BOOK REVIEW


Stephen B. Presser†

It was the practice of my first-year civil procedure professor, a sagacious, salty and spellbinding man, to begin each introduction to a new topic of law with a description of its common-law antecedents. One day we began studying new trials, and he started to tell us about attaint. Before the sixteenth century, the professor explained, if a special attaint jury found that another jury had decided a case wrongly, according to the common law those first jurors would lose their freedom, would become forever infamous, and would thereupon forfeit their goods and the profits of their lands; their houses would be razed, their meadows plowed, and their trees pulled up by the roots; they would be imprisoned forever, and their wives and children would be put out of doors.¹

Struck by this and the other tales of the common law related by this professor, I began to wonder what could have led any society to adopt such a system, and what it must have been like to live under it. I was thus introduced to what has been called the "romance" of legal history.² I soon discovered that many authors had chronicled the pageantry and the development of the law of

†A.B. 1968, J.D. 1971, Harvard University. Member, Massachusetts and District of Columbia Bars. The reviewer wishes to thank his colleagues, Daniel D. Polsby and Paul D. Gewirtz, who were most helpful in criticizing an earlier draft.

¹Lecture delivered by Professor James H. Chadbourne, March 21, 1969, as reconstructed from the reviewer's notes.

²The desire to study legal history is far from universal among students or even among professors of the law. Particularly in a period such as ours, when there has been a concerted effort to discard the "archaic paraphernalia" of the law of the past, it is frequently asked what sense it makes to study the development of old law. Several answers to this question are possible: (1) the study of legal history is essential to an understanding of jurisprudence—that is, without a knowledge of what the law has been, it is impossible to reach any understanding of the development of the philosophy of law; (2) the study of legal history leads to a coherent conception of the entire body of law, rather than the piecemeal approach so often found in law schools; (3) the study of legal history teaches the student that the law is constantly in flux, and helps him to predict the new courses that it may take in light of social developments; (4) the romance of legal history is exciting in itself. See generally Murphy, Book Review, 1 AM. J. LEGAL HIST. 259, 263 (1957) & sources cited.
England, but that no one had yet tried to set out what I hoped was the equally romantic panorama of American legal history. Professor Friedman has now written that story.

As Professor Friedman observes, any history of American law is to some extent a history of American life, and his history is therefore wide in scope. There is much familiar Americana in *A History of American Law* of the type out of which poems, novels and even television series have been made. There is information on the Salem witch trials, county poorhouses, squatters' rights, foreclosure on farmers' mortgages, the legendary oratory of Daniel Webster, vigilantes, hanging judges, blue laws, "no fishing" signs, railroad bells, sharecroppers, chain gangs and much more. In addition to these better-known items of American folklore, there are occasionally references to the most obscure esoterica such as the "lost" states of Franklin, the Indian Stream Republic and the State of Deseret. There are also historical tidbits of particular interest to lawyers, such as the explanation of how Reno became a divorce mill, and the revelation that Justice Cardozo's father, a New York judge at the time of the Boss Tweed ring, was thought to be as corrupt as his son was wise. There is also a description of New Jersey's role at the turn of the century as the "Mother of Trusts," and of how Delaware became a corporate haven. Finally, and proving the hoary cliche that every lawyer must to some extent be a legal

---


5 L. FRIEDMAN, A HISTORY OF AMERICAN LAW 595 (1973) [hereinafter cited as FRIEDMAN].

6 *Id.* 62.

7 *Id.* 189-91.

8 *Id.* 205.

9 *Id.* 374-75.

10 *Id.* 274.

11 *Id.* 319-22.

12 *Id.* 327-28.

13 *Id.* 511-12.

14 *Id.* 366 (semble).

15 *Id.* 419.

16 *Id.* 373-74.

17 *Id.* 523-24.

18 *Id.* 102.

19 *Id.* 439.

20 *Id.* 325-26.

21 *Id.* 458.
historian, Professor Friedman has woven into his historical narrative virtually every precedential old chestnut still taught in law school.\textsuperscript{22}

The aim of the book is an ambitious one; it is "the first attempt to do anything remotely like a general history, a survey of the development of American law, including some treatment of substance, procedure, and legal institutions."\textsuperscript{23} The two developments which make such a history possible at this time, according to the author, are the recent work of important scholars such as Willard Hurst,\textsuperscript{24} and the evolution of modern social science. Social science, explains Professor Friedman, has been "eagerly, even passionately grasped" in his analysis, in this effort to demonstrate that American law is a "mirror of society."\textsuperscript{25}

The mirror is illuminated by dividing American legal history into four periods, the first three of which are dealt with in some detail, while the last is relegated to a thirty-page coda. These are respectively \textit{The Beginnings: American Law in the Colonial Period}; \textit{From the Revolution to the Death of Chancellor Kent—1776-1847}; \textit{American Law to the Close of the 19th Century}; and the epilogue, \textit{American Law in the 20th Century}. Parts II and III taken together account for eighty percent of the book, which is principally concerned with the nineteenth century, the period that has been called the "Golden Age" or the "Formative Era" of American law.\textsuperscript{26} The composition of the parts varies, but in general for each time period there is a discussion of the structure of government and particular political problems, law and the economy, commercial law, property law, criminal law, torts, the bench and bar, and legal literature.

\textit{A History of American Law} arrives at a propitious time, when there may at last be a widespread awareness of the need for an increased emphasis on legal history in the curriculum of the American law school\textsuperscript{27} and when a flowering of American legal

\textsuperscript{22}See, e.g., the discussions of \textit{Marbury v. Madison}, id. 117; \textit{Trustees of Dartmouth College v. Woodward}, id. 174-75; \textit{Wheaton v. Peters}, id. 226; \textit{Gibbons v. Ogden}, id. 230-31; \textit{Swift v. Tyson}, id. 231; \textit{Plessey v. Ferguson}, id. 443; and even such old English gems as \textit{Hadley v. Baxendale}, id. 467; and \textit{M'Naghten's Case}, id. 514.

\textsuperscript{23}Id. 9.


\textsuperscript{25}FRIEDMAN 10.

\textsuperscript{26}THE GOLDEN AGE OF AMERICAN LAW (C. Haar ed. 1965); R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938).

\textsuperscript{27}For recent observations on the need for such an historical perspective in American legal education see, \textit{e.g.}, D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 444 (1965); Stevens, \textit{Two Cheers for 1870: The American Law School}, in \textit{Law in American History} 403, 406 (D. Fleming & B. Bailyn eds. 1971).
historical scholarship may be taking place. The stage thus being set, it is appropriate at the appearance of this self-proclaimed first general history of American law to take a broad look at the current concepts of American legal history in general, and in particular as they are set forth by Professor Friedman. To a certain modest extent, then, the aim of this Review is not only to evaluate Professor Friedman's book, but also to determine what paths of inquiry are now being taken by American legal history, and what other avenues might profitably be pursued.

No doubt sensing the timeliness and importance of his endeavor, Professor Friedman has made *A History of American Law* a study and a statement of legal historiography as well as legal history. Several themes, or interpretations of the historical facts, weave in and out of the narrative, and the subject of the book is not only what American law has been, but also the forces that have shaped it and the functions it has fulfilled. These are the themes that have determined past and present thinking among legal historians, and the book's exposition of them makes it a valuable introduction to the discipline.

Broadly speaking, these themes fall into three categories: those which describe the *substance* of American law, those which describe its *form* or *structure* and those which describe its *function*. Perhaps a brief examination of some of these themes and of the areas of the development of law to which they relate is the best approach to understanding and evaluating Professor Friedman's view of American legal history. Such an examination demonstrates that while the themes perceived by Professor Friedman are not original, and some have their roots in late nineteenth century legal scholarship, Professor Friedman's use of them has led him to an exposition of the development of American law that is orderly and coherent, and uniquely that of the social scientist.

---


29 This type-specification of the book's themes is not to be found in the book itself. Indeed, one of the problems with the book is that relatively little effort is made to consider its themes together, or to weigh the relative importance of the individual themes. Other than in the introduction to each part (which attempts to set an atmosphere or motif for each time period) thematic discussion is irregular and mixed into the treatment of the substantive areas of law. As it is helpful both in the understanding of American legal history as a whole, and in judging to what extent Professor Friedman has succeeded in his aim to write a comprehensive treatment of the subject, the reviewer hopes that he may have license to integrate and extrapolate somewhat from the themes as they are set forth in the book.
Professor Friedman's conception of the substance of law is basically the same as that set forth by Oliver Wendell Holmes, Jr. in 1881. As Professor Friedman puts it: "The basic premise of this book is that, despite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups." To the same effect are statements such as, "The theory of legal history is that the architect of contemporary law is always contemporary fact," and "Sentiment and tradition had little place in commercial law; only the fittest and most functional survived." That Professor Friedman's perspective is that of the sociologist studying social change is confirmed by a necessary corollary to the substantive theme just noted. Thus, with regard to legal change, it is stated that "the theory of this book is that law moves with its times and is eternally new," and "[h]istory of law is not—or should not be—a search for fossils, but a study of social development, unfolding through time." The statement of this theme warns the reader that because Professor Friedman will be concentrating on social development, and views law as eternally new, there will be relatively little in the narrative about universals and constants in American law, and law will be viewed as reflecting developments in other spheres of American life, principally economics and, to some extent, politics.

As is the case with other social science disciplines, the themes in legal history that deal with the law's form and structure have been derived by both inductive and deductive routes. What Professor Friedman calls "the master trend of American Legal History; the trend to create one legal culture out of many; to reduce legal pluralism; to broaden the base of the formal, official system of law; to increase the proportion of persons . . . who are consumers or objects of that law," is a valuable insight that has been gained through empirical study of legal developments. The parts of the book that deal with this inductive theme, which the author has also called "the pushing

---

30 The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.
31 Friedman 14.
32 Id. 178.
33 Id. 247.
34 Id. 14.
35 Id. 15.
36 Id. 572.
and pulling of [centrifugal and centripetal] forces: uniformity and diversity in constant tension over time" are perhaps the richest and most revealing, in that they illustrate the feisty, peculiarly American development of a legal system through the machinations of antagonistic groups and individuals. Under this rubric are to be found the descriptions of the struggle between those who championed the cause of a civil-law type codification for America, such as David Dudley Field, and those who thought that adherence to the inherited English common-law system of jurisprudence was wiser.

Also within this "uniformity and diversity" theme is Friedman's analysis of the building of what he felicitously calls "the republic of bees." This was the process whereby the framers of law in the different states borrowed from each other and from the mother country, alighting on the different and varying flowers of new and old social and economic institutions, taking the nectar, and making out of it a honey of their own—"a distinctive system: a separate language of law within the family founded in England." Included in this process were the key problems of the adoption of the common law of England and English statutes, and the question of the existence of a federal common law of crimes. Another element of the process was a recurring radical strain of American law that seeks to "abolish the tyranny of rules, to reduce law to the level of the common man," so that it will serve the millions, and not just a privileged few.

A deductive theme regarding the structure of American law expounded by Professor Friedman has been derived from sociological theory. It is the tendency of laws or legal institutions

---

37 Id. 31.

Both colonial law and the law of the United States were subject to centrifugal and centripetal forces: forces that pulled jurisdictions apart; forces that pushed them together. The mother country, its agents, its superior legal culture—these acted centripetally, before Independence; economic unity, guaranteed by the federal system, was a strong centripetal force after Independence. Geographical isolation, local politics, and the sovereignty, in law and fact, of different pieces of the country, provided an enormous amount of centrifugal legal force.

38 For a good introduction to some of the peculiarities of the American national character, such as 19th-century rugged individualism, which peculiarities led to some of the legal developments discussed by Friedman, see Potter, The Quest for the National Character, in The Reconstruction of American History 197 (J. Higham ed. 1963).


40 Id. 98.

41 Id. 96-98.

42 Id. 254-55.

43 Id. 98-99.
to move "from the simple to the more complex, from the undifferentiated to the hierarchical." In connection with this theme Professor Friedman describes how the law of divorce and the chartering of corporations evolved from the simple expedient of ad hoc treatment by the legislature to the construction of a more sophisticated statutory system intended to handle all cases. He also alludes to how economic demands resulted in the "patchwork of power" distribution of legal authority among the federal, state and local governments.

Perhaps the most provocative of the themes of American legal history and certainly the most important to Professor Friedman are those that deal with the function of American law. The motif of this type that is the most pervasive in A History of American Law is the conception of law, and particularly common law, as an instrument consciously employed to forge or abet social change, rather than as a static body of "natural law" principles which are "uncovered," or "found," but not made by judges. It is disappointing that Professor Friedman fails to deal fully with the changes in political theory that probably led to the emergence of the instrumental conception of law in America. Instead he appears to view this development principally as a matter of economics. Still, the exposition of this theme in the book leads to some of the most lucid analysis of important

44 Id. 40. This is the structural-functional analysis of the modern sociologist as it is set forth in current theories of "rationalism" and "structural differentiation." See, e.g., M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (A. Henderson & T. Parsons transl. 1947); N. SMELSER, SOCIAL CHANGE IN THE INDUSTRIAL REVOLUTION (1959).


46 FRIEDMAN 568-73.

47 The term "instrumental" as it is used in the remainder of this Review to apply to Professor Friedman's conception of law implies this view that law is an instrument for social change. In a sense, of course, all concepts of law are "instrumental" in that all see law as acting on or controlling men, even those which see the law itself as relatively static and an agent for the preservation of the status quo. Where Professor Friedman has used the term, it has principally been in the more limited sense that it is used here. Some ambiguity does surround Professor Friedman's use of the words "instrument" or "instrumental" as they apply to law, however, and the book would have benefited from a clearer definition of these terms.

48 FRIEDMAN 19, 99-100. Another aspect of this theme is the struggle that Friedman notes between what he calls the "jurisprudence of concept," or the dry legal logic of men like Christopher Columbus Langdell and Samuel Williston, and what Friedman clearly regards as the richer, more enlightened "legal realist" view of a law tempered with experience, as expounded by Karl Llewellyn, Jerome Frank and Arthur Corbin. Id. 593.

49 Compare id. 99-100 with HORWITZ, THE EMERGENCE OF AN INSTRUMENTAL CONCEPTION OF AMERICAN LAW, 1780-1820, in LAW IN AMERICAN HISTORY, supra note 27, at 287. Professor Horwitz argues persuasively that 18th century notions of popular sovereignty led to the disintegration of the natural law foundations of common law rules and the concomitant emergence of an instrumental conception of law.
developments in American law. One such example is the use of
criminal law as more than an expression of current standards of
morality, as a vehicle for economic and social planning.\(^{50}\) Another is the allocation of the costs of industrial accidents,
under nineteenth century tort law, among the members of
society as a whole, and away from the more productive industrial
sector.\(^{51}\) A final example, and this in a more legislative context, is
the administrative regulation of business by state and local
legislatures and special agencies during the period supposedly
categorized by *laissez-faire* but actually a time of government
intervention to foster and protect certain favored sectors of the
economy.\(^{52}\)

In addition, the notion of law as an instrument for social
change has enabled Professor Friedman, drawing directly from
the work of Willard Hurst,\(^{53}\) to present a coherent view of
nineteenth-century American law\(^{54}\) that reveals much of the
special character of the period, and which complements the work
of more general American historians such as Turner,\(^{55}\) H. H.
Bancroft\(^{56}\) and Beard.\(^{57}\) In this view, between about the time of
the Revolution and 1850 "[t]he theme of American law . . . was
the release of energy,"\(^{58}\) as legal institutions attempted to foster
wide-ranging economic development, but by 1900 the theme
was: "hold the line."\(^{59}\) During this latter period, "[t]he notion
was: organize or die . . . ."\(^{60}\) American law was then shaped by
the formation of special interest groups such as labor unions,
industrial combines and farmers' organizations, and law began to
be used more to forestall encroachments upon established
interests. From the Civil War to the end of the century was the
period when "robber barons" grew fat, and the period when

\(^{50}\)Friedman 64.

\(^{51}\)Id 414.

\(^{52}\)Id 384-400.

\(^{53}\)J. Hurst, Law and the Conditions of Freedom in the Nineteenth-Century
United States (1956).

\(^{54}\)Though the narrative does provide this coherent broad overview of nineteenth-
century law, sorely missing is any detailed architectonic conception of the way the
individual topics of substantive law relate to each other. The book would have benefited
from a preface setting forth Friedman's perspective in more detail. A good example is the
orderly conception presented in J. Hurst, supra note 24, at 3-19.

\(^{55}\)Friedman 296, 322; see F. Turner, The Frontier in American History (1920).

\(^{56}\)Friedman 322. Professor Friedman refers to H. Bancroft, Popular Tribunals
(1887). See also H. Bancroft, History of the Pacific States of North America
(1882-90).

\(^{57}\)Professor Friedman's (and Willard Hurst's) great debt to the class-conflict
economic interpretations of Charles A. Beard is obvious. Compare, e.g., C. Beard, An
Economic Interpretation of the Constitution of the United States (1913) with
Friedman 484-87.

\(^{58}\)Friedman 296.

\(^{59}\)Id.

\(^{60}\)Id 322.
"judicial review reached its most bizarre excesses" as conservative judges enlisted constitutional doctrines of due process in the service of economic reaction.

Professor Friedman's treatment of these themes, and particularly the notion of law as an instrument for social change, points up the essentially economic interpretation of American legal history which dominates his book. Occasionally the analysis borders on the purely Marxian. Thus Professor Friedman sees some of the aspects of the history of American law in the latter part of the nineteenth century as a class struggle between the middle-class professionals—especially judges who overturned legislation designed to protect the proletariat—and the newly class-conscious urban worker. Both groups are pictured as scrambling for a share in what both sides perceived as the zero-sum game of the economy. Although it is not always clear from the narrative in A History of American Law, or the work of other American legal historians such as Willard Hurst, perspectives on American legal history other than the economic or the political are possible, and perhaps the most significant failing of Professor Friedman's book is that he does not develop these other perspectives to a satisfactory extent.

One question that remains after reading A History of American Law is the weight that Professor Friedman attaches, or the weight that should be attached generally, to biography, to the definition of the position and significance of particular men in American legal history. Individual lives clearly are of some importance to Professor Friedman, as illustrated by the fact that some of his best and most absorbing writing is the description of particular personages, such as the judicial figures Marshall, Story and Kent. Further, Professor Friedman expounds a commonly-held view that the importance of individual judges

---

61 Id. 298.
62 Id. 300.
63 As Professor Friedman says with regard to usury laws, "by and large it was economic interest, not ideology, that called the tune." Id. 475.
64 Id. 399.
65 Professor Friedman does comment occasionally on the impact of morals on the law, for instance at id. 435, where he states: "In the law of marriage and divorce, religion, sentiment, and morals influenced the law, along with economic and business motives." The reader is left wondering precisely what weight Professor Friedman would attach overall to the continuing nexus between law and morality.
66 Id. 117-18.
67 Id. 288-90.
68 Id. 118-19, 290-92. Indeed, the last must be of particular significance to Professor Friedman, as he picks the death of James Kent to signal the end of one of the eras he describes. See text accompanying note 26 supra. Curiously, he never explains why this date was selected as marking the close of the period rather than, for example, the date of the Civil War, which Roscoe Pound said closed the formative era of American law. R. POUND, supra note 26, at 3.
was markedly decreased after the Civil War. Yet, as Professor Friedman himself acknowledges, the country's benches were not totally without great men during the period, men like Thomas Cooley, Charles Doe and Oliver Wendell Holmes, Jr. And during that time individuals who were not judges, such as David Dudley Field and Christopher Columbus Langdell, were clearly having a profound impact on American law. Though Professor Friedman is sensitive to the importance of great men in legal history, he leaves no definite impression of how their personalities compare in impact with the economic forces which dominate the book. This is a relatively minor flaw in the coherent conception of nineteenth-century American legal history that he has set forth, but one hopes that at some future time a legal historian will further elaborate the importance of biography to the understanding of American legal history.

Another question that the book raises by inference, but does not answer, is the ultimate and continuing importance to American legal history of jurisprudential theories, in particular the natural law theory that, to a greater or lesser extent, law exists apart from the men who interpret or are governed by it, and is ultimately made up of certain immutable principles of common right and reason. Professor Friedman does mention in a footnote that "[a] kind of natural-law aura hovered about the Constitution and the Bill of Rights, even in the late 19th century; this was important but exceptional," However, he never makes a judgment about the continuing importance of natural law theory to American legal history. Since natural law theory presupposes to some degree a notion that law is found or discovered and not made, and since this notion is antithetical to the instrumental conception of law to which Professor Friedman appears to subscribe, it is perhaps not surprising that natural law has received short shrift in his narrative. Yet the omission seems unfortunate, because not only did a natural law aura hover about the Constitution and the Bill of Rights, the Declaration of Independence fairly reeks of it. Also, as Professor Friedman notes, ideas of natural law influenced the adoption of the common law in America, the acceptance of a civil law code in Louisiana, and the cast of mind among prominent late

60 Friedman 331-33.
61 Id.
63 Friedman 385 n.2.
64 Id. 95.
65 Id. 153-54.
nineteenth-century legal educators.\textsuperscript{75} Even today ideas of natural law play a major role in jurisprudential thought in this country.\textsuperscript{76} Given this rather pervasive presence of natural law concepts, it is difficult to believe that they did not have some influence among lawyers and judges,\textsuperscript{77} and to some extent shape American law. This would seem to have occurred in the recent past when Chief Justice Earl Warren habitually disarmed advocates with the insistent query "Is it fair?"\textsuperscript{78}

Thus, some additional insight might be gained from a perspective on American legal history focused more narrowly on jurisprudential notions such as natural law, instead of Professor Friedman’s treatment which concentrates principally on economics. However, Professor Friedman is clearly aware that jurisprudential notions played some part in the growth of American law, and he alludes to the force of the nineteenth-century historical school of jurisprudence (which owed much to natural law theories)\textsuperscript{79} on James Carter, who led the fight against codification in the late part of the century.\textsuperscript{80} Apart from a very few acknowledgments such as this, however,\textsuperscript{81} the impact of jurisprudence or legal philosophy on American law does not seem to be accorded much weight by Professor Friedman. In this connection, it is interesting to note that noneconomic approaches were suggested two generations ago when Roscoe Pound noted at least four possible interpretations of legal history based on jurisprudence.\textsuperscript{82}

One of Professor Friedman’s aims in writing this first general survey was to attempt to provide American legal history with a measure of conventional wisdom, a tradition that others might “attack and revise.”\textsuperscript{83} If the present tradition of American legal history is to be a primarily economic interpretation,\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{75}Id. 531-36.
\item \textsuperscript{76}See, e.g., L. Fuller, supra note 71.
\item \textsuperscript{77}R. Pound, An Introduction to the Philosophy of Law 156 (rev. ed. 1953).
\item \textsuperscript{78}Pickering, Book Review, 84 Harv. L. Rev. 755, 760 n.10 (1971).
\item \textsuperscript{79}On the historical school generally, see R. Pound, Interpretations of Legal History (1923).
\item \textsuperscript{80}Friedman 352.
\item \textsuperscript{81}See, e.g., id. 179-80 (the intellectual and social basis of common law marriage); 98-99 (the attempts following the Revolution to replace “lawyers’ law” with “natural justice, whatever that might mean”); 79 (the influence on codification of the Puritans’ use of the Bible as authority); 94-95 (the impact of the thought of French jurists on the codification movement); 543-44 (the lack of influence of philosophy or social science on late nineteenth-century legal literature).
\item \textsuperscript{82}R. Pound, supra note 79. Pound called these theories of interpretation the “ethical,” “political,” “ethnological and biological” and “engineering theories.” Another theory of Pound’s based on biography was the “great lawyer” theory. Id.
\item \textsuperscript{83}Friedman 9.
\item \textsuperscript{84}Professor Friedman’s forbear, Willard Hurst, was also criticized for his overly economic analysis fifteen years ago. Surrency, Book Review, 1 Am. J. Legal Hist. 195, 196 (1956).
\end{itemize}
perhaps a fruitful attack and revision might center around some resurrected jurisprudential, perhaps natural law, perspective.

A more basic problem with Professor Friedman's analysis which perhaps results from his social science orientation is his central proposition that law is a "mirror of society." Aside from the difficulty that this kind of a statement is so general and so elusive as to be neither greatly meaningful nor provable, the perspective that it fosters tends to emphasize the instrumental and non-normative aspects of law almost to the exclusion of all others. Thus, while Professor Friedman notes the moral component of the criminal law in colonial America, his analysis of it appears to be ultimately economic. Further, while apparently accepting, at least partially, the proposition that laws may be passed simply for their symbolic value in reinforcing dominant norms, and not for instrumental purposes, he does not develop this theme to a satisfactory extent, or reconcile it with the book's predominantly non-normative approach.

Turning away from problems of perspectives on legal historiography, and focusing on Professor Friedman's treatment of more substantive matters, the topics in the development of law before the last few decades of the nineteenth century are treated, in general, quite satisfactorily and straightforwardly. This is true for both the scope of issues discussed and Professor Friedman's evaluation of the substantive trends that he observes. To this reviewer at least, it does not appear that Professor Friedman has left any major stone unturned, and there is thus no need to discuss these substantive topics beyond the short description of them provided at the beginning of this Review, or the topics mentioned as illustrations of the major themes in the book.

Particular problems plague Friedman's analysis of the more recent past, however. Probably the most disturbing to one who received his legal training pursuant to the now widely accepted case method is Professor Friedman's criticism of its founder, Harvard's Dean Langdell. Consistent with his positivistic historiographical view, Professor Friedman appears to be more

85FRIEDMAN 64-65.

86Professor Friedman alludes to this point as having been made by another scholar in connection with the passage of liquor laws, and very briefly draws parallels to the laws governing divorces and lotteries. Id. 511.

87It should be noted, however, that Professor Friedman has "deliberately kept to a minimum" references to constitutional law, and has emphasized the history of state law, since the former has been explored quite adequately by other scholars. Id. 10.

One minor omission is a decent discussion of the trial of John Peter Zenger, a colonial printer prosecuted for publishing statements critical of the crown's government in New York. Zenger's acquittal by a colonial jury, in the face of what appeared to be a clear violation of the criminal libel statute in question, has been seen as an early development in the continuing American struggle for freedom of the press. See generally A BRIEF NARRATIVE OF THE CASE OF JOHN PETER ZENGER (S. Katz ed. 1963).
comfortable with the thinking of the legal realists° of the twenties and thirties such as Karl Llewellyn° and Jerome Frank,° than with the "theological theories of late nineteenth-century figures like Langdell, who viewed law as a science with independent principles of its own. According to Langdell, the scientific study of primary legal sources such as judicial opinions would lead the student to derive "the few, ever-present, and ever-evolving and fructifying principles, which constituted the genius of the common law." Langdell believed that training in this type of analysis would produce the most capable lawyers. Professor Friedman takes a dim view of this shamelessly noninstrumental conception of law, and concludes that:

If law is at all the product of society, then Langdell's science of law was a geology without rocks, an astronomy without stars. Lawyers and judges raised on the method, if they took their training at all seriously, came to speak of law mainly in terms of a dry, arid logic, divorced from society and life.

Searching for a way to explain the widespread acceptance of Langdell's teaching method and ideas, and the almost feverish establishment of the Socratic method, Professor Friedman indulges in a bit of retrospective psychoanalysis. He states that Langdell's method won acceptance because it exalted the prestige of law and legal learning in a period when lawyers needed to justify their monopoly of practice. Perhaps this is one of those areas where grandiose social science analysis proves too much. It is more likely that Langdell's method won widespread acceptance simply because it worked, and produced more capable lawyers than older methods which relied on outmoded ideas of rote learning.

Professor Friedman acknowledges that "[i]t would be more than presumptuous to deal with 20th-century law in a few short

88 Also, as suggested earlier, Professor Friedman's conception of law as a mirror of society shares a weakness of the theories of the legal realists, "a failure to distinguish different levels and points of criticism, and a core ambiguity about the role of values in social and legal thought." See generally Note, Legal Theory and Legal Education, 79 YALE L.J. 1153, 1159 (1970).
90 See, e.g., J. Frank, LAW AND THE MODERN MIND (1949).
91 Holmes called Langdell "the greatest living legal theologian." FRIEDMAN 544.
92 Id. 531.
93 Id. 535.
94 Id. 536.
95 Professor Friedman's analysis occasionally demonstrates the truth of an observation which Roscoe Pound made almost forty years ago, that in American legal history there is such a thing as "too much perspective." Pound, New Possibilities of Old Materials of American Legal History, 40 W. VA. L.Q. 205, 206 (1934).
pages," and then proceeds to do so. Granted, the aims of his epilogue are very limited: "[t]o sketch, very broadly, some of the lines along which law in the 20th century seems to have evolved and to be evolving, and [t]o briefly discuss to what extent this American law is a continuation of what has gone before, or a fulfillment, or a sharp and precipitous break." Unfortunately his epilogue probably raises more questions than it answers.

Professor Friedman certainly notes the main twentieth-century legal developments: prohibition, the New Deal, the civil rights revolution, and the judicial activism of the Warren Court. Yet, as he makes clear "The strands that have gone to make the 1970's what they are, are far too complex for general treatment." Unwilling to let well enough alone, however, Professor Friedman makes an attempt at just such a generalization for twentieth-century law:

> It seems, in the long glance of history (which may be inaccurate too), that here was the unpeeling of one more layer of the onion of rationalism, one further consequence of the sunburst of modern secular thought. In our parochial legal terms, we can describe it as part of the process of making one legal culture out of the vertical pluralism of bygone times. Nobody, of whatever color or condition, seemed willing to accept a lower or despicable status, in law or in fact; to accept the detrimental definitions that an outside majority (or minority) had fastened on its head.

In other words, everybody wanted a piece of the action. True, no doubt, but hardly helpful in reaching a deeper understanding of the history of American law.

More fruitful in that regard, perhaps, would have been a deeper analysis of the mid-twentieth-century phenomenon that "[t]he Supreme Court, particularly when Earl Warren was Chief Justice . . ., took a stand far in advance of public opinion, in protecting unpopular minorities and furthering their interests." In light of the narrative in the rest of the book this activity on the part of the Supreme Court was unique, and was certainly something more than the law acting as a "mirror of society." Professor Friedman, however, preferring to hide under the obfuscating rubric of rationalism, refuses really to analyze it.

---

96 Friedman 567.
97 Id.
98 Id. 576.
99 Id.
100 Id. 578.
Perhaps it is in explaining the Warren Court's rather sudden bounding ahead of legal tradition and public opinion in a multitude of arenas that more focus on legal philosophy, and less on economic and social science concepts, would be helpful. Though this too is oversimplified, perhaps it would have been useful for Professor Friedman to have paused in his epilogue and observed that through his narrative we could watch first a natural law philosophy create the country's Constitution and encourage the acceptance of the common law. A few years later we could observe an instrumental conception of law emerge, as judges became more positivistic and attempted to foster economic development in the years before the Civil War. Subsequently we could see a reaction to this philosophy, as a stultifying conservatism set in on the bench following a national cataclysm, and then a rebirth of the instrumental conception with the legal realists in the twenties. Finally, the circle complete, we might note natural law's return with Warren's query, "Is it fair?"

Perhaps such a cyclical view of legal history is fanciful, but there appears to be a basis for it in the development of the law as described by Professor Friedman.

Two more puzzling peccadilloes perpetrated by Professor Friedman in his treatment of twentieth-century trends are his rather savage comments on the drafters of restatements and on his brother academics. With regard to the former group, apparently shocked by what he perceives as their unwillingness to come to grips with the social or economic consequences of the rules they proposed, he dismisses their work as follows: "They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones." Despite the eloquence of this denunciation, Professor Friedman fails to explain why such potent vitriol is warranted in attacking the restaters, or why in a legal world that he perceives to be governed by the utilitarian, this supposedly fruitless activity, begun more than forty years ago, still proceeds today.

In explaining why the movement for ecological reform

101One particularly obvious shortcoming of this simplified cyclical analysis is that natural law appears at almost every stage in the arguments of some lawyers or jurists who attempt to support their position in the way that politicians link themselves with such elusive values as patriotism and motherhood. Thus during the era which I have said was characterized by a stultifying conservatism, courts were overturning some social legislation on the theory that it was "counter to the broad general basis of Anglo-Saxon civilization." Id. 316. See generally Note, supra note 88.

102An accessible introduction to cyclical historical theory, which might prove useful to legal historians, is provided by A. Toynbee, A STUDY OF HISTORY (D.C. Somervell abr. 1957).

103FRIEDMAN 582.
caught on in the ivory towers in the late sixties Professor Friedman states:

Academics and the leisured class had their own self-interest, as consumers, at stake; they also needed and wanted some way to spend their surplus time and money. Many expended energy collecting stamps, writing histories of China, going to antique shops, getting drunk, and otherwise, but a certain number hit on the environmental crisis, which was real enough, and for which the time was somehow ripe.\(^{104}\)

Though such condescension may be nothing more than harmless twitting of one’s colleagues, it is clearly out of place in a book that purports to dwell on a high plane.

With these criticisms of the book’s historiographical perspective and its substantive treatment of certain subjects completed, it is appropriate to predict of what use the book will be, and to whom. *A History of American Law* will be of relatively limited use to the experienced scholar. Its analysis is almost entirely a result of the examination of secondary sources, and at times the narrative is merely a recapitulation of what has gone before.\(^{105}\) Still, the bibliography is superb, gathers virtually all the important writing in American legal history, and features a helpful short essay discussing the major works.\(^{106}\) Thus the book may be added to the scholar’s shelf as a handy reference and refresher. Where the book may become invaluable, however, is as a supplement or text in the hands of the beginning student of legal history, whether he is a graduate student in American history, or an undergraduate in law. For the former, *A History of American Law* will relate legal developments to what is already known about the student’s discipline. For the latter the book will provide a conception of the breadth of American law which has heretofore been unavailable in a single volume. Finally, in Professor Friedman’s attempt to make the book useful to laymen, an enterprise in which he largely succeeds,\(^{107}\) he has

\(^{104}\) *Id.* 586.

\(^{105}\) This is frankly acknowledged by the author in his discussions of slavery in the colonial period, *id.* 75; the reception of English statutes, *id.* 95; the history of divorce laws, *id.* 181, and mortgage law, *id.* 217; the development of the law of negligence, *id.* 262, and wrongful death, *id.* 415; and Dean Langdell’s reforms at Harvard Law School, *id.* 530. Because so much of *A History of American Law* is rather uncritically accepted from secondary sources, it is clear that the book does not rise to the level of a definitive account of the type that is now beginning to appear with the volumes of the Holmes Devise history of the Supreme Court. See Horwitz, Book Review, 85 Harv. L. Rev. 1076, 1077 (1972); Pollak, Book Review, 82 Yale L.J. 856, 864 (1973).

\(^{106}\) *FRIEDMAN* 596-601.

\(^{107}\) Two problem areas in which additional clarification for the nonlawyer would be
furnished a perfect guide for the first-year law student faced with exams in torts, contracts, property or criminal law, who desperately needs something to tell him what the purpose of these fields of law is, and has been. Turning to Professor Friedman’s book, such a reader will find the answers he seeks (albeit partial ones) set forth in clear, straightforward language.

It is appropriate that a review of *A History of American Law* close with a paean to its author’s purely literary skill. While his analysis may be problematic in parts, he has succeeded admirably in the enterprise for which I still admire my civil procedure professor—making exciting the struggles and personalities that contributed to the development of law. In short, Professor Friedman has contributed to the romance of American legal history. Perhaps his skill as a writer and analyst is best put in Professor Friedman’s own words, which he used to describe the *Commentaries* of Chancellor Kent:

> The style is at all points clear, the exposition transparent. Occasionally [he] even turns a decent phrase or two. He had a sure and impressive grasp of the whole fabric of American law. His jurisprudential thought was not original or profound; but his attitude toward the living law was pragmatic, hard-boiled and often shrewd.\(^{108}\)

In reviewing a book on legal history that has placed so much stock in the importance of social science, perhaps it is justifiable to borrow from psychology, and to accuse its author of a bit of projection.

\(^{108}\)FRIEDMAN 291.