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Citation Information

Friedman, Lawrence M.. "Law and Social Change in an Urban Environment." *Osgoode Hall Law Journal* 8.2 (1970) : 347-354.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol8/iss2/9>

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LAW AND SOCIAL CHANGE IN AN URBAN ENVIRONMENT

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There is a strong sense of crisis abroad in the land, and a strong feeling that that crisis can be described as an urban crisis. This sense of crisis has affected the academic world quite deeply. Law schools in general have been — not atypically — quite late to join in the general intellectual ferment. But recently here too there is agreement that law schools must grapple with concrete social problems, and that the concrete social problems of our day are centered in the cities. Indeed, if one tried to define urban law — a phrase which has gained currency only in the last few years — there is implicit in the concept the notion of an urban crisis. For example, if you asked law school professors to mention the elements of urban law or what a law school course in urban law should contain, you would receive a fairly standard response. It would obviously include urban government in the classical sense — municipal corporations. Beyond that, your respondents would present a fairly mixed bag of items — including, for example, the problems of urban crime, or crime on the streets (or crime in the houses for that matter). Now, it is true, that empirically speaking, most crimes — however one defines crime — are committed in urban areas. This could hardly be otherwise, since more than 70% of the population of the United States now lives in standard metropolitan areas. Actually, probably far more than 70% of the crime occurs in the cities and suburbs. Yet far more than 70% of the checks drawn on banks are drawn in the city, and certainly the banks on which they are drawn are overwhelmingly urban, and no one thinks of the law of checks as part of urban law. The reason for the distinction is neither very deep nor very scientific; it is simply that urban law is a convenient umbrella concept for describing a range of problems which are centered in the city, but which — equally important — have led to a sense of crisis. The crisis aspect is as much a part of the definition as the urban aspect.

What does the crisis consist of? One could divide the urban crisis more or less conveniently into three very broad categories. One we could call the environmental crisis — the sense that something has gone badly wrong with the environment. This problem, of course, is not confined to the city but is exacerbated (it is said) by conditions of city life. The garbage piles up on the street, the air is poisoned, the city is running out of fresh water, traffic is choking the streets, plant and animal life is wantonly destroyed to make room for man. The second is again not confined to the city but seems to be particularly striking there. We could call this the race and class crisis. The race aspect of it is much more intense in the United States than in Canada or Europe, at the moment. Perhaps the class crisis is as well. The war against poverty, revolts by welfare clients — all these are symptoms of the crisis; and

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the famous backlash is also part of the problem. The third crisis — we might call it a crisis of order and authority — is kind of a rag bag and includes many manifestations of unrest, from major riots down to the defiant growth of long hair by high school students. Obviously, the last two crises overlap; and all three are closely interrelated.

To look at urban law as the law of urban crisis is embarrassingly vague insofar as defining a boundary is concerned; but it is not illegitimate. The impulse to think about urban problems and to do research in urban areas flows out of this sense of crisis — the sense of problems which must be solved. Others in the course of these two days will spend a good deal of time talking about specific problems and about specific methods and strategies. In order for research to be truly productive and proposed solutions to be valid, they have to be guided by some general theory worthy of the name. But a lot of the speculation about the city and its crisis is not guided by any coherent general theory. There is a kind of implicit theory or proposition, however, of urban crisis, which runs something like this: this is an age in which urbanization has taken place very rapidly. In general, the rate of social change has been exceedingly rapid. The legal system has failed to adapt itself to the new conditions of society. Problems have arisen because of a mismatch between the rate of change in urban society and the rate of response to change in the legal system. Urban sprawl, fragmentation, riots, garbage non-collection, smog and so on are all symptoms of this failure to adapt.

This view is the conventional wisdom of millions of intelligent people; it is also in a way the view of the radical; and the view of a group who for want of a better term we can call the rational liberal planners. These are people who believe either that urban failure is essentially a technical failure in the art or science of managing, or that whatever the cause of it, the cures lie in the application of principles of science and rationality, which are part of the planning profession or various technical and engineering professions. This conventional view is also widely held by lawyers, whose training inclines them to think that there is a technically right or wrong answer to all sorts of questions and that, indeed, the application of known principles of the science of law (they would not use that term as such, of course) ought to give a technically correct answer to problems of government and law.

Now, I want to suggest, somewhat diffidently, that this theory or common assumption is at the least not obviously correct; and that it cannot really explain what is the matter with the cities. The theory, aside from its problems of definition and scope, makes a critical assumption about social change and American history. It assumes that 100 years ago or so in the United States there was a legal system, which somehow had evolved or been inherited in such a way as to fit the American social system as it then was. This match or fit has gone awry since then, because the rate of social change had been too rapid for adjustment. The theory provides no mechanism whatsoever to explain why change in rate or scale should be enough to throw this mechanism off. If you look at nineteenth century law in general, you find that the legal system, in fact, did change massively between 1800 and 1900 in a whole range of areas where social change was very rapid — and the law has continued to change rapidly in the twentieth century. If you look, for

example, at the law of business corporations, which barely existed in 1800, and then look at it again in 1900 and again in 1970 you will find that it revolutionized itself several times over, despite enormous controversy it was accommodated to a whole series of tremendous changes in the economy and in the social demand for new and different forms of business association. The same is true of the law of torts and the general commercial law of the United States. And indeed it has been true of law in general. That many people think otherwise is because they simply have not examined the evidence. And as a matter of theory, if law is and must be the reflection and product of current economic and social forces, then it *should* be constantly adapting to those forces — as they currently are, and whether we like them or not. Why then should there exist an area — called urban law or urban government — which is an exception to this rule, in which the process which seems so natural elsewhere and so expected, does not take place? Speed of change will not do as an answer. If a person were pressed, he might say that the cities have or had a bad or misfitting inherited structure. But then the question arises why that structure was not changed. The legal system has never been bashful about changing structure. And again, the general answer must be that if there are maladaptions (and indeed I agree that there are), if there are problems which are not being solved (solved from some standard which those of us present perhaps share but which are not *universally* held), it must be that there exists some status quo — or some inherited structure, if you wish — such that concrete interest groups exist that benefit so strongly from the state of affairs that they resist any change. The point is simple, almost obvious; and yet crucial and easily ignored. It is not the structure which is at fault. It is not a failure of application of known techniques, but a distribution of power which favours certain groups, who wish tightly to hold on to what they have, or increase their share.

Now let us return to the city itself and the urban crisis and look at it from this simple standpoint. Some of the factors which have led to this crisis are general to cities. Others are somewhat specific to the legal culture of the United States, though perhaps it is possible to generalize them a bit further.

The most general aspect of city life is that it is much denser than life outside the city. People live there in large concentrations, and the division of labor is more pronounced in the cities than outside. There is therefore a great sense (and reality) of interdependence of one person upon another. The hypothetical (largely mythical) frontiersmen, living beyond the pale of civilization, grew his own food; his wife wove the cloth of which their clothing was made; he built his own house. The family was more or less a self-sufficient economic unit. This man was always a member of a small minority, but he has provided the basic stuff of a great North American myth. At any rate, this kind of self-sufficiency is of course not only impossible in the city, but quite inconceivable. The city is a place of extraordinary interdependence. There are many kinds of communities that are interdependent; an extended family, a tribe, or, for that matter, a commune. But the extraordinary thing about cities is that in the city interdependence goes beyond the face-to-face group; one is dependent upon strangers. This is the essence of the urban condition: dependence upon strangers for all the necessities — all the

facilities — of life. Consequently, in the city, as in all complex societies, and sub-societies, there is a tremendous tendency or push toward the development of formal legal institutions. As opposed to the commune or the small group or the tribe, one cannot depend on consensus, on shared values, for regulation of the affairs of life. Of course, there are shared values in any society; in a complex society these values are not specific enough or general enough to dispense with the need to articulate them, and there are areas of life which call for detailed prescription, for precise, almost arbitrary regulation. This aspect of the city is not new. It is as old as the oldest city—as old as the imaginary city which Jane Jacobs has called *New Obsidian*. The city has always been the locus of formal regulation. But as the world gradually urbanizes, this feature becomes that much more pronounced.

In the United States, and indeed in Western societies in general, one can isolate one very broad, very important master trend in the development of legal systems over the past two or three centuries. This is the development of a single legal culture out of a pluralistic system. Some legal systems are openly pluralistic. The most obvious example is a colonial legal system. In the British African colonies of the nineteenth century English law governed in the capital and among those members of the society who were part of the market economy; in the hinterland customary law was recognized as valid and allowed a share of authority. It is not so readily recognized that all western legal systems were almost equally pluralistic. That is, there existed a formal legal system which, insofar as it governed at all, had to do with the affairs of an upper class; the rest of the population governed itself by its own rules, except insofar as rules from above, deemed necessary for the maintenance of order, pressed down upon the lower orders. The master trend in the last two or three centuries has been toward levelling out pluralism and extending the range and power of the official legal system. This development has gone through two main phases. The first phase was the creation of a legal system which could accommodate the mass market of consumers of law. I refer here to the fact that in the United States and Canada the number of people who, for example, owned and dealt in land in the nineteenth century was numbered in the millions rather than the relatively small number who owned and dealt in land in England. Consequently, the legal system had to be recast and simplified in such a way as to accommodate the interests of these consumers, to make it possible for them to deal in land. People who were not upper class, who were not in the habit of using lawyers (the local lawyers were not that well trained anyway) could not cope with the inherited land law. The first levelling, then, was one in which the system was reformed and recast in the interests of a mass market. The next phase, which came more or less after the American Civil War in point of time, was associated with urbanization. Within the growing cities, the sense of dangerous dependence was heightened. This meant a growing desire to create instruments of law, first, to control the sources of danger within the city; and, second, to provide enclaves within which people could be relatively free and secure from harm.

In 1872, Charles Loring Brace wrote a book about the poor and the criminals in his city and called it *The Dangerous Classes of New York*. The

title was significant. This sense has grown — stronger and shriller all the time — that dangerous classes, dangerous people live in the city; that we are dangerously dependent on those classes for our safety and tranquility. New Yorkers say the subway is not safe anymore. I do not know whether it ever was safe — or if it really *is* unsafe now. Evidence about the lawlessness of cities — meagre as it is — suggests that they were if anything worse a hundred years ago, more crime, more violence. But what was perhaps not worse a hundred years ago was the sense that danger emanated from the lower classes and infected the city as a whole. That idea is very strong now and has led, as you all know, to great movements for control, both repression and reform. The idea lends credence, too, to the general aims of that group we have called the rational liberal planners; these are men who claim that conditions are such that hierarchical command and rule by the experts are indispensable, before danger can be removed and city life revitalized.

The idea has also given rise to an enormous amount of law. Some of this law is plainly parasitic — it borrows the notion of social cost, the notion that the dangerous classes impose externalities upon the rest of the population. A beautiful example was a Massachusetts law of 1891, lobbied for by anti-sweatshop reformers. They were able to persuade the legislature of Massachusetts to pass an “Act to Prevent the Manufacture and Sale of Clothing Made in Unhealthy Places”. These reformers used the germ theory as a club to fight the tenement sweatshops — the theory that sick workers might infect clothes to be worn by the middle classes. This was a more or less parasitic way to force through social welfare reform, by making good rhetorical use of the dangerous dependence of urban life. Urban renewal itself borrowed heavily from this concept of social cost or externality. Examples could be multiplied.

In brief, the sense of urban interdependence leads to a demand for more law, that is, for social control over sources of danger. However, there is one very serious problem with this proposition — it provides a beautiful explanation for a phenomenon which in fact never took place in the United States: the development of a kind of supermetro government in which everything is controlled from a single rational center, out of one office lined with IBM computers and manned by experts on garbage, air pollution, the police force, and the like. Despite the fears and stresses of city life, and the demand for more and greater regulation, no rational monolith has ever emerged in the United States; what actually happened seems quite to the contrary. As the air becomes more and more polluted, for example, structures capable of solving the problem seem more and more remote; city government becomes more and more untidy and fragmented.

The cities, in fact, have been locked into their structures, physically speaking, since around 1900. The age of gobbling up the countryside came to an end about then. Boundaries have not changed. St. Louis, for example, has not grown an inch in a century. Central cities are, in fact, losing population; urban sprawl continues; but it is the suburbs and the unincorporated areas which are spreading into the hinterland. What has happened, of course, has been, we argue, not a technical failure, not a structural failure in

the adaptability of the legal system, or a failure to heed the advice of rational liberal planners, but something much more basic. What happened is that the second of the two possible solutions to the problem of dangerous interdependence has been adopted: the creation of what people consider to be safe and secure enclaves within the urban complex. Annexation is not an effective instrument for central cities because the suburbs do not wish to be annexed. They wish to continue to operate more or less as they are — in many cases as little more than incorporated neighborhoods. The legal culture of the United States fosters and encourages fragmentation of authority. The notion of checks and balances is firmly engrained in the culture. It becomes, if anything, stronger as the years go on. Wherever and whenever power appears to be concentrated in the United States, a movement springs up to reduce it, to check it, to counterbalance it. This does not prevent, mind you, the building up of enormous power centers — perhaps over-enormous, as in the case of the president's control of foreign affairs. But it does result in a tremendous resistance to anything like rationality in the European sense — systematization of law, the creation of structures with a beautiful, simple organizational chart. This trait of the culture fosters and encourages a kind of fortress or *Festung* solution to the problem of dangerous dependence. In the *Festung* culture of America, not only are there restraints on power centers, keeping them from becoming too strong, but the converse is also true — small power centres do not become too weak. No one ever gets wiped out; all is compromise and statemate; all is countervailing power; everywhere there are warlords, fiefdoms and bailiwicks.

The development of land use planning illustrates this point rather well. The first of the great modern devices of land use control — the equitable covenant — was borrowed from England around the middle of the nineteenth century. The leading English case was *Tulk v. Moxhay*. It arose out of a simple situation, which could easily recur today. A little subdivision had been laid out in the heart of London. There was a tiny park in the middle with an iron railing around it and an equestrian statue. The residents in the surrounding lots had keys so that they could get into this little park and frolic there. The case arose when one of the residents complained of a breach of the covenant to retain the park and its surroundings intact. There were technical reasons why the kind of action brought was somewhat novel, not entirely within the purview of prior cases on covenants. *Tulk* innovated, in such a way as to protect the rights of the lot owners; the innovation proved extremely functional. It made the trip across the Atlantic quite easily. The first cases in the United States arose out of very similar situations. The restrictive covenant began a magnificent career which continues to this day. It is a career which permits the creation of little *Festungen*, hopefully keeping property values high, and neighborhoods pure. It facilitated race and income segregation (though its racial uses have been outlawed since 1948). Whether the enclaves created are primarily economic or social is difficult to say and perhaps in the long run irrelevant, because money and status are so intertwined in the popular mind of Americans.

The restrictive covenant had its legal as well as its ethical flaws. It was usable only in certain situations. Along around the second decade of the twentieth century, zoning popped up to do some of the same things in a different way. Zoning itself had its limits as well as its strengths. It went beyond the covenant in effectiveness, but again within certain bounds. In 1948, the United States Supreme Court got rid of the racially restrictive covenant; and in 1949 urban redevelopment was born out of the ashes. I do not mean to suggest that there was any direct connection between these two events. But I do suggest that urban renewal and redevelopment — which in form are federal, and centralized, so that apparently there has been evolution from private enforcement, through municipal ordinance, to a strong federal program, and from individual to social solutions — are in many ways part of the same movement as the prior devices. They are strongly flavored by the *Festung* mentality. They aim to create enclaves of safety within the metropolitan area.

This historical *excursus* leads me to suggest, somewhat modestly in the face of assembled experts, that the issue of decentralization and centralization in the context of urban problems is in part a false issue. First of all, the meaning of these terms is obscure. People talk about centralization when they mean running things from Washington, D.C., rather than from state capitals or from the cities. But in the United States formally federal programs are tremendously varied in their *true* degree of centralization. Think of the draft, the post office, social security, the army, the forest service, the coast guard, urban renewal. The draft is wholly federal, and yet some aspects of its operation are highly decentralized. Young men used to ask each other, "Is your draft board good about graduate students?" And people would say, "The Ithaca, New York, draft board has such and such an attitude; the Omaha board has another." Post offices, on the other hand, seem to be stamped out of a cookie cutter in Washington, where they assign the quota of lost letters, the number of surly remarks to be addressed to the public, and so on. The true issue, it seems to me, is to find (from one's own particular value standpoint) what the optimum distribution of power is — formal and real — for the particular problem one is concerned with. For the United States at least, the idea of systematic, rational central planning has grave defects, even if theoretically one would think it the optimum solution to urban problems. There are separate blocks of problems which really operate at cross purposes. Many people are worried about the environmental crisis, which they cannot solve because of the enclave system in the United States. The enclave system, in turn developed as a response to what people thought of as a more important crisis — the order and authority crisis, in its prior garb, and the race and class crisis. But the cures, like the causes of the mismatch, will tend to be political, social, and economic, and not engineering or technical problems and solutions. The engineering problems and the engineering skills — including legal skills — are merely tools. The design of a beautiful or optimal urban legal system is no more a solution to urban crisis than the optimal engineering design for a highway or the optimal garbage system is; implementation is all. Hence, and this is my second point, the urban problem is not really a problem of urban structure. Structure is only a symptom. Rational solutions to urban problems are impossible not because of the

irrational structure of metropolitan areas, but because of what has *made* the structures irrational — people's fears and worries about some of the side effects of urbanization, and the resulting enclave mentality. The solutions, too, will have to be political solutions. If air pollution requires metro-wide handling, it must get it; but the problem will have to be disengaged from the undifferentiated mass of urban problems and handled separately, with its own separate political and social agenda. One cannot, then, solve the problem of the city *in general* through the reformation of urban structure. That reform would not only be ineffective; it would also be impossible.

What role does the lawyer play in the urban process? Again, if I may again encroach upon a later part of the program, I would like to suggest that he become systemically more sensitive to the whole range of forces — political, social, economic and historical — which have gone to create the present system, and in which so many prejudices, values, and interests are clustered and imbedded. The lawyer in a policy position must deal with the problems of social change, not solely as problems of technique, of engineering; he must learn to see them as problems of the social network that makes up the city. We may find that "decentralization" is the best achievable solution to the police problem, and the worst solution to the garbage problem; or it may be the other way around. The solutions, in short, are both harder and easier than one thinks; because they are, preeminently, human problems — the relationship of the human animal to his fellow men and his environment. The lawyer who understands this simple fact will be, from society's standpoint at least, the better lawyer to cope with the multiplex dilemmas of the city.