BRUNO LEONI'S LEGACY AND CONTINUED RELEVANCE

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Abstract

In his famous book, *Freedom and the Law*, originally published in 1961, Italian lawyer-economist Bruno Leoni posed the question of whether over the long run a society and legal system premised primarily on legislative law-making could sustain a system of individual liberty, or whether such a system required a common law-style foundation to support it. In this article I evaluate Leoni's challenge and find that his predictions about the nature of a legislative-centered legal system not only are more relevant than ever, but that recent tendencies toward extreme and arbitrary law-making by executive edict are consistent with the trends and intellectual principles that Leoni identified over 50 years ago. By identifying the underlying jurisprudential theories that generated the current state of affairs, Leoni's warnings are even more relevant today than ever before.

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This year would have been Bruno Leoni's 101st birthday but for his tragic murder in 1967.[1] Leoni was an Italian lawyer *cum* academic who was one of Europe's leading classical liberal thinkers in the post-War era. Friend to the leading classical liberals of the age—counting Hayek, Buchanan, and Alchian as friends—Leoni was not only a pioneer of law and economic thought but also an early adopter of public choice theory (Kemp 1990). Despite this, Leoni's legal philosophy is largely ignored today.

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[1] Leoni, as an attorney, looked after the interests of the family of a friend of his. He discovered that one of his friends' employees was stealing from him. On the evening of November 21, 1967 he went to see the employee and told him to return the money or be denounced. The employee responded by killing him. *L'incredibile storia di Bruno Leoni raccontata da sua figlia Didi*, in Il Foglio, November 30, 2007 (translated *The incredible story of Bruno Leoni told by his daughter Didi).*

To examine Leoni's continuing relevance to the law, we must accept the provocative statement that Leoni makes in his introduction to *Freedom and the Law*:

> My earnest suggestion is that those who value individual freedom *should reassess the place of the individual within the legal system as a whole*. It is no longer a question of defending this or that particular freedom—to trade, to speak, to associate with other people, etc.; nor is it a question of deciding what special "good" kind of legislation we should adopt instead of a "bad" one. (Leoni 1991, p. 11).

Instead, he continues, "It is a question of deciding whether individual freedom is compatible in principle with the present system centered on and almost completely identified with legislation. This may seem like a radical view; I do not deny that it is. But radical views are sometimes more fruitful than syncretistic theories that serve to conceal the problems more than to solve them." (Leoni 1991, p. 11).

This article takes up Leoni's radical challenge and asks: Is individual freedom compatible in principle with a legislation-centered system? Even more so, is individual freedom compatible with a system centered on executive fiat ("rule-making" hardly being an accurate term to capture the arbitrary edicts emanating from the Executive Branch today)?

The essence of Leoni's argument is a contrast between law-making by legislatures versus law-making via a common law-like process, which he describes broadly as "judicial decisions, the settlement of disputes by private arbiters, conventions, customs, and similar kinds of spontaneous adjustments on the part of individuals." (Leoni 1991, p. 7). In articulating this understanding of law, Leoni anticipates the arguments made by Hayek in *Law, Legislation and Liberty* ("LLL") a decade later. Leoni and Hayek's approaches consider common law as a spontaneous order process,[2] as distinguished, for example, from other philosophies that see the common law process through a lens of legal positivism, effectively treating judges as functionally equivalent to legislators. In fact, there is more than just a similarity between Leoni and Hayek's thinking on this point; it appears that it was Leoni that introduced Hayek to the common law, which then became the heart of LLL (Shearmur 1996, p. cite). In so doing, of course, Leoni also introduced Hayek to his distinctive interpretation of the common law, as an alternative to the modern realist-positivist view. Indeed, the novelty of the focus on the common

[2] The idea of a "spontaneous order", i.e. an order which emerges as result of the voluntary activities of individuals and not one which is created by a government, is a key idea in the classical liberal and free market tradition (Barry 1982).

law in LLL is striking: up until that time, the common law gets very little mention in either *The Road to Serfdom* or *The Constitution of Liberty* both of which focus on the formalist Rechsstaat notion of the rule of law. Then, the common law appears full-blown in LLL, with virtually no prior mention, and with a clear similarity to Leoni's version (Hayek 1973).

What happened during the period between *Constitution of Liberty* and *Law, Legislation, and Liberty* to transform Hayek's thinking so dramatically? By all indications, the intellectual change occurs from a single, identifiable influence: Hayek met Leoni and Leoni inculcated him to the importance of the common law.[3] In *Freedom and the Law*, Leoni grounds his understanding of law in his interpretation of the Roman jurisconsult. He compares the law-making process by the Roman jurisconsults to the common law judge that Hayek describes in LLL. Indeed, Leoni uses the Roman law made by the jurisconsults and English common law essentially interchangeably as an analytical matter, so that the structure he uses in describing Roman law developed by the jurisconsult is effectively and essentially the same process that Hayek later identifies as distinctive in the common law process under the English common law.

Law for Leoni, as made by the jurisconsults and the common law judges is a spontaneous order process focused on the way in which the law emerges from the resolution of discrete disputes between private individuals and an ongoing conversation among different judges to determine what the law should be. As Leoni writes, "[I]t means that the whole process can be described as a sort of vast, continuous, and chiefly spontaneous collaboration between the judges and the judged in order to discover what the people's will is in a series of definite instances—a collaboration that in many respects may be compared to that existing among all the participants in a free market." (Leoni 1991, p. 22).

For Leoni, the significance of Roman law (and later English common law), and its unique compatibility with individual liberty, stems from distinctive characteristics of the common law

[3] "The change in Hayek's views can in my view be best seen as a result of the impact of Bruno Leoni." (Shearmur 1996, p. 88). Or, more precisely, Leonard Liggio and Tom Palmer observe that Hayek's ideas on the nature of spontaneous order influenced Leoni and Leoni in turn influenced Hayek in analyzing the common law as a spontaneous order. (Liggio & Palmer (1966, p. 716 n. 11). F. A. Hayek and Bruno Leoni first met at the University of Chicago in 1953 (Hayek 1967). In a letter from Hayek to Leoni written on April 4th, 1962 Hayek says that he not only enjoyed Freedom and the Law, but that it had given him new ideas (Shearmur 1996). It appears that Hayek did not attend Leoni's lectures at the Freedom School in 1958 but read *Freedom and the Law* when those lectures were transcribed and became the basis for the book. Liggio and Palmer report that Hayek discussed Leoni's ideas at a seminar provided at the University of North Carolina in 1959, shortly before *The Constitution of Liberty* was published. (Liggio & Palmer 1988, p. 716 n.11).

lacking in the legislative process. At the heart of his model is the importance of what he calls "law as individual claim."[4] What does he mean by that and why is it significant?

Common Law Liberty

For Leoni, the idea of "law as individual claim" means that the law essentially leaves individuals alone, unless they seek intervention by a judge to resolve a dispute that has arisen between two private citizens. Significantly, that particular ruling is technically applicable only to those two parties (although by the force of precedent it may by extension potentially be invoked by other parties as applicable to their situations). He states "[J]udges or lawyers or others in a similar position are to intervene only when they are asked to do so by the people concerned… [and] the decision of judges is to be effective mainly in regard to the parties to the dispute, only occasionally in regard to third persons, and practically never in regard to people who have no connection with the parties concerned." (Leoni 1991, p. 22).

Thus, you can go about your business, and if everything works satisfactorily, you never have to call in the state. What this means, Leoni observes, is "that the authors of these decisions have no real power over other citizens beyond that which those citizens themselves are prepared to give them by virtue of requesting a decision in a particular case."

What about precedent—doesn't the rendering of a decision by one judge mean that the resolution of a dispute does in fact impact and bind third parties through an obligation of other judges to apply the same principle to later cases? Not as Leoni sees it. Embedded in the nature of the traditional common law—and this is an idea that was later developed by economists Robert Staaf and Louis De Alessi[5]—is the ability of private parties to contract around the common law rules. Thus, the whole point of common law rules are that they are there for private parties to use to coordinate their affairs; but where the rules are not useful to that end, the parties are at liberty to ignore them and create their own rules by contracting around them. This is the essence of his idea that the common law is a "spontaneous order" analogous to the market process: there is sort of back and forth collaboration between individuals asserting individual claims, judges resolving those claims and improving the law to better meet specific demands. In turn, those resolutions feedback into individual's decision-making and either promote or undermine private

[4] This view was developed by Leoni in lectures given at the Freedom School Phrontistery in Colorado Springs, Colorado, December 2 to 6, 1963. Although not included in the original edition of *Freedom and the Law*, it was added in the 3d edition of the book along with several other previously unpublished lectures.

[5] They argue instead that the virtue of the common law is not in its promotion of efficiency, but rather that it provides parties with a stable institutional framework of default rules and then parties to voluntarily contract around those rules, thereby respecting subjective cost. See on this De Alessi & Staff (1989, 1991).

expectations and private ordering. Moreover, judges can be seen as sort of entrepreneurs, proposing different rules in order to see which rules fit individual expectations most efficaciously.[6] From this enterprise of private, uncoordinated litigants seeking to vindicate their individual claims, an entire legal system springs up. In the common law the judges played the key role; for Leoni it was the jurisconsult under the Roman law who performed that function.

Legislation, by contrast, is enforced on everyone, whether you like it or not, and legislative commands are binding regardless of whether sensible, persuasive, or conducive to the needs of those bound by it (Leoni 1991, p. 100). Moreover, legislation typically is not animated by a desire to recognize and assist private parties in coordinating their individual affairs; it is intended by the state to create and impose a new state of affairs on private citizens that would not emerge from voluntary interaction. For instance, you and I could enter into a contract for me to have you work at my shop. We could contract about the terms—wages, benefits, hours—and everything else, in a way that makes each of us happy and is mutually beneficial. Assume now that the legislature passes a law that prohibits you for working for any wage rate below a certain dollar amount. The very definition of a minimum wage is that I am not allowed to contract with you for less even if both of us believe the contract would be mutually advantageous. Thus, in this example, legislation is a barrier to private ordering and mutually-advantageous exchange. Rather than law facilitating our exchange and allowing us to pursue our desired ends, legislation becomes the vehicle for dis-coordination and an obstacle to pursuit of our mutually-advantageous plans. In turn, Leoni (an early adopter of public choice theory) observes that this creates certain incentives in the legislative process for rent-seeking As Leoni observes:

> In this way, legislation has undergone a very peculiar development. It has come to resemble more and more a sort of diktat that the winning majorities in the legislative assembly impose upon the minorities, often with the result of overturning long-established individual expectations and creating completely unprecedented ones. The succumbing minorities, in their turn, adjust themselves to their defeat only because they hope to become sooner or later a winning majority and to be in the position of treating in a similar way the people belonging to the contingent majority today. (Leoni 1991, p. 13).

It is this notion of the Roman law and the English common law as emerging as a by-product from this private effort of individuals to vindicate their rights that leads Leoni (presaging Hayek)

[6] This emergence of spontaneous order in law potentially implies some degree of competition among courts and judges. (See Stringham & Zywicki 2011; Zywicki 2003).

to observe that law in this sense is something to be discovered, not something to be made: “Both the Romans and English shared the idea that the law is something to be discovered more than to be enacted and that nobody is so powerful in his society as to be in a position to identify his own will with the law of the land”— unlike a legislature, or apparently now President, who claims the power to make or unmake laws with the stroke of a pen.

Discovering the Law

And what does Leoni mean by the notion that the Roman magistrates “discovered” the law instead of “making” it? He writes:

> The Roman jurist was a sort of scientist: the objects of his research were the solutions to cases that citizens submitted to him for study, just as industrialists might today submit to a physicist or to an engineer a technical problem concerning their plants or their production. Hence, private Roman law was something to be described or discovered, not something to be enacted—a world of things that were there, forming part of the common heritage of all Roman citizens. Nobody enacted that law; nobody could change it by any exercise of this personal will. This did not mean absence of change, but it certainly meant that nobody went to bed at night making his plans on the basis of a present rule only to get up the next morning and find that the rule had been overturned by a legislative innovation. (Leoni 1991, p. 83).

This attitude of judges as law “discoverers” rather than law “makers” thus speaks to a certain humility in law-making conducive to the preservation of liberty that distinguishes judges from legislators that create law.

This difference between the short-term certainty of legislation with the long-term certainty of common law is the crucial argument for Leoni as to why he believes that in the long run a system centered on legislation is fundamentally incompatible with the maintenance of a free society. Partly it is the practical realities of the political process that legislation responds to the demand of rent-seekers and other parties to oppress or plunder nonconsenting losers in the political process. Yet it also has to do with the inherent instability of the legislative process and the relative predictability of the common law process, properly understood. This contrasting of public choice

analysis of the legislative process with a law and economics analysis of the common law process is Leoni's greatest contribution to jurisprudence.[7]

Leoni makes the unremarkable observation that for the free market to function effectively it is necessary for private individuals to have a stable legal framework in which to plan and be confident that their plans will be carried through to fruition. Moreover, for individuals to be free from oppression it is necessary for government to announce their rules in advance, so that individuals can know their permitted range of freedom (what is often, although imprecisely, referred to as the "rule of law"). For many modern thinkers this primacy on predictability and certainty has led them to advocate for greater legislation, as well as the need to spell out the rules in precise detail. In theory, legislation can promote predictability by expressing very precise instructions through detailed directions to private parties.

But Leoni challenges this notion that simply because statutory law can be more precise in the short-run that it is more predictable. He argues not only that that it is common law, not legislation, that is more predictable, certain, and conducive to liberty and the rule of law, but that the superiority of the common law on this point derives from its unwritten nature and the "discovery" process of judges.

Understanding why Leoni (and Hayek later) believes the common law to be more certain and predictable—despite its unwritten characteristics—derives from recognizing that the common law is a conceptual system, as opposed to legislation, which is a verbal system of commands. What does that mean? The underlying "law" to be discovered, for both Leoni and Hayek, is a sense of shared concepts that emerge from this spontaneous collaboration among private litigants, judges, and citizens that give rise to a certain shared sense of law and justice. It is the underlying substantive notions of shared expectations of right and wrong, as well as the "artificial logic" of the common law that creates legal concepts such as consideration in contract, duty and causation in tort, and rules of conveyance in property, that constitute the law (Leoni 1991). While these underlying norms are always changing gradually and often imperceptibly, over time they are relatively constant; and when they do change, it is in a gradual and predictable manner that comports with individual expectations, even as those expectations may also change over time. Thus, the common law is a conceptual system for which the articulations of judicial decisions (and rule-making as a by-product) are verbal attempts to articulate the underlying

[7] Indeed, Leoni's insight predates Richard Posner's similar distinction in *Economic Analysis of Law* by over a decade. (See Posner 2003, p. 532) ("Although the correlation is far from perfect, judge-made rules tend to be efficiency-promoting while those made by legislatures tend to be efficiency-reducing.").

concepts. Yet it is the concepts of the common law that are the law, not the precise linguistic formulation of judges applying those concepts to particular disputes. Further, it is from this that Leoni says that the common law, although lacking precise verbal formulations, is more predictable. Moreover, because this law exists outside the creation of judges, legislatures, or anyone else, it is largely insulated from the distorting rent-seeking and other distortions inherent in legislation.

In describing the law in this manner, Leoni's views are distinct from modern thinkers, who under the sway of legal positivism have come to think of the precise verbal articulations by judges as being the law. Modern scholars thus analogize common law judges to legislators creating law through their verbal commands. According to this understanding of the legal process, judicial opinions should be read like statutes—the verbal formulations matter more than the unexpressed concepts that those verbal formulations are attempting to express.

Having contrasted the ideal forms of legislation and common law, Leoni also admits that this jurisprudential revolution has taken its toll on the common law, such that today's common law has taken on many of the unfortunate characteristics of legislation. He writes "On the other hand, it cannot be denied that the lawyer's law or the judiciary law may tend to acquire the characteristics of legislation, including its undesirable ones, whenever jurists or judges are entitled to decide ultimately on a case." (Leoni 1991, p. 24). Indeed, he refers to the fact that for at least the first millennium of the common law there was no concept of binding precedent or "stare decisis" (i.e., that one ruling makes the law and is binding on subsequent courts).[8] (Leoni 1991, p. 86). Indeed, Leoni says that common law judges were more like "spectators" observing what private citizens have created as their own law than "actors in the law-making process." He writes, "Private citizens were on the stage; common law was chiefly just what they commonly thought of as being law." (Leoni 1991, p. 86). In this sense, judges were analogous to grammarians "epitomizing" the rules of language developed spontaneously by the people or a statistician "who makes records" describing the prices and quantities at which individuals trade in a market.[9]

Leoni singles out for specific criticism the establishment of "supreme courts" that have the ability to render definitive judgments binding on other courts and which results in the

[8] "[T]here were so many courts of justice in England and they were so jealous of one another that even the famous principle of the binding precedent was not openly recognized as valid by them until comparatively recent times. (Leoni 1991, p. 86).

[9] Hayek similarly analogizes the role of the judge in the common law process to a grammarian or prices in a market process. (See Zywicki & Sanders 2008).

"imposition of the personal views of members of those courts, or of a majority of them, on all the other people concerned whenever there is a great deal of disagreement between the opinion of the former and the convictions of the latter." (Leoni 1991, p. 24). Nevertheless, he argues that this bastardization of court processes into quasi-legislative outcomes is not an inevitable evolution of judicial law-making but can be prevented with proper diligence and institutional design.

Lawful Certainty

Leaving aside the more-recent of the common law and returning to Leoni's classical vision, he thus provides his great insight: a crucial distinction between what he calls the "short-run" certainty of the law, embodied in legislation, and the "long-run" certainty of the law promoted by the common law. So he writes,

> While legislation is almost always certain, that is, precise and recognizable, as long as it is 'in force,' people can never be certain that the legislation in force today will be enforced tomorrow or even tomorrow morning. The legislation-centered legal system, while involving the possibility that other people (the legislators) may interfere with our interactions every day, also involves the possibility that they may change their way of interfering every day. As a result, people are prevented not only from freely deciding what to do, but from foreseeing the legal effects of their daily behavior.

Moreover, because legislation changes unpredictably and largely arbitrarily in response to shifting political coalitions, changes in legislation are often abrupt, discontinuous, and illogical, in that their justification derives not from their reason or good sense, but simply the relative influence of competing interest groups and unintended consequences. As a result, private citizens cannot even easily project the future direction of legislative change and plan accordingly. Indeed, this unpredictable and unprincipled nature of legislative change is a defining characteristic of law-making in recent years. Indeed, even duly-enacted legislative mandates (such as deadlines imposed by the Affordable Care Act) have been suspended or waved aside by the President (and presumably could be reinstated equally arbitrarily) by processes as irregular as blog posts or press conference announcements that certain laws simply would not be followed.

Yet it is even worse than Leoni feared. While Leoni expressed concern that legislators might "change their way of interfering every day" could he have even imagined today's world in which the President of the United States asserts the authority to write or re-write any law and

effectively retroactively veto laws by refusing to enforce them or defend them in court when challenged. Not only can legislatures potentially change the law from day-to-day, but today the law can seem to vary almost hourly.

Fifty years ago, Bruno Leoni observed that "Sometimes the radical observations illuminate things that are otherwise obscured," namely whether freedom could survive in a system centered on and almost completely associated with a legal system premised on legislation. What would Leoni think of the current system of lawmaking not only by legislation—which itself has unleashed an orgy of unprecedented special-interest rent-seeking—but a system degraded to lawmaking by blog post and press release? While he certainly would be dismayed—as is any person concerned about the rule of law and constitutional government would be dismayed, of course—I suspect that Leoni would not necessarily be surprised. He foresaw 50 years ago the principles underlying the path we were on, and he pointed the direction in which we were headed. He warned us that it may not look this bad today, but the logic of our descent from the rule of law is inexorable.

If we return to Leoni's opening question - Is individual freedom compatible in principle with our present system of legislation as law? We must acknowledge this has become an even more relevant and pressing question today than it was 50 years ago.

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