

ARTICLES

THE THEORY OF LAW “AS CLAIM” AND THE INQUIRY INTO THE SOURCES OF LAW: BRUNO LEONI IN PROSPECT

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I. INTRODUCTION

This Article presents a systematic analysis of the theory of law *as claim* through a critical review of Bruno Leoni's work.¹ I argue that this

1. Bruno Leoni developed his ideas on the nature of law over a period of two decades (from 1947 to 1967), during which he worked as a professor of Doctrine of State and of Philosophy of Law at the University of Pavia. This Article focuses on the contributions that systematically illustrate Leoni's theory of law. Most of these are now translated into English: *LAW, LIBERTY AND THE COMPETITIVE MARKET* (Carlo Lottieri, ed., New Brunswick: Transaction Publishers, 2009) [hereinafter *LAW*,

philosophical theory provides a useful methodological framework for the analysis of lawmaking processes. I also demonstrate how Leoni’s critique of legislation offers insights into the efficient institutional response to the growing demand for law that has emerged from the increasing complexity of contemporary societies—insights that are particularly relevant in an age characterized by continuing technological changes and profound social mutations. Finally, I contend that the idea of law as claim provides useful guidelines for a critical review of the methodological foundations of the mainstream discipline of law and economics.

Leoni’s name is most often associated with the book *Freedom and the Law* (“*F&L*”), in which he criticizes the idea of law *as legislation* and emphasizes the advantages of juridical orders with evolutionary characteristics.² However, scholars often overlook the fact that the analysis developed in *F&L* is rooted in Leoni’s original (and, in many respects, anticipatory) theory of law.³ Thus, his work cannot be properly appreciated

LIBERTY]. Among the articles contained in this book, I will refer most often to the following: ‘*Consumer Sovereignty and the Law*’ (1963), at 33–37 [hereinafter *Consumer Sovereignty*]; *Law and Politics* (1961), at 167–183 [hereinafter *Law and Politics*]; *The Notion of the State in Kelsen’s Theory* (1961), at 185–192 [hereinafter *The Notion of the State*]; and *Obligation and Claim in Dogmatics, General Theory, and Philosophy of Law* (1961) at 193–215 [hereinafter *Obligation and Claim*]. I will also refer to Leoni’s two most famous contributions: BRUNO LEONI, *FREEDOM AND THE LAW*, 3d ed. (Indianapolis: Liberty Fund, 1998 [1961]) [hereinafter *FREEDOM*]; Bruno Leoni, *The Law as Claim of the Individual*, in *ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE* (1964) [hereinafter *Law as Individual Claim*] (reprinted in the appendix to Leoni, “*Freedom*”, *supra* note 1). Finally, the most systematic exposition of the theory of law as claim can be found in “*Appunti di Filosofia del Diritto, 1965–1966*” [Notes on Philosophy of Law 1965–1966]. This important work is not yet translated into English. I will refer to the original Italian version in *Il Diritto come Pretesa* [The Law as Claim] (Macerata: Liberlibri, 2004), 139–246 [hereinafter *NOTES 1965–1966*].

2. *FREEDOM*, *supra* note 1. Cf. Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 HARV. J.L. & PUB. POL’Y, 661 (1988); Leonard P. Liggio and Tom G. Palmer, *Freedom and the Law: A Comment on Professor Aranson’s Article*, 11 HARV. J. L. & PUB. POL’Y 71 (1988) [hereinafter *A Comment*]; Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887 (1994); Todd J. Zywicki, *Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961 (1995); Raimondo Cubeddu, *Friedrich A. von Hayek and Bruno Leoni*, 92 JOURNAL DE ECONOMISTES ET DES ETUDES HUMAINES 343–70 (1999) [hereinafter *Hayek and Leoni*].

3. This does not apply to Italian scholarship, which, over the last two decades, has largely recognized the central importance of the theory of law as claim in Leoni’s thoughts. See Antonio Masala, *Il Liberalismo di Bruno Leoni* [Bruno Leoni’s Liberalism] (Soveria Mannelli: Rubettino

without a full understanding of the way in which Leoni approached legal norms and their interaction in the context of juridical and economic orders. This Article proposes to fill this void and to elucidate the relationship between Leoni's critique of legislation and the theory of law as claim. In so doing, it identifies and emphasizes the actual relevance of Leoni's scholarship to the study of the lawmaking process. It also provides useful insights into the debate on the theoretical foundations of the discipline of law and economics.

The Article is organized into three sections. Section I discusses the theory of law as claim. Because this theory is based on a critique of Kelsen's normativism, I first discuss the normative approach and illustrate how Leoni's theory of law differs. Then, I define the concept of claim and illustrate Leoni's theory of the norm based on a structural analogy between the economic and legal orders. Section II discusses Leoni's critique of legislation and elucidates his normative theory of the sources of law. Finally, Section III proposes an interpretation of Leoni's work based on the concept of "process efficiency". It also maintains that the "Leonian" perspective provides valuable insights into the debate on the methodology of the discipline of law and economics and the efficient allocation of lawmaking authority across alternative sources of law.

II. THE ORIGIN OF LAW

Leoni's scholarship addresses issues rooted in a long history of philosophical inquiry, including (1) the nature of law, (2) the theory of the legal norm, and (3) the theory of the legal order (or "system"). Leoni's perspective on these three issues is summarized by the idea of law *as claim*, which he developed in opposition to the prevailing Kelsenian idea of law *as obligation*. Hence, it is in Leoni's criticism of Kelsen's doctrine of law

Editore, 2003) (It.); Emma Baglioni, *L'Individuo e lo Scambio. Teoria ed Etica dell'Ordine Spontaneo nell'individualismo di Bruno Leoni* [Individual and Exchange. The Theory and Ethics of the Spontaneous Order in Bruno Leoni's Individualistic Thought] (Napoli: Edizioni Scientifiche Italiane, 2004) (It.); Carlo Lottieri, *Le Ragioni del Diritto. Libertà Individuale e Ordine Giuridico nel Pensiero di Bruno Leoni* [The Reason of Law. Individual Freedom and Juridical Order in Bruno Leoni's Thought] (Soveria Mannelli, Rubettino Editore, 2006) (It.); Andrea Favaro, *Bruno Leoni. Dell'irrazionalità della Legge per la Spontaneità dell'Ordinamento* [Bruno Leoni. On the Irrationality of the Law For the Spontaneous Juridical Order] (Napoli: Edizioni Scientifiche Italiane, 2009) (It.).

that one can find the premise of his philosophical and methodological approach to law.⁴

A. LAW AS OBLIGATION

From the early 1950s, Kelsen’s “Pure Theory of Law” represented the obligatory reference point for the philosophical debate on the nature of law in continental Europe.⁵ Kelsen’s chief concern was to provide an explanation of the normativity of law, without reducing law to any other analytical domain (such as politics, psychology, economics, and so forth). From a Kelsenian perspective, an act or an event acquires legal-normative significance when normative meaning is conferred by a valid legal norm belonging to the juridical order.⁶ The juridical order is described as a hierarchy of norms related to each other through either inferiority or superiority. The logical recursion of superior relationships among norms anchors the legitimacy of the legal order in a particular norm characterized by a lack of superior norms. This is the *Grundnorm* (German for “Basic Norm”), which represents the point of origin of all norms and the positive foundation of the entire legal system.

For our limited purposes, three aspects of Kelsen’s thought must be emphasized. First, Kelsen’s legal theory is based on the twofold reduction of (1) law to norms and (2) norms to coercible obligations. From this perspective, the existence of a legal order depends upon the decision of a sovereign authority to create norms that express commands and to back these commands by the use of coercion. In this sense, Kelsen’s positivism qualifies as “normativism,” that is, a doctrine that assumes the norm to be

4. Leoni expressed his criticisms of Kelsen’s theory of law in a number of articles published as early as the 1960s. See *Law and Politics*, *supra* note 1; *Obligation and Claim*, *supra* note 1; *The Notion of the State*, *supra* note 1. See *Oscurita’ e Incongruenze Nella Dottrina Kelseniana del Diritto* [Obscurities and Inconsistencies in Kelsen Doctrine of Law] *Rivista Internazionale di Filosofia del Diritto* 1–2, 165–79 (1960) (It.).

5. See Hans Kelsen, *The Pure Theory of Law: Its Method and Fundamental Concepts*, 50 L. QUARTERLY REV. 474, 474–98 (1934) [hereinafter *The Pure Theory of Law Part I*]; see Hans Kelsen, *The Pure Theory of Law: Its Method and Fundamental Concepts, Part II*, 51 L. QUARTERLY REV. 517, 535 (1935) [hereinafter *The Pure Theory of Law Part II*]; see HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961); HANS KELSEN, *PURE THEORY OF LAW* (Max Knight, trans. 1967).

6. See generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961).

the logical *prius* of any reasoning on the nature of law. The essence of the juridical norm is reduced to a linguistic proposition prescribing a *Sollen* (German for “Ought”). That is, the essence of the legal norm is the existence of an obligation backed by the sanction provided by the legal order.

Second, Kelsen attempts to construct a rigorously formal conception of law as a normative sphere, independent of social, economic, or political conditions. His normativism aims to present a “pure theory” of law that disregards the social factors that influence legislators, courts, and people’s behaviors, in the sphere of law.⁷ Kelsen’s chief concern is the foundation of the validity of legal norms as immune from concerns about their effectiveness.⁸ A norm’s validity depends upon the norm being created by an authorized entity that derives its legitimacy from formal procedures prescribed by hierarchically superior norms. From this perspective, any evaluation of the correspondence of norms to legislators’ intended ends is foreign to the theory of the validity of legal norms.

Third, Kelsenian normativism provides philosophical legitimacy to a fully centralized legal order. In fact, the idea of a *Grundnorm* (which provides the foundations of the validity of the entire legal system) implies the existence of a unique source of legitimacy for the production of law. From this perspective, a sovereign’s monopoly of coercion is indissolubly linked to the sovereign’s monopoly of the production of law. Consequently, the content of legal rules depends on the sovereign’s will, which is embedded in the commands expressed by legal norms.

In response to this Kelsenian perspective, Leoni vigorously contends that the reduction of law to valid norms expressing coercible obligations leads to analytical distortions that prevent us from understanding the true nature of law.⁹ In other words, as Lottieri paraphrases it, “If we want to understand the real meaning of the obligations that structure a juridical order, we should also understand that they are what they are thanks to the claims that have, so to speak, generated them . . .”¹⁰ From this critical

7. See KELSEN, PURE THEORY OF LAW, *supra* note 5.

8. See *The Pure Theory of Law Part I*, *supra* note 5; *The Pure Theory of Law Part II*, *supra* note 5.

9. In NOTES 1965–1966, *supra* note 1, Leoni highlights the logical connection between the critique of normativism and the theory of law as individual claim. In fact, the discussion is divided into two parts: Part 1 “Criticism of Normativism” and Part 2 “Law as Claim”.

10. Carlo Lottieri, *Against Statism and Legislation: In Defense of Individual Rights*, in LAW, LIBERTY, *supra* note 1, at 20.

standpoint, Leoni develops his theory of law *as claim* as a philosophical alternative to Kelsenian normativism.

B. LAW AS INDIVIDUAL CLAIM

1. The Minimum Common Meaning of the Word “Law”

While Kelsenian normativism identifies the essence of law in the formal condition of the validity of legal norms, Leoni seeks a definition of law that is also a “causal explanation” of juridical norms.¹¹ In this respect, he observes that “law” is a “word,” not a “thing” or “an object of sensible experience.”¹² This consideration has significant methodological implications. While the definitions and denominations of things “have meaning when they refer more or less directly to our sensible experience,” the word “law,” as any other word, “does not possess a meaning that is directly and uniquely referable to a sensible experience as such.”¹³ Therefore, the definition of the word “law” requires a different definitional methodology. Attention should be devoted to the meaning attributed to the word “law” by the people who behave and undertake actions based on such meaning. Here, Leoni adopts the methodology that underpins Weber’s “comprehensive sociology,” according to which explaining a social phenomenon means grasping “the *context* of sense in which a directly comprehensible action belongs according to its subjectively intended sense.”¹⁴ From this standpoint, and confronted with the variety of languages and usages of the word “law,” Leoni proposes to seek the *minimum common meaning* in all possible uses of the word “law.”¹⁵ In short, the search for the minimum common meaning of the word “law” is the methodological criterion for inquiry into the nature of law.

11. *Obligation and Claim*, *supra* note 1, at 194.

12. *Id.* at 193.

13. *Id.* Here, Leoni clarifies that, in searching for an answer to the question, “what is law?” a preliminary issue ought to be clarified: that is, “what methodological criterion do we use to solve this question of definition, upon which all further investigations depends.”

14. See Peter Much, ‘Sense’ and ‘Intention’ in *Max Weber’s Theory of Social Action*, 45 *SOCIOLOGICAL INQUIRY*, no. 4, 59–65 (1975) (emphasis added).

15. *Obligation and Claim*, *supra* note 1, at 195.

Leoni observes that lawyers and jurists would identify the minimum common meaning of the word “law” as the *juridical norm*. However, such a definition is too narrow. Instead, the concept of “claim” better corresponds to the idea of the minimum common meaning. This summarizes a vast range of different meanings of the word “law,” as used by lawyers, jurists, and ordinary people. As articulated by Leoni, “[o]ne who presumes a right first of all *claims* that a third party will actually behave in a certain way.”¹⁶

The methodological strategy Leoni adopts to provide a definition of law has important *substantive* implications. While Kelsen’s reduction of law to norms (and to the obligations thereby expressed) limits the inquiry into the essence of law to the logical structure of norms as autonomous from people’s behaviors, Leoni attempts to search for the essence of law in the reality of the concrete juridical experience, by focusing on both people’s behaviours and subjective ends. He abandons the assumption that the norm is the prior to any reasoning about the nature of law, instead adopting the idea that the origin of law always traces back to individuals’ behaviors. The juridicity of a norm, thus, depends on its correspondence to people’s claims.¹⁷ To summarize, Leoni’s methodological choice entails a shift of focus from the formal structure of legal norms to the role of people’s behaviors in the formation process of the norms.

2. *The Concept of Claim*

In *Law and Politics*, Leoni provides a definition of “claim” that can serve as a useful reference point:¹⁸

... the concept to which the term *law*, as used in ordinary language, seems reducible could be defined as *the request for behaviour from someone else* which corresponds to one of our *interests* (or the interest of others on whose behalf we formulate the request), and furthermore behavior we consider as *probable*—or at any rate more probable than other behaviour—in the context of the organized coexistence to which we all belong. Moreover, in all cases we see this behavior as *determinable* through our *intervention* (towards another person or persons) on the basis of a *power* that we who formulate the request consider we have.

16. *Law and Politics*, *supra* note 1, at 170.

17. By contrast, according to the normative perspective, the *juridicity* of a behavior depends on the behavior being considered and typified by a coercive norm belonging to the juridical system.

18. *Law and Politics*, *supra* note 1, at 176.

It is useful to split this definition into two parts: (1) the definition of the constitutive elements of “claim” and (2) the distinction between “juridical” and “non-juridical” claims.

a. The Constitutive Elements of Claim

To define the concept of claim, Leoni conceives of claim as a “psychological fact.”¹⁹ He focuses on the forecasts and predictions implicit in the act of claim, identifying four distinct objects of individual prediction: (1) probability, (2) intervention, (3) power, and (4) interest. That is, a claim rests on the claimant’s judgment with regard to the objective probability and determinability of other people’s behaviors in a given situation in a given society; on the positive assessment by the claimant of his or her own power to determine someone’s else behavior; and, finally, on the claimant’s interest in the claimed behavior.²⁰

b. Juridical vs. Non-juridical Claims

The subjective definition of the concept of claim is not sufficient to distinguish between juridical and anti-juridical (or, more generally, non juridical) claims. To accomplish this task, a further objective element is needed. Leoni finds this element in the statistical probability of the claimed behavior in the society to which the claimant belongs. He explains the point as follows: not every claim is regarded as juridical in the common language. There are “common” claims that are regarded as “juridical,” and more “special” (that is, not common) cases that are considered “anti-juridical.”²¹ Thus, the rule to distinguish between common and special claims “is not a norm of the ‘juridical’ type, nor it is an obligatory norm of

19. *Id.* at 170 (“What does ‘claim’ mean? If considered as a psychological fact, ‘claiming’ is certainly a complex *act*, as complex as the corresponding *concept* of claim” [emphasis added]). That is, understanding the psychological components of the *act* of claim enables Leoni to provide a juridical definition of claim.

20. *Compare Law and Politics*, *supra* note 1, at 171–72 with *Obligation and Claim*, *supra* note 1, at 207–08.

21. *Obligation and Claim*, *supra* note 1, at 207.

any other kind. Such rule is simply *statistical . . .*”²² To explain the point Leoni provides the following example:²³

The statistical probability that a passerby will turn into a robber as soon as he meets another passerby in a lonely alley is relatively small and at any rate smaller than the probability that he will not turn into a robber. This is true in all societies destined to last for a reasonable time. A similar consideration applies to the statistical probability that those who establish a debt do not intend to pay it.

This definition represents another radical departure from Kelsenian positivism. It proposes that the juridicity of a claim does not derive from a coercible norm emanating from legitimate, centralized legal authorities. Rather, it rests on a statistical rule: the correspondence of the claimed behavior to the *id quod plerumque accidit* (Latin for “what usually happens”). In contrast, a Kelsenian normativist would say that the distinction between juridical and non-juridical claims is based on the existence of a norm that attributes legal relevance to the claimed behavior. For Leoni, juridical claims are those “*that have a good probability of being satisfied* by corresponding people in a given society at any given time.”²⁴ In *Notes of Philosophy of Law (1965–66)*, Leoni further specifies the notion of juridical claim as one that is likely to be “satisfied” and to be “advanced” by the people concerned in a given social situation.

Leoni ultimately defines a juridical claim as one that contains all the subjective elements of the claimant’s prediction (that is, a forecast of probable behavior, intervention, power of intervention, and interest) and, in addition, has a high probability of being satisfied and advanced by the relevant people in a given society. That is, the locus of juridicity must be sought in the correspondence between the subjective probability (as assessed by the claimant) and the objective probability (that is, the statically measurable probability) of the claimed behavior.²⁵ Figure 1 summarizes the discussion:

22. *Id.* (emphasis added)

23. *Id.*

24. *Law as Individual Claim, supra* note 1 (emphasis added).

25. Both *subjective* and *objective* probabilities come to the fore. The claim is, above all, a psychological fact; as such, it contains claimant’s *subjective* judgment about the probability of the claimed behavior (that is, subjective probability). However, this subjective element is not sufficient to qualify a claim as “juridical.” To be regarded as “juridical,” the claim must be “*statistically* probable, on the part of other people concerned” (that is, objective probability).

<i>Subjective Components of Claims</i>	<i>Objective Components of “Legal” Claims</i>
<ul style="list-style-type: none"> • Judgment of probability • Intervention • Power • Interest 	<ul style="list-style-type: none"> • Probability of the claim being satisfied • Probability of the claim being advanced

3. The Theory of Law as Exchange of Claims

The concept of law *as claim* represents the cornerstone of Leoni’s theory of the legal norm and the legal system, which is based on the genealogical similarity between law and the market. Two distinct analogies explain this similarity. The first analogy relates the demand for goods and services in private markets with the claims of individuals in the juridical system. The second analogy relates prices and norms. Just as prices result from the exchange of goods and services, so do legal norms result from the exchange of claims among individuals. In essence, the exchange of claims generates the system of norms in a way similar to the way in which the interaction between supply and demand generates the system of prices.

To appreciate the theoretical implications of the market-law analogy described above, one needs first to understand the mechanics of the exchange of claims, as it is based on individuals’ mutual expectations. Suppose that individual A advances on B a legal claim x . B complies with x because he or she expects that, in analogous future cases, A will reciprocally comply with B’s claim of x . More generally, B complies with someone else’s legal claim because he or she expects that all individuals will comply with anyone else’s legal claim. That is, mutual expectations establish the power of a claimant to determine someone else’s behavior and to have his claim satisfied. This power is based on two fundamental mechanisms. First, the act of a claim contains the implicit contraction of a future obligation to comply with similar claims. That is, the individual who makes the claim implicitly offers his willingness to comply with future analogous claims by others. Second, the individual’s power to obtain the

satisfaction of his or her claim is backed by the power of all other individuals in the society who want to obtain the satisfaction of similar claims. In the end, each claimant obtains compliance by offering, in exchange, his or her own obligation to comply with future, similar claims by anyone else. In doing so, the law results from the exchange of claims among individuals.²⁶

These mechanics are similar to those of trade in private markets, in which two individuals satisfy complementary needs through mutual exchange. For example, A's need for x generates his or her claim on B. To obtain B's cooperation, A offers his or her obligation to comply with B's future analogous claim. At the same time, by complying with the obligation to A, B earns the right to advance a future claim on A and, more generally, on anyone else in the society. In this context, the obligation serves the function of a trade currency, which allows for the exchange of claims between individuals.

The market-law analogy explains the formation process of legal norms and obligations. Consider, first, private competitive markets. Here, the price of a good or service reflects the equilibrium between supply and demand. The equilibrium occurs *only* when the price has the greatest probability of being accepted by both sellers and buyers. Similarly, the legal norm registers the conditions at which, in the vast majority of cases and with greater probability, the behaviors of those who exercise the claim

26. On this specific point, I partially disagree with the interpretation of the theory of law as claim recently proposed by Todd Zywicki in *Bruno Leoni's Legacy and Continued Relevance*, J. PRIVATE ENTERPRISE (forthcoming). According to Zywicki's interpretation of the theory of law as claim, juridical claims emerge from the iterative process of people making competing claims and judges responding through judicial decisions (by recognizing the validity of those claims or rejecting them as invalid). By comparison, I contend that, while this is certainly consistent with Leoni's explanation of the origin of law, both in *Law and Politics*, *supra* note 1, at 171–74, and *Obligation and Claim*, *supra* note 1, at 207–9, Leoni clarifies that the juridical nature of a claim does not necessarily hinge on the judicial recognition of the validity of that claim. Claims are juridical when they are likely (that is, statistically probable) to be advanced and satisfied in a given society. This might happen (in Leoni's view it happens most of the times) in the absence of a conflict between competing claims and as a result of the complementariness of individuals' needs and expectations. That is, the theory of law as exchange of claims does not eschew the "conflict" from the formation process of law, but it neither assumes the conflict as a necessary condition for the coming into existence of juridical claims. See *Law as Individual Claim*, *supra* note 1, at 198 ("Claims intermingle and may even conflict against each other, . . . their respective success depending on their respective probabilities of being satisfied by the people concerned."); *id.* at 200 ("The legal philosopher not only moves from the concept of claims, but also realizes that claims may be conflicting.").

meet the behaviors of those who adapt to it.²⁷ A claim becomes legal only when it has the greatest probability of being advanced and satisfied. From this perspective, legal norms are nothing more than linguistic propositions that register the exchange of claims among individuals, in the same way that prices register the interaction between supply and demand.

Second, the market-law analogy helps to demonstrate that the concept of obligation depends logically and explanatorily on the concept of claim. As in private markets where the supply of goods and services is driven by the corresponding demand, in the legal realm the obligation is generated by an underlying individual claim. On the one hand, there is no possibility of conceiving a juridical obligation without someone’s request for someone else’s behavior.²⁸ On the other hand, a claim makes perfect sense, even in the absence of an enacted norm that contains a coercible obligation, in the same way that the demand for goods and services precedes the supply of the corresponding goods. Therefore, it is the existence of a claim that establishes the juridical relevance of the corresponding obligations, and not the converse. In conclusion, the concept of claim seems to be more appropriate than that of norm or obligation as the ultimate basis of a theory of law,²⁹ and the logical source of juridicity is the existence of a claim, not the imposition of an obligation through coercible norms.³⁰

Finally, according to the market-law analogy, juridical norms originate from the exchange of claims among self-interested individuals. Law is the unintentional outcome of a spontaneous process in which each individual advances those claims that are considered more likely to be

27. *Law as Individual Claim*, *supra* note 1 (“Economists have traced back prices as a social phenomenon ultimately to individual choices between scarce goods. It is my suggestion that legal philosophers as well should trace back legal norms as social phenomena to some individual acts or attitudes. These acts reflect themselves in some way in the norms under a legal system, as individual choices among scarce goods reflect themselves in prices on the market under a monetary system. I suggest also that those individual acts and attitudes be called *demands* or *claims*.”).

28. *Obligation and Claim*, *supra* note 1 at 209–10 (“... wherever no one is making claims for himself or on someone else’s behalf, there are in reality no obligations of the type commonly considered juridical. . .”).

29. *Id.* (“The concept of juridical obligation expressed in the juridical norm comes to logically depend on the concept of claim.”).

30. NOTES 1965–1966, *supra* note 1.

satisfied at a given time in a given society. In so doing, each member of a social community contributes imperceptibly to the production of legal rules, in the same way that, in economics, each single consumer's choice infinitesimally affects the market price. As Leoni put it, law is "transsubjective;" that is, law is the objective outcome of individual actions pursuing subjective ends.

III. THE PRODUCTION OF LAW

A. THE SOURCES OF LAW

The theory of the origin of law as exchange of individual claims is strictly connected to the theory of the sources of law and to Leoni's critique to legislation. From this perspective, Leoni emphasizes that the transsubjective nature of the law is incompatible with any monopoly in the production of legal rules. If the law arises from the convergence of multiple individual claims, then there is neither monopoly in the production of law nor a centralized lawmaking authority. Instead, the ultimate source of law is the impersonal, non-coercive convergence of people's beliefs and expectations into the most statistically probable claims.

From Leoni's evolutionary perspective, law pre-exists the legislative process rather than being the product of it. Law is a *fact* that results from the "connections, convergences and exchanges" of subjective individual claims; its existence precedes any "institutional" lawmaking process.³¹ From this standpoint, lawmaking institutions are not "sources" of law, they are simply "techniques enabled in any organized coexistence (for example, through the work of jurists, or that of judges and legislators) for the propagation of uniform ideas on what must be understood as a 'system' of claims and of corresponding obligations."³² Lawmaking institutions coordinate the expectations and claims of individuals by "registering" and "describing" those claims that are statistically most probable at a given time in a given society (that is, juridical claims).

Leoni's view on the origin of law has an immediate normative implication. If law emerges spontaneously from the exchange of claims among individuals—such as demand and supply meeting spontaneously as the result of the interaction between individual choices in private

31. *Obligation and Claim*, *supra* note 1, at 212 ("Law is born of the coming together of claims that are relative to certain behaviors").

32. *Id.* at 212–13.

markets—the process of law creation is consistent with the nature of law *only* to the extent that is centered on individual will. This is the core principle around which Leoni develops both his normative theory of the sources of law and his call for a reduction in the range of issues subject to collective decisions.

B. LEGISLATION

Leoni considers three sources of law: legislation, judges, and lawyers.³³ In this section, I discuss Leoni’s critique of legislation, his proposed reorganization of the sources of law, and his ideas on judges’ and lawyers’ law.

1. *Legal Certainty*

One of the central theses developed in *F&L* is that legislation cannot ensure the certainty of law. Crucial to this point is the distinction between “short-term” and “long-term” legal certainty. Leoni’s chief concern is long-term certainty, or individuals’ ability “to make plans about the future legal consequences of their actions.”³⁴ In this respect, legislation fails. Leoni contends that long-term legal certainty remains impossible to achieve through the legislative process because the stability of legislation depends on the will of legislators, who are only in power for short periods and whose incentives to change or maintain existing laws are highly volatile and dependent on the balance of power among competing interest groups.³⁵

Long-term legal certainty depends on the quality of the lawmaking process rather than on the formal characteristics of the legal outcome. If rules remain subject to the possibility of change or abrogation at legislators’ will, it is unrealistic to expect legal certainty be secured by the

33. Bruno Leoni, *Law and Economy in the Making*, in *FREEDOM AND THE LAW* (3d ed. 1991) [hereinafter *Law and Economy*].

34. *Id.* at 83. The normative superiority of long-term certainty over short-term certainty is the logical consequence of the idea of law as the expression of the will of the people. This point will become clearer as the discussion proceeds.

35. *FREEDOM*, *supra* note 1, at 76.

“precise wording of the written rule.”³⁶ One of the most serious inconveniences associated with legislative lawmaking is based on the assumption that the precision of the letter of the law is sufficient to secure legal certainty. As Aranson observes, “[l]egislation provides instantaneously certain language, but *the process of its adoption makes real, long-run certainty a chimera.*”³⁷ As a result, in legislative systems, “*nobody [is] certain that any law, valid today, could last until tomorrow without being abrogated or modified by a subsequent law.*”³⁸

2. Legislation as Planned Economy

Legislators often lack the cognitive resources required to *register* and *describe* the juridical claims emerging from society. To elucidate this point, Leoni refers, once again, to the market-law analogy. He observes that “there is more than an analogy between the market economy and a judiciary or lawyers’ law, just as there is much more than an analogy between a planned economy and legislation.”³⁹ This enables Leoni to argue for the structural incompatibility between legislation and free-market systems.

a. Centralization

First, the legislative process is centralized and, as such, is subject to the same economic “calculation problem” that plagues centralized planned economies:⁴⁰

“[A] legal system centered on legislation resembles . . . 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

36. *Id.* at 80.

37. Aranson, *supra* note 2, at 173 (emphasis added). The selected text synthesizes Leoni’s thoughts.

38. FREEDOM, *supra* note 1, at 78 (emphasis added).

39. *Id.* at 23.

40. *Id.* at 22. Here, Leoni explicitly recognizes that no centralized decisionmaking body is capable of reliably mimicking the complex dynamics of market prices. “[A] centralized economy run by a committee of directors suppressing market prices and proceeding without them does not work because the directors cannot know, without the continuous revelation of the market, what the demand or the supply would be has remained so far unchallenged” As many commentators have observed, Leoni bases his critique of legislation on the conceptual framework of the Austrian school of economics—and, in particular, on the works of Friedrich August Hayek and Ludwig von Mises. *See infra* note 103.

whose respect, if any, for the people’s wishes is subject to that limitation.⁴¹

Since legislators lack sufficient knowledge of people’s preferences, incentives, and constraints, they cannot reliably predict how people will react to changing conditions, how they will respond or what the consequences of these actions will be.⁴² It is therefore unrealistic to entrust centralized representative bodies with the task of expressing people’s will. Legislation is the expression of the will of contingent majorities within legislative assemblies, and cannot, in any way, be regarded as the expression of the will of the people.

b. Ex Ante Perspective

A second limitation of the legislative process depends on its being characterized by an *ex ante* perspective that requires legislators to engage in deductive logical reasoning. Leoni believes in the normative superiority of inductive over deductive legal reasoning.⁴³ From his perspective, individual rights are inductions based on particular decisions rendered by courts in the context of adjudicating disputes between individuals. He opposes the idea—which underpins the legislative organization of the sources of law—that rights are deduced from general principles or abstract norms established by legislative bodies. According to this latter view, “subjective” individual rights are logical consequences of abstract and general legal rules established by the sovereign.⁴⁴ Legal rights are certain because they are based upon logical deductions from abstract legal provisions. In contrast, in Leoni’s view, lawmaking institutions induce legal rules from the logic underpinning the exchange of subjective individual claims.⁴⁵ The task of lawyers and judges is to discover the

41. *Id.*

42. *Id.* at 20 (“... no legislator would be able to establish by himself, without some kind of continuous collaboration on the part of all the people concerned, the rules governing the actual behaviour of everybody in the endless relationships that each has with everybody else.”).

43. *Cf.* Baglioni, *supra* note 3, at 72–75.

44. *Id.* at 73.

45. *See Law and Economy, supra* note 32.

implicit logic underlying the behavior of people in their mutual relationships.⁴⁶ In this manner, the law maintains a probabilistic connotation, and the process of producing law remains conditioned upon the demand for law emerging on the part of the people. Certainty is better secured by logical induction from a particular case than by the precision of rigorous deductive logical reasoning. In short, the *ex-post* dimension of lawmaking is a safeguard against the abuses of political power that are inevitably associated with the *ex-ante* unconditioned will of contingent majorities.

c. *Collectivization*

Leoni also emphasizes the structural differences between individual decisions in the market and in the political arena.⁴⁷ First, unlike consumer choices, political decisions are collective in nature, as they constitute the result of a coercive procedure in which people decide not as single individuals, but as members of groups.⁴⁸ In Leoni's language, political decisions are made by decision groups. Second, unlike the outcome of consumption decisions, the outcome of the political process is collectivized; that is, it produces a binding effect on the entire community subject to its laws, despite the fact that only a small part of the community's members have any possibility of influencing the process.⁴⁹ Leoni qualifies the outcomes of the political process as group decisions. Both the collective and the collectivized nature of the political decisions are sources of coercion and uncertainty in voting that do not occur in the market. In fact, political decisions involve a mismatch between those who decide and those who are impacted by the choice. While in private markets the choosing entity (that is, the consumer) coincides with the recipient of the decision (that is, the consumer), in the political process, the chooser (that is, the politicians) differs from the recipient (that is, the community members). This separation between chooser and recipient makes it more difficult for community members to predict the effects of their choices in

46. *Id.* at 212.

47. See James M. Buchanan, *Individual Choice in Voting and the Market*, 62 J. POL. ECONOMY 334 (1954) [hereinafter *Individual Choice*].

48. FREEDOM, *supra* note 1, at 105.

49. *Id.* at 105. (“[legislative] regulations are enforced upon everybody, including those who never participated in the process of making the regulations and who may never have had notice of it.”).

the political arena, as it exposes them to the risk of seeing their votes overturned.⁵⁰

d. Indivisibility

Political decisions are associated with a high degree of production indivisibility, which entails a degree of coercion that is never present in market choices.⁵¹ Political decisions bundle together a number of heterogeneous issues, with the result that many political alternatives “do not allow those ‘combinations’ or ‘composite solutions’ which render market choices so flexible in comparison with political choices.”⁵² In fact, “[t]he political scene . . . is comparable to a market in which the individual is required to spend the whole of his income on one commodity or the whole of his work and resources in producing one commodity or service.”⁵³ An important consequence is that alternatives of voting choice are “all-or-none”: they do not permit the division of contended resources necessary to maximize the surplus from trade. This accentuates the distributive (conflictual) aspect of politics, which in turn, exacerbates the problem of involuntary redistribution.

e. Legislation and the Free Market

Based on the above-mentioned problems, Leoni contends that the free-market system is structurally incompatible with a lawmaking process centralized by the authorities.⁵⁴ The reason for this assertion is straightforward. While “free-market” implies a spontaneous adjustment of demand and supply, any legislative organization of economic activity entails that “[d]emand may be obliged to meet supply, or supply may be obliged to meet demand.”⁵⁵ Legislation is strictly connected to the idea of

50. *Id.* at 108–09 (“The voter who loses makes one choice initially, but eventually has to accept another that he previously rejected; his decision-making process, has been overthrown.”).

51. *Individual Choice*, *supra* note 46.

52. *FREEDOM*, *supra* note 1, at 108.

53. *Id.*

54. *Id.* at 103.

55. *Id.* at 105.

the redistribution of wealth, which may oblige individuals to pay more for good and services than they would pay in a free-market system or to supply good and services at lower prices than they would in the absence of legislative constraints. In short, legislation forces a market to exist, even when no sellers are positioned to satisfy buyers' demand and no buyers are positioned to pay sellers' prices.⁵⁶

In addition, legislation often blocks the process of mutual gain through voluntary exchanges of goods and services. The success of Roman law and English common law systems has led to the creation of rules reducing transaction costs, thereby facilitating economic exchange and the generation of economic surplus. Unlike Roman law and common law, legislation creates obstacles to inter-individual exchange. Under legislation, for an exchange to occur, it is not sufficient for a net cooperative surplus to exist; rather, buyer and seller must also comply with the requirements imposed by a centralized lawmaking body. Since individuals do not participate in the production of legislative rules, such rules often do not reflect their utility functions or preference scales.

3. *Political Representation*

Leoni's critique of political representation begins, once again, by comparing private markets with the political arena. Leoni recognizes that the mechanism of representation can work effectively in the context of "private daily life and business," but emphasizes the inconveniences associated with the use of representation in the political arena.⁵⁷ In the context of "private daily life and business," representation works effectively for the following reasons: (1) representatives act "under certain precise conditions fixed by the represented themselves;" (2) "representatives are usually well-known to their represented;" and (3) the represented "may at any moment repeal the powers of the representative, and interfere with the action of their representatives in all respects."⁵⁸ However, once extended from the private to the political sphere, the mechanism of representation no longer preserves the function of an activity performed according to the will of the represented.⁵⁹ In particular, difficulties arise when the principle of representation is applied to the

56. *Id.* at 104 ("Legislation may achieve what a spontaneous adjustment could never do.").

57. Bruno Leoni, *A "Neo-Jeffersonian" Theory of the Province of the Judiciary in a Democratic Society*, 10 *UCLA L. REV.* 965, 976 (1963) [hereinafter *A Neo-Jeffersonian Theory*].

58. *Id.* at 976.

59. FREEDOM, *supra* note 1, at 119.

sphere of group decisions. Difficulties increase even further when the principle of representation is extended to all citizens in a political community. In this respect, Leoni observes, somewhat ironically, "It seems to be a great misfortune of this principle that, the more one tries to extend it, the more one defeats its purpose."⁶⁰

By criticizing the extension of the representation mechanism to political decisions, Leoni anticipates many of the insights of modern public-choice theory. In current economic terminology, Leoni identifies precisely the causal mechanisms that generate the agency problems associated with the voter-politician relationship: (1) the difficulty of specifying *ex-ante* the terms and conditions of the principal-agent relationship (that is, the "contractual incompleteness" problem);⁶¹ (2) the presence of asymmetries of information between the principal and the agent, which entail a lack of information by both parties on the other's behaviors and needs (that is, the asymmetric information problem);⁶² and (3) the high costs for the principal of monitoring and controlling the agent's behavior, which prevents the principal from rewarding good performance and sanctioning bad performance (that is, the monitoring-cost problem).⁶³ Finally, Leoni emphasizes that agency slack is, to a great extent, the result of voters' rational ignorance. Since, in many cases, voters do not have incentives to acquire information, legislators have strong incentives to shirk their duties and act in accordance with their own private interests.⁶⁴

60. *Id.* at 121.

61. *Id.* at 122. ("It is a truism that issues at stake in political life are too many and too complicated and that very many of them are actually unknown both to the representatives and to the people represented. Under these conditions, no instructions could be given in most cases.")

62. *A Neo-Jeffersonian Theory*, *supra* note 56, at 970. Here, Leoni argues that, in reality, people "have no means of evaluating the greatest part of the laws made by their 'representatives'" and that people are often "unaware of the existence of the most part of 'their' laws."

63. *Id.* Leoni observes that, in most cases, people are unable "to impute to their 'representatives' any real responsibility for 'their' laws." In order to make political representation more effective, "'people' should be able to formulate their dislike in a much more articulated way than they do now when they discard 'representatives' and elect new ones in the mere hope of not being forced to discard them in their turn at the next election." In conclusion, "voters have no unambiguous way of formulating their wishes . . ." *Id.*

64. *Id.* ("Lack of interest in elections on the part of a substantial sector of the electorate, ignorance of the real issues at stake, propensity to respond only to the most superficial slogans of the

In addition to the agency problem, Leoni identifies the difficulties associated with the problem of aggregating individual preferences. First, when the issue space is multidimensional, representation is a “very dubious process.”⁶⁵ In fact, “the more numerous the matters in which one tries to represent [people], the less the word ‘representation’ has a meaning referable to the actual will of actual people.”⁶⁶ Second, Leoni expressly recognizes the limitations associated with “the poverty of the schemes usually adopted and adoptable for the distribution of the voting strength.”⁶⁷ These limitations imply an impossibility for majoritarian voting to capture the intensity of individuals’ preferences. Third, Leoni is aware of the possibility of the intransitive cycle associated with pairwise majoritarian voting.⁶⁸ Fourth, as already mentioned, one of the major limitations of the voting process is that the voter “may lose his vote and be compelled to accept a result contrary to his expressed preference.”⁶⁹ Winners’ decisions are legitimate and binding on *all* members of the political community; as such, they impose involuntary costs on dissenting groups. This involuntary redistribution is foreign to private markets based on voluntary exchanges.

Thus, in essence, Leoni attacks the very foundations of democratic theory and contends that representative democracies are incapable of creating law that is (1) consistent with the will of the people and (2) compatible with individual freedoms, viewed as the absence of coercion. In contemporary terminology, Leoni identifies three major problems: (1) the “information,” (2) the “agency,” and (3) the “social choice” problems. In addition, he maintains that the mechanism of political representation generates a degree of coercion and uncertainty for both political representatives and people subject to the law.

propaganda of the political parties or to other futile stimuli of the demagogues, widespread habits of resignation towards unscrupulous and discredited candidates to ‘representation,’ are among the most peculiar traits of the attitude of ‘the people’ who would be able, according to the ‘democratic’ theory . . . to discard their ‘representatives’ whenever the latter have made ‘unpalatable’ laws).

65. FREEDOM, *supra* note 1, at 19.

66. *Id.*

67. *Id.* at 108.

68. *Id.* at 109 (“ . . . [T]he conditions under which group decisions occur seem to render it difficult to employ the notion of *equilibrium* in the same way in which it is employed in economics. In economics *equilibrium* is defined as equality of supply and demand, an equality understandable when the individual chooser can so articulate his choices as to let each single dollar vote successfully. But what kind of equality can exist between, for instance, supply and demand for laws and orders through group decisions when the individual can ask for bread and be given a stone?”).

69. *Id.* at 108.

C. THE REORGANIZATION OF THE SOURCES OF LAW

1. *The Will of the People*

Leoni’s normative theory rests on the central concept of “common will,” defined as “the will that emerges from the collaboration of all the people concerned, without any recourse to group decisions and decision groups.”⁷⁰ In *F&L*, he repeatedly emphasizes that the determination of the common will is reached through spontaneous lawmaking processes centered on the individual, rather than on political representatives.

The idea of “common will” is connected to the epistemological principle that “*nobody is more competent to know what one’s own will is than one is oneself*.”⁷¹ From this, Leoni derives the idea that the true representation of the will of individuals can be found in “what real people decide or do not decide within a society,” rather than in group decisions based on coercive procedures.⁷² The representation of someone’s will is the result of a choice on the part of the represented individual;⁷³ thus, representation does not necessarily entail group decisions made in accordance with the majority rule.⁷⁴

Leoni’s chief normative concern is to substitute *evolutionary* rationality for *constructive* rationality in the lawmaking process. The will of the people emerges from a secular process of spontaneous adjustments and mutually compatible free choices on the part of innumerable individuals. Therefore, law is capable of reflecting the will of each and every member of society—but only if it emerges from an evolutionary process based on the spontaneous collaboration of all people concerned, rather than on the will of contingent majorities. In evolutionary processes, each individual has a share “according to his willingness and abilities,” while in “representative systems,” based on group decisions and decision

70. *Id.* at 135.

71. *Id.* at 121 (emphasis added).

72. *Id.* at 18.

73. *Id.* at 121.

74. *Id.* at 121–22 (“There is in my country a saying, *chi vuole vada*, which means that if you really want something, you must go and see for yourself what is to be done instead of sending a messenger.”).

groups, an individual may find himself a member of a dissenting minority upon which winning majorities impose their will.⁷⁵ In short, evolutionary processes do not entail involuntary redistributions and perform better in minimizing the information, agency, and social choice problems associated with the production of law.

2. *The Will of the People and Group Decisions*

It must be clarified that, despite his insistence on the normative superiority of spontaneous lawmaking processes, Leoni recognizes that group decisions are necessary in a number of instances. This raises the issue of identifying the conditions under which the “common will” could be reflected in group decisions. Leoni distinguishes between two types of group decisions and corresponding winning majorities. On the one hand, there are majorities that impose constraints on minorities “to make the latter suffer what they never would suffer if only they could make free choices and free agreements with the former.”⁷⁶ As Lawrence Lowell observed, these majorities are merely *numerical* and, as such, cannot be regarded as *legal* because they do not correspond to the “common will” of the people.⁷⁷ For expository convenience, Leoni qualifies these majorities as “Lowellian-type” majorities, or majorities that impose “Lowellian” group decisions on their dissenting minorities.⁷⁸ For expository convenience, I will refer to them as “rent-seeking” majorities.⁷⁹ On the other hand, there are “decisions which, although not reflecting at every moment the will of all the members of the group, can be considered as ‘common’ to the group, *in so far as everybody admits them under similar circumstances.*”⁸⁰ Consider, for example, the decision of an adjudicating

75. *See Id.*

76. *Id.* at 134.

77. *Id.* at 134–37. Just as a group of robbers does not constitute a majority when it deprives a person in a lonely place of his or her pursue, in the same way, a handful of “representatives” who form a majority within a legislative body and impose an involuntary redistribution on a losing minority cannot be regarded as an expression of the will of the people.

78. *See id.*

79. The majoritarian decisions that Leoni qualifies as “Lowellian” involve the use of legislation as a mean of redistributing wealth among relevant interest groups according to their relative political influence. This is usually referred to in current economic terminology as “rent-seeking” or “special-interest” legislation. The term “rent-seeking” was coined in Anne O. Krueger, *The Political Economy Of The Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974). However, it was Gordon Tullock that first introduced the idea that the search for rents (of the kind associated with monopolies or tariffs) increases social waste, possibly by an amount equal to the value of these rents. *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 ECON. INQUIRY 3, 224 (1967).

80. *Id.* at 136 (emphasis added).

body to condemn a robber or murderer and deprive him of his freedom. In this case, although the sentence may not reflect the robber or murderer’s present will, had the criminal been a victim of the same crime (perpetuated by someone else), he would have supported the same decision. Therefore, in such cases, there is a “common will” among the members of the community to punish certain types of behavior. As Leoni points out, “every criminal would admit and even request condemnation for other criminals *in the same circumstances*.”⁸¹

To distinguish between rent-seeking group decisions and group decisions that reflect the common will, Leoni proposes a distinction based on the recognition of two differences between the two types of group decisions. First, rent-seeking group decisions entail a *redistribution* of wealth from the losing minority to the winning majority, while decisions to punish robbery or other crimes (that is, group decisions that reflect the common will) serve the function of protecting all individual members of the community against involuntary distributions. Second, the members of the winning majority would not approve of rent-seeking group decisions if they were part of the losing minority,⁸² while *everybody*, including each minority member, would approve of group decisions of the second type “in any other instance than his own.”⁸³ These two differences are strictly related. When the objective of the decision is to distribute wealth from one group to another, unanimity cannot be reached since nobody (or, at least, not everyone) would agree to be in the position of the losing minority. On the contrary, unanimity is reached more easily among community members when the objective of the decision is to protect the negative freedom of individuals against robbery and other types of violent appropriative behavior. Stripped to their essence, unlike decisions of rent-seeking type, decisions aimed at protecting negative freedom resist the “counterfactual” test of interchanging the majority with the minority under similar hypothetical circumstances.

81. *Id.* (emphasis added).

82. *Id.* at 137.

83. *Id.*

Leoni concedes that, in a number of cases in which group decisions are needed, unanimity might not be reached for each single outcome. However, where unanimity cannot be reached on each single outcome, it must be reached with respect to the decisionmaking process.⁸⁴ In essence, the unanimity requirement is shifted to the constitutional choice stage.

To summarize, group decisions are divided into four categories: (1) group decisions that reflect the will of the people as they are *unanimously* agreed upon by all the people concerned; (2) group decisions that reflect the will of the people because “the object of those decisions would be approved *under like circumstances* by all the members of the group, including the minority members that are their present victims;”⁸⁵ (3) group decisions that reflect the will of the people because the decisionmaking process is unanimously agreed upon at the *constitutional* choice stage; and (4) group decisions that do *not* reflect the will of people because they are of the Lowell variety (that is, there is no unanimity on the part of the community members).

3. *The Leoni Model*

Leoni proposes to restore the evolutionary functioning of the lawmaking process by “redrawing [the] maps of the areas occupied respectively by group decisions and individual choices.”⁸⁶ The “golden rule” governing this process should be that “all individual decisions that have proved to be not incompatible with one another ought to be substituted for corresponding group decisions in regard to alternatives among which incompatibilities have been wrongly assumed to exist.”⁸⁷ This general principle entails several normative implications.

a. *Group Decisions and Individual Decisions*

First, we must clarify which decisions, among those that are currently located within the set of group decisions, should be relocated to the set of individual decisions. According to the “golden rule,” individual decisions that are not incompatible with one another should not be replaced by group decisions. This can be understood by considering that juridical solutions resulting from individual decisions are the expression of the common will

84. *Id.* at 134–35.

85. *Id.* at 137 (emphasis added).

86. *Id.* at 130.

87. *Id.* at 131.

of the people, while group decisions (unless they are unanimous) are not. Therefore, all decisions based on the erroneous presumption that the underlying juridical issue cannot be solved simply by the spontaneous convergence of complementary individual decisions should be relocated to the area of individual decisions. In essence, Leoni establishes a presumption of efficiency in favor of the spontaneous production of law; the “burden of proof” to the contrary is upon the advocates of the legislative process.⁸⁸

Second, when individual decisions are incompatible with one another, a rigorous assessment of the relative advantages of legislation is necessary. Leoni’s “golden rule” suggests that group decisions that do not reflect the “common will” should be removed from the area of necessary decision groups and thus relocated to the area of individual decisions. This obviously raises a question regarding which issues can be decided through group decisions that reflect the will of the people. In this respect, Leoni observes that the content of the common will is much more easily ascertainable “in the ‘negative’ way . . . than in any other ‘positive’ way.”⁸⁹ It is easier to achieve unanimity with respect to what the community members “do *not* want to suffer as a result of the direct action of other people” than to “their wishes in other respects.”⁹⁰ So, issues that are suited to being decided through decision groups are those concerning the *negative* freedoms of all community members,⁹¹ while group decisions on issues of

88. *Id.* at 14 (“Substituting legislation for the spontaneous application of nonlegislated rules of behavior is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system. This preliminary assessment is simply unthought-of by contemporary legislators. On the contrary, they seem to think that legislation is always good in itself and that the burden of the proof is upon the people who do not agree.”).


89. *Id.* at 16.

90. *Id.* (emphasis added).

91. *Id.* (“Legislation protecting people against what they do not want other people to do to them is likely to be more easily determinable and more generally successful than any kind of legislation based on other ‘positive’ desires of the same individuals. In fact, such desires are not only usually much less homogeneous and compatible with one another than the ‘negative’ ones, but are also often very difficult to ascertain.”).

positive freedom should be displaced from the area of the group decisions to the area of individual decisions.

Let me refer to the above categorization of group decisions. Decisions falling within categories one, two, and three, are properly located in the area of group decisions, as they are supported by unanimous (actual, hypothetical, or constitutional) consensus. Group decisions of the Lowell type, however, should be relocated to the set of individual decisions, as shown by Figure 2:

Individual Decisions	Group Decisions
<p data-bbox="380 688 703 722">Not Mutually Incompatible</p> 	<ol style="list-style-type: none"> <li data-bbox="854 688 1094 722">1) Actual Unanimity <li data-bbox="854 726 1252 793">2) Hypothetical Unanimity ("under similar circumstances") <li data-bbox="854 798 1252 865">3) Unanimity at Constitutional Choice Stage <li data-bbox="854 869 1252 963">4) <i>Lowellian-Type Group Decisions (generally related to issues of positive freedom)</i>

b. *The Role of Legislation*

Three insights emerge about the role to be attributed to legislation. First, legislation should be rejected in any situation in which the spontaneous convergence of individual claims enables community members to reach juridical solutions without recourse to group decisions. Second, legislation should be rejected when it is used as a means to adopt group decisions of the rent-seeking type. Third, when legislation is not rejected on the basis of these two principles, the legislative process may enjoy relative advantages over alternative sources of law.⁹²

In essence, legislation plays a *subsidiary* role within the organization of the sources of law. Its function is to protect and facilitate the mechanisms of private legal orderings. Legislation merely embodies existing unwritten rules and turns *rationes decidendi* elaborated by judges into formally enacted legal rules. The content of law is independent of the

92. *Id.* at 178 ("Whatever is not positively proved as worthy of legislation should be left to the common-law area.").

legislation, whose role is to protect individual expectations and secure the long-term certainty of law.

D. JUDGES AND JURISTS

As repeatedly emphasized, in Leoni’s model, the lawmaking process is “chiefly connected with a *theoretical* activity on the part of experts, like judges or lawyers,” rather than with “mere willing of majorities within legislative bodies.”⁹³ In comparison to the legislative, the judiciary is more efficient at determining the common will of the people.⁹⁴ As Leoni argued, “Judges, especially if they are both learned and experienced in their profession, are to be trusted as interpreters of what real people . . . may feel and will.”⁹⁵

Four aspects distinguish the activities of judges and lawyers from those of legislators. First, lawyers and judges act only upon the initiatives of private parties. Second, “their decision is to be reached and become effective, . . . only through a continuous collaboration of the parties themselves and within its limits.”⁹⁶ The activities of private parties are decisive in determining the flow of information to lawyers and judges. Third, judges’ decisions produce immediate effects “mainly in regard to the parties to the dispute, only occasionally in regard to third persons, and practically never in regard to people who have no connection with the parties concerned.”⁹⁷ Fourth, judges and lawyers rely on past decisions on similar cases by other judges and lawyers. This reliance on precedents enables everyone concerned (that is, past and present parties) to determine the content of the law. Judges and lawyers “have no real power over other citizens beyond what those citizens themselves are prepared to give them by virtue of requesting a decision in a particular case.”⁹⁸ Moreover, as Leoni highlighted, “If we contrast the position of judges and lawyers with

93. *Id.* at 145.

94. *Id.* at 152 (“[L]egislation appears as a less efficient device for arriving at [the] determination of the common will of people”).

95. *A Neo-Jeffersonian Theory*, *supra* note 56, at 977.

96. FREEDOM, *supra* note 1, at 22.

97. *Id.*

98. *Id.*

the position of legislators . . . we can easily realize how much more power the latter have over the citizens and how much less accurate, impartial, and reliable is their attempt, if any, to ‘interpret’ the people’s will.”⁹⁹ In essence, judges’ and lawyers’ law is the result of an *individualized* process, in which individuals play a central role in the entire input-process-output-sequence. The production of law by judges and lawyers can ensure long-term certainty much better than legislative systems can.

Finally, the advantages of judges’ and lawyers’ law are only realized in decentralized, polycentric, legal orders, in which judges merely reinforce the objectives of private law. By contrast, in highly centralized legal orders, “judiciary law may undergo some deviations the effect of which may be the *reintroduction of the legislative process under a judiciary guise*.”¹⁰⁰ In this context, Leoni emphasizes the risk of members of “Supreme Courts” imposing their own personal will upon a great number of dissenters.¹⁰¹ This happens in two cases: (1) whenever supreme courts’ judges have the discretion to decide “ultimately” on a case and (2) when the power of binding effect is given to supreme court decisions with respect to the decisions of all future judges. In both cases, the contingent will of a few members of the court is imposed on a large number of people affected by their decision. That is, the centralized structure confers a legislative nature to the judicial process: rather than discovering the law, judges impose their version of the law on other parties.¹⁰²

99. *Id.*

100. FREEDOM, *supra* note 1, at 180 (emphasis added).

101. *Id.*

102. One might object to Leoni’s view of (decentralized) adjudication as a “voluntary” process that also adjudication, as well as legislation, contains a coercive element—that is, one of the two party by filing a claim (plaintiffs in civil matters and prosecutors in criminal matters) effectively coerce the participation of defendants (against the prospect of losing the case if they fail to appear). However, two points should be considered in this respect. First, the coercion that Leoni has in mind is the coercion exerted by the lawmaker on the people subject to law by means of “decision groups” and “group decisions”—that is, the coercion that is associated with collective processes and collectivized outcomes, which allow a majority to impose an involuntary redistribution against a dissenting minority, based on an act of pure *will*. Different is the case of a triadic process, such as adjudication, in which a third party (that is, the judge) pronounces a decision (1) that produces effects mainly in regard to the parties to the dispute, (2) based on the information provided by both parties, and (3) by relying on past decisions of similar cases by other judges; in Leoni’s view, these institutional features ensure that the adjudication outcome reflects the “common will” of the people. Second, Leoni expressly recognizes that individual claims may conflict with one another. *See supra* note 26 and accompanying text. In this respect, it should be emphasized that (as previously noted) when defining the concept of juridical claim, Leoni alludes to the claimant’s “power” to obtain (“alone or with the help of others”) the behavior that is object of the claim, when this behavior is *not* spontaneously adopted: That is, Leoni seems to recognize the possibility that the claimant uses coercive means to obtain the satisfaction of his juridical claim.

IV. LEONI’S LESSON

A. THE APPROACH

The first lesson to be drawn from Leoni’s theory of law is the application of the methodological tools of the “Austrian” theory of the economic process to the study of the production of law.¹⁰³

1. The Genetic-Economic Approach

A theory of law must explain the formation process of juridical actions in the same way that economic theory explains the formation process of economic actions. As previously noted, juridical claims correspond to the patterns of behavior that are statistically more probable in a given situation in a certain society. From this perspective, the theory of law must be able to identify all the conditions that determine the greater or lesser probability of juridical actions. Leoni emphasizes the possibility of analyzing these conditions through objective calculations.¹⁰⁴ It is not by chance that the word “ratio” derives from the verb *reor* (Latin for “calculate”); to identify the ratio of the norm means to calculate the probability of the juridical action described by the norm and, therefore, to investigate *all* the conditions that determine its formation process.¹⁰⁵ In this sense, Leoni’s

103. The core of the “Austrian” theory of the economic process is the idea that market prices are an essential source of knowledge necessary for identifying the efficient allocation of resources. Since it is impossible for an external observer to estimate individual marginal utility functions and to establish relative prices, no *centralized* decisionmaking authority can actually identify any sort of “efficient” outcome *independently* of the existence of an operating competitive market process. See F.A. von Hayek, *Economics and Knowledge*, ECONOMICA, Feb. 1937, at 33–54; F.A. Hayek, *The Use of Knowledge in Society*, AM. ECONOMIC REV., Sept. 1945, at 519–30; F. A. Hayek, *THE ROAD TO SERFDOM* (1944); Ludwig von Mises, *SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS* (1981). See also Raimondo Cubeddu, *THE PHILOSOPHY OF THE AUSTRIAN SCHOOL* (Routledge 1993). On the influence of the Austrian School on Leoni’s theory of law as claim, see Mario Stoppino, *L’Individualismo Integrale di Bruno Leoni*, [The Integral Individualism of Bruno Leoni] in BRUNO LEONI, *SCRITTI DI SCIENZA POLITICA E TEORIA DEL DIRITTO* 14–22 (Giuffrè Editore, 1980); *Hayek and Leoni*, *supra* note 2; Cubeddu, *Il Liberalismo di Bruno Leoni*, [Bruno Leoni’s Liberalism] in *LA LIBERTA’ E LA LEGGE* [Freedom and the Law] (LiberLibri 1995).

104. *Law and Economy*, *supra* note 32, at 212.

105. Cf., Bruno Leoni, *A Proposito della Teoria del Diritto e del Positivismo Giuridico*, *IL POLITICO* 2, 222–36 (1967)

theory of law is concerned with the explanation of the methods of production of law.

Leoni's explanation of law is based on a structural analogy between the formation process of prices and the formation process of law.¹⁰⁶ This is not meant to reduce law to a purely economic phenomenon; instead, Leoni looks at "economic" and "legal" orders as distinct objects. However, he also recognizes that, in spite of the autonomy of these objects' respective causal processes, they can be analyzed with similar methodological tools.¹⁰⁷ As Cubeddu acutely observes, "Leoni's theoretical perspective is . . . one of an investigation into analogies and differences between juridical acts and economic acts. As a consequence . . . it is possible to interpret his thinking as a fruitful attempt to study the subjects of law and politics like those of economics."¹⁰⁸ In this sense, Leoni can be considered a forerunner of the law and economics movement. However, as we will see, the subsequent development of the law and economics discipline has taken a significantly different path from the one that he envisioned.

2. *Integral Individualism and Evolutionism*

Stoppino—the most prominent of Leoni's pupils—defines Leoni's approach as "integral individualism," meaning that it is both a methodological and a theoretical form of individualism.¹⁰⁹ Methodological individualism is largely accepted by contemporary social scientists. It is centered on the idea that explanatory propositions of social phenomena must be based on the identification of individuals' volitions and actions. References to collective entities (such as parties, classes, masses, and so on) are admissible, but only to indicate patterns of social actions that ultimately trace back to individual actions and volitions. In contrast, only a minority of contemporary social scientists adopt an "integral" individualistic perspective based on theoretical individualism. Social phenomena are explained through exclusive reference to the concept of the individual. The reference to collective entities is completely inadmissible and individuals are regarded as the only possible unit of explanation. In short, individuals are not simply a methodological unit of reference, they

106. That the comparison between the law and the market in Leoni's thought is a "structural analogy," rather than a "causal determination," is clarified in Alberto Febbrajo, *Diritto ed Economia nel Pensiero di Bruno Leoni*, in *SOCIOLOGIA DEL DIRITTO* 1–2, 19 (1990).

107. See also *id.* at 134–35.

108. Hayek and Leoni, *supra* note 2, at 348.

109. Stoppino, *supra* note 102.

are also the fundamental unit of explanation of social phenomena. In sociological jargon, while methodological individualism provides a micro-founded explanation of macro-phenomena, theoretical individualism denies the theoretical relevance of macro-phenomena and, instead, views social phenomena as the outcome of inter-individual relationships.

Theoretical, or “integral,” individualism explains the social order as a spontaneous process based on the unintended consequences of individual behaviors. From this perspective, law and its formation process are the outcomes of the dense interactions among individuals across centuries and generations. There is no room for centralized institutions, collective decisionmaking processes, or collectivized outcomes. Law is the result of a spontaneous process based on the “actions and volitions” of multiple individuals. This explanatory argument leads to a fundamental normative conclusion: the juridical order generates advantages for community members to the extent that individuals are allowed to interact freely and without the interference of centralized authorities. This normative claim represents the main difference between a theoretical perspective and a purely methodological individualistic perspective.

3. The Subjective Theory of Value

One methodological cornerstone of the Austrian theory of economics is the subjective theory of value. As Mises states, “[V]alue is not intrinsic, it is not in things It is reflected in human conduct. It is not what a man or groups of men say about value that counts, but *how they act*.”¹¹⁰ This perspective drastically shifts the focus from the producer to the consumer of goods, since goods on offer can become objects of exchange only if they are actually demanded. Once applied to the theory of law, the subjective theory of value places the locus of juridicity in the claim of individuals, since a norm becomes juridical only when supported by the claims of individuals. In short, the origin of law is “on the whole *independent* of the

110. Ludwig von Mises, *Human Action. A Treatise on Economics*, 102 (3d ed. Henry Regnery Company, 1966) (emphasis added).

will of the rulers” and ultimately depends on the subjective evaluation of individuals who are subject to the rules.¹¹¹

4. *Freedom and Efficiency*

Leoni’s idea of efficiency differs significantly from the concept of efficiency used by the vast majority of contemporary law and economics scholars. First, for Leoni, the efficiency that matters is the efficiency of the lawmaking process, rather than the efficient allocation of legal entitlements. Second, and relatedly, efficiency is strictly connected to individual freedom, not wealth maximization. The function of the juridical order is to protect individual negative freedom, thereby allowing individuals to express their subjective preferences through their free choices. The process of private bargaining generates efficient results (that is, the allocation of goods supported by unanimous consensus). In this sense, there is an implicit “Coaseian” logic underlying Leoni’s perspective.¹¹² Third, efficiency reflects the unanimous, actual consent as expressed by people’s decisions. Thus, in essence, the law is efficient when it obtains the actual participation of the people concerned in the lawmaking process.¹¹³ What counts is the free participation in the process of the exchange of claims.

In short, Leoni views efficiency as a by-product of a free lawmaking process, based on the spontaneous cooperation of all people concerned. Freedom precedes efficiency both logically and axiologically. This perspective contrasts starkly with the dominant view in contemporary economics, which assumes efficiency as a chief normative concern and tends to consider freedom as a by-product of a “rational” government.¹¹⁴

111. *Consumer Sovereignty*, *supra* note 1, at 34 (emphasis added).

112. *See generally*, Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (providing and explanation of Coaseian logic).

113. FREEDOM, *supra* note 1, at 150 (“[F]ree markets and free trade, as a system as much as possible independent of legislation, must be considered not only as the most efficient means of obtaining free choices of goods and services on the part of the individuals concerned, but also as a model for any other system of which the purpose is to allow free individual choices including those relating to the law and legal institutions”).

114. *See* Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and The Economic Analysis of Law*, 93 IOWA L. REV. 559 (2008). For an excellent philosophical discussion of the relationship between the principles of “efficiency” and “consent” in the economic analysis of law, see Jules Coleman, *MARKETS, MORALS AND THE LAW* 133–35 and 277–89 (1988).

5. Comparative Institutional Analysis

Leoni's work foreshadows a comparative institutional analysis of the sources of law. Although generally overlooked by scholars, the comparative institutional analysis is one of Leoni's most important contributions to the methodology of legal economic inquiry. The introduction to *F&L* demonstrates this point by expressly recognizing the need for a comparative analysis of alternative lawmaking institutions. In particular, Leoni warns against the risk of inferring the virtues of one institution from the failure of other alternative available institutions. In so arguing, he anticipates the definition of what would, today, be called a "Nirvana Fallacy" argument¹¹⁵ or a "single institutional analysis."¹¹⁶ What this means is that analysts cannot justify the adoption of their favored institution simply by pointing out the failures of its available alternatives; instead, they must demonstrate that the favored institution can succeed where the others have failed and that a net gain can be achieved by substituting one institution for another. The two following propositions constitute a useful reference point:

To contend that legislation is "necessary" whenever other means fail [. . .] would only be another way of evading the solution of the problem. *If other means fail, this is no reason to infer that legislation does not.*¹¹⁷

Substituting legislation for the spontaneous application of nonlegislated rules of behavior is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system. This preliminary assessment is simply unthought of by contemporary legislators. On the contrary, they seem to think that legislation is always good in itself and that the burden of the proof is upon the people who do not agree. My humble suggestion is that their implication that a law (even a bad law) is better than nothing should be much more supported by evidence than it is.¹¹⁸

115. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

116. See Neil K. Komisar, IMPERFECT ALTERNATIVES. CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994).

117. FREEDOM, *supra* note 1, at 17 (emphasis added).

118. *Id.* at 14.

It is important to emphasize that the need for a comparative institutional analysis stems directly from the adopted evolutionary perspective. While the theory of law as obligation assumes a top-down lawmaking process that is inevitably anchored to the will of a centralized political authority, the theory of law as claim describes law as a dynamic interaction that is open to a variety of outcomes defined by spontaneous competitive adjustments. That is, rather than assuming a *single-institutional* lawmaking process, the Leonian perspective remains open to a *variety* of evolutionary, unintentional forms of law formation.¹¹⁹ This variety illustrates the need, from both a positive and a normative perspective, to compare the relative costs and benefits of alternative sources of law according to the changing characteristics of the regulated environments. In essence, comparative analysis is the logical consequence of a theory of law centered on the unintended consequences of individual behavior.

To summarize, Leoni's theory of law rests on five methodological principles: (1) genetic-economic approach, (2) integral individualism, (3) the subjective theory of value, (4) efficiency as unanimity, and (5) comparative institutional analysis. Based on these five principles and drawing on current social science literature, the next section sketches the outline of a "Leonian" line of inquiry, centered on an analysis of the methods of production of law, which aims at predicting problems of efficiency within the law.

B. THE PROCESS EFFICIENCY ANALYSIS

Conventional law and economics scholarship has been predominantly concerned with the *content* of legal rules rather than the *process* by which rules are created. According to this view, legal rights are treated as "commodities" that people (absent transaction costs and wealth effects) can freely buy and sell, such that the rights are allocated to the highest valued use. The analytical separation of law from its formative process has resulted in an almost exclusive focus on the allocative efficiency of legal entitlements.¹²⁰ "Leonian" methodology suggests that this conventional

119. Cf. Mauro Barberis, *Diritto e Legislazione. Rileggendo Leoni* [Law and Legislation. A reading of Leoni's work], 2 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 73, 253–54 (1996) (It.).

120. It is, indeed, convenient, on technical grounds, to forego all the complications associated with the highly complex dynamics at work in lawmaking processes and to focus, instead, on the allocation of legal rights based on implicit, highly simplified institutional assumptions. However, though convenient, this approach does not necessarily explain much.

approach needs to be integrated with a complementary process-oriented analysis capable of accounting for the causal relationship between the efficiency of legal rules and the efficiency of the lawmaking process (that is, process efficiency). From this standpoint, to understand law and predict inefficiency problems, one should focus more on the *process* of lawmaking than on its *outcomes*. The lawmaking process is the method by which individuals transform, through mutual interaction, inputs (that is, preferences and information) into regulatory outputs.

Leoni views the lawmaking process as an institutional arrangement designed to solve a chain of collective action problems associated with the coordination of individual claims. Leoni focuses, in particular, on four fundamental problems. First, *legal rules are theoretical constructs*; their formulation requires a great deal of knowledge, competence, and experience.¹²¹ In economic terms, legal rules are informational goods that require the generation of robust information flows. Therefore, information is certainly one of the important production factors of lawmaking,¹²² and information costs are the principal cost items to be considered when evaluating process efficiency. Actors involved in the lawmaking process must address informational problems and bear the considerable costs associated with acquiring necessary information.

A second chief concern is the responsiveness of the lawmaking process to the interests and preferences of the individuals subject to the law. In many occasions, Leoni uses the paradigm of the principal-agent relationship to analyze the ability of the lawmaking process to effectively reflect the interests and preferences of the recipients of legal rules. His criticism of political representation strongly emphasizes the misalignment between legislators' incentives and those of the people subject to the law. Additionally, he emphasizes that the actions of legislators are not easily observable by the individuals affected by legislative rules; thus, the people

121. FREEDOM, *supra* note 1, at 186 (“Law-making is much more a theoretical process than an act of will”).

122. Cf. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568 (1992) (“the problem of creating the law can be interpreted as one involving the government acquisition and dissemination of information”).

subject to the law face considerable difficulties in monitoring the activities of lawmakers and in ensuring that legal rules serve their own interests rather than those of the rulers or of organized minorities or interest groups.¹²³ In sum, Leoni emphasizes that divergent incentives and monitoring costs create pervasive and severe *agency problems* that affect the quality of the production of law.¹²⁴

Third, Leoni is, to a large extent, aware of the problem of aggregating the individual preference orderings of a large number of individuals into a stable, collective outcome that is responsive to individuals' preference intensities: that is, *the social-choice problem*.¹²⁵ As noted above, Leoni emphasizes that the indivisibility associated with collective processes (that is, decision groups) and collectivized outcomes (that is, group decisions) prevents the legislative process from reflecting the will of the people. On the one hand, decision groups are limited in their ability to reflect people's preferences because coercive procedures limit the capacities of those who participate in the decisionmaking process. On the other hand, group decisions are of the all-or-nothing variety; therefore, they entail a degree of outcome indivisibility that is not present in the market, resulting in unavoidable, involuntary distributions made at the expense of losing minorities. As a result, the structure of collective decisionmaking processes distorts (rather than reflects) social preferences. Finally, Leoni is also aware that the functioning of collective processes often entails bargaining—which, in turn, entails strategic behaviors (consider, for example, logrolling or vote-trading within a legislature).¹²⁶

123. On this point, Leoni draws heavily on the "elitist theory" originally developed by Robert Michel (who developed "the iron law of oligarchy"), Vilfredo Pareto (who emphasized the role of the "political elites"), and Gaetano Mosca (who identified the organizational superiority of an organized "ruling class" over the unorganized majority of the population). See ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden Paul and Cedar Paul, trans., The Free Press 1966). See GAETANO MOSCA, *THE RULING CLASS* (Arthur Livingston ed., Hannah D. Kahn trans., McGraw-Hill Book Co. 1939), trans. See also VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* (Ann S. Schwier and Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Publishers 1971), trans.

124. FREEDOM, *supra* note 1, at 122. Here, Leoni emphasizes that, in many cases, "there are reasons for thinking that the representatives and the people represented do not agree about the issues at stake."

125. To be clear, the social choice problem is independent of the agency problem; the lawmaker is confronted with the social choice problem even in the case of zero agency costs. This does not exclude the possibility that the social choice problem may exacerbate the agency costs associated with lawmaking.

126. FREEDOM, *supra* note 1, at 109 ("if the members of the groups are free to rank in changing majorities and can partake in revisions of earlier decisions, this possibility may be conceived of as a sort

Fourth, a central concern in Leoni’s work is the ability of the lawmaking process to ensure, at the same time, long-run legal certainty and efficient adaptation of the law to changes in social and economic environments. On the one hand, the legal system tends to preserve accumulated, historical informational capital; on the other hand, it incentivizes evolution through a vast array of institutional arrangements. These two driving forces of lawmaking are shaped differently, depending on the features of the institutional lawmaking design. For example, judge-made law resembles the evolutionary model: While conservative tendencies take the form of judicial decisions’ path-dependence, innovative tendencies are characterized by decisions overruling legal precedents. Political legal change is characterized by higher discontinuity than can be found in the evolutionary model.

The efficient lawmaking process is the one that best solves the above four problems (that is, information, agency, social choice and efficient adaptation), relative to any feasible institutional alternatives. This definition emphasizes two important points. First, process efficiency incorporates the unavoidable costs of lawmaking into the efficiency calculus, thus reflecting the relative magnitudes of the costs associated with alternative sources of law. Thus, process efficiency is not assessed against an ideal standard of a zero transaction cost world; rather, each source of law is assumed to be highly imperfect and to involve a significant level of internal transaction costs. From this perspective, imperfection is not synonymous with inefficiency. A lawmaking process is inefficient, not because it is imperfect, but because there exist less imperfect institutions that are better able to deal with the four problems identified above. In short, process efficiency is the result of a comparative assessment of relative imperfections, rather than the elimination of transaction costs.

Second, process efficiency implies a reversal of the relationship between efficiency and consensus traditionally assumed by the output-oriented law and economics approach. While, under the orthodox

of remedy for the lack of equilibrium in group decisions, because it gives to each individual in the group, at least in principle, the possibility of having the group decision some time or other coincide with his personal choice.”).

methodology, consensus on legal rules is inferred by the allocative efficiency of legal entitlements,¹²⁷ the “Leonian” approach assumes that economic efficiency is based on consensus. In other words, efficiency is not a property of the outcome, independent of the process; rather, efficiency depends upon the ability of the process to embody the general consensus regarding institutional rules. Thus, the structure of the process itself is the object of the efficiency assessment, and efficiency is shaped by the decisionmaking mechanism.

C. THE DISCOMFORTS OF *EX ANTE* CENTRALIZATION AND POLITICAL REPRESENTATION

The third lesson to be learned from the theory of law *as claim* is the identification of three institutional mechanisms that critically undermine process efficiency: the centralization of lawmaking, the *ex ante* perspective on the production of legal rules, and political representation.

First, on many occasions, Leoni emphasizes the problems of information associated with centralized lawmaking bodies. His main point is that “central authorities always lack sufficient knowledge of the infinite number of elements and factors that contribute to the social intercourse of individuals at any time and at any level.”¹²⁸ As a consequence, “The authorities can never be certain that what they do is actually what people would like them to do, just as people can never be certain that what they want to do will not be interfered with by the authorities if the latter are to direct the whole lawmaking process of the country.”¹²⁹

Second, and relatedly, Leoni identifies with precision the advantages of the *ex post* perspective and the limitations of the *ex ante* definition of legal rules. In comparison to the *ex ante* perspective, which is based on the abstract definition of legal rules by way of deductive logical reasoning, the fact-oriented *ex-post* perspective (based on inductive logical reasoning) proves superior in dealing with the information problem. Because law is born from the behaviors of people, the lawmaking process is better

127. Thus, for example, one of the tenets of law and economics contract theory is the criterion of hypothetical bargaining. Theorists hypothesize that the parties to a hypothetical bargain will voluntarily consent to the rule that generates the most efficient outcome. See David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991) (discussing the normative basis of the hypothetical bargaining approach and the construction of a method for framing hypothetical bargains).

128. FREEDOM, *supra* note 1, at 89.

129. *Id.*

anchored in the juridical experience than in the abstract *ex ante* definition of legal rules.¹³⁰

Third, legislation (that is, *ex ante* centralized lawmaking based on political representation) is rooted in collective procedures resulting in collectivized outcomes. This prevents any true representation of the will of the people. As Cubeddu observes, Leoni’s major critique of the majoritarian legislative system “consists principally . . . of realization of the fact that the outcome of the vote does not allow all claims to accomplish themselves: that is to say, of the denunciation of its being a decisionmaking process with a decidedly uncertain outcome.”¹³¹

In light of the foregoing, *ex ante* centralization and political representation come to represent residual instruments for producing law, which must be taken into consideration *only* upon (1) careful assessment of the failure of the available alternatives and (2) rigorous demonstration of the relative advantages of legislation over other sources of law.¹³² To be clear, Leoni does not deny the inevitable role played by legislation in the production of law;¹³³ instead, he maintains that there is a limit to the efficiency and effectiveness of legislation, which contemporary societies have largely overcome.¹³⁴ Thus, Leoni proposes a reorganization of the

130. To clarify the point, Leoni quotes a passage of *De Republica*, in which Cicero says, “never was in the world a man so clever as to *foresee* everything . . . it would be impossible for him to provide for everything at one time *without having the experience that comes from practice through a long period of history.*” FREEDOM, *supra* note 1, at 88 (emphasis added).

131. *Hayek and Leoni, supra* note 2, at 361 (emphasis added).

132. *See supra* note 117 and accompanying text.

133. FREEDOM, *supra* note 1, at 10–11 (“I do not maintain that legislation should be entirely discarded. Probably this has never happened in any country at any time.”) and 129–30 (“I do not say that we ought to do entirely without legislation and give up group decisions and majority rules altogether . . . 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.”).

134. *Id.* at 130 (“I would suggest that at the present time the extent of the area in which group decisions are deemed necessary or even suitable has been grossly overestimated and the area in which spontaneous individual adjustments have deemed necessary or suitable has been far more severely circumscribed than it is advisable to do if we wish to preserve the traditional meanings of most of the great ideals of the West.”).

sources of law, such that the recourse to political lawmaking would be considered a “solution of last resort.”¹³⁵

D. SPONTANEOUS LAWMAKING

The fourth and fundamental lesson to be learned from Leoni’s work is the relative advantages of the spontaneous formation of law. Leoni considers an “efficient” lawmaking process to be one: (1) based on *private inputs* and on the *accumulation of information* brought to the lawmaker through the cooperation of the all the people concerned; (2) that is *retrospective*, fact-specific, and grounded in *inductive* logical reasoning; (3) that is *descriptive* of people’s claims (rather than prescriptive of people’s conduct); and (4) that produces *individualized* outcomes designed to generate immediate effects only on those parties that have participated in the process.

This integrally individualized method of the production of law is likely to enjoy comparative advantages over the *ex ante*, centralized lawmaking of legislators who serve as political representatives of the people. Leoni is optimistic about the possibility for a society to spontaneously produce a legal order founded on legal certainty, even without the intervention of political legislators. Furthermore, he suggests that *juridical orders with evolutionary characteristics are equipped to meet the demand of regulations associated with accelerated technological changes* and provides arguments supporting the idea that spontaneous lawmaking can more efficiently meet the demand for law associated with continuing technological changes.

First, the decentralized nature of many spontaneous processes enables better information about the preferences of the people subject to law; this mitigates the maladaptation costs involved in centralized processes. Second, spontaneous lawmaking is based upon the direct participation of norm beneficiaries and target actors in the production process. This implies that the lawmaker has better factual knowledge and greater technical expertise with respect to the regulatory issue at stake. Third, the absence of delegation entails an internalization of the costs and benefits of regulation

135. *Id.* (“I am convinced that the more we manage to reduce the large area occupied at present by group decisions in politics and in the law, with all their paraphernalia of elections, legislation, and so on, the more we shall succeed in establishing a state of affairs similar to that which prevails in the domain of language, of common law, of the free market, of fashion, of customs, etc., where all individual choices adjust themselves to one another and no individual choice is ever overruled.”).

by all the people concerned. This reduces rent-seeking pressures and mitigates problems of agency. Fourth, politicians and bureaucrats do not value legal innovations as highly as private actors do; therefore, they do not have the incentive to pursue legal innovation or to experiment with new regulatory solutions with the speed and flexibility of private actors.

The foregoing suggests that, under certain conditions, spontaneous, evolutionary lawmaking could efficiently meet the increasing demand for the production of legal rules that is associated with the complexity of contemporary societies. From this perspective, the actual relevance of Leoni’s scholarship lies in his passionate defense of lawmaking processes with evolutionary characteristics—a defense that suggests that, in the future, as economies become more and more complex, the continuing changing demand for efficient legal rules could be better addressed through a gradual move from political *ex ante* centralized to spontaneous *ex post* decentralized lawmaking.

V. CONCLUSION

This paper has maintained that the methodological and theoretical tenets of Leoni’s work provide useful guidance for an economic inquiry into the organization of the sources of law. First, Leoni makes a significant contribution to the tradition of anti-formalistic legal thought¹³⁶ by developing the theory of law as claim in opposition to Kelsenian positivistic normativism. Leoni shifts the focus of the analysis from the logical structure of norms to the formation process of law, which he analyzes from an economic standpoint. In particular, the theory of law as claim sheds light on the structural analogies between the process of lawmaking and the formation process of prices in private markets.

Second, the discussion has elucidated the philosophical foundation of *F&L* and illustrated the relationship between the theory of law as exchange of individual claims and Leoni’s critique of legislation. In this respect,

136. Cf. Silvia Menocci, *L’Antiformalismo di Bruno Leoni nei suoi Rapporti con le Correnti del Realismo Giuridico* [Bruno Leoni’s Antiformalism and its Relationship with Legal Realist Thought] (DiGips 2003).

Leoni analogizes between different types of market structures and various types of lawmaking processes. From this perspective, legislation resembles a centralized, planned economy, in which a handful of people are called upon to mimic the complex dynamics of private markets. The analogy between legislation and centralized economies leads to three conclusions: (1) legislation is incompatible with the functioning of private competitive markets; (2) legislation is incompatible with long-term legal certainty; (3) legislation is incompatible with individual freedom and the idea of a lawmaking process that reflects people's will. What is most useful in this critique of legislation is the identification of most limiting institutional features of the legislative process: (1) the centralized decisionmaking process, (2) the *ex ante* perspective, (3) the process and outcome collectivization, and (4) the indivisibility of the political outcome.

Third, Leoni's scholarship provides a significant contribution to the methodological foundations of the discipline of law and economics by developing a genetic-economic approach to law based on the principles of the Austrian theory of the economic process, which includes (1) the subjective theory of value and (2) integral individualism. In this approach, efficiency is a by-product of individual freedom, depending, ultimately, upon the ability of the lawmaking process to reflect people's preferences and interests. More simply, efficiency is an attribute of the lawmaking process, while the legal outcome is merely descriptive of individual claims.

Fourth, this paper has proposed an interpretation of Leoni's work as an attempt to develop an approach to law and economics based on a comparative institutional analysis of the relative advantages and disadvantages of alternative sources of law. This view differs significantly from conventional interpretations of Leoni's scholarship. Scholars tend to underline the axiological (and ideological) dimension of Leoni's normative proposal by emphasizing his fierce opposition to any form of political socialism.¹³⁷ While I do not deny that the theory of law as claim is based on specific axiological assumptions,¹³⁸ I maintain that the most valuable lesson to be drawn from Leoni's work is the importance of comparative

137. More recently, for example, an increasing number of scholars seem to propose an interpretation of Leoni's work as a line of thought belonging to the libertarian tradition. Cf. Lottieri, *LA TEORIA POLITICA DI BRUNO LEONI* [The Political Theory of Bruno Leoni] (Antonio Masala ed., Rubbettino 2005).

138. Economic theory unavoidably rests on normative assumptions. See GUNNAR MYRDAL, *THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THEORY* (Paul Streeten trans., Simon and Schuster 1969).

institutional analysis for understanding the nature of the law and for predicting problems of the efficiency of the law. In essence, it is this methodological contribution that represents one of Leoni's most enduring lessons for legal economic scholars. In light of the foregoing, I have suggested an interpretation of Leoni's work as a first anticipatory attempt to develop a "Process Efficiency Analysis" of the sources of law—a comparative assessment of alternative lawmaking mechanisms based on the following four criteria: (1) minimization of lawmaking information costs; (2) responsiveness to individual preferences and their aggregation into a stable collective outcome; (3) responsiveness to the interests of the people subject to the law and minimization of the "agency problem;" and (4) the securing of long-term legal certainty while ensuring the adaptivity of the law to changes in the regulated environment.

Fifth, Leoni's work provides valuable suggestions for the institutional design of lawmaking in times of growing demand for efficient lawmaking. It suggests, in particular, that *ex ante* centralized lawmaking should be viewed as the solution of last resort in the organization of the sources of law. Leoni's work challenges the widely held assumption that the principal legal mechanisms by which societies can resolve pervasive social problems are legislation and regulation, suggesting that, in most cases, politics and bureaucracy are relatively inefficient and ineffective sources of law. Furthermore, in the absence of centralized mechanisms, socially enforced standards of behavior might emerge that represent efficient institutional responses to the growing demand for law. Based on these considerations, the shift of lawmaking activity from *ex ante* centralized decisionmaking processes toward spontaneous forms of lawmaking can be regarded as an attractive institutional arrangement to effectively mitigate the inefficiencies in the production of law.

Leoni's work also suggests that the most effective way of reducing the inefficiencies involved in the production of law is to increase the responsiveness of the demand for law to the quality of legal rules. This can be done by advancing the degree of polycentrism (that is, "competition") in the organization of the sources of law. As a result of this approach, if legal rules do not correspond to the demand for law, individuals who are subject

to the law will have an incentive to “opt out” of the inefficient law, and the exchange of claims among individuals will lead to the emergence of new and more appropriate juridical solutions.

It is easily understood from the foregoing that, although Leoni is recognized as one of the “fountain-heads”¹³⁹ of the law and economics movement, his work anticipates a line of inquiry that differs significantly from that of the mainstream law and economics discipline. In fact, the law and economics movement has followed, for the most part, a theoretical path based on the analytical separation of legal rules by their sources. In particular, the uncritical adoption of the neoclassical methodological paradigm has narrowed the analytical scope of legal-economic inquiry. This paradigm is predominantly focused on the allocative efficiency of specific *outcomes*, with little attention dedicated to the public-choice and information problems that affect the *production* of law. As a result, the field of conventional law and economics has largely given up the explanation of lawmaking processes and the normative assessment of their impacts on legal rules.

Finally, to properly appreciate the strengths and weaknesses of Leoni’s scholarship, an important theoretical point must be clarified. Leoni’s evolutionary perspective does not justify the normative superiority of one source of law over its alternatives, *per se*.¹⁴⁰ From a methodological standpoint, the concept of “spontaneous social order” is a powerful explanatory tool: It elucidates the role played by unintended consequences in the process of law’s emergence. However, this evolutionary explanation does not necessarily support normative conclusions in favor of spontaneous lawmaking processes. That is, once the evolutionary nature of lawmaking has been properly understood, one needs a normative criterion for assessing the consequences of the evolutionary process. Leoni’s normative criterion is the protection of individuals’ negative freedoms and a respect for long-term legal certainty.

139. I borrow this expression from *A Comment*, *supra* note 2, at 713.

140. See Barberis, *supra* note 1, at 245.