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Meaning and Development Behind American Law: Law in America: A Short History

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BOOK REVIEW

MEANING AND DEVELOPMENT BEHIND AMERICAN LAW

LAW IN AMERICA: A SHORT HISTORY. By Lawrence M. Friedman. New York: Modern Library, A Division of Random House, Inc. 2002. Pp. 207. $19.95 (hardback).

Reviewed by Britney Beall-Eder[*]

INTRODUCTION

As American law develops over time, the meaning and implications of our cultural norms mirror society's chosen rules. At times, American law can produce unjust results.[1] However, just, in addition to unjust, results develop historically based on the values and customs of the times.[2] The development of American law has been a rich and diverse process, creating a complex legal system based on customs, values, and interpretations of the Constitution, sometimes static and other times changing with society.[3] Understanding the law's developmental process explains the law's current role in everyday American life in the new millennium. Lawrence M. Friedman's *Law in America: A Short History* explains the role of law in American society from the colonial period to the present to illustrate his theory that "American law is a reflection of what goes on in American society in general."[4]

Friedman's chronological account of American history correlates the law to the values, enforcement mechanisms, and societal norms of different historical periods. Although the legal historian may need to look elsewhere and delve deeper to understand legal history, this book gives a short, illustrative account of the role of American law in history for the layperson.

Structurally, Friedman divides the book into four parts reflecting on four different eras: the colonial period, the nineteenth century, the twentieth century, and the beginning of the twenty-first century. Within each time period, Friedman evaluates major themes and developments in the law pertaining to that era. Friedman's use of temporal categorization

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1. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (establishing the "separate but equal" doctrine, which validated segregation, and holding that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. *See* LAWRENCE M. FRIEDMAN, LAW IN AMERICA: A SHORT HISTORY 6-7 (2002).

3. *See* FRIEDMAN, *supra* note 2, at 12-13.

4. *Id.* at 37.

creates a historical narrative of the past for the reader, but gives substantially less attention than others.[5]

In this review, Part I explores the law in colonial times, specifically evaluating the influence of English law upon colonial ideology. In addition, Part I looks at Friedman's account of colonial slavery and the progression towards independence from England. Part II examines the law's development during the nineteenth century and the changes that Friedman contends resulted from the development of American law beyond the borrowed common law from England. Part III summarizes the dramatic increase in legislation in the twentieth century. It also explores Friedman's view of the changing role of law enforcement, tort and contract law, and the impact of the civil rights movement. Finally, Part IV explores the beginning of the twenty-first century through Friedman's eyes and the impact of past generations of the law on contemporary society.

I. COLONIAL AMERICA AND THE LAW

In *Law in America: A Short History*, Lawrence M. Friedman devotes little space to colonial law, briefly describing the role of American law in the colonial period. Friedman focuses on three underlying themes: the relationship between law and religious values; colonial slavery; and the progression towards independence from England. The extremely limited scope of Friedman's discussion of colonial America tends to devalue the impact of early American law, thus presenting a less-than-accurate picture of the era.

A. Law to Achieve Religious Morality

Friedman begins by discussing the emergence of colonial law. "In essence, [the colonial legal system] was English law—at least in the sense that this was the only system the colonists knew anything about."[6] However, in addition to following the English law, Friedman contends the colonists also incorporated their own values and needs into American law.[7] Friedman asserts, in effect, that this integration contradicted the ideologies of traditional English men and women.[8] For example, the Puritans developed law to achieve what they perceived was a more holy society.[9] Friedman argues that the Puritans implemented procedures in

5. *See* Carl A. Pierce, *The Law in America*, 42 TENN. L. REV. 615, 619 (1975) (reviewing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973)). In reviewing Friedman's earlier book, Pierce asserts that Friedman fails to give adequate attention to certain time periods. *Id.* Here, the colonial period is given substantially less attention in the book than the Nineteenth and Twentieth Centuries. Thus, although being criticized for the flaw in analysis twenty-seven years earlier, Friedman still fails to give adequate attention to certain time periods, most particularly the colonial era.

6. FRIEDMAN, *supra* note 2, at 24.

7. *See id.*

8. *See id.*

9. *See id.*

their daily lives that they believed would help to achieve a godly society.[10] The Puritans, therefore, designed and orchestrated a legal system that would achieve results they desired.[11]

Friedman makes an interesting point in asserting that the Puritans shaped the law to fit the religious morals they strove to achieve. He fails, however, to adequately connect colonial law and the reasons underlying the Puritans need for intertwining religion with law. Why did the Puritans need religion in order to form a moral society? To that effect, why did they need law when they had religion? And more importantly, how did they make the conversion from technical English law to a hodgepodge set of rules defined by religious values and morals of the time? Friedman, therefore, proposes a viable thesis, but fails to adequately explain himself.

B. Colonial Slavery

Friedman also discusses slavery during the colonial era. He asserts that one of the mirrors shining back at the colonists was, unfortunately, the law of slavery.[12] Although "slavery was unknown to England, and English law," by 1640, "legal" slavery appeared in Virginia's history.[13] Friedman posits that "a strong consciousness of *race*" was a key aspect in the development of the slave custom and laws, as it certainly did not fit in with the godly society of many colonial communities.[14] Although slavery was an immoral practice of the colonists, Friedman explains that the slaves served an important role in supporting the colonial economy.[15] Specifically, labor shortages on the sugar plantations drove the demand for slaves.[16] The Africans transported to the colonies were "culturally and racially" different from the colonists.[17] Friedman posits that "[t]he deep consciousness of race—America's original sin—helped to bind these foreign servants to a status that degraded and exploited them."[18] Friedman, however, fails to explain the source of race consciousness. Why did white colonists perceive African slaves differently from, for example, white indentured servants? Was race consciousness the cause of the African slave trade or was race consciousness its result?

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10. *See id.* at 24-25.

11. *See id.* at 25 (explaining that the Puritans lived in "small, tight-knit, hierarchical" communities where the leading voices in the community were the clergy and the male heads of the household). The Puritans believed that their ideologies and societal values were best represented by male clergy and, thus, reprimanded those in their community who did not conform to their values by punishing church truancy, blasphemy, and morally reprehensible behavior. *Id.* at 24-25.

12. *See id.* at 25-26.

13. *Id.* at 26-27.

14. *Id.* at 27.

15. *See id.* at 28.

16. *See id.* ("Blacks were imported from Africa to do the hard work in the fields. Slavery was well known in Africa, and the slave trade depended on African help in enslaving other Africans.").

17. *Id.*

18. *Id.*

As slavery became more rooted in colonial life, so too did the growing "body of slave *law*."[19] Slave law gave slavery the stamp of approval, thus further instilling racism into colonial America.[20] Friedman argues that "the law codified custom and crystallized it; it put its enforcement power behind the 'peculiar institution.'"[21] In subsequent chapters, Friedman describes slavery's unfortunate and lasting effects. In contending that there remains no equivalent to the damaging effects of American slave law,[22] Friedman distinguishes his approach to the colonial era from that of most historians, who place the greatest emphasis in the colonial times on the progression towards independence from England.[23]

C. Progression Towards Independence from England and the Emergence of Early American Law

By the time of King George III's reign, colonial America had grown quite different from old England.[24] Friedman explains that, except for slavery, colonial America was much more egalitarian than England due to the differing conditions in the colonies.[25] In colonial America, land was more abundant and society was less organized.[26] People born in the colonies had no incentive to remain loyal to the mother country.[27] Although Friedman effectively explains the significance of the physical separation and the geographic differences between England and the colonies, he still undervalues religion as an impetus for the colonists' move for independence, which culminated in the Revolutionary War.

After the war, the colonies set out to form an independent republic.[28] "It was to be a 'government of laws and not of men.'"[29] The colonists' decision to pledge their allegiance, not to a king, but to the law, was "the basis for the experiment in democracy—or at least in democracy as defined by the leading men of the time."[30] This "American experiment," Friedman explains, was a society based on "laws, rules[, and] general principles," rather than the divine rights of royalty.[31]

The first attempt at creating colonial American law resulted in the Articles of Confederation.[32] Friedman posits that, because the Articles of

19. *Id.* at 29.
20. *See id.*
21. *Id.* Specifically, Friedman divides slave law into three categories in the colonial period: rules pertaining to the status of black slaves, rules pertaining to controlling and punishing slaves, and technical law dealing with their rights to property, water, etc. *Id.* at 29-30.
22. *See id.* at 30.
23. *Id.* at 31.
24. *See id.*
25. *See id.* at 31-32.
26. *See id.* at 32.
27. *See id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 33.
32. *See id.*

Confederation formed a weak central government, they proved unsuccessful at providing a legal framework capable of unifying the colonies.[33] As a result, a convention proposed and adopted a federal constitution.[34] The Constitution, Friedman argues, "has lasted so long, and served the country so well, because it is brief and general—helped by the fact that it acquired, very soon, a kind of aura of the sacred."[35] In effect, the Constitution was the voice of the people; it established fundamental principles and rules that apply across time.[36]

Although the reader is left trying to connect early colonial religious values to the constitutional framework that ultimately emerged, Friedman does an artful job of explaining the progression towards freedom in colonial America. Friedman's past writings on the topic have been criticized for not evaluating the relationship between law and morals in the colonial period.[37] Here, Friedman adequately makes this connection. However, more space could be devoted to other important building blocks of the era, such as "the politicization of legal issues,"[38] "economic instrumentalism,"[39] and other legal institutions that had an impact on the future of American law.[40]

Although Friedman acknowledges that traditional English law was the only law with which the colonists were familiar,[41] ultimately, he underestimates colonial law's impact upon American legal history. In a review of another Friedman book on American legal history, Carl A. Pierce makes a similar criticism.[42] In the earlier book, Friedman suggests that "only collectors and historians care about Massachusetts' laws of 1630,"[43] which may explain why Friedman's account of the colonial period is so brief in comparison to other periods. However, understanding why the colonists deviated from the common law when developing their own American law could explain the gradual move of the law toward a democratic nation.

In addition, Friedman underestimates the value of colonial history. Colonial law can be seen as much more than a reflection of the colonial life; it also can be viewed as reflecting the old common law of England,

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33. *See id.*

34. *See id.* (stating that the Constitution drafted by the founding forefathers "was the first and only Constitution of the United States" and is the "oldest living constitution" in the world).

35. *Id.*

36. *See id.*

37. *See* Pierce, *supra* note 5, at 620 (criticizing Friedman's earlier work for failing to connect colonial law with the relevant moral values of the time).

38. *See* Stanley N. Katz, *The Politics of Law in Colonial America*, *in* LAW IN AMERICAN HISTORY 257 (Donald Fleming & Bernard Bailyn eds., 1971).

39. Pierce, *supra* note 5, at 620.

40. *Id.* at 620-21.

41. *See* FRIEDMAN, *supra* note 2, at 24.

42. Pierce, *supra* note 5, at 619.

43. *Id.* (quoting FRIEDMAN, *supra* note 5, at 29).

which became a building block of a new American law.[44] For example, a "colonial legal historian might emphasize the continuity of both public and private law from the eighteenth to the nineteenth centuries and argue persuasively that the nineteenth century cannot be comprehended absent a knowledge of its colonial antecedents."[45]

Friedman's overview of colonial America leaves larger gaps in the law's development than sections describing other eras. Friedman seems to follow consumer demand in this book by devoting relatively more attention to post-colonial times.[46] However, his choice to downplay the colonial era may be justified in that Friedman's expertise lies in post-colonial American law and economics.[47] In this regard, Friedman's explanation of the history of slavery and general overview of early colonial times only skims the surface. Although the book is just a "short history," greater depth of treatment of the colonial period would give the reader a stronger historical base upon which to build in understanding subsequent eras.

II. PROGRESSION OF LAW IN THE NINETEENTH CENTURY

Friedman's account of the nineteenth century is more comprehensive than that of other temporal eras in the book. The nineteenth century produced a huge body of law relating to the economy.[48] Friedman primarily looks at the relationships among the economy, the law, and society. However, in the nineteenth century, he also shows how social aspects of society can move the law to achieve society's desired results.[49] This review evaluates just a few of Friedman's central themes for this era: the myth of a laissez-faire economy; the dramatic change in tort law; the rise of the contracts clause; slavery; and crime and punishment.

A. Laissez-faire: Myth or Reality?

Friedman contends that the notion that the nineteenth century was the era of laissez-faire economics is not entirely true because the government's influence on the economy was significant.[50] Friedman initially contends that, during this period, the government gave people rights "so basic that people tended to take them for granted."[51] Many people took

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44. *See id.* at 621.
45. *Id.*
46. *See id.* at 619-20; *see also supra* notes 5, 37-45 and accompanying text.
47. *See* Pierce, *supra* note 5, at 623.
48. *See* FRIEDMAN, *supra* note 2, at 37.
49. *Id.*
50. *Id.* ("[People] took for granted, for example, the idea of private property—in land, in commodities of all sorts.").
51. *Id. But see* Richard A. Epstein, *Legal History: The Assault That Failed: The Progressive Critique of Laissez Faire*, 97 MICH. L. REV. 1697, 1699 (1999) (reviewing BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998)). Epstein argues, although the laissez-faire era takes a "cautious view of government power," the notion of laissez-faire did give immense value to the ideas of individual liberty,

advantage of the basic right to contract, "the right to buy and sell, [and] to make agreements, with the understanding that the force of law stood behind these agreements."[52]

The government had a larger impact on the economy in the nineteenth century than many historians credit.[53] Although the government's presence in everyday life was not as pervasive in the nineteenth century as it is today,[54] Friedman contends that the main aim of the government then was "*promotional*; to enact laws to help the economy grow."[55] The government concerned itself with creating ways to support the infrastructure of the "institutions that made economic growth possible."[56] For example, the government created "roads, canals, bridges, ferries, and (later) railroads" in order that farmers and merchants could get their goods to market.[57] The government also created what Friedman calls "the invisible infrastructure," which consisted of money, banks, and credit.[58] Although the government "had very little in the way of money," it had a surplus of land.[59] The government "used land grants to stimulate the economy—grants to states for educational purposes, cheap land to settlers," and uncultivated land to states "who would put it to productive use."[60]

Because of Friedman's "professional focus on state private law and its relation to our economy,"[61] some reviewers have characterized his treatment of the economy as "over-emphasized" and at times bordering "on the purely Marxian."[62] However, Friedman's unique view of American legal history enables the reader to compare not only law and society, but also law and economics.

B. Applying Nineteenth Century Tort and Contract Law

Friedman argues that the law of torts also took a dramatic turn in the nineteenth century.[63] Torts constitute a civil, as opposed to a criminal, wrong.[64] Within tort doctrine, one of the largest nineteenth century developments was the law of negligence.[65] The Industrial Revolution in-

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the right to own property, and freedom of contract. Without these fundamental pieces of historical power, American society could not operate as it does today. *Id.*

52. *See* FRIEDMAN, *supra* note 2, at 37.
53. *See id.*
54. *See id.* at 37-38.
55. *Id.* at 38.
56. *Id.* at 40.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 40-41. For example, states received swamp lands that they could sell for money to build drainage systems and levees. *Id.* at 41.
61. Pierce, *supra* note 5, at 625.
62. *Id.* at 626.
63. *See* FRIEDMAN, *supra* note 2, at 43.
64. *Id.*
65. *See id.*

creased the use of machinery in the workplace, thereby causing more accidents resulting in bodily harm.[66] "Nothing does a better job of mangling human bodies than machines."[67] For example, Friedman notes that "the explosion on the *Sultana*, a sidewheel steamboat, on April 27, 1865, killed more than 1,700 people."[68] American law responded by, for the first time, permitting an individual injured in an accident to recover damages without proving that the tortfeasor intended to injure the victim.[69]

Many legal historians assert that the nineteenth century change in tort law was a shift from "strict liability to a moralistic 'fault' principle."[70] Friedman comments that it was "not really accurate to talk about a shift from strict liability; rather, there was a shift from *no* liability."[71] The issue was not morality, but, instead, who should bear the risk of loss in an action in tort.[72] Friedman takes a position similar to that of Oliver Wendell Holmes, Jr., separating morality from the liability framework.[73] Holmes believed that, because the common law was uninterested in evaluating the "state of mind" of the individual in deciding liability in a negligence action, there could be no "individual moral culpability" inherent in attributing liability to an individual.[74] Holmes evaluated tort law in terms of "standard[s] of external conduct."[75] Hence, tortfeasors could be liable for damages due to their negligence "even if they do their incompetent best."[76]

Although the nineteenth century development of negligence in tort created the legal vehicle for a victim to receive compensation for injury, the law as applied at that time favored business over the individual in determining where to place risks of loss.[77] Therefore, the external standards for reasonableness, by which an industry accused of doing wrong was to be judged, were defined by industry itself.[78] "The defendants were the entrepreneurs, the doers, the bringers of wealth."[79] Friedman posits

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66. *See id.* ("Railroad locomotives, belching fire and steam, and racing through the countryside were a tremendous source of injuries and deaths").
67. *Id.*
68. *Id.*
69. *See id.* at 43-44.
70. *Id.* at 44.
71. *Id.*
72. *See id.*
73. *See* A.W. Brian Simpson, *1997 Survey of Books Relating to the Law: VIII, Legal History: The Elusive Truth About Holmes*, 95 MICH. L. REV. 2027, 2028 (1997) (reviewing DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY (1995)); *see also* O.W. HOLMES, JR., THE COMMON LAW 108 (Boston, Little, Brown, & Co. 1881). "A man may have as bad a heart as he chooses, if his conduct is within the rules. . . . What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise." *Id.* at 110.
74. Simpson, *supra* note 73, at 2027.
75. *Id.* at 2028; *see* HOLMES, *supra* note 73, 110-11 ("The standard . . . must be fixed.").
76. Simpson, *supra* note 73, at 2028.
77. *See* FRIEDMAN, *supra* note 2, at 44-45.
78. *See id.*
79. *Id.* at 45.

that, because the law follows society, law in the economic growth-oriented nineteenth century followed the wealth.[80] Thus, the courts attributed liability to the wrongdoer only when the risk of loss fell on someone other than an industrial defendant.[81]

To illustrate this point, Friedman discusses *Farwell v. Boston & Worcester Railroad Corporation*.[82] In *Farwell*, a railroad employee was badly injured on the job due to the actions of another employee.[83] Farwell sued his employer, the railroad, "claiming that the negligence of another worker was the cause of his injury."[84] The plaintiff relied on the old "master and servant" rule, which provided that, "if an agent (a servant or employee), on the job, does something that harms somebody else, that somebody could sue the principal (the master or employer), because the principal is generally responsible for the acts of the agent."[85] In this case, however, the court held that the master-servant rule imposed liability on the employer only when the employee's actions injured a railroad passenger, but did not apply when the victim was a fellow employee engaged in the same work.[86] Friedman asserts that the underlying message from *Farwell* was the power of enterprise and the movement of law toward protecting business and industrial development.[87] Law favored industry because society also favored industry.[88] Society favored industry because most Americans at this time lived in rural areas,[89] so they viewed development of the railroads and further enterprise as keys to their economic prosperity.[90] Therefore, as Friedman suggests, morality was not a relevant factor in determining liability during the rise of enterprise, rather determining risks of loss resulted from industrial development and the power of enterprise.[91]

Friedman also discusses the impact of the Supreme Court's interpretation of the Contracts Clause in the nineteenth century.[92] The Constitution prohibits individual states from enacting any regulation or law "impairing the obligation of a contract."[93] Friedman argues that the Contracts Clause was "about the relationship of government and the economy, par-

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80. *See id.* at 44-45.
81. *See id.* at 46.
82. Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49 (1842).
83. *Farwell*, 45 Mass. at 55.
84. FRIEDMAN, *supra* note 2, at 45; *see Farwell*, 45 Mass. at 55.
85. FRIEDMAN, *supra* note 2, at 45.
86. *Farwell*, 45 Mass. at 54.
87. FRIEDMAN, *supra* note 2, at 48.
88. *See id.* at 47.
89. *See id.*
90. *See id.*
91. *See id.* at 44-45.
92. *Id.* at 51. The Contracts Clause was most likely created to prevent states from interfering with creditors' rights in bankruptcy cases. *Id.*
93. *Id.*; U.S. CONST. art. I, § 10, cl. 1 (The Contracts Clause states that: "No State shall . . . pass any . . . law impairing the obligation of contracts").

ticularly in times of great financial uncertainty."[94] Friedman asserts that "the whole point of the 'contracts clause' was to prevent states from going too far in helping out debtors," and thus to further protect enterprise.[95]

The validity of Friedman's analysis is evident today in how courts apply the Contracts Clause. Because the application of the Contracts Clause in the courts can be inconsistent as a result of judicial discretion, the government retains a vehicle to loosen or pull back the reigns of enterprise.[96] Courts do not interpret the Contracts Clause "to prohibit all impairment of contracts."[97] Instead, the courts apply a balancing test that weighs the "contractors' private rights with the public interest in a manner reminiscent of *Lochner v. New York*."[98] In a practical application of the Contracts Clause, judges do not have to follow precedent explicitly because "[b]alancing allows judges to weigh competing values on an ad hoc basis, which permits them to change the weight they give to different values over time."[99]

In effect, judicial discretion could have led to the opposite result of Friedman's contention that the courts primarily chose to protect enterprise during this time period.[100] Because the balancing of interests is left solely to judges, a decision could fall either way depending on the opinion of a particular judge.[101] However, sentiments of judges will most likely follow the economic and moral standards defining the law at a given time, as evidenced in the nineteenth century.[102] Judges apply the balancing test according to their own legal interpretation of a particular case at hand.[103] Thus, the Contracts Clause allows the judiciary to skew a clear legal rule, resulting in the Contracts Clause creating uncertainty for persons subject to contract, as well as security for governmental intervention in contracting during times of economic hardship.[104]

By limiting himself to a chronological, subject-by-subject analysis, Friedman overlooks the impact of contract law upon tort law during the nineteenth century. Although separately Friedman comes to interesting conclusions regarding the relationship between torts and the economy,

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94. FRIEDMAN, supra note 2, at 51.

95. *Id.* Friedman notes that most states by this time had insolvency laws to protect "at least *some* basic items from the clutch of creditors." *Id.* at 53.

96. *See* Michael B. Rappaport, *Note: A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 919-22 (1984).

97. *Id.* at 919.

98. *Id.*; *see* Lochner v. New York, 198 U.S. 45 (1905) (applying the contracts clause balancing test).

99. *See* Rappaport, *supra* note 96, at 920.

100. *See* FRIEDMAN, *supra* note 2, at 51.

101. *See* Rappaport, *supra* note 96, at 920.

102. *See, e.g.*, *supra* notes 77-91 and accompanying text (illustrating how the courts used their discretion to promote and protect economic development in the tort liability context).

103. *See* Rappaport, *supra* note 96, at 919-21.

104. *See id.* at 921.

and contracts and the economy, he fails to show the interrelationship the two legal subjects had on the economy as a whole. Specifically, during the nineteenth century, the legal regime was designed to allow "contract to dominate," thereby allowing a party to contract out of tort liability.[105] Thus, "[t]otal exemption or too great cutting down of remedy by 'contracting,' without regard for the tort phase of risk in hand" can result in legal implications for both subject areas.[106] In addition, by failing to consider the relationship between torts and contracts, Friedman fails to consider the affect that both legal subjects had in shaping and influencing "social and economic behavior."[107] After all, "while rules of law may be enacted in response to social and economic pressures, those same rules will influence and shape social and economic behavior."[108]

C. Nineteenth Century Slavery

Slavery not only continued, but, according to Friedman, became a stronger institution in the South during the first half of the nineteenth century because it was a strongly contested political issue.[109] After the Revolutionary War, the northern states abolished slavery while the southern states expanded the institution.[110] Slavery remained "vital to the southern economy" and thus became "an essential aspect of the social structure."[111] By 1860, the population of slaves in the United States "had grown to 3,922,760, all of them in the South."[112] While Friedman discusses race consciousness as an underlying social issue in his colonial account of slavery, his nineteenth century discussion of slavery explores continuing social complexities, such as the rise of segregation. Friedman points out that by the turn of the century, many Southerners accepted segregation. In fact, in *Plessy v. Ferguson*, the United States Supreme Court "gave segregation its seal of approval" and explained "so long as institutions were separate but equal, they were constitutionally acceptable."[113]

The battle between the North and South over slavery ultimately ended in the Civil War, which had become "a crusade against slavery."[114] President Lincoln delivered his *Emancipation Proclamation*, and later,

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105. *See* John B. Clutterbuck, Note, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory*, 97 YALE L.J. 1131, 1138 (1988).

106. *Id.*

107. Pierce, *supra* note 5, at 630.

108. *Id.*

109. *See* FRIEDMAN, *supra* note 2, at 69. Southern states continued to expand the body of slave law; for example, slaves could not enter into a legal marriage, and it became a crime to teach a slave to read or write. *Id.*

110. *See id.*

111. *Id.* at 69-70.

112. Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT. L. REV. 1009, 1032 (1993).

113. FRIEDMAN, *supra* note 2, at 70.

114. *Id.*

the Thirteenth Amendment ended slavery—at least in theory.[115] Although people in the North did not accept the institution of slavery, they also did not treat African-Americans as equals.[116] Friedman argues that, because the northern states after the Civil War had become indifferent to southern slave practices,[117] the South "relapsed into white supremacy."[118] Friedman's "brief history" again raises unanswered questions. Were white supremacy and segregation ways to extend the effects of slavery despite its abolishment? Furthermore, why would the North suddenly become indifferent to southern slave practices after crusading for years for its abolition?

D. A Change in Crime and Punishment

The law of crime and punishment—specifically, the "rise of the penitentiary and the development of urban police forces"—is another area of the law that significantly changed in the nineteenth century.[119] In colonial times, the onus was on the community to punish wrongdoers by banishment, branding, or the like.[120] Friedman contends that, as opposed to the godly colonial society, the booming population of the nineteenth century brought a decay of community morals, and disorder and riots in the streets, giving rise to a demand for urban control.[121] The law responded by creating the penitentiary.[122] Friedman explains that "the penitentiary was designed to remove the criminal" from the community while enabling the prisoner to reform.[123] In addition, Friedman posits, the penitentiary was designed to reduce capital punishment.[124]

Friedman describes the Cherry Hill penitentiary in Pennsylvania as an example of the nineteenth century penitentiary.[125] The prison system began as a strict, regimented system.[126] In Cherry Hill, inmates were isolated and not allowed to speak under any circumstances pursuant to the theory that time to think and prepare for re-entry into society would reform them.[127]

By the late nineteenth century, the strictly regimented system had evolved into a more rehabilitative process.[128] Credit for good conduct

115. *See id.*
116. *Id.*
117. *See id.*
118. *Id.*
119. *Id.* at 80.
120. *See id.*
121. *Id.* at 80-81.
122. *See id.* at 81 ("The community was no longer a cure for deviance, but if anything the cause. Out of this idea came the penitentiary.").
123. *Id.*
124. *See id.*
125. *Id.*
126. *Id.*
127. *See id.* at 81-82.
128. *See id.* at 83.

was considered in the release process, and the parole system was introduced into the criminal justice system.[129] Friedman explains that the "whole point of these devices was to shift emphasis away from the offense, and put the emphasis on the offender himself—his character, his personality, his propensities for good and evil."[130] As society progressed towards a more individualistic society, Friedman argues, so did the law itself.[131] Here, as in his *Crime and Punishment in American History*, Friedman "portrays the criminal law as a product of social forces—a mirror of the society it regulates."[132] According to one commentator, Friedman's narrow focus fails to consider "the power of the law to shape social values," and, thus, "makes it an incomplete portrait of the criminal law" and the justice system "in American history."[133] The law itself "has great power both to preserve the social order and to promote change, and it is Friedman's failure to describe this half of the relationship between law and society that renders his account flawed."[134]

III. LAW IN THE TWENTIETH CENTURY

The twentieth century produced a huge body of new law. In his account of American legal history during this period, Friedman again evaluates a vast array of subjects pertinent to the era. A few of his central topics here include: criminal justice and the role of the federal government, the evolution of tort law, and the Civil Rights Movement.

A. Criminal Justice and the Role of the Federal Government

In the twentieth century, social changes spurred change in the definition of crime and in the applicable punishments.[135] Friedman argues that new technologies and innovations required new law.[136] Automobiles increased bank robberies; computers created the need for laws to punish the computer hacker.[137]

Along with the increase in technological advancements, came the growth in the federal government's role in criminal justice.[138] The federal government became involved in criminal justice for the first time, pass-

129. *See id.* at 83-84.
130. *Id.* at 84.
131. *See id.* at 84, 87.
132. Book Note, *Mirror, Mirror, on the Wall*, 107 HARV. L. REV. 1813, 1813 (1994) (reviewing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993)). Although Friedman's book *Crime and Punishment in American History* is solely about criminal law and society, Friedman fails to acknowledge the implication of law upon society in this book, a weakness repeated in *Law in America: A Short History*. *See, e.g., id.* at 1817.
133. *Id.*
134. *Id.* at 1815.
135. FRIEDMAN, *supra* note 2, at 106.
136. *Id.*
137. *See id.*
138. *See id.*

ing a vast amount of federal criminal legislation.[139] Crime ultimately became "a *national* issue—an issue in presidential politics."[140] For example, President Hoover appointed a task force to study violent crime,[141] and the growth of the Federal Bureau of Investigation under J. Edgar Hoover's leadership opened the door for the federal government's entry into the "law enforcement business."[142]

States also began to tighten up their criminal justice systems by cracking down on a new surge of violent crime.[143] Friedman explains that, beginning in Washington State in 1984, states began to enact "truth in sentencing laws."[144] These laws required criminals to serve no less than 85 percent of their entire prison sentences, thus eliminating to a large degree credits given for good behavior.[145] Federal monetary incentives for prison construction accompanied these "truth in sentencing laws,"[146] and most states jumped on the bandwagon to receive the federal grants.[147]

Heightened societal demand to punish criminals, along with federal monetary incentives, stimulated the growth of the United States' huge population of prisoners according to Friedman.[148] Friedman's argument partially explains the increase in the prison population, but does not address the effect the law itself has on the population of prisoners. Some attribute the prisons' population growth to the growing number and complexity of laws, which creates more reasons to prosecute an individual.[149]

Friedman posits that the war on drugs is another reason for the dramatic growth in the prison population.[150] Friedman discusses how American values and the law have eliminated most other victimless crimes, such as sex outside of marriage.[151] However, the drug laws remain an anomaly that in many states make possible life imprisonment for a drug offense.[152] Friedman draws a valid conclusion here, but fails to acknowledge the underlying American societal values inherent in the

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139. *See id.* at 107. The National Motor Vehicle Theft Act was passed making it a federal crime to transport a stolen vehicle into another state. In addition, a large body of law was passed governing prohibition. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* at 108-10.

144. *Id.* at 110.

145. *See id.*

146. *Id.*

147. *See id.*

148. *Id.* In 1998, California alone had more prisoners than "France, Great Britain, Germany, Japan, Singapore, and the Netherlands combined." *Id.*

149. *See generally* R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715 (2000) (discussing complexity in the law).

150. FRIEDMAN, *supra* note 2, at 115.

151. *Id.* at 115-16.

152. *Id.* at 116.

decision to fill prisons with non-violent drug offenders. Many people perceive, or even believe, an act is criminal because it is illegal.[153] In addition, "law confers legitimacy because it persuades us that the existing social order is necessary, and, if not ideal, at least reasonable."[154] In other words, "the criminal justice system legitimates its own rules and outcomes."[155] Again, Friedman's critics note, "Law has great power both to preserve the social order and to promote change."[156] Thus, Friedman fails to address the independent impact that law, itself, can have on social order and law enforcement in society.[157]

In his analysis, Friedman fails to consider how history has shaped the development of twentieth century change. Although he correctly identifies new aspects of modern-day technology that require changes to be made in the law, such as the rise of computer crime, he fails to develop this theory. How did we get from there to here? Is moral decay multiplying exponentially over time, creating the social need for new laws, or is America creating new laws that criminalize more behavior? Friedman recognizes that prohibition and the drug wars "put millions of dollars into the pockets of men like Al Capone,"[158] yet he fails to realize that law actually can drive crime as well as hamper it.[159]

B. Tort Law in the Twentieth Century

As the twentieth century progressed and society became more individualistic, the nature of tort law had to change.[160] No longer could a court consistently side with enterprise.[161] One prominent example occurred in the area of products liability.[162] Friedman discusses the landmark case of *MacPherson v. Buick*[163] to support this contention.

In *MacPherson*, the plaintiff purchased an automobile with a defective wheel, which caused an accident that injured him.[164] MacPherson sued the auto manufacturer, Buick.[165] Historically, under the law of privity, MacPherson could have sued only the dealer from which he purchased the automobile because no privity existed between him and the

153. Book Note, *supra* note 132, at 1817 (criticizing an earlier Friedman book for his narrow view of the criminal justice system and its impact on the law).
154. *Id.*
155. *Id.*
156. *Id.* at 1815.
157. *See id.*
158. FRIEDMAN, *supra* note 2, at 104.
159. *See* Book Note, *supra* note 132, at 1813. As an example, just as the criminalization of alcohol during prohibition made bootlegging more profitable for the criminal, the drug war has made narcotics trafficking more profitable for the drug lords.
160. *See* FRIEDMAN, *supra* note 2, at 129.
161. *Id.*
162. *See id.*
163. MacPherson v. Buick, 217 N.Y. 382 (1916).
164. *See MacPherson*, 217 N.Y. at 384.
165. *See id.*

manufacturer.[166] Friedman asserts that "[Judge] Cardozo effectively undermined the old rule," thereby giving birth to products liability as we now know it and signaling the end of the age of enterprise.[167] For the first time, privity was abandoned in tort, and "if a product was dangerous, and caused harm, the victim must be able to sue the manufacturer directly."[168] After *MacPherson*, many other states followed Cardozo's holding and removed privity as an obstacle in determining liability in a tort action.[169]

Friedman explains that liability expanded dramatically after *MacPherson* with the emergence of the strict liability doctrine in which a product manufacturer could be held liable despite no finding of negligence.[170] Friedman's analysis, again, attributes legal development to changes in the economy and the rise of individualism, but fails to address another important social phenomena—the growing demand for fairness.[171] The practical distinction between the time of *Farwell* and *MacPherson* is that an emerging concern in twentieth century society was protecting the small party to an accident; that fairness should be a factor in determining risk of loss, shifting the risk toward big business.[172] The early years of national development were lean times, when society placed a high value on strengthening the economy, but during prosperous times that followed the Industrial Revolution, society came to view corporations as too powerful. Because the corporate defendant generally has the deepest pockets,[173] in some cases fairness dictates that liability should accrue to the party who is best able to bear the cost.[174]

C. The Civil Rights Movement

In addition to dramatic changes in tort law, Friedman also discusses one of the twentieth century's most significant historical developments—the Civil Rights movement.[175] After many years of segregation and unfair treatment of African-Americans, the Supreme Court overruled *Plessy v. Ferguson*.[176] In the landmark case of *Brown v. Board of Education*,[177] the Court ruled that "*all* school segregation violated the Fourteenth

166. FRIEDMAN, *supra* note 2, at 130.
167. *Id.*
168. *Id.*
169. *Id.*
170. *See id.*
171. *See* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 350 (1998) (explaining that in determining the liability of a corporate defendant, many jurors emphasize the issue of fairness in their consideration of damages).
172. *See id.* at 350-52.
173. *See id.* at 329.
174. *See id.* at 337 (explaining that jurors may consider how "the financial equities" of an award will affect the party paying damages; thus, fairness may establish that a corporate defendant may be better suited to bear the cost).
175. *See* FRIEDMAN, *supra* note 2, at 140.
176. 163 U.S. 537 (1896); *see* FRIEDMAN, *supra* note 2, at 141-42.
177. 347 U.S. 483 (1954).

Amendment."[178] Friedman argues that, although *Brown* was a cautious case in that it only pertained to education, *Brown* was the beginning of the end.[179]

After *Brown*, Friedman asserts the "Supreme Court struck down every instance of official apartheid that came before it: parks, swimming pools, public facilities in general."[180] Friedman suggests that federal court jurisprudence changed race relations dramatically and that, in the last half of the century, "race relations in the United States were totally revolutionized."[181] This is true with respect to the changing racial dynamics in the country and the acceptance of minorities in equal positions in the work force. However, Friedman fails to discuss the lingering impact of race consciousness and geography on American society in the twenty-first century.

Soon after the courts ordered desegregation, many schools fell directly back to segregated conditions. Although segregation ceased to exist in its most heinous form, which historically had barred African-American children from particular schools, segregation remained in the form of geographic segregation and socioeconomic inequality because many minorities lacked the financial resources to live in wealthier, predominantly white school districts.[182] Therefore, race relations cannot possibly be totally revolutionized as Friedman suggests because, had race relations been revolutionized, socioeconomic segregation would have ended with court-ordered integration of schools and workplaces.[183]

With respect to the twentieth century, Friedman provides an interesting account of the change in the criminal justice system due to increased federal criminal legislation. In addition, he effectively documents the change in tort liability and the significant progress made in the Civil Rights Movement. Although he fails to identify the impact that law itself can have upon society, and belittles the complications inherent in desegregation, Friedman's overall presentation of the law's role in the twentieth century is adequately portrayed.

178. FRIEDMAN, *supra* note 2, at 142; U.S. CONST. amend. XIV, § 1 (stating in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

179. FRIEDMAN, *supra* note 2, at 143.

180. *Id.*

181. *Id.*

182. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 263 (1991) (Marshall, J., dissenting) (commenting that replacing the desegregation order "with a system of neighborhood school assignments for grades K-4 resulted in a system of racially identifiable schools").

183. *Cf. id.* at 263-64.

IV. AMERICAN LAW AT THE BEGINNING OF THE TWENTY-FIRST CENTURY

In the last temporal era in his book, Friedman explores the role of the legal profession in modern America and the shift toward national unity. Although society has become more individualistic over time, the national government has unified the nation by providing all Americans access to information on an equal basis. Although little time has passed in the present century, Friedman gives an exceptional account of law's current role in society.

A. The Lawyer's Role in the New Millennium

Friedman argues that the law continues to be an important aspect of American life.[184] The role of the legal profession has become vital to our society due to the sheer volume of law created in the past two centuries.[185] "In a society where 'law' is everywhere, there is everywhere a need for people who know how to use it or abuse it."[186] The economy Americans worked so hard to build over time created and will continue to create new legal problems. As Friedman asserts, "*All* big modern economies need lawyers."[187] Whether running the administrative state, writing a contract, or sealing a deal, the modern economy needs legal help, and thus it needs lawyers.[188]

In the past, Friedman has been criticized for failing to give "any systematic consideration of the interrelationship of law, legal institutions, lawyers, legal education, and legal literature and their relative impact on the development of American legal history."[189] Here, Friedman remedies the problem by describing the lawyer's role in everyday life and history, discussing the continuing surge in the number of law schools, and the many different facets of business that the law must address.[190] Although Friedman does not address the effects that the growing legal community has "on the nonlegal spheres with which it admittedly interacts," [191] his account of how the function of modern day lawyers and law firms has evolved explains even to the layperson the need for lawyers in contemporary American society.

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184. *See* FRIEDMAN, *supra* note 2, at 165.
185. *Id.*
186. *Id.*
187. *Id.* at 168.
188. *See id.* at 169.
189. Pierce, *supra* note 5, at 628.
190. FRIEDMAN, *supra* note 2, at 166-68.
191. Pierce, *supra* note 5, at 628-29 (recognizing this shortcoming in Friedman's *A History of American Law*).

B. The Shift Toward National Government

Friedman also contends that the shift towards national government seems to be a continuing trend.[192] Americans are coming together as a unified nation, "[a]nd, as the culture gravitates to one central point, so, too, does the law."[193] Friedman explains that "in times of crisis—the Great Depression, the two world wars, the savage attack on the World Trade Center in September 2001—the country looks to its leader, to its center, to the national government."[194] Americans look to Washington for answers to "national problems" because, as Friedman persuasively argues, "[c]lassic federalism is, in truth, quite dead."[195] Friedman posits that "the federal government can do almost anything—can regulate anything—and the restrictions of federalism do not really hem it in."[196] For example, even if the state retains the power to freely spend block grants provided by the federal government, "Congress can choose *not* to use" them if it wishes.[197]

Friedman argues that another reason that society gravitates toward the federal government is increased media attention.[198] The President has become a movie star in the spotlight.[199] Friedman contends that the media and the public are consumed with his role as leader of the government and entertained by his personal life.[200] Government in the twenty-first century sits in a glass house, which everyone peers into through the media.[201] As a result, "what we see is of course not 'government,' but images and personalities. The public knows less and thinks it knows more."[202] Friedman makes an interesting point in asserting that government is bigger because we see more of it. An alternate view, however, is that the government is growing in complexity[203] and, therefore, citizens may feel they need to know more in order to adequately protect their interests. In addition, Americans want to know more; society is hooked on the national government's daily soap opera produced by the media. To that effect, Friedman observes that "the celebrity nature of authority, of leadership, means that society is governed, not so much by the invisible hand, as by the visible tube."[204] As such, "politics [have] become just

192. *See* FRIEDMAN, *supra* note 2, at 170.
193. *Id.* at 171.
194. *Id.* at 171-72.
195. *Id.* at 173.
196. *Id.* at 171.
197. *Id.* at 173.
198. *See id.* at 175.
199. *See id.* at 176.
200. *See id.*
201. *See id.*
202. *Id.*
203. *See* Wright, *supra* note 149, at 717-18.
204. FRIEDMAN, *supra* note 2, at 182.

another reality show, like *Survivor* or *Big Brother*. The electorate is the audience. The campaign is the show."[205]

Friedman's short account of the role of law in the new millennium is proportionate to the short period of time that has passed since its beginning. Friedman effectively explains the importance of the legal profession in our complicated society. In addition, he gives a keen account of the relationship between the media and society's shift to unify as a nation through a mutual interest in the national government.

CONCLUSION

From colonial America to the present, a vast amount of law has been created in response to the needs and norms of society. Friedman's *Law in America: A Short History* is a quick trip though time, displaying his view of the relationship between law and society. In addition to showing how society shapes current law, this book also gives a unique account of the relationship between the law and economy. Friedman provides an accurate account of the historical reasoning and development of American law, although his book could expand on certain areas of the law to present a more thorough look at every temporal era covered in the book. These few shortcomings are likely due to the fact that it is a "short history." Friedman artfully explains how history creates and moves the law and how law ultimately is a reflection of our society. As Friedman concludes, "Law is the glue that binds the cells of Leviathan's body; and the body of society itself."[206] This book is worth the read and may be attractive to both the legal historian and the lay reader, wishing to take a limited glance at America's legal history and, particularly, how economic forces drive legal change.

205. *Id.*
206. *Id.* at 183.