

Michigan Law Review

Volume 83 | Issue 4

1985

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Recommended Citation

Frederick Schauer, *Lawyers and Lawmaking*, 83 MICH. L. REV. 1141 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/49>

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LAWYERS AND LAWMAKING

*Frederick Schauer**

RECONSTRUCTING AMERICAN LAW. By *Bruce A. Ackerman*. Cambridge, Mass.: Harvard University Press. 1984. Pp. x, 118. \$10.

I

The law is a seamless web, so the old saw goes, but so too is life. Just as the categories and concepts of law are pervasively interconnected, the categories with which we divide up the world are similarly conjoined. The demarcations that people use to organize their perceptions and their lives are not rigid and mutually exclusive, but rather constitute a set of overlapping and fuzzy-edged constructs, linked in such a way that changes in the pressure applied at any one point in society are likely to reverberate throughout much of the network that is our existence.

What makes these interrelationships important to lawyers is that law itself is undeniably part of a larger whole. The seamless web of law is one component of the seamless web of life. And if the seamless web metaphor is indeed as apt for life as it is for law, then changes in any part of our social existence and organization are likely to be reflected not only in the content but also in the very nature of law.

Like many other social constructs, therefore, law derives part of its definition from the character and definition of those constructs that surround it.¹ But this is not to say that the concept of law simply collapses into or reduces to those concepts surrounding it. If there were no sheep there would be no wool sweaters, and our demand for wool sweaters likely also affects the number of sheep in the world. Yet the inseparable closeness of the relationship between sheep and wool sweaters does not mean that there is no difference between a sheep and a wool sweater.² And law, in similar fashion, can exist with its own

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1. Although I make this claim about the nature of definition solely in the context of certain social constructs, it has even been made about the character of definition and concept formation generally. In the jargon of philosophers, therefore, a change in the properties of some person or object under inspection solely as a result of changes in other people or objects or relations is a change of a special type, known as a "Cambridge change." See P. GEACH, *LOGIC MATTERS* 321-22 (1972).

2. I find the example useful in thinking about the claims that law is politics. See, e.g., Kairys, *Law and Politics*, 52 *GEO. WASH. L. REV.* 243, 248 (1984); Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 *STAN. L. REV.* 391, 411 (1984).

useful separate identity³ even while it remains constantly influenced by and totally dependent on many other facets of social organization.

Law is thus a culturally and temporally contingent part of a culturally and temporally contingent world. But part of what gives law its useful separate identity is the way it performs a *blocking* function. Legal norms block, or impede, the consideration of certain subjects, arguments, or facts.⁴ The effect of a legal norm is such that certain factors that might otherwise be relevant are precluded from consideration within the realm of discourse governed by the legal norm.⁵ Legal observations of the world, like other observations of the world, are theory-laden,⁶ and thus the "facts of the case" are those, and only those, that some legal theory has determined to be *legally* relevant. The consequence of this is that there may be many extant facts, principles, and arguments that remain unadmitted to the realm of what is noticed and considered by the law.

Once we understand, however, that law's place in the world and law's definition are but one corner of a constantly fluid social system, we can appreciate that what law at one time blocks from legal consideration might at another time be legally relevant. What is included in and what is excluded from legal consideration is one of the shifting seams between law and life, and thus large-scale societal changes may cause some facts or some reasons or some arguments to be included within the realm of legal discourse or legal power although they had previously been excluded.

Focusing on this particular seam is Bruce Ackerman's agenda in *Reconstructing American Law*. The main theme of the book is that law in contemporary America has shifted in such a way that areas of inquiry not previously open for legal consideration are now becoming a standard part of the lawyer's argumentative arsenal. The lawyer who fails to recognize this shift in the nature of law and adapt to it

3. "Useful separate identity" is a bit of a mouthful, but I can think of no better term to refer to a concept that does not collapse into others to which it is related.

4. This, of course, is a large part of what the Realists and their progeny are so concerned with denying. But note that a claim that the law blocks or impedes consideration of certain matters is only a claim that the consideration of those matters is more difficult than it would have been had the block or impediment not been in place. The impediments of the law are therefore best viewed as *presumptive* rather than absolute. When the effect of law and doctrine is so characterized, many of the assaults of Realism are largely beside the point. See generally Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Schauer, *Does Doctrine Matter?* (Book Review), 82 MICH. L. REV. 655 (1984).

5. A good recent example of this phenomenon is *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984), in which a unanimous Supreme Court held that the equal protection clause prohibited community reaction to an interracial marriage as a permissible consideration in a child custody determination.

6. I borrow the concept of theory-laden observation from the philosophy of science. See P. ACHINSTEIN, *CONCEPTS OF SCIENCE* 182-201 (1968); M. HESSE, *REVOLUTIONS AND RECONSTRUCTIONS IN THE PHILOSOPHY OF SCIENCE* 63-73 (1980); K. POPPER, *UNENDED QUEST* 52 (1976) ("There is no such thing as a perception except in the context of interests and expectations. . .").

accordingly is thus, according to Ackerman, running a serious risk of extinction.

Ackerman makes his case by drawing a distinction between the reactive state and the activist state (pp. 1-5, 23-37). In the reactive state the prevailing norms and political structures are comparatively stable, and thus government is charged primarily with making sure that things keep working as they have been. But in the activist state few things are taken as "inexorable givens" (p. 2). Rather, significant and perhaps all parts of social organization are constantly subject to change and adjustment by the "self-conscious decisions made by politically accountable state officials" (p. 1). At least since the New Deal,⁷ the United States has been the prototypical activist state.

Having drawn this distinction between reactive states with their relatively stable political presuppositions and activist states without them, Ackerman builds on it another distinction that is central to the book's message. This distinction, clearly derivative from the first, is that between the reactive lawyer and the activist lawyer. The reactive lawyer acts as a mechanic, not redesigning any of the machinery, but only fixing the machines when they go awry. Reactive lawyers serve when rules are or might be broken within a relatively stable framework of rules, and they also advise clients on how successfully to negotiate within that framework. Even in a reactive legal system the rules may not be stable in the absolute sense, but at least they are relatively stable with respect to the role of the lawyer. Other actors in society may at times change the rules, but the reactive lawyer is involved at the pathological edge of the law, becoming involved only to the extent that rules are broken or rules are unclear with respect to a given course of conduct.

The problem, to Ackerman, is that this role of the reactive lawyer does not fit with the role of law in modern American culture. Law in the United States now occupies a central place in the activist state, and the resultant activist law is profoundly dissimilar to reactive law. Activist law, constantly changing, constitutes perhaps the most important tool with which public officials forge a continuing series of new orders. In this system, therefore, unlike in the reactive system, the framework of rules is far from stable. The participants in the system, including and especially lawyers, do more than deal reactively with the occasional breakdown in a stable set of rules and practices. They are instead actively involved in a continuous process of changing the rules themselves.

Activist law thus engages itself not only with whether the rules have been broken, but also and more importantly with whether even

7. Although Ackerman takes the New Deal as the genesis of the activist state, one wonders whether activism in precisely Ackerman's sense hasn't always been a part of the American experience.

the unbroken rules should be changed. In this sense activist lawyering involves not merely operating within the rules, but constructing the rules themselves, including quite often breaking down existing rules and reconstructing them to suit the needs of an activist culture. To Ackerman, therefore, the reconstruction of American law is the transformation of the legal order from one that only stably reflects a stable society's normative presuppositions to one that actively participates in an unstable society's busy attempt to mold new forms of social organization.

When law is reconstructed so that legal rules are treated, within the legal process, as written on tissue rather than in stone, then it should be apparent that the seam between law and the rest of life must shift. Factors previously thought irrelevant are now central parts of legal argument. As Ackerman importantly points out, this shift has a pervasive effect on something so apparently mundane as the "statement of the facts." If the domain of "the facts" is itself determined by legal norms, and if those norms are in turn open for reconsideration in every legal argument, then there is no limit on those facts that might be relevant to a lawyer seeking to "rise to the Constructive occasion" (p. 3) and challenge the underlying presuppositions of the rule at issue. If "separate but equal" is the rule,⁸ then the relevant facts are those that bear on the existence of identifiable equality between comparable and identifiable facilities.⁹ But if the separate but equal standard is itself open to question, then a much larger menu of social facts and sociological perspectives suddenly becomes relevant.¹⁰ Similarly, if a purchaser is bound by all waivers of warranty as long as the classic conditions for contracting are met, then little factual information is legally relevant in a waiver of warranty situation except the document of waiver, evidence of the authenticity of the signature, and some evidence of consideration. But if some waivers are void for unconscionability,¹¹ a new and vast realm of general commercial practices then becomes part of the good lawyer's presentation of the facts of the case.¹²

The characteristic of contemporary American law that is Ackerman's focus is thus profoundly anti-Realist. For although the Realists reacted to changes in the American legal landscape by urging greater particularity, Ackerman sees instead the need for much greater generality. Instead of looking at how this particular case is different from the rest of the world, we should be looking at how this case is *part of*

8. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

9. See, e.g., *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

10. See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 & n.11 (1954).

11. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

12. Ackerman uses the example of landlord-tenant relations to make this point. Pp. 73-74.

the rest of the world. Although Ackerman has major differences with the "law and economics" perspective (pp. 44-45, 64-65, 80-93), he also draws much of his inspiration from it (pp. 47-71). For that perspective is grounded on the assumption that particular transactions can be understood only in the context of a much less temporally bound story that begins with what caused the parties to find themselves in the position that has now generated a legal event. That is, the economic analysis of law, to Ackerman, reminds us that we can understand the particulars only by broadening in both time and space our description of a particular event. The relevant facts are not only those as to who did what once they got to where they are now, but also those as to what put these parties rather than others in the position in which they now find themselves, and what put these parties in this position rather than some other. Ackerman's reliance on this broad perspective of law and economics is thus for him only an inspiration and an example, rather than a guiding principle for all legal inquiry. His guiding principle, in one sense, is that the reconstruction of American law is a reconstruction of the field of vision with which we view legal events. As changing the rules becomes increasingly the task of the lawyer, the lawyer's field of vision must become increasingly enlarged, including but not limited to those economic facts that are relevant under an activist but not under a reactive outlook.

II

Ackerman's central point is highly important and lucidly presented.¹³ By suggesting that the aberrational and the systemic present two profoundly different ways of looking at the law, he has focused our attention on an illuminating feature of any system of rules — that following a rule, breaking a rule, and changing a rule are three quite different activities. Moreover, the distinction does not pertain only to rules in any strict sense. Much the same can be said about practices, procedures, habits, principles, and virtually any other way of organizing, normatively or descriptively, our experiences, our desires, and our existence. Although this distinction is not the only window through which the legal system can be viewed, it is clearly one that should not be ignored. For by drawing this distinction we can

13. With reference to matters of style, however, I am troubled by Ackerman's occasional petulant dismissiveness with movements or perspectives with which he disagrees. This is most apparent with respect to the people in the Critical Legal Studies movement. *See, e.g.*, pp. 43 n.13, 44 n.15. Surely none of us, including Ackerman, would want to be held to the standard to which he holds Duncan Kennedy — having "to confront, let alone resolve, the obvious inconsistencies in the views expressed by his favored authors." Failing to do this is hardly, as Ackerman would have it, "name-dropping." All of us draw on some of the insights expressed by others without ever imagining that by so doing we are committed to the whole theory or position of which that one insight is a part. In addition, there are also snide references to certain members of the law and economics movement, references in a style that ought to have no part in a scholarly work. *See, e.g.*, pp. 44, 65, 69, 90, 91.

begin to understand the role of the lawyer within the context of a larger universe of making and implementing social choices.

Ackerman's distinction between the reactive and the active, and therefore the distinction between making rules and working within them, will not appeal to those who like their distinctions razor-sharp. Operating in a reactive mode still involves some influence on the standards themselves. For unless we are dealing with absolutely identical instances, the application of a rule, standard, or practice to any new situation involves some degree of modification of that rule, standard, or practice. This may at times be little more than clarification. And at times it may be more than that, making a decision about the scope of a rule or practice at the time, and not before, we are confronted with a new possibility of application. In this sense every application of a rule is also a case of rule making, and the distinction between changing rules, breaking rules, and following rules becomes cloudy.

Similarly, any instance of activism involves some degree of operation within a relatively stable, or reactive, environment. Even jugglers stand on the ground while they are juggling, and so too a claim that activist lawyering involves a potential challenge to everything must be understood in a context in which "everything" does not mean "everything." Reactivism and activism are both relative terms, and thus lawyering even in the activist mode will inevitably involve taking many things as settled while many other things, previously viewed as settled, are now up for grabs.

Thus, even the reactive lawyer is involved in some degree of activism, and even the activist lawyer has a reactive side. Those who expect too much from their distinctions might very well take this as grounds for rejecting the importance of this distinction, and thus the importance of what Ackerman has to offer. But distinctions need not be taken as necessarily performing a sorting function. In many instances they can more usefully be viewed as suggesting contrasting emphases within a non-sortable whole. That certainly seems the case here. To think in terms of conformity or nonconformity with a rule or practice is different in emphasis from thinking about changing the rule or practice. A major part of the difference is that if the question is conformity *vel non*, then the rule or practice itself establishes much of the framework for discussion. But if the rule or practice is open for adjustment, then it can no longer by itself be the framework. In such a case the framework becomes much more amorphous, much wider, and much more likely necessarily to include recourse not only to different disciplines, but also to a substantially less temporally and spatially bound array of social facts. By reminding us of this shift in scope that comes from this shift in task, Ackerman has performed an enormously valuable service for all who would think carefully about what it means to be a lawyer.

III

Reconstructing American Law is above all a survival manual for lawyers. Indeed, Ackerman seems far from bashful about admitting that this is his mission here (pp. 106-10). Unlike some other representatives of the Ackerman *oeuvre*,¹⁴ this book is addressed not to society at large, and not to those who would seek to create a better world, but rather to a profession seeking to survive in its own right in an extant world.

Because I find Ackerman's map of the current legal landscape to be largely accurate, I also find myself in substantial agreement with Ackerman's advice to lawyers on what they must do to survive in this terrain. But although Ackerman sets for himself here a rather limited mission, I was prompted at least to think about the larger societal question lurking around every corner of this book. Indeed, although it is both wrong and too easy to criticize a book for not being what it does not purport to be, I did come away from it thinking of the old joke — "Other than that, Mrs. Lincoln, how did you enjoy the play?" The feeling lingers that something is missing. For the question that kept coming up in my mind was the larger one of whether society in general, or this society in particular, would or should want lawyers to survive in the role that Ackerman would have them play. Ackerman's survival manual envisages lawyers as special and central figures in the formulation of values and rules in a society in which the formulation and reformulation of those values and rules is a visibly recurrent part of the public agenda. But why lawyers? Who are we to deserve such a position of prominence at the helm of the ship of state?

Ackerman is of course too perceptive not to have recognized that these problems are there to be confronted by society. Thus, he asks the reader to "[a]ssume, further, that the citizenry insists that law and lawyers have a central role to play in activist governance" (p. 28). And later he concedes that "[i]n 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 the democratic obligation to use *P* in a legal argument, rather than the *not-P* they favor in politics."¹⁵

These caveats make it clear that Ackerman well knows that giving lawyers a central role in public policy and value formation is hardly without controversy. Confronting precisely that controversy is simply not Ackerman's agenda here, and that is an entirely appropriate choice for him to make. But one of the hallmarks of a good book is

14. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

15. P. 79 (footnote omitted).

that it prompts the reader to think of things beyond the book's particular mission, and it is in this context that I was spurred by the book to think about whether writing a survival manual for lawyers, at least if survival depends on lawyers assuming the role that Ackerman would have them perform, is an enterprise deserving of praise or condemnation.

Clearly a book review is the last place for me to offer my own extended views on what I think should be the role of the lawyer in American society, although it should be obvious that I remain unconvinced that lawyers should be quite as central as Ackerman thinks they should be. For if indeed Ackerman's distinction between the reactive and the activist can carry its weight, then it is not necessarily the case that the same people who serve primarily reactive tasks in society should also perform those functions that are primarily activist. The fact that rules, principles, and practices are constantly open to reconsideration in American society does not mean that there is no value in *having* rules, principles, and practices. And what distinguishes rules, principles, and practices from, say, responses, judgments, and actions, is that rules, principles, and practices all involve some degree of regularity and stability. To choose new stabilities is not to destabilize.

If this society is to have its stabilities in rules, in principles, and in practices, then there may still be a place for the enforcers of those stabilities. A society may, no matter how much of it remains open to change, still need those who will know what the unchanged rules are, and who can operate within the framework created by those unchanged rules. As it is now, Ackerman is surely correct in noting that this function is performed by those, lawyers, who are also centrally involved in changing the rules. And he is also right in assuming that this trend is likely to continue, requiring that lawyers learn the many new tasks required of activist law-changers. But this is asking lawyers — or indeed any one class or profession — to take on a great deal. It may be that it is too much for lawyers to handle. It may be that society would want the advantages that come from specialization. And if this is the case, then we might want to try to roll the clock back a bit. We might want to treat policy making and policy implementation as largely separate tasks.

Should this society take that course and decide that lawyers are doing too much, it might for many be much less exciting to be a lawyer. If activism in Ackerman's sense becomes primarily the task not of lawyers but of economists, managers, professional politicians, journalists, philosophers, or theologians, then the current allure of being a lawyer will, for many people, evaporate. It's nice to be where the action is, and if the action is no longer with law and lawyers, then those who desire to be "active" might have to look elsewhere. This would

indeed be troublesome for the profession, but it might not be nearly as troublesome for American society. Bruce Ackerman is a lawyer, and so am I, so we can hardly be blamed for looking at society through lawyers' lenses. But not everyone in society shares this perspective. For the dialogue to continue, we need people who will look at this question as perceptively from a nonlawyer's perspective as Ackerman does from the lawyer's.