A HISTORY OF AMERICAN LAW. By Lawrence M. Friedman. New York: Simon and Schuster, 1973. Pp. 655. Clothbound $15.95. Paperbound $4.95. Reviewed by Stephen J. Spitz*

*A History of American Law* is an unusual book. For one thing, it is the first general book on American legal history. For another, it is serious scholarship that, unlike comparable law review work, manages to be interesting. What Friedman has done is to chronologically trace major legal movements from colonial times through the 19th Century. This, in itself, may strike one as the type of massive chore that frustrated law professors set up for themselves and that sensible readers stay away from. It is Friedman's scope of interest, tempered with a judicious use of historical material, which makes this book valuable reading for anyone interested in the foundations of American law.

When lawyers think of "law," they think of common law. When they think of legal history, they think of English history. If you press a lawyer as to why a particular precedent should no longer control, he might argue that current social policy requires different legal solutions. If you continue to press, he may come up with the history "behind" the old precedent: statements by courts during that period concerning the social object they sought to accomplish. Now, why the legal profession thinks of law as judge-made, of legal history as English, and of American legal history as judicial rationalizations in old opinions is, I believe, very much a product of American legal education. As is apparent from Friedman's discussion on the training of the legal profession, Langdell's case method was, from its inception in 1871,[1] deferential toward English law, hostile to statutory enactments, and consciously manipulative when it came to American legal history. However, whether legal education is responsible for these jurisprudential notions is not now the point. There can be no doubt that these attitudes are common in legal circles. *A History of American Law*, in effect, depicts the gravity of these misconceptions.

Friedman accomplishes this by building a unified historical edifice in which the common law in particular, and the law in general, are but important elements. For example, it is folly to view the Amer-

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[1] L. FRIEDMAN, A HISTORY OF AMERICAN LAW, 522-38 (1973). [Hereinafter cited as FRIEDMAN] Friedman reports that

> [t]o most . . . students, as well as to Langdell's colleagues, [the socratic method] was an abomination. The students were bewildered: they cut Langdell's classes in droves; only a few remained to hear him out. Before the end of the term, his course,. it was said, had dwindled to 'seven devoted men . . .'

*Id.* at 533.

ican Industrial Revolution as a creature of law. Yet, legal developments, especially legislative ones, did play a significant role. This was not because legislators had some over-all view that capitalism was to be encouraged. Rather, legislatures recognized that increased economic activity was demonstrably better for the public and sought in specific ways to facilitate such activity. Friedman captures this magnificiently, from the arousal of need, through enactment, and on to the economic and social consequences. Areas such as ease of incorporation, simplification of real property transfers, and use of land grants to increase commerce are detailed and analyzed.

As the author makes clear, social change of this magnitude is rarely the subject of universal acclaim and these legislative actions were inherently schismatic. As soon as a particular endeavor was sufficiently ensconced so as to take hold, the movement to control it was spawned. A particularly cogent example was the railroad and the railroad town. It was the prime goal of many communities to get the railroad to come their way; in fact, there was much competition in this regard. However, as soon as the tracks were down and goods were being shipped, people became resentful of the railroad's power. After all, the railroad could destroy the town by altering its path and could do severe damage merely by changing its schedule. Moreover, neither the townspeople nor anyone they knew had control over the rates charged by the trains. Viewed in this historical light, it is not difficult to understand the love-hate relationship which has characterized the American attitude toward industrial activity.

Friedman's ability to weave social and legal history and to select the right examples (and the right number) is no less true in his treatment of common law. The impact of industrialization on tort law serves as a fine example from the same historical period. Again, one would think from reading judicial opinions that negligence principles came directly from England and were extended to Americans in order to mitigate the rigors of the machine age. In fact, the incorporation of negligence as a separate action within the law of torts occurred over 100 years earlier in America than in England.[2] And, whatever one thinks of current personal injury practice, the principle of negli-

[2] Just prior to the Civil War, Justice Lemuel Shaw decided that the law of torts consisted of suits based on negligence and actions for intentional wrongs. *Brown v. Kendall*, 6 Cush. 292 (Mass. 1850). Judge Diplock, speaking for the Queen's Bench, accomplished the same result in *Fowler v. Lanning*, 1 All E.R. 290 (Q.B.D. 1959).

There was also a flow of "transatlantic traffic" in the opposite direction and "many leading cases [of this period] . . . were English: *Priestly v. Fowler* (1837) (fellow servant rule); *Davies v. Mann* (1842)(last clear chance); *Rylands. v. Fletcher* (1868) (liability for extra hazardous activities)." FRIEDMAN, *supra* note 1, at 409 (footnotes omitted).

gence arose to protect American industrialists from strict liability for direct harm. Strict liability, after all, was simply unthinkable in an age in which machines had a remarkable capacity to separate appendages from the stalk of the body. When lawyers, armed with poor and bloodied clients, evidenced a continuing interest in the company vault, defenses like the fellow servant rule and assumption of risk were invented and rigorously applied.[3] Still, as with the railroad town, not all judges, and perhaps, not any one judge, wholly perceived their function as protecting industrial defendants. "Indeed, the pull in the opposite direction was always there and grew steadily stronger. Reaction to the severe rules made itself felt almost as soon as each doctrine was born."[4] History is not monolithic.

A review of any work is intrinsically limited and necessarily episodic. These limitations are especially unfortunate in this case for one of the book's prime merits is its very comprehensiveness. At the least, this review should make clear that Friedman's *History* imparts an understanding of law that goes far beyond mere doctrine or simplified historical explanation. It is for this reason that *A History of American Law*, which was not written for legal historians, is a genuine historical event.

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[3] FRIEDMAN, *supra* n. 1, at 413. Existing doctrine was also expanded to meet the needs of industrial defendants.

> Contributory negligence can be traced, as a doctrine, to an English case decided in 1809. But it was rarely used before the 1850's. What happened in between was the rise of the railroads. In 1840, there were less than 3,000 miles of track in the United States; by 1850, 9,000; by 1860, 30,000; by 1870, 52,000. Personal-injury cases grew as fast as the trackage. Most cases were crossing accidents. The air brake was not invented until 1868; and it was not in general use until much later than that. Before the air brake, trains simply could not quickly slow down. They sped through the countryside, futilely clanging their bells, and, all too often, colliding with cattle, other trains, or men (footnotes omitted).

FRIEDMAN, *supra* note 1, at 412.

[4] FRIEDMAN, *supra* note 1, at 417.