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THE ROLE OF LAW IN SOCIAL CHANGE

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We find ourselves living in a period of social stress in which increasing demands for major reform have been made on our political institutions, especially as they affect the governance of our urban areas. It is against this background that I want to concentrate on the role of the law in social change, and especially on the role that courts can play in this effort. As lawyers, we are more comfortable in our traditional adversary role than in any other, and so we have looked in large measure to the courts as the appropriate forum in which to make our plea for social reconstruction. I will argue, however, that the role that courts can play in major social reform is limited, and that we should not expect too much from the judicial process. Effective judicial intervention in social controversy requires a consensus on the goals and objectives of social change, at a time in history when it is our failure as a society to agree on the goals and objectives of social change that is one of the principal causes of social unrest.

Social Order and the Legal System

My point of beginning is simply that the legal system as we know it was influenced by an earlier and very different concept of the social order than now prevails, and that judicial response to issues of social controversy reflects this less complex social system. Let me illustrate the point very briefly with the case of *Patton v. Westwood Country Club*,[1] a nuisance case which indicates the limitations of judicial intervention in the context of a simple dispute over land use.

Defendant in the *Westwood* case operated a golf club, and plaintiff was a homeowner who had a dwelling adjacent to one of the golf club's fairways. She sued in nuisance to enjoin the country club from operating its golf course in such a way that golf balls landed on her property. The court, after looking very carefully at the factual situation, and the problems and practices of golfers, decided that no enjoinable nuisance had in fact occurred. It was impressed by the fact that the club had, to a considerable extent, taken care of the stray ball problem by planting a line of trees to shield the plaintiff's house. Moreover, the court noted that the plaintiff had come to the nuisance. The golf course was there when she built her home, and so she could not now be heard to complain. The suit was dismissed.

The *Westwood* case illustrates very nicely some points I would like to make about the social order and how it has come to be reflected in our legal institutions. Some of these observations have been made before, but they are

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[1] 18 Ohio App. 2d 137, 247 N.E.2d 761 (1969).

worth repeating. The point to stress is that the law until recently dealt with very small institutions and very small aggregates of economic power, at least when it considered controversies over the management of urban resources. Westwood Country Club may control 100 acres of golfing on the fringes of Cleveland, but the Westwood Country Club is not a very large economic aggregate. On the other hand, the public housing authority of the City of New York is a very large aggregate of economic, social, and political power. Until recently, until 1937 in the case of public housing, we did not have in the United States the legal basis for the accumulation of potentially large aggregates of power in the public sphere.

As a result, the legal controversies which arose in the conduct of these small power aggregates were concentrated at the scale of the individual, or at best, clusters of individuals or small groups. The plaintiff in the *Westwood* case was a single homeowner, and the case is typical of the conventional land use controversy which arose out of simple two-party relationships, and which concentrated on the narrowly-defined interests around which these relationships revolved. In this kind of case, the attention of the court was focused on conflict resolution on a very small scale. The purpose of the *Westwood* litigation, after all, was to see if the court ought to do something about golf balls that went out of bounds on one of the defendant's fairways. Within so limited a context, the legal system could not deal with the larger distributive problems which such a case might raise, as distinguished from the narrower allocative problems which the court considered in the context of a nuisance lawsuit. That is, the court in the *Westwood* case could not decide (a) whether the country club was in the wrong place, or (b) that its membership was too restricted, or (c) that it ought to be larger, or (d) that not enough of the right people were playing golf, or (e) that residences in the Cleveland area ought to be located in different places in relation to social and recreational facilities.

It was difficult for a judicial system attuned to conflict resolution on a small scale to deal with these larger distributive questions. Providing opportunities for golf may not be one of the burning social issues of our day, and the distribution of recreational facilities not all that important to achieving social equality. But in other areas of social conflict the narrow focus of judicial attention to the immediate dispute has meant neglect of the disadvantaged in our society. They are the ones most likely to assert the need to deal with distributive issues, and they are most likely to be excluded from the confines of conventional litigation. We can trace some of the difficulty to the assumptions which underlie the decision in the *Westwood* case, which illustrates the tendency of the law to structure claims and interests in the use of urban resources in a property framework. This approach would disenfranchise those who, economically, had no property interest to assert. Urban renewal is a case in point. It was for this reason that families who had been renting slum dwellings on a monthly basis, and who were displaced from urban renewal projects, were found initially to have no property interest which the court could seize as the basis for giving them their day in court.

The law also tended to ignore interdependent relationships. Probably this attitude arose from the fact that claims were not only presented by individual litigants, but were considered under the assumption that society was characterized by independencies and not interdependencies in its social and economic relations. Nuisance law was an exception, and though the *Westwood* case is a modern example of the use of nuisance doctrine to deal with interdependencies in land use, we should observe that even in this context the court moved to deal with these problems in a very limited frame of reference. Nevertheless, as a rule the problem of interdependent relationships on the large scale was ignored.

I think it essential in looking at problems arising in an urban context to face the dependency question directly, and to agree, if possible, on how we want to characterize for purposes of legal inquiry the fundamental nature of social relationships in an urban setting. Economists worry about these problems. They worry about whether or not society is characterized as a general rule by independent or interdependent relationships, and much of economic inquiry proceeds on the premise that it is the interdependencies in the social and economic order that are dominant. As lawyers, we need to decide whether the economists are right, and whether our own emphasis on the independent quality of individual action is misplaced.

Allocative and Distributive Roles in Legal Reform

If we look at what passes for legal reform from the perspective we have been taking, we can see that when the courts have intervened they have not concentrated on the interdependent problems of distribution to which we have referred. Instead, the courts have been asked to look at allocative issues, and the thrust of legal reform has been to demand a larger voice in the existing system for those who have been excluded from its benefits. In other words, legal reform has worked from the older model of the legal order. Efforts at change have been in the direction of reforming that model to get it to work better within the assumptions and limitations it accepted, by giving greater power to those who did not have the leverage to gain entry to enforce their demands.

My response to this kind of reforming effort is cautionary. I have come to feel that the expenditure of legal energy in this direction, while essential, will in the long run have a limiting effect on what we accomplish. Let me say immediately that I am not suggesting that giving power to the weak in our legal system is not an essential component of any effort at social change. I do not consider this activity unessential, but in the long run I feel that it may not achieve all that we expect in the solution of more fundamental social issues.

Let me go back to my earlier observation about the role of property and the property interest in the settlement of controversies related to wealth distribution. Urban renewal remains a classic example, because it is a prime case of an extremely complex distributional system which has visited substantial harm on those who are caught in its legal processes and who have

a minimum of legal protection. In short, in plain English, a lot of people get hurt in urban renewal. Very often they are racial and economic minorities who are displaced from their homes in urban renewal project areas and who are forced to move elsewhere.

Quite early in the history of urban renewal, disadvantaged groups who were displaced from their homes brought lawsuits challenging the right of the renewal agency to eject them in the face of inadequate replacement housing. The question was whether they had enough leverage on the legal system to demand their day in court, and initially the response was unfavorable, partly for reasons we have already indicated. Litigants in these cases were asserting interests outside the narrower kinds of controversies which urban renewal had produced, such as lawsuits between the renewal agency and a protesting landowner alleging a lack of public purpose. However, displaced litigants who were not property owners had no property interest to protect which the law had so far been willing to recognize, and so courts asked to fashion remedial decrees to protect their rights found themselves without the necessary leverage to take charge.

In recent years, the current of judicial decisions has tended to run the other way, and in the United States at least the courts are beginning to give litigants displaced by urban renewal their day in court. In doing so, the courts have given recognition to the interests these litigants represent, even though they are not founded on the protection of property. These judicial developments in urban renewal illustrate the modern thrust of judicial intervention in the name of reform. It must accept the allocation of benefit and burden which the urban renewal system commands. The only difference is that previously excluded groups have now been given their day in court to challenge the fairness and the sufficiency with which these allocations are made.

To some extent, these developments are a modern echo of what happened in the law of labor relations at the time of the American New Deal. At that time, the labour union, like the urban renewal displacee, had an uncertain legal standing. The extent to which collective bargaining was judicially protected was very much in doubt, if it was protected at all. A lot of thought was given to going beyond the minimum requirements of a Fair Labor Standards Act, and to changing the distributional rules under which wealth is shared. This response was rejected, as you may remember, and a decision was made to enact a statute at the national level which would give bargaining power to an institution which so far had not possessed it — the labour union. The hope was that by giving the labour union the legal standing to speak for group interests which so far had been unrepresented, its share of production would be increased through bilateral bargaining. But the corporate and industrial structure was left untouched.

Reforms which affect controversies in the urban sphere are moving in the same direction. Courts are giving legal standing to disadvantaged groups so that they may assert their claims to fairer treatment in urban programs which are now managed by very large rather than small aggregates of economic power, just as the disorganized worker in the early years of this century faced

large aggregates of private economic power with which he had to deal. But the case of the workingman was simpler. It was one thing to give legal standing to labour unions in the hope that they would force an increase in labor's economic share. It is quite another to give voice to newly-recognized groups in an area such as urban policy-making, in which our goals are not only uncertain but in many cases conflicting. Under extreme conditions of goal uncertainty, recognizing new claimants in the allocative process introduces new protagonists with new values which that process has so far chosen not to accept. They are not content with changing the basis of allocation alone, for the effect of their intervention is to make demands on the rules of distribution which courts, at least, find difficult to handle.

Race, Renewal and Reform

We can get an insight into some of these difficulties by returning to our urban renewal relocation problem, and by investigating the judicial decisions which have given a hearing to those who have been uprooted and forced to move in the urban renewal process. One of the more famous of these cases is *Norwalk CORE v. Norwalk Redevelopment Agency*,[2] decided by a United States Federal Court of Appeal. Let us first note that the *Norwalk* case, like most of the other recent cases on this issue, was brought by minority groups who alleged discrimination in relocation in an urban renewal project in Norwalk, Connecticut. It is no accident that courts have seized hold of the renewal process in the name of racial discrimination. It is the protection the constitution gives minority groups which opens an avenue for judicial entry, and which avoids the more difficult problems presented by an attack on the renewal program through the property interest approach.

Unfortunately, while it is the racial side of the case which triggers the court's intervention, it is just in this area of concern that public policy is not only unformulated but unsure. We can see these difficulties if we inspect more closely the factual basis of the *Norwalk* lawsuit. The facts were many-sided, but what strikes us in a careful reading of the opinion is a reference two or three times to the fact that Negroes had been forced to leave Norwalk because of the activities and operations of the Norwalk urban renewal authority. The court appeared to view the fact that Negroes had to leave Norwalk as a bad thing and not as a good thing.

Let us look at this conclusion for a moment. We now have some recent evidence from the United States Bureau of the Census on the character and extent of Negro migration to cities. This evidence suggests that Negro migration to cities is slowing down. It also suggests that Negroes are more urbanized as a group than whites, that they have been in cities longer, and that they have been moving up in the urban place hierarchy from smaller cities to larger cities. If we assume that the opportunities to achieve a better standard of living are greater in larger cities than they are in smaller towns, and some of our colleagues in economics have told us so, then

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[2] 395 F.2d 920 (2nd cir. 1968).

this upward urban movement of Negroes is not entirely a bad thing. The fact is that Norwalk, Connecticut, is not a big city, and so I raise this question: If economic improvement is the value we are trying to maximize, then the fact that Negroes left Norwalk may very well have been good and not bad. I say "may" because I am not sure; I don't know. All I am saying is that if we agree that the urban system is complex, interdependent, and interconnected, then a complex set of interrelated policies and values is implicated in any decision that touches on the racial fairness with which any one program is conducted.

Let us look at this problem from a slightly different perspective. Up until recently, as we have said, the courts had closed most if not all avenues of judicial redress to those groups who were disadvantaged by the operation of many of our urban programs. Whatever redress was available had to come from those agencies, usually federal or local, which were charged with program administration. Unfortunately, at least on the racial issue, redress was not forthcoming from the political and administrative side.

It is certainly no secret that the racial impact of many of our federally supported urban programs was simply compromised at the federal level because of the crosscurrents of opinion on racial problems in the United States, and because these programs were not adopted with the racial problem primarily in mind. Public housing, to return to this example, was initiated in order to improve housing opportunities for those who could not compete in the housing market. It was not adopted as a program primarily aimed at Negroes, and for years the federal public housing agency adopted a position on integration in public housing projects which many saw as an improper compromise on the racial question. The same point can be made about urban renewal, which was adopted (in spite of polemic to the contrary) as a legal method to expedite the land assembly process in large cities for purposes of slum clearance, redevelopment, and the improvement of the urban tax base. For years it was true that most of those who were displaced by renewal were Negroes because Negroes are poorer than whites and are to be found in greater numbers in slum areas. I am willing to accept for the moment that most urban renewal agencies did not consciously adopt a policy of Negro clearance for the sake of Negro clearance alone.

But even if they did it was clear for a long time that Congress was not willing to legislate against this practice, and that the federal urban renewal agency was equally unresponsive. Nor should we have expected a federal agency representing large city interests concerned with economic revival to take a forthright stand on race. With the normal avenues of political redress closed, disadvantaged groups turned next to the courts for help, and as the courts have intervened in these disputes they have become politicized. That is, they have intervened to decide those questions of policy and priority which the political agencies were willing to leave alone.

True, the purpose of judicial intervention in a case like *Norwalk* is to impose on local agencies the obligation to be racially neutral, if not racially compensatory, in the administration of their programs. But the point is that the courts cannot become implicated in the racial issue without opening up

for examination the entire question of urban policies and priorities, for none of these problems can be approached in isolation. In the *Norwalk* case, the court became aware at one point that solving the problems of Negroes displaced by urban renewal in that city might require an order mandating the city to construct more public housing. Understandably, the court held back from so drastic a step.

This discussion of racial problems simply illustrates our concern with the contribution that can be made by judicial intervention, for the fact is that whenever we make a decision about program impact on the Negro community we say something about the character of the program itself. Unfortunately, since we do not know as a society what values we are trying to maximize in our urban programs we sometimes move in conflicting directions at the same time. For example, a federal district court in Chicago ordered the Chicago public housing authority to build scattered public housing projects in very small concentrations, in order to advance the objective of racial integration.[3] A few years earlier, a comprehensive plan adopted for that same city had called for tripling the production of public housing units in Chicago over the next 15 years, in order to meet low income housing needs.[4] My point is that the output of public housing cannot be increased by that magnitude without using wholesale construction methods, including no doubt the building of large projects on large tracts, an approach foreclosed by the court decree in the public housing segregation case. It may be, if concentration of the public housing supply has negative effects on racial integration of the projects, that we can only achieve racial integration by sacrificing the public housing contribution to low income housing.

Values and Variables in Urban Policy-Making

We can acquire a better understanding of the limitations on judicial consideration of these larger policy issues by turning to the analysis of expertise in decision-making which is contained in Professor Alan Altshuler's book on *The City Planning Process*.[5] Altshuler is concerned with how expertise is defined, and he concentrates on the city planner and related urban professionals. He notes that these professionals gain credibility by claiming a competence to make judgments on issues that are defined by a limited number of variables. Professionals are very careful in selecting the variables which limit their expertise, and the most successful tend to limit narrowly the variables over which they claim a concern. He gives as an example the highway engineer, who confines himself to decisions limited to optimizing traffic flows. Altshuler then suggests that the selection of the variables which are considered critical to judgment carries with it the selection of the values we are trying to implement. For example, it can be argued that public housing planners made important and critical value judgments when

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[3] *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

[4] Chicago Department of Development and Planning, The Comprehensive Plan of Chicago 77 (1966).

[5] A. A. Altshuler, *The City Planning Process* c. 6 (1965).

they decided (at one time) to build massive, high-rise projects in order to minimize cost and maximize the housing contribution. By not considering the racial impact of their policies they ignored the racial variable and, as a result, fostered racial segregation in the projects they built.

Altshuler points out that law contemplates a decision-making process which does not claim legitimacy through selection of a limited number of variables, and so is carried out under conditions in which goals are highly uncertain. The legal process avoids the problems of goal selection by slipping around them, claiming its credibility on the basis of collective rational decision-making through the process of incremental change. I would argue that whenever the American judiciary refuses substantive intervention in urban controversies we have a classic example of judicial avoidance of the tough questions that require value judgments. But courts may not shrink from a decision forced by racial inequities, even though that decision may carry value-laden judgments with it. The trouble is that introducing the racial variable simply introduces additional values for consideration, in the absence of guiding criteria to work out the conflicts that occur once the basis for decision has been broadened. I think we would all agree that the forum to work out these conflicts in values as they do occur is political, and that the judicial process is ill-suited to the task of political compromise. It is in the absence of political attention to these value conflicts that the courts have been enlisted by litigants who demand a hearing.

There is another deficiency in the use of the judicial process in conflict resolution, and it is here that we see more clearly the limitations of a judicially reformist role which seeks merely to introduce new claimants into the allocation system. The problem is that it is very difficult for the judicial process, on its own, to fashion new remedies for the redress of claims that do not get full consideration in the legal system as it now exists. To return to our relocation problem, probably the best that the judicial process can do, unaided, is to require fairness in the administration of the relocation effort, assuming that the court chooses not to stop the renewal program altogether. It is clear that a court, on its own, can do nothing about money flows, interest rates, and subsidy levels, all of which directly affect the production and distribution of housing in our economy and mean more to the success of a relocation effort than any relief a court might provide.

What role should the lawyer and the law then play in this process of reform which appears so necessary as the legal structure adapts to changes in the social order? I think the law has a role to play, and I think that it comprehends more than the representation of new claimants who make new demands on the existing system. Through the agency of the lawyer, the law can make a significant contribution by assisting the political decision-maker in drawing those linkages between values and variables which must be understood before the distributive choices inherent in the legal system can be redefined. For example, we might look at Negro migration patterns in the context of urban renewal policies, isolate a series of variables which we may want to maximize in this area, and then describe a series of legal options which can best implement those policies which are chosen. For example, if we

decide that Negro dispersion is the important problem in urban renewal, and if we decide that we want to maximize that dispersion, then we might adopt a series of policies on relocation assistance, housing subsidies, and housing location which will encourage that dispersion to take place. And we will have to argue to a court of law that dispersion under these conditions is not an unconstitutional discrimination. Here, I believe, is where we, as lawyers, must learn to function. We must try to understand the values which our public programs make operational. We must then make explicit the linkages between the value judgments which the political process chooses to adopt, and the variables on which we choose to act. Only then may the legal system move beyond its allocative role, to make the distributional choices that are necessary to any program of social reform.