

LIBERAL LEGALITY

In his new book, Lewis D. Sargentich shows how two different kinds of legal argument – rule-based reasoning and reasoning based on principles and policies – share a surprising kinship and serve the same aspiration. He starts with the study of the rule of law in life, a condition of law that serves liberty – here called liberal legality. In the pursuit of liberal legality, courts work to uphold people’s legal entitlements and to confer evenhanded legal justice. Judges try to achieve the control of reason in law, which is manifest in law’s coherence, and to avoid the peril of arbitrariness, such as personal moral judgment. Sargentich offers a unified theory of the diverse ways of doing law, and shows that they all arise from the same root, which is a commitment to liberal legality.

Lewis D. Sargentich is Professor of Law at Harvard Law School. He has taught jurisprudence and legal theory courses there for four decades, including seminars on subjects ranging from natural law to legal skepticism.

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Liberal Legality

A UNIFIED THEORY OF OUR LAW

LEWIS D. SARGENTICH

Harvard Law School



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Preface: Law's Quest

Legality is our topic. According to the vocabulary I use in this book, legality is law's aspiration. It is law's excellence, a sought condition of law.

When legality is realized, a regime of law exists in social life. What I am calling liberal legality, in particular, is a regime of law that helps to secure liberty. In this book, liberal law is so called because it aspires to achieve a condition of lawfulness that is prized by a political position that prizes equal liberty.

Liberal legal practice aspires to achieve the control of reason in law and the governance of law in life. Our law, on account of its aspiration, is liberal law.

This slender volume focuses, as its title indicates, on the commitment – the project – of liberal law. In its pages, we will examine the conception of reason-controlled law in control of society, its constituents, and implications. My objective is to identify and explore the high ambition of liberal legal practice. The aspiration of liberal practice is to bring about and sustain a condition of legality in law and life. This aspiration is a ramifying commitment. We will identify the components of the commitment, and draw out its main implications for the conduct of legal argument.

Argument conducted by reason is our way of doing law. The undertaking to secure law's governance in the world is a project that law in our society tries to carry out. So, in studying the content and implication of the aspiration of liberal legal enterprise, we learn about the formative commitment of our legal practice, and we see how that commitment gives rise to basic features of our manner of legal striving.

But our law has many aspects. Its quest to realize a certain conception of legality, here called liberal, while a prominent aspect, rich in consequence, is not the only one. Why should we focus just on this aspect? Here at the outset, by way of apologia for the present project, I offer two reasons for focusing on the aspiration to realize liberal legality, entrenched in our law, and on how it unfolds. The two main reasons for looking at the foundational commitment of liberal law are, I think, first, intrinsic interest, and second, that we care.

A very good reason for making something the focus of study is intrinsic interest. The liberal kind of law is, I would think, of considerable intrinsic interest for anyone interested in thinking about law.

Liberal law undertakes a rather pure quest. Its high aspiration is to achieve a sort of apex of lawfulness – law-fullness. Liberal practice of law aims to formulate the laws as precepts that, in their statement and in operation, exemplify essential law-like qualities. Law-like laws are general, impersonal, regular, coherent, rationally realizable prescription. Law-like law, at work securing liberal legality, is the quintessence of law. Legal study, trying to figure out how law works, has got to pay attention to this kind of legal striving. For someone interested in law as such, inquiry into the idea of law-fullness that inspires liberal law's quest is a pretty inevitable project. The present study conducts such an inquiry.

A second reason for focusing attention on liberal legality has to do with the importance – the value – of the commitment of liberal law. This commitment is of great value, or so I believe. And I would think that this belief is widely shared.

Liberal law is great in ambition. It is controlled by an aspiration of enormous practical significance. It works to bring about a situation of legality, the regnancy of law in social life, lawfulness – not arbitrariness – in exercise of collective power. The quest to realize law-like qualities in law for the sake of the governance of law in life is not just familiar; it is inspiring. It is an undertaking we care about. So, for many – maybe most – students of law in our society, the project of studying liberal law, the better to understand the content of its commitment and the trajectory of its pursuit, may be thought to be worth doing.