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Book Reviews

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BOOK REVIEWS

FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA. By Jerome A. Barron, Bloomington, Indiana University Press, 1973. Pp. 368. $8.95.

There's been a new legal right lurking about since 1967, when it was first espoused in the Harvard Law Review.[1] This is the right of access to the media, a new view of the first amendment postulated by Jerome A. Barron, Dean of the University of Syracuse Law School, who taught constitutional law and wills, estates and trust at the University of North Dakota Law School in the early 1960's.

Since its first public airing in 1967, Dean Barron's right of access has germinated a considerable amount of discussion and thought in various forums, ranging from *Mass Communication Law*, a textbook co-authored by Dean Barronn and Dr. Donald Gillmor[2]; to his address to a convention of the American Civil Liberties Union (ACLU); to his address at the annual Law and Free Society lecture series at the University of Texas Law School; to various book reviews and articles in *The Sturday Review, The George Washington University Law Review, The Quill, The Columbia Journalism Review, Editor & Publisher, Trial,* and other journals; to a show with James Reston and Clifton Daniels of the *New York Times* and Richard Jencks of CBS over the National Educational Television Network; and finally, to this book, which is the most exhaustive and up-to-date presentation yet of Dean Barron's thesis.

What is his thesis? Well, it's based upon the first amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.[3]

Dean Barron fashions out of this what he terms a positive inter-

1. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).
2. GILLMORE AND BARRON, MASS COMMUNICATIONS LAW (1st ed., 1969; Supp. 1971). Dr. Gillmore, incidentally, is also a former University of North Dakota instructor. He taught journalism and directed the Honors Program in the late 1950s and early 1960s. He is now teaching journalism at the University of Minnesota.
3. U.S. CONST. amend. I.

pretation, i.e. a right of access for all individuals to media coverage. As he says in his preface, "I became increasingly dissatisfied with the failure of our law to provide any right of public access for ideas. [I]n the era of mass communications, the words of the solitary speaker or the lonely writer, however brave or imaginative, have little impact unless they are broadcast through the great engines of public opinion — radio, television and the press. The major obstacle to freedom of expression in America is the difficulty of penetrating the media in a serious rather than a bizarre way."[4]

The book is a complete and thorough exposition of Dean Barron's thesis. He cites some irresponsible access denials by the media in turning down ads or refusing commercial air time. He points out that courts have recognized a right of access to the campus and high school press, but admits that this is due primarily to the state involvement in campus papers. "The serious and ludicrous results of this distinction can be appreciated when it is realized that what a labor union was unable to gain from four Chicago newspapers — recognition of a duty to publish — was in fact obtained by a small group of school children from a high school newspaper."[5]

He calls letters-to-the-editor columns a natural field for the development of a legal right of access. "The contract theory of right of access has a certain attraction,"[6] says Dean Barron, when discussing letters to the editor. This would bring into play the remedy of specific performance, but also the problems of offer and acceptance. Dean Barron says a first amendment based right to have a letter to the editor published has not yet been given full dress consideration in court, and he seems to prefer this constitutional approach rather than a contractual one.

A great portion of the book looks at radio and television, and the various court cases and Federal Communications Commission (FCC) regulations which have, according to Dean Barron, been slowly forging out an access doctrine of sorts. He discusses the fairness doctrine, equal time requirements, rights of reply, and the landmark Red Lion[7] case. However, he doesn't put much faith in the FCC as a forger of a right of access, saying the FCC "has met the demands for access to broadcasting obliquely rather than directly. The FCC steadfastly has refused to open up the media to the public or to representative public groups as a right."[8] Dean Barron does acknowledge that, "to everyone's surprise," the FCC in

4. J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA xiii (1973).
5. *Id.* at 36.
6. *Id.* at 47.
7. Red Lion Broadcasting Co. v. Federal Communications Comm'n; United States v. Radio Television News Directors Ass'n, 395 U.S. 367 (1969).
8. J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA 188 (1973).

May, 1970 adopted a prime time access rule which does limit the networks control over prime time programming.

The author goes on to talk about citizen group challenges to broadcast licenses, CATV and its role in the access spectrum, and finally the future of access, which he sees as fiarly bright if the courts use imaginative decision making.

The theory of a right of access has been debated, analyzed and reviewed for seven years now, and it would take more than a book review to try any thorough analysis or critique of the access theory.

However, there are a few points which should be parried in Dean Barron's arguments. Basically, I believe he's building his case against a problem which really doesn't exist on as widespread a basis as he pictures. He acknowledges this argument, saying that "one of the most perplexing obstacles to the right of access is the media insistence that there is no access problem, or, alternatively, if there is one it is the critic's responsibility to document it."[9] I don't know why the documentation requirement is perplexing to Dean Barron. Any attorney, when he files a change or takes a case into court, is expected to fully document alleged offenses or wrongs.

Dean Barron can point to a few glaring abuses, but when he starts talking about problems across the entire country, his documentation comes up short. The need for better documentation is shown in one of Dean Barron's statements that "efforts of dissenting groups on both the left and the right to secure something as fundamental and simple as advertising space in their community newspapers are often futile."[10] The plain fact is they are not *often* futile, and Dean Barron shows no evidence that they are.

It is hard to agree, from personal experience with publishers and reporters, with the broad, general statement by Barron that "conventional free press theory is a barrier to the admission of ideas to the media. (The media owners and managers) read freedom of the press as an immunity from accountability and any kind of legal responsibility."[11] For some reason, Dean Barron throughout the books shows an almost Nixon-like suspicion of the press, preferring always to think they will do their worst rather than their best. I would prefer a more positive notion that most publisher, reporters, and media owners, like most politicians, and even most law school deans, are honorable and honest, and are attempting to carry out their duties to the best of their abilities.

Two remedies are needed, says Barron: a nondiscriminatory right to purchase editorial advertisements in daily newspapers and

9. *Id.* at 312.
10. *Id.* at xiv.
11. *Id.* at 4-5.

a right of reply for public figures and public officers defamed in newspapers.[12] These are needed, but they shouldn't be imposed by statute.

One or two instances a whole case do not make. Yet, Dean Barron details an admittedly bad scene in Chicago — all four papers turning down ads from a union picketing Marshall Field & Co. — and then says this shows that "the advertising directors of American newspapers thus exercise a powerful private censorship."[13] First of all, nothing in Chicago is really very typical of America. And, that kind of sweeping generalization is the kind then-Professor Barron used to shoot down regularly in his UND constitutional law teaching days.

Dean Barron seems to think the normal editing functions of a newspaper or a radio or television station are in fact censorship. "Freedom to publish, not freedom to censor, is guaranteed by the first amendment,"[14] he says. He quotes Justice Louis Brandeis to the effect that freedom of the press exists to aid in the discovery and aid of political truth. "Freedom of the press," says Dean Barron, "is guaranteed in order that the poeple may have sufficient information to participate intelligently as self-governing members in a democratic order."[15]

This sounds well and good. Dean Barron adds that an informed public opinion is not possible unless the public, through newspapers and the electronic media, are exposed to all shades of opinion. Again, well and good. But, to Dean Barron, this means every single idea and theory that comes down the pike.

Now, if there's anything in this era of shortages that's of abundance, or overabundance in America, its different ideas. And somehow, according to Dean Barron, they must all be able to have their day in the press and on radio and television.

The public needs to be exposed to different ideas to be an informed part of democracy, but I've never read where every single idea deserves equal time. This is a practical impossibility.

It sounds as if Dean Barron expects newspapers and radio and television to perform the same functions as traditionally fulfilled by the small magazines, the underground press, and scholarly journals such as law reviews.

Using the Newspaper Preservation Act as an example of state action to aid newspapers, Dean Barron argues that if you can legislate to aid the papers, you can also legislate to benefit the readership. But, would the readers really want all of this in their

12. *Id.* at 6.
13. *Id.* at 15.
14. *Id.* at 16.
15. *Id.* at 15.

newspapers and radio and television? They can get it now, if they want, by purchasing the underground papers, and the scholarly journals where these ideas are now available.

Dean Barron talks about the importance of these ideas gaining an audience, and dismisses the claims of media executives that the first amendment does not guarantee all ideas the largest possible audience, and particularly their audience. He points to court cases which have given persons rights to distribute leaflets at shopping centers and similar areas as leading logically to the notion that all ideas should be granted a similar audience. However, unlike a shopping center, where people will keep coming back week after week for groceries, goods, etc., a newspaper reader or a television watcher is a bit different. If he is exposed to a constant parade of ideas he doesn't want, he will simply stop reading or watching, and then the audience is gone.

And, it's questionable if this type of access will lead to the informed and knowledgeable electorate needed for deomocracy.

Letters-to-the-editor columns, says Dean Barron, are much less open than they appear, and the letters chosen for publication in the first place are chosen by a highly subjective process and often are severely edited. But, he never says what this highly subjective process is. Often, in the case of the larger newspapers, it's simply trying to get a representative sample of all the letters. For example, the *New York Times* in 1969 received 37,719 letters to the editor, and were able to print only six per cent. It was estimated that if the *Times* had printed all 18 million words of these letters to the editor, they would have filled up at least 135 complete weekday issues.[16]

Dean Barron continually ascribes to certain citizen groups great qualities of representation, seeing them apparently as the will of the people pitted against the media bosses. He says, for instance, that the movement for access is designed only to anchor greater media responsiveness to community desires for direct participation. He extolls the citizen groups challenging broadcast licenses (such challenges are sometimes merely a form of sophisticated blackmail) when in fact they may be representative of only a small minority within the community and challenging for very selfish reasons. He talks of the primacy of the audience and the rights of the listeners. But do these listeners and readers want what Dean Barron wants to give them? If they did, they could get it now.

Dean Barron also points to the federal judiciary as the ideal place to decide sticky matters of access, saying they have the wisdom and experience of dealing with first amendment problems and

16. Daniel, *Right of Access to Mass Media—Government Obligation to Enforce the First Amendment*, 48 TEX. L. REV. 785 (1970).

protecting first amendment freedoms. I would not be so quick to ascribe such qualities to the federal judiciary in matters of press freedom.

As cases have shown in the last year, the judiciary sometimes takes a fairly repressive look at the media. In fact, a person could get the feeling, after associating with many attorneys and judges, and after reading how often the judiciary attempts to gag or exclude the press, that many attorneys and judges simply do not understand the media and really rather dislike it.

In his Law and the Free Society lecture, Dean Barron was challenged by Mr. Clifton Daniel of the *New York Times* "to write an access statute that would not entail some measure of official control of the press."[17] Dean Barron, never one to shrink from a challenge, responded with a bill which was introduced in Congress in 1970 and which, as he says, was somewhat sardonically called the Truth Preservation Act.[18] The bill failed to get anywhere, and

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17. *Id.* at 783.

18. The bill H.R. 18941, reads as follows:

To impose on newspapers of general circulation an obligation to afford certain members of the public an opportunity to publish editorial advertisements and to reply to editorial comment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Truth Preservation Act."

Obligation to Provide Access

Sec. 1. Each newspaper of general circulation shall—

(1) publish, in accordance with section 2, all editorial advertisements submitted to such newspaper, and

(2) provide, in accordance with section 3, a right of reply to any organization or individual that is the subject of a comment of an editorial nature by such newspaper.

Requirements Respecting Editorial Advertising

Sec. 2. (a) A newspaper of general circulation in a community shall be required to publish an editorial advertisement—

(1) only after all newspapers of general circulation in such community have been requested to publish such advertisements and have refused to publish it, and

(2) provide, in accordance with section 3, a right of reply to any orficient to pay such advertisement (subject to subsection (b)), and the newspaper has the space necessary to carry the advertisement.

(b) No newspaper of general circulation may charge for publication of any editorial advertisement, any charge—

(1) in excess of its charges for publication of comparable advertisements which are not editorial advertisements, or

(2) in excess of its charges for publication of other comparable editorial advertisements.

Requirements Respecting Right to Reply

Sec. 3. A newspaper of general circulation which is required under section 1(2) to provide a right of reply shall afford the individual (or in the case of a comment on an organization, the chief officer or a person delegated by him) a reasonable amount of space in a comparable place in the newspaper as soon as practicable after the newspaper's receipt of the reply.

Sec. 4. Any person aggrieved by the failure of a newspaper of general circulation to comply with any requirement of this Act may obtain a mandatory injunction requiring such newspaper to comply with such requirement. The district courts of the United States shall have jurisdiction of any action brought under this section.

Dean Barron admits it probably will not be passed in the near future. Which is a good thing, because it would open up the doors to the federal judiciary deciding what should and should not be printed, to deciding what is a comment of an editorial nature (which would be an extremely hard decision), and to generally interfering with the media. This is precisely what the first amendment, I believe, was meant to prevent: government officials telling the media what it must print.

Both Mr. Daniel, in his rejoinder to Dean Barron in the Law and the Free Society lecture, and Mr. Ben H. Bagdikian, a noted press critic, in the Columbia Journalism Review,[19] answered Dean Barron's criticisms with what the media is doing and can do, short of Dean Barron's proposals, to remedy abuses in the access area.

Mr. Daniel pointed out that there are more media voices now than ever before, and that the number of special publications is increasing rapidly. New ideas are not being stifled he said, and in fact just the opposite, since never before have so many diverse voices and opinions been heard across the land. He noted that a right of reply is widely accepted in journalism now, but cautioned against creating an absolute right of reply to large, ill-defined, hypersensitive population groups.

Mr. Daniel said, "There are effective devices that newspapers and their readers could and do employ: a page of dissenting opinions; more letters to the editor; no restrictions on political advertising; an ombudsman for the readers; a column to deal with readers' complaints and queries; a press council of community representatives to meet regularly with the editors; hiring reporters from minority groups to bring the views of their communities into the newsroom; and establishing a grievance committee to receive complaints about the press."[20]

Mr. Daniel, then an associated editor of the *Times* and now head of its Washington bureau, also said, about the right to an audience, that "No artist has a right to a clientele. He has to earn his audience by the forcefulness of his art, the persuasiveness of his talent. How much more cogently does this apply to political ideas!"[21]

Sec. 5. For the purposes of this Act:

Enforcement

(1) The term "newspaper of general circulation" means a newspaper intended to be read by the general public of any geographic area.

(2) The term "editorial advertisement" means an advertisement which communicates information or expresses opinion on an issue of public importance or which seeks financial support for an individual or organization to enable such individual or organization to advocate or carry out a course of action respecting such an issue.

19. Bagdikkian, *Right of Access: A Modest Proposal,* COLUM. J. REV. (Spring 1969).

20. Daniel, *Right of Access to Mass Media—Government Obligation to Enforce the First Amendment,* 48 TEX L. REV. 783, 788 (1970).

21. *Id.* at 785. The right to an audience idea can be extended to absurdity. There are, for

Bagdikian suggests: (1) newspapers including an occasional full page to a skilled journalist writing clearly and fairly on six or seven ideas of the most thoughtful experts on solutions to specific public problems; (2) newspapers devoting a full page a day to letters to the editor, some days for random letters and other days to a particular issue; (3) appoint a full-time ombudsman on the newspaper or station to track down and answer questions about the organization's judgement and performance; and (4) organize a local press council. Dean Barron dismisses Bagdikian's suggestions as useful but toothless.[22]

Dean Barron's book, in sum, is a rational and thought-provoking presentation of a difficult constitutional issue which should be read and discussed by individuals in the media as well as by those schooled and learned in law.

JACK MCDONALD*

example, many ideas or theories on the law. Some are legitimate and other crackpot. The audience for these ideas is in the law schools of the country—law students. Would Dean Barrow allow any and all to lecture to the freshman criminal law class at Syracuse, for example, on their pet theories of criminal law? I think not, but he would force these same ideas upon the readers of the New York Times or the Grand Forks Herald, or upon the viewers of NBC-TV in New York City or WDAZ-TV in Grand Forks.

22. J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA 306 (1973).

* B.A., University of North Dakota; Fellow, Washington (D.C.) Journalism Center; M.A., The American University; J.D., University of North Dakota; past work with United Press International, the Associated Press, and various newspapers and magazines; Connsel, North Dakota Legislative Council, 1970-1973; presently assistant city attorney, Grand Forks.

A HISTORY OF AMERICAN LAW. By Lawrence M. Friedman, Simon and Schuster, Rockefeller Center, New York, New York. 655 Pages, $14.95, 1973.

The author's concept of legal history is perhaps best illustrated by the following quote:

> The law is a mirror held up against life. It is order; it is justice; it is also fear, insecurity and emptyness; it is whatever results from the scheming, plotting, and striving of people and groups, with and against each other. All these things law will continue to be. A full history of American law would be nothing more or less than a full history of American life.[1]

With the above statement, Professor Friedman concludes what is perhaps one of the more comprehensive histories of the American legal experience. He begins his book at the beginning—that is, in the colonial past. Following social, political and economic developments through the 17th and 18th centuries, his review of the law becomes not a raw and indigestible collection of case studies, but rather, a testimony of historical experience.

The author discusses the areas of property, trade, crime, tort, courts, administrative law, corporations, commerce, labor, tax and legal literature, among others. The book, because of the extensive treatment of these topics, lends itself to a most cursory examination. The purpose of this review is to examine those areas which serve best to demonstrate the book's content, quality, and the author's view of the American legal experience.

To begin, the author dismisses several commonly held theories of early American law.

The colonies did not, as is often thought, adopt in toto the English system, nor were all the systems similar by reason of common background. Individual colonies adopted only such English common law as was needed. The several systems were shaped not only by the familiar common law, but also by geographical isolation, the character of the settlements, the absence of external control, politics and, of course, religion. Massachusetts, for example, attached legal significance to the Bible.

Civil procedure in the colonies was not strict, but rather began quite informally. According to the author, this was due chiefly to the background of the colonists themselves. Not being learned, they had no need or desire for unnecessary form. Correspondingly, there were few law-trained judges or lawyers. This early informality was not to last, for by the 18th century, America had become

1. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 595 (1973).

increasingly influenced by merchants and landowners who demanded more efficient and uniform laws.

American law was not beholden exclusively to the English common law for its legal morphology. While the eastern shores were steeped in English tradition, there also existed a civil law enclave. French and Spanish culture guided settlements in New Orleans, Florida, Texas, California, and along the Mississippi. Civil law traditions influenced many American doctrines and institutions, particularly in Louisiana, Texas and California.

In 1836, Texas formally adopted common law but not without some civil law guidance. The Texas Constitution of that date stated:

> Congress shall as early as practicable introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require.[2]

Well into the 19th century, Texas judges were dismissing common law pleadings as "bold, crafty and unscrupulous."

Ultimately, Louisiana held on as the only solid domain of civil law, despite early 19th century conflicts with proponents of common law.

With the American Revolution, a philosophical problem developed within the legal system. Independence required a whole new attitude towards common law — after all it was the King's law in the eyes of the former colonists. Alternatives were suggested: either total replacement or complete abandonment of all systems in favor of natural law principles. The Napoleonic Code was suggested by liberals. In 1805, Thomas Paine commented that the Pennsylvania courts still "hobble along by the stilts and crutches of English and antiquated precedents."[3] Despite revolutionary fervor and liberalism, the only system that had a chance was that which already existed. The obvious reasons for this, says Professor Friedman, were that few jurists spoke anything other than English; French law books were unavailable whereas English books were plentiful. Lawyers, too, tended to continue with the law with which they were familiar.

As Americans began to push westward in the 19th century, a law for the masses had to develop. The earliest law promulgated for the western lands was the Ordinance of 1787. It was to become the foundation law for Ohio, Indiana, Illinois, Michigan, Wisconsin, Alabama and Mississippi. Over years of application, it proved workable. Although the ordinance helped, it did not immediately render the west a law-abiding frontier; indeed it was raw and unsophisti-

2. *Id.* at 150.
3. *Id.* at 94.

cated. A portrayal of frontier justice was depicted in a 1854 publication by Governor Ford of Illinois as follows:

> The judges . . . held their courts in log-houses, or in the barrooms of taverns . . . The sheriff opened court by going out into the courtyard and saying to the people: "Boys, come in, our John is going to hold court."[4]

Interestingly, Professor Friedman compares the laxity observed by Governor Ford with that found in contemporary traffic courts.

At common law, land was the foundation for economic wealth and power. As the colonies developed, the public attitude toward property changed. Almost imperceptively at first, land was converted from a birthright to a commodity in a free market. The elaborate forms of English conveyancing were unworkable and unneeded. Feoffment with livery of seizin gave way to simple deeds. The warranty deed and the quit claim rapidly came into widespread use because their concepts were understandable to a population that was largely uneducated. Although usage and tradition dictated the growth of land law, it was also affected by state legislatures. Illustrative of state influence is the development of mortgages. Mortgages, long in use for securing land, moved in and out of favor depending on economic and political attitudes. Western legislatures, eager to give the debtors relief, were quick to expand the grace period. Even New York, in 1774, passed a law establishing equitable foreclosure and in 1820, gave debtors a year of grace.

The westward expansion brought with it vast national acquisition of land. The federal policy on how this land was to be managed is basic to American legal development. The land policy of the United States germinated from one premise: the government did not wish to manage its land as a capital asset, but rather, place its ownership and management in the hands of the citizenry. This attitude had been common to most Americans since the Revolution. The country was to be composed of a free people, each able to live on their own land.

From the beginning, it was federal policy to make land available for sale. A fluctuating price existed between 1800 and 1820, until the government, in the latter year, pegged the minimum price at $1.25 per acre. In 1841, persons who agreed to work the land were guaranteed the right to buy at the minimum price. Perhaps the greatest encouragement towards westward development was the Homestead Act passed in 1862. This statute permitted the private

4. T. FORD, A HISTORY OF ILLINOIS FROM ITS COMMENCEMENT AS A STATE IN 1818 TO 1847, at 82-83 (1954).

individual to receive land grants similar to those which railroads had received since 1850.

The national policy was successful, for by the end of the 19th century, the once vast public domain had almost all been either given away or sold. A fear of complete erosion caused the first public park to be established in 1872 — Yellowstone National Park.

As alluded to earlier, uniformity in the American legal system was encouraged by colonial merchants. The author explores the development of commerce in the Americas by first pointing out that, in their infancy, American colonies were dependent on international trade for survival. Requiring a common denominator for would trade, the colonies adopted the "law merchant." Later commercial law, as it developed in America, was formed from the roots of that English legal structure.

The law governing the sales of goods was also almost wholly assimilated from English precedents. The law of sales emerged from an amalgamation of the "law merchant" with the old law of contract. The ability to contract was, in the 19th century, regarded as an important right of a free people. The foundation of contract law was a belief in unrestricted individual choice in a free market. The standard contract maxim of caveat emptor was widely employed, although the rule was not universally admired. One South Carolina judge in 1818, termed the doctrine a "disgrace to the law."[5] American commercial law spawned other developments. In 1859, a New York case announced the concept of third party beneficiary.[6] Damages for breach also began to be awarded during this period.

The law of negotiable instruments has been a system of free and clear transactions from the colonial period to the present. The colonists, short on money but heavily dependent on trade, required liberal assignment and simply negotiated notes. The 1840's saw the introduction of the certified check, and the bill of lading came along in the 1850's.

Through these years, the law of commercial paper fluctuated from state to state. Some states had a few regulations; California, however, had a complete code consisting of 117 sections. Just as in colonial days, so too in the mid-19th century, businessmen wanted a more uniform system. Their demands gave rise to the first uniform law in the United States—The Negotiable Instruments Law of 1895. Today, the desires of business and trade have been realized with the Uniform Commercial Code.

No history of American law could be complete without an examination of crime and criminal law. Professor Friedman sets

5. Barnard v. Yates, 1 Nott & M'Cord 142 (S. Car. 1818).
6. Lawrence v. Fox, 20 N.Y. 268 (1859).

out a clear account of this topic. Although criminal laws in the colonial period sometimes appeared bloodthirsty, there were far fewer capital crimes than existed in England. Although public display and rebuke were frequently employed, the death penalty was not. Colonial criminal law concerned itself primarily with shame and secondarily with reform. Immorality was the most common crime.

The Revolution brought a change in attitudes toward criminal law. The Bill of Rights gave rise to an intellectual reassessment of criminal penalties. The fledgling states were quick to make reform operative through constitutions and legislation. In 1800, Kentucky allowed the death penalty only in cases of murder. In 1845, Michigan totally abolished it, followed by Maine in 1887. With the demise of capital punishment, corporal punishment also declined.

The states were quick to avoid a common law of crimes for fear it would breed strong federal criminal codes. It was reasoned that if federal prosecutors argued to federal judges, who in turn defined the crime and meted punishment, the central government would become too powerful. Digressing for a moment, it is interesting to wonder what the reaction a century ago would have been to the federal laws as set out in the United States Code and the Code of Federal Regulations. Federal power? Definitely.

Because of their fear, the states began to enact great codes themselves. In 1822, Rhode Island identified only fifty crimes, but by 1872, the number had grown to one hundred twenty-eight. Few crimes were ever repealed, but new ones were added year after year. These codes regulated nearly everything from morality to embezzlement. Indiana, in 1891, enacted a law making it a crime to "wilfully wear the badges or buttonnaire of the Grand Army of the Republic."[7] It is not recorded whether anyone was ever charged under this statute.

With the 19th century came new theories on the nature of the criminal mind. In 1843, an English court promulgated the M'Naghten rule of legal insanity.[8] This rule was further elaborated upon by the "irresistible impulse" test, usually referred to as the Dillon rule. New Hampshire developed its own theory in 1869 through the case of *State v. Pike*.[9]

Extensive development in the field of tort law grew in the mid-1800's. The industrialization of the country witnessed many injuries caused by machines and railroads. At first, American tort law borrowed its theories from England: *Priestly v. Fowler*[10] sup-

7. Laws Ind. 1891, ch. 33.
8. M'Naghten's Case, 10 Cl. & F. 200 (1843).
9. 49 N.H. 399, 442 (1869).
10. 3 M & W 1 (1837).

plied the fellow-servant rule, and *Rylands v. Fletcher* provided the rationale for extrahazardous activity liability.[11] The doctrine of contributory negligence, also spawned in England, came to American law in the mid-19th century.

Assumption of the risk developed alongside the fellow-servant rule, and together these doctrines protected the entrepreneur from the growing list of injury claims.

To balance out the ammunition available to either side in injury suits, American tort law imported the doctrine of last clear chance and res ipsa loquitur. Both of these were the product of an English case.[12]

Although case law taken from England provided the framework, tort law really grew with state legislation. Across the country, the states were drafting statutes defining the liabilities of railroads and other enterprises. While tort law began as a benefit to the young industrial corporations, it closed the 19th century as a compensation oriented field.

As the body of American law developed, so did the mechanics of the law — otherwise called lawyers. Early colonists were suspicious of lawyers, and seldom saw any reason ro rely on them. Massachusetts specifically prohibited pleading for hire, as did Virginia, Connecticut, and the Carolinas. This distrust was generated by a feeling that lawyers were members of the upper classes and favored the causes of their peers. The colonists, being themselves untrained for the most part, felt law trained persons were unnecessary in any position. Even the courts were run by lay judges.

Again the merchants spurred the development of a trained legal profession. Courts continued to sit, trade expanded, and land was exchanged. These areas required someone learned in law. Despite the absence of law schools, lawyers were generally available by 1750 in most cities. Apprenticeship training provided the bar with its members. Though not always good, this method did generate some fine lawyers. Out of the law office apprenticeship method grew the first law schools. The first was founded in Litchfield, Connecticut in 1784. Harvard established a chair of law in 1816, and had 163 students by 1844.

If lawyers were unloved in the colonial period, they were even more disliked during the Revolution. Public opinion still regarded lawyers as persons who lived "upon the ruins of the distressed."[13]

American lawyers tended to be persons from humble beginnings with meager education. Although not scholarly, they were ambitious.

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11. (1868) L.R. 3 H.L. 330.
12. Davies v. Mann, 10 M & W 546 (1842).
13. Quoted in OSCAR HANDLIN AND MARY HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, MASSACHUSETTS, 1774-1861, at 43 (1969).

Over the years they prospered because they were dynamic. The author says the practice of law is best described as what lawyers do. Lawyers became a prime cog in the development of American law. They were everywhere and involved in everything. Some began large city practices. Other attorneys, rough-hewn to be sure, joined the westward migration, serving often as agents for eastern speculators or as collection agents. Whatever the reason, they prospered. They had a large hand in drafting the legal system of the new western states. J. Warner Mills left his imprint on the Colorado statutes, as did Matthew Deady on the Oregon code. Lawyers came to fill most of the governmental offices in both federal and state governments. Many presidents and most senators have been lawyers. It was in their nature to be political. The Watergate scandal of this year more than amply illustrates this fact in a most unfortunate way.

In summary, Professor Friedman, a specialist in English and American legal history, has written an immensely readable book. As the author of several other books and over thirty articles, he has, by his current work, demonstrated a capacity for clear historical analysis. The Stanford University School of Law is indeed fortunate to have him on their faculty.

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