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BOOK REVIEW

SOCIAL JUSTICE IN THE LIBERAL STATE. By *Bruce A. Ackerman*. New Haven and London: Yale University Press. 1980. Pp. xii, 378. \$17.50.

*Reviewed by James R. Murray.**

In *Social Justice in the Liberal State*,¹ Bruce Ackerman attempts to construct a liberal theory of justice, and of law, that has as its defining feature a method of dialogue. The book's jacket predicts that it is "[c]ertain to become the most important work in political theory since John Rawls' *A Theory of Justice*" This claim is ambitious; but then so is Ackerman's book, both in the breadth of its topics (ranging from genetic manipulation and infanticide to a theory of judicial review) and in its vision. I shall examine here some of the more salient subjects of *Social Justice in the Liberal State*, and perhaps thereby preview the more extensive criticisms of the book that are certain to emerge, if the jacket's prediction holds true, over the next decade.²

For Ackerman, all issues of social justice are to be resolved in a liberal society by "neutral dialogue": a particular form of dialogue that he explains in great detail. My underlying criticism of the book is that of the many truths in it, few, if any, are necessarily related to or inherently part of a process of dialogue. I do not argue that dialogue, in many contexts, is not an important device. It is, for exami-

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1 B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980). Analysis of Ackerman's book is not yet extensive. For a unique discussion of the central doctrines of the book, see Weale, *Book Review: A Symposium on Recent Books in Moral, Political, and Legal Philosophy*, 65 MINN. L. REV. 685 (1981). Weale argues that Ackerman's work "draws liberalism closer to neo-Marxist and phenomenological theory," noting similarities to the views of Habermas and Merleau-Ponty. *Id.* at 699. For a lengthier discussion attempting to place Ackerman in the general framework of liberal theories, see Alexander, *Liberalism As Neutral Dialogue: Man and Manna in the Liberal State*, 28 U.C.L.A. L. REV. 816 (1981).

2 It is telling to note that within a year of the publication of *A Theory of Justice*, that work was the subject of a book-length critical examination by a renowned philosopher. See B. BARRY, *THE LIBERAL THEORY OF JUSTICE: A CRITICAL EXAMINATION OF THE PRINCIPLE DOCTRINES IN A THEORY OF JUSTICE* (1973); J. RAWLS, *A THEORY OF JUSTICE* (1971). (Barry's book was written in the summer of 1972.)

ple, a necessary feature of meaningful due process.³ For reasons set forth below, however, I argue that dialogue, in Ackerman's sense, cannot play a defining, guiding role in liberal theory.

Let us briefly consider Ackerman's story. Throughout one's life, "there can be no escape from the struggle for power. Each of us must control his body and the world around it" (p. 3). This is the reason for Ackerman's primary goal: to construct an ideal procedure which rational individuals, subscribing to its rules, may use to engage in power plays in an institutionally acceptable manner. This basic characterization is one refreshing and candid aspect of Ackerman's work—the acknowledgment that power, in its many forms and contexts, constitutes the stuff of political theory. Although many theories recognize this implicitly (Locke, Rawls)⁴ or explicitly (Hobbes, Nozick),⁵ Ackerman is unique in framing *all* questions of political and distributive justice in terms of a reaction to the phenomenon of power. The resulting analysis captures at least *why* people are concerned about justice, perhaps more realistically than does Professor Rawls' postulation of a "sense of justice" on the part of rational individuals.⁶

Ackerman calls his method of dialogue "constrained conversation"—a "dialogic" method which is governed by three principles: rationality, consistency and neutrality. The first principle, rationality, requires simply that "[w]henver anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is" (p. 3). The second principle, consistency, requires that "[t]he reason advanced by a power wielder on one occasion must not be inconsistent with the reasons he advances to justify his other claims to power" (p. 7). These two principles need little explication. They are assumed premises of almost any philosopher who at least pays lip-service to the role of reason in political theory.⁷

The third principle, neutrality, is the core concept of the book.

3 See, e.g., Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

4 J. LOCKE, *TWO TREATIES OF GOVERNMENT* (P. Laslett ed. 1960); J. RAWLS, *supra* note 2.

5 T. HOBBS, *LEVIATHAN* (W.G.P. Smith ed. 1929); R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

6 J. RAWLS, *supra* note 2, defined at 46, 312, 505.

7 There are alternative positions, of course. See, e.g., PLATO, *THE REPUBLIC*, Book 1 (E. Hamilton and H. Cairns eds. 1963) (Thrasymachus takes the position that social justice is nothing but the will of the stronger).

Under neutrality principles, in a liberal conversation, no reason given for a certain power arrangement is a good reason if it requires the power holder to assert: (1) that his conception of "the good" is better than that asserted by any of his fellow citizens; or, (2) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.

With the three principles of neutral dialogue established, Ackerman organizes the book into four parts. In the ideal "new world" of the first part of the book, liberal dialogues are monitored by a "Liberal Commander" who is blessed with a "perfect technology of justice" (meaning that the Commander has no trouble implementing whatever decision is just). This Commander is also responsible for insuring that all power conversations are consistent with the three liberal dialogic principles. The dialogues that ensue⁸ yield a distributional right of all citizens of the liberal state to equal shares of the ideal world's only resource: "manna." Ackerman never explicitly translates "manna" into any particular good when he makes the transition from the new world to the real world. If manna turns out to be money, one has a truly egalitarian-looking distribution. If, however, manna turns out to be something like "treatment as an equal," then one might have a very different-looking system.⁹ Still, Ackerman hopes that "subsequent conversational moves will define a

8 So that the reader may get a flavor of what Ackerman means by dialogue, one example follows:

COMMANDER: Unless I hear anything more, I shall declare that everybody present in this Hall should start off with an equal share of manna. Are there any objections? JEW: I object. I deny that this Nazi is a citizen of our liberal state. And since he isn't a citizen, he isn't protected by Neutrality. And since he isn't protected, I think we all should say he's a perfect swine and deprive him of all his rights to manna. COMMANDER: But why do you deny that he's a citizen? JEW: Because he fails the defensive test. COMMANDER: Well, then, Nazi. What do you have to say to this? NAZI: The Jew is wrong. While I do indeed think I'm better than he is, I need not make this strong statement to justify my claim to an equal share of manna. Instead, I need simply say that I am at least as good as a Jew and so am entitled to at least as much manna as he gets. This statement is certainly consistent with my true beliefs and fulfills the conversational requirements imposed upon citizens of the liberal state. I give you what is owing, though nothing more (p. 76).

9 For a lengthier analysis of this problem, see Alexander, *supra* note 1, at 821. Ultimately, Alexander's criticism of Ackerman on this point is unsatisfactory because it depends on an attempt to locate Ackerman's theory of liberalism on a spectrum of philosophical positions, from libertarianism on the "right" side of the spectrum to welfare state theory on the "left" side. This common portrayal of liberalism as "in the middle" is not accurate. Liberalism, by its refusal to endorse any theory of the good, is unique—it should not be visualized as in the middle of political possibilities, but as standing apart from traditional "orthodox" political theories (e.g., Marx, Plato). See Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MO-

liberal conception of equality that is compatible with a social order rich in diversity of talents, personal ideals, and forms of community" (p. 18). This "distinctive" conception of equality Ackerman calls "undominated equality" (as opposed to dominated equality?)¹⁰ and, he claims, it too will be protected and served by the dialogic method.

In Part Two ("Justice Over Time"), Ackerman extends the discussion to incorporate intergenerational problems into his dialogic theory of liberal legitimacy. And, in Parts Three ("From Ideal to Reality") and Four ("First Principles") he makes the full transition from ideal world to "reality." As the perfect technology of justice evaporates, the problems and structure of social justice begin to look familiar. Majority rule is the structural norm; a good part of his argument is devoted to outlining the limits of majority rule. There are, in Ackerman's system, "process controls" (*e.g.*, the "checks and balances" of our Federal system) as well as "output controls" (*e.g.*, a Bill of Rights) on what the majority can do. For Ackerman, the justifications for these norms are established through the dialogic method.

However, Ackerman does not seem initially to wander very far from the core of many other liberal positions. His most important principle is neutrality; and what constitutes neutrality for Ackerman is the liberal government's refusal to endorse or treat any person or life plan as morally superior to any other. Government must endorse no theory of the good. In the game of constrained conversation, the shorthand conversational move for this fact is: "I am at least as good as you are"—the dialogic analogue of "stalemate." With the problems Ackerman poses we begin to realize that the classic tension in political philosophy between theory and practice is at work in Ackerman's book as well. In liberal theory, it is an historical fact that certain values (*e.g.*, freedom, equality, general welfare) are just part of the "practice" component of that dualism. Unless one advocates radical reform to an orthodox political system (*e.g.*, Marxist), one is left largely with the task of reconciling a host of conflicting important values. For this reason, the bottom-line problems and so-

RALITY 123 (S. Hampshire ed. 1978); Murray, *The Role of Analogy in Legal Reasoning*, 29 U.C.L.A. L. REV. 844, 864-65 (1982).

10 Ackerman defines "undominated equality" as the fulfillment by a social world of the following conditions:

- a. No citizen *genetically dominates* another.
- b. Each citizen receives a *liberal education*.
- c. Each citizen begins adult life under conditions of *material equality*.
- d. Each citizen can *freely exchange* his initial endowments within a *flexible transactional network*.
- e. Each citizen, at the moment of his death, can assert that he has fulfilled his obligations of *liberal trusteeship*, passing on to the next generation a power structure no less liberal than the one he himself enjoyed (p. 28).

lutions of different liberal writers will often sound and be similar. Ackerman's book proves no exception.

The Problems of Method

Any theory that relies heavily on an ideal method likely confuses the model's justificatory power with the direct moral justifications for the substantive values supposedly justified by, or derived from, the model. For example, Thomas Nagel has shown that in Rawls' theory, the contract (entered into in the "original position") as a model for a theory of social justice depends on the presumption that it is fair to require citizens to submit to institutions and procedures only if they could have agreed in advance on the principles by which they must be governed.¹¹ More importantly, Nagel argues persuasively that hypothetical contracts, and hypothetical choices generally, have no justificatory power *per se*. A hypothetical contract is simply not a real contract, no matter how attractive the stipulated conditions surrounding it. In the case of the original position, then, it is not the phenomenon of agreement that justifies the principles of justice, but rather the moral power of the values supposedly derived from the original position. One must examine the values embedded in the first principle of liberty, the maximin principle (the lexical ordering of the two principles of justice) to see if they are just and good.

The point is accentuated (as Ackerman himself notes in his discussion of Rawls)(pp. 336-42) when the conditions of agreement are restricted in the Rawlsian fashion—not that these restrictions are not ultimately "good" restrictions, but they are controversial and hence detract from the power of the model *qua* model. The original position's moral bounds are determined by the substantive restrictions on choice: mutual disinterest of the parties, knowledge that they have *some* individual life plan, knowledge of the need and desirability of more rather than fewer primary goods, and a "sense of justice." One can, as Nagel notes, always reap the moral fruits of the original position by simply observing these constraints on political argument.

These points apply equally to Ackerman's model of "constrained conversation." First, we must question the notion that dialogue, as such, provides any justificatory power for Ackerman's thesis. The dialogue, in any case, is always in part a rhetorical device. Although used as a form of philosophical argument, dialogue is, for the vast majority of philosophers, an inferior one (include Ack-

11 Nagel, *Rawls on Justice*, 83 PHIL. REV. 220 (1973).

erman, save Plato). Furthermore, in Ackerman's sense, "dialogue" often does no real work; rather, the conversational *constraints* do the work of the general argument. The neutrality condition emasculates the real force and purpose of Platonic dialogue. Dialogue's potency is depleted in much the same way that the phenomenon of agreement in the original position is hampered by the veil of ignorance. Consider how easy the argument in Book I of *The Republic* might have been for Plato had he proceeded *a la* Ackerman:

SOCRATES: "So tell me, Thrasymachus, what is Justice?"
 THRASYMACHUS: "Justice, Socrates, is nothing but the will of the stronger." GREEK COMMANDER: "Thrasymachus, you have violated a principle (pick one) of constrained conversation. OK, Socrates, now you can have a 'dialogue' with Glaucon." SOC-RATES: "Gee, thanks Commander."

I do not argue that the neutrality constraint is not "good." It simply does nothing for Ackerman's argument to tell the tale in terms of the necessity for dialogue (in either liberal philosophical writing, or, as I argue below, in everyday liberal power plays). At one point Ackerman declares: "For a liberal statesman, the most basic right of any citizen is to have his question of legitimacy answered in a liberal conversation" (p. 308). Granted, a liberal makes the moral claim that an individual has a right to live his life with no unjustified interference from his government. To say that there is also a fundamental right to converse liberally about it with the government adds nothing to that moral claim. Indeed, as Albert Weale argued: "To write a book justifying conversation is odd. If conversation resolves political conflict, should not the rationale of this method be established by conversation itself?"¹² If a citizen has a complaint or if he is confused by an action of the government, or if he has cause to articulate his special circumstance, then indeed he has a basic procedural right to have his question answered by someone and answered in a meaningful way. But the basic right to dialogue described by Ackerman, while important, is not "basic," because it is contingent upon the nonfulfillment of some other substantive right. I shall return to this point.

The Concept of Neutrality

Ackerman vehemently attacks contractarian argument, especially Rawls', by pointing out that it is too easy to manipulate the

¹² Weale, *supra* note 1, at 685.

characteristics of the chooser and of the choice set "to generate any conclusion that suits one's fancy" (p. 340). He argues that if one wanted to establish the right to a given amount of, say, peanut butter, then all one need do is stipulate that the hypothetical chooser would prefer peanut butter to everything else in the world, or that the choice set only permits people to choose between peanut butter and a painful death. Yet Ackerman's preoccupation with Rawls' methodology is not particularly helpful. One can easily accept many of the substantive parts of Rawls' book without accepting the method. One can even endorse the method as a heuristic device to aid in focusing the issues of social justice. The true power of *A Theory of Justice* is in the substantive arguments Rawls gives for equality and autonomy. Ackerman's "peanut butter or death" scenario assumes that others are as hesitant about calling a value a value (freedom—yes, peanut butter—no) as he is.

It is remarkable that Ackerman does not admit that the constraints of neutrality do some powerful non-neutral work for him. Surely the dialogic move "I am as good as you are" is not neutral in a strict sense. It *is* a moral claim. Obviously, there is a special sense in which everyone is as good as everyone else. The root premise of this special sense is something akin to the idea of "basic human worth" as outlined by Gregory Vlastos¹³ some years ago. For Vlastos this value, that a person has worth as a person, can be sharply distinguished from all of that person's meritorious attributes. It is a conception that is at the bottom of any theory based on "equal concern and respect" or non-domination. That one's simply being a person (described by Kant as just having moral agency or autonomy), irrespective of all other questions of merit or status, demands equal concern and respect by one's government is: (1) liberal, (2) controversial, and (3) concerned with a particular conception¹⁴ of moral equality (and not neutrality).

Thus, the dialogic move "I am as good as you are" does not express moral relativity. Some people may still have better values than others. Ackerman often fudges the two claims. Perhaps the

13 Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* (R. Brandt ed. 1962).

14 I follow Professor Dworkin's distinction between a concept and a conception. A conception is more detailed and is peculiarly normative: "When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 135 (1977).

most dramatic example of this tendency is his discussion of liberal education.

Ackerman's analysis of liberal education is both a virtue and a vice of his theory. It represents an admirable attempt to flesh out broader the liberal vision's cultural and educational consequences. Yet for many, including myself, it exemplifies dramatically the most bankrupt aspect of a full-blown theory of neutrality.

For Ackerman, dialogue leads to the conclusion that the liberal state must provide its youth with the intellectual necessities, *i.e.*, an educational basis, for the ultimate choice of values and self-definition. At the higher levels of instruction, this would require "free choice" of curriculum and an abhorrence of "core-requirements." On all levels of instruction, the system must resist merely an extension of the child's "primary culture." Rather, it must "provide the child with access to the wide range of cultural materials that he may find useful in developing his own moral ideals and patterns of life" (p. 155).

This position contains empirical and theoretical problems. As Larry Alexander has commented, "[C]hildren are the Achilles heel of liberalism."¹⁵ Empirically, we must ask the question: "How *do* children learn?" What permutation of forced and free choices really does prepare one for responsible dialogue? It is surely conceivable that "classical education" ultimately develops a more critical capacity than the less guided "do-it-yourself" variety of education. That is, perhaps for a man to arrive at any concept of truth, he must be raised in the belief that he is experiencing truth, and at different stages of his life be allowed to cast off that part of his belief that he finds to be not truth, but shackles.¹⁶

Theoretically, the choice to nurture neutrality in the educational realm is itself a non-neutral choice. This observation is even more acute if the neutrality choice leads to crude forms of materialism in education (who would ever enjoy Henry James the first time they "tried it"?). Ackerman's treatment of education represents one example of his tendency to confuse dialogue *within* a liberal state and dialogue *in favor of* a liberal state.

Ackerman never fully explains what he intends by the conversational move "I am as good as you are." By not confronting this problem, he encounters a dilemma quite similar to one Professor Ronald

¹⁵ Alexander, *supra* note 1, at 855.

¹⁶ See, *e.g.*, PLATO, *supra* note 7 ("Allegory of the Cave").

Dworkin encountered in articulating his theory of liberalism.¹⁷ Dworkin acknowledges that there are two plausible senses in which one might say that a government treats its citizens with "equal concern and respect." One is to suppose that a state must be neutral regarding individual choices of the good. A second possibility, however, is to suppose that government cannot remain neutral on that choice because it cannot treat persons with equal concern and respect *without* a theory of the good. Treating a person as an equal, under this alternative, means treating him in the way a truly good person would want to be treated.

Dworkin ultimately says only that liberal equality endorses the first possibility: a state must remain neutral regarding a theory of good. But any concept of equality capable of justifying either one of these radically opposed interpretations will need to be thoroughly worked out if it is to play the fundamental role it does in Dworkin's theory.¹⁸ Thus, one should only endorse the first interpretation if he can present substantive arguments in its favor. Ackerman's concept of neutrality is subject to the same criticism. Depending upon one's conception of what it *means* to treat X in a way that guarantees that X is being treated "as good as Y," one can envision quite different theories of governmental behavior. To be totally neutral regarding life plans, such a liberal government must respect even those life plans that do *not* respect the fundamental "good as you" premise. The liberal must defend today those who would wipe him from the face of humanity tomorrow (*e.g.*, a Jewish liberal defends the Nazi's right to march in Skokie). It is unimaginable that a basic value—neutrality—could provide an adequate foundation for defining the complex relationship between a liberal citizen and his government.

The Concept of Autonomy

Another peculiar and persistent feature of Ackerman's theory is his attempt to eschew any connection with Kantian philosophy, while at the same time giving paramount importance to the notion of individual autonomy and human dignity.¹⁹ In deriding those liberals who endorse Kantian political philosophy, Ackerman confidently

17 Dworkin, *supra* note 9. For his very recent expansion of his theory of equality, see Dworkin, *What is Equality*, Pts. I & II, 10 PHIL. & PUB. AFFAIRS 185, 283 (1981).

18 See H.L.A. Hart, *Between Utility and Rights*, 70 COLUM. L. REV. 828 (1979), for an extended discussion of this criticism.

19 See I. KANT, *CRITIQUE OF PURE REASON* (1787). For an argument that there would be a political upshot of the distinction, see R.P. WOLFF, *UNDERSTANDING RAWLS* 101 (1977).

observes that such a move “makes liberalism a hostage of a *particular* metaphysical system” (p. 357). “Yet it is the essence of liberalism to deny people the right to declare that their particular metaphysics and epistemology contains the truth, the whole truth, and nothing but the truth” (p. 357).

There are two flaws in Ackerman’s position. First, a confusion arises from his explicit contention that the role of political talk with the liberal state and the role of political talk in defense of the liberal state are perfectly parallel. “The task of *philosophical* conversation is to make it possible for a person to reason his way to Neutrality without declaring that the path he has chosen is intrinsically better than any other route to liberalism” (p. 359). Ackerman here takes the liberal spirit to the point of absurdity. Liberals must maintain that the original structure of liberalism is substantively controversial and requires philosophical justification. The task of liberal political philosophy *is* to reach the political and moral truth—not to shove people in as many diverse, and even bizarre, directions as possible. Philosophical arguments in favor of the liberal state and political arguments within the liberal state are not analogous.

Second, I have difficulty with Ackerman’s belief that accepting Kant’s political philosophy entails accepting Kant’s metaphysics (and so what if it did—would there really be a political upshot of the phenomenon/neomenon distinction?). Any liberal who takes seriously the notion of personal autonomy, and the distinction between the public and private realms, is bound (or doomed) to acknowledge his debt to Kant, as opposed, *e.g.*, to Plato. (Rawls makes an effort to avoid Kant’s metaphysics, but he does not attempt to avoid acknowledging his debt to Kant, notwithstanding the metaphysics.) Why should not the liberal endorse Kant as a starting point if philosophical reflection points in that direction? Why encourage people, just for the liberally-spirited sake of it, to turn away from the well-developed, if controversial, existing framework?

Weale points out an important consequence of Ackerman’s hesitancy to acknowledge any legacy from Kant. Ackerman gives no real argument for the intrinsically important nature of the autonomous choosers whom the principle of neutrality protects. “In effect, this position asks us to attach value simply to the idea of linguistically competent purposive agency, without any consideration of the content of those purposes.”²⁰ Yet, as Weale argues, such an assumption raises the exact problems that Ackerman so critically points to in

20 Weale, *supra* note 1, at 696.

Rawls' theory. Ackerman criticizes the notion of the ahistorical, asocial, autonomous agent, surrounded by a veil of ignorance in the original position. Yet only a similar leap of faith allows Ackerman: (1) to ascribe such an important role to *individual* life plans (a problem of most liberals), and (2) to ascribe such importance to dialogic/linguistic competence—the ability to set forth one's theory of the good (a problem uniquely Ackerman's).

Weale argues—correctly, I think—that one of the reasons neutrality seems so desirable in Ackerman's account is the nature of the alternatives he presents (pp. 361-69)—*i.e.*, they are either overly authoritarian (*e.g.*, the Philosopher-King) or incredibly obscure (*e.g.*, Kant's metaphysics). To pose such a choice is to ignore all of the philosophical and legal work justifying varying *degrees* of paternalism, on the part of society and the state, between these two extremes.

The Concept of Exploitation

When Ackerman makes the transition from the ideal world to "reality," he acknowledges that the statesman must "reckon with the fact that every existing society is scarred by entrenched patterns of domination which resist change, not because of some technological constraint, but because those favored by the *status quo* will fight for their advantages" (p. 240). Ackerman employs a notion of exploitation through which he can acknowledge that groups exploit other groups, and that members of the latter should receive compensation as group members.

Ackerman has made a conceptual advance here, one that the literature regarding affirmative action has not fully appreciated. That is, the notion of neutral dialogue does help focus the issues of injustice and prejudice at a more generic level. Often the question is whether a particular person should be disadvantaged because of harm suffered by another particular person (*e.g.*, the white man who protests affirmative action on the grounds that "*he* had never owned a slave, stoned a school bus or oppressed a woman").²¹ Ackerman's discussion recognizes that individuals will at any given time be part of a number of groups and that perfect individual matches of prejudice/harm/compensation will be hard to achieve. Prescriptively, we should not feel we have to find such matches when historically we know that some groups will be discriminated against *qua* groups.

21 N. Y. Times Magazine, June 15, 1975, at 53.

Ackerman's advance is his sensitivity to the group exploitation issue in the liberal framework of individual rights. He realizes that a framework built on a theory of individualism is still capable of generating diverse forms of moral discourse. Although some would argue that we cannot define possible areas of subjugation without identifying certain individual rights, Ackerman shows that the liberal need not accept this assertion. Individual rights are a certain type of moral claim ("trumps" on collective justifications, in Dworkin's words²²); but they do not necessarily exhaust the liberal's "moral furniture,"²³ and one's reference point need not be solely individual nor solely communal.

It has often been asserted that in some sense every statement about law involves an overt or covert reference to some group. Everyone belongs to one or many communities and has a "complex social personality."²⁴ One's identity can be more or less strongly tied to one or more social groups. Yet, while the notion of a "complex social personality" reflects that we are, in the end, social beings, it does not establish groups as ontologically primordial. Granted, in some historical cases (*e.g.*, redness in American history) one's identity may be almost exclusively tied to a group. Still, even for a Native American, it is inconceivable that every moral claim that an individual makes will arise in terms of his membership in a group. The concept of group and the concept of social being are closely related, but they are not coextensive. Ackerman would allow that in certain contexts a group reference point may be the only sensible and acceptable way of addressing an issue.²⁵ Yet Ackerman can still account for many liberal values (privacy, self-expression) that would seem to have individuals as their primary reference point.

Again, although dialogue helps Ackerman focus these issues, the validity of his points regarding the concept of group exploitation do not depend on the existence of neutral dialogue. Any theory of individual rights can accommodate the same points by simply defining certain moral ground where claims of individual rights or harms have no particular relevance.²⁶

22 R. DWORKIN, *supra* note 14.

23 J. FEINBERG, *SOCIAL PHILOSOPHY* (1973).

24 L. Armour, *Seeing Through the Looking Glass: Groups, Rights and Harm* (unpublished manuscript on file at the University of Montana Philosophy Department).

25 *See, e.g.*, Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFFAIRS* 107 (1976).

26 Another advance in Ackerman's theory is his postulation of the pivotal role of economic justice in liberal theory. In the ideal world, his basic moral card calls for each person to receive an equal share of manna (p. 113). Like Dworkin, he rejects any principle of distri-

Persons and Citizens in the Liberal State

Ackerman makes a number of interesting arguments when considering the concept of citizenship and personhood in the liberal state. For example, his dialogues regarding genetic manipulation (p. 113) lead to the conclusion that a citizen can bring a child into the world only if the child will obtain a quantity of manna "no less than that guaranteed to members of the present generation." Furthermore, potential parents are restricted from bringing genetically dominated beings into the world, *i.e.*, every member of the first generation agreeing that X-genotype is less capable of achieving his favored conception of the good.

Ackerman insists that he has not forgotten the following objection to this procedure: the potential being might prefer simply to exist, "rather than remain a mere conceptual possibility" (p. 116). His response: "If a citizen agrees that B is at a relative disadvantage in pursuing the good, he (the citizen) cannot pretend to be a privileged communicant with the disembodied B and assert that B would nonetheless prefer to be born" (p. 116).

Ackerman's insistence on the dialogic method in this area produces some oddly artificial results. For Ackerman, the only conceivable arguments on this point would be raised by a spiritual communicant, because dialogue entails the need for one who can as-

bution that depends on interpersonal comparisons of welfare that would tell us how much manna each individual would need to fulfill his wants equally. In this context neutrality, for Ackerman, demands equal treatment, not just treatment as an equal. (As Dworkin says, we cannot pretend that a person's preference for Moet Chandon is an infliction, an incurable disease. It is morally irrelevant from the distributional point of view. Dworkin, *supra* note 9, at 129.)

Yet this is one place where the transition from the ideal to reality must be scrutinized closely. What is the political payoff of Ackerman's theoretical distribution? Weale asks us to consider that one important purported virtue of the equal distribution of manna is that it is envy-free. However, once reality is "set in gear" people will begin trading goods in ways that inevitably lead to non-envy-free allocations. "People may trade portions of their initial endowments, and they may envy the commodity bundles of those who have benefited from the general process of trading initial endowments." Weale, *supra* note 1, at 694. Thus, Weale argues that the attraction of the "original equal manna" principle in reality is not as forceful or as encompassing as in ideal theory. Different "commodity bundles" will lead, inevitably, to cases of "unreciprocated envy."

Although Weale's point regarding envy is well taken, Ackerman would surely respond that Weale simply misses the purpose of the original equal distribution principle. Ackerman's goal is not to analyze the emotion of envy. His purpose is to establish the morally relevant features for government to consider in the distribution of goods. He feels that many liberals have not put their money where their mouths are and to do so one must have a *norm of equal distribution*—a moral benchmark which makes such things as merit and ingenuity irrelevant. (All of this is subject, of course, to the point made before—Ackerman never explicitly translates manna into real world terms).

sert the complaint in its own name. Because ghosts do not exist, the assertion cannot be made, and therefore the claims against genetic planning are illegitimate.

Yet this is one point where the dialogic method might conflict with one's intuitions regarding right and wrong (a plus from Ackerman's viewpoint, of course). Surely one can universalize the situation, can put oneself in the other person's shoes, even if that person does not exist. It may be as "realistically" possible for us to do this as it is to put ourselves in the shoes of the Bangladeshi child (foreign, disembodied, unknown). The object of morality may be to view the world from other viewpoints, not necessarily John Doe's viewpoint. It seems quite intelligible, and aliberal, rather than antiliberal, to think that one would prefer to exist with less than not to exist at all.

Of course this is really only a part of Ackerman's general concept of citizenship as depending on "dialogic competence" and "dialogic rights" (pp. 69-85). Ackerman is correct, I think, that citizenship is best understood as a special construct, much like the concept of "person," demanding some degree of intellectual or rational competence. To illustrate his point, Ackerman invents a rational talking ape. Ackerman notes that out of sympathy true citizens may extend the "protective cloak of citizenship" to children and idiots. In contrast, the rational ape may *assert* its citizenship for itself: "The rights of the talking ape are more secure than those of the human vegetable." It is the notion of a rational being here that is doing the work; *for that reason* the apeness aspect becomes irrelevant. Ackerman's theory depends upon one's ability to assert one's rights—a literal forensic aspect. But a rights thesis is not doomed to such artificial consequences. Rights may be ascribed to children, idiots, or whatever we wish—the ascription of rights is a moral and political enterprise, not a process of discovery. Rights are simply one form of moral claim, an abbreviated type of argument, useful moral furniture. It is not an inherent aspect of rights that the *holder* of the right must be able to make the assertion of the right for himself, or itself.

Ackerman's citizenship thesis also overlooks much of the philosophical literature regarding personal identity. It is not clear that the liberal *should* accept Ackerman's claim that the idiot's rights are less secure than the talking ape's. John Mackie, for example, has pointed out that rationality and continuity of mind may not really be what is at work when we call something a person. Rather, for us, *homo sapiens* are the "objects of biologically determined and psychologically rein-

forced concern."²⁷ This is not to say that a talking ape would not present us with something "just as good"; but we would need further conceptual reform to extend personal identity to cover this beast.

Even if our concern extends to children and idiots only out of loyalty or courtesy to the species, it is not thereby less morally relevant. Ackerman's emphasis on dialogue, and on the ability to assert one's claims, leaves much of moral discourse curiously bankrupt.

Conclusion

Social Justice in the Liberal State is an engaging work; it merits close scrutiny by legal philosophers and by lawyers. It is a fun book. The dialogues constructed by Ackerman are amusing and witty. To be sure, one of the attractions of legal scholarship should be that it produces pleasure.²⁸ Ackerman's book certainly accomplishes that goal.

And yet, students of liberalism may have an uneasy feeling when they finish the book. Liberalism is under attack from all sides. A defense of liberalism must be as lucid as possible, unencumbered by any excess conceptual baggage. I have argued that Ackerman's method, "neutral dialogue," is generally superfluous to the many moral arguments embedded in the book. To this extent, the use of the dialogic device is sophistic and should not be endorsed as a defining component of liberal theory. The device should be discarded.

There are no acceptable unitary theories of liberalism—no single "deep value" or generating theories that satisfactorily and consistently account for all the values that liberals have historically respected and protected. Ackerman's attempt to generate a unitary theory of liberalism based on the concept of neutral dialogue is thus misguided. It must fail because Ackerman does not acknowledge: (1) that his task, as a liberal, is morally controversial, and (2) that a theoretically consistent and tidy account of all forms of liberalism is impossible. Indeed, it may well be that:

As things now stand, everything is up for grabs. Nevertheless: Napalming babies is bad. Starving the poor is wicked. Buying and selling each other is depraved. Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation. Those who acquiesced deserve to be damned. There is in the world such a thing as evil.²⁹

27 J. Mackie, *Personal Identity*, in PROBLEMS FROM JOHN LOCKE (1976).

28 See Leff, *Afterwork*, 90 YALE L.J. 1296 (1981).

29 Leff, *Unspeakeable Ethics, Unnatural Law*, DUKE L.J. 1229, 1249 (1979).

Discrete islands of moral truth in a sea of political controversy—these remain the ultimate landmarks against which any political philosophy's success must be measured. All liberals must be sensitive to this challenge.

