

So though every common trespass is not a foundation for an injunction, where it is only contingent and temporary; yet if it continues so long as to become a nuisance, in such a case the court will interfere and grant an injunction to restrain the person from committing it.

It should be observed, however, that these cases involved an offensive

27 H. WOOD, LAW OF NUISANCES 865 n.2 (1875).
28 H. WOOD, supra note 24, at 975.
29 1 Denio 436 (N.Y. Sup. Ct. 1845).
30 Id. at 439 (citations omitted).
31 E.g., Hutchins v. Smith, 63 Barb. 251 (N.Y. Sup. Ct. 1872); Davis v. Lambertson, 56 Barb. 480 (N.Y. Sup. Ct. 1868).
cheese factory\textsuperscript{33} and a lime kiln\textsuperscript{34} next door to the plaintiffs, and did not involve actual trespasses. Thus, although a nuisance next door was, after 1849, properly a subject for an equity court and an action on the case for damages,\textsuperscript{35} our initial inquiry remains unanswered: How is an overhanging balcony to be removed?

If an overhanging balcony is a trespass into airspace, as Butler indicates, the answer seems elementary: Equity will enjoin a trespass if the remedy at law is inadequate. In Williams v. New York Central R.R.\textsuperscript{36} equity enjoined a railroad company that laid tracks across plaintiff’s land.

Although he had a remedy at law for the trespass, yet, as the trespass was of a \textit{continuous nature}, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and can of course recover his damages as incidental to this equitable relief.\textsuperscript{37}

Thus, if an overhanging balcony is a trespass, and is a continuing one, we have solved our problem.

Parenthetically, perhaps, the concept of a “continuous” trespass must be understood. For our purposes, this definition should suffice:

To remain on land after a trespassory entry thereon is in itself also a trespass, a “continuing trespass” as it is commonly styled. So, if A places a chattel on B’s land and is successfully sued by B in trespass for this act, he is liable, if he fails thereafter to remove it, to further actions in trespass for the continued presence of the chattel on the land.\textsuperscript{38}

We are now ready to construct a matrix to set the problem of the overhanging balcony in context. A good beginning is Professor Powell’s discussion of the

three common law classes of land injury. If the defendant ousted plaintiff from possession, he was a disseisor; if he invaded plaintiff’s possession he was a trespasser; but if he interfered with plaintiff’s use and enjoyment of his property by acts done elsewhere than on plaintiff’s land he became subject to the twelfth century assize of nuisance.\textsuperscript{39}

Thus, so long as plaintiff was restricted to “practical” possession, as opposed to postulating ownership of the airspace over his land, eject-

\textsuperscript{33} Davis v. Lambertson, 56 Barb. 480 (N.Y. Sup. Ct. 1868).
\textsuperscript{34} Hutchins v. Smith, 63 Barb. 251 (N.Y. Sup. Ct. 1872).
\textsuperscript{35} See, e.g., Dillon v. Acme Oil Co., 49 Hun. 565, 2 N.Y.S. 289 (Sup. Ct. 1888).
\textsuperscript{36} 16 N.Y. 97 (1857).
\textsuperscript{37} \textit{Id.} at 111 (emphasis added).
\textsuperscript{38} H. STREET, LAW OF TORTS 62 (2d ed. 1959).
\textsuperscript{39} R. POWELL, 5 THE LAW OF REAL PROPERTY ¶ 704, at 317-18 (1968).
ment would not lay because there was no ouster—witness Aiken. Similarly, trespass was of no avail because his “possession” was not invaded—witness Pickering. Since the harm was “done elsewhere” by this narrow conceptualization of the plaintiff’s fee simple, the assize of nuisance was the correct remedy, and the advice of the Aiken court was, for its time, quite correct.

Once Butler was decided, however, plaintiff was given rights in possession of the superincumbent air column over his fee, and the matrix had to be rebuilt. In theory ejectment might now lie for an “ouster,” but Hahl discouraged further development along this line. Since the harm perpetrated was now within the zone of plaintiff’s “possession,” it followed that neither an action on the case for nuisance nor an equity action to enjoin a nuisance was an appropriate remedy. The elementary answer was that the installation of an overhanging balcony was a trespass, that its presence constituted a continuing trespass, and that a court of equity would remedy the situation. In order to prove this thesis, it is simply necessary to find a modern court enjoining an overhanging balcony as a continuing trespass rather than upon nuisance grounds.

In a 1957 Queen’s Bench decision, Kelsen v. Imperial Tobacco Co., the court held that an advertising sign projecting from the wall of an adjoining building and into airspace above the plaintiff’s shop was a continuing trespass and would be enjoined as such. Justice McNair, repudiating Lord Ellenborough, reasoned that superincumbent airspace must belong with the fee, else the Air Navigation Act, removing the right of landowners to sue aeronauts in trespass, would have made no sense. Herein lies irony galore, since the aeronauts cited as evidence of the existence of rights in space today threaten to destroy the habitability of the fee itself.

C. A Legal System for All the People

It took from 1815 to 1957 for the law to work its way from Lord Ellenborough’s nay to Justice McNair’s yea to the question: Would trespass lie? In the meantime some plaintiffs seeking to remove a balcony tried ejectment and failed. Others were cited to the ancient writs of nuisance, and probably were discouraged by the intricacies of pleading. In New York, the Code opened the door to equity’s jurisdiction to abate nuisances, but Butler was the real breakthrough when posses-

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41 Air Navigation Act of 1920, 10 & 11 Geo. 5, c. 80, § 9(1) (now Civil Aviation Act of 1949, 12 & 13 Geo. 6, c. 67, § 40(1)).
sion of space was recognized as a right protected by trespass. For a time, however, our balcony problem involved a nuisance approach, and it remains to be seen whether our matrix is yet free from influences left over from this temporary association.42

Are any lessons learned from a cursory survey of some one hundred and forty years' worth of lawyers' logic-chopping over an overhanging balcony? A shift appears from the pragmatism evident in Lord Ellenborough's day to the progressive conceptualization of the "territory" of a fee simple. This conceptualism turned upon the definition of "possession," so that the logical apposition reflected by Pickering and Kelsen could be depicted in terms of a yes-no, on-off binary system of logic. In practice, however, the shift involved chasing up the successive blind alleys of ejectment and nuisance, the latter diversion being further complicated by intricate procedural roadblocks. Still, there was evident throughout a concern for concepts, i.e., the meaning of possession, and for logic, i.e., whether one could intrude into non-possessed zones. From society's view, however, this whole affair seems to constitute a tremendous effort and, insofar as the actual victim of such an intrusion is concerned, an unsatisfactory set of legal responses prior to 1957.

The lack of adequate answers could mean that the problem was not worth reflection until urbanization and the economic necessity of building skyward made territory over a fee valuable in terms of hard cash rather than pride of dominion. Perhaps the arrival of the ubiquitous telephone wire marks the first time that courts seriously began to look skyward and define rights in space.43 Admitting as much, the lag between Butler and Kelsen does not reflect much credit upon the dispatch with which courts clarify conceptual muddles.

Moreover, abandonment of the application of the self-help doctrine to overhanging branches supports the idea that increasing urbanization has caused the law to take the problem seriously. Thus, in Bonde v. Bishop44 a California court in 1952 held that an overhanging oak

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limb, the source of an aerial bombardment of twigs, leaves and acorns upon plaintiff's patio and roof, constituted a nuisance, and ordered it abated by the owner. The court implicitly repudiated the notion that the courts would thereby open themselves to "innumerable and, in many instances, purely vexatious" actions. More recently, a New York court assumed jurisdiction to decide a case where roots from a neighbor's tree were undermining a patio and fouling a swimming pool pump notwithstanding plaintiff's defensive efforts at moat digging. Beautification campaigns and subdivision trends toward clustering houses in a picturesque environment promise to end the paucity of cases of this class.

But why the paucity of cases? Is it possible that two different kinds of questions are involved in the law? One, our simple hypothetical question, and the other a broader, social engineering style interrogatory? Our ruminations in terms of a simple human affairs problem do not elicit much response, and such response as there is evidences that lawyers make pretty heavy going of it. What if, instead of our balcony problem, we were to inquire: Is a manufacturer liable to a consumer injured by a defect in his product? In response to this question we are immediately deluged with Brown v. Kendall and Winterbottom v. Wright, illustrating the epoch of fault-centered liability, to say nothing of today's Uniform Commercial Code and the recent strict tort and implied warranty decisions. Can we, on the basis of this data, suggest as a hypothesis that the law, for all of its rhetoric, has never been as concerned with individuals as with broad issues affecting the structure of economic and political society? Is social engineering merely social planning on a broad scale at the expense of the individual problems at the over-the-back-fence level of society?

If for one hundred and fifty years after 1800 a citizen could not obtain a clear response to a question about an overhanging balcony, and if he was told to exercise self-help if he complained about an overhanging tree limb, the reflective citizen might begin to doubt the degree to which "law" protected the security of his home. Similarly, Mapp v. Ohio, if we are to believe Justice Brennan's lamentations

45 This is one of the rationales for the old self-help doctrine, taken from Michalson v. Nutting, 275 Mass. 232, 234, 175 N.E. 490, 491 (1931).
47 60 Mass. (6 Cush.) 292 (1850).
48 10 Mees. & Wels. 109, 132 All E.R. 402 (Ex. 1842).
over unconscionable police activity,\textsuperscript{51} supports an inference that the citizen was not secure until 1961 from invasions by the police, to say nothing of invasions by health inspectors.\textsuperscript{52} Presumably, a citizen's security depended on his position in the socio-political hierarchy and on the fact that the police "knew their place"—in short, his rights were commensurate with his social standing. The owner of a mere "cottage" beset by dangerous tree limbs by day and intruding authorities by night, notwithstanding the rhetoric expended in his behalf,\textsuperscript{53} could not expect much in the way of either physical or emotional security in terms of the law.

Instantly the optimist, delivering one of those dreary Rule of Law exhortations on Law Day, will object that all this has changed—witness the \textit{Mapp} decision and its progeny and the recent judicial interest in overhanging trees. No matter what history may have been, he will insist, the law in the sixties has finally substantiated the ideal that every man's home is his castle. The fact is that the law has arrived with

\textsuperscript{51} 1961 James Madison Lecture at the N.Y.U. School of Law:
Far too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel and downright brutality.


\textsuperscript{52} Frank v. Maryland, 359 U.S. 360 (1959), before it was overruled by Camara v. Municipal Ct., 387 U.S. 523 (1967), crystallized the conventional wisdom that health searches required no warrant. To discover how widespread these antics were, see the citations collected in Comment, \textit{Pre-Dawn Welfare Inspections and the Right of Privacy}, 44 J. URBAN \textit{L.} 119, 122-23 & n.23 (1966).

\textsuperscript{53} E.g., Coke's postulate: "That the house of every one is to him as his... Castle and Fortress." Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1604). In his dissent in \textit{Frank v. Maryland}, Justice Douglas relied upon Pitt's famous speech to the effect that:

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

\textsuperscript{559} U.S. at 378-79. The idea is charming, but reality suggests that search warrants are to be obtained in England for the asking. See, e.g., Letter from Professor E. C. S. Wade, The Times (London), Aug. 31, 1967, at 7, col. 3. Sad to relate, even social standing seems to be of little avail these days in England. Thus, in a \textit{Times} leader, one can find:

What the Lord Chancellor had to say in the House of Lords yesterday about the recent drug raid on Lady Diana Cooper's home goes to confirm the suspicion that there is far too much of the rubber stamp about the issue of search warrants by justices of the peace. The police application for a warrant was based on an anonymous message, but "this was not disclosed to the magistrate who signed the warrant for the search." . . .

Things are not what they were when the elder Pitt could say that "the poorest man in his cottage may bid defiance to all the forces of the Crown."
too little, too late. Vulgar police intrusions into the home are no longer needed in order to maintain discrete surveillance of the population in our technological era. At the same time, the aid now afforded the homeowner to ward off dangerous tree limbs and offensive roots is fairly irrelevant if the environment in which his now "secure" castle is situated is beyond his control. It may be that the sanctity of the home has actually been eroding, rather than progressing during our lifetime; a fact which, if true, will shortly necessitate some rethinking of the significance of the home.

II

COMMON LAW IMPLEMENTATION OF ENVIRONMENTAL VALUES

The common law technique for controlling environment was nuisance. Nuisance, however, was dealt with in terms of "fault" simply because fault, in the nineteenth century, was seen as fundamental to the imposition of any legal liability. This fault syndrome is manifest, for example, in the original Restatement of Torts. In order for a defendant's activity to merit a money damages sanction, his behavior had to be susceptible to pigeonholing in such conventional terms as "intentional and unreasonable," "negligent," or "ultrahazardous." Furthermore, even assuming defendant's behavior was susceptible to pejorative cataloging as intentional, monetary liability, to say nothing of injunctive relief, did not follow unless his conduct could also be labelled unreasonable. This latter opprobrium did not apply when

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54 There is no reason to doubt ... that by the year 2000 it will be possible to place a man under constant surveillance without his ever becoming aware of it. Moreover, since the culture will become cognizant of this advance, men will live with the constant possibility that they are under surveillance without ever being able to be sure whether this is so.


55 Consider the following:

What are the basic rights of an American citizen in the remaining third of the twentieth century? Does he have the right to be exposed to nature's own weather? The right not to be exposed to manmade environmental contaminants injurious to health? The right not to be subjected to ... life-shortening influences? The right not to be subjected to extraordinary noise?


56 See, e.g., Roberts, supra note 12, at 204-13.

57 RESTATEMENT OF TORTS, § 822 (1939).
sufficient social value could be credited to defendant's activities. A few cases will readily illustrate the significance of this body of doctrine, particularly the impact of the social value factor.

In *Madison v. Ducktown Sulphur, Copper & Iron Co.*, plaintiffs had farms with an aggregate assessed value of less than one thousand dollars. Defendants were "two great mining and manufacturing enterprises" worth nearly two million dollars, representing half of the taxable values in the county. Defendants reduced their copper ore by cooking it over open-air wood fires, emitting large volumes of sulphur dioxide smoke, and turning the valley into a wasteland. The Tennessee court held that plaintiffs were not entitled to injunctive relief because "the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances." "Liberty" here meant that the companies were free to create a wasteland if they paid for it, whereas the farmers were free to take jobs with the industry and continue to reside in a valley totally polluted with chemicals.

Counterpoint to this balancing of the interests is *Whalen v. Union Bag & Paper Co.*, which involved a farm situated beside a creek in Saratoga County. Defendant built a pulp mill a few miles upstream, investing more than a million dollars and providing jobs for between four and five hundred people. Discharges from the mill polluted the creek and a lawsuit resulted. The trial judge granted plaintiff an injunction to take effect one year later and awarded damages. The appellate division, impressed with the argument that the mill would have to close down to comply with the court's decision, reversed the injunction order and reduced the damages to one hundred dollars a year. The Court of Appeals, however, reinstated the injunction, announcing

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58 Id. §§ 822(d)(i), 826, 828.
59 113 Tenn. 331, 83 S.W. 658 (1904).
60 Id. at 343, 366, 83 S.W. at 660, 666-67.
61 Id. at 367, 83 S.W. at 667.
62 208 N.Y. 1, 101 N.E. 805 (1913).
63 It is somewhat ironic that pulp mills requiring immense quantities of clean water in their operations should face the most serious problems of stream pollution. The sulphite process, using an acid digestion of wood chips in pressure vessels with a solution of calcium and magnesium acid sulfites, produces about equal amounts of pulp and waste. An average sulfite process pulp mill turns out about 100 tons of pulp daily, and that means the sulfite waste liquor from the process contains another hundred tons of solid material in dilute solution that must be disposed of. This product seriously contaminates any streams into which it is dumped, and only those streams having extraordinarily high flow can accept this amount of contaminant without serious damage to the stream, its fish population, and the subsequent use of the water of the stream.

a ringing repudiation of any effort at balancing interests because, "if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich."  

Seemingly, therefore, New York and Tennessee came to opposite results, with the little man triumphant in New York.

The victory of a yeoman farmer in Saratoga County brings to mind McCarty v. Natural Carbonic Gas Co., in which a homeowner obtained an injunction forbidding a manufacturer’s use of soft coal. The court took pains to point out that this case came up from a “country district suitable for country homes.” Still, one must read in pari materia with Whalen and McCarty the revealing case of Bove v. Donner-Hanna Coke Corp., where the plaintiff unsuccessfully sought relief from the dirt cascading onto her house from a coke plant.

It is true that the appellant was a resident of this locality for several years before the defendant came on the scene of action, and that, when the plaintiff built her house, the land on which these coke ovens now stand was a hickory grove. But in a growing community changes are inevitable. This region was never fitted for a residential district; for years it has been peculiarly adapted for factory sites. This was apparent when plaintiff bought her lots and when she built her house. The land is low and lies adjacent to the Buffalo River, a navigable stream connecting with Lake Erie. Seven different railroads run through this area. Freight tracks and yards can be seen in every direction. Railroads naturally follow the low levels in passing through a city. Cheap transportation is an attraction which always draws factories and industrial plants to a locality. It is common knowledge that a combination of rail and water terminal facilities will stamp a section as a site suitable for industries of the heavier type, rather than for residential purposes.

The moral drawn by the court was elementary: “One who chooses to live in the large centers of population cannot expect the quiet of the country.”

There is a difference, then, between the peace and quiet of Saratoga County and the place where the plaintiff built her house.
toga County and a site "suitable for country homes" on the one hand, and a poor farming region in Tennessee and the Buffalo flats on the other. Thus, there is a great deal of truth to the proposition that nuisance cases are a species of "judicial zoning ... carried out on a sporadic, hit-or-miss basis." In the words of the progenitors of this thesis, the recent cases "clearly demonstrate a definite increase in judicial sensitivity to the 'character of the neighborhood.'" Nuisance is a form of land-use control, but the sensitivity of the judges remains to be seen.

In *Powell v. Superior Portland Cement, Inc.*, plaintiff-homeowner sought to enjoin the creation of dust by defendant's plant. Plaintiff had resided in Concrete since 1907, had purchased his house in 1934, and had lived in it until 1938 when he began to rent it. The cement plant had been in town since 1908. Indeed, it appears that the town grew because of the plant, and that the local economy was dependent on it. The installation of newly devised dust-catching machinery would have alleviated the problem, but the costs would have been enormous, requiring total reconstruction of the plant. The trial court refused plaintiff an injunction, but awarded him five hundred dollars damages. The Washington Supreme Court reversed the award of damages lest the principle established thereby "encourage litigation which would unreasonably harass industry ... which it is the policy of the law to protect within reason."

Ten years later, the same court decided *Riblet v. Spokane-Portland Cement Co.* This time plaintiffs sued to recover for damage to their residential property caused by cement dust. Here, however, the supreme court reversed the trial judge who relied on *Powell*, and announced modestly that "rights as to the usage of land are relative" and that the "crux of the matter appears to be reasonableness." Again the company had arrived in 1910, the town had grown around the plant, and the plaintiffs had arrived later. This time, however, plaintiff's property was located on a plateau some three thousand feet away, and perhaps significantly, plaintiff's husband was an official of a tram-

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72 15 Wash. 2d 14, 129 P.2d 536 (1942).
73 Id. at 21, 129 P.2d at 540.
74 41 Wash. 2d 249, 248 P.2d 380 (1952).
75 Id. at 254, 248 P.2d at 382.
76 Id. at 254, 248 P.2d at 382.
way construction company and an investor. Illustrative of their independent suburban status, moreover, were the facts that plaintiffs owned a vista house, a garage, a swimming pool, a croquet court which could be flooded in the winter to serve as a skating rink, and an outdoor checkerboard with giant-sized checkers. On these facts, the high court found the case distinguishable from Powell. The neighborhood, after all, was not devoted solely to industrial activity, "that is, the production of cement." 77

It seems fairly safe to assert that a suburban dream house has become part of the contemporary concept of utopia, which makes all the more interesting the Riblets' testimony that their home was "the culmination of their dreams." 78 As a tentative hypothesis, therefore, the nuisance cases thus far examined can all be organized around the rule that a home in a suitable suburban locale has become sacrosanct in American thought. Inhabitants of areas adaptable to "country-style living" merit protection against the inroads of tranquility-upsetting industrialization. The poor dirt farmer and the city dweller, however, must grin and bear it amidst the grime and stench of "progress."

There is more to this than drug store cynicism, however, as further reflection will reveal. As we have already seen, although answers to elementary questions pertaining to overhanging balconies come hard, solutions to broader social questions, such as the disposition of losses attributable to accidents, flow readily. Similarly, an effort to reduce to hornbook-style symmetry the various catch-phrase sophistries uttered by judges handling nuisance cases would promise the serious scholar a lifetime's exercise in futility. 79 Yet, behind the "vague, scrambled and flexible body of doctrine" 80 lies the process of adjusting discordant land uses. Once we admit that the judges are engineering harmony, however, we should not be surprised to discover that a canon of can't-helps serves to adumbrate the ideal of harmonious land-use. Just as the fault-centered ideology of the nineteenth century channeled the judges' stumbling efforts to crystallize the legal norm around the fundamental tenet of fault, today's judges organize the law of nuisance around contemporary conventional wisdom, elevating suburbia to a central position in our post fault-oriented ideology of the American way of life.

77 Id. at 255, 248 P.2d at 383.
78 Id. at 251, 248 P.2d at 381.
79 The reader need only peruse the cases collected in his own state's digest, e.g., Nuisances, 42 N.Y. Jurs. 441-533 (1965).
80 Beuscher & Morrison, supra note 71, at 443.
III

THE SUBURBAN SYNDROME

A. Creating Suburbia Through Zoning—The New Jersey Method

Even a cursory reading of the Standard Enabling Act reveals that zoning should be done “in accordance with a comprehensive plan.” The true nature of this comprehensive plan is the subject of no little controversy. A “zoning expert” once testified in response to a direct question as to what constitutes a comprehensive plan:

The plan itself is the map you see, is the ordinance that must be analyzed in conjunction with the map, and it is something which anybody looking at it would have to determine as to whether there is mutual consistency in what has been put on that map in terms of whether there is a reasonable direction that the community takes. In other words, a community has shown its hand as to what it believes a reasonable direction of the various uses of land is.

Q. Is it your testimony, then, that the comprehensive plan as you understand it is that plan as represented by the zoning map and by the zoning ordinance?
A. In essence, that is what it is.
Q. Either it is or it is not.
A. It is.
Q. Are there any other elements to it other than the map and the zoning ordinance?
A. I don’t think so.

Thus, just as the medium became the message, the zoning ordinance and map are their own comprehensive plan by which they are judged.

Professor Haar expressed regret that the legislative failure to equate comprehensive plan with master plan has created the problem of assigning an appropriate meaning to the term “comprehensive plan.” He concludes that the courts see the requirement of a compre-


[T]he only zoning case found in which conformance to a master plan has been considered is Matter of Fornaby v. Feriola, 18 A.D.2d 215, 229 N.Y.S.2d 185, in which the ordinance specifically provided that “use shall not conflict with the direction of business development in accordance with any Master Plan.” Most New York cases concerned with the meaning of the phrase have dealt with spot zoning and, while adopting no clear definition, have analyzed the ordinance and the fact situation presented in terms of consistency and rationality.
hensive plan as the equivalent of a constitutional directive for zoning authorities to refrain from arbitrary, unreasonable and capricious behavior. Since, however, an exterior set of values with which to judge the zoning authorities' behavior is absent, and since the zoning ordinance and map mesh into a consistent and rational pattern, the courts end up holding that the comprehensive plan is the map itself. Haar sees a danger that zoning "considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners."\footnote{Haar, "In Accordance with a Comprehensive Plan," 68 Harv. L. Rev. 1154, 1158 (1955).} Professor Reps recently added that this "circular reasoning will prevail until new legislation changes the rules of the judicial game."\footnote{Reps, Pomeroy Memorial Lecture: Requiem for Zoning, in C. Berger, Land Ownership and Use 823, 828 (1968).}

A number of communities, however, recognize that the zoning map is not simply a tracing of the existent land-use situation onto a map having the force of law for the purpose of stabilizing property values. They see quite clearly that the map can fix a community's future environment by regulating the users who henceforth will be let into the community. Thus, they see zoning as a useful tool for coercing community development along country-style, suburban utopia lines. A series of New Jersey cases illustrates the dynamics of the suburban syndrome at work, a phenomenon wrought with its own peculiar irony, since the New Jersey courts insist that "[z]oning and planning are not identical in concept."\footnote{Rockhill v. Chesterfield Township, 23 N.J. 117, 129, 128 A.2d 473, 480 (1957); Mansfield & Swett, Inc. v. West Orange, 120 N.J.L. 145, 198 A. 225 (Sup. Ct. 1938).}

Wayne Township, located in Passaic County just outside of Newark and New York City, covered roughly 25 square miles compared to Newark's 23.5. In 1952, its 12,000 residents were dwarfed by Newark's 438,000. Whereas Newark was a crowded urban center, only twelve percent of the land area in Wayne was improved. Bordering on several lakes, it contained little business or industry. Its residences varied from modest $10,000 homes to $75,000 estates. Faced with developers building small houses on the lake, the town fixed minimum bulk requirements that set a practical minimum cost of $12,000 on future homes. The planned result, of course, limited future buyers to respectable income brackets, and perhaps upzoned the township status-wise. The political validity of this purpose was unclear, however, since the move was argued in court in terms of the reasonableness of legislation designed to better the health and safety of the citizenry. In Lionshead...
Lake, Inc. v. Wayne Township,\textsuperscript{86} the New Jersey high court sustained the ordinance notwithstanding a vigorous dissenter who suggested that this was class legislation running afoul of "the fundamental principles of our form of government."\textsuperscript{87}

The next town to set about excluding the overflow mob from a nearby metropolis was Bedminster Township, situated to the west of Newark. Able to trace its history back to a royal charter in 1749, it was superbly suited to country-style living with its "rolling countryside divided into a naturally wooded area, farms and country establishments."\textsuperscript{88} Although "only 40 miles from New York, [Bedminster] is as essentially rural as if it were 400 miles away...."\textsuperscript{89} Somewhat larger in area than Newark, it had a population of 1,613 as opposed to Newark's 438,000. At stake this time was the validity of the five-acre minimum lot requirement in its residential area zoning plan. Again taking into account the rural conditions prevailing in the township, the court found nothing unreasonable in an ordinance designed "to preserve the countryside for its best use."\textsuperscript{90}

In 1955 the court sustained a Palisades Park supplemental ordinance excluding motels from a residential community just across the George Washington Bridge from New York City.\textsuperscript{91}

The environmental characteristics of many of our beautiful residential communities are such that the establishment and operation of motels therein would be highly incongruous and would seriously impair existing property values.\textsuperscript{92}

Although the dissenters could see restricting motels to certain parts of the community, they did not see how total exclusion could be anything but unreasonable. To them, apparently, zoning involved the classification of use-districts so that various activities could go on in different parts of town without harming property values; it did not involve planning the intangible environment of the community. Thus, the dissenters still believed that zoning and planning were distinct activities.

\textsuperscript{86} 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953).
\textsuperscript{87} Id. at 181, 89 A.2d at 701. For a biting criticism of the result, see Haar, Zoning for Minimum Standards: The Wayne Township Case, 66 Harv. L. Rev. 1051 (1953). What most upset Professor Haar was the fact that the court spoke in glowing terms of the need to protect the health of children and the benefits of expansive living-space. "The New Jersey court substituted shibboleths for reasoning, and used liberal shibboleths to attain an illiberal result...." Id. at 1063.
\textsuperscript{88} Fischer v. Township of Bedminster, 11 N.J. 194, 197, 93 A.2d 378, 379 (1952).
\textsuperscript{89} Id. at 198, 93 A.2d at 380.
\textsuperscript{90} Id. at 204, 93 A.2d at 383.
\textsuperscript{92} Id. at 30, 118 A.2d at 408.
The crunch finally came with the decision involving Gloucester Township.\textsuperscript{93} This twenty-three square mile community in Camden County was feeling the effects of overflow from Camden and Philadelphia. Its population had grown from 7,950 in 1950 to about 17,500 in 1960, and its 2,694 houses of 1955 had become 4,113 in 1959. Even so, the bulk of the township remained undeveloped. In an industrial district south of the growing residential area, a developer's desire to open a trailer camp led the township to amend its map to exclude trailer camps entirely. Again the court sustained the ordinance, waxing eloquent over the wonders of planning as a preservative of country-style living. First, it noted, "It is clear the tide of suburban development has begun to engulf the rustic character of the township."\textsuperscript{94} Second, it pointed out that in its industrial district the township did not envisage factories but instead "areas resembling parks where nuisance type plants are excluded and attractive architecture prevails."\textsuperscript{95} Finally, it unleashed a fusillade of polite pejoratives against trailer camps. The stage was then set for the court to reaffirm its belief in planning:

In the present case the township is seeking to create an attractive industrial zone. The purpose of the zoning ordinance is to guide the township in its transition from a \textit{laissez faire} growth to a well-ordered community. The zoning ordinance does not presently envision exclusively industrial districts since it permits dwellings to be erected in those areas. However, these houses can only by one-family detached dwellings on a lot not less than 75 by 125 feet. The governing body determined that such houses would be compatible with industrial uses. It thought that trailer camps would strike a discordant note and be detrimental to property values, present and prospective, and retard the progress of the township. The governing body stated "a trailer camp is not attractive in appearance" and considered this factor in reaching their conclusion. Aesthetics may properly be considered in establishing a zoning scheme. . . \textsuperscript{96}

Perforce, the plan was reasonable and, naturally enough, valid.

Thus far, the New Jersey court seems to have taken the Garden State idea seriously by giving its suburban communities considerable latitude to use zoning as a planning device to maintain a Walden-like idyll. However, whether the court is really as enamored of planning per se as it is of the idea of neat middle-class suburban townships not bothered by motels, tiny houses, or trailer parks remains doubtful. A


\textsuperscript{94} \textit{Id.} at 245, 181 A.2d at 136.

\textsuperscript{95} \textit{Id.} at 246, 181 A.2d at 136.

\textsuperscript{96} \textit{Id.} at 247-48, 181 A.2d at 137.
final case may shed light on this. In *Katobimar Realty Co. v. Webster*, the same court, which thought so highly of pleasant industrial parks uninhibited by trailer camps, struck down, at the behest of a shopping-center promoter, an ordinance zoning an area exclusively for industrial park use. Furthermore, as the dissent took pains to point out, the majority failed to invoke the litany in behalf of planning but, instead, reverted momentarily to the idea that zoning simply involves dividing a municipality into compatible use-districts.

B. *Suburbia Triumphant*

Every student of property lore recalls the case of *Hadacheck v. Sebastian*, wherein the Supreme Court of the United States sustained the closing of a brick manufacturing enterprise as a public nuisance. Tradition has it that this decision provided reformers with the courage to believe that zoning would survive the test of constitutionality. However, zoning enthusiasts had to be careful to advise businessmen that if they became nonconforming users, they would not suffer the same fate. But the ghost of *Hadacheck* still walks the land, as a recent New York cause célèbre illustrates.

A businessman purchased a parcel of land in the Town of Hempstead, Long Island, in 1927 when the area was primarily dedicated to farming. By 1960, however, the parcel was surrounded by residences. More than 2,200 homes and four schools with a total enrollment of 4,500 children were within a radius of 3,500 feet. The businessman's son thus found himself owning a thirty-eight acre parcel in the midst of a wholly new environment. The difficulty arose because the parcel was exploited as a gravel pit, and constant excavation had created a twenty-acre lake some twenty-five feet deep. Although the town zoned the area residential, the dredging went on as a nonconforming use. In fact, an effort to force the cessation of dredging as a violation of

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98 *Id.* at 133, 118 A.2d at 834.
100 E.g., B. Pooley, *supra* note 99, at 43.
101 E. Basset, *Zoning* 113 (1940):

During the preparatory work for the zoning of Greater New York fears were constantly expressed by property owners that existing nonconforming buildings would be ousted. The demand was general that this should not be done. The Zoning Commission went as far as it could to explain that existing nonconforming uses could continue, that zoning looked to the future, and that if orderliness could be brought about in the future the nonconforming buildings would to a considerable extent be changed by natural causes as time went on.
the residential zoning requirement proved abortive. In 1958, however, the town enacted an ordinance prohibiting further underwater excavations and requiring existing excavations to be backfilled. Indeed, the ordinance made noncompliance a new misdemeanor every week. The new ordinance, of course, put the gravel pit out of business.

How did the courts react? When the town sought to enjoin further operations, the Court of Appeals sustained the measure as an exercise of the police power for the public safety. The end, after all, was safety, and the “hazards . . . of these pits are common knowledge.”102 Given a proper end, the only question was whether the means were appropriate. The answer was elementary, however, because “[i]t is not the function of the courts but of legislators to determine the ‘reasonableness, wisdom, and propriety’ of regulations needed to protect the community.”103 In Washington, moreover, the businessman fared no better, because the Supreme Court decided that the appellant had not met the burden of proving the ordinance unreasonable.104

In the Court of Appeals, Judge Van Voorhis had dissented on the ground that “the record here indicates a systematic attempt to force the plaintiffs out of business.”105 Motive, however, is said to be irrelevant in these cases. An earlier New York case had involved a town suddenly interested in removing clotheslines from front yards after an irate taxpayer hung out dirty linen as a protest measure. There the Court of Appeals had been quite frank about motive:

It is a fair inference that adoption of the ordinance before us was prompted by the conduct and action of the defendants but we deem it clear that, if the law would otherwise be held constitutional, it will not be stricken as discriminatory or invalid because of its motivation.106

Thus, old activities marring the new suburban scene can be eliminated if they are, for example, a danger to children. The paradox, of course, is that the sand and gravel excavated from this pit probably served as the foundation of the houses around it, and thus the pit served to hasten its own end. Like Maeterlinck’s bee, it had served its purpose.

103 Id. at 105, 172 N.E.2d at 563, 211 N.Y.S.2d at 187.
105 9 N.Y.2d at 107, 172 N.E.2d at 565, 211 N.Y.S.2d at 189.
C. *The Quality of Suburbia*

The possibility of exploiting zoning machinery to plan the character of communities did not escape the attention of suburbanites.\textsuperscript{107} The behavior of the New Jersey judges illustrates, moreover, that pluralism is not an American value, since their decisions justify sub silendo the erection of a class wall shutting out the less affluent from suburbia. Even the New York judges, oftentimes trigger happy when it comes to vested property rights,\textsuperscript{108} seemed remarkably casual about writing off a man’s business under the guise of protecting the public safety. Together, these judges represent a judicial imprimatur on the local policy of restricting future immigration into suburbia and converting the countryside into the image of the suburban dream. What is the attraction in the dream which causes such compulsive conduct?

Descriptions of the suburban scene hardly explain its magnetism. Max Lerner has told us:

Suburban America was mainly middle-class America. . . .

So the would-be suburbanite picked his plot and his house type and got his homeowners’ loan, and made a down payment. He moved his belongings to a row of Cape Cod or “ranch-type” or “split-level” houses. His wife furnished it to look like the layouts in *House Beautiful* and she shopped in supermarkets, highway stores, and shopping centers where she could park and get everything at once. She filled the house with the latest kitchen appliances, and there was a TV set in the living room. There were rows of middle-priced sedans and hard-top convertibles lining the block which were as interchangeable and standardized as the houses, deep-freezes, TV sets, magazines, processed foods, and permanent waves that a community survey would reveal. . . .

As a way of life it defied all the traditional claptrap about American individualism. It was largely standardized and to a surprising degree collectivized. . . .\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{107} “Indeed, if planning is intended to achieve . . . some unstated or whispered social and political objectives, zoning has been far more effective than its originators dared expect.” R. Babcock, *The Zoning Game* 129 (1966).
\item \textsuperscript{109} M. Lerner, *America as a Civilization* 176-77 (1957). For a more sympathetic view of suburbia, however, see H. Gans, *The Levittowners* (1967). But cf. id. at 417:
\end{itemize}

The strengths and weaknesses of Levittown are those of many American communities, and the Levittowners closely resemble other young middle class Americans. They are not America, for they are not a numerical majority in the population, but they represent the major constituency of the largest and most
Unattractive as it may sound, there is a compulsion to move to suburbia. This can only be understood with the realization that a home there, notwithstanding the dreary alikeness of it all, is a status symbol in our society. If this is true, the "choice" to go to suburbia is illusory, since success demands it, and conversely, the very integrity of the symbol requires that the less successful be excluded. In short, America is a class society.

The impact of suburbia is being felt most directly upon the land itself. Developers want to improve flat land in order to keep costs down, but the flat lands today are the only economically viable farm lands. At the existing rate of rural land conversion, the nation could be faced eventually with a shortage of many food commodities that are presently being exported. By the year 2000 it has been estimated that at least 100,000,000 acres of our flattest and originally most fertile land will have been converted into urban uses. Once land is reduced to small disconnected plots in an urban development, it is no longer valuable for modern machine agriculture.

Agriculture, therefore, must be adjusted to ever more efficient methods of cultivating the remaining space. It is not inconceivable that in the future only those foods susceptible to total machine farming will be available. Quite unwittingly, the new country-style-living middle classes may be undermining the very foundation of their gourmet pretensions.

The quality of suburban life is subject to question. The suburbanites in New Jersey, for example, once drew their water from wells...
at a rate ten percent greater than the land's average yield.\textsuperscript{113} Septic tank systems dispose of sewage on plots of one acre, but a fascinating percolation problem presents itself when the system is used on lots measuring a scant 60 x 135 feet.\textsuperscript{114} But should the suburbanite escape both drought and disease, he must participate in the daily ritual of the trip into center-city to work. The notion that every workday sees the migration of 1,600,000 persons onto Manhattan, there to crowd together in a density of 180,000 persons per square mile,\textsuperscript{115} staggers the imagination. This spectacle of the madding crowd seems more reminiscent of a teeming and frantic Asian city than of the television stereotype of the well adjusted and self-contained hamlets inhabited by the likes of Patty Duke.\textsuperscript{116}

Yet, the choice\textsuperscript{117} to live in suburbia would be of private concern, except for the impact the exodus has had upon center-city. The city is well on its way to becoming a haven for the rich and a terminal for the poor.\textsuperscript{118} Worse, it is being remodeled to suit the desires of the

\begin{itemize}
\item \textsuperscript{114} See authorities cited note 113 \textit{supra}.
\item \textsuperscript{115} J. Gottmann, \textit{supra} note 111, at 30 (based on the 1950 census). Those contemplating the situation might do worse than to read T. S. Eliot, \textit{The Wasteland}, in \textit{The Complete Poems and Plays} 39 (Harcourt, Brace & Co. ed. 1952):
  \begin{quote}
  A Crowd flowed over London Bridge, so many,
  I had not thought death had undone so many . . . .
  \end{quote}
  or, from the same:
  \begin{quote}
  A rat crept softly through the vegetation
  Dragging its slimy belly on the bank
  While I was fishing in the dull canal
  On a winter evening round behind the gashouse.
  \end{quote}
\textit{Id.} at 42. Or, perhaps, the lines from \textit{The Hollow Men}:
  \begin{quote}
  This is the dead land
  This is cactus land
  Here the stone images
  Are raised, here they receive
  The supplication of a dead man's hand
  Under the twinkle of a fading star.
  \end{quote}
\textit{Id.} at 57.
\item \textsuperscript{116} S. Farber, \textit{Quality of Living—Stress and Creativity}, in \textit{Future Environments of North America} 342, 344 (F. Darling & J. Milton eds. 1966):
  But the editor was surprised to find that his most stressful time of day was not at work.
  His most stressful activity, as indicated by the peaks in his pulse rate, was commuting to and from his suburban home. His pulse rate was regularly higher while driving on the crowded highway than it was when the presses broke down or the front page had been reset just before deadline because of a new crisis in Berlin.
\item \textsuperscript{117} Apparently 90% of Americans believe that it is best to own their own single-family unit. S. Greer, \textit{Urban Renewal and American Cities} 134 & n.10 (1965).
\item \textsuperscript{118} "Increasingly since 1945, middle-income families with children have been de-
middle class. Urban renewal, under the guise of providing housing, has been exploited to create vast cultural centers like Lincoln Center, in keeping with the status needs of the middle class.\textsuperscript{110} It has also been exploited to construct luxury high-rises in keeping with the tastes for cosmopolitan living of the older middle class after they have weaned their litter.\textsuperscript{120} In the process, however, it is the poor who have paid the price of satisfying these desires by being crowded into shoddy housing.\textsuperscript{121}

D. Suburbia's Hidden Purpose

For most, the decision whether to purchase or to rent turns initially upon the availability of mortgage credit. Even if mortgage money is available, however, the decision to purchase hinges on the amount of the downpayment required, and the size of the monthly payments thereafter. Since the decision turns upon these several factors, it should be apparent that "control over the supply of mortgage funds, the length of time allowed for repayment, and the rate of interest charged become powerful tools for deciding how much housing will be made available and to whom."\textsuperscript{122} To increase the number of potential home-buyers, therefore, it is necessary to stimulate the agglutination of funds avail-

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\textsuperscript{119} But there is still no shopping center or cultural center in Bedford-Stuyvesant, an area containing some 400,000 people." Gavin & Hadley, supra note 118, at 32.

\textsuperscript{120} Two thirds of Washington's white population are over forty. Grier, \textit{The Negro Ghettos and Federal Housing Policy}, 32 \textit{Law \& Contemp. Prob.} 550, 552 (1967). See also, Whalen, \textit{A City Destroying Itself}, \textit{Fortune}, Sept. 1964, at 234: "Almost all families who can afford it, except the very rich, reject New York City as a place to bring up children."

\textsuperscript{121} M. Anderson, \textit{The Federal Bulldozer} 67 (1964).

What is important is the direction in which the federal urban renewal program has been operating. It has worsened the situation that it set out to solve by reducing the number of homes available to those people who don't have much money to spend and by expanding the choice for those who can afford to spend more.

\textit{See also} Nolan, \textit{A Belated Effort to Save Our Cities}, \textit{The Reporter}, Dec. 28, 1967, at 16: Each new urban renewal program has been designed essentially as an antidote, not a cure . . . . [T]he Model Cities program attempts to humanize urban renewal, which had too often erected luxury apartments or office towers without improving the housing of the poor people it displaced.

\textit{S. Greer, Urban Renewal and American Cities} 3 (1965):

At a cost of more than three billion dollars the Urban Renewal Agency (URA) has succeeded in materially reducing the supply of low-cost housing in American cities.

\textsuperscript{122} C. Haar, \textit{Federal Credit and Private Housing} 9 (1960).
able for loans, to encourage the lender to advance as near to one-hundred percent of the purchase price as possible, to spread out as long as possible the repayment period of the loan, and, at the same time, to keep interest charges within reason.  

The National Housing Act of 1934 made available to lenders home mortgage loans that, in the event of default and foreclosure, were exchangeable for Government-guaranteed bonds or cash. Thus, the banks were encouraged to regard mortgage loans as safe investments. Lest the banks be inhibited by the trauma of getting caught again with a portfolio of loans due in full on “law day” at the perigee of another boom-bust cycle, this insurance was limited to amortized loans, a fact which led to the overhaul of the whole mortgage-lending machinery. Furthermore, to satisfy the need for cash reserves to stem a short-run recession, the Federal National Mortgage Association (FNMA) was created to purchase qualified mortgages. Not only did FNMA prom-

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123 Id. at 10: “For example, on a twenty-five-year mortgage an increase in the interest rate from 4 to 5 percent raises monthly debt service by over 10 percent.” Hearings on FHA and FNMA in the Current Money Market before the Subcomm. on Housing of the House Comm. on Banking and Currency, 89th Cong., 2d Sess. 2-3 (1966):

[|If interest rates go up 1 percent, the family who buys a $20,000 home will pay more than $4,700 in additional interest over the life of a 30-year loan. With median incomes at about $4,600, this means that millions of people have to contribute a year’s wages to just pay the extra interest.


126 COMM’N ON MONEY AND CREDIT, supra note 125, at 219:

With a sustained flow of amortization receipts providing a substantial degree of flexibility to lending institutions, and with the development of a secondary market for government-underwritten mortgages imparting a measure of liquidity to such loans as well, the attractiveness of home mortgages to commercial banks was greatly enhanced.

C. HAAR, supra note 125, at 16: “[G]overnment-insured mortgages, unlike the conventional type of mortgage, more nearly meet these liquidity requirements (especially in the days of FNMA support) . . . .”

127 E.g., A. CASNER & W. LEACH, CASES ON PROPERTY 678-79 (1951).

128 COMM’N ON MONEY AND CREDIT, supra note 125, at 219.

129 C. HAAR, supra note 122, at 25:

FNMA provides a secondary mortgage market for the purchase, service, and sale of certain types of FHA-insured and VA-guaranteed mortgages. Originally chartered by the Federal Housing Administration on February 10, 1938, as a wholly owned subsidiary of the Reconstruction Finance Corporation, it was given a statutory charter on July 1, 1948. The next step occurred on September 7, 1950, when the Association was transferred to HHFA, under Reorganization Plan No. 22 of 1950. Under the Housing Act of 1954 (Title III of the National Housing Act) FNMA was rechartered and designated a constituent agency of HHFA.

Let Dwight Ink, Assistant Secretary for Administration, Dep’t of Housing and Urban Dev. continue the story:

When Robert C. Weaver was sworn into office on January 18, 1966, as the nation’s first Secretary of Housing and Urban Development (HUD), he undertook
ise liquidity, it could also provide more funds for a stagnant mortgage market by the simple expedient of purchasing mortgages at a discount.\textsuperscript{130} In substance, the federal government sought to make mortgage loans attractive in order to get the economy moving again.\textsuperscript{131}

Since World War II the increasing interest of life insurance companies\textsuperscript{132} in mortgages originated and serviced by mortgage placement companies\textsuperscript{133} has provided another vast reservoir of mortgage money.

the most ambitious and dramatic revamping attempted by any cabinet department in recent years.

\dots

The Act transferred intact to the new department the former agency's mixed-ownership corporation, the Federal National Mortgage Association, with the Secretary as chairman of its board of directors. [§ 5(b), 42 U.S.C. § 3534(b) (Supp. II, 1965-66)].


\textsuperscript{130} E.g., "When authorized by the President, FNMA can purchase insured or guaranteed mortgages for the purpose of retarding a decline in lending and building activities which threatens the stability of a high-level national economy." C. Haar, \textit{supra} note 122, at 25.

\textsuperscript{131} COMM'N ON MONEY AND CREDIT, \textit{supra} note 125, at 219; Professor Haar has commented:

With the onset of the great Depression, however, the weakness of the real estate market seemed beyond the ability of the states to correct. In the home-building field, eyes turned quickly toward the only source, at that time, of funds and initiative, the Federal government; and the Federal government exploited this invitation to launch its own policy for housing and land, mainly through the use of credit.

C. Haar, \textit{supra} note 122, at 7 (footnote omitted).

\textsuperscript{132} S. Klamann, \textit{The Postwar Residential Mortgage Market} 8 (1961):

The relatively slow pickup of the mortgage investments by life insurance companies was due in part to the cautious attitude of some companies remembering the experience of the thirties and in part to the problems of market reorganization. It was necessary to re-establish mortgage correspondent or branch office organizations, largely dismantled after many years of reduced mortgage activity during depression and war. As these problems were solved and skepticism toward mortgages faded, life insurance companies devoted a steadily rising share of assets to mortgages. Except for the first two years after the war, when commercial banks took the lead in mortgage lending, the net flow of funds from life insurance companies exceeded the flow from any other type of investor through 1951.

See also, W. Goldsmith, \textit{Introduction} to S. Klamann, \textit{Id.} at xxii:

The first of the basic tendencies exemplified by developments in the residential mortgage market during the postwar period is its institutionalization. At the end of 1956 nearly 90 percent of all outstanding residential mortgages were held by financial institutions.

The second characteristic of the market for residential mortgages [is] \ldots the large-scale adoption of government guaranteed mortgages. This process involved the use of legal and technical forms and of facilitating government agencies which were created as part of the far-reaching reconstruction of American finance under the New Deal—a development that is still often underrated in its long-term significance.

\textsuperscript{133} S. Klamann, \textit{supra} note 132, at 20:

Mortgage companies originate and service mortgage loans for the accounts of
The title insurance industry has grown concomitantly, providing a guarantee for mortgages generated by on-the-spot mortgage companies so that they can be sold to distant insurance companies. Indeed, the only thing lacking to complete the picture is a true secondary market in which mortgages are bought and sold like any other security.

The FHA insurance scheme was continued in the Housing Act of 1949. The motive this time was not to stimulate a depressed economy, but to "provide a decent home and suitable living environment for every American family." Rhetoric aside, however, the legislation was designed not only to meet the demands of returning veterans for decent housing, but to create a new stimulus for the economy lest a postwar recession occur. The use of federal credit as a device to invigorate the economy was becoming commonplace, but there also appears a coordinate objective. Indeed, FHA and FNMA stimulation of institutional investors, not for their own portfolios, and usually engage in one or more related real estate activities. Relative to their volume of business, mortgage companies have a very small capital investment. Their phenomenal growth is directly connected with the introduction of the federal mortgage underwriting program and its reduction of geographic barriers to mortgage investment. It also stems from decisions by most life insurance companies to acquire out-of-state mortgages through locally owned independent companies rather than through their own branch offices or subsidiaries.

See id. ch. 8.

134 Roberts, Urban Conveyancing Techniques in America: The Story Behind Title Insurance, 27 CONV. & PROP. LAW 240, 247 (1963):

Life insurance in United States is also big business, generating huge aggregates of capital which must be invested .... Thus, there was a supply of money available to meet the demand if the life companies could be assured that their liens upon property would be secure. But a life company, centered in Hartford, Connecticut, for example, could not be expected to run its own searches in Philadelphia and Los Angeles. Further, it could hardly familiarise itself with the Bar everywhere so that it would know whose reports were reliable. A device had to be found which would enable mortgages to become freely negotiable on the national scene.

It was title insurance which provided the device.

See also, Roberts, Title Insurance: State Regulation and the Public Perspective, 39 IND. L.J. 1, 8-9 (1963).

135 S. KLAMAN, supra note 132, at 23-24:

The relationship between primary and secondary mortgage markets is unique among capital market sectors. It derives from special institutional arrangements and techniques of mortgage loan origination and investor acquisition.

Mortgage market participants would regard a secondary market transaction as one in which, for example, a life insurance company acquired a mortgage originated by a mortgage company .... In other financial markets, secondary transactions are generally regarded as market trading in existing securities as distinct from primary transaction in which new debt or equity instruments are created.


suburban building, federal government stimulation of state expressway construction to open the avenues to suburbia, and the favored income tax treatment of the homeowner over the renter, add up to a consistent policy of fostering suburbia's growth.

Although the solution to the Great Depression was to use federal credit to stimulate private spending, the post-World War II conventional wisdom focused on production and, necessarily, consumption. If sheer production will keep everyone employed and in the long run filter purchasing power down to the poor, it becomes essential to sustain consumer demand for the products. People must not cease to desire; and no eccentric bauble, be it an electric toothbrush or an electric knife, is to be denigrated if consumer demand for it can be stimulated by the advertising media. It is within this context, moreover, that suburban housing has been carefully nurtured as the keystone to consumption of all the paraphenalia of the affluent society.

There is more to this, however, than simple pump-priming. In free-enterprise America, the planning controls are more obtuse than

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140 On the importance of production there is no difference between Republicans and Democrats, right and left, white or colored, Catholic or Protestant. It is common ground for the general secretary of the Communist Party, the Chairman of Americans for Democratic Action, the President of the United States Chamber of Commerce, and the President of the National Association of Manufacturers.
The individual serves the industrial system not by supplying it with savings and the resulting capital; he serves it by consuming its products. On no other matter, religious, political or moral, is he so elaborately and skillfully and expensively instructed.

Specifically, along with the production of goods go energetic and no less important efforts to insure their use. These emphasize the health, beauty, social acceptability and sexual success—in sum, the happiness—that will result from the possession and use of a particular product . . . . In turn, inevitably this affects social values. A family's standard of living becomes an index of its achievement. It helps assure that the production and, pari passu, the consumption of goods will be the prime measure of social accomplishment. (Footnote omitted.)

See also, M. Harrington, The Accidental Century 28-29 (1965):
Through one of society's most important educators, the advertising industry, all of the techniques of science are used for the private socialization of the public taste. The consumer's "free" choice if thus engineered and calculated as far as is possible so that it will coincide with the highest profitability to the producer. The influence of this carefully wrought value system increases as one descends the social class ladder. As in all things, the poor pay the highest cost and give aid and comfort to the rich.
Two powerful economic forces have played a major part in raising the tempo of economic growth in the West. They are: (1) the sustained expansion of international trade, and (2) the great building boom of the 1950s.
socialism's direct physical control over investments. Here, building and production remain in private hands, but government is vested with the duty of maintaining a stable overall economy by manipulating taxes and credit. Thus, the system constructed to stimulate the demand for housing has become a control device used to influence the whole economy. A control device, however, necessitates a valve to be turned off, in order to dampen demand, as well as on, to stimulate it.

If the decision is made to discourage demand in light of inflationary pressure, FNMA can cease to purchase mortgages, and the Federal Reserve Board can raise the discount rate, thus forcing commercial banks to hike interest rates and to look for better yields than those of mortgage loans. Indeed, this was done in 1966-67. Thus, suburbia is not an end in itself, but a contrived end which performs a distinct function in the affluent society as a keystone of the economic control system.

Nevertheless, this picture of housing as a manipulative factor in a Keynesian hierarchy does not, in and of itself, necessitate the condemnation of suburbia. The very success of capitalism over socialism in adapting itself to planning in an effort to achieve affluence merits approbation. Schonfield concluded:

> It bears saying again how much more profound was this Keynesian vision of control through a combination of financial pressure and improved economic information, than the Socialist formula . . . of capturing the "commanding heights" of the economy.

John Kenneth Galbraith, however, suggests that this affluence might be somewhat illusory if the air itself is too dirty to breathe, the water too polluted to drink, and the schools so bad that it is prudent to boycott them. Michael Harrington adds that the overemphasis on productivity and consumption has resulted in a "Reactionary Keynesianism," which simply "reinforces the contrast . . . between the opulence of the private sector and the squalor of the public sector." The time seems ripe, therefore, to reevaluate suburbia within the broader social context.

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143 In Sweden the policy of full employment is implemented by direct physical control over investments. Id. at 201.


146 J. Galbraith, supra note 140, at 253.

E. The Social Price of Suburbia

The emphasis on production in our Keynesian economy assumes that the resultant full employment and increased personal income will seep down to the lower orders and thus remove poverty. Presupposing that the industrial revolution is still alive in the United States, and that the problem of the poor involves only a lack of income, the rationale would appear sound. The fates, however, have undercut the assumptions supporting this Keynesian world and, perforce, have given the lie to the suburban syndrome.

The United States is no longer involved in the Industrial Era, for the country has launched into a new epoch, the Technological Revolution. The computer, automation, systems analysis, consumer research, cybernetics, and planning have replaced the old axioms of raw production and natural resources exploitation. Thus:

More and more heavy industrial jobs have been mechanized, automated, or cybernated. There is a vast migration from secondary occupations (factory labor) to tertiary ones (the office and service trades) just as the nineteenth century saw a movement from primary occupations (agriculture, raw materials) to secondary ones. But the process will not stop at the factory. Menial office jobs are now being abolished; middle management's turn could come tomorrow.\footnote{M. Harrington, supra note 141, at 134. See, J. Galbraith, supra note 141, at 267-68: In the eighteen years from 1947 to 1965, white-collar workers in the United States—professional, managerial, office and sales workers—increased by 9.6 million. In these years, blue-collar workers—craftsmen, operatives, and laborers, farmers and miners apart—decreased by 4 million. By 1965 there were nearly 8 million more white- than blue-collar workers—44.5 million as compared with 36.7 million. During these years the number of professional and technical workers, the category most characteristic of the technostructure, approximately doubled. No other group had increased so rapidly.}

The Technological Revolution, however, has left innumerable people ineligible to join the projected march to prosperity. Unskilled laborers are only the top of the iceberg of people no longer relevant in a technological era, for the drift from the farm is accelerating. Less labor is needed on the farms now that machinery is in vogue, and machinery prices dictate still larger farms, further accelerating the elimination of farm labor.\footnote{One could write a history of the United States in terms of the decline of the farmer. In 1790, for example, 90% of the population made their living farming. Not until 1920 did urban dwellers exceed rural ones. U.S. Bureau of the Census, Dep't of Commerce, Historical Statistics of the United States 14 (1960). Today rural dwellers are down to 30%. And we must distinguish between farmers and non-farmers, say tractor repairmen, who inhabit the so-called rural areas. Indeed, statistics now distinguish between the "rural non-farmer" and the "rural farm" types. The actual farmers now constitute...} Hardest hit, perhaps, are the southern...
farms which once relied upon cheap hand labor to harvest tobacco and cotton. Indeed, this labor force dropped from 4.2 to 1.7 million between 1940 and 1960.\textsuperscript{150}

Putting the unskilled to pasture has had a profound effect on the cities. Just as suburbia has lured away the successful, the cities have drawn these itinerant "misfits."\textsuperscript{161} Assimilation into the normal patterns of society has been barred by racial prejudice and educational deprivations.\textsuperscript{162} Although the Keynesian-inspired conventional wisdom may have been adequate for the closing stages of the Industrial Revolution, the surplus-labor effects of technology, coupled with the economic barriers inherent in the suburban syndrome, have created a nasty situation in center city. The addition of the racial problem could only portend an explosion.\textsuperscript{153}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{150}] N.Y. Times, Oct. 16, 1967, at 1, col. 4.
\item[\textsuperscript{161}] Gavin & Hadley, supra note 118, at 31:
\begin{quote}
The vast majority of the migrants, both white and black, lack—through no fault of their own—the education, training, and job habits to fit into the complex patterns of urban life . . . . Isolated, discriminated against, lacking the education, skills, and knowledge necessary in a highly industrialized society, bewildered by his new environment, the migrant separates from the mainstream of America and joins the undercurrent—the underculture of poverty.
\end{quote}
\item[\textsuperscript{152}] Throughout the 20th century the Negro population of the United States has been moving steadily from rural areas to urban and from South to North and West. In 1910, 91 percent of the nation's 9.8 million Negroes lived in the South and only 27 percent of American Negroes lived in cities of 2,500 persons or more. Between 1910 and 1966 the total Negro population more than doubled, reaching 21.5 million, and the number living in metropolitan areas rose more than five-fold (from 2.6 million to 14.8 million). . . .
\begin{quote}
[It] has to be said that there is a considerable body of evidence to support the conclusion that Negro social structure, particularly the Negro family, battered and harrassed by discrimination, injustice, and uprooting, is in the deepest trouble. While many young Negroes are moving ahead to unprecedented levels of achievement, many more are falling further and further behind.
\end{quote}
\item[\textsuperscript{153}] Within the cities, Negroes have been excluded from white residential areas through discriminatory practices.
\end{enumerate}
\end{footnotesize}
Two more factors assured that an explosion would occur. First, since the system is predicated upon consumption, the person who cannot consume is relegated to a sociological purgatory. If, through no fault of his own, he cannot earn the money to become a consumer either because he is a dispossessed farm worker, alien to the urban technological environment, or because of the accidental color of his skin, purgatory becomes hell, and rebellion against this unjust relegation becomes a rational recourse.\textsuperscript{154}

Second, the renovation of center-city after the image of the suburbanite dream serves to further exacerbate the situation. All too often the Negro is dispossessed to make room for urban renewal "improvements" at the very time that escape to suburbia is closed to him.\textsuperscript{155} Thus, the conventional wisdom regarding the societal infrastruct-

\begin{footnotesize}
\begin{itemize}
  \item If this is so, it is the single most important social fact of the United States today. (Italics in original: footnote omitted.) The Report continues:
    \begin{itemize}
      \item Until World War II it could be said that in general the Negro and white worlds lived, if not together, at least side by side. Certainly they did, and do, in the South.
      \item Since World War II, however, the two worlds have drawn physically apart. The symbol of this development was the construction in the 1940's and 1950's of the vast white, middle- and lower-middle class suburbs around all of the Nation's cities. Increasingly the inner cities have been left to Negroes—who now share almost no community life with whites.
    \end{itemize}
\end{itemize}
\end{footnotesize}

\textsuperscript{154} \textit{Civil Disorders Report, supra} note 152, at 274:

Various cultural factors generate constant pressure on low income families to buy many relatively expensive durable goods and display them in their homes. This pressure comes in part from continuous exposure to commercial advertising, especially on television.

Many poor families have extremely low incomes, bad previous credit records, unstable sources of income, or other attributes which make it virtually impossible for them to buy merchandise from established large national or local retail firms.

In this situation, exploitive practices flourish . . . . Consequently, a special kind of merchant appears to sell them goods on terms designed to cover the high cost of doing business in ghetto neighborhoods.

\textsuperscript{155} \textit{Id.} at 56:

\begin{itemize}
  \item [I]n Newark, New Jersey, a tumultuous meeting of the Planning Board took place. Until 4 A.M., speaker after speaker from the Negro ghetto arose to denounce the city's intent to turn over 150 acres in the heart of the Central Ward as a site for the state's new medical and dental college.

  \textit{Gavin \& Hadley, supra} note 118, at 38:

One of the major causes of the Newark riots was a plan to locate the new campus of the New Jersey College of Medicine and Dentistry in the slum area. This campus would have been beneficial to the ghetto, upgrading the area around it and providing desperately needed medical services to the community. But the ghetto residents had not been consulted. They saw their homes and businesses being demolished at the whim of "they."

In this regard, the ghetto residents may have been far more perceptive than their white neighbors. \textit{See, e.g., Plager \& Handler, The Politics of Planning for Urban Redevelopment: Strategies in the Manipulation of Public Law,} 1966 \textit{Wis. L. Rev.} \textit{724}, \textit{772-78:}
ture has been proved irrelevant. It remains to be seen what “fault” the lawyers bear for this tragedy.

IV

THE POLITICIZATION OF SOCIAL ENGINEERING

A. The Lawyers and The Society

Earlier it was suggested that a certain inconsistency existed between the amazing inarticulateness of lawyers faced with a mundane social question and the gushing responses of the same group when faced with a question concerning so-called social engineering. Given an overhanging branch, the lawyer is aghast and sputters, but given a policy question whether the consumer or the manufacturer should bear the loss attributable to accident, he becomes garrulous to a fault. There may be more than meets the eye, therefore, to the lawyers’ claim that they are “Social Engineers.”

The most precise rendering of the social engineer thesis is, without doubt, the succinct proclamation by Roscoe Pound:

For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants—the claims and demands and expectations involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For the present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and pre-

We have examined the decision making process in five urban redevelopment efforts.

... All five efforts require the participation of the local legislative unit of government in the decision-making process. This participation is required by law and is designed to inject democratic values and some measure of disinterested planning expertise into the decision. In four of these efforts ... the participation of the local legislature, as well as other groups in the community, was ritualistic and formal rather than genuine. By the time the projects were made “public,” serious debate and decision making had been foreclosed. In these four efforts, the proponents of the projects were able to monopolize the available political and planning skills. ... The locus of actual power rested on those able to command the two skills, and regardless of who actually wielded the power the decisions were managerial or bureaucratic, not democratic.
cluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering.\textsuperscript{160}

What is one to make of "efficacious social engineering" in the context of center-city alight with Molotov cocktails and reverberating to the cry of "Burn, Baby, Burn!"?

The decision in Brown v. Kendall\textsuperscript{157} has been defended on the grounds that it exhibited the wisdom of social engineering.\textsuperscript{158} Whether there should continue to be liability where harm was inflicted unintentionally and without fault was crucial to the evolution of negligence law. Chief Justice Shaw did away with the idea of strict liability, and some commentators have said he did so simply because he disliked its inhibition of the growth of free enterprise.\textsuperscript{159} However,

[s]et in his own cultural milieu could not the change have been inspired by a somewhat broader perspective? Brown itself, after all, did not involve industry; it involved private persons and a dog fight. Rather than simply promoting "General Motors," is it not more accurate to say that Chief Justice Shaw saw the change in moral terms as well, as sound policy not only for business but for every man? Taken at its own face value in its own period, was not the rule almost inevitable?\textsuperscript{160}

In short, the Chief Justice simply reflected and crystallized conventional wisdom into law.\textsuperscript{161}

The theory of the lawyer as social engineer working to crystallize conventional wisdom into law carries with it the most elite overtone, however, that the wisdom so incorporated includes only the propositions which, in the long run, are good for the body politic.\textsuperscript{162} Brown v.

\textsuperscript{156} R. Pound, An Introduction to the Philosophy of Law 98-99 (1922).

\textsuperscript{157} 60 Mass. (6 Cush.) 292 (1850).

\textsuperscript{158} Roberts, supra note 12.

\textsuperscript{159} E.g., Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359, 365 (1961).

\textsuperscript{160} Roberts, supra note 12, at 205.

\textsuperscript{161} Compare, C. Swisher, The Supreme Court in Modern Role 179-80 (1958):

The Supreme Court is able to lead in constitutional development, then, only by virtue of the fact that its leadership is of such a character that the people and their representatives are willing to follow. To put the matter more simply, the Supreme Court succeeds in leading largely to the extent of its skill not merely as a leader but as a follower. Since the medium of its leadership is the law, or the decision of cases in terms of law, we can go further and say that the effectiveness of the Court's leadership is measured by its ability to articulate deep convictions of need and deep patterns of desire on the part of the people in such a way that the people, who might not have been able themselves to be similarly articulate, will recognize the judicial statement as essentially their own. The Court must sense the synthesis of desire for both continuity and change and make the desired synthesis the expressed pattern of each decision.

Kendall and Brown v. Board of Education,\textsuperscript{163} each in its own time, might not have won a popularity poll, but they accurately mirrored enlightened opinion of how society ought to be ordered. Still, the reverberating cry of “Burn, Baby, Burn!” gives the lie to the lawyer as an effective social engineer, since the very fabric of the body politic is rent with turmoil. The time has come to reason why.

Michael Harrington poses an interesting exercise in intellectual counterpoint between the problems presented by the nineteenth and twentieth centuries:

It has long been recognized that under capitalism there can be a divergence between the private and social cost of a good or service. In the dear, dead old days, this divorce appeared manageable and measurable. A railroad, in its pursuit of profit, would start a new line. It would cost so much money for the materials, the engineering, and the land. But then, there would be another cost. The sparks from the train would injure trees bordering the track. Who was to pay, the company or the farmer? That was a relatively easy issue, and it could be settled in the courts. . . .

But now, as the twentieth century advances, a chasm opens up between private and social cost. The production of automobiles plays a role in changing the structure of the family, sexual mores, and polluting the very air men breathe. The private decision of real-estate developers to ring a city with carefully zoned, relatively expensive suburbs exacerbates social tensions, segregates education on the basis of color and class, modifies the urban tax base and consequently the political order, and embitters the experience of old age for those who are left behind.\textsuperscript{164}

Let us pause momentarily to test this thesis of nineteenth-century simplicity and twentieth-century complexity by running the lawyers through another exercise in time and motion.

B. Another Study in Time and Motion

1. The Trespass-Nuisance Game Again

The early days of aviation centered around private airports inhabited by daring pilots who, if the late shows can be believed, continually zoomed in inches above the houses across the street, then gunned their engines to skip over the ubiquitous electric line crossing the end of the runway, and finally skidded to a halt on the dirt field, inundating the neighborhood with dust as well as noise. These pilots can easily be cast as the Errol Flynns of this world, and the irate neighbors seem equally type-cast as the staid and unimaginative yeomen depicted in Grant Wood’s American Gothic. The judges and the law-

\textsuperscript{163} U.S. 483 (1954).

\textsuperscript{164} M. HARRINGTON, supra note 141, at 26-27.
yers in this scenario provide the comic relief as they attempt to resolve the conflict by applying concepts more suitable for use in Restoration England.

We have already seen that as early as 1815 Lord Ellenborough sensed the absurdity of holding an aeronaut liable for trespass. For similar reasons Congress in 1926 enacted the Air Commerce Act,\textsuperscript{165} which declared that "navigable airspace" was part of the public domain. In effect, a ceiling was placed over the fee simple; 1000 feet in congested areas and 500 feet elsewhere. Presumably, the rural yeoman was still sovereign of his estate up to the new ceiling.

Sir Frederick Pollack in his work on torts, however, had not accepted \textit{in toto} Lord Ellenborough's limitation on airspace, reasoning that an entry over land was a trespass "unless indeed it can be said that the scope of the possible trespass is limited to that of possible effective possession, which might be the most reasonable rule."\textsuperscript{166} The Massachusetts court later found that such could be said in \textit{Smith v. New England Aircraft Co.}\textsuperscript{167} This case arose when a neighbor sought to enjoin, as nuisance and trespass, low-level flights through "his" airspace. The plaintiff was unable to prove that the noise problem constituted a nuisance, but he did demonstrate low-level approaches and climbs over those parts of his 270-acre estate which consisted of brush and woodland not otherwise utilized.\textsuperscript{168} These flights, as low as 100 feet, were held to constitute trespasses, because they passed through the area of "effective possession," as evidenced by the common height of New England trees. Such low flights, after all, "create in the ordinary mind a sense of infringement of property rights which cannot be minimized or effaced."\textsuperscript{169} In a similar vein, the Georgia court in \textit{Thrasher v. City of Atlanta}\textsuperscript{170} reasoned that "legal title can hardly extend above an altitude representing the reasonable possibility of man's occupation and dominion."\textsuperscript{171} Thus, a flight through the zone of "reasonable possible possession" would constitute a trespass.

The plaintiff in \textit{Hinman v. Pacific Air Transport}\textsuperscript{172} had done his homework well, relying on the \textit{Smith-Thrasher} thesis to allege that he "may reasonably expect now and hereafter to utilize, use and occupy said airspace and each and every portion thereof to an altitude of not

\begin{thebibliography}{99}
\bibitem{166} F. Pollack, \textit{Torts} 362 (13th ed. 1929).
\bibitem{167} 270 Mass. 511, 170 N.E. 385 (1930).
\bibitem{168} \textit{Id.} at 531, 170 N.E. at 393.
\bibitem{169} \textit{Id.} at 530, 170 N.E. at 393.
\bibitem{170} 178 Ga. 514, 173 S.E. 817 (1934).
\bibitem{171} \textit{Id.} at 529, 173 S.E. at 825.
\bibitem{172} 84 F.2d 755 (9th Cir.), \textit{cert. denied}, 300 U.S. 654 (1936).
\end{thebibliography}
less than 150 feet . . . .'"\textsuperscript{178} The federal court, however, chose to base its jurisprudence of ownership on "dominion." In short, "[w]e own so much of the space above the ground as we can occupy or make use of,"\textsuperscript{174} and barring actual possession there can be no trespass through a vacuum.

Trespass or no trespass, an airport could constitute a nuisance. Thus, picturesque airports were enjoined if the racket on the tarmac and the frequency of low-level flights became too much.\textsuperscript{176} Indeed, the Oregon court finally illustrated impatience with the attempt of the Restatement of Torts to work out the problem in terms of trespass,\textsuperscript{178} concluding that it was an attempt "to pour new wine into the old bottle of trespass."\textsuperscript{177} Instead, the court declared that the law of trespass was irrelevant; the law of nuisance was alone in point. The impact of this approach is best illustrated in \textit{Brandes v. Mitterling}.

While nuisance doctrine was coming to dominate the stage, however, the Massachusetts court added a new factor to the equation by reaffirming its belief in the trespass approach.\textsuperscript{179} Nuisance doctrine, after all, centered upon the idea that the airport should be abated. The trespass approach allowed equity to enjoin low flights as continuing trespasses without abating the airport as a whole. In an opinion implicit with warnings for the future, Justice Qua gave notice that noise alone would not sustain the abatement of neighboring airports. In an age of increasing air travel, airports were becoming vital nerve centers in the economic life of the country as a whole. The day of the barnstorming adventurers and noisy private aerodromes was over; the time had come to deal with commercial airports situated in the midst of burgeoning suburban expansion.

2. \textit{Inverse Condemnation}

\textit{Causby v. United States}\textsuperscript{180} marked the opening of the next stage in the law's treatment of the problem. A chicken farmer brought an action in the Court of Claims to recover for a "taking" of an interest in his fee simple. His farm was located 2,200 feet from the end of a run-

\begin{itemize}
\item \textsuperscript{173} \textit{Id.} at 756.
\item \textsuperscript{174} \textit{Id.} at 758.
\item \textsuperscript{175} Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Gay v. Taylor, 19 Pa. D. & C. 81 (C.P. 1932).
\item \textsuperscript{176} \textit{Restatement of Torts} § 194 (1934).
\item \textsuperscript{178} 67 Ariz. 494, 196 P.2d 464 (1948).
\item \textsuperscript{179} Burnham v. Beverly Airways, Inc., 311 Mass. 623, 42 N.E.2d 575 (1942) (Qua, J.).
\item \textsuperscript{180} 328 U.S. 256 (1946).
\end{itemize}
way of an airport that had been taken over by the government during World War II. The glide path passed only 67 feet above plaintiff's home. Justice Douglas remarked simply enough, "The noise is startling." On these facts, the Supreme Court concluded that the government had "taken" what amounted to an easement through plaintiff's airspace, and thus was obliged to pay for it.

The idea that a landowner, unfortunate enough to have a glide path slicing through his airspace under the 500-feet ceiling, could initiate inverse condemnation proceedings proved vital in Griggs v. Allegheny County. The county used its power of eminent domain to collect a large tract of land upon which a new airport was constructed for the Pittsburgh metropolitan area. Plaintiff lived just outside the fence, but he discovered that a glide path cut through his airspace. Since an inverse condemnation claim lay against any entity possessing the power of eminent domain which had effectively taken property without actually going through the process of condemnation, plaintiff initiated a claim against the county based upon the Causby theory. The state supreme court dismissed the claim on the theory that the county had not taken the easement, presumably leaving plaintiff to sue the airlines themselves on the old trespass approach, or to pursue the federal agency establishing the flight patterns. Justice Douglas, speaking for the majority, would have none of this, because the county was the "promoter, owner and lessor" of the installation. The county had wanted an airport, and it must acquire the requisite land and space required for the safe operation of such a facility. "Respondent in designing it had to acquire some private property. Our conclusion is that . . . it did not acquire enough."

It is significant that the law had come to deal with the idea of space as an interest in land; a slice of airspace could be "taken" and must be paid for. Presumably airspace could be sold. Thus, it was conceivable that a building could be constructed in the airspace over a railroad yard in center-city without the structure being accessioned to the ground fee. This new sophistication is all the more interesting

181 Id. at 259.
182 369 U.S. 84 (1962).
183 Congress, in enacting the Federal Aviation Act of 1958, 72 Stat. 731, had included glide paths within navigable airspace, 49 U.S.C. § 1301(24) (1964), but even at the time of Causby it had generally been conceded that this would not ipso facto excuse compensation for the glide path easement over someone's home.
184 369 U.S. at 89.
185 Id. at 90.
186 Thus, the 41-story Prudential Building in Chicago is erected into the airspace over the Illinois Central Railroad tracks. Ramsey, Condominium: The New Look in
in light of the unresolved confusion in the law pertaining to over-hanging balconies.

3. "Progress"

The type-casting in this continuing drama changes considerably. The gallant barnstormer gives way to the sober airline captain, and the rural yeomen quit the scene in favor of bustling suburbanites. The little airport outside the city evolves into a major industry at the same time the outward expansion of the city population surrounds the site. Thus, the New York Times Magazine reported:

"This victimization of the public has been very democratic, touching alike all economic classes, from the wealthy homeowners of Playa del Rey, near Los Angeles's International Airport, and the élite of Georgetown, in the path of jets from Washington's National Airport, to the residents of walk-up flats in South Queens."

The stakes, moreover, grow higher; the New York Times estimates that the value of claims pending nationwide adds up to $200 million.

Technology further aggravates the problem as jets replace piston powered aircraft. Similarly, the language of technology dominates the discussion of the problem. Noise is now measured in terms of decibels, an arbitrary unit of sound measurement, the scale of which assigns "0" to the threshold of audibility and "120" to the threshold of pain. A 90 decibel measurement causes complaints in the town, and at 105 the community becomes outraged. Furthermore, the more a community is exposed to noise, the less its tolerance becomes. The stage is set, therefore, for the next act, wherein the comedy threatens to become a tragedy.

Batten v. United States and Thornburg v. Port of Portland ought to be read in pari materia. The cases have one thing in common—the appalling predicament in which the claimants found themselves. In Batten, the claimants moved into a subdivision near a discontinued Air Force base which was subsequently reactivated and expanded to accommodate long-range jet bombers and their attendant tankers. On a typical day, ninety movements were made by jets which warmed up


188 Id.

189 "With one aircraft blast per day, the community will put up with a rating of 115 decibels. But with 128 flights a day, the tolerance level drops to 94 decibels." Id. at 77.

190 505 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

191 233 Ore. 173, 375 P.2d 100 (1962).
for a half hour on a ramp within 650 feet of the plaintiffs' homes, then proceeded to even noisier preflight activities, and finally made full-power takeoffs further away.

Strong vibrations cause windows and dishes to rattle. Loud noises frequently make conversation and the use of the telephone, radio, and television facilities impossible and also interrupt sleep. During engine operation in the 100% range the sound pressure level measured in decibels varies from 90 to 117 decibels on the plaintiffs' properties. Ear plugs are recommended for Air Force personnel when the sound pressure level reaches 85 decibels and are required at or above 95 decibels.

In the summer months when there is an easterly wind, the black smoke developed during jet take-offs occasionally blows across the plaintiffs' properties leaving an oily black deposit on the houses and laundry . . . .

Since plaintiffs in *Thornburg* lived near a commercial airport, it can safely be presumed that their lives were no more comfortable.

Despite the horror of *Batten*'s facts, the plaintiffs did not recover. Although *Causby* required the government to pay for taking an easement through airspace, the court was "cited to no decisions holding that the United States is liable for noise, vibration, or smoke without a physical invasion." In *Thornburg*, however, plaintiffs recovered on the theory that the noise vector was such an invasion of the plaintiff's dominion as to constitute a taking of property.

Given the contemporary American trend toward enterprise liability, an easy solution suggests itself: Follow *Thornburg* and impose costs upon the airport, which in turn will recoup the loss by raising landing fees, which undoubtedly will be recouped by the carriers from their clientele. As a regulated industry, however, the carriers may not be able to spread their loss over their consumers at the simple

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192 306 F.2d at 582.
193 Id. at 584.
194 "In a nation which still winces at the word socialism, the judges have improvised an ersatz social insurance scheme and have imposed it upon industry." Roberts, *Consumer Protection and New Houses: The American Story*, 32 CON. & PROP. LAW. 21, 25 (1968).
195 Who actually flies?

Private surveys are reported to have shown . . . that the median income of passengers frequently using airlines is $17,500, which (if even approximately true) would indicate that air travel is used by well under 5 per cent of our population. . . . Nevertheless, the air-pollution and ear-pollution characteristic of environments surrounding major jet ports, maintained for the convenience of the small, privileged minority, have turned thousands of square miles of erstwhile pleasant human habitats into regions to be shunned. The supersonic boom, formerly the prerogative of the military, may—if airlines have their way—also be put at the service of the underwear salesmen hastening from here to there.

Moreover, it may be in the national political interest to subsidize a commercial carrier system by policies encouraging low fares thus creating volume traffic. The carriers continually re-equip themselves with ever more sophisticated and noisy equipment in order to remain competitive among themselves, and in order collectively to compete with foreign countries. This constant upgrading of equipment, after all, sustains a prospering aircraft industry, whose healthy existence affects both the national security and the national economy.

Two dissenting opinions merit reconsideration in light of these reflections. In *Griggs v. Allegheny County*, Justice Black dissented, not on the ground that the flights failed to constitute a taking, but because the federal government should have paid the bill instead of the county. Because its subsidy program was so much a part of the airport project, the United States, he felt, was the moving party behind the taking. Again, in *Goldberg v. Kollsman Instrument Corp.*, holding an aircraft manufacturer strictly liable for deaths occasioned in a La Guardia crash, the dissenters suggested that these were such muddy waters that prudence dictated some research in depth by a legislative committee before offhand fabrication of new rules was attempted by the bench. Thus, perhaps the ultimate solution is some form of subsidy provided by the taxpayer. This, however, suggests that the remedy ultimately lies within the political rather than the judicial province.

Recent English expedients bear watching since that country is also an exporter of airplanes. Although the Noise Abatement Act of 1960 specifically excluded noise or vibration caused by aircraft, the Airports Authority Act of 1965 took a different path and directed the Airport Authority to take “such measures as the Minister [of Aviation]

197 Consider in light of the balance-of-trade problem the following:
In a joint announcement last week, TWA, Eastern Air Lines and a British firm called Air Holdings, Ltd., disclosed that they will purchase 144 of Lockheed's 256-pasenger L-1011 air busses . . . .
. . . . This will bring in $625 million for a favorable U.S. balance of $390 million, and further sales in a market estimated at 1,000 planes by 1980 could raise the U.S. excess to well over $5 billion dollars.
TIME, Apr. 5, 1968, at 94.
198 569 U.S. 84, 91 (1962).
may direct for limiting noise . . . .” 202 Significantly, the legislation authorized the Minister to “make a scheme requiring the Authority to make grants towards the cost of insulating . . . dwellings [near an aerodrome] . . . .” 203 Thus, the solution may lie in an Orwellian future in which the residents are held hostage inside their soundproofed homes while aircraft noise holds sway in the open air. 204

In the meantime, of course, the victims of aircraft noise have not found the bureaucrats responsive. 205 Thus, in England, the anti-noise agitators are both unsuccessful and personally discredited. 206 In a similar vein, the New York Times has revealed that “[s]ome officials think noise protestors are a little odd.” 207 The ultimate irony, therefore, may come to pass when white suburbanites, trapped in the all-encompassing grasp of aircraft noise, resort to extra-legal means in order to give witness to their frustrations. 208

202 Airports Authority Act 1965, c. 16, § 14.
203 Id. § 15. Compare House & Home, Feb. 1968, at 8: “If a new sound-control experiment is successful, architect Norman L. Pedersen may well offer homebuilders some ways to build . . . on marginal land near noisy jetports, highways and factories.” The article goes on to explain that the experiment is being financed by $200,000 put up by the Los Angeles International Airport and that he calculates that his technique will increase building costs by something between 4% and 10%.
204 Those who believe that the traditional “castle” would be converted into a practical prison were not overly pleased when the functions of the Ministry of Aviation were transferred to the new Ministry of Technology. The Ministry of Aviation (Dissolution) Order 1967, 1 Stat. Instr. No. 155 (1967).
205 The English have, of course, always been aware of the power of the Civil Service. See, e.g., G. P. Snow, Corridors of Power (1964). Arthur Schlesinger, Jr., has popularized the idea here in A Thousand Days 680 (1965):

In the thirties conservatives had bemoaned the expansion of the federal government as a threat to freedom. Instead they should have hailed the bureaucracy as a bulwark against change. The permanent government soon developed its own stubborn vested interests in policy and procedure, its own cozy alliances with committees of Congress, its own ties to the press, its own national constituencies. It began to exude the feeling that Presidents could come and Presidents go but it went on forever.
206 So far, the anti-noise agitators have come out badly. They are called Colonel Blimps, middle-class grousers guarding the “territory,” alarmists, flat earthers, anti-libertarians, little Englanders, sentimentalists, sensationalists.

207 Sherrill, supra note 187, at 76 (italics in original). One general was quoted to the effect that the opponents of supersonic booms are “little old ladies in tennis shoes . . . .” Id. at 77.
208 The possible impact of the urban environment on the resident causes one to pause.

[1] In the Midtown Manhattan Study a lot of coldblooded people from Cornell Medical School sifted through the sample material and sampled 10,000 people and said 20 per cent of them should be in institutions, 60 per cent of them have demonstrable mental—whatever they are—aberrations, and only 20 per cent are clearly free of mental illnesses. From Park Avenue to the East River, including presidents of corporations, the leadership of America—and 20 per cent of them should be in institutions.
THE FUTURE

A. Social Engineering with a Social Purpose

The rise of suburbia, the growth of airport complexes, and the demolition of center-city seem diverse phenomena, yet each bears the common imprint of federal influence. Washington conscientiously manipulates fiscal devices to implement planned growth. Concomitantly, the business community plans its own activities within the interstices of the fiscal matrix in order to maximize productivity and thus wealth. It is axiomatic that planning is a fundamental adjunct of the new partnership between government and business designed to promote affluence and to remove the problem of the poor.

This is nothing more, of course, than the coming of age of the Keynesian consensus. The irony, however, is that recent events in center-city, to say nothing of recent doubts over the environmental quality of this affluent ideal, cause one to doubt the wisdom of the consensus. Thus, the President's Commission stated:

The racial disorders of last summer in part reflect the failure of all levels of government—federal and state as well as local—to come to grips with the problems of our cities. The ghetto symbolizes the dilemma: a widening gap between human needs and public resources and a growing cynicism regarding the commitment of community institutions and leadership to meet these needs.

Little solace is available for those who have escaped to the suburbs, however, for as John Kenneth Galbraith maintains, the entire system is suspect:

I am not quite sure what the advantage is in having a few more dollars to spend if the air is too dirty to breathe, the water too polluted to drink, the commuters are losing out in the struggle to get in and out of the city, the streets are filthy, and the schools so


209 Thus, Andrew Shonfield has argued that capitalism is entering a qualitatively new stage in which governments consciously pursue and attain full employment and an accelerated pace of technological change will become a normal, restless fact of life. Shonfield, The Progress (and Perils) of Planning, Encounter, Aug. 1965, at 32. See also Gavin & Hadley, supra note 118, at 34. "We live in a mixed economy. The debate between those who believe that private industry is always bad and federal intervention always good, or that the federal government is always wrong and private industry is always right, has ceased to have meaning."

210 Civil Disorders Report, supra note 152, at 283.
bad that the young perhaps wisely stay away, and hoodlums roll citizens for some of the dollars they saved in the tax.\textsuperscript{211}

Thus, there promises to be a considerable amount of political activity as society adjusts to meet these challenges.

Galbraith recently catalogued a series of land-use ills running the gamut of high rents, uncontrolled subdivision development, slums and chaotic transportation.\textsuperscript{213} He categorized the land-use controls thus far employed as "patchwork planning,"\textsuperscript{212} and offered a two-fold remedy.

The first step is to minimize or neutralize the adverse market influences. The second is to develop a planning authority of adequate power. Only strong and comprehensive planning will redeem and make livable the modern city and its surroundings.

Since the focus of market forces is the return to, and capital gains from, land, this solution means that there must be public land acquisition wherever market influences are palpably adverse. . . . And, no less than for the manufacture of automobiles or the colonization of the moon, it will require the scale, financial autonomy, control over prices, and opportunity to develop a technostructure which are the requisites of effective planning.\textsuperscript{214}

Thus, we are moving away from government partnership in the maintenance of affluence and toward conscious government leadership in the creation of a decent environment.

At first blush, this sounds very much like social engineering. It is, but not in the sense that lawyers tend to understand that phrase. Thus far the lawyers’ engineering has been largely commercial and financial, dealing with such things as wealth transmission, allocation of losses attributable to accidents, and the credit structure. In short, they have created and still service the institutions designed to expedite the production of goods and the consumption thereof on credit, while at the same time preserving from taxes the wealth derived from these institutions. Their greatest social engineering triumph was the structuring of a union system to channel the labor unrest of the Great Depression. This feat brought organized labor into the \textit{apparat} dedicated to the market system.\textsuperscript{215} In short, the lawyers’ glory and guilt is

\textsuperscript{211} Quoted by Harrington, "Reactionary Keynesianism," \textit{Encounter}, March 1966, at 50-51.

\textsuperscript{212} J. Galbraith, supra note 141, at 356-57, 359-60.

\textsuperscript{213} Id. at 360.

\textsuperscript{214} Id. at 360-61.

\textsuperscript{215} See, e.g., M. Lerner, supra note 109, at 323-24; Roberts, \textit{Natural Law Demythologized: A Functional Theory of Norms for a Revolutionary Epoch}, 51 \textit{Cornell L.Q.} 656, 668-69 (1966). Indeed, the craft unions have learned to manipulate the building codes to
that they built contemporary society in the process of settling disputes between the various interests which comprise it.

Lawyers' forays into planning have also evidenced considerable ingenuity if their efforts are graded in terms of the contributions these schemes have made to affluence. FHA, FNMA and urban renewal have pump-primed the economy to affluence, as measured by middle-class prosperity.Evaluated in terms of a decent environment, however, the lawyers may not be such superb engineers. Indeed, the entire system, viewed from the perspective of the poor, is a gigantic sociological Edsel. In light of recent events, it is conceivable that the ad hoc system of federal fiscal manipulation and private planning will give way to a system of central planning with compliance assured by the liberal use of the federal fiscal and monetary powers.²¹⁶

Change on the local level may include the scrapping of conventional land-use controls in favor of a metropolitan agency vested with authority to condemn all non-agrarian land-user rights on the fringe, enabling this land to be fed back into development at the decision of the agency and not the market.²¹⁷ The current zoning map will disappear in favor of parcel-by-parcel development decisions made in accordance with a master plan. Planning would cease to police untoward market forces for the purpose of merely preserving the status quo, and would instead direct the market into an affirmative quest for a decent environment inhabited by a population neither racially nor economically segregated.

their own advantage in such a way that this form of featherbedding unduly increases the costs of construction.

²¹⁶ A. SHONFIELD, MODERN CAPITALISM 353 (1965):

It is characteristic of the relationship between the public and the private sectors in America that government, having been formed in the image of private enterprise, now justifies planning on the ground that it is essentially a private enterprise technique..It is also noticeable that the most vigorous planning efforts by the government—outside the field of defence, which is a special case—appear in those areas where the pressures of private consumption and of private industry supplying consumer needs actively call for collective action by the public authorities. Roads and urban development, as offshoots of consumer demand for more cars and nicer houses, are outstanding examples. These are of course essential elements of an economic plan. However, the more profound collective choices, those which ought to find their expression in a comprehensive national plan for the distribution of the national product among its main uses, and which are logically prior to decisions about the level to be reached by particular kinds of consumer demand, go by default. It is of the essence of planning by business that it is partial planning. This has been reproduced in the public sector. A national plan is something quite else; it deliberately engages the transcendent power of the state in a design which is more than the sum of all the individual pressures in a society.

(Italics in original.)

²¹⁷ See, e.g., Reps, supra note 84, at 825.
B. Training Social Engineers

Should the political climate allow such an effort, the question must be faced whether the lawyers are adequate for the task of creating the necessary structure of decision-making agencies and processes.

The adequacy of the lawyers depends in large part on the adequacy of their preparation. Even now, lawyers lament that the recent graduates do not come to them fully equipped with the local forms in hand and trained in the nitty-gritty, paper-shuffling details of provincial practice. At the same time, moreover, social engineering training is grossly deficient. Although casebook courses in Regulated Industries and Land-Use Planning have multiplied, the law schools continue to shield their brood from the empirical complexities of the society they are supposedly being trained to engineer. If the training necessary to produce social engineers within the metropolitan law firm and government agency complex becomes even more sophisticated, it is likely that law training could diverge into two streams.

There is no real reason why a private lawyer needs more than two years of academic law. To placate the provincial alumni who now complain about the lack of local detail taught in law school, perhaps another semester spent at a bar association technique plant would complete a student’s training. The costs of producing a social engineer, on the other hand, are appalling to contemplate. Land-use planning, for example, without extensive experience with game-system models simulating the market to be regulated, borders on the absurd. Practical data about ecology, demography and sociology, together with a stiff dose of economic reality would seem mandatory. Only small groups working in a problem setting can be effective. Perhaps this group should take only one year of contemporary classical education in law, and then spend three more years alternating between the seminar, the field, and the game table. The cost of this approach, considered solely in terms of student-teacher ratios, illustrates that we will not be able to afford the personnel necessary for a truly planned society until several of the established national universities are, in effect, transformed into federal graduate universities.

Furthermore, for purposes of training social engineers, the case system needs some rethinking. Legal concepts, after all, can lead to absurd scenarios, as our overhanging balcony dilemma illustrated. Although the casebooks are annually crammed with more legal data served up horn-book style, cases in zoning are a sterile exercise in Neo-Scholasticism unless rehearsed against an ongoing economic model of their real environment. More important, the glory of the case system
requirement, forcing the student to distill a mass of facts down to a few critical facts organized around a single issue, may have contributed to legal disasters such as the airport cases. Courtroom law, dictated by the artificialities of a bloodless trial by intellectual combat, may boil down to precise isolated issues, but the real world is not an "either-or" place. Proper social engineering requires dealing in terms of entire systems involving mutually dependent variables in a state of flux.

Perhaps lawyers qua lawyers are not adequate to the task, and would be well advised to restrict their activities to the private sector, leaving the expanded national economic plans and the metropolitan land-use plans to others. Galbraith, for one, has nominated for the new elite the members of the "technostructure," whose "specialized knowledge, talent or experience . . . is the guiding intelligence—the brain—of the enterprise,"218 and with whom are associated in positions of ever increasing influence "a rapidly growing body of educators and research scientists."219

Indeed, the overhaul of law schools necessary for a conscious effort to produce social engineers would be so sweeping that the resultant institution would cease to be a law school, and would become, instead, a hybrid law-science-planning institute. Since lawyers basically represent interests, and since their engineering function has been the by-product of conflict resolution in the courts and legislatures, the two-year classically trained lawyer should be adequate to the task of representing the interests involved in the new planned society. The law schools, perhaps, should leave the job of producing social engineers to an institute properly designed for the task, and should return to a tightly disciplined casebook system of training representatives. At the same time, the promoters of the "planned society" should produce a model of the institute which would perform the broader social engineering function.

Apart from law, what would be the format of a planning institute? Economics, politics and foreign policy would be essential, since even a fleeting appreciation of our current housing potential necessitates a grasp of the interrelationship of the gold drain, the balance of trade, the federal reserve discount rate, the interest payable on demand deposits in commercial and savings banks, the interest payable upon FNMA offerings, the bond market and an almost infinite number of other factors. Ultimately, plans depend upon reasonable projections of the monies available to implement them. Thus, the study of land-use planning from an aesthetic or efficiency perspective makes sense only with

218 J. Galbraith, supra note 141, at 71.
219 Id. at 282.
a graph of the mechanics of the economic structure in hand, and with the realm of the politically possible realized.

A planning institute would treat problems somewhat alien to law schools, such as the potentialities of genetic surgery and government control over family planning. Indeed, biology must be included in the planning curriculum. Architecture and city planning are necessary, and the humanities are desirable lest the curricula prove too heady.

To balance these technical courses, the institute would have to develop an intellectual élan rooted in the values of humanism. That is, while learning the means, i.e., the devices by which environment is to be controlled, an end worthy of these efforts, i.e., the ideal environment, would have to be posited as the goal. In short, an environment worthy of human habitation, created by and for mankind, would have to be the alpha and omega of the institute. This has been best expressed by a Marxist theoretician:

To use the modern technical terminology, we can say that Marxist social science aims at a "hologram" of man instead of a series of photographs. It is the basic methodological premise and, at the same time, the discriminating feature of the Marxist approach to social science, that "economic man," "social man," "cultural man," "political man" and similar products of scientific division of labor are nothing but model constructs, creations of a long process of abstraction maturing in institutionally separated micro-social settings. The only genuine reality, from which all these models depart and to which they refer, is man as such, pursuing the process of living through and by his social and cultural environment. . . . To understand man we have to bring together all that we have discovered while penetrating the different aspect of his unified life-process . . . .

Notwithstanding the source of these reflections, the elevation of the study of environment in terms of a hologram of man is a dire necessity in our contemporary society. The ultimate question facing us is whether we can construct an environment that will support a standard of life acceptable not merely in statistical terms, but that one reflects a style of life worth living, without violence and alienation as its only trademarks.

220 Bauman, Modern Times, Modern Marxism, 34 Social Research 399 (1967). Compare the recent comments of Judge Keating:

Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.