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## BOOK REVIEW

### Interpreting Legal Constructivism

Gregory S. Alexander\*

RECONSTRUCTING AMERICAN LAW. Bruce A. Ackerman. Harvard Univ. Press. 1984. Pp. 128. \$16.00 (cloth).

Legal academics are by now well aware that a new mode of analysis has emerged in legal scholarship over the past twenty years or so.<sup>1</sup> Though its exemplars are a diverse group, this new form of legal reasoning in general utilizes the analytical tools of microeconomics, game theory, and related fields as the means to develop policy recommendations for lawmakers.<sup>2</sup> In his new book, *Reconstructing American Law*,<sup>3</sup> Professor Bruce Ackerman synthesizes the scattered work in this vein into a movement to which he gives the name "Legal Constructivism." Noting that Constructivism is already upon us,<sup>4</sup> Ackerman's objectives are twofold: first, to explain why the rest of the legal profession should cast off its old ways and join the new movement, and, second, to explain why legal culture, or at least part of it, has already turned to this new discourse. A book with such broad ambitions requires far more detail and explanation than this slim volume provides. So, if the success of a book is

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<sup>1</sup> See, e.g., Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (identifying this mode of analysis as "liberal law and economics").

<sup>2</sup> Some of the early writings that were influential in establishing Constructivism are the following: Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies, and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1972); Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

<sup>3</sup> B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 3 (1984) [hereinafter cited as ACKERMAN].

<sup>4</sup> Ackerman previously identified the emergence of Legal Constructivism within modern scholarship on the takings problem in his book, B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977). *Reconstructing American Law*, in a sense, merely elaborates on the basic vision underlying *Private Property*.

measured, as one supposes it ordinarily is, by whether it makes good on its promises, this book must be counted as a failure.

Despite the temptation to dismiss this book, however, it deserves to be read and discussed because it is a particularly clear example of a growing concern in legal thought. In making the case for Constructivism, Ackerman is really attacking irrationalism, which he sees as our legacy from Legal Realism and which is resurgent in some quarters, notably within the Critical Legal Studies movement.<sup>5</sup> Unlike these skeptics, Ackerman, to quote Anthony Kronman's recent description of the rationalist, believes that lawyers should be "confident in our power to discover the norms that ought to govern us through an abstract philosophical reflection untainted by experience or historical fact, and equally confident in our ability to implement whatever norms we choose through the systematic and self-conscious reconstruction of existing institutions from the bottom up."<sup>6</sup>

Ackerman's defense of this rationalist dogma comes at a particularly appropriate time. A "rationality debate" has been the center of attention in several other fields in recent years. In anthropology,<sup>7</sup> philosophy,<sup>8</sup> and literary theory,<sup>9</sup> to name only three fields in which the debate has been especially prominent, skepticism about the possibilities for discovering any "privileged vocabulary" has been met by a counter-attack on such ideas as being "relativist" and "nihilist." Until recently this debate has not been conspicuous in the legal literature.<sup>10</sup> That condition is rather clearly changing, however. The irrationalist outlook—or at least the perception of it—in Critical Legal Studies has already provoked a Reason-in-Distress reaction.<sup>11</sup> With *Reconstructing American Law* we now have an explicit prescription for purging legal thought of all vestiges of irrationalism.

Ackerman's case for formal rationality, however, is ultimately

<sup>5</sup> Examples of irrationalist thought within Critical Legal Studies are Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

<sup>6</sup> Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1571 (1985).

<sup>7</sup> The prominent figure here is Clifford Geertz. See, e.g., Geertz, *Anti-Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263 (1984).

<sup>8</sup> See, e.g., R. RORTY, *CONSEQUENCES OF PRAGMATISM passim* (1982).

<sup>9</sup> Irrationalist literary criticism, centered largely around the "Deconstructionist" movement, has produced a massive corpus of writing. Perhaps the most prominent of the Deconstructionists is Jacques Derrida. See, e.g., J. DERRIDA, *OF GRAMMATOLOGY* (G. Spivak trans. 1976).

<sup>10</sup> Joseph Singer's recent paper, *supra* note 5, should begin to connect the rationality debate with current legal theory.

<sup>11</sup> See Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984), and the correspondence that Dean Carrington's paper provoked, published in 35 J. LEGAL EDUC. 1-26 (1985).

unconvincing. Rather than providing an affirmative argument explaining why the conceptual apparatus of Constructivism is desirable (or indeed how formal rationality in legal analysis is even possible), Ackerman writes at the level of intellectual history by giving an account of the rise of Constructivism as a reaction to the "intuitionism"<sup>12</sup> of Realist analysis. By explaining Constructivism in these terms, however, Ackerman undermines his own deeper objective, to convince us that Constructivism is a strongly rational mode of legal analysis. His own historicizing of Constructivism draws attention to the very contingency of the new legal language that, as a rationalist, Ackerman wants to deny. This essay focuses on this tension within Ackerman's book, not because it is intrinsically important whether Ackerman is faithful to his historicist sources<sup>13</sup> but because the book illustrates why the quest for legal rationality, increasingly evident these days, is quixotic. Had Ackerman taken his own historicism seriously, he would have written a very different book, one that was far more skeptical about Constructivism and rationality in legal thought.

## 1

Ackerman argues that Legal Constructivism originated from two twentieth-century "revolutions": the New Deal of the 1930s and the Coasean revolution,<sup>14</sup> which began in the 1960s. Whereas the New Deal represented a broad socio-political transformation in thought and institutions, the Coasean revolution more narrowly has affected legal methodology. Coase, argues Ackerman, jettisoned the particularistic epistemology of Legal Realism, replacing it with a systematic approach to legal facts.<sup>15</sup> Constructivism synthesizes the political revolution of the activist state with the methodological revolution of Coasean systematic inquiry to create a kind of new liberal legal science.

For lawyers, Ackerman contends, the New Deal was significant primarily because it changed the political premises of legal discourse. It radically transformed legal culture from "reactive lawyering" to "activist lawyering." Reactive lawyering, which Ackerman associates with the legal culture of nineteenth-century formalism,<sup>16</sup>

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<sup>12</sup> ACKERMAN, *supra* note 3, at 19, 38, 72-78, 108.

<sup>13</sup> He explicitly relies on T.S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). ACKERMAN, *supra* note 3, at 60 n.16. *See infra* text accompanying notes 33-38.

<sup>14</sup> By "Coasean revolution," Ackerman refers to the cost-benefit analysis of problems involving the allocation of entitlements that scholars usually associate with the famous paper by Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>15</sup> ACKERMAN, *supra* note 3, at 46-71.

<sup>16</sup> *Id.* at 17.

accepted the legitimacy of social arrangements generated by unregulated markets. Activist lawyering rejects this laissez-faire tradition and calls for state intervention to improve the social and economic welfare. Ackerman emphasizes that the New Deal activism did not unqualifiedly embrace intervention or usher in an era of collectivism. Insofar as it justifies state initiatives only when intervention enhances the reality of individual rights, activism is consistent with the liberal ideal of limited government.

Other scholars have noted that Legal Realism was connected with an activist political vision,<sup>17</sup> but Ackerman adds a twist to this view of Realism. He argues that Realism, which was well underway by the mid-1930s, allowed the legal culture to accommodate the new activist political premise—and the institutional change it wrought—without concomitantly altering the familiar reactivist mode of discourse. He rejects the view that Realism was an iconoclastic movement bent upon a deconstruction of the Conceptualism practiced by high formalists like Joseph Henry Beale.<sup>18</sup> Instead, Ackerman interprets Realism as a culturally conservative movement because it salvaged most of the legal profession's familiar conceptual apparatus despite the great changes in the materials and institutions with which lawyers dealt.<sup>19</sup> Realism achieved this high degree of continuity in legal discourse by introducing a sense of skepticism that demoted traditional doctrines—freedom of contract, freedom of disposition, private property, and fault—from cornerstones to mere starting points. Thus, an adjudicator can supplement or abandon, *ad hoc*, as her “situation sense”<sup>20</sup> of justice requires.

Constructivism began to emerge when the Coasean revolution prompted lawyers to reconsider how factually to frame legal disputes. Ronald Coase's famous story of the farmers and the ranchers<sup>21</sup> has served as the model for changing the way lawyers construct

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<sup>17</sup> For example, my colleague Robert Summers has pointed out that Realism, which he treats as part of a broader theory that he calls “pragmatic instrumentalism,” can be connected with the Progressive movement in the early twentieth century. R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 29, 49, 84, 201 (1982). Whatever connection existed between Realism and the New Deal, for obvious chronological reasons, one cannot maintain that the New Deal was the genesis for Realism.

<sup>18</sup> See, e.g., E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (2d ed. 1957).

<sup>19</sup> None of the familiar studies of Realism, such as W. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968) and W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973), make the point that Realism's skepticism and intuitionism facilitated continuity of discourse even though the political underpinning of Classical discourse had been largely abandoned.

<sup>20</sup> The term is Llewellyn's. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121 (1960).

<sup>21</sup> Coase's story of farmers and ranchers illustrates his economic analysis of “those

and, hence, resolve legal problems. By introducing the concept of transaction costs into legal discourse, or more specifically, the hypothesis of zero transaction costs, Coasean analysis altered the temporal framework for analyzing even the simplest dispute. The starting point for legally relevant facts receded from the moment of initial conflict to the moment when the parties planned or might have planned their activities to avoid the conflict. From this *ex ante* perspective, facts traditionally ignored by legal storytellers became analytically critical: the rancher's failure to hire an extra hand, the farmer's failure to construct an effective fence, the polluting factory's failure to add available pollutant-reducing devices, and so on. The assumption of zero transaction costs, by its very unreality, illuminated the need to identify and analyze the complex range of transaction problems that prevent rational accommodation of conflicting interests through the market alone. This perspective has led to the development of new concepts of central importance to Constructivist legal epistemology—"free riders," "holdouts," "strategic behavior," and the like.<sup>22</sup>

Thus far, Legal Constructivism simply incorporated the epistemology of welfare economics for the purpose of factual analysis. But it is an activist and "progressive" political strategy that Ackerman believes the New Deal revolution compels legal culture to pursue.<sup>23</sup> Constructivism, unlike the Chicago approach to law-and-economics, did not stop with the Coasean transformation of factual inquiry. Animated by awareness that the New Deal had committed the legal system to an activist liberal political premise, Constructivists pushed ahead to develop a language of value inquiry as well.<sup>24</sup>

Ackerman is anxious to demonstrate that the center-left, Constructivist version of legal economics is not only subtler than the Chicago version but that it was also necessitated by the New Deal. Specifically, he argues, the Chicago school's fixation with allocative efficiency presents a "distorted account of the fundamental values of

sections of business firms which have harmful effects on others." Coase, *supra* note 14, at 1.

<sup>22</sup> For an introduction to this vocabulary, now widely used in the law-and-economics literature, see A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 18-20 (1983).

<sup>23</sup> ACKERMAN, *supra* note 3, at 19-22.

<sup>24</sup> Any doubt about Ackerman's commitment to positivism is dispelled by his adherence to the distinction between learning facts and acquiring values. This Review leaves to one side the objections that have been raised against this distinction in nonlegal literature. Three prominent critiques of the fact-value dichotomy underlying the whole positivist tradition are M. HEIDEGGER, *BEING AND TIME* (J. Macquarrie & E. Robinson trans. 1962); H. GADAMER, *TRUTH AND METHOD* (1975); and J.P. SARTRE, *BEING AND NOTHINGNESS* (H. Barnes trans. 1956).

the American legal tradition."<sup>25</sup> The overturning of the laissez-faire state committed the legal system to a greater willingness to intervene in the operation of the market in order to "improve upon the invisible hand."<sup>26</sup> Constructivism emerged as an alternative to Realism and, more recently, to Chicago law-and-economics because it and it alone can "redeem the promise of the New Deal."<sup>27</sup>

The pervasive problem of "market failure" justifies this willingness to regulate. Unlike the Chicagoan, the Constructivist recognizes that the complexity of modern society and economy generates transactional problems that frustrate market solutions. To be sure, the Chicagoan recognizes the occasional market failure justifying second-best legal intervention. But, unlike the Chicagoan, the Constructivist takes market pathology seriously and regards transactional defects in complex societies as pervasive. Consequently, Constructivists consider legal interventionism, or "activism," an inescapable fact of life.<sup>28</sup>

Equally important, the Constructivist fully admits the relevance of efficiency to interventionist decisionmaking but, unlike the Chicagoan, seeks to enrich rather than eschew normative discourse as a central element of legal analysis. Acting on an abiding faith in the possibility of rational value discourse, the Constructivist explicitly addresses fundamental questions about the right and the good within the adjudicatory context. Such normative discourse cannot be adequately addressed in efficiency terms alone. Ackerman asserts that the inadequacy of efficiency as a moral value was demonstrated to American lawyers long ago. The fall of *Lochner v. New York*,<sup>29</sup> for example, "teaches us the legal folly of equating market efficiency with social justice."<sup>30</sup> Similarly, *Brown v. Board of Education*<sup>31</sup> "forces lawyers to come to terms with an affirmative value [equality] before they can claim an understanding of the deepest aspirations of our existing legal system."<sup>32</sup>

## II

Ackerman credits Thomas Kuhn's thesis concerning the replacement of dominant paradigms in scientific thought as his inspiration for this account of the fall of Realism and the rise of

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<sup>25</sup> ACKERMAN, *supra* note 3, at 43 n.13.

<sup>26</sup> *Id.* at 105.

<sup>27</sup> *Id.* at 106.

<sup>28</sup> *Id.* at 60-65.

<sup>29</sup> 198 U.S. 45 (1905).

<sup>30</sup> ACKERMAN, *supra* note 3, at 91.

<sup>31</sup> 347 U.S. 483 (1954).

<sup>32</sup> ACKERMAN, *supra* note 3, at 91.

Constructivism.<sup>33</sup> Although Ackerman's account is superficially consistent with Kuhn, *Reconstructing American Law* repudiates the deeper implications of Kuhnian historiography. Kuhn argued that revolutions in scientific thought occur when an orthodox theory, or "paradigm," can no longer explain perceived phenomena; in other words, when it fails to fulfill its problem-solving responsibility. Similarly, Ackerman argues that scientific Constructivism is replacing ordinary legal analysis because of the inadequacies of intuitionism. According to Ackerman, the rise of the activist state was the particular event that rendered orthodox legal analysis inadequate. Constructivism, but not Realism, meets the needs of welfare-state capitalism.

Ackerman's commitment to legal rationalism, however, means that he must somehow avoid the deeper implications of historicizing Constructivism. He does so by providing an argument that contradicts historicism. He explains the shift to Constructivism in terms of adaptive evolution. He argues that the formality of Constructivism renders it better adapted to the needs of the activist welfare state than the informality of Realism. Accepting a familiar instrumentalist view, Ackerman emphasizes the greater need for formality in our administrative state in order to minimize the potential for abuse of individual rights posed by "administrative discretion."<sup>34</sup>

Indeed, Ackerman explains the emergence of Realism itself in adaptive terms. He depicts Realism as a transitional stage through which American legal thought had to pass on its way to a more mature version of formalism. Realism served to demonstrate the incompatibility of the ideology of Conceptualism with the New Deal. "[T]he shock of the activist state," Ackerman argues, "forced a change in discursive direction."<sup>35</sup> Prompted by this political change, Realism demonstrated to lawyers that they could no longer assume the formal determinacy and moral adequacy of Classical concepts like fault and bargain. Realism made them aware that problem resolution touched upon messy value issues. It, however, remained an immature form of legal thought because it continued to structure factual issues in the Classical, non-systematic fashion and to resolve those value-laden issues intuitively. Its crude, intuitive fact-value analysis is now replaced by a mode of legal analysis that will instrumentally meet the needs of the liberal activist state.

Ackerman's tactic of using an adaptive theory of change as a defense of rationalism is, like all other instances of the same argument, vulnerable to the critique of historicism. That critique, com-

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<sup>33</sup> *Id.* at 60 n.16.

<sup>34</sup> *Id.* at 75.

<sup>35</sup> *Id.* at 12.

monly associated with Kuhn but certainly not confined to him,<sup>36</sup> demonstrates how the basic ways in which individuals organize the social world, their conceptual structures and languages, are culturally and historically contingent. Modes of discourse cannot be objectified by so-called external determinants. Kuhnian historiography emphasizes the historicist nature of belief-structures and denies the predominance of functional determinism. Ackerman, by contrast, makes legal thought a variable factor, ultimately grounded in external determinants. This view of the dependency of ideas upon the existing mode of political organization more closely resembles the functional determinism of scientific Marxism,<sup>37</sup> which treats economic relations as the "base" and ideas as the "super-structure," than it does Kuhnian historiography.<sup>38</sup>

This contrast between Ackerman and Kuhnian historiography occurs not simply because Ackerman relies on the wrong sources, but because it indicates the central weakness of Ackerman's case for legal rationalism. Historicism, or what Richard Rorty calls "pragmatism,"<sup>39</sup> temporalizes rationality by demonstrating that the vocabularies of scientific knowledge are, after all, mortal. Recognizing that nothing is immune from cultural development, the pragmatist gives up the quest for an optimal set of conceptual tools. Yet Ackerman rejects this consequence of the historicist perspective and, instead, believes in the possibility of an objective, neutral, language that would compel agreement.<sup>40</sup> Because he objectifies conceptual structures, that is, sees them as inherently connected with particular modes of economic and political order, Ackerman is committed to

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<sup>36</sup> See sources cited *supra* notes 7-9.

<sup>37</sup> The distinction between "scientific" and "critical" Marxism is discussed in A. GOULDNER, *THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY* (1981).

<sup>38</sup> The resemblance to scientific Marxism is strengthened, and the similarity to Kuhn is weakened, by Ackerman's apparent belief that the history of American legal consciousness has direction. Like Marx, Ackerman not only sees history as divided into identifiable stages, but also regards the transitions from one stage to another as progressive, toward some ultimate, rational point, although Ackerman and Marx would not agree on the identity of that telos.

Looking for theoretical constructs from other disciplines that might serve more appropriately than Kuhn as analogues for Ackerman's progressive account, one might turn to evolutionary theories of individual moral consciousness. Just as theorists like Kohlberg posit an optimal end-point of moral development, see L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981), so Ackerman regards the stages of collective legal consciousness as evolving toward greater rationality, with Constructivism its ultimate stage. Extending this analogy, Realism, with its intuitionist approach to value questions, becomes something like adolescence, that penultimate period in the individual's struggle to abandon those naive notions that simplify his world. With Constructivism, legal culture finally attains adulthood, prepared to order the complexities of the welfare state with its new, sophisticated language.

<sup>39</sup> R. RORTY, *supra* note 8.

<sup>40</sup> ACKERMAN, *supra* note 3, at 99-101.

the view that every given form of economic organization has an optimal vocabulary.<sup>41</sup> Consequently, he denies that the same economic and political ends could be achieved through any of several alternative vocabularies. Stated affirmatively, the claim is truly heroic: once lawyers find the correct vocabulary, they can eliminate all of the inadequacies of the present legal order.

Understood in these terms, Constructivism fits Ackerman's own characterization of Realism—a "culturally conservative movement."<sup>42</sup> Realism was culturally conservative because it allowed lawyers to preserve much of the discourse of the Classical era. Constructivism changes this discourse, but its very pretensions to scientism blind it to its own contingency. Constructivism evades ongoing questioning of the sufficiency of its analytical assumptions and the legitimacy of the legal order it creates. Because it claims to provide a privileged vocabulary, Constructivism, in a manner reminiscent of Classicism, is a wholesale constraint on inquiry into other possible languages and, ultimately, other possible legal and social orders.

Constructivism, then, makes the same pretense to validity for which Classical legal thought was so notorious. But Realism showed that the project of objectivity is misguided. The quest to ground legal analysis is pointless, Realists said, for it is a matter of conviction, not knowledge, convention, not reason. Realism grew not out of a preference but out of a realization that once the limits to legal science are identified, intuitionism, bracketed by conformity to conventions around us, is all we have.

Similar to other recent defenses of rationalism, Ackerman's retreat from the implications of historicizing all legal languages is based on fear. The Constructivist fears that if we rely on irrationalist intuitionism in the welfare state, discretion in the hands of bureaucrats inevitably will degenerate into the arbitrary and dehumanizing exercise of power. Constructivism self-consciously formalizes legal analysis on the basis of the traditional rationalist belief that without rules we lack the "cognitive control" essential to prevent oppression and social injustice. Ackerman's call to make legal analysis more formal, rigorous, and professional grows out of the belief, or hope, that the right conceptions of reason and justice in law, systematically determined as some mixture of efficiency and fairness, will shield us against "tyranny."<sup>43</sup>

The intuitionist's only possible response to Ackerman is confession and avoidance. Intuitionism has no guarantees, but how can its

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<sup>41</sup> *Id.* at 45.

<sup>42</sup> *Id.* at 13.

<sup>43</sup> *Id.* at 98-100.

existence be denied? Rather than trying to cast out the demon, intuition, we would better spend our time exorcising the real evil, the undifferentiated fear of intuitionism. Intuitionism itself is merely there. To use Ackerman's own preferred vocabulary, rationality is "bounded."<sup>44</sup> Given the inherent limits on the human capacity to see and to predict, the formalist, whether Classicist or Constructivist, cannot hope to eliminate discretion and intuition from legal analysis. Non-formalists believe that greater hope exists for preventing abuse if they openly acknowledge the inevitable role of intuition rather than deny it. This move beyond formalism, indeed beyond method, gives the legal culture an opportunity really to mature by supposing that the ways in which we think and talk, the conceptual tools we develop, are beyond our control because they are necessitated by some external factor.

Living with intuition does not mean that we reject Ackerman's faith that the legal culture can "improve upon the invisible hand."<sup>45</sup> Far from it. Realism developed on the basis of just that faith. Acceptance of intuitionism merely requires that we recognize as a false hope the promise that a new vocabulary can guarantee this improvement. No vocabulary is so privileged.

At the same time, the intuitionist need not fastidiously refuse all of Constructivism's new vocabulary to avoid becoming a Constructivist. In the deconstructed legal culture lawyers must be intellectual scavengers, raiding other disciplines for helpful vocabularies, using as much of the discourse as seems helpful, and discarding the rest. For example, the deconstructive lawyer can happily agree with Ackerman that the language of "unequal bargaining power" is unhelpful,<sup>46</sup> and that such talk obscures the real problem, which is the ubiquity of "market failures" generated by "bounded rationality." But, unlike Ackerman, the deconstructivist concludes that we should talk explicitly about paternalism. The dread of intuitionism and paternalism is warranted only if we maintain social arrangements that frustrate our capacity to gain understanding of each other. Intuitionism requires knowledge of others that can only be obtained through empathy and intimate association. The prospects for such knowledge may seem bleak because distorted communication accompanies our society's diversity.<sup>47</sup> But denying any role for intui-

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<sup>44</sup> *Id.* at 56, 58.

<sup>45</sup> ACKERMAN, *supra* note 3, at 105. Ackerman, of course, believes that understanding "social reality" is the key to improvement. *Id.*

<sup>46</sup> See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

<sup>47</sup> The attempt to resuscitate rationality within the context of the social theory of communication and the possibility of undistorted communication in the "life world" are, of course, themes Juergen Habermas developed. Like Ackerman, Habermas wants to

tion, refusing even to make the attempt to dissolve the impediments to empathy with others, only ensures that these barriers will dominate social life. Constructivism's systematic focus on "complex market processes"<sup>48</sup> excludes ad hoc attempts to understand the individuals involved and intuitionally "get it right." Far from "civiliz[ing] the powers of technocracy,"<sup>49</sup> Constructivism exacerbates the dehumanizing effects of technocracy. Legal culture cannot hope to improve upon the invisible hand without a commitment to empathy. Ackerman concludes *Reconstructing American Law* with this observation: "political commitment is no substitute for legal deliberation."<sup>50</sup> He may be right, but, to borrow his own words, "the reverse is also true":<sup>51</sup> legalistic deliberation is no substitute for human commitment.

Ackerman invites the entire legal profession to become born-again formal rationalists. For those who have not immersed themselves in the waters of Constructivism, even a slight recollection of the Realist critique of formalism should provide adequate grounds for being skeptical about this book's claims for illuminating the path to salvation.

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establish social consensus in order to avoid coercion, but the two pursue consensual coordination from very different perspectives. Ackerman's constructive legal culture, viewed in Habermas's terms, merely exacerbates the problem of institutional control of the life world by pushing communicatively-structured social interaction more and more to the margins and subordinating the life world to systematic imperatives. See J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (trans. J. Shapiro 1971); J. HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (trans. T. McCarthy 1979).

<sup>48</sup> ACKERMAN, *supra* note 3, at 72.

<sup>49</sup> *Id.* at 109.

<sup>50</sup> *Id.* at 110.

<sup>51</sup> *Id.*

