

# Non-humiliating plans: a human rights approach<sup>1</sup>

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The concept of the decent society<sup>2</sup> demands that policymakers avoid the humiliation of others. Applied to spatial planning, this concept competes with more popular standards of evaluation: efficiency and justice. An examination of non-humiliating planning has to consider efficient and just plans that still violate at least one person's self-respect. The chapter examines some conceptual problems of the decent society: the essential humiliation caused by everyday planning, the domination by easily upset persons, and the non-humiliation by the hidden agenda of planners.

These conceptual problems can be resolved, however, by differentiating levels of humiliation. If a humiliation is caused by the violation of a human right, it is always unacceptable. Humiliations caused by contradictions to life-style decisions with no impact on human rights are often inevitable. A society is still decent if it accepts such inevitable humiliations, but carefully respects, protects, and fulfills all human rights.

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- 1 Dieser Beitrag ist eine erweiterte englischsprachige Fassung des Aufsatzes Benjamin Davy: »Raumplanung und die Politik der Würde«, in: Wolfgang Blaas/Johann Bröthaler/Michael Getzner et al. (Hg.), Perspektiven der staatlichen Aufgabenerfüllung. Zwischen budgetärer Knappheit und integrativem Anspruch; für Wilfried Schönböck zum 70. Geburtstag, Wien: Verlag Österreich 2014, S. 51-76.
  - 2 Avishai Margalit: The decent society, Cambridge Mass., London: Harvard University Press 1996.

## EFFICIENCY, JUSTICE, DIGNITY

Avishai Margalit's book *The Decent Society* (first published in Hebrew, then in English by Harvard University Press) confronts spatial planners and other policymakers with a demanding task: policymakers always would have to avoid the humiliation and degradation of others.<sup>3</sup> This precept is not meant to be a mere decoration of a planner's rhetoric, it is meant to be a fundamental standard for the evaluation of public policies. Why human dignity, why self-respect? Are efficiency and justice not sufficient as standards? After all, the two most popular standards for the evaluation of public policies are efficiency and justice.<sup>4</sup> In order to be acceptable, a plan or other public policy must be efficient and just. What does ›efficient‹ or ›just‹ mean? Here are two simple definitions:

- A public policy is *efficient* if it helps produce a better outcome with a given amount of resources than other policies. Also, a public policy is efficient if it helps achieve a policy goal by spending less resources than other policies.
- A public policy is *just* if it pursues goals and achieves outcomes that comply better with the standard of justice relevant to the policymakers than other policies.

For good reasons, both standards are not applied as absolute standards (»Policy A is efficient and just«), but in a comparison between different policies (»Policy A is more efficient than Policy B, yet less just.«). With respect to efficiency and justice as normative standards of spatial planning, planners have to choose from a variety of alternatives such a plan that is more efficient and more just than any other alternative. We can criticize a planner's choice, for example, for neglecting a superior alternative solution to her planning problem, for relating efficiency or justice to an inappropriate spatial unit, or for trading off justice and efficiency. Our criticism should take into account, however, that it is difficult to apply the standards

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3 Margalit (note 2).

4 Benjamin Davy: *Essential injustice. When legal institutions cannot resolve environmental and land use disputes*, Wien, New York: Springer 1997.

of efficiency and justice to planning solutions. Planners have to consider a whole host of issues, deal with a multitude of stakeholders, and often have limited time and resources for the preparation of their plans. Still, it makes sense for planners to step back now and then from their drawing board (today presumably, their ArcGIS or Vectorworks software) and consider the impacts and consequences of their choices on the public good and individual happiness. A planner can ask herself questions such as: »Do my plans avoid wasteful land uses?« – »Do my plans address the resentments of stakeholders who feel that they have been treated unjustly?« A planner, who ponders such questions, sometimes discovers a fresh way to improve her products, but perhaps she merely ascertains that her plans already are as efficient and just as it is possible.

Some legal systems specifically protect human dignity. Article 1, para. 1, of the *Grundgesetz* (GG) – the 1949 constitution of the Federal Republic of Germany – proclaims: »Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.«<sup>5</sup> As an Austrian migrant worker in Germany, I find the human dignity clause both appealing and confusing. Of course, every government should respect and protect human dignity, but how can any government endure judicial review if the courts take the government's obligation seriously? And if the courts depreciate the government's obligation for practical reasons, would that not be enormously humiliating? Margalit's book helped me appreciate the intricacies of the legal discourses on human dignity (although or perhaps because Margalit is a philosopher, not a lawyer). The human dignity clause in Article 1, para. 1, GG binds spatial planners, too.<sup>6</sup> But many jurisdictions, like Austria, do not protect human dignity explicitly in their domestic laws. Should we, nevertheless, evaluate spatial planning from the perspective of human dignity?

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5 Matthias Mahlmann: »The Basic Law at 60 – Human dignity and the culture of Republicanism«, in: *German Law Journal* 11 (2010), pp. 9-31.

6 Benjamin Davy: »Räumliches Existenzminimum. Zu Bodenpolitik und Menschenwürde im Sozialstaat«, in: *Flächenmanagement und Bodenordnung* 72 (2010), pp. 145-152.

## PLANNING AND THE DECENT SOCIETY

### The decent society

In *The Decent Society*, Avishai Margalit challenges the standards conventionally used for the evaluation of public policy.<sup>7</sup> We should not limit policy evaluation to efficiency and justice, Margalit claims. A public policy for the distribution of goods (for example, food aid) »may be both efficient and just, yet still humiliating«. <sup>8</sup> Margalit defines humiliation as »any sort of behavior or condition that constitutes a sound reason for a person to consider his or her self-respect injured.«<sup>9</sup> He uses the phrase »decent society« as the *Leitbild* for non-humiliating public policies:

»A decent society is one that fights conditions which constitute a justification for its dependents to consider themselves humiliated. A society is decent if its institutions do not act in ways that give the people under their authority sound reasons to consider themselves humiliated.«<sup>10</sup>

Margalit prefers to speak of self-respect rather than honor, human dignity, respect, self-esteem, integrity. Also, he refers to humiliation, not to an honorable life, a dignifying existence, or a morally or ethically valuable policy. Margalit chooses the words »self-respect« and »humiliation« purposefully. The central goal of the decent society is to avoid humiliation.

Margalit does not discuss spatial planning. He examines public policies and institutions like citizenship, privacy, bureaucracy, the welfare society, or punishment. Although none of these institutions predominantly focuses on spatial planning, the institution of spatial planning has an impact on the self-respect or human dignity of everybody who is affected by planning. The impact relates to the *exclusionary effects* of spatial plans. What is this exclusionary effect? Spatial planners, in performing the most fundamental activity of their profession, designate areas suitable for various land uses:

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7 Margalit (note 2).

8 Margalit (note 2), p. 280.

9 Margalit (note 2), p. 9.

10 Margalit (note 2), pp. 10-11.

Residential housing is here, close to a public park, over there is a hospital or shopping mall, and beyond the periphery, the lakeside forest will be preserved as open space. The designation of permitted land uses in legally binding land use plans or zoning ordinances determines the use rights of landowners and prepares public investments, particularly in the municipal infrastructure. Spatial planners preserve existing uses and promote future uses which are desirable from the perspective of the general public. Spatial planners usually employ general terms and categories – such as residential area, public park, or shopping mall – while drafting their plans. It hardly would make sense for planners to list the names of particular land users they have in mind for using building land, parks, shops, highways. Ultimately, however, each plan implies that some potential users will find land for their purposes and others will not. The first group of potential users enjoys inclusion by the plan, the second group suffers exclusion. Sometimes, spatial planning excludes unwanted land uses because planners want to rule out a certain land use specifically, but most of the times the excluded land uses are simply the opportunity cost (the next best use) of a designated land use. Also excluded are land uses that are even less valuable than the next best use. Land use plans or zoning ordinances, if read properly, implicitly contain long lists of excluded uses. The designation, for example, of residential building land simultaneously prohibits or discourages to use the designated land for commercial purposes, as highway, protected open space, public park, hospital, or wilderness. Whether the exclusion is explicit or implicit, the planners in the decent society need to avoid that anybody is humiliated by the exclusionary effects of spatial plans.

## Humiliating plans

Exclusion is not by itself humiliating. Frequently, exclusion is merely a matter of convenience and reduces transaction costs.<sup>11</sup> Spatial plans help us avoid endless discussions whether business owners may operate shops in a residential area or landowners may build houses in a protected wetland area. Both land uses are excluded by the current plan, but this simply means

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11 Benjamin Davy: *Land policy. Planning and the spatial consequences of property*, Farnham, Burlington: Ashgate 2012, pp. 186-188.

that the businesses will set up their shops elsewhere or that the houses will be developed on land suitable for building purposes. Occasionally, the exclusionary effect of spatial planning is not just inconvenient, however, and »constitutes a sound reason for a person to consider his or her self-respect injured«. <sup>12</sup> Perhaps such exclusion promotes efficiency and justice, yet it is unacceptable to the decent society as soon as the exclusion is humiliating.

A prominent example of humiliating planning is the practice of exclusionary zoning, well-known through U.S. case law (but not confined to the United States). Exclusionary zoning caters to the NIMBY (»Not In My Back-Yard!«) mentality of white and wealthy suburban neighbourhoods. Real estate values and community values in such neighbourhoods depend on the absence of locally unwanted land uses (or LULUs). Suburban homeowners do not appreciate the proximity of affordable housing for poor, black, or Hispanic residents, landfills, shelters for abused women, or adult entertainment facilities. <sup>13,14</sup> White and wealthy suburban dwellers encourage planners to protect their shared values by excluding LULUs:

»The benign view of zoning is that it is a system with everything in its place and a place for everything. Indeed, early proponents analogized zoning to good house-keeping: keep the piano in the parlor, not the bedroom and the stove in the kitchen, not the pantry. The dark side, however, [is that] zoning has played a significant role in establishing housing patterns that exclude, among others, persons of low and moderate income, racial minorities, and the disabled.« <sup>15</sup>

The case of exclusionary zoning achieved attention when the Southern Burlington County NAACP (National Association for the Advancement of Colored People) sued the Township of Mount Laurel, New Jersey, for its exclusionary zoning practices. Most of the land designated for building purposes in Mount Laurel was zoned for low density single-family housing. The zon-

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12 Margalit (note 2), p. 9.

13 Robert C. Ellickson/Vicki L. Been: *Land use controls. Cases and materials*, New York, NY: Aspen Publishers 2005, pp. 754-760.

14 Julian C. Juergensmeyer/Thomas E. Roberts: *Land use planning and development regulation law*, St. Paul, Minn.: Thomson West 2007, pp. 243-245.

15 Juergensmeyer/Roberts (note 14), pp. 214-215.

ing ordinance did not say: »Mount Laurel hereby orders poor people and people of color be excluded from dwelling within the township's boundaries!« Zoning for low density housing, however, had the *effect* of excluding everybody who could not afford a single-family on a relatively large parcel of land. In its 1975 Mount Laurel I decision, the New Jersey Supreme Court examines the legal question whether a municipality may validly, by a system of land use regulation, makes it physically and economically impossible to provide low and moderate income housing in the municipality. The court finds that such an exclusionary land use regulation must be held invalid:

»We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefore.«<sup>16</sup>

The court assumes that land use regulation is part of the state's police power and that the police power must be employed for the general welfare. With regard to land policy, the court takes issue with the exclusionary effect of planning. It exhorts the Township of Mount Laurel not to use its police power only with a view to its affluent white population:

»It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. [...] [T]he presumptive obligation arises for each [...] municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.

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16 New Jersey Supreme Court, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151 (1975) 174 – Mt. Laurel I.

Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.«<sup>17</sup>

Mount Laurel I, although limited in its legal effects, was a victory for the civil rights movement and is an important document for spatial planning and land policy. Exclusionary zoning is not limited to the United States. All planners, who designate acceptable land uses or prevent undesirable land uses, operate property relations of inclusion and exclusion. The planning systems in Germany and other OECD countries provide for local plans that, similar to zoning in the United States, designate permitted or prohibited land uses. Use classes, density requirements, or building lines determine the usability and the economic value of potential sites. Germany and many other OECD countries countervail some of the dire consequences of spatial planning with rent control, social housing projects, and housing subsidies. The fact still stands, however, that minimal plot sizes and similar planning tools exclude a portion of the population from ever owning a house.

## CONCEPTUAL PROBLEMS

### Essential humiliation

As a standard for the evaluation of spatial planning or other public policies, Margalit's concept of the decent society poses some conceptual problems. What is the surplus value of non-humiliation? Exclusionary zoning humiliates the poor and racial minorities, but, above all, it is unjust. Self-respect and human dignity must prove its value independently from efficiency or justice. Does the decent society merely emphasize the disapproval of inefficient or unjust acts? To identify a possible surplus value, we must examine the exclusionary effects of spatial planning in ordinary situations. We have to examine the problem of the efficient and just plan that persons deem humiliating. Since the humiliating plans are both efficient and just, we can

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17 New Jersey Supreme Court, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151 (1975) 178-180 – Mt. Laurel I.

assume that the humiliated persons do not suffer injustice of historic proportions or are threatened by genocide.

In ordinary situations, humiliation as a standard for public policy has a great disadvantage: as humiliation is an injury to self-respect,<sup>18</sup> it cannot be publicly discussed without scrutinizing every person's most intimate feelings and values. This scrutiny causes a great danger of humiliation. Margalit considers this disadvantage only with respect to minorities suffering from discrimination: »The humiliation comes from the sense that you do not want the discriminators to define you«. <sup>19</sup> His observation about minorities is of general importance, however, because it reveals the problem that a non-humiliating public policy very well can be humiliating itself. The paradox is caused by the self-defining nature of human dignity. Human dignity is a different kind of standard than efficiency and justice. A person's dignity results from how she or he think about themselves. Human dignity is the most personal manifestation of the self. How could this utmost intimate and self-defined manifestation be employed in the evaluation of public policies, such as spatial plans? Efficiency and justice are standards for policy evaluation which include subjective elements. Efficiency and justice do not entirely depend, however, on personal perceptions. If we question a person's actions as inefficient or unjust, we invite this person to public deliberation. The result of public deliberation very well can be that all persons, whose actions have been questioned as inefficient or unjust, insist that we have misjudged their actions. But we also can object to this criticism. After all, efficiency and justice can be subject to public deliberation although people disagree on what efficiency and justice means. Efficiency and justice actually must be subjected to public deliberation *because* of disagreements on what efficiency and justice means. A similar deliberation is impossible with regard to a person's self-respect. Above all, a person's self-respect can hardly be questioned in public deliberation without submitting this person to humiliation.

Human dignity probably has elements that are independent from a person's self. We can call these elements the objective core of human dignity and discount the »dignity« of racists and sadists and serial killers. Racist

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18 Margalit (note 2), p. 9.

19 Margalit (note 2), p. 153.

slurs, sadistic acts, or mass murder are not justifiable manifestations of human dignity. If a person's self-respect depends on racism, sexism, the joy to be cruel to others, or mental illness, we may feel legitimized to neglect this person's perception of self-respect and human dignity. Such disregard does not solve the problem of efficient and just planning that somebody deems humiliating. Consider, as a difficult example, the case of the concerned parent. The concerned parent is resident of a neighbourhood developed under exclusionary zoning which is now open to all sorts of formerly excluded land uses. The concerned parent worries about the children's safety. As a consequence of the new use mix, the crime rate goes up, there are more conflicts between diverse populations, and the environmental quality deteriorates. The concerned parent has specifically chosen this neighbourhood to achieve the highest possible level of safety for his or her children. The concerned parent had to make many sacrifices to accomplish the children's safety: relinquishing a better paid job in the big city, for example, or accepting the rather boring life-style of a suburban dweller. Also, the concerned parent and other suburban dwellers have invested large sums in developing the pristine neighbourhoods they desire, free of locally unwanted land uses. Due to a court's order, however, the local plans had to be changed to avoid exclusionary zoning. All these sacrifices suddenly do not matter because the urban quality of the neighbourhood changes dramatically as a consequence of the less exclusionary planning. Would the concerned parent and other suburban homeowners not have a »sound reason« to consider their »self-respect injured«,<sup>20</sup> if suddenly their homes are surrounded by low-income housing, immigrants, landfills, or adult entertainment facilities? Moreover, this change has been made necessary because the concerned parent and other suburban residents successfully have been challenged in court of being racist or elitist. As the concerned parent considers herself or himself as open-minded, tolerant, and supportive of poor people and people of color, she or he feels deeply humiliated by this accusation. After all, the concerned parent has planned a life according to Aristotle:

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20 Margalit (note 2), p. 9.

»There are two impulses which more than all others cause human beings to cherish and feel affection for each other: ›this is my own‹ and ›this is a delight.‹«<sup>21</sup>

The desire to keep to oneself and to live in the proximity of others who share the same values is, in itself, neither racist nor despicable. This desire is a strong motive to choose as residence a location that promises sameness and similarity. Moreover, a certain distance to otherness might be desirable to reduce the negative consequences of diversity. Seclusion necessarily results in exclusion. From this perspective, persons who are blamed of a desire to seclusion and of following Aristotle's observation have a sound reason to consider their self-respect injured. Courts or planners humiliate persons characterized in my example as concerned parents by imposing a more diverse environment on them. Surely, mixed land uses can be more efficient because of the advantages of agglomeration. Mixed land uses also avoid social injustice by admitting poor people and minorities to live next door to the wealthy majority. Applying Margalit's standard of the decent society in addition to efficiency and justice has a dire consequence: the abandoning of humiliating planning (in my example: exclusionary zoning) can be efficient and just, but *also* can be humiliating (in my example: to the concerned parent). Humiliation (as a fact) by non-humiliating (as an intention) plans can occur haphazardly. Perhaps the residents of Mount Laurel were not at all humiliated by the ruling of the New Jersey Supreme Court. But I observe that non-humiliation respects the dignity of some, yet humiliates others. I call this effect essential humiliation.

Humiliation and self-respect, as standard of public policies, depend on everybody's self-definition of human dignity and self-respect. Such a standard is highly unreliable, yet its reliability cannot be improved without humiliation. Every person is better able to know how she or he feels about themselves than everybody else. It would entirely contradict the concept of human dignity or self-respect to impose on others how they have to feel about themselves. Of course, to some extent social life is about testing and adapting self-respect. Neither the testing nor the adaptation must be a humiliating experience, and it will not be if it occurs in a social exchange that

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21 Aristotle: *The politics*. Translated by T. A. Sinclair; revised and re-presented by Trevor J. Saunders, London: Penguin Books 1992, p. 111.

helps the members of a society, without injury to their human dignity, to learn how they feel about themselves. At some point, however, human dignity and self-respect express a person's individuality. Nobody can supersede a person's feeling of self-respect by telling this person what human dignity or self-respect »really« means. A society would not be decent at all, if it deprives its members of the opportunity to make up their own minds whether they feel humiliated by smoking bans, the noise from children's playgrounds, a reform of spelling (*Rechtschreibreform*), the inefficient use of energy, second-hand smoking, public hostility towards children's noise, professors who cling to out-dated modes of spelling, or the prohibition of light bulbs. The list demonstrates that a fair degree of humiliation is inevitable. One person feels humiliated by second-hand smoke, another person feels degraded by a smoking-ban. One person feels elevated as a human being by the warm rays of a 100W light bulb, another person feels her self-respect injured by the lack of environmental compassion in today's society. The negative and positive test which Margalit applies to self-respect and human dignity does not help in cases of essential humiliation and, unfortunately, does not help solve the case of the concerned parent at all.<sup>22</sup>

As soon as the members of the decent society are fairly diverse and pursue plural rationalities, the decent society has to deal with a multitude of demands. Some of these demands are from members who claim that they must not be humiliated. Other demands are made by persons who think that such claims are capricious, inappropriate, or even offensive. Moreover, as soon as the decent society includes thin-skinned members who are easily upset, these hypersensitive contemporaries will dominate public policymaking. The domination by easily upset persons is simply the consequence of their heightened deep feelings towards themselves and the fact that they feel humiliated easily. The group of easily upset persons is very different from the group of persons who are concerned about efficiency or who demand that all public policies be just. While the advocates of efficiency and justice ponder social relations and the effect that public policies have on society, the easily upset persons each merely reflect about themselves.

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22 Margalit (note 2), p. 51.

## Is non-humiliation always decent?

The biggest problem with the decent society, as defined by Margalit, is the hidden agenda. The planners of the Township of Mount Laurel allowed the New Jersey Supreme Court to catch them red-handed. Although the planners had not announced racism openly, the court found sufficient reasons for censuring their acts as exclusionary zoning. What if planners or other policymakers do not display their ulterior motives at all? Would a society still be decent if most of its spatial plans and other public policies are utterly inefficient and unjust, but nobody knows? Since nobody knows about the inefficient and unjust policies, there is no person who has a sound reason to consider his or her self-respect injured.<sup>23</sup> In other words: A society pursuing a hidden agenda would have to be called decent because nobody is humiliated. In fact, if nobody knows, nobody *can* be humiliated.

Calling a society, planners, or other policymakers ›decent‹, if they are hiding the inefficiency and injustice of their acts from the public, strongly contradicts the normal meaning of being decent. The Merriam-Webster dictionary defines decent as »conforming to standards of propriety, good taste, or morality«. This definition does not fit with the cunning politics of the hidden agenda at all. Obviously, being decent demands much more than to abstain from the humiliation of others. Most people would consider the trickery of unjust and inefficient planners and other policymakers an example of indecency. Margalit does not examine whether undetected and concealed acts of inefficiency or injustice are in conflict with the decent society.<sup>24</sup> This omission is surprising because Margalit draws from a treasure trove of examples from Israel, Germany, the United States, France, or the United Kingdom. It is quite typical of inefficient and unjust leaders, including leaders in these countries, to hide their acts from the public. The cover up, even if it prevents the humiliation of others, makes such acts even more indecent and despicable. An inefficient and unjust society, in order to remain ›decent‹, must suppress free speech, uncensored media, or social networks. Would such censorship be legitimate because it prevents the humiliation of all who are affected (without knowing it) by inefficiency or injus-

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23 Margalit (note 2), p. 9.

24 Margalit (note 2).

tice? Of course, the censorship also would have to be concealed. Open censorship that bans the disclosure of inefficient or unjust acts to the public is humiliating. Feeding the press or social networks attractive and irrelevant information, however, often prevents the public to scrutinize the inefficiency or injustice of planners and other policymakers. Sometimes labelled as city marketing or executive summary, such information is entertaining and colorful, yet it conceals from the public what is really going on.

Cronyism and corruption often are concealed from the public whose members would have good reasons to feel humiliated if they knew about their leaders wrongdoings. Criminal acts are not truly interesting, however, in defending the efficient and just society against the politics of the hidden agenda pursued by the »decent« society. Systemic concealment is more interesting because it depends on institutions, not on the actions of malicious leaders, planners, or other policymakers. Good examples of the institutional entrenchment of a hidden agenda are the exclusionary effects of spatial plans, private property, and the politics of belonging.<sup>25</sup> Private property often is inefficient and unjust, but the »decent« society conceals this fact in order to avoid the humiliation of the dispossessed. In many countries, spatial planning confirms the legitimacy of private property. The confirmation is labelled as land use control. Private landowners must be controlled when using their land, yet regulatory planning hardly ever questions that the private ownership of land can result in the dispossession of vast numbers of citizens. This dispossession, facilitated by the right to private property, implies the denial of the right to exist to everybody who does not own land. Consider, for example, John Stuart Mill's critique of private property:

»No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of expediency. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced ... But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the new-comer.«<sup>26</sup>

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25 Davy (note 11), pp. 177-200.

26 John S. Mill: Principles of political economy. With some of their applications to social philosophy, New Jersey: Hackett Publishing 1987, p. 233.

John Stuart Mill addresses the exclusionary power of private property that is exacerbated by spatial planning and land policy. The »trick« of spatial planning and land policy, in confirming the legitimacy of private property, is to call planning »land use control« when, in fact, planners simply validate the distribution of land among landowners. Ultimately, »land« becomes synonymous with exclusion, as Ambrose Bierce brings to mind in his 1911 satirical reference book *The Devil's Dictionary*:

»LAND, *n.* A part of the earth's surface, considered as property. The theory that land is property subject to private ownership and control is the foundation of modern society, and is eminently worthy of the superstructure. Carried to its logical conclusion, it means that some have the right to prevent others from living; for the right to own implies the right exclusively to occupy; and in fact laws of trespass are enacted wherever property in land is recognized. It follows that if the whole area of *terra firma* is owned by A, B and C, there will be no place for D, E, F and G to be born, or, born as trespassers, to exist.«<sup>27</sup>

Any ownership society interested in the sustainable distribution of private property needs to invent ways to make property acceptable which can include the concealment of how property rights work. This is particularly true with regard to corporate property because most arguments justifying private property as guarantee of personal freedom do not apply to companies.<sup>28</sup> If private property had remained unmitigated, it would have been unacceptable. John Stuart Mill's critique of private property, the classic land reformers (Leo Tolstoy, Henry George, Adolf Damaschke), and Marxism had attracted some political attention in the late 19<sup>th</sup> and early 20<sup>th</sup> century. How did the ownership society resolve the tension? Violence and repression frequently do not engender broad acceptance of private property and are humiliating. A non-humiliating way to conceal the truth about inefficient and unjust ownership are a combination of widespread small property holdings

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27 Ambrose Bierce: *The devil's dictionary*, New York, Oxford: Oxford University Press 1999.

28 Davy (note 11), pp. 71-74.

and the institutions of the welfare state.<sup>29</sup> On the one hand, people learn from the experience of owning a little about the »goodness« of private property. The experience of owning a little always includes the hope of someday owning more. On the other hand, contribution-based social insurance schemes and social assistance cushion the experience of owning a little. Social security prevents hardship caused by owning *too* little. At least in Europe, the welfare state mollified the dispossessed. The concealment worked and the exclusionary effects of private property and spatial planning are non-issues. Apart from the agenda of sectarian groups within the Attac or Occupy movement, people in Europe do not feel humiliated by the institution of private property. The establishing of social security, introduced in Germany under Bismarck, had many motives, some of them pious, others tactical.<sup>30</sup> If we assume that the revolutionary potential of the ownership society has been disarmed purposefully by introducing the welfare state, we may have doubts about the »decency« of property rights and social assistance. Consider, for example, the following analysis of planning and social citizenship:

»When a planning authority decides that it needs a larger middle-class element in its town (as it very often does) and makes designs to meet its needs and fit its standards, it is not, like a speculative builder, merely responding to a commercial demand. It must re-interpret the demand in harmony with its total plan and then give it the sanction of its authority as the responsible organ of a community of citizens....This is one example of the way in which citizenship is itself becoming the architect of social inequality.«<sup>31</sup>

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29 Benjamin Davy: »Human dignity and property in land – A human rights approach«, in: Sony Pellissery/Benjamin Davy/Harvey Jacobs (eds) *Land policies in India. Promises, practices and challenges*, Singapore: Springer Nature 2017, pp 1-33.

30 Franz-Xaver Kaufmann/John H. Veit Wilson/Thomas Skelton-Robinson: *European foundations of the welfare state*, New York, Oxford: Berghahn 2012, p. 88.

31 Thomas H. Marshall: *Citizenship and social class and other essays*, Cambridge: Cambridge University Press 1950, p. 62.

The allocation of a civic modicum, facilitated by social rights, disempowers the poor. The monthly payment of social cash benefits dampens the feeling of manifest injustice (as expressed, for example, by John Stuart Mill or Ambrose Bierce). Moreover, welfare state institutions are almost only debated for their costs, rarely for their effective promotion of social inequality. Although the combination of private property and welfare state institutions avoids that the poor and extremely poor feel humiliated, we can hardly call the hidden agenda »decent«. In fact, the decent society and the welfare state have a strained relationship.<sup>32</sup> Should we console ourselves that giving welfare out of bad motives is not humiliating for the beneficiaries because they need not be grateful to the donor?<sup>33</sup> I suggest we seek consolation elsewhere. Private property affects the human dignity of the great unwashed (*Lumpenproletariat*) in a different way than it affects the recipients of social cash transfers in a welfare state. While large property holdings prior to the welfare state infringe on the right to existence of the poor, large property holdings in a welfare state merely maintain inequality. What is different? The difference with respect to human dignity and self-respect is the existence of social rights.

## HUMAN DIGNITY AS RIGHTS

The conceptual problems with planning and the decent society – essential humiliation, the domination by easily upset persons, or non-humiliation by the hidden agenda – demonstrate that adding non-humiliation to the standards for the evaluation of spatial plans and other public policies introduces an inherently biased element. The meaning and effects of this element (variously called human dignity, self-respect, humiliation) depend on volatile factors. Going from one of the problems to the next, the volatility gets worse. Plural perceptions (for example, of having or not having smoking bans in public places) result in essential humiliation but involve no malicious acts as in the case of the indecent trickery of unjust and inefficient policymakers. Considering the problems of human dignity as a standard for

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32 Margalit (note 2), pp. 222-246.

33 Margalit (note 2), p. 244.

public policy, we might conclude that we are better off by neglecting non-humiliation and the concept of the decent society. As a consequence of our conclusion, we would recommend that planners and other policymakers limit the deliberation of their spatial plans to efficiency and justice. The conclusion would be wrong, however, without examining first whether the problems of humiliating planning (even if it is efficient and just) can be resolved. The weakness and unreliability of human dignity as a standard of policy evaluation does not justify to draft and implement humiliating plans. How can the decent society solve the paradox of humiliating non-humiliating public policy, of diversity, of the domination by easily upset persons, or the hidden agenda?

### **Levels of humiliation**

Policymaking with regard to individual persons – not only under the concept of the decent society, but also in the efficient or just society – has to follow a two-step decision making procedure. In the first step, policymakers must ascertain whether and in how far their decisions are predetermined by individual rights. Any plan or other public policy that fails to respect, protect, or fulfill the rights of individual persons is in violation of the law. As soon as policymakers have determined, however, that individual rights neither demand nor prevent a certain decision, they can take the second step and make up their minds as to how to use their discretionary powers. Individual rights are of different legal quality. I suggest that the two-step model of policymaking be regarded from the perspective of international human rights: planners and other policymakers have to distinguish between humiliations that violate human rights (First Step Humiliation) and humiliations that do not violate human rights (Second Step Humiliation). The distinction helps to solve some conceptual problems of the decent society. Exclusionary zoning or smoking bans do not humiliate on the same scale. Exclusionary zoning often denies poor people and minorities the human right to adequate housing. Regulatory smoking bans, however, concern lifestyle decisions. Although in both cases, affected individuals may have reasons to consider their self-respect injured, a First Step Humiliation is unacceptable while Second Step Humiliations are often inevitable.

Exclusionary zoning of the Mount Laurel variety is a First Step Humiliation for poor people and people of color. The prohibition of exclusionary

zoning is a Second Step Humiliation, but the concerned parent (in my example) does not have a human right to a neighbourhood free from poor people and minorities. Even if concerned parents feel humiliated by a mandatory mix of land uses in their neighbourhood, the ban of exclusionary zoning does not violate their human rights. In a conflict between human rights and a possible Second Step Humiliation, planners and other policymakers have a limited margin of discretion: They must refrain from a First Step Humiliation and – if inevitable – inflict a Second Step Humiliation. Planners have a wider margin of discretion, if their plans or other policies affect no human rights. Of course, they also have to avoid Second Step Humiliations, but this is often impossible. In cases of essential humiliation, policymakers merely can choose *who* must endure the Second Step Humiliation. Regulatory smoking bans in restaurants or bars are a good example of how policymaking works in situations of essential humiliation.

A smoking ban is regulatory if it derives from public law, not from the property rights of the owner of the premises. For decades, non-smokers who visited restaurants or bars in non-Islamic countries have been exposed to second-hand fumes by smokers. Commencing in the United States, many countries have banned smoking in restaurants, bars, and other places accessible to the public. Why are smoking bans (also called tobacco control) interesting to spatial planners? After all, the political debate focused on the health issue: smoking as a cause of cancer and other diseases.<sup>34,35</sup> Regulatory smoking bans are not truly about public health, they modify spatial quality. Smokers and non-smokers exposed to second-hand smoke incur health risks because of smoking, not because of smoking in public. If policymakers had wanted to protect the public health, they would have prohibited the use of tobacco entirely. In particular, the prohibition would have extended to smoking in private homes and smoking in the presence of children or senior citizens. The current regulatory smoking bans add little to the improvement of public health. Policymakers perhaps wanted to ban tobacco

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34 Richard Blumenthal: »Tobacco control: A state perspective«, in: *Yale Journal of Health Policy, Law, and Ethics* 3 (2002), pp. 151-156.

35 Fernanda Nicola/Fabio Marchetti: »Constitutionalizing tobacco: The ambivalence of European federalism«, in: *Harvard International Law Journal* 46 (2005), pp. 507-526.

products entirely, but their limited regulatory powers kept them from invading private homes. To test my hypothesis that recent smoking bans are not concerned for public health in cases when regulators would have had the power to mitigate them, I have analyzed situations where policymakers have a say: social assistance and the protection of non-smokers in poor families. A program to protect non-smokers on social assistance from second-hand smoke would not infringe on their liberty or privacy but mitigate their cramped living conditions. Poor families on social assistance dwell in small apartments. As the members of poor families have no jobs and cannot afford to eat and drink in restaurants and bars too often, they spend much time at home. If even just one family member is a smoker, all family members are exposed to second-hand smoke. Still, the protection of the health of the members of poor families in their homes was not mentioned in the debates preceding the introduction of regulatory smoking bans. In 2014, a LexisNexis search of German newspapers (keywords: *Nichtraucher* AND *Schutz* AND *Hartz*) finds 18 articles. None of these articles mentions the protection of non-smokers who receive social assistance. Presumably, no policymaker in the United States or the European Union would demand an increase of social benefits to assist the non-smokers in poor families in obtaining larger apartments, for example, with separate non-smoking rooms. The reluctance can be easily explained. Regulatory smoking bans use health issues as an excuse for other policy goals. The ulterior goal of recent smoking bans is not the protection of health, but a spatial policy goal: the repossession of public spaces as smoke-free commons.

The permission or prohibition to smoke in public has a substantial impact on the quality of public space and the rights involved in the shared use of land. Many non-smokers find smoking in restaurants and bars disgusting. They are humiliated by the pressure either to endure the nuisance or stay away from restaurants or bars. Smokers find pleasure, however, in enjoying a cigarette or cigar after a good meal or while they are having a drink. Although some authors consider a human right to a smoke-free environment,<sup>36,37</sup> neither non-smokers nor smokers enjoy a human right to the pro-

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36 Rangita de Silva de Alwis/Richard Daynard: »Reconceptualizing human rights to challenge tobacco«, in: Michigan State University College of Law Journal of International Law 17 (2008), pp. 291-376.

tection of their lifestyle preferences. The German Constitutional Court (Bundesverfassungsgericht – BVerfG) emphasizes the legislators’ margin of discretion:

- Non-smokers cannot demand the protection from the humiliation caused by smoking in public places.<sup>38</sup>
- Nobody has the constitutionally protected right to smoking, at least not of illegal substances.<sup>39</sup>
- Policymakers can decide whether they permit or ban smoking in public as long as all public places are treated equally.<sup>40</sup>

The court handles Second Step Humiliation wisely. When it comes to smoking, policymakers cannot avoid essential humiliation. Smokers as well as non-smokers have good reasons to consider a ban on smoking or a general permission to smoke in public an injury to their self-respect. Regulatory smoking bans are humiliating for smokers, in particular for polite and considerate smokers, because they are excluded from forms of social exchange that accommodate their addiction. The previous acceptance of smoking in public as well as the repossession of public spaces as smoke-free commons are both potentially humiliating. The situation is, as I have explained earlier, an example of *essential* humiliation. By considering essential humiliation from a human rights perspective, we can determine the margin of discretion in establishing a (non-) smoking policy for the decent society. The German case law is interesting in general because it confirms the policymakers’ margin of discretion in a jurisdiction that explicitly protects human dignity by constitutional law.<sup>41</sup> Many conceptual problems of the decent society can be resolved by examining non-humiliation from the perspective of the relationship between human dignity and human rights.

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37 Carolyn Dresler/Stephen Marks: »The emerging human right to tobacco control«, in: *Human Rights Quarterly* 28 (3) (2006), pp. 599-651.

38 BVerfG, 9 February 1998, 1 BvR 2234/97.

39 BVerfGE 90, 145 – prohibition of cannabis.

40 BVerfGE 121, 317 – protection of non-smokers.

41 Article 1, para. 1, GG.

## A human rights approach to non-humiliation

Associating human dignity with individual rights is not a new idea.<sup>42,43</sup> Human dignity may be relevant under domestic law and even be included in constitutional law, as in the case of the German Article 1, para. 1, GG.<sup>44</sup> Since I do not want my examination goes under in regional legal quagmires, however, I prefer to consider human dignity and international human rights.<sup>45,46</sup> After all, the drafters of international human rights always have emphasized that human rights closely relate to human dignity. It may be true that international human rights law always found it difficult »to mate cannibals and non-cannibals without changing their incompatible attitudes toward cannibalism«. <sup>47</sup> Human dignity provided a common standard that proved quite resilient in the minds of »cannibals and non-cannibals« alike.

The founding document of the United Nations reaffirms »faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small[.]«<sup>48</sup> The Preamble of the Universal Declaration of Human Rights<sup>49</sup> recognizes the »inherent dignity« and the »equal and inalienable rights of all members of the human family« as the »foundation of freedom, justice and peace in the world« and proclaims that »disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind[.]« The International Covenant on Civil and Political Rights and the

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42 Joel Feinberg: »The nature and value of rights«, in: *Journal of Value Inquiry* 4 (1970), pp. 243-260.

43 Jeremy Waldron: »Homelessness and the issue of freedom«, in: *University of California at Los Angeles Law Review* 39 (1991a), pp. 295-324.

44 Mahlmann (note 5).

45 Myres McDougal: »Perspectives for an international law of human dignity«, in: *American Society of International Law Proceedings* 53 (1959), pp. 107-132.

46 William J. Wagner: »Universal human rights, the United Nations, and the telos of human dignity«, in: *Ave Maria Law Review* 3 (2005), pp. 197-226.

47 McDougal (note 45), p. 109.

48 Preamble to the Charter of the United Nations (1945).

49 UDHR (1948).

International Covenant on Economic, Social and Cultural Rights<sup>50</sup> also emphasize the »inherent dignity of the human person[.]« International human rights law, however, does not stop at the recognition of human dignity. Rather, human rights documents make visible and delimit the *rights* which derive from human dignity. Ultimately, human dignity and individual rights are closely related:

»Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called »human dignity« may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims. Not all of this can be packed into a definition of »rights«, but these are *facts* about the possession of rights that argue well their supreme moral importance.«<sup>51</sup>

Margalit considers the relationship between the decent society, human dignity, and rights.<sup>52</sup> He concedes that »[h]uman rights are the natural candidates« for rights that express self-respect and non-humiliation.<sup>53</sup> He is suspicious, however, that a society that respects, protects, and fulfills human rights is already a decent society. Maybe a society conforming with human rights is not decent because it disregards »civil rights«,<sup>54</sup> particularly the civil rights of non-nationals. The argument is, at least, partly misguided. Assuming that human rights distinguish between citizens and non-citizens, Margalit neglects the clauses that grant the full enjoyment of human rights without consideration as to »national [...] origin«. <sup>55</sup> Only »developing countries« may limit economic rights for non-nationals.<sup>56</sup> Apart from this exception, international human rights do not distinguish between citizens and non-citizens.

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50 ICCPR (1966); ICESCR (1966).

51 Feinberg (note 42), p. 252; emphasis in original article.

52 Margalit (note 2), pp. 28-40

53 Margalit (note 2), p. 39.

54 Margalit (note 2), p. 40.

55 Article 2, para. 1, ICCPR; Article 2, para. 2 ICESCR.

56 Article 2, para. 3, ICESCR.

Margalit uses Switzerland before the introduction of women's voting rights as an example of a society that observes human rights, but still is humiliating.<sup>57</sup> The example does not prove his point. As of 1992, the year of the Swiss accession to the ICCPR, Switzerland has an obligation, based in international human rights law, to grant »universal and equal suffrage« to all citizens.<sup>58</sup> Switzerland has submitted a reservation from Article 25 which concerns »elections within assemblies to be held by a means other than secret ballot«. An exclusion of women from Swiss elections would be a human rights violation. Perhaps Margalit refers to legal history, however, when he claims that unequal voting rights in Switzerland did not violate human rights. In 1971, when a 65% majority of Swiss (male) voters ended the exclusion of women from voting, Switzerland was not a State Party under ICCPR. Actually, the covenant did not enter into force before 1976. In 1971, unequal voting rights in Switzerland still contradicted the values embodied by human rights.<sup>59</sup> Margalit's example is ill-chosen; it expects that the audience of a political philosopher automatically finds humiliating a country that until 1971 had denied voting rights to women. I take issue with this expectation, not on legal grounds, but because it conceals the possibility that some Swiss men, particularly in the German-speaking areas, were humiliated by the introduction of women's voting rights (another case of essential humiliation).

Margalit is correct that the denial of other rights than human rights still may humiliate somebody. But is such a Second Step Humiliation a sound reason to dismiss human rights as the core of what the decent society demands? Second Step Humiliation – an injury to the self-respect of persons whose human rights are *fully* protected – relates to the margin of discretion that policymakers have to resolve situations of essential humiliation. Consider the problem of smoking in public spaces. Policymakers can choose to permit or ban smoking in restaurants and bars. As long as nobody's human rights are affected, policymakers are free to choose whose self-respect they value more: the human dignity of non-smokers or smokers. As a consequence of scarcity of space and other resources, humiliation is inevitable.

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57 Margalit (note 2), p. 40.

58 Article 25 ICPPR.

59 Article 21, para. 3, UDHR.

Margalit emphasizes that non-humiliating policymaking is *possible*, I rather emphasize that non-humiliating policymaking – under the constraints of scarcity – is *unlikely*. Somebody is going to be degraded. With regard to Second Step Humiliations, planners and other policymakers merely can choose *who* will be degraded.

A human rights approach to non-humiliating planning considers the sources of international human rights law as an inspiration for spatial planners who wish to check their plans, albeit efficient and just, for their potential to be still humiliating. Examples of human rights that inspire better planning are the right to life,<sup>60</sup> the abolition of slavery and compulsory labor,<sup>61</sup> the right to liberty of movement and freedom to choose her or his residence,<sup>62</sup> the right to freedom of expression,<sup>63</sup> the right to work,<sup>64</sup> the right of everyone to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions,<sup>65</sup> the right to the enjoyment of the highest attainable standard of health.<sup>66</sup> A human rights approach even can align private property with human dignity, yet in a surprising fashion.<sup>67</sup>

Following the two covenants, the international community has put into effect a number of conventions that specify the Universal Declaration with special regard to, among others, women, children, migrant workers, or persons with disabilities.

## CONCLUDING REMARKS

To equate human dignity with human rights has some merits. If a society fully respects, protects, and fulfills the civil, political, economic, social, and

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60 Article 6, para. 1, ICCPR.

61 Article 8, para. 1, ICCPR.

62 Article 12, para. 1, ICCPR.

63 Article 19, para. 2, ICCPR.

64 Article 6, para. 1, ICESCR.

65 Article 11, para. 1, ICESCR.

66 Article 12, para. 1, ICESCR.

67 Davy (note 29).

cultural rights stipulated by ICCPR and ICESCR, it would be difficult to condemn this society as indecent for the violation of other rights. The true problem of the world today is not that all countries observe human rights meticulously, yet maintain practices which humiliate despite the observance of ICCPR and ICESCR. The problem of today's world is that most countries, including countries with good human rights records, do not fully observe their obligations under international human rights law. Margalit's exception to human rights resembles an objection typical of the easily upset persons: »Yeah, thanks, but give me more!« This is not acceptable: After all, the Universal Declaration on Human Rights, as expressed by the United Nations, is under threat by the Universal Declaration of Human Hate, as posted on Twitter, Facebook, and other »social« media.

With respect to the exclusionary effects of spatial plans, the New Jersey Supreme Court defines the limits of humiliating planning. Planners, who are mindful of all opportunities they create or obliterate, avoid humiliation that amounts to a violation of human rights. Exclusion always reduces opportunities. The reduction of opportunities through spatial plans is the price the well-planned society pays for achieving its planning goals. It goes without saying, however, that many uses which are excluded from an area X, will find suitable locations somewhere else. As users have the opportunity to seek out alternative locations, their exclusion from area X is not humiliating. Only if their opportunities to find alternative locations is obliterated by planning, the exclusionary effect of a spatial plan denies these users their right to exist. With respect to human rights, the obliteration of all opportunities is illegitimate.<sup>68</sup> Preserving opportunities for using land is particularly important with respect to the poor. Maybe the nexus of location, property and poverty is a truism, as Jeremy Waldron claims:

»Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location.«<sup>69</sup>

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68 New Jersey Supreme Court, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975) 178-180 – Mt. Laurel I.

69 Jeremy Waldron: »Homelessness and the issue of freedom«, *University of California at Los Angeles Law Review* 39 (1991), pp. 295-324 (at p. 296).

The insight, even if commonplace, is important. The Mount Laurel I ruling implies a general guideline for spatial planning: Planners, who preserve a fair amount of opportunities for all to enjoy their human rights, avoid illegitimate humiliation. Their plans, to borrow Margalit's phrase, are decent.

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