

IS THIS LEGAL REALISM?

Norman Williams and Anya Yates

First of all, I want to congratulate my colleagues for the organization of this meeting and for the superb program they are putting on; we have many of the very best people in this field of law right here in this room. Anybody who made a list of the top half-dozen leading intellectuals in the field would inevitably start with Dan Mandelker¹—and continue with Dwight Merriam and Ann Strong. All these people have come all the way up here into our hills of Vermont to help us think about some things that are important.²

I have been asked to focus my thoughts on legal realism. I must say that my reaction has been to wonder whether or not that is what I have been up to all these years, and I am casting my remarks this morning in terms of a question asking for a response—is this legal realism, or have I been doing something else? I have always sort of assumed that my work would probably fall within the category of legal realism, but detailed discussion on these problems is really outside my bailiwick. I can (and will) report on how things look to me, after quite a bit of time spent looking at the law in various ways—that is, how the legal system seems to work in my area. However, now that I have taken a look at some of the formal legal literature on legal realism,³ it is obvious that normally I simply do not work at that level of abstraction. If you will look through my eight-volume book,⁴ you will not find much discussion phrased in these terms. In this literature, what seems to me a quite extraordinary amount of attention is directed to such questions as whether the realist approach leads to totalitarianism; I have never had time for that. Still, I have now had a chance to do some of the obvious reading in the field, with the aid of my most recent (and superb) research assistant; but I am not at all sure where I fit in with the world of the legal realists. I do not feel really qualified to discuss these matters in depth.

1. Now that Dick Babcock is gone.

2. The more I observe the actual operation of land use controls, the more I think that any significant improvement can come only with a really drastic overhauling—and so I find myself veering to the left. The American Planning Association (APA) is currently re-considering the whole control system, fortunately under the leadership of Stuart Meck, and I have advised them to start with a wholesale reconsideration of the financing of local government.

3. See, e.g., LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* (1986); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) and *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979).

4. See NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* (1988).

On Joan's⁵ point about the progressive tradition, I would just add two things which should help explain my own intellectual framework.⁶ It has been interesting to try to trace what has made me think the way I do. My father was an old-school country gentleman if there ever was one (my mother died early), but he brought me (and my sister) up to believe that there was one thing in the family background that we could really be proud of. In his view it did not much matter that our great-grandfather was an early Chief Justice in Illinois,⁷ or that our grandfather founded what is now apparently the biggest law firm in Chicago.⁸ That was all very well, but not particularly significant. There was, however, one important thing: of my four great-grandfathers, three of them⁹ ran stations on the Underground Railway, spiriting runaway slaves to Canada. And to that, father said, now there's something you can be proud of; that took nerve and principle.

A second major influence has been a heavy dose of the Vermont tradition. I was brought up in Woodstock from the age of seven on. Actually, members of my family have lived there for many generations; as I understand it, one of my ancestors turned up there in 1774, took one look at the valley and decided it was going to be a nice town—and some of us have been there ever since. I grew up here with a heavy dose of the Puritan tradition; and as you know, it has been a major element of that tradition that you damn well ought to think up some way to make yourself useful in the world. Since we grew up during the Great Depression, that included helping the less fortunate. Moreover, living in Woodstock was itself a deeply democratic experience.¹⁰ Woodstock was of course a lily-

5. Professor Joan Williams is the daughter of Professor Norman Williams. Her contribution to this Festschrift appears at Joan Chalmers Williams, *At the Fusion of Horizons: Incommensurability and the Public Interest*, 20 VT. L. REV. 625 (1996).

6. My experience has included a lot of very different things, and has been characterized by violent swings to the extremes; the ups have gone quite a way up, and the downs have gone a long way down.

7. *Livingston's U.S. Law Register* for 1859 and 1860 lists John Deane Caton as Chief Justice of the Illinois Supreme Court with his term ending in June of 1864. He earned \$1200 annually for his trouble.

8. The law firm, long known as Williams & Thompson but now known as Sidley & Austin, is located at One National Plaza in Chicago. The firm currently maintains offices in New York, Los Angeles, Washington, D.C., London, Tokyo, and Chiyoda-Ku.

9. We have not spent much time boasting about one of the three, whose name was Allen Pinkerton.

10. At least this was true until recently. In case anyone starts wondering about the exclusionary issue, let me add that I have been one of those urging an increase in permitted residential density in several parts of town, including my own street. There has of course been a fantastic inflation of housing prices in Woodstock recently, but this policy may make available some more affordable housing. The town already has a subsidized public housing project, and the local zoning law already

white town—though there were always a few black families¹¹—but the town was clearly diverse, economically and culturally. As a typical (and important) example, in the 1920s it was the custom in winter to flood the green for skating. When it snowed, we all got out and shoveled it off—and then we played “Prisoner’s Base” on skates. Let me assure you that, after you have played “Prisoner’s Base” regularly with somebody over a long period, you have usually got a friend for life—long after you have forgotten how the friendship started. Thus, in part because of this one institution, growing up in Woodstock was a fine democratic experience. One could summarize my 1955 article in *Law and Contemporary Problems*—which apparently started the movement which culminated in *Mt. Laurel* twenty years later—by saying that, if only everybody would just behave like Woodstock, all would be well.¹²

POLICY BACKGROUND

Well, to come back to somewhere near legal realism. I would start by suggesting four things which must be dominant in anybody’s thinking about planning law today; these are, I suggest, always in the background. The first is a basic fact of American geography. People used to say that this was the only country that went from barbarism to decadence without passing through civilization. At any rate it was a country where the population was increasing everywhere in a geometrical progression—and, therefore, where capital gains were almost unavoidable for anybody who bought land. The notion that land was a commodity to be used for speculation was a strong factor from the very beginning of Anglo colonization; as somebody said, “land speculation is as American as apple pie”—I understand that George Washington did it,¹³ and so did everyone

has the same lot size requirement for single family and two family houses—i.e., there isn’t really any real single-family district.

11. A member of one became a leading citizen of the town, and Verger and Senior Warden at the local Episcopal church.

12. See my *Planning Law and Democratic Living*, 20 L. & CONTEMP. PROBS. 317 (1955). The same attitude was considerably helped along by the experience of five long and bitter years at one of the snottier Eastern prep schools, where—especially before the 1929 crash—the dominant brokers’ sons from the North Shore (of Long Island) really thought the world was made especially for them. In Woodstock, by contrast, prestige simply depended on who skated (or, later, skied) the best.

I am not trying to play down the importance of the racial factor—only to suggest that it is a particularly serious part of the culture of poverty. (It is essentially the same point that the New Jersey Court recognized in *Mt. Laurel*.)

13. George Washington was engaged in speculative land enterprises in places such as the Great Dismal Swamp, which straddles Virginia and North Carolina, and the Mississippi River Valley. DOUGLAS SOUTHWALL FREEMAN, 3 GEORGE WASHINGTON, A BIOGRAPHY Chapter VI (1951).

else. Therefore, whatever we do about land in the course of our city planning, we are fighting against a very strong American tradition—"Bigger equals better." Now a counter tradition has begun to be generated, I think quite spontaneously, but only in the last few decades. Quite a lot of people now raise a question whether it is always true that bigger is always better; because of the heavy costs involved in rapid development there has been the beginnings of an anti-growth movement.¹⁴ But this runs strongly against the familiar American tradition, and the latter makes us all sound like the chamber of commerce. We must always remember that.

Second, any serious intellectual discussion of planning affairs in this country is inevitably phrased in constitutional terms. Ever since the first two basic and important decisions in the Supreme Court in the 1920s,¹⁵ the question of a developer's rights has been phrased in terms of constitutional rights to do this and do that. Maybe some people would like to repeal *Nectow* and start over again, on some less "high-falutin'" level. This would be desirable but I do not think that it is very likely; especially in the present mood of the courts. I think we had better assume we are stuck with that.

Third, there is a counter-trend which has been semi-dominant in constitutional law in the twentieth century. I say this with some hesitation because I am not a constitutional lawyer, but I do suggest that ever since the famous *Carolene Products* footnote in 1938,¹⁶ those of you who are lawyers will know what I am talking about when I say that there has been sort of a preference in law in favor of claims of civil liberties, as a matter of higher import than claims based upon property values and an alleged reduction thereof. This tradition has now been precisely and strongly challenged by Justices Rehnquist and Scalia,¹⁷ seeking to grant an equally preferred position to property rights, and at the moment the treatment of

14. See WILLIAM K. REILLY, TASK FORCE ON LAND USE AND URBAN GROWTH, *THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH* (1973).

15. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. Cambridge*, 277 U.S. 183 (1928).

16. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). An interpretation of the theory underlying this footnote, by one of its authors (Justice Stone's law clerk at the time), is set forth in Louis Lusk, *Minority Rights and the Public Interest*, 52 *YALE L.J.* 1 (1942). For Justice Scalia's attack on *Carolene Products*, see *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

17. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting, with Burger, C.J., and Stevens, J.); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987) (Rehnquist, J., dissenting, with Powell, J., O'Connor, J., and Scalia, J.). See also *Nollan*, 483 U.S. at 834 n.3.

the humanist special concern for the underprivileged minority is one of the big questions, with the present Supreme Court so close to evenly divided.

Finally, in any planning work for a new decade (and century) we must remember that we are dealing with an odd demographic situation. The curve of births has gone up, and then come back down, and now is apparently going up again.¹⁸ To take the most obvious result, we are dealing with a situation where, when the baby boom generation starts to retire, the social security fund is going to be in a terrible jam. Any serious planning thinking about the future must therefore take into account the unusual set-up of a sharply skewed demographic situation, where the demand for everything is at quite different levels for different decades.

LEGAL DEVELOPMENTS

Well, so much for the general policy background. Discussion of planning law in our generation has necessarily involved taking the broad guarantees which are the foundation of our constitutional law—primarily due process and equal protection—and transmuting these into much more specific terms, with rules of law which are definite enough to determine the result in specific cases. Due process of course essentially means fairness, and equal protection means equal treatment before the law. A lot of our constitutional law has taken those very broad concepts and developed rules from them; that is what planning law is all about—my land use course takes thousands of pages to try to explain this to students.

True, there are general rules which do exist, and there are plenty of examples where these rules do apply. They must be stated very precisely. For example, in Illinois residential zoning (with the resulting exclusion of commercial) is often challenged with respect to frontage on a main highway; if there are several commercial establishments already located on similar sites in the area, one may with some confidence predict that the residential zoning will be held invalid.¹⁹ (But this is not necessarily true in other states.) It is absurd to say that these rules do not play a role.

THE LANGDELL TRADITION

The trouble is that there are so many situations where no general rule applies. All discussion on legal realism seems to start with an attack on Dean Langdell and the Harvard Law School, way back before my time.

18. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994 (114th ed. 1994).

19. WILLIAMS, *supra* note 4, at § 6.16.

I think it is a little late to start flogging Langdell again; I have never quite known what to make of him myself. (My favorite classmate, Grant Gilmore, used to refer to Langdell as "an essentially stupid man."²⁰) But, since he developed the case method of legal education, which has dominated for a century, this seems to me to be going rather far, and makes me approach the point somewhat tentatively. I take it that Langdell was trying to resolve an obvious dilemma. Since the scientific method had worked so well with the physical sciences in finding underlying scientific principles in such sciences, the problem in the social sciences was to find the similar underlying principles, which must be there somewhere. I take it that this tradition, heavily emphasized until recently at Harvard and elsewhere (but not at Yale), is also behind the more recent move towards Restatements of the present state of the law, as an attempt at clarification of the case law. And in this connection I always remember the instructions which I understand were given by Judge Charles Clark to his clerks when he shifted from being Dean at Yale to become a federal judge in the Second Circuit. Judge Clark would tell his clerk: "if you have a very strong point which everybody knows is true, do not waste a lot of time with a long citation of cases—just find the best case, cite that and get along with the business. If you have a point which is not a very strong one, which you are not so sure of, cite a whole bunch of cases—and if you have no point at all, cite the Restatement." I think that would probably be a pretty good summary of legal realist thought in this kind of situation.

To return to Langdell, his idea was that the law could be reduced to a few simple straightforward rules that would apply generally; the first and most obvious point of criticism is that there are a large number of what I think you would have to describe as non-rational factors that come into how judges try to make decisions—which destroys any validity to the general application of this Langdell hypothesis. Let me start with the dominant fact of American constitutional law in these decades. It is, quite simply, who died when. Consider how different our law would now be if Carter had appointed four Supreme Court Justices to replace the four who had just happened to die when Carter was President, and Nixon had none. (What happened of course was that Carter had no appointments, and Nixon had four—Burger, Blackmun, Powell, and Rehnquist.) What has brought about the modern pro-developer rules in the Supreme Court is thus the sheer chance that four Justices happened to retire or die when Nixon was President—they should have known better. What is a dominant fact in American constitutional law now has nothing to do with a triumph

20. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977).

of conservative logic, but is thus a matter of sheer historical accident—exactly the opposite could easily have occurred, with overwhelmingly different results. It was not logic but historical accident that things happened to work to strengthen the position of the developers. I should think that there is one large hole in the Langdell hypothesis.

THE SOCIAL CONTEXT

Second, it seems to me that the most important way to evaluate any legal doctrine is in terms of its effect on social policy—to really understand what the effect of this will be on real people in the real world. I understand that the great function of Mr. Justice Thurgood Marshall on the Supreme Court was to make the Court face the actual situations before it in realistic human terms. Thurgood Marshall was not the greatest justice we have ever had on the Court—he was not in the same league as John Marshall, Holmes, Brandeis or Black—but he did have a marvelous faculty for describing in serious realistic human terms the social context of any given rule of law, and exactly what its impact would be on real people and their life styles. That is something very different from a dry private-law homily of rules that are supposed to prevail in all situations. A critical question in this connection of course is whose bargaining position is affected by the rule in question. The current emphasis on “takings” is clearly intended to focus attention on the problems of the developers—i.e., is clearly pro-development. There is plenty to think about these days on the other side of the equation, the effect of certain rules on the position of neighbors, but that does not seem to be getting much attention from the Court. There is as much at stake on the problems of what I call the third-party non-beneficiaries, those who—while not directly involved in lawsuits—are in fact prevented from coming into an area by the effect of public regulation on housing costs. So I am suggesting a major feature of what we might (or might not) call the Williams theory on legal realism—the way to analyze any given rule of law is by a serious analysis of its effect on real people in a policy context. And it is for this reason that I have laid heavy stress in my teaching that the students should think in terms of developing a “Brandeis brief” in any major review of some new kind of land use law. A corollary to that would be to note that in this world the judiciary are in fact policy makers, as well as the legislature. Here we merely touch in passing on a very large and difficult subject—what is an appropriate legislative function, and what is an appropriate judicial function?—a matter on which you could have a fascinating seminar every year for years, probably with different results every year. I am not trying to cover this seriously; it is the question often

referred to as the difference between the Warren Court and the Burger Court. But it is, I think, a clear example of the anti-Langdell legal realist tradition to recognize that the judiciary has a policy-making function. In fact, in the field of law where I happen to have concentrated my work, the normal situation is that major policy decisions are initiated by the judiciary, not by the legislative body. This is the way things actually happen, not the way the good book (or Christopher Columbus Langdell) says they should happen.

THE CULTURAL LAG

Moreover, a lot of rules of law are traceable to conflicts of social policy which were really important as of some *previous* era. My favorite example on this is to trace what social pressures have left their mark on real property law—as exemplified particularly by the alien land laws. As most of you know, in the 1920s the United States Supreme Court upheld a statutory prohibition in a number of Western states against ownership of land by Asians (thinly disguised by referring to them as persons ineligible for citizenship, as they then were)—with no trace of a dissent by Holmes or Brandeis.²¹ This strange, really horrendous racial discrimination was upheld on the ground that there is a long tradition in law to the effect that a government has a long-recognized special interest in the loyalty of those who own its land. This is clearly good medieval land law; in the feudal period there were excellent reasons why each level of government had to rely on the loyalty of those who held the land—the king depended on the lords to provide troops, and the lords depended on the serfs to do the agricultural hard work. And therefore, in the 1920s, the Supreme Court (with no dissent) cited this principle of loyalty as a compelling reason to uphold the clearly discriminatory prohibitions against land ownership by Asians. Well, this set me to thinking, way back in law school. The more I think about it, the more I think that this provides a good reason why property law is the most complicated and technical part of first-year law school. The reason is simple. What we talk about as if it were a consistent system of real property law has incorporated within itself contradictory doctrines based on sharply contradictory assumptions of social policy deriving from radically different periods of law. As indicated above, part of real property law goes way back to the feudal period, with its emphasis on status and the obligations then associated with land-holding. Another part of property law depends on a favorite nineteenth

21. *Terrace v. Thompson*, 263 U.S. 197 (1923).

century *laissez-faire* assumption, that it is improper social policy to limit the potential purchasers of land to a small group. Consider the attack on primogeniture and entail, and the rule against unreasonable restraints on alienation. In that period there was thus a deep-seated prejudice in favor of the free market. And then on top of that, there is in property law a third set of assumptions, contradicting the other two. This has come out of the modern environmental movement, where we now see that certain areas really should not be developed at all because this would be a direct (or an indirect) cause of pollution. No wonder you have got a confused and complicated system when in one system of law you are trying to reconcile principles based on three sets of mutually contradictory assumptions on policy.

LAW AS EXPRESSION OF CURRENT SOCIAL POLICY

Once you recognize the last point about the evolution of law, changing constantly to adapt to changing social conditions, it seems to me the implications for law reform are obvious. You are concerned for the poor, because that is a dominant factor in our current social situation. If you recognize that law is inevitably changing, then you are in the left wing as far as approaching policy is concerned. To see this does not require even a nice background of three great-grandfathers who were abolitionists.

Next (on a related) point, I am suggesting that any given system of law is related to, is in fact the expression of, the dominant social forces in existence at a given time—and the law will therefore change as the social forces change. What this means is that there is a built-in bias to the left. In any given year, what the conservatives were fighting to hold on to (or to restore) in the previous era can be seen as now outdated; in a word, the conservatives are always wrong. In reviewing how my own field of law seems to work, the basic framework is that various non-rational factors tend to affect a lot of decisions; for American planning law varies markedly by time and by place.²² It is easy to identify five periods of American land use law, varying roughly by decade; and it is equally obvious that things vary enormously between different states. Most American land use law comes from a dozen major states, and each one is quite different from all the others; in fact, there are no two with much similarity between them.²³

22. See generally NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* (1988).

23. In this connection I regularly take some delight in tormenting my students with an example of what they are in for when they take a bar exam. It just happens that as my land use course is laid out, for other reasons, we start with the official map cases. You will remember that this is a system

When looking for what influences land use law today, it seems clear that the dominant factor in today's land use law is the search for good ratables. The official system of land use control—consisting of zoning, subdivision control, the official map and urban renewal—is heavily dominated in actual practice by an outside factor which is purely institutional and therefore changeable like any other institution. In deciding on a proposed land use these days, the important thing is—will it bring in more taxes, or will it bring in more need for services? As indicated above²⁴, I have suggested to Stuart Meck, among others, that if we are redrafting the system, we had better start by spending some serious time on taxes. I have no doubt this is the dominant factor in land use decisions now; if we are redrafting the system, we had better have clearly in mind how tax decisions are going to affect the future system.

OTHER NON-LANGDELLISMS

We have now a quite new situation, with the United States Supreme Court intervening heavily and often in planning law, almost entirely on behalf of developers. For about fifty years, the Court did not take any land use cases at all, and the field has therefore grown up without their thinking. Since 1974, they have been back in business, heavily. I do not know any admirers of recent Supreme Court doctrine. In several areas they have changed long-settled law with no serious consideration of the

of law, based upon local statutes and ordinances, by which it is possible (a) to lay out a future street, and (b) for several years at least, to prevent the use of any development rights in the bed of that future street—and all this with no requirement for compensation. This makes perfectly good sense if you are planning to put a street through there, and do not want to have shortly to tear down a brand new building—that is, it is perfectly sensible if you are in a planning situation and know what you will be doing. It does not make much sense if you are not. One of the least happy experiences I have had with the legal system was in taking the bar exam, and my impression is that this is a practically universal reaction. The bar exam seemed to have nothing to do with legal practice, legal theory, or practically anything else; it is just a headache that everyone has to put up with. Now I understand that nowadays many states require that a bar exam include a series of true-false or multiple-choice questions on multi-state law, obviously reflecting the notion that there is a consistent body of multi-state law. So I use the official map mechanism system to look into that. The basic question in official map law is, of course, how long can you thus sterilize land and keep it out of development, without having to pay compensation. And if you review the multi-state law on this question, the answer is clear. In some states a year is longer than you are allowed to do this. Three years is much too long in other states. But, by two leading cases, with a delay of thirty-five years there is no problem at all—no legal issue. *Lomarch Corporation v. Englewood*, 237 A.2d 881 (N.J. 1968) (one year, too long); *Miller v. Beaver Falls*, 82 A.2d 34 (Pa. 1951) (three years, much too long); *Rochester Business Inst. Inc. v. Rochester*, 267 N.Y.S.2d 274 (N.Y. App. Div. 1966) (35 years, no problem); *Lord Calvert Theater v. Baltimore*, 119 A.2d 415 (Md. 1956) (35 years, no problem).

24. See *supra* note 2.

consequences,²⁵ often in cases where there was no reason to make a broad decision. In many areas the Court seems to act with no apparent awareness of changing social policies. It is quite rare when they have any touch with reality. The best example here is the enormous mass of recent litigation on groups who have to live together in groups, i.e., other than as the traditional family (husband, wife and two kids). In *Belle Terre*,²⁶ the Supreme Court went all out in favor of single-family zoning, as against these odd balls who live in unusual group arrangements of one sort or another. The serious thing is that all of this came just at a time when, as a matter of basic change in social policy, thinking had shifted away from large institutional living arrangements into smaller groups, preferably living in single family neighborhoods. At the very time when that basic change in social policy was taking place, the Supreme Court went all out in the opposite direction, to reinforce single family zoning against just such arrangements.

It must also be remembered that, in planning law nowadays, there is a big difference between state law and Supreme Court law. Essentially you have to learn two systems of law. We spend most of our land use course on the huge body of state law, which has developed over seventy years. Justices Rehnquist and Scalia are now clearly trying to supersede it, in a couple of unhappy dissents.²⁷ In several major areas, the state courts are showing no inclination to follow. Those of you who have had my courses are all familiar with the fact that strange things happen in both state and federal law. As I put it at the start of my course, do not believe a word of it.

Other cases seem clearly to have been decided on the basis of some prejudice of the judge—or, to put it more politely, some judicial attitude not based purely on the record. Here probably the best example is the *Penn Central* case.²⁸ The Supreme Court (by 6-3) upheld the designation of Grand Central Terminal as a historic landmark, and thus also the resulting requirement for public approval of any physical changes. Anybody who has lived along the main line of the Penn Central Railroad will recognize the possibility of some special attitude behind that decision. After all, all the members of the Supreme Court have to commute back and forth quite a bit between New York and Washington, and anybody who has done that is all too familiar with the operation of the Penn Central

25. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

26. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

27. *See supra* note 16.

28. *Penn Central*, 438 U.S. at 104.

Railroad. Anyone who lives there knows that decades ago that corporation gave up all interest in trains, and became essentially a real estate speculation outfit. It is notorious all over the Northeast that most of the captive passengers have strong feelings about the treatment they get. Once you recognize this, it is not surprising that the Supreme Court found it very easy to hold against them.

There are plenty of other irrational (or erratically rational) violations of the Langdell credo; one could ramble on at some length. A few other types of fact situations will indicate the range of material available in this area.

As good an example as any is the first case on floor area ratio controls, thirty years ago.²⁹ The first major case on those controls, long delayed, finally came out of San Francisco, involving a high-rise apartment building on Pacific Heights overlooking the Golden Gate. If you just read the opinion you will find a stunning affirmation of good planning thinking, so this seemed to be a major victory. What actually happened was just the opposite. Somebody in the San Francisco bureaucracy agreed to go ahead during the appeal and let the developer construct the building as proposed with additional stories, representing a higher floor level ratio, on the ground that he was so sure he would win the case in court. When he lost in court, he simply bought some adjacent land, thereby diluting the floor area ratio and becoming a complying building—no doubt to the infinite disgust of the supposedly victorious plaintiffs, whose only real interest was in the height of the building, blocking the magnificent view across San Francisco Bay. All you had to do is buy a couple of lots and you were home free. If you read *Broadway Laguna* you will think it is a marvelous opinion upholding floor area ratio controls, but what happened was just the opposite.

In other examples, knowledge of a fact not clearly appearing in the opinion will change the whole significance of a case. In a rapid reading, *Ayres v. Los Angeles*³⁰ appears to be an extreme (i.e., typical California) holding that even a small subdivision has sufficient effect on traffic on a major highway to justify a public requirement for dedication of a frontage strip. Everything looks very different if you take account of the fact that this developer had first subdivided huge areas in the surrounding Westchester area of Los Angeles, and was now arguing against a requirement for dedication of frontage here on the ground that this particular subdivision was only a weenie one. An equally striking example

29. *Broadway Laguna Vallejo Ass'n v. San Francisco*, 427 P.2d 810 (Cal. 1967).

30. *Ayres v. Los Angeles*, 207 P.2d 1 (Cal. 1949).

is *Belle Terre*, a case really involving the appropriateness of governmental discrimination between life-styles (students versus conventional families), where the Douglas opinion was nearly rhapsodic on the advantages of "yards that are wide."³¹ This heavy emphasis in the Douglas opinion provoked a spate of commentary on Douglas the environmentalist now entering the suburbs, all of which seems quite irrelevant to the central issue of discrimination between different life styles. But it all makes perfectly good sense if one knows that, just before the Supreme Court argument, a group of students moved into a house on Douglas' home block and started raising hell all night.

There are a variety of other ways in which the usual reported appellate opinions are unreliable guides to the real world, because of some mistake. In this realm the first (booby) prize clearly goes to the United States Supreme Court in its recent dealing with the takings issue. Recently, not once but twice, Justice Scalia has cited favorably a case which has either been overruled or otherwise discredited by its author. In one instance he cited a string of opinions with the comment that all of these (except the one from California) agreed with his argument that there must be a close nexus.³² In fact one of the cases cited, which clearly agreed with Scalia's position, was explicitly overruled by another case, also cited for the same proposition in the same string. In another case, Scalia in *Lucas* quoted from an anti-environmental opinion by Justice Frederick Hall—apparently in ignorance of the fact that in a later case Hall had gone out of his way to point out that the former opinion should no longer be respected. And, in an analogous situation, Justice Brennan made

31. *Belle Terre*, 416 U.S. at 9.

32. See Norman Williams, Jr. & Holly Ernst, *And Now We Are Here on a Darkling Plain*, 13 VT. L. REV. 671-72 n.97 (1989) (reprinted in NORMAN WILLIAMS, JR., AMERICAN PLANNING LAW ch. 5A (1974 & Supp. 1988)). At the end of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 839-40 (1987) (by Scalia, J., with Rehnquist, C.J., and White, J., Powell, J., and O'Connor, J. concurring and Brennan, J., Marshall, J., Blackmun, J., and Stevens, J., dissenting), Justice Scalia cited a long list of cases (apparently taken from an *amicus* brief) with the statement that all (except the California case) agreed with his main point (for a strict interpretation of the nexus). However, one of the cases cited, *Jenad v. Village of Scarsdale*, 218 N.E.2d 673 (N.Y. 1966), in fact explicitly overruled a New York case (also cited by Scalia), *Gulest Ass'n v. Town of Newburgh*, 209 N.Y.S.2d 729 (N.Y. Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (N.Y. App. Div. 1962), in which the lower courts had adopted a nexus test similar to Scalia's. Again, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-18 (1992) (by Scalia, J., with Rehnquist, C.J., and White, J., O'Connor, J., and Thomas, J., concurring; Kennedy, J., and Souter, J., filed separate statements, Kennedy, J., also concurring, and Blackmun, J., and Stevens, J., dissenting), Scalia cited favorably *Morris County Land Improvement Co. v. Parsippany-Troy Hill Township*, 193 A.2d 232 (N.J. 1963), an early (and rather extreme) wetlands case, without mentioning that this opinion was later explicitly repudiated by its author, Justice Frederick Hall. See *AMG Associates v. Township of Springfield*, 319 A.2d 705, 711 n.4 (N.J. 1974).

a simple arithmetical error in calculating the alleged depreciation of value resulting from the restrictions in *Hadacheck v. Sebastian*—a reduction from \$800,000 to \$60,000 is a reduction of 92.5%, not 87.5% as Brennan stated.³³ If a law student made mistakes of this character in his first month in law school, this would certainly raise a serious question as to whether he should be dropped as obviously hopeless. The criticism should of course be directed primarily at the Justices' law clerks; one wonders what these supposedly brilliant clerks do all day—are they so busy talking to Woodward and Bernstein that they have no time left for shepardizing?

Other instances involve obvious blatant mistakes not of fact but of law. For example, when one of the Resettlement Administration's greenbelt³⁴ towns was sold off after the war to a group representing its residents, the sales price was reduced to take into account the fact that the rights acquired would not include the development rights for the land located in the greenbelt. Yet, in a subsequent action brought by the purchasers' organization to invalidate the restrictions in the greenbelt, an intermediate Ohio court actually held that enforcing those restrictions in that situation would involve a taking. Or consider Judge Keating's opinion in a Bronxville case,³⁵ changing the whole theoretical basis of judicial review of land use restrictions in New York state; Keating simply cited Illinois case law, apparently on the theory that these opinions represented the nation-wide case law—in fact the Illinois law was obviously deviational, limited to that one state.

In other instances the courts have simply made a basic change in the previously existing law—which may have been a good idea—but all the while pretending that no change was involved. A particularly striking example of this is found in the Florida (federal) case which,³⁶ right out of the blue, began the long string of decisions approving the compulsory removal of (at least minor) non-conforming, non-residential uses in residential districts. This was of course a major step forward—but none of the cases cited to justify the change had anything to do with the case.³⁷

33. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). For the arithmetical error, see *Penn Central*, 438 U.S. at 131.

34. *Greenhills Home Owners Corp. v. Greenhills*, 202 N.E.2d 192 (Ohio Ct. App. 1964), *rev'd*, 215 N.E.2d 403 (Ohio 1966).

35. WILLIAMS, *supra* note 4, § 135.04. See also *id.* § 39.09; *Fulling v. Palumbo*, 233 N.E.2d 272 (N.Y. 1967).

36. *Standard Oil Co. v. Tallahassee*, 87 F. Supp. 145 (N.D. Fla. 1949), *aff'd*, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

37. Essentially the same comment could be made of the Supreme Court's recent change in the law on billboard regulation (in *San Diego*) and on compensation for takings (in *First English*).

In perhaps the least artistic example of a recent major change in the law, in the late 1980s the Supreme Court apparently decided to strengthen the law of inverse condemnation on behalf of land use developer plaintiffs by imposing a mandatory remedy of compensation in cases of a mistake in zoning (i.e., overly restrictive). For several years in a row the Court was obviously seeking an appropriate case to make such a holding—and for four terms they first accepted what was apparently such a case, and then discovered it was unripe for decision.³⁸ Incredibly, on the fifth try (*First English*) they made the same discovery again—and then, perhaps out of embarrassment, went ahead and imposed the mandatory-compensation remedy anyway. As a result, the rule in *First English* is rather odd—this is not a takings case (the California courts eventually so held, explicitly)—but if such a case should ever turn up, compensation will be required. The case was one, not of potential flood danger, but of an actual flood which had wiped out a campground—and the church, incredibly, was insisting on rebuilding the campground back in the flood plain—even though it was clear that plenty of upland was available, and in the church's ownership!

IS IT LEGAL REALISM ?

As the title of this commentary suggests, my intention has been to pose the question about legal realism, but not to answer it. Other contributors to this issue can debate and discuss the fine points of legal realism with more authority than I. I will leave it to them, and to future readers, to decide whether what I have written here, and whether my work over the past decades, can fairly be described as legal realism or whether my work should be put in some other jurisprudential pigeonhole.

38. *Agins v. Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981); *Williamson Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 390 (1986); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 303 (1987).

