

First Supplement to Memorandum 99-7

Attorney Fees in Eminent Domain: Comments of Consultant

Our eminent domain law consultant, Gideon Kanner, has sent us the attached letter commenting on Memorandum 99-7, relating to attorney fees in eminent domain. **Please note that this is an unfinished draft — a “work in progress”.** Professor Kanner has authorized distribution of this draft to the Commission in connection with the Commission’s consideration of this matter at the meeting; he plans to have a finished product to us before too long.

The letter makes a case for revision of Code of Civil Procedure Section 1250.410 to make it operate in a more mechanical manner, drawing a distinction between ordinary condemnations and condemnations for private profit-making purposes (such as redevelopment). It also suggests awarding attorney fees for condemnor “lowballing” or “sandbagging”.

The staff will summarize the arguments made in the letter, and the proposed statutory revisions, in some detail at the meeting.

Respectfully submitted,

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Re: Comments on Litigation Expenses in Eminent Domain

Dear Nat:

This is a quick response to the draft of your memorandum on this subject, and a follow-up to our telephone conversations. If you wish, I will convert this letter into a more formal memorandum. Later, in accordance with Commission custom, I mean to edit it into a proper law review article manuscript.

As you can see, this document is very much "work in progress" that needs considerable additional work to reach a proper form and refinement of content to make it suitable for publication. I send it now anyway because of your time constraints, with the expectation that it will be treated accordingly. I bring to bear on the problem of litigation expenses what I have learned in 35 years of practicing, writing and lecturing on the subject of eminent domain, as well as much interaction with informed colleagues all over the country, representing both condemnors and condemnees.

I believe that when dealing with law reform it is usually not productive to plunge into the specifics of existing law and propose nuts-and-bolts changes that, as the old expression goes, seem like a good idea at the time. I have come to believe after much reflection and experience that without giving a broader

context some thought and anchoring the proposed changes in it, this can be a mistaken approach that often fails to solve the problem at hand, merely substitutes other problems for the one seemingly solved, or is at times counterproductive. That is how the law of unintended consequences usually works.

The other difficulty that has to be guarded against is the familiar legislative business of compromising on the statutory language without sufficient regard for the policy that is meant to be served, and for the realities of litigation before fallible judges. An excellent example illustrating this problem is the familiar theme that wove in and out of the Commission deliberations in the 1970s, namely, how to draft laws so that they would maximize the degree of effectuating the legislative intent while minimizing opportunities for judges to misinterpret the resulting statutes. As the present effort makes clear, this is a serious problem that is probably not fully soluble. But it can be minimized by structuring the law so as to reduce, rather than increase the points of decision and the degree of discretion with which the decision-maker is vested. While this approach reduces judicial flexibility, it also increases predictability. At times, this can be a difficult tradeoff, but in today's legal climate, with an increasingly intellectually undisciplined, result-oriented judiciary in place, and with over 80% of the decisional law unpublished and therefore not practically speaking, knowable, predictability emerges as an important consideration that warrants renewed legislative emphasis.

Bottom line: as Justice Scalia put it, in order to have a rule of law, you first have to have a law of rules. Whether you are "conservative" or "liberal," the notion of judges as philosopher-kings is coming in for reconsideration because of the all too obvious politicizing effect it has had on the judiciary. The fact that poll after poll indicates that the stature of the judiciary is declining, is a worrisome phenomenon that speaks for itself. True enough, judges must have independence (and indeed they are scrambling right now to communicate that need to the public), but in a democratic society, judges must also depend on a widespread

perception that their rulings are not merely legitimate but also balanced and in conformity with prevailing notions of right and wrong. Yet in eminent domain, that has not been the case. Informed commentators have repeatedly noted that judge-made rules of eminent domain law favor condemnors over condemnees and perpetuate harsh, archaic rules that are simply indefensible in the context of modern, generally prevailing law.¹ Though phrased in strong language, there is no denying the basic merit of the assessment of modern American eminent domain practice by a commentator whose background, significantly, involves the representation of condemnors:

“The fact is that an ever increasing amount of shameless, senseless and needless damage and havoc are wreaked on the lives and fortunes of citizens and taxpayers whose only fault is that they own real property which is coveted by one or more of the myriad agencies which, wisely or not, have been entrusted with this terrible power which we call eminent domain.”²

Your own able discussion of the unpredictable litigation that has resulted from efforts to apply “flexible” standards to the litigation expenses problem is a proverbial “Exhibit A” for my thesis that the law of eminent domain has not fared well in the courts; at least its interpretation varies greatly with the

¹ Of particular significance is D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 Seton Hall Law Rev. 483 (1985). Professor Risinger’s effort is particularly noteworthy because he has done what no other commentator has done; he collected *all* pertinent commentaries and treatise expressions on the subject of compensability of business goodwill, that were written in the entire 20th Century (see, *id.* pp. 526-540) and has demonstrated that save for one 1949 student note, no commentator has ever attempted to defend the rule of noncompensability, and most have criticized in terms the author characterizes as ranging from “highly critical” to “savagely critical.” And yet, with the exception of Alaska, and to a lesser extent Michigan, Minnesota and Georgia, no state courts have even attempted to bring this bit of outmoded 19th Century barbarism into conformity with prevailing doctrinal standards on which modern law of damages is based.

² William C. Bryant, *Eminent Domain – Its Use and Misuse*, 39 U. Cinc. L. Rev. 259 (1970). Though acerbic in his choice of language, Mr. Bryant has much company. The pertinent body of legal commentaries – produced in response to the upsurge in condemnations that came on the heels of the Federal-Aid Highway Act of 1956 and the redevelopment programs that followed *Berman v. Parker*, ___ U.S. ___ (1954) – is replete with similar criticisms [CITATIONS]

various judicial personalities. It tends to be what we used to criticize as the "rule of men," not of law. And while I recognize that legislation cannot anticipate and address all factual variations, so that some discretion must be left to judges, it should at least reduce the number of decision points and to the greatest extent feasible, provide objective rather than subjective criteria for the award of litigation expenses.

And so, I begin by addressing some policy considerations and historical factors that underlie the eminent domain field in general, and move on from there to the specifics of litigation expenses.

I believe that you hit the bull's eye in the conclusion to your memo (at p. 15) where you note that the pertinent law is a "tug of war between two competing policies." The U.S. Supreme Court agrees in principle: "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. vs. Powelson*, 319 U.S. 266, 280 (1943). But even at best, to state the problem, however accurately, is not to address it. The fact is that some problems simply do not lend themselves to solution by balancing, however even-handed that approach may seem at first blush, because they implicate a need to make a principled policy choice.

I'm afraid that what we have on our hands is a half-a-loaf compromise built on concededly unfair and unsatisfactory law.³ What started

³ *County of Los Angeles v. Ortiz*, 6 Cal.3d 141, 148, n. 8 (1971) expressly acknowledged the unfairness of the then existing rule denying compensation for litigation expenses particularly where doing so deprived a condemnee of modest means of the constitutionally guaranteed "just compensation," but denied relief anyway. See William E. Hare, S. Walter Innenberg and Michael A. Aronoff, *Sympathy But No Tea: County of Los Angeles v. Ortiz*, 2 U. San Fernando Valley L. Rev. 49 (1972-73). In *Ortiz*, the condemnees raised a substantial constitutional issue, namely, that as owners of modest homes with small equities, they were being deprived of their constitutionally guaranteed just compensation altogether, because the amount of litigation expenses necessary to demonstrate the soundness of their valuation and the inadequacy of the condemnor's offers, would consume those equities, leaving them with no family home and no net compensation. In response, Justice Mosk, speaking for a unanimous court, offered sympathy (6 Cal.3d at 148, n. 8) but no relief, even though constitutional rights were plainly being denied to the aggrieved condemnees.

Compare *Serrano v. Priest*, 20 Cal.3d 25 (1977) allowing recovery of litigation expenses in a non-condemnation context and doing so on a rationale directly contrary to *Ortiz*, but without trying to reconcile these two cases or even mentioning *Ortiz*. *Serrano* held that where the interests sought to be vindicated in

out as implementation of a policy of fairness intended to shift litigation expenses to the condemnor from condemnees forced to pursue unnecessary litigation in order to secure their constitutionally guaranteed just compensation, has in the hands of judges largely become a contest over the safeguards rather than the reasonableness of condemnors' pretrial offers. The recent decision in *MTA v. Continental Dev. Co.*, 16 Cal.4th 694, 720 (1997) makes it official: the tail is now wagging the dog. The disparity between offer and demand, no matter how great, is no longer the most important factor in awarding litigation expenses under CCP § 1250.410, even though in the wake of *Ortiz* just that was of primary concern in the enactment of that statute.

Moreover, as you correctly point out, what started out as a reform intended to reduce litigation, has spawned a whole new category of cases. In that context, please keep in mind that these days over 80% of Court of Appeal opinions are unpublished, so there is no practical way to determine how many more such decisions may lurk among the unpublished opinions.⁴ As Professor

the litigation in question, are constitutional in nature, and their resolution would result in benefits to a large number of citizens, judicial power (said to be lacking in *Ortiz*, 6 Cal.3d at 148-149) somehow materializes and empowers the court to articulate the rule it asserted in *Ortiz* to be wholly within the purview of legislative powers. This bit of judicial sleight of hand gains particular significance when it is recalled that under the California version of the separation of powers doctrine (Cal.Const. Art III, § 3) the powers of one branch of government may not be exercised by another. Thus, if the power to formulate rules concerning recovery of litigation expenses was legislative in nature (as asserted in *Ortiz*) then it could not be wielded by the courts (as asserted in *Serrano*) and vice versa. In other words, the fact that the court saw the plight of the plaintiffs in *Serrano* as more sympathetic (or possibly, more "politically correct") than that of the defendants in *Ortiz*, is understandable but does not provide any principled doctrinal basis for the sudden appearance of the judicial prerogative to provide relief in the former but not the latter.

A similar lack of even-handedness on the issue of litigation expenses arises from a juxtaposition of *Holtz v. BART*, 17 Cal.3d 648, 658-659 (1976) (statute allowing litigation expenses in inverse condemnation cases only applies to trial court proceedings, but not to appeals because it did not so provide explicitly) with *Morcos v. Board of Retirement*, 51 Cal.3d 924, 927 (1990) (in other civil cases, a statute that provides for litigation expenses in trial courts is deemed to provide them on appeal as well, without need to say so explicitly). Also compare *Smith v. County of Los Angeles*, 214 Cal.App.3d 266, 295 (1989) (unsuccessful inverse condemnee plaintiff is not entitled to costs, and can be made to pay the defendant's costs) with *California Teachers Ass'n. v. State*, 20 Cal.4th 327 (1999), (teachers unsuccessfully seeking relief from state administrative agency may not be required to share costs of the administrative tribunal 50-50 with defendants, and statute requiring them to do so is facially unconstitutional because imposition of costs has no other purpose than to chill the assertion of constitutional property rights.) Ironically, both the *Smith* and *California Teachers* opinions were written by the same judge.

⁴ For example, a quite significant case in this area, dealing with what are the required formalities of a revised CCP § 1250.410 offer, was decided by an unpublished opinion. *County of San Diego v. Superior*

Paul Bator pointed out, legal rules that rely on multi-part balancing tests foment litigation; they provide an incentive to litigation since no one can tell in advance how a particular judge will balance competing considerations or why.⁵ For example in *Continental Development*, in spite of a verdict of \$1.1 million, as against the condemnor's statutory offer of \$200,000, an award of fees was held to be properly denied by the trial court. The Court of Appeal thought this was clearly erroneous (50 Cal.Rptr.2d 698), but the Supreme Court agreed with the trial judge. My own perception is that some judges make a purely subjective seat-of-the-pants call as to whether by their lights the condemnee "got enough" and if so, they simply deny litigation expenses.

The problem we thus face is the reverse of what supporters of judicial activism have been advancing in justification of vigorous judicial intervention in social policy making. This view has it that when legislatures fail in their task of addressing and solving pressing social and legal problems, it becomes proper for the courts to step in and do the job right. [CITATION]. Now, the shoe is on the other foot. In the case of eminent domain litigation – a historically much criticized field of law -- the courts have produced a body of unsatisfactory and much criticized law. Specifically, with regard to litigation expenses, they at first promulgated the clearly unfair rule denying them in all cases, irrespective of the equities, and clung to that policy of conceded unfairness until overruled by reform legislation (i.e. CCP § 1250.410). Thereafter judges have produced a body of unpredictable law that frustrates the legislative intent and perpetuates the historical unfairness, albeit to a lesser extent, though this time around it is done under the guise of "somewhat erratic" statutory interpretation (as you gently put it in you memo, at p. 15), and the exercise of discretion in ways that fail to give effect to the core legislative intent behind § 1250.410.

Court (Rancho Vista del Mar), 4th Civ. No. D026376 (1996). (Held: to be effective, condemnor's revised settlement offer must be served *and filed*, and therefore a condemnee may accept a rescinded offer where a superceding new offer has not yet been filed.)

⁵ Paul Bator, *What Is Wrong With the Supreme Court*, 51 U. Pitt. L. Rev. 673, ___ (1990)

What we tend to forget these days (a quarter century after the fact) is that the 1970s reform of eminent domain law, both in California and elsewhere was a legislative reaction to (or perhaps more accurately, a legislative recoiling from) the harsh impact of the mass condemnations of the 1060s, that followed *Berman v. Parker* and the enactment of the Federal-Aid Highway Act of 1956. Until then, what had been a small backwater of American law (except in wartime) became a mushrooming phenomenon,⁶ as an army of bulldozers started rumbling through American cities and the countryside. The legislative reforms of the 1970s, though beneficial and long overdue, rectified only a few of the most egregious injustices, but did little or nothing to gentle the basic unsatisfactory tenets of eminent domain doctrine that until this day remains largely an intellectual creature of the 1800s.

And so I suggest that instead of counting the trees we should at least begin by assessing the shape of the forest. In doing so, we should give consideration to the same elements of fairness that animated the reform movement of the 1970s, for they are timeless, and need to be given effect, not just lip service. A policy choice is called for here, and it needs to be formulated and implemented by clear legislative criteria that offer at least a modicum of predictability, and provide disincentives to litigation.⁷ This is so because once

⁶ See the national and California statistics collected in Gideon Kanner, *When Is Property Not Property Itself*, *supra*, 6 Cal. West. L. Rev. at 86-87.

⁷ Apart from the not insignificant considerations of fairness to people losing their homes and businesses, the shifting of litigation expenses was also intended to reduce litigation, because the prospect of having to pay attorneys' fees in cases of unnecessary litigation, would confront recalcitrant condemners with disincentives to abusive behavior that was par for the course in those days.

For example, in the case of *People v. Quinones-Quintana*, 231 Cal.App.2d 785 (1965), the condemnor insisted on trying a case of taking of a slice of land from the back yard of a modest East Side home that would leave it overshadowed by a towering freeway embankment, arguing as a matter of fact, not law, that no severance damages at all should be paid. The jury awarded \$2500, but the trial court remitted the award down to \$1500 which the condemnors accepted. But in so doing, they counted their time to accept from the date of service of the order. The condemnor triumphantly announced that this was too late, that the time should have been counted from the date of the order (one day earlier). Confronted with the prospects of a second jury trial over \$1500, the trial court entered judgment in the remitted amount. The condemnor appealed, and the Court of Appeal reversed in an opinion that to the best of my knowledge has never been cited by another court, and the second time around the jury awarded \$1750 in severance damages which the condemnor paid. Thus over the measly sum of \$1500 two Superior Court trial courtrooms and two juries were tied up at a cost to the court that in those days was around

you say with the U.S. Supreme Court that as far as judge-made law goes, one of the factors to be balanced against the other is the principle of indemnity to the condemnee, that necessarily implies that indemnity – though exhorted in court opinions as the core judicial standard of compensation⁸ –is something to be bartered away in exchange for “the people’s interest in public projects.”

But, to begin with, this notion of a tradeoff is at war with the thrust of modern constitutional law interpreting the core provisions of the Bill of Rights.⁹ To make the point obvious, we do not “balance” society’s indisputable interest in being free of violent crime against a criminal defendant’s right to refrain from self-incrimination, even in cases where a few pointed questions directed to the wrongdoer would be likely to lead to a correct resolution of the controversy, as graphically illustrated by the O.J. Simpson case. After all, as John Marshall put it in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), protection of the citizenry is the first duty of government. Yet in the discharge of that duty the government does not balance the right of accused individuals to remain silent (or their other constitutional rights) against the manifest societal interest in the preservation of citizens’ life, limb and property, because the constitutional guarantee against

\$1000 per day. The condemnor wound up paying \$250 more than it would have paid under the remitted judgment, plus interest and costs. Why was it done? Only the long since retired lawyers for CalTrans know for sure. But it seems plain to me that the purpose of that caper was intimidation; to get the word out to the informed legal community that CalTrans would spend “millions on defense, but not a penny for tribute” as its lawyers were fond of boasting, even if it cost the state and the courts far more than the piddling amounts in issue to which the condemnees were plainly entitled.

⁸ There is regrettably a strand of inconsistency, if not hypocrisy, running here through judicial handiwork. On the one hand, courts intone the bromide that the condemnees are to be placed pecuniarily in the same position they would have occupied had there been no condemnation [CITATION] but at the same time they hold that a variety of losses undeniably or even concededly suffered by those condemnees are noncompensable. The California Supreme Court has gone so far as to charge that condemnees who point to judicial expressions exhorting indemnity and fairness as the standard of just compensation, and seek its application are taking a “panoramic” view (*Community Redevelopment Agency v. Abrams*, 15 Cal.3d 813, 827 (1975); *Ortiz*, 6 Cal.3d at 147), as if the use of an epithet were capable of making up for lacking judicial analysis and consistency of principle.

⁹ In that connection it must be noted that just compensation has from the outset been deemed to be just such a core constitutional value. In fact, the right to receive just compensation for the taking of one’s property was held to be incorporated by the due process clause of the 14th amendment and thus made binding on the state in the first impression case. *Chicago B. & Q. R. Co. v. Chicago*, ___ U.S. ___, ___ (1896). For a concise summary of the doctrinal development of this principle see Justice Douglas’ dissenting opinion in *Waltz v. Tax Comm’n.*, 397 U.S. 664, 701-702 (1970)

self-incrimination is deemed of overriding importance. More closely analogous to the problem at hand, is *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) where the court imposed huge costs on the process of criminal law enforcement on the basis of disparity of economic resources between the impecunious criminal defendant and the well-financed law enforcement machinery of the state. The same is true of the many cases in which courts have imposed large costs on society in connection with reforming prison conditions [CITATION], school desegregation [CITATION – ST LOUIS CASE,] and the creation of public housing (see *Spallone v. United States*, 493 U.S. 374 (1990) (city councilmen ordered to rezone land and create public housing, on pain of being held in contempt of court.) Even as I write, the U.S. District Court in Los Angeles has just ordered the Metropolitan Transit Authority to purchase additional buses at a cost of hundreds of millions of dollars.

I fail to see, and no one has ever explained it to me, why the right not to have one's home or source of livelihood seized and destroyed without full or at least fair compensation – particularly in the context of urban renewal that routinely destroys entire neighborhoods while enriching municipally favored redevelopers and the redeveloped property's end users – should be of lesser importance to a civilized society. Property rights, as the U.S. Supreme Court reminded us lately, are not a constitutional "poor relation" and are to be accorded the same dignity as First Amendment and Fourth Amendment rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Though spotlighted and deplored by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1922), there is an unfortunate tendency to overlook the wholesome role that a stable system of protected property rights plays as the foundation of all liberties – "the mother of all rights." This is so, because as Justice Stewart aptly pointed out in *Lynch v. Household Finance Co.*, ___ U.S. ___, ___ (19___) the two species of civil rights – personal and economic – are interrelated and neither can have meaning without the other.

I understand, of course, that such expressions of principle notwithstanding, property rights continue to be viewed as a constitutional "poor relation," with the California Supreme Court blowing hot and cold, depending on how much it likes or dislikes the property right in question (see e.g., *Brostenhous v. State Bar*, 12 Cal.4th 315, 326, n. 6 (1995), and compare the judicial rhetoric in *California Teachers Ass'n*, *supra*, 20 Cal.4th 3). However, in light of the U.S. Supreme Court's ongoing revival of the importance of private property rights, it is not inappropriate to take note of these things and to recognize as a background policy principle at the very least, that property owners who are not accused of any wrongdoing, and who are dragged into court only because someone (at times not even a governmental agency) covets their land and hopes to put it to profitable private uses, have substantial equities on their side, and lawmakers should be sensitive to those equities, the same as in the case of persons accused of or plainly engaging in anti-social conduct.

Be all that as it may, the premise on which the courts base their parsimonious approach to formulating rules of just compensation presents us with a false choice because it not-so-tacitly presupposes that if we make a serious effort to indemnify condemnees (or more realistically, eliminate some of the widely conceded shortfalls that have been the historical hallmark of "just" compensation law), we will have to forego those "public works." But this supposed conflict is contrived; it is based on at best dubious facts, semantic manipulation,¹⁰ 19th Century constitutional law that is not applied elsewhere,

¹⁰ To take a common example, the conferring of private gain on redevelopers is justified by the courts as something that is "incidental" to the public purpose served by the taking (*Berman*, ___ U.S. at ___, *County of Los Angeles v. Anthony*, 224 Cal.App.2d 103, 106-107 (1964)). But even if we accept that as a justification for the taking, it fails as a justification for denial of full compensation to the displaced condemnees. For if the "public project" is economically productive, it is difficult to see why the resulting revenues should not be shared with the displaced condemnees to compensate them fully for the losses suffered by them. "Incidental" or not, these projects often generate large private profits and it is difficult to see why the full, fairly calculated cost of land acquisition should not be deemed a part of the cost of doing business by the ultimate beneficiaries.

and faulty economics.¹¹ The supposed threat to creation of “public works”¹² is unsubstantiated and all too often fabricated out of the whole cloth by self-serving condemnors and swallowed whole by naïve or result oriented, judges. See *infra*, pp.____. A *fortiori*, when the “public improvement” is a redevelopment project that serves the economic interests of mass merchandisers, car dealers, office building developers and the like,¹³ all of whom find it a highly profitable activity, the factually unsupported lamentations that we can’t afford to be just to displaced condemnees on whose land these new mega-businesses are built, is profoundly immoral.

Rationally conceived public projects, the same as all other projects (and indeed all human endeavors) are pursued and built only because they are worth the effort and expense, i.e., their benefit exceeds their cost. Professor Frank Michelman put it best in his widely noted article, *Property, Utility and Fairness*:

¹¹ As one commentator aptly put it: “The obvious question that springs to the fore is: how do the courts know? Having never afforded compensation for most consequential injuries arising from eminent domain, it becomes clear that the courts can not know.” Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 43 J. Urb L. 1, 34 (1969). Others have been less charitable: “The old chestnut that increased compensation will bankrupt the states has absolutely no validity.” Aloï and Goldberg, *A Reexamination of Value, Goodwill and Business Losses in Eminent Domain*, 53 Cornell L. Rev. 604, 647 (1968)

To state the obvious, the fact that no compensation is paid for demonstrable losses forced on condemnees, does not cause those losses to disappear. Rather, they are shifted from the condemnor (where they belong) onto individuals who lack the means to bear them, or the ability to spread them on the society at large that benefits from those “public works.” Compare *Armstrong*, ___ U.S. ___, ___ (19___)

¹² I have used quotation marks because a goodly share of today’s condemnations involve takings for redevelopment projects that are clearly not public but rather further the private commercial interests of shopping mall operators and car dealers, masquerading as incidental beneficiaries of “blight elimination.” In reality, redevelopment a huge private, profit-making business engaged in by large national companies. See Justice Fleming’s observations in *Regus v. City of Baldwin Park*, 70 Cal.App.3d 968, 982 (1977), quoted *infra*, at pp. ___, and, Sonya Bekoff Molho and Gideon Kanner, *Urban Renewal: Laissez Faire for the Poor, Welfare for the Rich*, 8 Pac. L. Jour. 627 (1977) See Anderson, *The Federal Bulldozer* (19___); OTHER LAW REVIEWS?

¹³ For a current discussion of how widespread and lucrative these practices of enriching favored private interests through the misuse of the power of eminent domain have become, see Dean Starkman, *Take and Give: Condemnation is Used to Hand One Business Property of Another*, The Wall St. Jour., Dec. 2, 1998, p. A1; John Gibeaut, *The Money Chase*, A.B.A. Journal, Mar. 1999, p. 58; Edward D. McKirdy, *The New Eminent Domain: Public Use Defense Vanishing in Wake of Growing Privatization of Power*, 155 N.J.L. Jour. 1144 (Mar. 15, 1999); Gerard Shields, *Urban Renewal, Property Rights Collide in City*, The Sun [Baltimore], Jan, 12, 1999, p. 1; Lisa Brennan, *Toledo “Taken” With Jeep*, Nat. L. Jour, Jan. 25, 1999, p.A1, Gideon Kanner, *NYSE Land Grab: Greed Is Still Good*, Nat. L. Jour., Dec. 12, 1998, p. A22; Dan Walters, *Redevelopment Power Misused by Many Cities*, Metro. News-Enterprise, Jan. 8, 1999, p. 9.

Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1181 (1967):

"What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, *including the costs that remain 'unsocialized'* exceed their benefits. Thus, it would appear that any measure which society cannot afford, or putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." (Emphasis added)

Nonetheless, judge-made law of eminent domain contains at times absurd (or at least unfounded) assertions that tacitly assume the contrary¹⁴ and have it that fair compensation to condemnees *for losses concededly suffered*, will cause "an embargo" on public projects (*Levee Dist. No. 9 v. Farmer*, 101 Cal. 178, 186 (1894)), that it is the responsibility of the courts to keep condemnation awards down (*People v. Symons*, 54 Cal.2d 855, 861-862 (1960)), and that courts must guard the fisc said to be endangered by condemnation awards that accurately reflect the condemnees' losses deliberately inflicted by a condemning agency (*People v. Superior Court (Rodoni)*, 68 Cal.2d 206, 208-209 (1968)¹⁵. But history has not dealt

¹⁴ The absurdity springs from the fact that even on the courts' baseless "embargo" premise, some condemning entities are flush with funds, even if others may arguably have to scrimp. But that hardly justifies a rule of law that gives the wealthy agencies a "free pass" to impoverish the citizens whose land they take. Ironically, in general civil litigation, courts deem it misconduct for counsel to argue that their clients cannot afford to pay a judgment against them. *Hoffman v. Brandt*, 65 Cal.2d 549 (1967). It is difficult to understand why such arguments are misconduct when made by lawyers, but become sound public policy when intoned by judges.

¹⁵ The *Rodoni* case is paradigmatic. There the California Division of Highways laid out a freeway so as to take 0.65 acre of land but in the process landlocked some 54 acres of farmland. When the farmer sought severance damages, the state sought to condemn the entire 54 acres, ostensibly to save money. Putting aside for the moment the mathematical absurdity inherent in the suggestion that taking more land would cost less money (discussed *infra*), it seems clear that the freeway could readily have been laid out so as to avoid this problem. Thus, the arguably high cost of that acquisition was caused not by Roy Rodoni's perfectly legitimate severance damages claim, but rather by the State's careless layout of the freeway that callously inflicted needless damage under the banner of "public necessity" that in theory requires it, *inter alia*, to so site its projects as to cause greatest public good and the least private harm (former CCP § 1241.2(c)),

kindly with them. In the fullness of time they proved to be unsound and had to be discarded.

Thus, the *Farmer* case was eventually overruled by the Supreme Court itself in *Valenta v. County of Los Angeles*, 61 Cal.2d 669, ___ (1964), and the *Symons* rule¹⁶ was repealed by the adoption of CCP § 1263.420 (b). As for *Rodoni*, not only was its rule repealed by CCP § 1240.410, but it further suffered the indignity of having its factual and economic foundations exposed by an investigation conducted by the Little Hoover Commission as thoroughly wrongheaded. The Commission's investigation revealed that condemnation of excess lands by the California Division of Highways proved to be the proverbial rat hole for public funds. Far from saving money, it wasted tens of millions of dollars, accumulating distressed land that the State couldn't use itself and couldn't sell. Indeed, it turned out that ___ years after the *Rodoni* case was decided, the State owned some

superceded in 1975 by § 1245.230(c)(2). But under the notorious *Chevalier* rule such matters were nonjusticiable even when the condemnor's determination of necessity (which includes the layout of the project) was the product of fraud, bad faith and abuse of discretion. *People v. Chevalier*, 52 Cal.2d 299, 307 (1959)). Not surprisingly, at the time, before enactment of environmental laws, condemnors were undisciplined by any legal restraints and rights of way were at times drawn by engineers who saw them as lines on a map, with scant regard for what the impact of those lines was "on the ground," for the [at times] avoidable human disruption they were causing, and indeed for the cost to the condemnor. See e. g., *People v. Volunteers of America*, 25 Cal.App.3d 111 (1971) (state required to pay severance damages because its right of way was laid out so that it nicked the subject property by some four feet – something that was clearly avoidable.)

The *Chevalier* rule was soundly criticized as encouraging economically inefficient government conduct. See *Condemnation Practice in California*, Chap. 6, Public Use and Necessity Defenses, § 6.20, p. 137 (CEB 1973). Nonetheless, when it came to having to pay compensation for losses caused by just such freewheeling governmental decision making, government "poor mouth" lamentations and predictions of imminent fiscal doom would ring out on cue. For a vintage example, see excerpt from a condemnor's brief quoted in Gideon 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 Cal. West. L. Rev. 57, 79, n. 96 (1969).

¹⁶ The *Symons* rule had it (on the basis of archaic case law) that in a partial taking the condemnee was not entitled to concededly inflicted severance damages unless the public project causing them (in the case of a highway, the actual traveled lanes, not just the right of way) was built on the taken land. At the same time, courts saw nothing wrong with charging condemnees with benefits that inured to their remaining land, irrespective of whether those benefits originated on the taken land or elsewhere.

\$___ million dollars' worth of excess lands without even being aware that it owned it. [CITATION]¹⁷

Nor were these cases the only examples of such misguided judicial concerns over nonexistent economic problems. In *Friesen v. Glendale*, 209 Cal. 524 (1930) the California Supreme Court succumbed to the importunings of some twenty governmental *amici curiae* and held that deed restrictions were not compensable property in eminent domain actions, even though they were treated as such in all other actions. But in time it became obvious that the *Friesen* rule was unsound, followed by only by a small minority of less-than-stellar courts, and accordingly it was eventually overruled in *Southern California Edison Co. v. Bourgerie*, 9 Cal.3d 169, 175 (1973).

The alarming extent to which otherwise brilliant and revered jurists could be induced to swallow condemnors' economic "parades of horrors" is illustrated by Justice Traynor's dissent in *Bacich v. Board of Control*, 23 Cal.2d 343, 379-380 (1943), where he lamented that awarding just compensation for substantial impairment of access would make the cost of freeways prohibitive and leave California with only the two freeways existing at the time: the Arroyo Seco Freeway (now the Pasadena Freeway) and a freeway in San Rafael. Of course, these hyperbolic concerns proved to be overstated (to put it politely) and before too long the California freeway network was measured in the thousands of miles, without any untoward effects on the public treasury. In fact, in the late 1960s and early 1970s, *annual* surpluses in the state highway budgets ran into the

¹⁷ Though a substantive inquiry into this subject goes to the question of a condemnor's right to take and is thus of collateral interest to the present discussion, one is entitled to ask why the State was engaging in so wasteful an activity and why it was defending it so fiercely in the California Supreme Court. The answer, I suggest, lies in Justice Mosk's *Rodoni* dissent (68 Cal.2d at 220) where he pointed out that the state had been using threats of excess condemnation as a means of coercing settlements with condemnees who demanded severance damages that the state did not wish to pay, even when they were plainly payable under law. For an example of such a coercive letter from the state to a prospective condemnee, see, Robert E. Capron, *Excess Condemnation in California – A Further Expansion of the Right to Take*, 20 Hastings L. Jour. 571, 583, n. 73 (1969).

hundreds of millions of dollars.¹⁸ That someone as accomplished as [Chief] Justice Traynor could be so easily taken in by condemnors' hyperbole is quite remarkable because, after all, he was the one who wrote:

"At the slightest sign that judge-made law may move forward, these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis . . ." Roger Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 621 (1961)

It bears noting that by the time he thus criticized "timid judges" easily intimidated by "bogus defenders of stare decisis" to such an extent as to forego "painstaking analysis," it was all too obvious that his hyperbolic concerns voiced in *Bacich* were utterly unfounded. Nonetheless he continued to cling to his unsound dissenting views (see *Breidert v. Southern Pacific Co.*, 61 Cal.2d 659, 668 (1964) (Traynor, C.J., concurring¹⁹).

Chief Justice Traynor's economic misadventures were further underscored by the economics of the *Rodoni* case. There, the State Division of Highways took the position that by condemning excess land (i.e., in addition to land to be used for its highway, additional land that would not be put to the specified public project), it would save money by foregoing the obligation to pay severance damages. The obvious problem with that approach, as correctly pointed out in Justice Mosk's dissent (68 Cal.2d at 218), was that by thus taking 83 times as much land as it would actually use, the state could not possibly save money, unless it meant to engage in the constitutionally forbidden practice of

¹⁸ See statistics collected in Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?* 48 Notre Dame Law. 765, 786, n. 101 (1973)

¹⁹ Though couched in the polite terms of a concurrence "under compulsion" of the *Bacich* case, this was Chief Justice Traynor's way of dissenting; see Roger Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U.Chi. L. Rev. 211, 219 (1957).

recoupment (i.e. taking the excess land with the intention of reselling it). As a matter of simple arithmetic, an entire parcel can be worth only 100% of its value, so that by taking it all the condemnor must necessarily pay the maximum amount possible, thus inherently saving nothing and indeed paying more, not less, than for a partial taking. Still, Chief Justice Traynor was able to muster a majority of the Court for his clearly unsound views, with only Justices Mosk and Peters dissenting. The majority thus went along with the condemnor's deficient argument, paying scant regard to the economic and indeed mathematical absurdity inherent in its position.²⁰ As noted, economic reality eventually asserted itself when a later Little Hoover Commission investigation revealed that Justice Mosk was right and the majority wrong, and that far from "protecting the fisc" the practice of excess condemnation produced huge net losses, and was evidently pursued by CalTrans just as Justice Mosk suggested: to coerce condemnees into unfavorable settlements (68 Cal.2d at 219-220), a matter that was evidently of no concern to the court's majority.

Though not quite as embarrassing, a similar fate befell Justice Burke's dissent in *Bourgerie*, 9 Cal.3d at 177-178, where he lamented that allowing compensation for takings of restrictive covenants would result in an avalanche of tenuous claims. In fact, in the quarter century that has passed since *Bourgerie* was decided, there have been no reported cases, at least none known to me, litigating valuation of such covenants. The concern proved to be fanciful.

Justices of the California Supreme Court have not been the only ones thus to gaze into the "clouded crystal ball" (to borrow the words of the *New Yorker* magazine). U.S. Supreme Court Justices proved to be equally incompetent as prophets. Thus, for example, in *United States v. General Motors*, 323 U.S. 373, 385

²⁰ The majority's ultimate justification was that the condemnor could eventually sell the landlocked remnant and thus recoup some of the cost of the parcel (68 Cal.2d at 209). But apart from the problem that this would only give rise to the constitutionally forbidden "recoupment theory" of excess condemnation, the majority offered no response to Justice Mosk's sensible inquiry of how it was possible that the landlocked land could be more valuable in the condemnor's hands, as opposed to the owner's. If the State could sell the remnant for a substantial sum in spite of its assertedly "worthless," landlocked condition, then why not the owner?

(1945) Justice Douglas lamented the effects of “swollen verdicts” for moving expenses, even in cases of temporary takings (where the tenant has to move out and then move back in when the condemnor takes a temporary “slice” out of an existing lease).²¹ Unchastened by experience which demonstrated the unsoundness of such concerns, Justice Douglas repeated his hyperbolic performance a quarter century later in *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 161 (1974) where he lamented that the court’s holding requiring the payment of just compensation to holders of secured liens in property of bankrupt railroads would produce multi-billion dollar liabilities. Neither of Justice Douglas’ concerns materialized. Moving expenses are now routinely paid to all displaced condemnees (Gov’t. Code § 7262(a)(1) and 42 U.S.C. § 4622(a)(1)) without any discernible effect on the construction of public works. As for those fancied multi-billion dollar liabilities that so worried Justice Douglas in the *Regional Rail Reorganization Act Cases*, economic reality proved their insubstantiality. See *Matter of Valuation Proceedings Under Sections 303(c) and 306 of Regional Rail Reorg. Act of 1973*, 445 F.Supp. 994 (Spec. Ct. Regional Rail Reorg. Ct. 1977)

Justice Black fared no better with his dissent in *United States v. Causby*, 328 U.S. 266, 274 (1946), where he decried an inverse condemnation award for the taking of an aviation easement as an act of unwarranted judicial interference with congressional power to regulate developing aviation. Yet, as we know, aviation has come a long way since 1942 when waves of Army Air Corps bombers swooped over Tom Causby’s chicken farm in North Carolina.

²¹ Justice Douglas’ views offer an interesting parallel to those of the government’s unsuccessful lawyer in the *General Motors* case. See Note, “*Just Compensation*” for the *Small Businessman*, 2 Colum. Jour. L. & Soc. Policy 144, 155 (1966), quoting Special Assistant to the U.S. Attorney General, Harry T. Dolan’s address to the Nassau County (New York) Bar Association, Oct. 19, 1945, to the effect that the U.S. Supreme Court’s holding in the *General Motors* case “would render needed public improvements impossible.”

Here in California, airports – in spite of their disingenuous lamentations²² – were repeatedly called to account for the damage their operations inflict on their neighbors (*Nestle v. Santa Monica*, 6 Cal.3d 920 (1972), *Greater Westchester Homeowners Ass'n. v. City of Los Angeles*, 26 Cal.3d 86 (1979), *Baker v. Burbank-Glendale-Pasadena Airport*, 39 Cal.3d 862 (1985), *Aaron v. City of Los Angeles*, 43 Cal.App.3d 471 (1974), *Drennen v. Ventura County*, 38 Cal.App.3d 84 (1974)), without any indication that this in any way impeded the development of commercial aviation in this state.²³ On the contrary, both LAX²⁴ and the Burbank-Glendale-Pasadena airports are even now in a process of expansion (Burbank to double its present size²⁵), with the only evident impediments being environmental concerns (*Burbank-Glendale-Pasadena Airport Auth. v. Hensler*, 233 Cal.App.3d 577 (1991)) and political infighting between the City of Burbank and the airport authority, *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, ___ Cal.App.4th ___ (85 Cal.Rptr.2d 28 (1999)).

²² See Michael M. Berger, *The California Supreme Court – A Shield Against Government Overreaching – Nestle v. City of Santa Monica*, 9 Cal. West. L. Rev. 199, 245 (1973), describing how following the filing of the Supreme Court's decision in *Nestle v. Santa Monica* 6 Cal.3d 920 (1972), the Los Angeles Department of Airports prevailed on the *Los Angeles Examiner* to run a front-page banner headline threatening to shut down LAX in 30 days unless the Supreme Court granted rehearing in *Nestle* (the actual headline is reproduced at 9 Cal. West. L. Rev. at 245). The threat was transparently phony because carrying it out would have required the City of Los Angeles to default on its airport revenue bonds, with a devastating impact on its municipal debt rating. The court, to its credit, was unimpressed and the city, of course, never carried out the phony threat. Still, this bit of clumsy public relations stagecraft provides an acute insight into the mentality of California municipal officials and their arrogant belief in the efficacy of their own powers to stampede the courts with contrived prophecies of imminent fiscal doom – a belief that, alas, was not always unjustified.

²³ None of these cases (in which aggrieved airport neighbors successfully sought just compensation for harm flowing from airport operations) deterred acquisition of vast amounts of land for the grandly named Los Angeles Intercontinental Airport in Palmdale which for all the fortunes frittered away on land acquisition for it (see e.g., *City of Los Angeles v. Retlaw Enterprises*, 16 Cal.3d 473 (1976), *Stone v. City of Los Angeles*, 51 Cal.App.3d 987 (1975)) is yet to become operational reality. If the Palmdale "Intercontinental" airport failed to materialize, it was not because of the City of Los Angeles had to pay excessive compensation to land owners whose properties it took, but because of poor planning inherent in the remarkable notion that an "intercontinental" airport could be built and operated in the middle of the desert without mass transit linking it to the population centers it was supposed to serve..

²⁴ Rick Orlov, *Will New LAX Plan Fly?*, Daily News, Jun. 15, 1999, p. 1; Jim Newton. *Riordan Offers Smaller Airport Expansion Plan*, L.A. Times, Jun. 15, 1999, p. B1.

²⁵ See Andrew Blankstein, *Burbank Airport Plan Near Takeoff*, L. A. Times, Jun.6, 1999, p. B1.

All of these judicial misadventures in gazing into “the clouded crystal ball” only illustrate what two commentators aptly characterized as an “inarticulate desire” of judges to limit the cost payable by the builders of public projects.²⁶ [TIE IN KRATOVIL & HARRISON]

A more realistic assessment of these problems suggests that when contemplated public projects are proposed but not built, the causes are usually matters having nothing to do with the rules that govern compensability of losses suffered by condemnees but rather with poor planning, overly ambitious or at best risky project design,²⁷ and the at times arrogant belief that with the aid of the courts public projects favored by a particular bureaucracy could be crammed down the throat of communities that wanted no part of them. The most obvious and notorious instance of stoppage of freeway construction was San Francisco’s “freeway revolt”²⁸ that resulted in the termination of freeway construction in San Francisco, some in mid-construction. But evidently, that reality and its obvious implications have gone unnoticed, by the courts while unjustified fears of fictional “embargoes” have gone on unabated, whether expressly voiced or not.²⁹

Other examples of failures to build improvidently planned public projects (for which land was acquired by condemnation) abound: *Lavine v. Jessup*, 161 Cal.App.2d 59 (1958) (Los Angeles courthouse not built on land acquired for it); *Spinks v. City of Los Angeles*, 220 Cal.App.2d 366, 369 (1934) (project for which the

²⁶ Frank S. Sengstock and John W. McAuliffe, *What Is the Price of Eminent Domain?* 44 U.Detr. Jour. Urb L. 185, 191 (1966)

²⁷ Two notable recent examples of fiscal overreaching and poor planning by local condemning agencies, were the Los Angeles Unified School District’s misguided effort to condemn Donald Trump’s old Ambassador Hotel grounds in Mid-Wilshire for a high school of all things, and CalTrans’ attempt to condemn the Union Station for a thrifty \$20 to 21 million (as opposed to a jury verdict of \$84.7 million). In each of these cases the respective condemnations were eventually abandoned at enormous cost to the condemnors and the condemnees.

²⁸ See Silen, *Highway Location in California: The Federal Impact*, 21 Hast. L. Jour. 781, 810 (1970), Charles M. Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 U. Det. J. Urb. L. 297, 302, n. 9, (1971)

²⁹ [Cite Kratovil & Harrison and the line from *Bacich*.]

land was taken not built); *Capron v. State*, 247 Cal.App.2d 212 (1966) (same); *Arechiga v. Los Angeles Housing Authority*, 159 Cal.App.2d 657 (1958), *id.* 183 Cal.App.2d 835, 838-839 (1960) (housing project for which land had been taken not built; land turned over instead to the Brooklyn Dodgers along with some \$2 million for site improvements, to induce them to move to Los Angeles; the Arechiga family was forcibly ejected from its land³⁰); also see, *Beistline v. City of San Diego*, 256 F.2d 421 (9th Cir. 1958). There is no indication that the cost of land acquisition played any role in the decisions not to proceed with the public projects.

Likewise, the county motion picture museum for which land was taken in *County of Los Angeles v. Anthony*, 224 Cal.App.2d 103 (1964) has never been built and the land forcibly taken from Steve Anthony who tried to resist the taking physically and was imprisoned as a result, is being used as a parking lot for the Hollywood Bowl. Similarly, in *Jones v. People*, 22 Cal.3d 144, 150 (1978) land was acquired under an advance acquisition program for a freeway that was never built. Indeed, several planned freeways in the Los Angeles area were never built, not because of any excessiveness of compensation that would have to be paid for the rights of way, but because of vigorous citizen opposition³¹ that is going on until this day³².

³⁰ For a historical background, see Thomas S. Hines, *The Battle of Chavez Ravine*, L.A. Times, Apr. 20, 1997, p. M1.

³¹ Ray Hebert, *Beverly Hills Freeway: to Limbo*, Los Angeles Times (S.F. Valley News, part II) Dec. 7, 1970, p. 1, Irv Burleigh, *Councilmen Issue Warnings: Freeway Protest Meeting Set*, Los Angeles Times (S.F. Valley News), Sep. 9, 1970, Part II, p. 1; Irv Burleigh, *Laurel Canyon: State Suspends Freeway Studies*, Los Angeles Times, Dec. 15, 1970, part II, p. 1; *No Urgency for Whitnall Route, Report Shows*, Los Angeles Times (S.F. Valley ed.), May 23, 1974, Los Angeles Times (S.F. Valley ed.), May 23, 1974; Part VII, p. 1

³² See Joe Mazingo and Richard Winton, *Judge Tentatively Bars Extension of Freeway*, Los Angeles Times (Valley Sec.), June 3, 1999, p. B11 (After some 35 years of on-again, off-again planning and fierce community opposition, the Long Beach Freeway extension through South Pasadena and El Sereno has been enjoined by a federal court.)

Still other projects were built on land taken by eminent domain, but in spite of rosy projections made at the time of taking, some of them failed after being constructed because of poor planning or ineffective management.³³

This discussion could be prolonged but the point seems quite clear: when freeways and other public projects have been delayed or scrubbed altogether, it was *not* because payment of compensation to displaced condemnees was prohibitive, but because of other considerations, most being community resistance [CITE UCLA ARTICLE – TRANSPORTATION IN MEGALOPOLIS], plain bad planning, and illegal conduct on the part of government agencies charged with the responsibility for those projects.³⁴

All of these considerations are of particular concern in redevelopment condemnations. The original vision of redevelopment as “slum clearance” has grown quaintly archaic. Even in its heyday, condemnation in the name of redevelopment often proved to be a smokescreen for the seizure of desirable urban land for well connected redevelopers,³⁵ while the urban poor – who were supposed to get safe, decent and sanitary housing out of it – were simply herded

³³ See *Pasadena Redevelopment Agency v. Pooled Money Investment Board*, 136 Cal.App.3d 290 (1982); Douglas P. Shuit, *Long Beach Mall Finds Its Niche But Not Survival*, L.A. Times, Jun. 15, 1999, p. B13; Anne Rackham, *Legal Costs, Failed Project Plan Carry Hawthorne to Brink, Auditor Reports*, L.A. Bus. Jour., Apr. 24, 1995, p.1 (Massive failure of a redevelopment project), also see, *Community Redevelopment Agency v. Force Electronics, Inc.*, 55 Cal.App.4th 622 (1997) (Hawthorne redevelopment Agency unable to pay condemnation judgment after its redevelopment project collapsed in the real estate recession); Michael Flagg, *Troubled Hotel Becomes Symbol to Critics*, L.A. Times, Sep. 12, 1994 (Insolvency of hotel built as part of redevelopment project in Redondo Beach)

For details of how the Los Angeles Community Redevelopment Agency incurred losses of some \$65,000,000 on its downtown project and the Baldwin Hills Crenshaw Plaza shopping center, see Ted Rohrlich, *City Made Bad Realty Investments, Report Shows*, L.A. Times, Mar. 30, 1998, p.B1. For a further report on Los Angeles CRA's economic misadventures that have brought it face to face with a projected \$40,000,000 shortfall for the next five years, see Beth Barrett, *Building Up Debt: Redevelopment Agency Facing \$40 Million Shortfall*, Daily News, Dec.14. 1998, p. 1.

³⁴ The Century Freeway provides an excellent example. Its construction was enjoined in 1981 by the federal court because of CalTrans' massive violations of environmental and relocation laws; see *Keith v. Volpe*, 501 F.Supp. 403 (C.D. Cal. 1980). For a discussion of the aftermath of *Keith v. Volpe*, see William Trombley and Ray Hebert, *The Century Freeway: Bold Housing Program Develops Big Problems*, Los Angeles Times, Dec. 28, 1987, Part I, p. 1.

³⁵ The redevelopment project that gave rise to *Berman v. Parker* is paradigmatic. The buildings that replaced the Southwest Washington slums were high-priced co-ops, townhouses, apartments and commercial facilities. I know. I lived there in 1963-1964.

into other slums, their lawsuits rejected, typically on the grounds of lack of standing.³⁶ Racism was rife, earning urban renewal the sobriquet “Negro removal. [CITE L REVS -- JOHNDROE PIECE -- MILES LORD SPEECH] These days, redevelopment concentrates on “blighted” land, using a definition of “blight” that is positively Orwellian [CITE L. REV ART. – BUNKER HILL – SWEETWATER] but is nonetheless routinely used to facilitate construction of avowedly private, profit-making enterprises, such as shopping malls, automobile retail centers, office buildings, etc. The subject of redevelopment has spawned a large body of commentary, nearly all critical, so no purpose would be served by replotting that ground here. Suffice it to quote Justice Macklin Fleming’s concluding observations in *Regus v. City of Baldwin Park*, 70 Cal.App. 3d 968, 982-983 (1977), which bear repeating:

“[U]nrestricted use of development powers fosters speculative competition between municipalities in their attempts to attract private enterprise, speculation which they can finance in part with other people’s money.[³⁷] When the extraordinary powers of legislation designed to combat blight and renew decayed urban areas are used as a fiscal device to promote industrial, commercial, and business development in a project area that is merely underdeveloped rather than blighted, competitive speculation may be turned loose. By misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which it then can use as a grubstake to subsidize

³⁶ Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 Va. L. Rev. 745 (19____); Charles Martin Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 U. Det. Jour. Urb. L. 297 (1971); Henry W. McGee, *Urban Renewal in the Crucible of Judicial Review*, 56 Va. L. Rev. 826 (1970); Terry J. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. Pa. L. Rev. 183 (1968); Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 U. Det. Jour. Urb. L. 1 (1968); Comment, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 Yale L. Jour. 966 (1968)CITATIONS

³⁷ See Siok-Hian Tay Kelley, *City Fears Losing Franchises, Sales Taxes: Monrovia Planning Auto Row Next to Duarte*, L.A. Times, Sep. 25, 1988, Part II, p. 6. Frank Klimko, *Car Lot Condemned so Dealer Can Expand*, San Diego Union-Tribune, Dec., 24, 1996, p. B-1.

commercial development in the project area in the hope of striking it rich. Such schemes contemplate borrowing money by issuing bonds on the strength of assured future tax revenues, money which is then used to acquire, improve and resell property within the project area at a loss as an inducement to business enterprises such as K-Mart³⁸] to locate within the project area rather than in the neighboring communities. In essence, the tax revenues are used as subsidies to attract new business. The immediate gainers are the subsidized businesses. The immediate losers are the taxpayers and government entities outside the project area, who are required to pay the normal running expenses of government operation without the assistance of new tax revenues from the project area.

The promoters of such projects promise that in time everyone will benefit, taxpayers, government entities, other property owners, bondholders; all will profit from increased future assessments on the tax rolls, for with the baking of a bigger pie bigger shares will come to all. But the landscape is littered with speculative real estate developments whose profits turned into pie in the sky; particularly where a number of communities have competed with one another to attract the same regional businesses. Undoubtedly, it was for these reasons that the Legislature restricted urban renewal to blighted areas, and, when faced with abuses in 1976, further tightened its restrictions.

At bench, City's projected redevelopment plan possesses a particularly speculative cast in that the businesses it hopes to attract through redevelopment are primarily those of consumption rather than production, businesses such hotels and shopping centers whose acquisition does not increase the total wealth of a region as a whole but merely redistributes the existing supply by capturing business from rival communities. The success of such strategy assumes

³⁸ That this is no hyperbole, may be seen from the fact that in *Redevelopment Agency v. Tobriner*, 153 Cal.App.3d 367 (1984), and 215 Cal.App.3d 1087 (1990) the purpose of the condemnation was to insert forcibly a Levitz furniture store into an existing shopping centers. The owners, by the way, received no compensation.

the absence of effective counter-measures by rival communities targeted for displacement.^[39] Private enterprises may embark on such speculative competitive enterprises. Under present law, public entities may not.”

That Justice Fleming was right about the fiscal hazards undertaken by municipalities thus fronting for private redevelopers is demonstrated by the track record of failed redevelopment projects and enterprises (see, e.g., *supra*, n. ___ and accompanying text). But even if ultimately successful, it is difficult to see why such clearly private, profit-making commercial ventures should be subsidized in part by denial of full indemnity to people – often indigenous business owners⁴⁰ - being displaced to make room for businesses more favored by city hall insiders because of their higher revenue generating potential (e.g., shopping malls, car dealers, and other well connected business interests). Perhaps under existing law municipalities have the raw power to engage in such conduct, Justice Fleming’s admonition notwithstanding, but they should not be permitted to do so by undercompensating the indigenous owners and occupants of redevelopment project areas.

While I recognize that by raising these matters I thrust my harpoon into another whale, as it were, and that reform of the ongoing scandal that is the bloated, wasteful process of subsidizing private business ventures with public funds on the backs of indigenous inhabitants and business people, is a subject afield from eminent domain litigation expenses (though related to it), it is appropriate to raise here the question of why should property owners being displaced for the pecuniary benefit of other private entities, be required to forego not only the full measure of compensation for losses suffered by them but also have to bear the expense of needless litigation to demonstrate that the limited

³⁹ For an example of such countermeasures, see Molho and Kanner, *Urban Renewal, supra*, 8 Pac.L.Jour. at ___.

⁴⁰ See e.g., *Chhour v. Redevelopment Agency*, 46 Cal.App.4th 273 (1996) (business located in an existing shopping center displaced by redevelopment agency to make room for other businesses)

“just” compensation being offered to them as their supposed constitutional due is inadequate even under existing rules of compensability.

Though redevelopment as practiced today, presents this question in stark, black-and-white moral terms, such concerns are equally applicable in cases of condemnations for more traditional public uses. To take highways as an obvious example, they impose direct costs (of construction and maintenance) but they also confer huge benefits on society at large and in particular on businesses such as construction, trucking, petroleum, and rubber, to name the obvious ones. The excesses of the “highway lobby,” though not much in the public eye these days because of the decline in new major highway construction, are a matter of historical record.⁴¹ In any event, if construction of highways would indeed be placed in jeopardy by indemnifying condemnees – a dubious notion, given the state of the highway trust funds – resort to toll roads would seem to provide the complete answer to that problem, even if it were real.

To sum up this facet of the discussion, in the context of eminent domain, courts in general and California courts in particular have failed in their cherished function of interpreting the Constitution so as to protect citizens’ rights enshrined in the Bill of Rights. On the one hand, courts rubber-stamp virtually anything as “public use.”⁴² They have made the public necessity element of the government’s right to take, a nonjusticiable issue, on a forcefully voiced rationale that it is not for them to pass judgment on the considered decisions of the executive branch of government as to the advisability or feasibility of a particular

⁴¹ See, e.g., Kelley, *The Pavers and the Paved* (1971), Leavitt, *Superhighway – Superhoax* (1970), Mowbray, *Road to Ruin* (1969). See Rosenblatt, *How Highway Lobby Ran Over Proposition 13*, L.A. Times, Dec. 27, 1971, Sec. F, p.1. See *Brown v. Superior Court*, 5 Cal.3d 509, 513 (1971)]

⁴² See *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60 (1982) (condemnation of an NFL football franchise for the purpose of conveying it to new owners, expected not to exercise their right of moving out of Oakland) deemed to be a “public use”), see James Krier, *How Free Is Government to Raid Private Domain?* L.A. Times, Jun. 24, 1982, Part II, p. 7. For an equally egregious case, see *Linggi v. Garovotti*, 45 Cal.2d 20 (1955) (owner of an apartment building with a defective sewer line that was creating a public nuisance held entitled to condemn an easement across his neighbors’ land to hook up to a county sewer line)

public project.⁴³ The generally prevailing formulation is that public necessity for a taking is not justiciable unless there is fraud, bad faith or abuse of discretion (*United States v. Carmack*, 329 U.S. 230, 247-248 (1947)), but the California Supreme Court went further and held in *Chevalier*, 52 Cal.2d at 307, that public necessity is not justiciable *even if fraud, bad faith, and abuse of discretion are present*. From that one might be justified to conclude that California courts have made a fundamental policy decision to stay out altogether out of the question of the feasibility of public works, since the decision to construct them and the task of raising revenues for them are clearly within the purview of the other two branches of government.

And yet, once the right to take is established and issues going to “just compensation” need to be litigated, the courts suddenly come alive, execute a neck-snapping about-face, depart from their passive role, and assert that it is not just their prerogative but indeed their duty to intervene actively in the planning of public project after all but only to keep condemnation awards down,⁴⁴ thus sparing the condemning agencies the need to face the full extent of the ineluctable economic consequences of their own non-reviewable decision-making. This is both logically inconsistent and morally questionable. If the courts are indeed as helpless in the process of setting taking policy as they tell us they are,⁴⁵ they should follow an equally scrupulous non-intervention policy when it

⁴³ Just how that rationale, or any other, even if accepted at face value, justifies the courts' nonfeasance in the face of government fraud, bad faith and abuse of discretion being perpetrated in connection with proceedings over which they preside, is obscure.

⁴⁴ *People v. Symons*, 54 Cal.2d 855, ___ (1960).

⁴⁵ The best example is provided by the concurring opinion of Chief Justice Bird in *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, ___ (1982) in which she lamented the misuse of the power of eminent domain at length, but then concluded that she ~ the most activist judge heading the most activist court in the nation ~ simply lacked the power to interpret the Constitution so as to disagree with a municipality's interpretation of a legislative enactment.

Paradoxically, even as the courts thus abase themselves before the asserted authority of the legislature to interpret the “public use” clause, they simultaneously assert that when it comes to the “just compensation” clause, they, not the legislature, enjoy decision making supremacy [CITATIONS] though the legislature may provide compensation, if it chooses, over and above the constitutional minimum. Then, adding insult to injury, when it suits them, the courts reverse course again and when they do not wish to change even concededly outmoded and unjust judge-made rules, they tell us that they lack the “institutional

comes to confronting the demonstrable economic consequences of the executive branch's unreviewable decisions, and set the "just compensation" guaranteed by the Constitution as their independent judgment dictates irrespective of whether or not that is congenial to the budgetary desires of the executive branch whose decision to proceed with a public project is conclusive. Certainly, in other areas of the law the California Supreme Court has experienced no difficulty rejecting similar claims of impending fiscal doom. (See, *Dillon v. Legg*, 68 Cal.2d 723, 747 (1968), *Connor v. Great Western*, 69 Cal.2d 850, 867-868 (1968). In those cases the court adopted the opposite rationale and confronted such claims with healthy skepticism. Indeed, in cases of tort liability of government entities, the court's stated policy has been that imposition of liability is desirable because it provides a disincentive to wrongful conduct. [CITATIONS]

In sum, this is a situation in which a bit of judicial consistency of policy would go a long way toward confronting the condemning agencies with the natural economic consequences of their freewheeling decisions to condemn, and infuse those decisions with an appreciation of their economic consequences. See, *Durham, Efficient Just Compensation As a Limit on Eminent Domain*, 69 Minn. L. Rev. 1277 (1985). Additionally, given both the private economic benefits generated by condemnations (particularly but not exclusively by redevelopment), and the enormous waste of public economic resources that has been the unfortunate byproduct of government land acquisitions, one has no intellectually honest alternative but to agree with Spies & McCoid (? CHECK) that "the old chestnut that increased compensation will bankrupt the states has absolutely no validity."

The bottom line of all this is that for all the brave judicial talk, fairness to condemnees has been parsimoniously rationed by judges. The experience of the 1970s demonstrates that an infusion of fairness and balance into this "dark corner

competence" to do so. *Community Redevelopment Auth. v., Abrams*, 15 Cal.3d 813, 828 (1975).[ADDITIONAL CASES]

of the law"⁴⁶ can come from the legislature, and this has been particularly true of litigation expenses. For here, the courts' performance has been dismal indeed. Just how the notion got started that condemnees are not entitled to recovery of litigation expenses, even in cases of condemnors offering them gross undercompensation that forces them into costly litigation necessary to secure their constitutionally guaranteed "just compensation," and thus into losing a part and at times all of it to litigation expenses, is obscure. What is clear is that to an alarming extent, the prevailing rules of "just compensation" were shaped in this country with the coming of the railroads in the 19th Century, and amazingly, they continue unreformed to a surprising extent even as society, law, public finance methods and the manner of exercise of the power of eminent domain have undergone a revolution.

Before moving on to specific recommendations, it seems appropriate to address here the arguments that usually are proffered in opposition to providing full and fair compensation to condemnees, that includes their litigation expenses.

First, the "costs too much" argument lacks merit, as is strongly suggested by the preceding discussion (*supra*, pp. ____) and as has been the judgment of virtually all commentators who have addressed the problem. The cost of public works includes not only the cost of land and of the supplies and services necessary to construct and operate them. It also includes the economic losses, demoralization costs suffered by condemnees whose homes and businesses are displaced for the public project, and the transactional costs incurred by them (including, where necessary, litigation expenses).⁴⁷ The latter component of the overall cost does not disappear when the displaced condemnees are denied full compensation. Rather, a significant part of it is dumped on them. As Professor Arvo Van Alstyne put it in one of his studies performed for the Commission:

⁴⁶ This characterization of eminent domain was coined by Lewis Orgel in his treatise *Valuation Under Eminent Domain*, Vol. II, § 249, p. 266 (Michie 1953).

⁴⁷ *Holtz v. Superior Court*, 3 Cal.3d 296, ____ (1970)

“The fundamental question that should be faced, and which deserves a rationally developed legislative response 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.”⁴⁸

If indeed a public project generates values that make it worth building, then those values should be ample to cover all demonstrable costs. We do not tell roadbuilders that they must lower their usual prices for highway construction because such reduction in revenues is part of their common burdens of citizenship. Nor do we tell the businesses that occupy redevelopment projects that they must curtail their profits as their burden of citizenship representing their contribution to revitalization of their community. There is likewise no legitimate reason to tell condemnees that such burdens of citizenship are theirs and theirs alone to bear.

Likewise, the argument that awarding litigation expenses to condemnees is a one-way street as argued by condemnors, is deficient. The short answer is that condemnees are supposed to receive “just compensation,” but when, in order to receive it, they have to bear litigation expenses that in the end diminish or wholly deprive them of the promised “just compensation,” that denies them the full measure of what the constitutional promises. This is true whether those litigation expenses are classified as constitutionally required (as in Florida) or are a matter of legislative grace. The fact is that however parsed, denial of litigation expenses de facto deprives condemnees, of their full measure of just compensation, and in the case of those at the lower rungs of the socio-economic ladder, of all compensation, when the cost of litigation equals or exceeds the equity in their homes.

⁴⁸ Arvo Van Alstyne, *Just Compensation for Intangible Detriment: Criteria for Legislative Modification In California*, 16 U.C.L.A. L. Rev. 491, 543-544 (1969)

Similarly unfounded is the condemnors' argument that the term "just compensation" implies justice to the condemnor as well as the condemnee.⁴⁹ Just what doctrinal consequences this catchphrase is supposed to have, has not been explained. Obviously, no one can object to courts being "just" in the sense of acting in an unbiased, evenhanded way. But the problem in eminent domain has been that courts have *not* been doctrinally even-handed in formulating rules of compensability. As is the overwhelming judgment of informed commentators, courts have been partial to condemnors.⁵⁰ Indeed, judicial opinions abound, freely confessing the prevalence of unfairness and harsh treatment of condemnees. Thus, for condemnors to demand "justice" in the application of prevailing rules of eminent domain law, borders on *chutzpah*.⁵¹ Nonetheless courts try to duck the ineluctable moral consequences of their mistreatment of condemnees, by passing the buck to the legislature,⁵² or even prattling about lacking the power to interpret the constitution⁵³ or lacking the "institutional competence" to reform concededly outmoded judge-made rules that no longer fit the realities of changed modern society.⁵⁴

This strange judicial attitude is an anachronism rooted in 19th Century history. In the early days, land was plentiful and cheap, condemnations were extremely rare, and even when they occurred the condemnees could usually move without suffering significant incidental losses. Litigation over just compensation was thus extremely rare. But a new era dawned when condemnations became more common as railroads started to build their lines

⁴⁹ See e.g. *People v. Pera*, ___ Cal.App.2d ___, ___ (19___)

⁵⁰ [CITATIONS – Gustafson et al.]

⁵¹ It should be recalled that one illustration of the concept of *chutzpah* in action is the case of the mugger who, while beating up his victim, yells "Help! Help!"

⁵² [CITE CASES COLLECTED IN EDISON]

⁵³ *Oakland Raiders*, 32 Cal.3d at ___

⁵⁴ *Abrams, supra*, 15 Cal.3d at ___

across the country. It was at first supposed that new railroads would bring prosperity, and so farmers gladly donated land for railroad rights of way. These practices are vividly described in the memoirs of John Sherman who served as condemnation counsel to railroads in Ohio before the Civil War [CITATION]:

“Much of the right-of-way was freely granted without cost by the owners of the land. As the chief benefit was to inure to farmers, it was thought to be very mean and stingy for one of them to demand money for the right-of-way through the farm. I went over the road from Mansfield to Plymouth with a company of five appraisers, all farmers, who carefully examined the line of the railroad, and much to my mortification, assessed in the aggregate for twenty miles of railway track, damages to the amount of \$2,000. I honestly thought this an exorbitant award, but the same distance could not be traversed now at a cost for right-of-way for ten times that sum.” (id. at 81)⁵⁵

There, in a nutshell, is the history of American eminent domain, that in many ways parallels the history of the country. The seemingly “free” land of an undeveloped bucolic American frontier quickly became a valuable and coveted asset. But even so, much of the law of eminent domain remains conceptually mired in that long since discarded 19th Century imagery in which self-proclaimed apostles of progress styled themselves the “good guys” confronting the “bad guys” property owners who were said to impede “progress” with their “mean and stingy” demands that their constitutional rights be observed and that they receive the “just” compensation promised by the Constitution but rarely

⁵⁵ What Sherman failed to tell his readers was that the Ohio railroads not only took advantage of the unsophisticated farmers’ naïvete in granting rights of way gratis, but they were at that time dipping generously into the state treasury. The state of Ohio too was so enamored with the prospects of railway promoters that in financing them it went into debt to the tune of \$20,000,000, a staggering sum in today’s dollars. The debt proved to be . . . CHECK L.REV ARTICLE: And yet Sherman and his confreres were “incensed,” no less, when local farmers sought fair market value for their land. When it comes to eminent domain, some things evidently never change.

delivered by the courts. Remarkably, some of that attitude persists until today.⁵⁶ So successful was that propaganda campaign that it survives until this day in movies and fiction where the plot staple is the depiction of a landowner, usually a "landlord" or "developer" who secretly buys up "on the cheap" land secretly known to him to be slated for public acquisition, in order to get a high price when the land is eventually acquired by the public body.⁵⁷

During the 1960s and early 1970s (before the Commission completed its reforms and the Eminent Domain Law was enacted) it was common for condemnors' lawyers to disparage the uncompensated harm to seriously undercompensated condemnees as "the price of progress." But no one ever explained why that price should not be paid as a quid pro quo by the beneficiaries of that progress, rather than more or less randomly chosen people whose properties wound up in the path of public projects.

But in fact, the 19th Century reality was the opposite of this imagery. The railroads were the instruments of enrichment for the "robber barons." In the East it was the Vanderbilts, and in California it was railroad magnates like Stanford and Crocker who grew rich beyond the dreams of avarice, even as their railroads' lawyers were in court persuading the compliant California judiciary to impose various restrictive rules on compensation payable in eminent domain.

⁵⁶ Lest the readers think this to be hyperbole, consider the amazing case of the Pacific Lumber Company which found itself confronted with open demands that it give away for free its substantial, multi-thousand acre timber holdings, containing valuable old growth redwoods for a federal park. For an exhaustive review of the huge scale on which the factually unfounded vilification of Pacific Lumber and its owner Charles Hurwitz was conducted by the mainstream press, see Harry De Angelo and Linda De Angelo, *Ancient Redwoods and the Politics of Finance: The Hostile Takeover of the Pacific Lumber Company*, 47 *Jour. Fin. Econ.* 3 (1998)

⁵⁷ [Cite to movies (Nadine? The Detective?)] In fact, when corrupt public land acquisitions occur, they are the product of collaboration between dishonest land owners and corrupt public officials, not litigation in open court. See e.g., *People ex rel Mosk v. Barenfeld*, 203 Cal.App.2d 166 (1962) See, Orgel, *Valuation Under Eminent Domain*, Vol. II, § ____, p. ____ (excessive cost of public land acquisition in New York traceable to corrupt municipal politics). The most recent nationally reported instance of such questionable dealings came up in 1988, when it was charged that friends of Massachusetts Governor Michael Dukakis bought a parcel of land in New Braintree (for \$3 million) that had twice been rejected as a site for a state prison. Two weeks after the purchase the site moved up to the top of the state's acquisition list, and was appraised by the state's appraiser for \$8.7 million. *National Review*, Aug. 19, 1988, p. 34; The site was acquired by the state for \$5 million. *Massachusetts Glossary*, *The Wall St. Jour.*, Aug. 12, 1988

The relationship between the courts and the railroads was incestuous and corrupt. Supreme Court Justice E.B. Crocker was the brother of Charles Crocker, one of the "big four" of the Southern Pacific. He was appointed to the California Supreme Court by Governor Leland Stanford (another of the "big four") who became chief counsel for the railroad after he left the court. [Kevin Starr, *Inventing the Dream*, Oxford U Press 1985, p. 200; also Supreme Court Justices, 2 volume work GET FROM LIBRARY]. All Supreme Court justices enjoyed free railroad passes. In short, it was not a hospitable environment for the Californians whose land got in the way of the railroads.

Insofar as litigation expenses were concerned, the traditional rule consisted of one word: "none," not even in cases of abandonment of condemnation in which the condemnees were put to considerable expense litigating compensation, only to have the railroad, dissatisfied with the verdict, dismiss the action and then refile it, thus de facto granting itself a new trial. This practice was known as "costing 'em to death," and former CCP § 1255a, enacted in ___ was the legislative reaction to this odious practice.

The usual justification for denial of litigation expenses has been that eminent litigation is like other civil litigation and as such subject to the "American rule" under which each party bears its own litigation expenses, as in contract and tort litigation. But this analogy is fallacious. The measure of damages in eminent domain is quite different than either in tort or contract. Moreover, in contract cases the contracting parties may protect themselves against having to bear litigation expenses by inserting appropriate language into their contracts. In tort cases, the measure of damages encompasses a variety of non-economic losses that, whatever they represent in theory, in practice provide liquid funds with which successful plaintiffs can pay their lawyers.⁵⁸ This is not

⁵⁸ To illustrate, it is a familiar phenomenon that when legislation seeking to reform tort law by imposing a cap on non-economic damages is proposed or enacted [CITE MED MAL LEGISLATION] the forceful response from the plaintiffs' bar is that this will deprive victims of torts of their day in court because with recovery for non-economic losses so limited, there won't be sufficient funds awarded to justify skilled lawyers taking on these difficult cases on a contingent fee basis.

true in eminent domain. "Just compensation" is strictly limited to fair market value of the taken property, and even that is subject to a procedural screening process and a variety of substantive judge-made rules that de facto deny even that measure of damages.⁵⁹ Most incidental losses are deemed non-compensable, and thus condemnees displaced from their property by eminent domain, do not receive the same measure of compensatory damages as they do when displaced by private parties. Thus, the analogy to other litigation is fallacious. Eminent domain cases are indeed different, as condemnor's counsel are ever ready to explain to inexperienced judges who naively think that the measure of damages in eminent domain is like in other cases.

[DISCUSS HISTORY- VICKERS AND ITS CRITICISMS -- GONZALES]

Eventually, in the aftermath of the raw injustice displayed in *Ortiz* the governmental resistance to a legislative solution was overcome, and CCP § 1249.3 was enacted (superceded by CCP §1250.410). Unlike the statutes in other states, the California approach did not hinge an award of litigation expenses on the disparity between the prelitigation offer and the award, but rather introduced a complex "gamble" scheme. Thirty days before trial each side would have to take a "final" position and gamble not on whether the award would exceed the condemnor's pretrial offer, but rather on whether the judge would deem the offer and demand "reasonable." That, of course, introduced an element of unpredictability into the process and spawned a whole new subspecies of litigation. How is a judge to determine "reasonableness" of the appraisal process? Section 1250.410(b) states that the determination of reasonableness is to

⁵⁹ The best example is provided in cases of partial takings where the measure of damages is the difference between the before and after values of the subject property (or its equivalent, the value of the part taken, plus severance damages, minus benefits). But if in the after condition the remainder suffers a diminution in value because its access is rendered inferior by the partial taking, courts do not allow that element of diminution in value to be considered in calculating severance damages, unless the condemnees demonstrate that the impairment of access is "substantial" – a maddeningly confused (and confusing) determination in which courts cannot even agree whether it is one of fact, of law, or both [CITATION]. Also see, *City of Baldwin Park v. Stoskus*, 8 Cal.3d 563 (1972) and *White v. County of San Diego*, 26 Cal.3d 897 (1980) (condemnor may assess condemnee for special benefits (and its own administrative and legal costs) even where the amount of the assessment includes the "just compensation" ostensibly awarded to the condemnee.) In such cases the condemnees get nothing for their taken land.

be determined on the basis of "evidence admitted and the compensation awarded." This is at best a vague standard that allows judges, if they so choose, to disregard the disparity between offer and award and second-guess the jury on the basis of their own perception of the evidence and their subjective notions of who should have won . Not surprisingly, judges have been using all sorts of factors as a standard of reasonableness, as illustrated by the Holly Olson Paz study, but in the end most have quite rationally concluded that when the disparity between offer and result exceeds a certain level, that fact becomes most important and militates in favor of awarding litigation expenses.

Unfortunately, in *Continental Development*, the supreme court overturned that built up body of judge-made law and has held that the disparity between offer and result is not to be deemed as the most important factor. That holding unsettles the whole body of existing law and sends lower court judges "back to the drawing board," as it were. One can now expect condemnors to argue that their self-serving depictions of the "care and good faith" in the preparation of their offers should trump the fact that those offers fall short of awards by even very large amounts.

I suggest that what all that demonstrates is that the supreme court has thus departed from the core purpose of the fee shifting statute, which was to award litigation expenses to condemnees who obtain awards that are substantially higher than the condemnor's offers, and thereby discourage "low ball" offers and not coincidentally to reduce litigation. That is what CCP § 1250.410 is all about. It (and its predecessor CCP § 12___) was enacted to address the problem of unfairness that results when the condemnee receives an inadequate offer and after having to incur [unnecessary] litigation expenses, demonstrates its inadequacy by a favorable verdict.⁶⁰

⁶⁰ INSERT HISTORICAL BACKGROUND – MASS CONDEMNATIONS, PORT CHICAGO, CONGRESSIONAL HEARINGS, NASSAU COUNTY STUDY, ETC. – FAILURE TO PROVIDE JC TO "LITTLE GUYS" PROBLEMS – "BIG GUYS" PROBLEMS -- OFFERS BELOW CONDEMNORS' OWN APPRAISAL ETC.

All those other things (i.e., the condemnor's good faith, care and accuracy of the condemnor's appraisal, etc.) were supposed to be secondary; they were included in the statute only as safeguards to deal with the situation in which a condemnee with a poor case gets lucky. To be sure, there are such cases, but they are rare.⁶¹ Moreover, the notion that condemnor's good faith somehow enables it to make grossly low offers with impunity, and shields it from the effect of the fee shifting statute is an amazing criterion. After all, most condemnors proffer their valuation evidence in good faith, don't they? And if not, shouldn't they be subject to censure or sanctions entirely apart from any fee shifting statute?⁶² And so, I suggest that good faith has nothing to do with the problem at hand. In a case in which a condemnee is put to the expense of having to litigate compensation and prevails the condemnor's motivation and good faith vel non simply don't matter. A condemnor that advances in good faith a figure that proves grossly inadequate to compensate the condemnee (as demonstrated by the duly adjudicated award) has unjustifiably imposed on that condemnee litigation expenses that diminish the latter's just compensation. This is so because appraisal is a matter of opinion (Evidence Code § 813) and opinions can differ widely for a variety of reasons, some good and some bad. Most fortunes that are made in the real estate market (and other markets as well) arise from the fact that the seller saw a much greater potential for the property than the buyer. That doesn't make their respective position either careless or in bad faith. Conversely, a buyer may be overly optimistic and overpay for a particular parcel, and eventually lose his shirt. That too is market reality. But appraisers, in opining what the statutory well-informed, perceptive buyer would pay (and a like seller accept) can only look to imperfect market transactions, and extract an opinion of value from those.

⁶¹ CITE CASE FROM PAZ STUDY.

⁶² See *Decker*

In other words, the inevitable burden of "guessing wrong" has to fall somewhere, and the policy decision behind CCP § 1250.410, though imperfectly articulated, is that it should fall on the condemnor whose filing of the action and whose inadequate offer are the precipitating cause of the problem. Some appraisers form opinions that are far afield from what the jury decides, but when they do, the condemnees' litigation expenses are incurred just the same, and they therefore have a legitimate claim to being indemnified.

It is for that reason that other states don't use the California "multiple-factor gamble" approach, and lawyers in other states with whom I have discussed our method generally thought that though better than a system of no fee recovery at all, our system is weird.

Apart from such subjective assessments, the California system also lends itself to manipulation and strategic behavior in which offers and demands are being made not in the expectation that they will (or should) be accepted, but in order to set the stage favorably for the anticipated litigation expense fight. This is particularly visible in cases in which the spread between the parties' evidence is very large and the condemnor offers evidence of very low value, but realizing that this increases the hazard of having attorneys fees awarded against it, it makes an offer that is a multiple of the evidence it intends to present⁶³.

With these considerations in mind, I suggest that the revision of CCP § 1250.410 should depart from California's idiosyncratic approach, and join the approach of the majority of the states that have enacted such legislation. That means that the trigger for the shifting of litigation expenses should be objective. The approach of other states that set a percentage increase over the condemnor's offer has much to recommend it: simplicity, judicial efficiency and predictability. I understand, of course, that this suggestion will not be to condemnors' liking. They were able to turn away such legislation in 197__, and substitute for it the present system that has given us a confusing body of inconsistent law. Now, with the supreme court's holding in *Continental Development* eliminating the only

statutory criterion that lends itself to even a rough quantitative approach, the situation is certain to grow worse.

I might add, that the present state of the law is good for condemnees' lawyers. It foments additional (and in my opinion, needless) litigation that in successful cases increases the fees payable by condemnors to condemnees' lawyers and at times to their appraisers. But the price for this bit of lawyers' prosperity is too high. It imposes needless burdens on all parties, including the courts. Avoidable procedural/litigational complexities, as Justice Friedman astutely noted in *People v. Voltz*, 25 Cal.App.3d 480, 487 (1972), only shift the cost of adjudication from the parties to the courts ("Any profit to the state highway fund would be weighed in the balance against the increased cost of court operation. One segment of government would pay for the tactical choices of another." id. at 487) In other words, in such cases the condemnor's gain is not only the owners' but also the courts' loss.

Accordingly I recommend that the Commission draft legislation that draws a distinction between ordinary condemnations and condemnations for redevelopment (or other similar cases where the taken property is to be devoted to private, profit-making purposes – e.g., the *Oakland Raiders* case) In the latter case, the law should provide (as does the law of Indiana, Louisiana, Michigan, Montana and Oregon – see p. 7 of your memo) that an award that results in any increase over the condemnor's offer would require an award of litigation expenses. As noted above, in the context of private profit-making uses to which the condemned land is devoted, any increased cost should be viewed as the cost of doing business of redevelopers and their customers.

As for other condemnations, I suggest that the new statute provide for the award of litigation expenses to the condemnees when the award exceeds the condemnor's offer, by using a specified percentage figure (see your memo, p. 7). I would recommend the figure of 25%; i.e., when the award exceeds the condemnor's offer by 25%, litigation expenses should be awarded.

⁶³ Discuss Vista Del Mar,

Another reasonable scheme along these lines would provide a sliding scale; e.g., where the award exceeds the condemnor's offer by at least 15% the condemnees should recover half of their litigation expenses, and where the award exceeds the offer by 25% or more the entire amount of litigation expenses.

To solve another nasty, long-standing problem at the same time, and kill two birds with one stone, the new statute should also provide that where a condemnor makes a statutory offer, or offers evidence of value that is below its good faith estimate of compensation represented by the deposit made under CCP § 1255.010, and the award exceeds the amount of the higher of the deposit or opinion of value presented at trial, the condemnee should recover litigation expenses. This would tend to discourage the long-standing though sharply criticized practice of "lowballing" or "sandbagging" (see Richard L. Huxtable, *Trial Preparation and Trial*, in *California Condemnation Practice*, § 9.57, p. 244 (C.E.B. 1973). Condemnees should be able to withdraw the deposit and use it for relocation without fear that a reduced offer will later try to pull the rug out from under them retroactively. The option of being able to make a deposit confers substantial advantages on the condemnor by freezing the date of value and enabling it to take pretrial possession, and no reason appears why in that context the condemnor should not be required to act responsibly. The process of condemnation, of being forcibly displaced from one's home or business, is traumatic enough at its best. It should not provide incentives to putting additional unfair pressure on the condemnees.

If you wish to discuss any of the matters contained in this letter/memo, please get in touch.

Sincerely,

Gideon Kanner
Gideon Kanner