

Viewed as Canadian, Viewing as Canada: Wolfgang Gaston Friedmann's Canadian Years (1950-1955)

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Abstract

From his birth in Berlin in 1907 until his violent murder in New York City in 1972, Wolfgang Gaston Friedmann lived his life to the fullest. In sixty five years he called five countries home, taught and wrote on at least nine different areas of law, worked in universities across the globe, and left a deep personal impression on countless colleagues and friends. At age twenty seven Friedmann left Germany for England where he taught at the University of London. He then emigrated to Australia and taught at the University of Melbourne before coming to Canada to teach comparative law and jurisprudence at the University of Toronto (1950-1955). This was the last stop before landing at his final destination as Director of the International Legal Centre and Professor of International Law at Columbia Law School where he taught until his death in 1972.

Friedmann is known primarily as an international law scholar who taught at Columbia University. However, this paper focuses on his Canadian years and approaches his life from an unexplored angle, namely by examining what Friedmann and Canada meant to each other. Little to nothing has been written on Friedmann's time in Canada, and this paper uses primary sources such as radio interviews and personal correspondence with his acquaintances to shed light on what he meant to Canadian international law. At the point of interconnection between Friedmann and the University of Toronto, both were struggling to define themselves—Friedmann was moving away from his European roots and on to Columbia, while legal education at the University of Toronto was breaking away from part-time study combined with apprenticeship training into a full-time academic program modelled on the Harvard-based professional law school.

Friedmann's career pushes the boundaries of what would typically be thought of as Canadian in several ways. He was a German émigré who was associated with the University of Toronto where he taught, and he was the only non-Canadian in the collection *Canadian Perspectives on International Law* (1974). Friedmann thus had a privileged and unconventional commentary on the Canadian approach to international law, and particularly emphasized what he thought of as the non-nationalistic hue of Canadian scholars' approach to international law, as seen in the following quotation:

It would in this writer's opinion be deplorable if, in the era of over-intense nationalism, which deeply endangers the progress of international law, national approaches to international law were too strongly emphasized . . . When we speak of Canadian 'approaches' . . . we should think not of a specifically Canadian attitude to international law . . . but of the richness and diversity of the contributions that Canada has made . . . because it unites in itself so many of the interests . . . and above all the values on which a progressive international law must be built.¹

This thesis of the paper is that Friedmann and Canada were engaged in mutual fantasies of one another. Friedmann was a foreigner, a German émigré who had lived in England and Australia, was fluent in both civil and common law, had several published textbooks to his name, and was interested in theory. The University of Toronto wanted Friedmann to be the exotic "other", the foreign academic who would sweep into the fledgling school adding pizzazz and cosmopolitan credibility by teaching theory-based subjects such as comparative law; whereas in reality there was no demand for comparative law at the University.

The mirror image of this fantasy is seen in Friedmann's view of the University and of Canada. Just as the University wanted Friedmann to be something other than what it really needed, Friedmann needed the University to be something that it was not. In coming to Toronto, Friedmann seemed to be hoping for an exciting, experimental institution where he could try out his somewhat novel teaching methods; whereas, in reality the University was flailing, not fully accredited, lacking in enrolment and traditional in its curriculum. Similarly, in terms of his international legal order, Friedmann fantasized Canada to be an ideal middle-power effecting much change, whereas in reality this was not so.

Introduction

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¹ Friedmann, "Canadian Approaches to International Law" (1963-1964) 19 Int'l Law J. 77 at 83.

attitude to international law . . . but of the richness and diversity of the contributions that Canada has made . . . because it unites in itself so many of the interests . . . and above all the values on which a progressive international law must be built.²

From his birth in Berlin in 1907 until his violent murder in New York City in 1972, Wolfgang Gaston Friedmann lived his life to the fullest. In 65 years he called five countries home, taught and wrote on at least nine different areas of law, worked in universities across the globe (including Tanzania, India and France), and left a deep personal impression on countless colleagues and friends.

Friedmann is known primarily as an international law scholar who taught at Columbia University, but this paper approaches his life from a different angle by looking at his Canadian years and suggesting that during his time at the University of Toronto,³ the University and Friedmann acted as mutually constitutive pivot points for one another. Both Friedmann and the University were at defining periods in their trajectories when they intersected for a brief five years, from 1950-1955. This paper draws out the parallels between these trajectories, highlighting the images that each projected onto the other and suggesting how these fantastical images did not necessarily match their realities. While both the University and Friedmann were ultimately to gain international reputations, at their point of interconnection they were struggling to define themselves—Friedmann was transitioning from his European roots through to Americanization at Columbia, while legal education at the University of Toronto was breaking away from part-time study combined with apprenticeship training into a full-time academic program modelled on the Harvard-based professional law school.

² Friedmann, “Canadian Approaches to International Law” (1963-1964) 19 Int’l Law J. 77 at 83.

³ The University of Toronto is hereinafter referred to either as “the University” or “Toronto.”

The paper begins by setting up Friedmann. After briefly sketching Friedmann's life, the literature pertaining to him is analysed. This analysis reveals that there are limited biographical sources, and the available sources are further limited by the fact that they are quintessential internal legal history. From informal sources, particularly those written after Friedmann's death, the fact that his violent murder had a profound effect on the embodiment of his persona as an international legal scholar seen as both hero and humanist emerges. The subsequent section of the paper provides an analysis of the formative experiences in Friedmann's life, and particularly his life-long connection to Germany.

After establishing this context of who Friedmann was, the paper moves on to a detailed analysis of his years at Toronto. To illustrate the dichotomy between fantasy and reality that existed between how the University saw Friedmann, and what it really needed, as well as between what Friedmann wanted the University to be and what it actually provided him with, a brief sketch of the University is laid out, as is Friedmann's role within the University. Thereafter, the paper moves to an analysis of Friedmann's scholarship, exploring the areas he focused on prior, during and after his Toronto years. A rough correlation is drawn between these different areas of law and the periods of Friedmann's life, ultimately leading to the conclusion that these areas culminated naturally in his ultimate field—international law. Alongside this analysis, reasons both pragmatic and principled will be suggested for why Friedmann did not focus on international law earlier in his career. Finally, the paper looks at Friedmann's view of the Canadian approach to international law, and the important place he saw Canada fulfilling in his rendition of the international legal order.

I. Biographical Outline

At age 27 Friedmann fled to England from Germany after studying law and working on the Labour Court; in England he chose to work in a Quaker commune near Welwyn Garden City (1933-1934) prior to returning to legal studies at the University of London (1936). He taught at the University of London as the Quain Lecturer in law and reader in law (1938-1947) while concurrently serving with the British intelligence services during WWII. In 1947 he emigrated to Australia and in 1948 received an LLM from the University of Melbourne before working as Professor of Public Law there until 1950. Thereafter he left Australia for Canada to teach comparative law and jurisprudence at the University of Toronto Law School from 1950-1955. Toronto was his last stop before arriving at what would be his ultimate destination—his position as Director of the International Legal Centre and Professor of International Law at Columbia law school where he taught until his death in 1972. A list of his appointments includes United Nations Consultant for Public Industrial Enterprise (1954), and Consultant to the Food and Agriculture Organization (1971). His horrific murder at the hands of muggers in East Harlem shocked the Columbia law school as well as the international law community.

His colourful and adventurous career is matched by an equally diverse and wide-ranging interest in law. Though clearly most famous for his work on international law, a survey of Friedmann's works reveals a staggering breadth of study. If there is a focus to be traced throughout his career it is from private law, through to public law; from administrative and comparative law through to international law, all of which were interlaced with the desire to relate law to society.

Friedmann did not reserve his passion solely for academia—his passionate personality transferred into his personal life. He had a wife and four sons, and seemingly endless friends and admirers. He played the piano, made time for his students—inviting them to his family home—and integrated into the local community wherever he lived. His critical edge and persistent need to be challenged were offset by his personable nature and charisma.

II. Historiographical Perspective

Internal History

According to Jim Phillips, the writing of legal history suffers from various blights, one of which is that the majority of historical accounts fall into a category he coins “internal legal history.”⁴ These historical accounts are internal in that they are written by lawyers rather than historians and focus on legal doctrine, legal ideas, the courts, the judiciary and the profession without bringing in external perspectives or attempting to relate the legal subjects to larger socio-economic themes. Internal legal history is problematic in that it ultimately creates “uncritical accounts of the great men of the bench and bar.”⁵ This internal legal history is pervasive in the international law field partly because of the need that members of the community feel to build momentum, collegiality and coherence to a field, the legitimacy of which is constantly being challenged. Much biographical legal history is written without due critical analysis because, as Phillips comments, “the author is too close to his subject” ultimately producing an “adulatory account.”⁶ These problems will surface as we explore the literature on Friedmann, and

⁴ Jim Phillips, “Recent Publications in Canadian Legal History” (1997) 78:2 Canadian Hist. Rev. 236.

⁵ *Ibid.* at 236.

⁶ *Ibid.* at 237.

although these are the sources which must of necessity be used, the limitations will be kept in mind throughout the paper.

Sources on Friedmann

This section begins by exploring the available sources and pointing out their strengths and weaknesses, noting the division between academic and informal sources, as well as pre- and post-death sources. The informal sources, and particularly the post-death tribute articles, show that the violent nature of Friedmann's death, and the timing of it in his life, determined that his reputation was crystallized as an international-law-scholar-cum-hero. Within the category of academic/biography there is an overarching setback—the non-Canadian material focusing squarely on Friedmann simply does not include information about his time at Toronto. In addition, even the most academic of the sources displays traits of internal history and frustrates attempts at critical inroads.

Biographical Sources

The limited academic sources on Friedmann range from objective biographical statements to a chapter by John Bell in *Jurists Uprooted* entitled “Wolfgang Friedmann (1907-1972), with an Excursus on Gustav Radbruch (1878-1949).”⁷ There are various biographical summaries, such as that in the *International Biographical Dictionary*, and another from the 10th Anniversary tribute to Friedmann in the *Columbia Journal of Transnational Law*.⁸ There are also a few references to Friedmann in other historical

⁷ John Bell, “Wolfgang Friedmann (1907-1972)” in *Jurists Uprooted* (Oxford: Oxford University Press, 2004) 517-534.

⁸ Michael Sovern, *et al.*, “Wolfgang Gaston Friedmann” (1971) 10 Colum. J. Transnat'l L 4 [“Tribute”].

sources such as *The Fiercest Debate*,⁹ *The University of Toronto: A History*¹⁰ and Philip Girard's biography of Bora Laskin.¹¹

Bell's work is the most academic of the sources—it is footnoted and provides analysis of the themes in Friedmann's academic work—however, there is a notable lack of critical analysis in its content. Not only this, but it also refers only sparingly to outside influencing factors and context, which is particularly puzzling given the nature of the book. Considering that the book draws together essays on different uprooted jurists and is subtitled “German-Speaking Emigré Lawyers in Twentieth-Century Britain,” one would expect a more nuanced approach to Friedmann's life which would set it explicitly within its socio-political context. There is the odd reference to elements of Friedmann's personal experiences that influenced his choice of academic topics; we learn, for instance, that his work on German reconstruction stoked his interest in public economic law.¹² The paucity of critical analysis appears to be replaced by praise for Friedmann: we learn that he was an earnest writer, was much loved, had a unique intellectual agenda and added breath and rigour to legal study. Finally, as is suited for the end of such an article, Bell concludes with a summary of Friedmann's “major achievements.”¹³ Essentially, Bell gives us a well-written and interesting overview of Friedmann's life and the legal doctrines that he developed, set against the backdrop of the law schools where he taught, without placing much, if any, emphasis on surrounding external contexts which lead to these developments. As such, this is classic internal legal history.

Personal/Informal

⁹ Ian C. Kyer and Jerome Edmund Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987) [*Fiercest Debate*].

¹⁰ Martin L. Friedland, *The University of Toronto: A History* (Toronto: University of Toronto Press, 2002).

¹¹ Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005).

¹² *Supra* note 6 at 524.

¹³ *Ibid.* at 530.

In contrast to the academic sources, there is a diverse range of personal, anecdotal sources on Friedmann, partly due to the fact that he had lasting personal effect on those he met, and largely due to the deep impression his violent death had on his colleagues and friends. These personal materials are separated into two categories, those written while Friedmann was alive, and those written after his death. What we glean from the pre-death personal sources are celebratory accounts, but what is perhaps more interesting is the image of Friedmann that subsists after his death. It will be argued that the image with which he is most frequently associated is due to the timing and nature of his death.

Pre-Death

Pre-death personal sources range from dedications to Friedmann in the introductions to books, such as that written by Jessup in *Jus et Societas: Essays in Tribute to Wolfgang Friedmann*,¹⁴ and that by Lord Denning as the introduction to *Law and Social Change in Contemporary Britain*.¹⁵ By far the longest pre-death tribute is that at the beginning of the 10th Anniversary Edition of the *Columbia Journal of Transnational Law*, in which ten contributors write about Friedmann's life and career. The impressive list of contributors includes Michael Sovern—the Dean of Columbia Law, René-Jean Dupuy—the Secretary General of the Hague Academy of International Law, Judge Philip Jessup, John Stevenson—Legal Adviser to the State Department, George Kalmanoff—Director at the International Bank, and Wilfred Jenks—Director of the International Labour Office.¹⁶ The fact alone that an issue of the Journal was dedicated to Friedmann while he was still alive reflects the reverence his colleagues had for him.

¹⁴ Gabriel M. Wilner ed., *Jus et Societas: Essays in Tribute to Wolfgang Friedmann* (The Hague: Martinus Nijhoff Publishers, 1979).

¹⁵ Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens & Sons, 1951).

¹⁶ *Supra* note 7.

Post-Death

Post-death personal sources are understandably written from a very close perspective, such as is demonstrated in the eulogies written at his funeral and published in an article entitled “Memorial Service for Professor Wolfgang G. Friedmann.”¹⁷ Correspondence with professors Martin Friedland—who was a student at the time Friedmann taught at Toronto, and Horace Krever—who was a student of Friedmann’s between the years of 1952-1954—provide other informal sources.

Despite the predictably adulatory tone of the eulogies, they are important for what they reveal about the meaningful effect Friedmann had on people in his daily life. More important than this, though, we see in them a crystallization of Friedmann’s persona as an international lawyer with heroic qualities, an outcome which may never have emerged but for the tragic circumstances of his death. Nowhere is the effect that Friedmann’s death had on his peers in the international law community more evident than in Pierre-Marie Dupuy’s article, “International Law: Torn between Coexistence, Cooperation and Globalization.”¹⁸ The psychological chord that Friedmann’s death hit in the consciousness of his peers is reflected in the dream Dupuy relates wherein Friedmann is resurrected as a ghost representing international law. Dupuy nostalgically relates that the night before, “Friedmann had come back to join us in our work.”¹⁹ He goes on to tell that Friedman asked what had changed in international law “since that afternoon when he left us all, near Central Park.”²⁰

¹⁷ William J. McGill *et al.*, “Memorial Service for Professor Wolfgang G. Friedmann, September 25, 1972” (1972) 72 Colum. L. Rev. 1136.

¹⁸ Pierre-Marie Dupuy, “International Law: Torn Between Coexistence, Cooperation and Globalization. General Conclusions” (1998) 9 Eur. J. of Int. Law 278.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 279.

The way in which Friedmann is remembered, and what he is seen as embodying, are partly the result of the savage nature of his death. As mentioned above, Friedmann split his academic career between institutions in England, Australia, Canada and the United States; at each period of his life he was partly constituted by these experiences. The fact that he was murdered while teaching international law at Columbia meant that he was inadvertently turned into a heroic pseudo-martyr for the international legal community. If he had been mugged and killed while teaching at Toronto, perhaps he would have been famous for his work in comparative law; likewise for administrative law if he had stayed at the University of Melbourne.

The distinct themes which emerge from both John Bell's article and the post-death tributes display the manner in which his personality was captured and frozen in time because of his death. The most striking themes which materialize are of Friedmann the hero, and Friedmann the humanist. Friedmann is depicted as being heroic both physically and morally, as well as being a pioneer in breaking down barriers between academic disciplines. The two most frequently-cited examples of his courage are that he fought off his first mugger, and was killed by a second, and that he stood up to the Nazis when he was an assessor in German Labour Court—defending the independence of the court. Even Bell, the most detached of the writers, begins the second paragraph of his article with a statement which has a reverential tone to it:

Friedmann was both physically fit and morally courageous, fearless in the face of danger. In Australia, he had taken up scuba diving. He had been able to fight off muggers who attacked him soon after he started in Columbia in 1955, and he was killed resisting muggers who attacked him.²¹

²¹ *Supra* note 6 at 518.

In terms of resisting Nazi terrorism, Otto Kahn-Freund's statement on Friedmann in the Tribute article sums up the general tone of such remarks:

What I, as one of Wolfgang's oldest friends, have always felt to be more important than anything else in his personality is his immense courage, and the willingness and the ability to stand up for his convictions in all sorts of adversities. He showed it in a very dramatic way when . . . he stood up to the mounting Nazi wave.²²

Not only is Friedmann depicted as a hero because of the political stance he took in Germany, but the image of him as a non-conformist is paralleled in his work in the academic world. According to Freund, Friedmann broke down barriers between the disciplines.²³ Bell picks up on this, echoes Freund's statement and takes it a step further, insisting that "he was not afraid to criticize even senior people in order to promote what he considered to be right."²⁴

Human interest is depicted as being central to Friedmann's academic work and the causes that he believed in, such as the economic advancement of developing countries and building towards world peace. In his memorial tribute to Friedmann, John Lindsay portrays Friedmann as engaging in a relentless battle against violence and injustice.²⁵ This is echoed by others, such as Dean Michael Sovern who claims that, "more than any man I know Wolfgang Friedmann affected people and, through them, institutions." He loved and people loved him back, and because of his warm personality they "opened to his insights and judgements."²⁶ Friedmann as the embodiment of heroic humanist is further seen in this statement by his student David Heleniak:

²² *Supra* note 7 at 24.

²³ *Ibid.* at 23.

²⁴ *Supra* note 6 at 518.

²⁵ *Supra* note 16 at 1138.

²⁶ *Ibid.* at 1139.

We were all aware of his reputation as a brilliant scholar and humanist, as a man of deeply held convictions, immense courage and personal integrity, of his opposition to the oppressive acts of the strong against the weak, his commitment to social justice for the weak and poor, and his opposition to official acts of retribution, as expressed in his . . . position on war crimes trials. . . But the man with whom we worked was a modest, unpretentious, charming and gracious man.²⁷

Thus we see that Friedmann is portrayed both as hero and humanist in the post-death sources.

III. Formative Experiences

The fullness of experience reflected in Friedmann's life story is awe-inspiring; he was clearly a man who loved change, sought out challenge and engaged fully in his endeavours. Amidst this relentless dynamism there are formative experiences binding together Friedmann's rather hectic life. Friedmann's connection to Germany constitutes such a formative experience as is shown through his personal experiences, his approach to legal education, his work on German reconstruction and the frequent references he makes to Germany throughout his academic scholarship.

Personal Connection to Germany

It comes as no surprise that Germany was a constant reference point for Friedmann throughout his career given that it was his birthplace, the place where he received his first degree, and where he had his first job. He completed his doctorate in law at Berlin University in 1930 and worked as an assessor in a German labour court before being forced to leave Germany in 1934 for England.²⁸ While Friedmann was of Jewish ancestry there is some uncertainty as to whether this was the impetus for his decision to leave Germany. Some have assumed that this explains why he left. However, he may not have

²⁷ *Supra* note 16 at 1141.

²⁸ *Supra* note 6 at 517.

been practicing the Jewish faith or self-identified in a way that would have put his life in danger. What is certain is that his confrontation with the Third Reich over the independence of the Labour Court put him in an untenable position in relationship to the regime.²⁹ Upon his arrival in England he maintained a strong connection to Germany. He lived in a Quaker community composed mainly of refugees and made himself useful by teaching German. Despite becoming a British citizen in 1939 he kept his German ties alive through work with the British government on post-war German reconstruction. He maintained at least one close academic tie: Otto-Kahn Freund who was a judge at the Labour Court during Friedmann's time there. Freund and Friedmann remained good friends and Freund wrote a deeply personal article in the tribute to Friedmann in which he calls himself one of Friedmann's oldest friends.³⁰ Finally, Germany remained with Friedmann in his approach to legal education. According to Bell, Friedmann "remained attached to the virtues of academic analysis and systematic doctrine which he had enjoyed in the German system."³¹

German Reconstruction as a Bridge

Friedmann's work on German reconstruction functions as a bridge linking his past ties to Germany with his future interest in comparative law. Indeed, his interest in comparative law may have been driven by the problems that came out of German reconstruction, as comments from "Teaching and Research in Comparative Law" suggest. Friedmann notes the importance of understanding the legal structure of other countries because increasing number of lawyers have become involved in international administration of one sort or another. He claims that understanding another nation's "way

²⁹ *Supra* note 6 at 517 and note 10 at 179.

³⁰ *Supra* note 7 at 24.

³¹ *Supra* note 6 at 519.

of thinking” is not a luxury but a necessity. He draws this conclusion back to Germany when he states: “Many blunders, could, for example have been avoided in the Allied administration of Germany had there been a little more knowledge of Germany’s legal system and structure.”³²

The list of Friedmann’s academic works which relate to Germany or contain German examples is extensive. There is room here for only a selection of such references, such as his review of the *Manual of German Law* in which he wistfully notes that “perhaps this excellent attempt will inspire similar manuals of other legal systems, without the regrettable incentive of military occupation.”³³ On explicitly German topics, he wrote a book on German immigration into Canada³⁴ as well as an article on the Berlin crisis,³⁵ alongside his book on *The Allied Military Government of Germany*,³⁶ and articles such as: “The Legal and Constitutional Position of Germany under Allied Military Government,”³⁷ “Arthur Nussbaum, a Tribute,”³⁸ and “Western and German Legal Thought, Community or Cleavage,”³⁹ to name but a few.

A specific example of Friedmann referring to the Nazi regime is seen in the third edition of *Legal Theory* which contains a chapter entitled “The Search for Absolute Ideals of Justice” in which Friedmann explores examples of ways society and the rule of law interact. He writes: “in the latter days of the Nazi regime, Hitler’s oral pronouncements often overruled courts or statutes. Sheer chaotic arbitrariness

³² Friedmann, “Teaching and Research in Comparative Law: Recent Developments at the University of Toronto Law School” (1954) 10 U.T.L.J. 245.

³³ Friedmann, “Review: *Manual of German Law*” (1950) 6 U.T.L.J. 162.

³⁴ Friedmann, *German Immigration into Canada* (Toronto: Ryerson, 1952).

³⁵ Friedmann, “Legal and Political Aspects of the Berlin Crisis” (1961-1963) 1 Colum. J. Transnat’l L. 292.

³⁶ Friedmann, *The Allied Military Government of Germany* (London: Stevens, 1947).

³⁷ Friedmann, “The Legal and Constitutional Position of Germany under Allied Military Government” (1947) 3 *Res Judicatae* 133.

³⁸ Friedmann, “Arthur Nussbaum, a Tribute” (1957) 57 Colum. L. Rev. 1.

³⁹ Friedmann, “Western and German Legal Thought, Community or Cleavage” (1942) 58 L. Q. Rev. 257.

undermined the hierarchical structure which even a positivist definition of law must regard as essential.”⁴⁰ He then goes on to ponder the legality of the Nazi regime, and asks whether “any obedience to laws expressive of Nazi principles [is] retrospectively illegal in the name of a higher law?”⁴¹ Thus we see that Germany and German themes provided a backdrop to an unstable early career and remained an underpinning reference point throughout Friedmann’s life.

IV. The Toronto Years: Fantasy and Reality

One of the benefits of hindsight is that it permits reflection on someone’s life from a point of view that was not available during their lifetime. A hindsight vantage point on Friedmann’s life, and particularly his years at Toronto, reveals a series of dichotomies between fantasy and reality. In other words, a series of situations where the way things were perceived at the time—the fantasy—does not match the way we see from hindsight that they were actually constituted—the reality. Take, for example, the relationship between the University of Toronto and Friedmann. The University wanted Friedmann to be the exotic “other”, the foreign academic who would sweep into the fledging school adding pizzazz and cosmopolitan credibility by teaching theory-based subjects such as comparative law; whereas in reality, there was no demand for comparative law at the University. The mirror image of this fantasy is reflected in Friedmann’s view of the University. Just as the University wanted Friedmann to be something other than what it really needed, Friedmann needed the University to be something that it was not. In coming to Toronto, Friedmann seemed to be hoping for an exciting, experimental institution where he could try out his somewhat novel teaching methods; whereas, in

⁴⁰ Friedmann, *Legal Theory*, 3rd ed. (London: Stevens & Sons, 1953) at 457.

⁴¹ *Ibid.*

reality the University was flailing, not fully accredited, lacking in enrolment and traditional in its curriculum. Similarly, in terms of his international legal order, Friedmann fantasized Canada to be an ideal middle-power effecting much change, whereas in reality this was not so. These polarities of fantasy and reality will be illustrated through the next part of the paper which begins by setting the context of what was happening at the University at the time when Friedmann arrived (in the late 1940s and early 1950s), analyzing the transition of the school from its original model through to a Harvard-like professional law school.

The University of Toronto: Early Years

To determine how Friedmann and Toronto influenced each other and to see how and why the University wanted Friedmann to be an exotic other even though it was not what the University really needed, an overview of the Toronto Law School as it was in the late 1940s and early 1950s is critical. This section provides a brief overview of legal teaching in Ontario at the time, and shows how the vision of Cecil Wright and Sidney Smith sought to revolutionize the Toronto Law School. From this overview, a contrast emerges: the fantasy that Wright and Smith had about creating a law school was that it would be “other” than the Law Society’s School by bringing in a new style of teaching in the Harvard model, but the reality is that the years between 1949 and 1957 were very difficult for the school as is shown in the low enrolment, the fact that the school was not accredited and that the teaching was not as progressive as the instigators had dreamed it would be.

Context for Change: Cecil A. Wright and Sidney Smith

The changes in legal education at the University of Toronto Law School comprised a break away from both the teaching available through the Law Society's School, and from the law program that existed at Toronto prior to the changes. The style of teaching that existed at the Law Society's School consisted of part-time study combined with practical law-firm training. The new program at Toronto was a full-time professional academic program, based on the Harvard model. Thus, it was also a break from the mould of the undergraduate law program which existed at Toronto prior to the changes which had been run by W.P.M. Kennedy and was based on the English-style undergraduate law model.⁴²

Sidney Smith (then president of the University of Toronto) and Cecil Wright (then Dean of the Law Society's School) were the main instigators behind the remodelling of the law school. At the time, the law school at Osgoode Hall was the only professional law school in Ontario, and it was run by the Law Society of Upper Canada.⁴³ Smith wanted to establish a top-ranking professional law school and he had discussed his plans with Wright. Although Wright was initially unsure about joining Toronto, changes implemented by the Law Society which reduced the academic component at the Law Society School provided the impetus for him to resign his deanship and accept the position of Dean freed by Kennedy's retirement and offered by Smith.⁴⁴ These changes at the Law Society School had rendered it essentially a trade school; under the reforms, students attended only two hours of lecture a day and spent the rest of their time as apprentices in law offices.⁴⁵ This was the tipping point which led to the formation of the

⁴² *Supra* note 9 at 439.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

new professional law school at Toronto. Events collided at the right time: Wright left Osgoode along with Bora Laskin and John Willis and all three were given appointments at Toronto by Smith. The expectation was that the new three-year, second-entry professional law program would be granted approval by the Law Society.⁴⁶

Unfortunately, events did not unroll as planned: the Law Society did not approve the full program. The three year program at Toronto was deemed to be the equivalent of only two at Osgoode and Toronto law students had to go to Osgoode to complete a third year.⁴⁷

Needless to say, despite the powerful faculty line-up at the new school, enrolment fell when students realized they would have to complete an extra year. The number of incoming students was under 20 in 1951 and the entire student body fell below 60 in subsequent years.⁴⁸ Girard states that “Caesar would have taken anything that could walk through the door during those years.” Indeed, the graduating class of 1953 was only thirteen men, while it was 43 in 1953 and 50 in 1954.⁴⁹ Enrolment did not rebound until the LLB was fully accredited in 1957-1958, at which point the incoming class rose to 87 students.⁵⁰ The years between 1949 and 1957 were very difficult for the university. As Girard states, “the euphoria of 1949-1950 soon ebbed away. The situation might be summed up as in the old 1960s expression: what if they held a revolution and no one came?”⁵¹ On top of the low enrolment, Willis left for practice saying that the law school was “for all intents and purposes dead.”⁵²

⁴⁶Bora Laskin, “Cecil A. Wright: A Personal Memoir” (1983) 33 U.T.L.J. 148 at 159.

⁴⁷*Ibid.*

⁴⁸*Supra* note 10 at 177.

⁴⁹*Ibid.* at 178.

⁵⁰*Ibid.* at 177.

⁵¹*Ibid.* at 176.

⁵²*Supra* note 9 at 441.

Thus we see that although Wright and Smith had envisioned a burgeoning law school that would stand in opposition to the Law Society's School and revolutionize legal teaching in Canada, the reality did not conform to the dream. The school was not recognized by the Law Society, enrolment was abysmal and at least one faculty member was so unhappy that he left.

The Harvard Model

Despite the ways in which Toronto did not meet the expected dream, it did adopt a new teaching style and this style was different than that available at the Law Society's School. In contrast to the English-based lecture system that was in place at the Law Society's School, the new program at Toronto was largely based on the Harvard model, which was to be expected given that Wright, Laskin, Smith, Willis and Milner were all Harvard-trained. As Friedland remarks, "it would certainly be American ideas and teaching methods that would guide the direction of the faculty in the future."⁵³ Girard likewise mentions that Wright wanted to build a school on the Harvard model—this is perhaps nowhere better seen than in the fact that the new mission statement of the university was lifted verbatim from the Harvard law school calendar.⁵⁴ In an article entitled "The Harvardization of Caesar Wright," Bickenbach and Kyer echo these comments, stating that Wright came away from Harvard "thoroughly Americanized."⁵⁵ Likewise, Risk argues that the major influence on Canadian legal scholars during this period was no longer so much English as American: "after the war, the United States

⁵³ *Supra* note 9 at 440.

⁵⁴ *Supra* note 10 at 171.

⁵⁵ Jerome E. Bickenbach & Clifford Ian Kyer, "The Harvardization of Caesar Wright" (1983) 33 U.T.L.J. 162 at 163.

became the dominant, often the exclusive, exemplar for legal scholars, and England was usually dismissed as mired in the past and simply ignored.”⁵⁶

As Risk’s comments suggest, the emphasis on American-style curriculum and teaching that the Toronto faculty imported to the new law school was in opposition to the traditional English methods. This was in keeping with the general trend in the 1930s towards rejection of British influence and the past in general.⁵⁷ The classic English approach to the common law was that the primary role of scholars was to summarize and synthesize pre-existing principles.⁵⁸ Such had been the teaching method at the Law Society School that Wright and the others had left behind; the English-style lecture system was used and “legal rules were presented from ‘black letter’ English textbooks.”⁵⁹

Both Wright and Smith held strong opinions on how law should be taught, but the reality, particularly for Wright, did not match the fantasy of what he hoped to implement. Wright wanted to forward the American style; meanwhile, Smith argued that “the law must be progressive and creative”⁶⁰ and hoped for the integration of law with other disciplines: “the hiving off of law from the totality of human knowledge as studied in university has bred dissatisfaction with legal process.”⁶¹ Smith felt that the type of education in Canadian and American law schools, which he saw as division and subdivision of fields of study, obscured the purpose of law school—to prepare the student for the profession: “the result . . . is that students dig trenches in legal minutiae without relating their work to that of others digging nearby and without reference to the

⁵⁶ R.C.B. Risk, “Canadian Law Teachers in the 1930s” (2004) 27 *Dalhousie L. J.* 33 at 52.

⁵⁷ *Ibid.* at 33.

⁵⁸ *Ibid.*

⁵⁹ *Supra* note 54 at 165.

⁶⁰ S.E. Smith, “Legal Education and Universities,” (1949) 8 *U.T.L.J.* 3 at 4.

⁶¹ *Ibid.* at 5.

surrounding terrain.”⁶² Wright, who had studied under Pound at Harvard, consciously tried to model the new school on the Harvard model but ultimately retained a semi-English approach. According to Risk, “Wright was like the 19th C scholars in that he thought law should be based on principles but departed from earlier belief that they could simply be applied to facts to produce decisions.”⁶³ Thus we see that there were several polar dichotomies at play in the historical setting into which Friedmann emerged. Wright and Smith’s vision for the school was of an “other” to the Law Society School that would break barriers and redefine legal teaching; in reality, the very survival of the new law school was doubtful and the teaching style was not as revolutionary as had been intended.

The Exotic Other: Friedmann at Toronto

Just as the fantasy/reality dichotomy is evident in the disparity between the vision for and outcome of the new law school, so is it present in the roles that Friedmann and Toronto performed for each other. As mentioned above, there is a fantasy/reality polarity in that what Wright wanted Friedmann to be was not necessarily what there was desire for at the University. Similarly, what Friedmann wanted or needed the University to be was not necessarily so in reality.

“Friedmann was a jurist in the continental traditional, with broad interests in legal theory, international law, and comparative law—an exotic indeed among the hard-nosed common lawyers in Caesar Wright’s faculty.”⁶⁴ With this statement Girard sums up Friedmann’s role for Toronto. Wright was familiar with Friedmann and his works; as editor of the *Canadian Bar Review* he claimed to have “had the pleasure of introducing

⁶² *Ibid.* at 5.

⁶³ R.C.B. Risk, “My Continuing Legal Education,” (2005) 55 U.T.L.J. 313 at 316.

⁶⁴ *Supra* note 10 at 179.

his written work to the country,”⁶⁵ but it was while Friedmann was on a lecture tour at Toronto speaking on the planned state and the rule of law that Wright decided to pursue the scholar who was then Professor of Public Law at the University of Melbourne.⁶⁶ He wrote a letter to Smith recommending that Friedmann be hired and pointing out that Canadian law schools had “devoted themselves almost exclusively to the technical minutiae of positive law . . . [and] left a gaping void in the development of juristic and jurisprudential thought.”⁶⁷

At this time Friedmann was already well-known. *The Fiercest Debate* refers to Friedmann at the time of his appointment to Toronto as a “distinguished international scholar” who had gained an international reputation through his writing.⁶⁸ Bora Laskin, writing a memoir about Wright, states that Friedmann enjoyed an international reputation in jurisprudence before he joined the faculty in 1950.⁶⁹ This is confirmed by Horace Krever, who took Jurisprudence with Friedmann in 1952-1953 and recollects having used Friedmann’s internationally-acclaimed book as their text.⁷⁰ Even considering that Laskin’s recollection of Friedmann’s fame may have been coloured by his later success at Columbia (the memoir was written in 1983), it seems clear that Friedmann was well-known in 1950 in the field of jurisprudence.

Friedmann was a foreigner, a German émigré who had lived in England and Australia, was fluent in both civil and common law, had several published textbooks to his name, and was interested in theory. He would have been an exotic other, indeed, amongst the Toronto faculty. It seems likely, too, that Wright would have wanted this

⁶⁵ Caesar A. Wright, “Speech of Introduction to Professor Friedmann” Feb 1 1950. (UTA) at 5.

⁶⁶ *Ibid.* at 6. On the lecture tour see *The Fiercest Debate*. *Supra* note 8 at 236.

⁶⁷ *Supra* note 8 at 236.

⁶⁸ *Ibid.* at 237.

⁶⁹ *Supra* note 45 at 160.

⁷⁰ This would presumably have been his seminal text, *Legal Theory*.

rising star on the faculty at this particular time as the issue of recognition of the program by the Law Society was reopened in 1950.⁷¹ Having a scholar like Friedmann on staff would have added caché and prestige to the struggling school, not to mention that Friedmann was willing to teach jurisprudence and comparative law, subjects which were not popular interests of scholars at the time.

Once at the University, Friedmann engaged with the local community, and held a certain status as a cultured European. According to Girard, Friedmann became a “kind of media star” due to his appearances on Canadian Broadcasting Corporation television shows on international affairs.⁷² He also participated in a public lecture series put on by the University of Toronto School of Social Studies in conjunction with the Canadian Institute of International Affairs, entitled “Can Modern Man be Free?”⁷³ and took an active involvement in his students’ lives. Horace Krever recalls him being “very friendly with the students.” When the students went on a retreat to the Hart House farm in 1952, Friedmann was the only faculty member who attended for the duration.⁷⁴ He was also a man of culture. Krever recalls that Friedmann thought Beethoven’s “Pastoral” symphony was played so frequently that it was rendered common.⁷⁵ As will be displayed below, despite offering these qualities of “other” Friedmann did not ultimately stay at the University, which may partly be because there was such low demand for the courses he taught.

Toronto for Friedmann

⁷¹ *Supra* note 8 at 237.

⁷² *Supra* note 10 at 180.

⁷³ *Globe and Mail*, 9 February 1953.

⁷⁴ Letter from Horace Krever (17 November, 2006).

⁷⁵ *Ibid.*

Why would a scholar, then, with an international reputation, training in civil and common law, experience in Germany, England and Australia choose to come to Canada? There are no direct sources on this issue, but it seems likely that there was a practical component—perhaps Friedmann’s visa in Australia had expired. Nonetheless, just as there are reasons why Wright wanted Friedmann at Toronto, there were aspects of Toronto which must have held appeal for Friedmann, particularly what could have been perceived as an open, exciting environment at a new school, and the opportunity to direct the comparative studies program.

The subject of legal education provides a concrete example of what Toronto offered Friedmann, or at least what he wanted it to offer him; this is particularly well-exemplified in the field of Jurisprudence. Friedmann saw in Toronto a more open teaching environment, while he offered Wright the theoretical component that Wright wanted for his school, but was unwilling to teach himself. Similar to Wright and Smith, Friedmann was critical of English and Australian legal education, stating that they put too much emphasis on technical accomplishments, and not enough on critical thinking.⁷⁶ It does not seem that Friedmann’s belief in the benefits of theory had been well-received by his colleagues at Melbourne, who commented that “Friedmann was somewhat sensitive to the legal profession’s criticism of his ideas as too venturesome.”⁷⁷ Bell confirms this when he sates “Friedmann’s approach was to add breadth and rigour to legal study at a time when technicality and analytical approaches predominated.”⁷⁸

⁷⁶ *Supra* note 6 at 519.

⁷⁷ R. Campbell, *A History of the University of Melbourne Law School* (Victoria: Faculty of Law, 1977) at 154.

⁷⁸ *Supra* note 6 at 519-520.

Friedmann's approach was in line with what Wright and Smith had envisioned for the new curriculum at Toronto. Smith, for one, thought that the teaching was becoming overly technical (see above). Meanwhile, although Wright was essentially a lawyer's lawyer with a pragmatic mind⁷⁹ and did not himself break the mould with his teaching style, he recognized the paucity of theoretical approaches to law at Toronto and wanted to remedy this shortage. Friedmann was the solution to this dilemma. In a letter to Smith recommending that Friedmann be hired, Wright pointed out that Canadian law schools had "devoted themselves almost exclusively to the technical minutiae of positive law . . . [and] left a gaping void in the development of juristic and jurisprudential thought."⁸⁰ The desire to have such matters taught in law school persisted, in his later polemical pieces on education, Wright emphasized the need to include comparative and other "academic" courses in law school curricula.⁸¹ So, even if Friedmann saw in Toronto the opportunity to teach freely and be surrounded by more experimental or progressive colleagues this fantasy did not completely materialize in reality in that the other professors, particularly Wright, did not actually teach in a progressive way.

Jurisprudence

A further dichotomy is seen in the difference between what Wright wanted to teach, and how he actually taught. Indeed, Wright's relationship with curriculum and teaching was an undeniably conflicted one, as the issue of teaching Jurisprudence illustrates. Partly due to influence gained while studying under Pound at Harvard, Wright wanted the Toronto law school curriculum to include theoretical approaches to law. But, he personally did not take this approach to law and did not enjoy teaching these topics. It is

⁷⁹ *Supra* note 45 at 152.

⁸⁰ *Supra* note 8 at 236.

⁸¹ *Supra* note 54 at 171.

an understatement to say that Wright did not break the mould with his teaching style as the bulk of his legal writing took the form of several hundred case comments and reviews.⁸² Moreover, although he tried to teach Jurisprudence, it seems that he did not enjoy the experience. In a draft of a letter to F.H. Bohlen he discussed the preparative work he was doing for his classes and stated:

I prepared for classroom use . . . mimeographed copies of embryo Canadian casebooks in Wills and Administration, Agency and (never breathe it to R.P. [presumably Roscoe Pound] Jurisprudence. This year, Jurisprudence—Thank God—is gone—in fact, I like to think that perhaps I killed it.⁸³

Wright was amongst good company in feeling reticent about teaching jurisprudence. While teaching at Toronto, Friedmann made some observations about American law teachers and their aversion to teaching jurisprudence in an article entitled “Vitalizing the Teaching of Jurisprudence.” Presumably these comments could be applied equally to Canadian schools at the time. With tongue-in-cheek Friedmann remarks that it is a typical sentiment for American law teachers to “look upon the subject of jurisprudence with a mixture of bewilderment and contempt, mitigated in many cases by something like a bad conscience.”⁸⁴ This could be an exact description of Wright’s comments in the letter mentioned above. Friedmann seemed deeply perturbed about this situation, claiming that it was “puzzling” and a “very sad state of affairs” that many American law schools did not even teach the subject. In short, while Wright did not enjoy teaching theory and was not necessarily as progressive as he wanted the new law school

⁸² *Supra* note 54 at 162.

⁸³ Undated rough draft of letter to F.H. Bohlen in the Wright Papers, likely from between 4 September and 20 November 1928.

⁸⁴ Friedmann, “Vitalizing the Teaching of Jurisprudence” (1952) 4 J. Legal Educ. 392.

to be, at a minimum, Toronto provided an open environment for Friedmann to teach these subjects.

Friedmann's Departure from Toronto

Despite being well-integrated into the community, and finding Toronto a reasonably favourable environment to teach in, Friedmann left for Columbia after only 5 years. Doubtless the immediate reason for this was that Jessup came to Toronto and recruited him for a position as Professor of International Law and Director of Columbia's International Legal Studies Centre. Other factors that likely influenced Friedmann's decision to leave may have been the low student enrolment at Toronto, along with a lack of interest in comparative law coupled with the fact that the very survival of Toronto was in question. All of which combined to cumulate in a situation where the reality was not what Friedmann had needed Toronto to be.

As noted above, 1950-1955 were years of very low student enrolment. Krever notes that in 1953-1954 his class of 10 students had a choice between Public International Law and Comparative Law. Since only a couple of students chose the latter, "the option disappeared and we all had to take both." He further remarked on the fact that there was little interest in comparative law: "[Friedmann] found it strange that in a country that had the advantage of the two great systems of law living side by side common-law lawyers had no interest in the civil-law system."⁸⁵ This lack of interest in comparative law, along with the fact that in 1955 the LLB remained unaccredited meant that Friedmann most likely did not see a secure future at Toronto. Recall as well that Willis had lost faith in the Faculty in 1952, and deeming the school dead had left for practice. Toronto would have appeared all the more insecure in comparison with the promise that Columbia offered.

⁸⁵*Supra* note 73.

Friedmann was also a seeker of challenges and change, and Columbia would have held out the promise of a new adventure. Jessup's comments about hiring Friedmann reveal that the decision may have been a difficult one on Friedmann's part. Jessup writes that Friedmann was very happy in his appointment at the University of Toronto and it was a wrench for the Friedmanns to leave these congenial surroundings.⁸⁶

All in all, the reality of what Toronto was for Friedmann did not match up to the fantasy that he had projected onto it. Despite being able to teach Jurisprudence and Comparative law the enrolment at the university was so low that there were barely any students in his classes, and students were particularly uninterested in Comparative Law. Moreover, although he must have been hoping to be among a group of like-minded professors, Willis left in 1952, and it seems there was not much enthusiasm for jurisprudence at the school, and particularly not from Wright.

V. All Roads Lead to International Law: Friedmann's Scholarship at Toronto

Having thus seen the way in which Friedmann and Toronto existed for each other in dichotomies of fantasy and reality, the following section looks in more detail at Friedmann's scholarship before, during, and after his time at Toronto, before moving on to an analysis of the role he saw Canada playing in his international legal order and his view on whether there is a particularly "Canadian" approach to international law.

The breadth of Friedmann's scholarship is bewildering; the profuseness of his writing is remarkable. Notwithstanding the breadth of the spectrum which his scholarship covers, there are at least two pathways which can be traced through his dynamic career. First, Friedmann's academic interests lead naturally towards international law, and second, he constantly sought to relate law to social realities. To demonstrate the first

⁸⁶ *Supra* note 7 at 22.

proposition, this section of the paper provides an overview of the different legal areas Friedmann focused on and then discusses how they all culminate in his passion for international law. The second path will be illustrated through his approach to international law, the theses of several of his major works and, finally, his approach to jurisprudence.

Friedmann's Areas of Specialization

Although Friedmann is most famous for his work on international law, he did not focus on this area of law until he reached Columbia and was appointed Professor of International Law and Director of the International Legal Studies Centre. Prior to Columbia, his interests progressed from the study of private law (contracts and torts) to administrative law, through to comparative and finally to international law, while interests in jurisprudence and international politics were constants throughout his career. As will be shown, these transformations in focus correspond loosely with the changes in universities where Friedmann taught, but are also tied to principles—particularly with respect to international law.

An overview of when he published works on different areas of law discloses the general trend outlined above. With one or two exceptions, all of Friedmann's works on torts and contracts were completed during his years in England and Australia. Administrative law was likewise relegated to his years at Melbourne.⁸⁷ In contrast, the majority of his works on comparative law were completed while at Toronto. Meanwhile, most of his work on international law and jurisprudence was produced at Columbia, and the entirety of his materials on international investment and economic development were produced while at Columbia.

⁸⁷ *Supra* note 6 at 529.

Administrative Law

There is clearly a traceable trend from private law to public law in Friedmann's career. Bell suggests that this is because North America provided the "opportunities and climate for [Friedmann] to achieve his potential."⁸⁸ Certainly locale and other practical aspects of Friedmann's life affected what he was working on, but oversimplification obscures other factors which may have been influential. In terms of administrative law, Bell suggests that Friedmann's work in this field originated from his teaching duties.⁸⁹ It seems there is also a link to be drawn here to his work on the German Labour Court. While this may have been the impetus for his study of administrative law, however, Friedmann did not continue to write on this subject later on in his career, which suggests that even if it was a genuine interest, it was overshadowed by others. It is also noteworthy that his years at Toronto overlapped with those when John Willis was teaching (1950-1952) and their approaches to administrative law are comparable.⁹⁰

A more direct correlation between location and field of study is evident between Friedmann's Toronto years and the subject of comparative law. Friedmann was hired specifically by Toronto to implement the comparative law program, which the university had received a \$50,000 Carnegie Grant to implement.⁹¹ This was a particularly large research grant and was probably a determining factor in Friedmann's decision to go to Toronto. The grant paid for Friedmann's salary along with funding a comparative law series, it also provided for exchanges of professors between Toronto and Quebec as well as an annual scholarship for a Quebec graduate student to study at Toronto.

⁸⁸ *Ibid.* at 518.

⁸⁹ *Ibid.* at 527.

⁹⁰ Loughlin cites both Friedmann and Willis in his article as having functionalist approaches to administrative law. Martin Loughlin, "The Functionalist Style in Public Law" (2005) 55 U.T.L.J. 361. See also Friedmann, "Judges, Politics and Law," (1951) 19 Can. Bar Rev. 811.

⁹¹ *Supra* note 10 at 179.

The Carnegie Grant and the comparative law program at Toronto may have been what encouraged Friedmann to come to Toronto, but they did not *create* his interest in comparative law. Rather, Friedmann had been interested in comparative law since his days as a student—his thesis (1930) focused on comparative law: it looked at Anglo-American and German laws on unjust enrichment.⁹² Considering his thesis topic and the fact that Friedmann was fluent in both civil and common law traditions by the time he was teaching at Melbourne, it comes as no surprise that he ended up teaching comparative law there.⁹³ In an article written while at Toronto, Friedmann alludes to the fact that his interest in comparative law may have stemmed from a desire to use law to solve problems. He notes the importance of understanding the legal structure of other countries because an increasing number of lawyers were becoming involved in international administration. He claims that understanding another nation’s “way of thinking” is not a luxury but a necessity. He draws this conclusion back to Germany when he states: “Many blunders, could, for example have been avoided in the Allied administration of Germany had there been a little more knowledge of Germany’s legal system and structure.”⁹⁴ He goes on to state that there is an acute need to study comparative law in Canada because of the existence of common and civil laws side by side.⁹⁵ All in all, comparative law seems like a natural place for a lawyer who was trained in both civil and common law and had lived in four different countries before arriving at Toronto.

World Politics and Jurisprudence

⁹² *Supra* note 6 at 520.

⁹³ See Friedmann, “The Teaching of Comparative Law. An Innovation at the University of Melbourne,” (1949) 1 *Annual Law Review*.

⁹⁴ *Supra* note 31.

⁹⁵ *Ibid.* at 245.

Friedmann had a continued interest in world politics and jurisprudence. While he may not have been teaching and writing in the field of international law while at Toronto, he maintained a live interest in international affairs and world politics. Indeed, the first edition of *World Politics* (which would be distributed to commonwealth embassies, and make a big impression on Jessup) was published in 1951. He also appeared on the Canadian Broadcasting Corporation's television series entitled *This Week* to discuss international affairs. In his comments on a show in August of 1955, Friedmann weighs in on the debate surrounding nuclear disarmament.⁹⁶ He demonstrates his interest in the United Nations in two other shows entitled, respectively, "United Nations Decisions, Who Abides By Them" and "Assembly in Crisis" (which looked at current problems facing the UN). In terms of jurisprudence, Kyer and Bickenbach state that when Friedmann was hired at Toronto, he was recognized as a leading scholar in the field of jurisprudence.⁹⁷ A statement echoed by Laskin in his memoir on Wright.⁹⁸

International Law

Thus we see that prior to coming into his own as an international law scholar, Friedmann had other areas of focus, including administrative law, comparative law, world politics and jurisprudence. This is not to say that he was disinterested in international law prior to arriving at Columbia. On the contrary, Friedmann had an ongoing interest in international law, but there were practical and principled reasons why he did not pursue this interest with vigour until later in his career.

While practical considerations appear to be the immediate reason why Friedmann did not specialize in international law until he was at Columbia, these considerations

⁹⁶ "This Week TV Series," Toronto, CBC Radio Archives (1955 08 29-D. t.c. on 820426-9(11)).

⁹⁷ *Supra* note 6 at 238.

⁹⁸ *Supra* note 45 at 160.

intersect with reasons of principle. In practical terms, Friedmann was working in Australia and Toronto in areas other than international law so there were bound to be time constraints and he would have been expected to publish on areas that he was hired in (particularly with regards to the comparative law area at Toronto). It is also clear that Friedmann had given thought to the status of international law in the 1930s and 1940s, but what is unclear is whether his anxiety about world politics and his resultant controversial approach to international law were the reasons that he did not have an appointment in the international law field at that time, or whether he deliberately chose not to work in this area.

Despite the fact that Friedmann did not focus on international law until the late 1950s and 1960s, Bell argues that the situation in Europe in the 1930s was influential on Friedmann's approach to international law.⁹⁹ Bell correctly characterizes Friedmann's approach to international law as one that attempts to place it within its political context, and goes on to explain that this approach was not readily accepted in England at the time. In contrast to the practical reasons proposed above for why Friedmann did not study international law earlier in his career, there seems to be room here to infer that Friedmann would not have been able to get a position in international law at this time regardless of his desire to do so.¹⁰⁰

Friedmann felt a good deal of anxiety about international relations; this, along with his approach to law in the late 1930s and early 1940s is expressed in his article "The Textbook Myth on International Law," where he states that "a universal family of nations

⁹⁹*Supra* note 6 at 528.

¹⁰⁰ *Ibid.*

no longer exists”¹⁰¹ and expresses further concern that society is breaking up into antagonistic groups, that many rules are no longer applicable, ultimately concluding that these factors culminate in a need to engage in a “far reaching re-examination of the whole existing system of International Law.”¹⁰² In the ultimate illustration of anxiety about an area of law, Friedmann fears that it is “impossible at the present time to write any textbook on International Law, for a textbook presupposes a tolerably well determined or, at least, determinable law.”¹⁰³ He suggests that rather than a textbook summarizing the law, emphasis should be put into critiquing the bases of the law and developing new approaches to international law—socially-based ones.¹⁰⁴

Friedmann was not alone with his fears about the relevance and future of international law; David Kennedy in his article “Tom Franck and the Manhattan School” suggests that during the period between 1939 and 1955 the general themes of international law consciousness were “war, anxiety and disputation.”¹⁰⁵ Indeed, international law was not popular in the 1950s: “international ‘legal studies’ may have been in vogue, but not international law *per se*. International Business Transactions, transnational law, foreign law—anything but World Peace Through World Law.”¹⁰⁶ So, it seems that Friedmann’s concerns matched the collective consciousness of his colleagues in this respect, and may be another reason why he did not focus on international law at this time.

International Law: A Natural Climax

¹⁰¹ Friedmann, “Textbook Myth on International Law” (1940) 4 Mod. L. Rev. at 300.

¹⁰² *Ibid.* at 300.

¹⁰³ *Ibid.* at 302.

¹⁰⁴ *Ibid.* at 303. See also Friedmann “The Disintegration of European Civilisation and the Future of International Law” (1938) 2 Mod. L. Rev. 194.

¹⁰⁵ David Kennedy, “Tom Franck and the Manhattan School” (2003) 35 Jour of Int. Law and Pol. 397 at 400.

¹⁰⁶ *Ibid.* at 409.

The areas of law that Friedmann practiced reached a natural peak in international law. Consider, for instance, that comparative law embodies an international element in that you need to be familiar with different legal system in order to compare them. Jurisprudence similarly involves a strong comparative element and a lack of national focus. In Friedmann's own words regarding the study of jurisprudence, "any purely national approach is . . . impossible."¹⁰⁷ Meanwhile, administrative law fits in with the public element of public international law, and world politics adds the international element. On top of all this, Friedmann was influenced by growing up in Germany during the years leading up to WWII. In his tribute to Friedmann, Oscar Schachter of the United Nations suggests that Friedmann's experience of fascism prepared him both physically and philosophically for the limits to be placed on state sovereignty by international law.¹⁰⁸

Relating law to society

Friedmann's approach to international law is indicative of a common thread woven throughout his career: the desire to relate law to social and political realities. Early in his career, he noted that the foundations of international law had to be re-examined because international relations had changed to such a large degree. This concern about relating law to society continued during his Toronto years, where he published *Law and Social Change in Contemporary Britain*, and would be sustained into his Columbia years in which he published *Law in a Changing Society* and *The Changing Structure of International Law*. Finally, as his approach to jurisprudence illustrates, Friedmann saw

¹⁰⁷ *Supra* note 83 at 398.

¹⁰⁸ *Supra* note 7 at 29.

jurisprudence and its ability to forge connections between disparate disciplines as a method of achieving this union between social realities and the law.

In *Law and Social Change in Contemporary Britain*, published in 1951, Friedmann uses the example of England to illustrate his theory that law must adapt to social change. Essentially, his thesis here is that there have been profound changes in the structure and function of legal institutions in England, which have resulted in the need to re-assess the function of law and legal institutions “in the vastly changing social pattern of contemporary England.”¹⁰⁹ He goes through a chapter by chapter analysis of different areas of law, including contracts, property, and tort law before looking at changes in English public law in light of modern social developments. In Friedmann’s view, it is possible to reconcile traditional common law with the modern social developments “provided there is a far greater readiness to adapt legal thinking to the social realities of the 20th century.”¹¹⁰

Law in a Changing Society, published in 1959,¹¹¹ is a broader take on the same theme explored in *Law and Social Change in Contemporary Britain*. His main thesis in this work is that if law is to continue to function as “paramount instrument of social order” it must respond to social change.¹¹² Friedmann explicitly states that he has drawn on the experience he gained from teaching and living in Canada and the United States to broaden the scope of this work.¹¹³ It is interesting to note that we see a connection between his humanist side and his belief that law and social realities are interconnected in that Friedmann takes his role as lawyer very seriously and suggests that “it has never

¹⁰⁹ *Supra* note 14 at 3.

¹¹⁰ *Ibid.* at 6.

¹¹¹ Friedmann, *Law in a Changing Society* (London: Stevens & Sons, 1959) at ix.

¹¹² *Ibid.*

¹¹³ *Ibid.* at x.

been more important that lawyers . . . should be more than highly trained craftsmen” because of the power the law has to order society.¹¹⁴

As outlined above, a distinctive element of Friedmann’s approach to international law was his insistence that law remain fluid and adaptable to changes in the international field. In his article “The Disintegration of European Civilization and the Future of International Law” he outlines changes that the world was undergoing during the 1930s and insists that “the international events of the last few years . . . cannot be passed in silence by the international lawyer.”¹¹⁵ The relationship between international law and international relations was not a focal point during his years at Toronto, but he later picked up on this theme in *The Changing Structure of International Law*, where he elaborates on his initial theory that international law had to be built on a new approach. He begins the work with a statement that international law reflects changes in international relations. Appropriately, he goes on to delineate changes in international relations; the second part of the book examines the theoretical foundations of international law in light of these changes in international relations. In essence, his thesis is that there are two approaches to international law: the international law of co-existence and the international law of cooperation. The former is comprised of the classic Grotian system of international law which governs inter-state relations while the latter is seen in the growing number of international organizations and pursuit of transnational human interests.

The law of international cooperation is the result of a plethora of changes, some of which include: the expansion of the exclusive club of western nations, which lead to the

¹¹⁴ *Ibid.* at xiii.

¹¹⁵ *Supra* note 103 at 194.

dilution of homogeneous values, the division of the family of nations along ideological lines (the Cold War), as well as the infiltration of social and economic matters into international relations and the resultant emergence of the social welfare state. In particular, Friedmann pinpoints the establishment of the International Labour Organization in 1919 as marking the beginning of a “still continuing and constantly growing internationalisation of concern with labour, health, food, communications and other matters of human welfare.”¹¹⁶ Thus, beneath the realm of state-based international co-existence, new cooperative arrangements had emerged between different groups along with new concerns for survival, specifically the interest in being preserved from national destruction and the interest in preserving common interests.¹¹⁷ Hence, Friedmann’s new theory about international law was a natural continuation of his constant desire throughout his career to relate law to society.

Inter-disciplinary Approach

One way in which Friedmann wanted to relate law to society was by linking law to other disciplines. Indeed, this is another of Friedmann’s distinctive qualities, and one which colleagues admired. Otto Kahn-Freund, one of Friedmann’s oldest friends, notes Friedmann’s remarkable ability for cross-disciplinary analysis, and his distinct way of drawing disparate themes together:

What I have learned from him particularly (and this experience I share with thousands of others) is not to be afraid of the little walls and ditches which scholarly . . . lawyers have erected between so-called “disciplines” in order to attempt to confine everybody neatly within these little boundaries. If anybody has taught us how to leap across these fences and climb these little

¹¹⁶*Supra* note 10 at 6-8.

¹¹⁷ *Supra* note 10 at 12.

walls, it is Wolfgang. Perhaps more than anybody else I know, he has . . . the power to “connect.”¹¹⁸

This ability to leap fences and climb walls is epitomized by Friedmann’s career-long interest in jurisprudence and was doubtless one of the reasons he was drawn to this area of law. In his article on vitalizing the teaching of jurisprudence he provides us with both the reasons why he was drawn to jurisprudence, as well as a justification for why law should adapt to social realities. Friedmann suggests that many subjects offer the feature of a wider perspective, but highlights that jurisprudence has a unique ability to draw together disparate topics, and thereby improve the understanding of the law as it relates to society:

Only a jurisprudence course which is built up on the teaching of special subjects and utilizes the knowledge gained to forge links between apparently disconnected matters, can provide the synthesis and open up some understanding of the function of law in society.¹¹⁹

In terms of the adaptability of law and lawyers to social realities, he notes that due to changes in society, and particularly international changes, there is a heightened need for teaching jurisprudence because lawyers deal increasingly “with legislative, administrative and judicial problems which involve the whole relationship of law to economics, politics, industrial relations and . . . ethics.”¹²⁰ Nations were undergoing major changes in mutual understanding at this time and Friedmann felt that the lawyer “in which the purely legalistic mind, unaware of the limits of law and its relation to other fields of human endeavour, is hopelessly lost.”¹²¹ He examines the state of affairs in the world, suggesting that the study of jurisprudence is required and regrets that “law often

¹¹⁸ *Supra* note 7 at 23.

¹¹⁹ *Supra* note 83 at 303.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

lags considerably behind social realities.”¹²² Thus we see that jurisprudence was, for Friedmann, a means to ensuring that the law and lawyers themselves remained in touch with social realities, rather than regressing into the technicalities of non-contextualized black letter law.

VI. Canada’s place in Friedmann’s International Legal Order

Friedmann did not focus on international law while he was at Toronto, and cannot be said to have developed his own uniquely “Canadian” approach to international law. Indeed, he placed particular emphasis on the non-importance of developing national approaches to international law. Somewhat ironically, though, the approach he projected onto Canada’s role in international law, and the approach that he hoped Canada would take were both typically “Canadian” ones. As will be explored through two of his works, he saw Canada’s role as a middle power, and one that was crucial to his vision of the international legal order. In analysing Friedmann’s view on international law not only does it become apparent that his view of Canada in the international order may have been a factor that encouraged him to come to Toronto, but another fantasy/reality dichotomy is apparent. Namely, Friedmann wanted Canada to hold a special role in his International Legal Order, and he projected this onto Canada, but in reality, Canada did not necessary fulfil this image.

The two articles where Friedmann discusses Canada’s role in his International Legal Order are a 1964 review article entitled “Canadian Approaches to International Law,”¹²³ and a chapter he wrote in *Canadian Perspectives on International Law and Organization*, entitled “Canada and the International Legal Order: An Outside

¹²² *Ibid.*

¹²³ *Supra* note 1.

Perspective.” Both works build on the same thesis—that Canada is an essential part of the international legal order that he envisions because of its status as a middle power.

In short, Friedmann proposes that Canada plays a critical role in the international legal order, largely due to her position as a middle power and her outstanding international reputation. Indeed, he claims that Canada’s disappearance would be a “major international tragedy.”¹²⁴ He defines a middle power as one that is not powerful enough to contend for world domination, yet has sufficient military, economic and other resources to maintain sovereignty.¹²⁵ He emphasizes the role that middle countries like Canada can play in the Cold War framework, stating that due to her military power, economic resources and international reputation, Canada “can make its voice effectively heard without being suspected of ‘imperialist’ ambitions.”¹²⁶

For Friedmann, Canada is a middle power both physically and politically, and more importantly, a power that is likely to feel more compelled than other countries to take a “leading role in the developing of functional international cooperation on which the survival of mankind may well depend.”¹²⁷ He continues his altruistic line of thought by stating that “it is out of the realization of *necessities* rather than *ideals* that a fuller international legal order of cooperation may emerge. And few other powers are better equipped than Canada to take a lead in this evolution.”¹²⁸ With regards to when Friedmann developed his view that Canada held this special place, it is noteworthy that in an article he wrote in 1954 on teaching and research in comparative law he states that Canadians are likely to play an increased role in international administration. This

¹²⁴Friedmann, “Canada and the International Legal Order: An Outside Perspective.”

¹²⁵ *Ibid.* at 35.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* at 53.

¹²⁸ *Ibid.* Emphasis in the original.

suggests that Canada's role as mediator and balancer was already taking shape in Friedmann's mind during his time at Toronto.¹²⁹

Friedmann's view of Canada is a common view. As Allan Gottlieb and Charles Dalfen elucidate in their article on new Canadian approaches to international law,¹³⁰ it was the default view about Canadian foreign policy. The typical tone in which Canada's foreign policy was conveyed (prior to 1968) was one of altruism and hope—it was thought that Canada had a benevolent mission and great potential as an international peacekeeper.¹³¹ However, in reality, this view was not necessarily accurate—as Gottlieb states: “reports of the time usually refer to the compromise role that Canada was trying to play, but a closer survey suggests that Canadian legal initiatives were few in number.”¹³²

So we see that Friedmann's vision of Canada was largely fantasy—albeit a commonly held one. Here, though, we are also concerned with how the fantasy played out as a factor in Friedmann's choices. Of the examples cited by Friedmann to buttress his claim that Canada had made important contributions to the field of international law several are telling in that they are from the period when Friedmann decided to come to Toronto. In both articles he mentions the effective role that Canada played in the UN; he highlights the fact that from the beginning Canada “was and has remained an active and constructive member of the United Nations.”¹³³ Lester Pearson's role in the formation of NATO in 1948 and 1949 is similarly used as an example of Canada's capacity to affect

¹²⁹ *Supra* note 31.

¹³⁰ Allan Gottlieb & Charles Dalfen, “National Jurisdiction and International Responsibility: New Canadian Approaches to International Law,” in Yves Le Bouthillier *et al.* eds., *Selected Papers in International Law: Contribution of the Canadian Council on International Law* (The Hague: Kluwer, 1999).

¹³¹ *Ibid.* at 5.

¹³² *Ibid.* at 14.

¹³³ *Supra* note 1 at 78

change as a result of her middle power position.¹³⁴ He also cites Pearson for his role in implementing the UNEF, which was constituted to diffuse the Suez Canal crisis of 1956.¹³⁵

Friedmann's optimistic faith in Canada's role as a middle power is equalled by the fullness with which he sees Canada epitomizing modern international law:

There is perhaps no other state in the world which expresses as vividly and as poignantly as Canada the realities of modern international law, and in particular the interaction between the three different levels on which international legal relations develop in our time: the universal international law of co-existence and co-operation, expressed by the general international law of customs and treaties; second, non-universal—usually regional—international law, developing between states linked by certain common defence, political and other interests . . . and thirdly, bi-lateral international law.¹³⁶

The light in which Friedmann paints Canada culminates in a flattering portrait, particularly of Canada in the late 1940s when Friedmann would have been considering coming to Toronto. This suggests that Friedmann may have been drawn to Canada because of the political climate of the day, the work that Canada was engaged in at the UN and at the international level in general; these instances alongside his personal interest in Canada because of the way she “vividly” and “poignantly” expressed international law could very well have been a motivating factor in his decision to come to Canada and, at a minimum, if they were not formed prior to his time in Toronto, were most likely formed while he was at the University.

VII. Cooperation as Opposed to Nationalism: a non-Canadian Approach to International Law

¹³⁴ *Ibid.* at 79.

¹³⁵ *Supra* note 123 at 36.

¹³⁶ *Supra* note 1 at 78.

In the quotation at the beginning of this paper, Friedmann outlines his belief that scholars should not over-emphasize nationalist approaches to International Law. Friedmann sought to build cooperation between nations; cooperation was a basic element of his approach to international law. This emphasis on cooperation rather than state-centeredness and coexistence translated into Friedmann's desire that countries not over-emphasize their national approaches to international law. Rather, Friedmann hoped that we would "think not of a specifically Canadian approach to law . . . but of the richness and diversity of the contributions that Canada has made."¹³⁷ This is not a unique take on what the Canadian approach to international law should be. Rather, as Karen Knop elucidates in "Canadian Approaches to International Law?" many Canadian international lawyers "are so resolutely internationalist that they are loathe to examine whether we have our own approaches" which ultimately has led to the ironic situation that the Canadian approach to international law is the absence of a national approach.¹³⁸ Friedmann seems to suggest that he believes the Canadian approach is an internationalist one in that Canada itself and the representations she has made represent "the values on which a progressive international law must be built."¹³⁹

In his piece, "Canadian Approaches to International Law," MacDonald considers whether there is a distinctly Canadian approach to international law, and concludes that there is not yet any discernible Canadian style: "there is no Canadian 'school' with an identifiable leader."¹⁴⁰ He then goes on to examine reasons for this paucity of a national

¹³⁷ *Supra* note 1 at 83.

¹³⁸ Karen Knop, "Canadian Approaches to International Law?" (2005) 31:2 *Canadian Council on International Law Bulletin* 8.

¹³⁹ *Supra* note 1 at 83.

¹⁴⁰ Ronald St. John MacDonald, "Canadian Approaches to International Law," in Ronald St. John MacDonald, *et al.*, *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 945.

approach by looking at the way that international law has been taught in Canada, and the lack of a national philosophy. Indeed, one thing he pinpoints as distinctly Canadian is the lack of a coherent national philosophy upon which a national style of approaching international law could be based.¹⁴¹ While Friedmann's view of what the Canadian approach to international law should be is similar to what MacDonald highlights, in that they agree there is no distinctly nationalist Canadian approach and that the Canadian approach is more of an international one, Friedmann would not have considered it particularly productive to spend too much academic energy speculating on whether or not a country has a distinctly national approach to international law, and whether one will develop.

Conclusion

This paper has sought to examine Friedmann from a different perspective than he is typically viewed. An examination of his life and scholarship reveals the richness and diversity of his interests, demonstrating that he was not merely an international law scholar who worked at Columbia University. On the contrary, he explored many areas of law from private law when he was in Europe, to administrative law when he taught at Melbourne, through to comparative law at Toronto. Meanwhile he sustained interest in world politics and jurisprudence throughout his life, and underlying all these areas was a continued interest in international law which re-surfaced when the opportunity arose at Columbia.

The University of Toronto law school was in its infancy when Friedmann arrived with his eclectic background and international renown. This paper has demonstrated that both the University and Friedmann projected qualities onto each other that did not come

¹⁴¹ *Ibid.* at 947.

through in reality in the way they hoped. At a minimum, though, Friedmann brought to Toronto his exotic other-ness alongside his interest in theory—jurisprudence and comparative law in particular—and Toronto allowed Friedmann a somewhat flexible teaching environment in which to develop his scholarship. Canada would ultimately reappear in Friedmann’s life by featuring prominently in his vision of the International Legal Order.

It is difficult to assess the exact impact that Toronto had on Friedmann, as there are few sources which speak directly to these five years of his life. This paper has looked at some of the ways in which Toronto and Friedmann intersected, and although there are more interconnections to be explored, one thing remains clear, he did maintain a good relationship with the University after he moved on to Columbia, as is illustrated by the following example. When Martin Friedland was Dean of the law school there were arrangements for Friedmann to visit the Faculty in December of 1972 to deliver some lectures. Friedland had also made plans with the University of Toronto Press to have the lectures published,¹⁴² but this was not to be. Friedmann was murdered in February of 1972. Coincidentally, and fitting to this paper, one of his last works to be published was his chapter on Canadian Approaches to International Law in the *Canadian Perspectives* book.

¹⁴² Letter from Martin Friedland (15 Nov. 2006).

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