

# Total Law, Total History

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ONCE UPON A TIME, many historiographical generations ago, historians aspired to write grand sweeping works, interpretations that encompassed eras and that defined the meaning of a nation. With rare exceptions, such works have given way to studies which are more pointillist in nature, which seek to exhaust more limited questions, periods of time, and geography. The grand works of yesteryear were, it must however be said, actually quite limited in their own ways. They read the past as the evolution of politics, government, and whole peoples, played out in conflicts, diplomacy, and movements. Moreover they were usually, and usually consciously, didactic. Those histories ignored the stuff of life which concerns most academic historians today, family life, ethnicity and race, gender, expressions of popular culture, and the like. Of course, this description is itself more than a

little sweeping, but it suggests a deeper problem for those who, in the latter part of a career, with years of accumulated learning, might today aspire to try to put it all together in the manner of the grand interpretations of the past. For one thing, to be taken at all seriously, such an attempt would have to cover, and attempt to integrate, not just the hoary materials of politics and government – the grand stage – but also the stories of the evolution of everyday life as experienced by a variegated people. No wonder few make the attempt.

Few try because few are capable. Among those few, even fewer are not intimidated, or simply exhausted, by contemplating the attempt. All the more remarkable then that Lawrence Friedman, one of the most distinguished legal historians practicing the craft, has made the attempt to link American law and society not once, but twice. His first go

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'round, the mistitled *A History of American Law* (1973),<sup>1</sup> is a grand work, the leading one to introduce anyone interested in the history of American law to its components through the beginning of the twentieth century. No other single volume is its peer and we must await the publication of *The Cambridge History of Law in America*, due out in 2005, before we have a more comprehensive introduction set out in one place. His approach in 1973, and even more so in 2002, drives home his thesis that law is molded from society's demands and pressures, that it is a tool of forces within society. He has little sympathy and even less patience for arguments that law is an autonomous force, somehow responding to its own commands, especially over the long run. Moreover, the long run can be very short in American life. Does his *American Law in the 20th Century* equal his earlier opus? In many ways it does. Writing about the history of law in the twentieth century at the close of the century is, however, a trickier business than writing about the nineteenth century at two or three or more generations' remove.

Friedman must have sensed that this would be a more difficult work to execute, for he is at pains in the first few pages (and more extensively in the last few portions of the book) to remind readers of the "themes" developed throughout. Without exhausting the list, they include the motive forces of technology, especially transportation and communication; the drive towards political and cultural heterogeneity exemplified in the rise of "plural equality;" and the consonant decline in the legitimacy, hence the effectiveness, of structures of authority less naked than law. These are not themes

easily developed, even in slightly over six-hundred pages of text.

Consider the difficulties. First, he must confront the foundational question of definition – what is law? Before the turn of the twentieth century that could be answered with some, albeit deceptive, ease. Law was what courts and lawyers, and, though often overlooked, legislative bodies, did. Other structures of authority coerced individuals, they influenced the conduct of institutions, and they purported to define society's mores, but they did not do law. Those structures were religious, familial, economic, and communitarian, among other things, but they were not, for definitional purposes, legal.<sup>2</sup> While Friedman knows that some people, and certainly many scholars in other disciplines, believe that any body that makes rules, no matter how informal, may be considered a law-maker, he takes a more "conventional" and "formal" view (x). For Friedman law is what contemporaries understand to be law. That is, of course, a porous and plastic understanding, but probably the only one that can actually do justice to the manifold ways in which the formal expression of authority expanded in the twentieth century.

And expand it did. Thus, the second difficulty. From a large, but still cognizable, set of sources – cases, statutes, constitutions, treaties and treatises – in the nineteenth century, American law has grown, some might say metastasized, into an unknowable collection of cases (the average case itself also growing in length), statutes (ditto, consider the cliché of the I.R.C.), constitutions (ditto, consider another cliché, the constitution of Louisiana), treaties (ditto ...), treatises (is an example even

1 The work is mistitled because the twentieth century is treated in an Epilogue, despite being first published in 1973 with nearly three-quarters of the century passed. Friedman is, to his credit, among the first to note that the title promises more than it delivers: "My own book ... despite its promising title, essentially peters out in 1900" (681).

2 Others agree with Friedman's method but deploy a somewhat different approach to categorizing, or at least to naming, the structures. See, for example, William E. Nelson, *The Legalist Reformation: Law Politics, And Ideology In New York, 1920-1980* (2001).

necessary?), executive orders, administrative rulings, opinion letters, and more. Moreover, the quasi-authoritative materials of law, the handbooks, the form books, the practitioner materials, and, of course, the law reviews, exist in quantities unknown before this past century. They not only have been meticulously organized, indexed, and catalogued because that is what the practice of law demands – such is our professional fetish – but also have become accessible to lawyers (and others) through the medium of the database in ways not simply unknown but unimaginable in earlier times. The historian is thus confronted with material that can only be sampled, not mastered.

Sampling of source material is one thing. Deciding what legal topics are worth covering is yet more complicated and controversial, for law, even the formal law, has become in his view “dominant, pervasive, [and] massive” (ix). Others have suggested, some quite recently, that the pervasiveness of the formal law in the United States is nothing new.<sup>3</sup> Nevertheless, the multiplicity of formal legal vehicles and the manner in which they have supplanted other structures of authority powerfully suggest that Friedman is correct when he argues that law reaches everywhere and does so ever more influentially. Finally, therefore, the third difficulty, choice. If law is everywhere, then its history threatens to become the history of everything, all the more so given both the simultaneous celebration and loathing of the Leviathan on the one hand and Friedman’s catholic intellectuality on the other.

Friedman must make choices and his choices are, of course, driven by what he believes to be important, both topically and methodologically (x-xi). His biography, at least his own intellectual biography, one might

suppose, could then threaten to become destiny. That truism of authorship is no problem when an author writes on the limited topics that define her specialty, but it threatens to undermine the basic project when the author wants to write a work of this breadth (and, in fact, titles it equally broadly). Thus, while it is true, for example, that he devotes somewhat more space to the evolution of the law of crime than to the law of business, to quarrel with that choice would be little more than a churlish quibble. This is a remarkably well-balanced book and, while specialists might well believe that he could have added some nuance in places (a critical temptation to which I will succumb), his treatments of various topics reflect wide reading and capacious understanding. With one exception.

Friedman writes about life and the law, political life, social life, economic life, cultural – at least popular – life, but little about intellectual life and the law. The influence, or at least correlation, of changes in patterns of thought and learning plays a scant role in his story. One, albeit vulgar, measure is his treatment of legal thinking by scholars and commentators. Indeed, the most vulgar index of his treatment is, literally, the index. No entries exist for “Jurisprudence,” “Philosophy,” or even “Legal philosophy.” To be sure, he mentions important movements in legal thought. Critical legal theory and critical race studies get a page, law and economics three, realism about half a dozen, and so on. This is not, however, the book one reads for an introduction to the history of thinking about law in America, even in its most traditional forms.<sup>4</sup> To his credit, however, Friedman makes explicit his judgment: “Philosophy of law was never a strong point among American jurists” (489), and he

3 Notably, for example, William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1998).

4 Readers who want such an introduction (reflecting, of course, a different set of views) might consult Neil Duxbury, *Patterns of American Jurisprudence* (1995), which is an exhaustive, if somewhat idiosyncratic, discussion of the evolution of American academic legal thought.

carries through on it.

Nonetheless, the life of the mind is part of life, indeed part of everyday life. Among other things, the twentieth century witnessed the new dominance of university-based law schools in legal education. A discussion, however brief, about the autonomy of legal education within the university, the influence (or lack of influence) of other faculties on the work of lawyers, would have added greatly to the tale of lawyer education in this past century. Moreover, even if it is true that ideas are not autonomous, surely they have influence through inspirations, aspirations, cautions, and syntheses, if nothing else.<sup>5</sup> Friedman himself acknowledges as much in at least a couple of places. For example, while he attributes the existence of feminist jurisprudence to a change in underlying material conditions, namely the fact that “women began to enter the profession in droves – as students, teachers, deans, lawyers, even judges” (496-97), feminism as an intellectual movement with political content did inspire, synthesize, and create counterthought and movement (542-43). If one can quarrel with what Friedman writes it is here, in this omission, or at least in the near-reduction of intellectual life to a behavioral response to social conditions. Surely explicit thought and action have a more symbiotic relationship.

In other respects, however, *American Law in the 20th Century* is a terrifically successful tapestry. Some of the themes of the book are simply superbly rendered accounts of developments that legal commentators in general and legal historians in particular have regularly noted. It will come as no surprise, for example, that the federal government’s role in society grew, especially given the political impulses of the New Deal, the exigencies of the Second World War, and the role America played in the world

thereafter. The rise of a national economy alone rendered some forms of national regulation a necessity. Nostalgia buffs and those who focus on the growth of the federal government alone, however, should be reminded, that the role of the states, including their legal role, has grown even as their proportion of power has diminished (e.g., 602). Similarly, the story of the Civil Rights movement, the growth of a rights consciousness, and the rise of the power of those previously marginalized because of race, gender, disability, or other reasons are not new stories. Friedman’s measured treatment of these historical developments is, however, enormously refreshing given the passions and resentments associated with those developments. Moreover, his synthesis, that these movements have given the country a new foundation in politics which he terms “plural equality,” while not novel, is academic history at its best. It is an explanation, a definition, and an engaging story. It links not just the obvious, the Civil Rights movement and the emerging voting power of racial and ethnic groups, but extends that story into groupings not exactly created by law, but in many ways defined by law, such as the disabled (325-26). He convincingly argues that not just individual rights but expressions of group identity, even when that identity is itself quite plastic, have influenced everything from the law governing housing (403-05) to jury selection (266). In this particular part of the story of twentieth century American law Friedman is at his best in demonstrating the interpenetration of social life and the law.

Elsewhere he is equally adept at explicating the interpenetration of law and everything else. In particular, and this should be an object lesson for all law professors, for many of whom the focus on the Supreme Court of the

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<sup>5</sup> Consider, for example, the ways in which Herbert Hovenkamp integrates economic theory, including the history of economic theory, into his own work. See Herbert Hovenkamp, *Enterprise and American Law 1836 – 1937* (1991).

United States takes on an obsessive quality, he gives us a very thoughtful contextual understanding of judicial power, even at its zenith. For example, after discussing Civil Rights in the inter-war period, including discussing the emergence of a (political) free speech doctrine, the political tensions that characterized the time, and the marquee cases such as the trial of Sacco and Vanzetti, he notes, "Civil liberties are not just theories; they are systems of behavior. What the Supreme Court decides may be important; and may have an impact on society at large. But more often the Court reflects and refracts; in any event, the Court is only a piece of the government, and the government is only a piece of society" (144). This message is one that should be repeated, not just to the academics who might count themselves his colleagues, but to those who look to the judiciary (or the government more generally) for salvation from every difficulty encountered, because government and the judiciary are not always receptive to such cries (e.g., 144). Their receptivity is itself a historically contingent phenomenon, dependent upon the nature of the judiciary, the mores of society, the welfare of the state, and the state of the economy, among other things.

Unsurprisingly, given his other work, Friedman is better able to demonstrate a wide range of those contingencies in some fields than others.<sup>6</sup> One can look long and hard, for example, to find a more nuanced number of brief set pieces on the history of crime and criminal procedure. His introduction to organized criminal behavior (245-46) is superb, discussing simultaneously ethnicity, federal power, politics, statutory change, and bureaucratic activity. If he is a little less rich in his description of the internationalization of crime (246), then most should defer to that

choice for he is in a better position to evaluate its significance than most others. Similarly, in contextualizing the rape shield statutes and the concept of "trying the victim" (248-49) he should not be misunderstood as approving of practices which degraded rape victims, but rather as explaining the changing legitimacy of such tactics by criminal defense lawyers.

In other fields, however, while the summary is fine, it lacks an equivalent richness. Take, for example, his discussion of the evolution of corporate law (50-54, 389-90). Among corporate law scholars the thesis of "bottom-racing" (51), is quite hotly contested and has a number of variations. Modern scholars of the law and economics movement see interstate competition for corporate charters as beneficial,<sup>7</sup> not harmful, by and large, or as a product of the mix of federalism and local politics, with mixed results. That kind of debate, elsewhere in evidence in the book, is less apparent in this section. And, while I am inclined to agree with Friedman's ultimate take on that matter, the evidence is far from clear. No work of this breadth, however, can manifest equal depth throughout its sub-topics nor should readers expect it, especially when an interested browser can scan the endnotes and find sources that will eventually lead her to the relevant literature. Those notes do contain references to leading works, important original materials, and often a smattering of more unusual references.

Gone, of course, are the days in which a legal historian could simply set out the evolution of a doctrine, discuss the baroque by-ways of its more exotic branches, and be done with the work.<sup>8</sup> Against such work Friedman's mentor, Willard Hurst, revolted, and Friedman follows that revolutionary path. Moreover, no one who can write a book with the title *Total Justice* (1985)

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6 For example, Lawrence Friedman, *Crime and Punishment in American History* (1993).

7 For example, Roberta Romano, *The Genius of American Corporate Law* (1993).

8 See William E. Nelson and John Phillip Reid, *The Literature of American Legal History* (1985).

would fail to understand that he must undertake not simply understanding law's evolution, but the histories that correlate with and affect that evolution. To put it mildly, that is no easy task. One could know almost no American history and come away from this book with a better than passing understanding of the nature of American government in the twentieth century; the sexual mores of the people; a sense of the people's religious, ethnic, and racial admixtures; the nature of aspects of the popular culture of the society, especially the changing nature of the media which deliver it, from books and newspapers, through radio, television and now the internet; the restlessness of the society, as demonstrated through the nature of its transportation system and its capacity to maintain a continent-wide nation; and many other aspects of the country's twentieth-century past. Oh, one would also understand something of the nature of the court systems, the topics of lawsuits, the creation of legislation, the changing nature of constitutionalism, the rise of the administrative state, and the legitimating of extraordinary executive power. This, then, is a work of great ambition, of grand sweep, focused on law, but necessarily really a history of America.

Topic by topic, whether in criminal law, corporate law, civil rights, or any other field, this volume develops the themes that hold it together to make a very simple point: in the face of competing understandings of what is "right,"<sup>9</sup> in the face of crumbling structures of authority, whether legitimately or illegitimately grounded, whether premised on race, gender, age, religion, culture, on any other traditional form of status, the law has relentlessly occupied ground previously held by more informal structures of authority. This has helped make law pervasive in American society, but it has helped even more to make it, as

Friedman puts it, dominant. He is, of course, far from the first person to have made this or similar arguments. He notes, and this is an exquisitely well-rendered insight, that in this country law can become a very brittle form of power, one which increasingly accommodates change through explicit amending rather than through supple and subtle adaptations. We have rules which are formal because we have undermined other structures of authority; we have rules which are detailed because we distrust even those who we have chosen to administer them. Nowhere has this become clearer than in the law of everyday life, in the activities of the administrative state: "The American tradition creates its own style of bureaucracy: a bureaucracy which is rule-bound and formal, because it is afraid of lawsuits, because it cannot expect or does not expect cooperation, deference, respect" (602-03).

That observation is not one we might usually expect a historian to make, at least not in a work of history, because it seems to be a judgment on contemporary society – it is, after all, even phrased in the present tense. Presentism and a desire to use the historian's pulpit to comment on modern affairs are the ever-present danger for historians who bring their work up to yesterday. Double that danger at least for historians who do not reside in departments of history, where professional mores frown on larding historical works with explicit judgments about the way things are turning out. Triple that danger for historians resident in law schools, where the bread and butter of the faculty is precisely such commentary. Some things, however, simply cannot be avoided. For example, while he is professionally very generous to some contemporaries, Judge Posner, for example (274), he is less generous to others, such as Justice Scalia (530). But, he is both professionally and personally aware of the

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<sup>9</sup> Here the intellectual context again suggests itself. See, for example, Morton J. Horowitz, *The Transformation of American Law 1870-1960* (1992).

temptation, which he almost simultaneously acknowledges and indulges (523). Such an occasional indulgence is of very little matter, however, as his judgments will either stand the test of time or they will not. Friedman generally does resist the temptation to speak *ex cathedra*, to speculate about the future on the basis of his understanding of American society and law.

Friedman is actually quite modest about what he accomplishes in this volume, especially considering the challenges. As I have suggested, one could learn a great deal about American history from these pages and the reading would be generally easy and pleasant. Furthermore, while this is probably not a book many would take to the beach for summer reading (though I confess that much of my second reading was done poolside as one of my children splashed around), it is easily accessible. He deploys a vocabulary that is rich without being pretentious. Technical terminology is at a minimum; what there is is almost (though not always) explained and defined; technical doctrines are clearly, often beautifully, explained. His explanation of *Swift* and *Erie*, the first embodying the doctrine which allowed federal courts to make federal common law rather than apply state law in cases where parties came from different states and the second the case which reversed that doctrine, is the best I have ever read. Every beginning student of civil procedure or federal courts, as well as lay readers who want to have a sampling of the technical work of law, would benefit from reading those pages (261-63). Furthermore, he has an excellent ear for an engagingly illustrative story, sometimes drawn from the facts of a case, sometimes not (e.g., 596-97).

Alas, the work is not, however, perfectly executed, though its flaws are few and usually trivial. The book could have profited from an editor more attentive to detail, both in fact and in text. Perhaps one of the usual whipping boys

of legal scholarship, the student law review editors (by the way, a sort of law-related group of which he is a member, *University of Chicago Law Review*, class of 1951), could have engaged in the “edit[ing] ... with a vengeance” he describes when discussing legal scholarship.<sup>10</sup> Such editing might have prevented some of the (admittedly minor) annoyances that crop up in the book. To pick a couple of obvious ones: what is a “tinny central government” (169) or a “white embargo” (176)? More subtly, however, does he really mean to refer to a female plaintiff in a gender discrimination action by her first name (308) when he refers to a race discrimination plaintiff a couple of pages later by his last name (310)? In an engagingly-written book, metaphor and simile are powerful tools, but they can be inapt or give sentences a dated feeling. While there is irony in discussing “immigrants ... who ... breed[] like rabbits” (96), or, for that matter, lawyers (457), it is at best a curious way to describe law schools (36). Sometimes, in fact, the literary devices are quite off-putting. When Ohio began executing criminals after a hiatus of many years, did it really “los[e] its virginity” (220)? For every sly reference to the contamination of “precious bodily fluids” (123), there are turns of phrase which add little, such as his use of the term “megabillions” to describe losses associated with the savings and loan scandals of the 1980s (224). Finally, I think the trans-Atlantic ocean liners were already moribund by the time the 747 made its commercial debut in 1970, killed not by the jumbo jet but by its predecessor, the 707 and its competitors (556). These are, however, just annoyances, easily corrected, that should not be allowed to distract from a marvelous achievement.

In the end, whether Friedman gives us an unusually rich portrait of change for any particular legal topic, or one that is simply sufficient and well-wrought, is less important

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10 I suppose full disclosure is in order – some 37 years later I held a position on that review.

than the message the work as a whole conveys. Implicit throughout and explicit at the end is an understanding of change, the stuff of historians' work. That understanding of change has little room for a legal system that resists forces of change. The legal system does not resist, it is a tool deployed by resisters: "Whenever the law is accused of inertia, it is not some abstraction called 'the law' which holds back progress: real forces, real interest groups, real passions oppose change for concrete reasons. When people say some

law or aspect of law is 'archaic,' they mean they disapprove of it (perhaps correctly); but archaic laws do not survive unless some living, nonarchaic people insist on keeping those arrangements alive" (588). If there is a lesson here, it is to look beyond the legal abstractions to the legal actors and ask what it is they want, aside from immediate victory, what they represent, aside from the positions articulated in their briefs and testimony. Those are questions for both historians and lawyers. *GB*