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LAND PLANNING AND DEMOCRATIC PURPOSES

*James S. Savage**

Introduction: The Land-Oriented Society

The common law of England that we received in this country at the end of the eighteenth century was land oriented, affording great protection to land-owners — a not surprising development in the light of English history. Though nineteenth-century American jurists were presented with problems that would have seemed strange and unfamiliar to their English colleagues — thus affording them a chance to be more creative — they, like their English brethren, were, and perhaps still are, reluctant to change this basic predilection of the law. Until the start of the twentieth century, it was a generally accepted notion both in England and in this country that government which exercises the least control over the lives of its citizens is the best government, a view which was certainly compatible with the land-orientation of English and early-American common law and legislation. The new century offered a more receptive climate to the doctrine that it is possible, and even desirable, to determine goals in a democracy and to plan governmental action so as to achieve them.[1]

A land-oriented society, if it is going to consider planning as a feasible thing at all, will entertain the possibility of planning land use. These may be very simple things at first, limited plans to accomplish a specific purpose such as early laws designed to reduce the fire hazards in crowded tenements.[2] In time it becomes apparent that a number of purposes can and should be achieved by planning on a more comprehensive scale. Planning of this sort was first introduced in this country in 1916 by a New York City zoning ordinance which, among other things, set out residential and business districts.[3] The New York Court of Appeals affirmed the action of the city,[4] and in 1926 when the United States Supreme Court gave its approval[5] to a similar plan, any basic constitutional objection to land-use, in the nature of comprehensive zoning at least, seemed resolved in its favor.

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1 It is entirely possible that this doctrine received a more favorable welcome in England than in the United States. Late-nineteenth and early-twentieth-century political leaders in England had been influenced to a considerable degree by Jeremy Bentham and his doctrine of reform through legislation. EVERETT, *Bentham in the United States of America*, in JEREMY BENTHAM AND THE LAW 185, 199 (1948). However, a discussion of planning in England is not within the scope of this discussion.

2 1 METZENBAUM, THE LAW OF ZONING 7 (1955).

3 Lincoln Trust Co. v. Williams Bldg. Corp., 299 N.Y. 313, 128 N.E. 209 (1920). See N.Y. GEN. CITY LAW §§ 20 (24), (25).

4 Lincoln Trust Co. v. Williams Bldg. Corp., *supra* note 3; Biggs v. Steinway & Sons, 229 N.Y. 320, 128 N.E. 211 (1920). See also Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1955).

5 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

6 *Id.* at 397.

The Court said:

> Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.[6]

It should be noted, however, that certainly not all conceivable constitutional problems had been solved. Nevertheless, by the middle of the present century, planning for land use had become an accepted part of municipal law.[7]

I. Democratic Purposes

One of the most provocative and recent statements in this area has been put forward by Norman Williams, Jr., Director of the Division of Planning, Department of City Planning, New York City. In an article entitled "Planning Law and Democratic Living,"[8] Mr. Williams asserts that comprehensive land planning should be recognized not only for the physical, geographical and civic reasons now motivating most communities, but also for the purpose of breaking down racial, ethnic, and economic barriers to the end that democratic living — at least as Mr. Williams understands it with a connotation of equality without regard to background or economic position — can not only be achieved but *must be achieved* in order to keep a democratic government alive and strong. In his desire for more planning Mr. Williams has company, as reference to the current literature on the subject would seem to indicate, but all may not be willing to travel along the planned road to achieve the goals Mr. Williams has in mind.[9]

Though democratic purposes are not the same to everyone, most would agree that they include some broad generalizations about liberty, freedom, justice and equality, just as most would agree that the Declaration of Independence and the Bill of Rights express the common purpose to achieve these democratic ends. However, attainment of democratic purposes is not an easy matter; historically the people in this country have felt that education, religion, and morality offered the best hope. When private citizens, or the government of the state or nation, appeared ready to defeat the attainment of democratic purposes, the citizenry seemed inclined to put faith in a vigilant judiciary or sometimes even in self-help. It did not appear to people in the last century that positive governmental action could achieve democratic

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7 1 McQuillan, Municipal Corporations § 1.118 (1939). Current interest in the problem is reflected in the curricula of some major law schools now offering courses or seminars in land planning: University of Chicago Law School; Northwestern University School of Law; Indiana University School of Law; Harvard Law School; Valparaiso University School of Law. For the most detailed modern statement of the problem, see *Symposium — Land Planning in a Democracy*, 20 Law & Contemp. Prob. 197 (1955).

8 20 Law & Contemp. Prob. 317 (1955).

9 See Haar, Land Planning Law in a Free Society (1951); Kramer, *Values in Land Use Controls: Some Problems*, 7 Am. U.L. Rev. 1 (1958); Sullivan, *Administrative Procedure and the Advocatory Process in Urban Redevelopment*, 45 Cal. L. Rev. 134 (1957); *Symposium — Metropolitan Regionalism*, 105 U. Pa. L. Rev. 439 (1957); *Symposium — Area Development*, 28 Rocky Mt. L. Rev. 453 (1956); McDougal, *The Influence of the Metropolis on Concepts, Rules and Institutions Relating to Property*, 4 J. Pub. L. 93 (1955); Stone, *The Myths of Planning and Laissez Faire: A Re-Orientation*, 18 Geo. Wash. L. Rev. 1 (1949).

purposes. It does not seem that way to some people at the present time. When, therefore, someone suggests land planning for the achievement of democratic purposes, and when land planning itself takes on this ambitious project, it would seem that it offers an opportunity to evaluate the function of positive governmental planning in all areas as a device to implement the purposes thought to be essential to democratic living.

When a small homogeneous group becomes a large hetrogeneous group, all of the problems of group living are so magnified and complex that in many cases they have required entirely new machinery to handle them. Until the start of the twentieth century most social problems were handled either by courts or by legislatures and pretty much *after* the problem had arisen. After all, the common law has always come into a situation that has already been created, and the pattern or theory of legislation in the area preceding the current century was more one of correction than of prevention. We are now faced with a proposition which says that some, perhaps all, of our social problems can, by planning, be avoided, simplified, or the effects made less severe, and all in advance. Land planning offers, in microcosm, an opportunity to gauge strong points as well as pitfalls, for planning in many more areas of living may well be just around the corner.

II. Philosophical Guidelines

It would be helpful in considering the objective of achieving democratic living by affirmative land planning if there were some philosophical guidelines. The important social historians, the political philosophers, the ethical philosophers, and the legal philosophers of an earlier time who supplied much of the theoretical guidance in the development of our democracy and society had little or nothing to say about democracy and planning, let alone democracy and land planning. This is understandable enough on the basis of modernity alone.[10] The current group of scholars is only just now concerning itself with this subject; their expressed opinions, though thoughtful, are in many respects inconclusive.[11]

It would also be helpful if land planning had been the subject of debate and controversy in this country, for then it would be a matter of common concern; it would be possible to ascertain some general common consensus as to its propriety, necessity, or desirability. Few people have an interest in land planning unless it is planning of the sort that stimulates the imagination such as the Tennessee Valley Authority or similar large and dramatic illustrations. Persons with property interests invaded or threatened may find that they have a greater stake in zoning than they had previously realized. The same is true with respect to planning, if this term is used to include governmental action designed to protect existing property interests as well as to

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10 Metzenbaum, *The History of Zoning — "A Thumbnail Sketch,"* 9 W. Res. L. Rev. 36 (1957).

11 Kramer, *Values in Land Use Controls: Some Problems,* 7 Am. U. L. Rev. 1 (1958); McDougal, *The Influence of the Metropolis on Concepts, Rules and Institutions Relating to Property,* 4 J. Pub. L. 93 (1955); Stone, *The Myths of Planning and Laissez Faire: A Re-Orientation,* 18 Geo. Wash. L. Rev. 1 (1949).

further public purposes. A neighbor's attempt to turn a garage into a photographic studio may harm a man's existing interest in his residence, but a determination by the planners of his community that land adjacent to his would be suitable for a community recreational area may be just as harmful. But in general, there is no indication of a common attitude on the subject of planning. This lack of interest is, of course, always a matter of difficulty in a democracy. As Barbara Wootton has said,

> Everybody knows that the democratic procedure works best when the questions to be settled are within the everyday experience of those to whom they are referred, and when those who elect understand the business entrusted to those who are elected.[12]

Land planning as a consequence lacks, on the one hand, philosophical guidance, and, on the other hand, popular directives from the persons most concerned.

If it is true that the thought and action of a society — the more or less collectively-arrived-at consensus of the community — is a reflection of the philosophical thinking of a preceding day, then it should be helpful to examine some middle and late-nineteenth century views on democratic living. These views — although certainly not made applicable to land planning by their authors — have provided some of the spadework of modern attempts to achieve democratic purposes through the use of land planning..

James Bryce in his *Modern Democracies* has stated in his general conclusion that the modern experiment in popular government had justified itself.[13] That although no form of government could revolutionize or perfect human nature, and that all forms of government had their characteristic defects, the defects of democracy had been less ruinous than those of other forms.[14] Bryce found much to praise in democracy both as a political expedient for the elimination of suffering, fear, and injustice as well as an agency for the positive stimulation and cultivation of the cultural lives of individuals.[15]

John Stuart Mill argued that democracy's superior virtue is the fact that it calls into activity the intelligence and character of ordinary men and women.[16] That in order to best do this it is necessary to afford to ordinary men and women considerable liberty. Many Americans would accept this as a starting point in any discussion of democracy and in the pre-planning era this was certainly the dominant theme in political theory. Liberty, Mill asserts, ". . . requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."[17]

When an individual attempts to exercise his "liberty" to work, however, he may meet governmental interference in the direct form of restrictive quali-

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12 WOOTTON, FREEDOM UNDER PLANNING 164 (1945).
13 2 BRYCE, MODERN DEMOCRACIES 527-609 (1921).
14 *Ibid.*
15 *Ibid.*
16 Mill, *On Liberty*, in 43 GREAT BOOKS OF THE WESTERN WORLD 267 (Hutchins ed. 1952).
17 *Id.* at 273.

fications, as in law or medicine. On the other hand, when he wishes to exercise his liberty of living wherever he wants in the United States, it would seem that governmental restraint is normally absent. Thus, no state can keep residents of other states from entering and becoming citizens.[18] During the thirties some states made efforts to keep out persons whom they thought possessed the potential of becoming objects of public charity, but this action was quickly struck down,[19] and in general the freedom to migrate has been an accepted liberty. But even though a man is free to move from state to state or city to city, is he also free to move from place to place within the confines of the community without legal restriction? Until somewhat recently — until the dawn of the planning era — the answer had been yes, if he could supply the necessary money to purchase in the open market. A man who lived on the wrong side of the tracks could, if he was able to garner the necessary money, move across the tracks with the blessings of the community, provided he were white and gentile. No one at that time considered that land planning was, or should be, anything more than dividing the city into residential and business district, much less a positive vehicle for eliminating racial or religious segregation or discrimination.

This particular approach to liberty of action had dominated much of the thinking in the American communities and most, if not all, of the geography of our cities and towns was determined by this theory. It did produce some spectacular results (magnificent residential areas for example) and some pretty unfortunate ones (where residential areas were vacated and allowed to become tenements) as any cursory inspection of urban America will reveal.

III. Self-Protection

The restrictions that were imposed in pre-planning days were for the protection of existing property interests. Restrictions of this sort — e.g., to keep an industry from invading a residential district — were not in those times the subject of too much general concern. The "American Credo" provided that everyone had an opportunity to acquire property interests as a result of hard work, thrift, and careful stewardship, and anyone who acquired property would value the very restrictions that insured the widest freedom of use to owners. Free speech, free press, free assembly, and free worship were, and still are, touchy matters in this country and any law or governmental action curbing them brought immediate response. When, however, it came to something like the yet-undefined rights in such things as a job, or where one could live, or how much (or of what quality) one could eat, it did not in those days seem to many persons that these were "significant" rights. The deprivation of these "rights" were facts of life and were accepted as such. It was assumed that the government (federal, state, or local) would interfere when these matters got out of hand, when destitution or death loomed as the

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18 U. S. Const. art. IV, § 2.
19 Edwards v. California, 314 U.S. 160 (1941).

only remaining solution, so that food and clothing and housing were furnished on a desperation basis. There were dissenters from this proposition — some of them quite articulate — but in general it was accepted.

Even prior to the first attempt at comprehensive zoning, another of Mill's ideas had come to be generally accepted.

> . . . to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used by physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[20]

In community areas where the prosperous were busy building nice residential neighborhoods it seemed to them that this dictum of Mill's was especially pertinent. Even as they sat back to enjoy the fruits of their industriousness and thrift they never quite managed to overcome a concern over two things: one of their neighbors might sell his property to an "undesirable," or a businessman might well decide that that particular area of the community would be ideal for a business establishment. What made this particularly worrisome was the fact that the *legal* remedies to avoid or restore were cumbersome and expensive. As to the first problem, adjacent landowners might agree among themselves, and their successors, that they would use, or not use, their land in a certain manner, or that they would not sell or permit "undesirables" to own the property.[21] In order for a private agreement of this sort to be truly effective, however, it must be susceptible of judicial enforcement.[22] As to the second problem, landowners faced with a threatened or actual industrial invasion may be able to establish the commission of a common-law nuisance and receive either financial remuneration by way of damages, or an injunction to prevent it from happening.[23] Both of these remedies depend on factors that make them something less than perfect: (1) going to court is almost always a time-consuming process which means that the private agreement, now in breach, or the alleged nuisance, may continue for some time resulting perhaps in an increased depreciation in value, and (2) the level of prediction in the common law, always a variable, is certainly not high when it comes to the definition of a nuisance, and the outcome is speculative at best; while in the breach-of-contract case the determination of adequate damages is troublesome and unpredictable, (3) going to court is expensive whether the claimant wins or loses, (4) the piecemeal results that flow from a series of judicial decisions, decided after the alleged wrong has occurred, would not lead to a uniform general plan.

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20 MILL, *op. cit. supra* note 16, at 271.

21 McDougal, *The Influence of the Metropolis on Concepts, Rules and Institutions Relating to Property*, 4 J. PUB. L. 93, 113 (1955).

22 *But see* Shelley v. Kramer, 334 U.S. 1 (1948), holding that such private agreements, though valid, are unenforceable, when based on racial discrimination.

23 *Id.* at 112.

IV. Affirmative Planning

Because these fears were so often well-grounded, there came among those concerned, principally residential property owners and city officials, general acceptance of the doctrine that the problem of land use must be handled as an exercise of the police power of the state and handled, as far as possible, in advance. Only by permitting agencies of the state to do some limited planning (for that is all that was contemplated initially) and, more important, to enforce the planning, would it be possible to protect property interests. Thus, there evolved the restrictive-type zoning ordinance that has become the common pattern in almost all American communities today.

In the thirties the American Credo started to take on a new meaning, a meaning that is not as yet completely defined. The proposition that intellectual, political, and moral freedoms were the only "significant" ones was challenged from many sides. It hardly seems necessary to review the developments that led to the now fairly general acceptance of the thought that man needs economic protection as well. If the thirties did nothing else, they created a climate favorable to the rejection of the notion that of all the various economic interests of man, only the vested property interest is worthy of protection. At the time when a substantial number of people did not have such property interests, as the old English-American law defined property, there gradually came into existence a recognition that a man might have, as his only economic or property interest, his job, his freedom from injury, his freedom from illness, and his freedom from the infirmities of old age. Out of this realization came legislation in the field of labor relations, compensation for employment injuries, compensation during periods of unemployment, old age protection, and the regulation of working conditions, to cite only a few examples. The unplanned operation of the market place did not suffice to cover these situations. As early as 1915 Mr. Justice Brandeis was noting this trend on the part of American courts.

> Political as well as economic and social science noted these revolutionary changes. But legal science — the unwritten or judge-made laws as distinguished from legislation — was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently eighteenth-century conceptions of the liberty of the individual and of the sacredness of private property. Early nineteenth-century scientific half-truths, like 'The survival of the fittest,' which, translated into practice, meant 'The devil take the hindmost,' were erected by judicial sanction into a moral law.[24]

This change in the notion of the proper function of government did not go unnoticed by the land planners. The transition from a theory regarding man as a free individual, economically speaking, to a view placing him in his economic context and taking affirmative steps to bring about results thought to be desirable for him, had its effect on planners. This, as Brandeis called it, "clamor for social justice,"[25] could not help but influence land planning.

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24 Brandeis, The Curse of Bigness 318-19 (1915).
25 Konefsky, The Legacy of Holmes and Brandeis 81 (1956).

Mill's dictum about self-protection, which was the original *raison d'être* of zoning, became inadequate in the eyes of some planners, although certainly not all planners. Bryce's ". . . agency for the positive stimulation . . ."[26] seemed more appropriate. The early land planners however were not so much concerned to put man into an economic context as to put him into a geographic and civic one, to regard him as a user of schools and churches, of streets, of utilities, and even as a potential fire hazard; in short, to promote efficient and inexpensive living. This in itself was a step away from the negative, self-protective thinking of the past. Mr. Horack and Mr. Nolan say:

> Although the early cases placed great emphasis upon the power to regulate land use for the protection of the individual — particularly, the residential use of land — the current emphasis is to justify land use control not for the protection of the individual but for the benefit of the entire community. Thus, Walter Blucher points out that: '. . . As time goes on, however, and as the zoning process has been refined, it becomes increasingly important that the zoning ordinance be used as one of the tools to give effect to a community plan. . . . Through the zoning ordinance affecting private property, you can help carry out a plan without paying any compensation, but to be really effective it must be a positive and affirmative document, rather than a negative document.'[27]

This change in attitude with respect to the ends to be accomplished by zoning ordinances, an observable, historical change, is a reflection of the greater evolution in the philosophy of land planners — and this change seems to be the heart of the matter. The shift from a negative approach, protecting only vested property rights, to a positive approach fostering new economic rights, means that, of necessity, there will be more and more restrictions on individual liberties for the general good. Since the common good is not readily discernable, it means that some one or some political body will have to direct affirmatively and execute an expanding definition of the common good in the future. Though it is conceivable that democratic purposes could be achieved by private agreements,[28] the bulk of the affirmative planning must be done by officers of the executive branch of the government acting under necessarily broad and vague standards.

If the present-day planners, like their immediate forebearers, are content to think of man in terms of geographic and physical contexts, will they and

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26 2 BRYCE, *op. cit. supra* note 13.

27 HORACK AND NOLAN, LAND USE CONTROLS 64 (1955).

28 The contracting parties could desire a certain result thought by them to be compatible with democratic living. A lending institution could finance a housing project and require the owner to offer his housing without regard to race or creed. The owner-builder would have to accept financial aid on this basis or reject it from this particular institution. The repayment schedule may make it imperative that economic equality not be granted to the occupants. This method of achieving some democratic purposes by private agreement would seem to afford the most individual liberty of choice to contracting parties. One of the difficulties with this theory of affirmative planning on a private-contract basis is that, in the last analysis, these contracts may have to be submitted to a court for interpretation and enforcement. It has been noted already that courts are in no position to do long-range planning and it may be difficult for a court to fit the particular agreement into existing concepts of law, and to do this in a law suit that may well present the usual panoply of procedural problems, matters of evidence, and all the problems normally associated with a breach-of-contract action. All this may make the use of such contracts a limited one.

their successors, in the light of the changing trend, remain content with this alone? When once it is conceded that the future growth of both urban and rural areas should be planned to produce cities and areas free of traffic dangers and congestions, free of physical dangers and nuisances, free of moral hazards, and offering light, air, space, and even aesthetics,[29] is it axiomatic that then it may be necessary to go further and insure to everyone in the community not just an equal opportunity, but an equal place? Attempting to afford this economic equality may make for a dead-level mediocrity that can in its own way be harmful to a democracy.

If this becomes the objective, then it is going to present some new issues. It has been established that efforts to afford self-protection — the old zoning rationale — must now, if based on race or creed, be done away with.[30] But what about what Mr. Williams calls "economic segregation"?[31] Is not zoning based on size and density restrictions, that keep persons, because of their economic means, out of certain area as invalid as the governmental action designed to keep persons, because of race or creed, out of a given area?[32]

Is there, then, an obligation on the planners to eliminate this so-called economic segregation and plan so that an equal share of the living space in the community is available to all without regard to economic ability? To Mr. Williams, these "liberties of living" may be the new civil liberties of this era. Accordingly, he is disturbed by the restraint of the Supreme Court in this area, when he says:

> What is particularly serious is that in this area the machinery of democratic government is itself often used successfully for anti-democratic ends — and that courts, constitutional lawyers, and the leaders of democratic thought and action remain unconcerned. Thus in the last few years, the Supreme Court has repeatedly refused to pass on grave constitutional questions arising in connection with regulation of the physical and social environment. The regulations involved in such cases have included: the exclusion of Negroes from a redevelopment project which had had the benefit of public donation of about 20 per cent of the site, eminent domain to obtain the rest of the site, and partial tax exemption; a requirement of three acres of land for all homes built in a given district; a mininmum building-size regulation (varying according to the number of stories and the presence or absence of an attached garage) which applied uniformly throughout an area of some 25 square miles, and which would apparently exclude about 70 per cent of the population from buying permanent new houses in such area; the exclusion of Negroes from previously built public housing projects; the exclusion of churches from residential districts; and the restrictions in the alien land laws on land ownership by Japanese-Americans.[33]

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29 Note, *Esthetic Zoning — The Trend of the Law*, 7 W. RES. L. REV. 171 (1956); 3 VILL. L. REV. 117 (1957).
30 Shelley v. Kramer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).
31 Williams, *supra* note 8 at 343.
32 *Ibid.*
33 *Id.* at 349.

Mr. Williams asserts that "it is a major premise of American democracy that familiarity, at least in the context of economic security and decent living conditions, breeds not contempt but mutual respect."[34] He contends that current developments "are tending to reduce the opportunities for those regular contacts which may result in spontaneous familiarity between different racial, ethnic, and economic groups," and he believes that this has an ominous implication for the future of democracy.[35] In short, Williams sees planning as an affirmative proposition that contains an imperative to plan and promote a general doctrine of state interference for the good of everyone, although he does not spell out how planners are necessarily to recognize what is good for everyone.[36]

What will happen if this affirmative governmental control over development of physical and social environments comes to pass? What if the planning does not work so well to accomplish democratic living? Persons not in sympathy with planning, or persons governed entirely by self-interest, may obstruct such a development of the community by their refusal to sell land, or buildings, or their labor, for racial, religious, or even economic reasons. The sanctions and penalties existing in present-day zoning and planning are not thoroughly effective.

> Seldom, except in the larger more impersonal metropolitan areas is either remedy (fine, imprisonment, or injunction) used. The owner is not considered a criminal and the cost of remodeling or removing structures seems confiscatory; therefore public support for such action is lacking and prosecution becomes politically inexpedient. Compliance with the ordinance thus is usually voluntary rather than a matter of official enforcement.[37]

If planning becomes completely affirmative and "democratic" how will these sanctions, now mostly ineffective, work? Once the economically restrictive zoning laws are removed, if a man cannot live where he wants to live at a price that he is able to pay, because of private restrictions, then are his constitutional rights being invaded and, if so, how will we afford him protection? Will it become necessary to have such a complex of laws, regulations, inspections, and administrative tribunals to see to it that these rights are not infringed? If this becomes necessary, then is it not possible that planning will become so expensive that we shall have to forego it entirely?

Comprehensive planning of the type envisioned by Mr. Williams requires so many controls to prevent evasion that in the end the socialist prophecy may be fulfilled, that planning without government ownership is impracticable. This would mean government ownership of land, of buildings, and at least complete domination of the building trades. At the present stage of American political thought it is more likely that planning will founder on the rocks of private vested interests or be wrecked by the exploitation of concentrated governmental powers.

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34 *Id.* at 348.
35 *Ibid.*
36 *Ibid.*
37 HORACK AND NOLAN, *op cit. supra* note 27.

Mr. Williams' position with regard to comprehensive land planning can be summarized as follows:

> It has not been generally realized that in many instances the problems arising in this field of constitutional law are closely akin to those involved in civil liberties law, and call for similar attitudes toward the exercise of governmental power.
>
> . . . What is needed is a conscious over-all strategy for integration into a more democratic society. Such a strategy would be concerned with *analyzing, understanding,* and *guiding* action in wide areas of American life — in fact, everything connected with the development of the physical and social environment, with special emphasis on planning and housing and relevant fields of law.[38] (Emphasis added)

Such a position has not been without its critics. Mr. Julius Stone, prominent Australian lawyer, law teacher, and legal philosopher, and co-author of *Law and Society*[39], states the argument against all total planning without necessarily committing himself to one side or the other.[40] Three of the arguments against planning coincide, almost perfectly, with Mr. Williams' last quoted statement of the case for comprehensive planning. Mr. Williams says, "analyzing," and Mr. Stone, in what he calls "The Argument of Ignorance," says, ". . . that the kind of knowledge which is available to social scientists is not the kind of knowledge on which action can safely or effectively be taken to affect the social complex as a whole."[41]

With regard to Mr. Williams' term, "understanding," Mr. Stone sets out the argument which he calls "The Argument of Conflict, Confusion and Instability of Objectives." Here, he says,

> Its tenor is that no amount of knowledge, and no amount of wise and enlightened leadership, can authoritatively settle the objectives which a society should set for itself. We are here, the Argument runs, in the field of the normative, the field of values; and when the men and women of a society are divided in the basic values they seek, no overall planning is possible which will leave the society free.[42]

With regard to Mr. Williams' term, "guiding," Mr. Stone sets forth "The Argument of Serfdom."

> Planning would inevitably concentrate far more conscious power in the hands of the planners than representative institutions, let alone the electorate, could control.[43]

These are strong arguments though negative in character. It is possible for both approaches to be attractive depending on a great number of relevant variables. As Robert Kramer said:

> Certainly we cannot afford not to have some land planning in a democracy. But the nature and extent of that planning — its goals

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38 Williams, *supra* note 8 at 350. In this connection, see Note, *Is There a Civil Right to Housing Accommodations?* 33 NOTRE DAME LAW. 463 (1958).

39 Stone & Simpson, Law and Society (1949).

40 Stone, *The Myths of Planning and Laissez Faire: A Re-Orientation,* 18 GEO. WASH. L. REV. 1 (1949).

41 Williams, *supra* note 8, at 350.

42 Stone, *supra* note 40 at 10.

43 *Id.* at 8.

> and methods — are still largely unsettled, even though the needs daily become more urgent.[44]

V. Conclusion

We will continue to have planning because we need it. What safeguards, then, can be placed around it so that, on the one hand it does not drift into socialism nor, on the other, produce such a dead-level mediocrity and nothingness (in the name of democratic living) that a skepticism, which can so easily lead to some unfortunate (if not fatal) political thinking and action, may grow up around the entire process?

There are a number of things that planners can and should keep in mind:

(1) Planners must, if we are to have democratic living, not forget that they are planning for indeterminate ends. That in planning for the present in a democracy, they do not forget that the future may have different goals and objectives. It should not always require a Holmes to point out that historical continuity is a necessity, not a duty. Planning is a means to the ends of democracy and not an end itself, and what the ends of planning may be will change from generation to generation. Or, as Mr. Stone has put it, planners should not try to do their duty once and for all.[45]

(2) Who will check the checkers, or plan for the planners? Barbara Wootton reminds us:

> The problem of freedom under planning thus resolves itself in the end into a circle that can be either vicious or virtuous: it is the citizens of a wisely planned society who are least likely themselves to fall victims to the dangers of planning; and vice versa. And all around that circle it is the responsible, the alert, the active, the informed, and the confident men and women in the street who hold the key positions.[46]

(3) Planners must learn to work with "middle principles," or stated somewhat differently, to learn when to temper principle with expediency in the light of the social conditions existing in the community. Even Mr. Williams admits that,

> So far as the special (and basic) problem of integrated residential areas is concerned, tactically it may be wise to concentrate first on the integration of groups whose differences, cultural or otherwise, are not too great; . . . ."[47]

(4) Planners must use rational methods with those for whose benefit the planning is being carried out. This involves not only having a wise electorate but in selling the electorate on the propriety of the planning. If these persons cannot be approaced rationally then they cannot be approached at all, for a democracy, with its heavy citizenship burdens, requires a rational electorate.

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44 *Symposium — Land Planning in a Democracy, Foreword*, 20 Law & Contemp. Prob. 197, 198 (1955).

45 Stone, *supra* note 40 at 49.

46 Wootton, Freedom Under Planning 180 (1945).

47 Williams, *supra* note 8, at 350.

(5) There must always be adequate judicial review at every step of the process. In any planning program there will be temptations to take short cuts. After all, we have been taught often enough that power corrupts. It is sometimes easier to do something efficiently by infringing another's freedom than by doing it in the "right way." If this means that there must be more accessible courts and fewer jammed dockets then they must be made available.

(6) Planners must be able and willing to plan for diversity as much as they plan for uniformity. John Stuart Mill once said:

> It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating. . . .[48] Mankind speedily become unable to conceive diversity, when they have been for some time unaccustomed to see it.[49]

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48 MILL, *op. cit. supra* note 16 at 297.
49 *Id.* at 302.