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BOOK REVIEW


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 yearings—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.

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).


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 economical 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.
6. P. 22.
7. P. 23.
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 sci-
cient revolution creating new imperatives making it unlikely at best that any
reversion such as Leoni advocates will come about. The implication of tech-
nology is the planned society—planning in fact is made necessary by tech-
nology\textsuperscript{10}—and the thought of judges doing that planning is ludicrous.

4. To expect courts to save us from our follies is, as Learned Hand re-
minded us three decades ago,\textsuperscript{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 tech-
nological 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.\textsuperscript{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 devel-
oped”). 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.\textsuperscript{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 believes\textsuperscript{14} 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

\textsuperscript{10} See Mayo, The New Technology and National Goals: Some Implications for
of Liberty 181 (Dillard ed. 1952).
\textsuperscript{12} Cf. Miller, An Affirmative Thrust to Due Process of Law?, 30 Geo. Wash. L.
\textsuperscript{14} Leoni might well read Handlin & Handlin, The Dimensions of Liberty (1961);
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.

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