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Book Review: Laverne and Shirley Meet the Constitution - Reconstructing American Law, by Bruce Ackerman

LAVERNE AND SHIRLEY MEET THE CONSTITUTION

RECONSTRUCTING AMERICAN LAW. BRUCE ACKERMAN. BOSTON: HARVARD UNIV. PRESS, 1984.

*Reviewed by David Fraser**

There is a theory which states that if ever anyone discovers exactly what the Universe is for and why it is here, it will instantly disappear and be replaced by something even more bizarre and inexplicable.

There is another which states that this has already happened.¹

Dialogue — Prologue at the Margin

Zaphod Beelbebrox (ZB): Bruce! Hey, Bruce!

Bruce Ackerman (BA): Yeah?

ZB: Bruce, you know, on my intergalactic travels I've seen lots of really weird stuff.

BA: Yeah?

ZB: See, it's this way Bruce. We've been searching for the answer to the Big Question in a lot of galaxies, but so far, no luck. So, I thought that here on Earth I'd take a shot.

BA: Yeah?

ZB: Well, Bruce, I just read *Social Justice in the Liberal State*.

BA: It's really a great book, isn't it?

ZB: To be honest, Bruce, it suffers from one slight defect.

BA: What's that?

ZB: It doesn't answer the Big Question, Bruce.

BA: Zaphod, don't panic! I've written another book, *Reconstructing American Law*. The Big Question is answered there.

ZB: I'll get back to you Bruce.

"Don't panic!" — This is the message of Bruce Ackerman's latest con-

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* Assistant Professor of Law, Dalhousie University. This review is dedicated to my colleague, Vaughan Black, who has accused me of not taking liberalism seriously.

¹ Douglas Adams, *The Hitchhiker's Guide to the Galaxy*. This book, along with *The Restaurant at the End of the Universe* and *Life, the Universe and Everything* and *So Long and Thanks for All the Fish*, chronicles the intergalactic adventures of Zaphod Beelbebrox, Former Head Honcho of All Creation and his companions as they search for the answer to the Big Question. The analogy to liberal scholarship should be obvious.

tribution to legal scholarship, *Reconstructing American Law*. Its self-proclaimed goal is to permit us² to practise law in the "activist state".³ We require such a programme because of the fall from grace which was one of the consequences of the New Deal. "We the people" ate from the tree of knowledge during this period and our mores and social structures were irrevocably changed. The New Deal radically altered the psyche of America; it modified forever the premises of American liberalism. Worst of all, it subverted the powerful rhetoric of the legal profession.

This destabilization of legal discourse is, in Ackerman's world view, the most nefarious consequence of the New Deal. The reaction of the profession, epitomized by the Legal Realist critique, was to seek to restabilize its own linguistic community. This, according to Ackerman, is where we blew it. Rather than recognizing the activist, interventionist nature of the new state and creating a legal language for progress, the Realist attack on traditional legal values was used to provide "the professional community with a credible means of insulating the established universe of legal meanings from the political crisis in which it has been implicated."⁴ As a result, lawyers have been left behind with their antiquated language and concepts which bear little resemblance to "political" reality. Such, in general terms, is the Problem According to Bruce Ackerman. I shall accept this characterization, for here I have a more fundamental concern, one which should be shared by Ackerman's fellow liberals and his radical opponents. This book does not deliver what it promises.

We are teased and titillated throughout with references to "normative arguments" and "values", but what this book really lacks is a serious discussion of any values of real interest. To be sure, we are informed that Ackerman thinks that Pareto efficiency may well be a value worth striving for and that lawyers must cope with computers at a level of sophistication greater than mere ability to call up the latest decision of the Wyoming Supreme Court on Westlaw or Lexis. But, who cares? Again, Ackerman provides us with exciting prose and inter-

² The use of the collective pronoun is not accidental. Ackerman's entire purpose is to permit the profession to regain a favoured position in society. Like all good liberals, however, he is not unconscious of the requirement that this be done while preserving at least the impression that "the people" ultimately rule.

³ An activist state is one in which "the very structure of our society depends upon a continuing flow of self-conscious decisions made by politically accountable state officials." Ackerman, *Reconstructing American Law* (1984) at 1. That this view is one of democracy "from the top" is obvious. For an intriguing analysis of this problem in another context, see Marcuse, *Soviet Marxism* (1961).

⁴ Ackerman, *id.* at 17.

esting insights, but fails to deal with the Big Question. Liberals will be unable to find a unifying principle⁵ or normative context from which to draw solace. Radical opponents of liberalism will be unable once again to pin down liberals in any debate about values. Ackerman, the messenger Hermes of liberalism, is as slippery as quicksilver.

Ackerman cannot be so easily dismissed, however. For we find in *Reconstructing American Law* a hidden agenda, one which is found at the margins of the text and at the margins of traditional liberal discourse.⁶ In these margins, it becomes possible to find out what Ackerman thinks about values. His goal is made abundantly clear. He wishes to provide the American lawyer, that species endangered by the predatory instincts of the New Deal, with a new lease on life. The means, and perhaps the end, for one is never too sure when reading this book, is language. More specifically, he seeks to provide us⁷ with "a professionally stabilized rhetoric" and "the new language of power".⁸ For once, a leading liberal has acknowledged the linguisticity of power and of existence.⁹ Ackerman's goal becomes evident. Language is power. Lawyer's must rise up and wrest language from the undeserving grasp of Harvard M.B.A.'s and return it to true guardians of the Ark.¹⁰

While this marginal discourse is perhaps ironically edifying,¹¹ it is used by Ackerman to stake out a disingenuous position. Not only does he fall prey to the trap which he asserts ensnared the Realist Movement, but he returns to neutrality about values: "In a democratic ac-

⁵ Except, of course, the traditional liberal "value" of neutrality. *Id.* at 99.

⁶ That the agenda is found at the margin does not render its importance marginal. Ackerman is pushing liberalism to its limits, which are no limits at all. Liberalism is being unfolded, invaginated, impregnated with its own limitlessness. See Derrida, "Living On: Border Lines" in Hartman, ed., *Deconstruction and Criticism* (1979) at 97. "Invagination is . . . the inverted reapplication of the outer edge to the inside of a form where the outside then opens a pocket. Such an invagination is possible from the first trace on. This is why there is no 'first' trace." Derrida expands on his theory of double invagination in *The Law of Genre* (1983), 7 *Glyph* 202.

⁷ The irony of this review is not without import. If this review has any authority, it is because it is written by one of us, for us, in a law journal aimed at us. We become increasingly like the Jesuits and the Franciscans, fighting for divine approval, engaging in incestuous battles, and forgetting about the *Big Question*. See Rodell, *Goodbye to Law Reviews* (1937), 23 *Va. L. R.* 23, and *Woe Unto You Lawyers!* (1939).

⁸ Ackerman, *supra* note 3, at 3, 42. He appears, at first blush, to propose a "strong reading" for legal language. Unlike Bloom's strong poet, however, he remains unwilling to betray his forefathers aggressively. See Bloom, *A Map of Misreading* (1975) and "The Breaking of Form" in *Deconstruction and Criticism*, *supra* note 6, at 1. "But change in poetry and criticism as in any human endeavour comes about only through aggression." *Id.* at 76.

⁹ See Derrida, *Of Grammatology* (1976) and Gadamer, *Truth and Method* (1975).

¹⁰ See Goodrich, *Rhetoric as Jurisprudence* (1984), 4 *Oxford J. Leg. Stud.* 887.

¹¹ Rorty, *Philosophy and the Mirror of Nature* (1980). Ackerman's discourse, while hardly unmasking fundamental contradictions, does make "one want to cut free from the words of the tribe." This effect is, in all likelihood, unintended. Rorty, *Habermas and Lyotard on Post-Modernity* (1984), 4 *Praxis Int.* 32.

tivist state, it is up to the people and not their lawyers, to decide upon the activist principles that will inform the legal system."¹² The self-professed goal of *Reconstructing American Law* is to provide lawyers with the power as language, or more simply, with power. But the great constraining principle of liberal activism is neutrality. Lawyers then must seek out the tools of neutral power. Such an oxymoronic agenda should trouble us all.

Except for such useless broad generalizations, it is a vain search for a pragmatic outline of these tools in *Reconstructing American Law*. We can find them, however, in another of Ackerman's recently published works, *Discovering the Constitution*.¹³ In this more erudite exposition of his thoughts about "law and politics", Ackerman attempts to grapple with the by now well-known "counter majoritarian difficulty". Like all liberal lawyers, he must find a theoretical justification for the continuing elitist role of the profession. A more serious study of this work, and its proper place in the *corpus juris Ackermanum*, than that which I offer here, will be required. I wish to focus briefly on but one aspect of Ackerman's thought, the theory of the "constitutional moment". Let him explain himself:

One form of political action — I shall call it constitutional politics — is characterized by Publian appeals to the common good, ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms. Although constitutional politics is the highest kind of politics, it should be permitted to dominate the nation's life only during rare periods of heightened political consciousness. During the long periods between these constitutional moments, a second form of activity — I shall call it normal politics — prevails. Here, factions try to manipulate the constitutional forms of political life to pursue their own narrow interests.¹⁴

During most of our lives, "normality" reigns. We get up, get the kids off to school, go to work, come home and watch *Laverne and Shirley*. Politics, unless we are part of a "faction", is external, a foreign discourse to which our one-dimensional existence gives us little access. Then a crisis arises. *Laverne and Shirley* is interrupted by a news flash, "All is not well!" We rise up and invoke "extraordinary institutional forms." Life returns to normal and, if we are lucky, we all get cable.

The most serious difficulty with this theory is that it ignores reality. Extraordinary forms, like most of the normal forms of politics, belong not to the people but to lawyers and other hegemonic elites. How

¹² Ackerman, *supra* note 3, at 3. It is hard to see how the new rhetoric of the Eighties will enable the profession to do anything but argue in the "normal" way. Ackerman simply argues that a new normality may have left lawyers behind.

¹³ *The Storrs Lectures: Discovering the Constitution* (1984), 93 Yale L. J. 1013.

¹⁴ Ackerman, *supra* note 3, at 1022 (footnotes omitted).

do we the people know when a constitutional moment arises? What are the values and norms which, when challenged, raise the collective ire? Ackerman offers no evidence, merely a call to outdated traditional democratic analysis.

This should not be surprising, for his entire problematic programme is based on nothing but power. Lawyers recognize a constitutional moment when they see one because they have read Alexander Bickel. Lawyers know what the fundamental values are because the values and the structures which reflect them belong to their limited professional universe.

The *Laverne and Shirley* theory of constitutional law simply pretends to democratize ideals while promoting and preserving the hegemony of legalism. Lawyers' structures are strengthened as lawyers' language is expanded. What we need, then, is to change channels. We must find a *Twilight Zone* of constitutional theory and practice. We must escape from the normalization which Ackerman seeks to impose, to a dimension not only of sight and sound, but one of imagination. The key to that new dimension is our mind, a place where belief, passion and desire rule, where not only the Big Question but the Answer are unnecessary.¹⁶ Let us imagine a world without lawyers.

Epilogue — Dialogue Return to the Margins

- ZB: Bruce! Bruce!
 BA: Yeah!
 ZB: Bruce, I've read *Reconstructing American Law*.
 BA: Great book, isn't it?
 ZB: Bruce, get a grip!

¹⁶ Deleuze & Guatarri, *L'Anti-Oedipe* (1972) at 197.

