

1992

I Hear a Rhapsody: A Reading of The Republic of Choice

Donald J. Herzog

University of Michigan Law School, dherzog@umich.edu

Follow this and additional works at: <http://repository.law.umich.edu/reviews>

 Part of the [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

Herzog, Donald J. "I Hear a Rhapsody: A Reading of The Republic of Choice." Review of The Republic of Choice: Law, Authority, and Culture, by L. M. Friedman. *Law & Soc. Inquiry* 17 (1992): 147-58.

This Review is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Reviews by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

I Hear a Rhapsody: A Reading of *The Republic of Choice*

Don Herzog

LAWRENCE M. FRIEDMAN, *The Republic of Choice: Law, Authority, and Culture*. Cambridge, Mass.: Harvard University Press, 1990. Pp. 265. \$27.50.

Readers coming to another volume by Lawrence Friedman might well expect a tightly crafted legal history. But this book is quite different. It offers a sweeping account of the transformation of modern law, a synoptic overview of what is finally distinctive about our legal culture, even a broad-brushed portrait of Western individualism. It does so breathlessly, in prose style and velocity. It's sometimes an engaging read, sometimes a distressing one, but—and here's what really matters—never a persuasive one. Or, worse yet, when it is persuasive it's because of its poetic and ideological features, not any kind of rigorous analysis.

The simple outlines of Friedman's story are told easily enough. Start with two historical discontinuities: Once upon a time, modernization made Western society a good deal more individualistic than it had been; then, between the 19th and 20th centuries, individualism changed dramatically. An older culture of discipline crumbled, only to be replaced with a narcissistic and freewheeling celebration of self-expression.

These cultural shifts do not exist apart from the law. Presumably they are in part shaped by the law, but Friedman is far more interested in the sense in which legal culture reshapes the law itself. So central legal doctrines have obligingly turned out to be quite pliable, and courts and other lawmaking bodies have sculpted "the republic of choice," a polity taking the free choices of individuals as the ultimate source of legitimacy. That

Don Herzog teaches political theory at the University of Michigan.

polity insists that you cannot be held accountable for harm if you didn't have control, that law should guarantee a wide range of choices, and that all options should be treated as equally good.

Friedman thus realizes—I think it the best point of the book—that an old Benthamite prop still haunting legal theory is just plain wrong. The Benthamite prop is that law and liberty are opposites, that every time one passes a statute one limits the choices available to people. Friedman likes to put the point this way: We care a lot about rights, but rights are meaningless until they are written into law as concrete entitlements that can be enforced. (Which means, among other things, that it is simplistic to cast our notoriously litigious ways as the enemy of liberty. After all, people sometimes go to court to have their rights vindicated.)

More generally, as Hart noted in *The Concept of Law*, some laws, like those defining the procedures for writing a will, open up new options that would not otherwise be available. More generally yet, many legal rules take the form of enabling constraints. By ruling out some actions (mugging, say), they make it possible to pursue others (walking through the park calmly). So we shouldn't think that a polity celebrating choice must be a polity with a minimalist legal order.

Now, Friedman's story is both slippery and commonplace enough that it's hard to argue with. Unwittingly, Friedman repeatedly dodges the chance to nail down a distinctive and provocative view by lapsing into evasive prose and by gesturing grandly where he needs instead sustained empirical analysis. I suppose, in its aspirations and scope, this book is supposed to count as a theory book. But theory had better not be what you get when you leave out the facts. Let me catalogue the chief equivocations of the book, and then suggest why it's better read as poetry or ideology.

Mythic History

Again, the historical backdrop to the argument depends on three stages: (1) the premodern past leaving no or little or far less room for individual choice; (2) the 19th century, coupling individual choice to discipline and responsibility; and (3) the 20th century, where an expressivist conception of choice runs roughshod over responsibility. In Friedman's treatment, all three distressingly lack any historical specificity. They are quickly summoned up, as quickly dropped, with impossibly sweeping language.

Sometimes I can't take seriously Friedman's historical *pronunciamentos*. They seem silly on their face. Consider this:

We live in the shadow of an unknown and unknowable future. It is natural for many of us to wonder about the nature and meaning of historical experience, to think about trends and evolutions, and to ask ourselves where we are going. This awareness is part of the essence of the modern. Medieval and tribal people had no concept of news, no sense of revolution—or of the banality of revolution. (At 18)

In fact, though, worries about the shape and meaning of history are “medieval” through and through: they are the creation of Christianity. As Hans Blumenberg has argued, in a deft piece of historicist analysis of a putatively philosophical dilemma, the question of the meaning of history arises only when one can put history in some larger context.¹ That context is supplied by the Christian story of the fall from grace and the coming return of Jesus Christ, a story that makes it easy to answer the question of the meaning of life. Human life, human history, are a pilgrimage in which we struggle for salvation from our fallen condition. (The existentialists, in this analysis, save a question to which they have deliberately renounced the conceptual materials that provided an answer. No wonder they found the question utterly baffling.)

Or again, it’s not that medievals had no concept of revolution. They had a different one, that of the wheel of fate coming full circle. Many scholars, notably J. G. A. Pocock in *The Machiavellian Moment*,² have charted the invention of the modern historical sensibility, in which history becomes linear, perhaps recapitulating the past in complex ways, but never simply repeating it. The point may seem a prissy corrective, but it means it’s not distinctively modern to worry about what comes next. True, we place those worries in a different conceptual framework, so they must have a different shape. But they’re not wholly new.

Still, one need not be any sort of adept in intellectual history to realize that this claim is odd. I just can’t imagine what Friedman is thinking when he says that medieval and tribal people have no concept of news. Native Americans, to take one of many instances, managed to assimilate and transmit the information that white men were coming to kill them. Nor can I imagine why Friedman permits himself the luxury of jeering at “the banality of revolution” in a book published the year after the remarkable revolutions of Eastern Europe. Perhaps he’s prematurely jaded. Or perhaps he’s not fully in control of the cascading flow of his own sentences. (This book gives every sign of having been hastily written and lightly edited.)

1. Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. Robert M. Wallace (Cambridge, Mass.: MIT Press, 1983).

2. Marc Bloch, *Feudal Society*, trans. L. A. Manyon (2 vols. Chicago: University of Chicago Press, 1961).

The more worrisome historical decrees, though, are the ones that look plausible. They are more worrisome just because the reader may permit himself to nod in too easy agreement. Consider this:

At one time, Western society, like most societies, rigidly defined age phases. The life-cycle was a one-way conveyor belt, a kind of assembly-line process, which started at birth and moved inexorably in a single direction from phase to phase, through adulthood to weakness, retirement and death. Each stage or station was firmly irreversible. There was little variation in the process and never any turning back. (At 172)

The analogy to the assembly line is jarring as a way of describing life before the industrial revolution—but leave that aside. Instead, ask this: Just what period and just what place does Friedman have in mind? Early modern Europe? Bastard feudalism? Feudalism in its heyday, that is in the long and inglorious process of decline charted by Marc Bloch?³ The early years of Rome? Of Attic Greece? Or what?

Even these referents, of course, are impossibly abstract. Think about what a genuine social history of the life cycle would have to look like. Think for instance of charting the particular practices of early Reformation England, of, say, the dissolution of the monasteries, which thrust people who had devoted their lives to God, in a timeless present tense, back into a secular world with a very different rhythm. Think of the struggles of the early modern workplace surrounding the introduction of time discipline, the use of the clock, and what that meant not just for the rhythm of the day but for the shift many experienced in moving from the country to the city. Or think of late 18th-century England, where there was a clear enough social script about the climb from apprentice to journeyman to master, but one could always slip all too easily back downhill. And so on.

No such history appears here. But the problem isn't that the book doesn't tell the history of the premodern West in any detail. It's that Friedman seems wholly uninterested in the merits of this conventional wisdom, in critically scrutinizing it to see how well it maps the fact of the matter about his stage 1.

Similarly for stage 2, or for the putative contrasts between stages 2 and 3. Again, consider this:

We can define success however we want to. We can choose to be monks, or nuns, or drop-outs; beachcombers, or high-school teachers; we can select our individual trajectories. Precisely this point distinguishes modern individualism from its nineteenth-century ancestor.

3. J. G. A. Pocock, *The Machiavellian Moment* (Princeton, NJ: Princeton University Press, 1975).

“Success” in the nineteenth century was a monochrome, not a rainbow. General norms defined and described it, not individual choices. It is in *modern* society, in contrast, where people can march to their own private drummers. (At 200)

“Modern” here must mean only the 20th century, but the trope of the drummer is lifted straight from the stirring closing passages of a vintage mid-19th-century text, Henry David Thoreau’s *Walden*. Perhaps Friedman’s thought is that Thoreau’s was a lonely voice, that he wanted people to march to their own drummers but they couldn’t. Perhaps it’s that only in the 20th century can we actually live by Thoreau’s credo.

But again, this seems misguided. The reactionaries so outraged by the filthy workmen mobbing levees at Jackson’s White House were worried that success wasn’t monochrome at all, and indeed Jackson’s endless invocations of “the real people” deliberately inverted one conventional story about who the successful are. So did James Fenimore Cooper’s savage portrayal of the land speculator Henry Halfacre in his jejune novel, *Autobiography of a Pocket Handkerchief*, although for different purposes. And if Thoreau was worried that his contemporaries were marching mindlessly through their lives, so was Thornton Wilder in his maudlin *Our Town*, and so were the radicals of the New Left in the Port Huron Statement. If the sort of grim Puritanism Nathaniel Hawthorne was obsessed with survived in the 19th century, it survives today, too. After all, the infamous social agenda of the New Right is not particularly tolerant of privately defined success. And when my high school biology teacher summarily sent a classmate home for “daring to forget her brassiere” (the oxymoronic verb coupling is eloquent), we knew perfectly well not just what she was up to but what the force of his response was. We didn’t gawk at him uncomprehendingly, as if he were some newly awakened Rip van Winkle. We even knew why he said “brassiere” and not “bra.”

Nineteenth-century Americans had some received—and conflicting—wisdom defining success, and some self-appointed gadflies contesting that wisdom; so too in the 20th century. And both centuries had expressivist individuals insisting that the criteria for success had to be found deep within oneself. (In his recent and important *Sources of the Self*, Charles Taylor has shown that such expressivist sentiments go back a very long way indeed.)⁴ So where’s the change?

Again, the point is not that there have been no changes. The history to be most skeptical of is the sort that insists on deep continuities all the time. But describing what changes there have been cannot simply be a matter of scaring up a line or two here and there about the 19th and 20th

4. Charles Taylor, *Sources of the Self* (Cambridge, Mass.: Harvard University Press, 1989).

centuries, of acting as though we all already were well versed in the relevant histories. Those histories are going to have to be richly detailed, attentive to doctrine and practice, written with what Bernard Williams once called an acute and wary sense of the ordinary. Many of them are yet unwritten.

The point here is elementary enough. Friedman cannot possibly establish that his “republic of choice” is something new unless he establishes that something has changed. And he cannot establish that just by announcing that it’s true, even if the announcement seems familiar and intuitive. For it might be that the conventional wisdom of the academy, or for that matter the self-understanding of today’s Americans, is deeply wrong. His thesis thus requires a much more sustained account of the predecessor legal culture than he provides.

Legal Culture and Law

Suppose we grant nonetheless that twentieth-century legal culture is importantly new, that it centers on self-determination in a way preceding societies would have found strange or repellent. Next Friedman wants to argue that legal culture drives legal doctrine, or the law itself. But this argument, too, is sometimes vague, sometimes contradictory, always undeveloped.

Friedman is cavalier about dismissing central questions of jurisprudence. So he announces, “No serious scholar treats the lawmaking power of judges as anything but an established fact. . . . The judges themselves are not entirely candid. Some of the most blatant lawmaking, in common-law countries too, gets covered by the fig leaf of ‘interpretation’ ” (at 21). Talk of candor and fig leaves makes sense if and only if these judges know perfectly well that they make law but choose to lie about it. One cannot invoke those categories if the judges mistakenly believe they don’t “make” law—the category demands the same scare quotes that Friedman surrounds interpretation with—or, more important, if they rightly understand that there are important differences between their position and that of legislators. This passage tells us something about Lawrence Friedman’s beliefs about modern law. Neither it nor anything surrounding it in the text, though, gives us any reason to believe he is right. Legal theorists since Hart, out to describe the law from an internal point of view, have had no patience whatever with the view that judges are simply legislators by another name. Those theorists might be wrong, of course, but it would be helpful for Friedman to pause to explain why.

Or again,

No one seriously asserts, of course, that law and legal systems are *totally* autonomous. In my view, even the case for partial autonomy has not been well established. (At 3–4)

Our general thesis, as we noted, is that the “autonomy” of law is only apparent and only skin-deep. (At 38)

One might wish a crisper statement of what is at stake in affirming or denying the autonomy of law—especially since Friedman articulates three contradictory accounts of his own view.

The first: Legal culture, understood as a “kernel of norms” or “ruling legal ideas,” exists at arm’s length from the law itself; and legal culture does the lion’s share of causal work in explaining the shape of the law (at 96). There is some residual equivocation here about the relationship between culture at large and legal culture; sometimes the latter is just a facet of the former, sometimes it is an independent entity causally driven by the former. In the first mood, Friedman writes, “legal systems are not autonomous but reflect social norms or dominant social opinion. This means, among other things, that general legal culture *makes* the law, at least in some ultimate sense” (at 197). In the second mood, Friedman writes, “The master theme of free choice has transformed legal culture and the texture of rules and practices; it has turned authority systems on their head, and reworked institutions, all in order to give greater play to the dominant motif of open options” (at 104). In both cases, though, the guiding thought seems to be that ideas drive the law. The language is puzzling: Ideas, one wants to say, aren’t agents; they don’t act in the world, and they certainly don’t act in the world to accomplish certain ends. Maybe the language is deliberate hyperbole, although then one wants to know what the pedestrian translation of it would be. Regardless, here Friedman is clearly committed to thinking that culture, or perhaps legal culture, is the causal source of law.

But Friedman also vigorously denounces such old-fashioned idealism. He writes, for instance, that “‘Concepts’ do not produce laws; social pressures do. The culture of fluidity affected the wish-list of the gray lobby and thus may have had an *indirect* influence on the law” (at 174). Introducing conventional pluralist pressure groups doesn’t alter the idealism all that much, for here they seem to serve as intervening variables. Consider something more unequivocally dismissive of idealism:

I have an underlying bias which leads me to think that the world makes the mind, on the whole, not vice versa. I do not believe in disembodied consciousness. Modern society is in large part the result of real events, notably events of technology and discovery. The crucible of context forms the modern mind. The world is more than

words, more than symbols, more than “interpretations of texts.” (At 195)

Here Friedman is firmly in the grips of the 19th-century debate between idealism and materialism. My own view is that the only reasonable argument for either of those quaint positions is the manifest inadequacy of the other and that our ability to furnish any cogent account of social life will depend on demoting or even scrapping the infamous distinction between “ideal” and “material” that motivates the debate. Regardless, though, in this mood Friedman cannot believe that legal culture shapes law; he would have to argue that “concrete” or “material” legal practices themselves give rise to legal culture. The idealist position he would have to ridicule as depending on the scarecrow of “disembodied consciousness.”

But there’s more. A third view: Legal culture isn’t in any interesting way independent of law, so no question of the causal relationship between it and law can arise in the first place. Legal culture is partly constitutive of law; it’s simply an abstract description of the contours of legal doctrine. In this mood, Friedman writes:

General tendencies in the flow of attitudes and behavior are nonetheless important; they must be dealt with and mapped out. The job is to peel off the outer husks and get to the kernel of norms; to describe and catalog those basic principles that saturate modern legal culture. These are, of course, abstractions—distilled and inferred from behavior patterns of legal actors, from expressions of attitudes, and from the language and content of rules of law. (At 96)

But this gives up the game. Now there’s no possibility of explaining law by turning to legal culture without lapsing into mere circular argument. That, perhaps, explains the curious idea that “modern legal arrangements *must* be congruent with modern legal culture” (at 38, Friedman’s italics). They must be, simply by definition.

We need not rely on Friedman’s own abstract accounts of his argument to figure out what he’s up to. We can see what he does, how he actually describes and tries to explain various “data,” if we want to understand which of these three views he really holds. Here again, though, his text fails us. It has plenty of evocative descriptions of modern individualism, but precious little in the way of fine-grained accounts of the law. There are plenty of scattered references to legal cases and doctrines but never anything sustained. And there is quite precisely nothing in the text enabling us finally to decide just what Friedman means by legal culture, just what work he wants it to do, and just where it stands between modern individualism and law itself.

The Ideology of Choice

So Friedman's book simply fails. Not because it's wrong on the merits: Plenty of books are that, and some of them are quite good anyway. This one fails because it doesn't ever articulate the case it claims to articulate. What can we make of it?

It looks awfully like a rhapsody, a dreamy celebration of "individualism" or "free choice" or some such hortatory category. Perhaps mindful of some conventional strictures about facts, values, and the neutrality of the social scientist, Friedman has a ritual disavowal: "In this book I have tried to avoid flights into the normative or political. My general aim has been to *describe* social phenomena, not to evaluate them" (at 194). That disavowal isn't persuasive.

I take it any cogent description of this terrain will require two closely connected distinctions, one between our self-understanding and the fact of the matter, one between our aspirations and our achievements. The first is more slippery than the second, since our concepts and categories don't exist at arm's length from society; but neither do they fully exhaust society. If I think of myself as an aristocrat, for instance, I will do certain things I wouldn't otherwise do. And any cogent account of what I'm up to will have to appeal to my self-understanding. But no matter what I do, I won't really be an aristocrat. For that depends on matters of social practice and public law that aren't in my control. I may for instance sneer at my neighbors or employees, and I may diligently try to reconstruct just how the aristocrats of early modern Europe sneered, but that won't turn them into serfs. So my self-understanding matters—it's part of "the data"—but it's an illusory self-understanding, and that matters too.

The second distinction is straightforward enough. Friedman himself notices it:

In all countries there is a depressing gap between aspiration and achievement—how large a gap is in dispute. This book has been about aspirations, their origins, their manifestations, and the legal forms they take; it has been less concerned with actual achievements or results. These are ignored not because they do not matter, but because they are not what the book is about. (At 195)

That last clause furnishes no justification at all: It says that the book isn't about achievements because the book isn't about achievements. Justified or no, though, attention to the gap between aspiration and achievement isn't on offer in these pages.

That will deprive Friedman and his readers of a crucial strategy for critically surveying the republic of choice. They won't be able to explore where our aspirations do in fact fall short, or for that matter where our

self-understanding is at odds with the actuality. As a result, despite its solemn bid for neutrality and objectivity, the book readily collapses into being an ideological celebration of the republic of choice, not any scholarly analysis of it. Indeed, immediately after assuring us that he is simply describing the republic of choice and that he is not interested in assessing the actual achievements, Friedman blurts out, "My own assessment, I freely admit, tends to be guardedly positive. I confess I like many of the achievements, including the legal achievements" (at 195).

That affection for the republic of choice shows up elsewhere. One dramatic example is this: "Coca-Cola, hamburgers, and judicial review have not been rammed down the throats of the Dutch or the Italians. As countries develop their own varieties of expressive individualism, they come to want these wondrous things for themselves" (at 49). There's no way to decide if Friedman's "wondrous" is ironic or not, no way to decide how serious he is in putting judicial review on a list with mere commodities. But the ideological instinct is clear. Nothing like imperialism, nothing like power, indeed nothing like accident, secures the increasing place of American culture across the world. It's not only a culture of choice, but that culture itself is freely chosen by those who adopt it: So the republic of choice becomes, in the title of one chapter, "The Chosen Republic." (One wonders if Friedman would put Australian aborigines on the list with Dutch and Italians.)

Ideology is a notoriously sticky concept, and much of its history is wrapped up in the byzantine debates of 20th-century Marxists. But by ideology, I mean only this: a set of beliefs true enough to supply a reasonably accurate account of society but false enough to make society look better than it really is. The canonical example—we owe this example to Marx (and to Adam Smith, but that's another story)—is the thought that the labor market is voluntary. True, wage laborers are not born as serfs tied to a particular lord and a particular plot of land. Nor are they impressed as sailors once were, or captured as chattel slaves. They are free to hunt around the market and find a particular employer.

Then again, their alternatives are sharply limited. There may be only one job available (or none at all). In the event of a wage dispute, the employer, with his greater savings, has his workers up against the wall: for they need their wages to live. And they may freely enter a particular workplace, but once on the job, they find themselves taking orders from foremen, managers, and the like.

I don't want to defend this example on the merits, either as an account of modern American workplaces or as an account of the English workplaces of the late 18th and mid-19th centuries that Smith and Marx were trying to make sense of. If it's right, though, it's a textbook example of ideology; for the view that the market is free will enable the worker to

find and hold a job. It gets some of the facts right; it does not leave him in the pathetic situation of Don Quixote. But it will also make him feel more free than he actually is; it will mask features of his situation that are distressingly unfree.

By focusing only on aspiration, not on achievement, Friedman is unable to explore the possibility that the republic of choice is an ideological one. Or, to put the point differently, his analysis itself, flattering us on the distance between us and our grimly unfree historical predecessors, becomes a piece of ideology. It makes us feel like the world is a better place than perhaps it is. In particular, he cannot explore the possibility that in public law, the modern celebration of choice makes people less free than they would otherwise be.

I am no scholar of constitutional law. So I will pose these as questions, not declarative claims, and leave it for readers more legally knowledgeable than I to decide whether they should be answered affirmatively. Does the Supreme Court ever withhold benefits, or impose penalties, on the grounds that individuals have alternatives, when in fact those individuals have no real alternatives at all? Does the Court, for instance, ever justify shabby treatment of welfare recipients by assuring us that after all they could find jobs if they wanted to? Does it ever tell us that people can choose not to look at smutty billboards, not to inhale cigarette smoke in crowded workplaces, not to reside in a state whose tax policies they disapprove of? Does it ever treat illegal immigrants as people who have simply chosen to come here, and could reasonably have stayed where they are? Does it ever justify the imposition of municipal or state policies by assuring us that after all ours is a federal system, and malcontents are free to move elsewhere?

But one example I do know. In overturning various campaign spending restrictions in *Buckley v. Valeo*,⁵ the Supreme Court recurred repeatedly to the claim that campaign spending is voluntarily chosen, and it's not up to the authorities to decide that we spend too much. But this just misses the point that candidates are stuck in a spiraling security dilemma, where everyone has to raise more and more money out of fear that his opponent will be raising even more. So, notoriously, they spend many hours every week raising many thousands of dollars. Talk of voluntary choice here is on a par with the claim that the denizens of Hobbes's state of nature voluntarily choose to secure power after power and fight each other.

In such cases—and again readers are free to fill in their own examples, and my hunch is that there are all too many examples to fill in—there's a pernicious irony. It's our very affection for free choice that prevents our seeing a lack of freedom, worse yet that very affection that makes

5. 424 U.S. 1 (1976).

us worse off than we would otherwise be. One might expect a scholarly book on the republic of choice to explore such ironic dilemmas. This one doesn't. Nor does it accomplish what it sets out to: it doesn't show that 20th-century individualism is in any way new, and it doesn't show that legal culture shapes the law. What does it do? It offers an intoxicated celebration of that republic. Consumers of ideology may find it an engaging read. Students of ideology may find it a useful source. But those who think that scholarship and social science aren't just ideology by another name have good reason to beware its sprawling and evocative portrayal.