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# CONDEMNATION BLIGHT: JUST HOW JUST IS JUST COMPENSATION?

Gideon Kanner\*

## I. Introduction

It rarely happens that proceedings for the condemnation of and for public use are instituted without months, years, and, in some instances, decades of time spent in preliminary discussion and in the making of tentative plans. These discussions and plans are usually known to owners and other persons interested in land in the vicinity of the proposed improvement, and are matters of common talk in the neighborhood. If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it is hanging like a sword of Damocles over the heads of the land owners in the vicinity cannot . . . fail to have a depressing effect upon values.<sup>1</sup>

This article deals with the legal problems that arise from such condemnation or planning blight<sup>2</sup> resulting from the governmental activities which precede the actual acquisition of the affected land, or herald an acquisition which does not materialize. But in order to analyze these problems it is necessary to fit them into the concepts which make up the muddled area of eminent domain law.

In spite of decades of determined litigation, accompanied by vigorous brandishing of scholarly pens<sup>3</sup> and the spilling of much printer's ink, the inter-

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1 4 NICHOLS', THE LAW OF EMINENT DOMAIN § 12.3151 (Rev. 3d ed., 1971).

2 As befits this controversial area, one cannot even muster much agreement on terminology. See Hagman, *Planning (Condemnation) Blight, Participation, and Just Compensation: Anglo-American Comparisons*, 4 URBAN LAW. 434-35 (1972); Comment, *Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings—Is Inverse Condemnation the Answer?* 3 PAC. L. J. 571, 573-74 (1972). While Professor Hagman's preferred term—"planning blight"—is probably logically correct, since the problem arises out of the planning preceding condemnation, or even from planning without condemnation being threatened, see *Selby Realty Co. v. City of San Buenaventura*, 104 Cal. Rptr. 866 (1972), (*vacated, hearing granted*), the generic term commonly used is "condemnation blight."

3 Eminent domain law has inspired literally reams of scholarly commentary trying to extract a viable legal theory out of the welter of conflicting judicial approaches to the theory and application of "just compensation." Some of the better endeavors of this kind may be found in Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3; Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954). Particular note should be taken of the anonymous (curse you, *Yale Law Journal*, for concealing the identity of your student authors!) Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957), which is particularly noteworthy for its analysis of the historical origins of eminent domain's anomalies, and for its incisive juxtaposition of judicial conventional wisdom with the economic realities of the mid-twentieth century. This scholarly literature is largely unsuccessful in formulating a theoretical matrix capable of containing the diverse judicially created doctrinal bases which underlie the common law of "just compensation," and is replete with critical assessments of prevailing decisional law. Therein lies the message: if eminent domain law is lacking in clarity, it is certainly not for want of analysis, but rather because of an uneasy and inconstant truce between judicial desire to do justice in the name of just compen-

pretation of constitutional guarantees against the taking (or damaging) of private property for public use continues to present a murky and confused area of the law,<sup>4</sup> whose conceptual premises can be charitably characterized as uncertain.<sup>5</sup> Judges, scholars, and practitioners with experience in this field, quickly learn that a modicum of mature research will—more often than not—disclose a kind of legal Newtonian law: for every rule there lies somewhere in the legal decisions a counterrule, espousing the opposite principle (or at least an entirely different approach to the problem).<sup>6</sup>

Within this climate, attention has focused from time to time on various areas of eminent domain law, in which the problems are particularly troublesome. The topic discussed in this article also falls within that category. After a lengthy period of judicial refusal to acknowledge the problem,<sup>7</sup> or even, in

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sation and an often simultaneous desire to protect the public purse even at the price of palpable injustice. "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner." *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 280 (1943). See, *Bacich v. Board of Control*, 23 Cal. 2d 343, 350, 144 P.2d 818, 822 (1943).

4 The late Associate Justice of the California Court of Appeals, Roy Gustafson, spotlighted this difficulty with noteworthy bluntness: "The fact is that the law in this area is a hopeless mess and one can find just about any statement for which he is looking if he reads enough cases." CALIF. LAW REVISION COMM'N MEMORANDUM 70-29, at 5. For a collection of similarly pejorative assessments by various commentators, see Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CALIF. W. L. REV. 57, 58 (1969). Connoisseurs of legal/scholarly invective should experience no difficulty in unearthing additional expressions of similar character.

5 Prof. Arvo Van Alstyne's monumental work for the California Law Revision Commission, in connection with its lengthy study of inverse condemnation (eventually published as the series of articles cited below), ably dissects some of the "... obtuse decisional law that is only occasionally relieved by judicial common sense, pragmatism, and candor." Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1, 4 (1967). See also Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967); Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968); Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HAST. L.J. 431 (1969); Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 SO. CAL. L. REV. 1 (1970).

6 At the highest judicial (and, coincidentally, most basic conceptual) level, judicial policy is a study in contradiction. The Supreme Court has repeatedly stated that "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . .," *United States v. Virginia Electric Co.*, 365 U.S. 624, 631 (1961); *United States v. Commodities Corp.*, 339 U.S. 121, 124 (1950), and that "The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States v. New River Collieries*, 262 U.S. 341, 343-44 (1923). Similar expressions may be found in *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1892); *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923); *B. & O. R. Co. v. United States*, 298 U.S. 349, 365 (1935). Yet, the Court has also stated that the law of just compensation is "harsh," and that relief ought to be sought from Congress. *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945). To the best of my knowledge, the High Court has never offered a word of explanation directed toward reconciliation of this head-on conflict of principles.

7 See, e.g., *Danforth v. United States*, 308 U.S. 271 (1939), where the Court, without analysis, asserted that "[a] reduction or increase in the value of property may occur by reason of . . ." precondemnation activities, but "[s]uch changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Id.* at 285 (emphasis added). Unfortunately this expression was pure window dressing. Long before it, and thereafter, the Supreme Court refused to treat any "increase in the value of property" as an "incident of ownership" and consistently held that when it came to such enhancement in value, the owner would not be permitted to collect it; his "incidents of ownership" were said to

some cases, of judicial partisanship in favor of the condemning agencies,<sup>8</sup> the problem of just compensation payable to the owner whose economic position is adversely affected by governmental precondemnation activities is increasingly receiving attention from the courts<sup>9</sup> and the commentators.<sup>10</sup>

The basic factual problem is simply stated: before ponderous bureaucratic machinery can translate public project planning into land acquisition, time passes.<sup>11</sup> During that time notice that a taking is imminent becomes widespread, which in turn promotes a wholesale departure of tenants, reluctance on the part of owners in the affected area to invest in improvements and maintenance, and distortion of the real estate market. Obviously, few people are willing to buy or lease property which will be taken from them in the foreseeable future.<sup>12</sup> Such reluctance cuts across the potential market. At one extreme, families are apprehensive about making their home in dwellings from which

extend only far enough to bear the loss caused by blight. *Kerr v. South Park Commissioners*, 117 U.S. 379, 387 (1886); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 76 (1913); and particularly *United States v. Miller*, 317 U.S. 369 (1943), in which, only four years after *Danforth*, the Court made it clear that the "reduction or increase" phrase in *Danforth* was only rhetoric, and that the owner cannot collect the increment of enhancement. Indeed, in *Miller* the Court was outspoken in eschewing the "incidents of ownership" approach to "reduction or increase in . . . value," and resorted to indignant rhetoric: "[T]he Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities." *Id.* at 377. *Query*: Why didn't the Court wax equally indignant in *Kerr*, *Chandler-Dunbar* and *Danforth* at the prospect of the owner having to absorb the diminution in value "arising from the known fact that the lands probably would be condemned"? In fairness to the Court, it should be noted that before too long it moved away from this heads-I-win-tails-you-lose posture. See *United States v. Virginia Electric Co.*, 365 U.S. 624, 625 (1961). See also Graves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319, 339 (1963).

8 For a discussion of this type of partisanship, see, e.g., *Klopping v. City of Whittier*, 8 Cal. 3d 39, 47-50, 104 Cal. Rptr. 1, 9-10, 500 P.2d 1345, 1353-55 (1972), where the court dissects earlier lapses in judicial reasoning whose effect was to permit the condemnor to take advantage of the blight it caused, while the courts at the same time denounced as "monstrous" the suggestion that the owner's compensation include the enhancement in value caused by precondemnation announcements of a desirable public project.

9 The problem of blight caused by precondemnation activities has increasingly been dealt with by the judiciary. See, e.g., *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E.2d 52 (1963); *In re Urban Renewal, Elmwood Park*, 376 Mich. 311, 136 N.W.2d 896 (1965); *Foster v. City of Detroit*, Mich., 254 F. Supp. 655 (E.D. Mich., 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380 (1970); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895 (1971); *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972).

10 See, e.g., Sackman, *Condemnation Blight—A Problem in Compensability and Value*, 1973 SW. INST. ON ZONING, PLANNING AND EM. DOM. 157; Hagman, *Planning (Condemnation) Blight, Participation, and Just Compensation: Anglo-American Comparisons*, *supra* note 2; Weber, *The Lost Identity of Blight*, 45 CALIF. S.B. J. 492 (1970); Anderson, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, 5 SANTA CLARA LAW. 35 (1964); Comment, *Delay, Abandonment of Condemnation, and Just Compensation*, 41 So. CAL. L. REV. 862 (1968); Comment, *Recovery for Enhancement and Blight in California*, 20 HAST. L. J. 622 (1969); Comment, *Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings—Is Inverse Condemnation the Answer?*, *supra* note 2; Comment, *Depreciation Damages: A Condemnor's Windfall* 51 NEB. L. REV. 147 (1971); Note, *Eminent Domain—Compensation for Lost Rents*, 1971 WIS. L. REV. 657; Comment, 72 COLUM. L. REV. 722 (1972); Comment, 40 FORDHAM L. REV. 698 (1972); Comment, 73 W. VA. L. REV. 348 (1971); Comment, 3 ST. MARY'S L.J. 339 (1971); Note, *Depreciation Damages in Eminent Domain Proceedings*, 18 CLEV.-MAR. L. REV. 106 (1969).

11 In *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal.3d 478, 496, 93 Cal. Rptr. 833, 852, 483 P.2d 1, 16 (1971) the court noted that "[g]overnmental bureaucratic action is notoriously slow. . . ." Likewise, see *Jersey City Redevelopment Agency v. Kugler*, 111 N.J. Super. 50, 267 A.2d 64 (1970).

12 See *State Road Dep't v. Chicone*, 158 So.2d 753, 754-55 (Fla. 1963).

they will be displaced at a time not of their own choosing, perhaps requiring a mid-term school transfer for their children. At the other end of the potential market, businessmen are even more reluctant to move into an area slated for a taking, and rightly so. What businessman in his right mind would buy or lease under such circumstances?<sup>13</sup> Why should he remodel, install trade fixtures, buy stock-in-trade, and develop goodwill for his business, only to have it all confiscated when the threatened condemnation comes?<sup>14</sup>

Market activity within the affected area decreases,<sup>15</sup> and such sales of real property as do occur are disproportionately composed of distress sales (*i.e.*, sales compelled by death, divorce, job transfers, economic reverses, and other factors tending to depress sales prices). The buyers of such properties understandably pay less than actual market value.<sup>16</sup> Since the affected area is "on borrowed time," economic activity within it—such as it is—tends to become dominated by persons who are able and willing to devote real property to short-term uses. Often, there are not enough such people to utilize existing improvements, with the result that vacancies increase, thereby encouraging vandalism and causing business to decline. These events in turn provide the remaining inhabitants of the area with additional incentive to relocate. In some instances such events

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13 Contrary to careless judicial assumptions that displaced businesses can readily relocate, *e.g.*, *In re Edward J. Jeffries Homes Housing Project, etc.*, 306 Mich. 638, 643, 11 N.W.2d 272, 276 (1942); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12 (1949), recent investigations indicate persuasively that, in fact, businesses displaced by condemnation suffer a high mortality rate, and the smaller the business, the higher such rate. See HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2d SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, 57,484 (Comm. Print 1964); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESS DISPLACED BY GOVERNMENTS 6 (1965).

14 The problem of uncompensated business losses in eminent domain remains one of the most egregious injustices in this field today. As such, it has been abundantly criticized by commentators. See Aloï & Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (1968); Kanner, *When is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, *supra* note 4; Note, *The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 HAST. L.J. 675 (1969); Note "Just Compensation" for the Small Businessman, 2 COLUM. J. L. & SOC. PROB. 144 (1966). Judicial progress in this area has been minimal and spotty. Only Georgia has candidly rejected categorical denial of compensation for business losses, as an oversimplification. *Bowers v. Fulton County*, 221 Ga. 731, 739, 146 S.E. 2d 884, 891 (1966). Minnesota has allowed compensation for business losses where it is impossible to relocate the destroyed business. *State v. Saugen*, 169 N.W. 2d 37 (Minn. 1969). A few jurisdictions have nibbled the edges of the problem, by indirection. Michigan has done so by allowing compensation for business interruption, *In re Ziegler's Petition*, 357 Mich. 20, 97 N.W. 2d 748 (1959), and for losses suffered by distress sale of the stock-in-trade of a taken business. *Mackie v. Miller*, 5 Mich. App. 591, 147 N.W. 2d 424 (1967). See also *United States v. Citrus Valley Farms, Inc.*, 350 F.2d 683 (9th Cir. 1965), which allowed compensation for damage to a cotton allotment, and *Ark. State Highway Comm'n v. Davis*, 455 S.W. 2d 97 (1970), which allowed an appraiser to consider the adverse effects of a highway on the condemnee's chicken ranch, its egg production, and the probability of future egg contract cancellation. Otherwise, the business-man-condemnee faces grim prospects when he finds himself in the bulldozer's path.

15 In the words of one court: "[P]rotracted preproject discussions imprison [the] property in an economic no-man's-land." *Merced Irrigation Dist. v. Woolstenhulme*, 86 Cal. Rptr. 575, 579 (Cal. App. 1970), *vacated and superseded*, 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P.2d 1 (1971).

16 See *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App. 2d 255, 259, 1 Cal. Rptr. 250, 253 (1959).

combine to form a vicious cycle leading ultimately to abandonment of entire city blocks.

All of these problems become exacerbated with the passage of time. How much time? There is apparently no limit. Several years is "par for the course," but delays of a decade or more are not unheard of.<sup>17</sup> Nor is passage of time the sole source of the problem:

In the meantime, spurred by news stories of urban renewal programs, plagued by demolition in the area, bewildered by the on again off again building code enforcement, disturbed by the lack of adequate garbage and rubbish removal, harmed by poor police protection, and continually confused by promises of the urban renewal program in its area, a neighborhood is rapidly accelerated into demise.<sup>18</sup>

The foregoing passage, of course, suggests another, more sinister facet of the problem: an intentional pattern of conduct by governmental officials, calculated to depress values for the purpose of acquiring the affected properties for less than their fair value.<sup>19</sup> Such tactics range from open harassment<sup>20</sup> to more sophisticated schemes, such as denial of building permits,<sup>21</sup> either completely or on condition that the owner make a gift of his land to the governmental entity,<sup>22</sup> imposition of oppressive zoning,<sup>23</sup> and kindred activities.

Still another problem arises in situations where governmental officials—while not guilty of outright bad faith—induce the owner to act in reliance on their property acquisition plans, and then change their plans and disclaim responsibility for the resulting disastrous consequences.<sup>24</sup>

17 *Silva v. City & Co. of San Francisco*, 87 Cal. App. 2d 784, 198 P.2d 78 (1948) (thirteen years); *In re Urban Renewal, Elmwood Park*, 376 Mich. 311, 136 N.W. 2d 896 (1965) (twelve years); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966) (fourteen years); *A. Gettelman Brewing Co. v. City of Milwaukee*, 245 Wis. 9, 13 N.W. 2d 541 (1944) (thirty-one years). See *Glaves, Date of Valuation In Eminent Domain: Irrelevance for Unconstitutional Practice*, *supra* note 7, at 327.

18 *City of Cleveland v. Hurwitz*, 19 Ohio Misc. 184, 189, 249 N.E. 2d 562, 566 (1969).

19 See, e.g., *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958) (zoning rollback openly designed to depress value of land slated for acquisition as airport clear zone); *Drakes Bay Land Co. v. United States*, 424 F. 2d 574, (Ct. Cl. 1970) (interference with owners' development plans by opposition of government officials, followed by protracted delay in acquisition). Notwithstanding recent judicial rejection of such governmental shenanigans, they continue to hold a quick-buck fascination to some. See Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 U.C.L.A. Rev. 795, 819 (1971); compare *Berger, Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CALIF. W. L. REV. 75, 96-97 (1971).

20 See *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E. 2d 52 (1963); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F. 2d 138 (6th Cir. 1968); Also see *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969), where the owner's property tax was raised, while simultaneously he was denied any use of his land.

21 See *Director of Highways v. Olrich*, 5 Ohio St. 2d 70, 213 N.E. 2d 823 (1966).

22 *Selby Realty Co. v. City of San Buenaventura*, 104 Cal. Rptr. 866 (1972) (*vacated, hearing granted*). See *Mid-Way Cabinet etc. Mfg. v. County of San Joaquin*, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

23 *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963); *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958).

24 See, e.g., *Hilltop Properties v. California*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965); *Bank of America v. County of Los Angeles*, 270 Cal. App. 2d 165, 75 Cal. Rptr. 444

But whatever the subjective motivation of responsible government officials, and whatever the technique used by them, the impact on the affected owners is the same:

The central issue here is not the willful or intentional acts of the city, it is the natural and probable consequence of the acts or the failure to act on the part of the city. It is the cumulative result of many things, each in itself that might not have been totally harmful, but when impacted all together have the full force of destruction of the property. . . .<sup>25</sup>

The issue increasingly being presented to the judiciary is under what circumstances, and on what doctrinal bases, is an owner caught in such a predicament entitled to compensation for the losses suffered.

II. Nor Shall Private Property Be Taken  
for Public Use Without Just Compensation,  
Versus  
Nor Shall Real Property Be Seized for  
Public Use Without Fair Market Value of What  
the Condemnor Acquires

Since the problem of blight is basically one of eminent domain law, aggrieved owners ask the courts in such litigation to hold that the affected property has been "taken" or "damaged"<sup>26</sup> by the condemnor's blighting activities, and therefore, that "just compensation" should be awarded to the owners. In this context, it is useful—if not necessary—to briefly examine the nature of those terms and the extent to which they are available to serve as a basis for recompense to the owners in blight situations.

This ground has been covered by several commentaries,<sup>27</sup> so little purpose would be served by duplicating their efforts. Suffice, for the purposes of the present discussion, to introduce the subject by noting that the "primordial" notion<sup>28</sup> of "taking" or "damaging" of "property" as requiring physical in-

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(1969), (*disapproved in* *Klopping v. City of Whittier*, 8 Cal. 3d 39, 52, n. 5, 104 Cal. Rptr. 1, n. 5, 500 P.2d 1345, 1355, n. 5, (1972); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y. Supp. 2d 345, 269 N.E.2d 895 (1971).

25 *City of Cleveland v. Hurwitz*, 19 Ohio Misc. 184, 190, 249 N.E.2d 562, 567 (1969).

26 The fifth amendment of the U.S. Constitution guarantees against uncompensated "taking" of property, which guarantee is binding on the states through the due process clause of the fourteenth amendment. See *Chicago, Burlington etc. R'D v. Chicago*, 166 U.S. 226 (1897). Early judicial interpretation of "taking" was so restrictive and unsatisfactory that several states adopted constitutional provisions expanding the just compensation guarantee to "taking" or "damaging" of private property. For a discussion of the rationale of such constitutional amendments see *Chicago v. Taylor*, 125 U.S. 161 (1888); *Reardon v. San Francisco*, 66 Cal. 492 (1885).

27 Kratovil & Harrison, *Eminent Domain—Policy and Concept*, *supra* note 3, at 599-604; Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 209 (1967); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, *supra* note 5 at 752-65. See also Kanner, *When Is "Property" not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, *supra* note 4, at 64-68.

28 Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, *supra* note 27, at 209.

vasion or seizure of physical objects has been largely abandoned in modern eminent domain cases<sup>29</sup> (to say nothing of general law<sup>30</sup>). However, the concept does surface with disquieting regularity in cases in which the courts choose to deny just compensation to the owner and, lacking another ground on which to pitch their decision, assert that "property" has not been "taken" because there has been no physical seizure.<sup>31</sup>

The student of eminent domain law quickly learns that concepts and notions of what constitutes "property" in other areas of the law are of little assistance when dealing with definitions of "property" in eminent domain law.<sup>32</sup> "Today when a court grants or denies compensation on the ground that a 'taking of property' is or is not involved, it is stating its conclusion and the reasons for its decision must be sought elsewhere."<sup>33</sup>

The United States Supreme Court has explicitly made it clear that the foregoing assessment of judicial performance is correct. In *United States v. Willow River Co.*,<sup>34</sup> the Court stated that whether or not a particular economic interest rises to the dignity of a constitutionally protected "property right," is in reality "the question to be answered." Unfortunately, the criteria articulated in *Willow River*, on which to base such answer, are obscure. The Court noted that "... only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."<sup>35</sup> But, as everyone with eminent domain experience knows, many economic advantages which have the law back of them—in the sense that courts compel others to forbear from interfering with them, or compensate for their invasion—are declared by the courts to be non-compensable non-property, in the context of eminent domain.<sup>36</sup>

29 Probably the most widely cited and conceptually clearest case on point is Justice Holmes' opinion in *Penna. Coal Co. v. Mahon*, 260 U.S. 393 (1922), where it was held that there was a "taking" of "property" by legislation forbidding the extraction of coal owned by the coal company. The significance lies in the fact that even though there was neither a transfer of title to the government, nor a change in possession or physical invasion, the court conceptualized a "taking" of "property" within the meaning of the just compensation constitutional guarantee.

30 For an exploration of changing concepts of "property," see Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 Bos. U. L. REV. 435 (1964); Reich, *The New Property*, 73 YALE L.J. 733 (1964). For imaginative student efforts in articulating a conceptual nexus between such newly formulated "property" rights and the just compensation guarantee of the constitution, see Comment, *Unemployment as a Taking Without Just Compensation*, 43 So. CAL. L. REV. 488 (1970); Comment, *Privacy, Property, Public Use, and Just Compensation*, 41 So. CAL. L. REV. 902 (1968).

31 See, e.g., *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895 (1971), holding that either physical invasion or direct statutory restraint is necessary before a "de facto taking" would be found. See also *Uvodich v. Arizona Bd. of Regents*, 453 P.2d 229 (Ariz. App. 1969); *Cayon v. City of Chicopee*, 277 N.E.2d 116 (Mass. 1971).

32 See, e.g., *Placer County Water Agency v. Jonas*, 275 Cal. App. 2d 691, 698, 80 Cal. Rptr. 252, 259 (1969); but see *Gottus v. Redevelopment Authority of Allegheny Co.*, 425 Pa. 584, 587, 229 A.2d 869, 872 (1967). And see Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, *supra* note 4, at 68-71.

33 Kratovil & Harrison, *Eminent Domain—Policy and Concept*, *supra* note 3, at 601.

34 324 U.S. 499, 502 (1945).

35 *Id.*

36 See *Grittenden v. Superior Court*, 61 Cal. 2d 565, 569, 39 Cal. Rptr. 380, 384, 393 P.2d 692, 695 (1964) for an express judicial acknowledgment of this phenomenon.

It has been suggested that this double standard is justifiable on the basis that the relationship between the individual property owner and the government is different than the relationship among private citizens (*i.e.*, that as against the government the citizens' rights are not "property" at all).<sup>37</sup> To the extent this theory is conceptually confined to governmental regulatory activities of the police power variety, it is basically supportable.<sup>38</sup> But, surely, once it is recognized that the open use of the power of eminent domain is involved to deprive the owner of an otherwise legally protected economic advantage, such a rationale is tantamount to reading the "just compensation" guarantee out of the Constitution. It is the purpose of such constitutional provisions to afford the private property owner the right to receive recompense from his government under circumstances where another private party would be liable.<sup>39</sup> Thus, where the government engages in activities in which another private party cannot (*i.e.*, regulatory activities) it is arguable that it should not have to pay for performing its function (*i.e.*, governing). When, however, the government inflicts damage of the kind for which a private party would be liable, denial of compensation subverts the rationale of the just compensation guarantees.

Of course, there is another edge to that sword. Since government engages in activities which no private party may embark on, it necessarily injures others in ways no private party can. This too has been judicially recognized, and it has been held that the government can be liable under circumstances which would not subject a private party to liability.<sup>40</sup>

It is undoubtedly warranted to assume that the constitutional framers intended that a farmer whose hay was commandeered by a passing platoon of dragoons, be compensated for the value of such fodder.<sup>41</sup> But such mental depictions of an eighteenth-century lawmaker's vision of governmental impingement of private "property" rights are hardly helpful in assessing the boundaries of compensability of "property" rights in today's complex society. Nevertheless, such economically primitive imagery forms—even today—the basis of much of our expropriation law. As noted by able commentators,<sup>42</sup> the notions that form

37 *United States v. Willow River Co.*, 324 U.S. 499, 509-10 (1945). Note, however, that this principle can be tortuously applied. In *Colberg, Inc. v. State of California*, 67 Cal. 2d 408, 419, 62 Cal. Rptr. 401, 413, 432 P.2d 3, 13 (1967), it was held that the construction of a low bridge across the Upper Stockton Channel completely blocking passage by ocean-going vessels, was in the nature of a police power "improvement" or "aid" to navigation. (Aficionados of the Vietnam War might be justified in observing that in *Colberg* it became necessary to destroy navigation by ocean-going vessels in the Upper Stockton Channel, in order to "improve" it.)

38 One must, of course, recognize the difficulty in drawing the line between police power regulation and stultification of the incidents of ownership by regulation which goes too far, thus becoming a Holmesian "taking." For exploration of this difficult topic see Sax, *Taking and Police Power*, 74 YALE L.J. 36 (1964); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, *supra* note 5. See also Chongris v. Corrigan, 93 S. Ct. 218 (1972) (Douglas, J., dissenting).

39 See *Youngblood v. Los Angeles County Flood Control Dist.* 56 Cal. 2d 603, 608, 15 Cal. Rptr. 904, 908, 364 P.2d 840, 844 (1961); *O'Hara v. L.A. County Flood etc. Dist.*, 19 Cal. 2d 61, 63, 119 P.2d 23, 25 (1941).

40 See *Holtz v. Superior Court*, 3 Cal. 3d 296, 90 Cal. Rptr. 345, 475 P.2d 441 (1970); *Clay v. City of Los Angeles*, 21 Cal. App. 3d 577, 98 Cal. Rptr. 582 (1971).

41 See Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HAST. L.J. 217, 248 (1965).

42 See Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 3, at 65.

the limits of "just compensation" have their roots in the eighteenth and nineteenth centuries, where takings were infrequent. The "property" taken was mostly raw land of little value, so incidental damages were rare in their incidence and relatively gentle in their impact. Thus, while it is understandable why early American courts formulated such restrictive rules of compensation, the reluctance of today's jurists to recognize the phenomenal changes of the last few decades (and the impact of those changes on the premises on which the early decisions rest) is considerably more difficult to fathom.<sup>43</sup> This difficulty is all the more perplexing when one reflects on the revolutionary changes wrought by the courts in so many other areas, in the name of fairness to persons dealt with harshly by their government.<sup>44</sup> And, finally, it is noteworthy that other western countries which have neither a counterpart of our constitutional guarantee of just compensation nor the phenomenal resources of the United States economy, have managed to evolve rules which fairly compensate property owners for their true losses sustained in expropriations.<sup>45</sup>

Nevertheless, whatever their historical origins, one must deal with American rules of just compensation as they exist, bearing in mind, perhaps, Justice Holmes' admonition: "The life of the law has not been logic; it has been experience."<sup>46</sup> And the American experience has tended to build on the concept of "fair market value" as a measure of just compensation. Certainly, this criterion of compensation is commendable. At least in theory, it is objectively ascertainable and permits a separation of the resource components of property ownership (*i.e.*, that which is convertible into money), from the idiosyncratic and the emotional attachments of the owner.<sup>47</sup> Yet, the market value concept also suffers from grave shortcomings. It works at its best when we speak conceptually of taking Farmer Brown's Blackacre. We visualize him replacing Blackacre with

43 Few topics afford as good an example of this phenomenon as the judicial treatment of business goodwill. The courts often deny compensation for the taking of goodwill on the rationale that it can be carried away by the displaced owner. *E.g.*, *In re Edward J. Jeffries Homes Housing Project, etc.*, 306 Mich. 638, 643, 11 N.W.2d 272, 276 (1942); *Banner Milling Co. v. State*, 240 N.Y. 533, 536, 148 N.E. 668, 670 (1925). This unmitigated fiction continues to be adhered to, even though the facts are plainly to the contrary. In at least some cases the owner cannot reestablish his business and carry his goodwill with him. *See State v. Saugen*, 284 Minn. 533, 169 N.W.2d 37 (1969); *HOUSE COMM. ON PUBLIC WORKS, supra* note 13; *ADVISORY COMM'N ON INTER-GOVERNMENTAL RELATIONS, supra* note 13.

44 *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The *Gideon* Court expressly based its decision on the unfairness that results when a criminal defendant of limited means is confronted with a powerful and well-financed governmental adversary. *Compare County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 148, n. 8, 98 Cal. Rptr. 454, 459, 490 P.2d 1142, 1147 (1971), where the court acknowledged that denying small property owners recovery of their litigation costs would be "markedly unfair," and cause them to forego their constitutionally guaranteed just compensation by compelling them to settle for "unreasonably low" amounts. But the court offered nothing more substantial by way of relief than its sympathy. *See Comment, Sympathy But No Tea: County of Los Angeles v. Ortiz*, 2 U. SAN FERN. VALLEY L. REV. 49 (1972).

45 *See Graves, Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice, supra* note 7, at 357; Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 VAND. L. REV. 63, 80-90 (1970).

46 O. HOLMES, *THE COMMON LAW* 1 (1881).

47 It bears noting, however, that some commentators have raised disquieting questions as to the wisdom of ignoring the purely personal aspects of involuntary deprivation of one's property. *See Klein, Eminent Domain: Judicial Response to the Human Disruption*, 43 J. URB. L. 1 (1969); Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 J. URB. L. 297 (1971); Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 801 (1969).

Whiteacre, which he has purchased from Farmer Jones, and to which he has moved his implements himself. In such a simple context, the "just compensation" payable to Brown may well be appropriately measurable by an idealized "market value"—the amount of money that Brown and Jones, and their neighbors, would pay for a farm like Blackacre, based on what they have actually paid for similar farms. But this concept rests on a number of assumptions whose lack of substance in any given situation may invalidate the concept of "market value" as the equivalent of "just compensation."<sup>48</sup>

Initially, if market value is to be a measure of "just compensation," there must be a market in properties of the kind being valued:

If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the "market price" becomes so important a standard of reference. But when the property is of a kind seldom exchanged, it has no "market price," and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights.<sup>49</sup>

This underlying assumption is too often taken for granted. Recall that much of our property and contract law is premised on the notion that each parcel of land is unique. This notion rests on a sound foundation of economic experience. In the area of commercial properties particularly, precise location and exposure may be decisive in establishing value.<sup>50</sup> The fact that properties similar in size and utility have been sold in the vicinity may be a questionable indicator of the value of the property being expropriated, and, even in the face of apparent "comparables," considerable sophistication by an appraiser may be called for.<sup>51</sup>

It is, therefore, encouraging to note that the Supreme Court has been careful to make it apparent that the "market value" is essentially a rule of convenience, not a conceptual straitjacket:

The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The

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48 See Dasso, *Changing Economic Conditions and the Condemnation Value of Real Property*, 48 ORE. L. REV. 237 (1969); Allard, *Is Market Value Just Compensation?*, 35 APPRAISAL J. 355 (1967).

49 *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949). The stock market furnishes an excellent and familiar example of this principle. The shares of a large, regularly traded corporation (absent proxy fights or "corners") are exactly alike, with their sales frequent and accurately recorded. Thus, to ascertain the "market value" of a particular stock at a particular time, all one needs to do is look up the stock exchange trading records for that time; the answer is readily obtainable, down to the penny and to the day. Nevertheless, there can be a considerable difference between "market value" and intrinsic value, or "book value" of a share of stock. See *In re Marriage of Williams*, 29 Cal. App. 3d 368, 378, 105 Cal. Rptr. 406, 410-11 (1972).

50 Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 505, n.82 (1962). The author catalogues an impressive array of circumstances wherein landlords and tenants, for perfectly valid business reasons, may enter into leases calling for payment of rents departing widely from prevailing, or "economic," rents, commanded by similar premises in the open market. Many of the same factors are as applicable to sales as they are to leases.

51 See, e.g., Fadem, *Trial Tactics to Make the Compensation Just to the Owner*, 1973 SW. INST. ON ZONING, PLANNING, AND EM. DOM. 261.

political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined. . . . The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. . . . But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases.<sup>52</sup>

Unfortunately, these principles are at times ignored. Courts often doggedly insist that the parties produce "comparables" exactly like the property being taken, with scant regard for the realities of the market, which may make it impossible<sup>53</sup> or, where possible, not very reliable.<sup>54</sup>

[T]he dual tendency of the courts to limit the presentation of market value to the comparative sales approach and to label this method the "best evidence" constitutes an unwarranted and often erroneous simplification of the value problem. Such an approach is blind to the advancement of appraising techniques and, more so, to the market place. In an effort to achieve expediency and simplicity, it reconstructs a Procrustean bed; if the subject does not fit comfortably—and with *comparative* ease—upon the ready-made bed, then the victim's head or feet are cut down to the convenient size. There is no justification for the existence of such a limited area of approval when the advancements in appraising techniques are fairly reliable (if not simple) and when the market place is oblivious to such judicial restrictions.<sup>54a</sup>

Moreover, this simplistic approach to valuation overlooks the fact that the "price" that any given "comparable" commands is not necessarily an indicator of objective "value." It may reflect nothing more than the product of mental (and emotional) processes of the parties to the transaction, which may have been aimed at ascertaining and discounting such factors as, for example, income tax shelter needs or profit expectations of those parties.

The area in which the market data approach to value deteriorates altogether is when the property being taken is of a kind rarely sold, as a park, church, golf course, school, or refuse dump. In this context, courts have candidly recog-

52 *United States v. Cors*, 337 U.S. 325, 332 (1949). *See also* *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945); *United States v. Miller*, 317 U.S. 369, 374-75 (1943); *Citizens Utilities Co. v. Superior Court*, 59 Cal. 2d 805, 817, 31 Cal. Rptr. 316, 328, 382 P.2d 356, 367 (1963); *Keator v. State*, 23 N.Y.2d 237, 238, 296 N.Y. Supp. 2d 767, 244 N.E.2d 248, 249 (1968); *Housing Authority v. Savannah Iron & Wire Works*, 91 Ga. App. 881, 887, 87 S.E.2d 671, 676 (1955); *State ex rel. Herman v. Southern Pacific Co.*, 8 Ariz. App. 238, 242, 445 P.2d 186, 189-90 (1968); *Walker v. United States*, 64 F. Supp. 135, 137 (Ct. Cl. 1946).

53 *Ark. State Highway Comm'n v. Dipert*, 249 Ark. 1145, 1146, 463 S.W.2d 388, 390 (1971).

54 *See* *Community Redevelopment Agency v. Henderson*, 251 Cal. App. 2d 336, 339-42, 59 Cal. Rptr. 311, 314-16 (1967), *disapproved*, *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal. 3d 478, 495, 93 Cal. Rptr. 833, 851, 483 P.2d 1, 16 (1971).

54a *A Study Relating to Evidence in Eminent Domain Proceedings*, 3 CALIF. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS AND STUDIES A-25 (1961) (emphasis in original, footnote omitted) [hereinafter cited as EVIDENCE STUDY].

nized that the notion of market value may be meaningless<sup>55</sup> and its employment may lead to an absurdity.<sup>56</sup>

That market activity may make for an unsatisfactory criterion of value is probably nowhere better recognized than in examining the methodology of the appraising profession. It is clear that unless there is a lively market in true "comparables," appraisers prefer other methods of valuation, such as capitalization of the income produced by the property being valued, or the so-called summation (or reproduction-less-depreciation) method.<sup>57</sup> In the case of income-producing or unusual properties, these methods are more objective in ascertaining value and freer from aberrations of the market.<sup>58</sup> Nonetheless, many courts seem to be enamored of the simplistic notion that the *summum bonum* of economic wisdom may be found in Farmer Brown selling Blackacre to Farmer Smith. Thus courts—particularly New York courts—have been known to launch into lengthy dissertations as to how appraisers should value property, uninhibited by their own lack of training or expertise in the field.<sup>59</sup> Typically, such judicial pronouncements exhort the virtues of market data analysis as the sanctified approach to valuation,<sup>60</sup> and view with suspicion the more modern and sophisticated method-

55 *Citizens Utilities Co. v. Superior Court*, 59 Cal. 2d 805, 817, 31 Cal. Rptr. 316, 328, 382 P.2d 356, 367 (1963).

56 *People ex rel. Dept. of Public Works v. City of L. A.*, 220 Cal. App. 2d 345, 352, 33 Cal. Rptr. 797, 805 (1963).

57 See Comment, *Valuation Evidence in California Condemnation Cases*, 12 STAN. L. REV. 766, 791, 800 (1960).

58 While judicial definitions of "market value" are replete with admonitions that it is to be the equivalent of a price that would be paid in a sale transaction between knowledgeable parties acting without compulsion to buy or to sell, see, e.g., *Sacramento etc. R.R. Co. v. Heilbron*, 156 Cal. 408, 409 (1909), that is not what actually happens in the market. The prices actually paid for "comparable" parcels often are the product of a host of factors reflecting varying degrees of subjective and more or less vaguely perceived economic pressure to sell or to buy, and varying degrees of ignorance as to the property's potentials or flaws. See SCHMUTZ, *CONDEMNATION APPRAISAL HANDBOOK* 8 (1963). As Professor Dunham has stated: "The market assesses expectations and values which, if openly stated as included in market price, would offend the sensibilities and moral standards of a large segment of the population." Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, *supra* note 3, at 95.

59 4 NICHOLS' THE LAW OF EMINENT DOMAIN § 12.3121[3] (Rev. 3d ed., 1971) collects several extended quotations from such opinions in which the courts of New York, with varying degrees of fervor, reject the widely used (in non-condemnation situations, particularly for valuation in connection with loans) method of hypothesizing a reasonable improvement to be erected on vacant land, and then capitalizing its projected income. New York courts are by no means alone; in California, for example, one section of the evidence code, CAL. EVID. CODE, § 814 (West. 1966), requires opinions of value to be based on matters "... of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property and which a willing purchaser and a willing seller ... would take into consideration in determining the price at which to purchase and sell ..." while another section limits capitalization studies to rents "... attributable to the land and existing improvements thereon ..." *Id.* § 819 (emphasis added). The fact that buyers, sellers and lenders frequently capitalize estimated rentals from projected improvements is disregarded, even though § 814 calls for a determination of value on the basis of the things that the market considers. One commentator has caustically observed: "[T]he present court procedures in this field [are] analogous to a comparison of present agriculture methods with Millet's 'Man With a Hoe'." EVIDENCE STUDY, *supra* note 54a, at A-28.

60 For a *reductio ad absurdum* of such judicial attitude, see Ark. State Highway Comm'n v. Dipert, 249 Ark. 1145, 463 S.W.2d 388 (1971) where the court, disregarding the thoughts of a rather shocked dissenter, proceeded to hold that the market data approach was the only proper valuation method, even where there were no sales of comparable properties within the community. *Id.* at 390, 393. See also Dunn, *Some Reflections on Value in Eminent Domain*, 24 APPRAISAL J. 415, 417 (1956).

ology of the appraising profession.<sup>61</sup>

The conclusions contained in a recent appraisal paper bear repeating:

The legal dictum that "comparable sales are the best evidence of value" apparently derives from the establishment of market prices of commodities, common stocks, and other fungible properties by continuous trading in an open market. If attention is confined solely to this class of property, one is tempted to conclude that marketability generates the value. But it is our opinion that the reverse is the case: the "value in use" generates the marketability.

It is our opinion that the value-in-exchange concept, namely market value, derived solely from prices paid for identical or equivalent properties without any consideration of the future benefits of ownership is inapplicable in the case of undeveloped land for which there is no current market.

The assumption that marketability generates the value of a property has led to difficulties in the field of valuation. Not the least of these difficulties stem from the judicial ruling that "comparable sales are the best evidence" of value or, more precisely "the prices at which comparable properties have sold are the best evidence of the value of a subject property."

When this dictum is applied to properties traded in units on an exchange and for which there is not only a current market but a more or less continuous market as well, the results are satisfactory. However, in the case of properties for which market quotations do not exist (real estate, business enterprises, patents, antiques, original manuscripts, etc.) and for which the market is sporadic, deferred or nonexistent, the situation is different. Here the distinction between investment properties and marketable noninvestment properties is crucial, and yet, in practice, attempts are made by some to apply the principle without making a distinction between the two kinds of property.

In the case of marketable noninvestment property, the rule is directly applicable only if sales of comparable property have taken place and, also, if it is reasonable to assume that a market exists for the subject property. Its strict application requires, first, a discovery, in each case, of what individual value elements are involved; second, the determination of the numerical magnitude of each such element; and third, a mathematical analysis of these magnitudes to relate them to the prices paid. This is the Sales Analysis Method. (In the case of some properties, however, for example, objets d'art, the value elements cannot be expressed numerically and the analysis used is a technique called Value Ranking.)

It is when attempts are made to apply the rule to investment properties that major difficulties appear. In the first place, the rule that "comparable sales are the best evidence of value" is by no means universally applicable—as pointed out above. Many investment properties are of a type not commonly bought and sold and for some there is no market. A stone quarry, a refuse disposal pit, wasteland which someday may be converted to urban use, a manufacturing business making sewer pipe, and a railroad (considered as a single whole property) are investment properties which it would be quite impractical, if not actually impossible, to value on the basis of comparable sales without giving consideration to the future benefits of ownership in each case. In the second place, even if sales of like properties were available in these cases, the problem of comparison remains. Comparison on the basis of physical characteristics—quantity of stone in the

<sup>61</sup> *Arlen of Nanuet v. State*, 26 N.Y.2d 346, 356, 310 N.Y. Supp. 2d 465, 467, 258 N.E.2d 890, 897 (1970).

quarries, capacity of the refuse disposal pits, area of the wastelands, age and condition of the improvements of the sewer pipe companies, miles of track and number of cars of the railroad companies—would leave out many factors such as marketability of the products, management, location, costs of operation, etc., etc. In our opinion, the only practicable basis of comparison in these cases is the single value element possessed by all investment properties, namely, *earning expectancy*. However, using expectancy as a basis for comparison involves forecasting of the series of net monetary returns and estimating the accuracy of this forecast and this is nothing other than the investment analysis method of valuation, which could have been used at the outset. In the third place, the comparable-sale technique is based on the existence of value elements which are *common* to both the subject property and the comparable properties but fails to take into account the *unique* value elements of a subject investment property. In the investment analysis method, on the other hand, the effects of such unique value elements are included in the earning expectancy forecast.<sup>62</sup>

But, judicial infatuation notwithstanding, the market value approach to just compensation suffers from more fundamental shortcomings. It ignores the concept of indemnification and attempts instead to impose a price on what the condemnor acquires.<sup>63</sup> This approach leaves no room for consideration of the "incidental losses"<sup>64</sup> (i.e., losses proximately caused by the taking, but excluded from the valuation process, such as business losses, moving expenses, etc.) suffered by the expropriated owner. Also, judicial disclaimers in *United States v. Cors*<sup>65</sup> notwithstanding, this approach does "make a fetish" of market value in most cases, and further, equates "just compensation" with market value of that which is seized by the condemnor.

The justification for this approach is said to be the *in rem* nature of the just compensation clause of the fifth amendment. As articulated by the Supreme Court in *Monongahela Nav. Co. v. United States*:<sup>66</sup>

[A]nd this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this fifth amendment is personal. "No person shall be held to answer for a capital or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal

62 THE RESEARCH AND DEVELOPMENT COUNCIL OF THE AMERICAN SOCIETY OF APPRAISERS, THE OPINION OF THE COUNCIL ON THE APPLICABLE METHOD FOR VALUATION OF UNDEVELOPED LAND FOR WHICH THERE IS NO CURRENT MARKET, at 5-6 (1972) (emphasis in original).

63 *Mitchell v. United States*, 267 U.S. 341, 345 (1925) is exemplary of this judicial attitude: "There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land." *Id.* But compare the following statement in *United States v. General Motors Corp.*, 323 U.S. 373 (1945):

In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.

*Id.* at 378.

64 See Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 3.

65 337 U.S. 325 (1949).

66 148 U.S. 312 (1893).

element is left out, and the "just compensation" is to be a full equivalent for the property taken.<sup>67</sup>

This theory represents a semantic obfuscation of what is, in reality, a problem in "[t]he political ethics reflected in the Fifth Amendment. . . ."<sup>68</sup> Although it has been rejected in more recent expressions of the Supreme Court,<sup>69</sup> it refuses to die and is periodically trotted out as the basis upon which to deny compensation for damages concededly suffered.<sup>70</sup>

Perhaps more importantly, the *Monongahela in rem* theory of just compensation is economically unsound. The assets that give rise to "property" rights have no value, except to the extent that their owners are subjectively able to derive utility from them or to command an economic *quid pro quo* from those who wish to avail themselves of those assets' utility. For example, a carload of pork bellies is a valuable asset in the United States because it has utility to people—either as a commodity which can be profitably traded, or as foodstuff which can be sold to consumers. But that same carload of pork bellies has no value in Saudi Arabia. Indeed, it may have a negative value there, by subjecting the owner to the economic burden of having to dispose of a large quantity of foodstuff which no one wants and to legal sanctions which may be imposed for possession of illegal goods.

The foregoing is concededly a farfetched example, designed only to illustrate a principle. Nevertheless, this principle is operative—in varying degrees—in more familiar economic transactions. Prospective buyers are not fungible; they bring to bear on each transaction their individual expectations, hopes and plans. Some of them—as California experience has time and again demonstrated—have the vision to perceive the future potential of a parcel and its surrounding area, which the seller may not share.<sup>71</sup> In other words, these people may care

67 *Id.* at 326.

68 *United States v. Cors*, 337 U.S. 325, 332 (1949). Professor Dunham has aptly noted that the problem of just compensation is stated by the Constitution itself in ethical terms. Dunham, *Griggs v. Allegheny County In Perspective: Thirty Years of Supreme Court Expropriation Law*, *supra* note 3, at 105.

69 In *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910), Justice Holmes, speaking for the Court, took the position that the Constitution ". . . deals with persons, not with tracts of land." And in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), a non-condemnation case, the Court effectively gutted the *Monongahela* rationale by concluding:

[T]he dichotomy between personal liberties and property rights is a false one. *Property does not have rights. People have rights.* . . . In fact, a fundamental interdependence exists between the personal right to liberty and the *personal right in property*. Neither could have meaning without the other.

*Id.* at 552 (emphasis added).

70 *See, e.g., Town of Los Gatos v. Sund*, 234 Cal. App. 2d 24, 44 Cal. Rptr. 181 (1965).

71 As an attorney concerned with such transactions, I used to marvel early in my career, at the willingness of parties to invest huge sums in what I perceived to be land of doubtful worth, located "in the boondocks." But more often than not, passage of time has demonstrated their wisdom and my own lack of vision. Some of these people have become millionaires out of such transactions. Time and time again I have seen "the boondocks" transformed into dynamic communities, with princely rewards going to their developers. Moral: neither litigation lawyers nor judges are, by their background or experience, equipped to assess the doings of "the market" with accuracy, and should not impose their notions upon it; nor should they attempt to tell appraisers how to appraise, any more than they tell doctors how to doctor in personal injury cases. To the extent it can be said that the appraiser comes to court to hold up a mirror to the economic world, the law at times compels him to wield a twisted mirror reminiscent of the carnival "fun house" variety, which distorts rather than reflects the economic

relatively little whether they pay the "value" of the land they acquire. (The word "value" being used here as an equivalent of prices paid for other land in the area.) Their purchase price of any given parcel is merely one factor in a complicated equation compounded of subdivision or other development cost studies, prevailing and projected interest rates, projected markets for their end product (whether homes, apartments, shopping centers, etc.), *ad valorem* and income tax considerations, and their ultimate profit expectations.

Thus, prices paid by them may be higher than "the market" because their economic motivation is the ultimate projected profit. Conversely, it may be lower than "the market" because the seller does not share their vision of the future, and when confronted with what he deems to be a decent offer decides "to grab it and run." Thus, where the number of "comparable" transactions is limited, the prices paid for such "comparables" may not be very helpful. And surely, such "comparables" can hardly be said to reflect the objective value, after "the personal element is left out."

In other words, the "value" which "property" possesses is inseparable from the "personal element" represented by desires of persons comprising the market for such property to acquire the utility which the "property" offers, and the extent to which they are subjectively willing to part with assets of their own as a *quid pro quo* for the fulfillment of those desires. And, of course, the owner whose asset ("property") is being valued (who in expropriation cases is cast in the role of a seller, albeit involuntarily) likewise brings to bear on the problem of valuation his desire to acquire the *quid pro quo* for his asset, which—assuming him to be rational—he must weigh against all the economic consequences of parting with his asset.<sup>72</sup> To put it still another way, no rational seller can be expected to voluntarily accept a "price" for his land, which after deduction of his losses and expenses incident to the sale and relocation will leave him impoverished. To the extent that eminent domain law assumes otherwise, it smacks of Alice in Wonderland.

Value cannot be determined. In view of the fact that value is a relation-

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world outside the courtroom. "Buying and selling in the mid-twentieth century is far different in the market place from the way it is viewed from the courthouse." EVIDENCE STUDY, *supra* note 54a, at A-26. I thus agree with Professor Dunham that if we are to use the "market value" criterion, we should allow the parties to bring the market into the courtroom, as it were, and to reconstruct there the price that the market would pay. See Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, *supra* note 3, at 81. The courts, however, while claiming to opt for market value of what is seized as the measure of just compensation, even where the result to the owner is disastrous, e.g., *Mitchell v. United States*, 267 U.S. 341, 345 (1925), have been known to eschew that measure of compensation where its application would favor the owner. See *United States v. Fuller*, 93 S. Ct. 801 (1973). The Court owes us a rational explanation why "... the basic equitable principles of fairness ..." constitute an adequate doctrinal basis for *judicial* relaxation of the rigidity of the market value approach *in favor of the government*, but not in favor of the owner who is told that the law is "harsh" and that he should seek redress from Congress. *Id.* at 803; compare *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945).

<sup>72</sup> See *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945). For example, it is a familiar phenomenon that the tax consequences flowing from 26 U.S.C. § 435(b)(2) (A) (ii) (1970), often compel rational sellers to sell their land on terms consisting of less than 30 per cent down, with the balance payable over an extended period of time. This is usually the case in sales of highly appreciated properties sold by knowledgeable sellers. In such transactions, the "price" arrived at by the parties is obviously influenced, if not dominated, by the seller's income tax situation, and the buyer's willingness to accommodate himself to it.

ship between a desirous person, on the one hand, and the rights of use of the thing desired, on the other, it follows that a precise determination of the amount of money for which the rights of ownership will sell must presuppose a precise determination of human reactions.<sup>73</sup>

Thus, *Monongahela's* economically naive notion that "property" has "value" which can be somehow abstractly ascertained after "the personal element is left out" should be recognized for what it is: a semantic device designed to conceal the court's true policy criteria in fixing the conceptual boundaries of just compensation.<sup>74</sup>

This brings us to the crux of the present portion of this article: What are the policy criteria that determine the extent of just compensation? Here, as in other areas of expropriation law, judicial performance forms what Professor Dunham has aptly called a "crazy quilt pattern"<sup>75</sup> which upon analysis reveals "... a haphazard accumulation of rules" rather than "a rational plan."<sup>76</sup>

Judicial performance in this area has suffered from an unwillingness or inability<sup>77</sup> to confront the fundamental clash of two competing principles: Does the compensation payable to the owner represent a monetary equivalent of what the taker acquires, or does the word "just" import into the economic equation an ethical principle requiring that the owner be indemnified for the economic detriment caused him by the taking?

This inquiry lies at the root of the problem and, like so many other basic facets of expropriation law, has not received from the courts the attention it deserves.<sup>78</sup> It seems safe to start with the premise that the word "compensation" denotes a *quid pro quo* which is fully equivalent to that which is being compensated for. "[I]f the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property."<sup>79</sup>

73 SCHMUTZ, *supra* note 58, at 27.

74 Other commentators have noted a judicial tendency to engage in such concealment. "[P]olicy factors, although at times discussed by the courts, are usually left undisclosed or concealed behind a veil of concept." Kratovil & Harrison, *Eminent Domain—Policy and Concept*, *supra* note 3, at 599.

75 Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, *supra* note 3, at 64.

76 *Id.* at 64, 106.

77 Professor Michelman's observation bears noting: "Fairness as a standard for judging a political decision may simply be too difficult for courts to grasp and apply successfully." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, *supra* note 3, at 1246-47.

78 The "loss to the owner" theory has emerged as the preferred one in valuation of a concededly compensable interest ("The question is what has the owner lost, not, what has the taker gained?"). *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal. 3d 478, 494, 93 Cal. Rptr. 833, 845, 483 P.2d 1, 12 (1971). However, the assertion that just compensation implies an inquiry into what the taker gained, persists in raising its head in the area of incidental losses. *See Mitchell v. United States*, 267 U.S. 341, 345 (1925); *City of Los Angeles v. Allen's Grocery Co.*, 265 Cal. App. 2d 274, 280-81, 71 Cal. Rptr. 88, 93 (1968); *Klein v. United States*, 375 F.2d 825, 829 (Ct. Cl. 1967) ("... 'the sovereign need only pay for what it actually takes rather than for all that the owner has lost'").

79 *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893). Some courts have elucidated this view at length. *Virginia etc. R. Co. v. Henry*, 8 Nev. 165, 171 (1873);

Thus, the word "compensation" alone provides a sufficient basis for opting for a policy which would require the taker to pay the monetary equivalent of that which he acquires. Is the word "just," then, of no significance? Is it merely a pragmatically meaningless linguistic embellishment? Those cases which espouse the *Monongahela in rem* theory of compensation, would certainly seem to answer these questions affirmatively.<sup>80</sup>

Nevertheless, among the Supreme Court's more recent expressions, there are other, competing views. Foremost among them is the theory that the import of the "just compensation" phrase is to give rise to a theory of indemnification, which has been probably best expressed in *United States v. Miller*:<sup>81</sup> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken." So far, the expression can be said to be compatible with the *Monongahela in rem* theory. But the Court went a step further and added: "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."<sup>82</sup>

In other words, under this more recent view, the object of just compensation is not merely a conversion of an asset ("property") into its monetary equivalent, but indemnification of the owner.

Obviously, the *policy* articulated in *Miller* is incompatible with that espoused in *Monongahela*. Where does that leave us? Was the Court really breaking with *Monongahela's* unrealistic economic theory? Not exactly. Only two years after *Miller*, the Court proceeded to limit the above-quoted principle, by stating: "Only in the sense that he is to receive such value [of the property interest taken] is it true that the owner must be put in as good position pecuniarily as if his property had not been taken."<sup>83</sup> In the aftermath of World War II temporary takings, *United States v. General Motors Corp.*<sup>84</sup> and *Kimball Laundry Co. v. United States*<sup>85</sup> were decided in which the Court did venture into an analysis of the conceptual bases and economic realities of expropriation law; however, in later decisions it effectively backpedaled and made it clear that it was not prepared to extend the logical implications of those two cases to situations other than purely temporary takings.<sup>86</sup>

*City of Los Angeles v. Oliver*, 102 Cal. App. 299, 311, 238 P. 298, 306 (1929); *Port of N.Y. Authority v. Howell*, 59 N.J. Super. 343, 347, 157 A.2d 731, 734 (1960).

80 *Monongahela* took the position that the effect of adding the word "just" was to make the compensation requirement "emphatic." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893). See also *Sweet v. Rechel*, 159 U.S. 380, 400 (1895), where the Court stated: "Reasonable compensation and just compensation mean the same thing." However, in more recent cases, the Court stated: "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *United States v. Virginia Electric Co.*, 365 U.S. 624, 631 (1961); *United States v. Commodities Corp.*, 339 U.S. 121, 124 (1950).

81 317 U.S. 369, 373 (1943). Similar expressions may be found in *United States v. New River Collieries*, 262 U.S. 341, 344 (1923); *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923).

82 *United States v. Miller*, 317 U.S. 369, 373 (1943).

83 *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

84 323 U.S. 373 (1945).

85 338 U.S. 1 (1949).

86 See *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). In *United States v. Westinghouse E. & Mfg. Co.*, 339 U.S. 261 (1950), the Court noted that in *General Motors* it "... was scrupulously careful not to depart from the settled rule against allowance for 'consequential losses' in federal condemnation proceedings," and was moved there to allow

The result is more than somewhat Kafkaesque. The owner is told that he is "to be put in as good a position pecuniarily as he would have occupied had his property not been taken," but at the same time he is told that in his postcondemnation pecuniary position he must absorb without compensation a host of economic losses arising directly from the taking of his property. He may, in fact, be economically destroyed by the condemnation,<sup>87</sup> but that's just too bad; the law—says the Court—is "harsh" and any remedy should be sought from the legislative branch of the government.<sup>88</sup> If that is *constitutionally* mandated indemnification then it surely is making its appearance in a convincing disguise.

But, notwithstanding this critical assessment of the Supreme Court's past performance, there are encouraging signs that the indemnification theory may once again be gaining the upper hand. In *Armstrong v. United States*,<sup>89</sup> a claim was made for compensation for materialmen's liens on a ship which the government seized from the shipbuilder pursuant to the terms of its contract. The Court upheld the compensability of the claim, and, in the process, articulated the policy underlying the indemnification theory:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.<sup>90</sup>

This language suggests a clear break with the *Monongahela in rem* theory of compensation. The Court's concern is for people—for individuals who might be compelled to subsidize public projects by foregoing compensation for losses suffered by them. Other courts have elaborated on this indemnification principle and have correctly pointed out that it is soundly based on the fact that the government, through its taxing power, is in the best position to act as a cost-spreading device.<sup>91</sup>

On this posture of the law, any conclusions as to the eventual outcome of the struggle between proponents of the *in rem* and indemnification theories, must await further development. However, if the views of the commentators carry

moving expense compensation only because of the unfairness to a tenant who is compelled by a temporary taking of his leasehold to move out and then move back in. The rationale of this distinction is dubious; if unfairness to the condemnee is a legitimate criterion on which to predicate compensation in temporary takings, then why does it cease to become legitimate in permanent takings?

<sup>87</sup> See, e.g., *People v. Ayon*, 54 Cal. 2d 217, 226, 5 Cal. Rptr. 151, 158, 352 P.2d 519, 525 (1960), asserting that even where a business is entirely destroyed by condemnation, the owner is still not entitled to compensation.

<sup>88</sup> See note 6, *supra*.

<sup>89</sup> 364 U.S. 40 (1960).

<sup>90</sup> *Id.* at 49. It bears noting that this theory of just compensation as a social cost distribution device was articulated by the California Supreme Court long before *Armstrong*, as well as thereafter. See *Bacich v. Board of Control*, 23 Cal. 2d 343, 350, 144 P.2d 818, 822 (1943); *Clement v. State Reclamation Bd.*, 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950); *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263, 42 Cal. Rptr. 89, 98, 398 P.2d 129, 136 (1965); *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 90 Cal. Rptr. 345, 350, 475 P.2d 441, 446 (1970).

<sup>91</sup> See *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 90 Cal. Rptr. 345, 350, 475 P.2d 441, 446 (1970).

any weight with the Court, the indemnification theory should emerge as the preferred one.<sup>92</sup>

But a great deal more than scholarly preference supports the selection of the indemnification theory. Two additional major factors point in that direction: the socio-political rationale of the Constitution and sound economics.

As far as the constitutional rationale is concerned, it seems safe to say that the Constitution—or at least the Bill of Rights—was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens from governmental excesses. The just compensation guarantee must accordingly be viewed as a part of the larger constitutional fabric. Thus, without even resorting to the concept of the constitutional penumbra, one is justified in concluding that the purpose of the just compensation guarantee—as of the rest of the Bill of Rights—was to protect the people from the government, not vice versa. Associate Justice of the California Court of Appeals, Leonard Friedman, put it well:

Constitutional judgments no less than the adjudication of private disputes demand that the bare words of the law be infused and warmed by recognition of purpose and result. The Constitution is not a set of neutral pronouncements. It is structure of law implicit with values: moral values, civic values, social values. It takes sides—usually the side of the individual, guarding his security, his dignity, his claims to equal and fair treatment, against the ponderous demands of the collective state. There is nothing neutral in the assertion of freedom of the press, in the guarantee against self-incrimination, in the guarantees of due process of law and equal protection of the laws.<sup>93</sup>

92 Virtually every commentator who has expressed himself on this point, has taken note of the basic fact of economics that denial of compensation for various items of damage suffered by individual citizens does not reduce the cost of the project, but only redistributes the incidence of that cost, so that "the public" in whose name the project is undertaken gets a windfall, while various innocent citizens bear a disproportionate proportion of such cost. See Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, *supra* note 7, at 344; Bragdon, *The Community Noise Problem: Factors Affecting Its Management*, 10 NAT. RES. J. 687, 696 (1970); Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, *supra* note 3, at 8; Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 451 (1962); Dygert, *A Public Enterprise Approach to Jet Aircraft Noise Around Airports*, in ALLEVIATION OF JET AIRCRAFT NOISE NEAR AIRPORTS 107, 111, 113 (1966); OFFICE OF NOISE ABATEMENT, DEPT. OF TRANSPORTATION, SUMMARY STATUS REPORT: FEDERAL AIRCRAFT NOISE ABATEMENT PROGRAM 6 (1968); SYSTEMS ANALYSIS & RESEARCH CORP., AIR TRAFFIC GROWTH, AIRLINE FINANCES, AND PUBLIC BENEFITS IN RELATION TO THE COST OF NEW PROGRAMS TO ALLEVIATE JET AIRCRAFT NOISE NEAR AIRPORTS 12 (1967); PANEL ON NOISE ABATEMENT DEPT. OF COMMERCE, THE NOISE AROUND US 120 (1970); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, *supra* note 3, at 1181; Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, *supra* note 5, at 544; Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, *supra* note 4, at 74; Aloï & Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, *supra* note 14, at 604; Berger, *Nobody Loves an Airport*, 43 SO. CAL. L. REV. 631, 679-81 (1970); Fadem & Berger, *A Noisy Airport Is a Damned Nuisance!* 3 SW. U. L. REV. 39, 49, n. 39 (1971); Berger, *You Know I Can't Hear You When the Planes Are Flying*, 4 URBAN LAW. 1, 3 (1972); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, *supra* note 3, at 96.

93 Friedman, *The Courts and Social Policy*, 47 CAL. S.B.J. 558, 563 (1972).

Once that premise is accepted, it should not be difficult to construe the words "just compensation" strictly in favor of the property owner who is the intended beneficiary of the constitutional scheme.

Moreover, whatever arguments of a historical nature one chooses to make (such as what was the framers' "real" intent), it must by now be plain to all, that the major thrust of the Supreme Court's constitutional construction of the last few decades points toward the strengthening of the notion that the purpose of the Constitution is to protect the individual in his confrontation with the government. Such judicial endeavors have been conspicuous in the areas of rights of criminal defendants,<sup>94</sup> political rights,<sup>95</sup> racial relations,<sup>96</sup> civil rights,<sup>97</sup> first amendment rights,<sup>98</sup> and have at times been quite controversial. But whether one agrees or disagrees with them, they plainly delineate the basic American constitutional theory of today—the government can and usually does take care of itself, while individual citizens are all too often deprived of a proper measure of their rights by the government which is supposed to serve them. Hence, the courts have implemented constitutional guarantees so as to interpose a shield between the citizen and governmental harshness.

Within this framework of modern constitutional theory it is difficult to find room for a doctrine which in the name of the "fairness and equity" embodied in the fifth amendment's just compensation command leads to results judicially acknowledged as "harsh" toward innocent citizens, and universally decried by the scholarly community as unsatisfactory, confusing, and unjust.

An intellectually honest economic approach to this problem likewise calls for selection of the indemnity theory as the proper one. One of the major concerns of the courts in delineating the boundaries of just compensation is a—sometimes voiced, sometimes concealed—concern that meaningful indemnification of owners will impose an undue strain on the public purse. This concern, however, is misplaced for several reasons.

First and foremost, it is an economic fallacy to say that public projects cost less when some components of their cost go uncompensated. The cost is precisely the same either way; the only difference between the two approaches is that under the less-than-indemnification theory of compensation, the damaged, but uncompensated, owners bear a greater portion of that cost.<sup>99</sup> As Professor Van Alstyne has stated: "The fundamental question that should be faced, . . . is not *whether* these costs will be paid; it is *who* will pay them, in accordance with *what* substantive and procedural criteria, and through *which* institutional arrangements."<sup>100</sup>

94 *E.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

95 *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962).

96 *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

97 *E.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

98 *New York Times Co. v. United States*, 403 U.S. 713 (1971).

99 In other words, if a Rolls Royce sells for \$20,000, and a man possesses the means of compelling a Rolls Royce dealer to part with one for \$5,000, he has not reduced the *cost* of that car by one penny. The man only succeeded in forcing the dealer to pay three-quarters of that cost.

100 Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, *supra* note 5, at 543-44 (emphasis in original).

Second, while the pertinent judicial polemics tend to be couched in terms of an asserted threat to public resources,<sup>101</sup> the fact is that the benefits generated by a great many public facilities and enterprises ultimately—and sometimes quite directly—inure to the private pecuniary benefit of various profit-making enterprises in the private sector of the economy. A conspicuous and currently lively example is the nationwide airport fracas, in which airports are increasingly being sued for damages caused by the unbearable noise of modern jet aircraft.<sup>102</sup> Although the responsible party has been held to be the airport operator,<sup>103</sup> the fact is that the most direct beneficiaries of avoidance of such liability are the airlines, as well as their passengers, and freight shippers,<sup>104</sup> who benefit respectively from enhanced profits and reduced cost of services they receive, while the neighbors of airports involuntarily subsidize them through reduced property values, destruction of their lives' amenities, and impaired health.

The same is true of the highway construction program. The excesses of the notorious "Highway Lobby" have been explored in detail in book-length

101 See, e.g., Justice Douglas' concern over "swollen verdicts" in his concurring opinion in *United States v. General Motors Corp.*, 323 U.S. 373, 385 (1945). Also, in *People v. Symons*, 54 Cal. 2d 855, 862, 9 Cal. Rptr. 363, 368, 357 P.2d 451, 456 (1960), the court, in justification of denying an owner proximity damages to his home, went through a colorful bit of Victorian hand-wringing by asserting that payment of compensation "... would impose a severe burden on the public treasury and, in effect, place 'an embargo upon the creation of new and desirable roads.'"

Such judicial dramas are worthy of some commentary. The fact is that not only is there no "embargo" in sight in California, but the state highway fund is experiencing huge surpluses annually:

<i>Fiscal Year Ending</i>	<i>Total Surplus</i>	<i>Unreserved Surplus</i>
1967	\$520,555,985	\$244,043,881
1968	\$546,312,698	\$236,747,252
1969	\$593,439,187	\$177,260,055
1970	\$522,116,743	\$ 17,282,633
1971	\$510,272,981	\$ 12,996,040

These figures were taken from the 1967-71 Statistical Supplements to Annual Reports of the [California] Department of Public Works Pertaining to The Division of Highways.

This cornucopia of road-building funds is derived in California almost entirely from motor-fuel taxes. CAL. CONST. art. 26. There are no toll roads in California. And if this weren't enough, in 1972 an additional 5% sales tax was imposed on gasoline, earmarked specifically for roads and other transportation needs of California cities and counties, which is estimated to generate another \$173,400,000 per year. See L. A. Times, June 25, 1972, § B, at 2. It becomes increasingly difficult to understand how the California Supreme Court, widely noted for its pioneering endeavors in liberalizing the right to compensatory damages in non-condemnation contexts, has chosen to deny compensation for serious damage, concededly suffered by innocent citizens, because of an unfounded fear of a fictional "embargo."

The original California case to intone the "embargo" bugbear was *Levee Dist. No. 9 v. Farmer*, 101 Cal. 178, 186 (1894). The holding of *Farmer* (having to do with compensability of a road closure) was expressly overruled in *Valenta v. County of Los Angeles*, 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394 P.2d 725 (1964). Thus, while *Farmer* may be a-moulderin' in its well-deserved grave, its spirit goes marchin' on, oblivious to the revolution in highway financing that has occurred since the late nineteenth century. Cf. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 431 (1935).

102 See, e.g., *Griggs v. Allegheny County*, 360 U.S. 84 (1962); *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P.2d 480 (1972); *Town of East Haven v. Eastern Airlines, Inc.*, 282 F. Supp. 507 (D. Conn. 1968). For an excellent exploration of such litigation see Berger, *Nobody Loves an Airport*, *supra* note 92.

103 *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

104 See Dygert, *A Public Enterprise Approach to Jet Aircraft Noise Around Airports*, *supra* note 92, at 107, 111, 113.

works.<sup>105</sup> It is no longer subject to serious dispute that the torrent of money generated by the various state and federal motor fuel taxes inures disproportionately to the benefit of a congeries of private entities consisting of the construction, construction materials, oil, rubber, trucking, and automobile and truck manufacturing industries.<sup>106</sup>

Also, in the case of urban redevelopment, there is not even any pretense at public utilization of the expropriated land. It is instead sold to private business entities, for the avowed purpose of making money from redeveloping the land in question.

Thus, the argument that various elements of damage suffered by condemnees must go without indemnification, lest the public purse suffer to the point of impairing construction of necessary public facilities is without merit—factually as well as conceptually. If the fears of the asserted threat to the public purse have any substance, the answer is to impose appropriate taxes on the economic benefits accruing to the private sector of the economy from the construction of public works. In the alternative, if the proposed project is all that expensive, it is certainly valid to question whether it should be constructed at all.<sup>107</sup> In any event, the answer is *not* to inflict uncompensated damage on innocent citizens.

In sum, the historical justifications for resistance to the indemnification theory of just compensation—whether factual, economic, or conceptual—break down when juxtaposed with the mid-twentieth century American society, and the constitutional theory it espouses.

### III. Someday Your Price Will Come

or

### Life Under the Sword of Damocles<sup>108</sup>

105 See KELLEY, *THE PAVERS AND THE PAVED* (1971); LEAVITT, *SUPERHIGHWAY—SUPERHOAX* (1970); MOWBRAY, *ROAD TO RUIN* (1969).

106 Note the political efforts of the Highway Lobby aimed at preserving the highway construction funds as untouchable by other public transportation needs. In California elections the Highway Lobby has made its power felt by massive and anonymous infusions of campaign funds to defeat a referendum which would have released some of the highway funds for mass rapid transit and air pollution research. See *Brown v. Superior Court*, 5 Cal. 3d 509, 96 Cal. Rptr. 584, 487 P.2d 1224 (1971); Rosenblatt, *How Highway Lobby Ran Over Proposition 13*, L. A. Times, Dec. 27, 1970, § F, at 1.

107 In recent decades, condemning agencies have persuaded the courts to bow to virtually any taking as sufficient to satisfy the constitutional "public use" requirement. See Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949). See also *Berman v. Parker*, 348 U.S. 26 (1954); *Linggi v. Garovotti*, 45 Cal. 2d 20, 286 P.2d 15 (1955). The necessity for governmental takings is altogether non-justiciable. *Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923). California courts have carried this rule to the point where the issue of necessity is non-justiciable even if there is fraud, bad faith and abuse of discretion by the condemnor. *People v. Chevalier*, 52 Cal. 2d 299, 340 P.2d 598 (1959). Note, however, that this rule has been severely and ably criticized. McIntire, "Necessity" in *Condemnation Cases—Who Speaks for the People?*, 22 HAST. L.J. 561 (1971).

Thus it is only fair that, having persuaded the courts to give them unbridled power to decide whether a given project is necessary, condemnors should not be heard to complain that the consequences of their decision are too expensive; and the courts should intervene by forcing the victims of public projects to bear a disproportionate share of the cost, while the "public" which benefits from those projects gets a windfall from such involuntary subsidies.

108 "It is one thing to have the sword of condemnation resting available but unpointed in the governmental sheath. It is another to have it suspended like that of Damocles directly above one's property." *Halpert v. Udall*, 231 F. Supp. 574, 579 (S.D. Fla. 1964) (Choate, J., concurring), *aff'd per curiam*, 379 U.S. 645 (1965).

The precondemnation "blight" of affected land may manifest itself in a number of ways, and be presented to the courts in a variety of procedural contexts. In some cases, the condemning agency announces or threatens that the subject property is about to be taken, but the taking never materializes,<sup>109</sup> leaving the owner with either a temporary or permanent loss of the use of his land.<sup>110</sup> In other situations, similar announcements or threats are made, but are followed by protracted delay; while the public project is never abandoned, its implementation is delayed so long that the owner is compelled to seek relief by filing an inverse condemnation action.<sup>111</sup>

Another, and more serious, problem arises where the condemnor—not content with the blighting effects of time and market pressures—decides to give events a little "help." In this situation, governmental blighting activity takes the form of denial of building permits,<sup>112</sup> sometimes coupled with a simultaneous demand that the owner make improvements to bring his building up to building code requirements.<sup>113</sup> Another governmental ploy is to notify tenants of the affected buildings that a taking is imminent, followed by protracted delay, thereby leaving the owner with a nearly empty building which produces no income, but continues to drain his resources through taxes, insurance premiums, and secured debt servicing.<sup>114</sup> The governmental arsenal of antiowner weapons has also been known to include the tactic of acquiring some buildings in the affected area, displacing their occupants and then leaving them empty and unguarded as an invitation to vandals and vagrants,<sup>115</sup> whose activities quickly produce a physical deterioration of the neighborhood and hasten the departure of remaining inhabitants. Sometimes normal municipal services—such as police protection and trash removal—are withheld, and general deterioration of the neighborhood is encouraged. And—in what is undoubtedly in the nature of rubbing salt in the wound—some entities have been known to raise the owners' taxes while preventing them from putting their land to any use whatever.<sup>116</sup>

The early judicial response to such problems was to ignore them. This is probably best illustrated by an incredible assertion of the Illinois Supreme Court

109 See, e.g., *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *Sanders v. Erreca*, 377 F.2d 960 (9th Cir. 1967); *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970); *Bank of America v. County of Los Angeles*, 270 Cal. App. 2d 165, 75 Cal. Rptr. 444 (1969), *disapproved*, *Klopping v. City of Whittier*, 8 Cal. 3d 39, 52, n. 5, 104 Cal. Rptr. 1, 11, n. 5, 500 P.2d 1345, 1355, n. 5 (1972); *Drakes Bay Land Co. v. United States* 424 F.2d 574 (Ct. Cl. 1970).

110 In *Hilltop Properties v. State*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965) the condemnor asked a developer to set aside a strip of land running through his subdivision to accommodate a future highway. After the subdivision was built the state's plans for the highway were dropped, leaving the owner with a useless strip of land. The owner was deemed entitled to compensation on an estoppel theory. But compare *Hamer v. State Highway Comm'n*, 304 S.W.2d 869 (Mo. 1957).

111 *Ream v. Handley*, 359 F.2d 728 (7th Cir. 1966); *Silva v. City & County of San Francisco*, 87 Cal. App. 2d 784, 198 P.2d 78 (1948).

112 *Hunter v. Adams*, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1960).

113 One court termed this "on again off again building code enforcement." *City of Cleveland v. Hurwitz*, 19 Ohio Misc. 184, 189, 249 N.E.2d 562, 566 (1969).

114 *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967).

115 *In re Urban Renewal, Elmwood Park*, 376 Mich. 311, 315, 136 N.W.2d 896, 899-900 (1965).

116 *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 850, 77 Cal. Rptr. 391, 396 (1969); *City of Houston v. Biggers*, 380 S.W.2d 700, 703 (Tex. App. 1964).

made only about a decade ago: "It is a well-recognized proposition of law that land is not damaged by reason of preliminary procedure looking to its appropriation to a public use."<sup>117</sup>

Of course, whether or not land is damaged can hardly be said to be "a proposition of law"; rather it is a question of economic *fact*,<sup>118</sup> which has been judicially recognized: "There is no question that property located within redevelopment project areas suffers drastically. . . ."<sup>119</sup>

In fairness to the judiciary, it should be noted that most of the judicial refusals to compensate blight victims were not based on such outright attempts to repeal the laws of economics. The problem was at first presented to courts in the procedural context of the owner waiting until condemnation proceedings were initiated to take his blighted property, and then seeking compensation undistorted by the damaging economic effects of the precondemnation governmental activities. In other words, by the time the condemning agency initiated formal expropriation proceedings, the actual market value of the affected property may have declined by reason of the factors discussed elsewhere in this article, so that the value of the subject property, particularly as reflected by comparable sales, would be depressed by such precondemnation activities, thereby resulting in an award reflecting the depressed value.

Early judicial response to such problems was harsh:

The market value is an effect and we are not governed by the cause that brings it about in order to determine it. The *market* value could have been neither greater nor less if the cause had been examined into.<sup>120</sup>

For a while the United States Supreme Court added its weighty voice to this judicial posture.<sup>121</sup> But, as already noted, this early judicial position was

<sup>117</sup> *Chicago Housing Authority v. Lamar*, 21 Ill.2d 362, 366, 172 N.E.2d 790, 792 (1961). The way in which *Lamar* arrived at this conclusion was by its strained interpretation of the "or damaged" clause of the Illinois constitution, as guaranteeing just compensation only for *severance* damages. *Id.* This is an unsound analysis, as severance damages are awarded under the "taking" guarantee. *United States v. Grizzard*, 219 U.S. 180, 184-85 (1911). The *Lamar* analysis thus ignores the rationale of the "or damaged" clause and effectively writes it out of the Constitution. *Compare Chicago v. Taylor*, 125 U.S. 161 (1888), where the Supreme Court, in construing the addition of the "damaged" clause to the Illinois constitution, aptly pointed out that such clause "would be meaningless" if it were held that it conferred no greater rights on property owners than the old Illinois constitution's protection against uncompensated "taking" of property. *Id.* at 168.

<sup>118</sup> Indeed, the foundation of the Holmesian theory of "taking" by overreaching applications of the police power is a recognition that governmental activity so diminishes the value of property as to be the equivalent of a "taking."

One fact for consideration in determining such limits [of police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

So the question depends upon the particular facts.

*Penna. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (emphasis added).

<sup>119</sup> *Levine v. City of New Haven*, 30 Conn. Sup. 13, 14, 294 A.2d 644, 645 (1972).

<sup>120</sup> *Atchison, etc., Railway Co. v. Southern Pac. Co.*, 13 Cal. App. 2d 505, 517, 57 P.2d 575, 582 (1936), *disapproved*, *Klopping v. City of Whittier*, 8 Cal. 3d 39, 49-50, 104 Cal. Rptr. 1, 9, 500 P.2d 1345, 1353 (1972).

<sup>121</sup> See discussion in note 7, *supra*. Similar expressions of the tenor that diminution in market value by precondemnation blight is a mere "incident" of ownership may be found. *Eckhoff v. Forest Preserve Dist.*, 377 Ill. 208, 211, 36 N.E.2d 245, 247 (1941); *A. Gettleman Brewing Co. v. City of Milwaukee*, 245 Wis. 9, 16, 13 N.W.2d 541, 546 (1944); *Cayon v. City of Chicopee*, 277 N.E.2d 116, 119 (Mass. 1971).

logically unsound and morally indefensible. In enhancement cases,<sup>122</sup> from the outset,<sup>123</sup> courts experienced no difficulty in confronting and analyzing the valuation problem of separating the positive increment of value generated by governmental precondemnation activity, from the value as it would have existed in the absence of such activity. Yet, in blight situations some courts professed an inability to deal with the problem and denounced attempts to do so as "unfathomable speculation."<sup>124</sup> Although the *Atchison* case<sup>125</sup> is something of a textbook example of the extent to which judicial unfairness in dealing with blight problems can be pushed,<sup>126</sup> it is hardly an isolated instance, at least in terms of result.<sup>127</sup>

While several earlier cases indicated that a condemnor should not be permitted to benefit from its own value-depressing, precondemnation activities,<sup>128</sup> the breakthrough came in the form of several cases from the midwest, in the wake of governmental abuses arising out of the massive urban redevelopment programs.

There can be no question to the right-thinking mind that Mrs. Nettie Carcione was subjected to outrageous and high-handed treatment by the City of Cleveland. The dubious governmental activities in *City of Cleveland v. Carcione*<sup>129</sup> and their disastrous impact on the Carcione property are detailed in the opinion, and should be read with care.<sup>130</sup> They included virtually the entire range of governmental blighting activities discussed elsewhere in this article, and persuasively demolish the, at best, naive judicial notion that "land is not damaged" by governmental activities preceding condemnation.<sup>131</sup>

The court's response to Mrs. Carcione's plight was based on two premises.

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122 These are cases in which the government announces a desirable public project, thereby causing land values in the surrounding area to go up. See *Merced Irrigation Dist. v. Woolstenhulme*, 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P.2d 1 (1971); *United States v. Miller*, 317 U.S. 369 (1943).

123 *E.g.*, *San Diego Land etc. Co. v. Neale*, 78 Cal. 63 (1888); *Nichols v. City of Cleveland*, 104 Ohio 19, 135 N.E. 291 (1922); *Smith v. Commonwealth*, 210 Mass. 259, 96 N.E. 666 (1911); *St. Louis Elec. Terminal Ry. Co. v. MacAdaras*, 257 Mo. 448, 166 S.W. 307 (1914); *Northern Pac. & P.S.S.R. Co. v. Coleman*, 3 Wash. 228, 28 P. 514 (1891).

124 See *Atchison, etc., Railway Co. v. Southern Pac. Co.*, 13 Cal. App. 2d 505, 57 P.2d 575 (1936). Notwithstanding *Atchison's* recent overruling, it is worthy of note because of its hostility to the property owner, which at times infects pertinent judicial analysis. The *Atchison* court denounced as "monstrous" the suggestion that the owner might collect the enhanced value of his land, and saw nothing unduly difficult in separating the enhancement increment from ostensible market value. Yet, in the same opinion, the court denounced as "unfathomable speculation" the suggestion that precisely the same legal and economic approach be in the blight situation.

125 13 Cal. App. 2d 505 (1936).

126 The deficient reasoning in *Atchison* has been abundantly criticized. Anderson, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, *supra* note 10, at 38-39; Comment, *Recovery for Enhancement and Blight in California*, *supra* note 10, at 648.

127 *San Diego Land etc. Co. v. Neale*, 78 Cal. 63 (1888); *Northern Pac. & P.S.S.R. Co. v. Coleman*, 3 Wash. 228, 28 P. 514 (1891); *Smith v. Commonwealth*, 210 Mass. 259, 96 N.E. 666 (1911); *St. Louis Elec. Terminal Ry. Co. v. MacAdaras*, 257 Mo. 448, 166 S.W. 307 (1914); *Nichols v. City of Cleveland*, 104 Ohio 19, 135 N.E. 291 (1922).

128 *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App. 2d 255, 258-59, 1 Cal. Rptr. 250, 253 (1959); *Congressional School of Aero. v. State Roads Comm'n*, 218 Md. 236, 245, 146 A.2d 558, 565 (1958).

129 118 Ohio App. 525, 190 N.E.2d 52 (1963).

130 *Id.* at 526-27, 190 N.E.2d at 53-54.

131 See text accompanying notes 108, 109, *supra*.

First, the court emphatically endorsed indemnification as the policy underlying the "just compensation" guarantee.<sup>132</sup> Second, the court focused on the decisional law denying an owner the right to collect for enhancement of his land. This principle was deemed analogous to blight, thereby calling for the formulation of a parallel rule of law.<sup>133</sup> In essence, the court concluded that what is sauce for the goose, should also be sauce for the gander.

The remedy fashioned by *Carcione* was to disregard the effect of the blight on value, and to evaluate the affected property as of the time immediately before the condemnor initiated its blighting activities.<sup>134</sup> In spite of the court's recognition of the various out-of-pocket losses inflicted on Mrs. Carcione—such as loss of rents and some \$11,000 expended on improvements ordered by the City as part of its "on again off again" enforcement of building codes—it did not address itself to such losses.

Notwithstanding the step forward that *Carcione* represented, its upshot was no more than to prevent overreaching condemnors from reaping the full benefit of their own value-depressing activities,<sup>135</sup> and, in reality, was far from approaching indemnity to the owner. This is so for several reasons. First, as noted above, this entire approach fails to compensate the owner for out-of-pocket losses suffered by him. Second, it proposes a remedy in the form of an early valuation date (*i.e.*, as of a time before the governmental blighting activity took its economic toll). Such a remedy is unsatisfactory in an inflationary economy; what it implies is that the owner is to be paid the "value" of his property which is not the fair (*i.e.*, unblighted) value as of the time of the taking, but the value as it was several years earlier. Under this method of valuation the owner—wholly apart from his out-of-pocket losses—loses the increment of value that would have accrued during those years by reason of inflationary factors and any real increases in value. In those parts of the country which are experiencing rapid population and economic growth, such a valuation theory can be seriously prejudicial to the owner.<sup>136</sup> Thus, to insure something closer to indemnification, a different theory was needed.

132 *City of Cleveland v. Carcione*, 118 Ohio App. 525, 529-31, 190 N.E.2d 52, 55-56 (1963).

133 *Id.* at 530, 190 N.E.2d at 56.

134 *Id.* at 531, 190 N.E.2d at 57.

135 For a fascinating insight into some condemnors' attitudes on this point, see *Jersey City Redevelopment Agency v. Kugler*, 111 N.J. Super. 50, 267 A.2d 64 (1970). The New Jersey legislature enacted two statutes, codifying a rule similar to *Carcione* (*i.e.*, requiring that properties taken as blighted under redevelopment schemes be valued at no less than their value as of the declaration of blight preceding the taking). Law of Oct. 10, 1967, ch. 218, § 1, [1967] N.J. Laws (repealed 1971); N.J. STAT. ANN. § 40:55-21.10 (1967), as amended, N.J. STAT. ANN. § 40:55-21.10 (Supp. 1972). The Jersey City Redevelopment Agency thereupon indignantly took the matter to court, seeking judicial declaration of constitutionally based invalidity of these statutes. The Agency had the temerity to complain that the legislative elimination of the windfall to condemnors in the form of acquiring properties at their depressed-by-blight value was a "gift of public funds." The court saw "no merit at all" in this contention and ruled against the Agency. *Jersey City Redevelopment Agency v. Kugler*, *supra* at 57, 267 A.2d at 69.

136 For example, it is not uncommon in California for land in certain areas to experience a 10 per cent annual appreciation in value. In such circumstances, requiring the owner to accept the value of his property as it was five or more years before the taking is to deprive him of a very substantial portion of that which is taken from him.

As a Texas court stated, quoting from a witness' testimony:

[I]f [the condemnor] wanted to take this property back in 1954 when the project was

One such theory was formulated by another line of cases arising in the mid-west, again out of the redevelopment project excesses.<sup>137</sup> As in *Carcione*, the redevelopment agency in Detroit was following the familiar pattern of blighting, which eventually compelled the aggrieved owners to seek relief. The most far-reaching consequence was the decision of Mr. Thomas E. Foster to seek relief in the federal courts on the theory that the blighting activities constituted a deprivation of his property without due process of law, and, as such, gave rise to a federal issue justiciable in the federal courts under 28 U.S.C. § 1331.<sup>138</sup> *Foster v. Herley*,<sup>139</sup> however, proved to be seminal. By reversing the trial court's dismissal of the original *Foster* action, the Sixth Circuit<sup>140</sup> recognized the viability of the theory that governmental blighting activity could, depending on the facts, amount to an uncompensated "taking" which was impermissible as a matter of federal constitutional law operating on the states through the due process clause of the fourteenth amendment.

The *Foster* decision was noted by the Supreme Court of Michigan, which promptly proceeded to apply this doctrine in *In re Urban Renewal, Elmwood Park*,<sup>141</sup> a case involving the same Detroit redevelopment project. The procedural posture of *Elmwood Park*, however, was different than in *Foster*. Here the owner did not take the initiative, but awaited the condemnation proceedings in which he raised his theory—namely, that in unusual circumstances the concept of "taking" should be applied to governmental activity falling short of physical appropriation or overreaching legislation, and that the city's blighting activities fell within this concept.<sup>142</sup> The court agreed, and remanded the case for trial to determine the date of such *de facto* taking.<sup>143</sup>

The *Elmwood Park* court also established a formula for fixing just compensation under such circumstances. The owner is deemed entitled to the value of the property as of the time of "taking" as determined by the jury, *less* the net rents received by the owner during the time following the taking, *plus* interest on the award accruing from the time of the "taking" to the payment of the award.<sup>144</sup> The court did not consider—and the owner did not claim—incidental damages.

While the *Elmwood Park* opinion did not contain any significant policy discussion—the court's conclusion rested largely on the basis of interpretation of earlier Michigan law—the opinion leaves little doubt that the court, by its

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started they had the same right to do it as they had to take it in 1958. But they didn't, and they couldn't sit down for four years in peace, and tie up this man's land for four years . . . and at that time try to roll back the price to 1954. . . .

State v. Cartwright, 351 S.W.2d 905, 906 (Tex. App. 1961).

137 *E.g.*, *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964); *In re Urban Renewal, Elmwood Park*, 376 Mich. 311, 136 N.W.2d 896 (1965).

138 *E.g.*, *Foster v. Herley*, 207 F. Supp. 71 (E.D. Mich. 1962), *rev'd*, 330 F.2d 87 (6th Cir. 1964); compare *Ream v. Handley*, 359 F.2d 728 (7th Cir. 1966). But note that the substantive rationale of *Ream* was overruled in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

139 207 F. Supp. 71 (E.D. Mich. 1962).

140 *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964).

141 376 Mich. 311, 136 N.W.2d 896 (1965).

142 *Id.* at 316, 136 N.W.2d at 899.

143 *Id.* at 317-18, 136 N.W.2d at 900.

144 *Id.* at 318-19, 136 N.W.2d at 900-01.

repeated emphasis of the word "just" as qualifying the word "compensation,"<sup>145</sup> expressed at least an implicit endorsement of the indemnification theory of compensation.

But, notwithstanding the progress represented by *Elmwood Park* and *Foster*, the state of the law continued to suffer from deficiencies. For, under such compensatory scheme, the owner still finds himself uncompensated for various out-of-pocket "incidental" losses suffered by him (e.g., loss of rents, loss of use for owner-occupied properties, cost of maintaining the property, etc.). Moreover, the interest accruing on his award—usually so-called legal interest fixed by statute—can be unrealistic when compared to currently prevailing interest rates, thereby falling short of providing an adequate measure of just compensation.<sup>146</sup>

Recognition of these facts came in the innovative opinion of the Wisconsin Supreme Court in *Luber v. Milwaukee County*.<sup>147</sup> The *Luber* facts, while basically similar, were considerably less virulent than the *Carcione - Elmwood Park - Foster* pattern of deliberately inflicted outrage. The *Luber* parcel was occupied by a tenant who, as a bottler and wholesaler of liquor, was required for purposes of licensing to maintain a long-term lease on the occupied premises. (The tenant had been occupying the *Luber* parcel for 20 years.) When it became known that governmental acquisition was imminent, the tenant refused to renew the lease and vacated the premises. Notwithstanding the owners' reasonable efforts, no replacement tenant could be found. Thus the owners were compelled to continue maintaining and paying taxes on the now unproductive building.

The Wisconsin legislature, apparently more enlightened than most others, had anticipated such problems by enacting a statute<sup>148</sup> permitting owners caught in such a predicament to recover as part of their condemnation award the rents lost by reason of blight. However, this legislation limited such recovery to losses incurred during the one year preceding the condemnation.

The court's approach to the problem of compensation was a triumph of modern legal thought over the nineteenth century notions that make up much of the bases of eminent domain law. The court proceeded directly to the inquiry of what is the "property" which is protected by the constitutional guarantee of just compensation. It concluded that it was dealing with property *interests* rather than with things. The court noted the widespread scholarly disapproval

<sup>145</sup> *Id.* at 319-20, 136 N.W.2d at 901.

<sup>146</sup> While a number of states have statutes providing for award of legal interest on condemnation awards, the origin of this rule is constitutional. *Metropolitan Water Dist. v. Adams*, 16 Cal. 2d 676, 680-83, 107 P.2d 618, 621-23 (1940); *L.A. Flood Control Dist. v. Hansen*, 48 Cal. App. 2d 314, 317, 119 P.2d 734, 738 (1941); *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933).

The theory underlying these cases is that where the just compensation is not paid contemporaneously with the taking, the owner is entitled to an additional increment of compensation to indemnify him for the delay. And legal interest, it has been held, is a reasonable measure of such additional compensation. In the "good old days" of low interest rates, this may have been adequate, but today it usually is not. *See City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 258, 321 N.Y. Supp. 2d 345, 360, 269 N.E.2d 895, 910 (1971); *United States v. 100 Acres of Land, etc., Marin Cty., Cal.*, 468 F.2d 1261, 1269-70 (9th Cir. 1972).

<sup>147</sup> 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

<sup>148</sup> WIS. STAT. ANN. § 32.19 (1964), *as amended*, WIS. STAT. ANN. § 32.19 (Supp. 1972).

of judicial failure to recognize incidental losses as part of "just compensation." In proceeding to deal with this problem, the court exposed the various familiar fallacies of accumulated conventional wisdom, and rejected the notions that just compensation is in the nature of an *in rem* right and that incidental losses are not compensable because the condemnor derives no benefit from them. The court's conclusion bears repeating:

We believe that one's interest in rental loss is such as is required to be compensated under the "just compensation" clause. . . . Sec. 32.19(4), Stats., insofar as it limits compensation for the taking of such interest is in conflict with the state constitution. *The rule making consequential damages damnum absque injuria is, under modern constitutional interpretation, discarded* and sec. 32.19(4), Stats., insofar as it limits compensation is invalid.<sup>149</sup>

The dissent in *Luber* bears mention since it provides a fascinating insight into the diversity of judicial approaches to the problem of blight. The dissenters hewed to the established judicial orthodoxy, and accused the majority of "amending" the constitution:

The majority, by equating loss of rent with a taking, are construing the constitutional provision as if it read: The property of no person shall be taken *or damaged* for public use without just compensation therefor. This is an unfortunate, and in my opinion an impermissible judicial amendment to the constitution.<sup>150</sup>

Note, however, that in at least two states whose constitutions do contain an "or damaged" clause, the courts have refused to adopt the *Luber* indemnification approach.<sup>151</sup> This juxtaposition of judicial approaches to the problem constitutes a penetrating insight into the familiar phenomenon that eminent domain opinions all too often are heavily laden with semantic devices designed to bend judicial analysis toward a desired result, without disclosing the true criteria of the decision-making process. The colloquialism—*there ain't no reason for it; it's just our policy*—comes readily to mind.

Following *Luber* there have been two major decisions in the area of blight, one from New York<sup>152</sup> and one from California.<sup>153</sup>

*City of Buffalo v. J. W. Clement Co.*<sup>154</sup> has received attention from commentators, some of whom have subjected its reasoning to well-founded criticism.<sup>155</sup> To properly discuss *Clement*, one must bear in mind its virtually *sui generis* facts. The J. W. Clement Company is one of the largest printers in the world. The *Clement* opinion indicates that during the time of the con-

149 *Luber v. Milwaukee County*, 47 Wis. 2d 271, 280, 177 N.W.2d 380, 386 (1970) (emphasis added).

150 *Id.* at 281, 177 N.W.2d at 387 (emphasis in original).

151 *Chicago Housing Authority v. Lamar*, 21 Ill. 2d 362, 172 N.E.2d 790 (1961); *Uvodich v. Arizona Bd. of Regents*, 9 Ariz. App. 400, 453 P.2d 229 (1969).

152 *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y. Supp. 2d 345, 269 N.E.2d 895 (1971).

153 *Klopping v. City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972).

154 28 N.Y.2d 241, 321 N.Y. Supp. 2d 345, 269 N.E.2d 895 (1971).

155 See Comment, 72 COLUM. L. REV. 772 (1972).

trovery, the company printed *Time*, *Life*, *Reader's Digest*, and some one hundred million paperback books per year. It takes no expertise in the face of those facts to visualize an enormous printing plant containing extremely large and complicated machinery. Obviously, one does not move this kind of enterprise by summoning a moving van; it is an endeavor that involves years of planning and construction, and requires the owner to enter into substantial long lead-time commitments for a new plant, machinery, etc.<sup>156</sup> Not surprisingly, Clement maintained close contacts with Buffalo redevelopment agency personnel and carefully scheduled its acquisition of new facilities and transfer of its operations to a new site, only after extended communications with the responsible—or, as it later turned out, irresponsible—city officials.<sup>157</sup>

While this was going on, the by now familiar pattern of blight and deterioration was taking place, spurred by what the court termed "a pattern of continuous agitation" resulting from "... various newspaper reports and the minutes of concerned public agencies. . . ." Also utilized to hasten blight was the now familiar ploy of denying all building permits.<sup>158</sup>

Clement completed its move in April, 1963, precisely according to the city's schedule, which called for acquisition of the Clement property in May, 1963.<sup>159</sup> It was only *then*, *after* Clement had moved, that the city officials decided that in spite of a decade of planning and scheduling they were not ready, after all, to acquire the Clement property. While the Court of Appeals, for rather obscure reasons,<sup>160</sup> dwelt at length on the history, growth, and motivation of Clement, it

156 See *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309, 44 P.2d 547 (1935), where the City of Los Angeles was enjoined from abandoning the condemnation of the old Los Angeles Times printing plant, because of the enormous commitments made by the owners to secure a substitute plant.

157 The facts recited by the court make it clear that there were extensive communications between Clement and the city, extending between 1954 and 1963, and that Clement's move in 1963 conformed precisely to the schedules and forecasts supplied by the city. *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 248, 321 N.Y. Supp. 2d 345, 351, 269 N.E.2d 895, 899 (1971). The court's later conclusion that there was only "mere announcement of impending condemnations" should be recognized for the triumph of rhetoric over reality that it is. *Id.* at 257, 321 N.Y. Supp. 2d at 359, 269 N.E.2d at 904.

158 *Id.* at 249, 321 N.Y. Supp. 2d at 352, 269 N.E.2d at 900.

159 *Id.* at 249, 321 N.Y. Supp. 2d at 352, 269 N.E.2d at 899.

160 The closest the court comes to enlightening the readers of its opinion as to the significance of its discussion of Clement's history is its observation that Clement had been experiencing steady growth since its founding in 1908, and in 1960, six years *after* it received the first notice of the city's redevelopment plan, it made a decision to seek substitute facilities. *Id.* at 250-51, 321 N.Y. Supp. 2d at 353, 269 N.E.2d at 900. Hence, said the court, Clement's motivation in moving was mixed; it was compounded of a desire to meet the city's acquisition schedule, and also of a desire to expand. *Id.* at 251, 321 N.Y. Supp. 2d at 353, 269 N.E.2d at 901. From this premise the court leaped to the *non sequitur*:

[T]o expand the current concept of *de facto* taking on the facts herein may well be to allow all property owners to seek refuge under the broader umbrella of *de facto* appropriation as soon as the proposed condemnation is announced, irrespective of their underlying motivation; and, perhaps even more importantly, despite the fact that the owner has the right to remain in quiet possession for as many as four or five additional years.

*Id.* at 251, 321 N.Y. Supp. 2d at 353-54, 269 N.E.2d at 901. Two observations seem appropriate. First, this rhetoric ignores the Clement trial court finding that Clement "... waited to [move] until the last possible moment that a prudent businessman could wait." *Id.* at 252, 321 N.Y. Supp. 2d at 355, 269 N.E.2d at 901. Such finding was eminently sound. Recall that Clement moved out in April, 1963, *precisely* in conformance with the City's schedule, which called for acquisition of the Clement property in May, 1963. Second, the court was, in effect, indulging in a sweeping indictment of the New York judiciary as incapable of distinguishing between meritorious and spurious claims. The response of the California Supreme Court to

failed to say a word about the reasons *why* the redevelopment agency officials suddenly changed their acquisition schedule *after* Clement had moved. In this context, it is impossible not to entertain grave doubts about the *bona fides* of their conduct.<sup>161</sup> Indeed, the absence in the court's discussion of any justification for the city's conduct leaves open the possibility that city officials victimized Clement by springing a trap, were guilty of gross bureaucratic blundering. None of this, however, was considered, for which the court deserves severe criticism. For, if the City of Buffalo or its redevelopment agency were themselves the victims of some unforeseen budgetary or other *legitimate* planning contingency, this would have added some moral justification to their conduct. If, on the other hand, the city officials were guilty of "setting up" Clement by inducing it to move, and then deliberately delaying acquisition, the court lent the prestige of its imprimatur to, at best irresponsible and at worst fraudulent, municipal conduct—something one would not expect from the prestigious New York Court of Appeals.

Clement's position was that the conduct of the city amounted to a *de facto* taking.<sup>162</sup> Its view carried the day in the intermediate appellate court,<sup>163</sup> but the Court of Appeals reversed in an opinion which is noteworthy for its blindness to the realities of blight. In the final analysis, that opinion constitutes an invitation to governmental entities to engage, not only in the various vicious blighting activities described earlier, but also in blatant fraud *vis-à-vis* citizens who turn to their government for information upon which to base their vital affairs.

Moreover, the *Clement* opinion is internally inconsistent, in that it fails to heed the criteria which it enunciates. The court summarized the criteria of a *de facto* taking:

[A] *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or

such an argument, made in the context of tort litigation, bears repeating:

Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier. Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious.

Dillon v. Legg, 68 Cal. 2d 728, 737, 69 Cal. Rptr. 72, 78, 441 P.2d 912, 917 (1968).

161 One commentator has suggested that "... the city had indicated its good faith by reducing the tax rate on the claimant's property." Comment, 40 FORDHAM L. REV. 698, 706, n. 73 (1972). Perhaps so, but the following caveat may be posited. Pragmatically speaking, there is no such thing as an act of "the city"; there are only acts of city officials. Thus the reduction in taxes may be indicative of the fact that the Buffalo tax assessor was a fair man. It, however, tells us nothing, one way or the other, about the *bona fides* of the redevelopment agency officials. But even assuming the absence of a subjective intent to damage Clement, the conduct of the redevelopment agency officials can hardly be characterized as reasonable.

162 See *City of Buffalo v. George Irish Paper Co.*, 31 A.D.2d 740, 299 N.Y. Supp. 2d 8 (1969). The concept of *de facto* taking had been employed by several jurisdictions to permit a measure of relief to blighted owners. Particularly, where the pertinent constitutional provision guarantees only against uncompensated "taking" the courts found the concept of *de facto* taking useful as a means of permitting recovery. *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380 (1970); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *In re Urban Renewal, Elmwood Park*, 376 Mich. 311, 136 N.W.2d 896 (1965).

163 *City of Buffalo v. J.W. Clement Co.*, 34 A.D.2d 24, 311 N.Y. Supp. 2d 98 (1970).

enjoyment of the property or a legal interference with the owner's power of disposition of the property.<sup>164</sup>

The policy basis of that rule was noted by the court:

[T]he policy of this State has been to deny recovery in the absence of a substantial impairment of the claimant's right to use or enjoy the property at any time prior to the date of final appropriation. Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a *taking* so as to warrant awarding compensation.<sup>165</sup>

These assertions, however, do not withstand analysis. First, even though the record in *Clement* disclosed that "... the Department of Buildings had been directed to deny *all* applications for building permits in the area. . ."<sup>166</sup> the court simply ignores that fact. Isn't an arbitrary denial of *all* building permits tantamount to "... a substantial impairment of the claimant's *right to use or enjoy the property at any time prior to the date of final appropriation*"?<sup>167</sup> Or, at the very least, even if the court felt inclined to answer that question in the negative, was it not incumbent on the court to analyze the issue?<sup>168</sup> Instead, it was swept under the rhetorical rug: "... mere announcement of impending condemnations coupled . . . with substantial delay and damage . . ." is not compensable. But the record disclosed not a "mere announcement," but rather, what the court itself termed, "a pattern of continuous agitation" over a period of nine years. In short, the *facts* recited by the *Clement* opinion belie the court's conclusion that all there was, was a "mere"<sup>169</sup> announcement of a future taking.<sup>170</sup>

164 *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 255, 321 N.Y. Supp. 2d 345, 357, 269 N.E.2d 895, 903 (1971).

165 *Id.* at 257, 321 N.Y. Supp. 2d at 359, 269 N.E.2d at 904 (emphasis in original).

166 *Id.* at 249, 321 N.Y. Supp. 2d at 352, 269 N.E.2d at 900 (emphasis added).

167 *Id.* at 257, 321 N.Y. Supp. 2d at 359, 269 N.E.2d at 904 (emphasis added).

168 In this day and age, where building permits are required by law for virtually *any* construction, remodelling, improvement, or even significant repairs, it is not unwarranted to conclude that a denial of *all* building permits is tantamount to a denial of use and enjoyment of the affected land. See *Eleopoulos v. Richmond Redevelopment Agency*, 351 F. Supp. 63, 64 (N.D. Cal. 1972).

169 The *Clement* opinion is something of a rhetorical masterpiece in its use of the disparaging adjective "mere." The court also used that word when it solemnly pronounced that "mere" personalty is not compensable. *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 259, 321 N.Y. Supp. 2d 345, 360, 269 N.E.2d 895, 906 (1971). Why not? The constitution protects all property, not just real property. *Armstrong v. United States*, 364 U.S. 40 (1960) (liens on ship held to be compensable); *Lynch v. United States*, 292 U.S. 571 (1934) (contracts held to be compensable); *Sutfin v. State*, 261 Cal. App. 2d 50, 67 Cal. Rptr. 665 (1968) (holding personal property to be compensable). If, in the context of compensability of fixtures, the *Clement* court wished to hold personalty removable and hence non-compensable, that may have been an arguable, though possibly unjust, conclusion. Cf. *Mackie v. Miller*, 5 Mich. App. 591, 147 N.W.2d 424 (1967); *Singer v. Redevelopment Auth. of City of Oil City*, 437 Pa. 55, 261 A.2d 594 (1970). But "mere" personalty? Suffice to say this: if the author of the *Clement* opinion should find himself relieved of his wallet by a pickpocket, I seriously doubt that his justifiable outcry of "Stop! Thief!" would be muted by the suggestion that the miscreant was only getting away with "mere" personalty.

170 Compare the following conclusion in *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 371 (E.D. Mich. 1970), made on similar facts:

Nor does this critical assessment of *Clement* stop here. The court predicated its analysis on the tacit assumption that the owner whose property is subjected to "blight" (as opposed to *de facto* taking) can continue carrying the expenses of ownership of his property indefinitely; at least until the formal expropriation comes, at which time he would receive his compensation, adjusted so as to exclude the blighting effect. This, of course, is a fallacious theory, even on its own premise. Many owners with a vacant and unproductive building, which generates no revenue while consuming the continuing costs of taxes, secured debt service, insurance premiums, security, and maintenance, go under and lose their properties by bankruptcy or foreclosure.<sup>171</sup> Others are forced to sell for whatever they can get, and thus never recover the true measure of their just compensation.

Even Mr. Julius Sackman, who appeared *amicus curiae* in *Clement*, in support of the City of Buffalo,<sup>172</sup> has since publicly expressed concern over this palpable injustice:

[I]t is submitted that, in all fairness and justice, and if the constitutional mandate of "just compensation" is to be respected, the "losses" referred to<sup>[173]</sup> must necessarily include the real and actual lost *fruits* of the ownership—the lost rentals—and the additional expenses which are required to *preserve* the ownership up to the date of formal vesting, without which the condemnee would lose the very basis for compensation for the *first* element of damages—the property itself.<sup>174</sup>

Mr. Sackman makes eminently good sense. If the owner is driven into foreclosure and loses his property, then no amount of judicial pigeonholing of his predicament as "blight" can obscure the fact that his property has been taken from him by the acts of the condemnor, as surely as if it had been seized. To such an owner, judicial pie-in-the-sky promises that someday his just com-

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Plaintiff's property was plagued by threats of condemnation beginning with the original expansion plans announced by Wayne State University; the black crepe was hung with each published news report concerning the renewal project, each circular to those in the vicinity concerning eventual acquisition, each demolition of a nearby building, each denial of normal services and safeguards. No *lis pendens* on file ever provided a more effective notice to the public to avoid dealings with "the plagued"; no actual condemnation proceeding ever carried any greater finality from a business standpoint than a constant, powerful, capable and continuously published threat of condemnation. . . .

. . . . The totality of these acts by the Defendant City contributed to and accelerated the decline in value of plaintiff's property in 1962 so as to constitute a "taking" of that property within the meaning of the 5th Amendment to the United States Constitution. For such "taking," just compensation must be paid to plaintiffs.

171 See *Sayre v. United States*, 282 F. Supp. 175 (E.D. Ohio 1967); *Klopping v. City of Whittier*, 8 Cal. 3d 39, 100 Cal. Rptr. 363, 500 P.2d 1345 (1972).

172 *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 247, 321 N.Y. Supp. 2d 345, 350, 269 N.E.2d 895, 899 (1971). Mr. Sackman is the author of *Nichols' on Eminent Domain*.

173 This is a reference to a statement in *Niagara Frontier Bldg. Corp. v. State*, 33 A.D.2d 130, 133, 305 N.Y. Supp. 2d 549, 552 (1969), *aff'd*, 28 N.Y.2d 775, 321 N.Y. Supp. 368, 269 N.E.2d 912 (1971) that: "[T]he state should not be permitted to benefit from any loss sustained by claimant as the result of the State's acts beginning in 1961."

174 Sackman, *Condemnation Blight—A Problem in Compensability and Value*, *supra* note 10.

pensation may come (and then again, maybe it won't)<sup>175</sup> (i.e., after perhaps a decade or more of blight and ruinous out-of-pocket expenses, the owner, if he lasts that long, will receive "just compensation" limited to the value of his property as it would have been without the "blight," or worse, as it was before the blight) smack of mockery.

But by far the most serious criticism to be leveled at *Clement* is its encouragement of governmental officials to act irresponsibly and fraudulently. The pragmatic essence of *Clement* is that anything goes, as long as there is neither physical invasion of the owner's interest, nor a direct restraint on his rights imposed by a law.<sup>176</sup> That this is virtually a broad wink to condemning agencies to sock it to owners by way of blighting activities falling short of *physical* interference and legislative enactments, can scarcely be the subject of serious dispute. They have, under *Clement's* reasoning, nothing to lose and everything to gain from such immoral conduct. If "a pattern of continuous agitation"<sup>177</sup> over a period of a decade, during which all building permits are denied, vacancies are common, and the area falls into "general disrepair,"<sup>178</sup> can be dismissed by a deft turn of judicial phraseology as "mere announcement of impending condemnations,"<sup>179</sup> there is very little that an imaginative condemnor cannot get away with.<sup>180</sup> Indeed, this Orwellian approach rewards governmental irresponsibility and drives a wedge of suspicion and distrust between the citizen and his government. In light of *Clement*, a conscientious New York attorney would have to counsel his clients that they must work on the assumption, whether true or not, that their government officials are liars (or, at best, unreliable bunglers) whose word is not to be trusted, and whose solemn assurances and official schedules must be viewed as completely untrustworthy. If that is the "policy" of the State of New York, it is a "policy" that could surely stand some overhauling, hopefully

175 See *Bank of America v. County of Los Angeles*, 270 Cal. App. 2d 165, 75 Cal. Rptr. 444 (1969), *disapproved*, *Klopping v. City of Whittier*, 8 Cal. 3d 39, 100 Cal. Rptr. 363, 500 P.2d 1345 (1972); *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *Hilltop Properties v. State*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965); *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970).

176 As noted earlier, the *Clement* court at least tacitly did not consider the arbitrary, blanket denial of all building permits to be a legal restraint, thus leaving one to wonder as to what manner of governmental overreaching that court would consider to be a sufficiently "legal" restraint.

177 *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 249, 321 N.Y. Supp. 2d 345, 352, 269 N.E.2d 895, 900 (1971).

178 *Id.*

179 *Id.* at 257, 321 N.Y. Supp. 2d at 359, 269 N.E.2d at 904.

180 One student commentator has naively suggested that *Clement's* holding is protective of the owner's rights because "... any reduction in property value, caused by such delay will be restored to the owner in the form of a condemnation award." Comment, 40 *FORDHAM L. REV.* 698, 706 (1972). Such unsophisticated arguments miss the mark entirely because they presuppose that (a) the owner will be able to retain his property until the condemnation comes and not lose it through bankruptcy or foreclosure, and (b), when the condemnation finally comes, the owner will have the economic resources and the will to plunge into lengthy and costly litigation with its attendant risks and uncompensated expenses. See 5 *NICHOLS*, *supra* note 1, at § 23.6[3]. What the above-cited commentator fails to understand is that suffering several years' out-of-pocket losses incurred in carrying and protecting an unproductive building can, and often does, drive the owner to the wall, and compels him to accept an *inadequate* price, if only to be able to be rid of the economic ball and chain that his property has become and to enable him to salvage whatever he can to start anew elsewhere. See text accompanying note 184, *infra* (the readers ought to reflect on the predicament of the owner quoted there as assessing such governmental activities as "Mafia tactics").

from that state's Commission on Eminent Domain which is currently at work in an effort to improve the concededly undesirable posture of New York's eminent domain law.<sup>181</sup>

The most recent—and, it is submitted, soundest—legal analysis of the problem has been enunciated by the California Supreme Court in *Klopping v. City of Whittier*.<sup>182</sup> Whittier decided to construct public parking facilities; accordingly it initiated condemnation proceedings against owners of the affected land. Because of a second lawsuit by a third party challenging the bond financing of the parking facilities, the city found itself unable to market its bonds and pay for the subject property. The condemnation was dismissed.<sup>183</sup> However, in the very resolution to dismiss the condemnation, the city also resolved to renew condemnation of the subject property if, and when, the bond litigation was successfully completed.<sup>184</sup>

In 1967, about two years after the city's first resolution to condemn the subject property, Klopping and Sarff, owners of two parcels within the affected area, brought inverse condemnation actions to recover for their losses caused by the blight resulting from the city's "on again, off again" condemnation announcement and delay. The city's demurrers to these actions were sustained and dismissals followed.<sup>185</sup> The intermediate appellate court affirmed on the basis of a sweeping assertion—reminiscent of *Clement*—that ". . . the mere fact that a condemning authority announces its intention to condemn in the future, thereby depreciating the value of property between the date of the announcement and the actual filing of the action, is *damnum absque injuria*."<sup>186</sup> The

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It must be recognized that a protracted life "under the sword of Damocles" sets the stage for a situation where the condemnor can make an offer that the owner "cannot refuse." Under *Clement*, if the owner fails to accept the low offer, all the condemnor has to do is delay some more, while continuing the "pattern of continuous agitation" and exacerbating the "general disrepair" of the neighborhood. No owner can hold out indefinitely under such circumstances. Compare Comment, 72 COLUM. L. REV. 772, 780 (1972), in which another student commentator ably spotlights these problems.

The pragmatic remedy of the owners thrust into such predicament may come from the federal courts. See *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970) (an owner subjected to blighting activities may accept the inadequate offer of the state condemning agency, and then bring an action in the federal courts to recover the balance).

181 See generally 1971 Report of the [New York] State Commission on Eminent Domain.

182 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972). The author of this article represented the *Klopping* owners in the California Supreme Court. It may be appropriate, therefore, to remind the readers of the observation of Mr. Justice Douglas: "The reader should know through what spectacles his adviser is viewing the problem." Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 229-30 (1965).

183 In an attempt to evade its legal responsibility to pay the owners' litigation costs upon abandonment of a condemnation, see CAL. CIV. PROC. CODE § 1255a (West 1972), the city engaged in a semantic ploy of calling the abandonment of the condemnation a dismissal, but the courts disagreed. See *City of Whittier v. Aramian*, 264 Cal. App. 2d 683, 70 Cal. Rptr. 805 (1968).

184 *Klopping v. City of Whittier*, 100 Cal. Rptr. 363, 366 (Cal. App. 1972).

185 *Klopping v. City of Whittier*, 8 Cal. 3d 39, 43, 104 Cal. Rptr. 1, 5, 500 P.2d 1345, 1348 (1972).

186 *Klopping v. City of Whittier*, 100 Cal. Rptr. 363, 365 (Cal. App. 1972). Note that under California practice, when the Supreme Court grants a hearing, the opinion of the intermediate appellate court is automatically vacated. Thus, the above-cited opinion is, under California law, of no legal or precedential effect. See Gustafson, *Some Observations About California Courts of Appeal*, 19 U.C.L.A. L. REV. 167, 175 (1971).

California Supreme Court granted a hearing and reversed the trial court's judgment of dismissal.<sup>187</sup>

*Klopping* established a number of criteria, substantive and procedural, for the resolution of blight<sup>188</sup> controversies. The court was willing to go along with the *Clement* classificatory scheme of segregating "blight" and "*de facto* taking" as separate problems;<sup>189</sup> however, it also recognized the existence of an area of interference with an owner's property rights, falling short of a *de facto* taking, but causing damage incapable of being included in any adjustment of the market value of the blighted property to its but-for-the-blight value, as was done in *Carcione* and *Clement*. The California Supreme Court established a test of reasonableness:

[W]hen the condemnor acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a *de facto* taking of the property so as to measure the fair market value as of a date earlier than that set statutorily. . . .<sup>190</sup>

In reaching this conclusion, the court relied heavily on *Luber* and quoted

187 Actually, the reversal applied only to Sarff. As to *Klopping* the judgment was affirmed on the theory that *Klopping* should have sought his damages in the direct condemnation action which the city filed after the inverse condemnation actions were brought. While this result was harsh as to *Klopping*, compare *England v. Medical Examiners*, 375 U.S. 411, 422-23 (1964) (litigants who contended for and established a new rule, but who would be denied relief under the technical application of that rule as finally formulated, should nevertheless be permitted to enjoy its benefits), it simplified the procedure and evidentiary presentation in such controversies.

188 While the court eschewed the use of the term "condemnation blight," deeming that term to be the converse of "enhancement" (*i.e.*, the impact of pre-condemnation activities on the market value) and not applicable to losses falling outside fluctuations in market value, the generic use of that term has now become so established by usage among the condemnation bar, that a change in terminology at this point would more likely confuse than enlighten. See discussion in note 2, *supra*.

189 *Klopping v. City of Whittier*, 8 Cal. 3d 39, 45, 104 Cal. Rptr. 1, 6, 500 P.2d 1345, 1350 (1972). Note that the California Supreme Court erroneously attributed to *Clement* the articulation of the "prevailing rule" that "... before a *de facto* taking results there must be a 'physical invasion or direct legal restraint.'" *Id.* at 46, 104 Cal. Rptr. at 7, 500 P.2d at 1351. In fact, this position taken by *Clement* represents a minority view, while several other cases have held that blighting activities falling short of *physical* invasion or *direct* legal restraint can give rise to a taking. *In re Urban Renewal, Elmwood Park*, 376 Mich. 311, 136 N.W.2d 896 (1965); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 136 (6th Cir. 1968); *Luber v. Milwaukee County*, 47 Wis. 2d 271, 117 N.W.2d 380 (1970); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 371 (E.D. Mich. 1970); *Haczela v. City of Bridgeport*, 299 F. Supp. 709, 712 (D. Conn. 1969). Also, see *Sayre v. United States*, 282 F. Supp. 175, 185 (N.D. Ohio 1967), wherein the court held:

[A]buse of the exercise of the power of eminent domain would constitute a taking of property without just compensation if that abuse directly and proximately contributes to, hastens, and aggravates, acting alone or in combination with other causes, the deterioration and decline in value of the area and the subject property.

Likewise in *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 584 (Ct. Cl. 1970), the court held that where the legislative body of the condemnor "flatly declares that it is going to acquire land," such declaration is tantamount to an acquisition of an "inchoate interest."

190 *Klopping v. City of Whittier*, 8 Cal. 3d 39, 51-52, 104 Cal. Rptr. 1, 11, 500 P.2d 1345, 1355 (1972).

with approval *Luber's* explicit rejection of non-compensability of incidental losses.<sup>191</sup>

But what makes *Klopping* by far the most noteworthy decision in this area, is the court's forthright and balanced treatment of the condemnor's arguments that imposing liability for "mere" announcement of future condemnations will promote governmental secrecy and raise havoc with governmental planning:<sup>192</sup>

[W]e are also aware that to allow recovery under all circumstances for decreases in the market value caused by precondemnation announcements might deter public agencies from announcing sufficiently in advance their intention to condemn. The salutary by-products of such publicity have been recognized by this court . . . ; plaintiffs likewise agree that a reasonable interval of time between an announcement of intent and the issuance of the summons serves the public interest. Therefore, in order to insure meaningful public input into condemnation decisions, it may be necessary for the condemnee to bear slight incidental loss.<sup>193</sup>

Additionally, *Klopping* simplified the procedure for blight litigation, by holding that blight losses may be claimed by the owner either by an inverse condemnation action or in the direct condemnation action when it is finally filed.<sup>194</sup>

*Klopping* thus represents the most sophisticated approach to the problem of blight thus far developed by American courts, even if it is not quite as favor-

191 *Id.* at 54, 104 Cal. Rptr. at 12, 500 P.2d at 1356. In spite of this endorsement of the *Luber* reasoning and conclusion, the California court immediately hedged its language by pointing out (*Id.* n. 8) that it was not declaring all incidental losses compensable, but rather viewed compensable "incidental" losses as occasioned by "... activity engaged in by the public agency prior to condemnation," and distinguishable from "traditional incidental damages" (such as, for example, moving expenses). *Id.* at 55, n. 7, 104 Cal. Rptr. at 13, n. 7, 500 P.2d at 1357, n. 7. This judicial phrasing will hopefully be the subject of future interpretation; for the time being, all one can say with assurance is that in contrast to prior California law, which viewed all incidental losses as equally non-compensable, now some incidental losses are more equal than others.

192 Compare *Clement's* rhetoric literally crying "havoc," and engaging in a parade-of-horribles argument that if the announcement of the impending condemnation were to constitute a *de facto* taking, there would be imposed on the condemnor an "oppressive" and "unwarranted" burden . . . [which] . . . would serve to penalize the condemnor for providing appropriate advance notice to a property owner. And to so impede the actions of the municipality in preparing and publicizing plans for the good of the community, would be to encourage a converse policy of secrecy which "would but raise [greater] havoc with an owner's rights". . . .  
City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 251, 256, 321 N.Y. Supp. 2d 345, 358, 269 N.E.2d 895, 904 (1971).

This extravagant rhetoric is plainly without merit. First, the Clement Company did not argue that the "mere" announcement was the source of its damages, but rather relied on the city's agitation, delay and misrepresentations, and on the general deterioration of the neighborhood—all of which rendered Clement's vacated facilities useless—as the operative elements of the blight leading to a *de facto* taking. *Id.* at 251, 321 N.Y. Supp. 2d at 354, 269 N.E.2d at 901. Second, the suggestion that a decade of "continuous agitation," followed by unexplained years of delay in acquisition, during which there was a general deterioration of the neighborhood, was in any way protective of the owners' rights, shows a disregard of reality. Compare these arguments with the observations of the New Jersey Supreme Court in *Lyons v. City of Camden*, 52 N.J. 82, 88, 243 A.2d 817, 822 (1968).

193 *Klopping v. City of Whittier*, 8 Cal. 3d 39, 51, 104 Cal. Rptr. 1, 10-11, 500 P.2d 1345, 1354-55 (1972). Compare *Klopping with City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 251, 256, 321 N.Y. Supp. 2d 345, 358, 269 N.E.2d 895, 904 (1971).

194 *Klopping v. City of Whittier*, 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 16, 500 P.2d 1345, 1360 (1972).

able to the owner as *Luber*.<sup>195</sup> It balances the property rights of the owner against the government's legitimate interest in engaging in bona fide planning activities. At the same time, it forcefully reminds governmental planners that their activities do have an impact on property owners, and hence such activities must be conducted with a reasonable regard for those owners' economic rights.

Finally, *Klopping* eschews legal pigeonholing in favor of a rule of reason. Here lies *Klopping's* greatest virtue. Neither side is permitted to rely on formulas or catchwords; the owner must demonstrate the government's unreasonableness, while the government must deal with the reality of its actions and cannot hide behind slogans such as "mere announcement." This test of reasonableness is admittedly an imperfect criterion, which, in the hands of different judges, may lead to diverse results and require further refinements at the highest appellate levels. But, in an imperfect world, it marks a giant step forward in the law of eminent domain, provides a balanced solution to the basic problems of condemnation blight, and moves the law closer to fulfillment of its promise of indemnification of the owner.

#### IV. Conclusion

The state of the law in the area of condemnation blight is unfortunate, to put it with restraint. After a century of litigation, most American courts have yet to disassociate themselves from the *heads-I-win-tails-you-lose* posture of forcing owners to suffer without compensation the economic burdens of blight—on a variety of unduly semantic rationales which do not withstand analysis—while at the same time denying the owners the right to recover the enhancement resulting from precondemnation activities.

The judicial progress discussed in this article forms a workable conceptual blueprint which needs further application and development of details. Basic to translation of the doctrine of indemnification from ornamental judicial rhetoric to a workable principle is a recognition that "incidental losses" are an inseparable part of the impact of condemnation and precondemnation activities. As such, they must be dealt with, not ignored, when structuring rules of just compensation. Curiously, even under the constitutions protecting only against uncompensated "taking," and absent an "or damaged" clause, no court has had difficulty in holding that severance damages, which conceptually are "incidental" to a partial taking, are encompassed within the just compensation guarantee.

While cases such as *Foster*, *Luber* and *Klopping* represent desirable reform of pertinent law, it seems plain that effective judicial progress can take place only under the impetus of the United States Supreme Court's prod, as some state courts continue to harbor open hostility toward the owner's cause and are willing to condone grossly immoral governmental conduct.

While the Supreme Court has already formulated the concepts and policies which can form an equitable theory of indemnification, it has nonetheless been extremely reticent about acting in this field. The number of eminent domain

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195 See Sackman, *Condemnation Blight—A Problem in Compensability and Value*, *supra* note 10, at 157.

cases decided by the High Court has declined drastically.<sup>196</sup> The Court has at times refused to act in areas which it acknowledged to be unsatisfactory.<sup>197</sup> This represents an unfortunate misallocation of priorities. The Court appears at times to be preoccupied with certain topics which generate a torrent of opinions, yet seem to produce more controversy than they settle. The ongoing obscenity imbroglio,<sup>198</sup> or the seemingly never-ending judicial dissertations on the increas-

196 In 1962 Professor Dunham reviewed the preceding thirty years of the Supreme Court's endeavors in eminent domain law. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, *supra* note 3, at 64. He found that the Court had decided eighty-nine eminent domain cases during that time, or about three cases per year. During the 1962-1972 decade, the Court's eminent domain output declined precipitously, amounting to only four real eminent domain cases: *United States v. Reynolds*, 397 U.S. 14 (1970); *YMCA v. United States*, 395 U.S. 85 (1969); *United States v. Rands*, 389 U.S. 121 (1967); *United States v. Merz*, 376 U.S. 192 (1964). Additionally, the Court decided seven cases involving some flavor or background of eminent domain, but really deciding issues in such areas as adequacy of service of process, *Schroeder v. City of New York*, 371 U.S. 208 (1962); right to injunctive relief, *Dugan v. Rank*, 372 U.S. 609 (1963); *City of Fresno v. California*, 372 U.S. 627 (1963); effect of administrative remedies, *Best v. Humboldt Mining Co.*, 371 U.S. 334 (1963); congressional authority to re-allocate without compensation the distribution of Indian oil royalties, *United States v. Jim*, 93 S. Ct. 261 (1972); federal jurisdiction, *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968); and police power, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). For the benefit of pedantic readers it should be noted that an additional seven cases make some passing reference to eminent domain and are so indexed by the editors of the *Lawyer's Edition*, but involve no decision even remotely connected with that area of law. *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600 (1971); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Paul v. United States*, 371 U.S. 245 (1963); *Kake Village v. Eagan*, 369 U.S. 60 (1962).

Thus in the last decade, the Court's output declined to less than one "real" eminent domain case per term, and none of these involved the determination of any of the most hotly contested issue in the eminent domain litigation wave that had swept the country during that decade. See Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, *supra* note 4, at 86-87. Note further, that during that decade the Court's "real" eminent domain decisions have involved only federal condemnation cases; not one single case involving a state's exercise of the power of eminent domain has been decided by the High Court during that decade.

197 For example, as the twentieth century dawned, the Court, speaking *inter alia* of the problem of impairment of access, astutely observed in *Sauer v. New York*, 206 U.S. 536, 548 (1907):

The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle.

Fifty-two years later, in *Martin v. Creasy*, 360 U.S. 219 (1959), the Court disregarded Justice Douglas' dissent pleading for a ruling that would insure a definitive determination of the question of what degree of protection is extended by the fifth amendment's "just compensation" clause to an abutter's access rights, and remanded the matter to the state court. And so, the law of impairment of access continues to be confused and "irreconcilable in principle." See Knowles, *Loss of Access: A Twentieth Century Enigma*, 6 St. Louis U. L.J. 204 (1960); Cromwell, *Loss of Access to Highways: Different Approaches to the Problem of Compensation*, 48 VA. L. REV. 538 (1962); Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, *supra* note 5; Stoebe, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733 (1969).

198 California Superior Court Judge, Robert H. Kroninger, recently spotlighted the "current judicial forays in obscenity law" and attributed to former California Chief Justice Roger Traynor the statement that such activities are a "... 'wasteful cost in time and money of piecemeal litigation that . . . culminates in a crazy quilt of rules defying intelligent restatement or coherent application.' " Kroninger, *Should Old Judges Reform Society Through the Courts?*, 47 CAL. S.B.J. 564, 568 (1972). For a readable and non-technical exploration of this topic see Bender, *The Obscenity Muddle*, HARPER'S MAG., Feb., 1973, at 46, whose author is a professor at the University of Pennsylvania Law School and former general counsel to the Commission on Obscenity and Pornography.

Certainly, there is much merit to the inquiry as to whether the government has any business supervising private sexual morals. But even if one disagrees with that premise, it seems

ingly Byzantine niceties of arrest or search and seizure,<sup>199</sup> serve well as examples, to say nothing of occasional judicial detours into areas which in light of the Court's backbreaking work load border on the frivolous.<sup>200</sup>

I must not be understood as in any way derogating the importance—nay, the vital necessity—of the Court's punctilious attention to our vital first amendment rights or to those due process aspects of police practices, which in the final analysis stand between a free society and totalitarianism. The Court deserves high praise for its willingness to tackle these enormously difficult and controversial topics, and its rule-making endeavors—controversy notwithstanding—have on balance unquestionably strengthened the vitality and improved the operation of American governmental institutions.

Nevertheless, such topics, vital as they are, do not constitute the totality of current constitutional concerns and some time must be found by the Court for the equally vital aspects of the "just compensation" guarantee, at least to the extent of clearing up the basic conceptual underpinnings of this area of law. For here too lies an area in which there is a pressing need for "... a profound attitude of fairness between man and man, and more particularly between the individual and government. . . ."<sup>201</sup>

In a society which traditionally measures progress and success—its own as well as its members'—by material well-being, rules which openly or tacitly permit the government to impoverish individuals pose a threat not only to "property" rights, but also to all other rights. For, if the government can empty a citi-

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to me that judicial-cum-expert-witness hair-splitting over whether a particular endeavor is "patently offensive" in light of "contemporary community standards," while down the street from the courthouse, "Deep Throat" is packing 'em in, with celebrities studding the audiences composed of middle-class men, women and couples, Blumenthal, *Porno Chic*, N.Y. Times, Jan. 21, (Magazine), at 28, comes off as ineffective and downright silly. Since the "community" whose "standards" determine obscenity is apparently quite willing to patronize films and other exhibitions depicting explicit sexual activity and to assess some of them as possessing artistic merit (e.g., the current critical acclaim being widely conferred on the motion picture *The Last Tango in Paris*), wouldn't it be better to free the police from the task of supervising individual sexual morality, so that they can better concentrate on seeing that the citizen who strolls down the street for an evening newspaper doesn't get bopped on the head by a mugger?

But even if one disagrees with this let's-throw-up-our-hands-and-not-fight-the-inevitable approach, shouldn't the Court give us something more workable than the present "exquisitely obscure and incoherent" tests and move on to other areas of the law in need of its attention?

199 Since these words were written, the following judicial observation has come to light: "I, and I suspect others, have difficulty in absorbing the sensitive and often puzzling and evanescent factual distinctions and applying the legal requirements in respect of arrest and search and seizure." *People v. Garrett*, 29 Cal. App. 3d 535, 541, 104 Cal. Rptr. Appendix (1972) (Roth, J., dissenting).

200 E.g., *Flood v. Kuhn*, 407 U.S. 258 (1972), whose holding is probably best assessed in the words of California's former Chief Justice Roger Traynor:

If the Court adheres to stare decisis, as it is wont to do, with an aloof statement that the question is one for the legislature—although it is one created by judicial decision—it creates not only a new halo for the old precedent but a rule that it is not within the province of the court to make a change. Thus doubly haloed such precedents become judicially untouchable, surviving more grandly than ever in the headnotes. They are grotesque tokens of the triumph of magic words over judicial responsibility.

Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 622 (1961). For another insight into the Supreme Court's occasional inordinate expenditure of its scarce time and resources, see the dissenting observations of Chief Justice Burger in *Hughes Tool Co. v. TWA*, 93 S. Ct. 647 (1973).

201 *Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951).

zen's pockets with impunity, it also has within its reach the means of infringing on his other vital rights. The man confronted with the loss of the economic end product of a lifetime will more often than not become quite tractable *vis-à-vis* the government that wields such power over him.

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.<sup>202</sup>

In the final analysis, we are dealing with the plight of individuals imposed upon by their government. Consider the following story which appeared recently in a Redding, Connecticut, newspaper:

"Here is the great American dream for you—turned into a nightmare," said Eric Lawaetz.

He and his wife Karen, a visiting nurse, are entangled in a bureaucratic mess, that began seven years ago when the state decided that it would obtain part of the Lawaetz land for the Norwalk River Flood and Watershed Protection Project.

Since that time the state has neither bought nor condemned the Lawaetz property, but has maintained control over it, by making its sale or development almost impossible. The Lawaetzes, who have owned the land for more than 30 years and have lived at the site for nearly as long, feel that the state, by its inaction, is forcing them to sell their property at a price far below its actual worth. . . .

In 1940, Mr. Lawaetz, a native of Denmark, bought 22½ acres on the west side of Route 7, between Ashbee Lane and Simpaug Turnpike (north of Walpole Woodworkers).

Several years later, he dismantled his colonial house in Hatterstown, part of Newtown, numbered each piece and moved it to the Route 7 site. Over a period of 12 years he reconstructed the house by himself.

He and his wife began a nursery, Apple Hill Gardens, on the property. They grew and sold perennials there, until two years ago, when Mr. Lawaetz retired at age 65.

It was the house, the business and eight acres of the land all fronting on Route 7 that the state informed the Lawaetzes in 1965 that it wanted. . . .

"At first, Mr. Lawaetz was very upset by the news," said Mrs. Lawaetz. "The land and house represented many years of hard work—years when we [j]ust managed to get by with me helping at the nursery and working as a nurse at the Norwalk Hospital."

Eventually, the Lawaetzes resigned themselves to the fact that the land was to be taken. "We were told during the town meeting on the project, that we would be considered a hardship case, and that ours would be one of the first properties that the state would purchase," said Mrs. Lawaetz.

On that assumption, the Lawaetzes closed down their business and bought a 75 acre farm overlooking Lake Champlain, in northern New York state, to which they expected to retire. . . .

In seven years, however, the state has refused to condemn the land thus making a settlement impossible, except on the state's terms. In 1970 the state informed the Lawaetzes that funds for buying property for the river protection project were depleted, and that it did not know when more money would be allocated. Those cases requiring condemnation proceedings would be settled last, the state said, and it made a "top offer" of \$70,000 for the land.

"Those are Mafia tactics," said Mr. Lawaetz. "I had to either sell the land to the state at its price or wait for an indefinite period, while I continued to pay taxes on the land."

Listing the property with real estate agencies for two years did little good. "No one wanted to touch the land until the state decided what it was going to do," said Mrs. Lawaetz.

For the past several years, the Lawaetzes have been paying taxes on both pieces of property, while hoping that the case would be settled.

Last year they were able to have the taxes on the Route 7 property abated until the state makes up its mind. But a mortgage on the property prevents them from doing the same this year. . . .

"Someone should be accountable for this," said Mr. Lawaetz.<sup>203</sup>

On those facts, as reported, someone should indeed be held accountable for it.<sup>204</sup> People like Mr. and Mrs. Lawaetz constitute the backbone of our society. They are its constructive members, whose effort and success give substance to "the great American dream." They, the same as the less fortunate and more antisocial members of our society, are deserving of, and, indeed, entitled to the benefit of the principle of fundamental fairness that forms the basis of the concept of due process.

The Supreme Court would do well to turn its attention to this "dark corner of the law,"<sup>205</sup> and to bring to it the same enlightened attitude that it has brought to bear on so many other facets of the relationship between the citizen and his government.<sup>206</sup> Here is an area in which the Court should experience no undue difficulty in reaching agreement. Surely, if—as we are told—conservative ideology is gaining strength on the Court, the traditional conservative respect for private property rights should make itself heard. Likewise, the equally traditional concern of judicial liberals over the plight of individuals subjected to

203 *From Dream to Nightmare*, The Pilot (Redding, Conn.), Dec. 28, 1972, at 5.

204 And it may well be that someone will be accountable if *Levine v. City of New Haven*, 30 Conn. Sup. 13, 294 A.2d 644 (1972) correctly reflects the attitude of Connecticut courts.

205 Guy, *State Highway Condemnation Procedures*, 1971 INST. OF CONTINUING LEGAL EDUC. 1.

206 The Court has already spelled out what the law should be. In *United States v. General Motors Corp.*, 323 U.S. 373 (1945) the Court stated:

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of goodwill which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. *No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered.*

*Id.* at 379 (emphasis added).

unfair treatment by their government<sup>207</sup> should provide a similarly appealing basis for judicial intervention. As the Court has repeatedly told us: "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . ." <sup>208</sup> It is time for those ideas to be translated from rhetoric to workable legal principle.

### V. Epilogue

Since this article was written the United States Supreme Court has decided two eminent domain cases<sup>209</sup> whose relevance to the matters discussed here cannot be overlooked. The impact of these cases can be summed up by the familiar expression: we have bad news, and we have good news—sort of.

First, the bad news. My—in retrospect — naive notion that the field of eminent domain might provide the judicial liberals and conservatives with a common ground, has been dashed. The "Nixon Court" appears to be split wide open in this field, with three out of the four Nixon appointees aligned solidly against the property owner.<sup>210</sup> I am thus reluctantly compelled to surmise that the familiar conservative tendency to side with the authority figure and to view with suspicion the cause of the party claiming monetary compensation, may prove to be a more powerful judicial motivational factor than the professed conservative ideological inclination to protect private property interests against encroachments by the collective state. While the conservative dissenters in *Almota Farmers Elevator & Whse. Co. v. United States*<sup>211</sup> agree with the majority that government may not blight property and then acquire it at its depressed value, they appear to suggest—particularly in juxtaposition with the majority opinion in *United States v. Fuller*<sup>212</sup>—that their willingness to depart from "fair market value" as the criterion of "just compensation" is more likely to materialize when such departure inures to the government's benefit. Justice Rehnquist, writing for the majority in *Fuller*, is outspoken in his view that "technical con-

207 See, e.g., Justice Douglas' acutely perceptive, albeit dissenting, observation on the potential abuses by ". . . hardnosed officials who, with all the power of the central government, seek to plow [the homeowners] under." *United States v. Reynolds*, 397 U.S. 14, 24 (1970). See also *United States v. Jim*, 93 S. Ct. 261 (1972) (Douglas, J., dissenting).

208 *United States v. Virginia Electric Co.*, 365 U.S. 624, 631 (1961); *U.S. v. Commodities Corp.*, 339 U.S. 121, 124 (1950).

209 *Almota Farmers Elevator & Whse. Co. v. United States*, 93 S. Ct. 791 (1973); *United States v. Fuller*, 93 S. Ct. 801 (1973).

210 Both *Almota* and *Fuller* are 5-4 decisions. In *Almota* the property owner won the case, which involved fixture valuation. The Court adopted the view of the Second Circuit, expressed in *United States v. Certain Property, Borough of Manhattan*, 388 F.2d 596 (2d Cir. 1967), that a tenant's fixtures must be valued as the market would permit, allowing for and discounting the probability that the tenant's lease would be renewed beyond its current term. In so holding, the Court reversed a contrary view of the Ninth Circuit expressed in *United States v. 22.95 Acres of Land, Whitman Co., Wash.*, 450 F.2d 125 (9th Cir. 1971). In *Fuller* the property owner lost. The Court held that the increment of market value contributed to the subject property by the fact that the owner also holds federal grazing permits on adjoining lands under the Taylor Grazing Act, 43 U.S.C. § 315b (1970), could not be considered in assessing "just compensation."

In both cases, Justices Burger, Rehnquist, Blackmun and White voted against the property owners. Justice Stewart proved to be the swing man, writing for the majority in *Almota* and voting with it in *Fuller*. Justice Powell, the remaining Nixon appointee, parted company with his conservative brethren, and voted with the property owner in both cases.

211 93 S. Ct. 791 (1973).

212 93 S. Ct. 801 (1973).

cepts of property law" should be tempered by "basic equitable principles of fairness,"<sup>213</sup> but speaks in the context of *reducing* "just compensation" to something less than "fair market value."<sup>214</sup>

Of course, it remains to be seen whether the judicial conservatives will in future cases be equally willing to relax the "technical concepts of property law" in favor of "basic equitable principles of fairness" when it is an owner who complains of some of the many unfair rules of eminent domain law. However, such clues as they provide in *Fuller* and particularly in their *Almota* dissent point the other way. Indeed, in the *Almota* dissent Justice Rehnquist, writing for the conservative minority, outspokenly hews to the orthodox notions of what he deems to constitute "property interests" within the meaning of the fifth amendment, accuses the majority of extending compensability to all manner of interests heretofore held non-compensable,<sup>215</sup> and is plainly unimpressed by the majority's quotation of his own words from *Fuller* that "technical concepts of property law" must be tempered by "basic equitable principles of fairness." In sum, the professed conservative respect for private property notwithstanding, the recent infusion of conservative elements into the Supreme Court's personnel appears to bode ill for property owners who find their vital economic interests threatened by the demands of governmental bureaucracy.

And now for the good news—sort of. In deciding *Almota*, the majority unequivocally reiterated that the government "... may not take advantage of any depreciation in the property taken that is attributable to the project itself."<sup>216</sup> Since the Court was deciding the extent of "just compensation" within the meaning of the fifth amendment which, in turn, is binding on the states through the "due process" clause of the fourteenth amendment,<sup>217</sup> it follows that state court holdings denying the owner compensation for blight-caused depression in value<sup>218</sup> have now been repudiated by the Supreme Court as a matter of federal constitutional law.<sup>219</sup>

While this principle is now clear, *the measure* of the just compensation uninfluenced by the blight is another matter. The *Almota* majority opinion is silent on this point, but the concurring opinion of Justice Powell suggests a *Carcione*-like rule, by stating that in either blight or enhancement cases "... the

213 *Id.* at 803.

214 The dissenting conclusion of Justice Powell in *Fuller* bears repeating:

It hardly serves the principles of fairness as those have been understood in the law of just compensation to disregard what respondents could have obtained for their land on the open market in favor of its value artificially denuded of its surroundings.

*Id.* at 810.

215 *Almota Farmers Elevator & Whse. Co. v. United States* 93 S. Ct. 791, 798 (1973).

216 *Id.* at 796. *United States v. Reynolds*, 397 U.S. 14 (1970); *United States v. Virginia Electric Co.*, 365 U.S. 624 (1961) were cited in support of this statement.

217 *Chicago, Burlington & R'D v. Chicago*, 166 U.S. 226 (1897); *Olsen v. United States*, 292 U.S. 246, 259 (1934).

218 *See, e.g.*, *Chicago Housing Authority v. Lamar*, 21 Ill. 2d 362, 172 N.E.2d 790 (1961).

219 *See* U.S. CONST. art. 6, § 2. This development should put an end to the timidity of some commentators, who have heretofore correctly, if cautiously, suggested that the Court's expression on blight in *Virginia Electric* is binding on the states. *See* the material quoted in Comment, 72 COLUM. L. REV. 772, 775-76 (1972).

Government must pay *pre-existing market value for each* [property interest taken].<sup>220</sup>

Perhaps immediate prospects are not quite as rosy as the conclusion to this article may have suggested, but progress is unquestionably being made, and eminent domain law, as applied to blight, is emerging from the dark ages, however haltingly and unevenly. At least, it can now be said with some degree of constitutional assurance that value-depressing precondemnation blighting activities will avail the condemnor little in terms of the compensation payable when the condemnation finally arrives, if the owner can hold on until then.<sup>221</sup>

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220 *Almota Farmers Elevator & Whse. Co. v. United States*, 93 S. Ct. 791, 797 (1973) (concurring opinion) (emphasis in original). Cf. text and accompanying note 136, *supra*.

221 If I have correctly assessed the thinking of the Supreme Court, its apparent approach to the problem of blight can be characterized as a "half a loaf" solution—better than nothing, but hardly adequate. See discussion in note 180, *supra*. Hopefully, a proper presentation of the problem, if and when the matter is fully briefed for the Court, will result in a fairer and more pragmatically satisfactory solution to the problem of blight.