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Book Reviews

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BOOK REVIEWS

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

Professor Leoni's volume is the outgrowth of lectures delivered under the sponsorship of the Institute on Freedom and Competitive Enterprise at Claremont Men's College. It represents an attempt to combine the *laissez faire* concepts of F. A. Hayek and Ludwig von Mises in economics with a theory of free competition in law making. Proceeding upon the old and worn assumption that law is discovered and not made and defining freedom as the absence of constraint by others, including the public authorities, Professor Leoni launches an attack upon legislation as a source of law and as a base for legal system; this he accomplishes without maintaining that legislation should be entirely discarded. A legal system centered on legislation is compared with *"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."*[1] Hence, the author finds "more than an analogy between the market economy and a judiciary or lawyer's law" on the one hand, and "between a planned economy and legislation" on the other.[2]

Legislation is depicted as antithetical to freedom because it is constraint by authority, is inconsistent with "the rule of law," is uncertain because of frequent changes, and is based upon false theories of representation. Although Leoni agrees with Hayek that executive discretion or administrative justice is a threat to liberty and to Dicey's conception of the rule of law, he is convinced that legislation is a greater threat because the ephemeral nature of statutes makes impossible long-range planning by individual persons. Moreover, legislation rests upon the power of numbers and results in a legal war of all against all carried on by way of legislation and representation. The remedy for this situation is a return to a kind of folk law made by the people in contractual and other relations and interpreted and applied by judges as legal specialists in adherence to established precedents. Thus the people would make a law as they make language through the spontaneous processes of individual choices. Legislation would be retained only in cases where the issues involve everybody and cannot be resolved by "the spontaneous adjustments and mutually compatible choices of individuals."[3]

1. LEONI, FREEDOM AND THE LAW 21-22 (1961). (Emphasis added.)
2. *Id.* at 22.
3. *Id.* at 131-32.

In short Professor Leoni would return to custom and judicial decisions as the major sources of law to fit a free competitive economy which does not exist. Just how such a return would increase freedom in societies characterized by gigantic clusters of economic power and a corporate collectivism Professor Leoni does not demonstrate. By accepting the free competition of the market place as a reality, by unhistorically equating freedom with *laissez-faire* economics, and by identifying legislation as a cause rather than as an effect of social and economic conditions, Professor Leoni has contributed little in the way of understanding either to freedom or to law. By invoking and intermingling the divergent theories of Savigny, Ehrlich, the naturalists, and others he has provided intellectual coloring for ideas congenial to those men who have not adjusted to the nineteenth century and cannot accept the twentieth. Professor Leoni's volume will provide effective slogans for those who never critically read it and yawns of disbelief from those who do.

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THE RULE OF LAW. Edited by Arthur L. Harding. Dallas: Southern Methodist University Press, 1961. Pp. xi, 89. $3.00.

The *Introduction* to this diminutive volume contains some magnitudinous truths: "The threat to international peace is found in a philosophy of unlimited and illimitable sovereignty of the national political state"; such philosophy, "if unchallenged," would already have brought the world to anarchy; "order can be maintained as against anarchy" by "erecting an institution" of sufficient power; "such a step," although "in logic it need not have that effect," would probably result in "defeat of justice" and destruction of cherished satisfactions of living; the "idea of government under law" is "that political sovereignty is not an absolute thing," but "subject to limitations" which are "not simply the written constitutions," for they are embedded in human reason and "predicated upon the observable fact that the universe is one of order," hence "presumably there is an order for mankind as a part of the whole"; "the problem in the international community is not greatly different from that faced in the several political states" in recent centuries.

Clarification of thinking in regard to such vital matters is the declared objective of the four essays, based upon papers delivered at the 1960 Conference on Law in Society and now published as volume VIII of *Southern Methodist University Studies in Jurisprudence*: "Government

Under Law," by H. Malcolm Macdonald; "Government by Law," by Thomas F. Green; "Justice According to Law," by Arthur L. Harding; and "The Rule of Law Among Nations," by Schuyler W. Jackson.

In these essays the theory and practice of constitutional government is analyzed: law "emerges as a norm limiting the application of power," but popular defiance of law, for instance of Supreme Court decisions on integration, "strikes a mortal blow at the core concept of government under law." The "administrative welfare-state" imposes a strain on rule of law; a judiciary mindful of the limitations of its own functioning remains law's "securest haven." The nature of law is explored. The creative role of the courts is fully recognized. The concept of the positive law is explained and found to be the most useful legal theory for making clear the meaning of law. "But peace or public order is not the sole problem of societal living." Law "affords a mechanism by which men may seek consciously to meet new problems." "In law we erect an idea of justice," that "amalgam of values" to which law "must give effect." The concept of due process and the advantages and disadvantages of legislative, administrative, and judicial justice are competently dealt with.

The international aspect of rule of law is discussed from time to time in the essays. Taken as a whole the treatment seems unduly elementary and not free from error, as where the United States-Great Britain treaties of 1783 and 1794 are confused (p. 74), and where it is said (p. 79) that "the language of the so-called Connally Amendment was taken from the language of the [UN] charter's Article 2, section 7." Properly unveiling the fallaciousness of that amendment to the United States declaration accepting jurisdiction of the World Court, one of the essay writers, referring to the Senator from Texas, says: "I am not inclined to blame him . . . since my information is that he was not the author." It would be interesting did there follow revelation of the true responsibility for this outstanding disservice to the rule of law in the world.

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