A UNIFYING ANTHEM OR PATH TO DEGRADATION?: THE JAZZ INFLUENCE IN AMERICAN PROPERTY LAW*

INTRODUCTION

Jazz in early twentieth century America provides a crystallized image of the turmoil, rebellion, search for identity, and countervailing efforts to maintain traditional values that defined this period.[1] In studying the origins and spread of jazz music, one comes to understand the African American fight for equality, the search of American youth for meaning in the face of post-World War I disillusionment, and the white elite's demand for a "return to normalcy."[2] The story of jazz is the story of both America's struggle to accept changing moral, political, and legal views and the clashing resistance against those views.[3] The use of improvisation, Afro-Caribbean rhythms, and breakneck speeds that typify jazz represent a departure from Western musical traditions. This unconventional nature of jazz reflects the modernizing American spirit.

At the time jazz was gaining popularity, Roscoe Pound insightfully stated that "'[c]ases . . . must be decided in the long run so as to accord with the moral sense of the community.'"[4] This view naturally follows from the idea that "law, in the long run, is, or tends to be, an expression of the preponderant settled opinion of society, an expression of community ideals, the *mores* of the times, as understood by the judges of the time being."[5] One should not be surprised, then, to see that as the United States struggled with the ethical and racial issues surrounding jazz music in the early twentieth century, legal boundaries, doctrine, and personal rights evolved to accommodate and embrace changing prevailing views. This co-existing development appears especially in the use of ordinances, zoning laws, and restrictive covenants as weapons to insulate middle- and upper-class white communities from the "evils" thought to exist in black communities, red-light districts, and dance halls. Prevailing community ideals held that the goals of maintaining a white, middle-class homogeneity and a proper moral envi-

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1. *See generally* F. SCOTT FITZGERALD, TALES OF THE JAZZ AGE (1922) (using jazz as a central trope of historical analysis).

2. TED GIOIA, THE HISTORY OF JAZZ 35 (1997) (depicting the social turmoil of the post-Reconstruction era).

3. BURTON W. PERETTI, JAZZ IN AMERICAN CULTURE 11 (1997).

4. Thomas P. Hardman, Editorial Note, *Legal Limitation of Municipal Beautification*, 30 W. VA. L.Q. 191, 193 (1924) (omission in original) (quoting Roscoe Pound, *Spurious Interpretation*, 7 COL. L. REV. 379, 384 (1907)).

5. *Id.* (internal footnote omitted).

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ronment suited for childrearing justified all efforts to segregate blacks in American cities. It is in the middle-class's efforts to preserve this idealistic environment that we see the influence of the uprising counterculture, and more particularly, its unifying anthem on property law.

This Comment gauges jazz's influence on property law. It uses the middle-class majority's efforts to maintain longstanding social norms and consequently, to regulate jazz as a means of measuring the impact that popular attitudes and unwritten moral codes have on legal doctrine. It also examines the ways in which legal doctrine mediates social conflict.[6] But before the idea of jazz influencing law is understood, the origins of jazz must first be examined.

I. THE ORIGINS OF JAZZ: SEGREGATION, SPEAKEASIES, AND LOOSE LIVIN'

While the roots of jazz are the subject of heated contention, many jazz historians credit New Orleans and its unique blend of cultural influences with creating jazz in the mid-1890s.[7] Although other cities certainly had many of the elements that blended to create jazz music, such as the blues, ragtime, hymns, and brass band music, only New Orleans had the black Creole subculture that was so pivotal in its evolution.[8] Many of New Orleans's early French and Spanish settlers had slave mistresses with whom they fathered children, who along with their descendants "constituted a second group of Creoles—the so-called 'Creoles of color' or 'black Creoles.'"[9] Often paternal feelings led slave owners to liberate their children, thereby granting these Creoles freedom and intermediate social status prior to the abolition of slavery in the South.[10] Throughout most of the nineteenth century, free black Creoles rose to the highest levels of New Orleans society, emulating the lifestyle and traditions of the continental European settlers and refusing to associate with the "lesser" black society.[11] They lived east of Canal Street in the French section of the city, which had become New Orleans's prominent economic and cultural center.[12] The "Creoles of color"

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6. Thus, this Comment is part of the legal-historical literature that gauges the law's effect on society and vice versa. *See* LAWRENCE FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY (2002); Alfred L. Brophy, *Law as a Character of Society: Legal Change in Twentieth-Century America, in* REVIEWS IN AMERICAN HISTORY (2002) (reviewing Friedman's AMERICAN LAW IN THE TWENTIETH CENTURY).

7. GIOIA, *supra* note 2, at 6 (attributing the commingling of Spanish, French, and American influences to the birth of jazz in New Orleans).

8. *Id.* at 33-34. In discussing the important role that the Creole culture played in the development of jazz, Gioia notes that "[t]he role of these New Orleans Creoles in the development of jazz remains one of the least understood and most commonly misrepresented issues in the history of this music." *Id.* at 33. Because a lengthy discussion of the Creole culture and its impact on jazz history is beyond the scope of this Comment, it may prove quite revealing and interesting to read Gioia's account in *The History of Jazz.*

9. *Id.* at 33-34.

10. *Id.* Such liberation was made possible because of Louisiana's famous Code Noir or Black Code of 1724, which allowed slave owners to consent to the liberation of their slaves. *Id.*

11. *Id.*

12. *See* Jonathan A. Beyer, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race*

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took great pride in their formal knowledge of European music and many led the best society bands in New Orleans.[13]

"Strongly rooted in its French and Spanish colonial origins, . . . New Orleans was in many ways a Caribbean city culturally."[14] Unlike any other American city in the nineteenth and early twentieth centuries, the "white and 'colored' Creoles in New Orleans still maintained Catholicism, the French language, and French musical traditions."[15] However, with the steady influx of newcomers after the Civil War, New Orleans in the 1910s was inundated with more "typical" American culture and values.[16] "After Reconstruction many rural whites and blacks had moved to the city, creating an industrial working class and a Protestant majority."[17] The former slaves were poor and uneducated, yet rich in their knowledge of the blues and gospel music.[18] Their meager homes west of Canal Street contrasted sharply with the privileged uptown homes enjoyed by the black Creoles.[19] However, this social distinction quickly faded after New Orleans enacted strict segregation laws in 1894, which forced the refined "Creoles of color" to move to the west side of Canal Street and live among the inferior "Negro" social class.[20]

New Jim Crow laws and the second-class citizenship forced upon black Creoles worked to mix their European influences with the blues styles of African Americans, as both groups were made to share the same impoverished neighborhoods.[21] By blending the polished Creoles' love of French music, their use of Caribbean rhythms, and formal musical training with the "hotter" harmonies and timbres of the Mississippi Delta blues, the once socially elite Creoles and former black slaves transformed customary ragtime style "into a New Orleans jazz phenomenon."[22] While groups in other Southern cities, such as St. Louis and Memphis, created similar music, they simply could not parallel New Orleans's "diverse musical traditions or its French-derived love for expressive music and dance."[23] Slowly this out-

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Theory, 88 GEO. L.J. 537, 540 (2000).

13. GIOIA, *supra* note 2, at 32-33.

14. PERETTI, *supra* note 3, at 19.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* GIOIA, *supra* note 2, at 34.

19. *See* Beyer, *supra* note 12, at 540.

20. GIOIA, *supra* note 2, at 34. The Louisiana Legislative Code of 1894 was a decisive turning point for black Creoles, as it designated that anyone of African ancestry was a Negro. As a result, "Creoles of color" were gradually forced into closer proximity with "the black underclass they had strenuously avoided for so long." *Id.*

21. Beyer, *supra* note 12, at 540. Thus, "[t]his forced association took place not only in the broader social arena, but also in the musical subculture of New Orleans." GIOIA, *supra* note 2, at 34.

22. Beyer, *supra* note 12, at 540. *See also* GIOIA, *supra* note 2, at 5 (discussing the process of "'syncretism'—the blending together of cultural elements that previously existed separately" and its essential role in the history of jazz).

23. PERETTI, *supra* note 3, at 19-20. The "exotic mixture of European, Caribbean, African, and American elements—made Louisiana into perhaps the most seething ethnic melting pot that the nineteenth-century world could produce. This cultural gumbo would serve as breeding ground for many of the great hybrid musics of modern times . . . ." GIOIA, *supra* note 2, at 6-7. However, "some have sug-

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growth of cultural diversity and rich expression came to be called "jass, jasz, or jazz . . . a word of unknown Afro-Caribbean origins and meaning, usually vaguely referring to fast movement or sexual relations."[24]

Even from its early origins in New Orleans, the creation and spread of jazz was in part spurred by law. Storyville, New Orleans's red-light district, was created by an ordinance passed in 1897 in an effort to keep the city's "undesirables" within maintainable boundaries.[25] Rather than stifling jazz's development, Storyville helped jazz flourish, as it created an area where predominately black jazz bands could showcase their innovations.[26] It was among Storyville's two thousand registered prostitutes, shady dance halls, and dives, with names such as "Funky Butt Hall" and "Mahogany Hall," that jazz bands tested their ragtime variations and new swing sound.[27] Because black musicians had difficulty locating work in New Orleans, they were often compelled to look to organized crime for jobs.[28] As black musicians were unable to work in the upper-class white district, Storyville and its many mafia-owned saloons and taverns became a necessary evil for black jazz bands.[29] Black musicians "worked part time as pimps and dodged the threats of hostile competitors, card sharps, and gangsters."[30] Because violence, prostitution, gambling, drinking, and narcotics thrived in the Crescent City's red-light district, jazz quickly became associated with crime, immorality, provocative dance, and daring sexuality.[31]

This is not to suggest that jazz was only embraced by black musicians and the less reputable members of New Orleans's society. On the contrary, within early New Orleans jazz there was surprising diversity.[32] Clearly, "[j]azz played host to the city's entire racial and ethnic spectrum."[33] For

gested that a contagion of vice, more than the contingencies of culture or economics, spurred the birth of New Orleans jazz." *Id.* at 31.

24. PERETTI, *supra* note 3, at 20. *See also* Brock v. State, 270 S.W. 98, 98 (Ark. 1925) (where rape victim was told by perpetrator to "jazz with [me]"); State v. Gummer, 200 N.W. 20, 23 (N.D. 1924) (where a convicted rapist refers to a hotel room reserved for sexual affairs as the "jazz room").

25. *See* GIOIA, *supra* note 2, at 31.

26. *See id.*

27. Note, however, that the prominence of Storyville in the development of jazz is debated. Donald Marquis, a leading expert on New Orleans jazz, interviewed many of the early prominent jazz musicians, none of whom remembered playing in a whorehouse. It is also argued that "[e]ven the name Storyville, now enshrined in the jazz lexicon, was largely unknown to jazz musicians at the time." GIOIA, *supra* note 2, at 31. Regardless of the validity of Storyville's now famed association with jazz, rumors of this connection in early twentieth century middle-class America contributed to the belief that jazz was "the devil's music." *Id.*

28. PERETTI, *supra* note 3, at 22.

29. *Id.*

30. *Id.* at 23.

31. *See* GIOIA, *supra* note 2, at 31. This association spread beyond the bounds of New Orleans as jazz music made its way into dance halls and night clubs across the nation. The widespread "reputation" that jazz garnered is evidenced by this statement in the *Tulsa World*: "Jazz, reeking of crime and sexual appeal, is rapidly becoming the national anthem. . . . Heaven pity America if her standards of art and morals are to be judged by the weird syncopations of the 'Coontown blues' sample of present popular taste." ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 73 (2002) (quoting *Jazz Becoming Anthem of U.S., Musician Says*, TULSA WORLD, May 28, 1922).

32. PERETTI, *supra* note 3, at 21.

33. *Id.*

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example, unlike many of the early instrumentalists of Caribbean Creole descent, Charles "Buddy" Bolden, often cited as the first jazz musician, was from a Protestant, Delta-born family. Rather than drawing inspiration from brothels, "Bolden got most of his tunes from the Holy Roller Church, the Baptist church on Jackson Avenue and Franklin. . . . [H]e used to go to that church, but not for religion, he went there to get ideas on music."[34] Also, in the late 1800s white bands began playing a toned-down version of the black district's "hot" jazz.[35]

Even after blacks were segregated by law, thereby allowing jazz to flourish in the crucible of Storyville, Jim Crow laws shaped the development of jazz in other ways. White New Orleans bands, which were not subject to the limitations on travel and performance locations that restricted black bands, were able to achieve the commercial success that first made jazz famous.[36] Such white bands were able to access the better-paying hotel and restaurant jobs from which blacks were banned.[37] They also benefited from the aid of a whites-only, local musicians' union.[38] For some black musicians, such as the New Orleans born pianist Jelly Roll Morton, endless touring eventually brought about a degree of respect and notoriety, despite the racism and segregation they faced.[39] Rather than discouraging black musicians like Morton or thwarting jazz's popularity, the inequities that separated black and white musicians perpetuated the jazz movement. Jazz, with its avant-garde musical styles, became the rallying call of the racially oppressed, giving blacks "a voice through which to express cultural identity and frustration with racial discrimination."[40] It was a "multicultural protest against the segregated conditions of late Nineteenth Century New Orleans" that effectively captured the struggles of urban African Americans, who were growing weary of being treated like second-class citizens.[41]

America's fascination with jazz firmly took hold in 1919, as World War I veterans returned home to a shaken and disillusioned nation. Burton Peretti captures the tension of the year, noting:

> Violence wracked the nation that year. . . . The worst race riots occurred during the "Red Summer" of 1919, and the Red Scare, widespread labor unrest, baseball's "Black Sox" scandal, and Wilson's failure at the Paris peace table also increased the public's pessimism. Many combat veterans came home emotionally shattered and suffered a bitter alienation from America and its devotion to glorious violence. . . . Combat veterans such as Dos Passos, Ernest He-

34. GIOIA, *supra* note 2, at 31.
35. PERETTI, *supra* note 3, at 22.
36. *Id.* at 37-38.
37. *Id.* at 22.
38. *Id.*
39. *Id.* at 20-21.
40. Beyer, *supra* note 12, at 540.
41. *Id.*

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> mingway, and e.e. cummings, as well as soldiers William Faulkner and F. Scott Fitzgerald . . ., wrote angry condemnations of the war, and some of them were giddily eager to cast off the civilization that had produced it.[42]

In search of an antidote to this "botched civilization," as Ezra Pound dubbed it, America's youth embraced an alternative lifestyle, which countered their parents' Victorian values with non-conformity, heavy drinking, nighttime leisure, and sexual activity.[43] Followers of this 1920s anti-Victorian movement "celebrated the frank and rebellious spirit of jazz. Between the world wars a polyglot community of African-American artists, American Jews, and rebellious bluebloods . . . found in jazz an expression of their own anti-elitism."[44]

The innovation, freshness, and rebellious spirit of jazz allowed women and men to ditch the outdated, formal dance steps of past generations and move with a marked lack of inhibition.[45] Daring white women, known as "flappers," embraced the short bob hairstyle, danced freely, drove cars, and even openly frequented saloons.[46] "The adventures of jazz musicians and fans in illegal speakeasies (where bootleg gin was sold), their elbowing at the bar with notorious gangsters, the stimulating effect of jazz on college students at 'petting parties' and on the wealthy smart set at Gatsby-style parties of the rich" made jazz a taboo yet darkly attractive American passion.[47] And so, as the war-torn nation endured "the end of American innocence," a rising subculture made jazz the "the beating heart" of the new worldview.[48] In this way, jazz became an alternative culture—a sort of anti-law.[49]

In 1931, F. Scott Fitzgerald dubbed the twenties "the Jazz Age," a title that succinctly expresses the post-war revolt which typified the decade.[50] This revolt occurred primarily in the homes of middle- and upper-class white Americans, where jazz was drawn on to cope with evolving lifestyles.[51] More specifically, white youths used this music to champion social rebellion and critique stringent adult standards.[52] While this movement eventually changed Americans' identity and values, it did not go unchal-

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42. PERETTI, *supra* note 3, at 29-30.
43. *Id.* at 30.
44. CHARLEY GERARD, JAZZ IN BLACK AND WHITE 98 (1998) (internal footnote omitted).
45. PERETTI, *supra* note 3, at 28.
46. *Id.* at 30.
47. *Id.* at 31.
48. *Id.* at 30.
49. *See generally* Ralph W. Ellison, *The Perspective of Literature*, *in* AMERICAN LAW: THE THIRD CENTURY 391 (Bernard Schwartz ed., 1976) (discussing the ways in which the jazz culture existed alongside the more acceptable, to the majority white community, culture of law). *See also* Alfred L. Brophy, *Foreword: Ralph Ellison & the Law*, 26 OKLA. CITY U. L. REV. 823 (2001) (discussing the conflict between Ellison's jazz musicians and "law").
50. PERETTI, *supra* note 3, at 31.
51. *Id.*
52. *Id.* at 32.

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lenged. The prohibition of liquor sales in 1920 signaled that reactionary opponents would counter the "jazz movement" throughout the decade.[53] Fearful of the emerging behavior of emboldened youths, Americans "condemned jazz as a symbol of the violation of tradition and morality."[54]

Jazz's appeal to the white youth of the 1920s coupled with its aggressively irreverent and suggestive sounds made it a topic of controversy. Jazz music "was condemned by conservatives as the downfall of America's white youth."[55] Newspapers, magazines, and outspoken leaders of the day made quite a case for the corruptive effects of jazz:

> A minister declared that "in 1921-22 jazz had caused the downfall of 1,000 girls in Chicago alone." Henry Ford attacked "the waves upon waves of musical slush that invaded decent parlors and set the young people of this generation imitating the drivel of morons." John McMahon, writing in the *Ladies Home Journal*, condemned "The Jazz Path to Degradation," asked "Is Dance Ruining Our Youth?" and yearned for a return "Back to Pre-War Morals."[56]

Even the official music educators' journal, *The Etude*, associated jazz with "vile surroundings, filthy words, unmentionable dances and obscene plays."[57]

Not only did "respectable" white Americans have to contend with a mounting sense of adolescent rebellion, shocking revolutions in courtship and dress, and a growing thirst for leisure activities, but they also had to address the disturbing influx of blacks into their cities. Until the 1920s, movie theaters, parks, and other entertainment-oriented establishments obsessed over preserving the "racial purity" of their audiences and consequently, segregated or excluded black customers.[58] During the Jazz Age, however, black musicians and dancers were growing in frequency and popularity. Thus, jazz and its black proponents threatened the homogenized environment to which whites had grown so accustomed.

When black musicians appeared before white audiences, they typically did so in disreputable "black and tans" or in the carefully controlled environment of elite nightclubs.[59] The institution of black-and-tan dance halls, where blacks and whites drank, socialized, and danced together, was "a regular feature of the tenderloin districts . . . [found in] every major American city" during the 1920s: New Orleans's Storyville, New York City's Harlem, San Francisco's Barbary Coast, Chicago's Levee, and so on.[60] The

53. *Id.* at 30.
54. *Id.*
55. *Id.* at 36.
56. *Id.* at 37.
57. *Id.* at 34.
58. *Id.* at 42.
59. *Id.*
60. JAMES LINCOLN COLLIER, THE RECEPTION OF JAZZ IN AMERICA 3 (1988).

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mingling of whites and blacks in black-and-tan speakeasies prompted condemnation in the press, as writers voiced concerns over "the alleged lack of inhibition on the part of black musicians and the predatory nature of swarthy 'tango pirates.'"[61] Naturally, the racist imagination resulted in an onslaught of unfounded rumors and fears. Such fears were often depicted in popular journalism, where "[t]he pink-cheeked society girl, yielding to the clutches of the tango pirate, was a common type."[62]

Fears of racial commingling and the tempting allure of jazz underlay fervent attacks on jazz by conservative whites in the early twentieth century. As noted by Burton Peretti:

> Jazz music in fact became a symbol for all the modern innovations that traditionalists despised—the new leisure, city life, . . . and other elements of 1920s cultural modernism. Traditionalists yearned for a return to a mythical past, to the dominance in America of Victorian values and persons of Anglo-Saxon stock. . . .
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> Battles between "wet" and "dry," rural and urban, Anglo-Saxon and "ethnic," conservative and radical Americans defined 1920s culture. Jazz was on the front lines of this battle, drawing the furious opposition of antiurban conservatives who knew a bold innovation when they saw one. Jazz music and the behavior it nurtured illustrated both the racial, social, and sexual daring of some white rebels and the greater caution of the larger mass audience, a group enticed by the allure of both nostalgia and novelty.[63]

For 1920s African Americans, jazz represented a very different reality from the one experienced by middle- and upper-class whites. Black urbanization brought with it a growing sense of community as blacks began to understand that there is in fact strength in numbers. Black communities embraced jazz "as an expression of their hopes" and symbol of their unity.[64] In dance halls, speakeasies, and homes, "jazz helped to cement audiences into communities; along with food, liquor, and dance, jazz stimulated the creation of politically active neighborhood groups."[65] Jazz was the central voice of protest, a unifying anthem of civil and economic justice.

Yet any optimism held by African Americans was undermined by unrelenting and intensifying racism, in both southern and northern cities. Ghettoization, systematic segregation, and job discrimination ensured that the quality of life experienced by urban blacks deteriorated as their communities became more polluted and violent. "Black jazz musicians [also] faced

61. PERETTI, *supra* note 3, at 42.
62. *Id.*
63. *Id.* at 44-45.
64. *Id.* at 54.
65. *Id.*

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constant discrimination," as they were banned from local hotels, made to enter through the back doors of nightclubs, and "suffered insults from whites who sought" to keep them "'in their place.'"[66] "Only the most gifted . . . black artists, such as [Louis] Armstrong and Duke Ellington" flourished in the sharply segregated atmosphere of the 1920s.[67] Thus, while jazz served to voice the evolving morals and culture of America's middle- and upper-class society, it primarily amplified the dissenting voices of disgruntled African Americans.[68] Clearly, jazz was a "multicultural protest" against the segregated conditions of early twentieth century America.

II. JAZZ'S INFLUENCE ON PROPERTY LAW

A. Testing the Outer Bounds of Property Law

Middle-class Americans emerged from World War I with a desire for a return to the normalcy of the pre-war world: a world of black subordination to white power. The race riots of the post-war era symbolize these desires and the struggle they incited.[69] In a myriad of ways, white reformers used the power of the state to try to recast their society and attain their idealistic vision of the pre-war era. At times the white majority employed the state's power for eugenic purposes.[70] At other times, they used this power to regulate property. It is significant, then, that the idea of zoning was first sanctioned by the U.S. Supreme Court in 1926,[71] just as private covenants were being used to create and maintain homogenous white communities.

The story of jazz is related in complex and subtle ways to the story of property law, which itself was undergoing significant change in the early years of the twentieth century. Restrictive covenants and the common law of nuisance were used throughout the nineteenth century to prohibit certain land uses, separate noxious from non-offensive land uses, and control indus-

66. *Id.* at 56.

67. *Id.*

68. Beyer, *supra* note 12, at 540.

69. During the late 1910s and early 1920s, dozens of riots broke out between blacks and whites in the streets of Charleston, East St. Louis, Tulsa, Omaha, Chicago, Washington, and various other cities. PERETTI, *supra* note 3, at 26. These riots were an inevitable result of the clash between the black community's growing ideas of equality, which partly resulted from their contribution to the war, and the white majority's desire to suppress black progress. *Id.* "More than 200,000 African-American men served in the armed forces" during World War I only to return home to segregation and white hostility. *Id.* "U.S. command [forces] refused to allow black soldiers to march in [a number of victory parades], and more than a dozen black veterans were lynched when they returned home . . . ." *Id.* The resulting level of tension was a riot waiting to happen. *Id.*

In discussing the origins of the Tulsa riot, Alfred Brophy quotes S.P. Freehling, Oklahoma's Attorney General at the time of the riot, who credits the black press's promulgation of "race equality" as the cause of the riot. Freehling further noted that the riot "might have happened anywhere for the negro is not the same man he was 30 years ago when he was content to plod along his own road accepting the white man as his benefactor." *See* BROPHY, *supra* note 31, at 70 (quoting *Propaganda of Negroes is Blamed*, TULSA TRIBUNE, June 18, 1921).

70. *See* Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 L. & HIST. REV. 225 (2002) (discussing the evolution of eugenics in Alabama).

71. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926).

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trial development.[72] The early twentieth century saw the genesis of exclusively private residential zoning from its roots in the city planning movement, the common law of nuisance, and restrictive covenants.[73] "[Z]oning's immediate parent, the city planning movement," began before 1900 and initially focused on maintaining municipal aesthetics and set architectural standards of public buildings.[74] By 1911 the focus of city planning had evolved to encompass the "'promotion of an orderly and attractive development of a city and its environs.'"[75]

By 1900, a few "cities had enacted ordinances limiting building heights."[76] Los Angeles was one of the first cities to create use districts in 1909.[77] After the passage of the first comprehensive systematic zoning law in New York in 1916, "zoning became very popular in the United States."[78] However, despite zoning's gaining popularity, there was great debate in state courts regarding its constitutionality.[79] More specifically, as America experienced the boom of industrialization and urbanization, the "ever increasing need [for] city planning and zoning, primarily to prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder"[80] gave rise to the issue of the police power's proper application. While the growing movement to embrace municipal zoning was facilitated by a concurrently evolving and expanding conception of the police power, its legal limits had yet to be conclusively addressed. To summarize the issue, courts disagreed as to "whether zoning was within [a state's] police power or . . . was a deprivation of property without due process."[81] For example, was it within the police power for a city to prohibit the building of a public garage, gas station, or apartment complex through exclusively residential zoning?[82]

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72. *See* Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-*Euclid *Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 371 (1994).

73. Exclusionary zoning, in this context, refers to "facially neutral 'land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the zoning municipality.'" *Id.* at 368 n.1 (quoting 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING §§ 8.01-8.39 (3d ed. 1986)). *See generally* KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (discussing the history of American suburbs).

74. Lees, *supra* note 72, at 371.

75. *Id.* (quoting M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 84 (1983)).

76. *Id.*

77. *Id.*

78. *Id.* at 370-72.

79. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390-93 (1926).

80. George D. Hott, *Constitutionality of Municipal Zoning and Segregation Ordinances*, 33 W. VA. L.Q. 332 (1927) (quoting City of Aurora v. Burns, 149 N.E. 784 (1925)).

81. Lees, *supra* note 72, at 373.

> According to constitutional doctrine, states could regulate property pursuant to the police power—that is, for the purpose of preserving the public health, safety, welfare, and morals—but were subject to the strictures of the Fourteenth Amendment, which forbade states to deprive any person of life, liberty, or property without due process of law.

Id. (internal footnote omitted).

82. Hardman, *supra* note 4, at 191 (addressing the proper application of the police power).

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To the extent that the police power was employed to promote public health, morals, order, safety, or the general welfare, its application was generally uncontested as this was the traditional use of the police power.[83] As to the constitutionality of zoning itself, this debate was resolved by the Supreme Court in *Village of Euclid v. Ambler Realty Company,* when it upheld the constitutionality of laws barring industry, businesses, and multiple dwellings from private residential areas, thereby solidifying the use of comprehensive zoning schemes throughout American cities.[84] "[C]ouched in terms of safeguarding the public health, safety, and morals," the Court's opinion was consistent with the established view of the police power's proper function.[85] However, the outer bounds of the police power were still in need of clarification as cities sought to legislate for purposes beyond the health, morals, and safety of the community.

B. Methods of Use Regulation by Property Law

Studying the evolution of comprehensive zoning schemes and city planning in general is helpful in tying jazz to property law only insofar as one understands the motivations which promoted the zoning movement. Naturally, the driving forces behind the early twentieth century push toward exclusively private residential zoning are varied and complex. It is clear, however, that zoning advocates were motivated by both economic concerns and racial/ethnic/class prejudices.[86] Residential property owners wished to protect their investments by maintaining quiet, white-only neighborhoods.[87]

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83. *Id.* In discussing the limits and proper application of the state police power, the California Supreme Court, in *In re* Miller, 124 P. 427, 428 (Cal. 1912), stated that "[t]he means adopted to produce the public benefit intended, or to prevent the public injury, must be reasonably necessary to accomplish that purpose and not unduly oppressive upon individuals." In light of the U.S. Supreme Court's view, the California court considered whether zoning and other land use restrictions "have [a] reasonable relation to a proper purpose." *Ex parte* Farb, 174 P. 320, 322 (Cal. 1918).

84. *Euclid*, 272 U.S. at 365 (sustaining the constitutionality of a zoning scheme which divided a locality into residential and commercial districts).

85. Although the decision was set "in terms of safeguarding the public health, safety, and morals, the opinion stressed the desirability of excluding commercial establishments and apartment buildings from single-family residential neighborhoods." James W. Ely, Jr., *Reflections on* Buchanan v. Warley, *Property Rights, and Race*, 51 VAND. L. REV. 953, 958 (1998). As discussed in Part II.B. of this Comment, this desire was consistent with the prevailing middle-class drive to insulate communities and preserve an idealistic home environment.

86. Lees, *supra* note 72, at 402. *See also* Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 2 J. SUP. CT. HIST. 79, 82-86 (1997) (discussing the exclusionary motives behind zoning).

87. Lees, *supra* note 72, at 409-13 (noting that the early zoning ordinances were precipitated by the desire of wealthy neighborhoods to protect property values by excluding minorities). *See also* Ely, *supra* note 85, at 957, stating:

> A look at the growth of land use controls in the early twentieth century dispels any illusion that regulation is a consistent friend of the disadvantaged. Elitist assumptions and exclusionary policies were part and parcel of zoning from the outset, and indeed help to explain the popularity of land use regimes. . . . Progressive Era land use regulators did not attempt to disguise their views about the appropriate racial composition of neighborhoods. The appearance of residential segregation ordinances as an early land use control tool simply reflected the prevalent racial norms of the day. Like separate railroad car laws, such ordinances were an

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This became more difficult as the World War I era experienced a mass migration of blacks to urban areas in both the South and the North. Consequently, a nationwide problem of "dealing with a non-assimilable race existing in large numbers in the midst of a more highly developed civilization" arose.[88] In response to this problem, the early 1900s saw the establishment of separate residential districts for whites and blacks in both southern and northern cities.[89] In creating these districts many cities began using zoning to segregate by race rather than by use.[90] While such regulations were eventually struck down by the Supreme Court in *Buchanan v. Warley*,[91] prior to this holding it was successfully argued in many states that segregation-driven zoning tactics were "not an actual race discrimination as to political and civil rights, but merely a recognition of the social distinction between the races and an exercise of the police power."[92] Middle-class opinions, whether voiced by forthcoming zoning advocates or the more veiled language of judges, left little room to debate the concrete forces of economics and racial/ethnic/class prejudices in shaping the use of zoning and other land use restrictions.[93]

> example of regulatory interference with the free market in order to advance community values.

Id. (internal footnote omitted).

88. Hott, *supra* note 80, at 341.

89. *See generally* DANIEL R. FUSFELD & TIMOTHY BATES, THE POLITICAL ECONOMY OF THE URBAN GHETTO 25-28 (1984) (describing the World War I era migration of blacks from the rural South to the industrial cities of the North).

90. Lees, *supra* note 72, at 369 n.7. "Baltimore passed the first ordinance establishing separate residential areas for blacks and whites in 1910, and other cities, such as Atlanta, Birmingham, St. Louis, Indianapolis, and Dallas, followed suit." *Id.*

91. Buchanan v. Warley, 245 U.S. 60, 82 (1917) (pointing to the high place of property rights in the constitutional polity, the Court invalidated the residential segregation law at issue). Although the Supreme Court struck down racial zoning in this seminal case, the practice continued for several decades. Noting the relative ineffectiveness of this decision, Ely concludes:

> *Buchanan* proved to be something of an aberration and did not lead to careful scrutiny of zoning generally. Following *Euclid*, most courts deferred to the regulation of land use by local governments and adopted a hands-off position. Local regulatory authorities enjoyed virtually a blank check free of constitutional restraint. This meant in reality that land controls were crafted by those already living within the localities to advance their goals, which often entailed preservation of the status quo. Such an environment was conducive to the spread of exclusionary zoning. After all, the impact of insider decisionmaking fell largely on outsiders and potential residents.

Ely, *supra* note 85, at 959 (internal footnote omitted). *See also* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 202 (1977) (stating that "[t]he policy of the courts has generally been to avoid interfering in community zoning").

92. Hott, *supra* note 80, at 343-44.

93. Many residential zoning advocates made little effort to veil their racial bias in describing the effect of unwanted changes on property values. Zoning advocate Frank Williams made no attempts to hide his motives, stating:

> Often the growth or change of districts inhabited by members of a race considered inferior, like the Chinese or negroes, or the desire of some of its members for betterment, brings them into contact with other peoples in the same block .... This invasion of the inferior produces more or less discomfort and disorder, and has a distinct tendency to lower property values.

FRANK B. WILLIAMS, THE LAW OF CITY PLANNING AND ZONING 200 (McGrath Pub. Co. 1969) (1922); Lees, *supra* note 72, at 411.

In many cases, however, the racial or ethnic prejudices were not overtly stated. *See* Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Af-*

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However, to attribute the evolving use of zoning to economic and prejudicial forces alone falls short, as this fails to fully consider the more abstract ideologies and values of the early twentieth century's most socially significant group, the white middle-class. The prevailing beliefs, ideals, and moral sense of the middle-class were arguably the central shaping forces in every aspect of American law during this era.[94] After all, one simply cannot escape the notion that "if you have a sufficiently preponderant public opinion in favor of a given proposition, that proposition, . . . in the generality of cases, will ultimately become law, embodied in judicial decisions."[95] This understanding of law leads to the conclusion that early zoning advocates were influenced not only by economic and prejudicial concerns, "but also, more abstractly, by their desire to preserve neighborhoods that were consistent with domesticity, pastoral, and health ideologies."[96]

In revealing their prejudice against "undesirables" and their fear of decaying property values, the middle-class simultaneously revealed what they in fact valued.[97] Efforts to keep blacks, immigrants, and lower class citizens away from white middle-class neighborhoods evidenced the value placed on safeguarding such neighborhoods as "repositories of morality"[98] that cultivate family life and child-rearing.[99] The ideal home environment was thought to be privately owned houses with trees and manicured lawns, placed securely in homogenous, quiet neighborhoods.[100] Thus, zoning advocates sought to ensure the realization of their middle-class norms by prohibiting property uses that were perceived as contradictory to such norms.

The view of the model home as a private sanctuary, completely separate from the public world of industry and work, is rooted in domesticity ideol-

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fordable Housing, 78 VA. L. REV. 535, 540 (1992) (noting that, in many cases, claims that zoning will "preserve the character of the neighborhood" were often "code for the desire to preserve economic, ethnic and racial homogeneity" (quoting STEPHEN R. SEIDEL, HOUSING COSTS AND GOVERNMENT RELATIONS 164 (1978)).

94. *See* Lees, *supra* note 72, at 411.

95. Hardman, *supra* note 4, at 193.

96. Lees, *supra* note 72, at 402.

97. *Id.* at 411.

98. *Id.* at 413.

99. JACKSON, *supra* note 73, at 47-48. In discussing the growing stress placed on the sanctity of one's neighborhood and home, Jackson notes:

> [T]he family came to be a personal bastion against society, a place of refuge, free from outside control. . . .
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> . . . . In countless sermons and articles, ministers glorified the family . . . and they cited its importance as a safeguard against the moral slide of society as a whole into sinfulness and greed. . . . As the Reverend William G. Eliot, Jr., told a female audience in 1853: "The foundation of our free institutions is in our love, as a people, for our homes. The strength of our country is found, not in the declaration that all men are free and equal, but in the quiet influence of the fireside, the bonds which unite together in the family circle. The corner-stone of our republic is the hearth-stone."

Id.

100. State *ex rel.* Morris v. City of East Cleveland, 22 Ohio N.P. (n.s.) 549, 555, 561 (1920) (speaking reverently of the concept of "a city of private homes, grass plots, trees and open spaces" and finding that "the greater the proportion of private homes in a city, preferably occupied by the owners, the better the city, in health, morals, peace and welfare").

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ogy.[101] Although domesticity ideology is more commonly associated with the nineteenth century, the mindset persisted into the early twentieth century.[102] This philosophy recognized the need to protect the home environment, as it was "a shelter for those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy."[103] Perhaps most importantly, the home environment served as a sanctuary within which both women and children were protected from exposure to external "immoral" influences.[104]

In addition to supporting moral values, a proper home and neighborhood environment was thought to "aid in the maintenance of health and vigor."[105] With the onset of rapid industrialization, booming city populations, and increasing traffic, residential districts were increasingly threatened by the encroaching noise and pollution of crowding businesses and "untrustworthy strangers."[106] Middle-class parents wanted to preserve a place where their children could play outdoors without the threat of speeding cars or strange outsiders accosting them. Escalating levels of automobile exhaust, industrial smoke, fears of infectious diseases, and other health threats certainly promoted the middle-class movement to create land use districts and protective zoning ordinances. This conclusion is clearly supported by the following Supreme Court statement:

> [T]he segregation of residential, business, and industrial buildings . . . will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.[107]

With an understanding of the motivating factors behind the early twentieth century zoning and city planning movement, namely the strong middle-class desire to maintain the sanctity, quiet, and morality of the home environment, the place of jazz in the history of American property law becomes clear. As discussed in Part I, the tendency of the white middle-class majority to associate jazz music with youthful rebellion, racial commingling, and late-night carousing made jazz the antithesis to all that this group

101. DOLORES HAYDEN, REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE 87-88 (2002).
102. *Id.* (describing the domesticity ideal of "home as haven" as particularly influential from 1870 through the 1930s).
103. Lees, *supra* note 72, at 417 (quoting W. HOUGHTON, THE VICTORIAN FRAME OF MIND, 1830-1870, at 343 (1957)).
104. ELIZABETH COLLINS CROMLEY, ALONE TOGETHER: A HISTORY OF NEW YORK'S EARLY APARTMENTS 20-24 (1990).
105. Goldman v. Crowther, 128 A. 50, 63 (Md. 1925) (Bond, C.J., dissenting).
106. Lees, *supra* note 72, at 428.
107. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

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sought to preserve and protect. Because of the immoral and generally negative view of jazz music and its proponents, to conclude that jazz and all that it entailed was a motivating force behind a number of property use restrictions is quite logical. The prevailing domesticity ideology and concern for healthy living conditions also support this conclusion.

While direct case evidence in support of this conclusion is scarce, the cases that do speak to this issue point to a nationwide trend. For example, in *Phelps v. Winch*, the Illinois Supreme Court upheld an injunction against the operation of a dance pavilion where jazz music was played until as late as 11:30 p.m.[108] In its decision the court noted that the noise of the music and dancing prevented reasonable comfort and enjoyment by the surrounding neighbors in their respective homes, thereby constituting a nuisance.[109] In describing the noise produced by the jazz music, the court said that "it is not only disagreeable but it also wears upon the nervous system and produces that feeling which we call 'tired.' That the subjection of a human being to a continued hearing of loud noises tends to shorten life . . . is beyond all doubt."[110] This exaggerated view of the ills of loud jazz music points to a systematic set of middle-class beliefs that feared the evils of this rebellious expression. As stated previously, such beliefs shaped and extended the reach of zoning and land use restrictions.

A similar approach was taken in *Trueheart v. Parker*, where a Texas Court of Appeals restricted the operation of a dance hall on the grounds that it greatly disturbed the peace of surrounding families and was, consequently, a nuisance.[111] The dance hall was in full view of the plaintiff's home and was host to unchaperoned females, late night meetings, drinking, swearing, and disorderly conduct.[112] The court's colorful language states:

> No self-respecting citizen with a home in which lives his wife and children could fail to be disturbed by the proximity of a place of assemblage at night of men and women, who to the accompaniment of screeching pianos, high-keyed violins and blaring saxaphones [sic], emitting the strains of barbaric jazz, more discordant than tom-tom or Chinese gong, transform rest and slumber into a night-

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108. Phelps v. Winch, 140 N.E. 847 (Ill. 1923).

109. *Id.* at 164.

110. *Id.* at 163-64 (quoting Gilbough v. West Side Amusement Co., 53 A. 289 (N.J. Ch. 1902)).

111. Trueheart v. Parker, 257 S.W. 640 (Tex. App. 1923).

112. *Id.* at 641. The court explains:

> Common experience has taught that public places where men and women, whose characters under no system can be properly investigated, have the right upon payment of certain fees, to assemble and engage in dancing, and perhaps drinking, may become foci of moral disease and infection, from which may emanate crime, drunkenness, immorality, and disorder, and such community centers are tolerated only under strict police surveillance and control.

Id.

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> mare, and render hideous the hours set apart by nature for their enjoyment.[113]

It is clear from this graphic depiction of the late-night dance hall scene that jazz was certainly associated with the evils that the middle-class targeted in its zoning campaign. As a result, the Texas court held that "a dance hall cannot be conducted under modern conditions in close proximity to private residences in such as way as to not disturb the occupants and not amount to an invasion of their rights of person and property."[114]

In *W.S. Douglas Shoe Co. v. Vredenberg*, the Supreme Court of Louisiana considered whether a subtenant's operation of a dance hall, where jazz music was played late into the night in the high class business district of New Orleans, constituted a violation of his lease and supported ejectment from the premises.[115] In affirming the judgment of ejectment, the court stressed the irreparable injury to the neighboring plaintiff's business that resulted from "the noise and commotion created by the jazz band of the dance hall."[116] While the court chose an equitable remedy rather than some form of property-based remedy, this case serves as an insightful illustration of the association of jazz with lost business, excessive noise, and unseemly late-night crowds. The language of this case clearly suggests that the Louisiana Supreme Court viewed jazz as a nuisance.

While the previous cases do not address the boundaries within which land use restrictions may be properly employed in effectuating middle-class ideals, the use of property law to regulate the threatening evils of jazz music and other rebellious behavior was not without its constitutional limitations. *Ex parte Hall* is an important example of the constitutional problems raised when local government sought to restrict jazz and its associated behaviors.[117] In this case, Pasadena attempted to zone existing dance halls out of existence by creating an ordinance that tightly regulated their location and hours of operation.[118] In striking down this ordinance as overly broad, the court examined the fundamental principles underlying the police power. In its analysis, the court stated that "[t]here can be no serious question respecting the authority of the city to enact and enforce ordinances designed to prevent boisterous conduct and loud, unusual, and discordant sounds that cause public annoyance or menace the public comfort and welfare."[119] Consequently, the court recognized the legitimate power of any municipality to

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113. *Id.*
114. *Id.*
115. W.L. Douglas Shoe Co. v. Vredenberg, 104 So. 309 (La. 1925).
116. *Id.* at 310.
117. 195 P. 975 (Cal. Ct. App. 1920).
118. *Id.* (discussing an ordinance entitled "[a]n ordinance of the city of Pasadena regulating the hours during which dancing may be conducted and dance music performed in certain places," which made it unlawful for any person in control of any room or hall, any portion of which was within twenty-five feet of a private residence, to conduct or allow dancing or the performance of any dance music between the hours of 10:00 p.m. and 8:00 a.m.).
119. *Id.* at 976.

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prohibit, within reasonable limits, the use of premises in ways that interfere with the public's comfort and welfare.[120] The court further stated that such ordinances, when they do not go beyond the bounds of reasonableness and do not unnecessarily invade the right of citizens to possess and enjoy property, will be sustained.[121]

However, in addressing the limits of the police power, the California court made it clear that "[t]he law-making body of a municipality has no power, under the guise of police regulation, arbitrarily to invade the personal rights and personal liberty of the individual citizen."[122] Essentially, the court applied a strict standard in testing the local government's power to regulate personal liberty, stating:

> [T]o justify legislative interference with property rights under the guise of an exercise of a police power, and to prohibit the citizen from a reasonable enjoyment of a lawful amusement on his own premises, it should plainly appear that the manner in which the property is used does menace the public welfare. Legislation which goes beyond that limit exceeds the rule of reasonableness. Laws which impose penalties on persons and interfere with the personal liberty of the citizen cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment.[123]

Consequently, the court held that the ordinance in question could not be upheld under the theory that it is a reasonable regulation designed to prevent disturbances during "the hours usually devoted to sleep."[124] In reaching this conclusion, the court noted that by choosing to live in the city, residents must necessarily accept the reasonable inconveniences of urban life along with the benefits.[125] Further, the court recognized the overbreadth of the statute by noting that clearly dancing and dance music may be so conducted "that persons of the average nervous temperament" need not be unreasonably annoyed.[126]

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120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 977.
125. *Id.* (stating that "[i]f people prefer living in a city, they can only do so because of others desiring to do the same thing in sufficient numbers to constitute a city, and each tacitly undertakes to suffer such annoyances or inconveniences as are incident to that kind of a community")
126. *Id.* at 978. In discussing the various, reasonable, and acceptable forms of music and dance that fell within the reach of this overly broad statute, the court states:

> [D]ance music, one of Strauss' waltzes, for instance, might float into the neighboring dwelling without jarring the most sensitive human tympanum . . . . It should be remembered that even in these days of bizarre extremes and freak abnormalities, the muscle tickling jazz has not yet succeeded in entirely excluding all sane dance music from the places where the devotees of Terpsichore are wont to foregather. And experts tell us that even jazz, like certain other things fast fading into oblivion, may be denatured—a consummation devoutly to be

The California appellate court's recognition of the limits of the police power and the ordinance's constitutional infringement reveals that jazz drove the development of more than property law. Namely, the middle-class desire to return to pre-World War I life and the resulting use of zoning and other land use restrictions to effectuate that goal necessarily raised the question: How far can property restrictions be used to legislate morality before constitutional rights are infringed upon? Touching on this issue, the California court stated:

> The general right of every person to enjoy his own property and engage in any lawful and innocent amusement therein, and to do so in his own way, provided he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment or municipal ordinance. . . . [T]he police power, "however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded."[127]

Implicit in this language is the idea that under the Constitution, specifically the substantive due process clause, courts cannot simply accept at face value sweeping legislative declarations about safeguarding morality, property values, and the public at-large. Rather, courts began to recognize that constitutionally satisfactory scrutiny required that they question both the goals purportedly served by the governmental action, "as well as the means employed to achieve the [goals]."[128] In addressing attempts to regulate immoral property uses, courts had to "determine whether a regulatory measure was a valid exercise of the police power or an arbitrary restriction of individual [liberties]."[129] With the development of this principle in mind, a subtle yet profound dynamic comes to light: The evils of jazz were an impetus to the regulation of property, while the desire to protect the right to hear and dance to jazz led to clarified constitutional protections and limitations on the police power.

C. The Image of Jazz in the Judicial Mind

In other cases, judges acknowledged the powerful grip that negative images of jazz held on their minds. While these cases do not directly relate to the influence of jazz on property law, their colorful references to jazz are certainly insightful. In *City of Youngstown v. Kahn Bros. Building Co.*, the Ohio Supreme Court struck down a Youngstown, Ohio, zoning ordinance

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> wished. "The law . . . does not tolerate the prohibition of something which may be regulated in such way as to overcome any evils which may be incidentally connected with it."

Id. (quoting *Ex parte* Farb, 174 P. 320, 323 (Cal. 1918)).

127. *Id.* at 976 (quoting *In re* Jacobs, 98 N.Y. 98, 108 (1885)).

128. Ely, *supra* note 85, at 969.

129. *Id.*

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that prohibited the construction of apartment buildings.[130] In reaching its decision, the court limited the scope of the police power to instances where regulation was required to protect "public health, morals, or safety, and not merely aesthetic interest."[131] The court feared the subjective nature of aesthetic judgments, noting that "[c]ertain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats."[132] Thus, in this case, jazz was used in justifying a more limited application of the police power.

In *Berg Auto Truck & Specialty Co. v. Weiner*, a New York judge dismissed a complaint that strikers were violent by comparing the strike to the colorful depictions of jazz parties set out in Gertrude Atherton's *Black Oxen*.[133] Jazz's influence on the judicial mind also appeared in more subtle ways. Judges were well aware that the word "jazz" itself denoted immoral behavior.[134] Further, jazz dances were often associated with drunkenness and other immoral behavior in judicial opinions.[135] It was also widely acknowledged that establishments where jazz was played were host to criminal behavior and violence.[136] Such associations reveal the varied and often subtle ways in which jazz and its surrounding evils lurked in the minds of judges, shaping court opinions and the law in general.

CONCLUSION

Jazz in the 1920s became an important impetus to the regulation of property through zoning restrictions and the judicially created doctrine of nuisance. The dark image of jazz as "reeking of crime and sexual appeal"[137] helped propel the middle-class's desire to return to the segregated, safe world of the pre-World War I era. Ironically, the resulting land use restrictions precipitated the articulation and development of constitutional protections. More specifically, a growing desire to protect the right to freely hear and dance to jazz music led to limitations on the police power. Thus, while the regulation of jazz illustrates the desire of Americans to harness the po-

130. 148 N.E. 842, 845 (Ohio 1925).

131. *Id.* at 843.

132. *Id.*

133. Berg Auto Truck & Specialty Co. v. Weiner, 200 N.Y.S. 745, 753 (1923) (concluding that the strike was "conducted in an infinitely more peaceful manner than the 'Jazz Parties'"). *See* GERTRUDE ATHERTON, BLACK OXEN (1923).

134. *See* cases cited *supra* note 24.

135. *See* Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67, 77 n.53 (2001) (citing several cases where Oklahoma courts correlated criminal or immoral behavior with jazz). *See, e.g.*, Gordon v. State, 30 P.2d 934, 936 (Okla. Crim. App. 1934) (using jazz as a metaphor for sex); Tobin v. State, 293 P. 575 (Okla. Crim. App. 1930) (discussing the degenerate attendance at a jazz party in a criminal case).

136. *See* Stein v. Rainey, 286 S.W. 53 (Mo. 1926) (stating that a restaurant that played jazz music hosted the sort of violent men who had the means to pay damages to their victims).

137. BROPHY, *supra* note 31, at 73 (quoting *Jazz Becoming Anthem of U.S., Musician Says*, TULSA WORLD, May 28, 1922).

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lice power to control and govern that which they feared, it also illustrates the power of music and property law to ultimately resist such control.

Amy Leigh Wilson

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