A Jurisprudence of Planning: Notes on the Outline of Law Required to Support and Control Planners

Richard O. Brooks

Follow this and additional works at: https://scholarship.law.stjohns.edu/tcl

Part of the Jurisprudence Commons

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/tcl/vol24/iss1/2

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
A JURISPRUDENCE OF PLANNING: NOTES ON THE OUTLINE OF LAW REQUIRED TO SUPPORT AND CONTROL PLANNERS

RICHARD O. BROOKS*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>2</td>
</tr>
<tr>
<td>II.</td>
<td>The Need for a Complete Reexamination of the Legal System of Planning</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>A. The Rise of the Planner</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>B. The Present Planning Structure</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>C. The Failures of Planning</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>D. The Movement Towards the Legal Recognition of Planning</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>E. Objections to a Jurisprudence of Planning</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>1. Broad Views of Planning in Society</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>2. Differing Views of Planning and the Position of the Planner in American Society</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>F. Specific Empirical Tasks of a Jurisprudence of Planning</td>
<td>18</td>
</tr>
<tr>
<td>III.</td>
<td>Specific Subject Matters of a Jurisprudence of Planning</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>A. The Requirements for Rationality in a Jurisprudence of Planning</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>1. Regulating the Relationships Between the Institutions of Planning and Science</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>2. The Institutionalization of a Systematic Planning Method</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>3. Other Sources of Rationality in Society</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>4. The Limits of Rationality</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>B. The Need for Appropriate Organizational Settings for Effective Planning</td>
<td>25</td>
</tr>
</tbody>
</table>

* Associate Professor of Law and Planning, University of Rhode Island.
I. INTRODUCTION

"Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."

When an environmental planner develops an impact statement under the National Environmental Policy Act, when a social services planner develops a comprehensive plan under Title XX of the Social Security Act, when a land use planner prepares a comprehensive plan under state land use enabling laws, all are acting under a law of planning, fragmented though it may be. My belief in the importance of formulating a jurisprudence of planning is based upon an undoubtedly biased assumption after years of working with the legal problems of that area. There has been a subtle rise in the relative power of a new elite, the administrator planner. This planner is part of the changing system of governance in America. By no means unified as a class, planners have increased in numbers and acquired increased influence. The legal system presently is seeking to cope with the rise in power of this new elite, and is having difficulty doing so because of the failure of "law people" to fully understand the uses and abuses of the methods and techniques which planners employ. This lack


The Calvert Cliffs' case involved the role of environmental impact statements as required by the National Environmental Policy Act. It is arguable whether these statements are, in fact, "plans." Later in the text, planning is defined broadly to include impact statements and other approaches to planning. For a collection of essays discussing the definition of planning, see A. FALUDI, A READER IN PLANNING THEORY (1973).

2 For a discussion of the growth of executive power in the United States, see W. FRIEDMAN, LAW IN A CHANGING SOCIETY (1972). Friedman maintains that western law gives considerable autonomy to the planning process. Id. at 375-97.
of understanding is accompanied by a lag in the present structure of legal institutions and legal concepts.

In addition to controlling this new elite, the legal system must be reformed to ease the application of proper methods of planning. One example of such reform is the current effort of courts to cope with the impact planning statements required under the National Environmental Policy Act. A tremendous growth of planning, planning techniques and applied science has occurred in the past three decades. How these activities relate to the legal system has been analyzed on a case by case basis, but no new general view has emerged. This legal theory about planning must define and identify the current activities of planning, past and future trends in planning, and theories about planning. It must describe how law may actually impede or help the planning process. Such a theory must not only direct empirical studies of the relationships of law and planning, but also explore the conceptual relationships between categories of planning methods and categories of legal reasoning.3

Most current legal theories are either very broad philosophies of law or very specific rationales for a series of decisions within a particular field. A “middle range” legal theory is required. A new legal theory would guide descriptive and predictive studies within a view to a set of hopefully shared goals. Studies would be conducted in a context in which law is viewed as promoting rational planning within properly structured organizational settings. Such planning would enable a community to guide its social change while minimizing violent conflict.

In addition to a theory about the law of planning, a theory of the law of planning is needed. The central problem of a theory of the law of planning revolves around the question: How can the law both facilitate and control the planning system in order to secure justice?2 Problems of justice—the securing of fundamental fairness in procedure and result5—arise within the planning system when the law seeks to allocate powers between planners and others, chooses one rather than another method of rational planning, institutionalizes several alternative structures for planning and implementing plans, reviews planners’ decisions regarding the appropriate kind and rate of social change, and establishes the ways in which planners should seek the appropriate balance among the needs of citizens, the


2 Although it is beyond the scope of this article, a presumption of the article is that a listing of individual goals, such as that provided by Laswell and McDougal, see Laswell & McDougal, Criteria For a Theory About Law, 44 So. Cal. L. Rev. 360, 362-94 (1971) [hereinafter cited as Laswell & McDougal], is not sufficient to “explain” and justify legal activity. A second assumption is that freedom is not the prime value but is one value to be allocated against others. This allocation of values raises the problem of justice. See O. Bird, The Idea of Justice (1967).

5 This definition is taken from J. Rawls, A Theory of Justice (1971).
claims of nature and the maximizing of freedom.\(^6\)

It is the combination of the theory about the law of planning—the descriptive and conceptual analysis of the law regulating planning and the theory of the law of planning—the normative exploration of the relationship of the law of planning to justice which makes up a total jurisprudence of planning,\(^7\) and which requires detailed discussion.

II. The Need for a Complete Reexamination of the Legal System of Planning.

The need for a jurisprudence of planning is stimulated by the rapid rise in the number and influence of planners, most of whom have a technique-oriented perspective and are busy developing functional plans which frequently ignore issues of justice, freedom and the creation of viable communities. In the language of Jacque Ellul, we are witnessing the triumph of "le technique" over other values that our legal system is designed to protect. For those acquainted with the present legal structure for planning in America, the disorganization of that structure contributes to its failure to supervise the planning process. But the more fundamental need for a jurisprudence of planning arises from the fact that the development of sciences and their application through planning results in the massive but silent reallocation of power. The activities of planners resulting from this reallocation may only be properly channelled through legal processes which are guided, in turn, by a jurisprudence of planning.

A. The Rise of the Planner

The increase in the number of planners in the United States is easy to document.\(^8\) The proliferation of planning-related legislation exemplifies

---

\(^6\) It may be properly argued that an underlying assumption of a jurisprudence of planning as herein described is "rationalistic" insofar as the assumption is made that laws can be made by man at least partially free from the constraints of history. Most commitments to planning arise out of a commitment to socialism, which, in turn, is often derived from theories which include basic beliefs in historical determinism. Yet, in a true sense, man can only plan effectively if he is free from such forces. Mannheim recognized this in his *Man and Society in an Age of Reconstruction* (1949). For a recent adaptation, see J. Friedman, *Retracking America* (1971).

\(^7\) The careful descriptive study of the law of planning processes is in its infancy. It is largely characterized by case studies which include legal aspects. Normative explorations of the law of planning are almost nonexistent. A basic premise of this article is that legal materials should be organized in broad normative frameworks, rather than according to legal doctrines or codes.

\(^8\) The growth of planners is discussed in Kaufman, *Contemporary Planning Practice: State of the Art*, in *Planning in America: Learning From Turbulence* 111 (D. Godschalk ed. 1974). In this article, the following statistics are given: Two decades ago, AIP had about 1,000 members while ASPO "had some 1,700 with considerable overlapping in membership." Fewer than 20 universities offered programs leading to the master's degree in planning, only one offered a Ph.D. degree in planning. *Id.* at 113. Today AIP has some 10,000 members, a tenfold increase over its membership in 1954. ASPO has more than 11,000 members. Fifty percent of ASPO's professional membership have planning degrees. Twenty percent hold at
the growth of the formal authority, if not actual power, of planners. Perhaps more germane evidence of the planners' power in local, state and federal governments is the rise of the strong executive who often supports, and is supported and advised by, planners. The important role of planning within the large-scale organizations (public and private), the growing role of applied science in production, and the increasing number of "appliers" of science within the post industrial occupational structure constitute indirect evidence for the proposition that the power of planners is growing.

Recognition of the growing importance of the planner has been obscured by past views of planning. In the late 1930's many had unrealistically high expectations that the United States would be dominated by "technocrats." These expectations were not fulfilled. Hundreds of case studies revealed that plans were not carried out, and scholars of planning often mistook the failure of plans for the unimportance of planners. Such

least master's degrees in related areas. Sixty universities now offer programs leading to master's degrees in planning; 15 offer Ph.D. degrees as well. Some 1,000 students received master's degrees in planning in 1973 compared to less than 100 in 1954. Since 1960, 220 Ph.D. degrees have been granted; before 1960, the number of those holding Ph.D.'s could be counted on one hand.

Thirteen thousand planners belonged to both ASPO and AIP in 1973 (with about 500 estimated not to be working for the governmental planning bodies). At least 3,500 planners were estimated to work for public planning agencies, however, and not belong to either of the two national planning organizations. Hence, about 16,000 planners work for government planning agencies.

* The best source for a review of current planning legislation is Donald Hagman's text. See note 1 supra. There is no codification of planning law. The American Law Institute has developed a Model Land Development Code which deals only with land use planning. Unfortunately, the conservative approach of the A.L.I. code towards planning makes it suffer in comparison to the more advanced states of Florida, California and Colorado.

Originally, I had intended to list the "planning laws" by citation. Such a list, besides being mammoth, would also be meaningless without extensive exploration. For example, are agency "reports" a required part of the planning process? They could be part of the feedback stage of planning. How about development of regulations? Such design of regulations may be part of a well-organized planning process or it may be ad hoc decision making. Thus, the actual implementation of these statutes may determine whether they are or are not "planning statutes."

* For one of many discussions of the rise in power of the modern executive, see A. Schlesinger, The Imperial Presidency (1973).

* Corporate planning is discussed and analyzed in N. Chamberlain, Private and Public Planning (1965). For the constitutional implications of the growth of corporations and their planning, see A. Miller, The Modern Corporate State (1973).

* This role of applied science is documented in detail in D. Bell, The Post-Industrial Society (1973).

* For a history of this development, see M. Scott, American City Planning Since 1890 (1971). See also R. Lawson, The Failure of Independent Liberalism (1930-1940) 39-91 (1972).

a mistake often missed the significant fact that planners were contributing
to public decisions—even if their plans were modified by other decision-
makers within a pluralistic political arena.

The fragmentation of planning structures also contributes to the
masking of planning’s important role. Public and private corporate plan-
ning have proceeded along two different lines of development, with differ-
ent scholars viewing planning as either a wholly public or wholly private
activity. Public planning itself is fragmented into subdivisions of envi-
ronmental, economic, urban and social planning activities. This fragmenta-
tion results in documented studies of planning within various specialties
rather than the preparation of any comprehensive portrait of the field as a
whole.8

Planners and people writing about planning disagree about what plan-
ning is. Thus, many activities are regarded as planning by some but not
by others. Despite this difference of views, a general paradigm regarding
the appropriate planning method prevails in many planning circles. Al-
though interpreted differently by many planning theories, planning itself
is seen as:

1. Conjectures about future setting . . . for which the working out of the
   plan over time is relevant and desirable;
2. Analysis leading to goal setting;
3. Evaluation of the costs and benefits of alternative plans for goal setting;
4. Tracing out the consequences for the chosen plan of pertinent circum-
   stances outside the plan’s direct operating environment;
5. Laying out and carrying out sequenced chains of actions that define the
   plan;
6. Evaluation of how the plan is working out on the basis of environmental
   feedback that permits recycling of the above steps.9

As a result of their commitment to technical rationality, planners view
law from a technique-oriented perspective. With such a perspective, plan-
ners see the law as helping to organize and structure the planning task,
implement the plan, and legitimatize the planners’ role. Viewed nega-
tively, the planner sees the law as contributing to the many institutional
barriers to effective planning.10 Nor do they view the law as properly requir-

---

8 There are, of course, examinations of the comprehensive planning process. See, e.g., T.
Kent, The Urban General Plan (1964).
9 This summary comes from D. Michael, On Learning to Plan and Planning to Learn 45
(1973). Actually, Michael advances a much more sophisticated theory of planning in this
book.
10 Models of the relationship of law and planning remain to be developed. These models may
include: (1) the “product-plan-law command” model in which the law sanctions an arrived-
at plan; (2) the “process-plan-law command” model in which the law sanctions decisions
emerging out of a planning process; (3) the “command plan” by which the plan itself is a
sanctioned command; (4) the “law-plan implementing” model in which a non-sanctioned
plan implements a legal command; (5) the “legally authorized advisory plan”; and (6) the
“field structured plan” implemented by legal structuring of “a field” to implement the plan.
All of these and others can be developed and classified according to the legal status of the
ing that planning be accountable to the people, or making certain that the plan and the planning process protects individual freedoms, property and the natural environment from plans and their consequent implementation.\textsuperscript{14} It is this technique-oriented perspective of the planner which has contributed to the environmental\textsuperscript{19} and relocation impacts of highways, and the social injustice of relocation under urban renewal.\textsuperscript{20} This perspective has also helped to spawn suburban plans and zoning resulting in unjust exclusion of certain groups.\textsuperscript{21} Thus, it is the technique-oriented perspectives of planners and their result which must be controlled through the proper workings of institutions.

B. The Present Planning Structure

The domestic planning "system" is a partially integrated, federated system of laws. At the national level, there is relatively little planning by the legislature,\textsuperscript{22} an example being the new Congressional Budget Committee.\textsuperscript{23} A national system of courts occasionally engages in indirect planning through the use of "Brandeis" briefs\textsuperscript{24} or consultation with planners in the implementation of court orders.\textsuperscript{25} Executive planning is conducted on the plan itself, whether the plan implements the law or vice versa, and the kind of sanction involved. Another approach is to inquire into the ways in which law and plan apply "reason" to society, and the kind of reason to be applied. Planning and law may be seen as the "applicators" of forms of theoretical knowledge to society, or they may be regarded as forms of "practical reasoning" in themselves, in which some theoretical reasoning indirectly enters. If the latter, then the question arises as to the difference in the reasoning process between planning and law. For one discussion of that reasoning process, see Levy, Introduction to Legal Reasoning.


\textsuperscript{22} Case histories document these impacts. See, e.g., A. Altshuler, The City Planning Process: A Political Analysis (1965).


\textsuperscript{25} See, e.g., Conn. Gen. Stat. § 2-68 (1975) which established research and evaluation functions in the legislative council. This law, however, has been repealed.


\textsuperscript{27} P. Rosen, The Supreme Court and Social Science (1972). It may be argued that such briefs are not "plans," although they embody many facets of planning, including an inventory of problems, definitions of objectives and considerations of alternatives.

\textsuperscript{28} For a detailed review of the role of the court in these matters, see E. Shapiro, The Court
basis of laws requiring planning either at the national28 or subnational levels.27 These requirements are often a condition of grants-in-aid or part of the regulatory system. Planning at the national level embraces environmental, economic, transportation, criminal justice, housing, science, and social security matters. There is also a raft of established advisory committees.28 Although planning may be mandated by federal law, it is conducted at a multi-state, state, regional or local level.29 Planning may also be part of a regulatory scheme at the national or subnational level, such as the planning required as part of the licensing of utilities,30 the air and water pollution control system,31 and even regulatory aspects of the welfare system.32

Most federal planning is single subject functional planning, although there are notable exceptions which include the President's Domestic Council,33 the Office of Management and Budget34 and the Council of Economic Advisors.35 The planning mandates established by law may be extremely

as a Housing Planner (1975) (MCP thesis, Univ. of Rhode Island). Shapiro also reviews the court's role in planning city services, educational desegregation and mental health planning. 26 See notes 32-33 infra. 27 See note 39 infra.


See note 9 supra.

For a detailed account of the legal matrix surrounding power plants licensing, see Brooks, Millstone Two and the Rainbow: Planning Law and Environmental Protection, 4 CONN. L. REV. 54 (1971). See also FEDERAL ENVIRONMENTAL LAW 928-1019 (West 1974).


Under Title 42 of the United States Code (1970), § 602 contains state plans for aid to dependent children, § 802 is concerned with state plans for social services to the aged and blind, and § 2974 calls for the preparation of a 5-year national poverty action plan by the Director of the Office of Economic Opportunity.

The President's Domestic Council is composed of the: (1) President; (2) Vice President; (3) Attorney General; (4) Sec'y of Agriculture; (5) Sec'y of Commerce; (6) Sec'y of HEW; (7) Sec'y of the Interior; (8) Sec'y of HUD; (9) Sec'y of Labor; (10) Sec'y of Transportation; and (11) Sec'y of the Treasury. See 5 U.S.C. § 903 (1970).

The Office of Management and Budget does the following planning-related, multi-functioning programming: (1) economic opportunity program, jointly funded projects, authority, administration, etc., see 42 U.S.C. § 2962 (1970), Exec. Order No. 11466; (2) flood prevention and watershed protection, delegation of functions of President to Director of OMB. 16 U.S.C. § 1005 (1970), Exec. Order No. 11512; (3) juvenile delinquency prevention and control, jointly funded projects, authority, administration, etc., see 42 U.S.C. § 2962 (1970), Exec. Order No. 11466.

15 U.S.C. § 1023 (1976) establishes the Council of Economic Advisors to the President. There are three members appointed by the President who will formulate and recommend national economic policy "to promote employment, production, and purchasing power under free competitive enterprise." For a discussion of their planning effectiveness, see H. WILENSKY, ORGANIZATIONAL INTELLIGENCE (1967).
broad and vague and, as in the case of federal power planning,\textsuperscript{38} they may be supplemented by administrative regulations or court interpretations, or both. Planning may be more specifically set forth in statutory terms as in some housing planning legislation\textsuperscript{37} or environmental laws,\textsuperscript{38} and may be either a totally public activity or a joint public-private venture, such as utility planning.

At the state level, planning activities may be required by federal law and enabled by state law or authorized solely by state law.\textsuperscript{39} Alternatively, the state may require or simply enable planning to take place at a substate level.\textsuperscript{40} The state legislature and judiciary itself may engage in some planning-like activities, but most of the planning is carried on by the executive. State land use, utility site locations, energy, economic development, criminal justice and welfare are just some of the subject matters covered.

Regional and/or metropolitan planning may be required or enabled by both the federal and/or the state governments. Transportation, solid waste, land use, health, and criminal justice are just a few of the many planning activities which are undertaken at the regional level.\textsuperscript{41}

At the local level, planning may be authorized by state and local ordinances or may be required by the variety of federal and state grant-in-aid programs either on a categorical basis or on a revenue-sharing basis.\textsuperscript{42} Local planning may be conducted by independent commissions or by the executive and/or the advisory to the legislature.

There is no organizational plan for the present domestic planning system. Very little attention has been directed to legislative\textsuperscript{43} or judicial


\textsuperscript{39} For an excellent brief discussion of the alternative formats, indicating how this account is necessarily oversimplified, see D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 1-31 (1971).

\textsuperscript{38} Most planning and zoning enabling acts, housing authority laws, and laws establishing local conservation commissions to plan environmentally fall into this category.

\textsuperscript{41} Typical regional planning laws include: (1) R.I. Gen. Laws § 46-16-8 in conjunction with the New England Interstate Pollution Control Commission; (2) the Tahoe Regional Planning Compact which includes parts of California and Nevada. See HAGMAN, supra note 1. This was federally approved on December 18, 1969. See Pub. L. No. 91-148, 38 Stat. 360; (3) VT. STAT. ANN. tit. 10, § 6000 (1971); (4) Adirondack Park Agency Act, N.Y. Exec. Law § 800 (McKinney 1971). For a review of multistate regional planning, see M. DERTHICK, BETWEEN STATE AND NATION (1974).


\textsuperscript{42} For one discussion of legislative planning, see C. NUTTING & R. DICKERSON, CASES AND MATERIALS ON LEGISLATION (5th ed. 1978).
planning or the relationship of planning within these branches to executive planning. No overall assessment has been made of joint public-private planning, although attention has been given to utility, redevelopment, economic development and new town planning. Discussions of the relationships between different levels of government planning and between multi-purpose and single purpose planning is sparse and unsatisfactory.

C. The Failures of Planning

The disorganized legal system of planning in the United States is not feared, mainly because legal planning is believed to be ineffective. Most case histories of planning in the United States are stories of failure. The ineffectiveness of local master plans, the decline and fall of the new towns program of the 1930’s, the elimination of the Natural Resources Planning Board, the disappointment with the urban renewal programs, model cities and anti-poverty programs, the demise of program planning and budgeting systems and the Domestic Council, and the recent close down of the new towns programs makes for rather dismal reading.

The limits of resources available, the lack of complete information, the conflict of values among participants of the process, the absence of any agreed-upon method, and general hostility to planning are only a few of the many reasons for the failure of many planning programs. As previously suggested, it is a mistake to conclude that planning is unimportant because failures in planning have occurred. Despite the lack of accomplishment of desired goals, planning does achieve some objectives, and often has

11 For a general discussion of the court as a policy planner, see McDougal, Law as a Process of Decision: A Policy-Oriented Approach to Legal Study, 1 Nat. L. F. 53 (1956).
16 A good description of the downfall of NRPB is contained in M. Scott, American City Planning Since 1890 407-11 (1969).
21 See note 33 supra.
serious consequences even when it does not succeed. Moreover, it is a mistake to rely on the failure of past planning efforts to avoid attention to the need for control of present planning efforts.

The failure of the law to support planning is not merely a result of its disorganization; it is directly related to the ambivalent relationship which the law has to the planning process. An understanding of that ambivalence contributes a new understanding as to whether or not the law of planning has “failed.” While law is intended to assist the planning process, it is also intended to control the planning process by preventing invasion upon essential freedoms, perpetuation of unequal treatment, or facilitation of projects harmful to the environment. For example, a plan may require the collection of information which invades people’s privacy. A plan to beautify a community may require design ordinances which in their implementation invade the first amendment right of people to lead their own lives. In effect, the law is on both sides of the planning process. As a faithful servant, it is available to implement plans, only to be often checked by other laws which properly control the planning process and its implementation.

Insofar as the law is intended to support the planning process, another complete dimension to the problem of the proper legal structuring of planning in society develops. In order to implement planning, the law requires a theory of “social rationality”—how and in what way man’s reason can be implemented in society. Such a theory requires acute knowledge of the methods of planning, the organizational setting in which planning is lodged and the process of social change within the community.

The law may place three kinds of controls upon planning. First, planning and implementation activities may need constitutional, statutory and common-law limitations either on the use of coercive force or curbing the involvement of the government from entering areas in which the government does not belong. Second, the law may require the agents of government to affirmatively plan where the government has failed to discharge its obligations. Finally, the law may require that plans and their implementation come under proper representative control.

A central problem of planning law is to draw the proper line between the dual role of the law as a facilitator and controller of the planning process. In order to define this dual role, the legal system must be designed to accommodate and support this planning process. It could be argued that

---

53 For a general discussion of these issues, see R. Brooks, Planning and Personal Civil Liberties (May 27, 1976) (unpublished). For a discussion of privacy, see Fried, Privacy, 77 Yale L.J. 475 (1968). For one of many discussions regarding the gathering of data, see Note, Privacy and Efficient Government: Proposals for a National Data Center, 82 Harv. L. Rev. 400-17 (1968).


the need to control planners is already achieved by the established laws
which limit the affirmative powers of the government planners, check
them by a horizontal separation of powers and vertical federalism, and
keep them from abusing the liberties and equalities of persons through
legal guarantees of individual rights. Such legal controls are established
primarily through broad constitutional provisions which apply to others as
well as planners. But the development of planning occurred in response to
forces which were not anticipated in the original Constitution, under which
a broad framework of control is not established.

The lack of a constitutional base for the support and control of plan-
ning undoubtedly has contributed to the failure of courts to supervise
planning and develop a coherent body of governing law. The common-law
approach, which triggers court action at the time of implementation and
often limits inquiry into the substance of the dispute at hand, conflicts
with the future-oriented comprehensive orientation of planners, which
scans hypothetical alternatives with the help of a forbidding quantitative
methodology.

The failure of the Constitution and common law to control and legi-
timize planning activities has led to the major corpus of "planning law"
found in statutes and administrative regulations. Until recently, however,
these statutory constraints have not been enforced by court decisions. The
history of judicial review of city planning, for example, has primarily been
one of avoidance. Until recently, courts have not only customarily failed
to give the proper definition to a local comprehensive plan, but have not
required that subsequent implementations conform with that plan despite
the statutory requirements for such conformance.

D. The Movement Towards the Legal Recognition of Planning

In the last decade, courts have shown a new concern that the planning
process be completed and implemented. The courts have paid the most
attention to the planning process through the implementation of the Na-
tional Environmental Policy Act (NEPA) of 1970. Despite its focus upon
only impact planning, NEPA and the cases under it are a true watershed
for planning law. In a myriad of cases, the courts have been forced to

---

* For a recent example of a court seeking to cope with the quantitative methodology of cost
  nom. Sierra Club v. Calloway, 499 F.2d 982 (5th Cir. 1974).
* The growth of the public law of planning has largely escaped attention of legal educators,
  since it relies primarily upon statutes and regulations with a paucity of cases.
* The entire series of cases emerging out of the National Environmental Policy Act of 1970
  is one example of this new court concern. For a good collection of cases, see D. Hagman,
  Public Planning and Control of Urban Land Development (1973).
* As indicated in the text, I believe that NEPA and court review of impact statements
  required by NEPA represents a veritable revolution in planning law, involving the court in
detailed review of these impact statements. However, even if such statements are not re-
garded as "plans," the courts have proceeded to review other environmental "implementation
plans."
structure a comprehensive environmental planning process governing federal actions and recently have turned their attention to similar state statutes and other planning statutes.\textsuperscript{42}

Despite this recent attention to the planning process, courts have developed very little new legal doctrine, theory, or commentary explicitly fashioned to help them in coping with the planning process.\textsuperscript{43} Unfortunately, with some notable exceptions, the legislature has been of little assistance to the courts in developing legal controls for the planning process. Although theoretically limiting the planner’s powers, statutes are often so broadly drawn that they do not succeed in explicitly limiting the planner’s power. To the extent that the planning function is carried on within the executive bureaucracy, the legislature’s and the courts’ present failure to control the bureaucracy means failure to control the planner as well. This failure results from a lack of legislative consensus needed for sufficiently specific definitions of policy objectives. This absence of consensus is expressed in vague laws, which then results in struggles within the executive, between the departments of government, and between the levels of the federal system.\textsuperscript{44} Thus, the fragmentation of power within the American system has resulted in the “accidental” control of planners’ power by preventing the concentration of power in any one set of planners’ hands. This frustration of the formal and legal concentration of powers necessary to carry on planning does not necessarily prevent the informal concentration of power either through effective political machines, named special purpose authorities, international cartels, or uncontrolled public-private partnerships. The planning of these informal concentrations of power, however, may remain unsupervised by the law. At the same time, the reliance upon pluralistic fragmentation of the formal planning process may also often cripple planning’s effectiveness. In short, it may control the planner at the expense of planning itself.

E. Objections to a Jurisprudence of Planning

The objections to a jurisprudence of planning may result from a variety of broad views regarding the role which planning should and does play in modern society. Also, the recommendation for a “jurisprudence of planning” may conflict with the existing structure of legal thought and legal subject matters. Thirdly, differing theories of planning create problems for the development of any unified jurisprudence of planning.

\textsuperscript{42} For a superb collection of cases and commentary, see E. Hanks, J. Hanks, & A. Tarlock, \textit{Cases and Materials on Environmental Law and Policy} (1974).

\textsuperscript{43} I realize this is a very broad statement. Obviously, such doctrines as “the scope of review” in administrative law or the “delegation” doctrine in constitutional law are used by courts in their encounters with plans. Perhaps what is required is the systematic reexamination of each legal doctrine and concept as it bears upon the planning process.

\textsuperscript{44} For an extended discussion of this problem, see T. Lowi, \textit{The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority} (1969).
1. Broad Views of Planning in Society

Many objections to a jurisprudence of planning may be found in the writings of recent social philosophers. Answers to these objections yield some broad guidelines for developing such a jurisprudence. Perhaps the most fundamental objection to the attempt to develop a jurisprudence of planning attacks the underlying assumption that reason through planning and law can guide human development and progress. Authors such as Dahl, Lindblom and Simon have raised fundamental objections to the feasibility and desirability of long-term planning. They argue that man does not have the capacity of intelligence for such comprehensive planning. Yet even these authors recognize that intelligence has a role to play in the governing of man's affairs. Even if they are correct and planning has a limited role to play, a jurisprudence of planning should then define the appropriate limits of planning set, in part, by the limits of the effectiveness of the exercise of reason within society.

A second objection to a jurisprudence of planning is based upon the belief that planning is necessarily an instrument of the state and that a jurisprudence of planning will merely rationalize the already excessive powers of government at the expense of individual freedoms. However, a jurisprudence of planning need not presume any specific balance between freedom and planning controls. Rather, any jurisprudence of planning must define the limits of planning in order to preserve and enhance human freedom. Unfortunately, there has been little systematic attention to the problem of balancing freedom and planning in the modern planning or legal literature.

Thirdly, if planning is viewed, as it often is, as an instrument of bureaucracy, and if bureaucracy is seen as gradually "taking over" the world, then a jurisprudence of planning might be viewed as simply the rationalization of the expansion of one aspect of bureaucracy. Consequently, when a jurisprudence of planning establishes the limits of plan-

---

65 The most basic objection will be the positivist objection to any "philosophy of law." I believe these objections are convincingly answered in M. Adler, The Conditions of Philosophy (1965).

66 The limits of reason within society are treated well in M. VanDoren, The Idea of Progress (1967). Planning, according to Van Doren, would fall under the concept of "anthropogenic progress through man's use of reason (rather than collective memory) to understand and control (partially) both external nature and man."

67 C. Lindblom & D. Braybrooke, A Strategy of Decision: Policy Evaluation as a Social Process (1963). Since most planning and law is the product of formal authority and law is identified as general rules, the role of reason can be overemphasized in the study of the law of planning. Only if law is viewed as partly the result of the irrational play of forces in the legislative and the development of legal doctrine in the courts, and only if the irrational obstacle to planning and carrying out of plans are kept uppermost in mind, will this error of "hyperrationalism" be avoided. There are certain theories of planning (discussed above) which are adapted to the limits of reason.


ning, it must establish those limits within a broader framework of constraints upon bureaucracy itself. Legal literature, primarily from the field of administrative law has attended to this problem but paid relatively little attention to the planning process itself. A jurisprudence of planning must discuss not only planning by the bureaucracy but also legal ways of planning alternative organizational structures which mitigate bureaucratic influences. Considerable attention in social science literature has recently been given to alternative forms of organization as well as the decentralization of existing bureaucracies. A jurisprudence of planning must include the planning of and by non-bureaucratic structure.

A fourth objection to a planning jurisprudence is expressed eloquently in Jacques Ellul's *The Technological Society*. Ellul views planning as a tool of instrumental rationality and hence, the expression of the spirit of an overextending technological society. Even less extreme critiques of the technological society recognize the dangers of such a society. It might be feared that a "jurisprudence of planning" is merely a rationalization for the further extension of technology in society. But any jurisprudence of planning must define the limits of planning as an instrument of technological development as well as controlling the consequences of such technological development. The recent work of Lawrence and Bruce Ackerman begins to establish a basis for establishing such limits.

Finally, it may be argued that jurisprudence is limited to general questions regarding the nature of law and justice, without concern for specific legal fields or activities such as planning. Hence "a jurisprudence of planning," it may be asserted, is the improper narrowing of the concerns of jurisprudence. Such an argument ignores the example of Plato's *Laws* and Bentham's *Theory of Legislation* which establishes a jurisprudence along with attention to specific laws and legal decisions. More importantly, such an argument ignores the need for using general jurisprudential insights to assist in guiding the development of specific legal fields. Of course, any jurisprudence of planning must articulate its general stance on

---


79 Galbraith has suggested that planning in current American society is an instrument of large corporations seeking for the most part their own growth, autonomy, and enhancement. J.K. GALLBRATH, *THE NEW INDUSTRIAL STATE* (1967). If Galbraith is correct, a jurisprudence of planning which ignores the corporate role in planning merely could rationalize the power and control of the corporate sector in American life. But Galbraith's view of the American corporate planning system leaves broad alternatives open for restructuring that system. On the one hand, a proper jurisprudence of planning might suggest necessary limits upon corporate planning and power as instruments of an uncontrolled "techno-structure." A recent work, A.N. MILLER, *THE MODERN CORPORATE STATE* (1973), is one effort to establish constitutional controls over the corporation. Additionally, Galbraith's recommendations for strengthening planning in other sectors of society serve as a counterbalance to corporate planning. See J.K. GALLBRATH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973).

80 Although basic jurisprudential questions are admittedly abstracted from any one specific field of law, the answers to these questions must in some sense explain or be coherent with the field of law. One other recent effort to develop a general view of a specific field of law is P. SELZWEICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* (1969).
jurisprudential issues as well as demonstrate its relevance to the specific legal field it seeks to establish.\textsuperscript{73}

A related argument would note that planning law is already becoming organized within separate bodies of law and that, consequently, it is unnecessary to establish a generic field of planning law.\textsuperscript{74} Such an argument for the existing organization of legal subject matters, pertaining to planning, however, accepts the status quo legal fragmentation of planning caused in part by the accidental historical divisions of legal subject matter. This acceptance of traditional legal categories fails to seek possible common legal principles for guiding all planning activities. Of course, it may be deemed impossible to construct a jurisprudence of planning because of the comprehensive scope of the resulting legal subject matter. Yet, every field of legal subject matter covers a variety of detailed cases, statutes, and institutions pursuing common principles underlying a multifaceted subject matter; a law of planning would be no exception. Moreover, such a jurisprudence should deal with planning and the attempt to implement that planning—not all public laws, no matter how indirectly related.\textsuperscript{75}

2. Differing Views of Planning and the Position of the Planner in American Society

Another set of obstacles to the development of a jurisprudence of planning law appears to be the differing theories and ideologies of planning. The broad definition of a jurisprudence of planning must encompass a variety of different ideologies regarding the role of planning in American society.\textsuperscript{76} Such a broad variety of ideologies would appear to make a unified jurisprudence of planning impossible, since many different, broad roles for

\textsuperscript{73} It could be suggested that a jurisprudence of planning is already under development in the American Law Institute Land Development Model Code. Such a code, however, falls considerably short of reviewing the law of many planning activities. In fact, it rejects a broad treatment of planning questions. Nor does such a code explicitly weigh the jurisprudential questions underlying the law of planning, although it contains an enlightened discussion of land use planning. Nevertheless, a jurisprudence of planning can and must have implications for such a Code. See ALI MODEL LAND DEVELOPMENT CODE (Proposed Official Draft, April 15, 1974).

\textsuperscript{74} The casebook series for various areas of law tend to establish acceptable categories of thought for the organization of legal subject matters. Any practicing lawyer knows that practical legal problems do not come so neatly packaged.

\textsuperscript{75} The concern over the scope and complexity of a jurisprudence of planning contains another important objection—the objection of the legal realist to the attempt to develop broad formal principles of law rather than the specific study of what judges and lawyers and other decision makers do. Certainly, this study is an important part of the descriptive and predictive aspects of a jurisprudence of planning. But the study of what judges and lawyers do is an incomplete jurisprudence without an inquiry into what they should do. See Laswell & McDougal, supra note 4.

\textsuperscript{76} This author believes that an ideological-neutral but broadly normative jurisprudence of planning is only possible at the most general level. When the problems become more specific, an ideological position is either consciously or unconsciously chosen.
planning in American society and many definitions of planning are asserted.

Obviously, different ideologies of planning may have different consequences for the way in which law structures planning. Unlike many fields of law, the law of planning cannot escape attention to these broad issues.

Aside from ideological differences, however, the legal structuring of rational planning in the United States and elsewhere encounters more specific obstacles, e.g., a lack of consensus regarding the appropriate methods, goals, institutional settings and kinds of knowledge appropriate to planning. As a consequence, there exist a variety of specific methodologies of planning embodied in existing law and regulations, different treatment of objectives and different formats for planning implementation.

One task for a jurisprudence of planning is to review these alternative methods, goals, settings and kinds of knowledge to determine those which it is appropriate to legalize. For example, to what extent should the law specify cost and benefit methods to be required in certain settings?

There appears to be very little comparative assessment of the many different specific legal arrangements for planning. Which legal structure for planning works best? The empirical studies of planning have been largely case studies, and customarily the specific role of law has not been examined in these studies. At the same time, many legal studies generally lack any solid evaluation methodology. The growth and development of

---

77 Without attempting to go into depth regarding these ideologies here, a brief mention of them is needed. In *Man and Society: An Age of Reconstruction* (1949) and *Freedom, Power and Democratic Planning* (1951), Karl Mannheim views planning in the context of the evolution of a free-floating intellectual class which, by its application of rational knowledge, can discover the principal factors of change in society and can hence attain controls over these factors primarily through the use of "indirect controls." Rather than basing planning upon the activity of a free-floating intellectual class, Amitai Etzioni, in his *The Active Society* (1968), views rational planning as part of an organized system of "societal guidance" with the planner as part of that system. Etzioni regards alienation as the major problem in modern societies and argues for the social mobilization of the formation of group consensus around important tasks in which centralized planning can assist. More recent approaches to planning, such as John Friedman's *Retacking America: A Theory of Transactive Planning* (1973), reject Etzioni's belief in mechanisms for central intelligence and view planning as a form of social learning that occurs in locally linked network structures consisting of small, temporary, non-hierarchical and task-oriented working groups.

78 For a discussion of these issues, see *Planning in America: Learning from Turbulence* (D. Gadschalk ed. 1974).

79 For a discussion of the kinds of knowledge appropriate to planning, see *id.*

80 For example, cost-benefit analysis, impact analysis, program evaluation, comprehensive community planning, and rational functional planning have all been required by one or more federal and state statutes.

81 A comparative evaluation methodology would have to be employed which seeks to factor out at least some of the many variables. Most of the work in the sociology of law has been much more specific in order to maximize the application of quantitative methods. But, unlike the natural sciences, the results appear to be more trivial.

evaluative research and system analysis may provide for the first time an appropriate methodology for assessing the contribution of laws including planning laws.\(^1\)

A review of these general objections to a jurisprudence of planning yields a series of broad criteria for a complete jurisprudence of planning. Such a jurisprudence should: 1) seek to articulate the implication of the limits of man's reason upon the establishment of any form of planning, helping to guide societal developments; 2) define the relationship between planning the various kinds of freedom; 3) fix the limits of bureaucracy and hence the limits of bureaucratic planning as well as the role of nonbureaucratic planning; 4) set forth or at least imply a theory of technology in society, the relationship of planning to technology and the limits of legal control of technology and planning; 5) establish the proper legal controls for "private" corporate planning and the role of increased countervailing public planning; 6) spell out relationship of general jurisprudential conclusions regarding the law of planning to specific legal fields, which now include planning materials; 7) decide between, reconcile or explore the legal implications of the various ideologies setting forth the role of planning in America; and 8) conduct empirically oriented evaluations of the alternative legal structure for planning. Obviously, such criteria imply a grandiose effort which will only take place through the efforts of many legal and planning scholars over the years. On the other hand, such criteria suggest the need to intellectually organize such an effort to pursue these questions over time, and perhaps, the framework for organizing the presently unorganized explorations of the law of planning.

F. Specific Empirical Tasks of a Jurisprudence of Planning

The brief description of the trends of planning activity, the legal institutions for planning, and the consequent problems of planning law suggests the need for a systematic and comprehensive framework for the study of the law of planning. Although there are scattered studies of judicial and legislative trends in certain areas of planning,\(^4\) there has been no systematic effort to trace the trends of laws and court decisions affecting environmental, urban, economic and social planning, seeking to determine patterns and discontinuities in these trends. In order to organize the study of these trends, and relate them to community decision making processes in a predictive way, it will be necessary to explore a variety of models of planning, urban systems, social change, and economic structure,\(^5\) and view the decisions in the context of these models.

\(^1\) See F. Caro, Readings in Evaluation Research (1971).

\(^2\) Most law journal articles are not adequate trend studies because: (1) they select only a few jurisdictions; (2) they seldom review the activity at the lowest court; (3) little follow-up analysis is done; and (4) attention is frequently upon court doctrine rather than outcomes and consequences of the decisions.

\(^3\) The rise in cross-community studies in sociology must be followed by cross-jurisdictional studies in legal sociology.
Despite the many case studies of planning, there is a lack of careful empirical study about what factors affect law officials' decisions about planning. Such studies require the proper use of empirical research methods, and, where appropriate, the use of multi-variant analysis and other statistical techniques to determine which factors affect decision makers. Such approaches have been taken by political scientists in their effort to predict Supreme Court decisions, but have not been extended to court decisions affecting planning.

Additionally, much of the legal commentary on planning law decisions falls into the category of efforts to clarify the often conflicting objectives involved in plans and the legal regulation of plans. For example, the recent multi-volume study of the laws and cases arising when localities seek to control their growth is an excellent example of this exercise. Unfortunately, there is almost no commentary on the law of social planning or economic planning. The clarification of policies implicit in many court decisions may benefit from the application of goal indicator analysis to legal opinions.

Finally, with regard to future trends, McDougal and Laswell state: "In a policy relevant jurisprudence, expectations about the future will be made as conscious, explicit, comprehensive and realistic as possible. Developmental constructs embodying varying alternative anticipations of the future, will be deliberately formulated and tested . . . ." The projection of future trends in the areas of planning law may be assisted by the cooperative evaluation of planning laws in other countries whose development in the field of planning appears to be "ahead" of ours.

Systematic attention to various policy alternatives is an essential part of a theory of planning law. Such attention might include: 1) alternative definitions of rationality embodied in planning, so that decision makers establishing a planning process would know which alternatives were available; 2) alternative organizational structures for planning and implementing planning; 3) alternative ways of setting forth the objectives of the planning process and alternative ways of relating planning processes to informal "community processes"; 4) alternative ways in which planning may cope with change, including different models of social change; and 5) alternative ways in which the law of planning and its implementation can evaluate both planning and its results. Even with the conduct of these
tasks of a theory of planning law, a theory of planning law must also conduct a variety of intellectual tasks as part of the normative aspects of a jurisprudence of planning. These normative tasks will be discussed within the context of specific subject matters of such a jurisprudence.

III. SPECIFIC SUBJECT MATTERS OF A JURISPRUDENCE OF PLANNING

A. The Requirements for Rationality in a Jurisprudence of Planning

Planning, in order to be rational, must either apply the substantive knowledge gained from the sciences or apply systematic rational methods of strategic planning. The precursor to modern planning theory, Karl Mannheim, stressed the need for the application of scientific knowledge to planning, and a wide variety of more recent technological approaches to planning have continued the tradition. From this point of view, "planning law" may be seen as establishing a relationship between the institutions of science and planning, defining the role of the substantive expert in planning, and regulating the flow of substantive concepts of science to planning and policy-making. The central question from this point of view is: How well does the law structure the relationships of science to planning?

1. Regulating the Relationships between the Institutions of Planning and Science

The statutes governing relation between the institutions of science—research institutes, universities, consultants, individual scientists—and policy-making at the federal, state and local levels has not yet developed into a coherent body of law. With the exception of Lawrence Tribe's pathbreaking Channelling Technology Through Law, no case books have been organized to deal with the subject. The legal subject matters range from obvious intrusions of science into policy making, e.g., the President's Science Advisor,9 to more indirect but equally vital relationships, such as participation of scientists on the Atomic Energy Commissions' Safety and Licensing Board and the new Nuclear Regulatory Commission. The issues raised by these relationships range from issues of academic freedom on the one hand to the establishment of mechanisms for the accountability of scientists on the other.2 The institutional issues customarily do not arise in the form of legal cases, but rather in the design of statutes establishing institutions.

The now traditional field of administrative law is one of several major legal fields which has struggled with the definition of the proper role of "the expert" in modern society, through legal doctrines of "reviewability,"

---

9 For a recent discussion of these issues, see T. GILPIN & C. WRIGHT, SCIENTISTS AND NATIONAL POLICY MAKING (1964).

9 These issues may be more likely to be discussed in constitutional discussions of academic freedom or discussions of policy in higher education.
"exhaustion of administrative remedies," and administrative rules of evidence. One recent example of the problems involved in defining the role of the expert within the planning process arose in *International Harvester Co. v. Ruckelshaus.* Under the Clean Air Act of 1970, the National Academy of Sciences (N.A.S.) is required to submit a study of the technological feasibility of meeting the emission standards to the Environmental Protection Administrator. The court in *International Harvester* was faced with the choice of whether to evaluate this report and determine its relevance to the Administrator's subsequent decision not to extend the air quality emission compliance deadlines. In light of the contradiction between the N.A.S. conclusions and the subsequent decision of the administrator rejecting the implications of the N.A.S. report, the court reviewed this report carefully. The issue of the extent to which the court should review detailed scientific reports was discussed, but hardly resolved by the court's opinion. In this case, the statute involved did not specify the precise relationship of the scientific report to the administrator's determination. The court became a critic of the scientific basis of the administrator's initial decision, utilizing the N.A.S. report to find defects in the Environmental Protection Agency technique of decisionmaking. Then, on the basis of this review, the court balanced the risks of enforcing the strict deadline against the possible benefits derived from meeting it.

In *International Harvester,* the court was reviewing scientific method. But statutes, regulations and court decisions may also be viewed as regulating the flow of scientific concepts into planning. For example, the National Environmental Policy Act (NEPA) introduces ecological concepts into environmental protection law and planning. Keynesian economic theory is introduced through such legislation as the Employment Act of 1946. Regulations introduce and require the use of a variety of scientifically derived concepts such as cost-benefit theories which, in turn, are derived from welfare economics. Yet, a careful review of these theories and their relationship to the legislation shows a substantial variance between the law, its administration and the theory it was originally intended to embody. A study of the "slippage" between scientific theory and its institutionalization in law is an important area of study in a jurisprudence of planning law.

The divergence between the pure scientific theory and the workings of the law results from the adoption of scientific concepts by the legislature and the courts with a given series of public policies in mind which often affect not only the legalization theory but its practice as a planning tool as well. For example, the history of the Employment Act of 1946 reveals a limited adoption of Keynesian theory due to the intrusion of other economic

---

478 F.2d 615 (D.C. Cir. 1973).
policies. The costs of such slippage should be carefully measured; a law of evaluation may be needed to measure these costs.

2. The Institutionalization of a Systematic Planning Method

The second kind of “rationality” in planning involves the application of a systematic planning “method” to the solution of normative problems. Although many such “methods” have been proposed, two major types have been the so-called “comprehensive,” and the “partial pluralistic incremental” planning approach. Much debate has arisen concerning which method is appropriate to planning and under what circumstances each method should be used. Statutes can be found which embody either approach. More importantly, courts and administrative agencies have been forced to decide the extent to which one or the other method would be used. In this context, some of the tasks of a jurisprudence of planning law include the answering of the questions: To what extent does law adequately establish one or another method? Should it dictate methods? Does it adopt contradictory methods? What are the consequences of adopting one or another method?

A comprehensive approach to the impact method of planning is best embodied in the National Environmental Policy Act, which requires that

in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

(i) The environmental impact of the proposed action;
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
(iii) alternatives to the proposed action;
(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.\(^1\)

Unlike the situation of comprehensive planning at the local level, where the judiciary has generally avoided intervention into the plan and its implementation, the courts have intervened into the comprehensive planning process of the NEPA. They have sought to define the “significant” problems requiring a planning process, the timing of the planning process, the determination of who must plan when multiple agencies are involved, the amounts of data to be gathered, the impacts to be assessed, the alternatives which must be considered and the kind of analysis of short-term uses, long-term productivity and irreversible resource commitments.\(^2\)

---

\(^1\) 42 U.S.C. § 4332(c) (1976).
Yet the detailed assessments of the NEPA planning process suggest that it has “been primarily successful in stimulating after-the-fact rationalizations which are examined less by agency decision makers than by agency lawyers whose job it is to ensure that the agency’s environmental review can survive legal challenge.” The reasons for this may not be hard to determine. Despite the strong environmental philosophy of the NEPA, the courts ordinarily have chosen to treat it as mainly a procedural planning requirement. In the absence of the constraints of substantive environmental goals enforced by the courts, the agencies have proceeded on their own course of action. Nevertheless, whether the NEPA works or not, the judicial interpretation of that act illustrates considerable judicial supervision of the planning process.

The apparent irrelevance of comprehensive planning to decision-making has led to a strong anti-comprehensive planning philosophy among planners, planning theorists, and public officials. The adoption of one or another form of non-comprehensive planning techniques has often resulted. These non-comprehensive approaches to planning have been authorized by laws establishing executive policy planning offices, advocacy planning, and other forms of pluralistic planning. Common to all of these approaches is that they are “low visibility” activities from a legal point of view. Since the stages of the planning process are not articulated in the laws, no standards of adequate planning may exist and few specifically defined planning products are required. As a consequence, there is little basis for contesting the exercise of discretion of the non-comprehensive planners. In effect, such planning is “lawless” planning, in the sense of being unregulated by specific statutes. More importantly, because of the lack of explicit legal structure of such planning, it is difficult to assess whether such planning is any more effective than its comprehensive predecessor. On the other hand, flexibility in executive planning is achieved and courts are not burdened with review responsibilities. Perhaps, however, a more extensive evaluation is needed.

3. Other Sources of Rationality in Society

One way of viewing the law’s relationship to planning is to view both law and planning as two alternative forms of rationality among many kinds of rationality. In addition to embodying its own form of rationality, law is an allocation mechanism which allocates different kinds of rationality within society. For example, when the law curbs the implementation of a plan through a regulation by deeming it to be an unconstitutional “taking” of private property, the law can be seen as protecting the market rationality at the expense of “technological rationality.” A broad inquiry is needed into the ways in which the law is allocating the various forms of rationality. Although this may be difficult to do so on a society-wide level, it may be possible to do with selected cases studies.

100 Id.
Alternatively, the law can be regarded as a unique form of rationality expressed in judicial reasoning—a case-by-case reasoning which centers upon the consistent and fair treatment of like situations rather than the facilitation of most effective techniques. From this point of view, "the law of planning" may be viewed as the arena for the meeting of two different forms of rationality: legal rationality and planning rationality. A study of the judicial review of planning might begin with this starting point.

A third way of looking at planning law within this context is to view law as giving up its own special rationality and adopting a means of facilitating technological rationality. To document this generalization would require a careful trend analysis of the growth of policy-oriented thinking in courts or the courts granting a discretion to planners.

4. The Limits of Rationality

Planning takes place in both private and public formal organizations. Within public organizations, planning is based upon a formal grant of "power to plan." The formal definition of that power establishes the limits of the affirmative power to plan. Consequently, that definition should be based upon the intrinsic limits of planning itself. The limits of planning can be placed in the context of the limits of government itself. Whatever the interpretation given to the social contract theory of the origin of government, one of its major implications is that the purposes of government are limited. The areas of autonomy from government cover a loosely defined perimeter surrounding individual and family life as well as private associations where an individual must be free to develop his own plan of life and make his own decisions. If this area of autonomy is not described as an area of freedom from government interference (which is discussed below) but rather as the set of individual goods which the government can only foster to a limited extent (goods such as friendships, family relationships, loves, individual moral qualities, health, and vigor and intellectual skills), then it can be seen that the affirmative power of planning through government is limited when pertaining to these individual goods since the formal power of government may only indirectly contribute to these goods. A philosophical inquiry into the law of planning which seeks to fix these limits would have inherent limits. Where precisely these limits are is not discussed by Van Doren. I can envisage a philosophical inquiry into the law of planning which seeks to fix these limits.
goods.\textsuperscript{103} It is this recognition which underlies the reluctance of many to provide for legal support and implementation in the field of social planning, i.e., the law of population, education, social services, health, etc. Yet surprisingly little work has been done to study the proper legal limits for social planning.

B. The Need for Appropriate Organizational Settings for Effective Planning

Many planning theorists regard planning as a kind of community and organizational development—an educational strategy adopted to bring about organizational change through a collaborative relationship between an external change agent and the constituents of the client system.\textsuperscript{104} Customarily, planners called “change agents” are assumed to share a common set of normative goals, including: commitment to improvement in interpersonal competence of persons in the organization; belief that a shift in values so that human factors and feelings can be considered legitimate; belief that development of increased understanding between and within working groups in order to reduce tension; development of more effective team management; development of methods of conflict resolution; and the development of “organic” rather than “mechanical” systems are the most effective approaches to planning.

Stimulated by the demand of various groups to participate in the planning process, as well as such theories of organizational development, the response of the law has been statutes, regulations, and court determinations supporting the right to citizen participation in planning,\textsuperscript{105} decentralization of decisionmaking\textsuperscript{106} and the promotion of new kinds of community-based organizations.\textsuperscript{107} These approaches are just beginning to receive careful attention from legal scholars. They are customarily discussed in terms of implementing plans, however, when they may result in reorganizing the entire planning process itself to accommodate new participation-oriented approaches.

Meanwhile, more traditional organizational problems continue to confront the law of planning. One set of problems derives from the federal structure and the plurality of governmental institutions responsible for planning. A second set derives from the division of planning labor between courts, legislature and the executive. Other problems stem from attempting to forge new relationships between public and private entities, while

\textsuperscript{103} This assertion is based upon the extensive argumentation offered by Mortimer Adler in his recent book, \textit{The Common Sense of Politics} (1971).
\textsuperscript{104} The most recent book embodying this approach is D. Michael, \textit{On Learning to Plan and Planning to Learn} (1973).
\textsuperscript{107} See H. Hallman, \textit{Neighborhood Control of Public Programs} (1970).
there continues to be argued a need for a new “fourth branch” of government for planning.

First, in the development of federalism, a gradual movement away from local instrumentalities as “countervailing-powers” to the federal government appears to be taking place, and there is an increased transformation of states and localities into instruments of planning and federal policy. Second, in the division of powers it appears that all three branches of government are now undertaking some planning responsibilities rather than leaving planning to the executive. A major issue remains concerning the extent to which the courts should review administrative planning and the question whether the legislatures and courts are appropriate planning bodies. A third major set of issues is the growth of public-private planning arrangements, such as privately sponsored new towns. Finally, arguments for “fourth power” planning instrumentalities continue to be raised. Questions here concern the allocation of powers and benefits between private and public instrumentalities and questions about the desirability of a “fourth planning power” remain to be seriously explored.

The complex multi-nucleated structure of planning and the implementation of plans cannot be resolved into a neat pattern of decision-making. Differing theories of democracy and its present condition in the United States make it difficult to reach agreement regarding which arrangement of powers is most desirable. As a consequence, a succession of different theories of federalism has taken place in the past several decades. Economic theorists have unsuccessfully attempted to resolve the problem of which is “the optimal jurisdiction” for planning. And planners have suggested a multi-factored approach which takes into account the differing values of alternative federal arrangements.

Realistically, the present legal system governing planning is likely to resolve its organizational problems through the ad hoc actions of the courts and the legislatures, neither of which have any clear comprehensive position regarding the proper arrangement of powers and jurisdictions. New and radical constitutional solutions to the organization of powers of planning are likely to be ignored. Nevertheless, legal scholars and planning theorists have the obligation of developing new clear and comprehensive theories of the costs and benefits of alternative organizations for planning, and discussing which organizational structure might be desirable.

An alternative approach, given the organizational chaos that is likely to persist, is developing a methodology which, while retaining some intellectual rigor, can still be effective in a multi-nucleated power structure.

109 See Davis, supra note 21, at 1-25.
The traditional planning methods which assume centralized decisionmakers and the modification of these centralized planning methods have not yielded a clear and coherent alternative planning methodology adopted to pluralism. This uncompleted task of planning theory becomes a present obstacle in the establishment of a satisfactory planning jurisprudence. Courts and legislatures have no viable specific pluralistic planning model to adopt.

C. Enabling the Community to Plan

Planning is primarily an activity of formal organizations within a community. Such planning, however, customarily is justified as enabling "the community" as a whole to solve its problems. The relationship of planning as an instrument of any one formal organization to the community as a whole, which includes many non-formal organizations, is problematic. On the one hand, there may be considerable disparity between the legal rules and plans adopted by a formal organization and the sociological, ecological or economic reality of the community in which it is located.\(^\text{112}\)

In order to avoid these problems, legal fields dealing with communities have adopted pragmatic, positivistic, or empirical approaches. The pragmatic orientation avoids exploring the relationship between law and the entire community by focusing upon some narrow and specific legal issue,\(^\text{111}\) leaving the problem of defining the community unsolved. The positivistic orientation simply takes "the sovereign" governmental institutions as the starting point and treats legal problems within this framework.\(^\text{115}\) The empirical orientation studies the relationship between law and the community as a species of social science,\(^\text{118}\) but does not resolve the important normative problems of how law and the community should be related to one another. Thus, four specific problems confront planning law in its attempt to relate its formal organizational structure to the community as a whole. First, the community and the law must define the community problems with which it is appropriate for the law and formal planning to deal, as well as those problems better handled by informal community institutions. Second, there is the question of how law and planning should set appropriate boundaries of the community to be served by the law. Third, when law and planning are seen as part of a total community system, the problem of where the appropriate intervention points for law and planning are within the community. And fourth, the very community purposes of law and planning become subject to question.

\(^{111}\) For example, the definition of formal jurisdictions by the law, e.g., municipal boundaries, zoning districts, economic development districts, may not accord with sociological, e.g., an urban area, ecological, e.g., a watershed, or economic, e.g., market area boundaries.

\(^{114}\) A recent approach to urban law, T. Sandalow & F. Michaelman, Governments in Urban Areas (1970), illustrates this approach.

\(^{115}\) Id.

\(^{118}\) E.g., J. Skolnick, Justice Without Trial: Law Enforcement in a Democratic Society (1966).
1. Definition of Community Problems

The law itself may establish, secure, or reflect community standards; community practices diverging from these legal standards may be identified as "community problems." When a community legislates the solution to a problem, the law frequently "defines" the problem. The variety of perceptions of the problem within the community are theoretically resolved by the appropriate statutory clause and/or legal doctrine of decision. A good example of the way in which the law has defined the problem is in the field of housing planning where the law has adopted census definitions of "substandard" housing, despite the conclusion of many housing studies that substandard housing is, in many aspects, relative to the perceptions of differing social subgroups.

New inquiry must be made into whether law should continue to define problems in "norm-deviance" ways or whether more system-oriented definitions of problems must begin to guide legal development. A "norm-deviance" approach which permits the recognition that the norms of different subgroups within the community differ may facilitate a planning process which allows for differing perceptions of "the problem" to take place and a consequent arrival at definitions of problems that take into account these differing perceptions.

2. Delineation of Community Boundaries

The law establishes the territorial jurisdiction for formal planning efforts within the community by establishing the boundaries of urban, ecological and economic communities. The establishment of these boundaries, whether by statute, regulation or court decision, is not merely a descriptive task, but also a normative one since the establishment of boundaries results in the allocation of powers and government services. The law adopts different approaches, ranging from the arbitrary setting of traditional jurisdictions, to the formal establishment of boundaries set by the rational planning approach of boundary commissions and the informal adoption of artificially set boundaries implied in models of an urban or ecological system.

3. Setting the Limits of Intervention into Community Affairs

Given the scope and complexity of the community and, in particular, urban communities, the location of the maximum "leverage points" for the intervention of law becomes problematic. On the one hand, planning may guide law in the search for the leverage points. On the other hand, the law may presume certain leverage points to provide a solution to community
problems and direct planning toward these solutions. A promising development in assisting the location of appropriate leverage points has been the development of economic, ecological and urban models\textsuperscript{118} and the development of evaluative research techniques. Models identify in detail at least some of the variety of variables and relationships to be taken into account in the application of policy. For example, a planning model which might guide legal interventions in urban areas is the Forrester model. The relevance of this model does not rest so much in the accuracy of its initial application which has been criticized, but rather in the yielding of a new view of the law as that which affects the rate variables in the urban system. For example, a series of laws may affect the public expenditure rate or the underemployed job multiplier. Laws would then be grouped according to their relevance to a particular multiplier, rather than in accordance with traditional legal subject matters and studies for their collective impact. But such an approach to the law requires evaluative research studies of the relative impacts of the law as instruments of public policy. Curiously, only a moderate amount of legal scholarship has been done within this area, despite the development of fairly sophisticated evaluation research models.

4. Establishing Purposes of the Community

The community can be and has been defined as the common purposes which both law and planning pursue. The original limited purposes embodied in the law of the United States have been expanded to include the achievement of a wide variety of goals of the populace, ranging from the provision of health services to higher education. Planning has consequently been extended to meet most of those goals as well.

In a classic article on planning law, Charles Reich argued that the law guiding planning has failed to offer substantive definitions of the "public interest" which is to guide that planning.\textsuperscript{120} This failure, according to Theodore Lowi,\textsuperscript{121} has resulted from the broad delegation given by the legislature to administrative agencies. But this failure may be due to the deeper limitation of planning techniques themselves which, while they define alternative means for the given ends, have failed for the most part to define those ends themselves because of a lack of any approved planning techniques for defining them. Unfortunately, many of the statutes enabling both comprehensive and non-comprehensive planning lack substantive, relatively specific goals set by the legislature to guide the planning process.

This does not mean that within the legal system as a whole there is not reflected a framework of substantive goals which can help to guide the

\textsuperscript{118} For one collection of such models, see Decision Making in Urban Planning (I. Robinson ed. 1972).
\textsuperscript{120} Reich, The Law of the Planned Society, 75 Yale L.J. 1227 (1966).
\textsuperscript{121} T. Lowi, supra note 64.
planner and to define the public interest. Definition of the "public interest" within the legal system as a whole sets forth legal standards of justice for the peaceful guidance of social change, the definition of basic human needs and the degree of freedoms to be protected. The remainder of this article focuses upon the way in which the legal system may provide a context of meaning for defining the public interest.

IV. CLARIFYING THE SUBSTANTIVE SOCIETAL GOALS OF PLANNING LAW

Insofar as a jurisprudence of planning is not merely a descriptive and conceptual task, but also a normative one, such a jurisprudence must include the clarification of the societal goals which are often reflected in the postulates of planning law. The clarification requires not only reflection upon the specific meaning of substantive values, but also reflection and judgment about the nature of the moral and legal status of these values, a status which ranges from non-legal moral values to statutorily defined policy objectives to statutory and/or constitutionally protected legal rights.

A. Planning and the Guidance of Social Change

The guidance of change through planning is based upon the combined factual and normative assumption that evolutionary progress is possible and desirable partially through the application of human reason. Given this assumption, which is frequently controverted, the question then becomes the way in which law enables planning to cope with and plan for the forces of change. Although many forces for social change may be identified, three forces—the extension of technology, the growth of affluence and population increase—are often identified as the major engines of change within the United States.

Legally established systems of planning, with varying degrees of sanctions, have been established to cope with the consequences of these forces. Systems of law and planning, however, are not organized to focus upon these forces. We do not have a law of technology, a law of economic growth, or a law of population increase. Rather, laws are scattered and fragmented in such a way that it is unclear how they collectively bear upon the engines of change. Even where there are fields of law dealing with subject matters related to the basic causes of social change, those laws frequently treat only symptoms. For example, one might identify national and regional economic planning law as primarily concerned with the guidance of economic growth, but it is dubious that the law addresses itself to the underlying causes of commitment to economic growth. Environmental planners under many state and federal laws are also attempting to cope

\footnote{\textsuperscript{122} For the past Marxian argument on this assumption, see \textsc{Mannheim, supra} note 6.}

\footnote{\textsuperscript{123} See, e.g., \textit{Regional Policy Readings in Theory and Applications} (J. Friedman & W. Alonzo eds. 1975).}
with the results of increasing affluence through such methods as "bottle bills,"\textsuperscript{124} with little attention given to controlling the pursuit of affluence itself. One exception is Lawrence Tribe, who identifies the wide variety of laws which bear upon the control of technology.\textsuperscript{125} Unfortunately, the history of the Technology Assessment Act, which he did so much to develop, resulted in a law manifestly incapable of controlling our technological machine.\textsuperscript{126} While the control of population through planning law ranges from the law of national population planning emphasizing free choice to local population growth policies,\textsuperscript{127} no organization of all the laws affecting the basic population rate has been carried out.

In short, the legal system which is organized to treat the symptoms of social change is fundamentally a "remedial" law. Since American planning is organized in accordance with that remedial law, that planning itself is fundamentally remedial planning. Rather than control directly the fundamental sources of change in society, an \textit{ad hoc} evolutionary body of law develops to preserve the existing interests which favor the continuance of the present forces of change. At most, the law and planning mitigate the detrimental effects of these forces. Such an approach to planning law adopts a strategy of peaceful control of the consequences of change, rather than the direct and probably less peaceful control of change itself. In essence, planning law reflects what Boorstin calls "the genius of American politics"\textsuperscript{128} and what other theorists have called "incremental decision-making."

While there are good prudent reasons for such a legal system, it creates a planning apparatus which often seems to hardly touch the fundamental problems in American society. At the same time, unauthorized planning efforts outside the law, \textit{e.g.}, Utopian communes, which seek to cope with more basic problems of the society, seem to be unrealistic and irrelevant. From this point of view, efforts in a jurisprudence of planning law might be properly directed to the problem of effectively controlling the basic sources of the process of social change and preserving the peace and "legalizing" more radical planning efforts which are seeking to directly control the engines of social change in America.

B. \textit{Planning for Common Human Needs}

The role of both planning and law within our welfare state is to meet the common human needs of its citizens and others. Despite the difficulty of precise definition and despite philosophical arguments about whether there are "naturally unique human needs," such needs are the basis of the

\textsuperscript{126} The Act merely provides a device for advice to the Congress. One example of the growth of dangerous technology unaffected by the Act is the development of supertankers.
\textsuperscript{128} D. Boorstin, \textit{The Genius of American Politics} (1953).
goals which each of us have and are the basis of the goals which each of us pursue. Given the recognition of these goals, claim may be made for rights for ourselves and others within our society. These include goals for the body, mind, character and personal association on the one hand and political, economic and social goals on the other. The natural rights to these goals consist of claims which we can make upon others to achieve these goals and which others can, in turn, make upon us. More importantly, this broadened concept of natural rights, based upon the needs of the citizens, requires affirmative government action in those cases where the individual cannot achieve those goals. The requirement for affirmative government action, whether derived from statute or constitutional interpretation, provides a legal basis for planning; government planning is to be directed to achieve natural rights which are becoming gradually fixed in positive law.\(^1\)

One of the most recent developments in planning methods has been the adoption of “goal indicators” to give more precise operational indices to goals set in the planning process.\(^2\) This indicator approach performs some functions analogous to the case law by refining and specifying goals. Recently, indicators have been used in statutes and court decisions and more frequently in administrative regulations.\(^3\) An exploration of the relation between goal indicators and more generally established legal rights remains to be carried out.

The problems inherent in establishing the proper relationship between law and planning in the process of goal-setting results both from the limitations of Anglo-American law and current planning methodology. Despite the recognition of a number of natural rights, Anglo-American law has still failed to establish, on a constitutional or statutory level, the rights to all of the essentials of life.\(^4\) As a consequence of this failure, planning efforts to secure these rights still lack proper legal sanctions and legitimacy in American society. Planners as a profession and planning law scholars should work to properly establish these rights in the law.

Another problem derives from the nature and limits of legal insti-

---
\(^1\) The philosophical basis for the entire organization of planning law, I submit, would rest most comfortably on the philosophical position outlined in several recent philosophical works of Mortimer Adler. As a Professor of Law at Yale and the University of Chicago, Adler outlined in the 1930’s the proper relationship between law and the social sciences. See M. ADLER & S. MICHAEL, CRIME, LAW AND SOCIAL SCIENCE (1971). More recently he has reviewed the biological evidence for uniquely human needs. See M. ADLER & W. GORMAN, THE DIFFERENCE OF MAN AND THE DIFFERENCE IT MAKES (1967). On the basis of this, he reinterpreted Aristotle’s ethics in M. ADLER, THE TIME OF OUR LIVES (1970). His political philosophy followed in M. ADLER, THE COMMON SENSE OF POLITICS (1971).


\(^3\) For one example, see 24 C.F.R. § 720.6 (1976) (regulations issued under the New Communities Act).

\(^4\) One recent interpretation of basic United States documents yielding the expanded conception of government as the affirmative agent for the securing the essentials of life is M. ADLER & W. GORMAN, THE AMERICAN TESTAMENT (1975).
tions themselves. As above stated, legislatures often fail to make use of planning goal indicators to clarify goals because of the necessary use of ambiguity to effect compromise. In addition, courts are limited in setting goals because the data often submitted to them in the course of the adversary process is not suited to the clarification of those goals. Moreover, courts themselves have not decided about the legal significance of various statutory goal and policy statements. One hopeful sign are recent cases giving detailed attention and approval to legislative findings and statements of policy. In People v. County of El Dorado, the California Supreme Court upheld the Tahoe Regional Planning Compact, basing its decision in part upon careful findings of fact which indicated that the compact was dealing with an interstate problem, and in part upon careful statements of policy in the statute under review which was sufficiently specific to permit the court to reject arguments that the compact was unconstitutional delegation.

But the failure of the legal system to benefit from the use of planning goal indicators is not only due to the limits of the legal system. Indicators themselves suffer from a variety of serious methodological problems ranging from unavailability of adequate data to partiality in the selection of the index to be used. Moreover, the use of indicators as part of the entire policy analysis process has been criticized as not accounting for fragile values and not resolving conflicts between goals and means-ends fluidity.

Nevertheless, despite all the problems, planning and law have much to give each other in their mutual effort to establish and define basic rights.

C. Preservation of Freedom

Mortimer Adler has argued that there are three concepts of freedom of the individual in society. The first is the unlimited freedom of complete autonomy consisting of each man's obeying himself alone and able to do exactly what he wants, i.e., license. The second is the limited freedom of the residual autonomy an individual retains when he acknowledges the limited authority of a de jure government, i.e., civil liberty. The third freedom is the participation in the political processes of government, i.e., political liberty.

Curiously, most completed local, state and federal plans do not espouse, in any detailed way, freedom as a goal of the planning process. For this reason, the field of planning law is concerned with the protection of civil liberties to the extent that it protects freedoms of speech and associa-

---

123 For an attempt to develop standards for judging the quality of legislative effort, irrespective of the content of the policy pursued, see E. Freund, Standards of American Legislation (2d ed. 1965).
tion,\textsuperscript{137} property\textsuperscript{138} and privacy\textsuperscript{139} from an overly aggressive planning process. One recent example of the law as a possible protector of freedom in the face of other laws designed to implement plans is Village of Belle Terre \textit{v.} Borass.\textsuperscript{140} The plaintiffs sought to have declared unconstitutional an ordinance which limited land uses to one-family dwellings, excluding lodging houses, boarding houses, fraternity houses or multiple dwelling houses. "Family" was defined as "one or more persons related by blood, adoption or marriage living or cooking together as a single housekeeping unit . . . ." Some of the plaintiffs were a group of six unrelated students who were ordered to move from a house in the zone. They claimed, among other things, that the ordinance affected their freedom to travel, to associate, to migrate and, more generally, to lead the way of life they desired. Although the court upheld the ordinance in question, \textit{Village of Belle Terre} does give an example of a court being asked to protect individual freedom from the implementation of a community plan through zoning ordinances.

But there are laws which less obviously affect the freedom of individuals. Conflict-of-interest laws, for example, which seek to limit the impact of corruption within the government planning process, protect individuals from the effect of government regulations affected by personal corruption of officials.\textsuperscript{141} Laws which seek to fragment potential sources of private power, \textit{e.g.}, anti-trust laws, aim to protect citizens from the imposition of the private planning of monopolies.\textsuperscript{142} The legal structuring of citizen participation\textsuperscript{143} and the requirement of legislative oversight of planning are areas in which planning law seeks to promote political liberties.\textsuperscript{144}

As previously stated, a jurisprudence of planning should not be seen as a rationalization for the unlimited extension of planning at the expense of freedom, but rather the fixing of the amounts and kinds of freedom permitted \textit{within} the planned state. Moreover, the paradigm of planning as a potential threat to freedom and law as curbing planning to protect freedom has only partial validity. As John Dewey has noted, insofar as planning itself aims at removing or preventing constraints upon man due to the unplanned actions of others—to that extent, planning itself is an

\textsuperscript{137} For a general discussion of these liberties, see T. Emerson, Toward a General Theory of the First Amendment (1966). For a discussion of them as applied to planning, see R. Brooks, Planning and Civil Liberties (May 26, 1976) (unpublished paper).

\textsuperscript{138} For a general argument for protection of property, see G. Deitz, In Defense of Property (1971).

\textsuperscript{139} See note 55 supra.

\textsuperscript{140} 416 U.S. 1 (1974).


\textsuperscript{142} For more recent approaches to the control of corporate planning, see R. Nader & M. Green, Corporate Power in America (1973).

\textsuperscript{143} For a recent discussion of the varieties of citizen participation in planning, see R. Brooks, Political Freedom and Planning (May 26, 1976) (unpublished paper).

\textsuperscript{144} For a good introductory discussion of legislative oversight, see F. Michaelman & T. Sandalow, Materials on Government in Urban Areas 1094-1132 (1970).
instrument of freedom.\footnote{This is the theme of Dewey's concept of freedom, advanced in J. Dewey, The Public and Its Problems (2d ed. 1946).} Thus, a zoning ordinance, implementing a land use plan which results in the freedom of home dwellers from unwelcome industrial intrusion, is an example of a freedom-producing plan from the homeowner's point of view. Finally, it may be argued that control through "spontaneous field" controls which permit administered markets to operate achieve a form of freedom which can be "planned." The planning of an effluent-free system for industrial polluters is one such example. The reformulation of laws both implementing plans and controlling planning efforts to increase freedom is a long overdue task.\footnote{Ironically, very few plans ever state freedom goals or freedom-related objectives.}

D. The Preservation and Enhancement of Nature

The legal control of social change to meet the citizen's basic needs will have to take place within the ecosystem. That system may be regarded as either a set of external constraints upon man's actions or a system of independent nature with its own legal rights, not based upon utility for man. It could be legitimately argued that the broad outline of planning law advanced here incorrectly assumes a "homocentric" view of nature, by which planning is directed at meeting the needs of man rather than recognition of the independent values of worth of nature.\footnote{There is a large amount of recent literature on this issue, begun by C. Stone, Should Trees Have Standing? (1974). A recent philosophical treatment of the issue is set forth in J. Passmore, Man's Responsibility for Nature (1974).} Even if one does not adopt an "immanent ethic," the development of a detailed knowledge of ecology may provide for the first time the basis upon which a new natural law which externally limits the man's actions can be partially derived.

Environmental planning obviously engages in identifying the natural constraints upon man's development activities. Hence, the law of planning, which structures the planning task and implements the resulting plan, has a particularly important role in establishing nature's constraints. The legally established planning process may trace the consequences of proposed interventions ("environmental impact planning"),\footnote{The environmental impact statements required under the National Environmental Policy Act and other federal and state laws are examples of this approach.} lead to specific legal limits to be placed upon man's actions ("standard implementation"),\footnote{For a discussion of "implementation plans" within the larger context of implementing planning through law, see R. Brooks, Planning and Implementation (May 26, 1976) (unpublished paper).} or lead to affirmative laws in which man's actions may be made more compatible with nature ("recycling planning").\footnote{The recycling approach can be found in recent federal and state solid waste recycling legislation as well as land management of waste water under the Federal Water Pollution Control Act.}

The issues which emerge in the relations between law and planning
in seeking to protect the environment are the issues partially discussed in the new field of environmental law, although this field has also tended to ignore the unique planning issues involved. These issues include: To what extent should environmental planning be guided or conditioned by a right to a decent environment? To what extent can ecological concepts in environmental planning be embodied within the law? How compatible are ecological concepts with more traditional legal conceptions? What is the role of the new "natural law" in planning and law? How should the law and planning determine who should pay the price of following the new environmental plans?

V. PLANNING AND JUSTICE

Let us suppose that the National Environmental Policy Act had, as originally proposed, established a right to a healthful environment. Presumably, the assertion of such a right not only would have secured court review, but would also have permitted the court to review not only the procedure of the environmental impact planning but also whether the decision was substantively correct. In so doing, the court would have to decide the level of protection of the environment to be provided as opposed to the achievement of other values. In other contexts, e.g., the assertion of a federal or state constitutional right to a decent environment, the court will obviously have to weigh that claim against the assertion of the other rights. This problem of the allocation of rights is the problem of justice. The problem emerges when we seek to balance personal freedoms and the benefits of planning in the countless possible situations.

How shall we conceive the relative contribution of planning and law in the pursuit of justice? Planning, like law, may be viewed appropriately as a means to achieving the common good, the sum total of the goods which society's members seek. Planning, in its pursuit of the common good, must be lawful. But the law, whether through omission, ambiguity or internal conflict between laws, may provide considerable discretion to planners in their pursuit of the common good. It has been the contention of this paper that American planners have adopted methods which emphasize a technological orientation to the effective pursuit of this common good. These methods seek to define goods and the alternative ways of achieving them as a "prudential" selection of the most effective or efficient alternatives. A review of most plans in the United States will find no definition of human rights within them. Nor, with the exception of some rare and recent exceptions, do the plans contain explicit considerations of justice.

The best discussion of these issues I have read is B. Ackerman, The Uncertain Search for Environmental Quality (1974).

Environmental law does not limit its concerns to environmental plans and their implementation.

I have chosen to use the concept "common good" rather than the more frequent recent term "the public interest." I am convinced by Mortimer Adler that such an approach is more philosophically correct. See note 66 supra.
To be sure, physical, economic and social planning have become increasingly concerned with not only the effective but also the just method of achieving the common good. Problems of justice in environmental, economic, and social planning have recently come to the forefront of planners' attention. Moreover, planning methodology has begun to pay more careful attention to questions of justice and equity through the adoption of such methods as advocacy planning. But, despite this incursion of equity into planning, planning is still predominantly concerned with prudential selection of alternatives.

If justice is universally viewed as the “approbative, obligatory, social norm,” there still remains considerable divergence of opinion about the kind of norm it is, and the relations of law to justice. This author subscribes to one variant of legal philosophy in which justice and injustice are not exclusively dependent on positive law, but rather that justice provides the criterion for the goodness of law. But, in opposition to Rawls, this author believes that justice derives from natural rights, which, in turn, are based upon a recognition of basic goods of man. From this point of view justice is an “objective,” but not necessarily certain, norm for human actions insofar as basic goods can be reasonably fixed.

From this point of view, the activities of planning and law deal with two aspects of justice. One aspect—the legal aspect—deals with regulation of the exchange and distribution of natural goods in accordance with rights and duties defined by natural needs. Hence, the search for justice is partially the search for the proper principle of exchange and distribution through the proper definition of rights and duties. The second aspect—the planning aspect—refers to the arrangement of power, freedom and goods

---

158 See note 65 supra. An outline of the argument runs as follows: Man is a unique being and has specific natural needs from which his real goods may be derived. (Issues regarding man's uniqueness, the “naturalistic fallacy,” and the empirical identification of these needs are obviously raised.) Things that are really good for me impose moral obligations upon me in the conduct of my private life. These obligations give me moral rights, i.e., the obligation of others with respect to me. I, in turn, have a similar obligation to them. Insofar as these others are organized into government, government has this obligation to me; governments are formed to secure these rights by preventing violation of them by others and to aid and abet me in my effort to make a good life. Not only do governments prevent and/or resolve conflicts affecting these rights, but through constitutional limitations, the government itself is limited from interfering. Governments are further established to support the pursuit of basic goods; (freedom is one of these goods or the means to these goods). Justice is that relationship between persons in society so that the violation of all persons' rights is minimized and achievement of basic goals for all, with a given basic minimum for each, is maximized. Positive laws are one of several means for achieving such justice.

Every one of these propositions is highly arguable!
159 The fixing of such “basic” goals can be done within the context of conflicting cultures and subcultures, as well as among individuals of different tastes.
to maximize the common good or the efficient pursuit of that common good. In any existing situation, it is possible that the planning principle and the legal principle of justice will diverge. Thus, it is possible to think of planning for maximizing the effective and efficient achievement of the common good which in turn will affect the existing form of distribution and exchange in an unjust way. The problem of coping with the divergence between planning as prudential maximization of the common good and the legal aspects of justice is a major problem of a planning jurisprudence.

I would like to posit, without proof, that the proper distribution of basic goods is the primary standard for organizing our society and the efficient and effective maximization of the achievement of goods is the secondary standard for organization of society. Thus, law, which pertains to the former, has supremacy over planning, which deals with the latter. Moreover, prudential methods of planning should be clearly subjugated to the laws' proper definition of the bounds of justice. A planned society which seeks to replace the legal definitions of just policy with the planning dictates for efficient maximizing of the common good is an improperly planned society.

Several broad options remain open for the achievement of a properly planned society. The planning task can be narrowed within the confines of legal standards which establish the just distribution of goods. For example, once courts and legislatures define the formula allocation for the regional distribution of low income housing, their planners can work out the details. Or planning itself can shift its technological orientation, incorporate a concern for both rights and justice, and seek to develop "just plans."

As an example, a plan authorized by state law regulations to protect the tidelands of the state may prohibit specified uses of land which would be harmful to others. The regulation may implement a plan to protect wetlands and hence maximize the public goods derived from wetlands. But the regulation may also deprive the owner of some value of his land. The court, under the fifth and fourteenth amendments of the Constitution, must decide whether the new distribution of societal wealth and goods resulting from the plan to protect the tidelands is a "just one."

The perennial search for an answer to the "taking question" is thus a search for a standard of justice in the allocation of developments and rights implicit in the maximization of environmental values.

The legal process of the courts in particular is suited to thinking about

---

106 The essential distinction made here is that justice is essentially a distributive principle, whereas planning is largely a prudential one. The problem of justice is who gets what and how much; the planning question is: which means is most effective in administering specific goods?

107 Planning will presumably be involved in selecting regulations in a via à vis eminent domain or market approaches, and determining the most effective regulations.

108 The relationship of justice and law to planning arises in a practical context when planners are accused of the unauthorized practice of law. See A. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN DEVELOPMENT 348-51 (1973).
the legal questions of justice and the conflicting claims for justice; it is properly designed and legitimated to do so. On the other hand, it is less suited for a variety of reasons for reviewing the effectiveness of one or another means or combination of means for achieving the common good.

These general considerations suggest in a necessarily broad and vague way the appropriate spheres of planning and the legal processes. Insofar as a problem is dominated by considerations of effectiveness and efficiency, planning is the appropriate vehicle. Insofar as the problem becomes an issue requiring the fixing of principles of distribution and exchange of basic rights, however, the legal process and, more specifically, court decisions, are a more appropriate institution.

Such a broad discussion of labor between planning and law may yield a rough formula for the legal review of the planning process. Thus, the court in its review of planning activities will focus upon the distribution and exchange of basic goods aspects of planning. In so doing, courts must engage in affirmative equity-oriented planning of their own, solicit plans from the interested parties or review already operating plans.

The legislature has a dual role. It may fix the plans into statute, ignoring the distributional and exchange aspects of the plan and simply seek to maximize public goods. But legislative authorization of a sharp separation between the functions of planning and law is lost. Yet such an analytic distinction is useful not only to provide an alternate standard by which the role of planning within the courts may be measured, but also in other situations where the relative roles of planning and law are in question.

Moreover, the different principles of planning and law may explain the different modes of reasoning with each use. Because legal processes are primarily concerned with justice and planning activities are concerned with the prudential selection of alternatives for maximizing the common good, differing modes of reasoning are necessarily used. These conflicting modes of reasoning may account for the mutual distrust and lack of communication so often found between planner and lawyer, and may explain the problems encountered when the different forms of reasoning come together in the same decision making process.

VI. CONCLUSION

This conclusion is the outline of a research and writing as well as a curriculum agenda directed at the unanswered problems of a jurisprudence of planning. It is only an outline of issues raised, questions asked, generalizations to be tested. The agenda does not resemble any past law or planning course outlines or agendas of study with which I am familiar. The agenda proposes a completely new field of law, emerging in reality, but still unrecognized in the laggard legal categories of existing subject matter. I

---

hope this new field of law will be institutionalized in casebooks, planning law courses and consultation among planning law scholars.

Originally, lists of research questions contained in the body of the paper were set forth in this outline. But the final product was unduly long. Consequently, the reader is referred back to the body of the paper, where the many problems are identified and discussed.

I. **Problems in the Definition of a Jurisprudence of Planning**
   A. The Limits of Past Jurisprudential Approaches to Planning
   B. The Central Concepts of Jurisprudence in Planning Law Perspective
   C. The Kinds of Reason Applied to Society
   D. Planning and its Relationship to Bureaucracy, Technology and Large Scale Business
   E. Planning Law and its Relationship to Other Legal Fields

II. **Specific Empirical Tasks of a Jurisprudence of Planning**
   A. A Description of Past Trends of Planning Law Decisions
   B. Analyzing Factors Affecting Planning Law Decisions
   C. Clarification of Community Policies Regarding Planning Law
   D. Projection of Future Trends in Planning Law
   E. Invention and Evaluation of Alternative Planning Law Formats

III. **The Law and Rational Planning**
   A. Differing Theories of Planning
   B. Different Approaches to Planning in Law (cutting across all legal fields)
   C. Law and the Applications of Science
      1. Regulating Relationships between the Institutions of Science and Planning
      2. Defining the Role of the Expert in Planning
      3. Regulating the Flow of Scientific Concepts into Planning and Decisionmaking
      4. Other Sources of Rationality and the Limits of Rationality

IV. **The Organizational Setting for Planning**
   A. Traditional Organizational Problems
      1. Planning and Federalism
      2. Planning and the Plurality of Governmental Institutions
      3. Planning and Public-Private Relationships
      4. Planning and Separation of Powers
   B. New Organizational Settings
      1. Decentralization of Planning
      2. Citizen Participation in Planning
      3. Interdisciplinary Planning
   C. Planning and Implementation
V. Planning and the Community
   A. Planning and the Definition of Problems
   B. Planning and Boundaries of Communities
   C. Planning and Appropriate Points of Intervention
      1. Law and Systems Analysis
      2. Law and Research Evaluation
   D. Planning and the Definition of Public Interest

VI. Law and the Guidance of Social Change
   A. Alternative Theories of the Relationships of Law to Social Change
   B. Alternative Theories of Guided Social Change
   C. The Major Forces of Change and the Law which pertains to them
   D. Alternative Ways of Structuring the Planning Process to Cope with Change

VII. Law and Planning for Common Human Needs
   A. The Identification of Human Needs
   B. Jurisprudential Issues Regarding the Relationships of Needs to Wants
   C. Specifications of Rights of Americans and Their Role in Guiding Planning
   D. Role of Legally Specified Social Indicators
   E. The Role of Goal Indicators in Law

VIII. The Law of Planning to Achieve and Protect Freedom
   A. The Promotion of Political Freedom Through Participation in Planning
   B. The Promotion of Civil Liberties
      1. Through Restraints on Planning
      2. Through Promotion of Freedom Resulting Plans

IX. The Constraints of Nature upon Planning
   A. Theories of Ecology
   B. Nature as a Constraint or as a Source of New Rights
   C. Alternative Roles of Planning for Constraints
      1. Environmental Impact Planning
      2. Environmental Standards Implementation Planning
      3. Environmental Recycling Planning

X. Law, Planning and Justice
   A. Theories of Justice
   B. The Contribution of Planning to Justice as Efficiency
   C. The Contribution of Law to Justice as Fairness
   D. The Proper Division of Labor Between Law and Planning