



EXCHANGES, CLAIMS, AND POWERS: ABOUT BRUNO LEONI'S SOCIAL THEORY

*In this discussion, Carlo Lottieri, Professor of Philosophy of Law at the University of Verona, argues that the main intellectual contribution of the Italian jurist [Bruno Leoni](#) (1913-1967) is usually connected to his analysis of the opposition between legislation and law, between the order built by lawmakers on one side and the set of norms defined by jurists (as in Roman *jus civile*) or courts (as in ancient English common law) on the other.*

But at the core of his analysis is what he wrote about individual claims: the idea that the legal order is the outcome of specific individual activity when people demand something from the other members of society. However, he argues, that two aspects of Leoni's theory are quite problematic. First, a philosophy identifying law with the most common claims cancels the tension between legality and legitimacy, between what is and what should be.

Second, from the perspective of a general theory of law, it seems reasonable that human coexistence can be better explained if we introduce something more demanding than simple exchange and at the same time something less demanding but no less important, namely the permanent presence of violent behavior. Carlo is joined in the discussion by Boudewijn Bouckaert, professor emeritus of the Ghent University Law School in Belgium; Peter T. Leeson, the Duncan Black Professor of Economics and Law at George Mason University; and Edward Peter Stringham, the Davis Professor of Economic Organizations and Innovation at Trinity College.

EXCHANGES, CLAIMS, AND POWERS: ABOUT BRUNO LEONI'S SOCIAL THEORY

by Carlo Lottieri

The main intellectual contribution of Bruno Leoni is usually connected to his analysis of the opposition between legislation and law, between the order built by lawmakers on one side and the set of norms defined by jurists (as in Roman *jus civile*) or courts (as in ancient English common law) on the other.^[1] But at the core of his analysis is what he wrote about *individual claims*: the idea that the legal order is the outcome of specific individual activity when people demand something from the other members of society.^[2]

Following Leoni, the legal order is basically the outcome of the actions of individuals and their intersections.

Developing some lessons of the Austrian school of economics, he found a strong analogy between prices and

norms. Both are the results of many social exchanges in spite of the fact that in modern times they are frequently the simple consequence of political decisions: prices are too often influenced by tariffs and norms are mainly regulations imposed by a majority. But prices decided by authority can work only if they are not too far from the prices that would emerge on a free market, exactly as legislation is respected when it meets the shared expectations of people. So if in the market we exchange goods and services, in our interpersonal relationships we demand from others that they accept some fundamental rules.

For this reason, at the origin of the legal order, there are the actions of people making *claims* with respect to behavior they expect of other people, and Leoni thought that the "claim of each individual contains, at least in essence, the idea of an entire 'legal' order (intended as the convergence or exchange and at least as a connection of claims) which can more or less coincide with similar ideas contained in the essence of somebody else's claims."^[3]

Using metaphorical language, Leoni spoke of an *exchange of claims*, but we may be sure that in these social relations, at the origin of legal rules, we have really an exchange.

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But to what extent can this analogy between law and market can be accepted? When Leoni suggested that exchange (of claims) played in the legal field a similar role to what exchange (of goods and services) played in the economy, his intention was to emphasize the centrality of trade. And this raises many criticisms.

Underscoring the omnipresence of exchange, Leoni adopted a realistic perspective. Compared to gifts, exchange doesn't imply that human beings are devoted to generosity and altruism. On the market, people are able to interact even if they are self-interested. For this reason, anyone who wants to explain the emergence of social rules from actions based on solidarity can design a model useful to understanding familial and tribal microcosms, grounded on strong communitarian feelings, but he will be unable to justify the birth of wide and complex social interactions. Focusing attention on exchange, one will understand the legal order from its crucial element: the individual's activity. When people make claims, they act and interact; in this way they build rules and principles that help people to live together.

Leoni sought to elaborate a theory suitable for interpreting the entire society. His idea was that exchange is crucial not only for economic life, but also for law; moreover, he believed that exchange had a similar role in politics because the political order is a consequence of many negotiations in which each individual employs his small or big power.

For this reason, in Leoni's social theory we have three dimensions: *exchange* in the strict sense (crucial in economy), *exchange of claims* generating norms, and,

finally, *exchange of powers*, which structures the political order. These three areas are both distinct and related.^[4]

From a prescriptive point of view, it is easy to understand why a libertarian scholar like Leoni saw exchange, which is based on voluntary relations and is a positive-sum game, as so fundamental. In any deal or contract, there is not just one winner and a corresponding loser, but two or more people who gain from the interaction. Leoni emphasized the role of the exchange because his theory, as Mario Stoppino remarked, "is not only a theory of the society as it is; on the contrary, it is also a description of the society as it should be: an *ideal model* of society."^[5] However, it is questionable whether the notion of *exchange* can explain, at the same time, the origin and development of economy, law, and politics.

In every society, people have many different types of relations. In addition to trade relationships, they have other links. Leoni was aware of this, but he thought exchange had a peculiar role in society -- and not only in the economic realm. In fact, he criticized economists because they understood "[the exchange of goods, but not the behavioral exchange](#) that makes possible an exchange of goods, regulated and occasionally enforced for that purpose by the law of all countries."^[6] And about politics he added that "[there is a sense in which you can exchange power](#) as well as you can exchange commodities or services."^[7]

To a large extent, this centrality of exchange is true in the economy. As we have remarked, an alternative model explaining productive activities as starting from gift-giving (or other interactions different from the exchange) would confront many problems: while the butcher, the brewer, and the baker may be benevolent, they usually give us what we need only if we give them something in return.

When we analyze a developed economy, it is difficult to deny the central role of exchange -- as well as the fact that this implies a not-very-optimistic anthropology. To have wide cooperation, people need not be altruists: it is enough that they learn to recognize some rules (above all: *alterum non laedere e pacta sunt servanda*, to injure no one

and to give to each his own), whose respect produces relevant benefits.

But things are not so easy if we consider exchange in the areas of law and politics.

About law, Leoni's idea is that people have reciprocal claims. For instance, Crusoe doesn't want to be aggressed against, and neither does Friday. In a tacit way, in time they introduce the norm that neither may use violence. When this rule is accepted, both can sleep peacefully.

Basically, from this perspective, the recognition of fundamental legal norms coincides with the approval of those premises that permit exchange: respect for private property and voluntary contract. But if we look more closely at Leoni's reconstruction, we understand immediately that we face quite serious problems.

What are the most problematic aspects of this reduction of law to the exchange (of individual claims)?

Each economic trade occurs among a few people. What Leoni called "exchange of claims," on the contrary, is my will that all the other people behave in a specific way and the fact that I am subject to similar claims (from all other people!). Economic exchange implies law, but the legal context – sometimes based on basic principles – rarely is the outcome of negotiation, well-defined in time and space, where we know who the actors are. When I buy or sell a car, I enter a real and voluntary contract, but when we consider the so-called "exchange of claims," we are forced to admit that it is not really an exchange. There is no moment when, as with trade, people living in a territory stipulate that none will kill other human beings. The norm against murder tends to conform to general principles accepted as objective, natural, and timeless, and it emerges historically. It is tradition and custom. When this rule is violated by a criminal, it is confirmed by the search for the culprit, by the trial, and by the penalty.

Why, in this situation, did Leoni use the notion of *exchange*?

He employed this term because any individual could have unlimited claims, but he has to consider the existence of other similar people. Every person "trades" the renunciation of attacking and robbing others in exchange

for reciprocal behavior from them. But I put *trades* in quotation marks because it is not an exchange in the strict sense.



Hans Kelsen

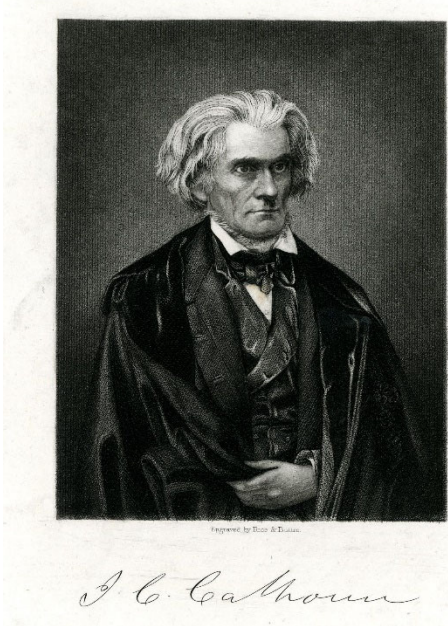
Leoni was right when he criticized Kelsenian normativism,^[8] and he tried to understand the origin of rules. But from a descriptive point of view, Leoni's theory is not totally persuasive, and from a prescriptive point of view, hypothetical consent cannot legitimate – especially when we have explicit dissent – the use of coercion and the imposition of some people's will on others. In a society where some wrong opinions are well-accepted by the large majority, we could have the emergence of unjust rules oppressing a minority of wise and moral people. According to Leoni, the claims are juridical when they are in harmony with the values and interests prevailing in a specific society; in other words, claims are correct when they have a high probability of being asserted and satisfied. In consequence, according to Leoni's theory, we could have laws supporting militarism when people share values and interests oriented toward war.

For Leoni, law is basically *effectiveness* related to the prevalence of ideas of what we can do and not do. Public opinion is the outcome of social interactions, but it is not the result of free agreement, as exchange is in the market. If in the market no one is in the situation of a political

minority, the legal realism adopted by Leoni always puts in the minority one who makes claims that only a few people accept and that, by consequence, are considered anti-juridical.

When we identify law and shared claims, we realize that in every society, there are prevailing norms of which the majority admits the legitimacy. They correspond to the values and interests of the larger and/or more influential part of society. But this forces us to consider all the objections to majority rule.^[9]

Moreover, we can satisfy our fundamental needs and desires through *economic* activities (as when we produce and trade) or through *political* initiatives, giving us the possibility of controlling the time and goods of other people. It means we can obtain resources by working and exchanging, but also by using violence and exploiting other human beings.



John C. Calhoun

Classical-liberal scholars have underlined how public institutions favor many forms of parasitism. The creation of state power has allowed some people to exploit others. For this reason it is possible to recognize a class struggle between people who control power (and use it to steal from others) and people who cannot really influence political decisions. In the formula introduced by John C.

Calhoun, we have a conflict between those who give more than they receive (tax-payers) and those who receive more than they give (tax-consumers).^[10] The former are systematically exploited by the latter.

These considerations help us to realize how politics is connected with the economy and how difficult it is to separate these two worlds. For this reason, if it is not easy to understand the legal order as the simple outcome of an exchange of claims; it is even more difficult to reduce the political realm to an exchanges of powers.

When Leoni talked about the negotiation of individual powers, he was contrasting politics with the modern state, conceived as a concentration of sovereign decision-making in the hands of rulers. Emphasizing that everyone had *some* power, he wanted to restore the original notion of the *state* (*stato* in Italian) as characterized by independent forces that face one another without a supreme power. The modern state, as the central institution of European modernity, was understood as starting from the complex situation implied by every political order: in the Middle Ages, powers were dispersed, weak, and fragmented, but later they were absorbed and monopolized by a central government. In spite of this, even in our times we cannot understand state power if we don't realize it is connected to a network of interests, actions, and interactions.

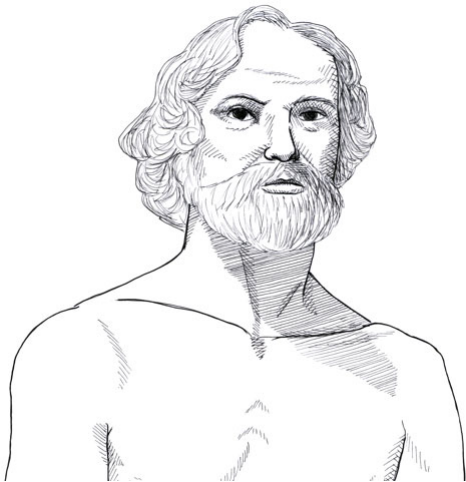
Against the abstraction of vertical sovereignty, Leoni emphasized the polycentric structure of power. Once again, he described social phenomena with the intent to understand how they depend on many dimensions (economic, cultural, etc.) and how decision-centers are always dispersed. However, this *description* also implies a *prescription* because Leoni pursued an *integral individualism* based on freedom and pluralism, and he rejected the violence and uniformity imposed by modern state institutions.^[11] But his libertarian political philosophy often conflicted with his legal realism.

In this case, as in the case of law, we have to decide if it makes sense to talk about exchange when we consider power relations.

Leoni thought that each individual had *some* power and that the political order was a composition of all coercive relationships. Evoking classical analysis, he recalled that there was a negotiation even between master and slave: the master imposed his will, but at the same the master knew that without the agreement and cooperation of the slave, everything would be difficult. Dissatisfaction and frustration could lead the slave to work inefficiently; in some situations he could even leave the relationship, especially when he can do so without consequences.

Somehow the slave had power, and the master knew it and had to keep this in mind. However, the resulting relationship is not really an exchange. In this tension between a bigger and lesser power, there is only the awareness, in those who are stronger, that domination is never absolute. The owner of a slave does not control him 100 percent because it is technically impossible to monitor and control all the gestures and activities of his "property"; therefore he evaluates what he can make his supremacy most effective.

At any rate, we have to admit that no real exchange (as voluntary choice) takes place in a power situation, which by nature is asymmetric and unbalanced.



Thucydides

Since Thucydides, the political-realism tradition has viewed the legal-political order as something unrelated to ethics. One consequence of that analysis is that we cannot have law where force is used to impose someone's power over other people. In the well-known dialogue between

the Athenians and Melians, the former adopted an immoral and cynical attitude when they said that "[right, as the world goes, is only in question between equals in power](#), while the strong do what they can and the weak suffer what they must."[\[12\]](#)

So even if it is true that the strong are not omnipotent and the weak are not totally disarmed, the conclusion that in these situations there is no supremacy or oppression is highly debatable.

If in the legal field the effectiveness of prevalent claims and opinions *makes law*, pushing the minority into illegality, this is even more true in the political field, where an order of unequal forces leads to the domination of a part of society. If this is the typical political relationship, then talking about an exchange of powers is misleading.

Are there situations where we see real exchanges among political entities? Are there circumstances where we have proper exchanges of power?

In some cases in the political realm, we have negotiation and contractual relations. Part of recent libertarian research has focused on (abstract) models of protection markets, but maybe it is more interesting to call attention to the wide network of *private cities* in which companies offer the basic services of a political order in competitive markets, such as protection of property, among others.[\[13\]](#)

This is true at the micro level because we can have city institutions develop in a consensual way. In addition, at the *macro* level we have the tradition of the original federalism (mutual-aid agreements on a voluntary basis). These political orders were leagues and alliances; members of federal compacts had equal status and accepted only the solutions agreed to by all.

In some respects, the political society of federations in the late Middle Ages was governed by *economic* relations: that culture preceded the modern state, and the parties to those contracts were cities or small regions, as in the case of Hansa, United Provinces, and the Swiss Confederation.[\[14\]](#) The parties to the agreement of 1291 on the Rütli meadow exchanged powers, but they did so while accepting mutual commitments, forcing each

contractor to offer services to the other members of the league. Those rural communities were small, and each one (unlike the "negotiation" between the Athenians and Melians) had a similar military force.

Leoni's social theory doesn't correctly explain the relation between real exchanges (including those in law – i.e., contract law – and in politics – i.e., shared properties and in federal orders) and "exchanges" of claims and powers that are incompatible with the libertarian perspective that inspired the Italian scholar -- because they are not based on true agreements.

Leoni intended to combine description and prescription. In his theory, exchange was the central institution of society, the basic element explaining how economy, law, and politics work, and the relationship necessary to lead toward a polycentric order. His intuition is interesting because there is a link between this analysis of society and the necessity of drawing an ethical-political perspective. Aristotle taught that nothing can be morally imposed if it is not possible because a crucial nexus exists between *Sein* and *Sollen*, between *as it is* and *as it ought to be*. But two aspects of Leoni's theory are quite problematic.

First, a philosophy identifying law with the most common claims cancels the tension between legality and legitimacy, between what is and what should be. At the same time, a philosophy of liberty cannot accept any sort of historical order and cannot justify any sort social institution, rejecting the distance between the real and the rational, between what can emerge by the evolution of societies and what is just according to the basic universal principles of law.

Second, from the perspective of a general theory of law, it seems reasonable that human coexistence can be better explained if we introduce something *more demanding* than simple exchange (the gift motivated by generosity, the unilateral promise, the will to share something with a community) and at the same time something *less demanding* but no less important: as when we realize that it is impossible to understand politics if we don't recognize the permanent presence of violent behavior.

Leoni emphasized the role that exchange plays in any society, but in this way he belittled the importance of gift and theft, help and aggression. The variety of social interactions is very wide. Leoni's simplification doesn't account for this complexity.

Exchange is at the core of every society at an advanced stage, but even in an economy, exchange cannot explain the complexity of the logic governing commerce and production. And if the exchange relation is not enough to understand how industry, trade, and money are organized in a society, even less can it help us to understand law and politics.

(I would like to thank Douglas Rasmussen, who read a previous draft of this paper and gave me very useful advice.)

Endnotes

[1.] Bruno Leoni, *Freedom and the Law*, expanded 3d ed. by Arthur Kemp (Indianapolis, IN: Liberty Fund, 1991 [1961]).

[2.] Bruno Leoni, "The Law as Individual Claim" (1961), in *Freedom and the Law*, pp. 189-203.

[3.] Bruno Leoni, "Law and Politics" (1961), in *Law, Liberty, and the Competitive Market*, ed. by Carlo Lottieri (New Brunswick, NJ, & London: Transaction, 2009), p. 176.

[4.] For an introduction to this general theory about economics, law, and politics, see Bruno Leoni, "Law and Politics," in *Law, Liberty, and the Competitive Market*, pp. 167-82.

[5.] Mario Stoppino, "La grande dicotomia diritto privato – diritto pubblico," *Il Politico*, 1982, p. 130.

[6.] Bruno Leoni, in *Freedom and the Law*, p. 52.

[7.] Bruno Leoni, "The Economical Approach to the Political" (1961), in *Freedom and the Law*, p. 225.

[8.] If Hans Kelsen built a pure theory of law (a logical-linguistic analysis independent of any historical reality), Leoni emphasized the social dimension of law, whose existence comes from exchange of individual claims.

[9.] Leoni himself was very critical about this rule: Bruno Leoni, *Freedom and the Law*, "5. Freedom and Legislation", pp. 95-111 </titles/920#lf0124_label_058>, and "6: Freedom and Representation", pp. 112-132 </titles/920#lf0124_label_065>.

[10.] From Calhoun's "A Disquisition on Government" (1849) in *Union and Liberty: The Political Philosophy of John C. Calhoun*, ed. Ross M. Lence (Indianapolis: Liberty Fund, 1992). </titles/683#Calhoun_0007_128>.

[11.] This formula (*integral individualism*, in Italian: *individualismo integrale*) has been used by a student of Leoni, the political scientist Mario Stoppino, who edited one of the first anthologies of Leoni's writings: Bruno Leoni, *Scritti di scienza politica e teoria del diritto*, ed. by Mario Stoppino (Soveria Mannelli: Rubbettino, 1997).

Thucydides, *History of the Peloponnesian War*, book V, 89. Online: Thomas Hobbes' translation </titles/772#Thucydides_0051-09_139>.

[13.] Fred Foldvary, *Public Goods and Private Communities* (Cheltenham, UK: Edward Elgar, 1994).

[14.] Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton, NJ: Princeton University Press, 1994).

THE METAPHOR OF MARKET EXCHANGE

by Peter T. Leeson

My dictionary defines interpersonal *exchange* as "the act of giving one thing and receiving another in return." Insert "freely" before "giving" and you get the kind of exchange found in markets. Don't —and in addition you get the kind of "exchange" found in carjackings.[15] Use the metaphor of market exchange to describe law or politics and you risk conflating these kinds of "exchange"; also, you find yourself in the company of libertarian giant Bruno Leoni.[16]

Carlo Lottieri puts it more delicately, but that's the point to which his essay directs our attention: Leoni well knew

and in fact eloquently explicated the differences between market exchange and interactions in law and politics.[17] Yet he used the language of market exchange—as in "exchange of claims" and "exchange of powers"—to describe the origin of legal rules and political communities anyway.[18] Why would Leoni do that?



Bruno Leoni

I see a few possibilities. But first a few words about market exchange.

Market exchange has two key features: 1. It's consensual. 2. In expectation it creates net benefits.[19] Because of these features market exchange finds libertarian friends with ease.[20] Perhaps you value liberty as an end in itself. Exchange has you covered: it's consensual, so it doesn't run afoul of any non aggression taboos. Or maybe you value liberty as a means to the end *prosperity*. Exchange has you covered in that case too: it creates net benefits, which is just another way of saying that exchange creates wealth.

These attributes of market exchange are intimately related. The very reason that market exchange assuredly creates net benefits is that parties engage in it only when willing—when each sees the prospect for gain. This relation is responsible for the so-called "happy coincidence" hinted at above, the fact that marketplace interactions both respect rights and produce wealth. The

coincidence, as it were, is not coincidental: consent implies the creation of net benefits.[\[21\]](#)

However, the creation of net benefits does not imply consent. Suppose that but for our ignorance of each other's existence, you and I could profitably exchange my Cuban cigars for your Dominicans—a property rearrangement that would generate \$15 in benefits. Suppose further that at a cost of \$3, a third party who's aware we exist, call him Arturo, takes your Dominicans without your permission and gives them to me and takes my Cubans without my permission and gives them to you. Arturo may have done so because he knew that if he'd asked, we would have consented.[\[22\]](#) Still, he didn't ask; we didn't consent; yet the rearrangement created \$12 of net benefits.

Since net benefits can be created without consent, it's coherent to talk about arrangements that were not consented to but create net benefits.[\[23\]](#) And since metaphor communicates similarity to that which is otherwise dissimilar, there's nothing "incorrect" about using the metaphor of market exchange to talk about those arrangements. Indeed, it may offer advantages: faster, easier, more concise, concrete, or just euphonious explication or comprehension.

Metaphor is a useful tool. Consider how Leoni used his "exchange of powers" to talk about the origin of "political community": "[If I grant you the power to prevent me from hurting you](#), provided that you grant me a similar power to prevent you from hurting me, we are both better off after this exchange."[\[24\]](#) Needless to say, you didn't *actually* exchange powers with Leoni; I doubt you even exchanged hellos. There was no consent. But there was the creation of net benefits (Leoni maintained), and to convey or understand that idea, the metaphor of market exchange can be helpful.

Of course, it can also be misleading—especially if the metaphor's user doesn't mention the difference between market exchange and that which he likens to it: consent. Yet this ostensible disadvantage of the metaphor suggests another, quite different reason one might want to use it: sophistry.

Suppose you consider coercion immoral but are also aware that many rules that underpin observed civilization were not consented to by the people they govern. Suppose further that you're fond of observed civilization. You appreciate that people don't have to live in stick huts and suspect that the rules in question contributed to this circumstance. You therefore feel torn: your deontological principles tell you to condemn the rules, but your consequentialist inklings would rather you not.

One response to this dilemma is to try to square the circle, to find a way to construe the rules in question such that really, basically, pretty much when you think about it, they were consented to after all. And one way to do that is to construe the process by which the rules came about as "exchange."

"True, it wasn't *exactly* market exchange," you tell yourself—or perhaps a helpful expositor who has invoked the metaphor of market exchange suggests to you. "But it was pretty damn close. Net benefits were created, which means that people would've consented if they could've. So really, basically, pretty much when you think about it, people kind of *did* consent. After all, it was an *exchange*!"

And in so many fallacious steps encouraged by the metaphor of market exchange, you've fooled yourself or allowed yourself to be fooled into accepting as true what you want to be true but in fact is false: the rules underpinning observed civilization were consented to. It's easy to fall for this "trick" because consent implies the creation of net benefits, and that seems a lot like "the creation of net benefits implies consent." Except the creation of net benefits does not imply consent—the troublesome rules above (hypothetically) providing a case in point.

That, in my view, is the danger of the metaphor of market exchange. And as it turns out, Leoni may have worried about something similar: the abuse of "[words originally having a technical use](#), but which were introduced into everyday language rather carelessly without paying heed to their technical sense."[\[25\]](#) As he explained:

[Lacking their original connection with technical words](#), half-technical or nontechnical terms often go adrift in ordinary language. Their meaning can change according to the people using them, although their sound is always the same. To make matters worse, several meanings of the same word may prove mutually incompatible in some respects, and this is a continual source not only of misunderstandings, but also of verbal disputes or worse.[\[26\]](#)

One manifestation of "worse": "[Shrewd people have tried to exploit](#) the favorable connotations of" such terms "in order to persuade others to change their corresponding ways of behaving."[\[27\]](#)

Leoni wasn't talking about the term *exchange* ; he was talking about the term *freedom*. But *exchange*, too, has technical uses (in economics), is part of everyday language, and at least among libertarians has favorable connotations. Thus the metaphor of market exchange may also be susceptible to exploitation by shrewd people.

That metaphor is useful for communication. However, it can be used for communicative purposes both "good" and "bad." Metaphor, you could say, is a double-edged sword.

(I'm grateful to Eiro Robustos for stimulating thoughts.)

Endnotes

[\[15.\]](#) That "exchange" would be the act of giving someone his life and receiving his car in return.

[\[16.\]](#) And not just him: James Buchanan, with his "politics as exchange" and "conceptual unanimity," is another notable example.

[\[17.\]](#) See Bruno Leoni, *Freedom and the Law*, expanded 3d ed. (Indianapolis, IN: Liberty Fund, [1961] 1991) and Bruno Leoni, *Law, Liberty and the Competitive Market*, Carlo Lottieri, ed. (New Brunswick, NJ: Transaction Publishers, 2009).

[\[18.\]](#) See for instance, Leoni, *Law, Liberty and the Competitive Market*, pp. 180, 208.

[\[19.\]](#) What constitutes consent isn't always unambiguous, and the parties to a market exchange aren't always the only people it affects. Still, most of the time what constitutes consent is clear, and when private property rights are extensive, external effects are insignificant. So "consensual and net beneficial" it is.

[\[20.\]](#) Some people distinguish "libertarians" and "classical liberals." I don't, and while the former term has the disadvantage of sounding like it belongs to a comic-book character, it has the advantage of being one word instead of two. Thus my essay uses the term *libertarian*.

[\[21.\]](#) Again, in expectation and absent external effects.

[\[22.\]](#) This example is of course hypothetical. I am not suggesting that parties are often in the positions described. The point is that an arrangement not consented to can in principle create net benefits, and that is the only point.

[\[23.\]](#) But since consent implies the creation of net benefits, it does not make to sense to talk about arrangements that were consented to but do not create net benefits (in expectation and absent external effects).

[\[24.\]](#) Leoni, *Freedom and the Law*, p. 229.

[\[25.\]](#) Leoni, *Freedom and the Law*, p. 30.

[\[26.\]](#) Ibid. p. 32.

[\[27.\]](#) Ibid. p. 35.

LEGISLATION VERSUS PRIVATE GOVERNANCE: LESSONS FROM BRUNO LEONI

by Edward Peter Stringham

To what extent are law and legislation compatible with individual freedom? Bruno Leoni, one of the 20th century's great legal theorists, analyzed all legislation as a form of central planning fraught with problems. He contended that Ludwig von Mises's arguments against

central planning of the economy—that it doesn't work because we need market prices to inform us about continuous changes in people's demand and supply—can be applied to central planning of the law. To Leoni, the conclusions about central planning of the economy (1961, 20) "*may be considered only as a special case of a more general realization that no legislator would be able to establish by himself, without some continuous collaboration on the part of all the people concerned, the rules governing the actual behavior of everybody in the endless relationships that each has with everybody else*" (italics in original).

Leoni argued that the legal central planners—government legislators—are not in a position to evaluate the myriad effects of their mandates on society. Neither opinion polls nor referenda nor mindreading will be sufficient to see how well the laws will conform to the wishes of individuals in society. Leoni wrote (1961, p. 22), "*In these respects 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*" (italics in original). So rather than viewing legislators as helping to create order in society, Leoni (1961, 21) portrayed them as creating a "legal war of all against all." As an alternative to top-down legislation, Leoni (1961, 152) supported bottom-up law or "spontaneous law-making processes." He thinks lawyers and judges are often useful, but only when people seek them out.

“BUT HOW FAR SHOULD THIS
ARGUMENT GO AND EXACTLY WHAT
ROLE DO LAWYERS AND JUDGES
HAVE IN A FREE SOCIETY?”

Leoni was seemingly a near-anarchist and closer to anarchism than his friend Friedrich Hayek or his friends and my professors James Buchanan and Gordon Tullock. Leoni (1961, 89) stated, "Even those economists who have most brilliantly defended the free market against the interference of the authorities have usually neglected the parallel consideration that no free market is really

compatible with a law-making process centralized by authorities." After Hayek's *Constitution of Liberty* (1960), Leoni's influence on Hayek became clear in Hayek's *Law, Legislation, and Liberty: Rules and Order* (1973). Hayek talked about a system of decentralized judges discovering law and expressed deep skepticism about legislation even though he did not take the argument as far as Leoni in opposing all legislation.^[28]

But how far should this argument go and exactly what role do lawyers and judges have in a free society? Leoni left readers with some unanswered questions and concluded *Freedom and the Law* (1961, 248) with the following: "While the market allows individuals to make free choices provided only that they are prepared to pay for them, legislation does not allow this. What we should now ask and try to answer is: Can we make a more successful comparison between the market and *nonlegislative* forms of law?"

In his essay Lottieri gives a thoughtful commentary on Leoni, describing Leoni's theory that proper law stems from individual *exchanges of claims*. Leoni (1961, 192) referred to "the law as individual claim" and stated, "Dictionaries define a *claim* as 'a demand for something due.'"^[29] Leoni (1961, 192) said that "only individuals can make claims, just as only individuals can make choices." Lottieri then asks us to consider Leoni's "analogy between law and the market." Lottieri points out that market exchanges are mutually beneficial and at the core of any free society. Likewise, Lottieri discusses how exchange of claims and exchange of powers can be mutually beneficial. For example, Crusoe and Friday agree not to aggress against each other, and that enables them to sleep well at night. Or people about to enter a contract agree that each party ought to deliver what he promises. Such legal norms need not be legislated from the top and can easily come from the parties.

A potentially important difference between market exchange and exchange of claims or powers is who is party to the agreement. With market exchange, all parties involved agree. But can we have universal agreement with, to use Matt Kibbe's phraseology (2015), norms that one learns in kindergarten? "Don't hurt people and don't take

their stuff." Lottieri wonders if we can have proper exchanges of power from Leoni's framework and is skeptical in the end. Lottieri writes, "When I buy or sell a car, I enter a real and voluntary contract, but when we consider the so-called 'exchange of claims,' we are forced to admit that it is not really an exchange. There is no moment when, as with trade, people living in a territory stipulate that none will kill other human beings." So Lottieri concludes that Leoni unsuccessfully made the case that exchanges of claims are equivalent to market exchanges.

Leoni's concluding chapter of *Freedom and the Law* (1961, 175–79) reports a couple of questions that he received from colleagues about the draft of his book: "[Is there any possibility of applying](#) the 'Leoni model' of society?" and "[Who will appoint the judges](#) or lawyers or other honoraries to let them perform the task of defining the law?" To the first question he answered, "[The displacement of the center of gravity of legal systems](#) from legislation to other kinds of law-making processes cannot be attained in a short time." From here one might assume that his vision is pie-in-the-sky thinking. But to the second question he was more grounded and responded, "[It is rather immaterial to establish in advance](#) who will appoint the judges, for in a sense, everybody could do so, as happens to a certain extent when people resort to private arbitrators to settle disputes in their own quarrels."

I believe Leoni's argument can be strengthened by highlighting that such examples are quite common. Lottieri mentions that "it may be more interesting to call attention to the wide network of *private cities* in which companies offer the basic services of a political order in competitive markets, such as protection of property, among others." My own research on private governance (Stringham 2015) shows that around the world in history and in modern times, people commonly have opted into rule-enforcing clubs to solve various problems. To use Leoni's terminology, parties exchange claims when they opt into these clubs. And I think such opt-ins offer a perfect example of Leoni's idea about the parallels of certain legal exchanges and market exchange.

Consider, for example, when someone opts to invest in a company. The relationship is ongoing and can have any number of arrangements, including intermediaries and rules, to govern it. When the first stock markets emerged in Amsterdam, London, and New York beginning over four centuries ago, many of the transactions were forward contracts. Government authorities considered them a form of gambling and refused to enforce such contracts. But despite a lack of legislation to govern these early stock markets, they still emerged and helped create very complex financial contracts, with their operation made possible by many private rules and regulations, or "exchanges of claims," in Leoni's terminology.



In 17th-century Amsterdam, the markets were governed by informal norms and reputation mechanisms. In 18th- and 19th-century New York, brokers transformed coffeehouses into private clubs to create and enforce rules. In London, stockbrokers would write the names of defaulters on blackboards and exclude the unreliable from their club. They created a rulebook that outlined systems of arbitration and stated that these rules were necessary because the law of the land was insufficient to govern their markets. In New York the rule-enforcing clubs added various listing and disclosure requirements for the companies they invested in.

Today, the Securities and Exchange Commission has many mandates that take important decision-making power away from investors and from providers of private governance such as the New York Stock Exchange. Nevertheless, the New York Stock Exchange competes on many margins with Nasdaq, the London Stock

Exchange, and other exchanges. Exchanges can have listing and disclosure requirements legislated by lawmakers or their administrative councils, or they can have them chosen by providers of private governance on behalf of their ultimate customers: investors and listed firms. Lawyers can be involved in working for market participants. Lottieri asks, "Are there circumstances when we have proper exchanges of power?" The stock exchanges do not use force in the traditional sense of power. But they govern the majority of wealth in the United States and many other countries. I think it is safe to say that a competitive system of private governance lives up to Leoni's ideals, and this choice of governance can be considered akin to market exchange.

Endnotes

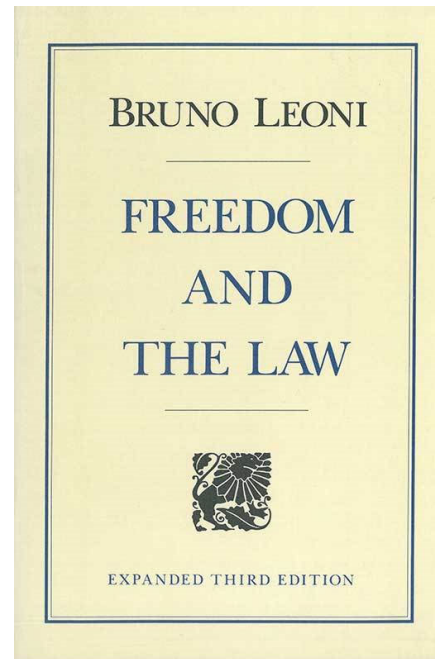
[28.] Hayek (1973, 168) wrote, "The case for relying even in modern times for the development of law on the gradual process of judicial precedent and scholarly interpretation has been pervasively argued by the late Bruno Leoni, *Liberty and the Law* (Princeton, 1961). But although his argument is an effective antidote to the prevailing orthodoxy which believes that only legislation can or ought to alter the law, it has not convinced me that we can dispense with legislation even in the field of private law with which he is chiefly concerned." For a discussion of Hayek's views toward legislation, see Stringham and Zywicki (2011).

[29.] Leoni (1961, 195) wrote, "[N]ow we should define what a claim is and what a legal claim is. This means that we have to lift our attention from people who say, 'I ought to' to people who say, 'I have a claim,' or 'I demand,' or 'I intend,' or 'I request.' Without those people there is no 'law.'"

BRUNO LEONI ON FREEDOM AND THE LAW: BASIC BUILDING BLOCKS FOR A LIBERTARIAN AND EVOLUTIONARY THEORY OF LAW

by Boudewijn Bouckaert

In his article on Leoni ("Exchanges, Claims, and Powers: About Leoni's Social Theory"), Carlo Lottieri puts the focus almost exclusively on Leoni's theory of law as an individual claim. This focus is justified, as this theory is one of Leoni's most original contributions to legal theory. But it deserves clarification, as I will try to do further in this contribution.



We recall, however, that Leoni developed viewpoints on a wide span of subjects related to law, politics, and economics. In *Freedom and the Law* he discusses topics such as law and constraint, the rule of law and *Rechtstaat*, certainty of law, law and democracy, law and economics. Most of his viewpoints have become common among classical liberals. His theory on law as a legal claim remains less known.

To contextualize somewhat Leoni's theory, it is useful to make the following remarks. First, besides being an academic, Leoni was a practicing lawyer. This experience clearly influenced his theory. Second, Leoni published at a time when Hans Kelsen dominated legal theory. According to Kelsen, the law consists of norms enacted and sanctioned by state authorities. Leoni's theory reads quite like an anti-Kelsen manifesto.

Analogies with free-market economics

Against Kelsen's theory of the law, Leoni tried to develop an explanatory theory of the law that would not place the state, but rather legally acting individuals ("parties"), at the center of legal evolution. As Lottieri remarks, Leoni perceived some analogies with free-market views on the economy. As economic interaction is not explainable by quantified relationships between macroeconomic aggregates, but rather by the choices and actions of entrepreneurs, capitalists, workers, and consumers, so is law not explainable by a static pyramid of norms, but by the actions of the users of law, i.e., the claiming parties.

Moral and legal claims

Leoni considered legal claims, not norms connected with coercion, as the basic elements of law. Thereby he made a fundamental distinction between a moral claim and a legal claim. For positivists the difference concerns merely state coercion. A moral claim is not backed by state coercion; a legal claim is. According to Leoni, *a claim is legal when it is based on a common opinion of duty and consequently motivated by the expectation that the claim has a high probability of being satisfied by corresponding people*. Leoni illustrated this by the following comparison. A thief, waiting for me in a dark alley and asking for my purse, has a claim but not a legal claim. There is no common opinion to back theft, and I, the victim, will not give in spontaneously. So the thief will have to threaten me with violence. A creditor, able to prove his IOU and claiming the liquidation of the debt from the debtor, has a legal claim. Common opinion backs his claim, for people generally believe that debts should be paid, and the probability is high that the corresponding party will comply. A legal claim involves a probability of being satisfied, though not a certainty. The corresponding party may deny the legitimacy of the claim

or parts of it, triggering either further negotiations and settlement, or a trial before a court. The legality of the claim resides in the common opinion in society, i.e., that claims of that kind should be satisfied. Of course, Leoni did not deny the normative element (the *Sollen*, the *ought*) within the claims. It exists, however, only as a legal norm insofar as it is part of a claim accepted by the common opinion in society.



Michael Oakeshott

Nomocracy and telocracy

Leoni's theory of law as an individual claim is obviously not applicable to all of what current public opinion considers "law." Most regulations in present social-welfare states are mere instruments of public goals adopted by governments. They have nothing to do with claims linking individuals in a relationship of reciprocity. Leoni's theory applies rather to what F. A. Hayek and Michael Oakeshott^[30] distinguished as the rules of nomocracy, contrasted to the rules of telocracy. The first type of rules concerns general rules of conduct, preventing individuals from using destructive methods to attain their goals (killing, stealing, destroying, deceiving, defamation, etc.). This type of rules does not impose the pursuit of any specific goal on individuals. It respects the Kantian imperative to consider every individual as an end in himself. In contrast, the rules of telocracy aim to

influence the behavior of individuals in order to make it compatible with the goals adopted by the government. Unlike nomocratic rules, telocratic rules are most often technical and detailed.

Roman law: driven by *actiones*

To provide some flesh and blood to Leoni's theory, we expand briefly on the evolution of Roman law. No legal scholar will doubt that the Roman law tradition is one of the pillars of the legal culture in the West if not the whole world, for the Western legal tradition spread to the world through colonialism and voluntary transplants.



The development and great sophistication of Roman law were not due to wise legislators who resembled Lycurgus. Roman law developed through a gradual bottom-up process of accumulating *actiones*, which allowed citizens to sue other citizens to enforce their claims. Although the Roman law developed initially from a primitive legal code, the "Law of the XII Tables," further development during the ensuing centuries occurred through an interaction of claims by citizens and the acceptance of these claims by the public authority. When citizens had a specific claim on another citizen, the *praetor* had to decide whether it could be allowed either within the framework of the already endorsed *actiones* or by the adoption of a new *actio*.^[31] When the claim was deemed actionable, a trial before a judge (*apud iudicem, litis contestatio*) could be initiated. In practice the *praetores* adopted the *actiones* approved by their predecessors in their *Edictum Perpetuum* and the list of *actiones* became longer and longer. The body of Roman law was further

enriched by the comments (*responsa*) of the *jurisconsultes*, who explored the meaning and range of the *actiones* in order to discover whether the concrete claim of their client could be fitted into the *actio*. These comments (*Digests*) constitute by far the richest part of the *Corpus Juris Civilis* of Justinian.^[32]

This bottom-up process fits quite well into Leoni's theory of the law as legal claims. Through their claims Roman citizens constantly tested the legal system on whether their claims were legal, i.e., were more or less compatible with common opinion in the Republic and therefore deserved enforcement after a judge (*judex*) sustained them.

We remark, however, that this process of incremental growth of Roman law did not start from scratch. This bottom-up process was possible because the original Roman Kingdom and the later Roman Republic were basically political communities of free farmers enjoying a strong protection of their *dominium*. This start in relative freedom and independence allowed the further bottom-up process. A bottom-up process is not possible when no operational "bottom" exists. In a totalitarian society of slaves, no independent actors at the "bottom" are present to trigger a further evolutionary process catering to a further sophistication of the nomocratic order.

Conclusion

This brief outline of the evolution of the Roman law tradition^[33] shows that Leoni's theory is useful to explain the richness of such traditions. They do not owe their richness to the endless wisdom of a genius at the top, but rather to the ingenious interaction between citizens as claimants, lawyers, courts, and political authorities. Legal claims, sustained by common opinion about legality, were the ultimate drivers. The other actors were crucial to integrate these claims into the conceptual framework of the prevailing legal tradition and to make them consistent with already-embedded principles. The private-law traditions in the West were mainly, at the same time, citizens-as-lawyers' law. To a much lesser extent, they were the product of a central political authority imposing its views on society.

The mentioned historical examples, however, show also that a mere evolutionary theory is not sufficient to elaborate a consistent libertarian theory of law. In societies without liberty an evolutionary process of law will not develop because they lack independent actors at the "bottom." In unfree societies the interaction occurs between "dependents" (slaves, serfs, political clients, but also dependents of modern welfare states) and the master in order to get privileges. The evolution in unfree societies is not about widening and refining the rules of interactions among free individuals, but rather about power relationships among groups, factions, and cliques. This means that a normative libertarian theory of the basic principles of society has to supplement an evolutionary theory of law. In his quasi-exclusive reliance on the common opinion about the legality of claims, Leoni is probably too conventionalist. This critical remark, however, does not diminish at all the major esteem we should have for Bruno Leoni as one of the most prominent libertarian legal scholars of our time.

Endnotes

[30.] F. A. Hayek, *Law, Legislation and Liberty*, volumes 1-3 (Routledge and Kegan: London, 1973-1978); M. Oakshott, *On Human Conduct* (Oxford: Clarendon Press, 1975).

[31.] For more details see J.C. Van Oven, *Leerboek van Romeinsch Privaatrecht* (Leiden: E. J. Brill, 1948).

[32.] The *Corpus Juris Civilis* was enacted in 527-528 AD and consisted of three parts: the *Codex*, i.e., the collection of edicts by the Emperors; the *Institutiones*, i.e., a legal-theoretical treatise; and the *Digestae*, the collection of *responsa* by the *jurisconsultes*.

[33.] A similar analysis can be made of the common law in England (see Arthur R. Hogue, *Origins of the Common Law* (Indianapolis, IN: Liberty Press, 1966). The development of the "law merchant" in Europe is another striking example of a bottom-up genesis of a body of sophisticated law. See Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, CO: Fred B. Rothman & Co., 1983).

TOWARDS A "COMMON LAW OF NATURE"?

by Carlo Lottieri

Leoni was a philosopher of law, and at the same time he was a political scientist and a scholar seriously interested in many discussions about economic theory, especially in the Austrian tradition. When some years ago I had the opportunity to work in his personal library in Turin, I realized that the two- most used and even "consumed" books in his collection were *Human Action* by Ludwig von Mises and *Man, Economy, and State* by Murray N. Rothbard. This is not surprising if we consider his quasi-anarchical vision and the fact that his research was grounded in the idea that the Austrian perspective helps us to better understand how law and politics emerge from individual interactions.



Ludwig von Mises

In a time dominated by normativism, mainly in the version elaborated by Hans Kelsen, Leoni's research project aimed to restore legal realism, explaining that juridical and political orders start from the actions of individuals.

Leoni focused on the special actions of individuals claiming specific behaviors from other people. In any positive legal system, "claim" has a peculiar role, but Leoni attributed a new meaning to this term. In his theoretical framework, a claim is legal not because it is supported by some legislative texts (as in the Kelsenian system), but because a large part of population shares

interests, values, and preferences. *We don't have claims because there is legislation; we have legislation (or other legal orders based on scholarly works, case-studies, etc.) because we have claims;* and these claims produce effects. Consequently, following Leoni's approach, when we have an evolution of society, we start to recognize new claims and, as a result, different rules.

“IN MY VIEW, HERE IS WHERE WE
PERCEIVE THE STRENGTH AND
WEAKNESS OF LEONI'S THEORY.”

In my view, here is where we perceive the strength and weakness of Leoni's theory. On the one hand it is true that the positive legal order is largely the consequence of a "state of affairs," but on the other we have to understand that when a dispute about the norms arises, usually there is also the need to define what is *just*, not only what is *accepted* or *imposed*.

Boudewijn Bouckaert remarks that we cannot understand Roman law if we don't realize that society was composed of individuals who were owners, largely protected by their property and able to negotiate. In the words of Bouckaert, "a bottom-up process is not possible when no operational 'bottom' exists." This seems to me quite crucial for many reasons.

When you look at Leoni's theory as a *description* of what law is, it seems evident that his evolutionary schemes are much more apt to explain a pluralistic society (where no person or no group dominates all) than a society based on the decisions of a few people. And even when we consider the *prescription*, it seems evident that Leoni's thesis – promoting the libertarian spirit of legal systems based on judges and lawyers – can be contradicted by those societies where that "bottom" doesn't have autonomy or where it is pervaded by illiberal ideas. In similar contexts it is quite problematic to have a libertarian order protecting individuals.

In other terms, not only do we need some fundamental norms (essentially natural and not only historical), but

they are better discovered and implemented if power is divided and dispersed.

For this reason Bouckaert underlines the importance of Leoni's contribution to classical-liberal legal theory and, at the same time, remembers the need for some principles because a pure realistic approach identifying human behavior and legal rules can open the door to an unjust society where some people tyrannize others. When "the legality of the claim resides in the common opinion in society" (as Bouckaert summarizes Leoni's idea), we don't have any safeguard against the arbitrary will of the majority and sometimes also against the decisions of the most influential and powerful minority.

Law largely needs practical wisdom (oriented to foster cooperation and reduce conflict) supported by a highly specialized knowledge, and at the same time it implies a horizon of justice. But when we talk about justice and principles, we are immediately forced to evoke the tradition of natural law and what Edward Coke in 1628 called the "common law of nature" (in the first volume of the *First Part of the Institutes of the Laws of England*).^[34] For that great English jurist, the historical development selecting the rules, from precedent, is an imperfect but reasonable way to approach what is just *per se*.

A confirmation of the need for principles comes from the fact that we have obligations which are the consequence of our choices and decisions (when we enter contracts), but also of other, extra-contractual obligations. If I am a tenant, I have to pay the rent on the flat, but at the same time I cannot aggress against my neighbors because they have rights (whatever the legal system says or doesn't say).

I agree with Edward Stringham when he remarks that the "Leoni model" of a society emerging from real exchanges can find a concrete application in the private governance of communities and cities based on mutual agreements. However, Leoni's idea that the rules are the result of converging claims does not refer only to the contracts, but also to the general legal order.

Stringham underlines that in some cases people build political institutions using contracts and, in fact, by engaging in market exchanges. The history of the

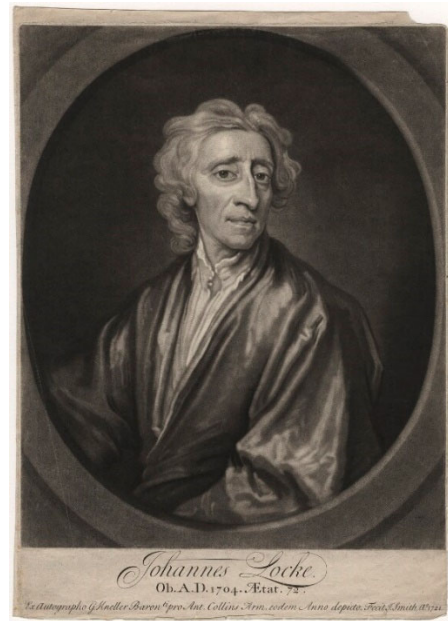
institutions conceived in the spirit of "clubs" shows that sometimes our negotiations produce new orders. But even in these cases the parties to the game have to be recognized as legitimate actors: free, able to negotiate, legitimate owners of their goods, and so on. The contract generates some obligations, of course, but before the contract, we need some previous obligations as a condition of fair play by the participants.

For this reason I am unsatisfied by the fact that Leoni tried a sort of "reduction," explaining the entirety of social life by the exchange relationship. Trades and contracts are crucial in economic life, but for Leoni exchange also generates law and politics.

As Peter T. Leeson says, exchange is both consensual and beneficial. And at the same time, Leeson remarks that what is beneficial is not necessarily also consensual. For instance, many economists suggest that some decisions (i.e., coming from the government) can improve the condition of all even if they imply violence or, more simply, avoid exploring if all people agree to an imposed arrangement.

Leeson suggests that the *metaphor* of "market exchange," when used for law and politics, can be misleading because it can be pushed to regard as consensual something that only implies net benefits for the participants.

Moreover, what can we exchange? Basically, we exchange titles to property and services. So when Leoni talked about the exchange of claims, his language was only metaphorical (as Leeson remarks) because the act of claiming something from someone else is not an object we can trade. Leoni's idea probably is that in social negotiations we reduce the number of our claims in our relationships with others (who do the same), but this interpretation doesn't show a real trade between specific people; rather, it shows a social convention involving a large population when it becomes majoritarian.



John Locke

This also can help us to understand that Leoni's theory can be much more effective when we refer to small groups. In other terms, "size matters" because it is more reasonable to imagine "exchanges" of claims and powers in small communities, and even in historical contracts, than in large nation-states. In the *Second Treatise of Civil Government* John Locke described the birth of old political compacts (he referred to Rome and Venice) with the idea that people can organize communities as they build commercial activities, avoiding coercion and aggression.[\[35\]](#)

When there are "exchanges of power" as those described by Stringham and we have people signing specific contracts limiting their autonomy and generating authorities, in fact we are not anymore in the realm of politics because we are talking about market exchanges. Some people dispose of their titles in order to have a better arrangement of their property: the same situation we have, for example, when two small companies merge into a larger one.

It seems to me that we are coming back to the starting point: we are leaving metaphorical exchanges of claims and powers and are talking again about economic exchange protected by the old principles of private law. But what remains quite problematic, at the end of this

exploration, is how we can define the legitimate rules charged to defend our liberty and how we can do it without any reference to fundamental ethical principles (even if, of course, there is a clear-cut distinction between ethics and law) and by ignoring that any real legal system refers to some basic morality, as Lon Fuller – among others – effectively highlighted in some of his writings.

Endnotes

[34.] Edward Coke, *First Part of the Institutes of the Laws of England*, vol. I, 1628 (anastatic edition: Garland, New York 1979), p. 138.

[35.] John Locke, *Two Treatises of Government*, ed. Thomas Hollis (London: A. Millar et al., 1764). . Of Civil Government, CHAP. VIII. Of the Beginning of Political Societies, §. 102.:

He must shew a strange inclination to deny evident matter of fact, when it agrees not with his hypothesis, who will not allow, that the *beginning of Rome and Venice* were by the uniting together of several men free and independent one of another, amongst whom there was no natural superiority or subjection. And if *Josephus Acosta's* word may be taken, he tells us, that in many parts of *America* there was no government at all. *There are great and apparent conjectures*, says he, *that these men*, speaking of those of Peru, *for a long time had neither kings nor commonwealths, but lived in troops, as they do this day in Florida, the Cheriquanas, those of Brasil, and many other nations, which have no certain kings, but as occasion is offered, in peace or war, they choose their captains as they please*, l. i. c. 25. If it be said, that every man there was born subject to his father, or the head of his family; that the subjection due from a child to a father took not away his freedom of uniting into what political society he thought fit, has been already proved. But be that as it will, these men, it is evident, were actually *free*; and whatever superiority some politicians now would place in any of them, they themselves claimed it not, but by [285] consent were all *equal*, till by the same consent they set

rulers over themselves. So that their *politic societies* all *began* from a voluntary union, and the mutual agreement of men freely acting in the choice of their governors, and forms of government.

ON MARKET EXCHANGE AND THE LAW IN LEONI'S THOUGHT: REMARKS ON PETER LEESON'S COMMENTS

by Boudewijn Bouckaert

The discussion on Leoni's legal theory centers on the questions of whether his view of law as an exchange of legal claims makes sense and whether his loose metaphorical use of the term *exchange* confuses rather than clarifies the debate.

Let me first make a rather exegetic remark about Leoni's theory. In his [chapter on law as an individual claim](#)[36] he does not consider exchange processes as the major driver of legal evolution, but rather the interaction between the individual claiming something (for example, restitution, compensation, payment of a debt, etc) and the common opinion of the political community in which he operates. This is not what we usually understand as an exchange, but rather an interaction between two concerned actors, i.e., the individual with his claim and the community with its common opinion. Leoni did not elaborate further on the specific features of this interaction. I conjecture, however, that, departing from [his appraisal of the evolutionary process in Roman law](#),[37] he saw this interaction channeled through public institutions such as lawyers, the courts, and political authorities (for example, the *praetor* in Roman law). These public institutions acted as intermediaries between the claims they were receiving and the common opinion within their political community. With the extension of the Roman Empire and the ensuing "multiculturalization," some parts of the law (the *ius gentium*) became common to the whole

Empire and were considered by legal philosophers like Cicero as the natural law, common to humankind. Consequently, I have my doubts about whether it is useful to spend so much attention on the analogy between the evolution of law and exchange in Leoni's thought. We should rather focus on his theory about the interaction between individual claims and common opinion in society.

Next, I agree with Peter Leeson's' skepticism about the loose metaphorical use of the notion *exchange*. By surreptitiously amending the classical meaning of terms like *exchange* and *consent*, some people fool themselves into believing that social outcomes which they value must have been the result of consensual processes. Such ex-post consensualist constructions were, for instance, common to 16th- and 17th-century social-contract theorists who were looking for a secular explanation/legitimation of the power of state authorities. As these princes bring order and peace in society, we cannot imagine that they acquired their authority by any other process than common consent. Notions such as *consent* and *exchange*, dear to libertarians, were in this way used as intellectual tools for justifying quite nonlibertarian political systems. Leeson is right to point to linguistic processes in which words with specific technical meanings are perverted by their metaphorical use in common language. Wittgenstein would fully agree with the remark. Disconnecting terms from their "natural" context creates confusion in debates and undermines their critical capacity.^[38]



Another interesting point in Leeson's comment concerns his analysis of the notion of *exchange*. He rightly perceives two key features in it: the consensual character and mutual expectation of benefit. It is, according to Leeson, possible to imagine situations in which a mutually beneficial outcome is realized through a nonconsensual process. *A* can steal something from *B* and give it to *C* and steal something from *C* and give it to *B*. It is possible that *B* and *C* value the item they received more than the item taken from them. In fact, advocates of the social welfare state often legitimate that institution in such a way. The state takes contributions from employers to finance welfare entitlements such as medical care for their employees. By this means, the employees remain in good health and will produce more. They are better off, for they value their welfare entitlements more than their higher labor obligations. The employers are better off, for they value the higher productivity of their workers more than the contributions they have to pay to the social-security fund.

This discussion much resembles Jeremy Bentham's discussion of efficient theft. According to Bentham, it is thinkable that a specific case of theft is efficient, for the value of the stolen good can be higher for the thief than for the victim.^[39] As a policy conclusion, one could argue that courts could check all thefts case by case on their efficiency and acquit the efficient thieves. Bentham, however, did not favor this solution. A case-by-case approach to the efficiency of theft would create among owners a general feeling of uncertainty. The utility loss caused by this feeling would overwhelmingly surpass the efficiency loss caused by the restitution of efficiently stolen goods. This Benthamite utilitarian argument applies also to nonconsensual exchanges. Of course, we can imagine cases of such exchanges producing a mutual benefit.

This thought exercise leads us nowhere when discussing the rules and institutions of society. Allowing a "super-thief-exchanger" to confiscate assets of some citizens and to switch them with assets of other citizens would create huge uncertainty in society. To operate as contended, the super-thief would have to be endowed with supernatural

"panoptical" gifts by which he could perceive individuals' valuations and order a switch when he records a possible mutual benefit. The unbreakable link between consent and mutual benefit, as it is posited in the libertarian theory of markets and exchange, guarantees that the stock of knowledge, spread over the many individuals, will be used to maximize mutual benefits in exchange processes. By way of conclusion, tinkering with the key elements of exchange is not an innocent game of terminological conventions. It strikes at the heart of the libertarian argument for free markets and a free society in general.

Endnotes

[36.] B. Leoni, *Freedom and the Law* (Indianapolis, IN: Liberty Fund, 1991), pp. 189-203. *The Law and Politics*, "The Law as Individual Claim" </titles/920#lf0124 label 121>.

[37.] B. Leoni, *Freedom and the Law*, pp. 208-18. "Law and Economy in the Making" </titles/920#lf0124 label 124>.

[38.] Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (New York: Wiley-Blackwell, 1958), p. 70

[39.] *Jeremy Bentham's Economic Writings*, vol. III, ed. W. Stark (London: George Allen & Unwin, 1952-54), pp. 324, 342. We have another version of Bentham's *Institute of Political Economy* (1801-4) online, *A Manual of Political Economy* (no date), which has the following interesting sections on this topics:

"Whoever takes upon him to add to national wealth by coercive, and thence vexatious measures, stands engaged to make out two propositions:—1. That more wealth will be produced by the coercion than would have been produced without it; 2. That the *comfort* flowing from the extra wealth thus produced, is more than equivalent to whatever [41] *vexation* may be found attached to the measure by which it was produced."

Jeremy Bentham, *The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring* (Edinburgh: William Tait, 1838-

1843). 11 vols. Vol. 3. </titles/1922#Bentham 0872-03 287>.

"Coercion, the inseparable accompaniment, precedent, concomitant, or subsequent of every act of government, is in itself an *evil*: to be anything better than a pure evil, it requires to be followed by some more than equivalent good. Spontaneous action excludes it: action on the part of government, and by impulse from government, supposes it." ... </titles/1922#Bentham 0872-03 301>.

"By raising money as other money is raised, by taxes (the amount of which is taken by individuals out of their expenditure on the score of maintenance,) government has it in its power to accelerate to an unexampled degree the augmentation of the mass of real wealth. By a proportionable sacrifice of present comfort, it may make any addition that it pleases to the mass of future wealth; that is, to the increase of comfort and security. But though it has it in its power to do this, it follows not that it ought to exercise this power—to compel the community to make this sacrifice." </titles/1922#Bentham 0872-03 322>.

POLITICAL REALISM AND EVOLUTIONARY ORDERS: TWO CONTRASTING IDEAS OF STATE

by Carlo Lottieri

Bruno Leoni was very interested in the study of politics, and at the University of Pavia he was the dean of the faculty of political sciences. He also created a bilingual academic journal, *Il Politico* (with articles in English and Italian), where he published important scholars of the time: Armen A. Alchian, Peter T. Bauer, James M. Buchanan, Friedrich A. von Hayek, Henry Hazlitt, Israel M. Kirzner, Fritz Machlup, Ludwig von Mises, Helmut

Schoeck, Hans F. Sennholz, George Stigler, Leo Strauss, Gordon Tullock, and many others.



Gordon Tullock

He was a philosopher of law, but for many years he also taught *Dottrina dello Stato*, a traditional course in public law that he used to introduce students to political science. We have the transcription of his lessons (unfortunately they have been published only in Italian),^[40] and from these texts we see that his attitude was that of a realist.

Introducing his students to the analysis of politics, he described the relationship between rulers and governed as a *rapporto disproduttivo*, an unproductive relation. In his interpretation, there is a radical opposition between a voluntary exchange and a decision imposed. Using coercion, the ruling class affirms its own will: here we have no free agreement, and as a consequence, there is no improvement of either participant in the interaction. Usually, we have someone exploiting someone else.

Leoni knew well the Italian tradition of political science, where a central role was played by the "elitist school" of Gaetano Mosca and Vilfredo Pareto. He was aware that in our time, democracy is only a version of the modern state and a system to select the few people who will have the privilege of disposing of the rest of the society. When in *Freedom and the Law* he focused his attention on the democratic system, he emphasized how majority rule can destroy individual liberty.^[41] In these pages it is clear that his libertarian attitude is strengthened by this realistic approach to politics.^[42]

If he was so disenchanted with this description of the democratic state, how he could elaborate his theory of a political order emerging from the exchange of powers,

since the norms are the consequences of the actions of people offering and supplying specific behaviors?

In his analyses of legal claims, Leoni showed that our acceptance of legislative rules was possible when the norms were in tune with the feelings and the interests of society. In a similar way, when he spoke about the political dimension, he intended to highlight that the vertical dimension of the institutional order of modernity (the modern state) implied the horizontal dimension of the network of spontaneous relationships supporting it. Each government would be unable to exist if it were only a top-down imposition.

For this reason he opposed two notions of *state*: the modern one, related to the concentration of power in our public law, and the original one, because before the logic of Westphalia the term *state* was used in reference to the general situation of a society, to the "state of affairs" of a political order, to the complex distribution of authorities, powers, capacities, etc. Leoni believed that if we wanted to understand the institutional pyramid of our time, based on the notion of sovereignty, we had also to analyze what is at the bottom supporting everything.

For this reason, this insistence on diffusion of the powers is necessary to understand even the entity which has monopolized power in modern times, what we now call the state. Moreover, this perspective can be useful to people – such as libertarians – interested in enlarging individual freedom and entering a different framework, where each political institution can be limited by the existence of other similar realities and a polycentric order can take the place of the state monopoly.

Endnotes

^[40.] Bruno Leoni, *Lezioni di dottrina dello Stato* (Soveria Mannelli: Rubbettino, 2004 [1957]).

^[41.] It is enough to read chapters 6 and 7 of *Freedom and the Law*. Chap. 6: Freedom and Representation </titles/920#lf0124_label_065>
Chap. 7: Freedom and the Common Will </titles/920#lf0124_label_087>.

[42.] When he analyzed political science studies in Italy after the World War II, Mario Stoppino pointed out that the rebirth of the discipline was connected to four main people: Giuseppe Maranini, Giovanni Sartori, Gianfranco Miglio, and Bruno Leoni (Mario Stoppino, "Intervento," in Lorenzo Ornaghi and Alessandro Vitale, eds., *Multiformità e unità della politica. Atti del convegno tenuto in occasione del 70° compleanno di Gianfranco Miglio*, 24-24 October 1988 (Milan: Giuffrè, Milan, 1992) p. 233). The importance of Leoni for Italian political studies is now recognized by most scholars.

FETISHIZING CONSENT

by Peter T. Leeson

Boudewijn Bouckaert observes Jeremy Bentham's take on "efficient theft": coerced transfers that increase net benefits when considered in isolation should nevertheless be prohibited since permitting them would produce uncertainty sufficient to reduce net benefits when considered on the whole. I agree.

Bouckaert observes also that to reliably increase net benefits through coerced transfers, a "super-thief would have to be endowed with supernatural 'panoptical' gifts by which he could perceive individuals' valuations and order a switch when he records a possible mutual benefit"—an impossibility. Again I agree.



Jeremy Bentham

I'm less sure, however, that "This thought exercise"—pondering the creation of net benefits without consent—"leads us nowhere when discussing the rules and institutions of society." On the contrary, I suspect it may lead us somewhere important: to a stronger defense of Western legal tradition.

One approach to defending that tradition evaluates it in terms of its relationship to *consent*:

"Western legal tradition provides a legal framework that facilitates markets and civil society. It enables and extends spheres of consensual interaction."

That's true, but this defense encounters a problem: legal institutions evolved through Western legal tradition were not historically and are not today consented to by all they govern. Lotteri's remarks highlight this fact; Bouckaert's recognize it as well; so does Leoni's analysis, according to which, claims sustained by common opinion, not unanimous consent, drive law in Western legal tradition. While that tradition's institutions advance consensual interaction—the desideratum in the consent-centered defense—they are therefore at the same time foundationally in conflict with the desideratum.

It's possible to retain a consent-centered defense of Western legal tradition despite this fact—but only by weakening the defense: "Western legal tradition's institutions are nonconsensual means that promote consensual ends. They do more to support consensual interaction than to undermine it; thus they're acceptable evils." This modification is coherent. But it renders the institutions of Western legal tradition evil all the same, hence the retained consent-centered defense is weaker.

An alternative approach to defending Western legal tradition evaluates that tradition in terms of its relationship to *net benefits*:

"Western legal tradition creates net benefits by providing a legal framework that facilitates markets and civil society. It enables and extends spheres of consensual interaction, which generates wealth."

This defense appears quite similar to the consent-centered defense, and indeed it is—with an important difference: the wealth-centered defense values consensual interaction facilitated by Western legal tradition as means to the end of wealth rather than as an end in itself. Its desideratum is the creation of net benefits, not consent per se.

The significance of this difference for the relative strength of the two defenses is straightforward. Whereas the consent-centered defense must treat nonconsensual legal institutions evolved by Western legal tradition as acceptable evils, the wealth-centered defense treats them as laudable as the consensual interactions they facilitate. Both those interactions and the institutions that facilitate them create net benefits: the former because all consensual relations create wealth; the latter because some nonconsensual institutions do too—and the evidence shows that those include institutions evolved through Western legal tradition, which facilitate consensual relations. Western legal tradition is therefore praiseworthy piece and quilt.

The wealth-centered defense is stronger. It is only possible, however, if one is willing to acknowledge that not just in hypothetical constructs but also in the world net benefits can be and in some very significant instances are created without consent. My point is not that one therefore *should* take the wealth-centered approach to defending Western legal tradition, only that considering the creation of net benefits without consent might therefore be useful in discussions about society's legal institutions.

POLITICAL REALISM AND EVOLUTIONARY ORDERS: TWO CONTRASTING IDEAS OF STATE

by Boudewijn Bouckaert

In his last contribution, Lottieri draws our attention to the political writings of Leoni. He was the dean of the faculty of political sciences and taught the *Dottrina dello Stato* (Theory of the State). As these courses are not available in other languages, I rely entirely on the headlines of Leoni's theory, as outlined by Lottieri. It seems to me that Leoni's theory of the state was still in its "scaffolds" and waited for further elaboration. His early death probably put an abrupt end to this interesting research.

Leoni and Lottieri are right to say that the term *state* carried many meanings throughout the centuries. It derives from the Latin term *status*, which means *position, condition*, something that *stands* (from the verb *stare*). In medieval politics a *state* referred to a body of inhabitants (clergy, nobility, citizens-burghers) of a political unit (a kingdom, a duchy, a county, a city...) whose representatives could participate to some extent in the government (the *states, les états, die Ständen*). The union of all recognized states was called the *states-general*, more or less the precursor of the later parliaments.

The term *state* seems to have been first used in its modern sense by Niccolò Machiavelli. In his famous *The Prince*,^[43] the state is a political community existing in a territory under one ruler. This definition applied well to the larger political units in Europe which developed in the 16th and 17th centuries. A pivotal moment in this evolution is indeed, as Lottieri remarks, the Treaty of Westphalia of 1648, in which the "serious players" (France, Spain, Habsburgs, Sweden, etc.) made a deal about the power division in Europe, thereby excluding the "non-serious players" like the Church and the *Deutsche Hansa*. Since then the international game has been one among states in the Machiavellian sense. All

other political models were thrown out of the game.^[44] The dynastic states evolved between 1789 and 1920 into nation-states. These states claim to be an emanation of the “nation,” of the “people.” Max Weber refined the definition of *state* by defining it as an organization exerting a monopoly of violence in a given territory and towards a given population.^[45] The Weberian definition is more or less accepted in present international law as the norm for recognition of states and membership in the United Nations.



Niccolò Machiavelli

Weber’s definition is not wrong for it indeed grasps key features of the dominating political units since the 16th and 17th centuries. That definition is, however, static for it tells us nothing about the interaction of the state with “society.” At this point it is interesting to bring in Leoni’s view on the *stato* in its original, premodern sense. Leoni’s political realism, as Lottieri calls it, focused on the interaction between, on one side, the vertical relationships of the state and its citizens, and, on the other, the horizontal relationships among citizens in society, based on exchange and reciprocity. According to Leoni, the state is only able to maintain itself when its actions are more or less in line with the common opinions in the horizontal dimensions of society.

As a positive explanatory statement about the relationship between state and society, this viewpoint certainly contains a great deal of truth. A major example

in this respect relates to the remarkable stability of social welfare states during the period 1945 -1975 (*les trentes glorieuses*). These welfare states are characterized by ever-increasing taxation and regulation unseen before in human history. Yet these high levels of taxation and regulation were more or less accepted by the majority of the population. A major factor explaining this stability resides in the strong link between proper state organizations (parliament, bureaucracy, justice, and army) and deep-rooted social organizations (unions, mutualist societies, charitable organizations, leisure clubs, etc.). Such organizations, which mostly first developed completely beside the state as voluntary associations, often through religious inspiration, were integrated into state policies by awarding them subsidies and delegations of state power (for example, reimbursing medical expenses and paying out benefits for unemployment). The Dutch political theorist Ari Lijphart calls this a consensus-democracy as contrasted with majoritarian democracies.^[46] A consensus democracy develops policy through a consensus among the ruling elites of these large social organizations, with the political parties leaning on them (mostly Christian- and social-democratic parties). The *Sozialstaat*, as German scholars call it, reaches a high level of “internalization.” Because the individual, in important aspects of his life, participates in these organizations, and because these organizations participate in turn in the formation of state policy, the individual feels as if the state is his/hers and that he/she is the state. The saying of Louis XIV, *l’état c’est moi*, is thus replicated in the minds of many citizens of social welfare states.

Since the 1980s and ’90s, this model has been gradually collapsing. A major explanation of this collapse is related to wrong Keynesian policies and short-term exploitation of the state by pressure groups.^[47] Also, deeper evolutions in the horizontal layers of society qualify as a cause. Immigration (internal and external) makes the population less homogeneous, eliminating former group cohesion. The increase of wealth makes people less dependent on the cultural and leisure activities offered by the classical social organizations. Electronic networking

provides multiple opportunities for socializing outside the classical networks sustaining the social welfare state.

Politically this leads to the rise of so-called populist parties that directly appeal to the populace, bypassing the intermediaries of the social welfare state. In the long term these deep changes could also lead to societal networks which are less dependent on the state and which open up new prospects for a more libertarian society. Leoni's "unfinished symphony" about state and society is more than helpful in understanding these perspectives.

Endnotes

[43.] Niccolò Machiavelli, *The Prince*, (London: Penguin Books, 2014).

[44.] This process is well analyzed by Hendrik Spruyt, *The Sovereign State and its Competitors. An Analysis of Systems Change*, (Princeton, NJ: Princeton University Press, 1996).

[45.] Max Weber, "Politics as a Vocation" in *Weber's Rationalism and Modern Society*, ed. Tony Waters and Dagmar Waters, (New York: Palgrave Macmillan, 2015).

[46.] Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*, (New Haven, CT: Yale University Press, 1984.)

[47.] For this we can refer to the wide literature on public choice economics. A pioneering book here was Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, (Cambridge, MA: Harvard University Press, 1971).

WESTERN POLITICAL TRADITIONS AND POLYCENTRIC LOCALISM

by Carlo Lottieri

In his piece "Fetishizing Consent," Peter T. Leeson refers to the Western heritage and to two different ways to defend it: adopting a consent-centered perspective or, on the contrary, a wealth-centered one. However, it is not evident whether and why classical liberals should defend the legal and political orders of Western societies. It is true that European history generated individual rights, government limited, pluralism, and toleration, but at the same time, it elaborated absolutism, nationalism, imperialism, and totalitarianism. John Locke and Thomas Jefferson, Jean-Jacques Rousseau and Napoleon Bonaparte, Karl Marx and Adolf Hitler: all these people have played a crucial role in our common past. In other words, individual freedom and omnipotent state are both notions rooted in European heritage.

“FOR THIS REASON, TO GIVE A CORRECT EVALUATION, WE PROBABLY NEED TO "DEHOMOGENIZE" SUCH A COMPLEX AND DIVERSIFIED TRADITION.”

For this reason, to give a correct evaluation, we probably need to "dehomogenize" such a complex and diversified tradition.

From a political point of view, one way to understand our past consists in distinguishing an institutional order focused on the *modern sovereign state* (as it was built in France and theoretically elaborated by Jean Bodin, Thomas Hobbes, and others) from a tradition more oriented to respecting *self-governing communities* in order to safeguard the autonomy of civil society (with Johannes Althusius its main theorist).^[48] The independent medieval cities of Flanders and Northern Italy, the United Provinces, the Hanseatic League, the Swiss

Confederation, and the American federation cannot be understood if we don't see this cleavage between two different ideas of West and if we don't realize that the tradition of the modern state is far from the "dissenting" line. In the second political vision, consent was usually the fundamental criterion because orders based on contracts were adopted in order to defend the dignity of human beings.

Even if he was a strong opponent of any state intervention, in his writings Bruno Leoni didn't show a preference for localism and federalism. However, his analysis of the origins of law can help us defend this important feature of Western tradition: the link between individual freedom and local self-government.

In a tiny community it is easier for people to share the same claims. In other words, a small political community is more homogenous, and less heterogeneity drives us to a society where only a few people are forced to submit to a "common opinion" that conflicts with their wills. For this reason, Leoni's theory about the nature of law -- as the outcome of individuals' claiming certain behaviors from others -- can help us understand the advantages of small jurisdictions. Moreover, if your interests and values are not in tune with the rules of the tiny jurisdiction where you live, the cost of exit is low: you can benefit from a "quasi-market" in protection services.

So a localist perspective can find good arguments in Hayek's idea that "knowledge is *essentially* dispersed, and cannot possibly be gathered together and conveyed to an authority charged with the task of deliberately creating order," [49] and the proposal of institutional competition can be strengthened by Leoni's idea that law emerges from the exchange of claims and produces less dissatisfaction when the different claims are similar and compatible.

Endnotes

[48.] As Boudewijn Bouckaert remarks (also referring to the important book by Hendryk Spruyt), these institutional orders were destroyed when the modern state triumphed, that is, when the sovereign state established itself as the only possible solution to the

problem of political order. See for example, Johannes Althusius, *Politica. An Abridged Translation of Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples*, ed. and Trans. Frederick S. Carney. Foreword by Daniel J. Elazar (Indianapolis: 1995 Liberty Fund). </titles/692>.

[49.] Friedrich A. von Hayek, *The Fatal Conceit: The Errors of Socialism* (London: Routledge, 2013 [1988]), p. 77.

BRUNO LEONI DID NOT FETISHIZE CONSENT

by Peter T. Leeson

Both of my previous commentaries raised the issue of how one might evaluate legal and political orders and touched on some implications thereof. In part those commentaries reflect my wondering about how exactly Leoni evaluated those order. That may seem a strange thing to wonder about regarding a libertarian scholar whose best-known work is titled *Freedom and the Law*. But I don't think the answer is entirely clear.

“HERE'S WHAT I THINK IS CLEAR:
LEONI DID NOT FETISHIZE
CONSENT.”

Here's what I think is clear: Leoni did not fetishize consent. On the contrary, he considered a certain degree of coercion *desirable*, political coercion, in fact. Leoni said so explicitly—in the same passage where he told us why he rejected anarchism:

I do not say that we ought to do entirely without legislation and give up group decisions and majority rules altogether in order to recover individual freedom of choice in all the fields in which we have lost it. I quite agree that in some cases the issues involved concern everybody and cannot be dealt with by the spontaneous adjustments and mutually compatible choices of individuals. There is no historical evidence that

there ever existed an anarchistic state of affairs of the kind that would result if legislation, group decisions, and the coercion of individual choices were to be altogether eliminated.^[50]

Leoni's (qualified) endorsement of political coercion appears to be entirely pragmatic. I read it like this: civilization is desirable, and civilization requires some legislation and group decisions, which are coercive; hence some coercion is desirable. Note how at the margin in question—getting society up and running—this prioritizes outcome over process, consequence over consent.

I sense the same prioritization of consequence over consent in Leoni's insistence that the (nonconsensual) "exchange of powers" he sees as originating "[political community ... is preliminary to any other](#), of commodities or of services."^[51] Given that Leoni thinks highly of markets and considers the political community to some degree coercive, I read: markets are desirable and markets require political community; hence some coercion is desirable. Again, consent is deprioritized at least temporarily in favor of consequence.

And then there's this:

[\[A\] political system based on freedom includes always at least a minimum amount of coercion](#), not only in the sense of hindering constraint, but also in the sense of determining—for instance, by a majority rule—through a group decision what the group will admit as free and what it will forbid as coercive in all the cases that are not susceptible of an objective determination.^[52]

My reading: political order based on freedom is desirable and (ironically) such an order requires some coercion; hence some coercion is desirable.

My point is not that Leoni takes a wealth- or traditionally consequence-centered approach to evaluating legal and political orders. Each of the foregoing examples could be understood in terms of a consent-centered approach that embraces nonconsensual means for the promotion of consensual ends. But even that approach admits that

some nonconsensual institutions are desirable—if only to increase the sphere of consensual interaction.

Accordingly, as my previous commentary pointed out, that approach also sees such institutions as necessary evils. And here again I'm left wondering about Leoni: is that how Leoni saw the nonconsensual institutions he considered desirable? Did he characterize them as necessary evils—or just necessary? I'm not sure.

Endnotes

^[50.] Bruno Leoni, *Freedom and the Law*, expanded 3rd edition, foreword by Arthur Kemp (Indianapolis, IN: Liberty Fund 1991), pp. 129-30. <[/titles/920#Leoni_0124b_400](#)>.

^[51.] Bruno Leoni, *Freedom and the Law*, pp. 229-30. <[/titles/920#Leoni_0124b_702](#)>.

^[52.] Bruno Leoni, *Freedom and the Law*, pp. 169-70. <[/titles/920#Leoni_0124b_544](#)>.

WESTERN POLITICAL TRADITIONS AND POLYCENTRIC LOCALISM

by Edward Peter Stringham

Leeson gives a hypothetical example where two people could benefit from exchanging items but they do not know about this possible trade. He says that, theoretically, a third party could take both items without either person's permission and increase net benefits through "a property rearrangement."

Leeson concludes that we should not be concerned about consent and instead be concerned about net benefits, stating, "The wealth-centered defense is stronger. It is only possible, however, if one is willing to acknowledge that not just in hypothetical constructs but also in the world net benefits can be and in some very significant instances are created without consent."

At the outset, I agree with Bouckaert's criticism of Leeson, where Bouckaert says that allowing all sorts of

rearrangements of property rights without people's consent would create tremendous uncertainty in society.

Leeson quickly goes from arguing that, theoretically, one can think of some examples where two parties do not know that changes in property arrangements could increase "net benefits" to endorsing a system based on net benefits, whether or not consent is involved.

Leeson quickly goes from arguing that, theoretically, one can think of some examples where two parties do not know that changes in property arrangements could increase "net benefits" to endorsing a system based on net benefits, whether or not consent is involved.



One could certainly make a similar argument about a benevolent and hypothetically smart central planner. One can dream up a scenario where the Soviet planners of a hundred years ago knew more about technology and industrial production than the peasants. Likewise, it is not too difficult to think of a scenario where Tyson Foods knows much more about maximizing food production per dollar than small farmers do.

It is quite a leap, however, to now adopt as a normative standard letting third parties decide for others, whether that third party is Leeson's benevolent redistributor, the Soviet authorities, or Tyson Foods. Yes, Tyson Foods likely could put many "underutilized" farmers to work, and society would have a lot more food. Leeson's "net benefits" standard does not even require the underutilized farmers to be better off from the arrangement, provided the benefits to consumers and Tyson's shareholders outweigh the workers' losses.

Notice how quickly such a system devolves into illiberalism.

A fundamental aspect of markets is letting individuals decide what they want to do with their time, their labor, and their resources, for good or bad. An important aspect of markets is that they encourage producers of food to work for the consumers of food and that the more a company's product is in demand, the more the company will need to hire workers and treat them well. So markets encourage a harmony of interests where people work to serve one another.

The consent question lets an individual opt in or opt out. Consent lets an individual make a market exchange—or keep his cigar if he doesn't want to give it or sell it to someone else. Consent lets one accept a job—or choose not to if he doesn't want it.

Replacing a consent standard with a "net benefits without consent" standard may appeal to a select few economists or picaroons in Hyde Park.

To me, and many others, the more appealing standard is that individuals be able to decide whether they give away their cigars or their money.

Even if one believes that some amount of private and governmental crime will always persist, consent can be the gold standard by which actions are judged. Consent can also be the gold standard by which legal arrangements are judged.

Not all arrangements live up to that ideal, but as Lottieri points out, some do. Lottieri mentions "the wide network of *private cities* in which companies offer the basic services of a political order in competitive markets, such as protection of property, among others." He also brings attention to the Hanseatic League and the Dutch provinces as having more consent in their societies than societies with strong centralized states.

Lottieri contrasts the sovereign-state worldview with a "tradition more oriented to respecting *self-governing communities* in order to safeguard the autonomy of civil society."

I agree with Lottieri and Bouckaert that Leoni did not make the definitive case for a free society. Leoni could have gone further. But he did help to better our understanding of pure freedom with his “quasi-anarchical vision.”

I also agree with Lottieri’s comment on my discussion when he states that contracts presume certain ground rules: “parties to the game have to be recognized as legitimate actors: free, able to negotiate, legitimate owners of their goods, and so on.”

These ground rules should be the starting point, and from there we can appreciate all voluntary exchanges that take place. Individuals accept the autonomy of others and work with them and for them, with their consent.

A society purely based on consensual relations, not one based on coercion for some greater good, is the gold standard.

DEFENSE OF WESTERN LEGAL TRADITION: CONSENT OR WEALTH?

by Boudewijn Bouckaert

In his post “Fetishizing Consent,” Leeson perceives both a consent-centered defense of Western legal tradition and a wealth-centered one. According to the first, Western legal tradition is laudable because it is (mostly) based on consent. According to the second, it is laudable because it facilitates voluntary exchange, which maximizes wealth.

In his reply, Lottieri amends the consent-centered defense by “dehomogenizing” the Western (politico-)legal tradition and distinguishes a centralist line (the emergence of large sovereign nation states) and a decentralist line (cities, small states, federal states).

Lottieri’s distinction is relevant. From a libertarian perspective, there is no need for a bulky defense of Western legal tradition. It is a geographical-historical notion, and nothing allows us to presume that this tradition would be homogeneously liberty-oriented. The

problem, however, is whether the centralist line can be fully qualified as “anti-liberty” and the decentralizing one fully as “pro-liberty.” Lottieri seems to suggest this qualification.

To challenge this qualification, let us consider two historical examples.

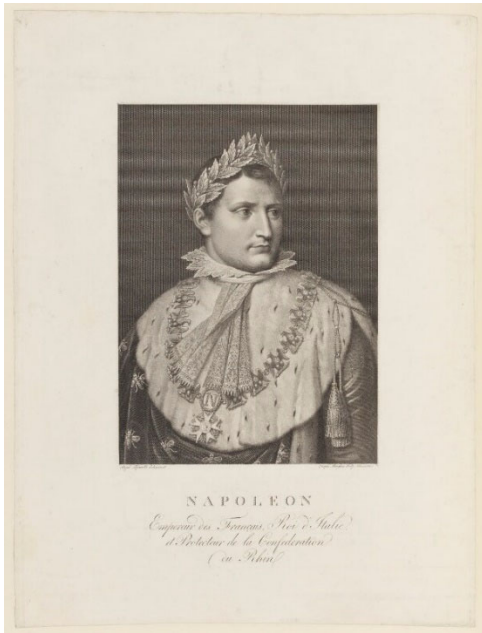


Miniature du Livre des profits champêtres, de Pierre de Crescens, du XV^e siècle, représentant des serfs.

Nobody will doubt that the rise of cities in the Middle Ages enlarged the scope of liberty for many people. Serfs could escape feudal exploitation; trade opportunities were dramatically enlarged; and city authorities based their policy decisions on (more or less) democratic procedures.[\[53\]](#) Nevertheless, cities often acted as monopolistic firms, violently suppressing competition from outside. The guilds of Ghent, for instance, often raided the countryside around Ghent in order to destroy all weaving chairs they could discover. This practice was ended by the “centralizing” Burgundian dukes. They broke the city monopolies, stimulating market competition and allowing for a wealth-enhancing boom in the second half of the 15th and first half of the 16th century.[\[54\]](#)

Until the French Revolution, France was legally segmented into *pays de coutumes* (places where legal customs applied). Legal rules concerning property, contract, tort, inheritance, and family law differed from *pays* to *pays*. This hampered the evolution towards enlarged interregional markets. The decentralized *Parlements* were eager to conserve this segmentation and opposed any legal reform. This deadlock was finally broken after the French Revolution. Under the pressure of Napoleon’s central authority, the

famous Code Civil of 1804 was enacted unifying French private law and allowing the emergence of a wide national market.^[55]



Napoléon Bonaparte

According to Lottieri’s consent-centered and decentralist view, the interventions of the Burgundian dukes and Napoleon should qualify as anti-liberty because they were not based on citizens’ consent. According to the wealth-centered view as developed by Leeson, both interventions were pro-liberty as they enlarged dramatically the scope of interpersonal exchange.

Both examples seem to suggest a difficult dilemma for libertarian theory. Either we support decentralizing political institutions at the risk that some of them will tilt towards small tyrannies, or we support the evolution towards larger political areas (the nation-states, the USA, the European Union) in which a general legal order prevails at risk that these large units will develop into big government.

To avoid this dilemma, it is useful to make the following distinction about political-legal institutions. Some of these institutions deal with the provision of public goods and club goods (roads, water provision, sewers, defense, police, public spaces, etc.).^[56] Some of them deal with the rules that individuals and their associations (legal entities, corporations, cooperatives, etc.) have to respect

in their relationships. The distinction between private-law and public-law institutions, made in continental legal theory since the beginning of the 19th century, corresponds more or less with this distinction.

As far as the first type is concerned, Lottieri’s decentralizing viewpoint should be fully supported. The provision of public goods and club goods requires firms in the Coasean sense and involves a relationship between management and customers.^[57] To maximize customer control over management, it is necessary to keep these firms as small as possible. Moreover, keeping these firms, which often exert territorial monopolies, small facilitates “voting with the feet.” This voting in fact constitutes a second-best to classical interpersonal or inter-company competition. For this reason, libertarians should not support the tendency in Europe to transform the European Union into a European “federal state.” Such a state would irresistibly evolve towards an uncontrollable Leviathan.

As far as the second type of institutions is concerned, the wealth-centered viewpoint should be supported. In exchange relationships, wealth is enhanced when the exchange possibilities are as wide as possible. This means that the legal institutions ordering exchange relationships (property, contract, and tort) should be applicable in wide jurisdictions. The procedure through which such institutions emerged and such wide jurisdictions were constituted are in this respect of lesser importance.^[58] In England such a wide jurisdiction came about through the judge-made common law; in France, through the intervention of a quasi-dictator such as Napoleon. In both cases, institutions were established facilitating exchange relationships in a very wide area and by this, enlarging freedom and wealth. To mention the case of Europe again, libertarians should for this reason also not support nationalistic tendencies in Europe aimed at reestablishing protectionist political entities. The European nation-states should protect European citizens against monopolization of public-goods provision by a European government. The European Union should protect European citizens against protectionist

intervention by their national governments and safeguard the internal market as a wide area of exchange.

A combination of wide areas of exchange, ordered by widely applicable private-law institutions, with a large number of small-scale political firms providing public and club goods seems to be the institutional success formula for maximizing wealth and liberty.

Endnotes

[53.] About the liberty-enhancing features of medieval cities see Boudewijn Bouckaert, “Between the Market and the State: The World of Medieval Cities” in Gerard Radnitzky, ed., *Values and the Social Order*, volume 3 (Avebury: Aldershot, 1997).

[54.] See Douglas C. North and Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (Cambridge: Cambridge University Press, 1976), p. 84.

[55.] According to Arrunada and Andonova this legislative intervention in France was necessary to impose free-market principles on the judiciary. Most of the judges were still appointed under the *Ancien Regime* and were still imbued with backward feudal legal opinions. See Benito Arrunada and Veneta Andanova, “Market Institutions and Judicial Rulemaking” in C. Ménard and M.M. Shirley, eds., *Handbook of New Institutional Economics* (Berlin: Springer, 2005).

[56.] Many goods labeled *public goods* by neo-classical economists are in fact rather club goods. This is well-analyzed and documented in Fred Foldvary, *Public Goods and Private Communities* (Washington, D.C.: The Locke Institute, 1994). Whether all public and club goods can be provided by voluntary associations is a far-reaching discussion for which there is no space here.

[57.] In his last comment, Leeson refers to Leoni’s rejection of anarchism and the fact that for some fields, coercive majority rule remains necessary (Bruno Leoni, *Freedom and the Law*, p. 191). Very probably Leoni had the provision of public and club goods in mind, for he referred to “cases [in which] the issues involved concern everybody and cannot be dealt with by the spontaneous

adjustments and mutually compatible choices by individuals.”

[58.] Alesina and Spolaore establish a relationship between the efficient size of nations and the widening of market areas through globalization. When wide market areas can be established through free-trade agreements, such as the European Union, WTO, NAFTA, and Mercosur, the nation state is not needed anymore for establishing wider market areas, as was the case in the 19th century. As a result, states will focus more on public-goods provision, which is more efficient on a smaller scale. (Alberto Alesina and Roberto Spolaore, *The Size of Nations* [Cambridge, MA: The MIT Press, 2005].)

OPACITY RESOLVED

by Peter T. Leeson

Writing is a chance for an author to communicate a message. Successful communication, however, is far from assured. The writer may not write clearly. The reader may not read clearly. Even deliberate misreading is possible, if you can imagine that.

For example, in concluding “[Fetishizing Consent](#),” I wrote: “My point is not that one therefore *should* take the wealth-centered approach” instead of the consent-centered approach. And my friend Ed Stringham read: “Leeson concludes that we should not be concerned about consent and instead be concerned about net benefits.”

I see now that my statement was terribly opaque. What I meant to communicate was this: my point is not that one therefore *should* take the wealth-centered approach instead of the consent-centered approach.

Yes, that’s much clearer.

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