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Book Review of Friedman, Total Justice

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BOOK REVIEW

TOTAL JUSTICE. By Lawrence M. Friedman.
Russell Sage Foundation. 1985. Pages 166 (hardback).
*Reviewed by Professor Jeremy M. Miller**

In a book released some time after its copyright date, Stanford law professor Lawrence M. Friedman offers perhaps the most palatable and digestible apologia for the liberal/welfare state ever written. As a result of this pleasing craftsmanship, *Total Justice* is readable, thought-provoking, and intellectually tempting. Nevertheless, Friedman offers us a society of stagnation where the individual is protected only by the dictates of a somehow ever-beneficent big government.

This volume was commissioned by the Russell Sage Foundation, in commemoration of its seventy-fifth anniversary. The foundation, in their own words, is a "general purpose"¹ foundation, taking no view on particular areas. The foundation's claim of neutrality echoes a similar claim by Friedman regarding the topics of his book: "I leave the question of good or bad open. The tone here has been mainly descriptive."²

Nevertheless, Friedman imprints on his writing not just the law he describes, but also his own views. Scholarship, especially legal scholarship, is a kind of politics.³ In criticism, therefore, even prior to reviewing the substance of Professor Friedman's thesis, his and his sponsor's notion of political neutrality is thoroughly specious. This, of course, is not to condemn the particular theories of Mr. Friedman. Rather, it is to label them as what they are: political philosophy.

The book begins by stating the axiomatic: there has been an explosion of law in the United States. Friedman writes, "lawyers . . . seem to be multiplying like rabbits."⁴ He notes further that complex legal notions have become commonplace to the average American citizen. Newspapers contain innumerable references to the law with

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1. L. FRIEDMAN, *TOTAL JUSTICE* vii (1985) [hereinafter cited as FRIEDMAN].
2. *Id.* at 147.
3. See generally A. ROSS, *ON LAW AND JUSTICE* (1958).
4. FRIEDMAN, *supra* note 1, at 3.

legal angles included in every story. The amount of litigation appears to be skyrocketing.⁵

Friedman paraphrases the criticism of this phenomenon: there is too much law, too many rules, too much government, and as a result our society will lose its freedoms.⁶ In Chapter 2, Professor Friedman states in more detail the above criticisms of the United States legal climate. However, at each turn he contests those criticisms—again, in a gentle, palatable way. For example, when discussing the litigation explosion, Friedman queries, “What would such an explosion look like, and how would we know one if we saw one? . . . The answer is far from clear.”⁷

The utterly overburdened state and federal dockets, together with repeated requests by ranking federal judges to create more judgeships and more courts offer rebuttal to Friedman’s point. Factually speaking there is a law *and* litigation explosion.

In subsequent chapters Friedman avoids the questionable arguments, as above, and moves on to the main point of his book. The increased importance given to law, he theorizes, is an inevitable result of society’s changes.⁸ Our society is no longer tightly knit, nor is it a society of a “radical individualist . . . frontiersman.”⁹ Instead, modern society is characterized by “division of labor.”¹⁰

Modern society therefore fosters tremendous “dependence on people we do not know.”¹¹ Law, then, and government offer people protection from the unseen impersonal masses with whom they must deal in order to survive. Big government is thus a necessity.¹²

The thesis of Friedman’s book, incidentally, if not already apparent, can be fairly summarized as follows. The increased emphasis in law is a necessary correlate of a dramatically larger and more technological society. Because the wonders of modern science have cured so many physical ills and so significantly improved the quality of life, people have grown to expect more from life. In fact, there has arisen a collective desire for “total justice.” The means of obtaining this total justice are by utilization of the legal system. Utilization of the legal system translates into increased government

5. *Id.*

6. *Id.* at 4.

7. *Id.* at 17.

8. *Id.* at 38.

9. *Id.* at 39.

10. *Id.* at 40.

11. *Id.*

12. *Id.* at 45-52.

and private liabilities for any and all wrongs befalling any and all.

The best parts of the book occur where Friedman is truly descriptive. Friedman traces the development in tort law, showing, for example, how juries now award greater damages.¹³ He also discusses worker's compensation, which, even more significantly, did away with "fault" as a bar to recovery.¹⁴ Friedman ultimately labels this emerging system the welfare state: The government acts as an insurer of all its people.¹⁵

Chapter five is entitled, "The Due Process Revolution." In this chapter Friedman gives the legal enzyme by which many of the above-noted changes—and others—have taken place. Due process has both state and federal applicability. As Friedman correctly notes, due process has come to mean an individualized expectation of fairness both from the government and from the private sector. Such fairness includes heretofore unincorporated military rights,¹⁶ prisoner rights,¹⁷ student rights,¹⁸ and of course the liberalization of sexual rights for both sexes.¹⁹

In developing his thesis, Friedman subtly counters the conservative fear that all of the above means a loss of individuality and its attendant rights. For one, people are now allowed to be more free because of the "safety nets" of the modern welfare state.²⁰ Further, whatever *de minimis* losses there may be are outweighed by increased equality (for the races, the sexes, etc.).²¹

Near the end of the book Friedman has difficulty in shielding his own opinions. He phrases all issues such that they beg for his one answer: big government overseeing all. For example, he states that there is a distaste for overregulation, but then he amicably offers a counter proof. What are better, the previously racist *rules* of the private sector, or the now just *laws* enacted by the government?²² He concludes, "I have to confess my personal sense of pleasure over many of the developments . . . I like the welfare state."²³

13. *Id.* at 52-63.

14. *Id.* at 63-67.

15. *Id.* at 68.

16. *Id.* at 85.

17. *Id.*

18. *Id.* at 88.

19. *Id.* at 126-45.

20. *Id.* at 104-05.

21. *Id.* at 107-23.

22. *Id.* at 149.

23. *Id.* at 151.

Aside from Professor Friedman's sugarcoating of hard issues, his book and thesis raise other fundamental criticisms. An often quoted Greek medical aphorism states: "Perfection is the enemy of good." Aristotle, in similar classical reasoning, argued that the best approach was one of moderation.

Friedman, however does not adhere to these perennial philosophies. Picture-perfect, exacting anything is *not* possible. Those who attempt it either produce nothing or fail in trying.

Brilliantly, Friedman characterizes our American system as seeking a "total justice." Then, in disappointingly anemic academic manner, he argues that this is a good thing. If what Professor Friedman perceives were to continue, all of the good laws, too, would be dismantled in the frenzy. The fallacies of the view that government is the cure for all individual human weaknesses are twofold. First, government is but *individuals* with power, and second, what is the cure when that all-powerful government misbehaves? Friedman, in his fervent love of modern social science, forgets all history. Governments, from the time of Socrates, to the religious persecutions, to mass-murder have been more often the force of corruption.

Power vested in government can be used for good, as Friedman suggests, but it can be used as easily for ill. And, power once vested in government has great difficulty in unvesting. Thus Friedman's approach, a characterization of big, all-encroaching government as "total justice," is patently immoderate.

Of course, government must oversee and offer protections to the downtrodden. But, in the present fevered litigious quest for damages (Friedman's "Justice"), an appetite in government, itself, is being fed. "Total justice" will not lead to a maximization of individual fulfillment, but to a loss in the respect given to the individual.

Besides his immoderate suggestion that a plethora of government rules will cure all ills, Friedman also misstates a fundamental tension. Friedman argues that both the great legal values of liberty and equality will be maximized by the welfare state. However, as Alexis de Tocqueville noted long ago, liberty and equality often conflict.²⁴

Equality is a great thing, but when such value is used to "level" all of society and intrude in even the most private choices, that equality has destroyed liberty. Friedman's approach is immoderate here as well.

24. See generally I. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 279 (Vintage 1945).

The worst part of this approach is that when it is followed, a reverse pendulum shift becomes inevitable. Is not the overzealous big government approach Friedman defends responsible for the overly conservative legal retractions of procedural rights in the 1980s? Did not Earl Warren create William Rehnquist?

