House of Russell
American Legal History Final Examinations
1991-99

1999 QUESTION ONE

Friedman's Mirror Metaphor

In the Prologue to A History of American Law, Lawrence Friedman deploys the metaphor of a mirror to describe the relationship of law and society. He writes:

> This book treats American law, then, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. This is the theme of every chapter and verse.

As I begin the project of revising A History of American Law, I wonder whether the mirror metaphor continues to have any vitality. Does the mirror metaphor attack a straw argument? Has the metaphor outlived whatever usefulness it may have had when Friedman first published the book in 1973? Should we retain the metaphor in the third edition?

END OF QUESTION ONE

1999 QUESTION TWO

Virginia's Slave Code (1705) and North Carolina Slave Code (1954)

Compare and contrast the 1705 Virginia statute concerning servants and slaves with the 1854 revision of the North Carolina Code.

(The 1705 Virginia statute, entitled "An Act Concerning Servants and Slaves" is at the end of the collection of Virginia Statutes on Slaves and Servants that are part of assignment 7 on the syllabus. Note that you should concern yourself with the 1705 statute in particular and not with all of the 17th and early 18th century slavery statutes that I collected for the reading assignment. Put differently, after you open the collection of Virginia statutes on slaves and servants, you should find and focus on the 1705 statute, which is near the end of the big group of Virginia statutes. The heading that precedes the 1705 statute is:

October 1705 - 4th Anne. CHAP. KLIX. 3.447.

An act concerning Servants and Slaves.

(The 1854 North Carolina Code is a free-standing document in assignment 27 of the syllabus.)

What do the differences and similarities between the two statutory schemes illustrate about the history of American law between the early 18th century and the late antebellum period?

END OF QUESTION TWO

1997 QUESTION ONE

Legal History of Slavery

A number of my professional colleagues have suggested to me that the legal history of slavery is not a topic that deserves much emphasis.

I have heard this most often from law professors who are not themselves legal historians. While they might grudgingly concede that the legal history of slavery could be a worthy topic within a history department, they do not see why students should study this history within law schools or why legal historians generally should spend much time on the question of slavery.

After all, my colleagues have suggested, American slavery is long dead as an institution, and there seems to be no chance that it will be revived in the United States. Slavery was so obviously an injustice that dwelling on it in the classroom or in published articles will only serve to inflame racial tensions. In short, they can see no reason to spend a lot of effort on the slavery question.

Draft an essay in which you respond to their concerns. Think broadly about the disadvantages or benefits of studying the legal history of slavery. An obvious question, of course, is whether the study of slavery's legal history sheds any light on our contemporary situation. But you might also wonder whether the study of slavery helps us to better understand other, non-slavery historical topics. Be sure, in your answer to consider any differences that you might see between slavery in the 17th century and slavery as it developed in the 19th century.

END OF QUESTION ONE

1997 QUESTION TWO

Lawyers as a bulwark against excesses of democracy

In 1835, Alexis de Tocqueville commented:

> In actual fact, the lawyers do not want to overthrow democracy's chosen government, but they do constantly try to guide it along lines to which it is not inclined by methods foreign to it. By birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes; so he is the natural liaison officer between aristocracy and people, and the link that joins them.
>
> The legal body is the only aristocratic element which can unforcedly mingle with elements natural to democracy and combine with them on comfortable and lasting terms. I am aware of the inherent defects of the legal mind; nevertheless, I doubt whether democracy could rule society for long without this mixture of the legal and democratic minds, and I hardly believe that nowadays a republic can hope to survive unless the lawyers' influence over its affairs grows in proportion to the power of the people.
>
> If you ask me where the American aristocracy is found, I have no hesitation in answering that it is not among the rich, who have no common like uniting them. It is at the bar or the bench that the America aristocracy is found.
>
> The more one reflects on what happens in the United States, the more one feels convinced that the legal body forms the most powerful and, so today, the only counterbalance to democracy in that country.

Question: Have lawyers, over the course of American history, acted as an aristocratic bulwark against the excesses of democracy? Describe how the legal profession has changed since the time of Jefferson and why. What have been the effects of such changes upon law and American society?

END OF QUESTION TWO

1996 QUESTION ONE

Law's Legitimacy

Consider the various ways in which the legitimacy of law has (or has not) been maintained from the 17th century to the New Deal.

How important has it been for law to appear legitimate? What mechanisms, institutions, or arguments have preserved the legitimacy of law. What social, economic, or political events have threatened the legitimacy of the legal system? What role has law played in creating, preserving, or maintaining its own legitimacy?

As part of your answer, you will want to consider and probably define just what legitimacy means in the context of the legal history of the United States.

END OF QUESTION ONE

1996 QUESTION TWO

Punishment

Consider carefully the material that you have regarding penitentiaries in the early nineteenth century, Docs. 387-406.

In what ways does the development of the penitentiary system fit with larger themes that we discussed for the legal history of the United States between the Revolution and the Civil War?

I have a sense that this material fits only uneasily with the other themes that I develop regarding the early nineteenth century. Is there a good reason for my disquiet? For example, I, along with Hurst, emphasized the release of energy as an important theme. What do penitentiaries have to do with that? Put more strongly, is there something about the material regarding the penitentiary system that can be used to show that I have emphasized the wrong themes regarding other areas of legal history. Or, are there linkages and similarities that I have simply failed to comprehend?

END OF QUESTION TWO

1995 QUESTION ONE

Revision of Friedman, A History of American Law

Lately, Lawrence Friedman and I have been discussing the possibility of my becoming the co-author of the third edition of his book, *A History of American Law*.

Your assignment is to draft a memorandum to me in which you argue for the changes that should be made to the current edition of *A History of American Law*.

You have three principal goals. One goal is to identify those parts of Friedman's book that must be changed because his arguments are either unclear, out-of-date, or just plain wrong. The second goal is to suggest topics that should be included, excluded, emphasized, or de-emphasized in the third edition. The third goal is to make suggestions that will improve the usefulness of the book as a textbook for legal history courses taught in law schools, graduate schools, or to advanced undergraduates.

You should, of course, write the memo from your own viewpoint, but you should also not ignore Professor Russell's arguments as you write your memorandum.

END OF QUESTION ONE

1995 QUESTION TWO

Divorce

In 1860, Elizabeth Cady Stanton, Rev. Antoinette Brown Blackwell, Ernestine L. Rose, Wendell Phillips, Susan B. Anthony, and others debated the issue of divorce at the Tenth National Woman's Rights Convention (See Docs., 353-72.). Examine their arguments and debate closely.

How do the debate and the arguments of the participants fit within broader currents of the legal history of the United States from 1800 through the end of Reconstruction?

You may, and should, consider the relationship of the divorce arguments to other issues affecting women and families, but you should not limit yourself to this inquiry. The real point of this question is for you to consider the relationship of the arguments about divorce to broader tensions or changes at roughly the same time in American legal culture.

END OF QUESTION TWO

1994 QUESTION ONE

Why Study Colonial Legal History?

Some years ago, a young legal historian interested in the colonial period met with J. Willard Hurst. (Hurst is, of course, the great giant of American legal history since World War II; if Hurst has been eclipsed, it is only by Lawrence Friedman, who was Hurst's student.) The young historian met with Hurst in order to discuss the young historian's research and career plans. Hurst told the young historian--not too subtly--that colonial legal history was not worth studying. Hurst suggested instead that if the would-be colonial historian were interested in the relationship between the present and the American past, he should limit himself to studying the years after 1870. Hurst's conversation with the young historian raises the issue that is the subject of this question: why study colonial legal history?

You should approach this question by taking seriously the issue of whether we should study colonial legal history at all. (For the purposes of this question, the colonial period lasts until 1760.) Using material from the readings and lectures for the colonial period, as well as from other parts of the course, you should make an argument as to whether the study of colonial legal history is worthwhile. Along the way, you should define for yourself what it means for the study of any history to be

"worthwhile." You should also feel free to use your essay as an opportunity to argue for either more or less material devoted to the colonial period in this course.

END OF QUESTION ONE

1994 QUESTION TWO

"Southern Distinctiveness"

Beginning with the early 19th century, discuss the place of the American South in the legal history of the United States as a whole. Consider some of the following questions in your answers.

In what ways have the patterns of Southern legal history fit with those of the rest of the United States? In what ways have the patterns been different?

What has been different about the relationship of law to society in the South as compared with the rest of the United States?

Have Southerners had ideas different than those of other Americans regarding the nature of law or the role of law in society?

Did the Civil War mark a fundamental break in the relationship between Southern legal history and the legal history of the rest of the United States? Or did the pre-Civil War patterns of Southern legal history persist beyond the war? Is there some other point in time at which the South became either more or less distinct in its legal history?

Obviously, slavery and race will have to be part of your discussion, but you should be sure not to limit your discussion to only these topics. You should also consider and discuss other aspects of the history of the South and the United States.

END OF QUESTION TWO

1993 QUESTION ONE

Equality—the ideal and the practice

What is the importance of equality--the ideal and the practice--in the history of American law from colonial times to the 1950s?

END OF QUESTION ONE

1993 QUESTION TWO

Time travel with Jesse Root

In the Documents, you have a selection from Jesse Root's Introduction to *Reports of Cases*. . .. (Documents, pp. 148-170). Root originally published this volume in 1796. The edition that you have is a reprint edition from 1899.

How would a lawyer alive in 1899 have reacted to Root's Introduction? What parts of Root's presentation would continue to appear relevant or accurate to a lawyer at the end of the 19th century? What parts would seem archaic? In what ways would the reader of 1899 regard the nature of law differently than Root? If a lawyer-reader of 1899 were to write such an introduction, what might he (or possibly she) include?

END OF QUESTION TWO

1992 QUESTION ONE

Law's Autonomy

In An *Invitation to Law and Social Science Desert, Disputes and Distribution* (1986) [on reserve], Richard Lempert and Joseph Sanders have defined a legal system as "autonomous" if it is "independent of other sources of power and authority in social life. Legal action, be it a decision to prosecute, an award of damages, or the reapportionment of a state legislature, is in an autonomous system influenced only by the preestablished rules of the legal system. These rules determine not only the consequences of social action, but also . . . its meaning, and it is from the assigned meaning that legal consequences follow. . . ."

> "If the law is to be autonomous . . . it must in the ideal case be fully independent of society's other mechanisms of social control. . . . [The] legal system should be autonomous [too] in one further sense. It must be *self-legitimating*, for to depend upon political, social or ethical forces for authority is to be vulnerable to the reach of such forces on decision making. A legal system is self-legitimating when its rules and rulings are accepted because they are legal. . . .
>
> ". . . [T]he situation of the law, as we know it in Western society, is one of partial autonomy. Law is influenced by the political, ethical or social order, but this does not mean that the law must be in essence a tool of the dominant class's immediate self-interest, the plaything of those in high office, or the obedient servant of some moral majority. . . ."

Lempert and Sanders state that some systems are more autonomous than others. A system is more autonomous when "a standard once embedded in law acquires meaning through the law's own canons of construction rather than by reference to the interests that gave it birth." Also "the more general the applicability of legal language, the less close will be the tie between the legal norm and the interests of a particular status group. Thus a system that forbids anyone from forging

a check is more autonomous than one that protects only capitalists from forgery. Put another way, a legal system characterized by generally applicable rules is likely to be more autonomous than one riddled with particularistic enactments."

In the light of what you have learned in this course, (a) how "autonomous" is the American legal system, either in terms of the criteria which Lempert and Sanders set out, or in terms of other criteria which you think better fit their initial definition; (b) has the "autonomy" (or lack of it) of the American legal system remained stable over time, or has it gotten greater or less great? And does "autonomy" vary from field to field of law? If so, which branches of law are more "autonomous" and which are less?

END OF QUESTION ONE

1992 QUESTION TWO

Answer either Question A or Question B.

Do not answer both questions.

The Great American Baking Test

A. The *Lawes & Libertyes* (1648) of the Massachusetts Bay Colony included a section entitled "Bakers" (*Documents*, p. 2) that regulated the baking of bread. In *Lochner v. New York* (1905, *Documents*, p. 460), the United States Supreme Court overturned a New York statute that regulated the baking of bread. In what ways did the relationship of law and economic activity change or not change during the 257 year period from the *Lawes & Libertyes* to *Lochner*?

Chase v. Iredell

B. In *Calder v. Bull (1798*, Documents, p. 119), Justices Chase and Iredell have a disagreement. What is the nature of their disagreement? Identify other instances in the legal history of colonial North America and the United States to 1954 in which the problem between Justices Chase and Iredell has arisen. What does the struggle over this problem reveal about the legal history of the United States? How has the issue been resolved?

END OF QUESTION TWO

1991 QUESTION ONE

Autonomy

For some time now, one of the big debates among legal historians, legal theorists, and legal sociologists has been the debate over whether what goes on in the legal system -

- legal norms, rules, procedures, institutions, etc. -- is more or less "autonomous" from or influenced by political, economic, or cultural forces and events originating in the society "outside" the legal system. In the interpretation of American legal history, for example, Roscoe Pound and Lawrence Friedman have taken up opposite sides of the issue. Pound wrote:

> Tenacity of taught tradition is much more significant in our legal history than the economic conditions of time and place. These conditions have by no means been uniform, while the course of decision has been characteristically steady and uniform, hewing to common-law lines through five generations or rapid political, economic, and social change, and bringing about a *communis opinion* over the country as a whole on the overwhelming majority of legal questions, despite the most divergent geographical, political, economic, social, and even racial conditions. . . . Economic and political conditions of time and place have led to legislative abrogations and alterations or rules and even at times to attempts to alter the course of the taught tradition. But such changes are fitted into the traditional system in their interpretation and application, and affect slowly or very little the principles, conceptions and doctrines which are the enduring law. The outstanding phenomenon is the extent to which a taught tradition, in the hands of judges drawn from any class one will, and chosen as one will, so they have been trained in the tradition, has stood out against all manner of economically or politically powerful interests.

Friedman, by contrast, takes the following approach:

> This book treats American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. . . . The [legal] system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls. . . . [T]he strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups.

Does your understanding of the History of American law tend to conform to either that of Pound or that of Friedman? If neither, formulate and defend a third position on the "autonomy" issue that you believe the historical evidence plausibly supports.

END OF QUESTION ONE

1991 QUESTION TWO

The Role of Judges

In *Calder v. Bull* (1798), Justice Iredell made the point that judges were not philosophers, but lawyers:

> If . . . the legislature . . . shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed on the subject; and all that the court could properly say, in such an event, would be, that the legislature, possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. . . . We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence.

Yet, as Alexis de Tocqueville pointed out in 1835, in the United States, judges are called to decide political, philosophical, or otherwise value-laden questions all the time:

> An American judge, armed with the power to declare laws unconstitutional, is constantly intervening in political affairs. He cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and remain in harmony with themselves. . . . There is hardly a political question in the United States which does not sooner or later turn into a judicial one. . . . There are cases, and they are often the most important ones, in which the American judge has the right to pronounce alone. He is, then, for the time being in the position which is usual for a French judge, but his moral authority is much greater . . . and his voice has almost as much authority as that of the society. . . ."
>
> In 1972, Christopher Stone turned Tocqueville's description into prescription:
>
> [O]ur highest court is but a frail and feeble -- a distinctly human -- institution. Yet the Court may be at its best not in its work of handing down decrees, but that the very task that is called for: of summoning up from the human spirit the kindest and most generous and worthy ideas that abound there, giving them shape and reality and legitimacy. Witness the School Desegregation Cases which, more importantly than to integrate the schools (assuming they did), awakened us to moral needs which, when made visible, could not be denied.

What do you think? Comment from the perspective of the course.

END OF QUESTION TWO

1991 QUESTION THREE

Historical Analysis in Supreme Court Opinions

Discuss the role played by historical analysis in the following:

Johnson v. McIntosh, 21 U.S. (4 Wheat.) 542 (1823)

Commonwealth v. Alger, 7 Cush. 53 (Mass. 1853)

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)

The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)

Brown v. Board of Education, 347 U.S. 483 (1954)

You should deal with these cases at a minimum; you might wish to bring to bear additional examples from the course material (and not just appellate opinions, either), in order to further substantiate points you make with regard to the listed cases or in order to make wholly separate points the listed cases do not support.

Possible points to consider include differing views expressed in these documents about the nature of historical change, they function of explicit or implicit historical conclusions in legitimating legal conclusions, what difference it makes whether or not the history used is "correct" or not and, of course, the mutually constitutive nature of doctrinal and social change. In any event, be sure to subordinate your discussion to a single, synthetic thesis point.

END OF QUESTION THREE

1991 QUESTION FOUR

Substantive Due Process

Compare and contrast the historical and doctrinal development of substantive due process as it appeared in the decisions of *Lochner v. New York*, 198 U.S. 45 (1905) and *Roe v. Wade*, 410 U.S. 179 (1973). (Note that *Roe v. Wade* was not part of the reading assignments for this course, but it is a case with which you may perhaps have some familiarity.)

You should pay particular attention to the issue of the relationship between social and legal change. You might consider, for example, how it is that the nineteenth-century version of the doctrine appeared in the guise of *Lochner*ism and the twentieth-century version in *Griswold*ism. Perhaps the differences in the doctrine's content in its nineteenth- and twentieth-century manifestations tell us something about the doctrine itself, or about certain even more basic questions about the nature of U.S. legal culture.

You may pursue this problem from any direction you choose. Be sure, however, to make some concrete, synthetic point about the comparison/contrast and to

support your position thickly with materials from the course, including but of course not limited to the principal cases themselves and their doctrinal predecessors.

END OF QUESTION FOUR

END OF 1990s EXAM ARCHIVE