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The Republic of Choice: Law, Authority, and Culture (Book Review)

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THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE. By Lawrence M. Friedman. Cambridge, MA/London: Harvard University Press, 1990. Pp. 206. \$27.50

Reviewed by Burton M. Leiser*

In the final chapter of *The Republic of Choice*, which he dubs "A Stab at Assessment," Lawrence Friedman says that his book "has been pitched mostly at the level of description and explanation."¹ This is the opportunity Friedman gives himself and his readers to examine some of the normative issues raised by the observations he has made in the preceding nine chapters about Western society in general and American society and legal institutions in particular. Those normative questions are not insubstantial. Nor has Friedman successfully relegated all normative judgments to the final chapter and rendered a pure description in the earlier parts of the book. Even anthropologists describing foreign cultures, religious practices, and legal or quasi-legal institutions may be unable to do so with perfect objectivity and without some admixture of praise or blame. It is far less likely that an American law professor would be able to describe his own legal and social milieu dispassionately, without some measure of normative judgment.

The book opens with a scene from the winter of 1985, when the temperature dropped below freezing and New York City officials issued an order to pick up the homeless, the drifters, and the derelicts, and to use force if necessary to remove them to municipal shelters.² Some of those who were picked up objected, insisting that they were entitled to their

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1. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 188 (1990) [hereinafter *CHOICE*].

2. *Id.* at 1.

"freedom" and that their rights were being violated.³ It ends two hundred pages later with a discussion of the situation in which the homeless, the dispossessed, the Joyce Browns,⁴ and the mentally ill find themselves, and the rights they claim to possess.⁵ Between these rather bleak descriptions of the homeless and their plight, we are treated to a fascinating array of observations on American life in the last decades of the twentieth century and the social, political, philosophical, and legal trends that have led to the conditions that Friedman describes. Friedman is an astute observer and he brings a wealth of solid historical scholarship to bear upon his subject.

In early societies, he notes, theories of law emphasized the sacral, magic, and "meta-human."⁶ Laws derived from God and were the special province of charismatic personalities. They were immutable and timeless, in no way related to the whims of human beings or dependent upon their consent, but legitimate because of their divine origin.⁷ Modern society's chief distinction from those of ancient times is its emphasis on individualism and the choices that are available to individuals:

[Modern society] structures relationships contractually, rather than through time-honored customs and mores; it does not force people into fixed social roles, decreed by sacred tradition and inexorable at the moment of birth, or at set stages of life; it turns its back on inheritance and

3. *Id.* at 1-2.

4. Joyce Brown, a homeless woman who had assumed the name "Billie Boggs," was forcibly hospitalized during a period of extremely cold weather and eventually released under court order. It was alleged that she had become a public nuisance, urinated and defecated in the street, screamed obscenities at passers-by, and was incapable of caring for herself. She was eventually released under court order and became something of a celebrity, appearing on television talk shows and at various university campuses. See *Matter of Boggs*, 136 Misc.2d 1082, 522 N.Y.S.2d 407 (1987), *rev'd sub nom. Boggs v. N.Y.C. Health & Hosp. Corp.*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (1987).

5. CHOICE, *supra* note 1, at 188-90.

6. *Id.* at 22.

7. *Id.* at 22-23.

ascription, and opens the door to freedom, mobility and choice.⁸

This is the theme of the book, summed up in a single crucial sentence: "[T]he history of humanity is a history that moves, or ought to move, from choicelessness to choice."⁹ The evolution of American society in that direction has gone so far, according to Friedman, that the founders of American democracy themselves would not only not recognize late twentieth-century America; they would be horrified by it.¹⁰ The concept of freedom that prevailed throughout the nineteenth century was confined principally to the political and economic spheres and had relatively little to do with the kind of personal autonomy, such as the choice of "life style," that has come to characterize American society in the latter part of the twentieth century.¹¹ "Freedom" and "individualism" in the nineteenth century meant popular government, throwing off the paternalistic governments of the past, asserting the right of individuals of all walks of life to participate in the nation's governance, and acting on the belief that the people would have enough self-discipline, responsibility, and maturity to make wise choices for themselves. But no one seriously questioned the traditional personal values of moderation and self-control, respectable behavior and adherence to time-honored norms of conduct. Middle class morality would naturally prevail, people would work hard, and they and the general economy would prosper accordingly.

In such a society, "people did not *choose* a particular way of life; rather, they were trained to accept a preformed preexisting model."¹² "The coercive parts of the law - criminal rules, primarily - were irrelevant to such people as coercion,

8. *Id.* at 23.

9. *Id.* at 25.

10. *Id.* at 26.

11. *Id.* at 27-28.

12. *Id.* at 33.

but they were important in other ways. They protected the interests of the respectable majority from the weaknesses and crimes of people whose control systems were weak, defective, or altogether lacking."¹³

The law was designed to control "tramps, thieves, paupers, [and] moral delinquents."¹⁴ Deviance was not tolerated, and the law was designed, at least in part, to proclaim the virtue of moderation and self-control and to condemn such vices as drunkenness, gambling, and debauchery.¹⁵ Discipline was one of the greatest virtues, both because it reflected personal morality and because it was necessary in a society that was becoming increasingly dependent upon teamwork in large, dangerous places like factories and railroads.¹⁶ Jefferson and Locke, Friedman says, would be amazed at the modern "right of privacy," for it is as remote as anything could have been from their own concepts of basic rights and liberties.¹⁷ But this notion, that people should fashion their own destinies through decisions they make throughout their lives,¹⁸ permeates modern society as a kind of controlling idea entitled, somehow, to govern both personal conduct and the legal system. People generally believe that their actions are voluntary, that even their habits and tastes are the result of choices they have made. With the exception of certain circles in the intellectual world, they reject the notion that criminal or deviant behavior can rationally be excused by theories of determinism. But according to

13. *Id.*

14. *Id.*

15. *Id.* at 34.

16. *Id.* (citing Lane, *Urbanization and Criminal Violence in the 19th Century: Massachusetts as a Test Case*, in *THE HISTORY OF VIOLENCE IN AMERICA* 468, 477 (H.D. Graham & Ted R. Gurr eds. 1969)). See also JOSEPH R. GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS* 149 (1981), commenting on the necessity of maintaining factory discipline and the strong norms against drinking and drunkenness: "Frugality, punctual appearance, scheduled activities are all part of an institutional structure in which loose, erratic, and spontaneous behavior threaten the coordination of parts and whole." CHOICE, *supra* note 1, at 218 n.25.

17. CHOICE, *supra* note 1, at 40.

18. *Id.* at 44 (citing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986)). See *id.* at 219 n.44.

Friedman, there remains a kind of ambivalence, even in popular culture: "Some people like freedom but also want to be led; others want freedom of choice but believe in the old values; they like strict order, they like authority. They support compulsion, discipline, firmness in government, and strict morality in private life."¹⁹

Friedman suggests that this ambivalence is not necessarily contradictory or incompatible with the "republic of choice," because "[d]emocracy and freedom of choice themselves require a certain level of toughness, a certain solidity of structure."²⁰ Genuine liberty, in other words, is impossible without a legal system that works, that prevents society from dissolving into a Hobbesian state of nature, like that which has prevailed in Beirut for the last fifteen years, in which the life of man is "solitary, poor, nasty, brutish, and short."²¹

Thus, Friedman concludes, ordinary people are *not* libertarians, who would advocate minimal state regulation, but they *are* individualists.²² They accept rules that regulate access to such scarce resources as television channels, radio frequencies, wilderness areas, fur-bearing animals, and the highways; for without such rules meaningful choice would become impossible. Highway traffic without regulation leads to chaos and destruction.²³ But on the other hand, another kind of rule that has developed only recently is designed to enhance the choices available to individuals, not by *restricting* or *regulating* access to scarce goods or facilities, but by demanding that each individual be judged on his or her own merits and not because of membership in some group.²⁴ The civil rights movement, designed to open educational and

19. *Id.* at 46.

20. *Id.*

21. THOMAS HOBBS, *LEVIATHAN*, bk. 1, ch. 13.

22. CHOICE, *supra* note 1, at 62.

23. *Id.* at 62-63.

24. *Id.* at 63.

employment opportunities to black citizens, was followed by the women's movement, and then by gays and lesbians, "the handicapped, the elderly, prisoners, students, immigrants, and others."²⁵ Each of them has emphasized individualism and individual autonomy. The principle is that individuals should be able to determine their own destiny without hindrance by laws based upon membership in classes.

Still another set of laws and regulations governs economic relationships, imposing restraints upon employers, landlords, banks, railroads, and other businesses that are designed to confer greater power and more decision-making ability upon small businesses, farmers, shopkeepers, and consumers.²⁶ The entire panoply of entitlements conferred upon the individual by the welfare state, including the so-called safety nets of social security, food stamps, and other forms of social insurance, are designed, according to Friedman, to ensure against any diminution in the individual's choices when such necessities as food and shelter are at risk.²⁷ Contrary to the contention of some conservatives and all libertarians, Friedman says, some laws actually increase the scope of individual liberty.²⁸ Because we are so dependent upon strangers in modern society, we must rely on regulatory control, as exemplified by the requirements that food packagers list the ingredients on their packages and that airline pilots have licenses. Such control enhances the range of choices that we may enjoy.²⁹

In recent years, American law has established a kind of principle against discriminating against people because of "immutable" characteristics.³⁰ Some characteristics are immutable because of biology. Others are *seen* to be

25. *Id.*

26. *Id.* at 65.

27. *Id.* at 67.

28. *Id.* at 68-69.

29. *Id.* at 72-73.

30. *Id.* at 89.

immutable as a result of social or cultural conditioning. But most are in fact hybrids of biology and definitions based upon social codes. Thus, for example, race is generally thought to be a purely biological question, but in fact, a person's race is determined by social or legal codes: whether a person with a single black grandparent is caucasian or black is a *normative*, and not a *scientific* question.³¹ Moreover, what is "immutable" at one time may not be so at another. A person's religion, for example, was fixed at birth in the nineteenth century, but today, at least in the United States, it is changeable at will. The courts have at times suggested that discrimination based upon race, gender, religion, or national origin is wrong because people cannot help but belong to the particular groups they were born into. But in the United States, at least, it is clear that many of these characteristics are alterable virtually at will.³²

The courts have gone so far as to say that people should not be disadvantaged, in some areas, by the fact that they are less wealthy than others. In *Gideon v. Wainright*,³³ the Court held that an indigent criminal defendant was entitled to legal representation at the state's expense, and in *Harper v. Virginia Board of Elections*,³⁴ the Court held that citizens who were too poor to pay the poll tax could not be deprived of the right to vote. But unlike other forms of "discrimination," wealth discrimination has not led to the assumption of strict scrutiny as a test in contested cases. Friedman speculates that this may be so because the public continues to view wealth as the product of merit, and its privileges as having been earned or deserved, while the privileges accorded to persons of preferred races, religious groups, and sexual groups are seen as being undeserved,

31. *Id.* at 90.

32. *Id.* at 92-93.

33. 372 U.S. 335 (1963).

34. 383 U.S. 363 (1966).

unearned, and consequently, unjust.³⁵

Friedman concludes that in the Republic of Choice, "[p]eople should not suffer harm because of events, traits, and conditions over which they have no real control."³⁶ Injustice, he argues, pertains whenever suffering follows as a consequence of a calamity or misfortune that "is *not* the result of free choice and is 'undeserved.'"³⁷

Although it is easy to see that in the context of the cases he has been discussing (misfortunes that result from racism, sexism, and the like), he is probably on the right track, as a proposition of general applicability, his principle seems to be clearly wrong. A person who is the victim of an accident brought about purely by natural forces, such as a landslide, an earthquake, a flood, or a lightning strike, over which no one has any control has suffered a misfortune that is not the result of free choice. Whether the injury sustained is "undeserved" depends upon how one thinks of that term. As a kind of emotional utterance declaring that the innocent victim's suffering is tragic, unfortunate, and not to be explained by any fault of her own, it is unexceptionable. But if the statement, "Theresa did not deserve to lose her leg in that landslide," is taken to mean that the victim suffered some wrong unjustly inflicted upon her, it makes no political, moral, or legal sense. Consider the following case:

A physician, Dr. Hacker, mistook Bromley for Horn, another patient whose right leg was to be amputated because of an advanced case of gangrene, and amputated Bromley's leg instead of treating a small boil that had developed on Bromley's big toe. The medical malpractice suit brought by Bromley against Hacker resulted in a verdict for Hacker. A friend, learning of the verdict, said, "Bromley didn't deserve to lose his leg in that operation." This can reasonably be construed to mean, not only that the friend is distressed over

35. CHOICE, *supra* note 1, at 93-94.

36. *Id.* at 96.

37. *Id.*

Bromley's lost leg, but also that Hacker's behavior was wrong and the jury's verdict unjust. The friend might also intend to convey her judgment that *someone* other than Bromley should pay for the damage he sustained. In short, it makes sense to claim that Hacker, the hospital, or society *owes* something to Bromley for the loss he sustained. It makes no sense at all to claim that *anyone* owes Theresa *anything* for the loss of *her* leg. There is simply no one to blame in Theresa's case, and even though she didn't *deserve* to suffer her injury, in the sense that her injury is a very sad bit of ill fortune, it does not follow that anyone, including society at large, owes her anything more than sympathy and, if she needs it, perhaps some assistance by way of charity. Theresa's bad luck should not necessarily become everyone else's bad luck as well by imposing upon them the duty to provide for her care and maintenance.³⁸ In short, Friedman is simply wrong in his contention that "when bad things happen to us that are *not* our choice and cannot be laid at our door, it *is* necessary for some outside agency to 'take responsibility'. . . ."³⁹ There is no rule of justice or morality that demands that there be a remedy for every hurt, or even for every wrong.

This brings us to another central contention that Friedman makes:

In classical legal theory, the concept of "right" was always balanced by the concept of duty; one man's right was another man's duty; in theory, then, the creation of rights always implied the creation of fresh duties.⁴⁰ But "rights" and "duties" in *actual* legal systems are asymmetrically distributed; the trend, in modern law, is to

38. The author assumes that she has not had the foresight to provide for her own care by purchasing medical insurance or saving enough to sustain herself through the coming years.

39. CHOICE, *supra* note 1, at 193 (emphasis in original text).

40. *Id.* (citing Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); STONE, LEGAL SYSTEM AND LAWYER'S REASONINGS, 137-61 (1964)). See *id.* at 237 n.10.

impose duties on government and large institutions. The bearers of rights are individuals.⁴¹

In Hohfeld's analysis of legal rights, there are four kinds of rights.⁴² Not all of them imply correlative duties. In each of them, however, the government stands as an outside third party, as a kind of enforcer of the rights discussed. Thus, if the client of a securities firm orders a hundred shares of stock from his broker, the client has a right to have the securities delivered to him if they are in fact purchased, and the firm has a correlative duty to deliver those securities to the client. At the same time, the firm has a right to be paid for the securities it has purchased on the client's behalf and the client has a correlative duty to pay that sum to the firm. The government stands outside the transaction unless a problem arises. If a problem does arise, and either the client or the firm complains through the appropriate governmental channels, the government steps in to enforce the claim of the wronged party. But the government is not a *party* to the agreement, and has no *duty* with respect to either of the parties except to do what government is thought, by virtually all legal philosophers and ordinary citizens, to be designed to do: to keep the peace by enforcing the legal rights of its citizens.

Friedman concludes that "[c]hoice and responsibility do not balance each other off logically or legally, as right and duty did in legal theory" and that they do not "stand in balance" in the real world.⁴³ Here too, it appears that he may have overstated his case.

Before Congress and the courts ruled on the right of black citizens to be served in restaurants and other places of public accommodation, Lester Maddox had the right (legally)

41. CHOICES, *supra* note 1, at 193 (emphasis in original text).

42. See *supra* note 39.

43. *Id.*

to demand that black citizens refrain from entering his Pick-a-Rick Restaurant and to give his white customers axe handles to use on any black person who trespassed on his property. Maddox's right to choose whether to admit blacks as customers entailed a corresponding duty on the part of all black persons to refrain from intruding onto Maddox's property. Once the law changed, the locus of the choice shifted from Maddox to black citizens. Black citizens then had the choice to enter or refrain from entering the Pick-a-Rick, and Maddox and his white customers had a corresponding duty to refrain from interfering with their exercise of that choice. That "choice" is precisely what Hohfeld called a demand-right, with its corresponding duty.⁴⁴

For every person who has a "choice", i.e., the option of doing or refraining from doing x, y, or z, there is at least one other person, and usually there are many persons, who have the duty not to interfere with that individual's choice, even though they *may* be affected by the choice thus made. To use some of Friedman's examples:

(1) A young woman today has a wide range of choices in the area of sexual conduct. As Friedman aptly puts it, members of the middle class "[a]im to go through life like shoppers in some cosmic department store, pushing a gigantic shopping cart, picking items at will off the endless shelves."⁴⁵ Among other things, "the supermarket is also a sex shop."⁴⁶ Corresponding to the young woman's right to choose are duties that did not exist before, and could not even have been imagined as existing: the duty of her parents, for example, not to interfere with her sexual choices, of her school not to suspend or expel her because of her sexual activities, of her employer not to intrude into her private sexual conduct, and so on.

44. *Id.*

45. CHOICES, *supra* note 1, at 192.

46. As well as "a shopping center for religions, a fashion emporium, and a career fair . . ." *Id.* at 192-93.

(2) A young man's choice of religious practices in the cosmic supermarket is practically unlimited. Whereas at one time it was not at all uncommon for proselytizing activities to be strictly limited, today there is practically no limitation at all. The young man's decision to join the Moonies or the Hare Krishnas corresponds to his parents' duty not to have him kidnapped for deprogramming, and the airport authority's duty not to interfere with his chanting and soliciting money for his cause, even though it causes some distress and discomfort for some passengers. It also imposes upon persons using the airport for its designated purpose a kind of liability that they might not have counted on when they purchased their airline tickets: the necessity of having to listen to the chants and being importuned for contributions as they pass through the airport, however offensive that might be to them.

(3) Billie Boggs's right to choose to reside on a cardboard carton situated on a sidewalk adjacent to a business establishment and apartment house⁴⁷ imposes numerous liabilities upon the residents, businesses, and passersby of that neighborhood. They must be subjected to her screams and curses and her demands for money. The businesses may have to suffer lost sales and lower profits because of her presence in the vicinity. Their sensibilities may be grossly offended by the smell of her excrement and her clothing. And despite all of this, her legally protected right to remain there imposes upon each of them the duty not to remove her or otherwise interfere with her decision to remain there.

Friedman concludes that "modern society defines justice as the fulfillment of expectations"⁴⁸ This may be so, but for every person whose expectations are fulfilled in the republic of choice, there are others whose expectations are of necessity frustrated and disappointed. Whether we approve of the current state of affairs or not, it is simply a fact that when children's choices are legally protected, their parents'

47. See *supra* note 4.

48. CHOICES, *supra* note 1, at 194.

expectation that they will be able to exercise what they believed were proper parental prerogatives must be disappointed. Fulfillment of the voyeur's desire to be titillated by pornographic films frustrates the expectations of those members of the community who prefer to have a "clean" neighborhood and to keep such spectacles out of the reach of their children and their fellow citizens. And fulfillment of Billie Boggs's expectations plainly disappoints those of her neighbors.

The republic of choice, then, is not a utopia in which everyone's expectations will be fulfilled. Nor is it obvious that the range of choices available is any greater than it was before, say, in the Victorian era. For every choice that has recently become available in the cosmic supermarket, some other one has been removed from the shelves. Friedman has done a masterful job of describing the magnificent array of choices now set forth in this great emporium. But it would be a serious mistake to suppose that all of the customers will find what they are looking for. It remains to be seen whether the pressure exercised by some of the more vocal customers has resulted in a *better* selection, or just a *different* one. Some of the older customers have become more and more vocal as their anger over the loss of their old favorites has intensified. The manager of the store might be well advised not to listen to Friedman's siren call, not to succumb to his sales pitch for the new merchandise, and to consider carefully whether there might still be some value in the old.