LAWRENCE M. FRIEDMAN

LAW IN AMERICA

A SHORT HISTORY

A MODERN LIBRARY CHRONICLES BOOK

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To Leah, Jane, Amy, Sarah, Paul, David, and Lucy

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INTRODUCTION

At my university (Stanford) I teach a course to undergraduates called Introduction to American Law. On my way to class, on the first day—the class usually meets at nine o'clock, and it is a tough assignment to keep the students awake—I buy a copy of the *Chronicle,* the morning newspaper from San Francisco. When I begin the class, after the first few announcements and the like, I wave the paper in front of the class, and read some of the headlines. The point I want to get across to the students is that *every* domestic story in the front part of the newspaper, before you get to the recipes and the comics and the sports pages, has a legal angle—has some connection with the legal system. Of course, I have no control over the newspaper, but the trick never fails. Almost invariably, *every* story about public life in the United States, or private life interesting enough to get into the newspaper, will mention a law, a legal proposal, a bill in Congress or in the state legislature, or something a judge, a policeman, a court, a lawyer has done or said; or some statement from the president or other high officials, in any case always about some affair or situation or event done by, with, through, or against the law. In the world we live in—the country we live in—almost nothing has more impact on our lives, nothing is more entangled with our everyday existence, than that something we call the *law.* This is a startling fact; and it gets the students' attention—as it should.

Why is it the case that the newspapers are so full of material about the legal system? What makes law so central to American society? Where does all this law come from? Is all of this emphasis on law and legal matters good for the country, or is it a sign of some deep-seated pathology? What *is* American law, and how did it get this way? These questions are the subject of this short book. What I am trying to do is

provide a historical introduction to American law—or, perhaps more accurate, to American legal culture; or, perhaps, to the spirit of American law, and how it has related, over time, to American society in general.

Before we go any further, I have to say a word or two about the *definition* of "law." There are, in fact, many ways to define this elusive term, and many ways to describe what we mean by "law." For now, I want to adopt a simple, but broad and workable definition. Law is, above all, collective action: action through and by a government. When I say "the law," I really mean "the legal system." The legal system includes, first of all, a body of rules—the "laws" themselves. Some of these are federal laws, enacted by Congress, some come from state legislatures, some are ordinances of city governments. Then there are literally tens of thousands of rules and regulations—from the Food and Drug Administration or the Securities and Exchange Commission or the Forest Service or the board that licenses doctors in Minnesota, or from local zoning boards or school boards or any of the dozens and dozens of agencies at every level of government. But all these, in themselves, are nothing but pieces of paper. What makes them come alive (when they do) are the people and the institutions that produce, interpret, and enforce them. This means police, jails, wardens, courts, judges, postal workers, FBI agents, the secretary of the treasury; it means civil servants who work for all the agencies in Washington, in the state capitals, and in city hall; and the inspectors who go out to factories and businesses, or who make sure that elevators are safe, or who put their stamp of approval on slabs of meat. It also means the lawyers (nearly a million of them) who advise people on how to follow the rules or cope with the rules or get around the rules, or how to use them to their best advantage. The lawyers are a vital part of the system, just as teachers are essential to the educational system, and doctors and nurses are essential

to the medical system. And "the legal system" is the way all of these people and institutions interact with one another, and with the general public.

What I outlined is, I think, a useful way to look at the law or the legal system. There are other ways as well. I spoke generally in terms of something readers could identify as "government"; what the government did or does, and how people use or react to government—broadly defined that is, so that the policeman at a busy intersection, straightening out traffic, is part of the system, just as much as the chief justice of the United States is part of the system. There are even broader ways of defining law. It can be looked at as a kind of *process,* which does not have to be connected with a "government" at all. Universities, factories, hospitals, big companies—these also often have a kind of "legal system," quite internal, quite "private." Law can, in other words, be official or unofficial; governmental or private. It can also be *formal* or *informal.* A big trial is a very formal procedure. It is governed by a network of formal rules. When a policeman breaks up a fight and tells two drunks to go home, this is a "legal" action—an action by an official, whose power comes from law—but it is also fairly informal. It follows no strict rules, and leaves no paper trail behind. All societies, in a sense, have a "legal system." They all have rules and ways to enforce the rules. Big, complex societies have big, complex systems. *Within* big, complex societies are smaller subgroups, down to individual families; and even families have ways to make rules and enforce them (sometimes, if the children are teenagers, without much success). The "law" inside a family is usually not written down, and "procedures" are pretty informal.

But the big society needs formality; it cannot go on without formality—without rules, especially rules of law. This is because a big society is made up of millions of people, who interact with each other in complicated ways. Strangers meet

and affect other strangers many times each day: on the street, in elevators, airplanes, stores, and workplaces. In many ways, our very lives are in the hands of strangers. Consider, for example, taking a plane from San Francisco to Chicago. A jet airplane is an awesome machine. It flies high above the clouds; and if something goes wrong, your life is at stake. What guarantee do you have that the plane was well put together? That the maintenance is up-to-date? How do we know that the pilot knows what he is doing? How can we be sure that the air controllers will do their job? We have no *personal* knowledge or control over any of these people—not the pilot, not the air controllers, not the maintenance crew, or the factory workers who worked on the plane. For this, and a hundred other daily events, people have to rely on something else. That something else is the law. There is a social demand for rules and regulations about air safety, the way planes are made, air traffic control, and so on. Of course, a society can function without such rules—people can take chances, if they wish. But in the modern state, the social demand for *regulation* is a fact; and air safety is one of the fields where the demand is quite strong. After the terrible tragedy at the World Trade Center on September 11, 2001, the demand for more rules—for more law, for tougher law—became especially marked.

In simple, face-to-face societies, custom, habits, and traditions do most of the heavy lifting as far as enforcing the norms is concerned. But in a complex society, a heterogeneous society, a society where the interactions between strangers are pervasive, a society where people buy food and clothes, instead of growing and making these themselves, a society made up of many different groups and many different ways of thinking, custom loses its bite, traditions give up their grip, and society comes to depend on other ways to control whatever forces and objects and people the society wants to control. This mechanism is what we call *law.* Social control

still, of course, depends heavily on customs, habits, and traditions; and the law does not come out of nowhere—it builds on these customs, habits, and traditions; but it adds to them the bite and the sting of collective rules and collective enforcement.

This of course would be true of any modern society. It would be just as true of Italy or Japan as it is true of the United States. And, in fact, all of these societies (and their legal systems) do have a lot in common. But they also, all of them, have features that make them distinctive, unique. What is distinctive about *American* law—compared, say, to the law of Italy or Japan?

To begin with, our legal system is a common law system. The common law is one of many *families* of legal systems in the world. Legal systems come in clusters—clusters of relatives. Legal systems are a little bit like languages in this regard. French, Spanish, and Italian are Romance languages: they are independent languages, but they have a lot in common, mostly because they have a common ancestor, Latin. English, German, and Dutch also have a lot in common, because they also have a common ancestor (though it was never a written language). Most of the legal systems of Europe belong to a single great family, often called the *civil law* family. Many concepts and terms within the civil law family reflect the influence of Roman law, the remote ancestor of these systems. In the Middle Ages—to make a long story short—Roman law was rediscovered, reworked, and "received" by most European societies; it began to be studied in the universities, and it became the basis of the various national systems.[1]

There was one prominent European holdout: the English. They never took part in the "reception" of Roman law. Instead, they on the whole stayed true to their native system, the so-called common law. As things turned out, the English became lords of a huge empire; and they carried their lan-

guage and their legal system with them throughout the empire. The common law therefore became the basis of the legal systems in all the English-speaking colonies (though not only in those). It was natural for settlers in, say, Massachusetts or Australia to make use of the only legal system they knew and were familiar with, just as it was only natural for them to use the only *language* they were familiar with, which was English. Just as the sun never set on the British empire at its height, it never set on the old common law.

The common law, then, forms the raw material of the law of England, its colonies, its former colonies, and the colonies of colonies. It is the basis of the systems in Canada (outside of Quebec), in Australia and New Zealand, in Trinidad and Barbados and the Bahamas, and in many other countries that were once part of the British empire. It is the core of the law in Nigeria and the Gambia and Singapore. But nobody outside this circle of English domination in fact has ever adopted the common law. In modern times, a number of non-Western countries have shopped around for a Western legal system, which (they thought) would do a better job of catapulting them into the contemporary world than their indigenous systems. Japan and Turkey are famous examples. In no case did such a country choose the American or English model. In every case, what was chosen was civil law, continental European law. Why? One answer is that these are *codified* systems. Their basic rules take the form of *codes*—rationally arranged mega-statutes, which set out the guts of the law, the essential concepts and doctrines. In theory, the judges have no power to add or subtract from the law, which is entirely contained within the codes. Their only task is to interpret these rules. The core of the common law, on the other hand, was essentially created by judges, as they decided actual cases. The common law grew, shifted, evolved, changed prismatically, over the years, as it confronted real litigants, and real situa-

tions. But as a result, it became hard to find and to identify "the law." The common law was, in a way, everywhere and nowhere—it was an abstraction, scattered among thousands of pages of case reports. It was not, in short, packaged for export.

In a common law system, the judges who write the opinions are crucial and important figures. To be more precise, the law gets made by *appellate* judges: judges who hear cases appealed from decisions on the level of the trial court. At the trial court level, on the other hand, the common law judge plays a much more muted role than the civil law judge. The civil law judge handles much of the job of working up the case, preparing it, investigating the facts. All this, in a common law system, is handled by lawyers; and the judge at the trial acts as a kind of umpire (a powerful one, to be sure). In common law countries (certainly in the United States) judges are themselves lawyers (practicing lawyers) who are elected or appointed to the bench, very often because they have been politically active. Civil law judges are, on the contrary, civil servants. Judging is a career on its own; judges are almost never recruited from among practicing lawyers; rather, they are trained from the very start to be judges, and they rise and fall entirely within the judicial hierarchy. And they are *never* elected.

There are many other differences, big ones and little ones, between common law and civil law systems. There are differences in procedures, in institutions, and in substantive rules. On the whole, civil law systems lack a jury, for example. There is an argument, though, that the systems, in the contemporary world, are converging—drawing closer and closer together. One reason may be that legal practice is globalizing: more and more legal effort goes into international deals and other matters that cross borders. But the main reason is simply that legal systems reflect the societies in which they are

embedded; and these societies are becoming more and more alike. European countries, the United States, Canada, Japan, Australia, and other countries, despite their differences, have huge commonalities as well, in society and law. Modernity is much of a muchness everywhere. An automobile is an automobile in Tokyo or Helsinki; a computer is a computer in Frankfurt or Singapore. All modern, developed countries have income tax systems, stock exchanges, international airports, tall buildings with elevators, and traffic jams. They all face issues of copyright, pollution, air traffic control, and bank regulation. Similar problems tend to generate similar solutions; and similar problems and solutions mean similar laws and legal systems. Also, the distinction between the "judge-made" common law and the codified civil law has lost a good deal of its relevance. The common law systems now have plenty of statutes and codes—shelf after shelf of them, in the typical law library. More and more of the work of common law judges consists of interpreting statutes passed by Congress or by state legislatures. And, conversely, the role of the judge in civil law countries is becoming a great deal more powerful—is coming, in some ways, to resemble the work of the common law judge. Many differences remain, to be sure—especially in the way lawyers tend to think, and the precise kind of jargon they use—but the odor of convergence is also fairly strong.

The common law family has many members; and each of them has, of course, its own special features. American law, which is our subject, has departed in many ways from the law of England, where the common law was born and raised. For one thing, the United States is a *federal* republic; it is made up of fifty states, each of which has its own legal system, with a national system sitting on top of or next to these. The states handle the great bulk of the country's legal affairs. They grant divorces, put burglars on trial, run the school systems, and