Planning Law and the New Frontier

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I.

Planning has given rise, during the past decade or two, to innumerable books in the spheres of government and political science, of economics, and of sociology. Planning commissions and boards have become features of our community life, from the local to the national scale. The plans which these agencies devise are put into effect through various types of laws. Yet nowhere can American casebooks, treatises, digest or encyclopedia articles on the broad aspects of planning law be found.

The situation with respect to planning is not unlike that which characterized the beginnings of administrative law, of labor law, of air law, or even of corporation law. All these subjects marked innovations in the law curriculum and in legal classification. The question is not whether one favors or opposes administration or aviation or planning. The question is whether the rules governing activities concerned with these fact situations are to be organized in a rational way, so that they may be made intelligible to persons engaged in the study or practice of contemporary legal problems.

Thus far, discussion about planning has been devoted, for the most part, to the desirability or non-desirability of planning in government. But there can be no real issue there, since planning is nothing more nor less than the application of intelligence to the attainment of certain ends.1 Whether certain specified ends or goals are desirable is debatable, as are also the means or methods proposed in reaching them; but the intelligence function itself is not subject to rejection, and the techniques which it devises, in order to reach the goals considered worth-while, cannot be left outside the law. Particularly is this true with respect to

1 "Planning is . . . the 'intelligence function' of government." McDougal and Haber, Property, Wealth, Land: Allocation, Planning and Development 457 (1948).
government planning, where not only legislation but also administrative and judicial determinations of the legality of its measures are essential to its effectiveness. The issue in law is always whether the plans are conducive to justice.

One factor which has given rise to government planning, as presently understood, is the growth of corporations and corporation law. Perhaps corporations would have developed on a wide scale, in connection with geographical explorations, commerce, and the exploitation of newly discovered resources, even if there had been no industrial revolution, with its inventions of machinery, labor-saving devices, and the assembly line. Speculation upon that point is idle now, because of the fact that through the law, corporations have been fostered to a degree where they have often become powerful enough to challenge the government itself. The important element in the growth of the corporate revolution is the fact that it has been accomplished in large part through government intervention, and, indeed, could not have reached its present significance without that intervention.

The question of whether or not to plan is quite distinct from the question of government intervention. There has been government without plan, but there has perhaps never been a time when government has not intervened in private affairs in one way or another, nor could there very well be, since the very function of government is regulation and protection. Self-regulation or self-government, under God, is, of course, the highest type of human action, and is the goal of mature men. The degree of responsibility which a people attains through self-government is a mark of its maturity. Few peoples, and not all adults, have reached an advanced point in their development along these lines. To the extent that they fall short, government is necessary to protect others from their deficiencies. Furthermore, in an economy like ours, where no one can raise and make, through his own efforts, all that he needs to eat and to wear,
some regulation is necessary to keep the channels of commerce and of communication open. The tariff is one of the earliest manifestations of government regulation of the economy, since customs duties are not now prescribed for revenue only. Copyrights and patents are illustrations of government intervention in what would otherwise be a free market in ideas. The system of land ownership in effect in any given place involves a different type of activity under governmental authority. The real issue is whether the amount of intervention interposed by the government is properly limited and determined according to a fair and reasonable plan, or whether it is so far without plan that the strong may secure, with the help of the government, unfair advantages at the expense of the weak, whom the government should protect.

The use of the term planning with reference to law seems to have begun in England with the enactment of the Housing, Town Planning, etc., Act, 1909. This Act was a revamping of the housing provisions which were included in the Public Health Act of 1875, The Housing of the Working Classes Act of 1885, and especially in the Public Health Acts Amendment Act of 1890. The necessity for some improvement in housing conditions for workers, brought to the cities and towns for employment in factories and mills, had become acute during the latter part of the Nineteenth Century. The statute of 1890 was the first of several acts, culminating in the 1947 Act, which have served to focus attention on the complex legal problems, such as compensation to former owners of nationalized property, which have arisen in making it effective. Several books on the law of town

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2 9 Edw. VII, c. 44.
3 38 & 39 Vict., c. 55.
4 48 & 49 Vict., c. 72.
5 53 & 54 Vict., c. 59.
6 53 & 54 Vict., c. 59 (1890); 9 Edw. VII, c. 44 (1909); 9 & 10 Geo. V, c. 35 (1919); 15 Geo. V, c. 16 (1925); 22 & 23 Geo. V, c. 48 (1932); 6 & 7 Geo. VI, c. 5, c. 29 (1943); 7 & 8 Geo. VI, c. 47 (1944); 10 & 11 Geo. VI, c. 51 (1947).
7 10 & 11 Geo. VI, c. 51.
and country planning have been issued by British law publishers, and their frequency has increased considerably since the enactment of the important 1947 statute. In April, 1948, a new *Journal of Planning Law* began publication.

In this country, interest in planning for municipalities became organized with the meeting of the first National Conference on City Planning of 1909. The broader aspects of planning for efficiency in industrial management were developed under the impetus of Frederick Winslow Taylor, whose views were at first opposed by organized labor. His proposals found a sympathetic hearing with Louis Brandeis,

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10 Proceedings reported in S. Doc. No. 422, 61st Cong., 2d Sess. 57 (1918).

however, who advocated their adaptation to the operation of the railroads, particularly. The Gilbreths' work on efficiency methods followed a similar line. Control of waste in the utilization of natural resources, such as water, timber, and petroleum, soon became of national importance under the term of conservation. Eventually, associations for the advancement of management were organized which encouraged experimentation in industrial planning. The principle of the assembly line, which was developed chiefly by Henry Ford, resulted in increased production and high wages through specialization which provided the enormous output of machinery that characterized World War II. The study of planning in the social sciences received new impetus with the organization of the Social Science Research Council in 1923. By 1934, organizations of planning officials had brought together much experience in various planning projects, which has been made available to the Federal Government through the National Planning

12 BRANDEIS, SCIENTIFIC MANAGEMENT AND RAILROADS (1912) (part of a brief submitted to the Interstate Commerce Commission).

13 FRANK B. AND LILLIAN M. GILBRETH, FATIGUE STUDY (1916); APPLIED MOTION STUDY (1917). FRANK B. GILBRETH, PRIMER OF SCIENTIFIC MANAGEMENT (1912) (Intro. by Louis D. Brandeis).

14 Society to Promote the Science of Management, 1911-1915; Taylor Society, 1915-1936; Society for Advancement of Management, 1936-. The American Management Association was organized in 1922 by merger of the Industrial Relations Association, the National Association of Corporation Training, and the National Personnel Association.

15 See FORD, MY LIFE AND WORK (1922).

16 Composed of the American Economic Association, the American Political Science Association, the American Sociological Association, the American Statistical Association, the American Psychological Association, the American Anthropological Association, and the American Historical Association.

17 The National Planning Association, 1934, and the National Conference on Planning, 1935-1942, which superseded the National Conference on City Planning.

The National Research Council was established in 1916 at the request of the President under a charter from the National Academy of Sciences. The Council of National Defense was established in 1918. The National Planning Board of the United States was established in 1935. S. Rep. No. 974, 74th Cong., 1st Sess. (1935); Hearings before the Committee on Public Lands on H. R. 10303, 74th Cong., 2d Sess. (1936). The National Resources Board, the National Planning Board, and the National Resources Committee became the National Resources Planning Board in 1939.
Board and its successor organizations since 1935. The need for stockpiling and stabilization of all kinds of national resources for security purposes and the support of military intelligence during the Second World War gave to planning an international significance.

Although it has been war and post-war problems which have focussed attention recently on the necessity of planning, nevertheless it is the need for better standards of living for all the people which gave planning its start and which justifies its activities permanently under normal conditions. In fact it was the great depression of 1929 which caused capital no less than labor to call upon the government for help, and provided the opportunity for the Roosevelt New Deal to turn to a national planning board for advice. It was, of course, something of a coincidence that the Soviet Five Year Plans were being worked out at approximately the same time and that the Second Five Year Plan, especially, which was in effect from 1932 to 1937, was available to American planners for observation purposes. The necessity for employment was so great in both countries that it was sometimes forgotten that there is a great difference between employment under government compulsion, otherwise known as forced labor, or slavery, and the employment of free men who have the opportunity to choose the kind of work in which they feel most skilled. Undoubtedly some of the planners have been considerably influenced by the arguments of Fabian Socialism in England, if not by Marxian theories of economics, and have proposed various forms of nationalization of industries of one type or another which would result in a state socialism quite contrary to the American principles of government. For that reason particularly, it is of the utmost necessity that American lawyers, who are trained to interpret, and sworn to support, the United States Constitution, with its incomparable checks and balances designed to protect human liberty, understand the purposes and programs of planning, so that the intelli-
gence which it employs can be utilized in advancing, instead of defeating, the way of life of the American people.

It has already been noted that the first mention of planning began to be heard around 1890 in connection with the demands of industrial laborers for living conditions more befitting human beings than those which the greed of unrestrained capitalism had afforded them. It will be recalled that the great Dock Strike, which had given Cardinal Manning deep concern, had occurred in England in 1889, and that the Homestead Strike at Pittsburgh, which started Justice Brandeis on a new orientation to law, had taken place in 1892. Shortly before this, the organization of the Knights of Labor had won the sympathetic support of Cardinal Gibbons, who presented their cause to Pope Leo, when he went to Rome to receive the Red Hat and to consult about the foundation of The Catholic University of America, an institution which, it may be added in passing, has ever since been outstanding, through a succession of leaders, such as Thomas J. Bouquillon, John A. Ryan, William J. Kerby, Edward A. Pace, Ignatius Smith, O.P., Donald A. MacLean, and many others, in working toward better living conditions and goals. The realization that a new approach to practical human problems was required, because of the growth of industrialization and corporate activity, had come to Pope Leo in the 1840's, at the time when, as Archbishop Pecci, he was Nuncio to Brussels and when Bishop von Ketteler was reapplying Thomistic philosophical principles

18 KENT, CARDINAL MANNING, 9 CATH. ENCYC. 608 (1910).
21 On the part taken by the University's professors in the McGlynn controversy, see BELL, REBEL, PRIEST, AND PROPHET 231 (1937) and MALONE, DR. EDWARD MCGLYNN (1918).
to contemporary human problems at nearby Mainz.\textsuperscript{22} The work of Bishop von Ketteler preceded by some years the Revolutions of 1848 and the Manifesto of Karl Marx. Afterward, when Archbishop Pecci became Pope Leo XIII, he not only called for a new understanding of the philosophy of St. Thomas Aquinas in his first Encyclical Letter, \textit{Aeterni Patris}, of 1879, but he also issued in 1891, the great Encyclical Letter, \textit{Rerum Novarum}, on the condition of the working classes.\textsuperscript{23} The proposals he made then were reinforced and promulgated anew forty years later in 1931 by Pope Pius XI in his Encyclical \textit{Quadragesimo Anno};\textsuperscript{24} just after the depression struck and before the economists, sociologists, and political scientists had worked out their planning on the national government scale. By 1942, no serious attention had as yet been given to the Papal proposals by lawyers generally; thereupon Pope Pius XII issued a Christmas Message on the needs of domestic law, as distinguished from international law, which constituted a striking challenge to the legal profession.\textsuperscript{25} Because these Papal proposals offer a plan for the reconstruction of society which, being based on the natural law and on the realistic philosophy of St. Thomas Aquinas, avoids the philosophical errors of communism and socialism, it is desirable that this Message as well as the earlier Encyclicals be brought again to the attention of the lawyers and law students returned from the War. What they have to say about the function of law demands intensive study in connection with the reappraisal of our whole legal system now under way because of the impact of the corporate and industrial revolutions on our juridical institutions.

\textsuperscript{22} On the work of Bishop von Ketteler, see \textsc{Hogan, The Development of Bishop Wilhelm Emmanuel von Ketteler's Interpretation of the Social Problem} (1946).


\textsuperscript{24} Pius XI, \textit{Quadragesimo Anno} in \textit{Five Great Encyclicals} 125 (Paulist Press ed. 1939).

\textsuperscript{25} Pius XII, \textit{Christmas Message, 1942}, in \textit{Principles for Peace} 789 (Koenig ed. 1943).
The fact is that in the necessary reconstruction of society our generation is confronted by a new frontier.\textsuperscript{26} The old frontier, which Frederick Jackson Turner had observed in 1893 as conditioning our national history from its beginning,\textsuperscript{27} is gone. The age of discovery, except for the polar regions, the airspace, undersea, and a few mountains and jungles, is over. The new frontier offers a challenge none the less heroic but of a different sort. It involves the more effective use of the resources already discovered and calls for a statesmanship in utilizing the resources at hand, without waste, for the betterment of human living. It is based on currency exchange and commerce in meeting human needs, and because such activities have traditionally been subjected to government controls, it requires a new evaluation of those controls and their functioning. It calls to the social sciences to catch up with the physical sciences. Above all it requires a reappraisal of the relationship of men to government and of government to men, so that freedom, under God and the law, may increase proportionately to maturity. The new frontier marks the beginning of a mature economy and demands clear thinking from adult minds.

To put it another way, the fundamental problem confronting this generation is the proper function of law in ensuring to all responsible human beings, without discrimination, freedom to develop their character and talents. Economists and social scientists generally are challenged by the new frontier to chart, analyze, and appraise the wealth of natural resources for human needs. Lawyers are faced with a challenge even greater in devising legal institutions and improving legal practices in order to ensure to each and every person, because he is a person, the opportunity to utilize the resources at hand for the full development of his personality. This liberty, which the law must guarantee,

\textsuperscript{26} McDougal and Hasse, \textit{op. cit. supra} note 1, at 46.

\textsuperscript{27} Turner, \textit{The Frontier in American History} (1920); Turner, \textit{The Significance of the Frontier in American History} in \textit{American Historical Association, Annual Report}, 1893, 199 (1894).
is not freedom from restraint, but freedom for the achievement of self-restraint and mature responsibility. While the law has always recognized in principle its proper function in this respect, it has too frequently assumed that its practices have faithfully corresponded to the need. Revolutions ought not to be necessary in order to prove that such assumptions at times may be unwarranted. Rather it is essential that the legal profession undertake some planning of its own, while properly preventing governmental planners from introducing new tyrannies in the name of a plan. The eternal goal of equal justice under law never needed stronger emphasis nor more devoted service than it does in this age of scientific progress and planning.

II.

To lawyers who are concerned about the relations of law and planning, the proposals of the Popes merit special study, not only because of their priority in time, but also because of the philosophical realism of their foundations, which, unlike communism and socialism, is identical with that underlying the common law system. In order that some of the specific directions about the function of law in the reconstruction of society may be brought to the attention of members of the legal profession who are not familiar with them, a few excerpts are presented here.

First of all, the importance of lawyers to the whole work of reconstruction is attested by Pope Leo, who observes:28

Some there must be who dedicate themselves to the work of the commonwealth, who make the laws, who administer justice, whose advice and authority govern the nation in times of peace, and defend it in war.

Concerning the obligations of those who hold such public offices, he says:29

29 Id. at 15.
The first duty, therefore, of the rulers of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as to produce of themselves public well-being and private prosperity. In connection with this activity he is careful to point out that "every precaution should be taken not to violate the rights of individuals, and not to make unreasonable regulations under the pretense of public benefit." However, when workingmen are oppressed, "there can be no question that, within certain limits, it would be right to call in the help and authority of the law." But he does not neglect again to emphasize that "the law must not undertake more, nor go further, than is required for the remedy of the evil or the removal of the danger."

On the troublesome subject of the relationship of law to property, which has been under discussion now for over a century, Pope Leo says that it "must be borne in mind that the chief thing to be secured is the safeguarding, by legal enactment and policy, of private property." Elsewhere he declares that the law "should favor ownership, and its policy should be to induce as many people as possible to become owners." As he notes, however, "the limits of private possession have been left to be fixed by man's own industry and the laws of individual peoples." It is the use of private property, not the right to own, which may be regulated by the state, he declares; if this use be subjected to taxation, then he says that the taxes must be fair and not confiscatory:

The right to possess private property is from nature, not from man; and the State has only the right to regulate its use in the interests of the public good, but by no means to

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30 Id. at 24.
31 Id. at 18.
32 Ibid.
33 Ibid.
34 Id. at 22.
35 Id. at 4.
36 Id. at 23.
abolish it altogether. The State is, therefore, unjust and cruel, if, in the name of taxation, it deprives the private owner of more than is just.

The right to possess private property, which is one of the rights which public authority is obliged to protect, affords no justification to any property owner for grasping power because of his wealth, nor for grinding down employees by putting them in fear of starvation, thereby forcing them to accept less than they need in order to live. Elsewhere the Pope declares that “whenever the general interest of any particular class suffers, or is threatened with, evils which can in no other way be met, the public authority must step in to meet them,” since, for a workingman “to consent to any treatment which is calculated to defeat the end and purpose of his being is beyond his right.” Furthermore, the right of the workingman “to procure what is required in order to live,” is as worthy of protection as the right to own property, since “the poor can procure it in no other way than by work and wages.”

In pointing out that “the more that is done for the working population by the general laws of the country, the less need will there be to seek for particular means to relieve them,” Pope Leo observes that not only strikes and violence may be avoided by appropriate preventive measures, but also that “another consequence will be the great abundance of the fruits of the earth” which “add to the wealth of the community” as a whole. In another passage he says, “wage-earners, who are, undoubtedly, among the weak and

37 Id. at 18.
38 Id. at 22.
39 Id. at 29.
40 Id. at 22.
41 Id. at 17.
42 Id. at 19.
43 Id. at 21.
44 Ibid.
45 Id. at 15.
46 Id. at 19.
47 Id. at 22.
48 Id. at 23.
necessitous, should be specially cared for and protected by
the commonwealth," 49 in order that "they who contribute
so largely to the advantage of the community may them-
selves share in the benefits they create . . . [for] the object
of the administration of the State should be not the advan-
tage of the ruler, but the benefit of those over whom he
rules." 50

In connection with government regulations, Pope Leo
mentions several other fields of family life, associations and
human living conditions where the help and protection of
the state may be needed, but where its undue interference
must be curbed. Of labor troubles generally, he says: 51

The laws should be made beforehand, and prevent these
troubles from arising; they should lend their influence and
authority to the removal in good time of the causes which
lead to conflicts between masters and those whom they employ.

And he concludes by emphasizing again that "those who
rule the State must use the law and the institutions of the
country" 52 in providing for the public welfare 53 and the
safety of the commonwealth. 54

"Forty Years After," on May 15, 1931, Pope Pius XI
drew attention to the "new branch of jurisprudence" which
had grown as a result of the Encyclical Rerum Novarum.
As he expresses it: 55

These laws concern the soul, the health, the strength, the
housing, workshops, wages, dangerous employments, in a word,
all that concerns the wage-earners, with particular regard to
women and children. Even though these regulations do not
agree always and in every detail with the recommendations
of Pope Leo, it is none the less certain that much which they

49 Id. at 18.
50 Id. at 17.
51 Id. at 19.
52 Id. at 29.
53 Ibid.
54 Id. at 17.
55 Pius XI, Quadragesimo Anno in Five Great Encyclicals 132 (Paulist
Press ed. 1939).
contain is strongly suggestive of Rerum Novarum, to which in large measure must be attributed the improved condition of the workingmen.

And the Pope rejoiced "that the Catholic truths, proclaimed so vigorously by Our Illustrious Predecessor, are advanced and advocated not merely in non-Catholic books and journals, but frequently also in legislative assemblies and in courts of justice." Elsewhere in discussing the right to own private property and the limitation of its use, Pope Pius says:

Most helpful therefore and worthy of all praise are the efforts of those who, in a spirit of harmony and with due regard for the traditions of the Church, seek to determine the precise nature of these duties and to define the boundaries imposed by the requirements of social life upon the right of ownership itself or upon its use.

Then continuing the direction given by Pope Leo to the lawyers and jurists, Pope Pius says:

To define in detail these duties, when the need occurs and when the natural law does not do so, is the function of the government. Provided that the natural and divine law be observed, the public authority, in view of the common good, may specify more accurately what is licit and what is illicit for property owners in the use of their possessions.

The "new branch of jurisprudence" referred to by the Pope, which includes labor law and so-called welfare legislation, is not the only branch of law which requires attention. "The regulations legally enacted for corporations, with their divided responsibility and limited liability, have given occasion to abominable abuses," he observes. And he points out that the struggle for power, in the economic sphere even more than in the political, has resulted in economic dictatorship in place of free competition. The whole

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58 *Id.* at 130.
57 *Id.* at 138.
59 *Id.* at 162. It may be noted that this was written in 1931, while the excellent book on this subject by Bearle and Means was first published in 1932. BEARLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).
paragraph should be studied at length. Particularly striking to lawyers is his comment that:

... immense power and despotic economic domination is concentrated in the hands of a few, and ... those few are frequently not the owners, but only the trustees and directors of invested funds, who administer them at their good pleasure. This accumulation of power, he goes on to say:

... is a natural result of limitless free competition which permits the survival of those only who are the strongest, which often means those who fight most relentlessly, who pay least heed to the dictates of conscience.

Since this concentration of power leads at length to a clash between states themselves, Pope Pius says:

Free competition and still more economic domination must be kept within just and definite limits, and must be brought under the effective control of the public authority, in matters appertaining to the latter's competence. The public institutions of the nations must be such as to make the whole of human society conform to the common good, i.e., to the standard of social justice.

His particular concern with international problems conducive to war leads the Pope to repeat at another point that "the proper ordering of economic affairs cannot be left to free competition alone." As he points out:

... all the institutions of public and social life must be imbued with the spirit of justice, and this justice must above all be truly operative. It must build up a juridical and social order able to pervade all economic activity ... Further, it would be well if the various nations in common counsel and endeavor strove to promote a healthy economic cooperation by prudent pacts and institutions, since in economic matters they are largely dependent one upon the other, and need one another's help.

The necessity for measures to encourage full employment through suitable wage scales and their relationship to prices is also mentioned by the Pope as appropriate for regulation.

60 Pius XI, op. cit. supra note 55, at 153.
61 Ibid.
62 Ibid.
63 Id. at 154.
64 Id. at 149.
65 Id. at 150.
by the public authority.\textsuperscript{66} That his thought is not only of labor but also of promoting the welfare of all is emphasized in what he has to say about investment. After mentioning "the grave obligations of charity, beneficence, and liberality which rest upon the wealthy," he goes on to say:\textsuperscript{67}

However, the investment of superfluous income in searching favorable opportunities for employment, provided the labor employed produces results which are really useful is to be considered, according to the teaching of the Angelic Doctor (S. Thomas 2.2.Q.134) an act of real liberality particularly appropriate to the needs of our time.

As in the earlier Encyclical of Pope Leo, there is here a rejection of socialism, of communism, and of all theories which would abolish private property. That the state should not go the least bit beyond that which is necessary to protect those who need help is stressed by Pope Pius, when he says that "the true aim of all social activity should be to help individual members of the social body, but never to destroy or absorb them."\textsuperscript{68} And in speaking of the growth of great corporations, he declares:\textsuperscript{69}

None the less, just as it is wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies . . . The State should leave to these smaller groups the settlement of business of minor importance. It will thus carry out with greater freedom, power and success the tasks belonging to it, because it alone can effectively accomplish these, directing, watching, stimulating and restraining, as circumstances suggest or necessity demands.

From these excerpts it may be seen that the Popes have prepared a specific program for the reform of the juridical order so that it will function more closely in accord with justice. What they propose is, of course, based upon the

\textsuperscript{66} Id. at 146.  
\textsuperscript{67} Id. at 139.  
\textsuperscript{68} Id. at 147.  
\textsuperscript{69} Ibid.
natural law, of which they are as always the incomparable defenders. The program has, however, little in common with the status quo, which has been at times confused by some with the natural law, but is in fact its contradiction insofar as injustice rather than justice prevails. Because lawyers have lagged in undertaking to abolish the injustices of the status quo, the present Pope, Pius XII, in 1942, in the midst of the Second World War, deemed it advisable to devote an entire Christmas Message to the need of juridical reforms. Holding that peace is the work of justice, he made it crystal clear that the tranquillity which is a fundamental element of peace must never be confused with the status quo. In an eloquent passage he speaks of true tranquillity in this way:70

Oh, blessed tranquillity, thou hast nothing in common with the spirit of holding fixedly and obstinately, unrelentingly and with childish stubbornness, to things as they are; nor yet with the reluctance—child of cowardice and selfishness—to put one's mind to the solution of problems and questions which the passage of time and the succession of generations, with their different needs and progress, make actual, and bring up as burning questions of the day. But, for a Christian who is conscious of his responsibilities even towards the least of his brethren, there is no such thing as slothful tranquillity; nor is there question of flight, but of struggle, of action against every inaction and desertion in the great spiritual combat where the stakes are the construction, nay the very soul, of the society of tomorrow.

After emphasizing that the first need in a just juridical order is a recognition of the dignity of each person, the Pope goes on to elaborate a bill of fundamental personal rights, which, though they must be guaranteed by the state, are not grants from the state, but are inherent in human beings because the latter are so created by God.71 False philosophies, such as materialism, positivism, utilitarianism, racism, and statism, which obscure or deny these God-given

70 Pius XII, Christmas Message, 1942, in Principles for Peace 796 (Koenig ed. 1943).
71 Id. at 800.
rights, must be replaced by a genuine juridical order before peace can prevail. “That social life, such as God willed it, may attain its scope,” says the Pope, “it needs a juridical order to support it from without, to defend and protect it; the function of this juridical order is not to dominate but to serve.” 72 The juridical order which is needed must safeguard from arbitrariness and human whims the unforgettable rights of man, through protection or punishment, and must rest on the supreme dominion of God, he says, and continues: 73

The relations of man to man, of the individual to society, to authority, to civil duties; the relations of society and of authority to the individual, should be placed on a firm juridic footing and be guarded when the need arises, by the authority of the courts.

Nothing less than “a complete rehabilitation of the juridical order” 74 will suffice, says the Pope, for: 75

The call of the moment is not lamentation but action: not lamentation over what has been, but reconstruction of what is to arise and must arise for the good of society. It is for the best and most distinguished members of the Christian family, filled with the enthusiasm of Crusaders, to unite in the spirit of truth, justice and love to the call: “God wills it,” ready to serve, to sacrifice themselves, like the Crusaders of old.

There is much more in these Papal messages which the legal profession in America should consider and study in connection with the restating and reappraisal of the common law which is now taking place. Surely they deserve space in American discussions of planning law comparable to that now being afforded to the plans of British socialism and Soviet communism.

First of all, it may be observed that there is no conflict between the Papal proposals and the Constitution of the United States. Both recognize the need of each person to be

72 Id. at 794.
73 Id. at 802.
74 Ibid.
75 Id. at 799.
protected against unjust encroachments upon his liberty of thought and action; both are based on the right to own private property; both reject statism and monopolistic power in any form; both provide for equality of opportunity for self-development and responsibility; and both require the government to act for the general welfare. There are doubtless many other points upon which both are in agreement. A prerequisite to an adequate understanding of the possibilities and implications of both programs would be a re-examination of the values which our legal system is designed to protect. When the values are restated, then the factual situations which prevail under modern corporate and industrial conditions may be analyzed according to the effects they may have upon those values.

The next step in charting the new frontier from the juridical approach would be a survey and reappraisal of the institutions and practices presently in force and of their effectiveness in protecting the accepted values under the actual conditions in which they function. Planning new institutions, devices, or practices which would be proposed to the people under constitutional procedures would follow. Their experimental character, if adopted, should be so far acknowledged that they may be changed when improvements are developed. The chief limitation upon changes in juridical institutions is, of course, the necessity of certainty with respect to legal obligations. Certainty has a very real value of its own, but that value is inferior to the need for justice. As long as a proposed change is neither arbitrary nor discriminatory in its application, its ultimate value must be measured not so much by the criterion of variability as by the standard of justice.

The necessity for a mastery of legal rules and principles for anyone undertaking to plan improvements in juridical institutions is, of course, obvious. It was because the late Mr. Justice Brandeis was a great master of the rules as
found in the cases that he became outstandingly successful in the devices he proposed for making some contemporary juridical institutions more just. It was because some of his imitators were less sound in their knowledge of the law, that they have been less successful in the results they have achieved. If the valid finding and acceptable proposals of planning boards are to be suitably incorporated in legal institutions, it is of the greatest importance that lawyers be found who are trained in the mastery of legal rules as well as in the purposes and implications of the plans offered. A knowledge of planning law, with its analysis of the effects of the plan upon existing property and other values, including human values, would appear to be a new prerequisite to the skilled and competent practice of the law, whether one’s client be a labor union, a property owner, or a government department.

It was noted above that the term “planning law” appears to have been used first in England. Thus it is not surprising to find the able writer on jurisprudence, Wolfgang Friedmann, whose works are published in England, remarking, in a recent review, that “one would hardly expect an appraisal of the fundamental impact of planning on law and legal thinking from American jurists.” What is quite remarkable, however, is his comment in the same review that surely it would not be impossible to obtain adequate studies on the neo-scholastic philosophy of law, especially as applied in modern Catholic doctrine and practice. Perhaps even a jurist as profound as he may not have realized, when he expressed these twin thoughts, that an adequate study of “the neo-scholastic philosophy of law, especially as applied in modern Catholic doctrine and practice” would necessarily involve some reference to planning for the reconstruction

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77 Especially Friedmann, Legal Theory (1944); Rooney, Book Review, 19 New Scholasticism 377 (1945).
78 Friedmann, Book Review, 64 L. Q. Rev. 545 (1948).
of society and the consequent reform of juridical institutions as set forth in the Papal Encyclicals. Since no such study appears yet to have been made by any competent jurist for the common law system, Dr. Friedmann's comment is less a criticism than a call. In view of what has already been said, need it be added here that because the basic philosophy of the common law, from its foundation centuries ago, is practically identical with neo-scholasticism as expounded by Pope Leo XIII, it would not be possible to write an adequate treatise on planning from the common law standpoint today without taking the principles of neo-scholastic philosophy into account? If and when such a study is competently done, it will then be doubly clear that the Papal proposals for a more just juridical order are in complete accord not only with the sound principles of the common law but also with those of the Constitution of the United States.

III.

What appears to be the first law book in America to use the term "planning" in its title, and to offer a juridical approach to some of the problems of planning law, has recently been published by Professor Myres McDougal of Yale University Law School. It is a prodigious piece of work and the perspective it affords of the terrain of the new frontier is exciting. Unhappily, its originality is not fully matched by profundity and there are many statements throughout the book, either written by, or apparently with the approval of Professor McDougal, which must be challenged from the standpoint of the philosophical principles of the common law. Because the work is voluminous and because comment of one sort or another is called for on practically every page, perhaps by design, as a stimulus to

79 For a comparison of the philosophy of Bracton with that of St. Thomas Aquinas, see Rooney, Catholic Univ. Philos. Studies No. XXXIV, Lawlessness, Law, and Sanction 20 (1937).
80 McDougal and Haber, op. cit. supra note 1.
clearer analysis of legal problems, it is not possible to point out in other than general terms at this time the fact that the book is not of a type quite suitable for indoctrination purposes. Furthermore, it cannot be used by itself to inculcate a knowledge of property law, but must be accompanied, as the author points out in the preface, by supplementary study of the customary authorities he specifies. To mature and well-grounded students of the law, however, the book opens a new avenue to juridical criticism and thereby fills a deeply felt need.

One meritorious feature of the book is that attention is drawn to changing concepts of property and some of their implications for legal institutions. Because the book is designed for use in a law school course on real property, it limits the discussion for the most part to tangibles without venturing far into the fluid eddies of contemporary indicia of intangible property, although they also need reappraisal in a complete study of planning law. Mention of the way in which a healthy and growing population increases the wealth of a community (which is, it is submitted, a more accurate description of what happens than Professor McDougal's shorthand statements about society's creating values and wealth) and the way in which that wealth may be utilized for the benefit, or welfare, if one prefers, of those who contribute to it, suggests a new aspect of the current trend from private to public law. Problems connected with zoning and restrictive covenants are carefully analyzed from the standpoint of human values as well as

81 McDougal and Haber, op. cit. supra note 1, at iv.
82 In 1930, Dr. Constantine E. McGuire offered a course in the changing concepts of property, values, etc., from the standpoint of economics in the reorganized curriculum devised at that time for The Catholic University Law School. Catalogue of the School of Law, 1930-1931. See also a statement by Dean John McDill Fox in 7 Am. Law School Rev. 155 (1930). For a brief indication of the plans for developing a neo-scholastic philosophy of law in America at that time by the late Dr. Edward A. Pace, Vice-Rector, see Rooney, Natural Law Gobbledygook, 5 Loyola L. Rev. 1, 12-13 (1949).
from that of government revenues through tax changes. There is, however, less thought given to the measurement of damages in condemnation proceedings under eminent domain than would be expected in view of the complex questions connected with nationalization with which British lawyers are at present confronted.

The discussion of allocations and priorities is new in property casebooks but none the less welcome on that account. Allocations go to the essence of private property rights under government planning but have not yet been widely tested in the courts because their application has been made principally under the war powers of the President. Perhaps even under normal conditions, judicial review of administrative discretion would be precluded in this field. If so, then the subject is an important one in any analysis of the incidence of planning on juridical institutions.

The section of the book dealing with government corporations as instruments for planning is notable although much more should be said about the various ways in which they are organized, with consequent implications for constitutional powers and for immunities of one kind or another. Business corporations are, of course, mentioned in various connections, but they are not discussed sufficiently in the section devoted to "dead hand" controls of property, a subject which is here limited to future estates created by will or trust. In view of the tremendous impact of the corporate revolution on all types of property holding, it would seem that a section on the "dead hand" controls manifested by corporations chartered by the government in perpetuity would be indispensable. Property rights represented by stock certificates and other forms of corporate paper would be treated usually in a course on business organizations rather than in a course on property, which doubtless accounts for their omission here.

One of the most interesting aspects of the book is the way it is organized around human values and juridical insti-
tutions. As observed earlier, the philosophical bases upon which human values are established here are inadequate (for what is created by the state, or by society, can be taken away by the state, or by society), but the emphasis given to them in appraising the effectiveness of existing juridical institutions for the attainment of justice, is altogether admirable. In passing, it may be noted that a criterion like this is quite inconsistent with the relics of positivism which crop up here and there, especially where reference is made to coercion and force. It is not without some significance for the advancement of jurisprudence that, in the recently published volume on *Latin-American Legal Philosophy* in the Twentieth Century Philosophy of Law Series, much attention is also given to human values, and in the forthcoming volume of the same series on the French jurists, Hariou and Renard, juridical institutions are so important that the book will probably be entitled, *The French Institutionalists*.

An unfortunate impression is made by the inclusion of a section on Soviet planning and its implications for law, while practically no mention is made of British socialism and its impact on common law institutions. One should perhaps not expect any reference to the Papal Encyclicals, but the work of the late Justice Brandeis in making law an instrument of social policy, would seem to be sufficiently important to justify as much space in a law book as, for example, President Roosevelt is accorded. To argue in one place that planning cannot be rejected, since it can be introduced in any form of government, and then to identify planning elsewhere not merely with government regulation

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84 *Siches, Cossio, de Azevedo, and Maynez, Latin American Legal Philosophy* (Ireland, Konvitz, de Capriles, and Hayzus’ trans. 1948); Rooney, Book Review, 10 *U. of Pitt. L. Rev.* 610 (1949).
85 Now being prepared by the author.
86 See McDougal and Haber, *op. cit.* supra note 1, at 778, for a note on community planning in England, citing a valuable note in 60 *Harv. L. Rev.* 800 (1947).
but with government control, and the rule of so-called expertise accompanied with state force, is to defeat what seems to be the purpose of the book. It cannot be emphasized too often that communism and socialism, with their abolition of private enterprise, can never be incorporated into the American system of life. The adoption of either system of state ownership of the instruments of production would mark the end of the American system and replace freedom with state servitude. A planned economy, or a welfare state, however, is not necessarily to be identified with either socialism or communism, but apparently can be devised in accordance with the principles of the United States Constitution. In fact, a partially planned economy has existed under the Constitution ever since protective tariffs were established, while the Constitution itself contains a provision for the general welfare. Since under present world conditions it would be practically impossible to dispense with planning in such matters as currency controls or national security, and since it is unlikely that welfare measures will be entirely repealed when so many people are dependent upon wages for their livelihood, it is very necessary that care be used to distinguish necessary governmental regulation from undesirable state ownership and domination.

Professor McDougal has presented a valuable book which points out a new way to study law. For a long time our ablest law reviews have been examining current decisions and legislative developments critically by asking how they function, using generally the vague standard of social desirability as a measure. Casebooks and treatises, however, have for the most part been content to rearrange their material around new emphases, without attempting to go outside the cases very far, even for the criterion of justice.\footnote{On the criterion of justice, see Rooney, \textit{Law Without Justice?—The Kelsen and Hall Theories Compared}, 23 \textit{Notre Dame Lawyer} 140 (1948).}

On the whole, the results have been fairly sound as far as they go, but, because little account has been taken of new
situations which have grown up, often through state activity, such as the creation of corporations, there has arisen a need for new criteria by which the soundness of the cases may be judged. In providing a casebook which demonstrates one way in which the standard of justice may be employed in reappraising the soundness of the cases, Professor McDougal has prepared such a good book that one wishes that it were better.

Because Professor McDougal's evident purpose in pointing out ways in which the law may be improved in its function of giving greater protection to human values is comparable to that so strongly set forth by the Popes during the best part of a century, it is inevitable that his program be considered against the background they have provided. As already indicated, many differences are to be found in the philosophical foundations of both. The sound realism of the natural law and neo-scholasticism, upon which the Popes premise their proposals, is much more consistent with the common law system and the United States Constitution than the eclectic combination of behaviorism, positivism, sociologism, rationalism, and the rest, many of which are in essence inimical to the common law, which Professor McDougal has managed to garner from his extensive reading. Without attempting to write a book the size of his at this time in order to elaborate upon and document this point, it may perhaps be possible to make the contrast between the two approaches to juridical reconstruction clearer by focusing on what appear to be the most significant factors in each. Professor McDougal is profoundly disturbed by the manifestation of power, rather than justice, so commonly found in the organization of society, and he devotes his intelligence to an analysis of the ways in which power can be obtained in the apparent hope of checking crude power through more skillful use of the intelligence. The Popes are also disturbed by power, but they are more concerned with the determination of what is just, and the development of
institutions which would not only tend to effect greater justice in particular situations, but would also operate to inculcate habits of justice in men generally. Intelligence is no less important for the Popes than it is for Professor McDougal; but the former, basing their recommendations on the experience of centuries in governing men in religious matters, consider intellectual skill as but one element in the development of character, in which the training of a will habitually directed toward justice is even more important in practice. It is the function of law, concerned as it is with conduct, to direct, guide and prescribe, through institutions of various types, ways of acting which will prevent injustice to others and assure as far as possible equality of opportunity to all for the exercise of their inherent personal rights. In serving these ends, justice and not power should provide the subject of primary importance in any study devoted to the improvement of the law. If Professor McDougal prepares a second book, perhaps he will be able to perfect it a bit more by giving as much attention to the soundness of his philosophical principles as he must to his legal ones, since both philosophy and law are necessary in order to make a real contribution to jurisprudence. Briefly, this appraisal of Professor McDougal's work may be summarized by observing that he has blazed a long and inviting trail on the new frontier, but he has not yet perfected title to his claim by valid occupation.

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