AN INQUIRY INTO THE PHILOSOPHICAL SCHOOLS OF THOUGHT IN PLANNING AND IN LAW

BY

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MASTER OF CITY PLANNING

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ABSTRACT

City planning practice has passed through a variety of historical periods in which the intentions and guiding principles have shifted, away from a sole concentration on beauty and efficiency in the spatial ordering of the city, towards the increasingly prevalent concerns with justice, equity, and fairness in planning actions. This inquiry into the parallel philosophical schools of thought in planning and in law, namely, the positivist, the normative, and the activist schools, shows a coincidence of guiding principles and prevailing concerns between the two disciplines. Indeed, many of the traditions and movements within the respective theoretical schools are common to both disciplines. The yet prevailing influence of the doctrine of logical positivism is clearly manifested in both planning and legal practice. The influence of the normative and activist schools in raising questions of "what ought to be," versus the scientific considerations of "what is," as the positivist school has stressed, has placed planning in a precarious position. In approaching the normative "ought," and in recognizing the political and often ethical nature of planning, there has been an increasing recognition that the scientific, rational basis for evaluation may no longer be relevant to this often subjective and value-laden approach. The legal consideration of the "ought," by contrast, is considered to be evaluative by the very nature and history of the legal process. The set of evaluative criteria in law, which is argued to be missing in the more recent approaches to planning, is directly linked to concepts of morals, justice, and ethics. This inquiry pursues knowledge in the parallel philosophical schools of thought in planning and in law, to allow an improved understanding in one's approach to these new and shifting intentions in the planning discipline.

CHAPTER 1

INTRODUCTION

CHAPTER 1.1

INITIAL PROPOSITION

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The initial proposition is one which states that many of the theoretical principles and traditions that govern city planning thought are related to legal philosophical thought.

This inquiry will thus pursue knowledge in the parallel philosophical schools of thought common to both the planning and the legal disciplines. The shifting intentions in planning will be pursued within an historical context, revealing a new and evolving set of concerns in planning which coincide with the prevailing concern in legal philosophy and legal practice. The knowledge of commonality between the planning and legal philosophical traditions will contribute to an improved understanding in approaching the prevailing concerns and intentions of city planning practice.

CHAPTER 1.2

RESEARCH DESIGN

RESEARCH DESIGN

This pursuit of knowledge will be through logical deduction. The research has largely been a survey of books, periodicals, and scholarly journals within the legal and jurisprudential field and within the planning field. From this body of knowledge, key principles have been deduced which exist within the philosophical schools of thought in planning and in law. Discussions have been engaged in with certain lawyers and legal philosophers to further this basis of knowledge. The discussions engaged in at the Planning-Law Symposium at Chapel Hill, North Carolina, in the Spring of 1979, have also contributed to this inquiry.

CHAPTER 1.3

INTRODUCTORY REMARKS

INTRODUCTORY REMARKS

For the purposes of this inquiry, it is important to appreciate the major divisions which exist within planning and legal thought. The task is, therefore, to discuss the theoretical parameters of the various schools of planning and legal philosophy. This is achieved by the division and discussion of the three leading and most influential schools of thought in planning and in law. These are: the positivist school, the normative school, and the activist school of thought. *

It is important to recognize, at the outset, that the three philosophical schools here discussed are by no means the only schools of significance. There are other schools and movements in both planning and law which are equally legitimate.

In addition, there are many variants in each school; the school of legal activism, for example, has numerous interpretations , and there is no one absolute school of natural law. The choice of these three particular schools of thought has been made, however, because they are the major, leading schools of thought in both planning and law, and they are fundamental to an understanding of the various

forces, movements, and modes of practice within each discipline.

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* The choice of the three schools of thought for this inquiry has been arrived at after much debate and discussion with Professor Mario Carvalho as well as through a series of Planning Theory class lectures in the Department of City Planning at the University of Manitoba.

CHAPTER 2

THE CONTEXT:

A SHIFTING EMPHASIS IN PLANNING

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The contextual element in which planning thought has developed is characteristic of a shifting set of intentions. Historically, planning has passed through various stages of development, each with a differing set of theoretical principles which have governed planning practice.

This shifting set of intentions will be discussed within three historical stages, which begin with the emphasis in planning on the aesthetic considerations of beauty and civic design and the concerns with order and efficiency. The second stage is one characteristic of socially oriented intentions in planning, highly influenced by the Chicago School and the social problems which had become evident by the 1960's. The final stage to be discussed is the most recent period of the 1970's, a stage in which terms such as equity, fairness, and justice have revealed a new set of intentions within planning thought.

CHAPTER 2.1

THE EMPHASIS ON BEAUTY AND EFFICIENCY

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Historically, planning was governed by the principles of physical order, efficiency, beauty, and other design considerations. These concerns became central by the mid-nineteenth century, at a time when the major industrial cities of England, Europe, and North America were marked by inefficiency, congestion, poverty, and overcrowded living conditions.

The reform movement which arose in reaction to these urban conditions was characteristic of benevolent planning undertaken by civic and religious leaders (predominantly Protestant upper-middle-class citizens), seeking a restoration of order and improved living conditions. The major planning responses in the mid-nineteenth century were slum clearance and reconstruction of model housing; the expansion of park and open space; and the construction of wider, more accessible streets. The governing principles in this period were clearly based on a belief in architectural and environmental determinism, that is, a belief that the social and economic ills could be cured by better design and living spaces.

In the latter part of the century, this reformist movement was joined by other groups, particularly architects, who introduced the two additional principles of beauty and civic design.

One of the classic contributions to this "artistic" movement in planning was the work of Camillo Sitte (1843 - 1903). His conviction that the artistic problems of the city are as important as the technical problems, led him to write the now classic planning text of the nineteenth century, entitled City Planning According to Artistic Principles. Sitte's concern with open-air squares, civic centres, apartment gardens and courtyards, and other beautifying civic measures leaves him open to the same criticism as that levelled at his contemporaries. Such measures were merely palliatives in approaching the severe problems of the nineteenth-century city. These were superficial reforms directed at the pressing urban problems and ills of rapid industrialization.

Baron Haussmann's reconstruction of Paris was one key example of planning for beauty, besides the other military considerations. The City Beautiful movement in the United States followed this and other European initiatives in creating grand civic vistas and avenues, and providing for the perception of open space, sunshine, and fresh air, clearly a reaction to the dense industrial cities and urban ills of the nineteenth century.

This reaction to crowded living conditions, narrow streets, and unhealthy urbanism was also evident in the British "new towns" development. Sir Patrick Geddes, both a natural scientist and planner, was a strong supporter of this movement. Based on the garden city ideas of Ebenezer Howard, the emphasis was on

> low-density residential communities marked by such amenities as ample open space, social facilities grouped away from traffic, an encircling green belt, and the planned containment of population.[1]

The culmination of the City Beautiful movement in North America was reached at the Chicago World's Fair of 1893, an exhibition of the leading design features of planning and architecture. The Fair was considered to be a splendid re-creation of "the White City," and was heralded by Frank Lloyd Wright as the noble and dignified "Classics" on a grand scale from which all of America could be constructed.[2]

The concern with beauty and design in planning is also clearly represented in the organization of the American Planning and Civic Association in Washington in 1935. The purpose of this association, as stated in its original announcement, was

> the advancing of higher ideals of civic life and beauty in America.[3]

The technical, design orientation of planning in the early part of the twentieth century in the United States and in Britain is clearly stated in one of the earliest publications of the Journal of the American Institute of Planners. A history of the shifting intentions in planning is revealed by merely surveying the journals chronologically. An article by Thomas Adams, the English town planner of the period, is representative of this emphasis on the technical and physical features of planning design. As stated here:

> It is of special importance for technical men to keep planning related to physical features (i.e. planning in its true sense as "design") separate from what somewhat erroneously is called planned economy or political planning.[4]

According to Adams, planners were to be the masters of the physical field, and planning was to be considered as no more than the design of physical features.

After World War I, municipal planning commissions were gradually established, and were staffed predominantly by civil engineers and architects - referred to as city planners. These planners, like the nineteenth-century reformers, believed that urban problems and people's lives were directly affected by their physical environment. Physical site planning, the arrangement of buildings and streets, and land uses thus became central to the planning profession. This belief in physical determinism was the

main force behind the urban renewal schemes of the early 1950's. The removal of slums and replacement with, or relocation to, more "decent" housing caused such upheaval and expense that, by the 1960's, experiments commenced in the area of neighbourhood rehabilitation.

The emphasis in planning for the greater part of its history has thus been highly design-oriented. From the mid-nineteenth century until the mid-twentieth century, the intentions in planning have been centered on aesthetic and efficiency considerations, guided by the key planning principles of beauty and order.

Notes

1. Park Dixon Goist, "Patrick Geddes and the City," Journal of the American Institute of Planners Vol. 40, No. 1 (January 1974): 33.

2. Sigfried Giedion, Space, Time, and Architecture: The Growth of a New Tradition (Cambridge: Harvard University Press, 1967): 396.

3. American Planning and Civic Association, an announcement of its organization in Journal of the American Institute of Planners Vol. 1 (1935): 33.

4. Thomas Adams, "Town and Country Planning in Old and New England," Journal of the American Institute of Planners Vol. 3 (1937): 91.

CHAPTER 2.2

THE EMPHASIS ON SOCIAL CONCERNS

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The guiding principles of beauty, efficiency, and order were replaced with a more socially oriented approach in the 1950's and 1960's, especially after the unanticipated consequences of, and the political opposition to, urban renewal.

The entrance of social scientists into the planning arena was one significant factor in a shifting emphasis in planning. Until the 1930's, the emphasis on physical design and land-use site planning was due to the influence of engineering and architectural members of the city planning profession. Some social science influence revealed itself in the 1930's, when large national and regional planning studies were commissioned by the federal government. However, it was only after World War II that social science became a prevalent influence in city planning. This was a direct result of the establishment in this period of the University of Chicago planning school, which emphasized social science technique over architectural, design technique.

According to Herbert Gans, the Chicago School "approached planning as a method of rational programming,"

arguing that

> the essence of planning was the deliberate choice of ends and the analytic determination of the most effective means to achieve these ends.[1]

The Chicago School emphasized empirical analysis and sociological surveys which best determined the means to the desired ends.

Measurement, observation, and social surveys of the population, determining both behaviour and the present and future wants, were carried out, and the emphasis on data led planners to develop a methods and techniques approach to their practice. Simulation models and systems analysis were a necessary part of this practice to interpret and handle the large volumes of data being gathered. Planners in this capacity were also viewed as advisers to the politicians, because of their ability to provide technical information for political decisions.

Throughout the 1960's, planning was criticized for its past emphasis on design and its concern with beauty and efficiency. The shift toward the more social, core issues of poverty, housing, transportation, and segregation was thus a direct response to this criticism and to the pressing problems of social and racial unrest in the cities. The new socially oriented intentions were directing planning activities towards an improvement in the supply of public housing; alleviating segregation through legal advocacy

planning and such transportation-oriented programs as busing; and implementing vast housing and transportation programs.

Notes

1. Herbert J. Gans, People and Plans: Essays on Urban Problems and Solutions (New York: Basic Books Inc., 1968).

CHAPTER 2.3

THE NEW CONCERNS OF THE LATE SEVENTIES

THE NEW CONCERNS OF THE LATE SEVENTIES

The most contemporary shift in planning thought has occurred within the past decade, particularly within the last five years, and follows a period of reconciling the planning approach since the turbulence of the sixties. The principles of "fairness," "justice," and "equity," along with "quality of life" concerns, have arisen in planning documents and are being introduced in the planning literature of the late seventies. Attempts are being made to connect the spatial or three-dimensional to these concerns with justice and fairness. Two key attempts in this regard have been David Harvey's Social Justice and the City and Manuel Castell's The Urban Question.

Planning journals are also beginning to reflect these concerns, with articles now appearing such as "Working Towards Redistributive Justice," "Planning for Declining and Poor Cities," and "The Concept of Justice in Regional Planning: Justice as Fairness." The latter article appeared in the Journal of the American Institute of Planners and addressed planning decisions as being distributional. The article explores the concept of fairness as a strategy in reaching an "equitable resolution of conflicts." It is argued that, where interest groups have objectives

which conflict, fairness as a decision criterion is more suitable than, for example, the "greatest good for the greatest number or other optimization principles."[1]

These current concerns in planning are also raised by the critical theorists and the "new humanists" in planning. The main concern, or intention, of the critical theorists is, quite simply, the abolition of social injustice. They, and the new humanist school theorists, argue for a reunification of knowledge and interests--in other words, for active political struggle and heightened human interaction. This emphasis on knowledge and human interaction is most characteristic of the theories of Edgar Dunn and John Friedmann. Friedmann, in Retracking America: A Theory of Transactive Planning, views the processes of mutual learning and societal guidance as basic to the transactive planning approach.[2]

The notions of the "just" and the "fair" decision in planning have also raised questions and concerns. The concept of the "right" decision has challenged the pre-existing notion of the "best," and naturally ethical and moral theory is now being related to this current level of planning thought.

The shifting intentions in planning, from the beauty and order considerations, through the more socially oriented concerns, to these current notions of justice as fairness, equity, and "goodness," are basic to this inquiry into the

planning philosophies which govern planning thought and practice.

Notes

1. Brian Berry and Gene Steiker, "The Concept of Justice in Regional Planning: Justice as Fairness," Journal of the American Institute of Planners Vol. 40, No. 1 (January 1974): 415.

2. John Friedmann, Retracking America: A Theory of Transactive Planning (New York: Anchor Press, 1973).

CHAPTER 3

THE PHILOSOPHICAL SCHOOLS OF THOUGHT IN PLANNING AND IN LAW

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As an inquiry into the analogous principles within the various philosophical schools of thought common to both planning and law, the shifting intentions and principles explored contextually above may be said to have arisen within, and indeed are guided by, three schools of thought. These are, the logical positivist school, the normative school, and the activist school.

The proceedings of this inquiry, for the purpose of clarity in organization, will be to first look at the respective schools of thought as they have developed historically, with a view to the origins, the founders, and the key contributors thereafter. From this descriptive basis, the core of the discussion will follow, centering on the ways in which the respective schools of thought are manifested, firstly in planning and secondly in law, as continuing philosophical traditions.

CHAPTER 3.1

THE POSITIVIST SCHOOL

> A positivist is one who, when confronted by a problem, acts in the manner in which a scientist deals with a problem of research. Positivism thus has to do with procedure, a procedure based on systematic observations from which conclusions are drawn.
>
> - Richard Von Mises
>
> Positivism: A Study in Human Understanding

THE POSITIVIST SCHOOL

The term "positivism" is used with many different meanings, and the sense in which it is to be used here requires explanation. However, any single definition of the word initially would detract from its overall meaning as a school of thought which is gradually developed below.

Positivism has its roots in post-revolutionary France, arising in an age when the ideals of liberty, equality , and fraternity were still alive, though unfulfilled. Social reform was considered to be evolutionary once the system of human rights was enacted, a philosophy held by Saint-Simon (1760-1825) and developed by him as a new "science of society" to end inequality of property and power through the sources of experience and scientific method. The principal founder of the positivist philosophy, however, was Auguste Comte (1798-1857), a follower of Saint-Simon in France in this period. The scientific method was offered as the principle to be followed in the reform of society. Knowledge was to be positive knowledge; that is, verified by positive science and grounded in natural laws (constant relations between facts), observation and experience. In accordance with this developing school of thought, it was stated that only positive knowledge

could be successfully applied in the various fields of human practice.

Comte, in his early years, believed in the supremacy of science as the guide to social reform. Much of his later writings (post-1850), however, were caught up in mysticism and religion. Between 1830 and 1842, his efforts were directed at positivist thought with regard to social phenomena. Rejecting the theological and metaphysical methods of investigation into social concerns, he set out to complete the realm of positivist thought by adding social science, or "sociology," as he coined the term, to the system of scientific philosophy already in existence in the fields of mathematics, astronomy, physics, chemistry, and biology. In social concerns, positive philosophy dictates the subordination of imagination to observation, which raises the scientific spirit of the period above the theological or metaphysical spirit still of significance at that time.

The emphasis on facts within the positivist school is derived from the empiricist tradition which accepts only experience as the source and norm of knowledge. It is in this way that empiricism is traditionally classified as distinct from rationalism, since rationalism accepts reason (ratio) as the source and norm of knowledge.

The early nineteenth century thus marked the progress of the natural sciences and a new awareness of the relevance of this expanding field to social and political phenomena. In both the French positivist school (St. Simon and Comte) and the English empiricist school (John Stuart Mill, Hume, Bentham, etc.), the relevance of the scientific methods to other sciences, such as politics, history, economics, and psychology, was suggested. The question of whether the study of political and social life could be scientific, particularly within the current reformist context, was prevalent in both schools of thought. It was generally believed that the phenomena of society were like the phenomena of nature and, so, must also conform to a set of fixed laws, and that, indeed, all phenomena of society are phenomena of nature.

This link of the scientific to the social has been one of the greatest movements in the history of philosophical thought and, inevitably, has been manifested in the pure idea of social science in the fields of psychology, sociology, anthropology, political science, economics, and all forms of planning. In fact, it remains one of the strongest guiding principles in most fields of social science despite the critical periods of idealism, mysticism, and romanticism which followed the positivist era, claiming the incapacity of science to penetrate ultimate reality.

Positivism in Planning

The linkage of social concerns to the methods of scientific inquiry originally pursued by Auguste Comte firmly established a tradition in the social science disciplines. As a result, the most widely held view of city planning currently is one which is positivist in nature. One may argue, in fact, that positivism remains the ruling theory in the planning discipline, despite various opponents to this view. There are, indeed, continuing and yet prevailing "traditions" in city planning which present themselves as clear manifestations of the positivist doctrine. These traditions in planning may be viewed in a continuing emphasis on such concepts as the means/ends conception of rationality, the rational-comprehensive model itself, and planning for a "public interest." Evidence of positivism generally reveals itself in most planning methods and techniques and in the core emphasis within the planning educational curriculum.

The most enlightening indicator of current planning thought is the prevailing emphasis found in planning journals and articles. The "state of the art" of planning remains scientific and positivist in nature, although various systems of thought are redirecting this mainstream practice.

A number of the more recent planning articles have both directly and indirectly addressed the subject of positivism in planning. Lawrence Mann reviewed[1] the influence and impact of the positivist approach in planning between 1900 and 1965, and focussed on the most significant period of impact, between 1956 and 1965, when the degree of empiricism and quantification in planning method reached its highest point of influence. Literature in the planning field, in general, reflects this period and the shifting emphasis after 1965. Lawrence Mann states in this article that planning has become an applied social science. In other words, the scientific approach to social questions is still a prevalent mode of inquiry despite the continuing criticisms of positivism. Although the sixties brought an awareness of the dubious standards for social knowledge associated with the empirical method, Mann states that this belief in positivism still exists for planning and that advances in the body of knowledge continue to occur.

Planning method generally is a tradition of scientific application in technique and measurement. The relevance of the positivist school of thought to planning is nowhere more clearly manifested than in the tradition of planning method. Mann's discussion in the article cited above is focussed upon the Deutsch-Platt-Senghass 1970 analysis of social science advances, which summarizes such techniques as factor analysis, who created it, the years

of relevancy, and so on. Other advances reviewed in this article include game theory; large-scale sampling in social research; statistical decision theory; operations research and systems analysis; information theory, cybernetics and feedback systems; and computer simulation of social and political systems. The "borrowing" habit of planning from other disciplines is nowhere better catalogued than in this article. The use of scientific "tools" from political science, sociology, psychology, geography, and economics is presented concisely, technique after technique. Economics is revealed to be the major contributor of technique to planning, with such advances as regional accounting, linear programming, cost-benefit analysis, cost-effectiveness analysis, computer simulation of economic systems (with particular emphasis on, and application to, urban housing markets), as well as in the recent interest in the relevance of welfare economics to urban planning.

A second area in which the positivist tradition is manifested is in planning education. The emphasis in planning schools on technique and means orientation versus the more value-laden and ethical question of ends is a tradition in planning education derived from the positivist school. This orientation or direction in planning generally, and not just in the educational system, will be discussed at further length below. The positivist trend in urban planning education is best seen in an educational emphasis

on statistics, linear programming, planning-quantitative methods, and in the substantial theories of economics, regional science, and regional economic and spatial planning. Richard Klosterman, in addressing the positive versus the normative planning foundations, states that implicit in this positivist tradition is a view by the planning student of the planner as

> a "value-free means technician" who collects and analyzes factual data concerning the means for achieving public policy objectives but avoids the "value" questions of defining these objectives.[2]

The philosophy of positivism is evident in the most basic tradition in planning, namely, the rational-comprehensive approach. Barclay Hudson, in a very recent article[3], addresses the rational-comprehensive, or what he terms the "synoptic" approach to planning, as being the most central of all the planning traditions. The four classical elements of the rational-comprehensive approach are:

1. goal setting
2. identification of policy alternatives
3. evaluation of means against ends
4. implementation of decisions[4]

Variations of these four stages do occur, but the procedure itself remains relatively constant. For example, the four stages of situational analysis; end reduction; designation of courses of action; and the comparative evaluation of

consequences are one variation of the classical model of the rational-comprehensive process. The stages have also been simplified to three in number, beginning with merely listing the opportunities for action, identifying the consequences of each, and, then, selecting the action which leads to the "best" or preferred set of consequences. Whichever variation is chosen to work with, the rational-comprehensive approach is characteristic of a process with a changing order, feedback loops, and sub-processes (that is, cost-benefit analysis, systems analysis, etc.). The positivist character of this planning tradition is best seen in Hudson's description of forecasting research as a sub-system of this model. He states that forecasting can be broken down into:

> deterministic models (trend extrapolation, econometric modelling, curve-fitting through multiple regression analysis); or
>
> probabilistic models (Monte Carlo methods, Markov chains, simulation programs, Bayesian methods); or
>
> judgemental approaches (Delphi technique, scenario writing, cross-impact matrices)[5]

From this, the rational-comprehensive model clearly relies on the positivist tradition of quantitative analysis. Hudson recognizes that, despite its potential for deep quantitative and scientific refinement, the model is extremely simple, and that planners cannot do without it since the issues it addresses, that is, the "ends, means,

trade-offs, action-taking issues," enter into virtually every planning endeavour.[6]

Traditionally, the rational-comprehensive approach defined a decision to be rational if it led to the most optimal or "best" solution, a solution arrived at through increasingly sophisticated and scientifically oriented tools of analysis. The recognition of human limitations on knowledge and information and, ultimately, on "comprehensibility" for this optimal rational solution, led to the notion of "satisficing" and Herbert A. Simon's concept of "bounded rationality." The positivist influence remained unchanged, however, with the introduction of this decision-making model gauged at attaining the most satisfactory answer, since the same technique and systematic analysis used in determining the best solution was still basic to this "bounded" process.

John Friedmann and Barclay Hudson explored the shift in decision theory after 1965 when a new emphasis on policy science arose.[6a] The influence of the positivist school of thought again remained basic to this changing planning process, with the emphasis on, for example, social indicators; planning-programming-budget systems; systems analysis; and large-scale computerized simulation studies.[7]

Positivism in urban planning, seen above as being central to the traditions of planning methods and planning education, and as basic to the traditional rational-

comprehensive approach to planning, remains a dominant force in still other aspects or "traditions" of planning. As recently as the Spring of 1979, at the Cornell University Conference, a statement by Richard P. Appelbaum fully summarized the existing positivist influence on planners. He stated that planners present themselves as "politically neutral, objective policy-scientists-technicians attempting to efficiently realize externally-given societal goals." This technical and value-free image into which the planning profession has been moulded is claimed by many to be a direct result of the rational-comprehensive approach to planning. This approach, or process, also involves the separation of means from ends, where means are selected to best (and/or efficiently) attain the given ends. The ends are usually presented in most discussions of the rational-comprehensive approach as externally given, but also as "societal goals" or in the "common good." It is generally true that the means constitute factual statements in which scientific techniques are offered for action. The ends, however, are usually value-laden and often constitute ethical statements. In the positivist tradition, the focus of the rational-comprehensive model is technical, scientific, and objective information, that is, means-oriented information, and this model excludes the subjective, the emotional, the human, and the moral information.

The rational-comprehensive model has also been characterized as creating the split between the planner and the politician. Planners, in working within, and applying the rational-comprehensive model to, their practice, are able to ignore the political aspects of the public interest and the emotional and subjective aspects of their information, leaving these concerns to the politician. In other words, the rational-comprehensive approach is more concerned with procedural techniques, and the substantive content is left for other levels.

Essentially, the rational-comprehensive model serves to keep the means or procedural elements in planning practice separate from the more value-laden ends creation. Hence, the ends are usually merely identified by a planner or are externally established by, for example, the elected politicians, public interest groups, or individuals. The limitation of planning to the factual consideration of means (versus the ethical consideration of ends) is a direct outflow from the positivist school of thought. Planners are restricted traditionally to only those issues and questions which can be considered rationally; in other words, only the selection of means for achieving already designated ends.

The positivist influence in this respect is discussed by Richard E. Klosterman. He states that this restriction of planners to the consideration of factual means

versus value-laden ends stems from two aspects of the positivist view, namely,

> the logical positivist conception of ethics, developed by the Vienna Circle at the turn of the century, and the means-ends conception of rationality.[8]

The logical positivist conception of ethics generally is one which views an "ethical" sentence (stating an action as good or bad, right or wrong, etc.) as non-factual and cognitively meaningless, since it can neither be true nor false. It cannot, therefore, provide the basis for systematic knowledge. The logical positivists also assumed that

> a clear distinction can be drawn between factual and ethical statements and a logical gap separates the two; that is, that no set of factual statements entails an ethical statement (and the reverse).[9]

The means-end conception of rationality, stemming from the positivist view, has to do with the rational evaluation of means with respect to ends. Klosterman describes this concept in terms of justification of actions. Means are only justified in achieving an end and can be rationally evaluated only on this ground. Similarly, an end cannot be rationally justified of itself but could be if it became a means to a further end. Klosterman gives an example to clarify this means-end view from the positivist school as raised by Simon, Weber, and others:

> Planners may justify placing public housing projects in middle-class neighbourhoods as a means for reducing racial and class discrimination, but they cannot justify reducing discrimination because they merely dislike or prefer to reduce discrimination.[10]

Thus, the positivist tradition in planning has manifested itself throughout much of the field. The most direct representation is clearly with the so-called planning method and technique which is likewise presented in the planning education curriculum. Positivism is the basic core of the rational-comprehensive approach to planning, which restricts planners to the impartial identification of externally designated or "given" ends and the procedural selection of means or action which can be rationally justified. This image of the planner as the objective expert emerged particularly during the World War II period when "hard" data and quantitative models were viewed as a planner's tools for action in societal goal achievement. In the 1960's, the chief response to the rising and critical social problems was this scientific objectivity, rationalism and political neutrality, a response reflective of the positivist school. Appelbaum quotes John Kennedy's vision of the sixties as

> demanding subtle challenges for which technical answers--not political answers--must be provided.[11]

Clearly, the spirit of positivism pervades much of our current levels of thought and has, thus, both directly and indirectly, shown its influence within the planning discipline.

Legal Positivism

As legal positivism is the first school of thought in law to be discussed here, certain introductory comments are required, both for the purpose of introduction to legal philosophy in general, and as background to the discussion of legal positivism in particular.

Judicial philosophy, or jurisprudence, is an extensive field of thought which is essential to an understanding of the nature of the legal process. As in planning, there exists in law key philosophical schools of thought which have guided, and been manifested in, the legal traditions or "currents" of the legal process. Legal Positivism, Natural Law, and Legal Activism have all come to be general terms which refer to a range of different theses and varying levels of thought. The nature of one's jurisprudence, depending on which particular school of thought is subscribed to, undoubtedly affects the way in which a judge judges, a prosecutor prosecutes, and a lawyer defends or advocates.

The varying level of influence that any one school will have upon a judge or lawyer is dependent upon one's regard to the doctrine of precedent and stare decisis. Legal precedence is that doctrine which requires a judge, in resolving a particular case before him, to follow the decision in a previous case, where the fact situations in the two cases are analogous. The problem which arises out

of "precedent" serves to link a definition of stare decisis. The problem arises when many past cases with similar facts dealing with the same particular problem in law have been decided in different ways. A judge must then decide which case to follow as a precedent. To resolve this problem, the doctrine of stare decisis is applied. This doctrine requires that a judge of a particular court must follow the decision of the highest court within that particular provincial jurisdiction in which the court resides, although he may be persuaded, to varying extents, by coordinate and higher courts outside the provincial jurisdiction. All courts are bound (in Canada) by the highest court in the land, the Supreme Court of Canada. Stare decisis is a Latin phrase meaning "to stand by decided matters." Stare decisis is itself an abbreviation of the Latin phrase "stare decisis et non quieta movere," which translates as "to stand by decisions and not to disturb settled matters."[12]

To overcome the rigidity imposed by the doctrine of precedent, a judge has the device of "distinguishing," which allows departure from a precedent case decision. In this process, a judge must be able to distinguish the precedent case from the current case on the basis of differences in their material facts. A judge may also argue that the precedent case was decided on a different rule of law than the current case should be, or he/she may argue that the precedent case was wrongly decided and, so,

choose to ignore it.

It is the degree of strictness with which a judge binds himself to precedent cases and, thus, the amount of discretion employed, which determines that school or legal philosophy subscribed to.

An understanding of the positivist doctrine in law can be gained through the writings of John Austin and Jeremy Bentham, the earliest legal positivists, and from those of H. L. A. Hart, for a contrasting and modern view of positivism. This understanding is furthered by the works of Hans Kelsen, who raises another view of positivism in presenting the law as a system of norms.

This discussion of positivism can be broken down into three main areas which are basic to an understanding of legal positivism. These basic areas are central ongoing debates in law and include the question of the separation of law as it "is" and law as it "ought to be;" the concept of moral judgements and the denial of any sense of the ideological in law; and, finally, the argument that legal decisions are deducible from set legal rules as applied to the facts of a case without reference to any political or social aims, policies, or attitudes.

The doctrine of legal positivism, also referred to as the analytical or imperative school of jurisprudence, was founded by John Austin (1790-1859). Positive laws, as proposed by Austin, are laws "simply and strictly so-called,"

"set by men to men," and are, therefore, distinct from divine laws set by God to men. The laws or rules set by men to men are sometimes set by political rulers, by persons exercising some form of government control, and so on. Positive law thus exists by position.[13] The positivist school of thought has been manifested in law in various ways, creating numerous schools of legal positivism, each, nonetheless, having a common stream which reflects the traditional scientific attitude of positivism.[14] Generally, legal positivism rejects speculation and confines itself to the data of experience. Legal positivists emphasize what "is" the law, over considerations as to what "ought to be" the law. Thus, there is a separation between law and morality, according to the legal positivist, which makes secondary any consideration of whether a particular law be a good or bad law. A law is, thus, considered valid because of legal criteria, not moral or social criteria.

Austin made a strong distinction between positive law and positive morality. He distinguishes human or man-made law and God-made law from another category of improperly styled laws made by men. This third category stresses the normative content of man-made "improper" laws. The name "positive morality" created by Austin retains the distinction from God-made by the epithet "positive," and the name "morality" prevents them from being identified as

laws, since Austin views them as improper law. This improper law or positive morality is a set of rules established by opinion and sentiment in regard to human conduct; they are often referred to as "moral rules" or "rules of honour." They are, thus, here distinguished from positive law.[15]

Both Bentham and Austin, along with other early positive law theorists, sought to distinguish between the law as it is and the law as it ought to be. Hart and other present-day legal philosophers argue, however, that this separation is false and that this hides the true nature of law and its essence in social life. The separation of law and morals has become a current and controversial debate which questions the very necessity of law to conform to an ethical standard. To Bentham and Austin (the original and principal positive law theorists), whether a law is or is not is one subject for inquiry; whether it be conformable or not to a set standard (nature, God, morals, etc.) is a completely different subject for inquiry. With regard to obedience, they would argue that a law, even that which is morally bad, is still the law until such time as man seizes his freedom to censure that law. He is not, therefore, free to argue that a law ought not to be the law and merely disregard it; rather, the law must either be accepted and obeyed or censured and replaced.

The natural-law doctrine, in its principle of conformity which demands positive law to be in agreement with natural law, is similar, Kelsen argues, to the relationship of the empirical world of reality to the metaphysical world of ideas. The world of reality is, thus, accepted or rejected emotionally according to its conformity to a set of platonic ideas, values, and so on, just as positive law is rejected or accepted by a natural theorist according to its conformity to the will of God, human reason, or nature, depending on one's interpretation of the natural law doctrine. Kelsen thus argues here that natural law theorists either justify positive law by proclaiming its agreement with the natural, reasonable, or divine order, an agreement asserted but not proved, or they question the validity of positive law by claiming that it is in contradiction of one of the presupposed absolutes. Thus, the doctrine of natural law is concerned not with the cognition of positive law, but with its highly emotional and unproved level of conformity with the absolutes of its own theory. Positive law, however, neither seeks to justify nor condemn, but seeks merely the pure and empirical legal reality.

Kelsen's discussion of a "pure theory of law" (positive law) raises the concept of a hierarchy of norms, namely, that found in the distinction between procedural and substantive law. He distinguishes between norms of a

higher level, which are fundamental norms called "grund-norms," and norms of a lower level, the latter having its reason for validity in the former. This principle of validity, Kelsen argues, is peculiar to positive law. He raises the example of the reasoning for validity of a judicial decision which contains the individual norm (the lower-level norm) and states that the norm

> is valid because the decision came into being by the application of general norms of statutory or customary law that empower the court to decide a concrete case in a certain manner.[16]

Hans Kelsen, in The Pure Theory of Law, presents a general theory of positive law which describes the law as it is, not as it should be. He raises a somewhat different approach in distinguishing between the "is" and "ought" by linking "ought" to behaviour and "is" to the act or will. Thus, one individual may will that another ought to behave in a certain way. The first part of this sentence, Kelsen describes as an "is," as one person's will over another, and the second part as an "ought." In law, the "ought" has both a subjective and an objective meaning which make it a valid norm. The subjective meaning implies merely that one ought to behave in a certain way; the objective meaning implies the existence of an authorizing norm, established constitutionally or by a legislative act. Kelsen raises the example of a man in need who asks another man for help. He states that the subjective meaning of this request is that

the other ought to help him, and, in the objective sense, he ought to help only if a general or established norm exists which makes valid "love your neighbour" (made valid by some leader who it is presupposed that one should obey as commanded). It is only with this objective sense of the "ought" that a positivist is concerned; in other words, one ought to behave in a certain way because it is the law to do so, not because of some "higher" system or ideal set of moral or religious laws. This is the essence of the positivist doctrine in stressing the "is" of the law--that is, the actual existence of the law.

The subjective meaning of the word "ought," in the phrase above, for example, where "a man ought to help another man in need," is given without any such man-made law. The man ought to do this for reasons other than the mere existence of this man-made law. The subjective sense of the term "ought" is, thus, more in conformity with the concept of Natural Law and the unwritten laws of morality and goodness. Hence, this insistence on the separation between law as it is and law as it ought to be is basic to the positivist doctrine.

Kelsen, in his positivist approach to the law, addresses the concept of ideology and the law, another major issue of the positivist doctrine. He argues that, if positive law is viewed in relation to a "higher" order which claims to be the "ideal" law, the "right" law, and

which, to be valid, must necessarily be in conformity with this order, then this positive law must be rejected as ideological.[17] Positive law is a science which seeks the real law as it is, and not the ideal law as it ought to be. Kelsen and others have referred to justice as being an "irrational ideal," rendering justice as neither the object of science nor of positive law. Instead, the object of positive law, according to Kelsen, is to seek the "real and possible law," and positive law is thus "radically realistic and empirical."[18]

Kelsen is thus arguing for a "pure theory of law" which presents positive law as free from this "ideal" or "right" law, a realistic theory of law which refuses to evaluate the positive law. Kelsen's "Pure Theory" seeks only to "grasp the essence of positive law and, by an analysis of its structure, to understand it" and thus seeks law as it "is" not as it "ought to be." This Pure Theory avoids any involvement with political interests by refusing any ideology. As Kelsen states,

> Such ideology is rooted in Wishing, not in Knowing . . . the forces that try to destroy the existing order and wish to replace it by another, thought to be better, may not have much use for such a cognition of the law.[19]

Kelsen is thus arguing, in his Pure Theory, for a pure "science of the law" which rejects ideology, in the tradition of the positivist school of thought.

The third major area basic to an understanding of legal positivism is the contention that legal decisions are logically deducible from two inter-related premises, one being the pre-set legal rules, concrete and certain by nature, and the other being a complete set of facts arrived at through the evidence presented in the respective case. Hart refers to the legal system in which one may reach the correct judgement as a "closed logical system,"[20] since the legal rules which are applied are predetermined and exist to be drawn from in the logical deduction of the correct legal decision.

In this regard, the positivist doctrine in law contains what is known as the deductive model of legal reasoning. In this model, a judge is to find the applicable rule of law, and this, together with the facts of the case, form the premise from which a conclusion or judgement is reached by deductive reasoning. A judge, under this model, is bound by precedent cases and has no discretion to modify the law in response to changing social conditions and prevailing attitudes. In adhering to the positivist school of thought, a judge thus strictly applies narrow principles of law to particular facts and decides cases accordingly.

This concentration on the rules and facts excludes other factors and premises from consideration by a judge. Under the doctrine of legal positivism, a judge has no

discretion to consider a legal decision according to political or social aims nor to public policies. Moral or ethical standards are likewise not considered or referred to in the deductive model of legal reasoning in positivist law. Such considerations are, however, addressed in the other two philosophical schools of thought, the normative and the activist schools, discussed below in the following chapters.

Notes

1. Lawrence D. Mann, "Social Science Advances and Planning Applications: 1900 - 1965," Journal of the American Institute of Planners Vol. 38, No. 6 (November 1972).

2. Richard E. Klosterman, "Foundations for Normative Planning," Journal of the American Institute of Planners Vol. 44, No. 1 (January 1978): 38.

3. Barclay M. Hudson, "Comparison of Current Planning Theories: Counterparts and Contradictions," Journal of the American Institute of Planners Vol. 45, No. 4 (October 1979).

4. Ibid., p. 388.

5. Ibid., p. 389.

6. Ibid.

6a. John Friedmann and Barclay Hudson, "Knowledge and Action: A Guide to Planning Theory," Journal of the American Institute of Planners Vol. 40, No. 1 (January 1974): 2-16.

7. Ibid., p. 10.

8. Klosterman, "Normative Planning," p. 40.

9. Ibid., p. 41.

10. Ibid.

11. Richard P. Appelbaum, "Planning as Technique: Some Consequences of the Rational-Comprehensive Model," a Preliminary Draft prepared for the Conference on "Planning Theory and Practice: Economic Context, Emerging Coalitions and Progressive Planning Roles" at Cornell University, Ithaca, N.Y., April 27-29, 1979.

12. G. L. Gall, The Canadian Legal System (Toronto: The Carswell Company Ltd., 1977), p. 180.

13. J. Austin, "The Province of Jurisprudence Determined," in Jurisprudence: Principles and Applications, ed. E. H. Pollack (Columbus: Ohio State University Press, 1979), p. 523.

14. H. L. A. Hart, in an article on legal positivism and the separation of law and morals, identifies five meanings of positivism in contemporary jurisprudence. These are given as:

    a) the contention that laws are commands of human beings;

    b) the contention that there is no necessary connection between law and morals, or law as it is and ought to be;

    c) the contention that the analysis (or study of the meaning) of legal concepts is (i) worth pursuing, and, (ii) to be distinguished from historical inquiries into the causes or origins of laws from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law, whether in terms of morals, social aims, "functions," or otherwise;

    d) the contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards; and,

    e) the contention that moral judgments cannot be established or defended as statements of fact can, by rational argument, evidence, or proof ("noncognitivism" in ethics).

    H. L. A. Hart, "Positivism and the Separation of Law and Morals," in The Philosophy of Law, ed. R. M. Dworkin (London: Oxford University Press, 1977), p. 18.

15. Austin, "Jurisprudence," p. 524.

16. Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," in Jurisprudence: Principles and Applications, ed. E. H. Pollack (Columbus: Ohio State University Press, 1979), p. 555.

17. Hans Kelsen, The Pure Theory of Law (Berkeley: University of California Press, 1967), p. 106.

18. Kelsen, "Law and Jurisprudence," p. 548.

19. Kelsen, Pure Theory of Law, p. 107.

20. Hart, "Law and Morals," p. 24.

CHAPTER 3.2

THE NORMATIVE SCHOOL

When we say of a person, "He ought to do X," we mean that X is the best thing for the person to do in a situation of choice which now confronts him or will confront him in the future.

- Paul W. Taylor
Normative Discourse

THE NORMATIVE SCHOOL

The word "normative" invokes certain images of evaluation, prescription, and judgement in what is right and what is good. We are involved in normative philosophy when, according to P. W. Taylor,

> we judge an object to be good or an act to be right, when we tell someone what he ought or ought not to do, and when we try to justify such judgements and prescriptions.[1]

The key concepts of the normative school are, thus, the concept of a good thing, the concept of a right act, and the concept of what one "ought" to do. Good and right imply evaluation, ought, prescription.

The Normative Philosophy in Planning

The normative philosophy has only recently entered the planning field, partly as a reaction to the positivist tradition, partly in response to the shifting intentions in planning. The faith in scientific knowledge as a solution to planning problems has been weakened by a realization that all problems are not technical ones with technical solutions. This had become particularly evident by the late 1960's. Until that time, the only "valid" solution was one based on facts, not values. Such planning problems and concerns as poverty, poor health services, segregation, and inadequate housing are understood now to have political and economic roots and not technical roots alone.

The tide of normative thought in planning has reached the point where the prepared plan itself is viewed as a normative order. However, planning statements which reflect substantive concerns or which incorporate normative prescriptive elements remain a problem for planners, or, at least, a cause for concern. This view is expressed by Barclay Hudson. He raises the example of forecasting, this being both a purely descriptive analysis and incorporating a strongly normative element. He states that the normative interpretation

> goes far beyond method, drawing on qualities of imagination, willingness to exercise moral

> interpretation of facts, and sensitivity to historical dynamics.[2]

He goes on to state that planners are "uncomfortable" with the "literary method," although this concern with substance may be the most accurate approach to social problems and solutions. The most dominant traditions, namely, the synoptic (the rational-comprehensive model) and the incrementalist, dominant because they are most comfortable with the concerns of objectivity and reliability, tend towards the social science method.

In making recommendations for the future, the planner is, in essence, stating what ought to occur, and this can be based on a normative model or a deterministic model. The willed future of the normative model embodies concepts of desirability and betterment, while the deterministic model relies on a causal relationship with the present and the future. This willed construction or "invention" of the future is referred to by Hasan Ozbekhan as "futures creation." Ozbekhan describes this concept as "requiring intellectual and emotional qualities of pure creativity and original synthesis." He goes on to state that,

> It calls for the ability to define goals and norms, to embody different sets of envisioned situations into evolving constructs, to abstract different alternatives from them, and to choose among such alternatives. It depends on one's capacity to distinguish between what is constant

> and what is variable, and to deal with large numbers of relevant, interconnected, but causally unrelated variables. Finally, if it is to satisfy the above requirements, the resulting construct will necessarily be different from the present state of the system, and this difference must symbolize some good, or virtue, that the present lacks . . . that is what I should call a normative approach to the future.[3]

The shift in planning intentions since the 1960's away from scientific solutions and answers to highly political and social questions and problems has also had the effect of bringing under a planner's consideration not only the means, but also the ends of public policy concerns. The means are usually linked to the "is," and the ends are usually related to "what ought to be" statements. A planner's consideration and emphasis on means generally stems from the positivist influence in planning methods and techniques, which are all directed at best determining the alternative for action, or the means to an externally given end. The selection of ends is usually considered "value-laden," often concerned with ethical and moral standards, and is, thus, usually left to the politician's consideration.

Klosterman presents a case for normative planning in which planners would subject the factual questions of public policy means to rational consideration, but also the ethical questions of public policy ends, the ends being "what ought to be" statements. D. A. Seni argues, however,

in his paper, "On the Rational Justification of Planning Decisions," that neither the scientific knowledge nor the moral/ethical standards can be rationally justified and that something less than full justification is required which leaves such knowledge and standards open to criticism and change.[4]

Given the newness of this approach, both of becoming involved in the consideration of the ends as well as the means in planning, and of considering the rational justification of such considerations, there is, as yet, much work to be done in this area. The normative school, in general, has introduced a value-oriented approach to planning which is linked to such concepts as morals and intuition, and to such concerns as the good and the right decision. This has produced an entirely different structure within which planners might test their solutions and information. This structure is remote from the long-accepted, systematic feedback arrows offered by the positivist, rational-comprehensive traditions. This shifting of intentions has inevitably caused many changes in approach and a series of key questions to be raised.

Generally, with this increasing awareness by planners that their actions are necessarily involving ethical issues and that the essence of their profession is political in nature, there has arisen an uncertainty of how to deal with these ethical aspects. Clearly, in approaching

the technical issues of society, the logical positivist tradition and the empirical sciences give quite a clear understanding and method of practice for planners. This is true in all cases of understanding the way the world is, according to Klosterman, but uncertainty arises in approaching "what ought to be" decisions in planning. Here, no clear guidance exists parallel to the positivist tradition.

As a result, planners seem to have responded in two different ways to ethical positions. According to Klosterman,

> Some, emphasizing planning's scientific nature and adopting the perspective of the positive social sciences, attempt to avoid all ethical questions by collecting factual information . . . Others, emphasizing planning's political nature . . . just assume their political positions to be "correct" and engage in pragmatic politics . . . to promote the interests of under-represented groups.[5]

It is this second response which is most characteristic of advocacy planners. Advocacy planning generally is viewed as being rooted in the sixties and in the legal adversary process, as being characteristic of plural plans, and as defending the small man's interests versus the power groups of business and government. Advocacy planning has been described as injecting normative principles into planning and as moving planning away from its neutral objectivity in dealing with both social problems

and those problems falsely defined as apolitical in nature. The advocate planner has, in the past, been involved with the highly politicized issues of education financing, busing, integration, legal attacks on exclusionary zoning, and environmental protection and impact. Advocacy planning has also had the effect of creating a stronger linkage between social scientists and judiciary processes in policy decision-making.

Neither of the two approaches referred to by Klosterman, he argues, addresses the ethical issues of public policy planning, and, by separating scientific analysis from political action, neither approach reflects the profession's traditional concerns with both rationality and reform. It is here that the limitations of the normative school in planning as a guiding philosophy are revealed.

The Normative Philosophy in Law

The normative school of thought is a strong and long-lasting influence within the field of law, and, in fact, has contributed to the very origins of law. The normative statements, "one ought to do X" and "one ought not do Y," are clearly the most basic concepts within the legal discipline and the study of law. This normative aspect of the law is directed at the behaviour of individuals and imposes obligations on each individual at the micro level within any particular system of law. There is, however, another level of normative thought in law, considered at the macro level, which opens up a different approach to the study of law and imposes obligations on the entire system or body of law itself. This is the order of Natural Law, a highly normative system which stresses what the law ought to be. It is at this level that the inquiry will be pursued, to determine the influence of the normative philosophy within the system of law as a whole.

In most of the readings of legal philosophy, and in this pursuit of the manifestations of the normative school in legal thought, it has been found that the discussions focus primarily on two key subjects. These are, the argument that there exists a higher system of law (usually a varying form of natural law) to which man-made or human law must conform, and the debate that the separation of law and morals is a false separation which denies

a "natural" linkage between the law as it "is" and the law as it "ought to be."

The origins of natural law are in Greece; the meanings and the interpretations given to it since that time are numerous and have been the focus of attention for such philosophers as Cicero, Saint Thomas Acquinas, Hobbes, Locke, Rousseau, and Montesquieu. In fact, it was from certain key ideas of Aristotle that the philosophy of Natural Law developed. For example, Aristotle's belief in man as possessing a sense of good and evil, of the just and unjust, and his concept of a universal law of God and of reason which is unaffected by desire and on which equity and justice rest are all believed to have been influential in the origins of the Natural Law doctrine.

Cicero was, however, the primary author of this philosophy and has been described as seeing a divine origin in natural law, and as viewing natural law to be universal and dominant over man-made law because of this origin; that is, because it comes from God. Natural law, in essence, according to Cicero, commands what ought to be done and forbids the opposite. Saint Thomas Acquinas identifies Roman Catholic theology with law, where divine reason becomes natural law. His theory frames all laws into two categories, one being man-made or positive law, and the other being the natural or eternal law. The positive law

must not be opposed to the divine law, else the former becomes a perversion of the law, and is considered unjust and ought not to be observed. Thomas Hobbes, in his doctrine of man's self-interest and self-preservation, departs from the divine origins of natural law given by his predecessors and raises a humanist conception of absolute government rationally conceived.

Natural law doctrine, in general, today is viewed as a set of elements in the legal system which are accepted universally as valid and as minimum precepts of morality. They are normative concepts with which any rational man would agree. Natural law doctrine thus maintains that there is an ordering of social relations separate from positive law, superior to it, absolutely "valid" and "just" because it emanates from either nature, human reason, or the will of God (depending on the variant of natural law doctrine one subscribes to).

The tradition of Natural Law, as described by H. L. A. Hart in The Concept of Law, comprises a twofold contention:

> first, that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin;
> secondly, that man-made laws which conflict with these principles are not valid law.[6]

This basic demand of natural law theorists for human law or positive law to conform with the higher system of natural law has been an ongoing and, yet, unresolved debate. The natural law theorist views the validity of positive law in its conformity with natural law, validity thus resting in an order established by nature, a higher authoritative standard than that of the human legislators.

The strongest criticisms, or the counterside of this debate, is levelled by the legal positivists, particularly Hans Kelsen. His main objection is that natural law doctrine is untenable from a scientific point of view and that it is unable to be verified since it rests on metaphysical beliefs and on the existence of a just God. The positivist legal theory is, however, criticized as containing no standard for justice or injustice nor any criterion to judge its positive law as just or unjust.

Hart further clarifies the positivist and natural law theorist positions in addressing the validity of a law seen to be iniquitous. The positivist would argue that such a law is still the law but is too iniquitous to obey or apply. The natural law theorist would argue that this law is in no sense law because it is iniquitous, that is, it does not conform to the higher moral principles.

This concept has been expressed historically in the German school of thought active during and after the Nazi regime. Many of the legal positivists who lived in pre-war Nazism were forced to discard their concept of law, once made to live under the morally evil laws of Nazi Germany. The exploitation of the positivist slogan "law as law" (Gesetz als Gesetz), the belief that positivism enforced the subserviance to the "morally evil laws" by separating law as it is from law as it ought to be, and, in essence, the belief that legal positivism powerfully contributed to the horrors of Nazism, all served to convert the legal positivist of the German school to the doctrines of the normative school and natural law. This conversion was reflected in post-Nazi German court cases in which convictions under certain Nazi statutes were not upheld on the grounds that those statutes were found to be contrary to the "sound conscience and sense of justice of all decent human beings," reasoning which has been hailed as a triumph of natural law over positivism.[7]

This argument between the positivist and natural law theorists is basic to, and indeed forms one part of, the broader debate on the separation of law and morals, or the separation of the law as it is and the law as it ought to be. H. L. A. Hart is one of the leading figures in this debate. The subject is addressed in his book, The Concept of Law and in his article entitled "The Separation of Law

and Morals."

Hart suggests that there are ways in which the law is strongly influenced by morals which every positivist would concede as fact, and that the positivist argument of the separation of law and morals must be explored further in order to challenge it. For example, he argues that no "positivist" could deny that statutes are often mere legal shells which demand, by their express terms, to be filled with moral principles; that contracts are limited by reference to conceptions of morality and fairness; and that liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility.[8] The role of morals and concepts of fairness and justice are thus implicit in their connection to the law, a point with which most jurisprudential schools of thought would agree. The normative school does, however, go even further in connecting the two, in arguing that the man-made law must conform to the first principles of morality and justice in order to be valid, that is, in order to be law.

Judges, in their position of interpreting statutes and precedents, are often guided by the assumption of reasonableness; that is, they acknowledge that the purpose of the statute or precedent being considered is a reasonable one, and it is not intended to be unjust nor to work against established moral principles. Morality is thus assumed by a judge to be at the basis of a rule or a law in

interpretation, since no judge would consider the intention to be unreasonable or directed towards injustice, unfairness or immorality.

In this regard, Hart raises the example of a legal rule which forbids taking a vehicle into a public park. Clearly, automobiles would be considered vehicles; however, bicycles and roller skates may or may not be classified as vehicles, and a judge must, therefore, take the responsibility of deciding. Hart argues that logical deduction cannot serve as a model for judges in bringing particular cases, like the one raised in this example, under general rules. Their arguments and reasons for deciding must be sound or rational without being logically conclusive. The criterion which makes a decision sound in deciding, for example, that a bicycle is not a vehicle for the purposes of this rule, rests, however, on some concept of what the law ought to be. Hart argues that

> it is easy to slide from that (the concept of what the law ought to be) into saying that it must be a moral judgement about what the law ought to be. So, here, we touch upon a point of necessary "intersection between law and morals" . . .[9]

Hart raises the most renowned judicial virtues in law, which are characteristic to judicial choice considered to be neither arbitrary nor mechanical. These virtues are:

> impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision.[10]

Judicial choice is given credence, therefore, both by its reasonableness (it is not based on interpretations of injustice or immorality) and by its virtue as informed impartial choice, which is the derived product of a weighing or balancing procedure aimed at "doing justice." Impartiality in the application of the law is usually referred to as "natural justice," better identified as the

> notion that what is to be applied to a multiplicity of different persons is the same general rule, undeflected by prejudice, interest, or caprice.[11]

It is with regard to these judicial virtues of impartiality, neutrality, and interest, and, particularly, with regard to the sense in which they are applied outside of the logical deductive model of legal reasoning and in the interests of the higher system of morals, values, and ethics, that this discussion now turns to the third philosophical school of thought, as manifested in planning and judicial activism.

Notes

1. P. W. Taylor, Normative Discourse (Englewood Cliffs, N.J.: Prentice-Hall Inc., 1961), p. vii.

2. Barclay M. Hudson, "Comparison of Current Planning Theories: Counterparts and Contradictions," Journal of the American Institute of Planners Vol. 45, No. 4 (October 1979): 394.

3. Hasan Ozbekhan, "Towards a General Theory of Planning," in Perspective of Planning ed. Erich Jautseh (Paris: OECD, 1969), p. 88.

4. D. A. Seni, "On the Rational Justification of Planning Decisions," a Preliminary Draft prepared for the Conference on "Planning Theory and Practice: Economic Context, Emerging Coalitions and Progressive Planning Roles" at Cornell University, Ithaca, N.Y., April 27 - 29, 1979, p. 31.

5. Klosterman, "Normative Planning," p. 40.

6. H. L. A. Hart, The Concept of Law (London: Oxford University Press, 1961), p. 152.

7. Hart, "Law and Morals," p. 33.

8. Hart, Concept of Law, p. 199.

9. Hart, "Law and Morals," p. 23.

10. Hart, Concept of Law, p. 200.

11. Ibid., p. 202.

CHAPTER 3.3

THE ACTIVIST SCHOOL

> . . . if the planner enters the realm of action, his word must be responsible. He is no longer setting forth alternatives, but advocating points of view that will affect the lives and well-being of others.
>
> - John Friedmann
> Retracking America

THE ACTIVIST SCHOOL

"Activism" is generally defined as taking a vigorous part in a political movement; this participation is often spontaneous, as opposed to contemplative or speculative in nature, and is a type of conduct which exerts influence.

The activist school is, however, manifested in other than the political sphere. Apart from political activism, there is judicial activism, planning activism (which has political dimensions), scientific activism, and religious activism. The activist school of thought focusses on both normative and prescriptive concerns, leading its subscribers to assume explicit value positions. It is in this way that the activist school can be seen as a further extension of normative thought. Indeed, it is the normative perspective which directs the various forms that activism takes.

Activism may be said to rest on beliefs in "what ought to be," but as a school of thought it goes further in this normative approach. Clearly, there is much overlap between the two discussions, and, in fact, various planning approaches, such as advocacy planning, will "fit" into, or be said to subscribe to, both schools of thought,

depending on the type of behaviour and the extent of approach taken by the specific advocate. Given the numerous manifestations of the activist school of thought, the clearest explanation of this school will be found in the relevant inquiry into planning activism and judicial activism outlined below.

Planning Activism

Within the activist school of thought, planning has historically been viewed from a number of positions. For example, planning is viewed as enhancing freedom on one hand and restraining freedom on the other (the "Great Debate" of Hayek, Wooton, and Popper); as a means for social reconstruction (Karl Mannheim); as a form of societal guidance (Amitai Etzioni); and as a vehicle for social learning (Friedmann and Hudson). The activist school of thought as it relates to planning is, with respect to the normative school of thought, more rooted in an explicit movement, in a specific value position, and has more of a developed theoretical basis from which to operate.

It is for the reasons cited above that the activist school is considered distinct from the normative school. Klosterman and others have considered both traditions to be one and the same, a single tradition which views planning as a means for improving government and improving society, and which requires a commitment to change. It is believed, however, that, because of the above differences, the activist school represents a separate tradition unto itself, in fact, a further graduation from the sole emphasis on "what ought to be."

The 1960's and 1970's saw the greatest emergence of planning activism. As with the normative approach, the absurdities recognized in a scientific approach taken by

planners to the problems which had surfaced in the 1960's became clear by the early 1970's. The major contributors to this school of thought during this period were Charles Hampden-Turner, Edgar Dunn, and John Friedmann. Theories of planning were being refocussed in this period of uncertainty on concerns with such things as humanistic values, existential knowledge, self-actualizing groups, and social learning through dialogue. As Friedmann and Hudson stated,

> The new paradigm insisted on man's psycho-social development as a central focus of planning, and portrayed planning itself as a form of social learning.[1]

The emphasis of this paradigm is on the interpersonal relationships or "transactions" between the technical experts with scientific knowledge and the client with personal knowledge from which mutual learning can occur. Dialogue was also emphasized, and knowledge was thus transformed into action. This approach to planning has been called "societal guidance," and the contributors are often referred to as the "new humanists."

Transactive planning, as presented by Barclay Hudson, emphasizes not the achievement of objectives, but, rather, the process of personal and organization development; that is, the effect of plans on

> people's dignity, their sense of effectiveness, their values and behaviour, their capacity for

> growth through cooperation, their spirit of generosity.[2]

Thus, transactive planning is concerned with personal face-to-face contact, dialogue, and with letting people control the social process of planning--in other words, decentralizing planning institutions. John Friedmann's desire that planning become a

> process embedded in continual evolution of ideas validated through action[3]

is clearly stated through the transactive approach. Thus, the positivist tradition is lessened, and mutual learning (dialogue, etc.) becomes a greater part of the planning method.

Radical planning, a further position of planning activism, is described by Hudson as having two mainstreams of thought, one being spontaneous activism, and the other being holistic, centering on critical theories of the state, class structures, and so on. The activist school is described by the "back to the roots" concept of mutual aid, community self-reliance, and the cooperative spirit, and stresses the importance of personal growth as in transactive planning. Participation under this model is to be maximized, state intervention minimized, and it is more desirous for community committees to plan than it is for central bureaucracies to do so. The holistic stream of the radical planning tradition concentrates on the effects of

economic relationships, class structures, and control by the media. Hudson states that, within this stream, planning is seen as playing handmaiden to conservative politics in a form of Mandarism.[4]

The radical planning movement has also recently taken on a sociological influence, emphasizing the individual in the city and the sociological impact of the industrial city. The writings of David Harvey, Manuel Castells, Weber, and others have all contributed to various interpretations of a radical theory of the city and the urban form. Inequalities in housing, the politics of land development, labour conditions in the industrial city, and bureaucratic alienation have all been subjects of inquiry in the radical planning movement.

The rational-comprehensive model of planning refers to a unitary concept of the public interest, avoiding issues of conflict between competing interests, issues in fact addressed by both the radical and advocacy schools of thought. Planners of the activist school, in arguing the limits of the rational-comprehensive model, thus attend to the political aspects of the public interest as well as the emotional and subjective aspects of their information. As Dyckman states,

> the social planner cannot afford the luxury of positivist detachment . . . The enterprise of social planning has always been facilitated by strong ideology. At the least, it requires

> determined leadership . . . It may be necessary for the poor and disadvantaged to have their own planners.[5]

The radical and transactive planning approaches emphasize dialogue, personal knowledge, class structures, political-economic relationships, and "grass roots participation" in addressing social problems. They are also seeking long-run results. However, given the central bureaucratic structure of most planning bodies, these schools are less feasible, according to Hudson, since the operating principles are unknown among planning professionals.

In arguing that the mainstream theories of planning are concerned with procedural techniques (the means), leaving the substantive content for other levels, Hudson presents the contrasting radical and transactive approaches as addressing the total realm, procedural and substantive together. These two approaches advocate that planning methods must correspond to, or recognize, the nature of planning problems being addressed--in other words, the social and political or entire content of these concerns. They view any technique or method as value-loaded, as having a built-in bias according to the interest of the group, and, thus, as never being neutral. According to Hudson,

> They view objectivity itself as a biased frame of reference, excluding those qualities of experienced reality that can only be known

> subjectively, and must be validated on grounds where social science is reluctant to tread.[6]

In this regard, Klosterman has argued that even the scientific procedure of gathering information for the policy-making processes requires a determination of which studies are to be conducted and which data is to be collected, decisions which necessarily involve substantial ethical issues. He also argues that, since planning is essentially political in nature, it is unrealistic to exclude substantive, ethical considerations from public policy.

Klosterman also supports the belief that plans are, indeed, political programs which clearly reflect political philosophies. He argues that the impossibility of planning is solely scientific, since planners' actions help determine "who gets what, when and how," and planning decisions thus affect people in the political sense. Because their actions necessarily involve ethical issues in, for example, distributional decisions, Klosterman argues the impossibility of limiting planning to only the factual or scientific consideration of means.[7]

Planners are necessarily concerned with ends, although the ultimate decision concerning ends rests with the politician. Planners are, however, involved in the determination and the effectuation of ends sought, essentially throughout the process of preparing a master

plan and in applying that plan once politically approved and in place. Once in place, the plan becomes a mandate to guide the decisions and actions subsumed under it. The principles contained within the plan, and the desired goals specified in the document, are then basic to the planning decisions.

Some of the more recent planning documents reflect the normative and activist approaches in their statements and direction. The concern with interest groups and minorities taken by the activist planners of this past decade, for example, is being reflected in a number of planning documents. Reference is made here to the Cleveland Policy Planning Report which speaks of interest and client groups, rejecting outright the concept of a unitary public interest as a planning myth. This report, heralded as the most progressive plan to yet emerge, addresses the income disparity of the Cleveland citizens and is one of the few documents, if not the only one, which mentions such words as "equity," "fairness," "power," "moral commitment," and "injustice." In fact, equity is, in the Plan for Cleveland, the one overriding standard for judging and appraising policies and programs. At the beginning of the Report, the Cleveland Planning Commission's single goal is stated:

> Equity requires that locally-responsible government institutions give priority attention to the goal of promoting a wider range of choices for those Cleveland residents who have few, if any, choices.[8]

The activist school of thought in planning has also made at least a preliminary approach to the question of linkage between what "is" and what "can be." Stephen Gale, for one, has examined the integration in planning theory between the actual (the "is") and the feasible (the "what ought to be"). He argues that a theory of planning must examine this linkage and integrate the conclusions with an analysis of the normative statements and judgements about the designs for future worlds. This argument regarding the independent identity of "what is" and "what ought to be" is an ongoing one. Many believe that "what ought to be" makes sense only if it corresponds to the "what is" and that only those activities which are possible within the probable range of existing experience (the "what is") should be prescribed as "what ought to be." This argument has been described in a clearer manner and has been recognized in this capacity for a long time by the traditional consideration of planning as both an art and a science. It has been argued that planning, as an art, must have some influence on human affairs, and, as a science, must be predictive of human affairs.

The rational-comprehensive model, associated with the positivist school, has forced planners to seek the "best" alternative for action. In planning, this is rational choice. However, the "best" concept need be questioned. It has been somewhat tempered by the bounded-

rationality model which seeks to "satisfice" and not necessarily to maximize or choose the "best" alternative. If one rejects the concept of a single, overriding public interest, then it must be asked, "the best for whom?" or "for which of the vying interests is an alternative deemed best?" The criteria for this "best" and even for the "satisficing" alternative are usually pragmatic, efficiency considerations. In other words, to say a choice is rational, usually in planning, only means it is efficient. Usually, efficiency is seen in terms of minimizing economic costs, but an alternative is also considered efficient with respect to time and, too often, with respect to political expediency. As Stephen Gale argues,

> . . . too little time is spent in the examination of criteria for judgement. To say a policy is rational may be to only say it is efficient; it does not provide grounds for rationally discriminating among efficient solutions, equitable distributions, and fair decision procedures.[9]

The subject of criteria and/or justification of planning decisions, first introduced in the last section as a shortcoming of the normative school, is a new area of study and is an understandable outgrowth from the normative and activist schools of thought. It does, however, tend to open up an entire new area of thought, which only a few pieces of legislation and a few of the most recent articles published in planning journals or presented at recent conferences reflect. For the purposes of this thesis,

this new area of thought which follows from, or perhaps could be included as, the most recent addition to the activist school, can only briefly be discussed here, as it does, in itself, introduce an entire new field of inquiry yet to be pursued. The subject of criteria in the justification of planning decisions links ethics and morality to planning and introduces concepts of the good, the right, and the just in planning. It is at this point that planning now rests. C. West Churchman has made this connection of morality to planning. The concept of morality being explored is that created by Kant, which Churchman cites as to

> so act as to treat humanity, whether in your own person or that of another, in every case as an end withal, never as a means only.[10]

Churchman argues that, by treating people as objects, a planner is acting immorally. He raises the example of a planning decision to locate a much-needed hospital in an area which will displace a few slum dwellers. Although they are guaranteed better dwellings elsewhere and a larger part of society will benefit by the decision, Churchman argues that the decision is immoral, since the slum dwellers are treated in the same way as the walls and boards of the houses; that is, there is a better place for them so they should be moved. The people are being treated as means, not ends, in the same way that residents of urban

renewal schemes were treated as a means of cleaning up a poverty-stricken area of a city. Thus, the necessity to treat a person, in Kant's words, as an end withal, never as a means only, could become a criterion for judging certain planning decisions as moral or immoral. Churchman does, as well, in following Kant's thesis, raise morality and immorality as eternal concepts. The relevancy to planning of this discussion by Churchman is significant, particularly in the determination of this so-called "best" or "satisficing" decision. He refers to Kant's discussion in the statement,

> Morality knows no trade-offs--no calculus of benefits here minus costs there. One does not make up for evil by doing more good: once the immoral act is done, it is there and remains there forever.[11]

Given this and his argument that morality is valid in and of itself, it is clear that such concepts could become basic criteria in planning decisions having a normative perspective or, in other words, which state "what ought to be." Morality thus becomes a justification for a planning decision, quite a shift from the positivist tradition of scientific justification and objective criteria.

This link between scientific and moral reasoning is addressed by Richard Klosterman, who sees morality as being a basis for criteria in planning decisions. In a recent article, he states that moral philosophers are

currently attempting to

> formulate rationally defensible criteria which match our considered moral judgement, just as the philosophy of science attempts to develop systematic principles which agree with accepted scientific practice.[12]

Klosterman has also connected morality to John Rawls's two principles of justice. In A Theory of Justice, Rawls has suggested that the rationality of ethical theories relies simply on whether rationally defensible criteria exist for validating ethical principles and decisions. He has developed such criteria in his two principles of justice, and they are, according to Klosterman, to be used in the social sciences as the scientific method is used to evaluate the hypotheses and theories of the empirical sciences. Klosterman, in fact, identifies Rawls's work as being one way in which planners can practice normative planning, rationally evaluating both the means and the ends of public policy.[13] Klosterman raises the example in which planners can argue that social policy, with redistributive effects benefitting the least well-off, is just, and can rely on Rawls's principles to support their position. In fact, the Cleveland Planning Report, in its normative position of promoting a wider range of choices for Cleveland residents, relies on Rawls's two principles of justice as rational justification.[14]

As Klosterman argues, planners' ethical positions would not reflect mere preference or taste, but would be justified according to set criteria in a way parallel to that in the scientific method. Planners would also no longer have to rely on claims to professionalism and solely scientific investigations into means; rather, their proposals could be defended on rational grounds and could be just as concerned with ends as they once were with means. As Klosterman states,

> if this does, in fact, happen, and the rational justification of public policy ends joins the scientific analysis of public policy means as a guiding ideal of the profession, the implications for both theory and practice will certainly be far-reaching.[15]

This furthest extension of the activist school, which seeks a justificationist position for normative and activist planning, is reflected only in the few recent pieces of literature cited above. The latest contribution to this developing position is an article by D. A. Seni, prepared for the Conference on Planning Theory and Practice at Cornell University in the Spring of 1979.[16] Seni responds to Klosterman and others on their justificationist position. He argues that planning decisions cannot be scientifically justified and that a weaker criterion than full justifiability is warranted. He does, in fact, combine his approach to the subject of the rational justification of planning decisions with Popper's theory of knowledge

as being incomplete. He thus argues that neither the moral/ethical (normative) standards nor the scientific knowledge can be rationally justified and that full justification has to be replaced by the position that takes knowledge as incomplete, as improvable and partial. He argues that knowledge must be held open to criticism and to testing, not because testing would prove scientific knowledge and normative standards true, but because it would not have shown them to be false.

There is, then, this search, in the realm of moral and ethical knowledge, by a few normative and activist planners, for a framework which supports a normative principle or decision. This search for a justification, or seeking the "grounds for" or the necessary and sufficient reasons for a judgement in planning, leads one onto new territory in planning theory. It will be shown that a similar set of questions, relating to the justification of morally and ethically based judicial decisions, is being raised in the parallel school of legal activism. This most recent movement in planning is thus carrying the question of "what ought to be done" one step further in asking "why," a question which is based on moral principles. The answer to this question requires, according to Seni, a set of ultimate moral principles, just as, in the rational justification of scientific statements, absolute first principles or criteria of ultimate truth are required.

Seni defines a moral principle as

> a proposition about the factors in a situation to which one can appeal as a moral reason for judging good from bad or right from wrong.[17]

For the purposes of decision-making or judgemental criteria, Seni argues that there must be reasons for human action which go beyond desires, purposes, and principles presently held, and that these reasons or ultimate principles must exist irrespective of the person, so that it will be possible to evaluate what a man, a rational moral agent, ought to do, whatever his contingent motivation may be.[18] This concept closely parallels John Rawls's "independent man" of the original position, whom he characterizes as value-free and without knowledge of any social position. Rawls has argued that this "veil of ignorance" allows a man to be without personal desire and personal motivation and, thus, enables him to settle on ultimate principles of justice as fairness.

The most recent emphasis within the activist school in planning has thus been centered upon the search for this justificationist framework which supports a normative principle or decision. In seeking the "grounds for" or the necessary reasons for a judgement in planning, new inquiries in planning theory are opened. It will be shown that a similar emphasis and set of questions are being raised in the parallel school of legal activism.

Legal Activism

Legal activism is similar to planning activism, in that it may be described as a further extension of the normative school of thought. Likewise, it represents an application of normative thought, an activity or action derived from certain normative principles based on a belief in "what ought to be." Legal activism does approach the question of what law and the courts ought to be doing, particularly with reference to competing social interests. Within an activist role, also referred to as a quasi-legislative role, judges resolve particular matters not in isolation, but rather in the context of social, economic, and other considerations, and render decisions in such a way as to permit the law to respond to changing social conditions.

One central concept of the activist school in law is concerned with a "reasonable" or "just" decision in an individual case. Thus, the legal activist is one who seeks a just solution despite the traditional demand of certainty in the treatment of similar cases. The legal rule may serve as an overall guide to a judge, for example, but the activist believes that the demands for certainty (in the application of that rule to the general case) ought to be sacrificed, if the need arises in dealing with an individual case, for the purpose of reaching a just decision.

An additional concept central to the school of legal activism is that which links the law at any one time to the social, economic, and psychological conditions of that same period. Both the effect of legal doctrines on society and the social forces which have produced the legal doctrines are examined within this linkage. This relationship is also studied within an historical framework which deals with rules and laws together with their economic and social history--in other words, with how the law developed as a result of historical socio-economic conditions.

In a series of writings by Roscoe Pound, the concept of individual versus social interests in law has been raised. Throughout history, natural rights of individuals and individual free wills were emphasized over matters of social interest and public policy concerns. It was generally felt that the courts should beware in their consideration of such social interests, particularly where individual interests were being infringed upon in favour of a broader consideration. It has been the influence of competing social interests which has led the courts to employ a somewhat vague conception of policy. The increasing number of social interests, according to Justice Pound, demands observation and study by the lawyer and judge

> in order to ascertain just what claims or demands or desires have pressed or are now pressing for recognition and satisfaction and how far they have been or are now recognized and secured.

Such observation and study, he argues,

> may well bear fruit for social science in general as well as for jurisprudence.[19]

Increasingly, therefore, the influence of activism in law is moving the courts towards action which mediates between interest groups for the furtherance of a so-called "common good." Knowledge of the sociological backgrounds of these competing interest groups is being demanded as well as a perception and awareness of "public policy" within the courts. Legal activism is forcing a clearer recognition that law does act to allocate resources and rejects any denial of such activity. Undoubtedly, there is much criticism directed towards this school, and there is, even yet, a clear hesitation by most Anglo-American judges to address social interests in their reasoning and in their judgements. Legal thinking generally seeks to follow the principles of certainty and the standard rules of law and procedure in addressing legal matters. The legal activist argues, however, that awareness of social interests and public policy does play a role in legal reasoning and should be <u>outwardly</u> addressed rather than approached in this subtle and hesitant manner in current practice.

In contrast to the normative school, this form of legal activism thus emphasizes such concepts as social forces and interests, and directs less attention toward those metaphysical concepts contained in the natural law

doctrine. This sociological emphasis, which reflects the courts' appreciation of current political policies, economic and social conditions, is addressed by Professor Gerald L. Gall in the statement

> When one . . . reads a reported decision of a court of law, one is reading not only the judgement rendered by the court with respect to the facts presented by the opposing litigants, but also that judgement must be regarded, realistically, as reflecting the judge's notion as to what constitutes public policy, the existing state of morality, and the political and economic conditions of the day.[20]

The activist school in law also approaches the question of the actual role of rules of law and of traditional legal concepts in producing court decisions. The activist school and the legal realists hold a certain distrust of this factor as the sole basis for decision-making and look to the attitudes, the values, and the biases of the judge as a human being with a specific background in "explaining" a judicial decision. This is not to argue that rules of law and traditional legal concepts are negated in their role in decision-making; rather, they are merely distrusted as the sole basis of, or reasoning in, judicial decisions. The personality of a judge is offered as an additional factor in determining legal decisions.

Both jurors and trial judges are addressed by the legal realist in the belief that they, as human beings, are affected by forces of the subconscious, by prejudices,

likes and dislikes, emotions, and their own convictions when hearing the "facts" of a case. Jerome Frank, as one of the key contributors to this movement, argues that jurors and judges are invested with an amazing discretion in determining the facts of a case. Where there is disagreement concerning the facts presented by witnesses, there is a wide "grey area" where discretion is applied. Frank and others have argued that the discretionary choice of facts is often reached by the influence of this complex of human emotions, biases, and values.

This realist movement in law, considered here as one branch of the legal activist school, is best summarized by Professor Gall in his description of the other influences and components of judicial decision-making. These include:

> the personality of the judge, the ability of the judge to distinguish, ignore and reinterpret precedent, the political or policy-making role of judges based upon a subjective perception of justice and equity by a particular judge, and the political, social, and economic substructure that defines the context of a given case.[21]

Professor Wallace Mendelson, in his description of a judge's use of discretion, identifies the balance between the amount of discretion and the amount of law considered appropriate in a given case. He states that a tendency towards one area rather than the other determines the difference between an activist judge and a "self-restraining" judge. He describes judicial activism as recognizing that

judges do make policies and should, therefore, make no false pretense of objectivity but should exercise

> their judicial power to achieve social justice--as they see it.[22]

The legal activist school, in general, subscribes to the concept of change, both in law and in society. When examining the legal system within the social context, the influence of one upon the other (law and society) is argued, and the appropriateness of the law vis-à-vis modern social conditions is questioned. From this, social change is examined and legal change is brought forward for consideration--hence, the "action" component of the school of legal activism.

The activist school has also introduced the concept of morality and the law, not in a higher system of rules and principles, as offered by the Natural Law theorists, but, rather, in the concrete dimension of responsible judicial decision. Prior to the influence of the activist school, morality and law were always considered within a hierarchical relationship, with the law conforming to a higher and universal set of moral principles. Within the activist school, however, a different approach to this relationship is offered--namely, the context of morality within legal decision-making. When one argues that judges and jurors are influenced in their decisions and judgements by personal values, convictions and emotions, and not

solely by the specific rule of law applicable in any one case, then there is a place for the application of moral principles here as well, a place that would be denied by the positivist interpretation of judicial decision-making, which argues for adherence to a rigid framework of legal rules and procedures.

An important concept is raised here by legal activists which is applicable to other disciplines, planning in particular. Any attempt at linking morality and concepts of "what ought to be" with the law in the broad sense may be made more difficult by a persistence, and a false persistence, according to the legal realists, in making scientific and value-free that practice which is actually highly value-laden. For the judge whose decision is supposedly resting on a rigid and certain rule of law but which is actually based on a highly discretionary process in which his own personality plays a part, there is great difficulty in even recognizing the application of moral principles, let alone engaging in such application. Therefore, one of the first steps in approaching this relationship between morality and the law is to recognize the role of such principles and human motives in the decision-making process. In other words, it is necessary to remove the scientific mystique or "black box" which covers the true factors involved in any decision. Only then can such principles as "morality," "goodness," and

"justice" be linked solidly and visibly to the decision-making process, whether it be legal or planning, or any other discipline's decision-making process.

Notes

1. Friedmann and Hudson, "Knowledge and Action," p. 7.
2. Hudson, "Current Planning Theories," p. 389.
3. Ibid.
4. Ibid., p. 390.
5. John W. Dyckman, "Social Planning, Social Planners, and Planned Societies," Journal of the American Institute of Planners Vol. 32, No. 2 (March 1966): 71.
6. Hudson, "Current Planning Theories," p. 394.
7. Klosterman, "Normative Planning," p. 39.
8. Cleveland City Planning Commission, Cleveland Policy Planning Report Vol. 1 (City of Cleveland, 1975), p. 9.
9. Stephen Gale, "On a Metatheory of Planning Theory," Papers in Planning No. 1 1975 ed. R. H. Wilson and T. Noyelle (Philadelphia: University of Pennsylvania, Department of City and Regional Planning, October, 1975), p. 7.
10. C. West Churchman, "Morality and Planning," Journal of Design, Method, and Theories Vol. 12, No. 1 (January - March 1978): 173.
11. Ibid.
12. Klosterman, "Normative Planning," p. 43.
13. Ibid.
14. Ibid.
15. Ibid., p. 44.
16. Seni, "Planning Decisions."
17. Ibid., p. 34.
18. Ibid., p. 44.

19. Roscoe Pound, "A Survey of Social Interests," in Jurisprudence: Principles and Applications ed. E. H. Pollack (Columbus: Ohio State University Press, 1979), p. 654.

20. Gall, Canadian Legal System, p. 5.

21. Ibid., p. 12.

22. Wallace Mendelson, The Supreme Court: Law and Discretion (New York: The Bobbs-Merrill Company Inc., 1967), p. 15.

CHAPTER 4

RESOLUTION AND CONCLUSION

CHAPTER 4.1

RESOLUTION

RESOLUTION

This inquiry has thus far progressed from the initial proposition on which this thesis rests (Chapter 1); through the contextual element within which the relevant thought and principles in planning have developed and, indeed, shifted throughout three historical periods (Chapter 2); to an extensive inquiry into the three parallel philosophical schools of thought in planning and in law which have governed the conduct of planning and legal thought (Chapter 3).

The core of this inquiry has focussed upon manifestations of the parallel schools of thought, revealed firstly in planning and secondly in law, as continuing philosophical traditions. The initial proposition, which states that many of the theoretical principles which govern the conduct of planning thought are related to legal philosophical thought, is supported solely by the parallel philosophies of the positivist, the normative, and the activist schools of thought, shown to exist as guiding systems within both disciplines. However, although the initial premise is thus supported, there are further analogies and linkages and, even more important, further pertinent principles which can be deduced from this inquiry.

Within both planning and law, the tradition of positivism is evident in the separation of means and ends in each of the respective processes. In planning, the belief that planners should concern themselves with discovering the best means to achieve the "externally given" ends, or those ends established by the politician, is paralleled in law, where the ends of the just law or a valid law are the concern of the legislator--that is, the politician. In other words, the long-stated rule that "judges do not make but discover law" is a continuing tradition of positivism, analogous to the means-end conception in planning.

Related to this is a further analogous principle within the positivist tradition. This is the emphasis on procedural concerns within both disciplines. The positivist doctrine in planning emphasizes the procedural aspects of planning, that is, the gathering of data and application of technique to determine the best means and actions toward pre-established ends. This concern with procedure is similar to the legal process, where the judicial role consists of a strict application of the particular law to the facts of the case at hand. The emphasis on the procedural aspects of the law over the substantive issues in the legal process is thus analogous to this similar concern in the planning process.

The positivist influence in the legal and planning disciplines has also been manifest in the two models basic to each practice. The rational-comprehensive model in planning can be compared to the deductive model of legal reasoning, again with respect to the emphasized procedural aspects of the respective practices. The stages of identification and selection of the best alternative or plan of action in the rational-comprehensive model are analogous to the stages of identification and selection of the most appropriate rule of law for application to the facts or evidence of the case which will lead to the best or most correct conclusion or judgement under the deductive model of legal reasoning.

The analogous principles within the positivist traditions in planning and in law raised above are quite clear and evident deductions from the philosophical schools of planning and legal positivism. In turning to the normative and activist schools of thought, however, other not so obvious principles and deductions are here revealed.

The split between the two current approaches of rationality and reform in planning, identified earlier in the Klosterman article, reveals one of the major weaknesses in the planning profession today. On the one hand, a number of planners have moved ahead, recognizing the political nature and the need for a normative, political, or ethical approach in their profession, and have merely

assumed their political position or ethical basis to be correct. In this movement, they have in many respects ignored the concept of public planning and have also discarded much of the scientific technique and know-how, once basic to their discipline. This movement, which has been gaining momentum over the past decade, has now brought planning into a precarious, albeit potentially exciting, position. The two historical traditions in planning, namely, reform and rationality, are now strongly split into the two approaches, the other approach pursuing the scientific method and technique orientation and becoming more entrenched in reaction to this opposing normative movement.

The position that planning has reached is described above as being precarious because of its highly normative emphasis devoid of any justificationist or evaluative framework. It would seem that, indeed, this approach is in a tenuous position requiring a framework which is thus far undeveloped for planners; in other words, the scientific, objective, and rational basis for evaluation may no longer be relevant to this highly political, subjective and value-laden approach.

The normative approach in planning, in stressing "what ought to be," is, by the very nature of the planning discipline, present and futures-oriented, and, by being both prescriptive and predictive, it is not usually a

central concern to be evaluative. In law, however, the "what ought to be" approach is highly evaluative. All judgements may be considered evaluative in differing ways, for instance, human behaviour, where "person A ought not to have done X" or "person A ought to have done Y" depending on whether an error of commission or omission is being judged respectively. In the interpretation of statutes, an evaluation can be seen as occurring, in determining the "reasonable" intention of the legislators. In both examples, in most areas of the law, it can be argued that the "ought" being considered is in a past tense, and, hence, evaluation is practically inherent within legal practice. By contrast, a planner's emphasis on what "ought to be" in the present and predominantly in the future, does not naturally encourage evaluative criteria in planning practice.

Given these distinctions between planning and law, an understanding is gained along with an insight into the reason why, in law, a decision or judgement is often argued to be "better" or more "sound" and, indeed, "convincing." Since a judge evaluates on a number of grounds and criteria, the judgement is in many ways considered, if not scientific, at least objective and rational, as it is weighed on such rules of law as a "balance of probabilities," "grounds of reasonableness," and so on. There is a secure belief in the legal system and in a judge because of this set of

criteria which demands that the interpretation and application of the law will not be "unreasonable," the meaning of unreasonable here being directed toward immoral or unjust decisions. This is reflected in the normative philosophy, which argues against the separation of law and morals, and which supports a superior system of Natural Law to which all positive law must conform. It is this set of evaluative criteria which is missing, at least in the concrete sense of the planning practice, from the normative school as it is applied to planning. Therefore, by seeking such analogy between planning and law in the context of the normative school of thought, a challenging position is opened up for planning. It is here that the core of this thesis is revealed.

The position of planning, described above as precarious, has initiated the more recent movement in planning which carries the question of "what ought to be" one step further in asking "why," a question which prompts evaluation and introduces the subject of ethical and moral standards into planning. This has largely been the concern of the planning activist school, as evidenced by the new humanist movement, the linkage by Churchman of morality to planning, and the ongoing debate on the rational justification of planning decisions between Seni, Ozbekhan, and Klosterman, as outlined in the preceding chapter.

There is, then, this search in the realm of moral and ethical knowledge, by a few normative and activist planners, for a framework which supports a normative principle or decision. This search for justification, or seeking the "grounds for" or the necessary and sufficient reasons for a judgement in planning, leads one onto new territory in planning theory, which is closely analogous to the legal process. It has, in fact, been shown that a similar set of questions relating to the justification of morally and ethically based judicial decisions is being raised in the parallel school of legal activism. The debate on the subject of the separation of law and morals closely parallels the set of "reasons" or "ultimate principles" sought in planning, which it is argued must go beyond desires and exist irrespective of the person. This concept is also raised in the legal argument of the linkage of moral criteria to legal criteria.

The requirement of such a set of "ultimate moral principles" raised in both the planning and legal disciplines has been compared above to the absolute first principles required in the rational justification of scientific statements. This set of moral principles would exist to which one could appeal as a moral reason for judging good from bad or right from wrong.

Clearly, this entire field, involving morality, moral norms, standards or rules, and so-called "ultimate moral principles" with concepts of the right and the wrong and the good and the bad, as it relates to planning, marks a critical point in planning theory and practice. It is a field which has only very recently surfaced relative to planning. The newness of these concerns to planners is indicated by the scant number of published papers directed at this subject to date. That concerns with justification and criteria for planning decision-making should arise at this point is an understandable outcome of the more recent traditions in planning influenced by the normative and activist schools of thought. In the movement or reaction from the positivist school, planning also moved away from its original justificationist position found within this school under the protective banner of scientific knowledge. Within the normative period, the planner did not attempt, at least to any extensive degree, to justify the normative statements or perspective adopted, given the realization that the scientific framework was no longer adequate in this highly political and normative approach to planning. In the activist school, a greater emphasis was given to a sound, theoretical basis which, in some ways, became a means for justification of one's position--for example, in the development of the transactive learning approach to planning, the advocacy, and the radical planning approach.

The influence from both of these schools in planning for "what ought to be" has directed planning concerns towards the question of criteria, the "why," or, in other words, towards a rational basis for justifying this normative perspective adopted. It is this position at which planning has most recently arrived. Intentions in planning are thus becoming newly focussed on concerns with the right decision versus the best, and with reaching the fair, the equitable, the good, or the just decision.

CHAPTER 4.2

CONCLUSION AND CONTEMPLATIONS

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This inquiry into the parallel philosophical schools of thought in planning and in law has shown a coincidence of guiding principles and prevailing concerns between the two disciplines. Indeed, many of the traditions and movements within the respective theoretical schools are common to both disciplines. The shifting intentions in planning, away from a sole concentration on beauty and efficiency in the spatial ordering of the city and towards the increasingly prevalent concern with justice, equity, and the good and the right decision, has meant an even closer commonality with these same concerns being prevalent in the legal discipline.

This inquiry has thus prompted further questions to be pursued from the level of knowledge attained here. Within the planning context, there exists, as yet, only a limited understanding of the concepts of justice, equity, fairness, and right which are currently being raised. Given the parallel philosophies, movements, and traditions and the coincidence of the key principles which govern planning and legal thought, a clearer understanding of these concepts and their original interpretation in the legal discipline will allow an improved response to these central concerns in

the planning discipline. Further fundamental thinking is thus required which links the relevance of the legal notions of justice and equity to these very same concerns presently held and considered vital to the future of city planning.

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