Review Symposium: On Ackerman's *Reconstructing American Law*

Radical Moderation

Joseph William Singer

BRUCE ACKERMAN, *Reconstructing American Law.* Cambridge: Harvard University Press, 1984. Pp. viii + 118. Cloth $16.00; paper $6.95.

> We are being offered a choice of worries.[1]
>
> Clifford Geertz

> Feeling does not necessarily exclude scientific accuracy. I even believe there are fields (such as psychoanalysis) whose scientific nature would be enhanced by the acknowledgment of feeling, if only to expose the profusion of false assertions that can be defended over a long period of time with the aid of incomprehensible theories. Only a feeling person can grasp the way an empty theory may function as a means to power, for he or she will not be intimidated by incomprehensibility.[2]
>
> Alice Miller

It was a dark and stormy night.[3] The astrophysics professor had just given a brilliant lecture on the foundations of the universe. Her grateful students and colleagues breathed a collective sigh of satisfaction and astonishment at the lucid presentation. The professor asked for questions, but no one raised a hand; their questions had all been answered. Then a shabbily dressed stranger in the back of the auditorium rose to speak. It was impossible to tell whether the stranger was a woman or a man.

"Professor, that was a very interesting speech," the mysterious person began. "But there is one problem with it."

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1. Clifford Geertz, Anti Anti-Relativism, 86 Am. Anthropologist 263, 265 (1984).
2. Alice Miller, Thou Shalt Not Be Aware: Society's Betrayal of the Child 8, trans. Hildegarde Hannum & Hunter Hannum (1984).
3. Cf. Madeleine L'Engle, A Wrinkle in Time 3, 5 (1962). This story, or one very much like it, was recounted by Wayne Roberge at the 1976 graduation ceremony at Williams College, Williamstown, Mass.

"What is that?" asked the professor cautiously.

The windows rattled madly in the wind.

"Well, I am sorry to tell you that it is all wrong. You see, I happen to know that the universe actually rests on the back of one great turtle."

The professor took one step back and forced a smile.

"Whatever are you talking about?" she asked.

"Just what I said," the figure replied. "You are right that the universe has a foundation, but it is not the mixture of gravity and magnetism and other forces that you so eloquently described. The foundation of the universe is a giant turtle."

Several dozen mouths opened in wonder. Someone giggled. How would the eminent professor respond to this lunatic?

"That is an interesting theory," replied the professor. "But tell me, if the universe rests on the back of a great turtle, what is that turtle standing on?"

The stranger was ready with an answer: "Another, much larger turtle."

"But——" objected the professor.

"I'm sorry, professor. It's turtles all the way down."

I. Legal Theory

Bruce Ackerman's new work on legal theory, *Reconstructing American Law,* is about the search for foundations. According to Ackerman, we are on the verge of discovering, or articulating, a brand new method of ascertaining facts and choosing values. This method will provide a foundation for answering our basic questions about the legal system. These are the questions St. Thomas Aquinas posed: "to know what [we] ought to believe; to know what [we] ought to desire; to know what [we] ought to do."[4]

Ackerman's answer differs from ancient and medieval formulations because he is a liberal. The liberal perspective assumes that, in the first instance, individuals should be allowed to answer these questions for themselves. Each of us has the right to pursue happiness, to determine our own moral ends, to decide what we should desire and how we should live. But because we live in a society with other similarly self-interested individuals, we construct a state to police our relations with each other, to protect us from each other. The state consists, partly, of a legal system that determines the legitimate boundaries on self-interest; the rules in force determine what we are and are not free to do with ourselves and each other.

The central issue of legal theory is how to determine and justify the legal rules that define both our basic social institutions and the legitimate limits on freedom of action. Since the legal realists forced us to see the contradictory values hidden within the vague generalities of common law discourse, two approaches to legal theory have competed for the loyalty of those interested in choosing or justifying the legal rules. The first approach is methodological; the second is pragmatic.

4. St. Thomas Aquinas, The Human Wisdom of St. Thomas Aquinas 49, trans. Drostan MacLaren, ed. Joseph Pieper (1948).

The methodological or rationalist approach tries to identify a decision procedure that can correctly choose between alternative possible institutions or social structures and between alternative possible legal rules. Legal theories that adopt this approach are determinative; they purport to describe ways to identify answers to legal questions. In contrast, the pragmatic approach is to identify a structured set of alternative institutions or rules, to try to predict the most likely consequences of adopting the different alternatives, to describe the values at stake in the context of the decision, and to present arguments for adopting one of the alternatives. Pragmatic theories are expressive rather than determinative; they do not describe a method of reaching answers but rather a language for discussing value choices and social structures.

In *Reconstructing American Law,* Ackerman argues passionately for the rationalist approach to legal theory. This methodological argument is intertwined with an explicitly political argument for a regulated market system characterized by a fair distribution of opportunities for wealth, power, and prestige.

II. The Activist State

A. The Decline of the Idea of the Self-regulating Market and Formalist Legal Reasoning

Ackerman begins with what is now a familiar historical account.[5] From the turn of the century until the New Deal, the dominant and traditional view was that there is a precise separation between state and society. Society was thought to function like a well-oiled machine: Individuals pursued happiness through voluntary transactions in the marketplace, free from state control; the market was thought to be both natural and self-regulating. Before the New Deal, lawyers viewed "self-conscious state intervention in the market economy as a relatively extraordinary event" (at 7). In this classical view, the

5. On the decline of the idea of a self-regulating market, see Morris Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927); *id.,* The Basis of Contract, 46 Harv. L. Rev. 553 (1933); Robert Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57 (1984); Robert Hale, Coercion and Distribution in a Supposedly Noncoercive State, 38 Pol. Sci. Q. 470 (1923); *id.,* Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603 (1943); Morton Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423 (1982); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Betty Mensch, Freedom of Contract as Ideology, 33 Stan. L. Rev. 753 (1981); Robert Gordon, New Developments in Legal Theory, *in* David Kairys, ed., The Politics of Law: A Progressive Critique 281 (1982).

On the decline of formalist legal reasoning, see Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 309 (1935); John Dewey, Logical Method and Law, 10 Cornell L.Q. 17 (1924); Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Thought in America, 1850–1940, 3 Research L. & Soc. 3 (1980); Roscoe Pound, Liberty of Contract, 18 Yale L.J. 454 (1909); *id.,* Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908); Joseph Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. Rev. 975; Kenneth Vandevelde, The New Property of the Ninteenth Century: The Development of the Modern Concept of Property, 29 Buffalo L. Rev. 325 (1980); Benjamin Cardozo, The Nature of the Judicial Process (1921); Grant Gilmore, The Ages of American Law (1977); Elizabeth Mensch, The History of Mainstream Legal Thought, *in* David Kairys, ed., The Politics of Law, *supra,* at 18; Edward Purcell, The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973). See also Hynes v. New York Cent. R.R. Co., 231 N.Y. 229, 131 N.E. 898 (1921) (Cardozo, J.).

state's role was distinctly limited to preventing citizens from harming each other's lives or property.

This perspective was smashed by the legal realists,[6] who argued that the market is not equivalent to the state of nature. Far from being self-regulating and natural, market relations are predicated on state definition and coercive enforcement of the rules of property, torts, and contracts through both common law and statutory regulation. This recognition allowed the legal realists to feel more comfortable with the vast amount of legislative and administrative regulation that began with the New Deal. According to Ackerman, the dominant view now supports the "activist state" (at 1). This view holds "that the very structure of our society depends upon a continuing flow of self-conscious decisions made by politically accountable state officials" (at 1).

At the same time we shifted from the idea of a self-regulating market to the notion of the activist state, lawyers moved away from a formalistic style of legal reasoning based on the supposedly logical deduction of legal rules from general, abstract concepts. The modern style of legal reasoning analyzes competing policies and values in the context of particular social conflicts and resolves those contradictory values in an ad hoc case-by-case fashion through intuitive judgments (at 11–19).

B. Legal Rhetoric and the Fundamental Criticism of Social Structures

Ackerman argues that we need to respond to these changes with new legal language, which he describes both as a "new law-talk" (at 4) and a "new form of power-talk" (at 46). The identification of discourse about law with discourse about power is significant; Ackerman believes that the purpose of the legal system is to define and enforce legitimate power relationships (at 94, 99). And he believes that the legal realists failed to construct a legal rhetoric capable of adequately expressing these concerns. He issues a call to action: "our legal generation has been challenged by history to engage in a rare act of collective creation: to construct a new language of power that does justice to the aspirations for justice of our fellow citizens" (at 4).

According to Ackerman, the classical era combined a belief in the self-regulating market with a laissez-faire policy of limiting state interference in the market. This social and political situation was reflected in the legal system by a style of argumentation (called "reactive" rhetoric) (at 24) that prohibited lawyers from questioning the "legitimacy of the military, economic, and social arrangements generated by the invisible hand" (at 25). Reactive lawyers "glorif[ied] the social expectations generated by existing social practices" (at 25); as far as the law was concerned, there was only one decisive question: "whether the challenged action deviate[d] from institutionalized norms" (at 26). Since "the legal conversation deal[t] with the appraisal of

6. It has been revived, however, in recent years by the conservative branch of the law and economics movement. See Mark Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. Cal. L. Rev. 669 (1979).

particular actions against the background of ongoing social practice . . . the legitimacy of an entire practice [was] never open to legal question" (at 26).[7]

In contrast, we now recognize that the legal rules define market relationships. The classical lawyers were mistaken in believing there was such a thing as the self-regulating market in which the law could intervene only sporadically. As Robert Gordon argues:

> a whole generation of Realists taught us to see that a regime of free contract delegates to those who contract legal powers, subject to a host of important legal exceptions, to coerce performance according to the contract; and the establishment of private property gives the proprietor a set of legal powers, again subject to important legal limitations, to dictate to others the terms of access to his property. . . . These bundles of rights and powers, diminished by exceptions and limitations, with which members of liberal societies are endowed, are critical determinants of the terms of their relations with one another.[8]

The state cannot pretend to be neutral in the face of "private" market relationships; its definition of property and contract rules determines the relative bargaining power of individuals who meet in the marketplace.

The legislative and administrative regulations of the New Deal era represented the rejection of the policy of laissez faire. This rejection followed the legal realists' recognition that laissez faire represented not a condition of unlimited freedom but delegation of power by the government to some people to control the lives of others. The New Deal legislation therefore did not replace "freedom of contract" with "state control"; it merely redistributed both power and freedom.

According to Ackerman, these realizations transformed the requirements for an adequate legal rhetoric: "the subject of legal conversation will no longer be limited to the appraisal of individual actions against the background of presumptively legitimate social practice" (at 28). Rather, we are "explicit[ly] concern[ed] with the legitimacy of entire social practices" (at 32); "the activist lawyer cannot simply assume the legitimacy of the ongoing structure of activities" but must assess the extent to which social practices should be restructured by changes in the legal system (at 54).

Ackerman argues that the legal realists failed to create an adequate legal

7. See also Morton Horwitz's discussion of this point in Richard Epstein, Charles Gregory, & Harry Kalven, Cases and Materials on Torts 171 (4th ed. 1984); The T. J. Hooper, 60 F.2d 737 (2d Cir. 1932) (Hand, J.).

8. Gordon, Critical Legal Histories, *supra* note 5, at 104. Ackerman seems to understand this point imperfectly. He recognizes that the legal realists criticized the abstractions of classical legal rhetoric (see, e.g., at 19) but relates this practice only to the legal realist critique of deductive legal reasoning and not to the idea of the self-regulating market. He equates the attack on laissez-faire policies with the statutory and administrative regulation of the New Deal era (see at 6–22). But the legal realists criticized the idea of the self-regulating market long before the New Deal. See, e.g., Morris Cohen, Property and Sovereignty, *supra* note 5; Robert Hale, Coercion and Distribution, *supra* note 5. The increased willingness to apply administrative regulation to the market is distinct from the recognition that even a laissez-faire economy constitutes a form of regulation because the legal system defines the property and contract rules that determine the relative bargaining power of different groups in the market. See Duncan Kennedy & Frank Michelman, Are Property and Contract Efficient? 8 Hofstra L. Rev. 711 (1980).

language that could focus our attention on fundamental criticism of social practices and structures. We need a "radical" (at 47) and "revolution[ary]" (at 90) change in our way of thinking and talking about law and legal reasoning; we should question the basic structure of society, including the distribution of wealth, power and prestige (at 97–98). The goal is "an institutional framework that guarantees individual contractors a fair share of economic power" (at 94).

I welcome Ackerman's call for a new legal language and for fundamental criticism of social practices and institutional structures. It is a basic message of the critical legal studies and feminist movements.[9] But Ackerman does not merely suggest the need for a new language; he argues that we are well on the way to creating it. For him, the new language of facts is the language of market failures; the new language of values is the language of neutral conversation.

III. The Construction of Facts

A. Empirical Investigation of the Consequences of the Legal Rules in Force

Like the legal realists, Ackerman argues that we should be concerned with the social consequences of legal rules. However, he argues that the realists used an inadequate method to discover those consequences. First, they focused on particular conflicts or situations and thus failed to develop generalizations about social practices. Second, rather than conducting empirical studies to determine the consequences of different rules, they relied on their intuition or "situation sense" (at 15–16).

In contrast, Ackerman calls for empirical investigation of the social consequences of rules (at 30, 65–67, 73–74). This investigation should focus on the social structures that may cause rules to have different consequences than we would imagine, on how these rules affect distribution of power and wealth, and on the secondary or remote effects of the rules (at 62–63, 66, 73). For example, it is wrong to assume that a warranty of habitability benefits tenants; whether or not it benefits tenants depends on the structure of the rental market (at 73).[10] The goal of Ackerman's project is the ability to generalize about the "systematic structural tensions of social life" (at 20). The "structural facts" (at 75) that concern Ackerman are "market failures" (at 71).

9. See, e.g., Gerald Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276 (1984); Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982–83); Catharine MacKinnon, Toward a Feminist Jurisprudence, 34 Stan. L. Rev. 401 (1982); Frances Olsen, The Family and the Market, 96 Harv. L. Rev. 1497 (1983); Joseph Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984).

10. See also Bruce Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution, 80 Yale L.J. 1093 (1971); Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563 (1982).

B. Market Failures and the Coase Theorem

According to Ackerman, the Coase theorem provides a language for describing and criticizing social structures (at 46–71). The Coase theorem states that in the absence of transaction costs, liability rules will not affect allocational efficiency; any set of legal rules will generate efficient, wealth-maximizing outcomes because legal entitlements will be either retained or purchased by those to whom they are most valuable. To the extent that transaction costs prevent market exchanges, the legal rules may determine whether efficient outcomes emerge.[11] Ackerman argues that the analysis of transaction costs, or "market failures," offers a radically improved language for discussing the consequences of legal rules (at 48, 53, 56–65, 69–71). We do not ask whether the rules adequately express social expectations and whether the parties lived up to those expectations. Instead, we ask whether transaction costs prevented the parties from reorganizing their activities in a way that would have avoided the problem through efficient exchanges. If so, can legal entitlements be assigned to approximate the outcomes that would have emerged in the absence of transaction costs? (at 29, 53, 73) Ackerman believes that this analysis satisfies his goal of a legal rhetoric that questions rather than accepts the legitimacy of entire social practices (at 53–54). He therefore argues that we should begin "the concrete investigation of the transactional failures that arise in the real world" (at 69).

There are several problems with this approach. First, Ackerman mixes up analysis of the consequences of legal rules with analysis of transaction costs. For example, in deciding whether judges should imply a warranty of habitability into all residential leases, we could use transaction-cost analysis in two quite different ways. We could ask whether, in the absence of transaction costs, tenants would bargain with landlords for such a term. If they would, then we can improve allocational efficiency by legally implying such a term into residential leases. If they would not, then landlords should have no such obligations in the absence of express agreement. Or we could ask what the effect of such a rule would be. Would it result in better rental housing or would it, in the absence of other remedial legal responses, simply cause inordinate rent increases and decreases in the housing supply? The answer to this question will vary depending on whether the existence of transaction costs would prevent exchanges of legal entitlements. But transaction costs are only one factor in determining the likely consequences of legal rules. Moreover, this question is entirely distinct from the question of whether the absence of a legal rule imposing such a nondisclaimable term is "inefficient" as defined by the criteria in the Coase theorem.

Second, it is distinctly odd to characterize the Coase theorem as a "tool of factual analysis" (at 57). Transaction costs are "facts"; they are whatever prevents or inhibits people who are willing and able to enter into bargains

11. Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960); Harold Demsetz, When Does the Rule of Liability Matter? 1 J. Legal Stud. 13 (1972).

from doing so. It may sometimes be possible to estimate the costs of transactions by looking at transactions that actually do occur. But in many cases, those costs cannot be known. Moreover, the Coase theorem is not a fact; it describes *counterfacts:* the bargains people would enter into *if they could,* given their present budget constraints and the existing legal rules and social institutions. To apply the Coase theorem, we must estimate what entitlements people would be both willing and able to exchange, and in what proportions, in a completely hypothetical situation; we have to guess what their preferences would be in a radically different world. Because this analysis is counterfactual, I am skeptical that empirical studies could answer this question.

Moreover, Ackerman accepts efficiency as a way to describe market structures but rejects efficiency as a criterion for rule choice, preferring instead his theory of neutral conversation (at 87). This procedure would make sense only if Ackerman accepted efficiency as a useful way to structure part of a discussion of value choices. The law and economics scholars divide values into two kinds: efficiency and equity. Their discussion of efficiency rests on their particular way of valuing certain costs and benefits; their analysis then shifts to a different set of value choices, generally labeled equity concerns. This is not what Ackerman proposes. He argues that we should first find out *factually* which markets are inefficient by empirically investigating transaction costs, and we should then use an independent method of value analysis to determine whether justice requires restructuring of the legal rules to correct the inefficiency or to achieve other goals. This procedure does not make sense, and Ackerman himself provides the arguments for why it does not.

The Coase theorem is not just a way of organizing and describing market relations and legal rules but a way of implicitly evaluating them. It describes one method for determining whether an existing or proposed practice is "efficient." A rule change is efficient if the benefits of the change outweigh the costs. There are many plausible ways to value costs and benefits; the Coase theorem picks one. It is therefore impossible to use transaction-cost analysis to objectively describe market failures and then use an independent method of value choice to decide whether, or how, to remedy those failures. The identification of a market as inefficient presupposes a series of value choices. Ackerman knows this: "lawyers cannot accept [the] notion that judgments about efficiency are not somehow less controversial than judgments about distribution" (at 91–92). They are simply "one way of talking about the distribution of costs and benefits imposed by the legal system, and an *obviously* inadequate way of making sense of our existing legal system" (at 92). Ackerman sometimes recognizes this, but only sometimes. He goes back and forth between treating transaction costs as merely a language for describing the world[12] and as a method for determining "the ways an activity might be

12. "'[L]aw and economics' permits a vast enrichment of the conversational resources available to lawyers trying to make sense of the legal foundations of an activist state" (at 44).

feasibly reorganized to avoid or ameliorate the inefficiencies and injustices it may be generating" (at 29).

Further, as a way both to describe and to value market relations, the law and economics procedure implicit in the Coase theorem is either status quo-oriented or indeterminate.[13] It is usually status quo-oriented; most analysts accept the existing distribution of income and all other legal rules and social institutions and then compare what people would ask to give up an entitlement with what others would be willing and able to offer to buy the entitlement from them.[14] If an exchange would take place but for transaction costs, the market is inefficient. Because offer prices are likely to be lower than asking prices, and because the usual procedure is based on existing institutions, legal entitlements, and the distribution of wealth, the method of analysis results in a systematic bias toward the status quo. On the other hand, if existing budget constraints are not taken for granted and we presume some hypothetical distribution of wealth, or if we reverse initial entitlements so that offer and asking prices are reversed, and if we posit different institutional relationships, the "efficient" result may turn out to be inefficient; moreover any result would be efficient given the right background entitlements and distribution of wealth. Ackerman assumes that there is such a thing as "the free market," which can "fail," be "imperfect," or be "inefficient."[15] But, as Gerald Frug argues, there is "no such thing as 'the free market.' There are only alternative possible markets, each of which restrains as well as enhances human freedom."[16] Ackerman assumes we can use transaction-cost analysis to describe market failure first and then make value judgments afterward. But it is impossible to apply the Coase theorem to determine which markets or rules are efficient without making value judgments *first.*

A third problem with Ackerman's use of the Coase theorem is his focus on transaction costs as a way to describe what is wrong with existing social structures. This focus trivializes his call for fundamental criticism of social practices by its methodological individualism. Identifying "market failures" with transaction costs results in an extremely conservative method for describing the relations between "individual conflicts [and] the systematic structural tensions of social life" (at 20). Focusing on transaction costs and markets to describe the failures of social life restricts us to looking at what prevents *bargains* or *exchanges* from taking place. This perspective completely ignores consideration of how to restructure the institutional relationships within which the exchanges are going to occur. Fundamental criticism of social practices should focus, for example, on the definition and organization of

13. Duncan Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 Stan. L. Rev. 387 (1981).

14. See Frank Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv. L. Rev. 1165, 1214–15 (1967).

15. Ackerman argues that we should focus on "the varieties of market failure" (at 71), meaning how "market imperfections hampered the participants' efforts to reorganize their activities in light of existing and proposed legal rules" (at 73).

16. Gerald Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1365 (1984).

various social and legal institutions, including the internal structure of corporations and municipal governments and the relation between them; the relation between family and work life; the reconceptualization of family relationships; the provision of child care and health services; and the ways social and legal relations are influenced by the organization of society into hierarchies based on race, sex, and social class. In fact, Ackerman recognizes this point:

> [W]e cannot reduce legal conversation to a guessing game about the *ex ante* bargains the parties might have reached in a frictionless Coasean world. Instead, freedom of contract makes legal sense for us within an institutional framework that guarantees individual contractors a fair share of economic power no less than political and civil rights. (At 94)

Ackerman argues that we need a "radical revision" (at 47) of the way we describe the facts of social life so that we can question the legitimacy of existing social practices (at 54). But his proposal to focus on market failures and to limit the definition of market failures to transaction costs takes our attention away from the institutional structures underlying those social practices. It therefore makes fundamental criticism of the status quo more difficult rather than less difficult.

IV. The Construction of Values

A. Disciplined Conversation: Language versus Methodology

Ackerman frequently describes his goal as a new legal language.[17] Language helps us express ourselves to each other in conversation. According to Ackerman, traditional legal language is inadequate because it prevents us from engaging in "comprehensive questioning of ongoing power relationships" (at 99). It does this by taking our attention away from facts that we would otherwise consider important and by preventing us from thinking about alternative possible social and legal arrangements.

I agree with Ackerman that legal discourse is a matter of conversation and that new paradigms and categories are often essential to enable us to think and talk about alternatives to the status quo. However, Ackerman is not just interested in a new form of rhetoric to use in discussing the legitimacy of social structures. He wants a "disciplined form of conversation" (at 10)[18] characterized by "rigor" (at 61). "Discipline" and "rigor" are code words for methodology. Ackerman wants to move beyond the "intuitionistic approach to value articulation" (at 72) of legal realism and critical legal studies; his goal is "a form of value analysis" (at 72), "a disciplined way to examine [to *test*] initial intuitions" (at 96). In other words, he wants us not only to be self-

17. "[T]he transformation of legal discourse" (at 2); "the new rhetoric," "a distinctive form of legal discourse . . . a new language of power" (at 3); "the new law-talk," "a new language of power" (at 4); "legal discourse," "activist law-talk" (at 23); "a new language of power" (at 24); "a new form of power-talk" (at 46); "a common legal language" (at 59–60).

18. See also "a professionally disciplined effort" (at 59–60); "legally constrained conversation" (at 97).

critical—to question our own intuitions about how to resolve legal issues—but he wants a method of reaching and justifying results.

To be valid, a methodology must actually be capable of telling us what to do in specific instances, and we must be able to demonstrate that it is based on a foundation that should be accepted by others. But the methodology proposed by Ackerman—neutral conversation—is based on a series of ambiguities and contradictions that render it indeterminate. Moreover, like Ackerman's transaction-costs analysis, it presupposes a vision of the world that precludes consideration of fundamental social change.

B. The Method of Neutral Conversation

Ackerman argues for a methodology elaborated in his book *Social Justice in the Liberal State.*[19] When someone claims a legal entitlement—a right to the state's assistance in protecting or acquiring some interest—anyone adversely affected by the entitlement has a right to demand a justification. No entitlement is justified unless it can be defended by a *neutral* reason; conversely, any interest that can be justified by a neutral reason may legitimately be legally protected (at 98). The two principles of neutrality are, first, that no one may justify their legal rights by "asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows" (at 99), and second, that no one may claim to be "intrinsically superior to their fellow citizens" (at 99).[20]

Ackerman's methodology is unlikely to be fruitful. First, it is based on contradictory premises: consensus and reason. Ackerman argues that lawyers should frame legal arguments based on first principles "that the People have chosen" (at 79).[21] It is unclear who "the People" are; how we are to find out what principles they have chosen; or what we are to make of the substantial political, moral, and legal controversies that have been present for several hundred years. But no matter: Even if we could identify a unanimously held view, we would still face a competing principle—that consensus should be limited by conversational "constraints that prohibit totalitarian

19. Bruce Ackerman, Social Justice in the Liberal State (1980).

20. It is impossible to assess the adequacy of this method without reading Ackerman's other book. Other than the above phrases, this book does not explain the method at all. It is also somewhat surprising that Ackerman considers his method revolutionary. In fact, his emphasis on the principle of neutrality is a modified version of arguments that have pervaded liberal discourse since the seventeenth century. See, e.g., John Locke, A Letter Concerning Toleration 13 (Bobbs-Merrill, 1950) (originally published 1689) ("everyone is orthodox to himself"); Thomas Hobbes, Leviathan 120, ed. C. B. MacPherson (1968) (originally published in 1651) ("For these words of Good, Evill, & Contemptible, are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves."); *id.*, at 109 ("For one man calleth *Wisdome,* what another calleth *feare;* and one *cruelty* what another *justice;* one *prodigality,* what another *magnanimity,* and one *gravity,* what another *stupidity,* etc.") (emphasis in original); *id.* at 314–18, 322–23 (arguing that despite disagreements among individuals about right and wrong, natural law has a substantive content that can be applied by judges).

21. "In a democratic activist state, it is up to the People, and not their lawyers, to decide upon the activist principles that will inform the legal system. If lawyers do not like the principles, *P,* that the People have chosen, they can try to persuade the People to change their mind. In the meantime they have a democratic obligation to use *P* in legal argument, rather than the not-*P* they favor in politics" (at 79).

transformations" (at 99). Rational principles limit consensus, but Ackerman treats them as if they were compatible. He argues that his restraining principles of neutrality have in fact been adopted by the people; they are implicit in the First Amendment and the Equal Protection Clause (at 99). This style of argument is neat; it allows Ackerman to pretend that he is both deferring to the will of the people and checking it at the same time. Moreover, without evidence that "the People" have adopted Ackerman's methodology—and I cannot imagine how one could ever come up with such evidence—we are left with the recognition that Ackerman's methodology cannot be derived logically from his first principles since the principles are contradictory.

Second, the principles of neutrality presuppose a fundamental distinction between morality and justice.[22] According to Ackerman, legal rights must be justified by principles of justice that are totally divorced from any notions of morality. This view assumes that moral views are private matters about which individuals should be allowed to differ, while views of law are public matters that should be based on principles about which we should theoretically agree. The only principle of justice that Ackerman proposes is the principle of neutrality: Legal rules must be justified by principles of justice rather than by principles of morality. But this principle is not a principle at all; it merely restates the problem. Ackerman nowhere explains how we are to distinguish principles about which we should all agree (justice) from principles about which we may legitimately disagree (morality).

Third, Ackerman purports to describe a method that can be applied to generate answers but, in fact, he presupposes an outcome that appears to have been chosen a priori. He wants a regulated market system (at 99–100)—not laissez faire and not "collectivism" (at 80). Now there is nothing wrong with choosing an outcome among alternatives and then justifying it by various arguments—that is the pragmatists' procedure. But Ackerman purports to reject this approach; he insists that he has described a method that *itself* generates answers. The method is legitimate because it does not privilege any person's moral views over any other's. But it is odd that this supposedly independent method, if applied correctly, generates exactly the kind of political, economic, and legal system that Ackerman personally supports. In fact, Ackerman has not described a method at all; his principles of neutrality do not generate any specific outcome. Because Ackerman has not provided us with any way to distinguish between principles of morality and principles of justice, it would be possible to generate a wide variety of legal systems from his methodology.[23]

Fourth, the individualism in the methodology imports a bias toward the status quo. Ackerman envisions a discussion between someone with an en-

22. See Singer, *supra* note 9; Michael Sandel, Liberalism and the Limits of Justice 9–10 (1982).

23. This is not the place to demonstrate the indeterminacy of Ackerman's method of neutral conversation. In *Reconstructing American Law,* Ackerman nowhere applies his method, so there is nothing to criticize. Such a demonstration would properly occur in a critique of *Social Justice in the Liberal State.* See Singer, *supra* note 9.

titlement and someone who objects to the entitlement or wants it redistributed (at 98). The paradigm is based on the lawsuit (at 96). This perspective takes our attention away from the institutional context in which the parties operate. It also makes it difficult to focus on collective responses to problems and on alternative social arrangements.

Moreover, Ackerman sometimes takes the position of a radical critic of traditional patterns of social interaction and value choice in the legal system and sometimes takes the position of an insider implementing traditional ideals. Ackerman proposes fundamental criticism of social structures that cause illegitimate inequalities of wealth, power, and prestige (at 100). According to Ackerman, the "activist lawyer cannot simply assume the legitimacy of the ongoing structure of activities" (at 54). At the same time, Ackerman argues that criticism of social structures should be carried out "under certain fundamental conversational constraints deeply entrenched within our legal tradition" (at 100). But the "ongoing structure of activities" is defined by "our legal tradition." And if we assume, as Ackerman does, that the principles in "our legal tradition" reflect a desirable moral consensus, it is hard to see how Ackerman's criticism of those structures will lead to anything but the most moderate reforms. When viewed in conjunction with Ackerman's narrow definition of "market failures" and his reliance on consensus (at 63) and tradition (at 100) as bases for the legal rules, the method of neutral conversation appears to support, rather than undermine, existing social practices.

V. A Moderate Manifesto

> If the middle way is the truth, it is not the middle way but simply a form of absolutism.[24]
>
> Al Katz

> The middle road is the only one that does not lead to Rome.[25]
>
> Arnold Schoenberg

Middle positions tantalize. They take everything into account; they accept everything that is good and reject everything that is evil. Like Aristotle, Ackerman sees virtue as a mean between extremes.[26] He is against both empty generalities and mindless particularities; he wants "middle-level abstractions" (at 15). He is against both mechanical deductive reasoning and intuition; he favors open conversation rigorously disciplined by neutral principles. He is against both libertarianism and communitarianism; he favors a liberal market. He criticizes the law and economics school on the right and the critical legal studies school on the left; he favors "the high middle ground disdained by the followers of Locke and Marx alike" (at 80). He calls for

24. Al Katz, Studies in Boundary Theory: Three Essays in Adjudication and Politics, 28 Buffalo L. Rev. 383, 435 (1979).

25. Arnold Schoenberg, Foreword to Drei Satiren fur gemischten Chor, opus 28 (Three Satires for Mixed Chorus) *in* 18 Saemtliche Werke: Chorwerke I, 66 (Complete Works: Choral Works I), ed., Rudolf Stephan, trans. Roberto Unger (1980) ("Denn der Mittleweg is der einzige, der nicht nach Rom fuhrt").

26. Aristotle, Ethics 35, trans. John Warrington (1963) ("virtue must aim at the intermediate").

fundamental criticism of social practices but argues that "it will rarely seem plausible to see an entire [social] practice as deviant" (at 31). He proposes "the comprehensive questioning of ongoing power relationships" (at 99) but only "under certain fundamental conversational constraints deeply entrenched within our legal tradition" (at 100).

It is right and good to engage in fundamental criticism of social practices and institutional and legal structures. Ackerman exhorts *us* to do this, but he does not. His methodology focuses our attention on market exchanges and individualized entitlements rather than on institutional structures and the context in which legal relationships occur. He therefore makes it more difficult for us to imagine new ways to structure society.

Ackerman, like most legal theorists, adopts the rationalist approach;[27] I adopt the pragmatic approach.[28] What is at stake here? Theories are invented to help us cope with problems in life. As Geertz notes, we are being offered a choice of worries. What the pragmatists want us to worry about is the kind of complacency, rigidity, and oppression that accompany dogma—the danger that the routine application of established doctrine can blind us to the fact that we have alternatives, that we make choices, that we exercise power. The belief that "reason" can adjudicate value conflicts that arise in legal disputes turns moral judgment into a matter of logical technique and good faith differences of opinion into questions of sanity. The ability to fool oneself this way helps government officials, including judges, exercise power in oppressive ways. The idea of a decision procedure allows judges to believe that when they exercise coercive power they are not really exercising power; they are not making choices but merely applying the law. The decision procedure may determine the outcome directly, or it may constrain judges' choices within acceptable boundaries. In either case, the belief in a legitimate decision procedure allows judges to feel that their discretion is constrained by principles outside themselves. It is all right to do what they are doing because they are not really doing it at all; they are passively applying a rational decision procedure rather than actively making law.

What the rationalists want us "to worry about, and worry about and worry about"[29] is the fear of arbitrariness, and uncertainty—the danger that we will not know what to do or that we will make decisions in a manner that is "arbitrary" (at 82) or "mindless" (at 54 n.9). Worse still, we may make decisions based solely on emotion or passion; prejudice will prevail over reason. Moreover, without a "rational" decision procedure, we cannot use logical argumentation to persuade each other what is right. We will therefore be unable to justify our decisions in a way that can generate agreement.

What worries the rationalists most about this state of affairs is that judges

27. Ackerman seeks to combat the idea that "all normative judgments are arbitrary" (at 82). He is determined to move beyond the "intuitionistic approach to value articulation" favored by the legal realists and certain proponents of critical legal studies (at 72). See also at 38, 95. He hopes to achieve a "disciplined way to examine initial intuitions" (at 96).

28. Singer, *supra* note 9.

29. Geertz, *supra* note 1, at 265.

will be in this same predicament; in the absence of a relatively determinate decision procedure, the rule of law—of reason—will have been replaced by the rule of people—of unrestrained and dangerous feelings. There will therefore be no check on oppression. Moreover, the limits on individual freedom of action imposed by the legal system are legitimate, according to Ackerman, only if they are determined by a neutral decision procedure that is based on an objective foundation. This decision procedure and its objective foundation reflect shared interests and values and, therefore, transcend the ordinary value conflicts that cause us to pursue happiness in different ways and to have different views of the good life.[30]

Of these two sets of concerns, I find complacent acceptance of the status quo a far more pervasive problem in the real world than the tendency to make up our minds carelessly or the inability to generate persuasive arguments. People do not make important decisions in an unconsidered or flippant manner. Nor do they generate agreement about legal and moral matters by using a logical method that appears to relieve them of all responsibility for making choices. The real issues here are how much certainty we can claim about the decisions we do make and what it means to make such claims. The idea of a decision procedure for choice among alternative possible legal regimes makes me nervous because it creates the illusion that we need not bear the burden of moral choice—we need only apply the method to know what to do and to be certain that we have acted rightly. It therefore generates the ability to live comfortably without self-criticism. As for the dangers of tyranny, the historical evidence seems to indicate that it is the illusion of certainty, rather than an orgy of arbitrariness, that most fuels the self-righteousness of oppression.

The rationalist fear that value choice will be made in an arbitrary fashion rests on a false dichotomy between reason and emotion. Ackerman assumes that it is possible to distinguish between reason and emotion and that the difference is crucial to the legitimacy of legal or moral choice. But this is not the case. Criteria for distinguishing between reason and emotion are not only foggy; they do not exist. When I look at the reasons Ackerman gives for adopting one form of legal rhetoric over another, they seem blatantly—and happily—emotional. This is not surprising or distressing. Reasons are emotions; emotions are reasons.

30. Activist lawyers "call . . . for the systematic test of particular activist interventions by legal principles that seek to capture the basic ideals that have led the American people to embrace activism in the first place" (at 20). My description of the rationalist position is exaggerated to highlight the differences between the rationalist approach and the pragmatic approach to legal reasoning. All rationalists acknowledge that judges exercise a substantial amount of discretion in making or applying law. Nonetheless, the emphasis in their theories is first, on providing an "objective" foundation for their first principles, and second, on demonstrating that those first principles are helpful in generating outcomes, even though they do not determine everything. The goal is to demonstrate that their theories create the proper mix of determinacy and indeterminacy. To demonstrate this, however, requires them to spend a great deal of time showing the extent to which their theories *are* determinate, or that they at least constrain choice within acceptable boundaries. For a full elaboration of this argument, see Singer, *supra* note 9; Roberto Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 567–76 (1983).

Rationalists believe that moral or legal argument is impossible without a methodological foundation. They claim that we need some criteria for judgment that are independent of personal feelings. I disagree. The acknowledgment of feeling does not destroy our ability to generate persuasive arguments. Rather, persuasion is only possible when argument taps into the listener's experience of the world. The identification of feeling as mindless, arbitrary, and dangerous (at 54 n.9, 82) causes Ackerman, and theorists like him, to create theories that purport to generate answers in ways that can compel agreement by their inherent rationality. They believe so firmly that we need such theories that they fool themselves into believing that their theories can actually do this. But when we examine those theories closely, including the theory presented by Ackerman in *Reconstructing American Law,* we find that those theories neither generate answers nor compel agreement by their inherent logic. They offer only the illusion of certainty.

Ackerman seeks to convince us that the moderate political, economic, and legal structures he supports can be derived impartially by a decision procedure that does not choose one set of controversial moral values over any other set; it is therefore a system that everyone would support if they simply thought straight.[31] My alternative is to recognize that no methodology is going to save us from having to make difficult and divisive value choices. The process of imagining a better kind of life requires us either to step outside existing categories or to transform them. It also requires far more joint participation in creating the conditions of our lives than we currently allow. None of this is easy. It nonetheless is worth attempting. We can only do what is possible, but we can change what is possible.[32]

31. "A strange game. The only winning move is not to play." Lawrence Lasker & Walter Parkes, War Games (motion picture screenplay) (1982).
32. See Jim Shepard, Flights 8 (1984).