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JUDICIAL CONSIDERATION OF MORAL DOCTRINE IN GOVERNMENT LAND USE CONTROL LITIGATION

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Urban land use in the United States is extensively controlled by government. The trend is toward an increase in this control even though resistance to it is common and frequently effective. Whether or not government control over urban land use should be imposed and what is the most desirable form of control are questions that involve difficult moral problems.

This article considers the nature of these moral problems particularly as disclosed by the widely varied goals of those participating in efforts to affect government control of urban land use. It is also concerned with the extent to which courts admit to being influenced by principles because those principles are morally good instead of merely authoritative and binding as legal precedent. Judicial opinions are primarily devoted to discussions of cases, statutes, ordinances and regulations. But do courts admit to making decisions in reliance only on this authority or do they in their opinions also admit to taking other standards into consideration?

A moral problem is a question the solution to which involves a choice between alternative courses of action such that the choice can be made on the basis of principles of good and bad. A moral solution or decision is one chosen by the decision maker because he considers it good. In this sense it is subject to being evaluated by others as good or bad depending on the moral doctrine of the evaluator. Moral doctrine consists of principles of good and bad. Legal doctrine, for the purposes of this article, is the body of rules and prior decisions that a court will adopt and apply in deciding cases. If a court attempts a moral solution to a problem, it may consider the principles it applies to be both legal and moral doctrine.

The terms urban land and government control are intended here to have broader meanings than they are sometimes given. By urban land is meant physical space within an urban community. It includes not only the natural surface of the earth on which an urban community is located, but man-made improvements constructed on or under this surface, and space above the surface in which urban activities are carried on. When located in an urban community,

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such common physical phenomena as rivers, harbors, lakes, bridges, streets, airports, electric utility lines, subways, sewer systems and buildings of all kinds are considered to be urban land. The term closely resembles the term urban real property when real property is used to refer to physical things rather than legal rights in such things.

By government control is here meant any government effort designed to influence the nature of urban land use. This can take many forms, but usually it consists of some type of government regulation of land use, government subsidy of land improvements by private persons, or government operation and improvement of land owned by a governmental unit. Control can become effective merely by the making of a new law or the acquiring by the government of a new land title. But for government influence to be felt, more may be necessary. The new law may have to be implemented by such means as enforcement proceedings or subsidy payments, and ownership rights may have to be exercised by eviction proceedings, construction of improvements, or some similar means. Government control can operate on land users directly, or it can operate on them indirectly through intermediaries. Zoning and subdivision regulations are illustrations of direct control; state enabling acts and federal and state statutes creating public authorities to regulate the land use of others are illustrations of indirect control. Land improvement affects land use by creating opportunities for new and better uses and often by replacing prior uses. Favorable location of improvements can even influence the use of nearby tracts through increasing accessibility, drawing customers into an area, and increasing neighborhood prestige.

Government decisions as to urban land use control, whether by courts, legislatures or administrative agencies, are normally influenced by private parties seeking to further their goals. Government action can thus be a medium for private action toward private ends. Common means for this kind of influence are litigation, lobbying, appearance at public hearings and election activity. It is also common for one government instrumentality to seek to influence the decisions of another government instrumentality, either to achieve public or private goals. Depending upon the nature of the ultimate goals involved, some of those seeking to influence government action are attempting to increase government control, others to decrease it.

All levels and branches of government are participants in efforts to achieve government control of urban land use. The federal government, for example, has extensively subsidized urban housing and roads, regulated rail and air transit into urban centers, and imposed war-time rent control over urban residential leases. The states have exerted great influence in diverse ways but particularly through enabling acts that authorize and guide the form of local gov-

ernment land use control. For it is local government that has the most extensive control over urban land use. Most local government activity is concerned with regulating, servicing and protecting privately owned land or in operating publicly owned land facilities. And local government is financed primarily from real property taxation, a device that is often manipulated to control the nature of land use.

The impact of the courts on urban land use is substantial but spotty. In some areas of legal doctrine, such as zoning and eminent domain, the incidence of litigation is high and the influence of the courts is great. In other areas, such as government subsidy through mortgage insurance and public housing, litigation is rare and the impact of the courts is slight. Urban land use problems that come before appellate courts almost always involve constitutional questions or the interpretation of statutes or ordinances. They rarely concern common law land control doctrines. Even common law nuisance has been largely supplanted as an urban land control device by such legislatively created concepts as zoning and building and housing codes. But the range of statutory and ordinance land use control concepts is wide. In addition to those mentioned, some of the more important are subdivision regulation, comprehensive plans, dedication, licensing, traffic and parking codes, mortgage foreclosure and government loans and grants-in-aid including those for urban redevelopment and renewal.

The private parties that participate in efforts to influence government control of urban land use are as varied as the kinds of urban land users: home-owners, residential tenants, churches, schools, hospitals, clubs, charitable agencies and every conceivable kind of business interest. Land owners and business interests are the ones most likely to exert pressure when substantially affected by government land use controls; low-income residential tenants are probably the least likely to do so.

GOALS OF PARTICIPANTS IN EFFORTS TO INCREASE OR DECREASE GOVERNMENT CONTROL OF URBAN LAND USE

An analysis of the goals sought by those participating in efforts to affect government control of urban land use has relevance to the kind of moral problems that exist in this setting and their treatment by appellate courts and other government decision makers. The goals of participants disclose much as to the nature of the choices involved in a moral problem by showing what the end results of a particular choice may be. A choice that on superficial examination appears innocuous, may be an evil one if it leads to a participant carrying out an evil goal. A choice may also be evil if it aids one participant in achieving a desirable goal, but prevents another participant from achieving a relatively more desirable one. Awareness of participants' goals, by emphasizing consequences and the relation of motivation to consequences, is part of the data for

making informed moral decisions. Such awareness may also be helpful in suggesting moral solutions, as participants often rationalize their goals in terms of moral doctrine or phrase them in a manner that appeals to the moral predispositions of decision makers.

Below is an illustrative catalogue of goals commonly sought by participants in efforts to increase or decrease government control of urban land use, with examples. It shows the complexity and variety of aims and choices facing the courts and other government policy makers, and hence the difficulty of the moral problems involved. It also shows that although land use is normally associated with property as a wealth or economic concept, there is great interest in it for achieving other kinds of human goals. When these goals conflict, as they always do in contested litigation, the difficulties of government decision makers are enhanced, although they often avoid the difficulties by ignoring them. To reduce the random character of the classification, it includes groupings under very generalized goals or values: wealth, power, well-being, respect and rectitude.[1] In application, any goal could be a means to achieving some more ultimate one classified under the same or a different value heading, as each participant usually has a series of related goals in seeking to influence a situation.

The catalogue is not exhaustive, but does set forth most of the goals sought by participants in present-day controversies over government control of urban land use in the United States. If these goals are converted into moral arguments —rephrased from aims sought to those that should be sought because morally right—they also include most of the moral arguments invoked by government decision-makers, including appellate courts, in justifying their decisions on government urban land use control questions in the United States.

Wealth

Enhancing the wealth position of a particular person or group.

1. By enhancing income.

   Examples:

   Local government efforts to increase its real property tax base by raising the millage rate, reassessing land for real property tax purposes, annexing contiguous areas containing valuable industrial improvements, or conducting an urban redevelopment plan that will replace old improvements with more valuable ones that are subject to real property taxation.

   Local government in seeking state and federal grants-in-aid for urban redevelopment and street and school construction.

   A business enterprise such as a retail store or manufacturer that seeks to have its land zoned in a classification favorable to its business.

[1] These are some of the values developed in the analyses of Myres McDougal and Harold Lasswell. See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); and LASSWELL AND KAPLAN, POWER AND SOCIETY 55-57 (1950).

Operators of privately owned urban mass transit in seeking fare increases from government regulatory agencies.

A real estate speculator who seeks the location by the government of a new road, bus line or park near his land so as to enhance the sale value of his land.

2. By reducing expenditures.
Examples:

Efforts of government agencies to justify relatively low land valuations in eminent domain takings.

Efforts of eleemosynary institutions, veterans' groups and industrial concerns in seeking limited or complete exemption from real property taxes.

Private real estate interests in their efforts to secure favorable federal income tax treatment from Congress or the Internal Revenue Service, such as exemption of eminent domain awards from the capital gains tax, exemption of real estate syndicates from corporation income taxes and allowances of interest payment deductions to owners of interests in cooperative apartments.

Tenants in seeking rent control regulations.

Private builders and land developers in opposing subdivision regulations and housing codes that require more expensive private construction of buildings, roads and utilities.

3. By enhancing monetarily valuable ownership rights in land.
Examples:

Local government in forcing dedication of land to it as a condition to approving private subdivision plans.

Private land developers in seeking to use the powers of eminent domain or to have them used for their benefit in assembling land tracts that cannot be assembled at a fair price without this power.

Local government in seeking to improve or maintain adequate mass transit by purchasing such systems from private companies and operating them.

4. By enhancing credit for land purchase or improvement.
Examples:

Federal Housing Administration and Veterans' Administration in granting mortgage insurance and guarantees.

Federal National Mortgage Association efforts to support the secondary mortgage market.

Debtor groups in seeking legislation providing for mortgage moratoria, government assumption of defaulted mortgages or more lenient redemption priviliges in case of mortgage foreclosure.

Attempts of cities to raise their statutory debt ceilings so as to make land improvements, or to avoid these ceilings by creation of special authorities to finance public land improvements.

5. By enhancing public land resources available for public use at little or no charge.

Examples:

Users of government owned land in efforts to obtain such new facilities as public parks, roads, sewers, electrical power systems and schools.

Efforts of military and commercial air transport interests to restrict surface owners' control over airspace, so as to facilitate air transportation.

Government efforts to eliminate air pollution.

6. By reducing economic risks.

Examples:

Efforts of federal government agencies to stabilize the business cycle by such means as appropriately timed increases or decreases in federal public works, subsidies of private residential construction and urban redevelopment.

Flood control measures, such as zoning, dams and dikes; sought by property owners in urban flood plains to reduce the risks of land improvement loss from floods.

Efforts of property owners and government agencies to stabilize property values in older urban neighborhoods by urban renewal and redevelopment.

Investors and government agencies in trying to reduce the risks of private investors and insured persons by obtaining adoption of such government control devices as regulation of the kinds of real estate mortgages that life insurance companies and savings and loan associations may invest in, and the adoption of state blue sky laws and federal securities acts applicable to sales of interests in land including syndicate shares and interests in cooperative apartments.

Builders, mortgage companies and mortgage investors in seeking broad government mortgage insurance and government commitments to support the secondary mortgage market.

7. By allocating and conserving land resources that are in short supply.

Examples:

Competing urban and rural users in efforts to obtain government allocation of water use, including use for consumption, pollution, power and fishing purposes.

Government and surface owners' efforts to allocate land solely for urban uses even though the land contains commercially valuable oil, coal or gravel, by prohibiting extraction because of fire, subsidence danger, or cost of adequate fill.

Government in seeking to allocate building materials during war emergencies.

Urban renewal efforts of government agencies and land owners to protect and conserve older areas from the inroads of urban blight. The urban renewal methods sought to be used for this purpose include enforcement of building and housing codes, redevelopment of selected sites, and liberal mortgage insurance for repair of existing structures.

Attempts of land owners, users, builders and government to allocate urban land by zoning restrictions on permitted use, height or bulk; build-

ing code restrictions on density of occupancy; and government purchase and development of land for parks, streets and parking areas.

Power

Enhancing the power of a particular person or group. Power consists of control over decision-making.

1. By allocation of power among government instrumentalities.
Examples:

Efforts of cities to secure greater power by home rule legislation, broad enabling acts and less restrictive federal grant-in-aid legislation so that the cities' control over urban land use can be increased relative to that of the state.

Attempts of central cities to extend the geographical areas under their control by annexation and extraterritorial subdivision regulation so as to increase central city land use control at the expense of counties and smaller cities.

Judicial development of constitutional doctrines pertaining to urban land use so as to increase judicial power to invalidate legislative acts.

Judicial doctrines restraining the scope of judicial power over legislation pertaining to urban land use, such as liberal application of the plain meaning rule in construction of land use statutes and refusal of courts to interfere with legislative or executive regulation of land use because of the inability of courts to adequately inquire into relevant facts.

Extensive delegation of land use control powers by city councils to administrative boards.

2. By allocation of power among private persons or groups.
Examples:

Suburban land owners and businesses in opposing annexation for fear of undue dilution of their political power over urban land use.

Legislative and judicial efforts to strengthen the unequal bargaining power of tenants relative to landlords and mortgagors relative to mortgagees.

Legislative efforts to enable nearby landowners to influence zoning changes proposed by a landowner by prohibiting such changes if a certain proportion of nearby landowners object or requiring more than majority city council or zoning board approval if the nearby landowners object.

Efforts of professional land planners to strengthen their influence position on government land use policies, as against patronage and other influence groups, by formal and effective recruitment requirements for government planning boards and extending the powers of these boards.

3. By allocation of power between government and private persons.
Examples:

Government efforts to restrain the private market in real estate. Most advocates of government land use regulations, from aesthetics' control to zoning, have this restraint on the powers of private property owners as one of their goals.

Government efforts to restrict private land use that threatens health or safety.

Restrictions on government power over private property owners by such judicial holdings as no public purpose in eminent domain cases or no taking of private property without compensation in land use regulation cases.

Efforts of government law enforcement officers to establish the right to inspect privately held land without a search warrant.

Well-being

Enhancing the well-being of a particular person or group. Well-being includes health, safety of persons and amenities. Amenities include conditions of land use conducive to comfort, relaxation, convenience, privacy and emotional and aesthetic satisfaction.

1. By enhancing health conditions.
   Examples:

   Government efforts to eliminate air and water pollution by such means as smoke abatement ordinances, river pollution restrictions and government owned water treatment facilities.

   Medical and veterans' organizations in seeking government subsidies for the construction of new hospitals.

   Efforts of city health departments to control housing maintenance and density of occupancy in accord with standards conducive to health.

   City health departments in attempting to enforce regulations pertaining to restaurant maintenance, equipment and personnel.
2. By enhancing safety conditions.
   Examples:

   Legislative and police efforts to regulate traffic movement by means of traffic codes and their enforcement.

   Government fire and building departments in advocating and enforcing ordinances requiring construction or alteration of buildings in accord with standards that reduce fire and structural accident risks.

   Flood control measures, such as zoning and government constructed dams and dikes, sought by residents of urban flood plains to reduce the risks of loss of life from floods.

   Military and civil defense agencies in seeking government funds for construction of civilian shelters to be used in case of enemy air attack on cities.

   Military authorities in selecting sites in urban areas for nike and rocket installations designed to protect cities from enemy air attack.
3. By enhancing amenity conditions.
   Examples:

   Efforts of government agencies, builders, lenders or potential occupants to increase the volume of decent housing or to reallocate this housing by the use of such government controls as federal grants-in-aid for public housing; revised rent, income and priority standards for public housing; changes in government rent control regulations; and government mortgage insurance and guarantees.

Residents and retail stores in seeking the adoption of zoning provisions preventing the location in their immediate vicinity of institutions that are depressing to those nearby—institutions such as schools for mentally and physically handicapped children, mental hospitals, mortuaries and cemeteries.

Efforts of recreational groups to conserve natural open spaces within metropolitan areas by inducing government purchase of such spaces for development as public parks, playgrounds and forest preserves.

Retail stores in seeking to make their premises more convenient to shoppers by acquiring more public parking facilities nearby through ordinances authorizing on-street parking and government owned parking garages and lots.

Land owners by seeking zoning ordinances that require architectural uniformity of all buildings in a neighborhood.

Government efforts to restrict or prohibit outdoor advertising in urban areas.

Respect

Enhancing the respect or status position of a particular person or group.

1. By enhancing respect based on class.
   Examples:

   Efforts of upper income property owners to create and maintain an exclusive and wealthy residential community by zoning provisions requiring minimum lot size of several acres.

   Efforts of property owners to exclude low-income, low-class families from a community by building codes requiring houses of a minimum square footage of floor space, zoning restrictions prohibiting conversion of single family dwellings into multiple family ones, and pressure on government agencies to locate public housing in existing slum areas.
2. By enhancing respect based on race, religion or national origin.
   Examples:

   Efforts of racial and ethnic minorities to eliminate the segregation of such minorities in housing, schools, public recreational facilities and transportation. The means used in these efforts include litigation attacking the constitutionality of segregation, advocacy of anti-discrimination statutes and pressure on local government to locate schools and public recreational facilities near the fringes of existing residential concentrations of minority groups to increase the likelihood of integrated use.

Rectitude (Morality)

Enhancing the rectitude position or morality of a particular person or group. This is accomplished by conduct in accord with moral doctrine that the person or group performing the acts considers to be right or good. It often involves conduct that forces or persuades others to conform to standards that the one forcing or persuading believes to be moral.

Examples:

Each of the goals listed under the other values is considered by many seeking that goal to be one that also should be sought because it is moral.

This is consistent with the common human characteristic of morally justifying personal conduct and aims. But there are other moral goals often sought by participants in government control of urban land use. These are usually of a more abstract character and from which the previously listed goals can possibly be derived as morally desirable. Some of these are listed below.

Persons similarly situated should be treated equally.

No person should be prejudicially treated because of his race, religion or national origin.

Moral problems should be resolved by expressions of majority will on the part of those affected.

Political minorities should be protected from abuse by the majority.

A standard of living consistent with health and decency should be provided those unable to provide such a standard for themselves because of age, physical or mental handicaps, family responsibilities or unemployment.

Political matters of local concern should be determined by residents of the locality involved.

The use and development of land should be rationally planned by a centralized government.

Private property owners should be free of all government interference with the use of their property except to the extent that such interference is necessary to protect the private property rights of others or to maintain public order.

The market in land, goods and services should not be controlled by government except to maintain competition or to regulate it when competition cannot be maintained.

Government should not interfere with religious freedom but should encourage religious institutions without favoring any particular sect.

Certain types of land use, such as gambling, commercial distribution of intoxicating liquors, Sunday sale of goods, or occupancy of buildings in an unsafe condition, are immoral and should be prohibited.

Government should seek to reduce tensions and avoid public disorder. Government decision makers should prefer solutions that enable each participant to achieve his goals. If this is impossible, solutions should be preferred that minimize chances of public disorder and strong emotional dissatisfaction. This means that compromise solutions should frequently be favored that enable each participant in a controversy to partially realize his goals.

THE DECLARED USE OF MORAL DOCTRINE BY SELECTED APPELLATE COURTS IN ZONING CASES

Appellate courts are faced with moral problems in all cases brought before them. An analysis of appellate opinions is helpful in understanding how appellate courts resolve these problems. What courts declare as their reasons for deciding cases is not always the real or complete description of the factors that

have influenced their response, but in many cases these declarations do fully and accurately reflect the judges' conscious reasoning process; and the effect of a decision as authority for deciding subsequent cases is based in large part on the reasoning that appears in the written opinion.

Judicial opinions in zoning cases are good illustrations of judicial reactions to moral problems involved in government urban land use control. A wide variety of moral doctrine is available for the decision of zoning cases, as is indicated by the frequency with which zoning examples appear in the catalogue of participants' goals. Many more zoning examples could readily be added under any of the value headings in the catalogue. Zoning cases also arise on appeal often enough so that fairly valid generalizations can be made about judicial treatment of these cases from a study of the opinions of a small number of courts. Eminent domain and zoning cases are by far the most common government land use control cases currently appearing in the appellate reports.

In order to ascertain how appellate courts deal with the moral problems involved in zoning cases, a content analysis has been made of all the opinions in zoning cases decided by the California and Kansas Supreme Courts and the New York Court of Appeals. Memorandum opinions are not included. Consideration of all the zoning cases decided by a court gives a more accurate indication of judicial method than does the more usual procedure of concentrating on lead cases. The analysis attempts to isolate all declarations of moral doctrine used in judicial opinions to justify decisions or to justify legal doctrine used in reaching decisions. This is a difficult task because it is frequently uncertain whether statements are made as moral doctrine or merely as legal doctrine, whether they are prescriptions of law or also statements of moral preference. They are classified as moral doctrine only if it seems reasonably apparent from the language used that the court is adopting them because they are good rather than merely because it is bound by their legal authoritative force. Unequivocal statements are rare that the law is as follows because for these reasons the results are better, good or morally preferable. Instead one finds statements of this sort:

> A variation under section 21 must do 'substantial justice.' To that end, the section, so far as is practically possible, must affect alike all persons in the same situation. Equality of privileges is a basic principle of government. To cure by exemption in his case the loss resulting to one owner from general deterioration of a neighborhood is to depreciate the adjacent properties of other owners, and is unjust also to those who properties remain subject to the same restriction in other localities likewise impaired.[2]

It is not clear whether equality of treatment and privilege must exist because this is good, or because whether good or not, the law requires it. Perhaps

[2] Young Women's Hebrew Ass'n v. Board of Standards and Appeals, 266 N.Y. 270, 276, 194 N.E. 751, 753 (1935).

when those kinds of statements are used the courts intend that they be both moral and legal declarations. A similar equivocal statement is this one, made in a constitutional test of a zoning ordinance changing a classification from commercial to residential:

> Zoning laws, enacted as they are to promote the health, safety and welfare of the community as a whole (see Village Laws, § 115), necessarily entail hardships and difficulties for some individual owners. No zoning plan can possibly provide for the general good and at the same time so accommodate the private interest that everyone is satisfied. While precise delimitation is impossible, cardinal is the principal that what is best for the body politic in the long run must prevail over the interests of particular individuals. . . . There must, however, be a proper balance between the welfare of the public and the rights of the private owner.[3]

Still another such statement; this one involving an alleged business use in a residential zone:

> Whether the questioned activities amount to the conduct of a business depends upon the adopted definition of that word and the primary intent of the zoning restrictions. Obviously the conduct of industry pursued for profit was prohibited because of the general tendency to interfere with the residential character assigned to the district. The zoning restrictions are intended to retain the highest residential and aesthetic value to the property owners and the district. They are general protective measures for the benefit of the residents of the district and of the community as a whole. However, a protective measure for the individual owner was also included to insure that a homemaker would not be deprived of the reasonable use of his premises.[4]

Instead of being intended as a statement of legislative purpose, this probably is intended as a moral declaration of why the court holds as it does. Such an approach is common in statutory construction by courts.

Clearer in its moral implications is this statement made in holding unconstitutional a planning board ruling forbidding a religious organization the right to erect a church and school in a residential community: " '[W]herever the souls of men are found, there the house of God belongs.' "[5] And further in the same opinion: "Moreover, in view of the high purposes, and the moral value, of these [religious] institutions, mere pecuniary loss to a few persons should not bar their erection and use."[6]

When the uncertainties of classification are somewhat arbitrarily resolved, for instance all of the above statements are classified as declarations of moral doctrine, moral declarations are found in the zoning opinions of slightly over one-fourth of the California, Kansas and New York cases analyzed.[7] Statements

[3] Shepard v. Village of Skaneateles, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949).
[4] City of Beverly Hills v. Brady, 34 Cal. 2d 854, 856, 215 P.2d 460, 461 (1950).
[5] Diocese of Rochester v. Planning Board, 1 N.Y.2d 508, 523, 136 N.E.2d 827, 835 (1956).
[6] *Id.* at 524, 136 N.E.2d at 835.
[7] The number of opinions from each court classified as including declarations of moral doctrine and the total number of zoning opinions from each court are these: California Supreme Court majority opinions, 16 opinions out of 39; California Supreme Court dissenting and concurring opinions, 5 opinions out of 11;

of preference appealing to justice, fairness, public good, community welfare or the interests of society are classified as declarations of moral doctrine. So are those attributed to public policy, the purpose of zoning, judicial or legislative purpose or intent, or the traditions of the American people. Usually statements of moral doctrine are unsupported in the opinions by case, statute or ordinance authority. Moral doctrine has even less significance in the opinions than the percentage of its invocation might imply. In no case was it thoroughly discussed, and in no case did it appear to be the controlling element in the decision. Rather it was typically added as a brief, casual and supplementary reference in support of a declaration of mere legal doctrine.

In making moral declarations, courts occasionally attempt to strengthen their position by citing in support respected secondary authorities that contain moral arguments of a similar nature.[8] Infrequently they also seek to more ac-

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Kansas Supreme Court majority opinions, 3 opinions out of 21; Kansas Supreme Court dissenting opinions, none; New York Court of Appeals majority opinions, 14 opinions out of 60; New York Court of Appeals dissenting opinions, 3 opinions out of 12. The opinions, by court, classified as containing declarations of moral doctrine are these:

California Supreme Court majority opinions, Roman Catholic Welfare Corp. v. City of Piedmont, 45 Cal. 2d 325, 328-329, 331, 289 P.2d 438, 440-441 (1955); Edmonds v. Los Angeles County, 40 Cal. 2d 642, 652, 255 P.2d 772, 778 (1953); Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 557, 254 P.2d 865, 867-868 (1953); City of Beverly Hills v. Brady, 34 Cal. 2d 854, 856-857, 215 P.2d 460, 461 (1950); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 466, 202 P.2d 38, 46 (1949); Acker v. Baldwin, 18 Cal. 2d 341, 344-345, 115 P.2d 455, 457 (1941); Hart v. City of Beverly Hills, 11 Cal. 2d 343, 348-349, 79 P.2d 1080, 1084 (1938); Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 93, 33 P.2d 672, 674-675 (1934); Rehfeld v. City and County of San Francisco, 218 Cal. 83, 85, 21 P.2d 419, 420 (1933); Jones v. City of Los Angeles, 211 Cal. 304, 311, 314, 295 Pac. 14, 18-19 (1930); Feraut v. City of Sacramento, 204 Cal. 687, 692, 269 Pac. 537, 539-540 (1928); Magruder v. Redwood City, 203 Cal. 665, 669-671, 265 Pac. 806, 808-809 (1928); Dwyer v. City Council of Berkeley, 200 Cal. 505, 514, 517, 253 Pac. 932, 936-937 (1927); Fourcade v. City and County of San Francisco, 196 Cal. 655, 664, 238 Pac. 934, 937 (1925); Zahn v. Board of Public Works, 195 Cal. 497, 513, 234 Pac. 388, 395 (1925); Miller v. Board of Public Works, 195 Cal. 477, 488-489, 492-496, 234 Pac. 381, 385-387 (1925).

California Supreme Court dissenting opinions, Roman Catholic Welfare Corp. v. City of Piedmont, 45 Cal. 2d 325, 340, 289 P.2d 438, 447 (1955); McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 899-900, 264 P.2d 932, 943-944 (1953); Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 563, 254 P.2d 865, 871 (1953); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 474, 202 P.2d 38, 50 (1949); Johnston v. Board of Supervisors, 31 Cal. 2d 66, 81-82, 187 P.2d 686, 696 (1947).

Kansas Supreme Court majority opinions, Moore v. City of Pratt, 148 Kan. 53, 58, 79 P.2d 871, 875 (1938); City of Norton v. Hutson, 142 Kan. 305, 307-308, 46 P.2d 630, 631-632 (1935); Ware v. City of Wichita, 113 Kan. 153, 158-159, 214 Pac. 99, 101-102 (1923).

New York Court of Appeals majority opinions, Harbison v. City of Buffalo, 4 N.Y.2d 553, 562, 152 N.E.2d 42, 47 (1958); Nehrbas v. Village of Lloyd Harbor, 2 N.Y.2d 190, 193-194, 140 N.E.2d 241, 242-243 (1957); Diocese of Rochester v. Planning Board, 1 N.Y.2d 508, 523-524, 136 N.E.2d 827, 835 (1956); Community Synagogue v. Bates, 1 N.Y.2d 445, 458, 136 N.E.2d 488, 496 (1956); Rogers v. Association for Help of Retarded Children, 308 N.Y. 126, 132, 123 N.E.2d 806, 809 (1954); Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 498, 121 N.E.2d 517, 519 (1954); Rogers v. Village of Tarrytown, 302 N.Y. 115, 126, 96 N.E.2d 731, 736 (1951); Shepard v. Village of Skaneateles, 300 N.Y. 115, 118, 120, 89 N.E.2d 619, 620-621 (1949); City of New Rochelle v. Beckwith, 268 N.Y. 315, 318, 197 N.E. 295, 296 (1935); Young Women's Hebrew Ass'n v. Board of Standards and Appeals 266 N.Y. 270, 276-277, 194 N.E. 751, 753 (1935); Dowsey v. Village of Kensington, 257 N.Y. 221, 226, 177 N.E. 427, 429 (1931); Town of Islip v. F. E. Summers Coal and Lumber Co., 257 N.Y. 167, 170, 177 N.E. 409, 410 (1931); Morrill Realty Corp. v. Rayon Holding Corp., 254 N.Y. 268, 282, 172 N.E. 494, 498-499 (1930); Wulfsohn v. Burden, 241 N.Y. 288, 300-301, 150 N.E. 120, 123-124 (1925).

New York Court of Appeals dissenting opinions, Harbison v. City of Buffalo, 4 N.Y.2d 553, 567, 573, 152 N.E.2d 42, 49-50, 53 (1958); Presnell v. Leslie, 3 N.Y.2d 384, 394, 144 N.E.2d 381, 387 (1957); Vernon Park Realty, Inc, v. City of Mount Vernon, 307 N.Y. 493, 502, 121 N.E.2d 517, 521 (1954).

The analysis includes opinions up to and including 49 Cal. 2d, 182 Kan. and 4 N.Y.2d.

[8] City of Norton v. Hutson, 142 Kan. 305, 307, 46 P.2d 630, 631 (1935); Town of Islip v. Summers Coal and Lumber Co., 257 N.Y. 167, 169-170, 177 N.E. 409, 410 (1931).

curately and completely delineate the moral problem by supporting factual data apparently not developed from the evidence in the trial.[9]

Some of the zoning cases disclose an apparent desire by the courts to resolve the goal differences between competing interests by a compromise.[10] No side is given all of what it wants, but each side is given something. The reason for the compromise may be that the court believes there is some merit to what each side is advocating so the line is drawn between the extremes sought; or the reason may be that the court believes a compromise will more likely solve the problem without those affected defying the law or without efforts being made to seek a different solution from a legislative or administrative body.

REASONS FOR THE LIMITED USE OF MORAL DOCTRINE IN THE OPINIONS OF APPELLATE COURTS

Declared moral doctrine is a comparatively unimportant part of appellate opinions. The most significant declared arguments ordinarily are abstract common law or statutory propositions of legal doctrine, or another form of legal doctrine, prior authoritative decisions in cases with analagous facts. In addition, courts often decide issues without giving any authority. They may reason cases down to the nub and then say that the result is clear or plain,[11] one side has the more reasonable or logical argument,[12] or we see no reason to disturb the lower court determination.[13]

The infrequent and sketchy reference to moral doctrine in appellate opinions is not peculiar to opinions in zoning cases. It is characteristic of appellate opinions in all areas of the law, including all the other areas in addition to zoning that are concerned with government control of urban land use. There are a number of reasons for this. One is the belief that courts do not, or at least should not, make law. If the duty of courts is merely to apply legal doctrine promulgated by others, the moral rightness of the doctrine is not the responsibility or concern of the courts. This belief about the law-making functions of courts has been widely dispelled, largely as a result of the realist movement in jurisprudence, but still persists with many judges and lawyers.

Courts infrequently consider moral doctrine in part because of the nature of most legal doctrine. Most legal doctrine is part of a self-contained system of principles having no necessary relation to observable facts. This doctrine can be manipulated to produce legal decisions without considering its impact on human institutions and without reference to its moral rightness. Such a system

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[9] Presnell v. Leslie, 3 N.Y.2d 384, 393, 144 N.E.2d 381, 386 (1957) (dissent).

[10] People *ex rel.* St. Albans-Springfield Corp. v. Connell, 257 N.Y. 73, 177 N.E. 313 (1931).

[11] Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938).

[12] Bailey v. County of Los Angeles, 46 Cal. 2d 132, 139, 293 P.2d 449, 453 (1956).

[13] Simmonds v. Meyn, 134 Kan. 419, 425, 7 P.2d 506, 509 (1932).

lends itself to a closed process of reasoning in which nothing is deemed relevant except legal doctrine.[14]

Another reason for the reluctance of courts to consider moral doctrine in their opinions is the difficulty of the moral problems in most cases that are appealed. The zoning cases indicate how often hard problems of choice are presented, such as who should be preferred when both parties individually are seeking meritorious goals; when such values as power and wealth or well-being and respect come in conflict; or when the choice is between slight deprivation of each of many and extreme deprivation of one. In the face of these difficulties, the courts usually follow the easier practice of talking in terms of legal doctrine and omitting any reference to moral problems or moral doctrine. Intellectually this is easier, and it avoids criticism. Frequent stands on moral issues in moral terms would not only invite public criticism of judicial moral values but also might weaken public respect for the courts' legal decisions.

In deciding the kinds of moral problems with which courts are faced, traditional philosophical and theological systems of ethics are of little or no help. This further discourages the use of moral doctrine by judges. Moral principles developed by such systems are generally too abstract to resolve the detailed, borderline type questions commonly involved in litigation. Even such a principle as the greatest good to the greatest number is of little help when the good sought by competing groups varies in kind and degree. Nor does the principle that community interests should prevail over private ones help if a community agency is reacting to the pressures of a private group seeking to prevail over a competing private group. Even if traditional systems of ethics were of more value in resolving legal problems before courts, judges would not be likely to draw on this knowledge because in contemporary society few besides clerics and professional philosophers have a useable grasp of traditional ethical doctrine.

Courts avoid many moral problems by narrowing their holdings or the arguments upon which the holdings are based. This may be done to avoid deciding hard legal or moral questions; or it may be due to a feeling that it is best if judicially created rules apply only to those who have had an opportunity to appear before the court and present their arguments. And courts sometimes are loathe to consider questions that require access to factual data that they feel ill-equipped to obtain or evaluate under such circumstances. To determine the rightness of legal doctrine may require knowledge as to how it will affect innumerable persons and institutions not before the court and the court under such circumstances ordinarily has no way of ascertaining this data. As society becomes more complex, courts are increasingly unlikely to have the factual background with which to decide the moral questions before them.

[14] Felix Cohen characterized such a closed system of jurisprudence as transcendental nonsense. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

Stare decisis also tends to narrow judicial holdings. The need for certainty and constancy in legal doctrine often leads courts to refuse reconsideration of such doctrine or the moral problems involved. So a case that involves significant moral questions may result in an opinion ignoring these questions and focusing on relatively trivial issues. Similar neglect of moral issues can result if a court feels that there is so little merit to an argument that it can be summarily disposed of in the opinion, often without even a reference to the legal arguments advanced by the parties. And then there are cases in which the courts feel that it makes little difference which of two or more alternative solutions is reached but it is important to declare for popular reliance purposes which is prescribed by legal doctrine.

Another possible reason for the neglect of moral doctrine in appellate opinions is that it may be easier to obtain judicial agreement on legal doctrine than on moral doctrine. This may lead some judges, in writing opinions, to omit reference to moral arguments so as to reduce the likelihood of separate concurring opinions or even of dissents.

But moral arguments may appear more frequently in appellate opinions than has been indicated up to now. It is common for judicial opinions to contain highly abstract, generalized legal concepts in support of the decisions rendered. And these concepts often have strong moral connotations and are often phrased in terms characteristic of moral doctrine. Examples of such concepts that appear frequently in government land use control cases are equal protection of the laws; due process; fair compensation for public takings; first amendment freedom of religion; and promotion of public health, safety and welfare. It is quite possible that when judges use these concepts, they commonly intend them as statements of both legal and moral doctrine.

CONCLUSIONS

There is an infinite variety of moral problems involved in government efforts to control urban land use and in the appellate litigation resulting from such efforts. No philosophical system is extensively relied on by courts in solving the moral problems with which they are faced in urban land use control cases. Nor in their written opinions do courts ordinarily even use moral doctrine nor phrase their problems as moral ones. When courts do make use of such doctrine in their opinions it is brief and incidential to primary reliance on mere legal doctrine as the basis of decision.

Does this judicial slighting of moral arguments mean that it is a foolish expenditure of effort for lawyers and scholars to evaluate legal doctrine by moral standards? The answer is no. Such evaluations have merit whether one is seeking to predict judicial behavior, influence it, or merely comment on it.

Many courts are sensitive to moral arguments whether these are reflected in their opinions or not. Bare legal doctrine and precedent are not enough for many judges; and they welcome arguments that help sharpen or dispose of their hunches, intuitions and vague prejudices. In addition, on any issue at any time there are limits of decision beyond which no court will go, and moral evaluations help to disclose where these limits are. Then too, moral evaluation of legal problems is important for other government decision makers. In many fields of law, including urban land use control, the most important law makers are not courts but rather legislatures and administrative agencies. Moral evaluation of legal doctrine may have more influence on these bodies than on the courts because they are less influenced by precedent and more responsive to morally impressionable popular will than are the courts. Lastly it is at least arguable that scholars' recommendations as to legal doctrine should always be based on a thorough and honest moral evaluation of that doctrine.