
Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance

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Studies of urban governance, as well as the overlapping literature on law and space, have been heavily influenced by critical analyses of how spatial techniques helped constitute modern disciplinary powers and knowledges. The rise of land-use control and land-use planning seem at first sight to be perfect examples of the disciplining of populations through space by the kind of governmental gaze dubbed by Scott (1998) as “seeing like a state.” But a detailed genealogical study that puts the emergence of the notion of “land use” in the broader context of urban governance technologies reveals that modernist techniques of land use planning, such as North American zoning, are more flexible, contradictory, and fragile than critical urbanists assume. Legal tools of premodern origin that target nonquantifiable offensiveness and thus construct an embodied and relational form of urban subjectivity keep reappearing in the present day. When cities attempt to govern conflicts about the use of space through objective rules, these rules often undermine themselves in a dialectical process that results in the return to older notions of offensiveness. This article argues that the dialectical process by which modernist “seeing like a state” techniques give way to older ways of seeing (e.g., the logic of nuisance) plays a central role in the epistemologically hybrid approach to governing space that is here called “seeing like a city.”

Theorizing Law’s Spatial Governance

Critical studies of the legal governance of space, and of the legal governance of problematic activities and people through space, have amply documented the historical emergence, in modern European societies, of ways of seeing that presuppose that both physical space and the space of governance are abstract, flat, and homogeneous. This phenomenon has been studied in Foucault’s

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work on disciplinary institutions, in Poovey's study of nineteenth-century reformers' medico-moral gaze, in Harvey's neo-Marxist account of spatial governance, and in Scott's extremely influential work, *Seeing Like a State*, among many sources (Blomley et al. 2001; Foucault 1979, 2004; Harvey [1973](2006); Poovey 1995; Scott 1998). Critical studies of modernist ways of seeing and managing space have also been influenced by de Certeau's ruminations on the contrast between impersonal, objective "space" and lived, practiced "place" (de Certeau 1984:119) as well as by the voluminous literature on the power effects of European mapping practices (e.g., Jacob 2006, a book dedicated to de Certeau). Theoretically oriented law-and-geography scholars also often rely on Lefebvre's quite unreadable but much cited work *The Production of Space*, published in French in 1974, a work that develops, in a philosophical vein, many of the same arguments made by Scott, though by tying what he calls "the production of abstract space" to capitalism (Lefebvre 1991).¹ One of the reasons for the popularity of the "seeing like a state" trope is one that links Scott to Foucault: namely, that, unlike Lefebvre's Marxist view, Scott's analysis (like Foucault's) ignored left-right divides and demonstrated that communist and capitalist states have actually used many of the same techniques for identifying and solving problems.

Scott's identification of the top-down, expert-driven, bird's-eye-view epistemology typically found in modernist governmental projects has been tremendously influential. His book has been excerpted in several anthologies for students and has been cited thousands of times (according to Google scholar). The notion of "seeing like a state" has also been seen as relevant to sociolegal issues well beyond those studied by Scott (which ranged from forest management to urban planning). For instance, Garland's influential account of contemporary criminal justice issues states that during much of the twentieth century criminal justice policy was driven by a belief in the virtues of expert intervention and large-scale reform that was a criminological version of Scott's "high modernism" (Garland 2001:34).

The account of the rise of a way of seeing and governing problems that privileges centralized management and expert knowledge provided by Scott was by no means totalizing. Unlike Foucault, who outlined the rise of various historically dominant modes of power/knowledge without documenting grassroots

¹ By the time Lefebvre's work was translated into English, there was a substantial audience of theoretically oriented geographers who were already working with existing critiques of abstract space and were delighted to see a thorough philosophical (and Marxist) treatment of the issue, Harvey being probably the most influential. Harvey mentions that by the time he read Lefebvre he had already developed his own similar Marxist theorization of urban space (Harvey [1973]2006:302–3).

experiments with alternatives, Scott's account is punctuated by detailed considerations of what might have been, considerations that highlight the persistence of older, pragmatic experiential or trade-based knowledges. For instance, he pays close attention to the much-neglected work of German socialist leader Rosa Luxemburg, who as Scott notes could have provided the rising East European communist movement with a way of seeing problems and peoples that remained open to grassroots participation, unpredictability, and experiential knowledge.² However, the thrust of the book is to document the rise and the tremendous power of "seeing like a state," so alternative gazes appear only as roads not taken or as "resistance"—as they also appear in Lefebvre's work.

The language of resistance, which occasionally appears also in Foucault's work (though usually in interviews, rather than being integrated into his books and lectures), certainly helps avoid determinism and encourage the recovery of what Foucault called "subjugated knowledges." However, acknowledging resistance or subjugated knowledges does not avoid the common fallacy of treating particular legal or governance techniques as if they had a built-in "essence" or a built-in politics. For example, many critical urban studies scholars have argued that North American zoning was an invention that furthered class and race exclusionism. Hall's influential account of the history of planning typically states that the American "zoning movement" was "if anything, socially exclusionary in its purpose and its impact" (Hall 2002:41). This kind of formulation is not necessarily functionalist, but it does tend to erase the distinction between origin and function. Other critical urbanists compound this crypto-functionalist tendency by focusing only on the socially exclusionary effects of city ordinances that purportedly govern space but are used to target such groups as homeless people (e.g., Mitchell 2003), without placing these often frankly exclusionary ordinances in the broader sociolegal context of urban regulation.

It is certainly true that zoning has been an important tool of race and class spatial exclusion. However, governance techniques do not necessarily have a built-in or default politics; more generally, technologies of governance—say, zoning ordinances—are not "married" to specific rationalities of governance (to use the language of

² Whether Luxemburg would have kept her democratic ideals alive if she had come to power, instead of being murdered in 1918, is an interesting what-if question, one that also applies to Scott's other main guru of anti-modernism, Jane Jacobs, who was very involved in grassroots urban activism but was never in a position of institutional power. To the extent that Scott's counterknowledges are presented as embodied in people who never exercised real power (and who, not coincidentally, were women living in men's worlds, though Scott does not discuss the gendering of the "seeing like a state" gaze), his argument is more elegant but less complex than real life.

governmentality studies [Rose & Miller 1992].) Legal inventions such as zoning succeeded for highly contingent reasons, and remain to this day extremely malleable (at least potentially) rather than being hard-wired to social exclusion agendas. This article thus challenges not only the substantive story about the ineluctable rise of “seeing like a state” projects that has become familiar in large part through Scott’s work but also the methodological tendency to regard legal and governance inventions (such as the notion of land use) as tools chosen to implement a fixed political project.

The first part of the article is therefore a (partial) genealogy of the category of land use, which is a key if not the key building block of contemporary urban governance, in North America. The notion that the earth’s surface can be apprehended as nothing but a collection of land uses is certainly a notable example of high modernism’s penchant for seeing like a state (see Boyer 1983; Fischler 1998a; Rabinow 1989). But the account presented here shows that the rise of land use categories, despite its central role in North American urban governance, did not wholly replace older, premodern ways of seeing and managing urban disorder. Premodern logics (the main example here being that contained in the premodern category of nuisance) not only survive but, more significantly, continue to constantly pop up anew in municipal law and regulation. This is not necessarily a question of resistance but rather an effect of internal contradictions that develop within the seeing like a state gaze. The persistence of nuisance logics, I argue, is best seen neither as resistance nor as a survival of old folkways. Rather, governing urban disorder through embodied, experiential, and relational categories is a *necessary* component of contemporary urban governance. The second part of the article therefore presents some instances of contemporary nuisance or nuisance-type municipal regulations that demonstrate that cities’ efforts to replace subjective, aesthetic, relational categories by hard-and-fast, objective, seeing like a state rules constantly undermines itself.

The relationship between modern and premodern modes of urban power/knowledge that emerges from a (necessarily partial) consideration of the genealogy of the legal tools that today’s North American municipalities use to govern conflicts about space is not captured by narratives in which one mode of power/knowledge replaces the other in Weberian fashion. Neither is the relationship reducible to the hegemony-versus-resistance paradigm. The relationship documented here—which is not put forward as exhaustive or complete, given that I am not arguing that existing accounts are wrong but rather that they are insufficiently dynamic—is dialectical in form, but it is open-ended rather than closed (as in Hegel’s dialectic). A particular way of seeing, a certain habit of governance, fails due to internal contradictions, leading to the

sudden adoption of its opposite—but without one mode of seeing replacing the other. The somewhat speculative conclusion that flows from the analysis is that given the easy epistemological eclecticism that characterizes the legal tools used to regulate local disorder, it may be useful to adopt the label “seeing like a city” to refer to the flexible relation between knowledges documented here. Seeing like a city is not the polar opposite of “seeing like a state,” therefore, as cities in all parts of the world do indeed often see “like a state.” The phrase is meant instead to indicate the pragmatic approach that uses both old and new gazes, premodern and modern knowledge formats, in a nonzero-sum manner and in unpredictable and shifting combinations.

How the Earth Came to Be a Collection of Land Uses

“Land use” was not a term used in its current sense in the nineteenth century. But by the 1920s, it had become a taken-for-granted way of seeing and governing space, without anyone footnoting the term or providing a theoretical justification for its deployment. Somehow, cities and other spaces (e.g., “natural” spaces seen as in need of “conservation” [Brinkley 2009]) began to appear as collections of land uses. In general, in early land-use thinking, the coexistence of different populations or activities in a single space was regarded as problematic, whereas competition between species or between activities was seen as normal and natural. Plant ecologists working within more or less Darwinian frameworks and making “succession” a key analytical term were seen as sources of inspiration by the diverse array of experts and amateurs who developed the American planning doctrine of incompatible uses that reigned supreme from the 1920s to the 1960s. Light’s recent work on the close links between biologists and ecologists on the one hand, and urban experts on the other, in the period from 1920 to 1960, decenters Chicago school sociology (often taken to be the original fount of spatial urban thinking) in an account showing that a wide variety of both practical and academic folks, from real estate experts to zoologists, productively borrowed from one another’s work on the spatial distribution of populations and activities, slipping from literal to metaphoric analogies about growth, evolution, and species/group succession with much creativity. While she provides a very rich and quite original picture of urban thinking in twentieth-century America (one that shows, though she does not stress the point, that today’s advocates of interdisciplinary urban studies are far less adventurous than their predecessors), she nevertheless treats “land use” as an ahistorical given—possibly because by 1920, her starting point, “land use,” in

North America at any rate, had already been largely “blackboxed,” as science studies scholars would put it (Light 2009).

Land use thinking had been prefigured in the nineteenth century in the same highly diverse locations that also prefigured urban planning.³ One of the three main roots of land use thinking, whose most legally powerful tool was, in North America, zoning, lay in the progressive campaigns against overcrowding and unhealthy conditions in working-class slums that took place in many countries in the second half of the nineteenth century (Hall 2002; Joyce 2003; Peterson 2003). The urban reformers who wanted to improve the health and the housing conditions of the working classes worked to develop building standards and other municipal rules governing privately owned buildings, in the United States as in Europe (*Hull House Maps and Papers* 1895; Platt 2005). This could have led to more direct municipal or central state intervention into housing, e.g., mass expropriations and mass public housing. But as it happened, housing issues were marginalized and largely excluded from planning, in the United States especially, with the housing reformers’ work being used within planning circles only to the extent that it laid some of the groundwork for comprehensive zoning (Makielski 1966; Revell 2003). This was a highly contingent development, because in the United Kingdom and other countries, the late nineteenth- and early twentieth-century working-class housing movement led in a very different, more socialist (and sometimes anarchist) direction (Hall 2002: ch. 2; Peterson 2003:240–54).

If the progressive reformers concerned with working-class living conditions had not been red-baited and excluded from mainstream organizations (Deegan 1988), land use controls could have been put to use to promote inclusion and equality. Rodgers’s comparative research on the origins of zoning leads to the conclusion that zoning was “an enormously malleable device” (Rodgers 1990: 184). Rodgers shows that it was only when taken up by a combination of city-beautiful visionaries and bourgeois consumers who expressed distaste at having to rub shoulders with garment workers on Fifth Avenue that “zoning’s mission was no longer to disperse overcrowded, overfactored lower Manhattan . . .” (Rodgers 1990: 186). “[A]s for the city planners, they quickly cut themselves off from the housing question altogether” (p. 195).

³ Land use controls such as zoning are usually presented, in official planning discourse, as tools to implement official plans. This view promotes the myth that zoning is an instrument of rational, disinterested planning. However, there are myriad instances of land use control that have nothing to do with a general, rational plan, but are rather reactive and site-specific responses to complaints. A municipal regulation banning pubs and restaurants over a certain size from a particular street, or imposing a closing time on outdoor patios (these being measures currently in effect in parts of the author’s own city) would be an example of particularistic and reactive land use control.

A second, quite independent root of land use controls including zoning can be found in the work of the nineteenth-century pioneers of grand urban parks. In earlier times, aristocratic estates had hunting areas, formal flower beds, and kitchen gardens, all laid out in separate spaces; but these were never meant as public spaces and no municipality had control over them (Wilson 1989). Frederick Law Olmsted and other pioneers of bourgeois public urban spaces, of which Central Park is only the most famous, believed that in the public realm too, quiet contemplative leisure had to be rigidly separated, spatially, from both work spaces and the commercial entertainment spaces frequented by the working classes on their time off. And in turn, park space was regarded as needing internal spatial differentiation. Sports were to take place in a specific space and walking and contemplating flowers on another space, while children's play had to be spatially confined and micromanaged by purpose-built playgrounds—a spatial governing habit taken to its extreme some decades later by New York City's czar of all things urban, Robert Moses (Roper 1973; see also Caro 1974). Mid- and late nineteenth-century parks designers and enthusiasts can thus be said, in retrospect, to have pioneered the doctrine of the separation of uses, but only in retrospect, since the parks movement had no intrinsic connection with the campaigns against skyscrapers and against having factories above shops that were responsible for zoning (Boyer 1983; Makielski 1966; Peterson 2003; Revell 2003).

A third strand in the prehistory of land use thinking can be discerned (again, retroactively) in the late nineteenth-century efforts to discipline nonpark public spaces, mainly sidewalks and squares. Baldwin's fascinating study of one city's campaign to eliminate ambulant peddlars and sidewalk vendors is applicable to virtually every North American city, even if some (mainly New York City) were less successful than others in this moral-physical clean-up campaign (Baldwin 1999; Blomley 2010; Loukaitou-Sideris & Ehrenteucht 2009). That commerce ought to be confined to designated spaces—with outdoor commerce being limited to exceptional, marked-off bits of squares and sidewalks, and indoor commerce being limited to buildings specifically approved for such a use and not used also as residences—is a theory of consumption and space that can be seen as similar to Olmsted's theory of internally differentiated urban parks.⁴ But the use of zoning rules to spatially segregate commerce as well as play was a contingent historical event, not the necessary result of the rise of seeing

⁴ Isenberg shows that the municipal campaigns to cleanse streets and other public spaces were supplemented by municipal publicity campaigns, embodied in postcards and other items, that represented the streets, especially each town's Main Street, as cleaner and emptier than it was in reality (Isenberg 2004: ch. 2). See also Ben-Joseph (2005) and Loukaitou-Sideris and Ehrenteucht (2009).

like a state logics. Before the nineteenth century the space (and the time) of commerce and of commercial leisure activities were certainly micromanaged, but by a system of discretionary licenses granted to markets, inns, and other such establishments, licenses that often included temporal restrictions. Such licensing systems can and do in many parts of the world provide much of the governing work conducted in North America through zoning. Even today, zoning is only one of the numerous bureaucratic obstacles that would-be urban retailers and entrepreneurs in North American cities face, even if citizens know less about municipal licenses and permits than about zoning due to the fact that zoning ordinances are more likely to be challenged in court than permits (Valverde 2005).

Architectural fashions and urban design trends promoted by the “city beautiful” movement also contributed, or can in retrospect be seen to have contributed, to the eventual success of comprehensive zoning. Studies of the 1893 Chicago World’s Fair, of the Haussmann Parisian street reform, and of other large-scale pilot projects in modernist city building have shown how private property rights were diminished so as to reserve certain urban spaces for monumental and official uses.⁵ These experiments in the deployment of what U.S. legal doctrine calls “the police power of the state,” promoted in the United States by such figures as Burnham (Smith 2006), did not always rely on the planning-law category of land use, but they can certainly be seen as prefiguring land use planning’s utopian hope that changing the design of streets and parks would have improving social and moral effects. Sennett comments that Haussmann’s much-copied monumental urban design projects were innovative in that “instead of assuming that changes in the social structure of the city should be accomplished first in order to change the physical appearance of the city, Haussmann bequeathed the notion to us that it is somehow better, and certainly easier, to change the physical landscape in order to alter the social patterns of the metropolis” (Sennett 1970:90–1). This notion predates Haussmann, of course, both in the field of urban design—as imagined by such Renaissance figures as More, in *Utopia*—and in other endeavors, as in the “moral architecture” promoted by early nineteenth-century asylum superintendents and “mad doctors.” But it is certainly true that nineteenth-century urban reformers often held a rather utopian view of the whole-

⁵ Scott’s *Seeing Like a State* uses Le Corbusier’s grandiose and inhuman projects, in which even private residences were architecturally organized as if they were public monuments to be gazed at from afar, as the paradigm of the “high modernist” way of imagining (ideal) cities (Scott 1998: ch. 4). These were also denounced, from a different political and theoretical perspective, by Mumford and Sennett. Many readers of Scott’s book may not realize that not all early planners and architects had a taste for monumental buildings and empty sidewalks.

some effects on the urban populace of such “technical” innovations as straightening streets and providing sewers, and that some measure of architectural and urban design determinism continues to pervade planning practice today.

To summarize the story thus far, early twentieth-century land use thinking emerged from the fortuitous conjunction of several unrelated trends: the city beautiful movement, the idea that sedate noncommercial recreation needed to be provided to the bourgeois public in specialized quasi-natural spaces, the Manhattan-based movement against tall skyscrapers, the efforts of housing reformers to put legal constraints on slum landlords, and municipal campaigns to eliminate vendors and peddlers. In addition, the progressives promoting better buildings for working-class housing unwittingly contributed to land use thinking, given that the health-based standards for light and air and space that they pioneered (e.g., maximum building size, minimum dwelling size) habituated people to thinking in the kinds of numbers that later became enshrined in zoning ordinances.

That certain movements and loose groups happened to converge on the same side of the question of whether cities ought to impose certain legal restrictions on the uses to which privately owned buildings could be put—the key politico-legal question raised by experiments in zoning, especially New York City’s highly influential 1916 comprehensive zoning ordinance (Haar & Kayden 1989; Makielski 1966)—was thus a contingent historical event. It is also a historically contingent fact that by the time that municipalities began to experiment with comprehensive zoning (as opposed to the highly targeted rules that had been previously applied to such problem buildings as New York City tenements and Fifth Avenue skyscrapers), other, unrelated events, such as the marginalization of Jane Addams and her left-wing allies from the centers of both governmental and academic power, had shaped the meaning and political effects of comprehensive zoning in North America (Deegan 1988; Peterson 2003; Rodgers 1990). The virulence of the post-World War I “red scare” in North America⁶ may well be responsible for at least some of the differences between British and North American planning law that are routinely noted in the literature.

In Britain and on the Continent, seeing like a state urban planning utilized a variety of legal technologies, including zoning or proto-zoning measures, but in combination with such egalitarian measures as public health regulations and state aid for public and nonprofit housing. Thomas Adams, the Scottish polymath who was arguably the

⁶ An alliance of engineers and landscape architects led by Frederick Law Olmsted excluded the “anti-congestion” New York housing reformers from the planning profession (Peterson 2003:24-256).

first person in the world to make a living exclusively from planning (rather than architecture or engineering), is a crucial figure in this story (Simpson 1985). He pioneered town planning in England but sided with the less political “garden city” movement rather than with the socialist urban reformers, and he then moved across the Atlantic to take a leading role in promoting city planning, first in Canada and then in New York, where he famously authored the first-ever “regional” (that is, metropolitan) plan in North America.

Apparently abandoning his early romantic advocacy of self-governing small garden cities, Adams worked hard to hitch the marginal enterprise of planning to the radical nationalization and state control measures implemented during World War I. Given the great struggle “in which the Empire is engaged,” he told an Ottawa audience in 1916, and given the need for states to take a much stronger role in coordinating and managing resources and labor, it made sense for states to develop a “system for controlling the uses and development of land” (Adams 1916:119).⁷

His audience was receptive to the then new idea of controlling the uses of land (Simpson 1985:69–85). This is not surprising as 1916, in the British Empire, was a high-water mark of state regulation of the economy. But the subsequent development of planning was hampered by the fact that the command-and-control experiments in governance undertaken by many capitalist states during the first World War did not last. Liquor prohibition is a partial exception, but even that was eventually repealed, beginning in the late 1920s in Canada and in the early 1930s in the United States. A further difficulty for Adams’s seeing like a state vision was the constitutional fact that in federal states the control of land uses is unlikely to be seen as a proper federal responsibility—something that Adams, having recently arrived in North America from the United Kingdom, may not have realized when he gave the speech cited. Be that as it may, the return of the free market, and the marginalization of progressive public health and housing reformers in the post-World War I “red scare” meant that “controlling the uses and development of land,” insofar as it was implemented, would function neither as a biopolitical measure of state or imperial power nor as a progressive tool of equalization and regulation of capital. Controlling the uses and development of land became instead a municipal tool for regulating certain aspects of private property in such a way as to further the aesthetic and the collective economic goals of the middle-class families and business leaders

⁷ Adams’s speech is contained in the *Report of the Seventh Annual Meeting of the Commission of Conservation* (Adams 1916:119). This commission was a short-lived effort to create a federal umbrella organization to promote “efficiency” in every field, from the exploitation of natural resources to public health and urban planning. It can be seen, in retrospect, as prefiguring New Deal rationalities and governance techniques.

who dominated (and still dominate) municipal politics. In the 1970s, land use thinking emerged in a different field of governance: namely, protecting agricultural and wilderness areas under the banner of environment; but the emergence of new federal and provincial/state tools to control pollution and preserve threatened land uses had little if any effect on the established municipal practices of land use control and planning.

One might ask how legal and political systems based on the ideals of free enterprise and individual property rights tolerated the codification of measures (such as comprehensive zoning ordinances) that greatly interfered with the ability of owners to extract profits from their property. One reason (not much discussed in the history of planning literature) has to do with the naturalization of different scales of governance. Specifically, the power of municipalities to impose limitations on private property rights through the coercive and/or paternalist “police power of the state” (in North America especially) has long been seen as legitimate as long as it remains local (Dubber & Valverde 2006, introduction; Valverde 2003b). Tellingly, Novak’s careful reconstruction of the “well-regulated community” legal tradition in American law, in his influential work on the police power, remains almost wholly confined to the municipal level. If Novak had included in his account federal national-security or narcotics legislation, for example, which are also rooted, at one remove, in the police power of the state, he would not have been able to paint such a rosy picture of republican communitarianism (Novak 1996).

The naturalization of the local scale of government, in a process by which the power of the local state comes to be seen as naturally more benevolent than central power despite the fact that local ordinances can micromanage behavior in ways that would not be tolerated in federal statutes, is a key chapter in the story of North American land use controls (Valverde 2009). If in the 1920s the U.S. government had intervened to directly impose aesthetic standards or to ban apartment buildings and shops from residential streets, instead of limiting itself to promoting state adoption of zoning enabling acts, this would have been seen as “bad,” indeed socialist planning, and no doubt rejected. But local, municipal interference with private property, especially if arising from the complaints or the wishes of other property owners, has long been tolerated in the United States as well as in the United Kingdom.

A second factor that helps explain the relative speed of the institutionalization of zoning is that early zoning ordinances were generally introduced only to protect districts that had already been either built or designed by private enterprise, rather than to impose standards across whole, existing municipal jurisdictions. The highly moralistic content of standards such as minimum lot sizes

could thus be presented as descriptive rather than prescriptive, and as a technique to defend the status quo of local “organic” communities rather than as a coercive state measure (Ford 1999; Frug 1999). Along these lines, Richard Ely, an important land economist working in the 1920s, justified zoning without addressing the issue of property rights, instead using the scientific, quasi-biological, descriptive language of “classification”:

The classification of land is part of a general classification movement in many fields of endeavour. Education experts have lately begun to classify school children according to the mental ability shown in intelligence tests. Labor experts are beginning to classify employees according to industrial tests. . . . Private businesses classify their merchandise according to saleability. But the classification of land has generally lagged behind the rest of the movement. (quoted in Fischler 1998a:401; see also Hoyt 1939)

Ely was invoking the notion, associated with the Chicago school but not exclusive to it, that legal tools differentiating urban space into distinct districts with specific physical and aesthetic standards do not impose particular moral and political values but rather serve to legally recognize the way things are. Just as U.S. urban sociologists wrote about racial housing segregation using the naturalistic language of “succession” (Park et al. 1952), so too early arguments in favor of comprehensive zoning could rely for their persuasiveness on existing notions about the “natural” tendency of different activities and different groups to become spatially segregated (Light 2009). In Park’s influential view:

It is because the city has a life quite its own that there is a limit to the arbitrary modifications which it is possible to make (1) in its physical structure and (2) in its moral order. The city plan, for instance, establishes metes and bounds, fixes in a general way the location and character of the city’s constructions, and imposes an orderly arrangement. . . . However, the inevitable processes of human nature proceed to give these regions and these buildings a character which it is less easy to control. Personal tastes and convenience, vocational and economic interests, *infallibly tend to segregate and thus to classify* the populations of great cities. (Park et al. 1952:16; emphasis added)

In this way, comprehensive zoning, and land use controls generally, which would have been discredited as socialistic if directly imposed by central governments, could be cast, in the spirit of American legal pragmatism, as nothing but law adapting itself to life.

The largely successful effort to “naturalize” the segregation of urban space by race, class, life cycle stage, and economic activity that was the comprehensive zoning ordinance was nevertheless not an inevitable historical development rooted in the shift from the

supposedly tolerant and cacophonous atmosphere of older cities to the bland, clean, centrally planned spaces of modernist planning. It is well known that comprehensive zoning's constitutionality was in question for a long time; but what few legal or planning scholars seem to know is that the court decision that finally legalized this approach to urban governance was by no means overdetermined by the seeing like a state story.

As it happens, the landmark case that is routinely taken as the confirmation, by the U.S. Supreme Court, that cities could begin to "see like a state" without fear of constitutional challenges, *Village of Euclid v. Rambler Realty*, was the product of an accident. This famous 1926 case was actually first decided the other way, i.e., against zoning and in favor of the realtor, by a slim majority of 5 to 4. However, Chief Justice William Howard Taft was friends with a lawyer who had brought an amicus brief defending municipal zoning powers. After meeting with his friend, Chief Justice Taft called a "re-hearing." After this unprecedented second kick at the can, the village of Euclid won. The United States thus got the "seeing like a state" tool that is generally called "Euclidean zoning"—not after the Greek geometer (though the association is very helpful if one regards zoning as a natural product of the all-powerful modernist gaze) but rather after the tiny municipality outside of Cleveland that was the litigant in the case (Haar & Kayden 1989:17).

The serendipitous encounter that led to the rehearing is one of those "Cleopatra's nose" historical facts about whose significance one can only speculate. However, the contingency of the American zoning system is by no means limited to this happenstance event. There is a structural contingency, if one can use that oxymoronic term, that was built into the system from the very beginning and that continues to play a very important role in protecting the system against potential or actual reform or abolition efforts.

A key reason—arguably the key reason—why comprehensive zoning came to be accepted by President Herbert Hoover's government, by the Supreme Court, and by municipal governments throughout the land was that the ordinances were always accompanied by a very generous and very flexible system of exceptions and exemptions. If comprehensive zoning ordinances had actually dictated built form in Stalinist fashion, then municipalities would have been completely overwhelmed with legal challenges and judicial reviews as well as with mass law-breaking, and comprehensive zoning would have gone the way of Prohibition. However, because, beginning with the 1916 New York ordinance that eventually became the model for the Hoover-era state zoning enabling acts, the zoning system was designed to provide ample room for property owners to legalize buildings and activities that did not conform with the law, municipal authorities then and now were

and are able to pretend that their cities actually follow the rules set out in the state enabling acts, when, in the case of older cities especially, that is not at all the case.

The far-sighted lawyer and politician who designed the 1916 New York City ordinance, Edward Bassett, did not expect that the rise of expert knowledges and modern planning ideals would suffice to bring about a general acceptance of either the specific New York ordinance or the general idea of comprehensive zoning. He did not trust in the evolutionary development of modernism to carry his project with it. As Revell's study shows, Bassett realized that no zoning plan would survive, politically and legally, unless plenty of safety valves and opportunities for exceptions were installed in the system itself. Thus, he set out to "judge-proof" the ordinance by providing a capacious and responsive system of zoning appeals and exception-granting (Revell 2003:199). Property owners found it very easy to obtain an exception and therefore lost any interest they might have had in challenging the ordinance as a whole. It was the exception-granting mechanism, the Board of Standards and Appeals—Bassett's invention for reconciling the idea of zoning with the heterogeneous reality—that made the zoning ordinance feasible. A legally crucial dispute amongst wealthy neighbors in Manhattan between the Astors, who were using one of their properties to store commercial goods, and the J. P. Morgan family, who dealt only in money, helped install the exception (the zoning variance) in the heart of supposedly comprehensive zoning plans. The Astors were able to get the Board of Appeals to grant their property what later came to be called "legal nonconforming use status." The Morgans took the matter to court, in a case that tested the whole idea of zoning; but the court limited itself to striking down the particular decision of the board, as courts have generally done since (Revell 2003:210–11). Boards can grant zoning variances very generously without undermining the zoning ordinance, since, even if a particular variance is subsequently denied through judicial review or through political interference, the mechanism remains invulnerable. And given the institutionalization of the appeal mechanism, few if any landowners have an interest in reforming the ordinance itself.

The fundamental role played by the exception-granting mechanism in contemporary planning is well known to practitioners, but it is not reflected in planning textbooks or in official law. The fact is that in many cities today, legal nonconforming uses are everywhere. There are condominium buildings that are twice as tall as the zoning regulations theoretically allow, many low-income people continue to live above workshops and stores despite the zoning rules, and there are numerous businesses that are not supposed to be located where they actually are. Planners gazing at maps showing different zones in various colors may well feel pride that a city

has been successfully reduced to a two-dimensional, differentiated, coherent representation. But at least in older sections of cities (and sometimes in new sections as well, given the trend toward “mixed use” micro-neighborhoods and locally specific higher densities), the actuality is not at all in keeping with the plan.⁸

The low visibility of the appeals mechanism within official texts has encouraged urban studies and legal scholars to believe that comprehensive zoning was in fact carried out and has prevented scholars from reflecting on the fact that few if any other areas of law have as a central mechanism anything analogous to the curious planning category of “legal nonconforming use”—the category that installs exceptionality, indeed illegality, at the very heart of modernist planning law.⁹ That a constant stream of exceptions flows out of planning departments in a routinized manner shows that the seeing like a state story does not capture the realities of planning.

Governing Space and Governing Urban Conflicts Through Nuisance

The broad-stroke sketch of the rise of land use thinking provided above has begun to show that the narrative by which seeing like a state techniques and governing habits replace older, more embodied, ways of being in the city and managing its disorders is not wholly adequate. But to further explore the internal contradictions of municipal efforts to see like a state it is useful to explore a category that was very important in the management of urban disorder in the nineteenth century and that, while less visible at the level of the letter of the law, is nevertheless still alive and doing much governing work today. That is the category of nuisance.

It may seem somewhat arbitrary to focus on nuisance, given that a whole range of regulatory mechanisms was used by municipal authorities in the nineteenth century to manage conflicts between

⁸ When doing research for a related project, I asked a city planner in Toronto to give me a rough count of the percentage of the city’s properties that were in compliance with the zoning bylaw. She was unable to do so, since apparently there is no official map in which all the variances and exceptions are recorded (not surprisingly, as there are so many exceptions and so many micro-local zoning rules that a football field would likely be needed for the exercise). However, when I probed further and suggested that on some streets more than 50 percent of the properties might well be “nonconforming,” legally or illegally, she agreed that this was a reasonable estimate.

⁹ Systematic observation of Toronto’s four boards of appeals (Committees of Adjustment) was carried out over two summers (2006 and 2008) for a related project. The key empirical finding from that research is that about 90 percent of the requests for variances were approved by these boards of citizens, even if the requests included fairly major changes. Toronto is unusual in the high number of exceptions and exemptions granted, a senior planner with experience in other North American cities told me, but its variances process is exactly the same as in the United States.

property owners and to impose public-interest limits on the profitability of private property, all under the police-power banner of *salus populi* (Novak 1996). In addition, public laws and rules did not have a monopoly on regulation, because such private actors as insurance companies also imposed rules, especially on commercial properties; and later, with the rise of mortgage markets, lenders as well as realtors also imposed their own private but nevertheless compelling regulations (Kruse & Sugrue 2006; O'Malley & Hutchinson 2007). A full genealogy of urban governance would have to include the myriad private as well as public regulatory structures that converged on different kinds of property owners and different kinds of properties. Such an account is obviously beyond the scope of this article. But insofar as analytic clarity is more important than comprehensiveness for present purposes, it is appropriate to focus on a single legal logic that can be taken as paradigmatic of the older way of governing urban space, in the same way that the notion of land use can be taken as paradigmatic of "high modernism." That mechanism, or rather set of mechanisms, is the category of nuisance. This choice is justified at the strictly legal level because nuisance has been described, with good reason, as "the workhorse of American private land use law" (Williams, in Haar & Kayden 1989:278). And zoning has long been seen by both lawyers and scholars as the codification of nuisance (as the *Village of Euclid* decision [1926] itself argues).

Nuisance is not a legal category that attracts much commentary, much less theoretically oriented analysis (for an exception see Cooper 2002). Nevertheless, the capacious and rather fuzzy category of nuisance enables a significant amount of legal governance—and not only as a somewhat anachronistic legal category. Environmental activists, for example, sometimes use nuisance law to put a stop to environmental degradation, though often with limited success (McLaren 1972; Wightman 1998). From a different political perspective, British politicians have revived the legal form of nuisance under the new banner of "antisocial behavior order" or ASBO, a category that targets individuals who persistently annoy someone "not of the same household" (a significant provision given the predominance of neighbor disputes in nuisance law [Cooper 2002]). Like nuisance, the ASBO empowers certain individuals or semi-public officials—mainly public housing managers—to enforce specific agreements that are individualized and look like contracts, but that have received state backing.¹⁰

¹⁰ There is a vast criminological literature on ASBO, much of which deplores the confusion of public law and private law that is caused by the category (e.g., Ramsay 2008); but if one puts ASBOs in the context of urban governance one sees that the ASBO bridges or confuses the divide between public and private law in exactly the same way, and through the same logic, that was for centuries embodied in nuisance.

The history of nuisance law underlines the fact that even in the United States private property has never been as sacrosanct as the famous constitutional guarantee would suggest, both in relation to the state (especially the municipal state) and in relation to other property owners, even during the supposed zenith of *laissez faire*, the nineteenth century. In grasping the real situation of private owners in regard to the sanctity of their property, however, it is important to look beyond formal municipal rules and acknowledge the very important role played (especially in the nineteenth century) by actions initiated by private parties against neighbors in the governance of many of the problems caused by industrialization and urbanization.

In many situations facing modernizing nineteenth-century cities (e.g., the sudden polluting of previously clean rivers by new industries, the rise of certain controversial commercial entertainment venues in cities), the public interest had little or no legal foothold. Instead, the private interests of other parties were invoked in order to mitigate harms—economic, material, and moral harms. Injunctions could be and were obtained to stop objectionable activities, and private nuisance lawsuits did much of the work that came eventually to be done by public regulations. Benedickson's sociolegal history of sewage, for instance, provides numerous examples of the way in which disputes that were essentially about public spaces and the public interest were fought or managed with legal tools designed for conflicts among individuals (especially individuals owning adjoining properties) (Benedickson 2007). For example, Joseph Story and James Kent, both of whom figure prominently in Novak's account of the police power in the nineteenth-century United States, played an important role in expansively reading private rights so as to put controls on industrial uses of river waters. They adapted eighteenth-century doctrines regarding the moral economy and community welfare for use in the industrial age. In regard to the contentious issue of riparian owners' ability to affect the quantity and quality of water flowing downstream, Kent stated:

No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it or a title to some exclusive enjoyment. He has not property in the water itself, but a simple usufruct while it passes along. (Kent, quoted in Benedickson 2007:21)

The term *enjoyment* is crucial here, as it is for nuisance law generally. First, "enjoyment" covers a variety of moral/aesthetic as well as material interests, without drawing a clear line between them, in keeping with the general logic of nuisance governance. Second, the term constructs the offense as one against other people's self-

reported well-being, rather than as an offense against objective, publicly declared standards.

As this very brief consideration of the crucial term *enjoyment* shows, nuisance is an inherently relational and thus embodied category. As the *Village of Euclid* decision (1926) of the U.S. Supreme Court put it, things or activities become nuisances when disharmony is produced as a thing or activity is moved away from its “proper” place: “A nuisance may be merely a right thing in the wrong place—like a pig in a parlor instead of a barnyard” (*Village of Euclid* 1926:379). Nuisance law, technically, regulates only property and its uses, not persons; yet the category of nuisance is inherently social, given that a smell or a flow of sewage or a rat becomes a nuisance only if a nearby property owner (or, to a limited extent, a legal occupier) is bothered by it and decides to seek redress. A nuisance is thus always the product of a particular social, aesthetic, and geographic context—as the pig in the parlor quote unwittingly reveals, since urban pigs, as Hartog shows to great effect, were legally confined to private enclosed spaces only late in New York City’s history [Hartog 1985].

The inherent relationality (or social interactionism) of nuisance is less visible in public nuisance law. A public nuisance is generally defined as one that harms not just the interests of an adjoining property owner but also the interests of the public. But the public of nuisance law is not coterminous with the nation-state, either geographically or conceptually. As Novak’s work, among other sources, amply demonstrates, the victim of public nuisance is neither the state nor the national public, but rather “the community” (Novak 1996). Even if it is spread out over a relatively large area, “community” is imagined at a different scale than that of the nation-state, not only because the community is generally associated with a locality but also because it is regarded as qualitatively different from the population recorded by census takers: It has particular interests, cultural as well as material, and it differs from other communities located within the same state (Rose 1999: ch. 5).

Because it is a local entity with necessarily fuzzy boundaries, and because the good being defended is enjoyment, not purely material well-being, the community whose peace and quiet are defended by public nuisance provisions is not an inert and bounded object to be measured by positivistic social science. Indeed, it is very likely that the popularity of “community” talk in the wake of rising skepticism about national projects and central governments (Rose 1999) is an important reason for the renaissance of nuisance-style governance tools such as ASBOs in the United Kingdom and “civility” ordinances in the United States.

If nuisance law constitutes community, so too does community construct (public) nuisance. In law, without a specific community to

which certain sensibilities are attributed either by the prosecution or by the court, there can be no public nuisance. And since micro-communities, in the context of urban governance, are always assumed to share certain local norms and tastes that distinguish one community or neighborhood from another, nuisance and related legal disputes play a constitutive role in the construction of culturally specific collective subjectivities. Cooper's careful analysis of nuisance cases, for example, shows that the somewhat stereotypical image of the oversensitive old lady who has nothing better to do than to complain about being disturbed by "the manly sport of cricket" (Cooper 2002:10) works to install a certain sober, sensible subjectivity as a general English norm. More generally, the case law shows that judges routinely assume that certain types of people and types of property are to be protected from noise and smell and bother more than others (see also Brenner 1974; Wightman 1998).

This idea, reminiscent of Chicago school ideas about neighborhoods and their differentiated moral sensibilities, is enshrined in many local laws today. For example, the current New York City Noise Code, touted as a major reform when passed in 2007, divides the city into three zones (by aggregating existing zoning categories) and sets different maximum decibel levels for each of the three "noise" zones: 50, 55, and 60 decibels, respectively. That the lowest maximum, 50, applies to single-family low-density districts was quite predictable, as "single-family detached" is always the top, most privileged category in North American zoning systems. Equally predictable, given the unease of today's courts with subjective and flexible standards, was the fact that New York City's solicitors tried to give a law that enshrines privilege an air of scientificity by using numbers, even though the numbers are clearly arbitrary—there is no particular reason why an area with working-class apartments should have a legal decibel limit that is five or 10 higher decibels higher than that prevailing in single-family detached streets (see <http://www.nonoise.org/lawlib/cities/newyork>, accessed 1 Dec. 2010).

As the New York noise code openly reveals, nuisance law has always acted to institutionalize and enshrine in law protections that are thought of as naturally differentiated by class and by other factors. How can the protection of local law be so unequally distributed, even in the age of equality rights? The answer is that the protection is not thought of, in law, as belonging to persons, but rather to properties, and the principles of equality and freedom have never applied to properties. The "quiet enjoyment" of one's property that is the guiding star of nuisance and quasi-nuisance law is not a right that persons have (in which case it would have to be equally distributed) but rather a privilege that flows from one's links to property. That is why the protection of local law is quite

openly differentiated, with those living in poorer and more crowded quarters being told that they have to tolerate more noise and pollution than their wealthier neighbors.

To conclude the analysis of nuisance, it is useful to review the features of the form (rather than the content) of nuisance governance. The content of nuisance is by definition indeterminate, since nuisances emerge only in relation to certain contexts and remain specific both to a certain kind of place and to a certain social community. And indeed, the content of nuisance and nuisance-type provisions (such as noise rules) actively institutionalizes in law the rather illiberal idea that middle-class homeowners deserve greater protection from disorder and disruption, at least when they are at home, than other citizens. The content of nuisance thus varies both by particular context and by micro-locality. The form, by contrast, is what gives nuisance governance the minimal determinacy it has. Its form can be analyzed by referring to three key dimensions of all governance mechanisms: temporalization, visualization/spatialization, and subjectivity (Rose & Valverde 1998).

In regard to the first governance dimension, that is, temporality, classic nuisance clearly looks backward. Something appears as a legal nuisance only *ex post facto*. Public nuisance provisions of course look forward insofar as municipalities can declare an activity to be a nuisance before it happens by invoking past experience; but as the legal term *abatement of nuisances* reveals, nuisance governance is basically backward-looking, and private nuisance is wholly backward-looking.

Second, in regard to spatialization, that is, the way in which the legal form envisages both literal space and the space of governance, nuisance localizes both problems and solutions. Again, the municipal task of nuisance abatement is always specific, to a type of business if not to a particular property. Whether the remedy is sought by an individual in a private action, or by a municipality enforcing ordinances, nuisances always have specific and usually local solutions: Put in a retaining wall here, install filters in this factory chimney, move your noisy bar to a high-density district, property owners are told. Nuisance-type regulations and nuisance-type litigation and negotiations with municipal authorities thus differentiate city space, often magnifying existing socioeconomic differences given that noisy or unpleasant activities are assumed to be less offensive in poorer areas—but this spatial distribution is not carried out according to an overall, Bentham-style classificatory plan but rather in an *ad hoc* manner.

Third, in regard to the forms of subjectivity it produces or encourages, nuisance governance is very firmly relational, indeed fully intersubjective. A nuisance is something that bothers some-

one, even if that someone is the supra-individual but still particularistic, specific “community.” The common law of nuisance consists of a series of tragic narratives about persons or communities whose peace and quiet—assumed, in the common-law world, to be the default setting of residents and communities alike—were ruined by this or that physical or cultural invasion.

Governing through nuisance-type provisions or negotiations thus tends to be backward-looking, locally specific (in an unpredictable manner), and intersubjective. The format of nuisance-type governance thus stands in sharp contrast to the knowledge formats typically found in modern governmental projects of the seeing like a state variety.

From Particular Nuisances to Risky Types of Business

If one takes a holistic look at the history of urban governance in the common-law world, rather than focusing on cases explicitly labeled as “nuisance,” one can detect a development that provides a bridge from the relational, embodied, localized, and intersubjective logic of nuisance to the seeing like a state logic of modernist grand planning. This is the lowly legal mechanism of licensing (Reich 1964). A brief discussion of the similarities and differences between governing through nuisance and governing through licensing is thus in order.

In the long lists of risky, nuisance-producing businesses that municipalities produced as commerce diversified and industries proliferated—lists of businesses with spatial restrictions or subject to special licensing rules—no clear division was made between morally objectionable businesses (saloons, gambling houses) and physically risky ones (e.g., gunpowder storage sites). Perhaps more remarkably, little or no distinction was drawn between objectionable buildings and objectionable types of people: Vagrants, gypsies, prostitutes, and, in North America, “Indians” were often subject to the same kind of spatially exclusionary rules as dangerous trades, and municipal ordinances often consisted of nothing more than rather random lists of types of people and types of businesses or trades, with little or no categorization.¹¹ This remarkable lack of attention to the usual distinctions between moral harm and physical harm still characterizes today’s municipal codes.

In governing the physical and moral disorders plaguing industrializing cities, nuisance law and quasi-nuisance regulations have had some limitations. Nuisances can only be suppressed, abated, or prohibited, all coercive actions that the police power

¹¹ Novak’s work (1996) opens with a very typical list of objectionable businesses and identities, drawn from the Chicago municipal code.

allows but that came increasingly to be seen as problematic for a liberal state and thus as requiring justification. Licensing, by contrast, which had for centuries been used in England as the key legal technique to govern the risks posed by the important public space of the pub, is more compatible with liberal tenets, because it allows authorities to regulate, not only to ban or suppress. One of the virtues of licensing is that it enables conditions to be placed on the license. This differentiates governance to suit either local conditions or local authorities' views, and at the same time minimizes the need for intrusive direct public policing (a great virtue in Anglo-Saxon countries haunted by the specter of absolutist French policing tactics). Instead, licensing contains a built-in encouragement for the licensee him-/herself to carefully control the operation of the business or other activity in such a way as to avoid trouble with the often highly local orders of the licensing authority. The ever-present fear of losing the license automatically generates the kind of governing move that some criminologists call "responsibilization" (Valverde 2003a).

An important step in the development of quasi-zoning general rules concerning the operation of businesses and industries was the judicial confirmation, in the United States, that municipalities had the power not only to license specific businesses but also to impose restrictions on the future location of whole categories of businesses. Shortly after the Civil War, the state of Louisiana had allowed New Orleans to ban private slaughterhouse operations in the city while—and this was the legally innovative step—requiring that all butchers ply their trade in a specific, municipally owned building (Labbe & Lurie 2003; see also Novak 1996). This was highly controversial (in the United States—not in the United Kingdom, as Joyce's careful study of municipal slaughterhouses and markets shows [Joyce 2003]). When the Supreme Court decided to support Louisiana's action, thus authorizing local governments everywhere to force a designated category of private business to locate in a single municipally owned space, the legal tools of American urban governance underwent a significant change. It is only slightly oversimplified to read this event as a milestone in the rise of future-oriented risk management. The slaughterhouse decision confirmed that interfering with private property did not require evidence of offensiveness to specific persons or communities. Restrictive objective rules justified on general, nonlocal grounds could now be applied in advance to govern problematic uses of private property.

While proactively confining problem businesses to municipally managed locations breaks with the logic of nuisance, abandoning relationality and embodiment in favor of objective and universalistic rules, business regulation after the slaughterhouse cases

nevertheless remained confined to places and trades that were regarded as inherently problematic. Certain categories of trade could be either banned or forced to locate in specific spaces; but neither industry nor commerce could be categorically separated, spatially, from residences. In other words, the common municipal technique of devising a list of activities and trades that required official permission (a license) and that could be subjected to spatial rules did not yet involve governing the whole of urban space. Once the technique of the list of risky businesses developed, however, municipal authorities seemed to be unable to resist continually adding more categories. For example, the Ontario Municipal Act of 1904 first required special permission for laundries, butcher shops, stores, and manufactories, but through a series of amendments, stables, tanneries, junk shops, movie theaters, dance halls, dog kennels, and many others were added (Moore 1979).

The proliferation of categories of businesses needing licenses and being subject to special spatial (and often also temporal) rules indicates that the logic of nuisance was here reaching its limits and beginning to undermine itself. Urban authorities did not want to passively wait for private actors or officials to launch nuisance actions; they wanted to mark out a public interest terrain in advance (Novak 1996:3). And as a new species of risk emerged (the dance hall, for instance), the apparently obvious governing response was to add it to the list. The increasingly unwieldy lists, however, became problematic at the legal level. The specifics of each municipality's list of problem activities and trades subject to special rules could not easily be defended against judicial review or against attacks from higher levels of government worried about municipal micromanagement (or about municipal corruption in the granting of licenses).

The proliferation of lengthy and unorganized lists of what kind of business could go where or be open at what time under what conditions can be seen (in retrospect) as one of the driving forces behind comprehensive zoning, and indeed behind urban planning. If instead of adding to the lengthy and somewhat irrational lists, municipal authorities grouped businesses into larger categories (such as light industrial, heavy industrial, etc.), the spatial classification would be more likely to survive judicial review or legislative attack. Classifying urban spaces instead of making lists of types of business does not necessarily bring with it the replacement of pre-modern knowledge formats by modern habits of standardization, objectivity, and numeration. But the rather uneven quest of municipalities to justify their legal powers on objective grounds (thus defending their ordinances from challenges) certainly encouraged using numbers more frequently in a variety of fields of governance.

On the architectural side, the idea of using numbers to regulate the look of buildings had been imported into New York by people familiar with German urban design and zoning practices (lawyer Edward Bassett in particular).¹² Initially, however, the problem of building height and bulk had been regarded as specific to a very small category of buildings (tenements, first, and then Manhattan skyscrapers). The same epistemological shift that marked a move from regulating specific businesses as nuisances to a general system of segregating industry and commerce into zones was involved in moving from regulating unusually problematic buildings through numerical limits to a general system of building codes and zoning numbers.

In general, in municipal governance numbers had not been particularly important until the 1920s; even building specifications tended to be qualitative rather than quantitative, relying on trade knowledges rather than on objective numerical rules developed through expert knowledge (Ben-Joseph 2005; O'Malley & Hutchinson 2007). But numbers had been used to some extent by public health and anti-congestion reformers, as can be seen in the *Hull House Maps and Papers* (1895) and related socio-medical works. Numbers were also used by engineers, even though engineering was a trade rather than a university-based science until well into the twentieth century (in North America) (Porter 1995). And before planning schools existed, practically trained engineers played many of the roles later taken up by trained planners (Ben-Joseph 2005; Simpson 1985).

In the 1920s and 1930s, the "expertization" of real estate knowledges encouraged by the Hoover and later the FDR administrations also encouraged the proliferation of geographically linked numbers, in detailed maps that sought to cover the whole of a particular city (see for example Hoyt 1939; in general, see Dennis 2008: ch. 3 and Joyce 2003). Overall, given the public health movement's visibility, at least during the Progressive era, and given the central role played by engineers in urban governance, as well as unrelated developments in other fields, such as real estate, the habit of quantification was increasingly available and could be put to use in the governance of conflicts about problem uses of private property.

However, the use of numerical standards is not the only or even the main indicator of a shift in municipal governance toward seeing like a state. To give great importance to the adoption of numerical formats in urban governance is to underestimate the power and effectivity of specifically legal formats. I have examined some major features of ordinances and discussed private nuisance to some ex-

¹² On Bassett and the New York City zoning bylaw, see, inter alia, Revell (2003) and Makielski (1966).

tent, but I have not yet considered other important shifts in private law. In the private-law history of modernist urban governance in North America, a key chapter is that pertaining to the rise and fall of the restrictive covenant. A brief comment on this will conclude the genealogy of land use controls.

Restrictive covenants, also known as deed restrictions, are in law “burdens on the land” and thus part of land law—even though they serve the same function as contracts involving multiple parties: namely, reaching a private but legally binding agreement to preserve a group of properties from potential intrusions by undesirable activities or undesirable people. Restrictive covenants, at their zenith, imposed very significant limits on the ability of owners to profit from their property, because they often prohibited uses such as subdividing homes or lots or selling to the highest bidder (Keating 1988:77; Peterson 2003:309). In the United States, private covenants long prevented African Americans from buying homes in white neighborhoods, especially suburbs, until racially restrictive covenants were struck down by the Supreme Court in the 1948 *Shelley v. Kraemer* decision (see Kruse & Sugrue 2006). After that date African Americans continued to find it nearly impossible to buy homes in white areas, due to the practices of both realtors and vendors, but the covenant was no longer as useful. For other reasons too, such private agreements often undermined themselves. A study of Vancouver, for instance, shows that during the Depression many downwardly mobile suburban homeowners flouted the covenants they or their fathers had signed by taking in tenants or converting stately homes into rooming houses (Hasson & Ley 1994).

The susceptibility of covenants to attacks from within as well as from without encouraged the development of site-specific but public ordinances or bylaws: “Covenants were losing their effectiveness in safeguarding the residential character of old neighborhoods” (Fischler 1998a:176). In Toronto, for example, the legislated numbers setting out maximum lot coverage that are now part of every municipal zoning ordinance were first made official in a proto-zoning bylaw requested by the families living in the new bourgeois enclave of Lawrence Park in 1927 (Moore 1979). Similarly, the 1916 New York City zoning ordinance included, at the request of Murray Hill homeowners, a small residential island in sea of commerce (Fischler 1998b:177).

Far from being a seeing like a state top-down state tool, then, the early local zoning ordinances that supplanted restrictive covenants were a public legal tool used for purely private, mainly exclusionary purposes, on a highly local scale (Frug 1999:144). That is widely recognized in the critical literature. However, what the critical urban studies literature often fails to point out is that the

same legal tools could be and were used for very different purposes. New York City's 1916 zoning ordinance, often described by critical urbanists as driven by upper-class shoppers' distaste for rubbing shoulders with needle trade workers on Fifth Avenue (Hall 2002:60), was in fact a complex and polysemic legal invention, devised first and foremost to manage the intra-bourgeois conflict between the expansiveness of capitalist commerce on the one hand and the cultural preference for class-homogeneous residential districts, on the other (as seen in the Astor-Morgan dispute recounted above).

Zoning is therefore a legal tool that can be used proactively and in a generalized manner for purposes of progressive city planning (Rodgers 1990)—as well as to target morally or aesthetically objectionable establishments (Bockrath 2009). Zoning, then, and land use thinking more generally, does not have a political essence. Seeing the earth as a collection of land uses is a knowledge practice that is compatible with a variety of political projects.

Having sketched out some of the main developments in the history of knowledge formats, the history of urban governance techniques, and the evolution of local legal tools from licensing and nuisance to zoning, I next describe the way in which premodern logics (specifically nuisance) pop up unexpectedly in the current day, showing that the modernist seeing like a state is unstable and internally contradictory.

The Reappearance of Nuisance

A noise bylaw in the city of Ottawa—which has equivalents throughout North America—shows that the embodied, relational, and intersubjective logic of nuisance was by no means eliminated with the emergence of objective numerical standards and comprehensive zoning plans. The bylaw appears to be objective and general: It forbids all “amplified sound” between 11 p.m. and 7 a.m. on weekdays, up to 9 a.m. on Saturdays, and up to noon on Sundays. However, the amplified sound is forbidden only if people are disturbed. And not just any people: In keeping with the history of nuisance law, only residents (not workers) are considered as potential victims of excessive noise. The citizens interpellated by this bylaw are envisaged as happily ensconced in their private home (rather than working, walking around the city, or partying) and as desiring only peace and quiet, never excitement: the bylaw forbids amplified sound played during the hours mentioned “so as to disturb the peace and comfort of any person in any dwelling house” (Paragraph 5).

A restaurant charged under the bylaw argued that the “disturbing the peace” element amounted to unconstitutional arbitrariness and vagueness.¹³ The city solicitor countered by arguing that the admittedly vague wording was a rational way to acknowledge differences among neighborhoods. The judicial decision reported that the city’s argument was that “tolerance to noise will vary from community to community depending on the make-up and characteristics of the community residents involved” (Par. 9). The judge agreed with this and added that “an inner-city community as opposed to a suburban community” “may tolerate a very different standard of what are reasonable night-time noises” (Paragraph 23). For this judge, whose reasoning was fully in keeping with the common law of nuisance (not to mention the new New York City noise code), the city is always already differentiated into zones that differ not only by demographics but also by their legal standing in regard to disturbances. From that perspective, a nuisance-type provision, which protects some neighborhoods more than others and that is only triggered by the actual or hypothetical complaint of the kind of person or community that the law considers as having a particular right to be free from certain disturbances, is a necessary supplement to the provisions that mention objective numerical rules (e.g., 11 p.m. to 7 a.m.).

Objective, numerical rules that evolved either as a result of legal “void for vagueness” challenges or due to the generalized proliferation of numbers and objective standards in municipal governance (or both) (Poovey 1995) could be seen by some as evidence that rule through abstract, homogeneous space has won out over more concrete ways of seeing, as per de Certeau’s well-known arguments (de Certeau 1984). But this is not the case.

In the Ottawa bylaw case, the numbers are internally linked to and activated only if a classic nuisance situation arises. Thus, the modernist knowledge format is secondary: It is parasitic on the antique legal identity of the homeowner quietly enjoying his or her property. In another noise bylaw, from the neighboring city of Montreal, the relation between subjective and objective standards is somewhat different, or at least it is laid out differently in the legal text—but the same dynamic and eclectic logic can be observed in the process of enforcing and adjudicating it.

Montreal’s noise bylaw is rooted in the Quebec Civil Code rather than the common law of nuisance. Thus, the bylaw does not imagine that peace and quiet is the default setting of householders but rather draws a line between normal, regular, background noise that must be tolerated, on the one hand, and “disturbing” noise on the other hand. “Disturbing” noise is illegal, but the code states that “neighbours shall suffer the normal neighbourhood annoyances

¹³ *Ottawa (city) v. Freidman*, OCJ 1998.

that are not beyond the limit of tolerance that they owe each other” (Quebec Civil Code s. 976)—a phrase, striking to the eyes of an English-speaking reader, that helps underscore the rural/suburban bias of the common law of nuisance. But the common law’s notion of distinct, differentiated communities as the victims of nuisance and urban disorder is, by contrast, as much part of the Quebec Civil Code as it is of the common law. The next clause installs the local community as the subject of this law, not the national/provincial public, by qualifying the “disturbing” requirement with the following addition: “according to the nature or the location of their land or local custom” (Quebec Civil Code s. 976).

The rather cosmopolitan image of neighbors stoically putting up with all but unbearable disturbances, but in a differentiated manner depending on their “local custom,” was at some point in the history of the city deemed legally insufficient. To this qualitative standard, the city added an objective rule of general application that did not require complaints and did not require proof of having gone beyond local background noise—a clause banning all amplified music that can be heard outdoors.¹⁴ It was under this more modernist, objective section that a strip club playing loud music in order to attract customers away from a competing strip club on Ste Catherine Street was charged.¹⁵ When the case eventually reached the Supreme Court of Canada, the question before the court was not whether the noise in question was in fact out of keeping with the usual din of the (very seedy) neighborhood, but rather whether a bylaw with this form was constitutional.

The majority of the court recognized that a total, categorical ban on all amplified sound leaking out from any building, at however low a volume, is indeed a rather draconian measure. But they creatively read the second section (the total ban) in light of the first (the one invoking local standards of disturbance), concluding that one can and must trust local enforcement officials to be sensible and act only when a nuisance is developing. Without using the term *nuisance*, but fully utilizing its logic, the majority stated: “The history of the by-law shows that the lawmakers’ purpose was to control noises that interfere with the peaceful enjoyment of the urban environment. It is clear from the legislative purpose [about which only speculative comments could be made] that the scope of article 9(1) does not include sounds resulting solely from human

¹⁴ “Amplified noise” became an urban danger only with the rise of record players, radios, and loudspeakers, obviously. Such noise could easily have been prosecuted under the existing offensiveness or disturbance provisions, but, in keeping with the tendency of municipal lists of problem activities to continue expanding through addition, adding new sections was thought desirable.

¹⁵ *Montreal (city) v. 2952-1366 Quebec Inc* [2005] 3 S.C.R. 141 (Text of bylaw reproduced in decision).

activity that is peaceable and respectful of the municipal community” (*Montreal [city] v. 2952-1366 Quebec Inc* 2005: headnote).

Thus, the majority wanted cities across the country to read their modernistic objective rules about times and decibels and amplified noise *as if* they were old-fashioned nuisance provisions, to be triggered only when the local cultural standards of a particular community had been breached. In his dissent, Justice Ian Binnie, then the court’s most vocal critic of the police power of the state, exposed the logical and legal contradictions inherent in his colleagues’ creative interpretation:

Article 9(1) imposes a general ban on noise classified only by source and includes noise which is not a nuisance . . . the legislative power to define and prohibit nuisances conferred to city hall by the Charter of the City of Montreal 1960 does not extend to defining some activity or thing as a nuisance. . . . Noise is not by nature a nuisance. . . . Read in its ordinary grammatical sense, article 9(1) would catch . . . people who can only make themselves heard using “sound equipment,” such as Dr Stephen Hawking. . . . article 9(1) would preclude a Montrealer sitting in his garden listening to Mozart playing softly through an open window from a kitchen radio. (Par. 45)

Like other municipalities, Montreal had tried to supplement and partly replace the old nuisance mechanisms by objective rules of general application, to conform with both modern ideas about individual rights and modern ways of governing order. Yet the specter of nuisance comes back to haunt the court, and thus the city regulation. Objective rules differentiating activities in an abstract disembodied manner turn out to create absurdities, such as inadvertently banning Stephen Hawking from communicating.

Some courts, and most city councils, are happy to invoke the common sense of enforcement officials as the magic solution for the internal problems of objective rules that are too rigid, while other courts will choose to force municipalities to find more precise wording. But, either way, the premodern knowledge moves contained in nuisance law and governance remain necessary for governing modern cities. Two brief examples from other cities are used here to develop this point.

The city of New York’s new noise code makes an effort to displace the traditional “unreasonable noise” category of the old code—clearly rooted in the common law of nuisance—and instead increase the number of objective, numerical rules. (The old code contained dozens of provisions with specific decibel numbers but also had a general provision banning “unreasonable” noise, in line with the Canadian bylaws discussed above.) *The New York Times* reported that in a concession to nightclub owners, the old rule

banning “unreasonable noise” emanating from commercial premises was changed to a numerical standard, but this new standard is fraught with enforcement problems. The code now states that such amplified sound cannot be more than seven decibels in loudness at any spot 15 feet from the property, or 42 decibels as measured inside any nearby residence. Given the usual background noise in the city of New York, seven decibels is practically inaudible. It is thus very likely that the attempt to regulate by using a specific number will fail or be challenged in future court actions.

Another clause in the ordinance similarly attempts to use numbers to govern problems that do not lend themselves to “seeing like a state” solutions. New York City dog owners are now told that if their dogs bark for more than 10 minutes in the daytime, or more than five minutes at night, then this constitutes a breach of the noise code. How this numerical rule will be enforced is not discussed. Adding to the problems of the new code provisions, New Yorkers are also now told that they cannot honk their car horns except in “an emergency”—a provision that simply brings back, in different words, the old “unreasonable” standard.¹⁶

A different, non-noise-related situation that also involves a shift from the nuisance logic of offensiveness to modernist approaches but then back again to offensiveness is documented by Ghertner in a study of civic politics in New Delhi. There, the municipal authorities enthusiastically took up the “seeing like a state” perspective to control and regulate squatter settlements that had mushroomed on the outskirts of the city. However, the squatters themselves became quite adept at working with and through modernist maps and sets of numbers, in such a way as to force the municipality to recognize and provide services to their “illegal” settlements (Ghertner 2010). The authorities then made a decision to not deploy more experts but rather vacate the field of modernist planning altogether, in favor of a rationality that Ghertner calls “aesthetic,” but which, from the point of view of law, is the familiar logic of nuisance. That informal slums could be threatened with destruction because they came to be seen as aesthetically offensive, in the new context of New Delhi’s project to remake itself as a “world-class city,” and that this way of constructing the problem could be in the end more successful than modernist planning and zoning, is regarded by Ghertner as a peculiar and unusual result. However, the return of nuisance and offensiveness logics in the governance of New Delhi’s informal slums has many parallels in

¹⁶ See http://nyc.gov/html/dep/pdf/noise_code_guide; see also “Ready or Not, New Noise Code Is Taking Effect” *The New York Times*, 30 June 2007. The old code was still available online, as of September 2010, at <http://www.nonoise.org/lawlib/cities/newyork>, a Web site containing information about numerous other municipal noise codes.

cities in the most advanced capitalist countries, as this brief look at municipal noise regulation in North American cities shows.

Modernist logics of urban governance have certainly been adopted by authorities all over the world, in New Delhi as in New York. But the persistence, and indeed in some cases the renaissance, of old nuisance logics puts in question the evolutionist zero-sum assumptions that see modernist knowledges as replacing or eliminating older ways of seeing.

The legal mechanisms of urban governance have never sought to be fully “modern” in Latour’s sense (Latour 1993). Arguments about morality and offensiveness are still highly effective today. “Seeing like a state” techniques coexist fairly easily with much older, more embodied, and relational ways of seeing urban problems, especially within legal contexts, given law’s continuing reluctance to abdicate its specific authority in favor of expertise and science. And “seeing like a state” logics sometimes fall flat, through inappropriate quantification or for other reasons, only to make way once more for the older logics of offensiveness and embodied “enjoyment” that do not disappear even at those times and places in which they recede into the background.

Conclusion: “Seeing Like a City” as an Unpredictable Dynamic of Premodern and Modern Knowledges

Critical studies of sociolegal governance often assume that as one way of seeing is introduced with success, older ways of managing order and disorder diminish in importance and eventually fade from view. But this kind of epochal thinking is not necessarily justified by the historical evidence. In an important article, Ford showed, more than a decade ago, that the rise of nation-states (and of supranational governing authorities) has not brought about any automatic diminishment of the role of cities and of local law and governance, and that in fact there is more of a dialectical relationship between the state and the locality than is generally assumed (Ford 1999).¹⁷ Similarly, Sassen’s recent historical sociology of local and state governance shows that in some cases older, existing scales of government (say, “the city”) are able to not only persist in the age of “globalization” but to actually acquire new

¹⁷ Without deploying the language of dialectics, Ford demonstrates that “the ‘local’ as a concept, as a category, as a significant object of concern, is the product of a governmental discourse whose goal was to catalogue, define and manage a territory by dividing it into knowable and distinct parts” (Ford 1999:911). He too sees the persistence of localism not as a product of “resistance” but as the result of the internal workings of the logic of (state) jurisdiction, though his analysis privileges the modernist territorial jurisdiction far more than I would do (for a critique of Ford’s view of the relation between scale and jurisdiction, see Valverde 2009).

importance and new powers, in part because of their ability to serve new functions and become a tool of global rather than local capital (Sassen 2006). Along somewhat similar lines, but focusing more on qualitative differences in governing gazes instead of on questions of quantitative scale, in this article I have endeavored to show that the logic of nuisance has by no means been eliminated by the modernist habit of seeing the Earth as a collection of land uses, and that nuisance-style governance is more than mere anachronism. Existing uses of nuisance logics in urban governance cannot be dismissed either as unimportant survivals of old-fashioned ways or as examples of resistance against expertise and science.

Seeing nuisance as proto-zoning, for example—a common evolutionist description—is certainly accurate in many respects, but it prevents observers from being attentive to the ways in which the failures and contradictions of modernist governing technologies have the effect of reviving older, embodied logics of nuisance and offensiveness. The history of urban governance shows that cities can and do use both modernist and premodernist ways of seeing and techniques of governance, acting as if there is no necessary conflict between them. In New Delhi, city planners can easily shift from scientific calculation to discussions about unsightly slums and offensiveness, as convenient—and the same epistemological eclecticism characterizes legal texts pertaining to the most advanced of capitalist cities (Valverde 2005). Sometimes the logical conflicts between these two ways of seeing are rendered visible, e.g., in the challenges to the noise bylaws discussed above. However, municipal regulation continues to rely on both subjective offensiveness and objective, general rules, and there is no reason to think that one will drive out the other. It may be—although this can only be a hypothesis, for the present—that “seeing like a city” is precisely a combination of heterogeneous ways of governing that may appear to be contradictory when examined philosophically, but which in practice supplement and/or replace each other without any fanfare.

The influential accounts of the transition from experiential, embodied, relational ways of seeing and governing the city and urban problems to modernist, “seeing like a state” perspectives provided by Lefebvre, de Certeau, and Scott (among others) are very much in need of revision, therefore. The identification of modernist “seeing like a state” techniques of visualization and spatialization was certainly useful and important (as was Foucault’s similar analysis of the panoptical gaze of disciplinary institutions). But identifying a logic of governance and documenting its dissemination does not mean that one has documented the decline, much less the death, of alternative perspectives and habits.

The theoretical geographer Doreen Massey has argued that after 30 years or so of critical studies of spatial governance highlight-

ing the power effects of scientific technologies such as mapping, it is high time to ask whether the picture of science that denunciations of modernism presuppose is accurate and whether it makes sense to routinely oppose science, on the one hand, or to experience and grassroots activism, on the other (Massey 2005). As she points out, de Certeau's influential contrast of "space" and "place," and of "strategy" versus "tactics," "cements into place precisely the very dualism (including between space and time) with which the rest of [de Certeau's] book is struggling" (Massey 2005:26).

In keeping with Massey's effort to reflexively question the abstractions that critical thinkers end up reproducing as they denounce abstract thinking, this article has shown that the critiques of the governmental modernist gaze of which Scott's *Seeing Like a State* is perhaps the most influential example have come to blind critical scholars of law and urban governance to the unpredictable dynamic by which older knowledge formats and older legal forms appear to go underground only to suddenly revive as one or another modernist legal invention breaks down. As they pop up in unpredictable locations, the new embodiments of older, premodern ways of seeing and governing urban space can and do take on a variety of political colors. The relationship between particular habits of seeing and political projects has to be documented in each case; we cannot assume that techniques of governance are hard-wired to particular political rationalities.

While further work in the history of urban governance would be necessary to prove it, the hypothesis that "seeing like a city," in practice, consists of being able to flexibly use a variety of legal and regulatory tools of quite contradictory provenances and logics may serve as the inevitably provisional conclusion to this article.

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