

COMMENTARY

PERSPECTIVES ON THE DEVELOPMENT OF AMERICAN LAW: A CRITICAL REVIEW OF FRIEDMAN'S "A HISTORY OF AMERICAN LAW"*

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On its publication in 1973, Lawrence Friedman's *A History of American Law*¹ was uniformly and deservedly well-received.² In a number of ways, it is a great work of legal scholarship. For the first time, we have a comprehensive account of the development of American law in the 19th century.³ It is an account unified by an apparently powerful vision, informed by the "skeleton key" provided by modern social science,⁴ of the relationship between the law and the wider society. It is also a deeply flawed work. Professor Friedman's perspective leads to serious distortions when particular problems are examined; indeed, I believe that these distortions are so serious that the work will shortly

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

2. See Ely, Book Review, 26 *VAND. L. REV.* 1353 (1973); Johnson, Book Review, 23 *DEPAUL L. REV.* 1086 (1974); Semonche, Book Review, 60 *J. AM. HIST.* 1087 (1974); Spitz, Book Review, 36 *OHIO ST. L.J.* 376 (1975); Tucker, Book Review, 86 *HARV. L. REV.* 1625 (1973). Professors Murphy and Nelson, in their reviews, treat the book as essentially noninterpretive. Murphy, Book Review, 26 *STAN. L. REV.* 701 (1974); Nelson, 18 *AM. J. LEGAL HIST.* 182 (1974). Reviews by Lurie, Mazor, Presser, and White contain criticisms similar to mine, although none develop the criticisms at length. Lurie, Book Review, 27 *RUTGERS L. REV.* 354 (1974); Mazor, Book Review, 60 *MINN. L. REV.* 147 (1975); Presser, Book Review, 122 *U. PA. L. REV.* 217 (1973); White, Book Review, 59 *VA. L. REV.* 1130 (1973).

3. The first section (FRIEDMAN, *supra* note 1, at 29-90) deals with the colonial period, and the epilogue (*id.* at 567-95) with the 20th century. Professor Friedman is plainly less comfortable with the colonial material than he is with later developments, and the modern material is no more than a sketch tacked on so that the book might be presented as a complete history of American law to the present day. The colonial section occupies 10% of the text, the epilogue 5%.

4. FRIEDMAN, *supra* note 1, at 10.

become no more than a useful compendium of facts. In a field as broad and disorganized as American legal history, composing such a compendium is an accomplishment that I do not disparage. But Professor Friedman quite clearly conceived of his work as a major force in shaping future interpretations of American legal history.⁵ Because the perspective it offers is so skewed, however, it is best treated as the last great work of the 1950's, not as the first work of the 1970's or 1980's. This essay will present an alternative to Professor Friedman's materialist perspective on legal history, an alternative that may lead to a more satisfactory account of the development of American law.

I. THE LEGAL ORDER AS A PLURALIST DEVICE

Professor Friedman describes his perspective clearly on the first pages of the book:

This book treats American law . . . not as kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society.⁶

This description is elaborated in the introduction to Professor Friedman's initial discussion of substance: "The [legal] system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls. The laws . . . reflect the goals and policies of those who call the tune"⁷

The metaphor of the mirror is central to Professor Friedman's conception of American legal history, and this essay could be seen as an extended critique of that metaphor.⁸ It develops two criticisms of Profes-

5. Professor Friedman's effort to avoid responsibility for errors must be ignored. He writes, "This book . . . is offered up . . . as a whipping boy, a primer, something to react to; a shape for the field, even if others find it misshapen." FRIEDMAN, *supra* note 1, at 10. Perhaps that is adequate to defuse criticisms of particular errors of interpretation, but no one writes a 595-page book honestly believing that others might correctly find that the entire perspective of the work is wrong.

6. FRIEDMAN, *supra* note 1, at 10.

7. *Id.* at 14. These quotations may become the standard historiographical excerpts from the work. See, e.g., Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW AND SOC'Y REV. 9, 10 n.3 (1975); Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC'Y REV. 57, 61 n.9 (1975); Ely, Book Review, 26 VAND. L. REV. 1353, 1353-54 (1973); Johnson, Book Review, 23 DEPAUL L. REV. 1086, 1086 (1974). Another example is found at FRIEDMAN, *supra* note 1, at 474: "Court decisions did not create economic conditions, trends, and business practices; rather, it was these which made decisions and laws." In a more recent work, L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (1975), Professor Friedman adopts essentially the same point of view. There are modifications on particular points (*see, e.g., id.* at 51 (on symbolic legislation); *id.* at 143 (distinction between long-term and short-term relation of law and society suggested but disparaged)), but the main theme is repeated: law is a mirror of society (*see, e.g., id.* at 20, 36, 142-43, 175). On the whole, the analysis of the later book is less subtle and more schematic than that of the earlier.

8. Another way of using the metaphor would be as a hypothesis. But Professor Friedman does not test the hypothesis against any competing ones. The only alternative that

sor Friedman's pluralist, materialist perspective. First, by taking as settled that the legal order is a faithful mirror of the social and economic order, Professor Friedman ignores the influence of autonomy on the legal order: he ignores the possibility that some changes in the law may be explicable solely in terms of the autonomous internal dynamics of the legal process and the possibility that the legal order may become an active influence, to some degree, on the social and economic order. Second, by focusing exclusively on the material interests of "those who call the tune,"⁹ he ignores the ideological functions of the legal order, as a means of persuading both oppressor and oppressed that their conditions or existence are just.

Before I develop these criticisms in detail, I must clarify several interpretations of the work upon which they are premised: that Professor Friedman presents the history of American law from a consistent perspective, that he regards the relation between law and society as nonproblematic, and that he treats the legal system as reflecting the material interests of the economically dominant elements in the society.

A. *The Consistency of Professor Friedman's Presentation*

Professor Friedman's general statements of perspective, such as those already quoted,¹⁰ strongly suggest that he does have a consistent overall approach. However, as excerpts to be discussed later show, when he presents particular analyses, his approach is more eclectic: pluralism forms the general framework, but notions of justice, sympathy for victims, bureaucratic necessity, or other considerations form an almost random assortment of additional factors used to fill out the presentation. Notwithstanding this eclecticism, I believe that it is truer to Professor Friedman's intentions, as expressed in the introductory remarks designed to tell the reader what to expect from the book, to consider the general perspective on its merits.

B. *Professor Friedman's Determinism*

Professor Friedman asserts that law is always molded by economy and society and flatly rejects ideas of autonomy. I could not sensibly claim that the law is never "molded by economy and society" or that it is always autonomous and responsive exclusively to the rationalistic urges

enters his consideration is that the development of the law is only the result of a fortuitous accumulation of events that are never systematically related, and he vigorously rejects that alternative. The vigor is itself odd, because for the last 20 years very few of the best, and not many of the lesser legal historians, have considered legal development to be accidental, affected solely by factors internal to the legal order, or whatever. For a brilliant historiographical essay, see Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC'Y REV.* 57 (1975). Also, the metaphor as a hypothesis is obviously too general.

9. FRIEDMAN, *supra* note 1, at 14.

10. See text accompanying notes 6 and 7 *supra*.

of treatise-writers or appellate judges. But Professor Friedman's claim is equally deficient. The claim might be accepted if it were properly confined to the analysis of what Marxists call "world-historical" changes. For example, the development of modern law is undeniably closely related to the transition from feudalism to capitalism, and the current controversy over the proper scope of the legal system, the crisis of modern law, has something to do with the development of the modern welfare state. But Professor Friedman does not limit his concern to such systemic questions. Indeed, in a history of American law up to the year 1900 it would be very hard to do so, since American society did not undergo such systemic changes in that period. Instead, Professor Friedman claims that rather particularized developments—the contours of 19th century tort law, the law of slavery, and so on—are molded by economy and society. As this essay will show, such a conception cannot adequately explain the development of certain aspects of American legal history. Thus, we have to conceive of the legal order as relatively autonomous, responsive directly to social or economic needs at some times with respect to some matters, responsive indirectly at other times or on other matters, and not responsive at all in still other instances. This formulation also helps to identify fruitful areas of further inquiry; one might, for example, write a narrative history of the law's relative autonomy,¹¹ or one might try to discover the circumstances under which the law's autonomy increases or decreases.

Indeed, I suspect that Professor Friedman's monographic work should not be seen as primarily vindicating his overall perspective, but as demonstrating that in many areas the law was not significantly autonomous during the 19th century. *A History of American Law*, despite its commitment to the view that the law is never autonomous, occasionally betrays a backhanded recognition that the question of autonomy may be answered differently at different times.¹² Unfortunately, Professor Friedman's commitment to his general perspective is forceful enough to lead him to treat such things as the law of slavery solely as a tool for the ordering of labor relations,¹³ an approach which ignores the important role of the law in justifying the master-slave relationship as one grounded in considerations of humanity.¹⁴

11. I have tried to do so on a single subject in Tushnet, *The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy*, 10 *LAW & SOC'Y. REV.* 119 (1975) [hereinafter cited as *The American Law of Slavery*].

12. In discussing the Republican period of constitution-making, Professor Friedman writes, "In this period, law was seen more and more as a utilitarian tool . . ." FRIEDMAN, *supra* note 1, at 100. The linkage to a specific time is, I believe, the only way that such an evaluation can be intelligible. It would be more consistent with Professor Friedman's general perspective, however, to read this as meaning that the law's lack of autonomy was more easily seen at that time, though it was no different in degree from its lack of autonomy at other times.

13. See FRIEDMAN, *supra* note 1, at 75, 192-201.

14. See *The American Law of Slavery*, *supra* note 11.

C. Professor Friedman's Pluralism

Professor Friedman rejects the view that legal development is accidental; it is, rather, "molded by economy and society." Professor Friedman describes the mechanism by which the law is molded as pluralism, a perspective which regards all public policy as determined by the interplay of pressure groups which are seen as almost always motivated primarily by material interest. Although not logically compelled by the elements of pluralist analysis, Professor Friedman and other pluralists perceive that the outcome of public policy has tended to favor the middle class, which is coincidentally identified with the society at large.

One example of Professor Friedman's pluralist orientation is his discussion of the national policy regarding the disposition of the public lands: "[It] was not a question of philosophy, but of the concrete interests, demands, and needs that pressed in politically upon Washington On [various] points, federal government was pushed now in this, now in that direction, by the interplay of pressure groups and regional interests."¹⁵ Occasionally Professor Friedman's evidence of the determining effect of interest group politics is rather weak,¹⁶ but that is not my primary concern.

Rather, my purpose is to describe the pluralist mechanism on which Professor Friedman relies.¹⁷ Although his explicit formulations do not suggest that any particular interest group systematically prevails, the implicit analysis relies on a sort of vulgar Marxism: the interest groups that win are the capitalist-entrepreneurs. Again, I must emphasize that on a number of questions that is very likely correct. The problem is that those instances are improperly generalized into a whole outlook on all legal development. It would take another full-scale history to demonstrate that the generalization is improper. Since I do not intend to pursue that course, I can only point to two aspects of Professor Friedman's work that suggest the need for some other way to look at some issues.

15. FRIEDMAN, *supra* note 1, at 203-04. For other examples of this pluralist approach, see *id.* at 19 (referring to "delicate [social] balance"); *id.* at 104, 216-17 (mortgage law product of "clash of interests"); *id.* at 297 ("Each session of an American legislature was a cockpit of contention between interests"); *id.* at 298 ("Law was made by hammering out bargains, some explicit, some not"); *id.* at 299, 388. See also *id.* at 51, 126.

16. On public land policy, Professor Friedman shows that particular interests led to the imposition of limitations on the sale of public land. *Id.* at 202-05. But no identifiable interests led to the choice of sale instead of government management of the land. Perhaps management, as a policy, was not pursued because the administrative bureaucracy was underdeveloped, a point Professor Friedman notes in passing. Unless that deficiency was perceived by the relevant decisionmakers, which is quite unlikely, a pluralist account of public land policy is deficient. Of course, one may think of one of the "interests" in contention as the majority view of proper policy, but then the pluralist account loses all explanatory force.

17. Ordinarily pluralism describes how competing interests contend and says nothing about which interests tend to prevail on which issues. If pluralism is taken in that way, Professor Friedman's perspective simply shifts the level on which accident is determinative: *that* the law reflects society is not accidental, but *what* it reflects is accidental.

First, Professor Friedman occasionally characterizes the 19th century as a period in which a law "for the middle class" developed.¹⁸ Unfortunately, it is hard to consider a law that serves the interests of capitalist entrepreneurs a law for the middle class, at least using a standard American definition of "middle class."

It seems more correct to assert that most middle class Americans thought that a law which served the interests of entrepreneurs served the general interest as well. That way of putting the matter, though, indicates that we must have a type of analysis that Professor Friedman entirely eschews; we need to ask what mechanisms lead large segments of a society to accept institutional arrangements that are designed to serve the interests of much more parochial groups. I suggest that those mechanisms are ideological, and that Professor Friedman's failure to pursue an inquiry into the ideology of the legal order¹⁹ diminishes the value of his work substantially.

Second, the omission of an ideological perspective helps to explain a strange phenomenon in Professor Friedman's book. He notes, without apparent puzzlement, large areas of the law which a priori would seem quite likely to be responsive to, and in aid of, the interests of entrepreneurs, where no systematic relations between interests and doctrine can be discerned. In the area of commercial law, for example, Professor Friedman notes that rules relating to the sale of goods "were rather too elegant . . . to have much effect on the actual working of the market"²⁰ and concludes that "it is doubtful whether specific doctrines of commercial law were cause, effect, or condition of American capitalism; or all or none of these."²¹ If, however, doctrine had no impact on the market, why, in a pluralist model, would anyone devote energy to the shaping of doctrine?

Professor Friedman argues that changes in doctrine reflect a transition from an economic order conducted by middlemen in the small community of merchants to one conducted by ultimate producers and consumers in isolated transactions throughout the society. This, too, may be true, but it does not explain how pluralism, Professor Friedman's mechanism of change, had its effect; why would the ultimate producers even care about calling the tune of doctrine?²² Entrepreneurs might have cared, in part, because they needed a sort of disaster insurance: legal rules

18. This conception is introduced to distinguish American from British law, which is described as an instrument of the landed gentry. FRIEDMAN, *supra* note 1, at 99. But it rapidly pervades the text. *See, e.g., id.* at 297.

19. Indeed, elsewhere Professor Friedman has revealed a positive hostility toward such inquiries. *See* Friedman, Book Review, 77 YALE L.J. 1244 (1968).

20. FRIEDMAN, *supra* note 1, at 233.

21. *Id.* at 234.

22. Strangely, in the same paragraph in which he says that rules had no effect on the market, Professor Friedman concludes that the law came "to favor" producers. *Id.* at 233. Again, if the rules have no effect, in what sense can they "favor" anyone?

almost never would be invoked in their transactions, but should the unexpected occur and litigation result, it would be useful to have rules that favored the entrepreneurs. While the argument has some force, it would seem that investing effort in changing the legal system would be less attractive, in purely economic terms, than self-insuring by devoting that effort to attempts at expanding the entrepreneur's own business. A fuller answer, I think, lies in the utility of the legal order as the expression of the world view of a dominant class.²³ As I will argue in Section III of this essay, the ideology of the legal order helps to reconcile the dominated segments of the society with the fact of their domination and helps to reconcile the dominant elements with the fact that they are dominant.

II. THE AUTONOMY OF THE LEGAL ORDER

Professor Friedman claims to have seized upon "some of the central insights of social science"²⁴ in constructing his explanation of American legal history. The major influence, apart from the pluralists of the 1950's,²⁵ appears to be Max Weber. Rationalization—Weber's idea that the law is affected by the need to institutionalize methods of disposing of routine matters—is invoked to explain the transition from divorces, manumissions, and corporate charters issued by the legislature, which considered each case as an individualized matter, to judicial divorces, manumissions by will or by local official bodies, and general incorporation laws.²⁶ Curiously, though, Professor Friedman misses what I think was Weber's "central insight," that rationalization is, in important part, the result of historical circumstances which supported the development of an autonomous legal system.²⁷

This section analyzes several ways in which the legal order is autonomous from other aspects of the social order. Professional interests lead to the emergence of a specialized bar, which has sometimes shaped the law in the service of the lawyers' self-interests. However, that self-interest was not simply material. The American bar developed an ideology that asserted the law's autonomy from the interests and needs of entrepreneurs and that emphasized its subservience only to the ideal of the

23. Professor Friedman does note that the doctrine of caveat emptor served, in part, as a device for enhancing the finality of transactions and so for limiting the amount of litigation. *Id.* at 234-35. See also Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975). Friedman's analysis of caveat emptor is consistent with the Weberian thread that runs throughout the book. See text accompanying note 26 *infra*.

24. FRIEDMAN, *supra* note 1, at 10.

25. See, e.g., R. DAHL, *WHO GOVERNS?* (1961); S. LIPSET, *POLITICAL MAN: THE SOCIAL BASIS OF POLITICS* (1960). A comprehensive bibliography can be found in *THE BIAS OF PLURALISM* 251-53 (W. Connolly ed. 1973).

26. See FRIEDMAN, *supra* note 1, at 172, 182, 194. See also *id.* at 32 ("[C]ourt organization . . . followed one fundamental social law. The colonies began with simple, undifferentiated structures, and developed more complex ones, with more division of labor.").

27. See Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 736-39.

Law. The lawyers' ideology of autonomy helps to explain some aspects of American legal history about which Professor Friedman's approach has little to say.

A. *The Autonomy of the Professional Bar*

Of course, a competent account of the development of law must deal with the growth of the organized bar, and Professor Friedman's does so. The book describes the change from a rudimentary profession during the colonial period²⁸ to one which, though more complex, was still quite unstructured in the 1850's,²⁹ and, finally, to a full-fledged professional bar, with specialized membership requirements and collateral organizations, such as law schools and bar associations.³⁰ As soon as the bar became differentiated from other institutions, lawyers began to assert what might be characterized as guild interests. Some of those interests related solely to the economic needs of practitioners; the models here are restrictive requirements for practice, and enforceable prohibitions on the unauthorized practice of law.³¹ But, though material interests clearly played a role in the development of these institutions, persuasive evidence indicates that an ideology of autonomy, a theoretical conception of the law as inaccessible to the untrained, also was important. Another guild interest might be called inertia, the desire to do things as they have been done because it is too hard to design new ways of doing them.³² While these guild interests must be taken into account in a full explanation of legal change, they are not especially productive of insight.

B. *Legal Autonomy Through Professional Norms of Consistency*

A different interest gives us some leverage on important problems. As the legal profession has developed in the United States, the value of consistency rates high among the things that lawyers want out of the legal system. American lawyers have regarded consistency as important because, as a component of an ideology of autonomy, it insulates them from disquiet arising from contradictions in their roles as servants of the elite, engaged in enhancing a domination at odds with important Western ethical and religious traditions, and as guardians of the law that is thought to embody those traditions. Professor Friedman, I believe, ignores the fact that, in America, the law has been preeminently a discipline that uses doctrine to coordinate current actions with past ones.³³ His perspective

28. FRIEDMAN, *supra* note 1, at 81-88.

29. *Id.* at 265-78, 323-24.

30. *Id.* at 525-38, 561-66.

31. *See, e.g., id.* at 276-77, 564-66. *Cf. id.* at 378-79 (on title insurance and registration).

32. *See, e.g.,* FRIEDMAN, *supra* note 1, at 51-52, 126.

33. The discussion that follows focuses on the judicial process, primarily for ease of exposition. Legislative and administrative actions can be analyzed along the lines suggested here, but the exposition would be extremely complicated, since the various lines of argument are harder to pick apart in those settings. The sections of this essay dealing with ideology treat legislative matters more directly.

calls only for inquiry into contemporaneous events. But, because of the role of doctrine in American law—or, put differently, because of the professional norm of consistency—his perspective is too narrow. We must look backwards, too, in order to understand why specific legal rules were adopted and how they took their particular shape. That is, while economy and society did mold the law, they did so within constraints provided by tradition and doctrine.³⁴

It is striking that the best evidence of the major part that impulse toward doctrinal consistency played comes from the area of torts, which, according to Professor Friedman, “must be laid at the door of the industrial revolution”³⁵ His account begins by noting both the increase of accidents attendant upon industrialization, and the harm that extensive liability for full damages might do to “the health of the precarious enterprise.”³⁶ “The careful, conscious aim of the judges was to limit damages to some moderate measure,”³⁷ and in the service of that goal, “courts invented new and more cunning traps for injured plaintiffs,”³⁸ such as contributory negligence, the fellow-servant rule, and assumption of risk rules. However, these traps were increasingly and harmlessly sprung by counterdoctrines—comparative negligence, last clear chance, *res ipsa loquitur*—developed to alleviate the heartlessness of the rules promoting enterprise.³⁹

There are several difficulties in this account. The first is an internal inconsistency with Professor Friedman’s general pluralist perspective. He identifies a concrete interest that would support strict rules limiting enterprise liability. However, when he acknowledges, as he must, counterrules, he does not provide us with a pluralist source for those rules. He could not plausibly suggest that the interest of labor, expressed in some organized fashion, had an important impact during the mid-19th century. He does suggest that the material interests of lawyers, as embodied in the contingent fee system, played some part, since the bar could not profit from the increasing number of industrial accidents unless plaintiffs’ lawyers occasionally won.⁴⁰ But Professor Friedman recognizes the inadequacy of this suggestion. The full explanation, he says, is that “[i]n personal-injury cases, juries, and judges, were likely to let their hearts dictate results.”⁴¹ That is, notions of fairness, entirely independent of material interest and rooted in a sense of tradition, affected both the content of doctrine and the outcome of cases. Another way of putting the point is that tort law doctrines promoting enterprise may have been

34. See generally J. HABERMAS, *LEGITIMATION CRISIS* 47-48 (1975).

35. FRIEDMAN, *supra* note 1, at 409.

36. *Id.* at 410.

37. *Id.*

38. *Id.* at 411-12.

39. See *id.* at 417-19, 422-23.

40. *Id.* at 422-23.

41. *Id.* at 423.

mitigated because of the lawyers' devotion to concepts of individualism that were far more the product of a general American tradition than of any specific interest group. This is unquestionably true, but it cannot be built into the pluralist framework without serious efforts at reconstruction.

The second inconsistency in Professor Friedman's account is that the development of tort law, even as he presents it, does not seem to follow the course of strict rule followed by ameliorative counterrule. Some rules were articulated before others, and the earlier ones may indeed have tended to state the harsh rules, but what stands out is the near-simultaneity of all these developments. Professor Friedman makes the process look too systematic and overlooks the effect of chance in leading the appellate courts to consider a fellow-servant case before they dealt with a last clear chance case; after all, as he continually notes, those cases that reach the appellate courts are only a small and, with respect to content, largely random selection from the universe of cases. Once the first case is articulated as a fellow-servant case, it is only natural that the next is articulated as a limitation of the new doctrine, but the fact that the articulations take that form should not lead us to think that the courts had to develop the law in that way; one can easily imagine a structure in which the fellow-servant rule would be articulated as a limitation favoring employers of the last clear chance rule. The impact of chance on the framework in which doctrine was stated, and the relative alacrity with which 19th century tort doctrine took mature shape, suggests that something other than the pulling and hauling of material interests was at work.

I can make no claim to have worked out the correct alternative, or to have examined the sources in much detail, but I want to sketch an alternative account that seems suggestive on its own terms, and that will, in any event, advance my general argument, as an illustration of the kind of analysis that I think is more satisfactory than Professor Friedman's. Courts in the 19th century were confronted with accidents arising in the industrial setting. That setting differed from other settings in which accidents occurred, in part because a prior contractual relationship existed between the injured employee and the defendant-employer. What was needed was a way to conceptualize these cases; neither tort law nor contract law alone would do. In *Farwell v. Boston & Worcester Rail Road*,⁴² Lemuel Shaw, chief justice of the Massachusetts Supreme Judicial Court and one of the century's greatest judges, dealt with the problem in essentially a contract framework, arguing that employers and employees could work out the allocation of risk in the employment contract without any judicial supervision through the law of torts.⁴³ The retreat from the fellow-servant rule of *Farwell* may represent the recognition by other judges that a pure contractual approach was inadequate for problems that were at least partly tort-like.

42. 45 Mass. (4 Met.) 49 (1842).

43. See also *Ponton v. Wilmington & W.R.R.*, 51 N.C. 245 (1858).

My suggestion is that the cases represent an attempt, often groping and confused, to conceptualize questions that could not easily be fit into the existing structure of legal analysis. The cases posed conceptual difficulties, as well as questions about the promotion of enterprise; the judges rarely focused upon material consequences, and when they tried to do so they could not be sure where interest lay, so that material consequences could not be determinative. Of course there is a material underpinning to my sketch: the emergence of a new setting for accidents. But the new industrial setting in which accidents occurred was not the source of judicial action in favor of economic interests which desired particular results; it was the source, rather, of the need to make choices about how to think about a set of legal problems. And doctrine was not simply the result of material interest, although it may perhaps have aided some particular interest, but was the result of choices between concepts, choices made by lawyers whose primary interest lay in coherence, not in currency.

Several strands in the preceding analysis can now be pulled together. First, tradition, at least in a profession one of whose norms requires that present actions be shown to be consistent with prior actions, must be given independent weight in any analysis of historical development. Second, material conditions are the source of both material interest and conceptualizations of those conditions. Third, at least on some issues at some times, those conceptualizations have an important influence on the shape of the law. These three strands help us understand a phenomenon that Professor Friedman does not: the development and importance of an ideology of legal autonomy.⁴⁴

C. *The Lawyers' Ideology of Autonomy*

A major section of Perry Miller's *The Life of the Mind in America*⁴⁵ deals with the ideology of legal autonomy. It shows that such an ideology took shape in the early part of the 19th century and was expressed in a rather wide range of legal materials, including legal treatises and periodicals. I cannot adequately condense the rich detail in Miller's work, but it may be helpful to note some of the elements of the ideology of legal autonomy. Interestingly, one of its central themes was that law was a science, an idea whose transformations from Kent to Langdell to the legal realists deserves close study. The science of law was both inductive and deductive. It was inductive in that one could understand the law only after immersing oneself in the reported cases, and deriving from them the true rules of law. It was deductive because it was derived from lawyers' reasoning about practical problems for which legal solutions had to be devised. Because there were so many cases, intellectual efforts that only

44. The *History* ignores this ideology; Professor Friedman's views on the question are expressed in Friedman, Book Review, 77 *YALE L.J.* 1244 (1968).

45. P. MILLER, *THE LIFE OF THE MIND IN AMERICA* (1965).

diligent students could expend were needed to make the law accessible to ordinary lawyers and judges. Indeed, the adaptability of the common law made it especially well-suited to American conditions, even though the common law might be harder for the public to understand than the codes of the civil law. Since only the members of the bar could cope with the intricacies of the common law method, Miller argues that the lawyers saw themselves as being autonomous from the rest of the social order.

Miller claims that this ideology of legal autonomy penetrated through to all levels of the bar and to the public as well, but the evidence for those claims is wholly lacking. Nonetheless, the emergence of an ideology of autonomy at the more sophisticated levels of the profession deserves examination, in part because Americans traditionally regarded the legal system as obviously and properly subordinate to other social interests⁴⁶ and in part because those who articulated the ideology of autonomy—the Kents and Shaws—were the primary makers of law, as judges, legislators, and counselors to the entrepreneurs.

One way to approach the issue of ideology is to look for the social functions served by the ideology. Here great caution is necessary. Perry Miller claimed that the ideology of autonomy insulated the profession from assaults by the masses; the lawyers could invoke the ideology and so persuade their assailants that the charges of legal robbery and injustice were misdirected. This perspective, however, requires that the ideology of autonomy has reached the general populace, and, while his evidence for its permeation of the higher reaches of the bar is persuasive, Miller presents almost no evidence that the ideology was shared by any substantial portion of the public. In light of this failure of evidence, it is hard to identify any functions served by an ideology of autonomy in relation to the profession's dealings with the public.

Thus it makes sense to look inward. If the ideology of autonomy could not protect the bar against the public, might it nonetheless have protected the bar against itself?⁴⁷ At this point the observation that the evidence points only to an ideology for the higher reaches of the bar becomes significant. The lawyers who constructed and shared the ideology had a special social function, distinct from that of the journeymen described by Joseph Baldwin.⁴⁸ The elite lawyer's job, as Professor Friedman emphasizes, was to facilitate the growth of enterprise. But economic growth was clearly not an unmixed blessing. The elite lawyers

46. See, e.g., FRIEDMAN, *supra* note 1, at 82-84.

47. The focus here is on function. I do not claim that the ideology of autonomy was consciously developed as a mechanism of self-defense. Indeed, to the extent that it was a consciously defensive device, it was likely to be ineffective. Rather, the point here is that a notion of autonomy, developed probably from purely philosophical concerns, became influential because it was useful to elite lawyers.

48. J. BALDWIN, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI* (1957) (first published in 1853).

may have been shielded from the costs of growth by their social affiliation with the entrepreneurs, if not solely by their employment by the entrepreneurs.⁴⁹ Even so, because their social position was not directly dependent upon the growth of industry, these lawyers may have discerned a tension between what they actually did and what the traditions of fairness and justice, to which the legal profession purportedly adhered, indicated they should do.⁵⁰ An ideology of autonomy may have served to diminish this tension by indicating that what the lawyers did was dictated not by the narrow self-interest of the entrepreneurs, but by the internal demands of legal reasoning.⁵¹ Without repeating Miller's description of the 19th century's ideology of legal autonomy in detail here, I can still suggest that most of its features are consistent with the preceding sketch.

For example, the legal literature—treatises, opinions, and hortatory speeches—is pervaded with expressions that the legal order faces an inherent conflict between policy and equity, between promotion of enterprise and protection of individuals.⁵² This conflict, I suggest, reflects the tension within the social role of the elite lawyers, who simultaneously served the parochial interest of the entrepreneurs and identified themselves with a legal tradition which placed great emphasis on norms of fairness and evenhanded treatment of all. Those norms themselves were reinforced by the lawyers' handling of the general run of cases, where questions of the ends of the legal rules were so far below the surface that the lawyers could easily treat the cases as presenting no issues of policy at all. An ideology of autonomy expanded the meaning of these routine cases, so that their emphasis on doctrine encompassed the entire range of the legal system, and thereby guaranteed that concern over service of narrow interests would never become too troubling.

A few final points remain to be brought out. First, Miller's great accomplishment is to show that the achievement of an ideology of autonomy were the result of enormous intellectual effort. Nothing in the

49. Here the various histories of the bench and bar, which Professor Friedman makes fun of (*see* FRIEDMAN, *supra* note 1, at 544-45), are a fruitful source of information on the social origins and affiliations of elite lawyers. For an insightful essay using similar ephemera, see M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876*, at 148-63 (1976).

50. Habermas puts it this way: "Because the reproduction of class societies is based on the privileged appropriation of socially produced wealth, all such societies must resolve the problem of distributing the surplus social product inequitably and yet legitimately." J. HABERMAS, *LEGITIMATION CRISIS* 47-48 (1975).

51. This argument depends upon the existence of a substantial overlap between the lawyers who attempted to create a coherent rationale of legal autonomy and those who directly served the entrepreneurs. Prior to the emergence of academic schools of law, symbolized by the Langdellian revolution, there appears to have been such an overlap. *See* FRIEDMAN, *supra* note 1, at 530-36. Perhaps the divorce between the two groups led to the wholly idealistic approach to law against which the legal realists rebelled; if so, the realists might be viewed as, at the deepest level, true reactionaries masquerading as liberals.

52. This will be made clear when work in progress by Duncan Kennedy of Harvard Law School is completed.

nature of things determined that the struggle to create such an ideology would be successful. Thus, historical analysis of concrete events and particular actors remains necessary; this approach contrasts sharply with the simple material determinism of Professor Friedman's scheme. Second, the ideology of autonomy was linked to specific social positions and to a specific historical setting. I do not, and could not, claim that such an ideology is an unchanging feature of the legal system throughout American history. Third, the penetration of the ideology must be seen as variable. Because the legal system is bound up with the articulated expression of value choices, the systematizers were likely to influence even those lawyers whose social role was not the service of the entrepreneurs.⁵³ But those lawyers did not experience the tension between practice and tradition as acutely as the systematic thinkers did. The ideology of autonomy was therefore less firmly rooted in their experience and may have been more subject to displacement than it might otherwise have been. Finally all of these elements of the analysis must be viewed as problematic; they do not inhere in the structure of the legal system in prescribed patterns but must be arranged by historical actors in real situations.

III. THE IDEOLOGY OF THE LEGAL ORDER

As the preceding discussion has indicated, Professor Friedman's account ignores the ideological functions of law. Material benefits have never been equally distributed in American society, and the law serves as a partial explanation, to those who receive less, of why they do. Put more bluntly, the legal order, both in its ordinary manifestations and in its higher rationalizations, may help to reconcile the oppressed with the system that oppresses them.⁵⁴ Perhaps more important, the legal order helps the oppressors understand their actions as those of humane and reasonable people, by placing what they do in the comprehensive setting derived from a long tradition of ethical reasoning.

A. *The Analysis of Particular Rules Distinguished From the Analysis of the Legal System*

To understand the ideological functions of the law, we have to draw some important distinctions. We must distinguish between the existence

53. That is, the elite lawyers were elite in two senses. First, they served the dominant entrepreneurs. Second, they provided leadership to the bar as a whole because they, more than any other lawyers, exemplified the profession's commitment to the articulate expression of value choices. To the extent that the ideology of legal autonomy was rooted in the elite's role of serving the entrepreneurs, its penetration through the bar was superficial, for the ideology could be adopted by other lawyers exclusively because they deferred to the elite's doctrinal leadership.

54. This, of course, is problematic. At times the disparity between the visible operation of the legal system and the articulated justifications of the system may increase the dissatisfaction of the oppressed.

of the legal system as such, and the existence of particular doctrines within that system. I have previously argued that Professor Friedman fails to consider Max Weber's contribution to the analysis of legal autonomy. In a way, he turns another of Weber's insights upside down because he does not draw the distinction that I have just suggested. Weber argued that the development of capitalism required, or was promoted by, certain elements of the legal system.⁵⁵ First, the legal system had to provide an institution for the routinized resolution of disputes that had not been disposed of through less formal means. Second, it had to provide a degree of doctrinal consistency so that capitalists could plan without the fear that their plans would be disrupted by legal rules whose meaning could not be anticipated. Thus, in the American setting the notion of precedent, of the legal system as a mechanism for coordinating present actions with past ones, does have some basic links to economy and society. However, since Professor Friedman devalues the autonomous impact of doctrine, he is unable to confront this function of the legal system.⁵⁶

Finally, according to Weber, a capitalist legal system had to have a certain minimal doctrinal content, primarily in the area of contract law, where the notion of freedom of the individual will had to have some weight.⁵⁷ Again, because Professor Friedman focuses on particular doctrines, he makes much stronger claims than Weber did, and than the evidence will support. Professor Friedman's general theoretical claim is that, in examining any specific rule of law, we can understand it as an expression of contemporaneous needs. Thus, in his prologue he writes, "Old rules of law and old legal institutions stay alive when they still have a purpose—or, at least, when they do not interfere with the demands of current life."⁵⁸ And, as I have already argued, Professor Friedman recognizes only the demands of entrepreneurs as systematically embodied in legal rules. Weber claimed only that entrepreneurs needed some system of rules and that, in general, the precise content of those rules was irrelevant. This view provides us with a better guide to understanding

55. For a general discussion, see Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 740-45. I must emphasize that my phrasing, in terms of what capitalism "required," carries overtones of determinism that Weber (and I) would disclaim. For the purposes of a summary presentation, however, no other phrasing seems easily available.

56. See text accompanying notes 40-42 *supra*.

57. Cf. J. HABERMAS, LEGITIMATION CRISIS 21 (1975):

After the capitalist mode of production has been established the exercise of the state's power within the social system can be limited: (a) to the protection of bourgeois commerce in accord with civil law (police and administration of justice); (b) to the shielding of the market mechanism from self-destructive side effects (for example, legislation for the protection of labor); (c) to the satisfaction of the prerequisites of production in the economy as a whole (public school education, transportation, and communication); and (d) to the adaption of the system of civil law to needs that arise from the process of accumulation (tax, banking, and business law).

58. FRIEDMAN, *supra* note 1, at 14. The qualification, if taken seriously, would force Professor Friedman to acknowledge a degree of autonomy, at least for certain rules and institutions. For a discussion of the final clause, see text accompanying note 89 *infra*.

American legal development than does Professor Friedman's. For example, Weber would not be surprised, as Professor Friedman ought to be, to find that the special doctrinal content of the 19th century commercial law had no impact on the market.⁵⁹ In general, Weber's formulation, that the promotion of enterprise required only a certain minimal doctrinal content, helps to explain why, in important areas of the law, doctrine developed relatively autonomously.

B. Facilitative, Repressive, and Ideological Functions of the Legal Order

Certainly, however, the fact that only a minimal set of rules was required in order to promote enterprise does not mean that only that set of rules developed. Some rules which were direct responses to entrepreneurial demands for aid went beyond what was strictly needed. At this point, I find it useful to introduce a set of distinctions relating to the functions of law: the law has facilitative, repressive, and ideological functions.⁶⁰ Because Professor Friedman treats all law as facilitative, he misses important features of the legal system.⁶¹ The argument presented in this section is that the ideological function of the law permeates its other functions, playing a part, for example, in the form that facilitation takes. The distinction among the functions, then, helps us to understand aspects of the legal order that cannot be understood when it is treated as if it were, in all its aspects, purely facilitative.

1. THE FACILITATIVE FUNCTION

Facilitative rules or institutions are exemplified by general incorporation laws⁶² and trusts.⁶³ They provide the legal framework for entrepreneurial choice. Sometimes, as in the periods of special incorporations⁶⁴ and subsidies to railroads,⁶⁵ law was facilitative by directly promoting enterprise. At other times the law simply made institutions available for use as the entrepreneurs chose. In American law the facilitative role of law has seemed responsive primarily to particularized demands, and so conforms to Professor Friedman's pluralist model: entrepreneurs sought aid, and the state provided it. It seems likely that the range of facilitative law, and therefore the scope of pluralist influence on the law, is greater where there is general agreement on the procedure to be used for lawmaking, and where most people are indifferent to the outcome, so

59. See text accompanying notes 29-30 *supra*.

60. This distinction is analogous to the distinction between civil society and political society in the work of Antonio Gramsci and to that between ideological and repressive state apparatuses in the work of Louis Althusser. See A. GRAMSCI, PRISON NOTEBOOKS 12-13 (Q. Howe & G. Smith trans. 1971); L. ALTHUSSER, LENIN AND PHILOSOPHY 141-48 (1971).

61. Compare J. HABERMAS, LEGITIMATION CRISIS 53 (1975).

62. See FRIEDMAN, *supra* note 1, at 166-78.

63. See *id.* at 221-23, 368-71.

64. See *id.* at 166-69.

65. See *id.* at 158, 169-70.

that sharply defined and narrowly based interest groups can occupy the field. However this picture, though broadly accurate, has to be modified on important details.

For example, entrepreneurial pressure undoubtedly led to many special incorporations, but the adoption of general incorporation laws seems to have been the result of both popular hostility to special incorporations as a device for the protection of privilege⁶⁶ and increased opportunities for investment which led to increasing numbers of requests for special incorporation made of legislatures that were ill-equipped to make that number of individualized determinations.⁶⁷ Thus the enduring hostility to special incorporations appears to have had some significant ideological component with its own momentum.

A second qualification to Professor Friedman's scheme arises from the transformation of the trust from a device that could protect only landed wealth to one that protected wealth in general. This seems to be an example of a legal institution that simply happened to be available to the entrepreneurs whose wealth resided in factories. Of course, modifications in the forms that trusts took responded to the new need for flexibility in managing invested, rather than landed wealth,⁶⁸ but the trust device itself seems clearly not to have been created in response to entrepreneurial demand.

2. THE REPRESSIVE FUNCTION

The second category of law comprises those activities of legal institutions that are repressive, in the sense that they involve the mobilization of physical force in the service of social control. Substantive criminal law plays some part in this, as Professor Friedman notes when discussing colonial labor laws. They were, he says, aimed at "keeping social lines distinct, maintaining order in the lower ranks."⁶⁹ At this point, it is helpful to distinguish between different functions of the criminal law.

Much of the growth of criminal regulation in the economic sphere may be explained, at least initially, by Professor Friedman's characterization of the criminal law as instrumental to the material interests of powerful groups. However, these laws are precisely those as to which the slippage in the criminal law system is greatest: complaints are not pressed in economic regulation cases, prosecutors refuse to charge, or jurors refuse to convict. Thus an instrumental explanation is not completely adequate. Professor Friedman toys with the notion that substantive criminal law is primarily symbolic, a gesture to appease naive pressure groups that has no impact on the actual working of society.⁷⁰ The pull of his

66. *Id.* at 171.

67. *Id.* at 172.

68. *Id.* at 223.

69. *Id.* at 63.

70. *Id.* at 510-11. For subtle recent discussion, see Carson, *Symbolic and Instrumental*

general approach is so strong, though, that he reverts readily to an instrumentalist explanation: "The sleepy old Sunday laws came to life because unions wanted them enforced; unions wanted a shorter work week, and Sunday laws were a useful instrument. The ministers and preachers acted as willing accomplices; labor and religion here formed an odd but understandable coalition."⁷¹

Even the subject apparently most amenable to Professor Friedman's approach remains at least partly a puzzle. To resolve the puzzle, I turn to a second function of the criminal law. Professor Friedman recognizes that some parts of the substantive criminal law are best understood as the embodiment of the community's judgments about what behavior is morally wrong.⁷² These judgments promote a way of thinking about behavior that, both superficially and deeply, expresses a comprehensive view of the world. On the surface, for example, criminal prohibitions of theft and assault demonstrate the society's commitment to a regime of private property in tangible goods and in one's person. The prohibitions also help guarantee the stability of transactions premised upon expectations that one's property will remain one's own until alienated by personal choice. More deeply, the model of deterrence that justifies the existing scheme of sanctions in the criminal law rests on a radically individualist conception of the relationship between each person and the whole society, a conception that is, of course, closely linked to the intellectual constructs of individualism basic in a capitalist society.⁷³ Thus it seems that a full understanding of even the repressive aspects of the legal system requires the infusion of an ideological approach to the material.

Other repressive activities of the legal system are probably best located in such associated institutions as the police, the public prosecutor, and the prisons. About these there may be little to say, since the repressive role is so obvious. Professor Friedman devotes four sentences to the development of police forces⁷⁴ and not much more to that of the prosecutor's office.⁷⁵

Dimensions of Early Factory Legislation, in CRIME, CRIMINOLOGY, AND PUBLIC POLICY 107 (R. Hood ed. 1975).

71. FRIEDMAN, *supra* note 1, at 511.

72. *Id.* at 60-63, 509-12.

73. See generally J. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962).

74. FRIEDMAN, *supra* note 1, at 252-53.

75. He does assert, without any evidence at all, that selective enforcement of laws against immorality was "used to 'get' somebody or [was] invoked against some unusually flagrant or unlucky offender." *Id.* at 512. The problem of discretionary justice is an important one in analyzing the legal system's repressive aspects, but there has been little historical investigation in this area. The book contains a relatively large amount of material on prisons (*id.* at 259-61, 519-24), but it is not terribly illuminating and probably reflects only the liberal reformist bias of Professor Friedman. A colleague has suggested that the disparity between the treatment of the police and that of the prisons arises simply from Professor Friedman's knowledge about the latter's history and ignorance of the former's. That, however, just shifts the question back one step; I would reply that his decision to learn about the prisons and not about the police reflects his bias.

Although Professor Friedman does not devote his attention to the history of the American police, his scheme would lead us to expect organized police forces to emerge when the ruling elite felt that unorganized methods of protection, such as informal nightwatches, provided inadequate security for property. Yet the history is different, in important ways. In Boston, for example, a nativist riot that led to the sacking of a Catholic school was the focus for the initial efforts at creating a police force. The riot was indeed thought to portend increasing insecurity of property; if the Catholics could be attacked today, elite property could be the subject tomorrow. However, the riot was also seen as a mere symptom of generalized social disorder, the breakdown of those moral ties that had previously united the community.⁷⁶ Thus, much more than material interest was at stake. A complex set of ideas, relating to law, morality, religion, and politics, shaped the way the Boston elite responded to attacks on property and so affected the organization of the police.

Other interesting questions are raised when we ask why were these institutions of social control located within the legal system? Elsewhere they have been ancillary to the military system, as in continental Europe in the 19th century and in Brazil and Chile in the 20th. Yet, when threatened with serious labor unrest in the late 19th century, American capitalists did not simply have the troops called out, although they almost certainly could have; they went to court to secure injunctions.⁷⁷ This phenomenon can only be understood, I think, by considering the law in its ideological aspect. The labor injunction, as a device emanating from legal institutions, looks two ways. To the extent that legal institutions per se were highly regarded by workers, resistance to suppression may have been diminished by obtaining an injunction instead of resorting to pure military suppression; to the extent that capitalists themselves regarded legal institutions as independently valuable, they would be more comfortable using the forms of law instead of military force.

76. See R. LANE, *POLICING THE CITY* 23-37 (1967); J. RICHARDSON, *THE NEW YORK POLICE* 24-50 (1970). See also W. NELSON, *AMERICANIZATION OF THE COMMON LAW* (1975).

77. See FRIEDMAN, *supra* note 1, at 487-88 (discussing railroad receiverships as well). Again, a full account would show a much more complex picture. For example, capitalists did not disdain the use of private armies and public troops, and often relied on military solutions to labor unrest. Even so, military solutions tended to follow upon attempts to settle the problems through injunctions. In part, labor's failure to obey injunctions served as the formal basis for the use of public troops, although executive determinations of emergencies were sometimes used instead. The injunction also shifted the locus of decision away from local decisionmakers, such as mayors, who might be sympathetic to organized labor, and to more cosmopolitan decisionmakers, particularly federal judges. Cf. H. GUTMAN, *Class, Status, and Community Power in Nineteenth-Century American Industrial Cities*, in *WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA* 234, 255-56 (1976) (discussing use of injunctions in Paterson, New Jersey, strikes of 1877-79). Even when all this is added to the analysis, we must still explain the capitalists' frequent preference for government by injunction, and it seems clear that an important reason for that preference, though not the only one, was ideological.

3. THE IDEOLOGICAL FUNCTION

As the brief discussion of the labor injunction indicates, the ideological role of the law has two components. First, the legal order helps to persuade the dominated elements in American society that their domination is justified—or that their material conditions of existence are justified or, equivalently, that they are not dominated at all. This is, of course, what the political scientists refer to as the legitimating function of the law. The idea is that people believe that a practice which is legal is, by that fact alone, a practice which is just. Thus, if one criticizes the distribution of wealth in the society, the ideology of the legal order answers that the distribution is just simply because it arose from transactions that were legal; property, that is, is not theft because the acquisition of property does not meet the legal definition of theft.

Historical evidence that this legitimating function of law was important in the past is rather skimpy. My skepticism about elevating this function to a high place is affected also by several assumptions that must be made to reach this conclusion. We would have to assume that the ideology of the legal order penetrated widely throughout the society. Contemporary evidence suggests that the general public has only a vague conception of the role of law in society, and a weak belief that acts justified by the norms of the legal system are automatically just.⁷⁸ Historical evidence on such matters is hard to come by. Perry Miller pointed to the enormous popularity of Cooper's *Leatherstocking Tales*—in which the man of nature, Natty Bumppo, demonstrated his superiority over the civilizing force of the law by taming the wilderness—as evidence that, far from society treating legal forms as automatically justifying results, Americans tended to count the fact that some practice was legally justified *against* the claim that the practice was morally justified.⁷⁹ That surely is not conclusive evidence, but it points in a direction opposite to that suggested by the legitimation analysis. In addition, that analysis, when confined to the legal system, rather obviously overrates the importance of the legal system, with which most people have only sporadic contact, as compared with other sources of legitimation, such as the educational, religious, and family systems. Finally, beliefs about the legal order arise in part from day-to-day contact with the system. Most people's ordinary contacts with the legal system would probably lead them to see it as a force enhancing their victimization. There may well be an American tradition of deference to legal forms, but that tradition must have been in almost constant tension with the conception of the legal system arising from experience.

It cannot be said that the ideology of the legal order had no role in

78. The evidence is summarized in S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 62-78 (1974), and, in more detail, in Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence* (1976) (forthcoming in *LAW & SOC'Y REV.*).

79. See P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 99-102 (1965).

suppressing views of justice that would have undermined the existing distribution of wealth and power in the United States. However, the ideology of the legal order should probably be viewed, from the perspective of those who lack power in society, as a barrier that can be overcome only in special circumstances, rather than as a source of affirmative support for the existing society. My suggestion is that the ideology of the legal order affects social stability by combining with other factors to inhibit social change. Four factors determine whether those whom Professor Friedman calls "the underdogs"⁸⁰ act to alter their position in a major way: a calculation of the benefits and costs of the existing arrangements; a similar calculation regarding the potential benefits and likely costs of rebellion; an ideology that arises from the total life-experience, including contact with the legal system; and an ideology that derives from the traditions of the underdogs, which include legal traditions.⁸¹ In American history, it is probably the case that the first two factors and the last have reinforced each other but, I must emphasize, this is a contingent fact.⁸²

The second major component of the ideological role of the law relates to those on top. They face an inherently contradictory situation: their material position is evidently far superior to that of the underdogs, and, on the barest reflection, depends in part on the existence of an underclass. Yet the societal traditions to which they refer rather strongly imply that gross maldistributions of wealth and power are at best anomalous and at worst unjustifiable. Thus, in order to live with themselves in light of their historic inheritance of ideas about what constitutes fair treatment, the dominant elements in American society need some explanation for their position. The ideology of the legal order, among other forms of ideology, provides that explanation: their position arises from, and is continually supported by, the normal operations of an autonomous legal system; because the system is autonomous, the decisions emanating from it are necessarily justified in terms of our deepest traditions.

To complete the picture, I must add a few details. As in other sections of my argument, here too the question of penetration arises. The ideological role of law depends on the acceptance, not merely among the legal elite, but among the general social elite, of the ideology of legal autonomy. It is extremely unlikely that the elaborate ideology that Perry Miller identified for the legal elite⁸³ was substantially shared outside that

80. FRIEDMAN, *supra* note 1, at 428-45.

81. See E. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 261* (1976).

82. Habermas says:

The factual recognition of [dominant] norms does not, of course, rest solely on belief in their legitimacy by those affected. It is also based on fear of, and submission to, indirectly threatened sanctions, as well as on simple compliance engendered by the individual's perception of his own powerlessness and the lack of alternatives open to him (that is, by his own fettered imagination).

J. HABERMAS, *LEGITIMATION CRISIS* 96 (1975).

83. See text accompanying notes 54-55 *supra*.

elite; it was far more complicated than was necessary. Still, my perception is that the broad, albeit vague, contours of the ideology of the legal order were widely shared. Because the elite's social role requires that they have access to articulated justifications for their social position, the legal ideology, and other ideological systems that rely on the articulation of ideas for their effect, may be particularly important for the elite.⁸⁴ In any event, on this issue the evidence should be available. The social elite in America has been a literate group fairly attentive to what has been written, so that published materials probably would be adequate as a basis for assessing what the elite believe.

Finally, I should note one persistent theme in the ideology of the legal order: the relevant actors for legal purposes are individuals, or collectivities, such as corporations, conceived of as individuals.⁸⁵ This theme resonates with strains in other forms of ideology, and here I do not doubt the penetration of the individuating ideology through the society; indeed, it is so deep-rooted that most of us would find bizarre the suggestion that the law should treat only actions of collectives.⁸⁶ The individuating theme serves as an additional barrier to organization of the underdogs to upset existing social arrangements, and arises, in part, from the material experience of life in individualized, noncommunal settings.

IV. THE INFLUENCE OF THE LEGAL ORDER

My emphasis on the importance of autonomy and ideology can be countered with a ready question: what reason is there to believe that either autonomy or ideology has any influence on society? There are three ways in which there may be such an influence, and, in addition, one answer in the nature of a confession and avoidance. The latter can be disposed of quickly. I have indicated already that many legal developments seem to have no effect on social arrangements.⁸⁷ The social historian may indeed put these developments aside as irrelevant to his task, but the legal historian has some obligation to account for them, and the account will refer to autonomy and ideology.

The first of the ways in which legal autonomy may influence society is illustrated by the background and consequences of *Brown v. Board of Education*.⁸⁸ As Richard Kluger's recent study of the case shows,⁸⁹ the

84. It may be useful to note here that in this essay I am not attempting to claim that the ideology of the legal order is somehow more significant than social Darwinism or other similar ideologies, only that a legal historian must consider the ideological dimension.

85. Cf. FRIEDMAN, *supra* note 1, at 455 (noting development of fiction of corporate "personality" under the fourteenth amendment).

86. Cf. *Monroe v. Pape*, 365 U.S. 167 (1961) (city not a "person" within meaning of 42 U.S.C. § 1983 (1970)).

87. See text accompanying notes 29-30 *supra*.

88. 347 U.S. 483 (1954).

89. R. KLUGER, *SIMPLE JUSTICE* (1976).

Justices who decided *Brown* thought that the result was compelled by prior Supreme Court decisions. They were concerned not with what result to arrive at, since precedent seemed to dictate a single result, but with how to present the decision most effectively. Of course, we should not ignore extralegal influences on the decision, such as the concern that segregation was inconsistent with the ideological posture that the United States was assuming during the Cold War. But Kluger's account makes it clear that such extralegal influences had only a small impact on the decision. *Brown* must be seen as primarily the product of the legal order's dependence upon consistency as an autonomous value. Yet it is absolutely clear that *Brown* played an important part in shaping the black movement of the 1950's and 1960's, a movement that plainly has made a difference to our society. *Brown* thus illustrates a general point: because of the penetration of the ideology of the legal order, legal decisions provide resources for political movements⁹⁰ by providing a needed rallying point to gather strength.

A second way that legal autonomy makes a difference to the society comes through the effects of legal rules and institutions that persist because of the difficulty in changing them when social forces that generated these rules and institutions have weakened or disappeared. Professor Friedman writes that "old rules of law and old legal institutions stay alive when they still have a purpose—or, at least, when they do not interfere with the demands of current life."⁹¹ This approach, however, ignores the possibility that the death throes of old rules may delay the emergence of new rules long enough for social forces to change substantially, so that what would have been accomplished had the old rules died quickly can no longer be accomplished. One might plausibly read the history of the New Deal, for example, as a tale of conservative judicial rearguard actions until forces of reform had tired themselves out. Again, the point can be generalized. Old social forces are not instantaneously replaced by new ones. Rather, a process of debilitation and strengthening occurs, and the old order struggles with the resources available to it to postpone its demise.⁹² At times, officials of the legal order may be strategically placed for these purposes because the legal order's autonomy means that it does not change overnight. Professor Friedman's focus on the pluralist mechanism, which may be a useful way of examining the relationship between society and the legal order at any particular time, does not help us to

90. For a rather simplistic discussion of this point, see S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 131-48 (1974). For a richer treatment of the political uses of symbols to organize mass movement, see V. TURNER, *Hidalgo: History as Social Drama*, in *DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY* 98 (1974). See also F. SORAUF, *THE WALL OF SEPARATION* 94-95 (1976).

91. FRIEDMAN, *supra* note 1, at 14.

92. See generally K. MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (International Publishers ed. 1963).

understand that relationship as the relative strength of pluralist contenders changes over time.

The third means by which the ideology and autonomy of the legal order affect society is subtler. Many social and political movements in America have thought that the road to success lay through securing changes in the law. After those changes have occurred, however, the aspirations of the movements may narrow, even though the change in law did not accomplish what the movements set out to achieve. Here I find it useful to reintroduce the idea of symbolic politics.⁹³ Professor Friedman's conception of the symbolic use of the legal system derives from an interpretation of the temperance movement as an effort by groups whose status was declining to capture the symbols of public morality.⁹⁴ The aim of the movement related exclusively to symbols.

There is another sort of symbolic politics, however, where the movement aims at substantive results, achieves only a symbolic victory, and then abandons the quest for the substantive results. The accomplishment of the legal gain in these situations narrows the horizons of the political movement.⁹⁵ Although the situations are all much more complex when looked at in detail, this process captures some elements of the abolitionist reaction to the fourteenth amendment and Reconstruction, the popular response to the Sherman Antitrust Act, and labor's reception of the National Labor Relations Act. But the process seems anomalous. Why should a movement be defused when all it achieves is a change in legal rule, not the substantive change it sought?

In part, the legal change may be viewed as all that could be accomplished within the existing contours of power. But one would then expect the proponents of the change to treat it with resigned acceptance and to continue their efforts to increase their power. Instead, it seems that with some frequency the proponents enthusiastically endorse the change and either retire from the field or divert their attention from the accumulation of power to the operation of the new legal institution. This transformation of means into ends has its roots in the ideology of the legal order and in the social structure that supports that ideology. When the movement settles upon the strategy of legal action, it may well turn to lawyers for advice, and as the strategy is pursued the lawyers may assume general leadership of the movement. Then, when the change in law is accomplished, the lawyers' professional commitment to the legal order may induce them to guide the movement into narrower channels.⁹⁶ In addition, the legal victory *is* a victory, and the supporters of the movement may think that other successes in the same arena will be forthcoming. Finally,

93. See text accompanying note 69 *supra*.

94. J. GUSFIELD, *SYMBOLIC CRUSADE* 115, 169, 180-83 (1963).

95. See M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 22-43 (1964).

96. I hope to pursue this argument in a study of the NAACP Legal Defense Fund strategy in the 1940's, that I am designing.

and perhaps most important, the penetration of the broad outlines of the ideology of the legal order seems deep enough to make it difficult even for those who seek substantial changes in American society to break away from the idea that, because what is legal is just, the way to guarantee justice is to alter the law. That is, the ideology of the legal order simultaneously provides an important means for mobilizing political action and inhibits mobilization that cannot refer to conceptions of social order already inherent in the legal order.

I have treated the preceding discussion as if it were concerned with the effects of legal autonomy. We might, however, ask whether it was legal autonomy or some underlying constellation of forces in the society that made the difference. For example, the black movement of the 1950's might have occurred even if *Brown* had been decided differently, because the material interests of the American elite required the full absorption of blacks into the national economy or, alternatively, because the capitalist interests wanted to create an artificial division between the struggle of the blacks and the struggles of other exploited groups in order to prevent unification of the workers' movement. Several responses to this position can be suggested. First, historians have to understand events as they happened, not as they might have happened, so that, although something else might have led to the black movement, what did in fact do so was *Brown*. Second, we might distinguish between the long- and shortrun: over short periods, legal autonomy may have some effect in shaping the precise contours of particular disputes or of the narrow problems addressed by the lawmakers, but over the long term, the law taken as a whole will take its shape from the interests of socially powerful groups. Thus, the conservative judges of the Supreme Court could not delay the realization of a welfare state program, or maintain the power of old-fashioned monopolists, for very long.

I accept whole-heartedly the claim that the legal system responds to gross, long-term trends in the society. Unhappily, that is not Professor Friedman's claim, for he repeatedly attempts to explain particular events by the play of localized social forces. One making the more general claim would write a very different book than Professor Friedman's; one would write a general cultural history of the legal system, relating systemic changes to manifestations of basic alterations in the society and the economy, as Max Weber did.⁹⁷ For that is the only way to infuse rich detail into an historical account of developments that are significant only when viewed from a magisterial perspective in which the little hills and valleys portrayed by Professor Friedman disappear into the general contours of the terrain. From the magisterial perspective, too, a narrow concern with the values expressed in the legal order might appear dis-

97. See, e.g., R. UNGER, *LAW IN MODERN SOCIETY* (1975).

torted, because lawmakers would seem more like everyone else in the society, with a range of values related to many aspects of the culture.

I can conclude only with a general caveat: I have done no more than sketch an alternative perspective on American legal development. It is not a complete social theory or a grand explanation of everything that has occurred in American legal history. It is "only" a way of looking at that history, but it reveals a more complete picture. I must reiterate the conclusion of the preceding section: the analysis is historically contingent, not determinate, and different elements must be emphasized as we take up different topics.

V. THE PERSPECTIVE APPLIED: CODIFICATION, 1810-1850

The alternative way of looking at American legal history that I have just offered is undoubtedly far more complex than Professor Friedman's. One can fairly ask, then, whether my approach would be of any use in attempting to write a comprehensive history of American law; perhaps it is suitable only for monographs, but not for Professor Friedman's endeavor. I therefore will attempt to use the analysis of the previous sections to treat one incident in American legal history. Professor Friedman devotes approximately seven pages to the late 19th century movement for codification;⁹⁸ only a part deals with the earlier impulses to that end. Making allowances for differences in emphasis and for the incredible amount of information that Professor Friedman can pack into a very compressed account, I will try to tell the story from my perspective in approximately three pages. I make no pretense, however, at matching the lucidity and occasional elegance of Professor Friedman's expression.

In 1811, Jeremy Bentham offered to codify American law.⁹⁹ His letter embodies most of the contradictory themes in the subsequent considerations of codification. Codification would, it was said, replace archaic rules of law framed in the English feudal setting with rules fully consonant with the needs of a dynamic commercial society; in this regard, codification looked to substantive law reform. Codification also would replace the ever-accumulating mass of precedents with a concise statement of governing rules. This would have two effects. The code, by foreclosing judges from searching among conflicting precedents for the one that supported the result they preferred, would restrain the otherwise unchecked power of the judges; here codification meant a reform in methodology for political ends. In addition, codification would make the law easily accessible to the lay public, and so would promote the broad distribution of access to the legal system. Finally, codification would mean the systematic ordering of the decided cases; here the aim was

98. FRIEDMAN, *supra* note 1, at 340-42, 351-55.

99. The discussion is drawn from Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284, 297-310 (1969), which I wrote as a student.

reorganization, not reform, in aid of the lawyers who might otherwise be overwhelmed with detail.

During the 1820's, the first phase of the codification effort, only the last concern played an important part. Significantly, during the same period the first American law texts, devoted primarily to providing a comprehensible framework for American law, began to receive wide distribution. The lawyers who promoted codification wished primarily to simplify the materials with which they had to deal; they recognized, however, that in attempting to codify American law, they would incidentally have an opportunity to rid it of feudal excrescences.

By the 1830's, a new force entered into the codification movement. One element of the rising popular democracy symbolized by Andrew Jackson dealt with the control of judges; substantial political efforts at establishing the principle of election of judges began. Subsidiary to, but clearly linked with, the demand for judicial elections was a demand for codification. Now the idea of the code as a control on discretion and as a handy source of law for the public drew greater emphasis. Thus, codification was transformed from a movement among lawyers for reforms that would enhance their position into a stirring among the populace for reforms that would reduce the need for lawyers. The movement for substantive law reform also threatened the economic position of those established merchants who were favored by the existing rules of law.

Not surprisingly, then, the orthodox lawyers, who saw their positions and those of their clients threatened, attempted to recapture the movement for codification. Their effort took two forms. On the organizational level, Justice Joseph Story played a major role in the most serious governmental examination of codification in the 1830's, as a member of a Massachusetts commission formed to consider the wisdom and expediency of codification. Story was deeply committed to the common law, whose substance he saw as the source and guardian of American liberty and whose methods were perfectly suited to the need in a progressive society for rapid adjustments of legal rules to social change. Thus, it should have come as no surprise when Story's commission issued a vigorous defense of the common law, recommending only that the general principles underlying commercial law be collected in a short code. This proposal, a most grudging concession to popular opinion, would not even alter common law methodology, for the new code would serve, as decided cases did, primarily as a source of analogy for deciding new cases. By placing the imprimatur of a commission on codification of some sort, Justice Story effectively shifted the ground of discussion from proposals for overarching law reform to precise formulations of what the content of the new code should be.

The lawyers' second response to the popular codification movement was to return to the earlier conception of codification as a rational

reorganization of existing law, with only incidental substantive reform and with no attempt to alter judicial method. Just as this intellectual structure was completed, the Jacksonian coalition dissolved and, as sectional and economic issues replaced concern for political democracy on the political agenda, codification, which never had been high on the agenda, fell off of it entirely. What remained was the lawyers' movement, revitalized and restructured by a threat to the law as an institution. Ultimately, those impulses led to a striking constriction of the focus of codification efforts. Earlier, codification had been a goal for the entire corpus of the common law. When the Field Code, limited to civil procedure, was adopted in New York in 1848, it was hailed by its supporters as the vindication of 30 years of struggle, and denounced by its opponents as the ruin of the common law. Only the most perceptive noticed the transformation of codification into a goal for a very limited, albeit significant, area of the law.

The lawyers' discussions of codification, though they emphasized different themes at different times, reflected two difficult intellectual problems they faced. First, the American struggle to establish a national identity called for the creation of a distinctive system of American law. The common law, however, derived from hoary English precedents. To defend the common law against nationalist urges, the lawyers were forced to redefine what was the essence of the common law: not the rules, but the full elaboration of the methods of the common law was to be the American contribution to the law. For, unlike static England, dynamic America provided the ideal setting for the common law method of analogy and distinction to flourish. By shifting the ground from rule to method, and by treating the common law method as especially suited to American conditions, the lawyers involved in codification were able both to allay misgivings about the nationalism of the common law and to counter fears that adoption of the common law meant saddling the country with outmoded rules.

The second intellectual problem was subtler. A strong stream of emotionalism, exemplified in the religious revivals of the 1820's, pervaded the American tradition. No defense of the common law could be forcefully asserted unless it somehow treated the common law as incorporating elements of emotion as well. The lawyers found those elements in the arts of the pleader, whose elegance of style and appeals to the instinctive need for finality made his products as responsive to demands for passion as the sermons preached during the revivals. By introducing what was an essentially esthetic criterion of elegance into their defense of the common law, the lawyers had difficulty in trying to preserve the common law system of pleading because the ornate curlicues of the common law system were inconsistent with more general views of what constituted good style in the 1830's.

Thus, the intellectual positions taken by the lawyers, which included

reference to esthetics as well as to reason, permitted them to reclaim the movement as a technical reform effort: they managed to protect the interests of a bar that lacked skill in the intricacies of common law pleading without sacrificing either the autonomy of the profession or the mysteries of the common law method.

It is impossible to illustrate the full range illuminated by the perspective offered here through the analysis of a single incident. Codification, for example, did not involve serious ideological problems for the general public, nor did it implicate any substantial interests of the entrepreneurs, except as it was an integral, though small, part of the Jacksonian program. However, the brief account that I have given shows how the guild interests of the bar interacted with the intellectual problems posed by lawyers' roles as Americans and as lawyers; the outcome resulted from the organizational and intellectual strategies adopted by the lawyers, and not simply from a compromise of their material interests and popular demands. Thus, the lawyers involved in the codification effort devised proposals that would preserve the autonomy of legal reasoning in the common law tradition that were structured by legal ideology which found such autonomy needed in a dynamic society and that accommodated ideological concerns over the conflict between reason and emotion which transcended merely legal concerns.

VI. CONCLUSION

Professor Friedman's perspective on American legal history is deficient because it cannot take into account either the autonomy of the legal order—the influence of tradition and tendencies toward consistency on legal outcomes, or the ideology of the legal order—the way in which autonomy promotes a neutral system of rules which masks the skewed distribution of actual results. The perspective offered in this article attempts to correct those deficiencies. It respects the independence of legal reasoning about particular problems, while taking account of the relation between the legal order and the social and economic order by defining that relation in terms of its ideological contours rather than in terms of the unmediated play of pressure groups. Now that we have an elaborate account of American legal history in pluralist terms, we may expect historians to put aside Professor Friedman's work as a limited, though valuable, contribution, and to go on to studies that treat the legal order in its complexity.

