

1983

The Watchdog of Neutrality

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Recommended Citation

George P. Fletcher, *The Watchdog of Neutrality*, 83 COLUM. L. REV. 2099 (1983).
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BOOKS

The Watchdog of Neutrality

SOCIAL JUSTICE IN THE LIBERAL STATE. By Bruce Ackerman. New Haven: Yale University Press, 1980. Pp. 392. \$17.50.

*Reviewed by George P. Fletcher**

No one knows who counts as a democrat, as a fascist, or as a liberal. It is much easier to know whether it is good or bad to earn one of these political labels. Virtually everyone—including repressive regimes in eastern Europe—regards it as good to be democratic. These days, however, it is hard to encounter a sympathetic wink for fascism. Liberalism is more controversial. A growing number of our colleagues in law schools now regard it as intellectually bankrupt, if not worse, to think of oneself as a liberal. Respectable philosophers chronicle the poverty of liberalism,¹ yet argue that poor as it might be, liberal thought remains rich in unbridgeable rifts called “antinomies.”² Now comes Bruce Ackerman with his redoubtable energy and analytic acumen bent on upholding an undefined liberal tradition. *Social Justice in the Liberal State* attempts primarily to prove that at least one coherent, intellectually respectable form of liberal thought survives—namely Ackerman’s.

It is difficult to assess whether Ackerman’s arguments, even if sound, vindicate the liberal tradition. We should first need an historical analysis of the many strands in that tradition. We should have to understand, for example, the difference between nineteenth-century liberals, who stressed the primacy of liberty and a laissez-faire economy, and twentieth-century liberals, who favor redistribution of wealth and governmental regulation of the market. We should have to decide whether liberalism is primarily a doctrine of method,³ expressing openness toward change, or a doctrine of substance, linked to contemporary “liberal” views such as opposition to the death penalty. Ackerman does none of these things. Rather, his analysis of liberalism is limited to assessing two supposedly major strains in the liberal tradition: utilitarian moral theory and contractarian political theory. In postulating these two lines of thought as liberal, Ackerman hardly assists us in accepting his own views—consistently distinguished from the other two—as a vindication of liberalism.

The strength of Ackerman’s work lies not in his account of liberalism, but in his innovative philosophical method and in his substantive proposals for the just distribution of resources. At the level of method, his innovation consists in the faith that dialogue—disputes about the justice of holdings—can, by itself, generate compelling principles of justice. It is hard to imagine

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1. See, e.g., R. Wolff, *The Poverty of Liberalism* (1968).

2. See R. Unger, *Knowledge and Politics* 6 (1976).

3. Ackerman seems attached to these methodological values, as evidenced by his emphasis on inculcating a critical posture toward authority as the aim of liberal education (pp. 159–63).

how mere talk could yield principles that we would accept as just. The system of private law exists precisely because talk between the parties so rarely proves adequate to the task of doing justice. Accordingly, Ackerman significantly limits the kind of reasons that his hypothetical characters may offer to vindicate their positions of relative advantage. The principle of Neutrality banishes all arguments that appeal to either (1) an allegedly superior conception of the good, or (2) the alleged superiority of the claimant (p. 11). Under this constraint on content, as well as under the formal constraints of consistency (p. 7), completeness (p. 35) and comprehensiveness (p. 42), Ackerman's characters argue about the justice of their positions in the distribution of wealth and power.

The outcomes of these hypothetical dialogues constitute a set of substantive principles of justice. At their core, these principles hold that all wealth and advantage should be distributed equally. Thus the structure of Ackerman's work closely resembles Rawls's classic work on justice.⁴ The analogue to Rawls's original position⁵ is Ackerman's system of dialogue constrained by the principle of Neutrality. The analogue to Rawls's two principles of justice⁶ is a complex set of propositions interwoven with a core commitment to egalitarian distribution.⁷

In reviewing Ackerman's argument and his conclusions, we confront a problem of priority. Does the thrust of the book lie in advocating neutral dialogue as a philosophical method or does it lie in claiming equal distribution as the foundation of a just society? On the one hand, Ackerman invests more in the method of neutral conversation than does Rawls in the thought-experiment of the original position. Ackerman has a vision of a society in which a consensus on criteria of justice emerges from actual people actually talking to each other, not from a hypothetical conversation of disembodied spirits, as in Rawls's original position.⁸ The vision draws on the anarchistic dream of adjudication without judges; a world in which a shared commitment to reason leads to harmony without coercion.

On the other hand, we have to assess the method not as a general aspiration, but as a technique for vindicating the specific claims of justice that dominate the book. Therefore, this Review begins with a detailed statement of these substantive claims. It then turns to an assessment of neutral dialogue as a means for persuading us that these claims are right. Finally, it exposes some specific shortcomings that compromise Ackerman's system for pursuing a just society.

4. J. Rawls, *A Theory of Justice* (1971).

5. *Id.* at 17.

6. *Id.* at 60, 302.

7. See the exposition *infra* Part II.

8. P. 135 ("Can we really talk sensibly of the preferences of a *disembodied* 'contractor' as he picks and chooses.") (emphasis in original).

I. THE SUBSTANTIVE CLAIMS OF JUSTICE

Ackerman's neutral dialogues repeatedly conclude that a just society would distribute resources equally to all citizens. This formula requires specification of at least three variables: (1) what are the "resources" to be distributed, (2) what is an "equal distribution," and (3) who are the "citizens" entitled to an equal share.

Clarifying the range of "resources" to be distributed poses more difficulties than Ackerman concedes. His discussion focuses generally on the distribution of a hypothetical substance, called manna, that has some remarkable properties. Manna comes in infinitely divisible grains that can apparently be transformed effortlessly into any material object one desires (pp. 24, 31). However, resources other than manna and material objects also call for distribution. Ackerman's notion of "resources" includes any position of advantage that someone else might desire. The list includes "genetic abilities" (p. 4), "education" (p. 4), and even the right to use one's own body (p. 15).

Ackerman claims that these resources should be distributed equally. Manna serves as a good vehicle for illustrating the correct distribution, for one can suppose that everyone gets the same number of grains. There are, of course, competing criteria of equal distribution, such as equivalent subjective satisfaction or equivalent progress toward a shared goal. Rejecting these alternatives, Ackerman stands squarely in favor of equal material distribution (pp. 49-59). Problems arise, however, in applying the principle of material distribution to incorporeal rights, such as the right to privacy.⁹ Ackerman never addresses the problem of evaluating these rights so as to gauge the amount (or number?) that each citizen should receive.

The radical sweep of Ackerman's equalitarianism emerges in his claim that both temporal and spatial priority should be irrelevant in determining the distribution of manna. First, each generation is entitled to begin with as much manna as held by prior generations (p. 204). It follows that each generation must hold its initial endowment in trusteeship for its descendants (pp. 202-06). Second, those in close physical proximity to the manna are entitled to no more than those far away from it. Rich nations therefore have a problem explaining why they should not share everything they have with poor nations (pp. 93-94). However, those who are born genetically disadvantaged are entitled to a greater share as compensation for suffering "genetic domination" (p. 130). The basic principle is clear: no one is entitled to a greater share than anyone else unless he or she suffers an undisputed genetic disadvantage, in which case a greater share serves the purpose of equal distribution.

Who is entitled to share in this equal distribution? All citizens of the liberal state, Ackerman tells us. This sounds simple enough, but in fact the notion of citizenship proves to be a powerful lever for shifting Ackerman's system in the direction of some surprising results. Citizenship requires two

9. See the analysis of abortion rights *infra* Part III.

conditions—one a feature of human development and the other, a feature of social cooperation. Citizens must be capable of posing questions about the legitimacy of other people's holdings (pp. 74–75). Accordingly, children below the age of five are at least presumptively not citizens (pp. 96, 141, 146). More surprising implications derive from Ackerman's second, "behavioral" requirement of citizenship. Respecting the rights (power holdings) of others is a necessary condition of citizenship; those who violate or threaten to violate the rights of others lose their citizenship (p. 85). Criminal convictions function as a form of expatriation. As we shall see, this conception of the criminal law makes sense only if understood as a strategic necessity within Ackerman's system of argument.¹⁰

The commitment to equality also motivates a number of other features of Ackerman's system. First, in discussing the foundations of democracy, Ackerman reluctantly comes to the conclusion that democracy has no superiority over a system of decision-making based on the arbitrary, blind selection of one ballot that is treated as decisive (pp. 276–77, 288–89). It is hard to imagine anyone seriously entertaining the latter method for solving political problems. Imagine trying to decide the level and composition of the public budget by asking every citizen to write down his ideal budget, putting all the proposals in a large bin and picking one of them as the budget of the government. However unconventional, the latter system has the advantage of securing an equal chance to all citizens that their wishes will prevail. Democracy disfavors those who, because of their views, are likely to end up in the minority. A radical commitment to equality gives every deviant an equal chance to prevail over everyone else.

A second aspect of Ackerman's egalitarian instincts surfaces in his discussion of the extent to which we should protect an irreplaceable resource such as the Grand Canyon. Ackerman imagines a dispute between conservationists and those seeking to mine the Canyon's resources at the expense of its beauty. Given no alternative sources of grandeur and of energy, only one solution is possible: split the difference (pp. 212–16). Let both sides win by guaranteeing some conservation and permitting some mining; each side gains an equal share of its desired outcome (p. 216).¹¹

In addition to these particular positions, Ackerman takes a number of stands that do not relate in any obvious way to his central concern with egalitarianism. He endorses a range of contemporary "liberal" rights, such as rights to use contraception (p. 126), to engage in private, consensual sexual behavior (p. 179), and to engage in behavior that some people might dislike, such as forming nudist colonies (pp. 193–94). His positions on abortion (pp. 127–28) and infanticide (pp. 128–29) seem to be more ambivalent. His views on private property (pp. 186–90) and the free market (p. 264) are noncommit-

10. See the analysis of punishment *infra* Part VI.

11. In referring to "Solomonic instincts" (p. 216), I assume that Ackerman means that one should actually split the difference, rather than threaten to split the difference in order to determine which side cares more about the Grand Canyon.

tal; in the ideal world of frictionless transactions, Ackerman can see no particular egalitarian advantage of private property over collective ownership (p. 173).

II. META-THEORIES

Ackerman stops short of unreserved commitment to equal distribution of all resources. As we all know, the virtues of equality conflict with other cherished values, such as liberty and the public welfare. Ackerman copes with these conflicts by weaving in an implicit set of meta-rules for determining when the principle of equal distribution should prevail. These meta-rules turn out to be philosophically rich, for it is only when we seek accommodations between equality and other values that serious problems engage us.

The conflict between equality and liberty arises in two forms. First, why should the majority in a democratic society not have the liberty to pass whatever laws it chooses, even at the expense of equal distribution. Although Ackerman never argues conclusively for majority rule over a democratic lottery (p. 289), much of the book proceeds as though majority rule is the appropriate means for resolving disputes still pending after applying the principle of equal distribution.¹² The first implicit meta-rule, then, is this: if the matter at stake is a resource covered by the mandate of equal distribution, the substantive rule of equality applies; if the matter is not a resource, the majority is free to regulate it as it sees fit. Whether this rule is a sensible and fair way of restricting the power of the majority depends, of course, on the concept of resources. As we shall see, Ackerman has failed to generate a concept of resources suited to the weight it must carry under his meta-rule.

Second, why should individuals not have the right to give or bequeath their assets to whomever they choose, even if the transfers make some people better off than others? Ackerman's second meta-rule holds that the principle of equality should prevail over an important liberty, namely the right to transfer one's wealth to particular members of the next generation. Unrestrained testamentary freedom generates inequalities in succeeding generations. Therefore, Ackerman concludes that equality should prevail over this species of liberty. He struggles, however, to give due sway to the freedom of each individual to use his resources as he sees fit.

The conflict between equality and testamentary freedom thus generates the following set of subtly interrelated principles:

As between the hypothetical personalities, rich Elder and poor Junior:

1. Elder holds his initial allotment of resources in trusteeship for the succeeding generation (pp. 202-04). His right to have children is limited by the extent of his resources (p. 113). He must be in a position to bequeath to each child the quantity of resources with which he himself started.

12. See the discussion of sadistic abortion at p. 128.

2. Subject to the trustee obligation mentioned above, Elder may destroy any or all of his resources (pp. 60-61).

3. Elder can "work" or "invest" his resources so as to increase his holdings. He is entitled to keep the return on his labor or investment (p. 204).

4. Elder can enter into a contract with Junior, according to which Junior performs services, earns money, and thereby increases his holdings relative to his contemporaries (pp. 208-09). The contract is valid regardless of whether Junior is Elder's child.¹³

5. Subject to the trustee obligations specified in the first proposition, Elder may make a gift of any amount to any one of his contemporaries (p. 201).¹⁴

6. Elder may not make a gift to Junior, if the gift is motivated simply by parental loyalty (*id.*).¹⁵ Elder may make a gift to Junior if it is motivated by affection.¹⁶ Gifts include testamentary bequests.

The sixth proposition turns on a subtle distinction between parental loyalty and affection. Yet it is not easy to work out a rigorous system of equal distribution and at the same time allow people to make gifts of the resources that exceed their trusteeship obligations. The tension in Ackerman's complicated system derives from his problematic stand in the third proposition. It is not self-evident that in an egalitarian society individuals should be entitled to the return on their labor or investment. Ackerman's stand on this question proves to be more vulnerable than he apparently realizes. The third proposition represents the critical turn that generates the casuistry in the sixth proposition.

The meta-rule arising from the conflict between equality and the public welfare is much harder to state. The argument recurs frequently to "second-best solutions" justifying inegalitarian distributions that serve the public interest.¹⁷ For example, restricting immigration from poor countries to rich countries is justified, as the second-best solution, by the necessity of preserving the "liberal state": too many poor, improperly educated immigrants would apparently threaten Ackerman's ideal polity (p. 94). Similarly, if everyone in the polity would benefit from providing special incentives to a selected few, the appeal to the "general advantage" justifies the inegalitarian regime (p. 258). Sometimes the appeal to the general advantage requires the explicit consent of

13. It is critical, however, that Junior not exploit his preexisting relationship with Elder (pp. 210-11). This would presumably not be the case if Junior's offer were the best that Elder received (pp. 184-85).

14. There is no objection in the dialogue to the asserted right to lavish gifts on "some complete stranger."

15. Parental loyalty creates "preferential access," which apparently violates the principle of equality.

16. This would be a case in which Elder "would have chosen [Junior] anyway" (p. 201). We do have to assume that Elder's affection is personal; it is not a consequence solely of the parent-child relationship.

17. Ackerman introduces the notion of "second-best" solutions as the proper response to the imperfections of technology in the real world (pp. 21-24, 232). Occasionally, however, he uses the term to refer to the consequences of an imperfect theory, e.g., the conflict between principles of equality and transactional freedom (p. 212).

those who receive the smaller share (p. 206); at other times hypothetical consent appears to be sufficient (pp. 260–61). The second-best solution serves as a way of delineating the arena in which anti-egalitarian values hold sway. In the ideal world, these considerations would never justify departures from the ideal of equal distribution; in the complicated real world, anti-egalitarian politics survives.

III. RESOURCES AND THE RIGHTS OF THE MAJORITY

As we noted earlier, Ackerman seeks an accommodation between equality and majority rule by holding that all resources must be distributed equally—regardless of the majority's preferences. The problem is whether he has a definition of resources that can account for this restriction of the majority's power.

Ackerman's definition proves to be looser than one would want. "Any resource will do," he tells us (p. 15). Apparently, 'any resource' includes anything you have that someone else might want. But that elastic notion includes your children, your lover, both of your eyes, your hair, your personal secrets—the list goes on and on. According to Ackerman, having these things represents power over scarce resources. Since others may desire them and challenge the legitimacy of your having them, you are required to justify your position of relative advantage.

Ackerman's exposition fluctuates between treating resources as materially defined—witness the reliance on manna as the paradigm—and expanding the notion to include anything that someone else might desire. If the relevant objects of desire were limited to material things, there need not be conflict between these two approaches. Yet Ackerman concedes that "your right to use your own body" (p. 15) counts as a resource. Though your body is material, using your body is not. Rights to use things should be treated no differently from rights to the things themselves. And as any modern property lawyer would tell us, the right to anything consists in no more than a bundle of rights to use it in particular ways.

The uncertainty in Ackerman's thinking about resources surfaces in his intricate stand on abortion. He holds that the majority has the right either to permit or prohibit sadistic abortions (p. 128), but in two other types of abortions he takes a stand that removes the matter from the majority's jurisdiction. If the abortion functions as a second-chance at birth control, then, apparently, the majority cannot justify its prohibition (p. 127), but if the abortion functions as a means of genetic engineering, it violates the liberal principle favoring random genetic distribution and the majority cannot permit the abortion (p. 128). Thus, there are three possibilities: (1) majority decision, (2) required tolerance, and (3) required prohibition. Whether the abortion falls into one category or another seems to turn exclusively on the motive of the person seeking the abortion.¹⁸

18. Compare the unexpectedly decisive role of the actor's motive in the sixth proposition on the relationship of equality to liberty, *supra* text accompanying notes 15–16.

This gerrymandering of the issues leaves one confused. The first question should be whether the fetus is a resource covered by the mandate of equal distribution. If it is a resource, the problem of distribution would be solved if we held that the fetus belongs to its natural parents or, more simply, to its mother. If the latter were the case, we would be hard-pressed, at least under Ackerman's system, to avoid recognizing the mother's right to abort—for whatever reason. After all, individuals have the right to destroy their share of manna, even for the most ignoble of motives (p. 61). Why should destroying the fetus be treated differently?

If the fetus belongs, as a resource, to both natural parents, then we encounter problems of a different order. In the case of disagreement between the mother and father about the future of the embryo, how would Ackerman apply the mandate of equal distribution? Rights to control the future of a resource simply do not lend themselves to quantitative assessment and equal distribution. Only material objects can be so easily dissected and distributed.

If the fetus is not a resource, it would follow that the majority should decide its fate. But under Ackerman's analysis, whether it is a resource depends on the motive of the person seeking the abortion. In assessing the workability of Ackerman's system, we are led to the conclusion that his principles have yet to receive the fine tuning that coherent, workable principles require.

IV. EQUALITY AND NEUTRALITY

Let us concentrate on Ackerman's core proposition advocating the equal distribution of material resources. How could one argue for this claim? It is to Ackerman's credit that he eschews three techniques of argument that are all too common these days in the literature of political philosophy:

A. *An appeal to intuition.* Ackerman distances himself from Rawls's technique of bringing particular solutions into line with general propositions and concluding from the overall consistency of the propositions that a good case has been made.¹⁹ Intuition and reflective equilibrium are not enough (pp. 352-53).

B. *An appeal to self-evidence.* Ackerman distances himself from Nozick's technique of positing basic rights and building a theory on the assumption that these rights are sacrosanct.²⁰

C. *An appeal to conceptual implication.* Ackerman tries to reject the range of unilluminating arguments that rest on the supposed conceptual content of the premises. He minimizes the argument that a liberal must be committed to an egalitarian solution, for that is "the nature of liberalism" (p. 351). The value of liberalism is open to the same scrutiny and requires the same argumentative analysis as the particular substantive proposals (p. 4). Ackerman's

19. J. Rawls, *supra* note 4, at 20-21.

20. R. Nozick, *Anarchy, State and Utopia* ix (1974) (basic rights posited).

conclusions do not rely simply on the premise that the book is about the liberal state.

What, then, is the argument? The critical premise is that dialogue itself will prove sufficient to legitimate or delegitimize any random set of holdings. Talk, by itself, will lead to the truth. The great advantage of this approach, Ackerman claims, is that it is rooted in a concrete life process, not in an appeal to hypothetical utility-maximizing observers or to hypothetical parties contracting in the original position (p. 327).

People have been talking to each other for a long time and, alas, there is still no acknowledged truth, no consensus, about when someone's holdings are legitimate. In order for dialogue to have the effect that Ackerman desires, he must channel discourse toward results he is willing to accept. He accomplishes this by introducing the principle of Neutrality, which tunes out all arguments asserting (a) "that [one's] conception of the good is better than that asserted by any of [one's] fellow citizens or (b) that, regardless of [one's] conception of the good, [one] is intrinsically superior to [one's] fellow citizens" (p. 11). If the antennae of discourse are so truncated, do they receive any signals worth hearing?

To explore the constraints imposed by Neutrality, let us examine its application to a range of possible justificatory claims. Suppose two people simultaneously come upon a chain lying on the beach; there is no way to locate the owner. What could the two finders say on behalf of an allegedly exclusive right to the chain? Here are some of Ackerman's conversational gambits and some of my own:

1. The chain looks better on me.
2. The chain would make me happier than it would you.
3. I am smarter, better, more attractive, etc. than you, and therefore I deserve the chain.
4. I am poorer than you, and therefore I deserve the chain.

The first two arguments are utilitarian claims about the impact of the chain's allocation on the happiness of the people affected. The first argument is directed to the happiness of those who would look at the chain as it adorns someone's neck; the second, to the happiness of the person wearing it. Neither argument meets the test of Neutrality, for both assert a conception of the good, namely that it is good to maximize the happiness of those affected by one's decision (p. 49).

The third argument offends Neutrality more blatantly, for it asserts a theory of desert based on the intrinsic merit of one of the parties. It is easy to agree with Ackerman that a just system of allocation would not gear itself to criteria of the general superiority of one of the claimants. So much for the easy cases.

The claim of relative poverty exposes a difficulty within Ackerman's system, for if we were distributing all the goods of the world *ab initio*, we would presumably strive for equal distribution. In the process of distribution,

we should want to keep tabs on who has more and who has less: we would direct the distributive spout toward those who have less. But is the same claim of relative poverty significant in allocating every lost chain that turns up on the beach? Or does the assertion of poverty in this context violate the dictates of Neutrality? After all, the premise backing up the claim is that it is *good* to reduce inequalities in wealth.

For reasons never quite made explicit, Ackerman never discusses arguments, such as the appeal to poverty, that trade on events leading up to the dialogue in question. He considers only the allocation of resources at the beginning of time. In this hypothetical dialogue occurring at a nonexistent moment of time, the past has yet to occur. Ackerman's orientation leads him to overlook a whole range of arguments, based generally on desert, that in fact shape our dialogues of legitimation. Of these arguments, there will be more later.

For now we should concentrate on the question whether, even at the hypothetical stage of initial distribution, any argument could slip by the Watchdog of Neutrality. Acknowledging that his "real life" dialogue would be severely limited, Ackerman claims that one argument would qualify as neutral. Each party could maintain, "I am at least as good as you are" (p. 56). This claim is neutral for it does not assert a conception of the good or of intrinsic merit; it merely denies the superior, intrinsic merit of other claimants.

In our case of the disputed chain, no clear result follows from each party's claiming that she is as good as the other. For Ackerman, the result should be equal distribution of the disputed resource (pp. 56-58). But why should this result follow? Why does the chain have to be allocated at all? Why should the two parties or indeed the whole society not hold it in common? Or why not simply leave it where it is? The problem for Ackerman is explaining how the premise "I am at least as good as you are" yields the conclusion, "I am entitled to half."

A simple interpretation of Ackerman's argument for equal distribution reduces it to a claim to equal entitlement based on equal intrinsic merit. It goes like this:

1. We two are entitled to the chain because we found it.
2. We are intrinsically equal.
3. Therefore, we are each entitled to half.

Let us not be troubled for the moment that the first premise admits the relevance of the past. Assume that we are still in Ackerman's favored posture of distributing at the beginning of time, T_0 .

A problem arises with the premise of intrinsic equality and the implicit assumption that if two people are equal, each is entitled to half. This claim violates Neutrality for it stands, boldly, for a conception of the good. It asserts that it is good to distribute material goods in shares proportional to intrinsic merit.

In order to have a chance of passing through the filter of Neutrality, the argument has to be rendered more subtle. Ackerman stresses the qualification

“at least as good as” for he does not wish his claimants to be asserting their intrinsic merit, but merely denying the superior merit of their opponents. The argument, then, takes on this structure (pp. 55–58):

1. You are not entitled to claim that you are better than I am.
2. Therefore, for all practical purposes, you are no better than I am.
3. The chain must be distributed to one of us.
4. You are entitled to no more than I.
5. Therefore, I am entitled to half.

This argument also reeks of conceptions of the good. First, it assumes that it is good for newly discovered resources to be distributed rather than left in their natural state.²¹ Second, it adopts the background premise that distribution should occur according to established merit. Nonetheless, Ackerman accepts this mode of argument as the paradigm of neutral discourse. To do so, he must obviously suppress the evaluative dimensions of the argument. He does this, it seems, with a few deft expository moves. He treats the good of distribution not as an assertion of the good, but as a background assumption of the dialogue. And he would deny that distributive shares are measured by merit. It is rather that distribution occurs equally, *faute de mieux*. Any unequal distribution would testify to some party’s deserving more. Since the unequal distribution could not be justified in a neutral dialogue, the only thing left to do is to give everyone an equal share.

Ackerman’s case for equal distribution turns, in the final analysis, on his subtle manipulation of the burden of persuasion. If the burden lies on the party claiming an equal share, he can carry that burden only by establishing a foundation for the claim that would invariably violate Neutrality. If the claimant can shift the burden to the party favoring an unequal distribution, he can sit back and wait until his opponent speaks. Since the opponent cannot say anything relevant without violating Neutrality, the claimant will win his equal share. This manipulation is illustrated in the central dialogue between Manic and Depressive (pp. 55–58), in which Manic, claiming an equal share, manages to shift the burden of argument to Depressive to establish that Manic is not so entitled. Of course, Depressive cannot meet that burden, and therefore, with the seeming imprimatur of Neutrality, the outcome favors equal distribution.

The ruse, of course, is shifting the burden. Ackerman’s arbiter, “Commander,” grounds the shift on what appears to be Manic’s *prima facie* case of actually being equal to Depressive (“I *am* a person with a conception of the good”) (p. 55). We will turn later to that argument for equality; for now we should note Ackerman’s ingenuity in structuring his dialogues so that, with a

21. Ackerman simply assumed that the newly discovered manna will be distributed (pp. 31–34).

subtle shift in the burden of argument, the outcome supports his commitment to the rule of equal distribution.

Yet if everything turns on the burden of argument, the Watchdog of Neutrality should also be on guard against nonneutral arguments that induce a shift in the burden. If a claim of equality and equal entitlement would stand for a conception of the good, then so should a *prima facie* argument of equality designed merely to shift a hopeless burden of argument to one's opponent.

Ackerman lets the argument of *prima facie* equality slip by. Indeed he has to, for too much rigor at this juncture would have ruled out his technique for establishing equal distribution as the only permissible, neutral outcome.

V. TRUNCATED DISCOURSE

Ackerman's numerous scripts suggest that in the liberal utopia, competing claimants enjoy a rich conversational life. Yet the assumptions that generate Ackerman's substantive conclusions severely limit the range of acceptable argument. Just as the principle of Neutrality eliminates all claims of the good and of intrinsic merit, Ackerman's preference for timing his hypothetical dialogues filters out all arguments that turn on the past deeds of the claimants. To understand the latter restriction, let us imagine an actual dispute in which Challenger seeks to undermine Powerful's claim to the gold chain he already possesses. In response to the challenge, Powerful might rely on any of these conventional gambits:

1. I bought the chain and therefore it is mine.
2. I found it; I tried to locate the owner but could not, and therefore it is mine.
3. I did some work for a jeweler who gave me this chain as compensation.
4. I made it myself from a piece of gold (the gold itself might have been acquired by purchase, finding or compensation).

All these arguments refer to Powerful's past deeds. The process by which Powerful came into possession of the chain provides the grounds for testing the legitimacy of his having it.

Ackerman ignores all arguments based on past doings and claims of desert. He fails to defend his silence on these issues. Instead, he has a strategy for defining problems that renders past acts seemingly irrelevant. His focus is on the discovery of "a new world" and the allocation of a fresh supply of material goods (pp. 31-34). It is this allocation of new goods, and not the vindication of holdings already acquired, which provides the stage for discourse. With the script so conceived, the problem of desert based on past deeds never makes an entrance.

Although Ackerman never discusses questions of desert, his arguments use desert as an implicit criterion for legitimating distribution. He is committed, for example, to the principle: as you work, so shall you reap. How else could we explain his accepting the controversial proposition: if you work or invest your grain of manna and thereby turn it into five grains, you are

entitled to keep the incremental gain? He is also committed to the principle that voluntary transactions create entitlements to the things received. Relying on the latter principle, he regards the fruits of voluntary exchange as beyond the range of delegitimizing challenges (pp. 184–86).

Ackerman's ambivalence about desert reflects his failure to keep distinct the problem of initial allocation at time T_0 and the problem of justifying holdings at some subsequent time, T_n . He has endeavored to write a book in which the world is constantly created anew, a world in which we think prospectively, not retrospectively. The ideal case is the discovery of a new planet; the setting up of a new society. The past never restrains our efforts rationally to approach the future. Yet, in the end, the effort to banish the past generates its own contradictions. There is no way to legitimate an act without conceding that after the act occurs, the past becomes relevant in legitimating a new pattern of distribution. Take, for example, Ackerman's view that everyone is entitled to destroy his share of manna (p. 61). If the moment after destruction were conceived of as T_0 , the destroyer would be entitled to complain of his inequality. He would be in the proverbial position of the defendant who murders his mother and father and then begs for mercy as an orphan.

Whatever the paradoxes of his approach, Ackerman remains steadfast in his efforts to ignore the effects of past acts in justifying present holdings. As a result, other important distinctions remain suppressed. The architectonic distinction between distributive and corrective justice never receives its due. Corrective justice functions entirely *ex post*, as a response to acts in the past. Therefore, given Ackerman's bias toward prospective thinking, this critical distinction goes unmentioned.

VI. NEGATIVE DESERT

Prior actions, such as buying, finding, earning, and making, traditionally generate bases for vindicating one's present holdings or claims of positive desert. Of equal importance are claims of negative desert, which, as we conventionally regard these matters, justify imposing undesired sanctions against those who deserve them. In light of his preference for thinking prospectively rather than retrospectively, Ackerman avoids issues of negative as well as positive desert.

Yet he addresses two arenas of human conflict in which the justification of sanctions seems to call, undeniably, for criteria of negative desert. The first is child abuse (pp. 143–46). Should parents lose their children if their child-rearing offends both the goals of the state and the interest of the child? The second is criminal punishment (pp. 83–85). If an individual engages in violent, criminal acts, should he suffer a loss of liberty?

One would expect considerations of desert to figure prominently in discussions of whether parents should lose custody of their children. Unless, by virtue of their conduct, the parents have forfeited their rights and no longer deserve their children, the state conventionally has no basis for intervention. For Ackerman, however, the analysis of child abuse turns exclusively on whether the parents are adequately preparing their children for life in the

liberal state. If parents mistreat their children to the point that they are not likely to become articulate, questioning citizens of the liberal state, then apparently the state can intervene (p. 145). This argument ignores forms of abuse that have no bearing on the citizen's capacity to engage in neutral dialogue. For parents who merely maim or torture their children, Ackerman needs a different mode of argument for dealing with the conflict between the parents' presumptive rights and the interests of the children. In a limited range of cases, however, Ackerman's prospective rationale—namely insuring that children grow into effective citizens of the liberal state—proves to be coherent and consistent.

The institution of criminal punishment does not lend itself so readily to reformulation as a forward-looking means for achieving the state's interest. Retribution requires that punishment fit the crime—an event in the past—rather than some prospective goal of social control. Ackerman, however, manages deftly to redefine the criminal law so that it merges with the rules defining the future obligations of citizens. Only those people who are committed to the peaceful relationships of discourse and voluntary exchange that constitute the core of liberal social life count as citizens (p. 85). Individuals who threaten harm against others fail this test and therefore do not qualify as citizens. For Ackerman, the criminal trial reduces to an inquiry whether the defendant was, is, and should be a citizen of the liberal polity.

Ackerman's analysis addresses the issue of preventive detention rather than criminal punishment. The rationale for restricting someone's freedom is not past criminality, but the prediction of future crime. In Ackerman's utopia, for example, the spouse-murderer who showed no signs of danger to anyone else would not be sanctioned. Only those who threatened harm would be deprived of their liberty.

Reducing the criminal law to a system of preventive detention runs afoul of Ackerman's commitment to equality. Should individuals be able to commit crimes and escape punishment simply because their prognosis for the future is good? The imperative of retributive punishment has its roots in the principle that no one should arrogate to himself the material or psychic benefit of committing crime.²² Restoring the balance of benefits and burdens requires that those who do arrogate this psychic benefit to themselves suffer a sanction that restores the equal distribution of benefits and burdens. Thus, a rigorous commitment to equal distribution should lead a theorist to a recognition of desert and retributive punishment in a full theory of justice.

Another serious difficulty attends Ackerman's effort to fit the institution of criminal punishment within his criteria of citizenship. What follows from a declaration that someone is not a citizen? I take it that he or she would no longer enjoy rights under the principle that all resources should be equally distributed. Conviction for a crime—or, strictly speaking, of the threat that one might commit a crime in the future—entails the loss, then, of all rights the individual might enjoy in the liberal state. Convicted criminals cannot claim

22. H. Morris, *Persons and Punishment*, in *On Guilt and Innocence* 31, 34 (1971).

their equal share of *anything*. That is a heavy price to pay for threatening to inflict a minor harm on a fellow citizen.²³

The point is that Ackerman's approach to the criminal law ignores the justice of proportional punishment. Citizenship, I assume, does not come in degrees. One either has it or not. Yet a just sanctioning system must respond to the degree of the criminal's wrong, already committed, or in Ackerman's forward-looking scheme, to the wrong threatened in the future. The most Ackerman concedes to the principle of proportionality is that the state must employ the least restrictive alternative that will eliminate "undue risks of illegitimate aggression" (p. 86). Once the threshold of "undue risk" is crossed, however, the state can do whatever is necessary to prevent the anticipated aggression. Suppose that the only way the state can prevent a would-be citizen from writing bad checks is either to brand a dollar sign on his forehead or to imprison him for life (depending on which measure you regard as less restrictive). If that is what proves necessary to eliminate this "illegitimate aggression," then apparently the state is entitled to do it. That is simply the price of ensuring that other citizens in Ackerman's liberal utopia can exercise their rights without interference.

Ackerman's theory of criminal law turns out to be a statist version of the Lockean theory of self-defense, a theory holding that all citizens can use whatever force is minimally necessary to protect their autonomy from encroachments by others.²⁴ According to this conception of self-defense, aggressors are treated as outlaws who have forfeited their right not to be injured—precisely as Ackerman's criminals forfeit their citizenship. Like Ackerman's theory of criminal law, the Lockean conception of self-defense ignores the justice of proportionate response.²⁵ Humanitarian considerations sometimes require that law-abiding citizens suffer minor losses if the only alternative is to inflict excessive harm on the aggressor. A similar sensitivity to proportionality in the criminal law requires the state to tolerate some bad checks—when the only means of prevention prove to be disproportionate to the harm threatened. The principle of the least restrictive alternative hardly suffices to accommodate the requirements of proportionality. In some cases, as in the bad check example, the least costly measure of prevention might be excessive relative to the petty harm reflected in the "undue risk of illegitimate aggression."

Ackerman's misunderstanding of the criminal law derives directly from his failure to consider desert in framing the state's response to harmful behavior. Proportionality and desert are opposite sides of the same issue—the

23. "[T]he fate of noncitizens will be the appropriate subject for majoritarian politics" (p. 71). This proposition is difficult to reconcile with our earlier analysis of the way the notion of "resources" fits into the system. See *supra* Parts II and III. Noncitizens might be "resources" and therefore the proper objects of equal distribution. It is hard to take Ackerman seriously in his analysis of criminal punishment. He could not possibly mean that because convicted criminals are not citizens, the majority could do anything it wanted to them.

24. For an exposition of this theory, see G. Fletcher, *Rethinking Criminal Law* 860-64 (1978).

25. *Id.* at 861.

greater the offender's culpability for his wrongful threat, the greater the state's permissibly proportionate response. Ackerman approaches the problem of crime exclusively as an issue of prevention and thus fails to appreciate that some preventive measures inflict undue costs on those who do not deserve them.

VII. AGENDAS FOR FUTURE DIALOGUES

The indulgence of the reviewer is that he may criticize the efforts of others without proposing solutions of his own. I have done enough of that. The shortcomings of Ackerman's analysis are laid bare. Now in sympathy with Ackerman's basic objectives, I should like to suggest a course for future conversations. Instead of thinking retrospectively about *Social Justice in the Liberal State*, I shall turn, prospectively, to three areas of difficulty that require our creative efforts.

A. *Ex Ante and Ex Post*

A full theory of justice must recognize the distinction between justifying the distribution of liberties and wealth at time T_0 and testing the legitimacy of holdings at subsequent time T_n .²⁶ Theories that collapse these two perspectives may not be sound. For example, one theory holds that all goods must be distributed equally at all times. Another theory prescribes some other pattern that tests the justice of distribution at any time T_n . But no theory of this sort can accommodate transactions that modify the initially just distribution. There are essentially two ways in which individuals can alter the state of affairs accepted as just at T_0 :

1. *Voluntary Transactions.* Individuals can trade or give away or destroy their assets or work their assets so as to increase their value. These transactions will produce a new pattern that does not meet the criteria generating the distribution at T_0 .
2. *Involuntary Transactions.* Individuals can intentionally, negligently or faultlessly cause harm to their neighbors, thus altering the initially just distribution.

As a result of these voluntary and involuntary transactions, a new state of affairs arises at T_n . A full theory of justice must question whether the transition from the just initial state at T_0 to the new state at T_n is just. If the transition is just, then holdings at T_n are just; if the transition is not just, the theory of corrective justice intervenes to set matters right. It is hard to imagine a convincing theory of justice that does not acknowledge these problems and the necessity of examining ex post the justice of altering the initial state at T_0 .

B. *Neutrality*

Ackerman's basic insight is sound. If liberalism means anything at all, it requires tolerance for diverse conceptions of the good life. The state cannot

26. See, e.g., R. Nozick, *supra* note 20, at 150-55.

dictate how we should seek fulfillment and meaning in our lives. It cannot even determine whether "fulfillment and meaning" are the proper aims of our lives or indeed whether our lives have "aims."

This sound insight goes awry when Ackerman banishes all conceptions of the good from neutral argument. Ackerman goes too far in branding all efforts at moral argument as "playing God" (p. 34) or striving for a "privileged insight into the moral universe" (p. 10). In any vigorous, tolerant society people have to argue about whether capital punishment, abortion, public nudity and violence in films are good or bad, permissible or impermissible. There is no value-free way of justifying legislation on these issues. Whatever is said entails a conception of the good. Yet it does not follow that moral positions on these questions should be branded as illiberal or intolerant.

It is tempting simply to resort to the democratic process as a means for resolving borderline issues of social conflict. The whole point of Ackerman's effort, however, is to work out a set of principles for restricting the power of the majority. That he has not succeeded should not end the effort. A properly formulated notion of Neutrality serves two functions. It generates principles that define the limits of majority rule. It also, by implication, creates an arena for political and moral discourse about the power that we, through our democratic institutions, exercise over each other.

Discourse in the latter realm would encompass assertions of value about whether practices, such as capital punishment, abortion, pornography, and public nudity, were right or wrong. Public debate would be informed by the faith that a full airing of the issues would lead to a consensus or at least to a well-considered majority view. This conception of dialogue, as the foundation for intelligent choices by the majority, differs markedly from Ackerman's truncated dialogues, designed to elicit principles that bind the majority. The subtlety of political theory emerges when we realize that dialogue can function not only to restrict the power of the majority, but also to legitimate majority rule as a well-informed process of decisionmaking.

C. Equality

Ackerman resists conceding his commitment to equality as a fundamental value of his system. He prefers to derive the mandate of equal treatment from the inability of others neutrally to prove the merits of inequality. Yet the device of shifting the burden of argument, a necessary step in Ackerman's derivation, presupposes a *prima facie* case for human equality. That case has yet to be made.

Ackerman is not alone in his hesitation to address the issue of human equality. For all the outpouring of literature on the nature of equality and the requirements of treating people equally, one is hard pressed to find a satisfying account of why all human beings—but not animals—deserve to be treated as equals. In a secular culture, uneasy with arguments about God's image,²⁷

27. Cf. Genesis I: 27 ("So God created man in his own image, in the image of God created he him; male and female created he them.") (King James).

we struggle to find a rational basis for accepting a principle belied by the vagaries of the human condition.

Ackerman does have the beginning of a case for human equality. He stresses that we all describe ourselves as "morally autonomous" (p. 57), as "purposive beings" (p. 55), as having a "conception of the good" (pp. 55, 66). Yet he fails to explain why these attributes of reason should render us morally equal. He could follow Kant's path of identifying reason as the feature of human existence that reflects the imprint of God and thus confers absolute worth upon us.²⁸ But this path is not the way of modern, secular argument. Whether in a world without God we can justify our worth and our commitment to human equality remains to be seen.

These, then, are the challenges for another round of dialogue. Can we refashion the principle of Neutrality so as to admit the right amount of moral argument in the discourse of legitimation? Can we develop a convincing, secular case for human equality? These questions are urgent and important. The achievement of *Social Justice in the Liberal State* lies not in resolving these questions, but in engaging us in an ongoing common effort to find their proper resolution.

28. I. Kant, *Foundations of the Metaphysics of Moral* *414 (L. Beck trans.) (reference to the divine and holy wills as perfectly rational).