

Tulsa Law Review

Volume 40
Number 4 *The Scholarship of Lawrence M.
Friedman*

Summer 2005

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Recommended Citation

James L. Huffman, *From Legal History to Legal Theory: Or Is It the Other Way Around*, 40 *Tulsa L. Rev.* 579 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol40/iss4/2>

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FROM LEGAL HISTORY TO LEGAL THEORY: OR IS IT THE OTHER WAY AROUND?

James L. Huffman*

Twenty years ago, I had occasion to comment at a legal history symposium on a paper by Professor Lawrence M. Friedman. I noted then that Friedman's work on divorce law was one of many contributions he had already made toward the development of a theory of the relationship between law and society. I wrote at the time:

Legal education has not contributed much to the development of this much-needed theory. We generally plug along in the Langdellian tradition, looking for the law's rationality, notwithstanding our perfunctory bow to Karl Llewellyn and the Legal Realists. The Realists themselves never really escaped the Langdellian tradition. That tradition is like a bog that keeps sucking us back into the never-ending tasks of analogy and distinction. Professor Friedman has at least one foot out of the Langdellian bog and confirms that there is nothing inevitable about our legal past. In the words of Grant Gilmore, "[t]here is no reason to believe that there are not real alternatives of choice. We can go this way or that way. We can sink but it is, so far as we can know, equally possible that we can swim."¹

My conclusion about the contributions of the legal academy to a general theory of law and society is about the same today. We are mostly still an uncomfortable mix of Langdellians and Realists.² Well over a century after Langdell, most law professors continue to embrace the case method of instruction in law school courses. Casebooks proliferate in every subject. Subjects proliferate as the legal taxonomy adapts to the ongoing explosion of law, and I am not talking about the many "law and" courses offered at most law schools. We have wildlife law, health law, aviation law, cyberlaw, space law, sports law, anadromous fish law, insurance law, and so forth; all are taught as autonomous subjects by specialists who pursue scholarship in their chosen niche. While few today would agree that the law is a seamless web,³ we must assume that there is a

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1. James L. Huffman, *From Legal History to Legal Theory: A Comment on the Work of Lawrence Friedman*, 63 Or. L. Rev. 671, 674-75 (1984) (footnotes omitted) (quoting Grant Gilmore, *The Age of Antiquarius: On Legal History in a Time of Troubles*, 39 U. Chi. L. Rev. 475, 488 (1972)).

2. Christopher Columbus Langdell, Dean of Harvard Law School from 1875 to 1895, is generally credited with the introduction of the case method in American legal education. The method was rooted in his view that law should be approached as a science, with the law library serving as the legal scientist's laboratory and the reported cases serving as the raw data for scientific study. The Legal Realists of the 1920s and 1930s questioned whether the law really controlled judicial decision making, but they did not overcome the Langdellian search for determinable coherence in the law.

3. The phrase "law is a seamless web" has been attributed to many, including Oliver Wendell Holmes, but its origin remains a mystery. Ethan Katsh concludes that Frederic Maitland was the first to use the phrase "seamless web" in a law related context. Ethan Katsh, *Law in a Digital World: Computer Networks and*

web of some sort if we are to take seriously the search for a general theory of law and society. But few in the legal professorate pay any attention to whatever web may exist. Few pursue a unifying theory, without which it is difficult to think about or describe the legal system as a whole. Rather, most in the legal academy treat the law as a collection of loosely connected, or even unrelated, parts that combine to constitute the law school curriculum and the subjects to be tested on the bar examination.

I cannot demonstrate empirically what goes on in law school classrooms, but my educated guess is that most classes are narrowly focused on legal doctrines, i.e., a particular body of law, with little effort to relate that law to overarching theory. You would not reach that conclusion if you attended the annual gathering of America's law professors, or many of the regional and local academic conferences sponsored by individual law schools. Social and political themes of the law dominate our academic meetings, but the content of our casebooks and what I have observed in classrooms suggest that America's law school courses are filled, for the most part, with discussions of legal doctrine.⁴ Students demand to know something about the law so they can pass the bar examination and find employment. Law professors often have other interests (political more often than theoretical), but most of them succumb to the demands of their students. So we have a disconnect between what law professors teach, and what they write and convene about.

To the extent that theory, as opposed to politics, has penetrated the classroom over the last three to four decades, it has come mainly in two guises: law and economics, and critical legal studies. Law and economics does suggest an overarching theory to explain much legal development.⁵ While many in the legal academy have resisted its explanations, law and economics has found its way into many casebooks and classrooms, although rarely as an integral part of the course. Critical legal studies, though now seemingly on the wane, made a big splash at some law schools but has contributed little to legal theory largely because it is at its core anti-theory. To assert that the law is the mirror of power, which is really all the Critics have to say, is to abandon law as a discipline in favor of politics.

Did Friedman's early quest for a general theory of law anticipate or hope for a different path for legal education and scholarship over the last four decades? At that time, he seemed to believe that a general theory of law and society was both possible and desirable. Friedman correctly concluded that we have general theories of law whether or

Cyberspace, 38 Vill. L. Rev. 403, 403 n. 3 (1993). There is no mystery in Friedman's view that while the law is part of a complex web of historical, political, economic, and social factors, it is not a seamless web unto itself.

4. Undoubtedly, there are exceptions to this generalization in individual professors' classrooms. Generalizations are seldom accurate. But I am confident that the majority of professors at most law schools are teaching as if the law is internally coherent, and are doing little to demonstrate the truth or falsity of that assumption.

5. Economists, wrote Friedman, "tend to believe in one general economic theory, which, once mastered, can be applied more or less everywhere and in any culture." Lawrence M. Friedman, *On Legal Development*, 24 Rutgers L. Rev. 11, 13 (1970).

not we recognize them.⁶ In the late 1960s and early 1970s, Friedman wrote several articles on the subject of a general theory of law and society. Some of this was written from the narrower focus of a theory of legal development, but for Friedman they were really the same challenge.⁷

A theory of legal development would explain how law changed over time and might be of assistance to countries seeking to modernize their legal systems in the interest of economic and political development. Today, some would challenge the idea of legal progress, but when Friedman was first writing, development implied improvement. There were “under-developed” (later called “less developed” or “developing”) countries that were assumed to aspire toward development. Although this was the age of the “ugly American,”⁸ it was before the age of American cultural imperialism—before the age of cultural relativism.

Friedman’s interest in a theory of legal development was probably inspired by the contemporary pursuit of parallel theories of development in economics, society, politics, and other social science disciplines. It was all of a piece—the social scientists, working alongside the agronomists, entomologists, engineers, and hydrologists to explain how to overcome poverty, disease, and political repression through development. Economics had the theories of Albert Hirshman,⁹ and political science the theories of David Apter.¹⁰ The law was in need of similar theories to guide and perhaps accelerate legal progress.

While Friedman did not purport to have a theory of his own, he had a point of view about much of what passed for legal theory. He suggested there were two broad categories of legal theories: those that saw law and the legal system as autonomous, and those that understood the law to be an integral part of the broader society and culture.¹¹

6. Friedman observed:

Patient work on particulars, to be sure, is sorely needed. But this work would be enormously more efficient if it were guided by some general theory. In fact, no work is possible without some ruling concepts or propositions. The point is that these concepts and propositions do exist as assumptions, superstitions, half-formed notions.

Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & Socy. Rev. 29, 30-31 (1969).

7. Friedman comments: “The theory of law and development is only a special case, or corollary, of the theory of law and society.” Friedman, *supra* n. 5, at 53.

8. See generally William J. Lederer & Eugene Burdick, *The Ugly American* (W.W. Norton 1958).

9. Albert O. Hirschman, *The Strategy of Economic Development* (Yale U. Press 1958).

10. David E. Apter, *The Politics of Modernization* (U. Chi. Press 1965).

11. Friedman wrote:

On the origins of law, there are two polar types of theory: One is that law does nothing more than reflect and express social forces and values generated elsewhere in the social system, that it has no life of its own. At the other pole is the point of view that law is independent of outside forces, that it follows its own laws of development, that it is relatively insulated, relatively impervious to pressures flowing in from the rest of the social system. Those who hold this point of view tend to explain law in terms of its own principles and logic, in terms of the legal tradition and the way lawyers and judges think. The other point of view looks for social, economic, psychological or political causes of law.

Friedman, *supra* n. 5, at 54. Friedman’s description of the alternatives is unchanged three decades later: One central question concerns the autonomy of law: is this a kingdom of its own, ruled by lawyers and judges, which grows and decays in accordance with its own rules, its own inner program? Or is it, rather, an integral part of the larger society, so that changes in the world bring about, inevitably, corresponding changes in the law?

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

Friedman clearly favored the second approach.¹² In this he was every bit the instrumentalist¹³—law would be understood as the product of human decision in pursuit of human ends, or perhaps as both a cause and an effect in the complex array of institutions and happenings called human society.¹⁴ Because legal theorists and even legal historians had been focused on law and legal regimes as self-contained systems, theories rooted in the instrumentalist understanding would take some time to emerge. There was a lot of work to be done to put meat on the bones of instrumentalist legal theory.¹⁵

Friedman not only favored the instrumentalist approach, but he was disdainful of those who sought to explain law as autonomous. In a review of Perry Miller's *Life of the Mind in America*,¹⁶ Friedman stated that Miller was "sublimely innocent of law and life."¹⁷ Miller's idea that we could understand the historical development of American law by reading the works of great thinkers like James Kent and Joseph Story was ludicrous to Friedman. "Kent was not a great systematic thinker," wrote Friedman, "[n]or is there any depth or system to the rather pedantic prose of Joseph Story."¹⁸

But accepting that neither Kent nor Story was a great theoretician of the law does not mean that others might not succeed where they failed. Indeed Langdell's law as science approach was a smashing success as measured by its impact on legal education and legal practice. Today we teach our students to reason their way to an understanding of the law. As lawyers, they will sort through the vast sea of precedent in search of the controlling rule. As judges, even as self-described pragmatist judges, they will explain why the law requires the result they reach.¹⁹ How is it, then, that instrumentalist

12. Friedman, *supra* n. 11, at ix. Compare this with Friedman in 1969, where he notes "On the basis of present evidence, it is hard to say that any of these theories and variants of theories are right or wrong . . ." Friedman, *supra* n. 5, at 56.

13. Friedman, like almost every other late twentieth century legal historian, owes a debt to James Willard Hurst who charted the course for an instrumentalist approach to the study of legal history. See James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (U. Wis. Press 1956) [hereinafter Hurst, *Conditions of Freedom*]; James Willard Hurst, *The Growth of American Law: The Law Makers* (Little, Brown & Co. 1950). Hurst demonstrated the task of the legal historian in his detailed and grassroots study, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Harv. U. Press 1964).

14. Friedman comments: "If by law we mean the structures themselves, the skeletal aspects of a government system, it is difficult to say [whether law is dependent or autonomous]. But if we mean the whole system, the whole process, then clearly law is cause as well as effect." Friedman, *supra* n. 5, at 57.

15. In his early writings Friedman argued that autonomous theories of law explained little and that social theories of law would be a long time in coming because little was known about the relationships between law and society. He frequently stated hypotheses about this relationship and urged studies (many of which he pursued himself from the bowels of one courthouse or another) that would reveal the empirical knowledge necessary to a theory of law and society. "The legal profession, sad to say, has had little to offer so far toward the solution of problems of law and society, and law and development. And law, in the broad sense, is far too important to be left to traditional lawyers." Friedman, *supra* n. 5, at 62.

16. *The Life of the Mind in America: From the Revolution to the Civil War* (Harcourt, Brace & World 1965).

17. Lawrence M. Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 Yale L.J. 1244, 1250 (1968).

18. *Id.* at 1254.

19. The leading and most articulate proponent of judicial pragmatism is Judge Richard Posner. See e.g. Richard A. Posner, *Law, Pragmatism and Democracy* (Harv. U. Press 2003) [hereinafter Posner, *Pragmatism*]. In his book on *Bush v. Gore*, Posner defends the Supreme Court's decision on pragmatic grounds, but critiques the legal justifications offered by the majority as not the best "legal-type judgments." Richard A. Posner,

theories, linking legal development to changes in society and culture, seem best to explain the history of a legal system whose operating manual appears to be based on internal coherence and consistency?

The answer is probably simple. Coherence and consistency are important to people—particularly to people investing their time and resources in trying to make their lives better. A legal theory that allows lawyers and judges and law professors to explain the law based on internally consistent rules serves the instrumentalist objectives of predictability and stability. It also serves the end of human liberty to the extent that it actually constrains those who govern. Langdell did not speak the language of instrumentalism. His model was the objective method of science.²⁰ But if legal science revealed an internal theory of law that judges and other legal officials could rely upon to say what the law is, it would serve the unspoken value of the rule of law.

Most agree that the rule of law is a good thing, although some would argue that it is an impossibility in a system unavoidably run by humans. The Realists taught us that it matters who is making the decisions—that like other sciences, law can be influenced and even corrupted.²¹ The Critics tried to convince us that what passes for the rule of law is all about exploitation—that legal history is written by the powerful at the expense of the powerless.²² But it is difficult to accept that the pervasive appeal to the rule of law as the core value of American legal culture²³ is all a ruse. Some people, including Friedman, take the rule of law seriously, even while acknowledging that the Realists have a point.²⁴

The rule of law depends on having some internal theory of law. If our position is that the law is whatever folks think will get them where they want to be, there can be no pretense of a commitment to the rule of law. Even if we embrace the appeal to science

Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 145 (Princeton U. Press 2001). Because “Holmes and Jackson are about the only Justices in the history of the Supreme Court who had the rhetorical skills to acknowledge the pragmatic grounds of their constitutional interpretations without appearing lawless,” *id.* at 175, Posner, the pragmatist, would have judges “cover their pragmatic tracks with plausible legal explanation of their decisions.” James L. Huffman, *Like the Supreme Court, Posner Is Right for the Wrong Reasons*, 1 L., Probability & Risk 67, 72 (2002).

20. Langdell told the members of the Harvard Law School Association “that law is a science, and . . . all the available materials of that science are contained in printed books.” Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 L. Q. Rev. 123, 124 (1887). This assertion led Langdell to the conclusion “that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.” *Id.*

21. See e.g. Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222, 1222, 1243 (1931).

22. See e.g. Morton J. Horowitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford U. Press 1992) (as applied to American legal history); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harv. U. Press 1986).

23. Friedman comments: “The immediate source of law is not social change but what we can call legal culture. By this I mean people’s ideas, attitudes, values, and expectations with regard to law.” Friedman, *supra* n. 11, at 589 (endnote omitted).

24. Friedman wrote:

There is still a commitment to the common-law approach, to evolutionary movement, and to constant recourse to grand principles of law, established precedent, or constitutional phrases as the major premises of judicial reasoning. Legal realism has not freed the courts from an obligation to society, only from an obligation to a certain style of legal logic . . .

Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 Stan. L. Rev. 786, 823-24 (1967).

(and here I mean real, not legal, science) to resolve the factual uncertainties inherent in legal disputes, we will remain dependent on legal process for stability and transition. Without an internal theory, even if so basic as an implicit acceptance that most of the time we will defer to generally accepted understandings of what the law is, there can be no rule of law.

If no such acceptance exists, we are not doomed to chaos. The reality of a reasonably stable society in which people and institutions behave in predictable ways does not prove that what appears to be the rule of law is the product of an internal legal theory rooted in the importance of stability and consistency. It might be that the combination of other social forces produces something that looks like the rule of law. Or maybe it is nothing more than exploitation of the poor by the rich—stability does seem to benefit the rich, although it also provides a condition necessary to becoming rich.

In his early writings, Friedman had little patience for legal theory rooted in the idea of an autonomous legal system.²⁵ He argued that about two centuries ago there was a radical shift in legal cultures across the globe.²⁶ Before the nineteenth century, legal systems were rooted in fixed principles, often religious in character. The United States Constitution was the law of the land because it was the Constitution. Legal legitimacy was rooted in the word of God, or the word of the Founders, or the divine right of kings. According to Friedman, legal legitimacy today is rooted in delivering the goods.²⁷ The law is an instrument employed to achieve particular ends. It is evaluated on the basis of how well it contributes to the achievement of those ends.²⁸

More recently, Friedman has again evidenced little patience for autonomous theories. In a recent symposium at Chicago-Kent on the theme of “taking legal argument seriously,” Friedman wrote that he is “not very interested in taking legal argument seriously.”²⁹ But such theories persist and therefore are a part of the legal history and culture about which Friedman has written extensively. He rejects these theories because they do not explain the historical evolution of American law. Indeed, I imagine he would object to my use of the term “evolution” to describe what is merely “change.”³⁰

25. See *supra* n. 15.

26. Friedman states: “In the last 2 centuries or so, a radical alteration seems to have taken place in the fundamental idea of law. The basis of its legitimacy has altered.” Friedman, *supra* n. 5, at 29.

27. Friedman comments: “[L]aw is no longer worshipped as the way of the world. The test of a rule, a code, an institution is its work: Does it advance the enterprise? Does it serve my interest or yours? Few rules of law still rest on traditional or religious grounds.” *Id.* at 33.

28. Friedman stated:

People of the modern world look upon law as a tool, an instrument, not as an object of tradition or sentiment, as sacred, as an end in itself, or as a direct emanation from the Divine. They have a utilitarian view of law. Each particular aspect of law is judged on the part it plays in some larger scheme of values, in some large network of ends and means.

Id. at 29-30.

29. Lawrence M. Friedman, *Taking Law and Society Seriously*, 74 Chi.-Kent L. Rev. 529, 542 (1999). Friedman observes, that among several reasons we might want to take legal argument seriously is because “good legal argument leads to correct legal answers.” *Id.* at 529 (citing Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 Chi.-Kent L. Rev. 415 (1999)) (citation omitted). Friedman states, however, “this position assumes that there are, in fact, legal answers that can be described as ‘correct.’” *Id.*

30. Friedman has been critical of evolutionary theories of law:

Evasion of the problem of cause and effect is a general, nagging problem in all the evolutionary theories. They do not shed any light on how legal change and social change fit

Evolution implies an internal theory to explain change; like “the survival of the fittest” or “natural selection.” The instrumentalists’ explanation of legal change is external to the law: the law adapts to changing circumstances and responds to changing needs and desires in society.³¹

But among society’s needs is stability, and an attribute of American society is a legal system that provides stability through internal coherence—through the rule of law. So it is not surprising that American lawyers are schizophrenic on the nature of legal theory. Perhaps the marriage of legal science and legal realism—of internal and external understandings of law—is not so uncomfortable after all. Perhaps an important instrumentality of the law is a belief that the law is not instrumental.

Even Judge Posner, the most articulate defender of judicial pragmatism, generally plays by the internal rules of the game.³² Of course, judicial pragmatism is only one aspect of the legal instrumentalism about which Friedman has written, but what judges do is particularly important to legal theory because they are expected, and expect themselves, to justify what they do. It is simply not enough for American judges to justify their decisions on the grounds of it being a good thing for society.³³ They might observe that their decision is a good thing for society, but without reference to the requirements of the law, they will not have satisfied the demands of what Friedman calls the American legal culture.³⁴ Friedman might agree that most judges rely on legal reasons most of the time, but he says that judicial opinions “do not necessarily reflect what the judges were actually thinking”.³⁵ “A judge might pay a lot of attention to strictly legal argument in an intricate tax law case, and very little in a case on abortion rights. Or it might go the other way around.”³⁶ Friedman is correct that we can never know what the judge was actually thinking, but we do know that almost every judge in almost every case claims to have been thinking about what the law requires.

What does this say about Friedman’s early ambitions for a theory of legal development? Was he wrong to insist that legal theory must arise from an understanding of the relationship between law and society, rather than from an internal and autonomous logic? And most importantly, what has Friedman’s comprehensive study of American

together. They describe some sort of relationship over time, but they do not show whether law or society moves first or whether a particular sort of interaction exists.

Friedman, *supra* n. 5, at 22.

31. Friedman comments: “[T]he conventional concept of the legal system, based on historical evolution, is not a helpful tool of research and theory, if the purpose of classifying bodies of law and generalizing about them is to understand the relationship between law and society.” Friedman, *supra* n. 6, at 33.

32. See *supra* n. 19 and accompanying text.

33. While insisting that “[l]egal formalism and legal pragmatism are opposites,” Judge Posner makes “the important qualification that a pragmatic judge might in some circumstances decide to adopt a formalist rhetoric for his judicial opinions—might even decide to embrace formalism as a pragmatic strategy rather than just as a pragmatic rhetoric.” Posner, *Pragmatism*, *supra* n. 19, at 18. Most judges, I suspect, would qualify Posner’s statement to say that in most (not just some) circumstances they rely on formalistic justifications.

34. Friedman distinguishes internal and general legal cultures. Internal legal culture is “the world of the legal profession: judges, lawyers, jurists. . . . [I]t is linked in many different ways to the general legal culture: the attitudes, opinions, and points of view of the population as a whole—lay people, whether investment bankers, factory workers, nurses, bus drivers, or anybody else.” Friedman, *supra* n. 11, at 505.

35. Friedman, *supra* n. 29, at 530.

36. *Id.*

legal history contributed to a theory of legal development—to a general theory of law and society?

First, what is the point of a theory of law, or a theory of law and society? What would we do with such a theory if we had one? One thing it would do is help explain how we got where we are. A theory of law and society that does not explain how we got where we are is unlikely to predict where we are going or explain how we might get where we want to go. It would be like the theories of climate change that must first explain climate history before we can begin to rely on them to predict future climate change and help us determine what we might do to affect or mitigate that change.

Just explaining how we got where we are—for example, explaining whether modern American property law is largely the product of some mix of nineteenth century laissez-faire capitalism and twentieth century social welfare regulation, or whether ancient Roman notions of property have a lingering influence—is a worthy undertaking. Antiquarian curiosity ought to be worth at least as much as reality television. But Friedman would seem to want more from a theory of law and society. By explaining cause and effect, a theory of law and society might allow us to predict, and more importantly, influence future outcomes—like the theory of climate change that allows us to avoid or mitigate the negative social consequences of a changing climate. Although Friedman is not interested in taking legal argument seriously, he is seriously interested in achieving “social justice through better understanding of the world in which the legal system lives and works”³⁷ A theory of law and society would be most useful to this enterprise.

So what has Friedman done to advance his cause? Have nearly four decades as America’s leading legal historian gotten him, or us, closer to a theory of legal development or a general theory of law and society?

When he first started writing on the subject, Friedman thought we did not know very much—certainly not enough to claim to have a theory.³⁸ Unlike the economists and political scientists writing at the same time, Friedman was cautious about theorizing. Legal history seems to have been part of his solution to that knowledge deficit.

The other part of his solution is comparative study. At a minimum, comparative study suggests that law and society are intertwined; that law affects society and society influences law. But beyond that simple confirmation of the instrumentalist hypothesis, what do we learn from comparative studies? Friedman’s interest in a theory of legal development suggests that we might be able to generalize across legal systems and societies. Can we develop a general theory of legal development or, better yet, a general

37. *Id.* at 542.

38. Friedman commented:

At the present time, legal research is in no position to identify legal factors that make for successful economic development, for political stability, or indeed for any reasonable measure of the effectiveness of law. For one thing, no country, not even the United States, has an accurate bank of quantitative information about its legal system.

Friedman, *supra* n. 6, at 39-40. Friedman has often suggested the need for empirical and historical studies to enlighten understanding of the relationship between law and society. In an early article in the *Stanford Law Review*, he suggested “some propositions about the relationship between institutions, their history, their society and their output of rules. Many more propositions could be enunciated, but those discussed here will be enough, it is hoped, to show the possibilities inherent in future study.” Friedman, *supra* n. 24, at 798.

theory of law and society that is explanatory of law and legal institutions in different societies?

Friedman is adamant in his rejection of evolutionary theories of legal development.³⁹ There is not a path of legal development with stages through which every legal system passes. Friedman would seem to agree with Grant Gilmore's argument that neither the law nor society is on a linear path of progress.⁴⁰ Gilmore associated such linear thinking with a nineteenth century frame of mind that also gave us Marxism and Darwinism.⁴¹ It was a perspective that served to justify American slavery and what is today called discrimination against women, but was then called the protection of women. Slaves and women might one day be equal before the law to white men, but not until they became equal in fact. That may happen, but only after traveling the linear path of progress.

Gilmore's point,⁴² or perhaps it was Friedman's point first,⁴³ is that the law moves this way and that in response to the demands of society. For Friedman the law is demand driven.⁴⁴ We can probably say that about every legal system and every society, but that is only a reconfirmation of the instrumentalist hypothesis. Can we generalize beyond that across societies? Are there, for example, basic legal functions that must be served in all societies?

In the United States, we distinguish the legislative, executive, and judicial functions and we often critique other constitutional systems for failing to recognize this distinction in the design of their own governments. Obviously not every legal system must separate these functions, but it does seem fair to claim that the three functions are performed whether or not they are separated. Other functions may be similarly integral to all legal systems. Something resembling the collection of subjects studied in the first-year law school curriculum in the United States might well be a taxonomy applicable to any legal system. There will be property law, contract law, legal process, criminal law, and the law of personal injury in most, if not all, legal systems. The law will vary dramatically from one society to another, but the social need fulfilled by each of these types of law will exist in every society.

If I am right about these generalizations, then a theory of legal development might amount to more than an affirmation of legal instrumentalism. But probably not a lot more. We do not know much about an elephant by knowing that it is respiratory, ambulatory, and masticatory. Nor do we know very much about the law of a country by knowing that it provides in some way for property, crime, contract, tort, and legal process. A country's property law may define an elaborate system of private rights or it may establish a system of largely public ownership. Both regimes will meet the functional need of establishing control of resources, but they may otherwise have little in

39. See *supra* nn. 30-31.

40. Gilmore, *supra* n. 1, at 477-78.

41. *Id.* at 477.

42. *Supra* n. 1 and accompanying text.

43. Friedman comments: "The real question is what aspects of society make the legal system run, and how; at what pace, and for what reasons. Social change leads to legal change; but never automatically." Friedman, *supra* n. 11, at 589.

44. *Supra* n. 26-28.

common. More significantly, our general theory of essential legal functions will tell us little if anything about how the law became what it is, what it will become, or how a particular society might use the law to achieve its ends.

After forty years of doing legal history along with a whole lot of other things, Friedman concludes that we still do not know enough to formulate much of a theory. In his conclusion to *American Law in the Twentieth Century*, Friedman writes, “[w]hat will the next century bring? No one can know.”⁴⁵ He is, nonetheless, willing to make this prediction about twenty-first century law: “Right now, I feel reasonably sure it [will] be a story about growth, transformation, adaptation—a story about change.”⁴⁶ Of course, Friedman is risking little in this prediction. Change is ever-more the story of human existence. It is the prospect of change that makes us want to predict the future and influence its human uncertainties through the rule of law.

Looking back from Friedman’s early interest in a theory of law and society to his most recent history of American law in the twentieth century, I conclude that, notwithstanding enormous progress in our knowledge and understanding of American legal history, little headway has been made on the theory front. With one significant oversight, Friedman has been looking in most of the right places, but the theory we end up with is the theory we started with—legal instrumentalism. Friedman’s approach to legal history is a reflection of John Willard Hurst’s legal instrumentalism and the interdisciplinary methods of the law and society movement.⁴⁷ There seems little doubt that the instrumentalist approach explains much about the development of American law. The contributions of interdisciplinary and comparative study are less clear. Reliance on the social sciences is implied in the instrumentalist approach. How else to study the interactions between law and society? But comparative study is largely about data collection and comparison, and little about explanatory theory.

The reason Friedman is America’s leading legal historian is twofold: he understood the instrumentalist position that law is a demand driven, grassroots enterprise, and better than anyone else, he put it into practice as a method of doing legal history. Because the instrumentalist approach is by definition external to the law, study of society and its many formal and informal institutions is part of the work of the legal historian. But it is not clear that Friedman’s law and society focus has contributed much to his remarkable achievements. Like every social science discipline, law and society has a perspective that limits inquiry. Sociology, anthropology, social psychology, political science, and macroeconomics seem to have the upper hand with the law and society scholars, so the focus is on social units rather than the behavior of individuals. One sees limited influence from microeconomic theory and virtually nothing from biology in Friedman’s work. Would Friedman be much closer to a general theory of law and society if he paid more attention to these and other disciplines that focus on individual behavior?

45. Friedman, *supra* n. 11 at 603.

46. *Id.* at 607.

47. See *supra* n. 13 and accompanying text.

If we believe the best way to understand law is as a tool employed in pursuit of human objectives, what could be more important than an understanding of individual behavior? The government seeks to reduce pollution, so it enacts a regulation designed to reduce emissions. But to be effective, that regulation must influence those who pollute—it must give them reasons not to pollute. The polluter might then enter into a contract for the installation of pollution control equipment. But to be effective the contract must give both parties reason to comply. These instrumental uses of law require a theory of individual human behavior. This is not to say that individual behavior is not influenced by social factors—it surely is. But individuals make or participate in every decision. As economists like to say, incentives matter. What are those incentives? How do they work? Whether we recognize it or not, we rely on implicit if not explicit theories about human behavior every time we employ the law as an instrument.⁴⁸

When we employ the law in pursuit of particular ends, we sometimes get it right and sometimes wrong, but always we experience unintended consequences. In Oregon, we have urban growth boundaries intended to control urban sprawl and preserve rural lands.⁴⁹ An unintended consequence has been rapidly rising real estate prices with negative implications for those priced out of the housing market.⁵⁰ Had we paid attention to basic economics, we would have anticipated this result. We might still have made the same choice, but in that event, the impact on real estate prices would have been an intended (if not a desired) consequence. Or we might have made a different or more nuanced decision. When Hurst wrote about the “release of energy,”⁵¹ he surely meant to include the energy of entrepreneurs. Armed with an understanding of individual behavior, legal history can explain how the law helped release those energies. It can also explain how the law might have been more effective with fewer unintended consequences. And if legal history can perform these tasks, the theories it relies on can help us to make better instrumental uses of law in the future.

In a discussion of evolutionary theories of law, Friedman noted, “the word progress is much less used than a century ago; it has the unfortunate flavor of [Herbert] Spencer and the Social Darwinists, of the era of unabashed capitalist enterprise, and of colonial empires.”⁵² Like most in the legal academy, Friedman has steered clear of any line of inquiry that might associate him with the repudiated ideas of Spencer.⁵³ But we

48. See *supra* n. 6 and accompanying text.

49. Or. Admin. R. 660-008-0005 (2005).

50. Samuel R. Staley & Gerard C.S. Mildner, *Urban-Growth Boundaries and Housing Affordability: Lessons from Portland* (Reason Pub. Policy Inst. 1999).

51. See generally Hurst, *Conditions of Freedom*, *supra* n. 13, at 3-32.

52. Friedman, *supra* n. 5, at 30 (footnote omitted).

53. Spencer was a contemporary of Charles Darwin and sought to apply the principles of emerging evolutionary biology to all natural processes including “the development of the Earth, . . . the development of Life upon its surface, the development of Society, of Government, of Manufactures, of Commerce, of Language, Literature, Science, Art” Herbert Spencer, *Progress: Its Law and Causes*, 67 *The Westminster Rev.*, 445, 447 (1857). His theories became very controversial in the twentieth century when they were employed to justify racial and sex discrimination on the basis of allegedly innate superiority. Whether Spencer meant to justify differential treatment of people based upon their race and sex, his theories were used to that end by others. At least since Justice Holmes wrote in *Lochner v. New York*, 198 U.S. 45, 75 (1905), that “[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics,” the association of one’s argument with

can repudiate Spencer's misuse of evolutionary biological theory without abandoning the science of biology as useful to our understanding of human behavior.⁵⁴ One will not read much of sociobiological theory in the proceedings of the Law and Society Association. Anthropologists, in particular, have taken great offense at biological explanations of social behavior, but the evidence grows stronger by the day.⁵⁵ The legal instrumentalist ignores biology at the peril of those the law is meant to serve. As Edward O. Wilson said in his controversial 1978 book, *On Human Nature*, if women are biologically predisposed to certain social behavior, our chances of achieving real equality are far better for understanding any such predisposition.⁵⁶ I do not know where Friedman stands on sociobiology, but his status as a high priest of the law and society movement suggests that he is a skeptic.

Having stepped firmly on the toes of our distinguished honoree, if not for wrongly anticipating his views on sociobiology, then for calling him a high priest, let me return to the problem of internal legal theory. Friedman has said that "[l]aw from the internal perspective is comparable to a system of theology."⁵⁷ I agree. But there is something of theology in most academic disciplines, more so in the social sciences, where our reach often exceeds our grasp. Accepting that internal legal theory, and therefore much of what we do in law schools, is like theology, it is nonetheless an important aspect of the law. It is a critical part of what Friedman calls the legal culture.⁵⁸ When lawyers and judges perform the rituals of legal argument, they are more or less constrained by the exercise.

There is no question that Lawrence Friedman is *the* giant of American legal historians and one of a handful of giants in the American legal academy over the last half century. He is surely correct that the law influences and is influenced by a multitude of forces outside the law. But when he says "the 'internalist' point of view is perhaps sociologically interesting—but nothing more,"⁵⁹ he discounts an important aspect of a legal system that depends on the rule of law to achieve its instrumentalist objectives.

Herbert Spencer or with "social Darwinism" makes it clear that the argument is without merit. Sociobiologists still suffer guilt by association with the theories of Spencer.

54. The recent experience of Harvard President, Lawrence Summers, suggests that I may be wrong about our ability to separate the pursuit of science from the fear of the misuse of science. Summers suggested that there may be fewer women than men pursuing careers in science and math for biological reasons. Many scientists on his and other faculties responded in a most unscientific way, suggesting that he had set back the cause of women rather than posed a hypothesis to be proved or disproved. See Natalie Angier & Kenneth Chang, *Gray Matter and the Sexes: Still a Scientific Gray Area*, 154 N.Y. Times A1 (Jan. 24, 2005).

55. See Paul R. Gross, *Exorcising Sociobiology*, 19 New Criterion 24 (Feb. 2001)

56. "From this troubling ambiguity concerning sex roles one firm conclusion can be drawn: the evidences of biological constraint alone cannot prescribe an ideal course of action. However, they can help us to define the options and to assess the price of each." Edward O. Wilson, *On Human Nature* 134 (Harv. U. Press 1978).

57. Friedman, *supra* n. 29, at 529.

58. *Supra* n. 23.

59. Friedman, *supra* n. 29, at 529.