

Book Review: Romancing the Law - Reconstructing American Law, by Bruce E. Ackerman

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Book Review

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BOOK REVIEWS

ROMANCING THE LAW

Reconstructing American Law. By Bruce E. Ackerman. Cambridge: Harvard University Press, 1984.

*Reviewed by Donna Greschner**

Remember the old-style romance novels? All of them shared one plot: the Good Girl who epitomized every traditional virtue; the Hero with looks, strength and success; and the Other Woman with savvy of the ways of the world. Although the Other Woman might tempt the Hero, the Good Girl would become, after several skirmishes, the object of the Hero's affections. The inevitable happy ending was the blissful, lasting marriage of the Good Girl and the Hero. For those of us who relegated romance novels to the dust bins of adolescent days, we can again read the basic plot, for Bruce Ackerman has presented a romance novel for lawyers. Indeed, he has improved on the formula. Romance writers were allocated approximately 190 pages for their plots, but Ackerman manages to skip through the essentials in a mere 118 pages, footnotes and index included.

Reconstructing American Law is concerned with one question: whither the lawyer in modern society? Ackerman takes it for granted that we have lived in an activist state since the New Deal. That is, we accept that the government should intervene in the market mechanisms to correct the worst aspects of capitalism. We recognize that the distribution of wealth is a central question and quest in our political activity. For over fifty years, these objectives of the activist state have been implemented through massive volumes of regulatory legislation. Unfortunately, Ackerman laments, the suddenness and scope of the New Deal legislation caused a crisis in the legal profession. Lawyers had to make sense of legislative mandates and bureaucratic decrees that were couched in technical jargon and enforced primarily through administrative agencies. Traditional common law discourse no longer seemed appropriate as a method of analysing the new law. According to his

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description of history in Chapter 2, lawyers failed to synthesize the common law and the statutory and bureaucratic rules, and thus they did not produce coherent legal principles. Instead, New Deal lawyers embraced the analysis provided by another contemporary phenomenon, the Legal Realists. The Realist, as described by Ackerman, was profoundly skeptical of the existence of any legal principle, even in the old bastion of principle, the common law. Any talk of principle was only rhetoric. The task of the lawyer was to pierce the rhetoric and recognize that every concept (such as contract) concealed a panoply of discrete fact situations. Each particular set of facts required not a concept but a particular "sensitive response by Realist lawyers with situation sense."¹

The quick and tight embrace of Realism by the profession occurred, according to Ackerman, because the Realist's basic tenet of the primacy of fact situations allowed lawyers to avoid making sense of the jumble of legislative provisions and bureaucratic practice. Why bother searching for more principles when abstraction was irrelevant? Moreover, skepticism about legal abstraction permitted lawyers to continue using their old methods and old forms of language. One could still bandy about concepts like contracts and talk about particular contracts, but since it was all meaningless rhetoric there was no need to question the existence or wisdom of any ideals or principles behind the contracts. Rule skepticism could mask intellectual and political irresponsibility. Realism also allowed lawyers to apply common law doctrines in a piecemeal way to the new law: "Since traditional doctrines were now demoted to the status of working rules of thumb, it became easier to supplement, modify and transform them whenever a Realistic sense of situational justice required it."² Lawyers would maintain their identity as lawyers, using the old language, but they could also assure themselves that they had adjusted to the changing times since they engaged in intuitionistic adaptation of the common law in the light of the policy demands of the new law.

Ackerman views the legacy of the Realists — "the intuitionistic effort to craft legal rules to fit very particularized fact patterns"³ — as no longer appropriate, if it ever was, as a response to the activist state. The activist state will not disappear. Lawyers must be better equipped to talk about economic interventions that seek to correct market failures and unjust distributions. Vague terms such as "public policy,"

¹ Ackerman, *Reconstructing American Law* (1984) at 16.

² *Id.* at 18.

³ *Id.* at 19.

used by the neo-Realists to justify changes to common law principles and to understand the new law, must be replaced by hard analytic techniques.

Ackerman believes we can move from Realism to a reconstruction of law and that this movement is already taking place. His cursory explanation of Realist thought and influence (that is, his diagnosis of the problem) is not of any special interest. It is his prescription for the legal profession on how to overcome the alleged ill effects of Realism that merits attention. In essence, Ackerman advocates the rebuilding of legal concepts, doctrines and principles with an avowedly economic blueprint. Economics will provide the hard words and techniques. He tells us that we must not dismiss the use of economics in law as a mere ideological smokescreen thrown up by those who seek to dismantle the activist state. Critical Legal Scholars often dismiss or ignore the sophisticated contributions economics offers to the law and instead engage in "pseudocritical posturing"⁴ and gratuitous name-dropping of disparate philosophers in support of their counterproductive positions.⁵ Economics, Ackerman says, will guide us from Realism to Reconstruction.

Ackerman's historical excursion is a description, in romance novel terms, of the traditional virtues. The tradition is state activism within a liberal framework. Only market imperfections are matters of concern, not the notion of a market. The Hero, who is the object of desire, is the legal profession. With the spurning of Realism, two recent protagonists now compete for the embrace of the Hero. The Good Girl is Constructivism, Ackerman's solution to the perceived problem of the Realist's heritage. Constructivism embodies and furthers the traditional values of the liberal state. The Other Woman, who also seeks to capture the imagination of the Hero, is the Critical Legal Studies Movement. Ackerman rarely engages in a direct confrontation with the Other Woman; one only glimpses the enemy in the footnotes and in a few pages of the text. However, his message is clear. If lawyers discard Realism as an unsatisfying partner, they are not driven into accepting the Critical Legal Studies perspective but instead can choose Constructivism, which will result in a long, valuable union.

By choosing Constructivism the activist lawyer will be concerned with the economic policies enacted by the state. This lawyer will want to ensure that the policies only correct market imperfections. Ackerman's activist lawyer with a simple tort dispute will look not only at the particular facts concerning the litigants but will examine the economic

⁴ *Id.* at 45.

⁵ *Id.* at 44, especially 44n.

structure within which the dispute takes place. What could the state do to ameliorate the inefficiencies of the activity as a whole? A revised and expanded notion of the facts is necessary for such an inquiry. Ackerman devotes Chapter 4 to a description of the new statement of the facts. Such a statement must encompass the ways in which the activity is currently organized and the options for its reorganization by the state. However, not only are statements of facts reconstructed in terms of coverage, they are now couched in the language of economics. Since activist lawyers are concerned with market imperfections, it seems to follow that the way to ensure that the law reflects the best types of interventions is for lawyers to adopt the language and method of economics. Ackerman's prayer for a hard analytic technique to replace Realist intuition is made before the great god Economics. Moreover, since the amount of relevant facts under Constructivism will be enormous, lawyers must not only become proficient in economic jargon (such as Pareto efficiency and first-mover advantage), they must also master computer technology in order to manage the facts efficiently. Ackerman considers it scandalous that law students are allowed to graduate without any comprehension of statistical reasoning and formal modelling.⁶

Ackerman anticipates one objection to a wholesale adoration of economics. Economic theories have failed to deal with *values*. Economics, even of the welfare gender endearing to Ackerman, is presented and played by economists as a neutral game of shuffling demand curves and assessing transaction costs. The adoption of value-free economics is not Ackerman's proposal, nor does he endorse the primitive proclamation by the Chicago school that economic efficiency is the supreme value. He believes values will temper and frame the new legal language of economics. Other than a reference to the equality of individuals in Chapter 5 entitled "Constructing Legal Values," he does not tell us what those values are or will be. Yet, we need not fear that lawyer-economists will be robots, for the Constructivist will have a heart. In romance novels, the calculating, distant Hero always revealed kindness and compassion toward the end of the book.

Before elaborating on why Constructivism is the Good Girl, let us pause to consider why the Critical Legal Studies Movement is the villain, the Other Woman. One inference we can draw from Ackerman's comments on Critical Legal Studies is that it will not lead away from Realism. This is because most, if not all, writers of the Critical persua-

⁶ *Id.* at 68-69.

sion reject legal abstraction and formalism. They challenge the deeply entrenched notions of legal rationality and objectivity and some even make the claim that all law is politics. This claim is the beginning of the end for the legal profession, for if law is politics, lawyers have no claim to special expertise or status. Embracing the Other Woman leads to death, not marriage.

If we believe Ackerman, a marriage with Constructivism will ensure the continuing virility of the Hero. The adoption of economics by lawyers is a necessary though not sufficient condition for this lasting happiness. When the facts of economics are mingled with the talk of values, lawyers retain their Hero status. Ackerman does not reveal the values to be promoted by lawyers because such revelation is impossible for a liberal. In a liberal state, no values are absolute. Members of a liberal state constantly reaffirm, rearrange and recreate their values through open discussion. Hence, the values to be promoted by the economic policies of the activist state will of necessity change over time. This is how the lawyer acquires a Hero status. What lawyers are good at is talking. In their litigation and public service, they can lead the public debate on the desired values at any point in time. (Ackerman prefers the term "dialogue", I assume, because it connotes cool rational argument as opposed to the more raucous "debate".) The Constructive lawyer will be constructing value as well as facts.

Like its counterpart in the romance novels, Constructivism reflects traditional virtues. The American way to define activist legitimacy and alter its values has always been, according to Ackerman, through the process of legal disputation. Litigation has been employed by Americans throughout their history to articulate their rights and duties to each other.⁷ Moreover, Ackerman warns that if lawyers do not continue this tradition through their commitment to dialogue, no other group, particularly not the technocrats, can step into the vacuum of value discourse. Why not? Because no one else has been trained to do so.⁸ Lawyers are the repositories of values by default.

I have caricatured Ackerman's little book because he has caricatured some significant issues of legal and political philosophy. It is possible to categorize the current revival of legal philosophy into two schools. Law and Economics glorifies the values of the market; like Marxism it makes economic relations central but through a very different analysis and with opposite objectives. Critical Legal Studies, insofar as it represents a neat set of tenets, seeks to reveal, like Marxism,

⁷ *Id.* at 97, 109-10.

⁸ *Id.* at 110.

the ideology of current legal systems and also hopes to move beyond market ideology into a communitarian society. There are important issues about the nature of law, legal reasoning and legal legitimacy raised by both movements. One of the central problems with Ackerman's book is that, although he has a grand project, he does not address any of the grand issues which engage the two movements. All he has done is place himself within the Law and Economics school and show that this is consistent with his liberal activism. Has a serious argument ever been advanced that liberalism was incompatible with a version of Law and Economics? Furthermore, why should there be any interest in where Ackerman places himself within the two schools? We should be vitally interested in good arguments for rejecting Critical Legal Studies or accepting Law and Economics. To say, as Ackerman does, that lawyers will be left out if they do not become economic experts, and to say that leaving out lawyers is against the American way, will not convert the Realists still floating in the backwaters nor the Critical Studies lawyers swimming against the currents. Nor will economists be convinced that they should welcome lawyers into their territory.

Polemics are rarely persuasive. What is required are sophisticated arguments that recognize the complexities of the issues at stake. For example, what exactly will be the nature of legal reasoning if lawyers become Constructivists? All we can discern from Ackerman is that the language of legal reasoning will be heavily laden with economic terms. Surely a different method will be required by Constructivist lawyers and *judges*. Judges are indispensable participants in the legal system, but Ackerman ignores them altogether. Take the integrally related issue of the nature of law. Although Ackerman rails against Critical Legal Studies, he does not refute their proposition that all law is politics — he fulfills it. Constructivist law appears to be identical to politics. The new statement of the facts utilized by Constructivists will not vary from what is considered by the executive and legislature, nor will the arguments be different between the judicial and political forums, for both will examine options for economic intervention and both will be concerned with values. Ackerman is simply mistaken if he has assumed that only lawyers think about values. (Indeed, in public perception at least, lawyers are concerned with rules, rights and riches, not values.) To warrant a special label, Constructivism must possess a distinct concept of the nature of law; however, the supposed reconstruction leads to the very result he purports to oppose.

My fundamental objection to Ackerman's book is not its superficiality but its message of elitism. Even though economics is to be of criti-

cal importance, economists will not have the last word on economic issues. Lawyers will, because they will be challenging economic policies and infusing them with the otherwise allegedly absent values. Nor will legislatures have the last word, for economic policies written into legislation will be continuously debated and reworked through litigation. Ackerman is fully aware of the elitism, for in concluding he asks the rhetorical question: "Whoever said that lawyers ought to preside forever at the helm of the American activist state?"⁹ His response, as has been pointed out, is tradition. Perhaps if equal legal advice was available to all persons within a society, we could accept lawyers as the elite powerful group with less qualms. Without such accessibility, entrenching lawyers at the helm will likely only reinforce existing economic arrangements with minimal redistribution. They who pay the piper call the tune. The activist state may well wither under the guidance of the lawyer-economist. Surely a better justification than tradition should be demanded before supporting such elitism.

When we read romance novels in our early teens, we harboured the suspicion that the Other Woman was not the complete villain she was portrayed to be, and that the Hero was often a fairly nasty individual. We began to question whether or not we really wanted to become Good Girls. Our doubts stemmed from a growing realization that human relationships were complex affairs involving conflict and compromise. The romance novels, by painting the world too starkly black and white, only fuelled a desire to experience reality. However, they could still provide an occasional interlude from the difficulties of finding our way through the morass of human interaction. We stopped buying new books and traded with friends when the need arose for escape. Future readers of *Reconstructing American Law* should adopt the same approach. Read it as a beginner's prelude to weighty philosophy or as light relief from the important raucous debates but do not spend money.

⁹ *Id.* at 108.

