

1-1-1962

Freedom and the Law. By Bruno Leoni.

Arthur S. Miller

The National Law Center of The George Washington University

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Law and Society Commons](#)

Recommended Citation

Arthur S. Miller, *Freedom and the Law. By Bruno Leoni.*, 11 Buff. L. Rev. 424 (1962).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol11/iss2/11>

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact law scholar@buffalo.edu.

BOOK REVIEW

FREEDOM AND THE LAW. By Bruno Leoni. Princeton, New Jersey: D. Van Nostrand Company, Inc., 1961. Pp. 204. \$6.00.

An Italian lawyer has written a book which exemplifies in classic form the operation of "the fallacy of 19th-centuryism." That is the fallacy—all too evident today, as witness, for example, the activities of those political groups often called the "Far Right"—which is manifested by the notion that institutions suitable for one period in history can be resurrected, dusted off, and made viable for a later period in which the social conditions are fundamentally different.¹ Despite the numerous adherents to that sort of "thinking," its faulty nature would seem, on reflection, to be obvious. Perhaps the tenacity with which some hold to it may indicate that it serves in part to satisfy deep-felt psychological yearnings—for certainty, for a "golden age," for simpler times—during an era of rapid, even cataclysmic social change. Technological change, which is creating a "new society,"² manages to drive some back into a search for the womb.

Bruno Leoni proposes that the sphere of legislation be substantially restricted to limits defined by the "golden rule." He would replace law as legislation with a system of law as something discovered and applied by judges independently of the will of the official authority and expressing a "common will." In short, he calls for a return to a "common law" system of jurisprudence. Since this is seriously propounded by a person who is Professor of Legal Theory and the Theory of the State at the University of Pavia, Chairman of the Faculty of Political Science, Director of the Institute of Political Science, editor of the quarterly review *Il Politico*, President of the Center of Methodological Studies in Turin, a practicing lawyer, a contributing columnist to the Italian financial newspaper *24 ore*, and a sometime Distinguished Visiting Professor at the Thomas Jefferson Center for Studies in Political Economy at the University of Virginia, the book deserves attention. The danger of legislation and of identifying law-creation with the legislative process, to Leoni, is that it leads ineluctably to the diminution of individual freedom. Perhaps the flavor of his message may be derived from the following brief quotes:

The paradoxical situation of our times is that we are governed by men, not, as the classical Aristotelian theory would contend, because we are not governed by laws, but because we *are*.³

My earnest suggestion is that those who value individual freedom

1. For a statement of this fallacy in a different context, see Miller, Foreign Trade and the "Security State": A Study in Conflicting National Policies, 7 J. Pub. L. 37, 91 n. 233 (1958).

2. Compare Carr, *The New Society* (1951) with Seidenberg, *Anatomy of the Future* (1961) and Drucker, *The New Society* (1950).

3. P. 9.

should reassess the place of the individual within the legal system as a whole.⁴

. . . A legal system centered on legislation resembles in its turn . . . a centralized economy in which all the relevant decisions are made by a handful of directors, whose knowledge of the whole situation is fatally limited and whose respect, if any, for the people's wishes is subject to that limitation.⁵

Unless I am wrong, there is more than an analogy between the market economy and a judiciary or lawyers' law, just as there is much more than an analogy between a planned economy and legislation.⁶

The problem of our time . . . seems to be . . . that of getting rid of a host of harmful or at least useless rules because of a tremendous glut and, so to say, an indigestible surfeit of them.⁷

The Leoni prescription, thus, is the analog of that school of current economic thought which travels under the banner of "neo-liberalism."⁸ Since a number of practitioners of this discipline are located there, perhaps this could be termed the University of Chicago School of Economic Liberalism. *Freedom and the Law* is, in that connection, one of a series—the William Volker Fund Series in the Humane Studies—one of the other volumes of which having been written by the well-known neo-liberal, Ludwig von Mises.

In the somewhat larger context, then, of the neo-liberal posture, what might be said about Bruno Leoni's proposal? The brief compass of a book review permits only the listing of several remarks in somewhat dogmatic form. These include the following:

1. "Neo-liberalism" is an example of how far the human mind can go in seriously proposing public policies without reference to the underlying social structure. Leoni's prescription has some limited interest as an exhortation. But since it does not take into consideration either the fact that policy cannot be divorced from the social milieu of the era or the fact that policy is a continuing process and not something that can spring Minerva-like into full bloom, it does not go beyond its hortatory nature.

2. Leoni takes the common-law system as he believes it was historically and equates it with the maximization of human freedom. But it is pertinent to ask: Freedom for whom? We have long known that "necessitous men are not free men." During the 19th century—the heyday of the common law—the majority of men were necessitous.

3. Human affairs are moving in the direction of greater and greater organization;⁹ the principle of organization seems to be all-pervasive. Technology

4. Ibid.

5. Pp. 21-22.

6. P. 22.

7. P. 23.

8. See Hanslowe, *Neo-liberalism: An Analysis and Proposed Application*, 9 J. Pub. L. 96 (1960).

9. See Seidenberg, *Post-Historic Man* (1960); Boulding, *The Organizational Revolution* (1953).

is giving added impetus to that trend. Just as the industrial revolution spelled the doom of the historical common-law system, so too is the present-day scientific revolution creating new imperatives making it unlikely at best that any reversion such as Leoni advocates will come about. The implication of technology is the planned society—planning in fact is made necessary by technology¹⁰—and the thought of judges doing that planning is ludicrous.

4. To expect courts to save us from our follies is, as Learned Hand reminded us three decades ago,¹¹ fatuous. Judges are not supermen and are not likely to have that type of expertise so greatly needed in a technological society.

5. There *is* a role for the courts, and particularly for the United States Supreme Court, but it is not that of creating a body of law in the sense of a consistent corpus of principle. (The decisions of administrators are far more important in this respect—more important in the number of decisions and more important in the intrinsic significance of decisions—than are those of judges. True today, when the “administrative state” is coming into full swing, it is likely to be even more so in the future.) The historical task of courts is being changed. It is not yet clear just what it will be in a full-blown technological state. Possibly the United States Supreme Court will find a place as the “national conscience” of the people, setting norms toward which the people might strive.¹²

6. It is difficult to understand how anyone can write a book about freedom and law in these days and make no reference to the threat of war or the possibility of thermonuclear holocaust or to the population explosion so evident in the poor nations (those which are now euphemistically called “less developed”). The vacuum in which Leoni makes his prescription is almost complete; it is entirely devoid of reference to most of the hurricane winds of change and turmoil that are sweeping the world today.¹³

I do not mean to denigrate what appears to be a serious proposition. Much of what Leoni says no doubt makes sense. Certainly his call for a higher degree of human freedom should find a ready response. But the problem of freedom in the modern era is far more complex than he believes¹⁴ and it is not likely that books such as his do much to further the cause of human liberty. The talents of the neo-liberals could well be turned to more useful and meaningful tasks, such as analysis and explication of means by which the social conditions could be established which would permit the flowering of freedom throughout

10. See Mayo, *The New Technology and National Goals: Some Implications for Legal-Policy Decision Making*, 37 *Notre Dame Law*. 33 (1961).

11. See Hand, *The Contribution of an Independent Judiciary*, in Hand, *The Spirit of Liberty* 181 (Dilliard ed. 1952).

12. Cf. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 *Geo. Wash. L. Rev.* — (1962).

13. See, e.g., Ward, *The Rich Nations and the Poor Nations* (1962).

14. Leoni might well read Handlin & Handlin, *The Dimensions of Liberty* (1961); Arendt, *Between Past and Future* (1961); Bay, *The Structure of Freedom* (1958).

BOOK REVIEW

the world. Exercises such as *Freedom and the Law* add little to our understanding and offer nothing to the fuller realization of the goal of freedom.

ARTHUR S. MILLER

Professor of Law

The National Law Center of

The George Washington University