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Lawrence Friedman: American Law Study Guide

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LAWRENCE FRIEDMAN: AMERICAN LAW STUDY GUIDE (1997) Steven Alan Samson

CHAPTER ONE: WHAT IS A LEGAL SYSTEM?

Outline

1. Law Modifies or Influences Behavior
 - a. Shopping
 - b. Driving
 - c. Building Codes
2. Contract: purchases, liability [2]
3. Law forbids and facilitates [2]
4. Meanings of Law
 - a. Network of Rules and Regulations
 - b. Governmental Social Control: criminal and civil (torts)
 - c. Official Law
 - d. Legal System: rules about rules (secondary rules)
5. Elements of a Legal System [5]
 - a. Structure
 - b. Substance
 - c. Legal Culture
 - d. Impact [8]
6. Functions of the Legal System
 - a. Social Control
 - b. Dispute Settlement
 - c. Social Engineering [10]
 - d. Social Maintenance (persistence of structure, continuity, bridging the generations, controlled change)
7. Claims of Right [13]
 - a. Rule of Law vs. Abuse of Power
8. The Common Law and Its Competitors
 - a. Civil Law Family [15]
 - b. Common Law
 - c. Socialist Law
 - d. Scandinavian Family
 - e. Islamic Law [18]

CHAPTER TWO: LAW: FORMAL AND INFORMAL

Study Questions

1. How may law be defined (Donald Black, Lon Fuller)? Does the government have a monopoly on law? [20-21]
2. What kinds of sanctions are available to non-governmental or private organizations?

How do they resemble official legal systems? How have they been changing? Distinguish between formal and informal rules. Does this distinction apply also to private law? Identify some unofficial courts. What sanctions do they have available? [21-24]

3. How do occupational groups make use of law? What is arbitration? What is the "rent-a-judge" system? How do the public and private spheres of law interact? How are damages claims usually settled? What are four types of law? How does the reality of the law differ from its form? [24-26]
4. Identify some forms of "justice" that stand completely outside legality. What role has vigilanteism played in American history? What are some examples of popular tribunals? How does private justice figure in our popular culture? Are law enforcements moving in the direction of greater or lesser formality? [26-29]
5. In what ways are legitimacy crises often resolved? How were claim jumping and squatting handled? What happens when the law is almost universally disobeyed? [A nation of scofflaws]. [29-30]
6. What is the historical relationship between formality and informality? Why do societies move from one to the other? What sanctions are available in the absence of a formal legal system? [30-31]
7. What made the residents of Tristan da Cunha such models of behavior? Compare them with the Puritans of Massachusetts Bay. What are other examples of informal sanctions? Why are advanced societies unable to rely as much on them? [31-32]
8. How does our situation within various "molecules of people" differ from that of the Tristan da Cunha islanders? What's required to uphold the old norms? Why do they break down? How may this pattern be detected in public education? How has a greater degree of formality entered into matters of school discipline? Why? [32-34]
9. What general principle does the author derive from the development of students rights as a whole field of law? Why is there so much law? [34-35]

CHAPTER THREE: THE BACKGROUND OF AMERICAN LAW

Study Questions

1. What were some of the sources of law during the colonial period? How and why did the colonies differ in their legal development? Identify the three chief groups of colonies. Where was slavery practiced? How did the system of indentured servitude work? [36-38]
2. How did the laws of Massachusetts Bay differ from English law? What were its three elements? What role was played by ideology? Why was primogeniture abandoned early? Where did it survive and why? [38-40]
3. Characterize the English court system. How did the colonial courts resemble English

- courts? How did they differ? What were some of the factors that favored conformity with English law? What accounts for the popularity of Blackstone in America? [40-42]
4. What fundamental question did the United States government face following ratification of a new Constitution? Under the Northwest Ordinance of 1787 how were territories and new states to be treated? [42-44]
 5. How does the legal system of Louisiana differ from those of the other states? What is the origin of the community property system and how does it operate? What are survivals? When did the northern states abolish slavery? Identify some provisions of the southern slave codes. [44-46]
 6. Why were northern states concerned with southern slavery? How did (and do) the northern states differ from each other? [46-47]
 7. What were some of the consequences of the "classlessness" of American society? How did the status of women change? How was widespread land ownership favored by the law? How did American land law differ from English land law? [47-50]
 8. How has divorce law changed? Why has American law been streamlined and simplified? How has legal knowledge been popularized? [50-51]
 9. How has the law been used to promote economic development? Identify some milestones that contributed to a legal dynamism that J. Willard Hurst called "the release of energy." How has government aid been used to promote growth? [51-53]
 10. Relatively speaking, American law has been associated with an amazing level of personal freedom. What are some skeletons in the closet? [55-56]

CHAPTER FOUR: THE STRUCTURE OF AMERICAN LAW: THE COURTS

Study Questions

1. What makes American law so complex? [57]
2. Identify the separate layers of the state court system. What are some examples of special courts? What are some of the chief complaints about the "bargain basement" of justice? How are most cases settled? What is a bench trial? A trial de novo? What is the basis for an appeal? How is the discretion of the highest court manifested? [58-61]
3. Identify the separate layers of the federal court system. What is meant by "circuit duty" for Supreme Court justices? How does the Supreme Court exercise docket control? What is a writ of certiorari (cert)? What are original cases? What are some "oddities" that still remain at large with the judicial system? [61-64]
4. How do judges in common law and civil law systems differ? What is the typical background of an American judge? Why are some judges elected and others

- appointed? Who has influence over the appointment process? What is the Missouri plan? Why is it so difficult to get rid of a judge? How has the judicial selection process been further politicized? [64-67]
5. What do court procedures differ from state to state? What factors have favored a standardization of procedures? Compare the adversarial and inquisitorial systems of jurisprudence. Identify some special courts that resemble the inquisitorial system. [68-70]
 6. What is equity? How does it operate? How does it differ from law? What has become of it? [70-71]
 7. How are most cases settled? Describe the filtering process that eliminates so many cases? Why do so few go to trial? What is bargaining "in the shadow of the law"? [71-73]
 8. Why do we know so little about the business of the courts? What do statistics reveal about the work load of the courts? What about filings in petty courts? How much work goes into routine administrative matters? In ways have the courts abandoned their historic functions? [73-75]
 9. What do ordinary citizens (or even lawyers) know about the appellate courts? How have the types of cases heard by the higher courts changed in the last century? How have the cases in trial courts changed? What is the significance of this "judicialization"? [75-78]
 10. What is the division of labor between judges and juries? [A better term for jury "lawlessness" is "jury nullification"]. What sorts of publications fill a typical good law library? What elements may be found in a typical written opinion? [78-80]
 11. What is a concurrence? A dissent? How do courts vary with respect to judicial differences of opinion? How do scholars tend to view judicial reasoning? How much do we learn about judicial behavior from exposés like *The Brethren* or from scholarly studies? [80-82]
 12. Do studies show that judges tend to be prejudiced against the poor or that white-collar criminals are better treated than street criminals? What factors complicate such research? What factors merit greater attention by researchers? What has changed since the nineteenth century? [82-84]
 13. How does social change affect legal doctrine? How do the attitudes of judges vary? What is legal realism? What is some evidence that legal realism is taking root? How are citation patterns changing? How do the lower courts affect society? [84-87]

CHAPTER FIVE: THE STRUCTURE OF AMERICAN LAW: STATUTES AND STATUTE MAKERS

Study Questions

1. Identify various types of "legislative" bodies that establish general rules. What is significant about *Baker v. Carr* (1962) [and some subsequent decisions]? How much power is legally vested in the state legislature over local governments? Why is Congress immune from *Baker v. Carr*? [88-90]
2. What about the American electoral system did Lord Bryce deplore and why? Why are the courts not equipped to compete with legislatures on their own turf? [90-91]
3. How did the courts and legislatures respond to the growing problem of industrial accidents? [91-92]
4. Why is the common law system inherently messy? How did David Dudley Field attempt to bring order to the law and curb the power of judges? How and why did the movement to standardize state laws get started? What role did Karl Llewellyn play? [92-93]
5. What are private laws? Why have they declined in importance? How widely do statutes vary in substance? What are some of the purposes of and problems with Congress's broad delegation of authority by law? Cite examples. [96-98]
6. What is a statute's double message? What makes some statutes especially problematic? Who interprets the law? What does construction of the law mean? What role is played by maxims and counter-maxims? [98-102]
7. How is the real meaning of a law determined? Why are legislative intent and legislative history such imperfect criteria for interpretation? [102-04]
8. Identify some factors that influence legislative decision-making. What role is played by lobbyists? What is logrolling? [104-06]

CHAPTER SIX: THE STRUCTURE OF AMERICAN LAW: EXECUTING POLICY

Study Questions

1. How may the administrative sector be defined? What are some of the varieties of administrative agencies, their jurisdictions, and their activities? [107-09]
2. What sort of administrative agencies did the United States have during its first century? Identify some of the factors that led to an expansion of state and national administrative law from the 1850s on? What makes the Interstate Commerce Commission Act such an important turning point? [109-12]
3. How did the understanding of the commerce clause change? What were some of the twentieth century milestones in the creation of an administrative state? What did the New Deal add? The Johnson Administration? [112-14]
4. How do administrative agencies vary in subject matter, structure, etc.? What are friendly and hostile agencies? What does it mean to capture an agency? [115-17]

5. Identify some of the means of controlling agencies. What factors are especially relevant? What is an ombudsman? Why was the *Schechter* case so controversial? Why has judicial review toughened? [117-22]

CHAPTER SEVEN: FEDERALISM AND AMERICAN LEGAL CULTURE

Study Questions

1. What makes a system truly federal? How federal are such countries as Canada, Australia, the USSR, and the EEC? How is power divided along federal lines in the United States? [123-24]
2. How did government under the Articles of Confederation differ from government under the Constitution of 1787? What types of cases are under the jurisdiction of the federal courts? What powers are forbidden to the states? [124-25]
3. How has the culture of federalism expanded or pushed beyond its formal structure? If the words are the same, why has the music changed? How do the three basic elements of law interact? [125-26]
4. How did early nineteenth century federalism differ from today's federalism? Why was the West more national-minded? Why does American legal culture tend to be local? What are some exceptions? What is the chief unifying factor? How have provisions in the Constitution aided this unification? Why are state borders so weak? [126-31]
5. How and why does economic unity together with legal diversity favor interstate competition? In what ways has Nevada been able to siphon business from other parts of the country? Why do so many corporations make Delaware their home? What are some advantages and disadvantages of this interstate legal marketplace? How have states nullified the effect of laws in other states? In what ways was the child labor issue addressed (including *Hammer v. Dagenhart*, 1918)? [131-33]
6. How has the interpretation of the commerce clause changed since the early nineteenth century? How and why did the Supreme Court rule as it did in *United States v. E. C. Knight Co.* (1895)? In *Katzenbach v. McClung* (1964)? What accounts for the change? [134-35]
7. Can states discriminate against either the residents or the products of other states? How has national and international politics affected the balance of power between the central and state governments? How has it changed in the following areas: welfare, education, and criminal justice? What is the "new federalism"? [135-37]

CHAPTER EIGHT: INSIDE THE BLACK BOX: THE SUBSTANCE OF LAW

Study Questions

1. Identify the chief documentary legal records that comprise the substance of the law: the "awesome bulk" of this system of public social control. How is it organized? What do we need to know in order to "look up" the law? What else does a lawyer need? [138-40]
2. What did the Romans contribute to the organization of law? William Blackstone, James Kent, and Nathan Dane? What did Henry Maine say by saying that the law progresses from status to contract? [140-42]
3. How do the concepts of offer, acceptance, capacity, and consideration contribute to the idea of a contract? Why do businessmen ordinarily avoid using formal contract law in dealing with each other? What takes its place? What are some related areas of law? [142-44]
4. What is a tort? What is at the heart of tort law? What was Judge Lemuel Shaw's fellow-servant rule and what replaced it? What subfields of tort law have been growing rapidly? What is negligence and what rationale is used in determining it? What is strict liability and where is it applied? [144-45]
5. What is the distinction between real and personal property? Why does property law emphasize the first? Why has real property law declined? How important was land ownership (tenure) under feudalism? Why is it no longer so important? [145-46]
6. What are some of the issues in land ownership? What are some related areas of law? How is land divided into spatial or temporal estates? What are future interests? Land use controls? [146-47]
7. What belongs to the law of succession? What is required for making a will? What are trusts? What is the object of estate planning? Why is succession so important? [148-50]
8. What areas are encompassed by family law? How has divorce law changed? What have been some of the effects of no-fault divorce? [150-51]
9. What is a corporation and what are some of its legal advantages? How has corporation law changed since the early nineteenth century? What is a partnership? An agency? What is the doctrine of *respondeat superior*? [151-52]
10. What is the origin of the distinction between public and private law? Why has it become less relevant in recent times? What are some of the major fields of public law? [152-53]

CHAPTER NINE: CRIMES AND PUNISHMENTS

Study Questions

1. What is it that constitutes a crime? Identify some crimes that are less universal than murder, rape, or arson? How does the perception of what is a crime vary with time, place, or circumstance? What determines the seriousness of a crime? [154-56]
2. Historically, what is the origin of criminal justice? How do simpler societies deal with deviance? What is the hazard posed by concentrating violence in the hands of the government? What are the chief functions of a criminal justice system? How does law act as a kind of rationing system? What then is law's macrofunction? Why is criminal justice involved with economic crimes? [156-59]
3. Identify some conventional ways of classifying crime? What is a way of supplementing traditional crime statistics to get a more complete picture of crime? In what areas of the law does public opinion affect law enforcement? How have crimes against morality been treated and even redefined at different times in our history? How did federal law enforcement get involved in this area? What problems have resulted? [159-63]
4. Identify several typical steps in the criminal law process from crime to punishment. In particular, identify the terms information, indictment, bench trial, peremptory challenges, and error. [163-66]
5. What is plea bargaining practiced? Why is it controversial? What reforms have been introduced or actions taken against it? How well does it work? What is its historical background? What about the guilty plea? [166-69]
6. Why is trial by jury declining? How has it changed during the last two centuries? What are some ways in which criminal justice has been professionalized? What professional groups are now included? [169-70]
7. How significant is the discretion of judges in the punishment phase? What is the origin of the penitentiary? What was the silent system? Why did it disappear? What is the origin of parole, probation, and the indeterminate sentence? How successful have they been? How professionalized? How have public perceptions of imprisonment changed more recently? [170-73]
8. How do race and gender influence or how are they reflected by the criminal justice system? Identify some formal rights that have been established by the Supreme Court and the cases that gave rise to them. What are some of the consequences of the "rights revolution"? In what sense is criminal justice a system, if at all? [173-77]

CHAPTER TEN: CONSTITUTIONAL LAW AND CIVIL LIBERTIES

Study Questions

1. What does the author mean by "the constitutional system?" Does having a written constitution have much bearing on whether a country is democratic or not? While serving as Governor of New York, Charles Evans Hughes remarked that the Constitution is what the judges say it is. What did he mean by this? [178-79]

2. When did the meaning and limits of free speech first become a major issue for the courts? Does this fact support the author's conclusion that "constitutionalism is more behavior than theory, at any given time?" What is judicial review? What was at issue in *Marbury v. Madison* (1803)? Why is judicial review so controversial? Should majority rule somehow be limited? [179-81]
3. What role has the protection of minority rights played in shaping American constitutional history? Why is the Court alone strong enough and independent enough to address these issues? How does its guardianship protect long-run values? [181-82]
4. How do state constitutions differ from the federal Constitution? Why are they so brittle? How does the initiative work? [183-85]
5. What role did the contract clause play in early Supreme Court rulings? How did the Civil War change the country? How did the Fourteenth Amendment affect the Supreme Court's case load? How was "substantive due process" used in *Lockner v. New York* (1905)? [185-88]
6. When did judicial activism really get started? How did Franklin Roosevelt respond to the Court's nullification of several key New Deal laws? How did he ultimately prevail? How does *Williamson v. Lee Optical* (1955) represent a change of attitude? After the Court left off its intervention into government regulation, where did it concentrate its attention? What new rights have allegedly been created by the Court? How has the Court inflated the meaning of some texts or even ignored it? [188-90]
7. How was the Sedition Law overturned? What civil rights claims were given very limited scope or recognition by the Court? What was the Court's decision in *Barron v. Baltimore* (1833) and how has it been bypassed through the Fourteenth Amendment in such cases as *Palko v. Connecticut* (1937)? [191-92]
8. How does "incorporation" of provisions of the Bill of Rights work? What exception was made in *Hurtado v. California* (1884)? How did the "rights revolution" finally succeed? How has the Court dealt with the "intractable" issues of pornography and obscenity? How did it deal with peonage and how successful was it? Why was the Court's decision in *Brown v. Board of Education* (1954, 1955) more successful? [192-97]
9. How have some of the newer constitutional systems modified the American model? [197-98]

CHAPTER THIRTEEN: THE AMERICAN LEGAL PROFESSION

Study Questions

1. What are some of the different ways in which lawyers are employed? What skills were most important to early lawyers? How did they occupy themselves? What new breed of lawyer emerged after the Civil War? [231-35]
2. Where are Wall Street lawyers recruited? What accounts for the litigation boom at the larger law firms? What kinds of cases do they handle? Who handles "one-shot"

- clients? What are "contingency fees?" What is being kept "on retainer?" [235-38]
3. How has the practice of law been associated with social advancement? When did women and blacks begin entering the field in large numbers? What is the typical background of a law school student today? [238-40]
 4. What is the difference between a barrister and a solicitor? What was the typical "career path" of a lawyer in early America? Professional legal education in America evolved from the convergence what two educational streams? What was the Litchfield School? Who held the first chair of law at an American college? At Harvard? [240-42]
 5. What educational innovations were introduced by Christopher Columbus Langdell at Harvard in 1870? How has legal education changed since that time? What role has been played by night schools? [242-44]
 6. What is the background of the ABA? How has it changed in recent years? What is an integrated bar? How well does the bar police the profession? [244-47]
 7. What sort of revolving door connects government service with the legal profession? How differently do lawyers and non-lawyers vote and behave in state politics? How does the American legal profession compare with that in other countries? [247-50]
 8. What is the business of lawyers? How is legal assistance made available to those who lack the financial means? What are "public interest" lawyers and who pays for them? [250-53]

CHAPTER FIFTEEN: EPILOGUE: THE FUTURE OF LAW IN THE UNITED STATES

Study Questions

1. What factors have transformed the legal environment? What are some of the trends in litigation? How has the reach of the law been extended? What are the ramifications of the observation that we have become a "nation of strangers?" What happens as custom breaks down? [280-90]