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THE AMERICAN LEGAL EXPERIENCE

COURSE GUIDE

Professor Lawrence M. Friedman
STANFORD UNIVERSITY

The American Legal Experience

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Stanford University

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Course Syllabus

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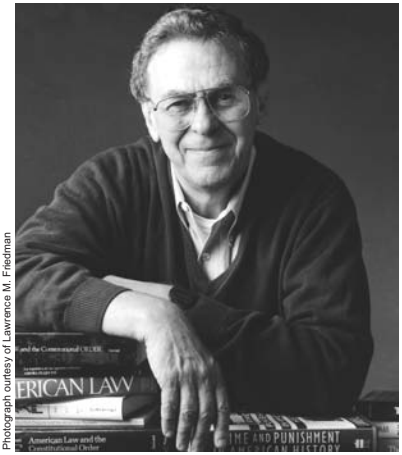

Photograph outtesy of Lawrence M. Friedman

ABOUT YOUR PROFESSOR

Lawrence M. Friedman

Professor Friedman is the Marion Rice Kirkwood Professor of Law at Stanford Law School. He received his AB in 1948, his JD in 1951, and an LLM in 1953, all from the University of Chicago.

Professor Friedman served on the faculties of St. Louis University and the University of Wisconsin before his arrival at Stanford in 1968.

He has served as President of the American Society for Legal History, President of the Law and Society Association, and President of the Research Committee on the Sociology of Law, International Sociological Association.

Among his many awards and honors, Professor Friedman is the winner of the American Bar Foundation Research Award (2001), the Silver Gavel Award of the American Bar Association (1994), and the Harry Kalven Prize for Distinguished Research on Law and Society from the Law and Society Association (1992). He is also the recipient of five honorary degrees from universities in the United States and elsewhere.

Professor Friedman has written more than twenty books on a wide range of legal subjects. These include *A History of American Law, Law and Society: An Introduction, Your Time Will Come: The Law of Age Discrimination and Mandatory Retirement, The Horizontal Society, Crime and Punishment in American History,* and *American Law in the twentieth Century.* Professor Friedman has also published over 150 articles and papers for professional law journals and publications.

Introduction

The legal system in America is the basis of freedom as we know it today. The system is based, ultimately, on the common law of England, but it has grown, developed, and changed over the years.

American law has been a critical factor in American life since colonial times. It has played a role in shaping society, but society—the structure, culture, economy, and politics of the country—has decisively shaped the law.

Through history, the legal system has been intimately involved with every major issue in American life: race relations, the economy, the family, crime, and issues of equality and justice.

The true strength of the American legal system lies in its ability to adapt to new and difficult issues.

Lecture 1:
Introduction to the American Legal System

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law*, pp. 1–19.

What Is a Legal System?

There have been many attempts to define "law" and "legal system." There is no exact, agreed-upon definition. There are different definitions, depending on different purposes. Law can be formal or informal; it can be official or non-official. Every large institution, such as a big corporation, university, or hospital, has a kind of internal "legal system" (that is, rules and regulations, and ways to enforce them).

We will focus, however, on law that is "official" (that is, connected to the state or government). All of us have at least some idea of what we mean when we talk about "the law" or "the legal system." We think of statutes passed by Congress or the legislatures of the states; rules and regulations of administrative agencies; municipal ordinances; and, very significantly, doctrines and decisions of courts. It all constitutes a vast body of dos and don'ts. We also think of the people and institutions who make and enforce and interpret the laws: members of Congress, city aldermen, state senators, judges and justices—and also the police, lawyers, prison officials, and countless members of the civil service.

It is obvious, when we think of the system in this way, that it has enormous importance in our lives. The legal system affects almost everything we do—driving a car, going to work, buying clothes in a department store. There is a thick network of rules and regulations covering almost every aspect of life—business life, work life, even private life (laws of marriage, divorce, and child custody, for example). Has there always been so dense a network? How did this system evolve in the United States? Why do we need all these rules, if we do? This series of lectures is an attempt to answer these questions. The lectures rest on one basic assumption: the legal system is, basically, a product of society. Its independence is limited. Political, economic, and cultural forces determine its shape and its content.

Every country, of course, has a legal system. No two legal systems are the same. There are different ways of classifying the legal systems of the world. One method classifies them by their ancestry in a manner somewhat analogous to language. Using this method, we find two groups of legal system of particular importance. The civil law system covers almost all of Europe, Latin America, and parts of Asia and Africa. These systems rest on a base of Roman law, as it was rediscovered and revived in the Middle Ages. Starting about 200 years ago, these systems began to arrange their fundamental rules in the form of codes of law. The French and German Civil Codes have been particularly influential. From the nineteenth century on, a number of countries that wanted to modernize adopted civil law systems—notably Japan and Turkey.

One country resisted the “reception” of Roman law in Europe. This was the island kingdom of England. It retained its own native system, the so-called common law. Civil law was influential, but never succeeded in replacing the common law. Then England became a mighty empire, and the common law spread to English colonies, and the colonies of colonies. Hence the common law is the basis of the law of Canada (outside Quebec), Australia and New Zealand, other English speaking countries, such as Jamaica and Barbados, and many of the former colonies in Africa and Asia. It is also the basis of the law of the United States (Louisiana is a bit of an exception, because of its heritage of French law).

What Is Distinctive About the Common Law?

Many characteristics set off the common law from the civil law—details of procedure and also of substance. Also, the common law is not a codified system. In essence, common law has been judge-made law; judges, in the course of deciding actual cases, created the basic principles and doctrines of the common law. The decisions of appellate courts, reported in the hundreds of volumes that line the shelves of law school libraries, are the heart of the common law system.

There are many other traits that set it off from the other legal systems of the world. There is, for example, the institution of the jury. Most civil law systems do not have a jury; judges decide on guilt or innocence, for example. Common law procedure is strongly oral in nature. The familiar drama of the courtroom, dominated by lawyers and consisting of witnesses who are examined and cross-examined, is specifically common law. The civil law systems, historically, leaned more heavily on written documents, and avoided the dramatic, lawyer-dominated trials of the common law.

Within the common law world, the American legal system has its own peculiarities. For one thing, it is a federal system: a cluster of states, each of which is sovereign in many ways within its borders, and controls such matters as ordinary crimes, education, commercial law, and family law. The United States also has a written constitution and judges who can review the work of other parts of the government. Some of these structural traits were developed after independence. But the seeds of a distinctive legal system were sown during the colonial period, which is the subject of the next two lectures.

FOR GREATER UNDERSTANDING

Questions

1. What makes law such a central part of American life?
2. Compare American law and British law. Are there fundamental similarities? What are the roots of the differences?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

Other Books of Interest

Hall, Kermit. *The Magic Mirror: Law in American History*. New York: Oxford University Press, 1990.

Kagan, Robert A. *Adversarial Legalism: The American Way of Law*. Boston: Harvard University Press, 2003.

Tyler, Tom R. *Why People Obey the Law*. New Haven: Yale University Press, 1992.

Lecture 2:
The Colonial Legal Experience

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law,* chapter 2.

The Colonists and Their Law

English-speaking people arrived on the Atlantic Coast in the early seventeenth century. They founded settlements all along the coast. They were not the only settlers in what is now the United States. There were the Dutch in New York, the Spanish in Florida, and Native American peoples throughout the area. The English pushed out the Dutch and displaced its legal system; they ignored, by and large, the legal systems of the native tribes.

The colonists brought with them the common law. It was the only law that they knew and understood. But the legal institutions that they set up were very different from the institutions in England. In the first place, English law was very complex and had many local variants; some of these variants had special impact on colonial law. But mostly, American law veered off in its own directions because of the vast differences between the colonial situation and the English situation. The early colonies were small, precarious communities. They were also, in many cases, deeply religious and even theocratic communities. Their law was shot through with rules and institutions that reflected their size, aims, and their religious heritage. That heritage was in many colonies not the same as the established church of England.

Every colony had a system of courts. The colonies did not reproduce the complex jungle of overlapping and confusing jurisdictions that existed in England; they simplified greatly. In general, the colonial courts were cheap, accessible, and handled a wide range of business. They were not just "courts" in the modern sense; they handled a lot of what we would call administrative and legislative work, along with the ordinary work of settling disputes. People entered wills and documents in courts; they registered earmarks. The courts were really basic institutions of government for the colonies. The law they applied, however, was also much simpler and more streamlined than the law of England, both in substance and procedure.

The colonies were, in many ways, functionally independent. They were part of an empire, but the capital of the empire was thousands of miles away, across a vast ocean. Travel was slow and precarious, and the British had yet to develop a real sense of how to govern colonies. In theory, colonial statutes (for example) could be disapproved in London, but this was not common, and in any event, took years to occur.

The colonies were hardly experiments in laissez-faire—the ideas of Adam Smith were far in the future. The colonial authorities tried to maintain a grip on the economy—on labor, prices, and the quality of commodities. They controlled, for example, the price and size of bread and other staple products.

A society developed that was fundamentally unlike English society. This was less a matter of ideology than of circumstance. The English class system—and the control of land by a small elite, the landed gentry—was impossible in the colonial situation. There was an abundance of land. The legal system reflected this new reality. For example, most of the northern colonies rejected primogeniture (inheritance of land by the oldest son). They treated all children equally. The colonies also devised systems for recording transactions in land, a system that did not exist in England. In England, land was the basis of a hierarchical social system. In the colonies, land was becoming something quite different—basically, land was a commodity, an item to be bought and sold.

Labor

There was no shortage of land, but there was a shortage of labor in the colonies. Some colonists worked for wages, like modern workers. But there were two other types of pre-modern labor: indentured servitude and chattel slavery.

An indentured servant was a kind of temporary slave. The servant worked for a master, lived in the master's household, and was fed and clothed by the master, but earned no wages and had no right to quit the job. The master was supposed to treat the servant humanely, and the servant could go to court and complain if a master was excessively cruel. But the servant was bound to the master. A runaway servant could be forcibly returned, and punished. Servants worked for a specific length of time, often a seven-year term. At the end of this period, they were free. But before this, the servant could be bought and sold, and if the master died, his heirs inherited the rest of the servant's period of work. Many immigrants paid for their passage by selling themselves into servitude for a period of years.

Essentially, the slave was a servant for life, and the status was associated from the very beginning with black people imported from Africa. In the course of the 17th century, the law of slavery was crystallized and formalized. In Virginia, for example, statutes in the 17th century made it clear that slavery was an inherited status. The children of a slave mother were themselves slaves—regardless of the identity of the father.

There were slaves in every colony, even in Massachusetts and New Hampshire. But the slave population was most significant in the southern colonies, which developed a system of plantation agriculture. By the middle of the 18th century, black people, almost all of them slaves, constituted 40 percent of the population of Virginia. Virginia and the other southern colonies built an elaborate body of slave law. The law regulated the conduct of slaves (and to a degree, the conduct of masters) and, in particular, dealt with the issue of how to discipline slaves and prevent slaves from rebelling against their masters.

FOR GREATER UNDERSTANDING

Questions

1. How was the colonial court system tailored to life in the colonies?
2. In what way does slave law represent a link between the economic system and the legal system?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

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Hoffer, Peter, C. *Law and People in Colonial America*. Rev. ed., Baltimore: Johns Hopkins University Press, 1998.

Konig, David T. *Law and Society in Puritan Massachusetts: Essex County, 1629-1692*. Chapel Hill: University of North Carolina Press, 1979.

Mann, Bruce H. *Neighbors and Strangers: Law and Community in Early Connecticut*. Chapel Hill: University of North Carolina Press, 1987.

Lecture 3:
Criminal Justice in the Colonial Period

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law,* chapter 2.

Sin and Crime

Like all societies, colonial societies developed (or inherited) ideas about the forms of behavior that deserved to be punished—ideas about what we call crimes. In these societies, particularly those dominated by the Puritans, little distinction was made between sin and crime. There was no such concept as "victimless crime." The criminal code, in essence, was believed to consist of commandments that came from God himself. God will see and punish a community that transgresses. The clergy were important figures in all of the colonies. The colonies enforced religious orthodoxy. They punished blasphemy. In Massachusetts, there were laws against Quakers and Catholics. Nonattendance at church was also a crime. So was breaking the Sabbath.

The colonies also were very active in enforcing laws against immorality. Lying, idleness, drunkenness, and foul language were crimes. Especially important were offenses against the strict sexual code. Sodomy, fornication, and adultery were criminal acts. Indeed, in some colonies, fornication was the most frequently punished crime. Colonial records show hundreds of instances in which men and women are whipped, fined, admonished, or ordered to marry for the crime of having sex outside of marriage. In addition, of course, the colonies punished the more conventional and familiar crimes—murder, rape, arson, assault, and various kinds of robbery and burglary.

Corrections

How were all these various crimes punished? The colonies made frequent use of money fines. Corporal punishment was also exceedingly common. In instance after instance, courts ordered people convicted of crime to be soundly whipped. For very serious crimes, there was banishment or the death penalty (hanging).

All forms of punishment were administered in public, including whipping and the death penalty. There was also very frequent use of punishments that inflicted stigma and shame. People were made to sit in the stocks, or to be gagged, or ducked in water. This too was done in public. Branding with a hot iron was another form of corporal punishment. For some crimes, there was mutilation—cutting off an ear, for example. Adulterers, as in Hawthorne's famous novel, *The Scarlet Letter,* could in some colonies be made to wear a big capital letter "A" on their clothes.

Most of these punishments fell on the thousands of servants who toiled away in the colonies. Slaves, too, were punished, and more severely than whites. What to our modern ideas seems missing from colonial corrections is

imprisonment. There were jails in the colonial period, but they were ramshackle affairs, and they were rarely used as places of punishment. The men and women in jail were either people who were waiting for trial (and had not made bail) or those who had been imprisoned for debt.

Capital Punishment

The colonies were not particularly bloodthirsty. In England, many men and women were hanged for property offenses; this was not common in the colonies. There were some episodes of savagery, to be sure. The famous Salem witchcraft trials were one example. Witchcraft was a recognized crime, but in this notable instance, a kind of hysteria seized hold of a community and led to a wholesale denunciation of witches. The death penalty was also heavily used after real or imagined slave revolts; one such occurrence was in New York in 1741. Here, too, a kind of panic overtook the colony, and there were scores of executions.

As we said, capital punishment, like other forms of correction, was carried out in public. It was used for such serious crimes as murder and rape. At a hanging, large audiences came to witness these spectacles. Sometimes the condemned man or woman made a speech from the gallows, confessing to crimes and warning the audience not to follow in the path of wickedness. Hangings, in short, were a form of didactic theater, as was true of criminal justice in general in the colonial period. This was the point of the heavy use of stigma and shame. Punishment was, in short, a community matter.

Criminal Procedure

Some aspects of criminal procedure in the colonial period would be familiar to people today—the use of a jury of twelve, for example. There was also a grand jury, which heard accusations and decided whether there was enough evidence to warrant a full trial. There were some striking innovations in criminal procedure, as compared to England. England had a system of private prosecutions, but very early in their history, the colonies made use of prosecutors that the government itself paid for—district attorneys. The colonies were also more generous in allowing the use of counsel for the defense than was true under English practice.

FOR GREATER UNDERSTANDING

Questions

1. Are there any contemporary equivalents to the Salem witch trials?
2. To what extent should morality be reflected in the law?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

Other Books of Interest

Banner, Stuart. *The Death Penalty: An American History*. Cambridge, MA: Harvard University Press, 2002.

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Spindel, Donna J. *Crime and Society in North Carolina, 1663–1776*. Baton Rouge: Louisiana State University, 1989.

Lecture 4:
Revolution and the New Republic

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law*, part II, chapter 1.

The Coming of the Revolution

The political events that led up to the American Revolution in the late 18th century are fairly familiar: the controversy over British trade laws, the Boston Tea Party, and so on. These issues between the majority of the colonists and the mother country came to a head in the 1760s and 1770s, and finally resulted in war. The political disputes with England were important, but even more important, perhaps, were cultural differences. The two countries had traveled in very different directions politically, economically, and socially. On this side of the Atlantic, land was widely held; in England, it was controlled by the landed gentry. The colonists were in the habit of governing themselves. Their society was open and egalitarian compared to the English system, which was much more patriarchal and hierarchic. English society was bound together in knots of deference and authority, aspects of the social order that had loosened considerably in the colonies.

Building a New Political System

In the new Republic, there were many elements of continuity: the common law system remained in effect and the courts continued to function. It was distinctively American common law, essentially a continuation of the colonial systems. There was still considerable British influence, partly because there was a shortage of local printed materials and some classic British literature (*Blackstone's Commentaries,* for example) was useful and available. As time went on, more and more purely American materials were published; local authors wrote treatises and textbooks, or put out American editions of British books; cases were reported from American courts; scholars and jurists self-consciously constructed a purely American system, rejecting many aspects of English law.

The main job the country faced after the War of Independence was to create new structures of government. The monarchy had been overthrown. The new state was to be based not on loyalty to the crown, but loyalty to a system of order—loyalty to law. New political ideas were in the air. They rested on assumptions that were foreign to the English legal order: the sovereignty of the people, for example, and concepts of equality (at least for adult white men).

Structuring a new government would not be easy. The individual colonies were jealous of their independence. The first plan, the Articles of Confederation, called for a very weak central government. When this failed to work out, a constitutional convention gathered in Philadelphia and drafted the Constitution, which was adopted after considerable controversy and debate. It

is this Constitution that is still in effect. It provided for a somewhat stronger, but still limited, central government—a President, two houses of Congress, a national court system. But this was still a federal Republic: the states retained an enormous reservoir of power. The Constitution embodied a whole series of compromises—between big states and small states, for example. In the Senate, big and small states had equal representation. The Constitution also embodied certain compromises on the subject of slavery. But the essential plan proved to be durable and effective.

The constitutional idea was already in place in the states, and indeed, the tradition of embodying fundamental rules in a written document was not new. Many of the colonies had had written charters, which were essentially their constitutions. Most of the states, indeed, drafted constitutions after the Declaration of Independence. Some of these constitutions contained bills of rights. Many people criticized the federal Constitution, because it lacked a bill of rights; and soon after the adoption of the federal Constitution, the Bill of Rights was engrafted onto it as a series of amendments. The Bill of Rights guaranteed freedom of speech, press, and religion. It also contained rules to guarantee the right to trial by jury and to a fair trial; it outlawed cruel and unusual punishment, and unreasonable searches and seizures.

It was a delicately balanced system—balanced between states and central government and between branches of government. Who was empowered to preserve the balance? One answer that evolved was the courts, through the power known as judicial review. The most famous instance was the great case of *Marbury* v. *Madison* (1803), decided by the United States Supreme Court and its chief justice, John Marshall. Here the Supreme Court asserted the right to strike down an act of Congress on the grounds that it was unconstitutional. Similar powers were asserted by state courts. Each state had a constitution, and the state supreme court was the final authority on its own constitution. The Supreme Court also had the power to declare acts of state legislatures unconstitutional, if they violated the Federal Constitution.

Once in place, the republican form of government continued to evolve. For example, the right to vote was originally dependent on ownership of property, but as time went on, the states moved toward manhood suffrage. The power of the judges was a controversial element, both in the states and federal government. In a number of famous instances, governments tried to remove judges by impeaching them. The most notable instance was the attempt, during Jefferson's presidency, to impeach a Supreme Court justice. This failed by a narrow margin. Another way to control judges, adopted by most of the states, was to make judges stand for election. In the course of the nineteenth century, most states adopted the elective principle, both for high court and low court judges.

FOR GREATER UNDERSTANDING

Questions

1. In what ways could different interpretations of the Constitution affect the powers of the three branches of government?
2. How might the Judicial Branch have developed if there had been a different ruling in *Marbury* v. *Madison?*

Suggested Reading

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Other Books of Interest

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Rakove, Jack N. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Knopf Publishing Group, 1996.

Smith, Jean Edward. *John Marshall: Definer of a Nation*. New York: Henry Holt and Company, 1996.

Wood, Gordon S. *The Creation of the American Republic, 1776–1787*. Chapel Hill: University of North Carolina, 1998.

Wood, Gordon S. *The Radicalism of the American Revolution*. New York: Vintage Books, 1993.

Lecture 5:
Law and Economic Development in the Nineteenth Century

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law*, part II, chapters 5 and 6.

Promoting the Economy

The nineteenth century is usually assumed to be a period of laissez-faire, or minimal government. In fact, state governments played a large role in stimulating and regulating the economy. The federal government played a secondary role. It had one major asset, the vast public domain, and to a certain extent it used this asset to promote economic growth (for example, through land grants designed to finance the development of railroads). But mostly the federal government, under intense pressure, disposed of the public domain through a system of land sales. And in most other regards, the federal government remained inert.

Government involvement in the economy was largely promotional. It was designed to stimulate "the release of energy," that is, to create conditions under which wealth would increase. Government was intensely involved in the financing and building of roads, canals, turnpikes, and then railroads. Farmers and small merchants were eager to stimulate the building of railroads and other elements of infrastructure. There were some notable state enterprises, but eventually, disillusionment set in after periods of financial crisis and mismanagement. There was also intense legal activity (and controversy) over banks, insurance companies, and the money supply. The tilt toward a market orientation also resulted in a vast expansion of the law of contracts, which governed voluntary, market transactions. Many of the crucial doctrines of the law of contracts developed in the early part of the nineteenth century.

Although promotion was the major concern of governments, there was a considerable amount of regulation, in the interests of public health and safety, to conserve resources and to promote the general welfare. There were regulations to guarantee the quality of staple products, especially products that were for export. How effective the network of nineteenth century regulations could have been, in a period when taxes were exceedingly low and the civil service tiny, is another question.

Economic considerations were crucial in the development of tort law (the law of personal injuries). This was a product essentially, of the industrial revolution, which, for the first time, produced injuries on a big enough scale to create a social problem. The new railroad industry and the steam engine on boats were fertile sources of accidents. In almost all cases, the plaintiff (the injured party) was an individual and the defendant was a business. A cluster of rules developed that reduced the liability of businesses for accidents. The key concept was the concept of fault. Liability occurred only if the defendant was "negligent," that is, its behavior did not live up to the standard of the "rea-

sonable man." Nor could a plaintiff recover if he too was negligent, even if the negligence was slight.

The most notorious of the limiting rules was the fellow-servant rule. It appeared in the 1840s and spread to every state; the most influential and powerful decision was the *Farwell* case, in Massachusetts. Farwell was a railroad employee injured on the job. He sued his employer, but the Massachusetts court denied recovery. Under the fellow-servant rule, a worker could not recover for injuries if the accident had been caused by a fellow worker. In hindsight, the rule seems callous and biased. Many of the early cases, however, were railroad cases, and the railroads were genuinely popular with farmers and small merchants, as we noted.

It is often said that the nineteenth century was a period that favored property rights. But there was a distinct bias in the law toward dynamic property, entrepreneurial property, rather that "static" or "vested" property rights. The famous *Charles River Bridge* case illustrates this tendency. The issue was the clause of the Federal Constitution that forbids states from impairing the obligation of a contract. The Supreme Court had expanded the meaning of this clause in a notable series of cases. In one particularly famous case, the *Dartmouth College* case, the Supreme Court decided that a corporate charter, granted by the legislature, was a "contract," and that the state could not alter, amend, or otherwise change the charter later on—this would be an impairment of the contract.

In the *Charles River Bridge* case, Massachusetts had authorized, by charter, the construction of a toll bridge. Many years later, they chartered another bridge, very close to the first one, which was to be a free bridge. The proprietors of the first bridge sued, claiming the legislature had destroyed the value of their franchise. They invoked the contract clause of the Constitution. But the Supreme Court turned them down in a notable opinion written by the new Chief Justice, Roger B. Taney. Among other things, Taney stressed the importance of progress and the necessary destruction of old values in favor of new ones.

This was also a period in which the business corporation rose to prominence. At first, corporations were chartered one by one; there were comparatively few. Most corporations were not business corporations—they were charities or municipalities. Partnerships were more common than corporations. With the rise of bigger businesses, the corporate form became more popular, and the corporate form began to be more widely used for businesses. The states moved away from the idea of customizing corporate charters; they passed general laws, allowing any group of entrepreneurs to form corporations easily and with a minimum of expense.

FOR GREATER UNDERSTANDING

Questions

1. In what ways did the legal system reflect the needs and wants of ordinary farmers and other citizens?
2. In what way did the American legal system reflect the strength of the idea of “progress”?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

Other Books of Interest

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Lecture 6
Black and White:
Slavery and Its Aftermath in the Nineteenth Century

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law*, part II, chapters 5 and 6.

Half Slave, Half Free

During the colonial period, there had been slavery in every colony, but after the Revolution, the country divided into slave states and free states. The northern states abolished slavery and freed their existing slaves. The Northwest Ordinance (1787), which provided for the development of government in the old Northwest (Ohio and other midwestern states were formed in this territory), prohibited slavery. The balance between slave states and free states was carefully preserved in the Missouri Compromise and later laws.

The Law of Slavery

In the South, slavery was a more and more important institution, economically and socially. Slaves worked the plantations. They toiled away in factories, hotels, and mercantile establishments; thousands worked as domestic servants. Each state maintained an elaborate slave code. Law and custom regulated the slave population tightly. The laws restricted manumission (setting slaves free) and often provided that freed blacks had to leave the state (though this was never fully enforced). Each state also had a free black population, but nowhere were they allowed to vote, and nowhere were they accorded full rights (this was also true, for the most part, in the North). Meanwhile, the enormous economic significance of slavery led to the creation of a huge body of commercial law, regulating traffic in the bodies and labor of the slaves.

In legal theory, slaves were entitled to decent treatment. But the law (and custom) granted owners almost absolute rights over their slaves, including the right to punish them. The whip was in universal use on plantations. Even punishment that was extremely severe—sometimes resulting in death—was within the power of the master. Slaves were under a whole range of disabilities; they were not allowed to own property and were not allowed to marry, although many entered into informal unions. It was against the law to educate a slave—a rule that some masters ignored. Nothing prevented owners from splitting up families and separating parents and children. When masters ran into debt, or when an estate had to be divided among heirs, sales of this type were particularly frequent.

Slavery and the Federal System

Slavery became more and more of a national issue in the course of the first half of the nineteenth century. The North resisted the expansion of slavery. The South felt more and more beleaguered. Fugitive slaves were another fertile source of controversy. A fugitive slave law was passed in 1793 and a more stringent one in 1850. Attempts to return fugitive slaves led to a number

of bitterly contested cases and incidents of violence in which crowds in northern cities forcibly attempted to free slaves who were about to be returned to slavery. Some slaves fled to Canada. The pro-slavery decision in the *Dred Scott* case only exacerbated the situation when it declared the Missouri Compromise unconstitutional and asserted that African-Americans were not and could not be federal citizens.

The Civil War and Beyond

The Civil War ended in 1865 with a decisive southern defeat. This meant the end of slavery. The Emancipation Proclamation was an important symbolic event, but it did not apply to the entire country. The Thirteenth Amendment to the Constitution, however, made slavery and "involuntary servitude" illegal in the United States.

The southern states, shortly after the end of the war, enacted the so-called "Black Codes," which recognized that slavery had ended, but tried to keep as much of the pre-war racial caste system as possible. Under the leadership of Congress, however, federal armies occupied the South, ended the Black Codes, and gave political rights to the freed slaves. During the Reconstruction period, many blacks held state offices, served in state legislatures, and were elected to Congress. The white South never acquiesced; this was a turbulent period with much corruption (in the North as well); the rise of the Ku Klux Klan began a period of violence and intimidation of the black population. In 1876, Reconstruction ended, and the South reverted to white supremacy and to a regime of racial segregation. A dense network of laws bound the majority of the black population to the soil. Through legal and extra-legal devices, the southern states disenfranchised the black population. The number of black voters dropped almost to nothing, and black political power was completely ended.

In the late nineteenth century, the black population was under firm, harsh rule; blacks could expect little or no justice from the courts. No blacks served on juries or had any positions in the police or correctional system. At the end of the century, the subjugation of the black population and the dominance of the southern code were reinforced by an epidemic of lynching, often of incredible brutality. Lynching took place publicly and in full view of the authorities, but almost nobody was ever punished for participating in a lynch mob.

The federal courts, for their part, did very little to help the cause of black liberation. Indeed, the Supreme Court in 1875 struck down a civil rights law that attempted to outlaw discrimination in public accommodations. And, at the end of the century, in *Plessy* v. *Ferguson*, the Supreme Court approved of segregation laws and enunciated the "separate but equal" doctrine. *Plessy* was a transportation case, but segregation was written into law in the South for all areas of life, from schools to prisons. And the facilities were never really equal.

FOR GREATER UNDERSTANDING

Questions

1. What impact did the Dred Scott case have on the coming of the Civil War?
2. What role did the courts play in the developing system of white supremacy?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

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Berlin, Ira. *Many Thousands Gone: The First Two Centuries of Slavery in North America*. Cambridge, MA: Harvard University Press, 1998.

Fehrenbacher, Don E. *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective*. New York: Oxford University Press, 1981.

Litwack, Leon F. *Trouble in Mind: Black Southerners in the Age of Jim Crow*. New York: Knopf Publishing Group, 1998.

Morris, Thomas D. *Southern Slavery and the Law, 1619–1860*. Chapel Hill: University of North Carolina Press, 1996.

Lecture 7:
The Other Americans:
Natives and Immigrants

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *American Law in the Twentieth Century*, pp. 122–134.

Multi-Cultural America

The last lecture and this one explore American policy and attitudes toward racial and ethnic minorities. Religious minorities have usually fared better than racial minorities, although there have been outbursts of anti-Catholicism, sometimes violent. One egregious exception to the record of tolerance has been the treatment of Mormons, who were driven out of the East, and, when they settled in Utah, were severely persecuted by the federal authorities, at least until the Mormon church officially renounced polygamy.

A Trail of Tears: the Saga of Native Americans

The relationship between the white settlers and the native tribes had always been complex, but in general, the native peoples were the victims of the insatiable land hunger of the settlers. One striking example was the fate of the Cherokees, who, despite their willingness to adopt some of the economic and social ways of the majority, were driven out of the east and forced to follow the "trail of tears" to what is now Oklahoma. The Cherokees had won a significant victory in the United States Supreme Court, but the Supreme Court lacked the power to enforce its own decision.

By the late nineteenth century, the native peoples had been defeated militarily, had lost most of their lands, and been herded into "reservations," where they did retain some measure of sovereignty. The Dawes Act (1887) was an attempt to destroy the Indian land-tenure system. Indians could become citizens if and when they gave up tribal land ownership and converted their holdings to individually owned plots. In practice, however, the Dawes Act was a disaster. The aim was assimilation, but the result was even further loss of land, and a riot of cheating and divestment. Whites ended up owning most of the land subject to the Dawes Act.

The Indians were defined as "dependent domestic nations," but it was never clear what this meant. In *Lone Wolf* v. *Hitchcock* (1903), the Supreme Court attempted to give an answer. The Court held that Congress had full power to do whatever it pleased with regard to native peoples. The Court, in other words, emphasized the "dependent" aspect of the legal situation of the native peoples. In essence, the Bureau of Indian Affairs ran the reservations in a more or less colonial manner, and with deep hostility to Indian culture, language, and religion.

The Chinese

If the aim of policy toward African-Americans was subjugation, and toward Native Americans assimilation, the policy toward the Chinese was expulsion.

The Chinese came to the United States mainly as workers, especially on the transcontinental railroads. They were concentrated on the West Coast, particularly in California. Anti-Chinese sentiment in that state was quite virulent. Laws and ordinances discriminated against them, and there were occasional acts of violence. The Chinese were feared as unfair competition on the labor market, and the unions were particularly opposed to the importation and retention of Chinese labor. In one famous case, *Yick Wo* v. *Hopkins* (1886), the Supreme Court struck down a laundry ordinance of San Francisco, which had been used blatantly to outlaw Chinese-owned laundries (and no others). But this victory in court was a rare exception.

Starting in 1882, federal law began to aim at the elimination, through immigration control, of the Chinese community. No Chinese could become a naturalized citizen. Chinese who left the country were not allowed to return. Late in the century, federal law excluded Chinese immigrants from entering the country altogether, first for a period of ten years, and then, in 1902, permanently. West coast states typically forbade the intermarriage of whites and Asians, and alien land laws barred Asians (in this case the main target was the Japanese) from acquiring land. Under the "gentlemen's agreement" between the United States and Japan (1907–08), the Japanese government promised to keep workers from moving to the United States.

The American Empire

America had expanded until it filled the whole continent—in the process gobbling up a large chunk of what was once Mexico. It expanded into the Pacific, too, with the acquisition of Hawaii. And the war with Spain, at the end of the nineteenth century, brought more empire: notably, Puerto Rico and the Philippines, territory where the population did not speak English and was definitely non-white. How would these territories be governed? Did the "Constitution follow the flag"? Or could Congress treat these places as colonial territory? The definitive answer came from the Supreme Court in the so-called Insular Cases. According to the majority of the justices, these territories were not ready for freedom, and the Constitution definitely did not follow the flag. Congress could rule them as it pleased.

Immigration and Immigration Law

America was thus, by 1900, a mixture of races and cultures, and the master of a colonial empire. It was a period of imperialism—and racism. During most of the nineteenth century, there were no formal restrictions on immigration. Most immigrants were northern European Protestants—the main exception, the Irish Catholics, faced much discrimination and sometimes even violence. By the end of the century, the nature of immigration had changed greatly: millions poured into the country from southern and Eastern Europe—Jews, Catholics, and Eastern Orthodox, for the most part. The Chinese were the first to be excluded, but a strong movement arose to limit immigration from non-Protestant Europe. The result eventually was the Immigration Act of 1924, which established the so-called national quota system. Each country of Europe had a quota, based on the proportion of natives of that country to the whole American population as it existed in 1890 (before the crest of the new

immigration wave). The result was to reduce drastically immigration from such countries as Italy and Greece.

Interestingly, there was no restriction on Western hemisphere immigration. Partly, this was because of a demand for cheap Mexican agricultural labor. Partly, too, it was a recognition that most of Latin American was too distant, too traditional, and too poor to constitute the same sort of “threat” that the Eastern Europeans posed to America’s traditional ethnicity.

FOR GREATER UNDERSTANDING

Questions

1. In American history, why have issues of race caused more division than those of religion?
2. What economic, political, and cultural factors have driven immigration law over the years?
3. When did the United States adopt a policy of limiting immigration? On what basis was the inflow limited?

Suggested Reading

Friedman, Lawrence M. *American Law in the Twentieth Century*. New Haven: Yale University Press, 2002.

Other Books of Interest

Clark, Blue. *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century*. Lincoln: University of Nebraska Press, 1994.

Daniels, Roger. *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882*. New York: Hill and Wang, 2004.

Gordon, Sarah Barringer. *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*. Chapel Hill: University of North Carolina Press, 2002.

Hing, Bill Ong. *Making and Remaking Asian America Through Immigration Policy, 1850–1990*. Stanford, CA: Stanford University Press, 1994.

Lecture 8:
Family Law

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law*, pp. 202–212 and pp. 495–504.

The Rise and Fall of Common Law Marriage

The "common law marriage" is a marriage without witnesses or a ceremony. If a man and woman agree to be married, that is sufficient. In the early nineteenth century, most of the states recognized the validity of the common law marriage, in part because of a shortage of clergy in some parts of the country. Moreover, the common law marriage doctrine was useful, because so many families owned land or other kinds of property. The doctrine legitimized marriages, and children, and helped to regularize the inheritance of property. What the doctrine meant in practice was that a couple who lived together, acted respectable, and behaved as if they were married would be legally presumed to have entered into a common law marriage.

The doctrine fell into disfavor at the end of the nineteenth century and the beginning of the twentieth century. States were more anxious to control marriage and make sure that marriages were properly recorded. They demanded a license, a ceremony, witnesses, and in many states, some sort of doctor's certificate.

This reform of marriage was undertaken partly for eugenic purposes (to prevent people with venereal diseases or other forms of mental illness from marrying) and partly for bureaucratic purposes (to clarify pension rights, for example). A few states today still recognize common law marriages, but these marriages are no longer at all common.

What is, however, common in contemporary society is cohabitation. The legal rights and duties of unmarried people who live together in a more or less stable or long-term relationship is still in the process of being worked out. The key case of *Marvin* v. *Marvin* established (in California, and in other states that followed its lead) the principle that contracts or agreements between cohabiters could in fact be enforced.

Married Women's Property Rights

At common law, the doctrine of "coverture" meant that a woman lost her right to buy and sell property and to control her own wealth when she got married. These rights passed to her husband, and her property was also liable for his debts. There were ways to avoid this situation, but they were complex and expensive to arrange. In a situation where many families had a stake in the economy, the doctrine of coverture created many problems. For example, a woman whose husband deserted her would be unable to sell, mortgage, or deal in land. These problems probably weighed more heavily on the minds of legislators than the nascent women's movement, which also called for an end to coverture. The first Married Women's Property Act was

passed in Mississippi in 1839; in the 1840s, many other states joined in. By the end of the century, nothing remained of the doctrine of coverture.

Adoption

Common law systems did not recognize the adoption of children. Again, property rights and inheritance made this a problematic situation. This was especially true in a period when many children were orphaned and were raised by relatives or friends. Massachusetts in 1851 passed the first general adoption law, and the majority of the states soon followed.

Divorce

Divorce has had the most complex history of any aspect of family law. Before the Civil War, the southern states typically had the system of legislative divorce. Divorces were granted one by one, and by statute. The northern states generally adopted the system of judicial divorce. An innocent party sued in court for a divorce from a spouse who had committed adultery, or deserted her, or treated her with cruelty. The list of "grounds" for divorce varied from state to state. In New York, a state with a very strict and stringent divorce law, adultery was the only practical grounds for divorce.

Many clergy and leading citizens felt that divorce was, at best, a necessary evil that should be uncommon and used only as a last resort. It was widely believed that easy divorce led to instability in marriages and in society. In fact, the demand for divorce rose steadily throughout the nineteenth century. Probably the main stimulus was a change in the nature of marriage. The rise of the so-called companionate marriage led to an increase in the demand for divorce, since spouses expected so much more out of marriage. But the formal law of divorce was difficult to change, because of the strength of the forces in opposition.

In the late nineteenth century, two escape routes developed. The first was the so-called migratory divorce. Some states eased up on their divorce laws—by lowering residence requirements, for example—to attract the business of people who wanted divorce. These "divorce mills" were controversial and were often quickly shut down; Nevada, however, in the twentieth century, proved to be a more permanent haven for people who wanted quick and easy divorce.

The second escape route was collusion. In theory, divorce was an adversary case. But in more and more cases—the overwhelming majority by the end of the century—the couple agreed in advance on the terms of the divorce, and the trial became a mere charade. One spouse (usually the wife) asked for a divorce, claiming cruelty or some other grounds. The husband simply failed to appear, and the divorce was granted by default. In New York (where adultery was the only grounds), a bizarre racket sprang up in which the husband checked into a hotel and was photographed with a woman (hired for this purpose). The photos were then presented in court as evidence of adultery.

Thus divorce became what we might call a dual system, in which the formal, official law, and the living law, were radically different. Despite many calls for reform, the system stayed amazingly stable, on paper at least, while the actu-

al divorce rate rose dramatically. The system finally broke down in 1970 when California adopted a so-called “no-fault” statute. Under a no-fault statute, in practice, either party can ask for, and get, a divorce. No defense is allowed. The majority of the states quickly followed. Despite some signs of backlash in a few states (notably Louisiana), the no-fault system has firmly taken hold.

FOR GREATER UNDERSTANDING

Questions

1. What is the relationship between laws governing marriage and people's right to privacy?
2. Has the legal system contributed to the rising divorce rate?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

Other Books of Interest

Cott, Nancy F. *Public Vows: A History of Marriage and the Nation*. Cambridge, MA: Harvard University Press, 2000.

Grossberg, Michael. *Governing the Hearth: Law and the Family in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press, 1985.

Hartog, Hendrik. *Man and Wife in America: A History*. Cambridge, MA: Harvard University Press, 2000.

Lecture 9:
Crime and Punishment in the Nineteenth Century

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law*, part II, chapter 7, and part III, chapter 10.

The Invention of the Penitentiary

There were two dramatic innovations in criminal justice in the first part of the nineteenth century: the penitentiary system and the organization of municipal police forces.

The penitentiaries (Cherry Hill in Philadelphia is a classic type) were large, impressive stone buildings surrounded by walls in which prisoners were confined, one to a cell, under a strict and disciplined regime. For the first time, the normal punishment for serious crime was imprisonment at hard labor, instead of corporal punishment. The prisons were run on the silent system: prisoners were not allowed to speak. Prisoners wore uniforms, and their daily routine was minutely specified.

The penitentiary was, in part at least, a reaction to the failure of the colonial system of punishment, which relied heavily on stigma, shame, and the didactic effects of punishment. In the turbulent, growing cities of the new republic, these methods seemed inadequate. Moreover, the community—the mobs and the underworld of the cities—were part of the problem, not part of the solution. Locked up and subject to iron discipline, the criminal would be removed from evil companionship and forced to repent and reform. At least that was the theory.

Death Goes Private

Suspicion and fear of urban disorder led also to a movement against public executions. Executions no longer seemed like didactic theater; rather, they struck many people as barbaric spectacles that only incited the blood lust of the crowd. In many states, in the first part of the century, executions were moved into the courtyard of the prison or jail. Later in the century, the invention of the electric chair made executions still more private; they were now held in the bowels of the prison with only a handful of witnesses.

The Invention of the Police

The police force replaced the old system of constables and night watchmen. Nineteenth century cities were unruly, riot-torn places; the urban disorder frightened the elites and led to a search for methods to control a restless population. The first urban police force was London's, but the idea spread quickly to New York, Boston, and other American cities. Police forces were paramilitary groups, on duty 24 hours a day, who wore uniforms, carried nightsticks, and were assigned the job of maintaining order in the cities. They were a visible presence; for more secretive crime, including confidence rackets, the cities developed plain-clothes forces who worked undercover; these were called detectives.

Correctional Policy: An Era of Reform

In the latter half of the nineteenth century, there were important changes in correctional policy. The silent system decayed in the prisons, and the next generation of prison officials devised new methods of organizing the correctional system. The aim was to separate reformable from incorrigible prisoners. A key idea was the indeterminate sentence. Judges would no longer impose specific sentences on persons convicted of crime. Rather, condemned men would serve a minimum sentence (often one year), and at the end of that time, prison officials would assess them, judge their behavior, and decide how long they would serve. Under the parole system, prisoners could be released early, if, in the opinion of a parole board, they showed signs of reform and rehabilitation. A convicted man on probation would not go to prison at all; his freedom, however, was conditioned on good behavior, as judged by a probation officer. The net result was a radical individualization of sentences. There was a relative shift of emphasis from the offense itself to the person and character of the offender. Another reform, at the end of the nineteenth century and the beginning of the twentieth century, was the creation of special juvenile courts for young offenders and for neglected children. These were not, in theory, criminal courts at all.

The Criminal Trial

The basic form of the criminal trial was inherited and is still familiar: a jury of twelve (all men in this period), the adversary system, and cross-examination. But trial by jury was actually in decline during the nineteenth century. More and more defendants pleaded guilty; in many cases this was the result of a deal (a "plea bargain"). At the level of police courts and municipal courts, "trials" were perfunctory; huge numbers of men and women were processed in a routine manner for drunkenness, vagrancy, and other petty offenses.

Full trials remained important for a small but significant group of trials. These were cases that attracted the attention of the media and caught the fancy of the public, such as the trial of Lizzie Borden in the 1890s. Indeed, these big trials are often striking social documents—they can be seen as social dramas in which two rival versions of the truth vie for attention, and in which the trial as a whole illuminates social norms and gives insights into the minds of the period.

The Fall and Rise of Victimless Crime

As we saw, the colonial systems put heavy stress on crimes against morality. In the first part of the nineteenth century, there was much less emphasis on such offenses as fornication and adultery. Indeed, in some states, only "open and notorious" adultery was criminalized; occasional, secret acts of sexual misbehavior were not offenses at all. It would be an exaggeration to say that vice was tolerated, but little effort went into enforcement. In the cities, there were "red light districts," where prostitution and gambling flourished, sometimes with payoffs to the police, in what we might call the Victorian compromise.

At the end of the century, the situation changed radically. For complex reasons, powerful social forces led to a crackdown on vice and crime. There was a sense of cultural crisis in a period of heavy immigration and urbanization;

urbanization; many people felt that civilization was under threat, and that vice had to be crushed in order to protect the moral security of the nation. Abortion was criminalized. Laws against sexual misbehavior were tightened. The campaign against vice would become even stronger, as we will see, in the twentieth century.

FOR GREATER UNDERSTANDING

Questions

1. How effective has the legal system been in enforcing codes of morality?
2. Is reformation of criminals a reasonable goal of the American legal system?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

Other Books of Interest

Banner, Stuart. *The Death Penalty: An American History*. Cambridge, MA: Harvard University Press, 2002.

Friedman, Lawrence M. *Crime and Punishment in American History*. New York: Perseus Book Group, 1993.

Friedman, Lawrence M., and Robert V. Percival. *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910*. Chapel Hill: University of North Carolina Press, 1981.

Walker, Samuel. *Popular Justice: A History of American Criminal Justice*. 2nd ed. New York: Oxford University Press, 1998.

Lecture 10:
Conflict and Struggle:
Labor and Social Legislation

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *A History of American Law*, pp. 553-563.

Taking Care of the Poor

The states inherited from the colonies a system of poor laws of English origin. Relief was local at the level of the township. A pauper was entitled to relief only if he was "settled" in that township (legally defined as belonging to that jurisdiction). In many places, new arrivals who seemed poor could be "warned out" (that is, told they could not remain in the community).

In the first half of the nineteenth century, however, there was an important shift from "outdoor" relief (relief in a person's own home) to "indoor" relief, a requirement that paupers had to enter a poor house or poor farm in order to have a claim for funds. These were highly regimented institutions—more like prisons than anything else. The idea was to make relief so painful and stigmatic that all but the most desperate would avoid it. There was also a fear of "sturdy beggars," men who could work but refused to. This was, on the whole, a fantasy; most of the residents of poor houses were old, sick, mentally ill, or destitute women with children.

Poor houses were meant to be severe but humane, but in many of them, conditions were appalling. In reaction, states began to try to centralize administration of relief in the latter part of the century through the creation of state boards of charities.

A constant in welfare history is the attempt to distinguish between the worthy and the unworthy poor. This was the idea behind the poor house. The "worthy poor"—blind people, or veterans of the Civil War—were treated with much more dignity, and granted both institutional and financial aid.

Labor and Labor Law

Perhaps the most important social development in the late nineteenth century was industrialization: the creation of a large, landless urban working class. The position (and livelihood) of the workers in factories and mines was precarious. Under the law, the owner could hire and fire at will. Workers tried to organize and form unions as a counterbalance to the power of the employer. These efforts were often bitterly opposed by management, and strikes were frequent and sometimes violent in the later part of the century. The battle between labor and management was also a legal battle. Generally speaking, legislatures tended to be somewhat more favorable to workers, who were after all voters. The courts tended to be more favorable to management.

One powerful weapon that the courts forged, and used against strikes and organized labor, was the labor injunction. An injunction is a court order to do a certain act (or, sometimes, not to do a certain act). An injunction is a pow-

erful tool, because disobedience can be considered contempt of court, and contempt of court can lead to imprisonment without trial.

The labor injunction began to be used around 1880 and became a powerful strike-breaking measure. One famous example of the use of the labor injunction occurred when a major strike against the Pullman company paralyzed the country's railroads in 1894. President Cleveland called out troops. The government also asked for, and got, an injunction against the union leader, Eugene V. Debs, ordering him to stop interfering with the railroads. Debs refused to obey. He was then jailed for contempt. On appeal, the Supreme Court (1895) upheld his conviction. The labor injunction would continue to be used to harass organized labor for some decades.

Social Legislation and the Courts

Organized labor also tried to get favorable legislation passed by the various states—laws regulating conditions of work, including health and safety measures, and such matters as the outlawing of child labor. Many northern states did in fact pass child labor and factory inspection laws, but enforcement was often weak and underfinanced. Employers also challenged each law in court, often on constitutional grounds. They had mixed success, and the results tended to vary from state to state and from court to court.

There were mixed results, too, in the United States Supreme Court. In *Holden* v. *Hardy* (1898), the Supreme Court upheld a Utah law instituting an eight-hour work day for miners and smelters. But in the famous case of *Lochner* v. *New York* (1905), the Court struck down a New York statute that limited the hours of bakery workers to 10 hours a day and 60 hours a week. Such a law violated the "liberty of contract" of workers and employers, and (said the Court) thus violated the Fourteenth Amendment to the Constitution.

The Court appeared at its most retrograde on the issue of child labor. Northern states had enacted child labor laws; southern states had not. Only an act of Congress could create a national standard (and help curb the flight of factories to southern states). In 1916, Congress passed a law that tried to provide such a standard by forbidding factories that used child labor from shipping their products across state lines. But in 1918, the Supreme Court struck down this statute. Congress tried to repair the damage by passing a law that attempted to impose a tax on the profits of mines or factories that hired children. But the Supreme Court struck down this law as well.

Occupational Licensing

Supreme Court decisions of this type were intensely controversial. But the Supreme Court also accepted much social legislation (notably, maximum hours for women), as did the state courts. Nor were the courts consistent in their concern for "liberty of contract." In the late nineteenth century, for example, legislatures in the states passed dozens and dozens of occupational licensing statutes: these statutes covered health professions (doctors, nurses, pharmacists), but also architects, morticians, barbers, plumbers, and even horse-shoers. Most of these were "friendly" statutes in which, essentially, the occupation or profession governed itself. Like union activity, they were attempts to control the labor market, but they did not raise the specter of class warfare, did not frighten the judges, and on the whole, were easily upheld by the courts.

FOR GREATER UNDERSTANDING

Questions

1. In the nineteenth century, in what way was treatment of the poor similar to treatment of criminals, and why?
2. How has the relationship between the legal system and the labor union movement changed in the course of U.S. history?

Suggested Reading

Friedman, Lawrence M. *A History of American Law*. 2nd ed. New York: Simon & Schuster, 1985.

Other Books of Interest

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Tomlins, Christopher. *Law, Labor, and Ideology in the Early Republic*. Cambridge: Cambridge University Press, 1993.

Lecture 11:
Crime and Punishment in the Twentieth Century

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *Crime and Punishment in American History*, Part III.

Enter the Federal Government

Criminal justice is mostly a state matter, and continues to be today—the vast majority of all criminal trials are state trials; the police, jails, and prisons are state institutions. The federal government did not even have a prison until almost the end of the nineteenth century; it boarded its few prisoners in state prisons. In the twentieth century, however, federal criminal justice has become significantly more important. New regulatory statutes—the federal income tax law, for example, or securities regulation—have greatly expanded the list of crimes that are federal in nature. The federal government became a factor in crime-fighting with the formation of the Federal Bureau of Investigation. National Prohibition filled federal jails in the 1920s; in later decades, federal drug laws contributed tens of thousands of prisoners.

In the age of radio, the movies, and then TV, a national culture—and the increasing importance of the Presidency—threw a spotlight on the federal government; in the latter half of the century, crime became a national issue, and Presidents campaigned on the issue. The federal government also inserted itself in local systems of criminal justice, mostly by funneling money to states and localities.

The War on Vice—and its Defeat

In the first part of the twentieth century, the war on vice that had begun in the late nineteenth century continued and strengthened. Congress passed the Mann Act (the "white slave" law) in 1910. This act made it a crime to transport a woman across state lines for "immoral" purposes. The states toughened their sex laws, in part by raising the so-called "age of consent." This in effect made teenage sexuality a criminal offense (for the male); it defined even consensual intercourse as "statutory rape." There were serious campaigns to close down the red light districts in city after city; the aim was to get rid of prostitution once and for all. The first important drug laws were passed around the time of the First World War. The crown jewel of the movement, no doubt, was national Prohibition. A constitutional amendment in effect criminalized alcoholic beverages; the decade of the 1920s was officially "dry."

A strong moral sense powered the movement, but there was also the notion of severe danger to the polity from vice and crime. This sense of danger was reinforced by the growth of the eugenics movement. It was widely believed that crime and vice were inherited traits; it was thus important to prevent defective human beings from breeding. Many states passed sterilization statutes, which the Supreme Court upheld in the case of *Buck* v. *Bell* (1927).

The tables began to turn as early as the 1930s, when Prohibition was repealed. Prohibition was certainly a political failure; in the cities, it was widely evaded, and it also was blamed for police corruption and the growing power of organized crime. In the last half of the twentieth century, there was a dramatic and steady reversal of the trends that characterized the earlier portion of the century. Many states repealed their laws against adultery, fornication, and sodomy; as to sodomy, the Supreme Court (in 2003) completed the task by striking down all the surviving laws. The enforcement of the Mann Act was essentially abandoned. Control over pornographic literature and movies relaxed enormously. Gambling spread from Nevada to Atlantic City, then to most of the country.

The so-called sexual revolution was in part responsible for this shift, and this in turn probably rested on even deeper social forces that drove a culture of self-realization and personal choice. All this deeply influenced the law. The drug laws, however, stood out as glaring exceptions to the trend. They became, on the whole, sharper and more draconian over time, and few voices spoke out for decriminalization. The drug laws were one factor that led to an enormous increase in the prison population. They fell with special severity on members of racial minorities.

The Death Penalty

Use of the death penalty declined in the first half of the century. At one point (1972), the Supreme Court struck down all existing death penalty laws, but four years later (1976), the Court gave its stamp of approval to one type of death penalty statute; this then became the template for statutes in the majority of the states. Death penalty procedure is complex, and usually involves a double trial—first, the guilt phase; then, the penalty phase. About a dozen states lack the death penalty altogether. Most of the other states use the death penalty only sparingly. The exceptions are some states of the deep South, and especially Texas. At the very end of the century, fresh doubts arose about the death penalty after a few highly publicized cases of innocent men wrongly convicted and put on death row.

The War on Crime

Violent crime rose dramatically in the years after the Second World War. Fear of crime became a major social fact, and crime itself became a salient political issue. Toughness on crime became a political necessity. States embarked on an orgy of prison building—and on filling the prisons with new prisoners. Harsh statutes were passed, such as California's "three strikes" law. Some states repealed their parole and indeterminate sentence laws. Laws were enacted making it possible to try juveniles as adults. Whether all these laws actually had any effect on the crime rate is a much-contested question. At the very end of the twentieth century, the crime rate began to slacken for reasons that are very poorly understood.

Trial and Error

Trial by jury is still a constitutional right, but in the late twentieth century, comparatively few defendants made use of it. The vast majority pleaded guilty; the plea bargaining system became pervasive, and remained so,

despite some attempts to limit or abolish it. The Supreme Court under Chief Justice Warren, in the 1950s and 1960s, dramatically extended the rights of criminal defendants—in theory, at least—and made the "Miranda warning" a part of American culture. Police brutality remains an issue and a problem. At the dawn of the twenty-first century, the "war on terror" has led to new demands for the curtailment of ordinary criminal process for terrorists and people suspected of terrorist activity.

FOR GREATER UNDERSTANDING

Questions

1. Does the prosecution of victimless crimes represent a threat to personal freedom? What are the arguments for and against prosecuting such crimes?
2. What impact does the criminal justice system leave on the actual crime rate?
3. Is our present system of criminal justice too harsh? Too lenient?
4. What role should the federal government play in the enforcement of laws against crime?

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Lecture 12:
The Rise of the Welfare-Regulatory State

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *American Law in the Twentieth Century*, chapters 1 and 6.

The Regulatory State in the Nineteenth Century

In the early nineteenth century, travel and communication were painfully slow, and the very idea of centralized control of the economy was unthinkable. But the railroad and the telegraph wrought a fundamental change. National railroad nets formed; the transcontinental railroad was a reality by 1870. Farmers and merchants had welcomed the railroad, but they now found themselves at the mercy of giant railroad corporations that were both greedy and corrupt. The Granger laws of the 1870s were attempts to regulate railroads in the midwestern states. But state regulation failed politically, and it was both weak and legally inadequate in a federal union. The Interstate Commerce Commission was established in 1877; this was one of the first great federal independent agencies. The law, however, was an incoherent jumble of contradictory aims, and administration of the ICC was hardly what farmers and merchants had hoped for.

The rise of big business seemed to many to pose a threat to the small merchant and the ordinary citizen. Corporation law had become, essentially, permissive, and made little attempt to control the behavior of corporations. The Sherman Act (1890) was an attempt to curb the "trusts," giant combines, (Rockefeller's Standard Oil was one of the prime examples) that monopolized particular industries. This brief act purported to outlaw monopolies, but it set up no mechanism for enforcement and left it to the courts, and to the administration, to carry the act into effect. Early cases tended to interpret the Sherman Act quite narrowly. But in the early nineteenth century the government did succeed in breaking up Standard Oil, and the Clayton Act (1914) created a federal agency to enforce Fair Trade Practices. Antitrust law since then has had its ups and downs—some notable successes (the breakup of the telephone monopoly) and some significant failures (IBM, perhaps Microsoft).

The New Deal Revolution

Federal regulation, and regulation in general, had been slowly growing since the late nineteenth century, but the Great Depression and the election of Franklin D. Roosevelt vastly increased the demand for federal intervention into the economy. The states and cities were helpless and bankrupt, and the New Deal moved into the vacuum. The New Deal attempted to create jobs through massive public works programs. It sought to cure the ills of Wall Street and curb fraud in the sale of stocks and bonds by passing a crucial regulatory act, the Securities and Exchange Commission Act. The New Deal brought in federal deposit insurance and a public housing program. It created a National Labor Relations Board, a law that tilted toward the unions, guaranteeing them the right to organize, and preventing employers from interfering

with union elections. The New Deal, in effect, took over the welfare system with the passage of the Social Security Act, one of its most popular and long-lasting achievements.

Roosevelt was a master politician, and through radio and newsreels, his message reached millions. His personality accelerated a process that was inevitable: centralization and a relative shift of power from the states to the central government. Roosevelt had enormous majorities in both houses of Congress, but there was always some opposition, and the opposition, at first, had enormous success in the courts. The Supreme Court struck down some key statutes of the early New Deal. When Roosevelt was re-elected, he tried to tame the Court with a plan to add new justices, and thus swamp the opposing justices. The president appoints Supreme Court justices for life; these appointments must be confirmed by the Senate before the justices are allowed to take their seats. Because justices are appointed for life, and because there is no mandatory retirement age, Roosevelt faced a dilemma in dealing with a Court unsympathetic to his policies.

Itching to fill the Court with appointees of his liking, Roosevelt was unwilling to wait for judges to retire and instead embarked on his plan to "pack" the Court by appointing new judges to match those who were over 70 years of age.This "court-packing" plan was, however, decisively rejected by Congress. In the end, however, Roosevelt succeeded in his goal of changing the tenor of constitutional decision-making. He served more than three terms, and he simply outlasted the justices; by the end of the term, almost all the justices were men appointed by Roosevelt, men quite favorable to the New Deal.

The outbreak of war in 1941 led to even further centralization, given the need to mobilize the entire population, raise a gigantic army, navy, and air force, and control a wartime economy. The post-war period proved not to be a period of retreat from the New Deal, even under Republican presidents. And the Presidency of Lyndon Johnson brought in important new programs, especially Medicare, which, like Social Security, proved to be enormously popular.

FOR GREATER UNDERSTANDING

Questions

1. How has the legal system reacted to the growth of big business, and why?
2. In what ways did the New Deal change the relationship between the states and the federal government?
3. What aspects of the New Deal have proved to be of permanent importance?

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Lecture 13:
Race Relations, Civil Rights, and Civil Liberties in the twentieth Century

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *American Law in the Twentieth Century*, chapters 5 and 10.

The Rise of the Civil Rights Movement

The early years of the twentieth century were the high point of white supremacy in the South. Politically, blacks were powerless, and this drove them, almost by necessity, to seek redress through the court system. The National Association for the Advancement of Colored People (NAACP), founded early in the century, fought American apartheid with vigor and began to have results. In Thurgood Marshall, it found an exceptionally talented and effective advocate.

In *Shelley* v. *Kraemer* (1948), the Supreme Court held that courts could not enforce racially restrictive covenants in deeds. The NAACP had long since mounted an attack on the "separate but equal" doctrine. They won some cases, but on the narrow grounds that the facilities for blacks were not equal. The litigation strategy, however, won a smashing victory in *Brown* v. *Board of Education* (1954), which declared the system of racially segregated schools unconstitutional—a violation of the equal protection clause of the Federal Constitution. In later cases, the Supreme Court made it clear that the underlying principle of the case went far beyond public schools. All racial segregation was unconstitutional. And in *Loving* v. *Virginia,* the Court struck down laws that made interracial marriage a crime.

The reaction of the white South to *Brown* and the cases that followed was bitter, intense, and sometimes violent. Desegregation was painfully slow. A decade after *Brown,* very few black children attended integrated schools. Southern universities, too, resisted integration. In a number of instances, integration had to be enforced with federal troops. A notable example occurred in connection with Central High School, in Little Rock, Arkansas. But the civil rights movement persisted; some judges of the lower federal courts, where desegregation cases were handled, also stood firm. In the person of Martin Luther King, Jr., the movement found a charismatic leader.

In 1964, under the leadership of President Lyndon Johnson, Congress passed a major civil rights law that outlawed discrimination in housing, education, public accommodations, and employment. The act also created an agency, the Equal Employment Opportunity Commission (EEOC), to enforce the employment provisions of
the act. In 1965, Congress enacted the Voting Rights Act, which swept away all the various devices the southern states had used to keep blacks from voting. The voting rights law has proved to be quite effective, and it profoundly altered southern politics. For the first time since Reconstruction, there were black mayors and members of Congress from the southern states.

The Civil Rights Act was itself in many ways extremely successful—in ending segregation in public accommodations, for example. Housing and employment have been more troublesome. In employment, the courts and agencies have developed doctrines to ferret out and fight covert discrimination. If a policy of an employer (to require a college degree or a written test, for example) has a "disparate impact," racially, then the employer must show that the requirement is essential to the job. If the employer does not meet this burden of proof, then the requirement cannot be sustained.

One area of law that remains deeply controversial is affirmative action. It has been adopted by businesses, municipalities, and universities in an attempt to increase "diversity." But affirmative action is unpopular, and it is usually voted down if presented to the electorate. The Supreme Court has vacillated on the issue over the years; some justices feel strongly that affirmative action is sound policy, while others feel that it is a form of race discrimination, and that discrimination against whites, for whatever reason, is as odious as discrimination against blacks. Ultimately (2003) the Supreme Court seemed to approve of the idea of taking race into account, in a case concerning admissions to the law school of the University of Michigan, but outright quotas were illegal, and the standards remain somewhat vague.

Gender Discrimination

The 1964 Civil Rights Act included a ban on sex discrimination. The EEOC enforces this ban too. Over the years, many occupations have opened up to women that were closed to them before. The Supreme Court, seven years after the Civil Rights Act, decided that gender discrimination, like race discrimination, was also a violation of the Fourteenth Amendment. The legal treatment of race and sex discrimination is not identical—there are, after all, real and significant biological differences between men and women. But most statutes and practices that make the distinction have been voided, including those which were ostensibly passed for the protection of women. Airlines, for example, had the practice of hiring only (young) women as "stewardesses"; a male successfully challenged this practice.

Plural Equality

The ban on race and gender discrimination is a symptom of a larger movement that has affected other minorities as well—religious minorities, ethnic minorities, students, aliens, the handicapped, sexual minorities. Native American rights have been increasingly recognized, and the various tribes have gained more autonomy. Many even have systems of tribal courts. Age discrimination became illegal in the workplace in the 1960s, and Congress later abolished mandatory retirement. An important statute, the Americans with Disabilities Act, was passed in 1990; now an employer cannot refuse a job to a person with a handicap, unless the disability really prevents him or her from doing the job.

Civil Liberties

The United States has always possessed a tradition of freedom of speech and the press, but only in the twentieth century has the Supreme Court concerned itself with defining the boundaries of the concept. Some of the key

cases arose during and after the First World War, partly because of the vigorous way in which the government tried to suppress “sedition.” Another trying time for freedom of speech and for civil liberties in general was the Cold War era, and in particular, the episode associated with Sen. Joseph McCarthy. The Supreme Court has also wrestled with the issue of the limits of sexual expression. It has never developed a satisfactory or usable test for determining what is or what is not “pornographic.” In most big cities, the attempt to exercise any control, in the era of the sexual revolution, has been, practically speaking, given up.

FOR GREATER UNDERSTANDING

Questions

1. In what ways does legislation on discrimination (against African-Americans, women, Native Americans, and others) both reflect and drive social change?
2. How effective has the legal system been in enforcing equality in matters of race and gender?
3. What limits should there be, if any, on "free speech" in the interests of suppressing sedition or pornography?

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Lecture 14:
Culture, Policy, and Law in the Late Twentieth Century

Before beginning this lecture you may want to . . .

Read Lawrence M. Friedman's *American Law in the Twentieth Century*, pp. 419–426, 558–571, and 588–607.

American law is incredibly complex, and it is impossible to sum up developments in the late twentieth century in a few short sentences. Social change, obviously, has had and continues to make a profound mark on the system. It has profoundly altered the federal system. The shift toward the center has been going on since the days of the New Deal; the mass media, particularly television, accentuated the importance of the Presidency (and the federal government in general) and has created a single mass culture. The transportation revolution has created a single, national economy as well. All of this has had a deep effect on American federalism.

The Environmental Movement

The late twentieth century produced an entirely new field of law: environmental law. There had been conservation laws before—laws protecting fish and game—and the National Park movement began in the nineteenth century. But in general, the nineteenth century treated resources as essentially infinite. Interest in the environment accelerated dramatically in the last half of the twentieth century.

One aspect of the movement was simply a reflection of increased concern for public health. The "Donora death fog" of 1948 and the Los Angeles smog problem were wake-up calls for a clean air movement, and Congress passed a clean air law in 1963. Clean water also became an issue; an important law was enacted by Congress in 1965. Later amendments strengthened these federal programs.

But the environmental movement goes beyond health considerations. It reflects more romantic or emotional considerations. The National Environmental Policy Act was passed in 1970; President Richard Nixon, by executive order, created an Environmental Protection Agency (EPA). Programs faced the necessity of justifying themselves with "environmental impact" statements. All this reflected the wide popularity of the environmental movement. Congress has also passed laws to protect marine mammals, and endangered plants and animals in general. However, in some instances, actions taken under these laws have proved wildly controversial: when, for example, logging interests are made to give way for the protection of an owl or a tiny fish seems to hold back the building of a mighty dam. The struggle over drilling for oil in Alaska is another example of the conflict between economic and environmental interests, especially with regard to the vast public domain.

The Right of Privacy

Wealth, leisure, and a search for individual fulfillment were characteristics of American culture in the late twentieth century; they fueled the environmental

movement, for example. Another striking reflex of current social forces was the evolution of the constitutional right of privacy.

A tort action for invasion of privacy was suggested by a law review article written in 1890, and some states did later recognize a right of privacy—in cases where, for example, a company used a person's name or picture, without authorization, in advertising. On the constitutional level, however, the story begins with *Griswold* v. *Connecticut* (1965). Connecticut had a law that made it a crime to use any drug or device "for the purpose of preventing conception." The Supreme court struck down this law, the most stringent of its kind in the country, on the grounds that the statute invaded a protected "zone of privacy" implied in the text of the Constitution. The Griswold case had referred to the sacred institution of marriage, but later cases made it clear that this new right extended to decisions on sex and procreation, regardless of a person's marital status. The climax of this line of cases, no doubt, was *Roe* v. *Wade* (1973), which put a woman's right to an abortion (at least in the early months of pregnancy) within the constitutionally protected zone of privacy. In *Bowers* v. *Hardwick* (1986), the Supreme Court refused to extend the doctrine to include homosexual behavior (Georgia's sodomy statute was at issue), but a number of state courts reached contrary conclusions, under their own constitutions. In 2003, however, the Court overruled *Bowers* v. *Hardwick* and invalidated the remaining sodomy statutes.

Roe v. *Wade,* the abortion case, has been controversial since the day it was decided. It has become one of the most important political issues in the country, and has figured in many electoral campaigns. It stimulated the growth of a "right to life" movement, but the case has also generated great passion in support of a woman's right to choose. *Roe* v. *Wade* (and the whole privacy line of cases) had only a tenuous connection with the text of the Constitution, and this was another source of criticism.

In 1992, it was widely thought a conservative majority on the Supreme Court would overrule *Roe* v. *Wade,* but the Court, somewhat surprisingly, declined to do so. President Clinton appointed two justices who were committed to the pro-choice side, and, as of 2003, the decision seems (temporarily at least) secure.

The rise of the computer has brought the issue of privacy to the fore in a more literal sense. The capacity of big government and big institutions to gather information about ordinary citizens, to compile elaborate dossiers, together with an almost infinite ability to store this data, link it with other data, and share it with other institutions, suggests that protection of individual privacy may well be one of the major legal and social issues of the new century.

American Law at the Dawn of the Twenty-First Century

The 21st century is only a few years old, but it continues to demonstrate the dramatic centrality of the American legal system. The Supreme Court decisively intervened in the election of 2000, in the case of *Bush* v. *Gore.* The attack of September 11, 2001, led to important changes in the law—an innovative program of compensation, for victims of the disaster, but also the Patriot Act and other measures designed to fight terrorism. There has been intense political controversy over appointments to the federal bench. It is far too early to

assess the meaning and impact of many of the legal events of the new century, but it is clear that the omnipresence and supreme importance of the legal order, in this country as in others, continues, and indeed is likely to grow.

FOR GREATER UNDERSTANDING

Questions

1. What factors have influenced the increased interest in environmental issues?
2. How have public and private perceptions of liberty changed since colonial days? How has the law changed along with these shifting perceptions?

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