Freedom Through the Common Law

Freedom and the Law, by Bruno Leoni.

In the realm of theory, the defense of individual liberty has been all but abdicated to economists. Lawyers and political scientists prefer heated debates as to which unit of government should regulate the lives of the citizenry—federal or state, executive or legislative. In Freedom and the Law, Professor Bruno Leoni, a practicing lawyer and chairman of the faculty of political science at the University of Pavia, has challengingly raised the crucial question and attempted an answer: how can the skill of the legal theorist and legal historian be used to maximize individual freedom in society.

While other theorists, notably Professor F. A. Hayek, have urged that liberty is maximized when government coercion is restricted to legislative enactments which are certain, general, and equally applied, Leoni finds the major threat to our liberty in legislation itself. He would restrict legislation within the narrow limits of a modified Confucian "silver rule" which would allow legislative prohibition of conduct only if all persons would want the state to prevent this from being done to themselves. The rest of human conduct should be regulated either by non-governmental means such as custom, convention, tacit rules, spontaneous and voluntary adjustments among individuals, and private arbitration, or by the common law.

He first turns to a semantic analysis of the terms "freedom" and "constraint." While he points to certain problems apparent to the legal mind but usually ignored by the economist and political scientist, he is covering well-trod territory and comes to familiar conclusions. The startling departure of the book is his preference for the common law as opposed to legislation. Economic decisions in a free enterprise society, as well as customs, language, and fashions arise from what Leoni refers to as a true "common will," that is, they arise from a spontaneous consensus without "coercion" of a dissenting minority (one can speak Esperanto or wear a toga without being thrown in jail). Likewise he contends that the common law allows for such voluntary and spontaneous adjustments without the coercion of minorities which is inevitable with legislation.

There is much to be said for this contrast between common law and legislation, and libertarian philosophers should develop it further. The common law is an uncodified judge-made law in which each new decision is to a large degree based on previous decisions. As a result the law changes gradually, often almost imperceptibly. Consequently individual decisions can be made with relative certainty that the law will not change to upset expectations. Further, the law evolves by a slow trial and error procedure in which unsuccessful experiments can be rejected in subsequent decisions. The common law has been to a large extent the embodiment of customs and institutions which have in turn grown up as a result of spontaneous and voluntary interactions, thereby expressing a kind of "common will" of society. Just as the free market adjusts to the infinite number of factors which the economic planner cannot possibly foresee, the common law can gradually take into account these factors which the individual legislator can never foresee. An additional limitation on the common law is that an action must be initiated by a party directly involved; consequently a large area of conduct in which no one can complain of an
injury is beyond the reach of the common law courts.

However, the analogy between common law and free market is overdrawn, and Leoni's account of the workings of the common law is oversimplified. A common law decision is not a result of the voluntary cooperation of the parties involved, as he often seems to suggest. Unlike arbitration agreed to by both parties (which incidentally is an increasingly important method of settling disputes) one party forces the other into court. The judge's decision is as coercive and binding on the defendant as it would be if it were a result of legislation. If the common law rule is based on a custom to which he did not consent, he is not free to defy the custom with the same ease with which he can speak Esperanto or wear a toga. Further, the common law has often developed in a way so restrictive of individual freedom in some areas of contract law (especially usury) torts or civil wrongs (especially defamation), property law, and trade regulation that even from Leoni's viewpoint legislation liberalizing the common law rules would be desirable.

Leoni describes the common law judge's function as "discovering" the law, i.e., applying by logical deduction legal principles developed in previous cases. He also finds a virtue in the common law's ability to reflect the spontaneously developed customs and usages of the time. Actually, when customs and usages undergo change, these two goals may be in conflict. Freedom to "contract" or to do business may be enhanced by the judicial statesman who will bring the law in line with changed institutions by ignoring or twisting the logic of previous cases. A noted example is Lord Mansfield's incorporation of the "Law Merchant" or customary commercial practice into the English common law. While a close study of the relative values of legislation and common law in maintaining individual liberty would disclose many advantages in the common law, the differences are not sufficient to warrant the classification of the latter as a "voluntary" institution and representative of a "common will."

This minor criticism is not meant to detract from what is a pioneering theoretical work which is generally both lucid and tightly reasoned. The book is especially valuable because of the light it may shed on the alleged libertarian-conservative controversy. Although an eloquent representative of libertarian thought, Professor Leoni argues that a society of minimal government is necessary to allow the development and maintenance as well as the slow evolution of the delicate web of customs, usages, and conventions which the conservative sees as the basis of an ordered society. While Leoni would part company with the authoritarian conservative who is ever anxious to enforce majority (or even minority) customs and goals on dissenters most conservatives will find in Freedom and the Law a convincing case for freedom as the best means of utilizing the accumulated wisdom of the past.

Reviewed by Robert M. Hurt

Failures in State Medical Care


For some years the American Medical Association has had an Economic Research Advisory Committee which met regularly to discuss questions related to the establishment of various systems for providing medical care. From their discussions the present volume evolved. Under the editorship of