Introduction

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The chapters in this volume approach and bounce off a common object from many different angles. That object is the set of concepts, themes, methods, and conclusions in the work of one of the most influential and productive scholars of law and society, Lawrence M. Friedman of Stanford University. The authors are an international cast of distinguished scholars of law and society: legal sociologists, legal historians, and students of comparative law. This book is not a Festschrift in the usual sense of a collection of miscellaneous essays by colleagues and disciplines assembled to honor a great scholar. Rather it is a sustained examination and application of the scholar's ideas and methods. Some of the writers directly assess and comment on Friedman's vast body of work. Some examine his conclusions to see how well they have stood up over time. Others apply concepts and insights derived from Friedman's work to the study of similar problems in different periods and societies. Still others use Friedman's concepts and insights as a foil or contrast to their own approaches to studying law and society from theoretical perspectives very different from his.

We should say a few words first about the extraordinary man whose ideas and their applications are the centerpiece of this volume. Lawrence M. Friedman was born in Chicago in 1930. He received a B.A. at the age of 18, a J.D. at 21, and an LL.M. at age 23, all from the University of Chicago. He practiced law briefly in Chicago before becoming a law teacher at St. Louis University (1957–60), University of Wisconsin (1961–8), and ultimately Stanford (1968–present), where he is the Marion Rice Kirkwood Professor. At Wisconsin, James Willard Hurst, the guiding influence on Friedman's life's work, recruited him to the study of the mass of the legal system's ordinary business; Friedman is generally regarded as Hurst's successor as the greatest of American sociolegal historians. He is also preeminent among

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comparative sociologists of law and has been president of both the American Society for Legal History and the Law and Society Association.

Friedman is extraordinarily prolific. He is the author of 18 books, an editor of 8 more, and has written more than 200 articles. His work falls into four broad categories:

1. Studies of patterns of legal enactments and decisions in particular fields of American legal history: His pioneering study of 500 Wisconsin contract cases in three different periods, *Contract Law in America* (1965), was followed by monographs on government slum housing policy, the political-economic origins of workers' compensation laws, the impact of business cycles on the legal regulation of usury, longitudinal studies of the business of state courts, the rise of personal injury litigation, changes in the law of wills and trusts, the courts' treatment of occupational licensing laws, changing patterns of family and divorce law (e.g., *Private Lives: Families, Individuals and the Law* [2004]), morals regulation (*Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy* [2007]), and the history of criminal justice policy (e.g., *Crime and Punishment in American History* [1993], a Pulitzer Prize finalist), among many others.
2. Synthetic general works of legal history, such as *A History of American Law* (1973, 3d ed., 2005) and *American Law in the Twentieth Century* (2002), building on the monographs but supplemented by research into hundreds of other topics.
3. Work in legal sociology on the relation between legal enactments and social change, the interpretation of legal texts, and variations in legal cultures, illustrated by comparative and historical examples (e.g., *The Legal System: A Social Science Perspective* [1975]).
4. Reflections on large-scale social trends affecting the design and development of legal systems in the West, particularly in the United States: *Total Justice* (1985), *The Republic of Choice* (1990), and *The Horizontal Society* (1999).

Underlying all of Friedman's work are certain consistent unifying themes:

- Social conditions create law, and law changes in response to social forces. Friedman treats law "not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as the mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. . . . The [legal] system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls. . . . [T]he strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups" (*A History of American Law*, 12).

- Thus law has little autonomy: Law's distinctively legal doctrines, principles, and procedures have little independent importance; legal "traditions" do not by themselves account for much of the current content of law. Law is constantly changing because society changes; when law seems to stand still, it does so not because of the force of precedent, inertia, or "lag," but because powerful background forces have stalemated and current interests are pushing back against pressures for change. Likewise, the forms of law – for example, whether it uses rules or standards, strict or loose interpretations of texts and legal instruments – are usually functions of background demands on legal systems. Change internal to the legal system cannot in itself bring about large social consequences. Law cannot consistently or for long periods remain out of sync with the interests of the powerful in society. The historian or social scientists looking for explanations of legal change will most likely find them in the study of social interests, forces, and demands – not in the doctrines, principles, or internal structures of the legal system. Similarly, legal change is most likely to be effective when it is supported by powerful interests.
- The background demands in modern societies tend to follow broadly convergent patterns of development or modernization. Developed commercial and industrial societies differ from one another in details, but tend to follow similar developmental paths, which produce similar legal doctrines and consequences.
- Although similar in general shape, social demands on legal systems are mediated through variable "legal cultures" – that is, by people's – including legal professionals' – ideas, attitudes, and expectations about law and legal process that help condition what sorts of demands social groups will make on their legal systems.
- Legal cultures also mirror general social trends of modern societies, such as the growth of individual rights-consciousness and the sense of personal entitlement to create and develop selves through choices. These social trends translate into claims on legal systems to provide "total justice" – to play an active role in preventing and compensating violations of rights and to provide security and space for the exercise of personal autonomy.

Along with these general theoretical commitments – and partly as a result of them – Friedman has also developed a distinctive set of working assumptions and methods.

- Friedman is inclined (as we noted earlier) to look for the sources of legal change in external social pressures and interests that generate demands on legal systems. To explain legal change he tends to privilege technological change, social structure, and political movements. He is skeptical of explanations that identify elite theories or ideologies, such as philosophical or juristic movements, legal principles, or the rhetoric of legal opinions, as motors of change. However, he is not any kind of economic determinist: People act out commitments to values as well as interests.

- Like his mentor Willard Hurst, Friedman prefers to study routine rather than exceptional legal phenomena: the output of state legislatures and courts rather than large federal constitutional cases, the commonplace legal problems of ordinary people, the routine dockets of trial and appellate courts. He likes to find his research materials in the courthouse basement. He has written pioneering studies of routine criminal processing in the courts of Alameda County and general court dockets in San Benito County, both in California; of the business of trial courts and appellate courts; and of historical trends in tort and divorce litigation and in morals regulation.
- Although Friedman's general theoretical and methodological commitments are clear, firm, and consistent over a lifetime's work, he is remarkably nondogmatic. His main commitment is openness to being surprised by whatever the data of his research are likely to yield. When he goes on one of his many foraging expeditions into documents in the basement, he has very few preconceived notions about what he is likely to find there – except the general notion that it is *there*, that the truths about law are to be found in the mass of evidence that is collected at the bottom of the system. In the service of that commitment he has made many original discoveries that, where there was previous work, have upended received ideas and, in other cases where he was the first to venture, have laid the foundation for future scholarship.
- Not least important, Friedman has a commitment to an informal and accessible style. Like his preference for studying routine enactments that affect the lives of ordinary people and his privileging of bottom-up social demands as causes of legal change, this is a democratic commitment. Law should not be a mystery; its archaisms are more likely to be affectations than attachments to traditions; and there is no legal doctrine or practice, however technical, that cannot be expounded clearly.

Friedman's prolific output, manifold original historical discoveries, distinctive and forcefully expressed theories of law and society, vast comparative learning, and charming and accessible prose have made him one of the most cited and influential of legal scholars. He is as well known or perhaps even better known internationally as in the United States, and his books have been translated into many languages.

We now introduce the chapters in this volume.

GENERAL OVERVIEWS AND ASSESSMENTS OF LAWRENCE FRIEDMAN'S WORK

Contributors to the first section of this collection treat Friedman's work directly. They give overviews of some of its major themes and provide assessments of its central assumptions and conclusions.

Lauren Edelman's (University of California, Berkeley) "Lawrence Friedman and the Canons of Law and Society" summarizes the basic elements of Friedman's sociology of law. The most important theme is that law is not autonomous, but rather a part of society, a product of social forces; likewise it is dependent on outside social conditions in its effects. Social actors make demands on the legal system and these determine the content of law, but once in place, law has independent feedback effects on social life, affecting the type and shape of future demands. Legal change is most likely to be effective if it reinforces and furthers social changes already in process. Thus to understand the legal system, one has to study it from the outside; its internal doctrines and arguments give little guidance as to how it actually works. And one has to study it in action; the focus is on the grubby detail at the working level of trial courts, bureaucrats' and lawyers' offices, police on the streets, clients, and prisoners.

In "'Then and Now': Lawrence Friedman as an Analyst of Social Change," Vincenzo Ferrari (University of Milan) assesses where Friedman's work places him in the company of sociologists generally and of sociologists of law specifically. Friedman belongs in the rare company of scholars who study law from the outside and develop theories of its functioning as part of a macro-social system, but who also investigate empirically how specific changes within the law are affected by social factors. Friedman is willing to be loose and eclectic in his choices of theory and method. He is a "functionalist" in his concern with analyzing legal institutions such as courts in terms of how they "work," their social purposes and effects, but he does not assume that such functions are benign. The most recurrent theme in his writing is that of social change, law "then and now." Friedman is a particularizer in that his historical work searches out undiscovered and often surprising details. However, he is also a generalizer, who finds large-scale trends and tendencies in (especially) Western legal practices and legal cultures, such as the growing expectation of "total justice," which results in more claims on the legal system for redress, and the growth of "expressive individualism" and tolerance for individual choices.

Victoria Saker Woeste (American Bar Foundation), "Lawrence M. Friedman and the Bane of Functionalism," draws on Friedman's work in legal history to arrive at conclusions similar to those of Ferrari. She addresses the charge made by some of Friedman's critics that he is a "functionalist" or "instrumentalist"; that is, someone who reduces law to an epiphenomenal (or, as Marxists say, "superstructural") effect of material interests and forces. Woeste argues that Friedman is indeed suspicious of the "judicial mind" – intellection by judges, the formal content of legal reasoning, or even judicial psychology – as an important explanatory variable in accounting for legal change, because he believes that change inside the legal system is largely explained by change in outside society as mediated through variable "legal cultures." Yet Friedman is not a crude materialist: He accepts a large variety of social factors as influences on legal change and is pluralist and nondogmatic in attributing influence.

In "Lawrence M. Friedman's Comparative Law," Tom Ginsburg (University of Chicago) examines Friedman's contributions to scholarship on comparative law. Although not a recognized player among scholars of comparative law, Friedman has made important contributions to that field by "asking the right questions." Some law and development writers believe that law does (or should) evolve toward uniform norms of legality; others argue that law is irreducibly culturally specific. Friedman takes a middle ground, asserting that some kinds of law (like commercial law) tend to converge with globalization and modernization, whereas others (like family law), rooted in religion and tradition, are less likely to do so; in any case converging law is a product, not a cause, of social and economic development. He is very critical of the kind of standard comparative law work that compares doctrines across legal cultures or else classifies whole legal systems into families according to their genealogical origins. Both of those approaches treat law as an autonomous system, insulated and independent of social forces. Friedman does not believe law is autonomous, but neither is it reducible to the product of social forces. Societies mediate social demands for law in different ways, depending on variations in social attitudes toward and expectations of legal systems; that is, of "legal cultures." Yet that does not mean that legal cultures are incommensurable: They too are subject to change and tend to converge as societies modernize.

APPLICATIONS OF CONCEPTS, INSIGHTS, AND METHODS IN FRIEDMAN'S WORK

Legal Culture

As Lawrence Friedman defines it, "legal culture" is a broad umbrella concept that includes the whole complex of ideas, attitudes, values, and opinions that people in a society hold about law, lawyers, courts, and the processes of lawmaking. One aspect, and an important one, of legal culture is popular legal culture, which includes the representations of law in mass media, arts and letters, and entertainment. Friedman was one of the first scholars to write extensively about law and lawyers in popular culture. In "To Influence, Shape, and Globalize: Popular Legal Culture and Law," Jo Carrillo (University of California, Hastings College of the Law) explores Friedman's views of how cultural representations both mirror and distort the legal system, and the effects that those reflections and distortions have on the demands that people make on legal systems and on their confidence in outcomes.

José Juan Toharia (Universidad Autónoma de Madrid) has carried out several research projects attempting to operationalize Friedman's concepts of legal culture – both internal (to the legal system) culture and external legal culture. In his chapter here, "Exploring Legal Culture: A Few Cautionary Remarks from Comparative Research," Toharia reports on some of the limitations and difficulties of public opinion research into how ordinary people view and evaluate the legal

systems – specifically the courts – in their societies. He notes that survey research on courts tends to be distorted by several common sources of error: "top-of-the-head" responses reflecting superficial commonplace opinions, rather than the results of actual experience or reflection; "clichéd" responses based on stereotypes or prejudices that tend to disappear on more probing questioning; and opinions that are subject to rapid fluctuations or instabilities in public opinion. He concludes that the corrective is the use of sharper and subtler methodological instruments for assessing opinion and cross-checking comparisons across time periods and societies.

Total Justice

Perhaps the best known and the most controversial of Friedman's ideas about legal culture is his theory of "total justice." *Total Justice* (1985) argued that in the early twentieth century Americans began to experience what eventually became a major shift in their demands on the legal system. Generally speaking, nineteenth-century Americans who suffered harm accepted it as the outcome of fate or bad luck or their own fault. By the twentieth century, however, they began to believe that if they were harmed, someone or something else must have caused the harm and could and should be legally blamed for it, made to redress or pay for it, and change their ways to prevent such harms from happening in the future.

In this volume two leading scholars of law and society debate the extent to which the growth of demand for total justice ever was – and if it once was has continued to be – the master trend that Friedman maintained it was. A third scholar then comments on how total justice has become a demand for justice and accountability in international as well as domestic law.

First, Marc Galanter (University of Wisconsin-Madison), in "The Travails of Total Justice," looks at developments since the 1980s to ask whether the total justice thesis may require qualification or abandonment. He cites the campaigns for constriction of tort remedies, the reform of civil justice (managerial judging, diversion to alternative dispute resolution [ADR], fewer trials), the U-turn toward more formalistic contract law, the deregulation of usury, the curtailment of bankruptcy protection, harsher criminal penalties, the collapse of the rehabilitative model, the vast increase in imprisonment, and other changes that can be interpreted as reflecting a turnabout or change of course from the total justice trend. He concludes by asking, Was it truly a master trend or just a local blip?

Robert A. Kagan (University of California, Berkeley) takes up the challenge posed by Galanter. In "'Total Justice' and Political Conservativism" he reexamines the total justice thesis from the roots up. He first points to evidence that tends to qualify the argument that the expectation of total justice was ever sweeping and uniform: In twentieth-century America, plenty of groups continued to believe that people were largely responsible for their own fates and should not look to the legal system to bail them out. Conservative individualism and distrust of government have always

been a barrier to the construction of a comprehensive welfare state. Like Galanter, Kagan acknowledges that these counter-tendencies have grown stronger in recent years and have partially rolled back liberal policies promoting security against risk and compensation for harm. Yet he concludes that despite these trends, total justice lives! The norms of security and redress for harm are sturdily embedded in policies and popular expectations.

In a third chapter on total justice, "Failures of War Tribunals from Leipzig, Nuremberg, and Tokyo to Milošević and Saddam Hussein," Erhard Blankenburg (Free University of Amsterdam) argues that total justice is an obsession not only of everyday (American) life but that it also has a grip on international war politics. Although European aristocrats in the nineteeth century still could look at their territorial wars as the ultimate means of politics among family members, modern national leaders have to find legitimacy in morally destroying the enemy regime. Courts and tribunals are new players in the game, and the media have become as important as conventional weapons. With courts defining what is seen as "bellum iustum," a body of law is being built up, with Nuremberg and the Yugoslavia tribunal as the main precedents. Yet this is a risky game that can easily be lost by those playing it. The dilemmas of the Saddam Hussein tribunal demonstrate that a war can be lost not only on the battlefields but also in the courtroom.

THE LEGAL PROFESSION

One of Friedman's abiding preoccupations has been the legal profession. The chapter by Philip Lewis (Oxford University), "Friedman on Lawyers: A Survey," provides a critical survey of Friedman's body of work on lawyers. In *The Legal System: A Social Science Perspective* (1975), lawyers play a significant part, albeit briefly described, in transmitting messages from legal actors to those intended to be affected by them. Friedman touches on their role as advocates and advisers to the latter even more briefly and scarcely mentions the significance of their legal culture, as part of the "internal legal culture." In later, mainly historical work, Friedman portrays lawyers not just as messengers or information brokers but also as a group who would put their legal knowledge to use wherever and in whatever way it might pay them. Relaxed admission requirements worked to promote this internal culture that facilitated, and perhaps encouraged, further demands and an external legal culture of resort to lawyers. Lewis's chapter considers how these historically based observations fit with the more theoretical approach taken in *The Legal System*.

In "Legal Culture and the State in Modern Japan: Continuity and Change," Setsuo Miyazawa (Aoyama Gakuin University Law School) and Malcolm Feeley (University of California, Berkeley) examine an aspect of internal legal culture – recent changes in the Japanese legal profession – in the context of a longer historical background. Pre-Meiji law was not autonomous, but rather was a branch of administration, the instrument of a benevolent paternalism. Meiji-era regimes

tried to continue this tradition of state control, but by importing Western models, they unintentionally helped build and strengthen an autonomous profession and the ideal of the "rule of law" as a constraint on the state. Even after World War II, however, the judiciary remained mostly passive; access to justice was limited, and the private bar was small (relative to those of the West), weak, and dependent on the state. Recent reforms – the expansion of the bar, the creation of new independent law schools, the growth of public interest law challenging the state – though modest, may yet help strengthen the profession as an autonomous element of civil society

LAW AND LARGE AREAS OF SOCIAL LIFE

Lawrence Friedman's exceptionally wide-ranging historical and comparative knowledge has enabled him to survey interactions between law and society over long sweeps of time and across many societies. The chapters in this part follow his example and adopt many of his insights and methods to large areas of social life: law and contractual relations, law and the environment, law and religion, and law and the family.

Law and Contractual Relations

In "*The Death of Contract*: Dodos and Unicorns or Sleeping Rattlesnakes?" Stewart Macaulay (University of Wisconsin-Madison) reassesses and updates the argument of Friedman's first major book. *Contract Law in America* (1965) tells a story about legal doctrine. Judges and scholars imagined a contract law that was general, timeless, and wholly abstract, indifferent to context and the situations of parties: such a law, they thought, would be certain and predictable and give effect to free choice. In contrast, Friedman showed that from early on the Supreme Court of Wisconsin bent specific rules and the letter of written contract terms in particular cases. He argued that no economic system could operate with truly abstract contract law, particularly in times of rapid economic development. Notwithstanding the court's undercutting the formality of contract, Wisconsin's economy prospered. In this book Friedman also argued that frequently litigated situations quickly move out of general contract law into specialized statutory and administrative regimes so that the general contract law taught in law schools is a law of leftovers. Macaulay thinks that Friedman's argument was true for its time, but that since then the general abstract and formal law of contracts has undergone a resurgence as a tool used by business interests to impose terms on and to defeat regulation on behalf of workers and consumers.

Law and the Environment

Robert V. Percival (University of Maryland), in "Law, Society, and the Environment," shows how Friedman's ideas about how social forces shape law and how

law, in turn, influences society can help illuminate why we have environmental laws, why they often seem impossibly ambitious, and why they have been highly successful in some areas but not in others. Percival traces the history of environmental law from its common law roots to the vast federal regulatory infrastructure that prevails today. Political theory predicts that federal regulatory legislation to protect the environment should not exist because it imposes concentrated costs on politically powerful industries to provide diffuse benefits to the general public. Yet enduring public support for environmental protection ultimately produced transformative regulatory legislation during the 1970s and 1980s. Although critics of federal environmental regulation decry the laws' strict directives as inefficient and costly, they have been largely unsuccessful in efforts to roll back the federal regulatory infrastructure. Percival's chapter explains why these efforts have failed, focusing on the symbolic value of the environmental laws and their remarkable tolerance for innovations that soften their impact. The chapter concludes by examining the limits of law and the importance of social norms in shaping human behavior that affects the environment. Public demand to protect human health and the environment is an important aspect of the "total justice" phenomenon Friedman has described, but environmental law has been most successful when it has employed approaches that reinforce preexisting social norms, while failing miserably when it has attempted to dictate changes in individual lifestyles. Environmental law's promise of comprehensive protection for future generations has helped society feel virtuous, much like what Friedman has described as the "Victorian compromise" of nineteenth-century morals legislation, even while tolerating individual behavior inconsistent with some of its basic premises.

Law and Religion

In "Separating Church and State: The Atlantic Divide," James Whitman (Yale University) explores what appears to be a strange contradiction. Americans are proud of the strict separation of church and state mandated by their constitutional law. In particular, they often compare themselves favorably with continental countries like France. Yet to outside observers America often looks very much like an aggressively religious country. In contrast, France may tolerate some intrusions of the state into religious life, but French religion is kept scrupulously out of French politics. The United States may have a strong form of the separation of religion and *state*, but it has at best a weak form of the separation of religion and *politics*. Like other continental countries, France has a strong form of the separation of religion and *politics*. What explains these differences? Whitman proposes an explanation based on some large claims about the comparative history of church–state relations in France and the Anglo-American world. In France, he asserts, the state has assumed many of the historic functions performed by the medieval church. In contrast, in America, historic church functions have generally either been left to the churches