

# LEGAL REALISM, NORMAN WILLIAMS, AND VERMONT'S ACT 250

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"Legal Realism," a unique legal philosophy of the early and middle twentieth century which captures the pragmatic spirit of America, endures in the lives and work of legal scholars of the late twentieth century.<sup>1</sup> Norman Williams, a nationally renowned scholar of land use law, is one such legal realist, whose magisterial treatise and law journal articles set forth a vision of land use law not as a body of rules, but as a body of the decisions made by participants in the "zoning game."<sup>2</sup>

Legal realists in general, and Norman Williams in particular, have their share of devotees and critics.<sup>3</sup> Unfortunately, this criticism, often conceptual and abstract, embodies the very vices which legal realism sought to eradicate. I propose another rather oblique approach to legal realism and Norman Williams' work based upon my recent study of Vermont's Act 250.<sup>4</sup>

Act 250,<sup>5</sup> Vermont's premier environmental and land use law is, in part, the product of legal realist land use scholars, and hence, embodies many of the principles of legal realism. This Act also reflects many (but not all) of the principles for which Norman Williams has argued in land use law. If we can identify these principles within the Act, and we study the Act's successes and failures,<sup>6</sup> we can learn a lot about the strengths and weaknesses of legal realism itself. In a sense, Act 250 offers an interesting little concrete test case of legal realism at work.<sup>7</sup> As we shall see, such a study of Act 250 sheds light on three major assumptions of land use legal realists: the assumptions of empirical instrumentalism, scientism, and clinical competency. More specifically, the study of Act

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1. For one of many excellent books on the legal realist movement, see WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). Upon reading a draft of this article, Ann Louise Strong sent me an excellent review of the Scandinavian school of realism authored by her husband, Michael Strong, entitled *The Uppsala School of Jurisprudence* (1958) (unpublished manuscript on file with author).

2. See RICHARD F. BABCOCK, *THE ZONING GAME* (1966).

3. The philosophical criticisms of legal realism are extensive. For my favorite criticism, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 11-31 (1988).

4. RICHARD O. BROOKS, *TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ENVIRONMENTAL LAW* (forthcoming 1996).

5. VT. STAT. ANN. tit. 10, §§ 6001-6108 (1994).

6. I believe that, unfortunately, legal scholars have failed to use the insights of program evaluation developed in the 1960s. Program evaluation seeks to employ social science methods to more systematically evaluate programs or laws on legal rules.

7. Experimental jurisprudence sought to apply empirical methods within jurisprudence.

250 offers an opportunity to evaluate the realist's claim that the reality of law lies in the empirical study of the actions of law officials and others; the realist's reliance on instrumentalist planning, in which general policies and goals are posited to guide the law; the realist's faith that science can contribute to law in some way; and the realist's appeal to a pragmatic craft sense in making specific decisions.<sup>8</sup>

By using Act 250 to explore these assumptions of legal realism, my underlying premise is that legal theory is not merely a plaything for academics. At least in the case of legal realism, legal theory can have, and in fact has had, a tangible impact upon the shape and structure of our laws, in general, and at least some land use laws, in particular.<sup>9</sup>

### LEGAL REALISM AND LAND USE LEGAL REALISM

To trace the impact of legal realism on Vermont's Act 250 requires a little knowledge of history. This history will begin with the late stages of legal realism in the mid-twentieth century and follow its evolution at Yale Law School,<sup>10</sup> where Norm Williams studied, until the adoption of Vermont's Act 250 in 1970.

The two figures of legal realism with which I would like to begin my story are Karl Llewellyn and Myres McDougal.<sup>11</sup> I had the honor of taking a course with Llewellyn when I was a graduate philosophy student at the University of Chicago in 1958. He was a big (or seemed big), red-faced, beefy man, who pounded the table, talked in the same funny way he wrote, and saw law as a mix of science and craft. If Llewellyn was the prophet of legal realism, McDougal was its pharisee, who sought to establish a system for understanding law which, in its later years, embodied an elaborate system of categories with its own unique language. McDougal was a favorite professor of mine at Yale Law School. Although Myres would be insulted by the notion, I always thought there was something quite medieval about the elaborations of his thought! He and St. Thomas Aquinas would have gotten along well.

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8. The legal realist philosophy is an amalgam of several controverted philosophical positions. For one insightful account of its broader intellectual context, see MORTON WHITE, *SOCIAL THOUGHT IN AMERICA* (1947).

9. Although the relationship between theory, history, and practice is a philosophical quagmire, this relationship can be illustrated within specific histories such as this one. For one of many general discussions of the relationship of theory and practice, see NICHOLAS LOBKOWICZ, *THEORY AND PRACTICE* (1967).

10. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986).

11. Obviously, such a selection leaves out such figures as Moore, Thurman, Arnold, Fleming, James, Cook, Frank, and many others.

Llewellyn and McDougal are, of course, principal figures in twentieth century jurisprudence. Llewellyn's *Bramblebush*, *The Common Law Tradition*, *The Cheyenne Way*, and his recently issued *The Case Law System in America* are jurisprudential classics.<sup>12</sup> Similarly, McDougal and David Haber's *Property, Wealth, and Land* and McDougal and Harold Lasswell's *Law, Science and Policy*, as well as other writings, are classics in the fields of property, land use, jurisprudence, and international law.<sup>13</sup>

Although Llewellyn and McDougal were fellow legal realists, they did not completely agree with one another; in fact, they made some rather critical statements about each other. Nevertheless, they shared a number of legal realist principles: (1) that the empirical reality of the application of rules, not the formal rules themselves, were legal reality (the "crude realism" assumption);<sup>14</sup> (2) that the goals and policies of the law are important, both in the understanding of law and reasoning about it (the "instrumentalist" assumption);<sup>15</sup> (3) that law is what law-related officials do, and predicting what they do requires not only a knowledge of legal doctrine, or past precedent, but knowledge of social trends, and relevant science (the "scientific" assumption);<sup>16</sup> and (4) that understanding, predicting, and advocating for specific legal decisions requires a craft-like approach to the law (the "competency" assumption). McDougal emphasized the second and third principles, Llewellyn the first, third and fourth.

Each of these principles, baldly stated, does not seem very revolutionary these days. It is a tribute to the success of legal realism that many of us accept them. Crude realism lives on in some of the works of recent critical legal theorists. The instrumentalist assumption lives on in the writings of those who view legal scholarship as a branch of policy

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12. KARL N. LLEWELLYN, *BRAMBLEBUSH* (1981); *THE COMMON LAW TRADITION* (1960); *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1983); *THE CASE LAW SYSTEM IN AMERICA* (1989).

13. MYRES S. MCDUGAL & DAVID HABER, *PROPERTY, WEALTH, AND LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948); MYRES S. MCDUGAL & HAROLD LASSWELL, *LAW, SCIENCE AND POLICY* (1953).

14. Most of the legal realists were not philosophers willing to discuss the nature of reality. Their appeal to what William James calls brute fact does not enable these realists to escape their own brand of conceptualism. Hence Llewellyn offers an elaborate theory of "the steadying factors" of appellate court decisions. McDougal adopts the philosophical system categories of Lasswell and Kaplan, and Williams offers an understanding of land use law based, *inter alia*, upon the kinds of participants, the stages of history, and the jurisdiction. Because of their unconscious reliance upon a conceptualism of their own, none of these realists successfully articulates the proper role of theory in law and land use.

15. ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

16. JOHN H. SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

analysis.<sup>17</sup> The scientific assumption lives on in those who preserve the sociology of law or find the relations of science and law to be of central importance.<sup>18</sup> The competency assumption lives on in the clinical movement.<sup>19</sup>

The focus upon the empirical reality underlying legal concepts leads the legal theorist away from conceptual system building. Emphasis on goals and policies in the understanding and guiding of the law demands replacement of the deductive rationality of rules with a means-ends instrumentalism. Social science assists both in assuring that means and ends are properly matched and in predicting judicial decisions. Traditional case reasoning of the common law is replaced with appeals to "craft" (Llewellyn) or "application" (McDougal). These principles, however, express the abandonment of the search for rationality only in the formal rules and doctrines of law, replacing them with a continued search for rationality in science, policy or practical skill.<sup>20</sup> Although attacking legal formality, these realists believed in rationality, thus distinguishing themselves fundamentally from some late twentieth century authors of a jurisprudence which finds no rationality in the law, but only the operation of power and contradiction.<sup>21</sup>

As applied to land use, legal realism is the belief that rationality in land use is possible if the empirical consequences of land use laws and decisions are studied, and if laws are understood and framed in light of shared policies and purposes. It posits that land use decisions ought to be made with the help of science, an understanding of social trends within communities, and the exercise of craft-like knowledge and experience as applied in the context of specific land use cases.

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17. BRUCE ACKERMAN, *RECONSTRUCTING OF AMERICAN LAW* (1984).

18. LAWRENCE FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (1975).

19. Robert MacCrate, *Legal Education and Professional Development*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR.

20. For one excellent study of the ways in which policy has recently been invoked in English cases, see JOHN BELL, *POLICY ARGUMENTS IN JUDICIAL DECISIONS* (1983).

21. The extent to which a study of the relationships of power (at the expense of a search for justice) preoccupy the critical legal theorist differs from author to author. For two of many efforts at a definitive account of critical legal studies, see ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987). For an account of deconstruction and the law, see MATTHEW H. KRAMER, *LEGAL THEORY, POLITICAL THEORY AND DECONSTRUCTION* (1991).

## THE HISTORY OF LEGAL REALISM AND ACT 250

The seeds of legal realism at Yale were planted in the 1920s,<sup>22</sup> but the early years were experimental years, and the heyday of Yale's legal realism was during the 1940s and 1950s.<sup>23</sup> This was the period when McDougal sought to apply legal realism to the fields of property and land use. The expression of that application was *Wealth, Land and Property*, a remarkable property text, which not only rigorously criticized the traditional property law doctrines, but sought to describe trends in the ownership, use and abuse of property law and to argue for the importance of long-term planning.<sup>24</sup>

The very title of McDougal and Haber's *Property, Wealth, and Land: Allocation, Planning and Development* indicates the authors' intention "to take seriously the newer cognitions about the relation of legal doctrine to social fact and hence, to locate the authoritative doctrines and practices of property in their context in community purposes."<sup>25</sup> In addition to a vitriolic critique of the legal doctrines of property law, half of the text was devoted to an examination of property and wealth within the context and policies of community (local, state, regional and national) planning.<sup>26</sup>

A remarkable group of land use and planning law scholars and practitioners, most of whom were students of McDougal, emerged out of this era, including Norman Williams, Daniel Mandelker, and a bit later, Charles Reich, Ann Louise Strong, Bob Freilich, Jonathan Brownell, Paul Davidoff, Jesse Dukeminier, Edward Logue, Robert Reich, and Dwight Merriam.<sup>27</sup> (Since the 1960s, another Yale generation, including Bruce

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22. KALMAN, *supra* note 10, at 1.

23. Clearly, the New Deal mentality and the years of the Second World War contributed to the notion of law serving important national purposes. Many of the legal realists, including Frank, Arnold, and Douglas, were part of the Roosevelt administration. See ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 49-50, 445, 469 (1959).

24. For a longer discussion of McDougal's work, see KALMAN, *supra* note 10, at 152, 176-87.

25. MCDUGAL & HABER, *supra* note 13, at iii.

26. *Id.* at 426-1205.

27. Daniel R. Mandelker is one of the most prolific and insightful authors in the field. One of his many books is *ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE* (1981). Charles A. Reich, of *The Greening of America* fame, wrote *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966). Ann Louise Strong's work is discussed below. Robert Freilich authored *GROWTH MANAGEMENT AND HISTORIC PRESERVATION* (1988) with Terri A. Muren. Jonathan Brownell is discussed below. Paul Davidoff was a major figure in the efforts to break down the suburban zoning barrier for low-income housing, and he invented the notion of advocacy planning. Paul and Linda Davidoff, *Suburban Action: Advocate Planning for an Open Society*, 36 *AM. INST. OF PLANNERS J.* 12-21 (1990). Robert Reich, the current Secretary of Labor under President Clinton, has authored books on public policy, including the editing of *THE POWER OF PUBLIC IDEAS* (1988). Jesse Dukeminier has authored numerous articles on land use law. Edward Logue was redevelopment

Ackerman, William Reilly, David Callies, and Jan Laitos has supplied a new realist dimension through economics and the law, environmental policy, and land use law.)<sup>28</sup> All of these scholars and land use practitioners have completed major scholarship in the field. They have also consulted on or drafted a variety of the innovative land use laws of the past thirty years. It is not my purpose here to recap this part of the intellectual history of land use law, nor to sing the praises of graduates of Yale Law School at the expense of many other excellent land use law scholars. It is my purpose to suggest that legal realism at Yale Law School in general, and the work of Myres McDougal in particular, were the source of a cadre of land use scholars and practitioners who shaped the face of land use law in the 1950s, 1960s, and 1970s.

For Vermont, the most important members of this group were Norman Williams, Ann Louise Strong, and Jonathan Brownell. Norman Williams and Ann Strong were activist scholars while Jonathan Brownell, was a Vermont legal practitioner, political advisor, gadfly, and intermittent state official.

#### NORMAN WILLIAMS AND HIS AMERICAN LAND PLANNING LAW

Norman Williams had, of course, an illustrious career before coming to Vermont; his magnum opus, *American Land Planning Law*, was completed in 1974.<sup>29</sup> This treatise is the quintessential legal realist land use writing. The treatise begins with planning as the basis of land use controls, identifies the situations which give rise to planning, and offers a rationale for the need to "develop a concept of a probable future." Although Williams discusses the content of plans and those who design them, he is not starry-eyed about them; he is aware of the shortfalls of many—if not most—planning efforts. Moreover, unlike many planners, Williams does not talk about the planning process alone, but he also offers a detailed discussion of the substantive goals of land use laws.<sup>30</sup>

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director of the cities of New Haven, CT, Boston, MA, as well as the director of New York City Urban Development Corporation.

28. BRUCE A. ACKERMAN, ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974); JAN G. LAITOS, *NATURAL RESOURCES LAW* (1985); WILLIAM REILLY, *THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH* (1973); DAVID CALLIES, *REGULATING PARADISE: LAND USE CONTROLS IN HAWAII* (1984).

29. NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* (1974 & Supp. 1988).

30. *Id.* at 187-327.

Although Williams does not adopt a "sophisticated,"<sup>31</sup> quantitative approach to defining the goals of land use law, he carefully analyzes these goals by describing their subsidiary objectives and placing their pursuit within a community context. For example, in Williams' most recent work, he carefully pursues the elements of aesthetic and historic land use protections, primarily in Vermont.<sup>32</sup>

Williams does not examine land use conflicts through the lens of legal or planning doctrine,<sup>33</sup> nor philosophy or political science.<sup>34</sup> Rather, his analysis focuses on the parties at interest, the particular period in the history of land use law, and the state's cultural and political settings for land use control. The reality of land use law for Williams lies in case-by-case decisions and their underlying facts. Williams avoids reading the secondary literature—the conceptualizations of his colleagues. On the other hand, he does not conduct in-depth case studies or empirical studies of unreported lower level cases. In approaching his task, Williams echoes Jerome Frank's *Law and the Modern Mind*, when he states:

Legal Scholars and other lawyers have long been divided in their thinking about law between two different notions:

1. Rules of Law. For every given fact situation, there is one fixed rule of law which will control and which the courts can be counted upon to follow;
2. "Stomach jurisprudence." The decision in any case depends in large part on how the judge feels about the particular situation, in light of his various preconceptions and social attitudes . . . .<sup>35</sup>

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31. "Sophisticated" here is both a word of contempt for inappropriate use of quantitative methods and a word of respect for a complex recognition of the conflicting values in land use law. For a deep discussion of sophistication, see MARK BACKMAN, *SOPHISTICATED: RHETORIC AND THE RISE OF SELF-CONSCIOUSNESS* (1991).

32. These works include NORMAN WILLIAMS, JR. ET AL., *VERMONT TOWNSCAPE* (1987); *READINGS IN HISTORIC PRESERVATION* (Norman Williams, Jr. et al. eds., 1983).

33. There has been valuable scholarship on planning theory. See, e.g., ROBERT E. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* (1982).

34. The rich literature of political science study of local communities is of particular relevance to anyone talking about community planning. The classic in this field remains ROBERT A. DAHL, *WHO GOVERNS DEMOCRACY AND POWER IN AN AMERICAN CITY?* (1961).

35. WILLIAMS, *supra* note 32, at 86-87.

Although Williams bows to the role of law, he offers the fundamental insight that:

[I]n American planning law many of the rules are broad and vague; and in many situations sensitive issues of social policy are involved. For both these reasons, American planning law is a particularly clear-cut example of a field where stomach jurisprudence takes priority . . . .<sup>36</sup>

Yet Williams is no mere skeptic or detached political realist:

Planning law necessarily involves the accommodation of various interests in land and particularly of those interests which the legislative process has somehow failed to represent adequately; essentially the question is: how are we all going to live together?<sup>37</sup>

In one respect, Williams' work does not reflect a central theme of legal realism (i.e., the attention to social science and science more generally).<sup>38</sup> Some of the earlier realists, including McDougal and his colleagues, had an enlightenment faith in science, which they believed could enable practitioners to predict the law and shape its policies.<sup>39</sup> That faith in science—at least in the social science of the day—appears in retrospect to be naive. Science does not yield policy directives, and social science does not offer the precision necessary to either justify or predict decisions.<sup>40</sup> Williams does not appeal to the social or natural sciences. He does, however, appeal to social trends, by classifying the past history of land use into several different eras. Although I am skeptical of his classification, I and most others bow to Williams' comprehensive knowledge and documentation of these trends.

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36. *Id.*

37. *Id.*

38. Williams takes a common sense approach to land use law and planning. He does not confuse the forecasting of trends with the prediction of scientists, and he does not appear to regard planning as "applied science." See JOHN FRIEDMANN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* (1987) (discussing applied science approaches).

39. MCDUGAL & LASSWELL, *supra* note 13.

40. This may be a slight overstatement. The prediction of land use decisions using a multi-variant analysis and employing the computer is a promising development.

ANN LOUISE STRONG AND HER ECOLOGICAL APPROACH  
TO LAND USE LAW

Unanticipated by the legal realists, the new science of ecology,<sup>41</sup> with its attention to a holistic view of nature and sensitivity to the natural limits of land to support development, was a "science" which was coming into its own during the 1960s. It remained for Ann Louise Strong, along with John Keene, Ian McHarg, Luna Leopold, and others, to recognize the relevance of this new science to the art of land use planning and land use controls. Their work in the Brandywine Valley, although ultimately unsuccessful,<sup>42</sup> set an example for a new generation of environmental land use planning. McHarg brought that message to Vermont in the 1960s to consult in the planning of one Vermont town. Consultant planners who visited Vermont in the 1960s were well aware of the new environmental planning work of McHarg and Strong.

LAND USE CONTROLS IN VERMONT

The Legal Realist tradition in Vermont's land use laws first found expression in the 1967 Vermont Planning and Development Act.<sup>43</sup> The law, shaped in part by Norman Williams, planner Richard May, and Jonathan Brownell, recited a broad set of goals for land use regulations and required the Vermont Agency of Development and Community Affairs to prepare, maintain and distribute a planning and land use manual.<sup>44</sup> The law enabled, at the discretion of localities, the creation of municipal planning and zoning commissions, as well as regional planning commissions. If municipalities created such commissions, they were

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41. It was the work of Ian McHarg which first spelled out in detail the relationship between ecology and land use. See IAN MCHARG, *DESIGN WITH NATURE* (1969). The field of ecology had "flowered" in the previous two decades. See DONALD WORSTER, *NATURE'S ECONOMY: THE ROOTS OF ECOLOGY* (1977). Another line of influence was regional planning theory of Mumford and others. See MAURICE ROTIVAL ET AL., *A CASE FOR REGIONAL PLANNING WITH SPECIAL REFERENCE TO NEW ENGLAND* (1947).

42. John Keane & Ann Louise Strong, *The Brandywine Plan*, 36 J. AM. INST. PLANNERS 12 (1970). The co-authors of the plan itself were Robert Coughlin, Luna Leopold, Benjamin Stevens, as well as Keane and Strong. ANN L. STRONG, *PRIVATE PROPERTY AND THE PUBLIC INTEREST: THE BRANDYWINE EXPERIENCE* (1975).

43. VT. STAT. ANN. tit. 24, §§ 4301-4495 (1967), No. 334 (Adj. Sess.) (eff. Mar. 23, 1968).

44. *Id.* § 4304.

required by law to plan.<sup>45</sup> The content of the municipal development plan was outlined in the statute.<sup>46</sup> Zoning bylaws and subdivision regulations were to be adopted to implement the plan.<sup>47</sup>

In addition to the authorization of planning and the enabling of municipalities to adopt laws in the promotion of community policies, the 1967 Planning Act reflected the realists' attention to the importance of recognizing change, indeed *embracing* change. To the realists, legal concepts and rules were "static," failing to account for the dynamic changes which underlay the law. The recognition of the inevitability of change is reflected in the Vermont law's requirement that plans be systematically updated and that the study of trends be an important basis for that updating.<sup>48</sup>

The most important chapter in this story of legal realism's influence in Vermont's land use laws is the passage of Vermont's Act 250 in 1970. Jonathan Brownell, a student of Myres McDougal in the late 1950s, played a major role in shaping Act 250. Act 250 embodies the principles of the McDougal and Llewellyn versions of legal realism. The Act originally assumed the view of a "crude reality" of Vermont, emphasized the role of planning in guiding land use laws, encouraged the use of science and trend analysis in the planning and decision-making process, and authorized a fact-based, situation-oriented review of applications for development.<sup>49</sup>

#### TESTING THE LEGAL REALITY PRINCIPLES IN ACT 250

##### *The "Crude Reality" of Vermont*

The view of Vermont underlying Act 250 was that of a state possessing an unprotected nature, assaulted by major outside development, resulting in a variety of environmental and social abuses. Such a crude realism failed to recognize the extent to which Vermont's "nature" was a landscape shaped by a declining natural resource and farming economy, that environmental abuses resulted from internal forces of urbanization,

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45. *Id.* § 4381.

46. *Id.* § 4382.

47. *Id.* §§ 4401(a), (b)(1)-(2).

48. *Id.* § 4385(d).

49. To be sure, some of the characteristics of the Vermont law were part of a broader revolution of the administrative state, but the topic of the relation of legal realism to administrative law is beyond the scope of this article. See Richard O. Brooks, *A Jurisprudence of Planning: Notes on the Outline of Law Required to Support and Control Planners*, 24 CATH. LAW. 1 (1978); Richard O. Brooks, *The Legalization of Planning Within the Growth of the Administrative State*, 31 ADMIN. L. REV. 67 (1979).

and that "the assault" on Vermont's nature was perpetuated by the perennial myth of the machine in the pastoral garden.<sup>50</sup> The decline of Vermont's farming, the growing dependence on tourism, and the spread of the "delights" of modern urbanization raises serious questions about the view of Vermont's reality which underlies Act 250.

### *Planning and Law*

The planning process authorized by Act 250 includes, *inter alia*, an interim land capability plan, a capability and development plan, and a state land use plan. These plans were to be based upon an ecological study of Vermont's environment, a description and projection of the trends of development, an identification of the policies to be pursued, and finally, a mapped plan for regulation.<sup>51</sup>

Both the interim capability and development plan and the final capability and development plan were adopted. The state land use plan never was adopted. The ultimate failure of this planning process sheds some light upon the limits of the McDougal and Williams brand of legal realism. The interim plan, which was to depend upon the scientific knowledge of land capability and development trends, was a sketchy affair, lacking the large amount of data necessary to plan and guide development decisions based upon accurate ecological information and a careful projection of development trends. As the Vermont experience illustrates, legal realism seriously underestimated the cost of collecting information and, more importantly, the uncertainty of much of that information. The capability and development plan, adopted in 1973 by the legislature, was a fine statement of policies; however, the relationship among these often potentially conflicting policies was not set forth. This lack of attention to conflicting policies continues to be a central failure of land use planning. The Williams and McDougal brand of legal realism and the plans based upon that realism assume a consensus on goals and policies which even a relatively homogeneous state like Vermont could not achieve. In short, legal realism and land use legal realism assumed the possibility of a background consensus on major societal goals that would permit a program

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50. LEO MARX, *MACHINES IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* (1964); Simon Schama, *Arcadia Redesigned*, in *LANDSCAPE AND MEMORY* 517-78 (1995).

51. VT. STAT. ANN. tit. 10, §§ 6041 (*omitted*), 6042, 6043 *repealed by* 1983, No. 114 (Adj. Sess.) § 5.

of action towards more specific objectives.<sup>52</sup> Despite the failure of this assumption, these policies have succeeded in providing interpretive principles within specific application decisions.

The failure of the state land use plan was also, I believe, an indication of the limits of legal realism's theory of how general policies were to be "applied" in specific situations. The Vermont land use plan was rejected, in part, because it did not offer an adequate rationale for the mapped allocation of proposed land uses, and in part because the necessary political process which would lead to a consensus was lacking. McDougal had assumed that by making policies "operational," whether through maps or in other ways, more general conflicts could be avoided. Such an assumption was unrealistic. In fact, as Brownell has often pointed out, making policies "operational" through maps exacerbated the conflict over policies in Vermont. This conflict results from the fact that the perception of Vermont's landscape and its protection is imbued with different meanings by many different groups.

### *Reliance on Science*

The lack of consensus on goals seriously limits the careful study of facts envisaged by legal realism. Let us examine the way in which Act 250 pursues the legal realist program's use of science and the study of trends in land use decision-making. In addition to the plans discussed above, the trends of development are reflected in regional and municipal land use plans. Conformity of proposed projects to these plans is required as one of the criteria under the Act.<sup>53</sup> Again, due to lack of funding and support by local political processes, both regional and local land use planning in Vermont have often failed to provide the specific data necessary to help formulate policies to guide many decisions.

Perhaps a more important source of scientific fact within the Act 250 decision-making process is the expert environmental advice of the Agency of Natural Resources. The Agency enters the process via an Act 250 provision which allows some permits issued by the Agency to create a rebuttable presumption of compliance with selected Act 250 criteria in order to secure Act 250 permits from the Environmental Board or commissions.<sup>54</sup>

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52. The political events of the 1960s and the rise of critical legal studies has led to the questioning of whether such a consensus is possible.

53. VT. STAT. ANN. tit. 10, § 6086(a)(10) (1995).

54. *Id.* § 6086(d).

For example, an air quality permit issued by the Agency of Natural Resources, after its collection of relevant facts, can be a rebuttable presumption of the fact that under Act 250, the project complies with its requirement that no "undue air pollution" will result. The validity of that conclusion depends upon the adequacy of the science used as part of the air pollution permit process by the Agency of Natural Resources. Although this process, by which the Agency of Natural Resources permits are employed in Act 250 proceedings, has worked relatively well, political struggles have resulted among the Vermont Environmental Board and commissions which issue the permits under Act 250 and the Vermont Agency of Natural Resources. Moreover, the Environmental Board is wary of being bound by the Agency of Natural Resources' fact-finding. That reluctance has been upheld by the courts.<sup>55</sup> The result, which I would not want to over-emphasize, may shed doubt upon the legal realist faith that science can escape the clutches of politics.

#### *Legal Realism, Specific Decisions, and Act 250*

Lawyers and legal scholars, at least in the Anglo-American common-law tradition, are most interested in specific cases. Specific decisions are where the proverbial "rubber meets the road," where the universal meets the particular, where dreams meet reality.<sup>56</sup> Many of the realists saw a gap between the general rules of law and specific decisions. Llewellyn was one such theorist. He sought to explain the decisions in specific cases by appealing to the judge's experience and craft knowledge of the situation. And he argued that the specific situation in the case is to be treated as an example of a "type situation." Llewellyn stressed the importance of past practice and the expectations this practice engenders in specific decision-making. He also emphasized the need to consider the future "harmony" of those in similar situations, and to achieve "felt net values," as well as to recognize "the imminent law of the situation."<sup>57</sup>

Much of Norman Williams' discussion in his treatise and later writings reflects a similar approach to specific cases. To take a recent example, Norman Williams' and R. Jeffrey Lyman's criticism of the

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55. *In re Hawk Mountain*, 149 Vt. 179, 184-85, 542 A.2d 261, 264 (1988).

56. This relationship between the unusual and the particular has been the source of extended philosophical disquisition. See Mortimer Adler, *Universal and Particular*, in *GREAT IDEAS: A LEXICON OF WESTERN THOUGHT* 883-91 (1992).

57. Llewellyn's final theories on all these matters are set forth in *KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

Supreme Court case of *Lucas v. South Carolina Coastal Council*<sup>58</sup> appeals to an historic state law that presumes legislative provisions to be valid if they pursue a legitimate goal with reasonable, not overly broad means which leave the landowner some reasonable return for his land.<sup>59</sup> Williams and Lyman claim that the Court ignores this "large and long established American legal tradition."<sup>60</sup> The authors criticize the *Lucas* majority's appeal to the *Mugler*<sup>61</sup> case (in which a "taking" was found), by comparing that decision with the *Euclid*<sup>62</sup> case.<sup>63</sup> In an odd version of precedent counting, Williams and Lyman point to the relative number of citations of each case, claiming that *Euclid* has been cited much more often in the tradition of land use law than has *Mugler*.<sup>64</sup> In legal realist fashion, the authors debunk the Court's efforts by pointing out that the Court has recently adopted thirteen different rationales for its analyses of the "takings" question.<sup>65</sup> They conclude, citing the relatively unique holding in *Just v. Marinette*,<sup>66</sup> that according to recent trends, all reasonable land owner uses may be taken without compensation in selected environmental situations.

Whether or not Williams' and Lyman's article properly cites "the trends" in state land use law, a broad appeal to such "trends" is inadequate. The central question is whether past "trends" should be followed in the future. Williams and Lyman make no effort to provide an appropriate rationale for when and under what circumstances private property values should be respected or regulations upheld. To be sure, as legions of land use scholars will attest, this is no easy task. Like the other legal realists, they appear to avoid the difficult question of how to find justice within a context of conflicting values.

In many ways, Act 250 seeks to "institutionalize" the realists' fact-based approach to land use decision-making. Act 250's fact-based assessment approach is somewhat similar to the environmental impact

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58. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

59. Norman Williams & R. Jeffrey Lyman, *Where Are South Carolina and the Supreme Court Taking Us?*, 16 VT. L. REV. 1111, 1115-16 (1992).

60. *Id.* at 1119.

61. *Mugler v. Kansas*, 123 U.S. 623 (1887).

62. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

63. Williams & Lyman, *supra* note 59, at 1121.

64. *Id.*

65. *Id.* See Norman Williams, Jr. & Holly Ernst, *And Now We Are Here On A Darkling Plain*, 13 VT. L. REV. 635 (1989). Fortunately, the legislative protection of wetlands has been upheld by more temperate rulings.

66. *Just v. Marinette*, 201 N.W.2d 761, 768 (Wis. 1972). The reasoning of this case has not been followed by most jurisdictions and for good reason.

approach used under some national and state laws. However, unlike most environmental impact laws, it requires substantive judgments.<sup>67</sup> Environmental commissions consider applications one by one, and their decisions are based upon the application of broad statutory standards. Except for jurisdictional determinations, few commission decisions depend upon precedent-generated legal doctrine. Even appeals to the Environmental Board on selected issues entail fact-based de novo hearings, and Board decisions are frequently shorn of precedent. In a sense, such a decision-making process is "pure legal realism" at work.

How, in fact, does legal realism work? One example of such decision-making is the *Okemo Mountain, Inc.* case involving the impacts of snowmaking on streams.<sup>68</sup> The issue in the *Okemo* case was whether a ski developer's withdrawal of water from the Black River for snowmaking constituted a violation of Vermont's Act 250 requirements that the project must: (1) "whenever feasible" maintain the natural condition of the river; (2) retain the shorelines and waters in their natural condition "insofar as possible and reasonable"; and (3) not destroy or significantly imperil necessary wildlife habitat, nor endanger any public investment in the river, nor jeopardize or "unnecessarily" interfere with the public's use, enjoyment and access to the river.<sup>69</sup>

The Board reviewed the applicant's "instream flow inventory methodology," which sought to assess the effects of stream flow changes upon an "indicator species," brown trout. An historical analysis of stream flow was based upon another river within the watershed where historical information was available. This information allowed an estimate of the "naturally-occurring flow" of the river.

The Board also reviewed alternative water sources and the developer's incentives to efficiently use the water. It noted that the withdrawn water would be returned to the watershed in the form of snow melt and the applicant's proposal to develop a stream enhancement plan.

The Board approved a minimum low flow rate (comparable to the naturally occurring February low flow rate), permitting the developer to withdraw water, but less than it had requested. According to the Board, the permitted withdrawals would maintain "the natural condition of the stream." The Board found that a lower withdrawal rate was reasonable in

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67. *State and Local Environmental Impact Requirements*, in 5 ZONING AND LAND USE CONTROLS, (Patrick J. Rohan ed., 1988).

68. *Okemo Mountain, Inc.*, No. 2S0351-12A-EB, 1992 WL 124886 (Vt. Envtl. Bd. March 27, 1992).

69. This sentence is an abbreviated statement of Criteria 1(E), 1(F) and 9(K) for VT. STAT. ANN. tit. 10, § 6086(a) (1994).

light of "a balancing of the effect on the resource . . . with [the] need . . . to obtain additional water for snowmaking."<sup>70</sup>

The form of decision-making by the Environmental Board in the *Okemo* case is unsatisfactory. There is little precedential reasoning. There is no linkage to broader plans or policies affecting other rivers or snowmaking areas. The decision is extremely fact-specific, including the modeling of the river itself. There is no detailed quantified or non-quantified cost-benefit analysis. There is no discussion of what constitutes "significant harm" to the river. There is a rough and ready judgment that the "natural winter low flow" should be the standard, and there is a rough awareness of the costs of such a standard. But no principles are offered for balancing development and protection.

Llewellyn's legal realist approach is inadequate for decision-making in this situation. First, Llewellyn would find this to be an important state industry versus environmental concern "type of decision." (The framing of the type of decision itself, of course, is an art.) Llewellyn urges examination of "past expectations." An example of the developer's past expectations might include compliance with a more stringent standard under which the developer had operated previously. Such a standard, however, would ignore other ski area developers. It would also fail to consider whether the ski industry, as a whole, and the developer, in particular, were facing shrinking profit margins. The decision, Llewellyn might say, seeks future "harmony" between ski area developers and environmentalists. It is difficult to see how such "harmony" could be forthcoming in light of the two groups' different agendas. In any event, in the *Okemo* case, harmony was hardly forthcoming, since a series of disputes over the withdrawal followed the decision.

#### POST-LEGAL REALISM AND LAND USE LAW

Each of the principles of legal realism—crude realism, instrumentalism, scientism, and competency—have been subjected to rigorous criticism and have evolved in different ways since the mid-twentieth century.

Since the advent of modern naive realism in philosophy, science, and law, a sea of change has taken place recognizing the important role of conceptions in our unconscious thought and actions, and in our conscious methods of science and legal scholarship. In the field of land use law,

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70. *Okemo*, 1992 WL 186658, at \*11.

these developments include recognition of the important role which conceptions have played in our past notions of public planning,<sup>71</sup> the importance of a systematic cultural geography, (the interpretation of meanings in the landscape),<sup>72</sup> and the importance of tacit conceptions underlying our basic land use law.<sup>73</sup> These dimensions of conceptualism are essential to any understanding of the "reality" of land use law, a reality which is more complicated than the crude realism of the realists.

The policy-oriented instrumentalism of legal realism arose out of a societal consensus on broad goals during the Second World War. That consensus dissolved by the 1960s. The consequence, according to some, was the emergence of political pluralism. According to others (e.g., critical legal theorists), the previous consensus of the 1940s and the pleasant pluralism of the 1950s simply masked the operation of hierarchy and power. The conflicts of the 1960s revealed this hierarchy and imbalance of power. Whether one finds pluralism or oppression, the simple legal realist pursuit of law found in policy seemed inappropriate. In a conservative backlash, many came to believe that within the courts, the role of policy should be limited to situations in which there was ambiguity, conflicts, or gaps in the law.

In this regard, Norman Williams appears to be a transitional figure. Williams recognized the plurality of groups playing in the land use game, but he continued to believe that their interests could be joined in the appeal to public values. Williams thus anticipated the work of some recent legal theorists who have sought to find and articulate broad substantive goals that transcend conflicting interests.<sup>74</sup>

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71. JOHN FRIEDMANN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* 21-48 (1987).

72. NEIL EVERNDEN, *THE SOCIAL CREATION OF NATURE* (1992).

73. CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 3 (1977).

74. How pluralism is contained within the public interest or common good is a problem which legal realists did not confront with any sophistication. McDougal simply assumed that there were a series of shared values, formulated at the most abstract level. Some more recent authors have sought to show that there are historically grounded common values or a common identity. See, e.g., WILLIAM A. GALSTON, *LIBERAL PURPOSES* (1991) (common values); CHARLES TAYLOR, *THE SOURCES OF THE SELF* (1989) (common identity).

Others have turned to ideals and practice of community. See, e.g., MURRAY BOOKCHIN, *THE RISE OF URBANIZATION AND THE DECLINE OF CITIZENSHIP* (1987); PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* (1992); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

The deepest and most sophisticated efforts to resolve conflicts between plural beliefs is the work of Richard McKeon. See, e.g., *DEMOCRACY IN A WORLD OF TENSIONS* 194-213 (Richard McKeon ed., 1951); *THE FREEDOM TO READ* (Richard McKeon et al. eds., 1957) (for a specific example of resolution).

When McDougal and Lasswell wrote in the 1940s about the law as a public profession, they envisaged the lawyer as a planner.<sup>75</sup> Since that time, however, there has been a slow and steady growth and development of the planning profession, and it has become the role of the public planner rather than the lawyer to prepare the plans. It is the land use planner's job to use natural and social science to identify problems and development trends in the formulation of plans and policies. Norman Williams, himself the past Director of City Planning in New York City, recognized the emerging role of public planners in the land use field. The lawyer's role has become a more modest one of participating in the implementation of plans.<sup>76</sup>

Since the 1960s, the art of planning has evolved away from the traditional planning paradigm advanced by McDougal, Lasswell, and Williams.<sup>77</sup> An important work, *The Strategy of Decision*, by Charles E. Lindblom and David Braybrooke, attacks the traditional planning method and advances a theory of "disjointed incrementalism."<sup>78</sup> This theory moved planning away from its assumption that planning could posit comprehensive community goals and, with the help of science, project future trends.<sup>79</sup> Planning was reduced to incremental decisions made in different contexts in a pluralistic world.<sup>80</sup> Different sciences were relevant in different settings.

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75. Myres S. McDougal & Harold D. Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 206 (1943). Bruce A. Ackerman has continued that tradition, in *RECONSTRUCTING AMERICAN LAW* (1984).

76. I sought to point this out as part of a new agenda for studying the relationship of planning and law. See Brooks, *supra* note 49.

77. That tradition or paradigm urged the inventory of community conditions and problems, the projection of future trends, the setting of objectives, the evaluation of alternative means for addressing them and the evaluation of these means. See, e.g., T.J. KENT, JR., *THE URBAN GENERAL PLAN* (1990). For one of the most definitive and detailed statements of the traditional paradigm, see YEHEZKEL DROR, *PUBLIC POLICYMAKING REEXAMINED* (1968).

78. CHARLES E. LINDBLOM & DAVID BRAYBROOKE, *A STRATEGY OF DECISION* (1963). Charles E. Lindblom followed up with another important related book, *THE INTELLIGENCE OF DEMOCRACY* (1965). Organizational theory had reached a similar conclusion. See, e.g., JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1958).

79. Political scientists questioned the ability and legitimacy of planners to posit goals. See, e.g., ALAN A. ALTSHULER, *THE CITY PLANNING PROCESS: A POLITICAL ANALYSIS* (1965). The difficulty of projecting trends is illustrated in the poor record of planners' efforts to project populating trends.

80. For a careful rethinking of incrementalism, see ROBERT E. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* (1982). The theory of community political pluralism was advanced by Robert Dahl. See, e.g., ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* (1967).

Recognition of that pluralism led to a myriad of new planning theories, including Paul Davidoff's "advocacy planning" approach.<sup>81</sup> The role of planner has shifted from the authorized spokesperson of a community consensus to many representatives of various interests within the mix of community pluralism. The task of law has been transformed from the implementation of an agreed-upon plan to either structuring the process of community bargaining or supporting advocacy planning, supplying legal arguments to proponents of one or another plan. Underlying such a pluralistic view of law and planning is acceptance of the dissolution of the modern community which offered the basis for a vision of shared values. Norman Williams has steadfastly refused to give up on the American community.

The third principle of legal realism, the appeal to a craft sense of the law or its application based upon policy sciences, has led to a virtual explosion of theories linking general laws and specific decisions. These theories include hermeneutics, judgment, "neo-prudentialism," practical reason, policy analysis, economics of law, rhetoric, informal logic, legal reasoning, equity theory, applied ethics, deliberation, symbolic logic and computer reasoning, pragmatism, law, language and literature.<sup>82</sup> This pluralism of theories of decision-making is the consequence of a deeper philosophical<sup>83</sup> and ethical pluralism.<sup>84</sup> The pluralism of theories mirrors the pluralism of interests as well as the many decision-making contexts and sciences.

In short, in their effort to legitimate the specific decisions to be made by courts and agencies without appeal to rules of law, the legal realists relied upon appeals to naive realism, consensus on goals and policies, the use of science and analysis of social trends, and the craft of decision-

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81. A. Heskin, *Crisis and Response: A Historical Perspective on Advocacy Planning*, 46 J. AM. PLAN. ASS'N 50-63 (1967).

82. LEGAL HERMENEUTICS: HISTORY, THEORY AND PRACTICE (Gregory Leyh ed., 1992) (hermeneutics); PETER J. STEINBERGER, *THE CONCEPT OF POLITICAL JUDGEMENT* (1993); KLAUS GUNTHER, *THE SENSE OF APPROPRIATENESS* (John Farrell trans., 1988) (applied ethics); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (prudentialism); ROBERT AUDI, *PRACTICAL REASONING* (1989) (practical reasoning); MICHAEL CARLEY, *RATIONAL TECHNIQUES IN POLICY ANALYSIS* (1980) (policy analysis); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1986) (economics of law); EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* (1994) (rhetoric); ROBERT J. FOGELIN, *UNDERSTANDING ARGUMENT: AN INTRODUCTION TO INFORMAL LOGIC* (1982) (informal logic); NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978) (legal reasoning); H. PEYTON YOUNG, *EQUITY IN THEORY AND PRACTICE* (1994) (equity theory); S. L. HURLEY, *NATURAL REASONS, PERSONALITY AND POLITY* (1989) (deliberation); JAMES BOYD WHITE, *JUSTICE AND TRANSLATION* (1990) (law, language and literature).

83. WALTER WATSON, *THE ARCHITECTONICS OF MEANING: FOUNDATIONS OF THE NEW PLURALISM* (1985).

84. JOHN KEKES, *THE MORALITY OF PLURALISM* (1993).

making. With a reality inevitably shaped by human invention, without a consensus on objectives, without the ability to move from the descriptive world of science to the prescriptive world of law, and lacking a convincing theory of law craft, the legal realist agenda fails. A similar effort at the application of legal realism to land use law also fails.

#### THE NEO-PRUDENTIAL ALTERNATIVE TO LEGAL REALISM

Recognition of the pluralism of interests, planning contexts and methods, and varieties of decision-making within the political community requires the selection of an appropriate decision-making theory and planning method. This selection depends upon the context and relevant cluster of community interests. Since it is beyond the scope of this article to review the various decision-making theories and their relevance in different contexts, I have simply selected one post-realist theory, "neo-prudentialism," which I believe rectifies some of the problems of legal realism. Rather than assume a naive realism, this view of law recognizes that the reality on which law works is itself a reality shaped by human perceptions and concepts. In land use law, the landscape is culturally created. Rather than assume a community consensus, this theory assumes a community context in which both shared and conflicting principles and values provide the decision-making context. Goals are not fixed but are shaped and defined by the deliberative process. Science is not assumed to deliver agreed-upon facts and predictions. The perceptions of the participants and the policies they seek shape the facts. The art of deciding specific cases requires the recognition of conflicting principles and the undertaking of a variety of ways of accommodating these principles.

Neo-prudentialism seeks to address one fundamental failure of legal realism—its refusal to recognize judicial decision-making as part of a normative realm requiring reasoned ethical choice among conflicting values and principles. Just as normative political theory seeks to provide the rationale for the selection of goals, ethical theory provides the basis for determining how specific decisions should be made, and is the basis for understanding legal decision-making.

Henry Richardson's *Practical Reasoning About Final Ends*,<sup>85</sup> sets forth the most detailed view of "neo-prudentialism." In summary fashion, this theory begins with the following approach (analogous to common law reasoning):

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85. HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1994). Another eloquent advocate of neo-prudentialism is Anthony Kronman. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

First we describe the problem at hand and the alternatives available. Second, we analyze the alternatives to uncover the specific values at stake. Third, we collect comparison cases in which these same specific values are involved and on which we hold settled judgments . . . .<sup>86</sup>

Richardson then argues for the progressive specification of objectives.<sup>87</sup> In the case of interpersonal decision-making, he employs abstraction (a generalizing of the issues), distinction (the appropriate separation of differing realms of competing values, rules, or norms), and analogy (seeking relevant similarities in order to reach a more general version of a position).<sup>88</sup>

Finally, the decision may undertake both a weighing of the consequences of the alternatives and a search for mutual support among competing positions.<sup>89</sup> Although in some ways Richardson's account resembles case-based legal reasoning, his rationale is not an appeal to an arcane specialized discipline of law but simply to ethically-based reasoning. This account of reasoning offers a way of thinking about values, goals and policies, goal redefinition, and conflict resolution, within a specific decision-making context. The decision-maker may employ science in the description of the problem, the generation of the alternatives, the selection of comparison cases, the specification of objectives, the distinction of differing realms, and the establishment of analogies.

Rather than discuss neo-prudentialism in the abstract, I will apply it to the Act 250 *Okemo* case discussed above. The *Okemo* and other land use cases require a recognition of the conflicting principles at stake within a given community, and the adoption of a method which can best resolve the conflict between those principles.

How might neo-prudentialism apply to our *Okemo* decision? The competing general principles implicit in the *Okemo* case are: (1) the "ski area principle"—the importance of fostering ski area development (an "industry" important to strengthening Vermont's economy); and, (2) "the environmental protection principle"—the protection of Vermont's streams and related wildlife. The specification of the ski area principle requires assessment of the relative economic strength and vulnerability of Vermont's ski industry in general, and the *Okemo* development in particular, and their relative contribution to Vermont's economy. The

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86. RICHARDSON, *supra* note 85, at 167. See also HURLEY, *supra* note 82.

87. RICHARDSON, *supra* note 85, at 169-172.

88. *Id.* at 231-250.

89. A full discussion of weighing is set forth in HURLEY, *supra* note 82.

specification of the environmental protection principle requires the relative assessment of the importance of an already altered stream, partly artificially stocked with fish, in a specific water basin, and the general role of streams within Vermont's nature and culture.

A distinction may be drawn between the ski industry in general, its members, and a particularly vulnerable member. Also, a distinction may or may not be properly drawn between the value of the ski areas as a whole, and a specific ski area, in particular or between different ski areas depending upon their vulnerability. Another distinction may be drawn between the conservation of recreation stocked rivers and the preservation of untouched streams.

Generalizing from the *Okemo* decision principles would require extending their application to other ski areas or major industries within the state and to the status and role of other rivers in the state. Of course, within a specific legal context, an administrative board may lack the competency or authority to undertake such a generalization. As a consequence, the legislature or an administrative agency may be a more appropriate decision-maker for the industry and the riverain environment as a whole.

In deciding the *Okemo* case, analogies may be drawn to other decisions invoking conflicts between nature-based recreation or protection of natural systems and other major developments dependent upon Vermont's unique environment. Farming, forestry, and slate excavation are examples of such developments. These analogies may seek to secure fundamental fairness to like industries and ecosystems. (Unfortunately, Act 250's case-by-case fact specific decisions discourage reflection upon such analogies.)

This process of specification, generalization, distinction, and analogy may help to resolve the conflict. For example, a rule may offer strong protections to untouched streams, but permit some carefully limited water withdrawals in streams already "degraded" where the withdrawal is made by an economically vulnerable member of an important state industry dependent upon relevant Vermont environment and important to the industry as a whole.

However, in order to adopt such a rule based upon specification, generalization, distinction, and analogy, the decision-maker must assess the relative weight of the analogous cases.<sup>90</sup> This weight may be assessed by the number, importance, and rationale of laws and decisions in which the principles in question are adopted. For example, in the *Okemo* case, the

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90. *Id.* at 143-59.

strength of the principle of lesser protection for already degraded streams and other environments may be assessed.

The decision regarding the *Okemo* water withdrawal may not require selection of a single principle, but a more coherent resolution of conflicting principles. The basis for such a coherence may be the recognition that: (1) both fish protection *and* ski area development are important recreation goals; (2) the ski area developments serve environmentally protective as well as environmentally harmful functions; (3) in accordance with ecology, the rivers are ecosystems (they are not simply conduits for fish); and (4) the rivers are part of a larger land use and water basin system. Planning and ecosystem management may lead to the allocation of different uses to different streams within a river basin.

### CONCLUSION

Legal realism provides a needed critique of doctrine-oriented legal thinking. Legal realism also calls attention to empirical reality, policy, science, and craft to legal decision-making. Norman Williams has been a major contributor to this process. But as evidenced by Act 250, appeals to "reality" policy, science and craft cannot resolve the fundamental conflicts of value over land use and environmental resources. Lack of a political consensus about community goals requires new political mechanisms for seeking such a consensus. When such a consensus cannot be achieved, decisions still must be made in the context of pluralism.<sup>91</sup> A more sophisticated intellectual approach must be adopted that recognizes a more complex reality, carefully uses science within the process of deliberation, recognizes conflicts in values and principles and the need to redefine them as part of deliberation. A variety of differing approaches to decision-making and different planning methods using different sciences must be adopted in different contexts. Different forms of legal reasoning are required which move beyond the legal realists' appeal to "craft" to cope specifically with the conflicting principles inherent in legal decision-making. Norman Williams and the legal realists have given us a good start. But there is much to be done!

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91. The pluralistic approach suggested here was first outlined in WAYNE R. A. LEYS, *ETHICS FOR POLICY DECISIONS* (1952).

