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Review of “Contract Law in America,” By Lawrence M. Friedman

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BOOK REVIEW

CONTRACT LAW IN AMERICA. By Lawrence M. Friedman.¹ Madison: The University of Wisconsin Press, 1965. Pp. x, 280. \$6.50.

The work in American legal history seems to have advanced rapidly over the past few years. In addition to the *Journal*—whose continued existence is itself a hopeful sign—there are an ever increasing number of monographs, editions of lawyers' works, and the like. Most heartening of all, there are even casebooks on the subject.² Nevertheless, it remains a terribly diffuse and unsatisfying field. Nothing seems to relate much to anything else. One result, it seems to me, is that the average lawyer has very little idea of legal history even of the most elementary sort.

I should like to suggest that the reason for this state of affairs is that no one has ever constructed a framework or theory for American legal history that is easily grasped. These exist in abundance for other types of history. Turner's Frontier Theory, Namier's theory of English politics in the reign of George III, or Pirenne's theory about the effect of the Moorish and Norse invasions on European economic development are examples. They exist even in schoolboy history:³ the Puritans came to America to find religious freedom; the Revolutionary War resulted from George III and his ministers refusing to recognize the colonists' rights as free-born Englishmen, etc. It does not matter if such theories are "wrong," even very wrong. Once there is a framework which bears any relation to the facts, it is possible to find some meaning in the whole—often by demolishing the framework or theory. It may be argued that the quantity of the data makes it impossible to construct even the most elementary theory for American legal history at this time. But these are surely no more numerous nor complicated than economic data, and yet economic histories abound, as do social histories, cultural and religious histories, and all the rest. It seems to me that it would be a great advantage to have wide currency given to any theory no matter how outrageous. For example, some such farrago as: the planting and mercantile classes of the seaboard sought to adopt English rules to this country in order to perpetuate their position, but the increasing strength of the small holders and propertyless men on the frontier caused these to be re-

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2. See, e.g., J. SMITH, *CASES & MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* (1965); S. KIMBALL, *HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM* (1966).

3. That is to say, American public schoolboy history, not the sort of thing known to those extraordinary schoolboys of Macaulay's acquaintance.

jected until a new oligarchy arose which demanded a new class-buttrressing legal system, as is shown by the history of the spendthrift trust, etc. Such a theory would enable one to organize the data preliminarily, after which it could be shot down. Of course it would be pleasant to have an elegant and accurate theory, but legal history could use a Parson Weems. Instead we have the *Life and Letters of Mr. Justice——*, the *Records of the Orphan's Court of ——*, etc. All very fine but hard to put together.

There is, however, one body of work which is almost an exception to this, or at any rate one body of work that I am aware of—that being done at the University of Wisconsin under the direction of Professor Hurst. The fact that it does approach a theory would, to my mind, make this work the most interesting and significant that is being done in the United States even if it did not have other virtues—though it certainly has. The reason I qualify the work as almost an exception is that there has not yet come from this school an explicit theory or outline of American legal history, nor have they produced, as yet, a legal history of the United States, or even of Wisconsin.⁴ Nevertheless they do have a theory, or rather two, and these pervade all their work, or so it seems to me. The first is methodological: American legal history, at least in its private law aspects, is the history of individual states and must, in consequence, be studied state by state, in depth. The second theory is that the law is a social phenomenon, and must be studied in its social context with particular emphasis on economics.⁵

Professor Friedman's book is the most recent application of this approach, and illustrates both its virtues and its defects. His decision to investigate the history of contracts apparently resulted from his having taught the subject. The traditional approach would have been to take certain doctrines and

4. Professor James Hurst came fairly close to writing a history in *THE GROWTH OF AMERICAN LAW* (1950), but since he purported to be writing only an institutional history, and avoided treating substantive law developments except incidentally, it does not give the appearance of a general history, though doubtless it contains enough material, even on substantive law matters, to make it possible to consider it as one. Hurst's *LAW AND ECONOMIC GROWTH* (1964), comes closer to being a legal history of Wisconsin, and hence, by extrapolation, of the United States, but the fact that it concentrates on the lumber industry makes this a little hard for the non-initiate to grasp. As a consequence, it seems to me, its impact on the legal community has been small. On the other hand, its very high quality as history is admittedly due in large measure to its concentration.

5. This is based primarily on the work that I have seen that has actually appeared under the aegis of Professor Hurst, works such as that under review, and S. KIMBALL, *INSURANCE AND PUBLIC POLICY* (1960), and G. KUEHN, *THE WISCONSIN BUSINESS CORPORATION* (1959). Professor Hurst's theories about law and society in the United States are, of course, considerably more complex than the summary I have given. See J. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 1-27 (1960). What I am interested in, really, is popularized history and easy theories, and it seems to me that one can legitimately over-simplify the Wisconsin school as indicated.

trace their development from England, through various state courts and commentators down to the Restatement, and even, if he had been feeling daring, the Uniform Commercial Code. Instead he limited himself to one state, Wisconsin, and read all the cases decided by the Supreme Court of that state for three significant periods: I, 1836-1861; II, 1905-1907, 1913; III, 1955-1958. He analyzed the cases and set them in their social and economic context (he does not pay much attention to politics), including relevant legislative activity, during the period. The cases are analyzed in two ways: by subject matter and by doctrine. The most important categories of subject matter in all three periods are land, labor and sales cases, though of course the nature of the transactions litigated varies. So, for example, in the case of land, cases between land dealers and speculative investors predominate in Period I, support cases in Period II, and cases arising out of the real estate subdivisions that were created after World War II in Period III. In general, the cases are relatively unimportant—that is, they are not limited to, or even principally composed of, important disputes between important people or type cases that are important to a lot of people (a test case of the validity of time charges in installment sales for example). There is often, even in the modern period, relatively little money involved. Moreover, though the cases contain indications of their social background, they do not reflect these conditions very accurately. For example, the labor and service cases have almost nothing to do with either agricultural or industrial labor.⁶ The “sales” category excludes sales for resale which are categorized under *mercantile contract*. These are considerably fewer than sales and almost disappear in the modern period.⁷

From the point of view of doctrine, the three most important categories are: fraud, illegality, and performance and breach, though in the third period, there were more cases involving construction (interpretation) than fraud or illegality. However, all of the categories have some cases and there does not seem to be much change from period to period. The doctrine in general does not change greatly according to Professor Friedman.⁸

The legislative activity is somewhat chaotic. As Professor Friedman indicates, all economic regulation affects contracts in a way, and hence he limits himself to certain trends.⁹ In Period I there is a great deal of legislation dealing with debtors and creditors (notably exemptions), and initial governmental regulation (the validity of gambling debts and the

6. Pp. 44-52.

7. Pp. 58-60.

8. Pp. 138-39.

9. P. 141.

like). This increased greatly in Period II with the La Follettes' progressivism (statutes on hours of labor, insurance, licensing of occupations, anti-trust, etc.). These are continued and were tinkered with in Period III (although by this time, the torch had, of course, passed to Washington).

In analyzing these results, Professor Friedman emphasizes the importance of the relationship between contract law and the market. In the early period "legal institutions were so framed as to give support to the market."¹⁰ He points out that this freedom was often used by the powerful to restrict competition—or the market—with the result that statutes were enacted to curb such action.¹¹ He also senses a declining willingness by the courts to apply abstract doctrines. Rather, there is a tendency to arrive at fair results by whatever route is available.¹² At the same time as the decline in abstractness,¹³ there is a decline in activity (in contract matters). This partially resulted from a decrease in the courts' effectiveness as an institution—particularly in the business area, due to its lack of expertise, for example, and the general dislike of law suits. One interesting result of the loss of business is the failure of similar fact situations to recur, which means that the court cannot be as creative as it should.¹⁴ Businessmen solved their own problems among themselves. At the same time the legislature and administrative agencies "usurped" many of the courts' functions. Mr. Friedman traces finally the styles of the courts from creativity to abstraction to "legal realism." In the long run he decides that courts in contract cases (and elsewhere as well) have outlived their function.¹⁵

10. P. 184.

11. Pp. 186-90.

12. Pp. 190-92.

13. By abstractness, Professor Friedman means essentially the traditional doctrines expressed in the usual way. A court that applies "the law" without reference to the particular facts except insofar as these are necessary to determine which person's name will be substituted for the symbols in the formula (offeror and offeree for example) is acting abstractly. A court which, like the New Jersey court in *Hennigson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), interests itself in the economic roles of the parties, changing marketing patterns and the like is departing from "abstractness," and may, if it takes account for example of the susceptibility of the particular plaintiff to be over-reached, recognize the "unique particularity" of the case. "Consumer," "manufacturer," and the like are abstractions of economics and marketing which Mr. Friedman also dislikes. P. 190. But then "elderly invalid," "manual laborer," "small town druggist" and the like are also abstractions—perhaps of art. They have, at any rate, a certain "resonance," as indeed do most (all?) nouns.

14. Pp. 201-02. It is interesting to consider this phenomenon in the light of Holmes' ideas on the way common law grows. See M. HOWE, *THE PROVING YEARS* 82-83 (1963), in which "The Theory of Torts," 7 AM. L. REV. 652, 654 (1873), is referred to.

15. Pp. 210-15.

Mr. Friedman's conclusions from all this, if I understand them, are that contract law began with abstraction (promissor, promisee, consideration, not buyer and seller of farm land, or widow or farmer and rich buyer of farm land). Freedom of contract was substantially the rule, and thus contract theory and economic theory were essentially identical. In the course of the period studied, the "law," which is essentially that agreements will be enforced as made, did not change greatly except where the legislature decided to remove the subject matter from freedom of contract (the permissible hours of labor for example).

This shows, it seems to me, the strength and weakness of the book and the approach. The strength is what Mr. Friedman says it is: the combination of insights which only a depth study can give—and in the United States a depth study of more than one state is almost impossible—together with the help which anyone in the Wisconsin group can get from his fellows.¹⁶ Mr. Friedman sees contracts as conduct of actual people engaged in certain specified activities in a particular economic, social and political context which he is aware of and tells about. Moreover, he does not need to consider only the "contractual" activities of the parties since he has other data about them. The result is then, in fact, a setting out of "law in action." Something we rarely get. In some ways it seems to me that this is the book's most valuable feature. One is forced to see contracts in terms of land speculation, industrial development and populist legislation. Moreover, the extremely varied activities of the state legislature are set out. There may be virtues in abstracting the "Law of Contracts" from its context, as lawyers generally do, but now at least we have a good idea of what the context is.

But there are also disadvantages to the approach, and one is its parochialism. If Mr. Friedman really considered the English law, for example, to say nothing of the continental, it seems to me that he would not be quite so confident in equating the market economy with contract law, nor would it be so clear that its importance had disappeared with its decline in the utterances of the Wisconsin Supreme Court. After all, English property law is essentially a congealed form of contract, from the original feudal tenures to the modern deed (whose immediate ancestor was, in terms, a contract of sale). This is to say nothing of the law of trusts or the Strict Family Settlement.

Moreover, while it is of course true that the standard sources for seventeenth and eighteenth century law, such as Blackstone and Viner, contain little on contract, as Professor Friedman points out,¹⁷ this may mean only

16. P. vii.

17. P. 17.

that the common law courts were leaving this subject matter to other courts or tribunals. Or, for that matter, that Common Law commentators did not care to talk about it, for the seventeenth and eighteenth century reports are so poor that we cannot say with confidence what the courts were doing. But in any event, if we move across the Channel, there is something very like our law of contracts which existed before a market economy had developed. Thus, Grotius, writing in 1619-21 on the law of the Netherlands, placed freedom of contract at the beginning of his discussion of the law of obligations. He then proceeded to treat such familiar topics as capacity, illegality, cause, conditions, unjust enrichment, and offer and acceptance, as well as a number of special contracts.¹⁸ In Pothier, a century or so later (a book that was widely circulated in the United States and England) there is a similar organization.¹⁹ Then at the time Langdell and similar thinkers were doing the organizing of contract law which Mr. Friedman dislikes so, the modern continental codes were being drafted or enforced, and these seem to me to contain rules remarkably like those of the Restatement,²⁰ and the most recent addition to the group, the 1964 Civil Code of Russia.²¹

It may be, of course, that a study like Professor Friedman's of the actions of Dutch courts over the past 350 years would yield results very similar to his study of 120 years of Wisconsin legal history. I should not be at all surprised if it would. But the fact that Europeans generally seem to express roughly the same ideas about contract as ours, and regard it as useful to express them—if this is indeed the case, and it may simply be that I misread the foreign law—is itself a cultural fact or datum of considerable significance. One cannot ignore Christianity simply because one finds the Bible hard (or impossible) to believe. And I do not mean to be sacrilegious for I think that the mental attitudes of the higher criticism and those of legal realism are similar. It is just that one is a century behind the other. And Professor Friedman's work—like that of his colleagues—seems to me to be in the direct line of that of the legal realists.²² So far this has been much

18. H. GROTIUS, *THE JURISPRUDENCE OF HOLLAND* 295-307 (Lee transl. 1926).

19. *See* M. POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS* 2-63 (2d Am. ed. Evans 1839).

20. In the *FRENCH CODE CIVIL*, the preliminary provisions on contracts are § 1101, definition of contract as an agreement to give, do or omit doing something; § 1102, definition of bi-lateral contract; § 1103, definition of unilateral contract. § 1108 gives four essentials to a contract: consent; capacity; a certain object; legal *cause*. The provision on the preeminence of the contract over other provisions of the law once it is entered into is § 1134.

21. *See, e.g.*, *CIVIL CODE OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC: AN ENGLISH TRANSLATION* §§ 158, 160-65, 167 (W. Gray ed. 1966). Of course there are differences. *Id.* at §§ 159, 166.

22. Curiously, Professor Friedman does not mention Professor Llewellyn's work on the

stronger on the destructive side than in replacing the old myths with new ones (or hypotheses or theories if one prefers). Mr. Friedman offers the market—in effect, an economic interpretation of contract. There are other objections to this besides the historical,²³ but on the other hand it does offer a framework on which to organize the data and thus gives the work a coherence it otherwise would not have. Doubtless that is sufficient justification for it.

All of this is just to say, I suppose, that I do not believe that Professor Friedman has written *the* history of the American law of contracts. But he has written *a* history, and that is something we did not have before. Anyone who reads his book attentively may well find points with which he disagrees, may indeed disagree with the whole theory, but by disagreeing he will, in effect, construct his own theory, his own history, and that is just what a good history should produce.²⁴ Good histories also sometimes produce expanded second editions by the same author, and such a work would in this case be most welcome.²⁵

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change that has taken place in the work of the appellate courts in the United States although their analysis seems to me to be similar in many ways. To be sure, Professor Llewellyn seemed to feel that the courts had progressed to a valuable new style or method. See K. LLEWELLYN, *THE COMMON LAW TRADITION* 41-45 (1960), while Professor Friedman apparently regards the current approach as one of many aspects of the decadence of state courts. Pp. 213-315.

23. One of which is pointed out by the author. One of his principal categories in Period II is support cases, *i.e.*, cases involving agreements, usually by children, to support their parents in their old age. In exchange the parents give property, such as a farm, to the children. Later there is a dispute over whether adequate support has been given. There does not seem to be much point in connecting such agreements with the "market," particularly if, as Professor Friedman suspects, they are, for the most part, an attempt to reproduce by means of contract the European village customs of those who entered into them. Pp. 36-37.

24. A view shared by Holmes it would seem. See H. HOWE, *THE PROVING YEARS* 137 (1963).

25. It would be nice, for example, to have *all* the cases decided by the Wisconsin Supreme Court since its founding, but that is unquestionably too much to ask. More within the range of possibility, perhaps, would be to have fuller reports of the cases and statutes that were studied. Thus a list of all 585 of them with a brief statement of the category and principal doctrines applicable to each would be desirable. Most important of all, of course, would be to have Professor Friedman's additional conclusions or opinions as he continues to work with the material.

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