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Legal Scholarship Symposium: The Scholarship of Lawrence M. Friedman

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LAWRENCE FRIEDMAN: THE LEGAL HISTORIAN AND THE SOCIAL ORGANIZATION OF CRIMINAL JUSTICE

Robert J. Cottrol*

Lawrence Friedman has achieved a singular preeminence as a legal historian not merely for having authored a body of important works in the field, but also for having, at an early stage, articulated a new vision of legal history as a discipline. That vision was once iconoclastic, but it has now become commonplace. He expressed this vision in 1973 in his preface to his then new *A History of American Law*:

This is a *social* history of American law. I have tried to fight free of jargon, legal and sociological; but I have surrendered myself wholeheartedly to some of the central insights of social science. This book treats American law, then, not as a 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.¹

At the time, Friedman's vision was still something quite new in American legal historiography. At one time, legal history as a scholarly field tended to fall through the disciplinary cracks of the American academy. Most historians regarded the field, with the exception of constitutional history, as being too technical for historians without formal legal training. Legal scholars had, of course, long been interested in legal history, but their interest tended to be in what today we would regard as a fairly narrow slice of the field: doctrinal evolution, major appellate cases, and the biographies of the great jurists.² Friedman was offering some relatively new insights for legal historians. Part of Friedman's new offering was the application of social science methods to legal history. By then, social science had a long history of involvement with legal practice and legal

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1. Lawrence M. Friedman, *A History of American Law* 12 (2d ed., Simon & Schuster 1985) (emphasis in original).

2. Lawrence M. Friedman, *Opening the Time Capsule: A Progress Report on Studies of Courts Over Time* 24 *L. & Socy. Rev.* 229, 230 (1990). William Novak provides a good example of this earlier approach to legal history in his discussion of the early career of James Willard Hurst. William J. Novak, *Law, Capitalism and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 *L. & Hist. Rev.* 97 (2000). Novak notes that Hurst's 1937 collaborative work with Felix Frankfurter on *The Commerce Clause Under Marshall, Taney, and Waite* was an example of the traditional methodology in legal history with "its focus on constitutional doctrine and judicial personalities." *Id.* at 102. Hurst, of course, would move beyond that kind of traditional historiography of American law to, in the postwar era, pioneer a much broader kind of legal history. See *infra* pp. 628-29 (discussing Hurst's work).

scholarship. The legal realists, including Justice Oliver Wendell Holmes, had, of course, long maintained that legal scholars, and indeed, practicing jurists and lawyers had to have a familiarity with sociology, economics, statistics, and other disciplines that would inform lawyers about the law's societal impact.³ Louis Brandeis had pioneered the presentation of empirical evidence in legal argumentation in *Muller v. Oregon*⁴ in 1908. The use of such evidence in constitutional cases was made more famous and controversial in *Brown v. Board of Education*⁵ in 1954. Lawrence Friedman has noted that there has been an identifiable "law and society movement" in American law schools since the 1920s.⁶

But, American legal historians would be somewhat slow in integrating insights from the social sciences into their inquiries into law's past. That began to change after the Second World War. James Willard Hurst at the University of Wisconsin School of Law began demonstrating that legal history encompassed more than the traditional diet of great judges and major appellate cases.⁷ His writings showed the possibilities of a legal history intimately interconnected with social and economic development in the nation's past. In many ways, Hurst brought a social science perspective to legal history that owed much to the school of institutional economics that flourished at Wisconsin before the Second World War.⁸ The institutionalists tended to reject the often-simplified views of economic actors frequently found in classical (and now neoclassical) economics, in favor of an approach to economic decision making that recognized the complexity, and indeed, messiness of human behavior and motivations.⁹ Hurst brought

3. See generally John Henry Schlegel, *American Legal Realism and Empirical Social Science* (UNC Press 1995). See also Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 5, 181-83, 188-89, 209-12 (Harv. U. Press 1992).

4. 208 U.S. 412.

5. 347 U.S. 483.

6. Lawrence M. Friedman, *The Law and Society Movement*, 38 Stan. L. Rev. 763, 775 (1986).

7. Hurst discussed his approach in his 1963 preface to his study of the legal history of the Wisconsin lumber industry:

The interplay of the lumber industry and the law in Wisconsin was such, in fact, as to yield no large grist of "great cases" or high debates of constitutional policy. Three closely related features characterize these materials. The legal history of the Wisconsin lumber industry resides more in legislative and executive materials than in the Wisconsin Reports, rests about equally in "public" and in "private" law, and in both "public" and "private" law consists more in policy developed out of rather routinely handled instances than in policy developed in moments of drama. . . . "Great cases" and constitutional debate deserve their place in the telling of legal history. But most of life is not melodrama, and most of the reality of legal order as men experience it lies in the kinds of action (and default) and the tone of busy practicality which prevail in the lumber industry story.

James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* xi (Belknap Press 1964).

8. For a good overview of institutional economics and its methodology, see Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. Econ. Literature 166 (1998).

9. Hodgson shows how the institutionalists were traditionally far more concerned with empirical examinations of actual human behavior as opposed to classical and neoclassical economists who basically assumed rational choice and utility maximization on the part of economic actors. See *id.* at 168-69. It is important for purposes of this discussion that one of the leading institutionalists in the interwar years was John R. Commons, a major figure in the Wisconsin Institutional School. See Don Martindale, *American Sociology Before World War II*, 2 Annual Rev. Sociology 121, 131 (1976). When Commons was chair of the economics department at Wisconsin, sociology and anthropology were part of the department and did not separate until 1929. This doubtless contributed to the more holistic approach of institutional economics. *Id.* Commons also

this perspective to the study of legal history and particularly the history of the law's role in mediating economic activity. A critical part of the Hurstian inquiry was, as William Novak reminds us, examining the difficult and often conflicting relationship between historical actors and the social structures that both limited and yet made their actions possible.¹⁰

Lawrence Friedman would be heavily influenced by Hurst's approach to legal history especially during Friedman's formative years as a legal scholar at Wisconsin.¹¹ Friedman's works would further extend Hurst's notions of legal history as a sociolegal inquiry, helping to move the field into new and often surprising precincts. Friedman was able to do so, in part, because of the powerful example his own scholarship provided and also, to use an institutional approach, because of structural changes in the historical profession generally and in legal history more particularly. The publication of the first edition of Friedman's *A History of American Law* in 1973 coincided with often significant changes that were beginning to take place in the training of historians in graduate history departments. Throughout the 1970s and beyond, the traditional training of historians as humanists comfortable with language and letters was being challenged by those who claimed that aspects of the past could be better captured through exploitation of census schedules and the calculation of chi squares.¹² If not everyone subscribed to the new social, economic, or political histories, it was nonetheless clear that the methodologies and concerns of the social sciences would become an integral part of historical training and historiography. The new methodologies would co-exist, often warily, with the more traditional, humanistic side of the discipline. This new orientation of the historical profession would help expand the audience for what Friedman was urging by example: a new legal history. The movement of recently trained history Ph.D.s into teaching law in the 1980s and 1990s would also aid in the transformation of legal historiography. These developments would not only increase the receptivity toward Friedman's approach to legal history, but would also help transform legal history, at least partially, into the kind of sociolegal discipline that Friedman had urged.

Friedman's approach to legal history is one that introduced us to previously unexamined actors and institutions. While the received tradition in legal history guided fledgling and veteran legal historians to appellate courts and the memoirs of the great jurists, Friedman informed us that important legal decisions had also been made in more mundane venues: state legislatures, administrative agencies, municipal courts, and district attorneys' offices. Nowhere is Friedman's approach better illustrated than in his work examining the history of criminal law and its administration in the United States. Today, the history of criminal law is quite a robust field with numerous articles devoted

made considerable contributions to the study of law and labor history. See e.g. John R. Commons et al., *History of Labour in the United States* (Macmillan 1918).

10. Novak, *supra* n. 2, at 111-17.

11. Friedman, *supra* n. 1, at 13.

12. See economic historian Robert Gallman's discussion of the new social historians and their use of quantitative methods in Robert E. Gallman, *Some Notes on the New Social History*, 37 *J. Econ. History* 3, 7-9 (1977). Social historian Tamara Hareven gives an overview of the contributions of the new social history from its beginnings among American historians in the mid-1960s to the mid-1990s in *What Difference Does It Make?* 20 *Soc. Sci. Hist.* 317 (1996).

to the topic as well as specialized book-length histories of such areas as criminal procedure, the jury, the death penalty, penitentiaries, and comparative examinations of the history of criminal law, among other topics. This was certainly not the case in the 1970s when Friedman began exploring how social science methods might illuminate the development of the criminal law. Although there were a number of studies examining the criminological history of the colonial era, studies exploring the history of criminal law and the administration of criminal justice in the post-independence United States were still relatively new.¹³

Friedman was thus plowing somewhat unfamiliar ground when in the 1970s, he, along with his student and collaborator Robert V. Percival, began mining the records of the Alameda County Courthouse in order to explore the day-to-day functioning of the kind of trial court that had previously been underexplored by legal historians. An early product of their collaboration, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, illustrated Friedman's functionalist approach to legal history.¹⁴ *A Tale of Two Courts* focused on civil litigation and had a concern, in large part, with legal decision making as traffic management. There was a concern with the changing functions of courts over time, the extent to which an increasingly complex and differentiated society helped bring forth more use of formal rules in resolving disputes.¹⁵ Friedman and Percival covered the history of the two trial courts for some eighty years, between 1880 and 1970. Their article provides a good illustration of Friedman's social science approach to legal history. Although *A Tale of Two Courts* was an empirical study, it was different from much of the new social and economic history that was written in the 1970s. As a study it was not model bound, abstract, and heavily dependent on the use of inferential statistics.¹⁶ Friedman and Percival's concern was less with the kind of narrow hypothesis testing that had, by then, overtaken much of American social science, than it was in providing a rich evolutionary and ethnographic exploration of the two courts. To be sure, Friedman and Percival employed social theory, but I think it is fair to say, that they did so loosely as a way to guide and not constrict their inquiry into the two county courts.¹⁷ Similarly, they used statistics, particularly basic descriptive statistics, to add to their textured description of the courts.

A Tale of Two Courts revealed a social science methodology that owed much to an earlier generation of social scientists. Friedman's approach was to bring the reader into an intimate contact with the day-to-day workings of the Alameda and San Benito County

13. Lawrence M. Friedman & Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910*, at 5 (UNC Press 1981).

14. Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 L. & Socy. Rev. 267 (1975).

15. *Id.* at 268-70.

16. For a good primer on the basic techniques employed in the new economic history, see Pat Hudson, *History by Numbers: An Introduction to Quantitative Approaches* 191-211 (Arnold 2000).

17. Their theoretical approach, in my view, greatly resembled what sociologist Robert Merton described as "theories of the middle range." See Robert K. Merton, *Social Theory and Social Structure* 39 (Free Press 1968) (emphasis omitted). Merton noted these as "theories that lie between the minor but necessary working hypotheses that evolve in abundance during day-to-day research and the all-inclusive systematic efforts to develop a unified theory that will explain all the observed uniformities of social behavior, social organization and social change." *Id.* (footnote omitted). Merton saw theories of the middle range as a guide to empirical inquiry. *Id.*

Courthouses. We learn from Friedman and Percival of the relative importance of actual dispute resolution, as distinct from routine administration, and how this importance shifts over time. In a very real sense, Friedman and Percival are bringing us a history with an ethnographer's concern for detail. It is an approach that dominated American sociology in the classical interwar period, but was somewhat less favored in the 1970s when Friedman and Percival were doing their research.¹⁸

Friedman was able to apply his approach and the data that he had gathered from the Alameda County Courthouse to a small article, *Plea Bargaining in Historical Perspective*.¹⁹ Once again, Friedman was bringing legal history to a somewhat new and unexpected venue. While practicing lawyers and legal scholars had long been aware of the existence of plea bargaining, Friedman was able to give a systematic picture of the practice from 1880, the earliest year for which he had data, forward. In doing so, Friedman also demonstrated how his kind of empirical legal history might provide useful information for modern policy debates. By the 1970s, crime, punishment, and deterrence had, of course, become policy issues of national concern. Plea bargaining was seen as a systemic flaw in the criminal justice system; one engendered perhaps by the crowded criminal dockets of the 1960s and 1970s. Friedman's demonstration that plea bargaining had roots well back in rural nineteenth-century Alameda County suggested that the practice was a much more integral part of the American criminal justice system than had been previously believed.

Friedman and Percival's explorations of the Alameda County court records led to their book, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910*.²⁰ Their book was the first county level study of the functioning of a criminal court in post-independence America.²¹ Here again, *The Roots of Justice* provides a clear illustration of the Friedman method. The authors inform us from the very beginning that their "book straddles two fields: American legal history and the study of law and society."²² Friedman and Percival also announce early on that the process of exploring criminal justice in Alameda County is complex both conceptually and methodologically:

This, then, is one central argument of the book. The criminal justice system of Alameda County, in our period, had no single function, and cannot be summed up in a single, simple formula. A second and related point has to do with what we might call *layering*. Not only was there no single function, there was, in an important sense, no single *system*. Rather, there were a number of systems, each with its own job, its own process, its own way of looking at the world and the work. The systems were arranged one on top of another, like layers in a layer cake. At the top was the domain of the great show trials; at

18. See Martindale, *supra* n. 9, at 136-38. See also Charles Lemert, *Social Things: An Introduction to the Sociological Life* 69-72 (Rowman & Littlefield 1997) (discussing the importance of the Sociology department at the University of Chicago in developing a disciplined empirical and ethnographic approach to the study of urban life).

19. Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 L. & Socy. Rev. 247 (1979).

20. Friedman & Percival, *supra* n. 13.

21. *Id.* at 9 (discussing Alameda County).

22. *Id.* at 15.

the bottom, the realm of the drunks in police court; in the middle, ordinary burglaries, thefts, and assaults in Superior Court.²³

This recognition of the court as a multi-dimensional institution contributed to both the complexity of their inquiry and the sophistication of their result. By studying criminal proceedings in Gilded Age and Progressive Era Alameda County, Friedman and Percival were able to look at a corner of the law generally far removed from the great body of national law that traditionally engaged legal historians. The cases generally involved poor or working-class defendants, the kind who would only rarely, if ever have the resources to bring their convictions to appellate courts and generate modifications in legal doctrine. Federal courts had not yet begun the process of applying the criminal procedure provisions of the Bill of Rights to the state courts.²⁴ The cases heard in the Alameda County Courthouse were unlikely to disturb the federal judiciary or generate new constitutional doctrine. Thus, Friedman and Percival were able to study the court as a largely self-contained body. It was not totally autonomous to be sure. State appellate courts had real, if rarely exercised, authority. But the Alameda County Court was sufficiently self-contained to allow the authors to focus on the internal dynamics of the court and to give the readers a good understanding of both the formal and informal processes that determined the fate of criminal defendants.

From the beginning, *The Roots of Justice* contributes to our understanding of the criminological past through its recognition of not only the organizational complexity of the system, but the moral and legal complexity as well. Sociologists of deviance had long been concerned with the functions of crime and deviance—the idea of boundary maintenance.²⁵ Friedman and Percival extended that discussion by looking at the defining of at least certain crimes less as a means of strengthening a general social solidarity and more as a means of strengthening the hegemony of those groups who manage to impose their view of what should be criminalized. Their discussion was an important contribution for historians. It pointed to a way of understanding how different activities came to be made criminal or non-criminal over time.

Alameda County between 1870 and 1890 was a small slice, geographically and temporally, of the history of criminal law, yet Friedman and Percival were able to use that history to discuss important, broader themes in the history of criminal justice. It was a time and place in which crime engaged significantly less public concern and resources than in the America of the 1970s when the authors were researching and writing. Alameda County, at the time, was more rural and less ethnically diverse than it would be after the Second World War. Yet, Friedman and Percival demonstrated that the records of its criminal proceedings held important lessons for modern students of criminal justice. In a very literal sense, *The Roots of Justice* provides a road map illustrating the origins of the modern American system of criminal justice. This was a time of change. Increasingly, the administration of justice was being placed in the hands of insiders. The

23. *Id.* at 14-15 (emphasis in original).

24. Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 192-95 (Duke U. Press 1986).

25. See e.g. Emile Durkheim, *The Rules of Sociological Method* 65-69 (Free Press 1938); Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* 3-29 (John Wiley & Sons 1966).

police force was becoming professionalized. The role of citizen participants, grand and petit jurors, was becoming less important. Indictment by grand jury was being largely replaced, with few exceptions, by charges of information determined by judges.²⁶ Trial by jury still existed, but an increasing number of cases were being heard by judges with sentences determined by explicit or implicit plea bargains.²⁷ There was also a greater use of the criminal justice system to enforce a middle class, Progressive-era view of the moral order, or what that order should be.

Friedman and Percival exploit the universe of available sources in their effort to illuminate every nook and cranny of the criminal court system in Alameda County. We get arrest statistics and information from police blotters. Details of executions as recorded by newspapers are related. Friedman and Percival present a portrait of the criminal bar ranging from neophyte attorneys learning their craft through representation of indigent defendants to successful criminal lawyers with decent success rates. We see summary processes for public order offenses, public drunkenness, low-level assaults, and similar offenses as well as the more serious procedures in felony trials. We learn, not surprisingly, that disfavored groups—blacks, Chinese, and Irish—have higher arrest and conviction rates than native-born whites.²⁸

Friedman and Percival also tell us something important about the way crime and punishment had changed by the dawn of the twentieth century, something that was true for Alameda County and probably even more the case in other venues. Criminal law and the administration of criminal justice was coming more and more to reflect greater social cleavages within the society. Increasingly, the respectable middle classes, whose mores were represented in, and protected by the criminal law, came to view offenders less as fallen members of the same community, and more as members of a distinctively different dangerous class or set of dangerous classes, people in need of the monitoring and disciplinary function of the criminal law. In this aspect of their discussion, Friedman and Percival were exploring somewhat new territory for historians of criminal justice. Previous histories had largely focused on rather homogenous communities in the Colonial era. While punishment in these communities was often harsh, they nonetheless recognized the offender as part of the community. The aim of punishment was often designed to bring the offender back into the fold or to encourage other potentially errant members of the community not to follow the offender's path. As Stuart Banner informs us, even Colonial death sentences followed a prescribed ritual in which the condemned offender had a speaking part and an occasional last minute pardon at the execution site—all designed to foster repentance on the part of audience and offender.²⁹ The history that Friedman and Percival report is one where the respectable, middle-class, rule-setting element of the community view offenders as a distinctly different class; it is a feature of a society with more profound social divisions than had previously been examined by American historians of criminal justice. It was, of course, more familiar to students of racial and ethnic conflict in American history. It was territory that had certainly been

26. Friedman & Percival, *supra* n. 13, at 166-68.

27. *Id.* at 175-81.

28. *Id.* at 105-07.

29. Stuart Banner, *The Death Penalty: An American History* 40-43, 61-70 (Harv. U. Press 2002).

explored by historians of slavery, as well as historians of ethnic conflict.³⁰ It would later become more of a staple inquiry among students concerned with the history of criminal law.³¹

The Roots of Justice stands out as a work applying social science insight to legal history, in part due to its thoroughness, and in part due to its methodological simplicity. Statistical evidence is used cautiously; in the final analysis its role is to bolster the study's descriptive effort and not to make hard inferences from the data. The portrait of criminal justice in Alameda County is not a work of grand theory, attempting to shoehorn the untidiness of real events into a Procrustean theoretical framework. Neither is the work a piece of narrow minded empiricism that gets us lost in the trees of the county's criminological history without reminding us of the significance of the larger forest. What we have instead is a detailed and intimate portrait that tells us what actually made the criminal law function in one time and place. In doing so, Friedman and Percival provided a template for the monographic study of the history of criminal justice for other scholars to follow.

Many of Friedman's insights from the Alameda County study would be brought to bear in his article written with Paul Tabor, *A Pacific Rim: Crime and Punishment in Santa Clara County, 1922*.³² Santa Clara in 1922 was a good laboratory in which to test hypotheses Friedman had developed in the Alameda study. It was during the Prohibition era—the ultimate American effort to use the criminal law to discipline the presumed baser instincts of the “dangerous classes.” The county was ethnically diverse including people of Italian, French, and Yugoslav descent with long traditions of wine making and spirit distillation.³³ Prohibition had both strong opponents and defenders. Friedman and Tabor indicate that county officials had mixed success with respect to enforcement of California's state prohibition statute.³⁴

A Pacific Rim also sketches the criminal justice systems response to other crimes, great and small. The article also allows Friedman to continue his inquiry on the erosion of popular or communal participation in the criminal justice apparatus. He does so by continuing to look at the impact of plea bargaining. By 1922, use of the plea bargain had increased, further eroding the role of jury trials in determining the outcome of criminal cases.³⁵ Criminal justice was becoming less a reflection of community norms, and more a reflection of the mores and insights of criminal justice insiders. The jury trial had previously added laymen, with their representation of community norms and biases, to the business of deciding cases. This could add uncertainty to the criminal justice process. But since the beginning of the twentieth century, the uncertainties of jury

30. Kenneth M. Stampp in 1956 had provided an extensive discussion of the role of criminal law as a mechanism for the social control of slaves. See Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* 206-24 (Alfred A. Knopf 1956).

31. See, for example, legal historian James Q. Whitman's discussion of the influence of slavery on the development of systems of degrading punishment in American history in *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* 173-77 (Oxford U. Press 2003).

32. Lawrence M. Friedman & Paul Tabor, *A Pacific Rim: Crime and Punishment in Santa Clara County, 1922*, 10 L. & Hist. Rev. 131 (1992).

33. *Id.* at 138.

34. *Id.* at 140.

35. *Id.* at 141-42.

decision making were having less and less importance in the criminal justice system. Instead, a small community of police, prosecutors, defense attorneys, and judges, with perhaps an occasional contribution from social workers or others who could attest to a defendant's psychological or social suitability, would determine what happened to offenders.³⁶ Defendants could insist on their right to a jury trial to be sure. But they did so at their peril with the likelihood of harsher sentences if found guilty. Friedman's continuation of this discussion in *A Pacific Rim* informs us of a critical shift in the history of American criminal justice.

If Friedman had simply confined his criminological histories to explorations of California counties in the early twentieth century, he would have made an important contribution to the history of criminal justice as a field. His explorations were both methodologically and thematically innovative, advancing legal history generally, and particularly the emerging field of the history of American criminal justice. Friedman however, advanced the history of criminal justice in the United States several steps further with his book *Crime and Punishment in American History*.³⁷ Like his other two massive explorations of the legal history of the United States, *A History of American Law* and *American Law in the Twentieth Century*,³⁸ *Crime and Punishment* is remarkable for often providing the kind of detailed illumination of the forgotten corners of the nation's legal history that the *The Roots of Justice* did for the history of one county. *Crime and Punishment* tracks the subject from the earliest English settlements in North America to the troubled early 1990s when Friedman was writing. As with his earlier efforts, Friedman's concern is with the functions of criminal law. And in looking at the criminal law's functioning in the past, Friedman again asks the all important questions: Whose law? Whose order? For what purposes? And how are these ends achieved?

By the time Friedman was writing *Crime and Punishment*, American legal history in general and, indeed, the history of American criminal justice were fields that had matured considerably. More and more legal historians had followed Friedman's prescription to conceive of United States legal history as, indeed, a social history of American law. There were more micro studies of trial courts done in the manner that Friedman had helped to pioneer. There was also a greatly expanded community of legal and social historians who had devoted their efforts to the history of criminal law and criminal justice. Friedman was able to draw on the work of these scholars, as well as his own previous efforts, and, of course, considerable primary research in his overview of criminal justice in American history. His discussion of the Colonial era echoed some of the themes he had developed earlier in *A History of American Law*. His readers were reminded that although American law in the Colonial period had common law roots, the common law, as known in seventeenth century England, was too complex and required too much expertise to be instantly transported to the rough wilderness of seventeenth century North America. Instead, the law, in this case the criminal law, came to America

36. *Id.* at 144.

37. Lawrence M. Friedman, *Crime and Punishment in American History* (Basic Bks. 1993).

38. Lawrence M. Friedman, *American Law in the Twentieth Century* (Yale U. Press 2002).

piecemeal, and was the product of local codes; codes that were often informed by dominant local elites and the Protestant sects that they adhered to.³⁹ Ultimately, as the colonies became more settled and as they eventually became states, American criminal law would become more like the common law from which it sprang, although it would be modified and ultimately codified.⁴⁰

Like *The Roots of Justice, Crime and Punishment* is concerned less with the great cases and ensuing appellate doctrine and more with the law's application to ordinary, indeed, anonymous people in American history. Here again, we see Friedman's concern with those institutions that ultimately make the most difference in the day-to-day functioning of the system. That concern takes us through some of the major themes of the criminological history of the nation: Colonial-era stocks and the development of the penitentiary in the nineteenth century, race and crime and vigilantism, plea bargaining, and the enforcement of morals. Friedman brings in modern concerns: the contemporary death penalty, drug criminalization, and gun control, among others.

Friedman provides an especially valuable analysis of one singular aspect of American legal culture: the large amount of tolerance for extra-legal violence. He devotes a chapter to the subject, examining such issues as the frontier tradition, the duel, vigilantism, and lynching.⁴¹ These are activities that have found few parallels in modern Western Europe or other societies with which the United States is frequently compared and raises the difficult question of how to account for a significant degree of "American exceptionalism" in the area of crime and justice.⁴² Friedman is especially valuable in discussing issues of race and crime, whether examining lynching's history as a tool of racial control or the dual evils of police brutality and police under protection in modern inner city communities.⁴³

As with his other explorations on the history of criminal justice, Friedman's *Crime and Punishment* does far more than provide a detailed tapestry illustrating the functioning of criminal law in the past. Friedman also provides us with a "useable past," one that informs us of how we have arrived at our troubled, criminological present. I use the term "useable past" somewhat guardedly in this context because Friedman's text, like history itself, does not point us to any quick or easy policy prescriptions. We are all familiar with the major criminological policy prescriptions that have been offered over the last half century or so. Some criminological theorists have urged that the criminal justice system should stress rehabilitation, others have urged a greater emphasis on punishment and retribution.⁴⁴ The debate over whether the death penalty deters murder

39. Friedman, *supra* n. 37, at 22-23.

40. *Id.* at 63-65.

41. *Id.* at 172-92.

42. For an important discussion of "American exceptionalism" in the area of criminal justice, see Whitman, *supra* n. 31. I have discussed the issue and argued that we should look at American exceptionalism as the result of unique microcultures of criminal violence in the United States. See Robert J. Cottrol, *Submission is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 *Colo. L. Rev.* 1029 (1998).

43. Friedman, *supra* n. 37, at 189-92.

44. Friedman notes the movement away from efforts to make the criminal justice system more "humane" after the 1960s. See *id.* at 404-06. Certainly, from the 1970s onward, retribution has been seen as an increasingly legitimate function of the criminal justice system and there has been less willingness to accept

has become a more than cottage industry among empirical social scientists.⁴⁵ Sociologists, economists, public health specialists, and citizens' groups engage in long running battles over whether private gun ownership increases or deters violent crime.⁴⁶

But Friedman's usable past is not a law office history that facilely proves that the death penalty does or does not deter murder, or that either the champions or opponents of gun control are basically right or wrong. He briefly lets his views show on these and other contemporary policy debates to be sure, but that is not where the value of his efforts lie. Instead, *Crime and Punishment* brings a more than needed touch of context and nuance to the debate over criminal justice policy. By doing a history of criminal law and its administration that shows the evolution of criminal justice policy within the broader context of the evolution of American culture, Friedman gives us a history that produces a healthy skepticism toward what may be accomplished in this often-troubling area. *Crime and Punishment* came out in 1993 as the crack cocaine connected phenomenon of urban, youth, gang-related violence was beginning its awful rise. The book was published two years after devastating riots in Los Angeles followed the police beating of Rodney King. It was a time, like the present, of a strong association between poor black men and violent crime. The public wanted reassurance, frequently in the form of quick fixes. Politicians were quick to supply such.

And yet Friedman's history told us of the complexity of crime, and indeed, the criminal justice system that was meant to control it. Perhaps crime rates might respond to harsher or more frequent punishments, but the history of crime and punishment was not necessarily reassuring on this point. Could these harsher or more frequent punishments be applied within the framework of the criminal justice system that had developed over three centuries of American history? How responsive to public outcry was a system that had grown increasingly autonomous and bureaucratic, whose work had become the product of professionals and not lay people over the last century likely to be? Friedman also reminds us, that there was an even broader question: How much do the American people want to tackle the problem of violent crime, and what are they willing to give up to do so? In the abstract, public opinion might support the truncating of certain civil rights or civil liberties to insure a greater degree of public order and perhaps safety, but the public has proven to be far less willing to do so when faced with concrete proposals that limit existing rights. Could the promiscuous use of the death penalty complete with mandatory death sentences for specified crimes and draconian limitations on appeals deter first-degree murder? Might mandatory long-term imprisonment for

medical or psychological explanations as excuses for criminal behavior. See John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 2-7 (Clarendon Press 1990); John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 *J. Crim. L. & Criminology* 723, 723 (1982); Marvin E. Wolfgang, *The Medical Model Versus the Just Deserts Model*, 16 *Bull. Am. Acad. Psych. & L.* 111, 111 (1988).

45. For an overview of some of that debate and how people who are not especially inclined toward quantitative methodologies might approach it, see Robert J. Cottrol, *Death and Deterrence: Notes on a Still Inchoate Judicial Inquiry*, in *Statistical Science in the Courtroom* 379-91 (Joseph L. Gastwirth ed., Springer Pub. 2000).

46. Criminologist Gary Kleck provided a good guide to the social science and public health literature on gun control as of the mid-1990s. See Gary Kleck, *Targeting Guns: Firearms and Their Control* 31-62 (Aldine 1997).

repeat offenders deter recidivism? Would radical gun control, prohibition on ownership of all or most types of firearms with severe penalties for violators lessen gun violence? The efficacy of such proposals might be debated, but it is also clear that such proposals and others that might be envisioned run counter to strong cultural and political sentiments concerning individual rights and limitations on government within American society. Friedman wisely cautions us that this culture of rights and sense of what is proportionate punishment has to be taken into account in any development of alternatives to current criminological policy. Friedman's insight in this regard takes on an even greater vitality in the post-September 11th world.

Whether looking at criminal justice in the limited context of late nineteenth-century Alameda County or giving us a broad overview of criminal law and its administration across the broad sweep of the nation's history, Friedman makes an important contribution precisely because of his ability to integrate the legal and the social. Crime and society's responses to crime involve law with the society's broader culture in a way that no other area of the law can. At its base, criminal law and its administration involve fundamental questions of a society's moral vision and the mobilization of the public behind that vision. It also deeply involves questions of social hierarchy and power. These are legal questions, but behind those legal questions stand powerful questions concerning a society and its culture. The history of American criminal law has benefited greatly from having Lawrence Friedman apply his skilled law and society lens to a once neglected field in legal history.