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The Casuistical Turn in Planning Ethics
Lessons from Law and Medicine

David Thacher

Abstract

Case studies have recently played a prominent role in the study of ethical issues in planning. To clarify the role that cases can play, this article investigates how two other professional fields (law and medical ethics) have used cases to analyze practical ethics. The author argues that law and medicine use studies to develop "moral taxonomies"—classifications of important cases that help clarify the meaning and limits of ambiguous values, principles, and maxims. Three features characterize case ethics in law and medicine: (1) a focus on hard cases, in which key values or principles are ambiguous or in conflict; (2) use of analogical reasoning to analyze those cases, to determine which previously resolved cases they resemble and which they do not; and (3) identification of low-level principles that underwrite these judgments of similarity and difference and can help inform judgments about future cases.

Keywords: professional ethics; planning ethics; case studies; casuistry

David Thacher (Ph.D., MIT) is an assistant professor of public policy and urban planning at the University of Michigan. His work examines how empirical research can help us think more clearly about values in public policy—both in general and in the specific areas of housing policy, criminal justice, and public management. Recent publications include "Managing Value Conflict in Public Policy" (with Martin Rein, forthcoming in *Governance*) and "Conflicting Values in Community Policing" (*Law and Society Review*, vol. 35, no. 4, 2001). He is currently beginning a study of housing for ex-convicts.

An important idea has overtaken recent discussions of planning ethics.[1] This idea holds that ethical questions depend heavily on context—that ethical concerns cannot be separated out easily from the details of particular situations, treated abstractly in the manner of analytical philosophy, but instead must be considered in situ. On this view, we cannot say what it means to be ethical by remaining in the precise but rarefied world of moral principles; we also need to grapple in some substantial way with the complex and messy details of actual cases. As John Forester (1999) put it, "When we have practical bets to make about what to do and what might work, theory matters—but so do the particulars of the situation we are in"; thus, to study morality in planning, "we need to explore not only how planners respond to standing norms and principles, but also how they attend to situational details" (pp. 21, 225).

This perspective can be understood in terms made popular by Albert Jonsen and Stephen Toulmin. Much discussion of ethical issues in planning has moved away from an "axiomatic" approach to normative judgment—one that aims to deduce conclusions about what to do from well-founded abstract principles (the "norms and principles" Forester refers to above)—and toward a casuistical, or case-oriented, approach to morality (one that "attends to situational details"). In Jonsen and Toulmin's (1988) words,

> We inherit two distinct ways of discussing ethical issues. One of these frames these issues in terms of principles, rules, and other general ideas; the other focuses on the specific features of particular kinds of moral cases. In the first way general ethical rules relate to specific moral cases in a *theoretical* manner, with universal rules serving as "axioms" from which particular moral judgments are deduced as theorems. In the second, this relation is frankly *practical*, with general moral rules serving as "maxims," which can be fully understood only in terms of the paradigmatic cases that define their meaning and force. (p. 23)

In planning theory, the clearest examples of the axiomatic approach appear in efforts to clarify the general moral principles that do or should guide planning practice (e.g., Beatley 1984, 1991; Howe 1990; McConnell 1995; Harper and Stein 1983, 1995; Stein and Harper 2002).[2] Often, these efforts do incorporate case studies (e.g., Howe 1990, 1994; Kaufman 1993), but the cases play a subordinate role in the sense that Jonsen and Toulmin suggest: the analyst derives judgments about what should be done in a particular case or evaluates actions that were actually taken by using deductive logic to deter-

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mine what the general principles require given the facts of the case (e.g., Howe 1994, 207-51; Levine and Garb 2000, 34-37).[3] Most of the analytic effort in these studies focuses on the merits of the principles themselves—on determining which principles out of many possibilities are most defensible as guides for action (e.g., Beatley 1984; Howe 1990; Harper and Stein 1995)—while concrete judgments about particular cases are mostly limited to judgments about how the general principles apply to them (e.g., Beatley 1984, 464). By contrast, the casuistical approach to ethical issues in planning is evident in efforts to analyze and generate new insights from the concrete features of specific cases, with little emphasis on the application of general principles (e.g., Forester 1999; Flyvbjerg 1989, 1993, 1998; Throgmorton 1996). The authors of these studies intend their analyses to illuminate planning ethics in a more grounded way than principles can, though it is not always clear exactly how case-oriented analyses will serve this ideal.

This article aims to investigate more precisely how case studies like these can inform practical judgment in planning and, particularly, ethical judgment in planning. The enthusiasm for a casuistical approach to planning ethics, and to planning theory more generally, has not always been matched by a clear statement of how case studies can inform practical judgment (but see Flyvbjerg 2001 for an important attempt). Although there has been considerable attention to the role that case studies can play in informing scientific judgment about causation (Campbell 1998; Yin 1994), there has been less analysis of how cases can inform normative judgment about values. This article aims to contribute to that analysis.

This enterprise is important because ethical analysis needs help from convictions at all levels of abstraction. In his celebrated account of ethical reasoning as the pursuit of "reflective equilibrium," John Rawls (1999) argued that people have ethical convictions "at all levels of generality, from those about particular situations and institutions up through broad standards and first principles to formal and abstract conditions on moral conceptions" (p. 239); he then went on to insist that any defensible analysis of what morality requires should incorporate convictions at all of these levels (cf. Rawls 1971, 19-21; 1951).[4] A purely axiomatic approach to ethics is incomplete because it disregards all but the most general of our convictions—despite the fact that convictions about particular situations are often more certain than convictions about general principles (Richardson 1997, 138; Jonsen and Toulmin 1988, 16-19).

The point is not, it should be clear, to favor concrete judgments about particular cases at the expense of principles. I will take pains to stress the role that principles play in casuistry throughout this article, and casuistry itself is only one possible approach to ethical analysis—one that should supplement rather than replace the axiomatic approach. Nevertheless, concrete convictions are an important and often untapped aspect of our ethical knowledge, and we will improve our ability to think clearly about the hard ethical dilemmas planners confront if we can develop better ways to incorporate them into normative analysis.

Bent Flyvbjerg, a leading exponent of the case study approach in planning theory, has offered a general statement about the purpose of his own cases that can serve as a starting point for this inquiry. Describing his case study of a major planning project in Aalborg, Denmark, Flyvbjerg (1998, 5) explains,

> Aalborg is offered as a reference point against which rationality, power, and democracy elsewhere can be compared. Others will be able to ask practical questions like, "Do we have an instance of an Aalborg here?" "How close to or how far from it are we?" And, as people in Aalborg have asked on the basis of the original Danish version of the book, they can pose the question, "Is this what we want?" . . . In this way, the story of Aalborg may be used not as a model but as a guide for situational ethics and practical action. (cf. Flyvbjerg 2001, 167; 1993, 12)

The idea that case studies serve as guides for situational ethics is, I believe, exactly right. In this article, I hope to elaborate Flyvbjerg's notion in more detail by illustrating what it means in practice—by illustrating exactly how cases can serve as guides for situational ethics in well-established fields that have relied extensively on the case ethics approach. In particular, I will examine the use of case ethics in law and medicine to analyze how cases contribute to ethical inquiry in those fields. After doing so, I will then discuss how planning ethics might incorporate the lessons of those fields. I do not argue that planning ethics should exactly mimic law or medicine. A central insight of casuistical thinking is that context matters, so case ethics in planning will need to depart somewhat from case ethics in other fields. But another central insight of casuistry is that even though each case is to some degree unique, the best way to understand it is with reference to other cases to which it bears a family resemblance.

By following this approach, I aim to offer a casuistical analysis of casuistry, offering case studies that show how other fields have used case ethics to support ethical inquiry. This approach is consistent with the one taken by leading casuists such as Albert Jonsen and Stephen Toulmin (1988), whose seminal statement of casuistical method is mainly historical rather than theoretical—a description of how casuistry has been used (and abused) in several historical periods. Although this approach may appear circular, using the casuistical method to validate itself, this element of reflexivity is unavoidable and ultimately desirable. Any account of the proper methods of ethical reasoning itself embraces an ethical commitment (i.e., a commitment to the view that a particular way of reasoning about ethics

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is a good way), so it needs to be justified in the same way as any other ethical commitment. An adequate account of ethical reasoning must hold true of itself.

► An Overview of Casuistical Method

For this reason, to say more about the approach I will take in this article, I need to state my conclusion about the proper shape of casuistical reasoning up front. In brief, casuistical inquiry involves the use of cases and analogies to define and elaborate the inherently fuzzy ethical principles (e.g., "do not lie," "return what you borrow," etc.) that we use to guide our practice. By using analogical reasoning to analyze hard cases—those in which the proper application of the principles is unclear—casuistry helps to clarify how the principles apply to unfamiliar contexts, and it helps to mark out the principles' boundaries by investigating situations in which they conflict with other considerations.

On this view, case ethics is not utterly opposed to general maxims and principles. Indeed, that position will be an important theme in the discussion that follows since case ethics is often misunderstood in this regard. Nevertheless, the casuistical perspective suggests that the meaning of these general maxims is always understood with reference to a family of specific cases. To a first approximation, the maxims take their meaning from especially clear examples. "We understand general maxims," Jonsen and Toulmin (1988) write, "because, and to the extent that, we are familiar with the central unambiguous kinds of cases (the 'paradigmatic cases') that those maxims are commonly understood to cover" (p. 8). But although these paradigmatic cases reveal the core meaning of general maxims, they can only take us so far. Jonsen and Toulmin continue,

> Once we move far enough away from the simple paradigmatic cases to which the chosen generalizations were tailored, it becomes clear that no rule is entirely self-interpreting. The considerations that weigh with us in resolving the ambiguities that arise in marginal cases, like those that weigh with us in balancing the claims of conflicting principles, are never *written into* the rules themselves. In dealing with real-life moral problems, which so often turn on conflicts and ambiguities of these two types, we are often forced to go behind the simple rules and principles themselves and see what underlies them. (p. 8)

Our most difficult ethical dilemmas are difficult precisely because it is controversial which general maxim covers them. "It is just those situations that are *not* covered by appeal to any single simple rule that begin to be problematic" (p. 7; cf. Frankena 1973, 3).

Jonsen and Toulmin (1988) argue that such situations can be illuminated not by refining the general principles directly but by indicating how the marginal cases compare with (i.e., whether they are similar to or different from) other cases about which our judgments are more certain. This idea leads them to their central notion: "One indispensable instrument for helping to resolve moral problems in practice, therefore, is a detailed and methodical map of morally significant likenesses and differences: what may be called *a moral taxonomy*" (p. 14). Elsewhere, Toulmin has argued that we analyze new hard cases by asking where to locate them on this map—which cases in the moral taxonomy the new case resembles and which cases it differs from significantly. One by one, these analyses extend the map itself by charting the location of hitherto-unimagined hard cases. In this way, we "triangulate [our] way across unexplored ethical territory" (Toulmin 1990, 135), using the methods of analogical reasoning (i.e., judgments about similarity and difference) at each step (Sunstein 1996; Lakoff and Johnson 1980; Schön 1963; Verma 1993, 1998). General maxims, together with the paradigm cases that exemplify them, play important roles in these maps of moral terrain; they stand out as its sharpest features. But to complete a useful map, it is necessary to inch away from the paradigms, analyzing the moral status of harder cases along the way to clarify the fuzzy boundaries that delimit the general maxims' reach—boundaries that are never visible in advance but are established instead through situated judgments about similarities and differences among cases. This process mobilizes at least two kinds of relatively concrete convictions: convictions regarding what should be done in the paradigm cases and convictions that two cases are similar or different (Sunstein 1996; Schön 1963, 59, 69). As Rawls (1999) indicated in his discussions of reflective equilibrium, we may revise convictions like these once we consider their relationship to other convictions, but they serve as "provisional fixed points" from which ethical inquiry can begin (p. 238; Rawls 1971, 20).

Contrary to some accounts of casuistical reasoning, this process typically does generate new principles, albeit at a low level of abstraction. We conclude that two cases are different or similar for a reason, even if that reason is not theoretically ambitious (Sunstein 1996, 65). Giving reasons in this matter adds to the epistemic legitimacy of analogical judgments by making their bases explicit and testable (Verma 1993, 15; 1998, 97-101). Nevertheless, casuistry qualifies this concession to principles with two central tenets. First, the principles do not precede the concrete judgments of similarity and difference but instead emerge out of our encounter with specific cases (Sunstein 1996, 66). The world invariably surprises us (Richardson 1997, 98; Milgram 1998), so complete standards of ethical action can rarely be defined in advance. Second, the principles should remain as concrete as possible, tailored to the specifics of the cases at issue. Overly general principles aim to

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govern cases we have not yet encountered, and for that reason they are likely to misfire since moral judgments are often more reliable when they refer to concrete situations (Richardson 1997, 138).

This approach to ethical reasoning differs from the axiomatic approach. When presented with a new problematic situation, axiomatic analysis tries to determine which action should be taken by referring directly back to general principles—for example, by asking which action would be consistent with Kant's categorical imperative, with Rawls's two principles of justice, with Bentham's dictum to promote the greatest happiness of the greatest number, or with a preexisting code of ethics (e.g., Howe 1990; 1994, 211 ff.; Beatley 1984). By contrast, casuistical analysis tries to determine which action should be taken by referring to a moral taxonomy of related cases, asking how the present case is similar to or different from other cases about which our judgments are more certain.

With this background, it is possible to describe the goals of this article more precisely. I aim to examine case studies of ethical inquiry in the professions to map out the reach of a particular maxim: the maxim that a detailed map of morally significant likenesses and differences is the core of casuistical reasoning, defining the unclear boundaries that distinguish ethical choices from unethical choices. That maxim, like all maxims, is too abstract to guide our practice definitively; it cannot say, for example, what type of cases will best contribute to a useful moral taxonomy. This article aims to fix the meaning of this maxim more clearly by developing case studies of law and medical ethics (together with associated low-level principles) that help define its contours. Section 1 begins with the case of legal inquiry, presenting it as a paradigm case of casuistical reasoning that demonstrates what a sustained attempt to use case ethics looks like in the simplest and most favorable context. I then move on in section 2 to consider the use of casuistry in medical ethics, showing how a similar approach to ethical inquiry can operate successfully outside a heavily structured context like the law. Building on the discussion so far, my description of these two examples of casuistical reasoning will focus on three major features of each enterprise: (1) its use of cases, (2) its use of principles, and (3) the relationship between the cases and the principles. In the conclusion, I argue that law and medicine stand (mostly) together as exemplars of ethical reasoning in the professions, and in doing so, they convey their lessons to a wider range of institutional contexts than law alone. I then defend the proposition that planning ethics can usefully draw from the models of law and medicine, and I suggest how the field of planning ethics should proceed to do that by considering the similarities and differences between planning and the two fields I have analyzed.

▶ Law

Law is the paradigmatic example of casuistical reasoning. Prominent defenses of casuistry refer to law (and particularly the Anglo-American common law) as a major example of this approach to ethical inquiry (e.g., Jonsen and Toulmin 1988). I am not referring here to the field of study commonly known as "legal ethics"—the branch of professional ethics that focuses on the professional practice of lawyers, including matters such as the appropriate norms governing a lawyer's relationship with her or his clients. I refer instead to the much broader and better established field of case law. At first glance, case law may not appear to have much in common with the fields of planning ethics and medical ethics, but in fact it is centrally concerned with normative analysis. Legal inquiry attempts to determine which values should guide legal decisions in a specific case, how those values should be understood, and how their conflicts should be resolved; it is not primarily concerned with factual inquiry of the sort that dominates the physical and social sciences (Dworkin 1997, 433). These questions are very similar in form to those posed in more conventional fields of professional ethics.

The casuistical dimension of legal inquiry is widely appreciated in the common law, but a similar approach also dominates constitutional law and statutory interpretation (Dworkin 1986, chap. 9-10; Sunstein 1996, 77 ff.). On the surface, constitutional law and statutory law appear to be principle driven, but in reality, legal cases involving the Constitution and ordinary legislation wind up in court—and particularly in the appeals courts where case law is made—precisely because they pose some difficulty of interpretation (i.e., because key constitutional or statutory principles are ambiguous or conflicting). The courts develop and use case law to clarify these interpretive ambiguities. For example, Fourth Amendment cases typically raise questions about whether a particular search or seizure is "unreasonable," and Fourth Amendment jurisprudence aims to distinguish reasonable searches and seizures from unreasonable ones, primarily using a taxonomy of different kinds of search and seizure cases to do so.

Casuistry and the Takings Clause

A brief example illustrates how legal inquiry uses cases to define the scope and meaning of ambiguous legal values. Takings law is an especially useful example because it will be familiar to many planning scholars. My purpose here is not to give a full account of takings law, or even to offer an overview of its major substantive provisions (q.v., Mandelker 1997, chap. 2). Instead, I aim to give examples from takings jurisprudence

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that illustrate how the courts use cases and analogies in their analyses.

The Fifth Amendment to the U.S. Constitution prohibits "private property [from being] taken for public use without just compensation." This maxim is not self-interpreting: key terms such as *taking*, *public use*, and *just compensation* admit to varying interpretations. Takings jurisprudence tries to define the meaning of these terms more precisely so courts can decide cases in consistent and appropriate ways. In large part, it has proceeded casuistically, marking out the scope and meaning of each term through official court pronouncements about hard cases—those in which it is not immediately clear whether compensation is just, whether the proposed use of land is public, or whether land has been taken.

The most active branch of this case law has tried to clarify the concept of a "taking." As Jonsen and Toulmin would recognize, our understanding of the takings clause rests on our familiarity with the simplest paradigm cases—cases in which government takes title to private land to use it for some accepted public purpose (e.g., a highway) by using its power of eminent domain. In these cases, it is obvious that land has been taken, so government must clearly compensate the property owner. By contrast, there exist many hard cases in which it is unclear whether a taking has occurred. In particular, many government regulations greatly restrict the use of private property, and some of these regulations may effectively "take" a property owner's land. The hard question is which regulations fall into this category.

The U.S. Supreme Court first established this possibility—that regulation could restrict land use so severely that it amounted to a government taking of private property—in *Pennsylvania Coal Co. v. Mahon* (260 U.S. 393, 1922). Like many coal companies, Pennsylvania Coal often sold the surface rights to mining land to home builders, continuing its mining activities below. In 1921, however, Pennsylvania passed legislation (the Kohler Act) that generally made it illegal to mine coal from land if it would cause subsidence to a home. In the land at issue in *Pennsylvania Coal*, the law prohibited further mining and thereby made the company's subterranean property worthless. The question posed to the court was whether the Kohler Act effectively "took" Pennsylvania Coal's property without just compensation. Writing for the majority, Justice Holmes found that it did. Citing a state court case that held that "for practical purposes, the right to coal consists in the right to mine it," Holmes wrote that "what makes the right to mine coal valuable is that it can be exercised with profit. *To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it*" (260 U.S. 393, 1922, emphasis added). Thus, Holmes reasoned analogically, arguing that the regulation had the same economic impact on Pennsylvania Coal's land as direct appropriation would. The state would have clearly been required to pay just compensation if it had taken the land directly, so it had the same obligation when it passed the Kohler Act.

In coming to this conclusion, Holmes relied on the idea that the Kohler Act and eminent domain were similar in all relevant respects because they would both have the same economic impact on Pennsylvania Coal's property. This reason for treating the two actions similarly, in turn, suggested a more general principle about when the takings clause would apply to land use regulations:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits. . . . One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. . . . While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. (260 U.S. 393, 1922, at 414-15)

In this formulation, the difference between justified regulations and those that amount to "takings" is that the latter "go too far" by diminishing the property's value excessively; in doing so, they become indistinguishable from eminent domain.

Holmes's formulation is (famously) ambiguous, but it establishes a general possibility that has underlain most of the subsequent history of takings law. Moreover, the details of the Pennsylvania Coal case help to clarify one way in which a regulation might "go too far." On one interpretation (supported by the excerpt above), the significant detail is how much the value of the land is reduced by the regulation. On another (supported by Holmes's statements elsewhere that only a "single house" was affected by mining in the case before the court), the significance of the public benefit also matters (Mandelker 1997, 2.12). In any case, these details would be specified in further case law. For present purposes, what was important was that the court established an important general possibility—that overly restrictive land use regulation could amount to a taking—together with a concrete example in which it judged that this possibility had become real. Holmes candidly admitted that much ambiguity remained after his decision, arguing that this ambiguity was unavoidable: "[The takings question] is a question of degree—and therefore cannot be disposed of by general propositions" (260 U.S. 393, 1922, at 416).

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Subsequent takings cases further clarified the scope of these so-called regulatory takings by establishing examples of the kinds of regulations that the court judged to "go too far." *Penn Central Transportation Co. v. New York City* (438 U.S. 104, 1978) is widely recognized as the most important of these cases. *Penn Central* is complex in many ways, but in essence it presented the court with the following question: did New York's historic preservation law effectively "take" part of Penn Central's property by prohibiting the company from constructing high-rise office space above its historic Grand Central Station? Where did historic preservation laws like New York's fall on the regulatory map—in the region of de facto takings that required compensation, or in the region of legitimate regulations?

To answer this question, the court proceeded analogically. In particular, Justice Brennan argued (over Penn Central's objections) that historic preservation laws did not differ in any significant way from zoning regulations, and since the court had held that zoning regulations did not generally amount to takings, neither did New York City's historic preservation law. Both kinds of regulation served valuable public purposes, and both created a wider benefit for property owners even while they burdened them with restrictions on their property use (i.e., they created a "reciprocity of advantage"). Moreover, Brennan rejected Penn Central's contention that the regulation had completely taken the company's air rights over the railroad station, arguing that the New York City regulation was no different from many past regulations the court had previously held to be legitimate. He wrote,

> The submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. *Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels.* (438 U.S. 104, 1978, at 130; citations omitted, emphasis added)

From these analogies, Brennan induced a significant principle that shaped subsequent takings cases: "Taking jurisprudence," he wrote, "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site'" (438 U.S. 104, 1978, at 130). The economic impact of regulation clearly mattered: if regulation eliminated a large share of a property's economic value, it might well amount to a taking. But here Brennan argued that for the purposes of that analysis, the relevant denominator of financial value should be defined broadly, as encompassing what has come to be known as the "whole parcel" rather than any of the parcel's elements in isolation. (The "whole parcel" rule, in turn, itself presents hard cases, since it is often hard to determine the correct definition of a parcel when it is made up of multiple properties. Lower courts have tried to clarify these ambiguities casuistically; e.g., *Bevan v. Brandon Township*, 438 Mich. 385 [475 N.W.2d 37, 1991]).

In this way, Brennan reasoned that *Penn Central* was indistinguishable from previous cases in which the court had ruled that no taking had occurred and that it could be distinguished from previous cases in which it had held the opposite. In the process of making these analogical arguments (including several that space does not permit me to review), Brennan articulated several important low-level principles that supported his judgments of similarity and difference but had not been identified explicitly before—and indeed that it is difficult to imagine anyone identifying a priori. (The "whole parcel" rule is an example.) Ultimately, Brennan supported Holmes's view that takings cases could not be decided by a "set formula," but he did identify several factors that helped to distinguish between legitimate regulations and those that effectively "took" property. First, in legitimate regulations, the economic impact on the property was not excessive—in particular, it did not infringe on "distinct investment-backed expectations."[5] That was the salient difference between *Penn Central* (in which the property owners conceded that they could continue to earn a profit from Grand Central) and *Pennsylvania Coal* (in which the Kohler Act stopped mining on the company's property entirely). Second, legitimate regulations differed from de facto takings partly because of the "character of the governmental action"—both the worthiness of its purpose and the manner in which it affects property. When the regulation promotes "a substantial public purpose," it will only qualify as a taking if its economic impact is severe,[6] and Brennan indicated—significantly—that historic preservation was in fact an example of an important public purpose, on par with zoning. Moreover, Brennan distinguished between regulations that "adjust the benefits and burdens of economic life to promote the public good" and those that physically invade a property. Historic preservation laws were again like zoning regulations in this respect, and so the court would tend to view them as legitimate regulations rather than de facto takings.

In sum, as he compared the facts of *Penn Central* with previous takings cases, Brennan came to the conclusion that *Penn Central* had more in common with legitimate regulations than with those that the court had viewed as unconstitutional takings. The reasons that supported that conclusion, in turn,

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defined several low-level principles that helped to distinguish legitimate regulations from takings. Together, those principles made up the "multi-factor balancing test" (i.e., the view that takings judgments need to consider and balance the various factors just outlined) for which *Penn Central* is famous. Further cases helped to define how that test would be applied, particularly at its extremes—for example, in cases of the smallest possible physical intrusion (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 1982) and cases in which government pursued an admittedly worthy public purpose in a way that destroyed all economically valuable use of a property (*Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1992). These cases mapped out further boundaries that regulations could not exceed without compensating property owners.

Lessons from Takings Law

Three observations are worth making at this point. The first is the simplest: to interpret the takings clause, the court has proceeded casuistically, at least in part. At each stage, the court has not tried to adjudicate each case with direct reference to the text of the Fifth Amendment. That strategy would be unworkable since these cases reached the Supreme Court precisely because it is unclear how the "plain language" of the takings clause applies to them. Instead of returning to the principles announced in the constitutional text, the court has mostly compared each new case with the cases that preceded it, trying to determine whether the new case is more like those in which a taking was found or more like those in which it was not. Even in *Pennsylvania Coal*, the first major regulatory takings case, Holmes compared a hard case of a severe regulation with the paradigm case of eminent domain, arguing that the Kohler Act's impact on Pennsylvania Coal's property was indistinguishable from the impact of direct appropriation.

Second, the court has not chosen cases haphazardly but has instead chosen to focus on hard cases—cases in which the proper interpretation of key principles is unclear (relative to what previous courts have already established). An example is *Pennsylvania Coal* itself, in which it was controversial whether land had been taken. This focus on hard cases guides the courts to the regions of the ethical map that are most contested and thus most in need of clarification. Moreover, the courts gradually approach these regions from firmer ground, reasoning analogically along the way. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.* (458 U.S. 419, 1982), the court approached the outer limits of *Penn Central*'s principle that "physical invasions of property are likely to be found as takings" by examining a New York City rule that required apartment owners to let cable companies run wires into apartment units.

Finally, in pursuing its casuistical task, the court has not avoided principles entirely. It judges cases to be similar or different for a reason (cf. Verma 1993, 15; 1998, 97-101)—for example, that historic preservation regulations are like zoning regulations because (among other things) both "adjust the benefits and burdens of economic life to promote the public good" rather than physically invading property—and these reasons establish principles that can be used to illuminate new hard cases. At the same time, these principles are constrained in three important ways. First, the principles often arise out of the process of comparing cases rather than preceding it, as in the example of the "whole parcel" rule or the principle that "investment-backed expectations" are protected. As legal scholar Cass Sunstein (1996) puts it,

> The governing idea is not given in advance and applied to the new case. Instead, analogical reasoning helps identify the governing idea and is indispensable to the identification; we do not know what the idea is until we have assessed the cases. Analogy and disanalogy are created or discovered through the process of comparing cases, as people discern a principle that makes sense of their considered judgments. (pp. 65-66)[7]

The "considered judgments" (cf. Rawls 1971, 47-48) at the heart of this process are judgments about the paradigm cases and judgments about how they compare with the case at issue. Analogical reasoning generates new principles by trying to identify reasons that support those judgments (cf. Schön 1963, 59 ff.; 1983, 182-87). Second, this process tends to produce low-level principles tailored to the case at hand rather than abstract, far-reaching principles. "It is rare," Sunstein observes, "for any area of law to be highly theorized"; instead, law "produces principles that operate at a low or intermediate level of abstraction" (pp. 53, 69).[8] Thus, takings jurisprudence never articulates an overall theory of property rights; even when it does rely on principles, it does not rely on wide-ranging, universal principles like Kant's categorical imperative or Rawls's two principles of justice (but see Dworkin 1986, 1997). Instead, it establishes modest low-level principles that distinguish legitimate regulations from regulatory takings in specific kinds of cases: for example, the principle that regulations are takings when they physically invade land, when they destroy all its economic value, or when their slight public benefits do not justify the severe burden they place on individual property owners. Finally, although Sunstein does not mention it, these principles are not usually absolute or fixed because they are themselves ambiguous. For example, the principle that regulations are takings when they interfere with "reasonable investment-backed expectations" contains a crucial ambiguity: how can we

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tell what "reasonable investment-backed expectations" are? All we know from *Penn Central* is that the expectations held by Grand Central's owners that they could build a large skyscraper over their historic property do not qualify. Future cases that consider whether particular expectations are protected may reason analogically from this paradigm case, and in the process they may establish new low-level principles that distinguish protected expectations from those that are not protected (q.v., n. 5).

Beyond Law

I will argue below that this model of casuistry—a model that focuses deliberately on hard cases and tries to analyze them by comparing them with previous cases, generating low-level principles in the process—applies to ethical inquiry in many professional fields. Such claims are often greeted with skepticism. Law is different, the skeptics say, because its paradigm cases have an official imprimatur that rarely has any counterpart in other branches of ethical inquiry. Casuistry requires clear cases from which to begin—cases in which there is little dispute about what actions should be taken—and law meets this need through its system of precedent and the norm of stare decisis, which provide a rigorous framework of paradigm cases within which casuistical reasoning can operate. (Any court interpreting the takings clause of the Fifth Amendment must—exceptional circumstances aside—accept the cases I have just reviewed as binding; in considering a new case, the court's only question is how that case relates to these precedents, not whether the precedents were decided rightly.) By contrast, paradigm cases in less structured fields of ethical inquiry lack the authoritative force of court precedents. Planning ethics, for example, does not enjoy the benefits of a central, Supreme Court–like authority that declares unquestionable judgments about particular cases. No authority can tell us definitively whether the Aalborg project is a good project worthy of emulation or a bad project worthy of avoidance, so that the only question we would need to answer to assess new cases is, "Do we have an instance of an Aalborg here?" (Flyvbjerg 1998, 12). Thus, planners confront a kind of difficulty that (most) judges do not. That problem makes planning a hard case for casuistry. It is not clear whether planning ethics should be approached casuistically and what such an approach would entail since it is unclear how the notion applies when one of its central features is absent.

Planning is not, however, the only professional field in which these difficulties arise. Quite the contrary: in this respect, law turns out to be the odd duck among the professions. Medical ethics faces the same difficulties as planning, but it operates much like legal inquiry. I make this argument in the next section, in which I argue that the difficulties I have just described are real but not intractable: they do not undermine the use of casuistry in that field. That conclusion suggests that related difficulties are not fatal to the use of casuistry in planning ethics either.

▶ Medical Ethics

Medical ethics has exploded as a field of study over the past three decades. One of the most important developments in this field has been the growing commitment to patient autonomy, and a brief investigation of that issue can illustrate the role cases have played in medical ethics.

In a break from what medical ethicist Dan Brock describes as its "authoritarian and paternalistic" history, medicine began to accept a much greater role for patients in medical decision making beginning roughly in the 1950s. Before that time, most doctors viewed their main goal as promoting patient health (Brock 1993, 24; cf. Jonsen 1990, 1998), and the definition of "health" was viewed as a scientific matter (Brock 1993, 73; Toulmin 1990, 181). This perspective left little room for patient input into medical decisions. If doctors aimed only to cure disease and promote health, and if they possessed expert knowledge about how to do that most effectively, then they could make treatment decisions unilaterally. But this view became more and more problematic over time as medical science developed new technologies that could prolong life for deeply ill patients and aggressive new therapies that cured disease at the cost of severe side effects; eventually, doctors could cure diseases in ways that worsened quality of life rather than enhanced it. In response, many medical ethicists concluded that doctors should use their medical skills not just to maximize health but to serve the patient's "overall well-being" (Brock 1993, 26; cf. Cassell 1983). Brock (1993) explains the implications of this shift for patient autonomy as follows:

> For a given medical condition, appropriate treatments will vary greatly because people's goals and values themselves vary greatly. People differ in their tolerance of pain and so, for example, in whether for a slipped disk they prefer surgery with the risks of serious disability or prefer more conservative treatments which may require them to tolerate pain more. An active person may prefer radiation therapy to surgical amputation of a cancerous limb, even if radiation has a higher risk of recurrence of the cancer. (pp. 26-27)

Thus, the central problem with the paternalistic stance in medicine was that doctors have no special expertise about what a

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patient's well-being consists of. "Sound health care decision-making involves both objective and subjective components," Brock writes, so "a process of mutual interaction or shared decision-making is called for, with the physician and patient each contributing what each is in the best position to know" (pp. 27-28). To ensure that treatments would truly enhance well-being, patients should have significant input into the choice of those treatments.

This growing commitment to patient autonomy reshaped medical decision making substantially, but it also gave rise to difficult questions for medical ethics. Here, I will focus on two. The first involves an attempt to identify the limits to patient autonomy—the places in which its pursuit would unacceptably undermine other values—and the second involves attempts to clarify what "respect for autonomy" means in hard cases. As I will show, medical ethics has tried to clarify the scope and meaning of patient autonomy with case studies, using methods similar to those used in law.

The Scope of Patient Autonomy

The simplest model of doctor-patient interaction, and the simplest conception of patient autonomy, embodied an extreme reaction against the paternalistic tradition. On this view, what Brock describes above as the "subjective" components of medical decision making should be handled entirely by patients, while doctors focused exclusively on the objective, scientific components—how to achieve the goals or values that patients define.

This model captures simple cases of doctor-patient interaction well, but it runs into obvious objections in more complicated cases. By viewing doctors as technicians, it ignores doctors' own normative commitments, and perhaps for that reason it came to be known as "the doctor as engineer" (Veatch 1972) or "the doctor as body mechanic" (Bayles 1981) model. In an influential article, Robert Schwartz (1999) argued that some medical techniques lie outside the proper scope of medicine even though they are technically feasible. He began with the vivid but hypothetical case of an otherwise competent patient who asks her doctor to amputate her right arm to expiate her sins; the doctor, understandably, demurs. Although surgery could successfully amputate the arm in a technical sense ("I would be crazy if I went anyplace else," Schwartz's imaginary patient protests; "I mean, you wouldn't recommend a butcher or a chiropractor, would you?"), and although patients should generally have the freedom to choose their own medical treatments, that choice must be bounded by a range of legitimate medical options—a range defined by doctors themselves as they exercise their own moral judgment.

Schwartz argues that this constraint plays an important role in real cases, giving an example in the case of Helga Wanglie, an eighty-seven-year-old woman who entered Minnesota's Hennepin County Medical Center for a hip fracture but quickly deteriorated, eventually suffering cardiac arrest and irreversible brain damage that left her in a vegetative state. After several months, doctors came to the conclusion that it was inappropriate to continue life support, but Ms. Wanglie's family insisted (partly for religious reasons) that they keep her alive. No other hospital in Minnesota was willing to take Ms. Wanglie in as a patient, and her doctors asked the court to appoint a conservator to replace Ms. Wanglie's family in decision making, arguing that they were not competent to do so. Schwartz, however, argues that framing the issue as a question of the family's competence was a mistake. "The lawsuit asked nothing more than whether Mr. Wanglie was the most able to apply his wife's values to the medical facts in this case," Schwartz (1999) explains. "The real question, however, should not have been what Ms. Wanglie would have desired . . . —there was no reason to doubt her family on that point—but whether the continuation of ventilator support and gastronomy feeding were among the reasonable medical alternatives that should have been available to Ms. Wanglie or her surrogate decision maker" (p. 520). The question was not just a scientific question about futility. "The treatment was designed to keep Mrs. Wanglie alive, and it served that end effectively," Schwartz notes. "The question is not whether the treatment offered would successfully do what Mrs. Wanglie's family said she desired—keep her alive—but whether keeping her alive, under the circumstances, was beyond the proper scope of medicine" (p. 520).

Schwartz's two examples establish the principle that patient choice is not absolute but instead restricted to a predefined menu of "reasonable medical options," and they offer concrete images that help to define how far that menu extends. It remains unclear exactly which medical options are on the menu, just as it remained unclear after *Pennsylvania Coal* when a regulation "goes too far." On Schwartz's own interpretation, the demand for ventilator support and gastronomy feeding for Ms. Wanglie was unreasonable because no doctor was willing to provide it, and it shares this feature with the case of the would-be amputee. This comparison suggested a particular principle for distinguishing reasonable medical options from unreasonable ones: unreasonable options are those that no doctor is willing to provide. Schwartz went on to argue that this principle would maximize patient choice because the diversity of medical opinion ensures that this arrangement will only exclude obviously inappropriate treatments. "It is only when a patient desires treatment that not a single healthcare provider believes to be in the limits of medicine [as in the Wanglie case

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or the amputation case] that the patient will be denied that treatment" (Schwartz 1999, 521). Thus, Schwartz drew the line between reasonable and unreasonable medical interventions with a procedural principle—one that identifies who has the power to draw that line. That focus on procedure is not, however, inevitable. One can imagine a more substantive interpretation of the Wanglie case: the medical care her family demanded was unreasonable because the severe brain damage she had suffered ensured that she would never regain consciousness, and medicine is not in the business of preserving unconscious life unless there is a chance for recovering consciousness.

Regardless of how "reasonable options" are defined, the cases of Helga Wanglie and the aspiring amputee undermine the pure notion of doctors as body mechanics. More constructively, they help define the contours of ethical decision making in medicine by calling attention to one of the boundaries that delimits patient autonomy—a boundary that arises from doctors' own normative commitments. The maxim "patients should contribute to medical decisions that affect them" is qualified by the idea that the patient contribution only extends to "reasonable" medical options (among other limits). The vague notion of "reasonable options," in turn, is elucidated with reference to the features of Schwartz's two cases, which can serve as a starting point for future casuistical analysis.

The Meaning of Patient Autonomy

Whereas the example just described aimed to help define the scope of "patient autonomy" with reference to exemplary cases, other branches of medical ethics aim to define its meaning. When a patient is able to speak for herself or himself, few questions arise about how to respect the patient's wishes. But when a patient is unconscious, incompetent, or otherwise unable to express her or his wishes to the doctor, the best way to respect the patient's autonomy and promote her or his well-being may be unclear. A wide variety of problems arises in such cases (Buchanan and Brock 1989). Here, I focus on one example: the problems that arise in the use of advance directives or "living wills," in which patients declare in advance what kinds of medical care they want or do not want if they become incapable of making their own decisions directly.

Like all forms of surrogate decision making, living wills are an imperfect substitute for discussions with the patients themselves. A 1992 case published in the *Hastings Center Report* (the leading journal for scholarship about medical ethics) illustrates a common problem. The case focuses on thirty-two-year-old "Mr. R," who has come to the emergency room with shortness of breath. Mr. R was recently diagnosed with HIV, and the doctors determine that he has come down with pneumocystis pneumonia—a disease that many AIDS patients eventually die from, though Mr. R's episode seems to be a mild one. On the same visit, Mr. R presents the doctor with a living will that prohibits intubation and respiratory ventilation (among other measures) "under any circumstances." The will sets the stage for a dilemma:

> While a bed is being readied, Dr. D orders a dose of the appropriate antibiotic to be given to Mr. R and goes to see the next patient. Upon starting the antibiotic and leaving the room for a few minutes, the nurse returns to find Mr. R unresponsive, with a bright red rash and severe trouble breathing. Immediately recognizing a life-threatening allergic reaction, she stops the antibiotic and calls for the doctor. Mr. R is in anaphylactic shock. Quickly ordering four appropriate medications, Dr. D opens his mouth to ask for an endotracheal tube and respirator—and realizes he has a problem. Mr. R will die as his airway closes up if patency is not *immediately* ensured by placement of a tube. . . . The good news is this is a time-limited condition. With immediate aggressive action, only a few hours or days of ventilator support should be necessary and there should be absolutely no long-term sequelae. (Anonymous 1992, 26)

Dr D recognizes that Mr. R's pneumonia could potentially get worse, but he has little experience with anaphylaxis or pneumocystis pneumonia, so he does not know what the chances of that happening are.

Two commentaries accompanied the case in the *Hastings Center Report*. In both, the authors concluded that Dr. D should intubate the patient despite the clear statement in his living will. Lewis Silverman and Manette Dennis (1992) explain that "common sense rather than literal interpretation must be used to guide actions in this case"; they introduce an analogy to demonstrate the need for exceptions: "Let us suppose you hire a babysitter to sit with your infant. Since it is raining outside you give strict instructions: 'Don't leave the house with the baby.' Five minutes after you leave, the house catches fire. Would you expect the babysitter to keep the baby in the house? Of course not!" (p. 26). They go on to argue that Mr. R's case raises the same issues because it also involves unforeseen circumstances. "In general, intubation and mechanical ventilation are certainly more invasive, uncomfortable, and onerous procedures than blood tests, IVs, and other routine modalities of diagnosis and treatment," they explain; "in this instance, however, this is simply not true. Mr. R clearly does not wish to be kept artificially alive while dying from a terminal illness, but as evidenced by his acceptance of antibiotic therapy, he is not refusing treatment for nonterminal, generally reversible conditions" (p. 27). So long as the doctors would be able to end the

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intubation if Mr. R's condition worsened into the "hopeless situation" he probably (though not certainly) envisioned when writing his living will, they should intubate him for now.

In a separate analysis of the case, Fenella Rouse and David Smith (1992) focus on the same issues, emphasizing the doctor's obligation to clarify advance directives to the extent possible. Some ambiguity is inevitable, but doctors can and should take steps to minimize this ambiguity by asking the patient to explain the reasons behind his or her directives more fully—and especially by asking about cases the patient is unlikely to have considered. Patients often associate medical interventions such as intubation and cardiopulmonary resuscitation exclusively with bleak prognoses, protracted treatments, and permanent damage to quality of life. They do not envision cases like Mr. R's, which is likely to be very different on all three dimensions. Familiarizing patients with such possibilities may reduce the ambiguity in their advance directives.

For the inevitable ambiguity that remains, both sets of commentators suggest that doctors, like babysitters, should disregard the plain meaning of an advance directive when there is good reason to believe that the patient did not foresee the situation at issue and when other evidence about the patient's wishes suggests he or she would want the treatment. Mr. R's case—in which treatment will probably be much shorter in duration, with a much more optimistic prognosis than the patient likely had in mind when expressing his views—exemplifies the notion of an "unforeseen situation." It also exemplifies the kinds of information that might help guess how he would handle the unforeseen case, such as his voluntary decision to seek treatment at the hospital and his willing acceptance of antibiotics.

Lessons from Medical Ethics

Several features of these examples from the medical ethics literature are worth comment. First, in the introduction I claimed that casuistry attempts to clarify the meaning of general maxims. How does it do that in medical ethics? The examples in this section illustrate how cases in medical ethics, like cases in law, serve to mark out two kinds of boundaries around general maxims. The first kind of boundary has to do with limits of a general maxim, which arise out of conflicts between that maxim and others. Schwartz's delineation of "reasonable medical alternatives" exemplifies this kind of problem, and he mobilizes his cases to try to mark out the boundaries of the maxim that doctors should "respect patient autonomy"—boundaries set by doctors' own normative commitments. The second kind of boundary has to do with the meaning of a general maxim, which is unclear in situations in which key elements of the maxim are ambiguous. What does it mean to "respect patient autonomy" when the patient cannot speak for herself or himself? Mr. R's case helps to clarify this maxim in a particular kind of situation.

Second, to mark out these two kinds of moral boundaries, these medical ethicists inch toward them gradually. For example, to analyze the ethical issue presented by the Wanglie case, Schwartz begins with an artificial but clear case that establishes a principle that the *Wanglie* court, at least, had not found obvious: that patient autonomy is hemmed in by ethical constraints, established by doctors, that define a menu of options from which patients must choose—a menu limited for normative as well as scientific reasons. He then argues that the Wanglie case is like the amputation case in all relevant respects. In both, no medical provider can be found that finds the chosen treatment within the bounds of the medically acceptable. To the extent that Schwartz's argument is successful, he establishes the Wanglie case as a new paradigm case that demonstrates that there are limits to the options a patient may consider. That new paradigm, in turn, may guide future consideration of related practical questions. In this way, these two examples do not simply establish a fixed point of judgment by announcing an intuitive judgment about an isolated new case, nor do they establish such fixed points by applying abstract principles directly to the cases. Instead, the examples typically begin from an artificial paradigm case, reasoning casuistically from there to the (real) case in question. They thereby illustrate Toulmin's (1990) idea that ethical reasoning "triangulates its way across unexplored ethical territory."

Third, the identification of clear, typically artificial cases to get the analyses going makes it possible to engage in casuistical reasoning in the absence of an authority empowered to pass official judgments on cases. Ultimately, Schwartz's (1999) argument establishes a paradigmatic case outside of—and indeed in opposition to—the institutional authority of legal precedent. The court deciding the Wanglie case decided against the doctors, albeit on the grounds that they had not shown that Mr. Wanglie was not a competent surrogate decision maker. Schwartz does not claim the institutional authority of the court for his judgment. To the contrary, he establishes his paradigm case by arguing that the court was mistaken, focusing wrongly on the issue of who should speak for Ms. Wanglie rather than what options that surrogate should be able to consider.

► Conclusion

It is long past time for me to bring this discussion back to planning ethics. I have described how case-oriented inquiry

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into ethical questions proceeds in law and medicine, suggesting that these examples represent useful models for the field of planning ethics. To make good on that suggestion, in the space that remains I want to explain why I think planning ethics shares important commonalities with the fields I have reviewed and what those commonalities reveal about how planning ethics might proceed. The first goal leads me to consider common objections to the idea that planning ethics might usefully model itself on law or medical ethics. The second leads me to outline a possible research agenda for the use of case studies in planning ethics. The next two sections pursue these tasks in reverse order.

A Casuistical Agenda for Planning Ethics

To summarize the main argument of this article, casuistical inquiry uses concrete cases to clarify the meaning and limits of ambiguous values, principles, and maxims. To do that, casuists focus on hard cases, analyzing them with the tools of analogical reasoning to determine which previously resolved cases they resemble and which they do not. In the process, casuistry develops relatively concrete principles that underwrite judgments about similarity and difference, and these principles can help to inform judgments about future cases. For example, the courts clarify the meaning of the takings clause by using analogical reasoning to compare new hard cases with those that have already been resolved (as when Holmes compared the Kohler Act to "direct appropriation"). In the process, they develop a moral taxonomy that distinguishes legitimate regulations from de facto takings, and they articulate low-level principles that explain these distinctions along the way (such as the principles that regulations are takings when they "go too far" or "interfere with investment-backed expectations"). Similarly, the strands of medical ethics that I reviewed aim to clarify the scope and meaning of the maxim that doctors should respect patient autonomy. They do so by identifying and analyzing hard cases, like the cases of Helga Wanglie, Schwartz's would-be amputee, and the unconscious Mr. R with his ambiguous living will.[9]

This approach to ethical reasoning makes room for concrete convictions that have little place in the axiomatic approach: provisional judgments about how particular cases ought to be handled and about the similarities and differences among cases. In the process, it allows for the generation of new convictions (also relatively concrete) about the low-level principles that ought to govern specific areas of practice. All of these convictions are part of our ethical knowledge (Rawls 1999; Richardson 1997; Jonsen and Toulmin 1988); the merit of casuistry is that it offers a way to bring them to bear on new ethical problems. Much more needs to be said about the status of these convictions and the uses to which we may justifiably put them, so those topics deserve a place in future scholarship about ethical inquiry in the professions (cf. Verma 1998; Schön 1963; Thacher 2003a, 2003b). Nevertheless, the examples of law and medicine offer important evidence about the nature of casuistry and its merits: images of what sustained ethical inquiry in the professions looks like in practice and—absent a realistic and compelling picture of how these fields might proceed differently—what it should look like.

How might planning ethics use this approach? The first task is to identify maxims, principles, or values that play a central role in planning practice, the way the takings clause shapes the practice of constitutional interpretation and the value of patient autonomy shapes the practice of medicine. Many such maxims and values arise in planning, and most cry out for clarification. To offer only one example, the norm of citizen participation has long been a strong value in planning, but the maxim that "a planner must strive to give citizens the opportunity to have a meaningful impact on the development of plans" (American Institute of Certified Planners/American Planning Association 1992) encounters many hard cases. One kind of example arises when citizen opinion appears to be uninformed; another arises when vocal citizens make self-interested demands that threaten to disadvantage less vocal groups. It is not easy to say whether or how planners should uphold their commitment to citizen participation in hard cases like these. Case ethics may offer a valuable way to investigate that question—to identify and analyze hard cases on both sides of the line that separates appropriate citizen influence from nefarious co-optation of government officials (e.g., Thacher 2001a).

A casuistical approach to problems like this would need to be developed piecemeal, one case at a time. The first step is to identify clear cases about which there is relatively general consensus: for example, cases in which it seems reasonably obvious that planners failed to provide for sufficient citizen input, such as Peter Uberoff's plans for the postriot "Rebuild L.A." initiative (Inam 2003), Robert Moses's plans for the Cross-Bronx Expressway (Caro 1973, 850-84), or a variety of redevelopment plans from the urban renewal era (e.g., Gans 1962, 323-46). These initial judgments are always subject to revision if we discover reasons to do so on reflection, but they stand as provisional fixed points (Rawls 1999, 239) from which casuistical reasoning can get started. Armed with paradigm cases of ethical or unethical action, it is then possible to analyze harder cases by asking whether and how they resemble the paradigms rather than by appealing directly to general principles. For example, the level of citizen participation in HOPE VI redevelopment projects might be analyzed by asking whether it is similar to the level of participation in urban renewal (e.g., Keating

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2000, 391-92, though Keating's comparison would need to be extended considerably to support a thorough casuistical analysis). Doing that would not only be a way of evaluating citizen participation in HOPE VI but also a way of extending our understanding of the citizen participation norm by developing new concrete convictions about it.

By following this approach, casuistical planning ethics could become a cumulative enterprise—one similar to the various departments of law, in which each new case builds on those that preceded it to extend our knowledge of how ambiguous ideals apply to unfamiliar contexts. To do that, planning ethicists would need to consider explicitly how each new hard case relates to those that have come before it (Forester 2001)—for example, to consider whether citizen participation in HOPE VI projects is similar to previous cases in which attention to citizen views was widely judged appropriate, or whether it is more like previous cases in which attention was inadequate. They would also need to articulate the reasons that support these analogical judgments (for example, the reasons that support Keating's judgment that citizen participation is as weak or weaker in HOPE VI as in urban renewal). Those reasons, in turn, may generate new low-level principles that further define what the norm of citizen participation requires.

This type of ethical inquiry in planning may often relate closely to planning law. For example, the respect for property rights that underlies takings law is (or should be) a central value in planning. For that reason, takings law already is a body of casuistical inquiry that helps to clarify a core planning value. Such overlap between legal discourse and ethical discourse is common (for example, the field of medical ethics overlaps considerably with medical law, as demonstrated in the Helga Wanglie case), but that does not mean the law leaves nothing for ethics. Typically, the courts set only minimal standards that good practice should aspire to exceed; at other times, law steps in to define core values only because professionals have abdicated the responsibility to do so themselves. That is clearly the case for planning. In the case of citizen participation, there exists case law that identifies examples in which disregard of citizen input is so extreme that it is simply illegal. But planners should aspire to exceed these minimal standards, and a moral taxonomy that reaches beyond the zone of bare illegality can help to do that.

For the most part, this kind of case-oriented inquiry into core planning values (such as "rationality," "citizen participation," "comprehensiveness," and "respect for private property") is probably best pursued by planning academics, or at least in academic forums. Although legal inquiry is centered in the court system rather than the legal academy, planning (like medicine) lacks the institutional framework needed to support that kind of practice-centered system. Consequently, academic journals (rather than anything like the judicial opinions that play such a prominent role in law) may offer the most promising venue for casuistical inquiry. To this end, planning might benefit from new journal formats. In medicine, the *Hastings Center Report* emerged as a major locus for work on medical ethics, and many important cases in that field have appeared in a special section of that journal dedicated to cases. A similar model (perhaps special sections of the *Journal of Planning Education and Research* or the *Journal of the American Planning Association* devoted to ethics cases) could support casuistical inquiry in planning.

At the same time, there may be a few ways in which the institutions of planning practice could contribute to casuistical inquiry by developing court-like systems of administrative or professional review. Consider the citizen participation norm again. A large planning agency could fairly easily initiate a policy of review for controversial cases in which commitment to citizen participation was questionable (cf. Klockars 1996; Thacher 2001b, 402-6). In each case in which planners chose to disregard significant citizen input (e.g., in a case in which a planner proceeded with a grant application to build a neighborhood park even though many residents voiced their opposition), the planner might be required to submit a report detailing the situation to her or his supervisors, including the context of the decision, the concerns raised by residents, and the planner's reasons for overruling them. Higher level managers in the organization might review the facts of the case and potentially offer advice about whether the planner's action was appropriate, referring to past cases within the agency to do so. The past cases could help to evaluate the case at hand and offer instructive examples of how such situations could be handled more effectively. Such a system could quickly develop something like a "case law" about how the norm of citizen participation ought to be understood within the agency. An important limitation of this system, of course, is that it may only be practical in the largest agencies, in which a critical mass of cases would be available and in which managerial oversight is formalized enough to support such reviews. Smaller agencies that generate fewer hard cases would need to reach further out into the planning professional community to develop the critical mass of material needed for a truly useful moral taxonomy. Steps in this direction are evident in Charlie Hoch and Ann Cibulskis's proposal for helping planners cope with political conflict. Hoch and Cibulskis (1987) suggest that one of the most promising ways the profession might help planners cope with political dilemmas would be to "connect those who have experienced conflict with those in the midst of one" (p. 105). The implicit idea is that planners confronting an ethical dilemma might learn something by comparing their own cases with similar cases experienced by others.

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Can Planning Ethics Really Follow the Examples of Law and Medicine?

Regardless of its specific institutional form, this model of a case-oriented approach to planning ethics is likely to encounter several objections. I have already tried to answer the most powerful of them—the objection that planning's lack of anything like law's system of precedent and stare decisis makes analogical reasoning impossible. The example of medical ethics demonstrates that this objection is misdirected. Case ethics can proceed usefully without the kind of institutional supports provided in the legal system, and it has already done so in the field of medical ethics; moreover, even in law the norm of stare decisis is not absolute since any theory of law must leave open the possibility that past courts made a mistake (Dworkin 1986). The lack of an authoritative imprimatur on any particular decision will mean that planning cases will often remain controversial. For example, in a case ethics focused on the proper interpretation of "rationality" in planning, there may be no consensus about whether the Aalborg case represents the failure of rationality rather than a necessary compromise with power; by contrast, in takings law there is an institutionally enforced "consensus" that the Kohler Act does amount to an unconstitutional "taking." But medicine confronts the same difficulty—some observers may believe, pace Schwartz's view, that Minnesota hospitals were wrong to deny Helga Wanglie the care her family asked for—and yet that field has not been paralyzed by conflict. To be sure, the lack of any institutional authority that establishes some cases as precedents may be the reason medical ethics is less of a cumulative enterprise than law; this difficulty is one that a casuistical planning ethics needs to confront. But in the end, even without authoritative rulings about the right answer in hard cases, considerable consensus about particular cases does seem to emerge in both medicine and planning. For example, in the case of Flyvbjerg's Aalborg, few deny that rationality was illegitimately sacrificed in that case, though no authority has the power to endorse that judgment as the right one. The same may be true of the paradigmatic cases of failed citizen participation that I listed earlier.

Although planning is similar to medicine in this respect, it differs in others. In medicine, the doctor's duties center on individual patients, but planners must pay heed to many stakeholders—and indeed to the broad abstraction commonly referred to as "the public interest" (Howe 1992). For this reason, it may be objected that medical ethics is a bad model for planning because the ethical problems that confront planners are of a much different and possibly more complex kind than those that confront doctors. Nevertheless, although this difference between medicine and planning is real, it involves the content of ethical knowledge rather than its form. Planning ethics will cover many topics that medicine ignores—notably the nature of the public good and right way to resolve tradeoffs among major political values. But it is hard to see why this difference makes the casuistical method less appropriate for planning, and even harder to see why it would make a purely axiomatic approach to ethics more appropriate. Planners must surely interpret a wide range of highly ambiguous values that doctors need not consider. But that fact supports rather than undermines the view that case ethics can help to guide them in their struggles. The more complicated the questions that professional practice raises, the more useful a casuistical approach is likely to be since the distinctive strength of casuistry is in analyzing problems in which general maxims are ambiguous or conflicting (Jonsen and Toulmin 1988, 8).

A final distinctive feature of planning is more significant. Planning takes place in the shadow of politics (Hoch and Cibulskis 1987; Benveniste 1977), and this characteristic makes planning less autonomous than either law or medicine, which have been ceded considerable independence by society at large. In a related vein, planning involves normative commitments to public participation and public deliberation that most judges and doctors escape. In this respect, planning's closest cousins among the professions are the fields of public policy and public administration rather than the fields of law and medicine, and future analyses of the research agenda in planning ethics should examine ethical inquiry in those fields as analogies for planning (e.g., Walzer 2000; Bok 1978). It seems unlikely, however, that this feature of planning poses insuperable obstacles to the casuistical enterprise. Like the focus of planning on the public interest rather than client interests, the influence of politics and the demands for citizen participation mainly shape the content of planning ethics rather than its form. Moreover, because the political dimension of planning adds complexity to the situations planners confront, it is again hard to see how this difference makes a purely axiomatic approach more appropriate for planning than law or medicine—to the contrary, for the reasons already given. To be sure, planning's lack of autonomy relative to medicine and law is significant because it may make cumulative progress more difficult in planning ethics: it is likely to undermine the consensus about cases and low-level principles that helps to make such progress possible. But this difference is a matter of degree rather than kind (neither law nor medicine is completely autonomous), and the only way to investigate its significance is through experience—to press forward with the effort to develop a systematic case ethics of planning. That effort would usefully complement the axiomatic approach to planning ethics because it would mobilize important but often-neglected aspects of our ethical knowledge.

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► Notes

1. Like many recent planning theorists (e.g., Flyvbjerg 1993; Forester 1999), I will define "ethics" broadly. Forester (1999), for example, goes so far as to identify ethics with "the study of better and worse practice" (p. 221), a conception that encompasses what is sometimes seen as a much more general question—the question of what should be done. I will not go that far since I think this definition of "ethics" risks equating it with all aspects of practice, but I share Forester's inclination to define ethics more broadly than usual. I use the term *ethics* to refer to aspects of practice that involve the proper interpretation of ambiguous values or the proper resolution of value conflicts (as opposed to those that involve the proper resolution of uncertainties about the consequences of actions, which make up the domain of scientific study).

2. It is also evident in survey research that aims to understand planning ethics through relatively general questions about planners' values (Howe and Kaufman 1979; Hendler 1991), in descriptive work that aims to assimilate planners' ethical commitments to general philosophical principles (Howe 1994, 148-80), and in many efforts to develop and refine professional codes of ethics (American Institute of Certified Planners/American Planning Association 1992), at least insofar as the codes are understood as fixed and general principles that should govern action (as in Howe 1994, 211 ff.). It is possible, of course, to take a more casuistical approach to these topics—to incorporate questions about detailed cases in survey research, to describe planners' ethical commitments with fewer references to general principles (Forester 1999), and to develop and continually elaborate codes of ethics with reference to new cases (Wachs 1989, 478; Hendler 1990). Moreover, this distinction is only rough: the difference between casuistry and the axiomatic approach is best understood as a continuum rather than a dichotomy. For example, some of the survey questions in Howe and Kaufman (1979) and Hendler (1991) are relatively concrete (though neither asks about detailed case studies), and work by Martin Wachs (1989) illustrates an interesting blend of brief cases with midlevel principles not derived from general theory (though not generated by the kind of casuistical analysis described here either).

3. In this respect, the application of principles to cases in the axiomatic approach takes a form that planning theorist Donald Schön (1963) described as the "concept-instance relation" (pp. 27-29)—one in which consideration of a new case does not generally lead to substantial modification of the theoretical concepts (pp. 29-34).

4. Some planning ethicists with axiomatic leanings have neglected this element of Rawls's view, suggesting that Rawls deduced his two principles of justice from an analysis of what the contractors would choose in the original position (e.g., Howe 1990, 138; McConnell 1995, 34-35; Beatley 1984, 460). Rawls himself, however, emphasized that the two principles of justice are only adequate if they are consistent with our considered judgments about a variety of abstract and concrete issues after reflection. He also emphasized that the original position itself is a theoretical construct designed to represent the moral point of view, and it would be a failure—a different theoretical representation of the moral point of view would need to be developed—if it generated principles that conflict with those judgments (Rawls 1971, 19-20, 51, 130-31, 579-80). In planning, Stein and Harper (2002) offer a useful discussion of reflective equilibrium (though they do not emphasize the central role concrete convictions play in it).

5. Like the "whole parcel" rule, this phrase has also been a crux of takings cases, and lower courts have again tried to clarify it casuistically (Mandelker 1997, 2.20). *Penn Central* itself simply established that regulations that do not violate "investment-backed expectations" do not generally amount to takings, and it nominated the use of air rights over Penn Central Station as an example of such unprotected expectations.

6. This principle arose out of Brennan's consideration of the so-called noxious use cases, such as *Goldblatt v. Hempsted* (369 U.S. 590, 1962); Brennan implied that the public purpose at issue in *Penn Central* was "substantial" in the same way that the public purposes at issue in the noxious use cases were.

7. Schön echoes Sunstein's account closely, arguing that analogical reasoning is commonly misunderstood by analysts who presume that the principles used to relate or distinguish cases must exist prior to the comparison (Schön 1963, 30 ff.; 1983, 185-86). Properly understood, analogies begin with an intimation that two things are similar or different—a relatively concrete initial conviction about the relationship between them—and we modify our concepts by exploring the nature and implications of these convictions (Schön 1963, 59 ff.).

8. Sunstein (1996) argues that this approach has several virtues. By refusing to develop broad principles that have implications far beyond the cases at hand, courts promote continued public deliberation about unsettled issues, they avoid giving unnecessary offense to the losing side (which loses on the case at hand but not on its most fundamental commitments), and they allow for continued moral evolution.

9. This conception of casuistry, which aims to develop a systematic moral taxonomy, indicates a need for many modest cases rather than a few extensive cases. Indeed, law and medical ethics have relied on relatively cursory case studies (cf. also Bok 1978; Walzer 2000). Extensive detail of the sort championed by Flyvbjerg (1998) may not be necessary for this purpose (though it may be valuable for others) (q.v., Flyvbjerg 2001).

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