LAW IN A CHANGING SOCIETY. By W. Friedmann. [London: Stevens & Sons, Ltd. 1959. xxvi and 522 pp. £2 10s. net.]

"Law in a Changing Society" is described by Professor Friedmann as a new book on an old theme. The theme is to be found in his "Law and Social Change in Contemporary Britain" first published eight years before the present work. Because the theme is old, one tends, on reading the new book, to experience some little disappointment. Much of what Professor Friedmann has to say seems obvious. Even if the particular problem is posed in the form of recently decided cases, the methodology has a familiar ring about it. His discussion of *Bonsor* v. *Musician's Union* (pp. 335-6) is just what one would have expected.

Since this is so, it is as well to stop and consider why. But few years ago, the impact of a book such as this would have been tremendous. That it may well be less nowadays is surely due to nothing other than the fact that a few pioneers have blazed the trail for us. We have survived the initial shock, and to many, it must have come in the form of Professor Friedmann's "Law and Social Change in Contemporary Britain." That work was an eye-opener to this reviewer when he first read it as a student. It was apparently rather disturbing to some who had to review it at the time of its publication. It, and others equally unfettered (particularly Stone's *Province and Function*), have moulded our methods of thought. It would therefore be harsh criticism, indeed, to complain that we are not presented with a new and different thesis, as convincing and exciting as the old.

What the new book does do is to attempt to place legal events right down to the date of publication, in their social context. Data are taken not simply from contemporary Britain, as in the earlier book, but from a much wider range of jurisdictions, about 20 in all, Great Britain and the United States of America, and to a lesser extent, Australia and Canada, being the chief among them. The method is improved as a result of the addition of the comparative element. The enormous amount of material thus made available inevitably necessitates selection, and Professor Friedmann frankly admits that to some extent, his selection is conditioned by limitations of knowledge. This is manifestly a most unsatisfactory basis for selection. The following suggestions are made in the hope that, if they do not already fall within the limits of the author's knowledge, they may be brought within, and considered for selection on some other basis. They may then be more properly rejected.

Professor Friedmann makes very little reference to adjectival law. There is a certain tendency to associate procedure with the worst of analyticism, yet it cannot be ignored for this reason. Procedure is socially significant for on it depends the effectiveness of substantive rights. The ordeal, compurgation, the forms of action, pleadings, the incompetence of the accused and his wife's privilege are legal phenomena which are presumably related to the changing mores of society. What effect, if any,

has the controversy between science and superstition had on our rules of evidence? Tape recorders, truth drugs and electro-encephalographs are surely "contemporary" enough.

In considering 'socialisation of risk' in the chapter on Tort and Insurance, the author makes no mention of *Summers* v. *Frost*[1] and *Staveley Iron & Chemical Co.* v. *Jones.*[2] The former case is significant as instancing the re-ordering of values in industry. Safety is to be paid for, even at the price of impossibility of production! The latter case is doubly significant. The actual decision affirms the progressive trend noted by Friedmann and evidenced in *Summers'* case, but *dicta* discountenancing the ratio of Denning, L.J., in the Court of Appeal, give warning of reaction.

It would have been interesting to have seen some attention paid to the compensative aspect of the penal function in the chapter on Criminal Law. Friedmann takes us through the traditional course of theories of punishment, and thus brings us, at the end, to a questioning of the idea of responsibility. Analogously, tort law has seen the decline of fault as the criterion of liability. In the same way that state control is exercised over dangerous operations by licensing, so, now, the criminal is incarcerated for purposes of reformation. Yet civil law now has "liability without fault" whilst the state refuses to take any hand in the compensation of the victim of the irresponsible criminal.

There are some occasions for query in those branches of the law which Professor Friedmann selects for detailed treatment. Thus, at p. 8, he makes the statement that "there were definite limits to the power even of the Nazi Government to effect a total legal revolution," and supports it by reference to a decree "authorising — and thereby commanding — members of families to denounce other members who had made utterances critical of the Government," which was not, in fact, observed by most people. The difference between authorising and commanding is, in Hohfeldian terms, that between privilege and duty. People cannot be said to be guilty of non-observance if they have a privilege not to observe. If, on the other hand, Friedmann is suggesting that the Nazi regime was such that the German people were intimidated into regarding mere authorisation as command, non-observance is paradoxical. At page 51, the author discusses *R.* v. *Manley*[3] and indulges in some prognosis about that decision, with no mention of *R.* v. *Newland.*[4] The statement appears at p. 134, that *Donoghue* v. *Stevenson*[5] "disposes of the rule that contractual liability of A to B excludes tort liability of A to C." It is doubtful if such a rule ever existed, and certainly one author,[6] prior to *Donoghue* v. *Stevenson,* had analysed the cases so as to yield the wholly different rule that contractual liability of A to B does not automatically involve liability to C for consequential damage. At p. 135, the author is content to oppose the decisions in *Grant* v. *Australian Knitting Mills*[7] and *Daniels* v. *White & Sons*[8] without mentioning the use of carbolic acid in the bottle-cleaning process in the latter case, a fact which puts it on all fours with the Privy Council decision in *Grant's* case and which surely affects its authority, it being merely a first-instance decision. Since the publishers have gone to the trouble to print a corrigendum (p. xiv) of an alleged injustice to Professor Hart, it may be noted that the view

1. [1955] 1 All E.R. 870.
2. [1956] 1 All E.R. 403.
3. [1933] 1 K.B. 529.
4. [1953] 2 All E.R. 1067.
5. [1932] A.C. 562.
6. Pollock, Torts. 13th ed., p. 570.
7. [1936] A.C. 85.
8. [1938] 4 All E.R. 258.

attributed to him in the text and disowned by him, in discussion with the author, is in fact expressed by him at p. 144 of the *Journal of the S.P.T.L.* [9]

In conclusion, it should be noted that Professor Friedmann's thesis has recently been challenged *in toto.* Professor Friedmann is convinced "that the law must, especially in contemporary conditions of articulate law-making by legislators, courts and others, respond to social change if it is to fulfil its function as a paramount instrument of social order." The challenge to this thesis takes the form of a questioning of the possibility and manner of response [in a book review, (1960) 23 *M.L.R.* 585]. "How do I recognise a 'social change' (as opposed, for instance, to a political change or to social fluctuations or fashions of a purely temporary character)? Who, among 'legislators, courts and others', is actually under a duty to respond to the change, once it is accepted as such? and perhaps most significantly, how is such response to be effected by 'courts and others'." Friedmann's position on the last two points seems completely unambiguous. All who indulge in articulate law-making affect the paramountcy of the law (it is misleading to think in terms of duties). Response is effected by means of the normal law-creating processes. It is the first point which causes difficulty. With regard to it, the following points may be not inapposite.

It assumes a difference in kind which does not exist. The distinction drawn by Friedmann, and regarded as significant by him, is the distinction between social change and personal idiosyncracy. What are termed 'political change' and 'social fluctuations', etc. may be one or the other. The significant question is one of degree; at what point should the articulate law-maker act? Once it is recognised as a matter of degree, the conclusion, for example, that the judge should look for "the resultant of many conflicting strains that have come, at least provincially, to a consensus" becomes more palatable. Agreed, it is not nearly such an easy and comforting matter to have to weigh values and judge trends in opinion as it is to compartmentalize legal concepts. Bramwell B. once said of the latter type of mental exercise, as practised by a learned exponent:

" This Mr. Justice Storey calls 'satisfactory'. Satisfactory in what sense? In a practical business sense? No, but in the sense of an acute and subtle lawyer, who is pleased with refined distinctions, interesting as intellectual exercise, though unintelligible to ordinary men, and mischievous when applied to the ordinary affairs of life."

Common lawyers, particularly in England, still tend to run away from social problems which, however, continue to exist and consequently to be the business of lawyers. The syllogism will yield conceptual symmetry but it will not photograph life, for life requires an infinite number of major propositions. It redounds greatly to his credit, and to our benefit, that Professor Friedmann is not frightened by such a prospect.

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