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The Burden of the Liberal Song

Peter R. Teachout
Vermont Law School

THE BURDEN OF THE LIBERAL SONG

PETER R. TEACHOUT*

THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL. By Ronald D. Rotunda. University of Iowa Press. 1986. Pp. xii, 136. $14.95.**

RECONSTRUCTING AMERICAN LAW. By Bruce A. Ackerman. Harvard University Press. 1984. Pp. viii, 118. $17.50.***

> It is one of the tendencies of liberalism to simplify, and this tendency is natural in view of the effort which liberalism makes to organize the elements of life in a rational way. And when we approach liberalism in a critical spirit, we shall fail in critical completeness if we do not take into account the value and necessity of its organizational impulse. But at the same time we must understand that organization means delegation, and agencies, and bureaus, and technicians, and that the ideas that can survive delegation, that can be passed on to agencies and bureaus and technicians, incline to be ideas of a certain kind and of a certain simplicity: they give up something of their largeness and modulation and complexity in order to survive. The lively sense of contingency and possibility, and of those exceptions to the rule which may be the beginning of the end of the rule—this sense does not suit well with the impulse to organization. So that when we come to look at liberalism in a critical spirit, we have to expect that there will be a discrepancy between what I have called the primal imagination of liberalism and its present particular manifestations.
>
> The job of criticism would seem to be, then, to recall liberalism to its first essential imagination . . . .[1]

I. INTRODUCTION

In his famous preface to *The Liberal Imagination,*[2] Lionel Trilling describes the almost tragic tendency of liberalism to betray its own deepest principles. The plight of liberalism in the modern world, as Trilling saw it, was epit-

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* Professor of Law, Vermont Law School. B.A. 1962, Amherst College; J.D. 1965, Harvard University; M.A. 1967, University of Sussex.

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1. L. TRILLING, THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY xii (Anchor Books ed. 1953).

2. *Id.*

omized by the experience of John Stuart Mill, in particular by the famous "crisis" of Mill's youth.[3] Mill's upbringing had led him to embrace a conception of liberalism in which certain elements, the liberty-seeking and rationalizing elements, had been carried to extremes, giving rise to an abstract and soulless libertarianism. The vision of life upon which such a theory of experience opened was a despairing one: it was of a world from which those very aspects of human existence that give it meaning—as Trilling refers to them, "the sentiments and the imagination"[4]—had been banished from relevance. To Mill this was an intolerable prospect, intolerable not just intellectually but psychologically as well, and it precipitated in him something of a mental breakdown.

Mill's recovery lay paradoxically, as Trilling points out, in his embrace of certain virtues performed in the thought and writing of his primary ideological opponent, the conservative writer and thinker, Samuel Coleridge. Mill had great respect for Coleridge's power of ratiocinative intellect, but it was not in that, Trilling tells us, that Mill found his salvation; rather it was in "certain particular attitudes and views that sprang . . . from Coleridge's nature and power *as a poet.*"[5]

Trilling explains why this poetic element assumed such importance to Mill:

> Mill had learned through direct and rather terrible experience what the tendency of liberalism was in regard to the sentiments and the imagination. From the famous "crisis" of his youth he had learned . . . that liberalism stood in paradoxical relation to the emotions. The paradox is that liberalism is concerned with the emotions above all else, as proof of which the word happiness stands at the very center of its thought, but in its effort to establish the emotions, or certain among them, in some sort of freedom, liberalism somehow tends to deny them in their full possibility.[6]

This "denial" had been a central aspect of Mill's own experience because of the extreme nature of the liberal principles upon which he had been brought up. Nor were such principles unique to Mill's own personal experience; to varying degrees they were shared throughout the culture. In Dicken's *Hard Times,* a novel set in roughly the same period, Trilling points out, adherence to the same extreme principles eventually leads to the downfall of the character Louisa Gradgrind. That explains why Mill was so drawn to the poetic element in Coleridge's writings.

> [It] restored him to the possibility of emotional life after he had lived in a despairing apathy which brought him to the verge of suicide. That is why, although his political and metaphysical disagreement with Coleridge was extreme, he so highly valued Coleridge's politics and meta-

3. *Id.* at ix-xii.
4. *Id.* at xii.
5. *Id.* (emphasis added).
6. *Id.*

> physics—he valued them because they were a poet's, and he hoped that they might modify liberalism's tendency to envisage the world in what he called a "prosaic" way and recall liberals to a sense of variousness and possibility.[7]

Nor did Mill turn to poetry for mere "private emotional advantage"; he believed it to be, Trilling makes clear, "an intellectual and political necessity."[8]

Mill's "crisis" can be seen, Trilling suggests, as a manifestation of the larger predicament of liberalism in the modern world. The heart of the problem lies in the fact that liberalism has always proceeded from a deep belief in the organizing and civilizing power of human reason. Yet in the very attempt to rationalize and organize experience, liberalism often tends to simplify and reduce that experience in ways that inadvertently limit or deny the role played by "the emotions and the imagination,"[9] by "variousness and possibility,"[10] in individual existence and the life of the larger culture. Trilling explains the dynamics of this phenomenon in the following passage:

> Contemporary liberalism does not depreciate emotion in the abstract, and in the abstract it sets great store by variousness and possibility. Yet, as is true of any other human entity, the conscious and the unconscious life of liberalism are not always in accord. So far as liberalism . . . moves toward organization, it tends to select the emotions and qualities that are most susceptible of organization. . . . [I]t unconsciously limits its view of the world to what it can deal with, and it unconsciously tends to develop theories and principles, particularly in relation to the nature of the human mind, that justify its limitation. Its characteristic paradox appears . . . in [yet] another form, for in the very interests of its great primal act of imagination by which it establishes its essence and existence—in the interests, that is, of its vision of a general enlargement and freedom and rational direction of human life—it drifts toward a denial of the emotions and the imagination. And in the very interest of affirming its confidence in the power of the mind, it inclines to constrict and make mechanical its conception of the nature of mind.[11]

This, then, is the tragic tendency of liberalism as Trilling sees it: the tendency, in seeking to rationalize and organize experience, to reduce that experience to "prosaic"—or bureaucratically-manageable, or politically-expedient, or system-accessible (the exact categories do not matter here)—terms, and by doing so to deny a central place to those very elements—sentiment and imagination, variousness and contingency—that give richness and meaning to life.

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7. *Id.* at xiii.
8. *Id.*
9. *Id.* at xiv.
10. *Id.* at xii.
11. *Id.* at xiii-xiv.

It becomes critically important therefore to be able to distinguish between liberalism in its many stunted and mechanical forms—the distorted variants of liberalism that result when these reductionist tendencies are not held in check—and what Trilling refers to as liberalism in the "large" sense.[12] We must step back from the complacent and often mistaken "present particular manifestations"[13] of liberalism in an effort to regain an understanding of liberalism in the classic and original sense. We must seek to rediscover, in Trilling's phrase, "the primal imagination of liberalism."[14] The great difficulty of course is finding a language capable of expressing the complex fusions of intellect and emotion, rationality and imagination, ideology and sentiment, politics and poetics, public life and private life, that lie at the core of liberalism so conceived.

Trilling's essays in *The Liberal Imagination* reflect his own effort to discover and establish such a critical language. Their great value to us lies not so much in their success in doing so, although by any measure they succeed on this score in a way that few other such efforts have done, as in what they have to teach us about the difficulties involved. It lies in the challenge they lay down to all those who would take liberalism seriously: the challenge or invitation, as Trilling puts it so nicely at one point, "to recall liberalism to its first essential imagination."[15]

Trilling's challenge is called particularly to mind by two recent works about liberalism by nationally-prominent American law professors: *The Politics of Language: Liberalism as Word and Symbol*[16] by Ronald Rotunda of the University of Illinois Law School and *Reconstructing American Law*[17] by Professor Bruce Ackerman, now of Columbia Law School. In *The Politics of Language,* Professor Rotunda traces the use of the term "liberal" in English and American political experience over the past century and a half, exploring the ways in which the language of liberalism has been used by political parties during this period to gain and broaden support. He is particularly interested in the use of "liberal" as a political symbol. Rotunda concludes by observing that liberalism's star, at least in the American political

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12. If liberalism is, as I believe it to be, a large tendency rather than a concise body of doctrine, then, as that large tendency makes itself explicit, certain particular expressions are bound to be relatively weaker than others, and some even useless and mistaken. If this is so, then for liberalism to be aware of the weak or wrong expressions of itself would seem to an advantage to the tendency as a whole.

Id. at x-xi.

13. *Id.* at xv.

14. *Id.*

15. *Id.*

16. R. ROTUNDA, THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL (1986).

17. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

context, is a falling one. Never before, he insists, have the forces of liberalism been in such "disarray."[18]

Rotunda's study falls upon the heels of Professor Ackerman's provocative and controversial book of a couple years ago, *Reconstructing American Law*. In this work, Ackerman's primary effort is to breath new life into liberal thought in American law. His book is intended as a sort of rescue operation for jurisprudential liberalism, an attempt to revive what has been generally considered as the mainstream tradition in American legal scholarship and what until a few years ago was the *only* source of serious ideological literature in American jurisprudence. In recent years, however, the liberal tradition in American law has come under heavy attack, not just from the right but also, for the first time, from the radical left. To counteract this, Ackerman proposes that lawyers and legal scholars adopt a "new language of power."[19] His book is devoted in large part to defining this "new language" and establishing its legitimacy and importance. The adoption of such a new language is essential, Ackerman insists, if the liberal agenda is to be carried forward and the liberal vision is to remain a vital one in an increasingly complex modern age.

Although these two works approach liberalism from very different angles—Rotunda's largely from an historical and empirical perspective, Ackerman's from a more visionary and proscriptive one—both share a common and preoccupying fascination with language, with the shaping impact of the way we use words upon the world of law and politics. Moreover, both are centrally about the language of liberalism. By approaching the problem of liberalism from this perspective, these works hold out the promise of shedding new and badly needed light upon the difficult question of what it "means" to be a liberal in the modern world.

Yet it is precisely in this respect that both works are in the end so puzzlingly disappointing. The liberalism we encounter here seems such a transient and paltry—such a *manipulatable*—thing. What is missing is any appreciation of what Trilling refers to as the larger tendencies of liberalism. We come away as a consequence without any sense of the deep cultural claims laid upon us by the liberal tradition as it has been handed down to us through the generations, without any understanding of the complex burdens imposed upon us by that tradition. The language of liberalism as it appears here—whether in Rotunda's discussion of the term "liberal" as a political label or symbol, or in Ackerman's proposed "new language of power"—is a language utterly unequipped to carry the burden of the liberal song.

What is it that goes wrong? Why do these works fail so completely to come to terms with the larger tendencies of liberalism? And where do we

18. R. ROTUNDA, *supra* note 16, at 3, 91.
19. B. ACKERMAN, *supra* note 17, at 3.

turn, if not to works like these, if we want to discover the expression of liberalism in the large sense? Where do we go in the literature of American law, or elsewhere, to find the truly vital liberal performance? This essay is an attempt, however imperfect and tentative, to find answers to these questions.

II. THE DISINTEGRATION OF LIBERALISM: ROTUNDA'S *Politics of Language* AS A STUDY IN THE MANIPULATIVE USE OF LANGUAGE

> This book is about naming things—about symbols and labels, the importance of words, their power to *manipulate,* and why people fight over them. In particular, it is a study of a specific word, "liberal."[20]

Rotunda's *The Politics of Language* is an intriguing but, it seems to me, ultimately frustrated effort to understand the interface of language, politics, and liberalism. The great strength and interest of the book lie in the story Rotunda tells of the struggle between Hoover and Roosevelt over the term "liberal" during the New Deal period: of how each laid claim to the liberal label, and how Roosevelt ultimately succeeded in capturing it, and in doing so in large part determined the meaning of political liberalism in this country. The great weakness lies in the fact that Rotunda deals with this struggle, as he does with the larger historical developments he treats in this book, largely on the political surface. The book is flawed by Rotunda's failure—or, perhaps more accurately, refusal—to come to terms with the larger liberal tradition.

One consequence is that we come away from the book without any real sense of what the liberal tradition means and without any real appreciation of its deeper requirements. Rotunda's book provides a very curious experience in this respect; the further one proceeds into it, the more the term liberal seems to *lose* meaning, and the more this significant term in our cultural heritage seems to undergo a kind of disintegration. This may in part be a reflection of the reality: contemporary liberalism may have entered into a period of counfusion and disarray. But it is also, at least in part, as I hope to show, a product of the critical methodology Rotunda employs and of the compositional structure of his work.

A. The Structure and Critical Methodology of Rotunda's Book

Rotunda's book proceeds on two basic levels. At one level, it is a history of the rise and fall of the term "liberal" as a political label or symbol, a study of the way the term has been used by political parties over the past century and a half as a means of gaining and broadening their base of

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20. R. ROTUNDA, *supra* note 16, at 3 (emphasis added).

support. At another level it is a study of how political symbols function generally in our lives, of how they "mold the way we think and act."[21]

The special interest of the book derives from Rotunda's fascination with the manipulative use of language, a fascination reflected among other places in his opening description of what the book is "about": "This book is about naming things—about symbols and labels, *the importance of words, their power to manipulate,* and why people fight over them."[22] Upon initial reading one tends to pass by the juxtaposition in this sentence of the two phrases, "the importance of words" and "their power to manipulate." But as we proceed the significance of this juxtaposition becomes more and more apparent. In Rotunda's world, it turns out, the "importance of words" is measured almost entirely by "their power to manipulate."

Rotunda takes his inspiration, and in large part his critical methodology, from Thurman Arnold's pioneering work, *The Symbols of Government.*[23] At one point Rotunda quotes the following passage from Arnold's work:

> The question which confronts the student of government is what kind of social philosophy is required to make men free to experiment—to give them *an understanding of the world, undistorted by the thick prismatic lenses of principles and ideals,* and at the same time undamaged by the disillusionment which comes from the abandonment of ideals. How may we make [more accessible] the truths of which men are dimly aware only in humorous or satirical moods . . . ?[24]

Rotunda seems particularly attracted to the notion expressed by Arnold here that to gain an accurate "understanding of the world," the scholar must adopt a "social philosophy" or methodology "undistorted by the thick prismatic lenses of principles and ideals." Indeed, Rotunda's adoption in this work of an Arnoldesque empirism is one of the things that gives to his study its unique interest and makes it in its own way valuable.

Arnold's influence can be felt in two major aspects of Rotunda's study. First, it shapes Rotunda's choice of a definition of "liberal," a choice that in turn has a profound impact on the rest of the work. In seeking to find a usable definition of liberal, Rotunda faced a real dilemma. The problem is that liberalism seems to be such a *relative* term. It has meant different things to different people at different times. Moreover, even within a particular culture at a particular moment in history, people who see the world quite differently nonetheless lay claim to the same "liberal" political label.[25]

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21. *Id.* at 4.

22. *Id.* at 3 (emphasis added).

23. T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935).

24. R. ROTUNDA, *supra* note 16, at 96 *quoting* T. ARNOLD, *supra* note 23, at 258-59 (emphasis added).

25. Rotunda is particularly fascinated in this respect by the fact that both Hoover and Roosevelt saw themselves as "true" representatives of the liberal tradition. R. ROTUNDA, *supra*

Under these circumstances what is the empirical scholar to do? Is it possible to find a neutral definition, one that will not inadvertently lead to "taking sides"? Rotunda's dilemma is a real one. Given the seeming relativity, or mutability, of the term, how can one hope to come up with a definition that is likely to have any sort of *permanent* validity?

Rotunda's solution to this dilemma is in some ways remarkably ingenious and simple, and it clearly reflects the impress of Arnold's influence. He adopts a non-"normative"[26] definition that includes virtually everyone, or at least everyone who wants to be included: *"a person is a liberal who can convince other people that he or she is a liberal."*[27] It is difficult to imagine a more non-discriminating definition, one that more perfectly satisfies the expectation that the empirical scholar employ a methodology "undistorted" by the "lenses of principles and ideals."[28]

Arnold's influence can also be felt in the somewhat cynical attitude Rotunda adopts toward experience in this study. The nature of that influence is something I can only suggest here by pointing to the emphasis Rotunda gives in the course of his discussion to the elements of manipulation and political advantage. The following statements, taken from the introductory chapter, are fairly representative:

> Perhaps because we have passed 1984 unscathed, we often ignore the significance of George Orwell's Newspeak. *But governments know better.*[29]
>
> Symbols are . . . *useful for generating loyalty* in . . . modern governments.[30]
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> Symbols . . . enable leaders to give the *appearance* of action. It is *very advantageous for leaders,* especially in our democratic society, to be able

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note 16, at 4, 52-83. Rotunda explains his dilemma in these terms:

> That most people now agree that Herbert Hoover was not a liberal does not explain why he honestly called himself a liberal until his death. And, even if we grant that Franklin D. Roosevelt was a recognized liberal of the New Deal days, what about other important figures of the New Deal? Were they liberal? Is Walter Lippmann a liberal? Is Governer LaFollette a liberal? Is Justice Black a liberal? Max Lerner says that we ask these questions with "desperate amusement" because all these men share in the liberal heritage and yet have important differences among themselves. Alan P. Grimes, after considering the very different men who have called themselves liberal, asks, "Must we then despair of definition? Is a liberal nothing more than any man who calls himself one? Or is called one?" Grimes answers "no" to this question and then tries to classify the concepts that form his definition of liberalism. Any such definition, however, *is by its nature normative and not descriptive;* such a definition excludes many people who claim to be liberal and have convinced others that they are liberal.

Id. at 13 (emphasis added).

26. *Id.* at 13.
27. *Id.* (emphasis added).
28. *Id.* at 96 *quoting* T. ARNOLD, *supra* note 23, at 258-59.
29. *Id.* at 4 (emphasis added).
30. *Id.* at 5 (emphasis added).

> *at least to appear to be taking action.* People like to think that something is being done about their problems; *for short-range popularity it does not make much difference if something is actually done.*[31]

Notice the emphasis that Rotunda gives here to the creation of "appearances" that are "useful" or politically "advantageous." Rotunda is not interested, it becomes clear, in the way the rhetoric of the liberal tradition has shaped the basic character of our legal and political culture[32] but rather, like Arnold before him, in the way the "symbols" of liberalism can be "used" to "mold" public opinion.[33] This behaviorist point of view is reflected in the key terms upon which his study proceeds: "mold," "manipulate," "useful," "appearance," "political advantage," "popular," and "fashionable."[34]

These two things then—Rotunda's non-"normative" definition of liberal, and his behaviorist's fascination with the manipulative use of language—fundamentally shape the character of his history. In large part they determine what he includes, how he understands what he includes, and what he leaves out.

B. Rotunda's History of the Rise and Decline of the The Term Liberal as a Political Label

Rotunda's history can be divided into four major phases or segments: (1) the initial employment of the term liberal as a political label on the continent in the early 1800's; (2) the importation of the term into English politics in the 1830's and the subsequent transformation in the political meaning of the term over the next century; (3) the emergence of liberal as a significant political term in American politics in the 1930's, and in particular "the great debate" between Hoover and Roosevelt over the political meaning of the term; and (4) the subsequent decline in popularity of the liberal label in this country and corresponding rise in popularity of the conservative label.

The term "liberal" was first used as a party label in Spain, in 1811, when a group supporting the adoption of a Spanish constitution based on the revolutionary French model called themselves "Liberales."[35] On the conti-

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31. *Id.* (emphasis added). Another example is Rotunda's facination with Lenin's use of the term, *Bolsheviki* ("Majorityites") for its *"psychological advantage"* or "propoganda" value. *Id.* at 7-8 (emphasis in original).

32. For a discussion of the differences between the character-shaping role of language and the behavior-manipulating one, see *infra* text accompanying notes 78-80.

33. *See, e.g.,* R. ROTUNDA, *supra* note 16, at 7. ("[S]ymbols are also important because they determine the very way people think. Symbols not only reflect; they mold.").

34. *See, e.g., id.* at 4, 7, 98 ("mold"); *id.* at 3 ("manipulate"); *id.* at 5, 10, 58, 87 ("useful"); *id.* at 5, 87, 98 (emphasizing cultivation of appearances); *id.* at 10, 20, 51, 61, 89 (primary significance that of "political advantage"); *id.* at 11, 91 (stressing importance of what is "popular"); *id.* at 10, 94 (stressing "current fashion" or what is "fashionable").

35. *Id.* at 18.

nent, in other words, the initial association of political liberalism was with anti-clericalism and the "radical thought of *les philosophes.*"[36] From Spain the political term spread to other countries, where its meaning often varied according to the particular political problems existing at the time; so even from the outset, Rotunda observes, the term did not have a fixed and universal political content. Nonetheless, the fact that "liberal" as a political term was initially cast in the forge of civilian theory and in the mold of the "radical thought of *les philosophes*" left a lasting mark on continental notions of liberalism. From the very outset continental liberalism has been a creature of rationalist theory. It has been theory-dependent in a way that has not been true of Anglo-American liberalism. This more than anything else may explain the rather brittle and rationalist—the paradoxically illiberal[37]—cast of liberalism as it has developed on the continent.

It may also help to explain why continental liberalism is so very different from liberalism in England and America. The term liberal initially was introduced into English politics, Rotunda informs us, as a term of censure or opprobriation.[38] The opponents of the English Reform Act of 1832, an act which extended the franchise, sought to tar the supporters of the bill with the label "liberal" intending it in its continental (and it was thought derogatory) sense of "radical." But this ploy backfired. It did so because of the powerful hold exerted upon the term *by the English language.* In the English cultural context, Rotunda observes,

> "liberal" seemed to be a word with inherently good implications. . . . [S]ince before 1600, the adjective "liberal" has meant "free from prejudice or orthodox zeal." . . . [It was associated with] loftiness of view, concern with the things of the spirit, a respect for human decency.[39]

In other words, upon entering the field of force of English culture, a culture shaped by the traditions of English common law and constitutionalism, and, perhaps more significantly, by the English language, the term "liberal" took on an altogether different meaning from what it had had in continental theory and politics. It took on, although Rotunda does not use this terminology, a more "rounded" or ethically integrated character.

The chief difference between political liberalism in England and political liberalism as it subsequently emerged in America is that in England the term became incorporated in the name of a political party, the Liberal Party. The significance of this development, to Rotunda, is that it meant that specific political meaning could be poured into the term through the framing and adoption of a party platform. Control of the meaning of the term

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36. *Id.*
37. *See, e.g., id.* at 19.
38. *Id.* at 19-20.
39. *Id.* at 20.

became in a sense a function of control of the party. By the same token the fact that in America the term was not part of the name of a major party meant that it was unencumbered with particular associations and expectations, and thus was a term that could be used to advantage by reform-minded politicians when the opportunity arose.[40]

Over the next century, political liberalism in England underwent a major transformation. As the economy became increasingly industrialized and socialism emerged as a politically significant force, English liberalism, at least insofar as it was reflected in the policies and programs of the Liberal Party, moved from a laissez-faire to a welfare ideology:

> The philosophy that was adequate in the first half of the nineteenth century in England was no longer tolerable in the second half. The major philosophers of liberalism, exemplified by J.S. Mill, changed their beliefs in response to the new situation. . . . Old classical liberalism was poured out of the bottle and welfare liberalism was poured in; but although the contents were new, the label "liberalism" was not changed.[41]

It is not entirely clear from Rotunda's account whether this change was a reflection of changes in policies and programs made necessary by altered social and economic circumstances, or whether it was simply the product of crude political capture of the old liberal label by a new political crowd. At times, Rotunda seems to adopt the former explanation: that *not* to have changed would have been a betrayal of the deep commitments of liberalism.[42] But at other times he gravitates toward the "crude political capture" explanation. In the end the new liberals won and the old liberals lost, Rotunda suggests, not because the deepest impulses of the liberal tradition required such a repositioning, but "simply" because the new liberals were successful in capturing the liberal label.[43]

It was not until the 1930's that the term became a significant political term in America. Rotunda does an interesting job of describing the early abortive attempts to introduce the term liberal as a party label in this country,[44] and the influential role played by the *New Republic* in introducing the term as an alternative to the discredited "progressive" label.[45] It was not until 1932, however, when Roosevelt began to "popularize the liberal-

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40. *Id.* at 30-31, 96-97. *See also id.* at 40 (describing liberal as a "good and unencumbered word").

41. *Id.* at 27.

42. *See id.* at 27 (recognizing that "welfare liberalism grew out of basic elements of classic liberalism"); *id.* at 28 ("it was quite logical for the welfare liberals to be called liberal, since their beliefs about welfare grew out of the elements of classical liberalism").

43. *Id.* at 28. "When the new liberals won control of the party, they won control of the label. Those who clung to the tenets of laissez-faire were simply read out of the party."

44. *Id.* at 32-38, 41-44.

45. *Id.* at 38-41.

conservative dichotomy"[46] that the term became in this country "an important political tag."[47]

Rotunda is particularly fascinated by the struggle between Hoover and Roosevelt over the liberal label. Each of these men saw himself as the "true" representative of liberalism,[48] but in the end Roosevelt won out by successfully capturing the liberal label. Roosevelt used the term effectively to diffuse charges of "tyranny" and social "regimentation" that were leveled against socialism by the opponents of the New Deal.[49] And he also "used the liberal label to operate as [a] cross-pressure against the . . . factor of party identification."[50] In large part because of Roosevelt's efforts a powerful association was forged during this period between the idea of liberal politics in this country and, in Raymond Moley's words, "an ideology based on the enlargement of the power of the Federal government and an abundance of welfare programs."[51]

By 1939, according to a poll taken that year, 55 percent of those polled associated Roosevelt with "liberal" while only 5 percent associated Hoover with the term.[52] Rotunda does not seem terribly interested in helping us understand whether Hoover's or Roosevelt's particular vision was more consistent with the deep ideas and sentiments of the liberal tradition. What is important is that Roosevelt was the more adept propogandist. He had, in the terms of Rotunda's definition of liberal, "convinced" more "other people" that he was a liberal than Hoover had. Roosevelt had "won a symbol."[53]

To the end of his political career Roosevelt continued to use the liberal label to political advantage. In seeking Willkie's support in 1944, Roosevelt let it appear that he was thinking of starting a new liberal party that would bring together liberal Democrats and liberal Republicans. Rotunda explains:

> Roosevelt permitted Willkie to believe he was willing to start a liberal party in order to win, or imply that he had won, Willkie's support for the 1944 election. This 1944 episode with Willkie was really Roosevelt's last great *use* of the concept of liberal to bridge the gap caused by party labels and to win, or at least *appear to* win, the endorsement of a prominent Republican.[54]

In a final section of the book, Rotunda documents the decline in popularity of the liberal label in recent decades and the corresponding increase in

46. *Id.* at 60.
47. *Id.* at 51.
48. *Id.* at 13, 54.
49. *Id.* at 74.
50. *Id.* at 56.
51. *Id.* at 74.
52. *Id.* at 82.
53. *Id.* at 83.
54. *Id.* at 85 (emphasis added).

popularity of the conservative label. The polls show a marked shift, he observes, from liberal to conservative in recent years. The picture is complicated however by virtue of the fact that programs that once were considered liberal now have the approval of voters who see themselves as conservative. Rotunda offers a number of explanations for this shift in voter alignment: (1) the liberal symbol had become "overused";[55] (2) liberalism is a victim of its own success;[56] (3) we are witnessing a conservative breathing space between cycles of liberal reform;[57] (4) Vietnam gave liberalism "a bad name;"[58] and (5) the shift to conservatism reflects the "current fashion in labels."[59] The significant fact however, at least as far as Rotunda is concerned, is that liberal is no longer as politically advantageous a term as it once was.

This decline in popularity has contributed, Rotunda suggests, to a sense of loss of identity and purpose on the part of liberals. The old association of liberalism with the New Deal has clearly lost its drawing power, and even the Civil Rights movement, arguably the last great liberal movement in this century, has receded into the past. Rotunda quotes a speech given at the outset of this decade by a liberal politician in which the speaker seems almost desperate to find some instance of social "abuse and injustice" that will "mobilize the new generation," that will rekindle the feelings of "anger and outrage that [once] fueled the liberal cause."[60] For liberalism to have come to this (although this may not have been Rotunda's purpose in including this speech) strikes one as somehow pathetic. No longer does liberalism represent, or even claim to represent, a coherent vision of the world. It has become instead a political label in search of a certain *feeling:* of moral "anger and outrage." Never before, Rotunda concludes, has liberalism been in such "disarray."[61]

What can we learn from this study of the rise and decline of the liberal label? The primary lesson, Rotunda suggests, is that to be learned from Roosevelt's successful political exploitation of the liberal symbol. Roosevelt was successful because he took a term with generally favorable connotations, yet unencumbered with specific political content, and forged a powerful association between that term and his own particular political programs.[62] At a more general level, we learn about the power of words, about their power "to confuse and to clarify, to help legitimate policies, to generate

55. *Id.* at 91.
56. *Id.* at 92.
57. *Id.* at 93.
58. *Id.* at 94.
59. *Id.* at 94.
60. *Id.* at 92 (quoting Senator Paul Tsongas from Massachusetts).
61. *Id.* at 91.
62. *Id.* at 96-97.

loyalty, to give the appearance of action, to mold people's perceptions of the world . . . ."[63]

C. *Skinner's Box: The Distortions and Limitations of Rotunda's Behaviorist Methodology*

In a book that purports to be about "liberalism" and the "politics of language," one would expect to find at least *some* consideration of the profound impact the liberal tradition has had upon our Anglo-American jurisprudence—upon the basic character of our legal culture. But there is no such discussion here. There is no discussion, for example, of whether Justice Holmes was or was not a "liberal";[64] nor is there any consideration of Morris Cohen's interesting discussions of the jurisprudential implications of liberalism in the thirties and forties.[65] Even more striking in some ways is the absense of any discussion of the recent critical attacks upon "liberal thought" and "liberal legalism" by scholars associated with the Critical Legal Studies movement.[66] Indeed, for some strange reason, the radical left simply does not exist in Rotunda's world. The puzzle is that all of this is centrally concerned with both "liberalism" and "the politics of language." But there is absolutely nothing about it here. Why?

The answer seems to lie in the narrowness of Rotunda's focus. His book, it turns out, is really not about liberalism at all but only about the way political parties have used the liberal label. Similarly, it is not about the "politics of language" but only about the much more narrow subject of how symbols can be used to manipulate others: about how language can be used "to *generate* loyalty, to *give the appearance* of action, to *mold* people's perceptions of the world."[67] In Rotunda's view, apparently, jurisprudence occupies a non-political world. Since in any case the impact of liberalism upon our jurisprudence is not something that can be easily measured by *counting*—by taking polls or counting "sign frequencies"[68]—it simply falls outside the scope of Rotunda's inquiry.

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63. *Id.* at 98.

64. *See* D. BURTON, JUSTICE OLIVER WENDELL HOLMES: WHAT MANNER OF LIBERAL? (1980).

65. *See, e.g.*, M. COHEN, THE FAITH OF A LIBERAL (1946) (written in 1938).

66. There is a brief reference to this new school of jurisprudence in an "Afterword" by Professor Hoeflich, *see* R. ROTUNDA, *supra* note 16, at 99, but Rotunda himself makes no mention or reference to it. For an introduction to Critical Legal Studies literature, see *Critical Legal Studies Symposium,* 36 STAN. L. REV. 1 (1984).

67. R. ROTUNDA, *supra* note 16, at 98 (emphasis added). *See also infra* text accompanying notes 78-80.

68. Rotunda adopts Lasswell's quantitative approach to understanding "important social processes," in particular Laswell's suggestion that we try to understand "integrative" or "disintegrative trends" in the culture by counting "sign frequencies." R. ROTUNDA, *supra* note 16, at 7.

There is nothing wrong with narrowness of focus as long as it is recognized as such. But the problem here is that Rotunda does not recognize that he is dealing with liberalism and the politics of language only on the surface. The greatest puzzle of the work indeed is Rotunda's apparent lack of interest in getting beyond the various "present particular manifestations"[69] of liberalism he describes to reach and articulate some larger understanding of liberalism. As a consequence we are left wandering the historical landscape without any frame of reference to understand the experience we are witnessing. Let me give an example.

When we come to Rotunda's discussion of the initial use of the term liberal as a political label in the early nineteenth century, one of the things we want to know is the nature of the relationship between this novel political employment of the term and the larger liberal tradition, a tradition that had shaped the basic character of western civilization since the days of classic Greece. We know (although not from Rotunda) that at least since the time of Pericles' Funeral Oration in fifth century Athens, there had existed an established rhetoric for expressing what it "means" to live in a community governed by liberal principles and sentiments.[70] And we also know that with the Renaissance there had been a reawakening of interest in the ideas and rhetoric of the classic literature of Greece and Rome. So it is interesting to ask, and important to understand, what the relationship is between the ideas associated with this novel political employment of the term liberal as a party label and the larger cultural tradition of which it was in some way, presumably, an attempted expression.

Rotunda handles this important question essentially by ducking it. He does so by taking the curious position that whatever existed before the early 1800's was simply a "thing": "while the *thing* liberalism has been . . . the outstanding doctrine of the West for four centuries," he quotes Sartori as saying, "the *word* is more recent."[71] This then apparently excuses Rotunda from making any inquiry into the way the liberal tradition shaped western culture prior to the outset of the nineteenth century.

But what does it mean to say that the "*thing* liberalism" shaped "the outstanding doctrine of the West" up until that time? Are we supposed to believe that it did so somehow *without any language to express it?* Such a view seems nonsensical. Yet something very much like this is what Rotunda would have us believe. He dismisses, as if with a wave of the wand, the entire western liberal tradition and the cultural rhetoric in which it is embodied. It is all reduced here to an inarticulate and unarticulated "thing."[72]

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69. *See supra* text accompanying note 13.
70. *See infra* text accompanying note 230.
71. R. ROTUNDA, *supra* note 16, at 18 (quoting Sartori) (emphasis in original).
72. Rotunda describes the spread of political liberalism into the various countries on the

This is to remark upon a very significant but curious feature of the world we encounter in this study. The empirical "lenses" through which Rotunda views experience filter out not only "normative" understandings of liberalism, apparently, but the larger liberal tradition and rhetoric as well. In Rotunda's world, it turns out, *there is no western liberal tradition, no inherited body of ideas and sentiments, no inherited cultural rhetoric.* There are *only* the "present particular manifestations" of liberalism as they variously appear on the political surface.

Interestingly, at one point it appears as if Rotunda is going to have to come face-to-face with liberalism in the large sense whether he wants to or not. It occurs at a point in his narrative when, in the context of discussing a comment by Arthur Krock, he quotes from the definition of liberalism that one finds in the *Encyclopedia Britannica.*[73] While one does not normally go to an encyclopedia to find out what a word as complex as this one means, in this case the encyclopedia definition is not a bad one:

> [L]iberalism is a belief in the value of human personality, and a conviction that the source of progress lies in the free exercise of individual energy; it produces an eagerness to emancipate all individuals or groups so that they may freely exercise their powers, so far as this can be done without injury to others; and it therefore involves a readiness to use the power of the State for the purpose of creating the conditions within which individual energy can thrive, of preventing all abuses of power, of affording to every citizen the means of acquiring mastery of his own capacities, and establishing a real equality of opportunity for all. These aims are compatible with a very active policy of social reorganization, involving a large enlargement of the functions of the State. They are not compatible with socialism, which, strictly interpreted, would banish free individual initiative and responsibility from the economic sphere.[74]

The basic ideas expressed here lie at the core of the liberal tradition as it is conventionally understood, particularly in the emphasis that is given to the "belief in the value of human personality" and in the commitment that is made to "establishing a real equality of opportunity for all." To be sure there are also elements in this definition that might more properly be considered as the reflection of present preoccupations: for example the positioning that is done with respect to "socialism," and the apparently felt need to endorse "a great enlargement of the functions of the State." These are not elements of the classic understanding of the liberal tradition but reflect rather "present particular manifestations." Yet overall the *Britannica*

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continent during the early 1800's in much the same terms: "the word followed the fact." *Id.* This reflects his general view of the role of language in culture. The "thing" somehow comes into existence first and the role of language is simply to attach a label to that pre-existing thing.

73. *Id.* at 70-71.

74. *Id.* (quoting Krock, in *N.Y. Times,* Jan. 6, 1935, § 4, at 1 (quoting *Encyclopedia Britannica*)).

definition does a rather good job of identifying some of the central commitments of liberalism conceived in the large sense. It provides—or would have for another scholar—at least a starting point for an inquiry into what liberalism really means. But to Rotunda—and this is the critical point—this definition has no more validity, and is entitled to no more respect, than any other. It is just *another* definition.

It has no more validity for example than the following description of a liberal which Rotunda composes out of phrases taken from an article written in 1952 by a conservative writer:

> [T]he word "liberal" no longer means "a citizen who had a fixed and shining ideal, a man of honor, a man of logic and clear thought," but now means "a somewhat confused and craven creature who spends most of his waking hours trying to 'see all sides of the question' and ends up as a confused and ineffectual pulp, whose greatest terror is of being called 'conservative.'"[75]

I do not want to insist that some who view themselves as political liberals cannot be seen this way, or to deny that in fact they are so viewed by some conservatives. The point I want to make rather is a different one. It is that in Rotunda's world the term liberal has no fixed or traditional meaning so that *every definition or description is of equal validity or worth.* There can be no such thing as a debased meaning of the term since there is no standard or traditional understanding of the term from which such a debasement can take place. A liberal is simply anyone who can convince someone else he or she is a liberal.

In Rotunda's world the "meaning" of the term lies almost entirely in its *usability* for purposes of political advantage. Rotunda himself, toward the end of the work, treats the words "liberalism" and "libertarianism" as if they were effectively interchangeable. It is, he writes, "a tribute to the potency of the liberal label that the New Right . . . often call themselves 'libertarians.' Both Left and Right find their roots in the same symbol."[76] The refinements of meaning that have been built up around these two terms over the years to allow us to distinguish between them are here carelessly stripped away. All that is relevant is that both terms—"liberalism" and "libertarianism"—derive from the same Latin root, and both can be *used to gain and broaden political support.*

The sense that liberalism has lost its meaning derives as well from the increased reliance Rotunda places, as we move forward in time, upon the results of polls. As we turn increasingly to the activity of counting, we turn increasingly away from any effort at thoughtful expression of what liberalism

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75. *Id.* at 91 (quoting Bromfield, *The Triumph of the Egghead,* 3 FREEMAN 157 (1952)).
76. *Id.* at 95.

is and what it requires. With the shift to "quantitative" discourse,[77] any hope we might still have of seeing emerge from this study some articulation of a shared cultural understanding of what liberalism means disappears. By the end of the work the sole measure of what it means to be a liberal has become the goat bleat "yea" or "nay" uttered by some anonymous individual in response to some pollster's questionnaire. Whatever this once important cultural term means, it has by now become something utterly individual and idiosyncratic. There is no longer *any* shared vision. Each individual's own private understanding represents a separate "present particular manifestation." This is liberalism reduced to the lowest common denominator. In a very real sense it has been rendered "meaning"-less.

But it goes beyond that. What strikes one most about the world one encounters here is the *unthinking* quality of the way individuals respond to language and experience. Those who participate in the electoral process are for the most part regarded as a manipulatable mass. In large part this derives from Rotunda's narrow and somewhat perverse view of the role of language in culture. In the life of a culture, language has always played two quite distinct roles. The first and most significant is that of *shaping character.*[78] The character-shaping role of language has been recognized since the time of ancient Greece. It forms a central theme in the classic works of that civilization—in Homer's *Iliad,* Thucydides' *History of the Pelopennesian War,* and Plato's *Gorgias,* to name a few—and has continued to form a central theme in the classic works of our literature down to the present. Underlying this body of literature is the recognition that language is not something separate and apart from culture but in a very significant sense constitutive of it.

Against this character-shaping role of language is conventionally set another—darker—role which focuses instead on the use of language to *manipulate.* One of the central purposes of Plato's *Gorgias* is to show how fundamentally opposed these two roles of language are; it is to demonstrate on the one hand how destructive it is to the integrity of self and community when language is used to manipulate others, and on the other how essential to the achievement of that integrity is the development of an ethically integrated language.[79]

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77. The emphasis that Rotunda gives to "quantitative" treatment of the meaning of liberal in this study is reflected not only in his reliance upon polls but also in his utilization of the technique of counting "sign frequencies." *See supra* note 68. *See* R. ROTUNDA, *supra* note 16, at 15 ("In the pre-Crowley era [that is, before 1909 when Crowley's *The Promise of American Life* was first issued] . . . [o]ne cannot argue that liberal was never used but rather that *in quantitative terms* this symbol was insignificant") (emphasis added).

78. For a thoughtful and imaginative treatment of the character-shaping role of language as a central theme in the classic works of our cultural tradition, see J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984). *See also* Teachout, *Worlds Beyond Theory: Toward the Expression of an Integrative Ethic for Self and Culture,* 83 MICH. L. REV. 849 (1985).

79. J. WHITE, *supra* note 78, at 24-58.

One of the chief problems with this book is that Rotunda ignores almost entirely the character-shaping role of language and focuses exclusively on the manipulative use of language for purposes of political "advantage" or "popularity."[80] It is not accidental in this respect that the two most salient words in Rotunda's study of language are "mold" and "manipulate." Because of this preoccupation with the manipulative use of language, Rotunda has no way of coming to terms with the shaping impact of the rhetoric of the liberal tradition upon western civilization. That explains in part why he treats that inherited cultural rhetoric here simply and crudely as a "thing."[81] In such a world liberal rhetoric can have no underlying integrity—as in fact it does not here. It is simply something to be *used* to manipulate others.

This leads to a final observation. There is, one senses, a fundamental incompatibility between the critical methodology Rotunda employs in this study and the deeper requirements of the liberal tradition. Rotunda's world is not one where ideas and sentiments, reason and imagination, shape the life of the individual and the larger culture; individuals do not respond to experience here the way they do under the liberal vision of human nature. In Rotunda's world, rather, individuals appear much as do rats or pigeons in a behaviorist's laboratory experiment—responding to "symbols" much as rats and pigeons respond to little bits of corn. They are sometimes "manipulated," sometimes "molded," sometimes "confused," but their reactions are almost always unthinking ones. The world we encounter, in other words, is the world as a mechanical behaviorist might see it and the view of human nature to which Rotunda gives expression, a mechanical behaviorist's view. And it is that view—that critical perspective—that ultimately prevents him from coming to meaningful terms with liberalism in the large sense. The world in which we ultimately find ourselves in this study of liberalism, it turns out, is not a liberal world at all—but the world of Skinner's Box.

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80. Thus, Rotunda describes Hoover's chief failure as the failure "to *capture* the label—that is, to *popularize* it and give it meaning so that it referred solely to his philosophy." R. ROTUNDA, *supra* note 16, at 50 (emphasis added). *See also supra* note 35 (references to "political advantage" and "popularity"). What politics is primarily about in Rotunda's world is manipulating the meaning of generally favorable words like "liberal" so that they refer to one's own political or philosophical agenda.

It is worth observing in this respect that, in Rotunda's analysis, the chief virtue of the term liberal to Roosevelt and the New Deal was that it was relatively *empty* of meaning. Thus, Rotunda describes liberal as "a good and unencumbered word," R. ROTUNDA, *supra* note 16, at 40, as if "good" and "unencumbered" with meaning are synonymous. And elsewhere he tells us the "great disadvantage" of the term progressive was that it was "not an empty enough word to be in the public domain." *Id.* at 58. It is a central strand of Rotunda's argument that the less "unencumbered" a word is, the more "empty" it is of meaning, the more *usable* it is for purposes of gaining political advantage.

81. *See supra* text accompanying note 71.

III. CALCULATOR'S PROGRESS: ACKERMAN'S *Reconstructing American Law* AND THE LANGUAGE OF MECHANICAL RATIONALITY

> [T]here he will find THE CALCULATOR'S PROGRESS from self-confiding philosophy (or rather *psilosophy*) which refuses the aid of all moral instincts, and laughs at "the voice within" as a superstition . . . .
> —Samuel Coleridge[82]

Unlike Rotunda, Ackerman has a clear vision of the form liberalism should take, a vision deeply rooted, as he understands it, in the experience of the New Deal:

> [I]f we are to redeem the promise of the New Deal, American lawyers can blind themselves to neither the libertarian nor to the communitarian visions of the dissenters. The challenge instead is to grasp both of our critics' half-truths at the same time and build the legal foundations of a world where the affirmation of individual freedom does not conceal the pervasive reality of social injustice, where the affirmation of communal responsibility enriches the significance of personal liberty.[83]

The idea of a world in which "the affirmation of communal responsibility enriches the significance of personal liberty" is not unique to the New Deal, of course, but has ancient roots in the western liberal tradition.[84] It is a powerfully attractive idea. But that is not what is new or significant about Ackerman's undertaking here. What is new and significant is the critical language he proposes for carrying forward the liberal vision: a "new language of power."[85]

This new language, as Ackerman envisions it, is to be a more scientific, less amateur, language than that used to carry the liberal vision in the past. Essentially it must meet two basic design requirements: it must reflect "sophisticated" economic theory, that is, economic theory that is sensitive to the pervasive existence of market imperfections;[86] and it must be compatible with new techniques in modeling and computer programming[87]—in a word, it must be market and computer "friendly." The development and adoption of such a new critical language is essential, Ackerman warns, if we are to carry the liberal vision forward in an increasingly complex technological age.

Reconstructing American Law represents the culmination of a much larger effort on Ackerman's part to construct a rational model or theory of liberalism, and as such it brings together a number of strands developed in

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82. S. COLERIDGE, ESSAYS ON HIS OWN TIMES FORMING A SECOND SERIES OF THE FRIEND II, 653-54 (S. Coleridge ed., 1850).

83. B. ACKERMAN, *supra* note 17, at 103-04 (emphasis in original deleted).

84. *See infra* text accompanying note 230.

85. B. ACKERMAN, *supra* note 17, at 4.

86. *Id.* at 45, 56, 65.

87. *Id.* at 67-69.

Ackerman's earlier writings.[88] Ackerman's particular effort here is revealing. It is to establish a liberal jurisprudence so rational in its operation—so free from the taint of cultural or individual prejudice, so purified of values not derived from theory, so removed from dependency upon the non-rational elements that inform intuition and judgment—as to form an almost mechanical science. His goal, in short, is to design and assemble, and ultimately put at the service of the liberal vision, a perfectly rational jurisprudential system.

The great fascination of this work lies in the striking discrepancy that exists between this aspiration to create a perfectly ordered and rational system and the troubled world that lies beneath it. It lies in the way this work replicates within itself, as it were, the crisis of rationality that in John Stuart Mill's case ultimately led to a form of mental breakdown.[89] One can see it particularly in the character of Ackerman's performance, the way this effort to create a perfectly rational jurisprudential system exerts tremendous distorting pressures upon both Ackerman and his project—pressures that drive Ackerman to manipulate history in an attempt to make it serve the needs of his thesis,[90] to downgrade and dismiss the achievements of others,[91] to invoke and trade upon false dichotomies,[92] to reduce the views of those he regards as his ideological opponents to a form of caricature,[93] to resort all too often to facile rejoinder and glib dismissal when something more is called for,[94] and in these and countless other ways to betray the very tradition he purports to champion.

That is not to say that Ackerman's argument is utterly without rational appeal. Indeed, as I will try to demonstrate below, it makes a certain amount of sense—as long as one does not press very hard or very critically. But it is to say that beneath the rational surface, one encounters what at times seems almost a kind of insanity: delusion, an exaggerated sense of self-importance, divorce from reality, the schizophrenic organization of language and experience, and the failure to make connections. How much of this, one wonders, is the reflection of the tragic liberal syndrome that Trilling

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88. *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Ackerman, *Four Questions for Legal Theory,* 22 NOMOS 351 (1980); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980). For a discussion of the relationship of *Reconstructing American Law* to these earlier works, see Priest, *Gossiping About Ideas,* 93 YALE L.J. 1625-27 (1984).

89. *See supra* text accompanying notes 3-8.

90. *See infra* text accompanying notes 141-58, 167-87.

91. *See infra* notes 109, 159, 188; *see also infra* text accompanying notes 167-87.

92. *See infra* text accompanying notes 159-66.

93. *See infra* notes 109, 159, 188; *see also infra* text accompanying notes 167-87.

94. *See infra* note 159. Even those who generally support Ackerman's basic approach have expressed embarrassment and dismay over the character of his performance in this work. *See, e.g.,* Schuauer, *Lawyers and Lawmaking,* 83 MICH. L. REV. 1141, 1145 n.13 (1985). *See infra* note 188.

describes:[95] the tragic tendency to try to make rationality do too much work, to reduce experience to the terms of system? Ackerman's performance in this work, it can be argued, is a classic illustration of what happens when the rationalizing and organizing impulses of liberalism are cut free from the bonds of tradition and culture, and let to run unchecked and unrestrained. It is a classic example of what happens when one refuses to listen to "the voice within."

A. Ackerman's Argument

Ackerman's argument proceeds from the view that the New Deal represents a pivotal point in the development of our legal culture. Up until the time of the New Deal, he argues, the practice of law fell largely into a "reactive" mode.[96] This is to be contrasted with the "activist" mode[97] that began to emerge roughly at the time of the New Deal. Reactive law, as Ackerman portrays it, was centered in large part in the forms and traditions of the common law; and the common law, he insists, was the embodiment of laissez-faire principles.[98] It reflected the ideological view that the less interference of government in the operation of the market, the better. Activist law, on the other hand, emerged in response to the growing recognition of the existence of serious market imperfections. Initially reflected in the emergence of new administrative and regulatory agencies in the late nineteenth century, it came into its own during the New Deal period.

There is another significant difference between the old and the new approaches. Reactive common law, as Ackerman views it, took a "narrow" rather than "broad" view of underlying legal problems.[99] It was incident-focused, primarily concerned with determining "deviance" from some established norm.[100] By contrast, the activist approach seeks to deal with legal

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95. *See supra* text accompanying notes 9-11.

96. *See* B. ACKERMAN, *supra* note 17, at 21-28 (discussing reactive lawyering); *see id.* at 6-11 (describing transformation worked by the New Deal).

97. *See id.* at 28-37 (contrasting activist with reactive lawering).

98. Thus, at one point Ackerman tells us that New Deal legislation represented an "insidious threat" to the existing "legal culture" of the common law because the new legislation questioned "the legitimacy of laissez-faire." *Id.* at 6. Again, in describing the realist approach to legal analysis, he accepts uncritically the view that the "roots" of the common law were "in Free Contract and Private Property" (it was, Ackerman insists, "not merely one form of legal understanding: it was the *only* [one]"). *Id.* at 17. He makes the same association later when he asserts that "attorneys [during the thirties and forties] had been reduced to speechlessness by the New Deal's constitutionally successful challenge to their laissez-faire intellectual heritage" (by which he is clearly referring to their common law heritage). *Id.* at 19. In Ackerman's world, the association of the language of the common law with the language of the laissez-faire ideology is complete and unqualified. Indeed, the association is necessary to the structure of his larger argument.

99. *Id.* at 54.

100. *Id.* at 47.

problems in a systematic way in light of social and economic realities and objectives.[101] It adopts a social-engineering rather than incident-focused perspective. An example of the shift from the old to the new approach might be the shift that took place in workplace accident law around the turn of the century, the shift from reliance upon tort liability as a mechanism for providing compensation to injured workers to reliance upon a workmen's compensation system. The former focuses upon the single accident in light of expectations developed, so Ackerman would argue, without regard to the social and economic realities of workplace injuries. The latter views such injuries as a statistically predictable occurrence, an anticipatable cost of doing business, and tries to develop an efficient system for ensuring quick and reliable compensation.

In order to understand Ackerman's overall thesis, it is critical to appreciate the basic associations he establishes here. Reactive law, as we have noted, is associated with the common law approach which in turn is viewed as the embodiment of laissez-faire ideology. Activist law, on the other hand, is associated with the rise of regulatory agencies and the marked shift toward an administrative state under the New Deal. The New Deal represents a critical pivot point: it represents that moment in the life of a legal culture when it undergoes a major "paradigm shift."[102] In this case that paradigm shift is from the reactivist legal consciousness embodied in the common law approach to an activist legal consciousness which is grounded in a central awareness of market imperfections and the need for pervasive intervention by the state in the operation of the market.

If rejection of the critical mode and language of the common law forms the first major step in Ackerman's thesis, the second step is coming to terms with the legal realists and the role that they played in this consciousness-transforming revolution. Ackerman views the realists as important transition figures but insists that their role was primarily a negative one.[103] It was to destroy any remaining claims to legitimacy that might be advanced on behalf of the old order. In Ackerman's view, the realists were primarily useful for the role they played in exposing the false claims made by an earlier generation of legal formalists for the common law approach. The legal realists made clear that the doctrinal law that had been developed in the nineteenth century was fundamentally inadequate to deal with the social and economic realities of the twentieth century.

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101. *Id.* at 20, 31, 93.

102. *See id.* at 1-5; *id.* at 4 ("the transformation of legal discourse engendered by the New Deal is deeper than one might initially suppose"); *id.* at 60 n.16 (recognizing Kuhn's idea of a paradigm shift as "a source of inspiration for the present essay"). Ackerman clearly views himself as at the cutting-edge of this revolutionary transformation. *See infra* text at note 130.

103. B. ACKERMAN, *supra* note 17, at 16-22.

The problem with the realists, according to Ackerman, is that while they were helpful in destroying the old order, they offered no positive agenda of reform. Their tragic flaw was their inability to shake free from the old common law approach. Instead of developing a new structural and analytical approach for dealing with the new problems of the twentieth century, they were content by and large to demolish the old order. Their only move was to insist that each case be decided on the basis of its own unique circumstances. Ackerman condemns this as an "intuitionist" response[104] to a set of problems that call for more systematic treatment. In place of a false formalism, he charges, the realist offered only negativism and anarchy.

Against the deconstructivist mode of the legal realists, Ackerman sets off what he advances as a "constructivist" alternative.[105] The way out of the realist dilemma, he argues, is to cast off entirely the language of the common law, the old language of blame and responsibility, and substitute in its place the sophisticated language of modern economic theory.[106] By "sophisticated" Ackerman means a language that is capable of dealing in a sophisticated way with the reality of market imperfections[107] and also compatible with new techniques of modeling and computer programming.[108]

Ackerman views this step as both natural and important. Leaving behind the critical approach and language of the legal realists and adopting in its place the approach and language of sophisticated economics is to move, Ackerman makes clear, from an "immature"[109] approach—a kind of adolescent kicking off of the traces—to a phase of new maturity.

But before he can reveal this new "mature" legal consciousness and the language in which it is to proceed, Ackerman must first deal with the intervening contributions of scholars associated with the "Harvard" legal process school. Did these scholars not offer a constructive alternative to the approach of the legal realists? They tried, Ackerman answers, but the process-centered alternative they developed must ultimately be dismissed as hopelessly amateur, old-fashioned, and "simplistic":

> Instead of building realistic, let alone rigorous, models of bureaucratic and legislative behavior, they were content with simplistic conceptions of these institutions. . . .

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104. *Id.* at 19.

105. *Id.* at 20.

106. *Id.* at 46-93.

107. Ackerman divides law-and-economics scholars into two basic groups: the "simplifiers" and the "complexifiers." *Id.* at 56.

108. *Id.* at 67-68. *See id.* at 70 ("If we are to move beyond Chicago simplicities, the cure must be more computer modeling, rather than less."). *But cf.* the view expressed by Fuller, *infra* text accompanying note 195.

109. B.ACKERMAN, *supra* note 17, at 20, 41, 65, 70, 73. Ackerman variously associates the Realists with "muddled efforts," *id.* at 20; with those who need a "security blanket," *id.* at 41; with an "impatient" approach, *id.* at 70; with a "naive" point of view, *id.* at 73; and with "thinking small," *id.* at 74.

> . . . .
> An even more serious flaw becomes clear when we turn from legal process to legal substance. Here, the Harvard group simply had nothing to offer, other than a vague recognition that new forms of expertise were aborning somewhere in bureaucracy-land.[110]

The problem with the legal process school approach, in short, is that it was not scientific enough.

Before we turn to examine the new critical language Ackerman proposes, it is important to appreciate that it is derived, at least in part, from Ackerman's effort to position himself—and liberalism—between what he views as two significant available contemporary alternatives. The first is the critical approach and language of "the Chicago School" of law and economics, a conservative jurisprudence that embraces, as Ackerman depicts it, an "extreme form of positivism."[111] The second is the approach and language of the Critical Legal Studies movement, a radical jurisprudence—in part "intuitionist," in part communitarian in thrust—that proceeds centrally upon rejection of the liberal tradition.[112] These two schools represent to Ackerman two diametrically opposed jurisprudential approaches, two competing ways of thinking and talking about legal experience, two alternative legal cultures between which we must somehow make our way. His central effort here is to find a jurisprudential language that will allow us to stand between them.

The Chicago School approach and the language in which it is expressed is flawed in two fundamental respects. First, the Chicago approach adopts a simplistic view of the operation of the market in that it fails to recognize the pervasive existence of market imperfections. The language of the Chicago School is thus a "primitive" market language.[113] Second, since Chicagoan literature gives expression to a simplistic laissez-faire ideology, the *only* shared values underlying it are those of efficiency and libertarianism. Ackerman distinguishes his own proposed approach and language in three major respects. First, his own approach is informed by the centrist vision of the New Deal: the vision of a culture in which individual liberty is understood in the context of a larger sense of communal purpose and welfare.[114] Second,

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110. *Id.* at 39-40; *see id.* at 38-40. For a critical discussion of Ackerman's treatment of legal process jurisprudence, see *infra* text accompanying notes 167-87.

111. B.ACKERMAN, *supra* note 17, at 82.

112. *Id.* at 43-45. It is helpful to think of the scholars within the Critical Legal Studies movement as falling into two rough subgroups or teams: the demolition squad—the deconstructionists or "trashers"—whose primary job is to tear down the existing liberal edifice; and the communitarian visionaries who come along after to create upon the ruins a new more humane social order. For some reason, Ackerman focuses most of his attention here on the former group, particularly as represented by the writings of Duncan Kennedy, who is probably the leading deconstructionist. Ackerman seems to take special, almost perverse, pleasure in relegating Kennedy and his writing to footnote status. *See, e.g., id.* at 43 n.13; *id.* at 44 n.15; *id.* at 70 n.29.

113. *Id.* at 45.

114. *Id.* at 104.

Ackerman's proposed new language is specifically designed to recognize the pervasive existence of market imperfections and to pull those imperfections into sharp analytical focus.[115] It is in this sense a "sophisticated" rather than "primitive" economic language.[116] Third, the play of this sophisticated market language is bounded in Ackerman's world, by two fundamental "principles of neutrality":[117]

> The first principle, a generalization of the Establishment and Free Exercise clauses of the Constitution, *forbids* citizens from justifying their legal rights by asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows. The second principle, an interpretation of the Equal Protection clause, *forbids* the legal recognition of any right that requires its holders to justify its possession by declaring themselves intrinsically superior to their fellow citizens.[118]

It is important to note the form that these principles take: they are theory-derived, they are purportedly "value-neutral" in derivation and operation, and they serve as "forbidders." Ackerman's jurisprudential model, in other words, is one where fundamental principles, "neutral" in character, operate primarily to set bounds upon the free play of market language. Ackerman's proposed system would retain in this respect (or perhaps more accurately, establish in exaggerated form) the public law-private law dichotomy, since the role of public or constitutional law would be primarily to contain—or bound—the operation of otherwise unconstrained market forces,[119] It is through this sort of containment maneuver that Ackerman seeks to pull the language of sophisticated economics into the permanent service of the liberal vision.

The problem with the Critical Legal Studies scholars, as Ackerman views them, is essentially the problem with the old legal realists: they do not offer a positive agenda. The Critical Legal Studies emphasis upon "deconstructivist" modes of analysis represents simply a new form of the old "intuitionist" approach to legal experience. It represents a throwback to the "immature" legal consciousness of the realists.[120]

Ackerman does not have much to say about the radical communitarian element within the Critical Legal Studies movement, an element whose views

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115. *Id.* at 65.
116. *Id.* at 45.
117. *Id.* at 99.
118. *Id.* (emphasis added).
119. It should be noted that this represents a radical departure from the traditional common law model where market forces are channeled and directed by a complex body of internal norms that have developed over centuries and been woven into the fabric of common law doctrine. *See infra* text accompanying notes 141-58. One major consequence of adopting Ackerman's proposal would be to rid private law of these internal ethical directives replacing them with a couple of theory-derived bounding principles. *See infra* text accompanying note 177.
120. This is the essential thrust of Ackerman's attack upon Kennedy. B.ACKERMAN, *supra* note 17, at 13 n.11; *id.* at 43 n.13; *id.* at 44 n.15.

are perhaps most articulately expressed in the writings of Roberto Unger.[121] But what he does say is reflective of the *tone* he adopts generally in the work toward those on his ideological right and left with those whose views he does not agree:

> While I suppose all of us will have to endure an extended shouting match pairing outrageous and self-congratulatory Chicagoan against obscure and critical Ungero-Marxist, I hope to urge the main line of conversation in a more Constructive direction . . . [T]he task is to make Constructive law-talk more sophisticated, rather than indulge in pseudo critical posturing.[122]

It is through such a manner of rejection or dismissal that Ackerman seeks to position himself between what he regards as the two primarily available jurisprudential alternatives.

All of this defines, then, Ackerman's primary effort in this work: to carve out a middle language—a language of sophisticated market theory bounded by his two "principles of Neutrality"—to carry the liberal tradition.

And what would such a language look like? It is here that we come to the very heart of Ackerman's proposal. In the coming age, Ackerman predicts, lawyers will gradually shuck off their old common law habits; they will abandon the ordinary language of ethical judgment upon which the common law proceeds. In place of the old-fashioned language of blame and responsibility they will substitute a "new language of power."[123] They will no longer talk as common law lawyers do about what is just and reasonable but now rather in the much more scientific language of sophisticated market theory. The language of the law will become the language of "market failure and externality, Pareto efficiency and Rawlsian maximum."[124] "[L]oose talk" about "unjust enrichment" or "unconscionability"[125] will give way to talk about "zero transaction costs,"[126] "imperfect information,"[127] and "the cost of negotiating a full set of 'contingency contracts,'"[128] "'moral hazard,' 'monitoring costs,' 'first mover advantages,' and the like."[129] Ackerman sees himself very much in the forefront of this radical transformation of legal language. Indeed, he presents himself in this book as one who has been sent to help direct us in this, as he describes it, "rare act of collective creation."[130]

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121. *See* R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); R. UNGER, KNOWLEDGE & POLITICS (1975); R. UNGER, LAW IN MODERN SOCIETY (1976).
122. B.ACKERMAN, *supra* note 17, at 44-45.
123. *Id.* at 4.
124. *Id.* at 3.
125. *Id.* at 22.
126. *Id.* at 48.
127. *Id.* at 58.
128. *Id.*
129. *Id.* at 61.
130. *Id.* at 4.

When this revolution in legal discourse has taken place, Ackerman announces confidently, the culture itself—"our real world"[131]—will be fundamentally transformed:

> [O]ur real world will come to seem a place full of pervasive transactional problems with many names: "free ride," "moral hazard," "bounded rationality," "nonconvex demand and supply curves," "imperfections in capital markets," and so forth . . . .[132]

This radical transformation of the language in which lawyers speak and write forms the heart of Ackerman's proposal. It is a transformation that will, if Ackerman is right, fundamentally alter the character not only of our legal culture but also of "our real world."

The resulting jurisprudential system would be grounded in a radical division of labor between a "political" legislative process and a "scientific" judicial process. "Values" would be supplied entirely by "the People"[133] through the legislative process.[134] The particular shape and character of those values Ackerman leaves, in accordance with economic theory, to be determined by "the People" themselves. Presumably they would in large part reflect idiosyncratic preferences and floating fashions, whatever the current generation found convenient.

By contrast, the judicial decisionmaking system would be value-free or value-neutral; it would be, to the extent humanly possible, an "objective" system. Judges and lawyers would be specialized technicians charged with operating Ackerman's proposed new sophisticated language of economic theory, constrained in this activity by two primary value-neutral mechanisms: by Ackerman's fundamental "principles of Neutrality"[135] and by the requirements of "procedural due process."[136]

Ackerman's proposal, in summary, is based upon the radical rejection of the common law tradition, and upon the effective dismissal of the jurisprudential contributions of the legal realists and the legal process scholars. Under his proposal the "amateur" jurisprudential approach and language of these earlier efforts to organize legal experience would be replaced totally by a new more scientific approach and language. Under such a jurisprudential system "intuition" would be radially separated from "rationality," the subjective from the objective, statements of value from statements of fact, public law from private law, the "political" legislative process from the

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131. *Id.* at 58.
132. *Id.*
133. *Id.* at 79.
134. Or, alternatively, values would be supplied by "the People" through constitutional mandate. *Id.* at 92 n.18. But values are clearly *not* to be supplied by lawyers and judges through development of the common law. *Id.*
135. *Id.* at 99; *see supra* text accompanying note 119.
136. *Id.* at 79.

"scientific" judicial process, and the setters of end values ("the People") from the technique specialists (lawyers and judges). The most significant change would be the radical transformation of legal language: lawyers and judges would no longer talk about what is fair and just and reasonable but rather about "zero transaction costs," "imperfect information," "moral hazard," and "the costs of negotiating a full set of 'contingency contracts.' "

B. The Legal Embodiment of Technological Man: Ackerman's Betrayal of the Liberal Tradition

> Aldrin spoke . . . of "various contingencies that can develop," of "a wider variety of trajectory conditions"—he was talking about not being able to join up, wandering through space, lost forever to life in that short eternity before they expired of hunger and thirst. Small hint of that in these verbal formulations. Even as the Nazis and the Communists had used to speak of mass murder as liquidation, so the astronauts spoke of possible personal disasters as "contingency." The heart of astronaut talk, like the heart of all bureaucratic talk, was a jargon which could be easily converted to computer programming, a language like Fortran or Cobal or Algol. Anti-dread formulations were the center of it, as if words like pills were there to suppress emotional symptoms.
>
> This endless preciosity of specification was necessary. . . . Everything was important. After a while everything began to seem equally important. . . . Like narcissists, like children, like old people, the astronauts all exhibited a single-minded emphasis on each detail which arrived before them, large or small . . . . [T]hey existed in capsule like the real embodiments they were of technological man, forever engaged in activities whose controls he wields until he controls them no more, powerful, expert, philosophically naive, jargon-ridden, and resolutely divorced from any language with grandeur to match the proportions of his endeavor.
>
> —Norman Mailer[137]

What are we to make of Ackerman's strange proposal, and even stranger performance, in this work? Ackerman labors here to create a rational jurisprudence that is in a sense just the opposite of Critical Legal Studies jurisprudence, the opposite of a jurisprudence that proceeds from the radical embrace of intuitionism; he labors to create a jurisprudence that is not as "heartless" as that of the Chicago school; he labors to create a jurisprudence that is liberal to the core—yet somehow it comes out all wrong. In place of the traditional language of the common law, the language of fairness and justice and reasonableness,[138] we are given what seems to be a kind of astronaut talk, a technical "jargon" designed "to be easily converted into computer programming," a "bureaucratic" language in which finally "everything [is] important."

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137. N. MAILER, OF A FIRE ON THE MOON 274 (1970).
138. *See infra* text accompanying notes 141-58.

What is most striking are the incongruities: between the surface rationality of Ackerman's system, and the troubled world that lies just below the surface; between Ackerman's effort to create a system that is perfectly coherent from the standpoint of rationalist theory, and the awareness that that system not only does not hold the world together but in fact opens upon a world divided against itself; between Ackerman's claims of objectivity, and the realization of how much he has had to manipulate and distort reality to get things to come out the way he wants them to; between the grand aspirations that Ackerman has for his proposed new jurisprudential system, and the deep and pervasive inadequacies of the language he proposes to carry that enterprise forward. No matter how hard he tries, Ackerman cannot finally escape sounding here like one of Mailer's astronauts: "powerful, expert, philosophically naive, jargon-ridden, and resolutely divorced from any language with grandeur to match the proportions of his endeavor."

One does not have to reject out of hand the value of economic theory and the language in which it proceeds to appreciate that there is something wrong with Ackerman's attempted employment of it here.[139] Whatever its value, it is simply not equipped by itself, or even when bounded in its operation by a couple of thin principles, to carry the complex burden of the liberal tradition. Perhaps the best evidence of this is Ackerman's own performance. That performance, as I shall try to indicate below, demonstrates more powerfully than any outside criticism could ever do the ethical inadequacies of his proposed new jurisprudential language and system.

Critics have charged that Ackerman's failure in this work is a reflection of the intellectual and moral bankruptcy of modern liberalism.[140] But I want to call that criticism into question. Even the most insensitive reader should be able to see that liberalism is not the problem here. If nothing else is clear, it should be clear that the intelligence we see at work, however one might describe it, is *not* a liberal one. That is in any case what I would like to try to show in the discussion that follows. My effort will be to demonstrate what ought to be evident: that Ackerman's performance in this work is not an expression of the liberal vision but in a very fundamental sense, a betrayal of it.

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139. This point needs to be stressed to ensure that it is not misunderstood: It is not that the language of sophisticated economic theory has no role in the law. Indeed, the views expressed here are quite consistent with the conviction that, properly employed, sophisticated economic theory has great value. It reflects the view rather that, whatever that role is, it is not the exclusive sort of role that Ackerman claims for it here.

140. *See, e.g.*, Peller, *The Politics of Reconstruction* (Book Review), 98 HARV. L. REV. 863 (1985); Freeman & Schlegel, *Sex, Power and Silliness: An Essay on Ackerman's Reconstructing American Law*, 6 CARDOZO L. REV. 847 (1985).

1. Ackerman's Distorted Treatment of the Language of the Common Law

One place we see evidence of this betrayal is in the distorted picture Ackerman paints of the common law and the ethical character of the language upon which it proceeds. Ackerman's entire argument is based upon the insistence that the language of the common law is essentially the same as that of laissez-faire ideology.[141] This is the foundation stone of his thesis. But if, as I think I can show, that picture is inaccurate and unfair, then the foundation is insecure; and that in turn threatens his whole proposal with collapse.

The historical reality in fact is quite complex. While it is true that considerations of expediency and public convenience played a role, probably an expanded one, in nineteenth century common law jurisprudence, the evidence does not support the view that that jurisprudence was completely transformed into the image of the self-regulating market.[142] Throughout the nineteenth century, even during the period of so-called "legal formalism," considerations of justice and fairness continued to play an extremely important and central role in common law jurisprudence, and the language of the common law fully reflected that fact.[143]

The classic nineteenth-century statement of the role and character of the common law is found in that famous passage from Chief Justice Shaw's opinion in the *Norwood Plains* case:[144]

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, *the common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular case which fall within it.* These general principles of equity and policy are rendered precise, specific, and

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141. *See supra* note 98 and accompanying text.

142. The view that, during the first half of the nineteenth century, the common law *was* transformed into the image of the self-regulating market forms the central thesis of Professor Horwitz's revisionist history of this period. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977). But the Horwitz thesis has been seriously criticized. *See, e.g.*, Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

143. *See, e.g.*, Railroad Co. v. Lockwood, 17 U.S. (Wall.) 358 (1873) (railroad's ability to contract out of liability for negligence limited to terms that are just and reasonable); Riggs v. Palmer, 115 N.Y. 506 (1889) (invoking the general common law principle that the wrongdoer may not profit from his own wrong); *see also* Schwartz, *supra* note 142.

144. Norwood Plains Co. v. Boston & Maine R.R., 1 Gray 263 (Mass. 1854).

> adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding . . . the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its *foundations in the principles of equity, natural justice, and that general convenience which is public policy;* although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community; yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered in a good degree, precise and certain, for practical purposes, by usage and judicial precedent.[145]

It is this notion—the notion of carrying forward fundamental principles "founded on reason, natural justice, and enlightened public policy" into a constantly changing world—that informed the nineteenth century understanding of the common law enterprise, and in large part has continued to inform that enterprise down to the present.

Contrary to what Ackerman suggests, these fundamental principles did not reflect the radical embrace of market ideology. The decided cases reflect rather a complex cultural ethic: a pressure toward the development of a body of law that is, to borrow Lon Fuller's phrase, "just, fair, reasonable, workable, efficient, and respectful of individual dignity."[146] If the language in which the common law proceeds is in part the language of "general convenience" and "enlightened public policy"—and in that sense related to the language of efficiency—it also proceeds centrally upon considerations of fairness and justice.

What impresses one most when one stands back to survey the common law in its entirety is the depth and richness of its ethical texture. At the core of the common law are "hard-won and deeply imbedded principles"[147] that have emerged as the product of long trial and error, principles that reflect the fundamental conscience of the culture. One thinks, for example, of the principle that no one should be able to profit by his own fraud or take advantage of his own wrong,[148] or the prohibition against unjust en-

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145. *Id.* at 267 (emphasis added).

146. L. FULLER, *Means and Ends,* in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON FULLER 47 (K. Winston ed. 1981)

147. H. HART & A. SACKS, THE LEGAL PROCESS 101 (1958 tent. ed.). *See infra* text accompanying note 176.

148. *See, e.g.,* Riggs v. Palmer, 115 N.Y. 506 (1889); Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution,* 49 HARV. L. REV. 715 (1936) ("It has long been the policy of the common law that no one should be allowed to profit by his own wrong; the maxim, *nullus commodum capere potest de injuria sua propia,* in one or another of its forms, has a very special application both at law and equity.").

richment,[149] or the principle that those with great economic power ought not to be allowed to take unfair advantage of others.[150] Principles of this sort, moreover, form just the core of the common law, and are surrounded by a constellation of additional ethical principles and directives of different weights and statures: those that bear, for example, upon the ethical functioning of our economic system[151] or that reflect the ethical expectations implicit in the customs or practices of a particular trade,[152] or that reflect evolving social mores.[153]

Even this, however, fails to describe the ethical heart of the common law. If the language of the common law were a listing language, one might be able, in theory, at least, to extract the various ethical directives referred to above and catalogue them in an elaborate list of maxims. But the distinguishing feature of the language of the common law is that it is *not* a listing language. The common law does not consist of a set of ethical statements that lend themselves to arrangement in some sort of elaborate taxonomy. The heart of the common law rather is the activity of ethical judgment one finds there. The special virtue of the language of the common law is that it is not a systems language, not the language of theory, but *a language of judgment.* The education it offers is, and has always been, an education in the difficult art of applying competing ethical principles to infinitely varied experience.

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149. The ethical prohibition against unjust enrichment underlies, among other things, the doctrine of constructive trust: "where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." A. SCOTT, THE LAW OF TRUSTS § 404.2 (2d ed. 1956).

150. *See, e.g.*, Railroad Co. v. Lockwood, 17 U.S. (Wall.) 358 (1873).

151. *See, e.g.*, Trailmobile Co. v. Whirls, 331 U.S. 40 (1947) (Jackson, J., dissenting) ("Courts from time immemorial have held that those who undertake to act for others are held to good faith and fair dealing and may not favor themselves at the cost of those they have assumed the represent.")

152. *See, e.g.*, The T.J. Hooper, 60 F.2d 737 (Cir. 1932); Dixon, Irmaos & Cia, Ltds. v. Chase Nat. Bank of N.Y., 144 F.2d 759 (Cir. 1944).

153. *See, e.g.*, Oppenheim v. Kridel, 236 N.Y. 156 (1923) (making rights assertable previously only by husbands available equally to wives):

> A remedy, not provided by statute but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by actions of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? . . . Does not the principle that the 'law will never suffer any injury and a damage without a remedy' apply with equal force to either cause? . . . The common law is not a compendium of mechanical rules written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation.

Id. at 164; Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902) (Gray, J., dissenting) (changing social mores are grounds for expanding protection of individual privacy and creating enforceable privacy right); *see also* J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 191-93, 322-23, 327-34 (1910).

It is clear that Ackerman wants to get rid of the language of the common law. But why? Perhaps it is because he really believes that it embodies laissez-faire ideology, or that it has no capacity for taking market imperfections into account. But it is just as likely that he wants to get rid of it because it does not lend itself readily to translation into the language of economic theory or into a format compatible with the requirements of computer modeling. The complex language of judgement we find in the common law cases resists reduction to such terms—even as it resists reduction, at a more general level, to the terms of rationalist theory.[154] In order to get rid of this complication, therefore, Ackerman creates a caricatured common law; he creates a strawman and then disposes of it. The result is bad history and bad jurisprudence.

This, moreover, is just one example of the way Ackerman bends and distorts history in this work to make it serve the ends of his argument.[155] One of the requirements of the liberal tradition, it would seem, is the requirement that when we deal with historical experience, we at least try to do justice to the complexities of that experience. As Fuller insisted, "[Though] the reality we confront is difficult and dangerous, nothing can be gained by obscuring its true nature."[156] It is the simple expectation of critical honesty. Ackerman falls short of living up to that expectation here. By manipulating and distorting history as he does to make it fit his thesis, he ends up betraying the very tradition he purports to champion.

The great tragedy, of course, is that by throwing out the language of the common law, Ackerman unwittingly throws out the very rhetorical resources from which a vital liberal jurisprudence might have been fashioned.[157] He dismisses an inherited cultural rhetoric that embodies in all its richness and complexity the underlying conscience of our liberal civilization. One cannot fail to be struck by the contrast between the two languages—between the ethically rich and versatile language of the common law and the ethically impoverished language of mechanical rationality which Ackerman offers here as a replacement.[158] This is just one manifestation, moreover, of Ackerman's self-destructive refusal to listen to "the voice within."

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154. For a discussion of the "deeper coherence" of the common law, and its resistance or opposition to translation into rationalist theory, see Fuller, *Reason and Fiat in Case Law,* 59 HARV. L. REV. 376 (1946); Teachout, *The Soul of the Fugue: An Essay on Reading Fuller,* 70 MINN. L. REV. 1073, 1117-20 (1986).

155. *See infra* text accompanying notes 167-87.

156. Fuller, *Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom Through Law,"* 54 COLUM. L. REV. 70, 73 (1954).

157. Compare Justice Jackson's creative employment of the common law tradition in his opening statement at Nuremburg, discussed *infra* in the text accompanying notes 197-204 with the very different, but still central, reliance upon the common law tradition in the liberal jurisprudence of other post-war liberal scholars, discussed *infra* in the text accompanying notes 205-25.

158. *See infra* text accompanying note 189.

2. Building a Jurisprudence Upon False and Simplistic Antitheses: Ackerman's Dismissal of the Realists and Rejection of the Role of "Intuition" in Judicial Decisionmaking

Others have commented on Ackerman's curiously beligerent treatment of the legal realists,[159] and I will not pursue that criticism here except to observe how that treatment reflects a deeper problem with his basic approach to the organization of language and experience. Ackerman's discussion of the legal realists proceeds upon the establishment of a radical dichotomy between the role of intuition in judicial decisionmaking and the role of reason. Basically he dismisses the "intuitionism" of the realists as the reflection of an "immature" legal consciousness, while holding up the "rationalism" of his own proposed approach as an example of what one should expect from a "mature" jurisprudence. In Ackerman's moral universe, in other words, intuition is bad—it is something from which we should try to divorce ourselves[160]—and rationality is good.

But as Fuller pointed out long ago in his classic essay, *Reason and Fiat in Case Law*,[161] this is to build a jurisprudence upon a false antithesis—or, more descriptively in Ackerman's case, a whole set of false antitheses. Although it is possible to view reason and intuition (or fiat) as representing fundamentally opposed impulses, it is important to recognize that they also form "indispensable complements" for one another.[162] The very genius of our jurisprudential system depends upon its ability to harness both impulses together in the activity of judgment. Without combining both, indeed, a meaningful language of judgment would be impossible.

The radical dichotomy Ackerman establishes between intuition and rationality here reflects his basic approach to the organization of language and experience in this work. His entire jurisprudence is constructed upon a set of radical, and for the most part false, dichotomies. It is this that contributes to our sense that while Ackerman's proposed system reflects a certain superficial coherence, it rests upon an unstable foundation. When we enter the world of Ackerman's jurisprudence, we enter an essentially schizophrenic world, a world characterized by internal separations and divisions. It is a world in which the past (in the form of our common law tradition) is radically cut off from the present and future; the language we are to speak

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159. *See, e.g.*, Priest, *supra* note 88, at 1633-34 ("very unusual interpretation of Realism"); Freeman & Schlegel, *supra* note 140, at 853 ("Ackerman's argument is simply a liberal legalistic attempt to put to rest the radical potential of Realism"); White, Book Review, 34 J. LEGAL EDUC. 731 (1984).

160. In Ackerman's moral universe, Professor Duncan Kennedy, who represents the radical intuitionists within the Critical Legal Theory movement, is "bad" and thus is someone from whom we should seek to divorce ourselves. *See supra* notes 112, 120.

161. Fuller, *supra* note 154.

162. *Id.* at 381.

as lawyers and judges is made into a highly specialized language, separate and distinct from the language of ordinary discourse; the realist impulse is radically denied in order to make way for the conceptual organization of legal experience; the particularistic approach to experience is rejected entirely in order to replace it with a systematic one; the language of fact is divorced and isolated from the langauge of value; the activity of legal argument and judicial decision is treated as unrelated to the activity of setting social ends; the amateur citizen end-setters ("the People") are set off in one sphere and the professional technique-specialists (lawyers and judges) are set off in another; a "normative" public law is regarded as radically different in function and character from a "non-normative" (or so it is represented) private law; and the "subjective" element in judicial decisionmaking is ruthlessly suppressed in the attempt to create an "objective" system. It is a world, in sum, in which, to borrow from Radbruch, "[o]nly the intellect carefully insulated from character . . . may assert itself in the discharge of the judicial function."[163]

One could go on, but this should be enough to demonstrate the essentially schizophrenic character, and disintegrative thrust, of Ackerman's jurisprudence. In each of the contexts described above, Ackerman first establishes a radical dichotomy and then proceeds to reject one branch of it in favor of the other.[164] But because these are for the most part false dichotomies, the consequence is often both a perverse form of self-denial[165] and the radical embrace of something that ought not to be *radically* embraced.[166] By adopting

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163. R. RADBRUCH, EINFEURING IN DIE RECTSWISSENSCHAFT 158 (1952). *See infra* text accompanying notes 185-87.

164. *Cf.* Fuller, *supra* note 154.

165. Ackerman's denial of the realist impulse is a good example. One need not become a radical intuitionist to appreciate that the realist impulse is a pervasive one in our jurisprudence, and indeed that, for all its mischievousness, our jurisprudence is dependent upon it for its vitality. It is the impulse that among other things helps keep us from self-delusion. And at its best, it represents the kind of irreverence that keeps us from taking ourselves too seriously. Without it our jurisprudence would quickly lose its capacity for doing equity, and, on a larger scale, its capacity for self-correction and growth. What the realist impulse ultimately stands for, after all, is the insistence upon going back to the experience itself, the impulse that Joyce has Stephen Daedalus express so perfectly in the closing moments of *The Portrait of an Artist* when he has him say: "I go to encounter for the millionth time the reality of experience. . . ." J. JOYCE, A PORTRAIT OF THE ARTIST AS A YOUNG MAN 253 (Viking Press ed. 1916).

These, moreover, are just a few of the many faces of realism. So it is puzzling what one stands to gain by writing off the realist impulse, as Ackerman does, as the reflection of an "immature" legal consciousness.

166. It is interesting in this respect how Ackerman's radical denial of the realist impulse drives him to the radical embrace of rationalism. This is the logical consequence of his dichotomous, or schizophrenic, organization of language and experience. Some reviewers of Ackerman's book have intimated that what is wrong with Ackerman's approach is his claim that reason plays a role at all in the law. *See, e.g.*, White, *supra* note 159, at 735 (charging Ackerman with having attempted to resurrect the discredited legal process idea of "reasoned elaboration"). But it is not an appeal to reason that characterizes Ackerman's work, or that

such an approach to the organization of language and experience, Ackerman ends up denying the very tensions—between rationality and intuition, substance and technique, fact and value, principle and practicality, the active virtues and the passive virtues, the particular and the general, realism and idealism—that give to our jurisprudence, and to the liberal tradition generally, its unique vitality.

3. Ackerman's Treatment of the Legal Process School

Ackerman's dismissal of the contributions of the legal realists has been much commented upon,[167] in part perhaps because it is so openly antagonistic. But his condescending and distorted treatment of the "Harvard" legal process scholars,[168] whom he regards in some respects as allies and teachers, is in some ways even more puzzling and offensive. The central problem with Ackerman's portrayal of legal process scholarship is that it is simply inaccurate. Ackerman asserts that the legal process school taught that courts should not be "primary lawmakers"[169] but should leave value setting to other agencies of government, in particular to the legislative branch. This in turn is a reflection of a larger view that Ackerman has been promoting: that legal process jurisprudence is not concerned with developing a substantive ethical vision but only with *process.*[170] Legal process jurisprudence, as he

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is so disturbing about it. Rather it is the *mechanical rationality* of the system he proposes. It is Ackerman's effort to exclude from the activity of judgment those non-rational elements that in fact play such a large role in judgment when it is responsibly excercised. It is one of the lessons of Swift's digression on madness in *A Tale of a Tub* that reason without intuition is just as insane as intuition without reason. J. SWIFT, A TALE OF A TUB 336-47 (Modern Library ed. 1958); *see* J. WHITE, *supra* note 78, at 132-35.

167. *See, e.g.,* Priest, *supra* note 88; White, *supra* note 160.

168. *See supra* text accompanying note 110.

169. B. ACKERMAN, *supra* note 17, at 39.

170. According to . . . conventional Legal Process wisdom, the mistake of the Old Court of the 1920's and 1930's in striking down social welfare legislation was not that it had a *wrong* vision of the good society but that it purported to have *any* comprehensive vision at all. The Legal Process School sees the articulation of social philosophy as a task for the political, not the judicial, process because the executive and the legislature, unlike the courts, are directly responsible to the people through the democratic process.

Ackerman, Book Review, DAEDALUS, Winter 1974, at 123-24 (emphasis in original). Part of Ackerman's problem is that he tends to treat as interchangeable what to legal process scholars are two very distinct situations: the situation where the court declares an act of the legislature *unconstitutional* thereby precluding the legislature from taking any action inconsistent with the court ruling; and the very different *non-constitutional* context of common law adjudication or statutory interpretation where the legislature is free, if it chooses, to correct an "erroneous" judicial decision. In the latter context, contrary to Ackerman's assertion, the legal process scholars would have the courts play a very active lawmaking role. *See infra* notes 174-78 and accompanying text. By confusing these two contexts, Ackerman seriously misrepresents the basic thrust of legal process jurisprudence.

has insisted elsewhere, simply invites us to "worship at the shrine of Process."[171]

But even the most cursory review of Hart and Sacks' classic *Legal Process* materials,[172] to which Ackerman himself refers,[173] would show that he is wrong. In some respects, indeed, Ackerman's assertions about legal process jurisprudence directly contradict the actual legal process approach. Ackerman's claim that legal process jurisprudence teaches that courts are not be "primary lawmakers" is one example. In fact, if the Hart and Sacks' materials stress a single point, it is that the courts have *an active and inescapable responsibility to make law and to make law that is just and reasonable.*[174] Indeed, it is probably not to claim too much to say that a majority of the "problem" cases we encounter in these materials—cases, that is, which in the editors' view have been wrongly decided—are those where the court has *declined* to make law, out of misplaced deference either to the doctrine of stare decisis or to the notion that it is for the legislature and not the courts to make new law.[175] Of course Ackerman *wants* legal

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171. *Id.* at 124.

172. H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958).

173. B. ACKERMAN, *supra* note 17, at 38 n.9 (describing Hart and Sacks' materials as "undoubtedly the most influential unpublished work in recent legal history").

174. The idea that the courts have a primary and inescapable responsibility to develop the law, and to do so on terms that are just and reasonable, forms a central theme of the legal process materials:

> [E]merging problems of social maladjustment tend always to be submitted first to the courts. The body of decisional law announced by the courts in the disposition of these problems tends always to be the initial and continues to be the underlying body of law governing the society. Legislatures and administrative agencies tend always to make law by way not of original solution of social problems but by alteration of the solutions first laid down by the courts.
>
> *How the courts should exercise this primary and basic responsibility for the development of the law is one of the major concerns of these materials* . . . .

H. HART & A. SACKS, *supra* note 172, at 186 (emphasis added). *See id.* at 366-564 (it is the duty of the courts to develop a body of law that is just and reasonable in common law context); *id.* at 1144-1416 (it is the duty of the courts to develop a body of law that is just and reasonable in a statutory interpretation context).

175. The criticism of courts for failing to assume responsibility for making new law and for "passing the buck" to the legislature forms a major theme in the *Legal Process* materials. *See* H. HART & A. SACKS, *supra* note 172, at 472 (criticizing the *Roberson* court majority for claiming that the right of privacy "cannot now be incorporated" into the jurisprudence of New York "without doing violence to settled principles of law."); *id.* at 486 (criticizing dissenting Judge McLaughlin in the *Oppenheim* case for referring plaintiff to legislature for changes in the law); *id.* at 488 ("To what lengths of intellectual nonsense will courts go to pass the buck to the legislature and avoid taking an open and honest responsibility of their own for the growth of the law?"); *id.* at 494 (criticizing dissenting judges for referring infant plaintiff to legislature for change in the law to permit recovery for negligently inflicted prenatal injuries:

> Are not Judge Lewis and Judge Conway, in effect, saying to the infant plaintiff, "There can be no justice for you under the institutions of this state, you poor child, wrongfully injured though you have been. The thing for you to do when you grow up, is to get the legislature to pass a statute so that injustices like this

process jurisprudence to stand for a value-neutral, legislature-deferring, jurisprudence so he can invoke it—this aspect of it at any rate—in support of his own proposed scheme. But the fact is it does not.

The reality is that legal process jurisprudence stands in radical opposition to Ackerman's jurisprudence on almost every score. This is no more fully evident than in the very different conceptions of the common law that underlie the two jurisprudential approaches. Ackerman, as you recall, views the common law as simply the embodiment of laissez-faire ideology, and, for that reason, as something to be utterly rejected. The Hart and Sacks' *Legal Process* materials proceed upon a radically different understanding of the common law and the role that it plays in shaping the character of the larger culture. The legal process materials adopt the view:

> that the law rests upon a body of hard-won and deeply-imbedded principles and policies—such, precisely, as the principle that one should not be allowed to profit by his own wrong; that this body of thought about the problems of social living is a precious inheritance and possession of the whole society; that the legislature, within broad constitutional limits, has the right and power to modify or depart from one or more of these traditional principles and policies if after due consideration it deems it wise to do so; but that no body of men and women constituting for the time being merely one session of the legislature has authority to abandon any part of this inheritance unthinkingly or without making clear openly and responsibly its purpose to do so; and that accordingly every statute is to be read as subject to established principles and policies of the general law save only as a decision to modify or depart from them is made unmistakably plain.[176]

There are, it should be noticed, two fundamental differences between the view expressed here and that which underlies Ackerman's jurisprudence. First, there is a very different view of the ethical character of the common law. Instead of viewing the common law, as Ackerman does, as the embodiment of laissez-faire ideology, legal process jurisprudence sees the common law as consisting of a body of "hard-won, deeply-embedded principles" that reflect a gradually accumulated wisdom about "the problems of social

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will not continue to be wrecked upon your successors.");
id. at 515 (suggesting that "gradual accretions by judicial recognition to the list of customary crimes" may be less dangerous to liberty than "the unthinking proliferation by modern legislatures of novel and regulatory crimes."); *id.* at 536 (taking the Supreme court to task for declining to decide a case on the grounds that the particular area under consideration might be more appropriately developed by the legislative branch); *id.* at 545 (criticizing Supreme Court cases in which the Court declined "to consider the question of present justice on its merits on the ground that Congress should decide the question of future justice. . . .").

These, moreover, represent just the tip of the iceberg. It is impossible to understand how Ackerman could have come away from these materials thinking that they stand for the proposition that courts do not have primary lawmaking responsibility, or that they should defer to the legislature wherever matters of value judgment are concerned. They so clearly stand for just the opposite proposition.

176. *Id.* at 101.

living." In legal process jurisprudence, accordingly, the common law is not something to be gotten rid of, but regarded as a "precious inheritance and possession of the whole society." The common law provides legal process jurisprudence, in other words, with what is so noticeably missing from Ackerman's proposed system: an ethical *heart.*[177]

Second, there is a radically different view of the respective roles of court and legislature. Ackerman's "sophisticated" jurisprudence proceeds from the cavalier assertion that "every competent lawyer knows that constitutional and statutory values supersede law made by judges in a democratic system like our own."[178] *Therefore,* Ackerman concludes, courts ought to get out of the value-judgment business entirely. The "simplistic" legal process jurisprudence, in contrast, adopts the view that courts have a duty to preserve the body of hard-won principles represented by the common law against unthinking legislative erosion, and accordingly should read legislation as if it were written, not upon a blank slate, but upon this foundation of hard-won principles. The one is a jurisprudence that would constantly shift in response to floating fashions, the other, a jurisprudence anchored in the permanent traditions of our culture.

Ackerman's portrayal of legal process jurisprudence is ultimately based in the notion, which he has in part been responsible for propogating, that legal process scholarship is unconcerned with developing a substantive ethical vision—that it invites us to worship, in Ackerman's terms, "at the shrine of Process."[179] Nothing could be further from the truth. To begin with, the Hart and Sacks' *Legal Process* materials proceed from a very definite substantive vision of the ultimate aim of the legal and social order: to establish conditions of community that will permit each of us to realize our full human potential.[180] Moreover, these materials are centrally concerned with

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177. It provides, to put it in slightly different terms, a cultural "conscience."

The difference between the legal process approach and Ackerman's is not, as Ackerman suggests, the difference between an undisciplined and simplistic system on the one hand, and a rigorous and sophisticated one on the other. It is more like the gulf that separates Edmund Burke and Thomas Paine, the gulf between a tradition-centered view of culture and a theory-derived one. What Ackerman proposes to do here is like what, at least from Burke's perspective, Paine proposed to do: throw out the "precious inheritance" of accumulated experience as it is reflected in cultural tradition and substitute in its place an abstract theoretical system bounded in its operation by a couple of thin principles.

178. *Id.* at 92 n.18.

179. Ackerman, *supra* note 170, at 124. Critical Legal Studies scholars, who generally have not been very generous in their criticisms of Ackerman, find his characterization of legal process jurisprudence in this respect "helpful." Freeman & Schlegal, *supra* note 140, at 850

180. The ultimate objective of the law is to assist in the task of "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man." H. HART & A. SACKS, *supra* note 172, at 110 (quoting Snee, *Leviathan at the Bar of Justice,* in GOVERNMENT UNDER LAW (1956)). *See id.* at 115 ("No division of presently available benefits is . . . 'fair' unless it accords to every human being in the society, at birth, a reasonable opportunity to realize his potentialities.").

the development of "character,"[181] both of the legal culture and the individuals who work within it. This ethical concern is expressed in a myriad of ways. It is reflected in the central and recurring insistence that we take responsibility for the development of a legal system that is fair and just and reasonable.[182] The primary activity in which the student is invited to engage, indeed, is that of judging—as *ethical* performances—representative performances by lawyers and judges of a whole range of activities in which lawyers and judges typically engage.[183] One need not read very long or far in these materials, in other words, to realize that the language in which they proceed is not simply a language of process but a complex language of ethical judgment.

It is illuminating to consider in this light the concluding observation upon which the Hart and Sacks' materials come to rest.[184] The concluding section opens with an excerpt from Radbruch's *Einfeuring in Die Rectswissenschaft*.[185] The purpose of including the excerpt is to contrast two alternative conceptions of judicial decisionmaking: one centered in the notion of "character," a conception to which the *Legal Process* materials clearly subscribe; and the other, along the lines of Ackerman's proposed system, centered in detached "intellect" and "rationality."

The former conception explicitly recognizes that judges are constantly and inescapably engaged in "creating law":

> In creating law, in formulating legal norms and value judgments the judge commits his entire personality not only in its cognitive but also in its value-choosing qualities; not merely his intellect but also his character are involved; the requirements of character suffuse the judicial ideal of the "Schwabenspiegel" (about 1275) which is cast in terms of touching pathos: "Each and every judge shall have four virtues: the first is justice, the second wisdom, the third strength, the fourth moderation."[186]

"[T]he requirements of character suffuse the judicial ideal"—there is, it could be argued, no more succinct expression than this of the conception

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181. *See infra* text accompanying note 186.

182. A central theme of the legal process materials is that arrangements that are just and reasonable are more likely to provide a stable foundation for on-going relationships, while those that are not are likely to breed litigation. *See, e.g.*, H. HART & A. SACKS, *supra* note 172, at 212-32 (responsibility of lawyer in framing private leasing arrangement to include terms that are fair and reasonable to both parties); *id.* at 274-80, 287 (criticizing lawyers for airlines for including provisions in tariff that are clearly not fair and reasonable). This is intimately related to the major theme that courts, in deciding cases, have an inescapable responsibility to decide each case on terms that are just and reasonable, and that it is a betrayal of that responsibility to pass the buck to the legislature. *See supra* notes 174-75.

183. *See, e.g., id.* at 287 (editors chastize airlines lawyers for unethical and unprofessional performance in drafting airline tariff provisions); *id.* at 535 (editors chastize Justice Black for thoughtlessness and unethical character of his opinion in the *Halcyon* case).

184. *Id.* at 1407.

185. R. RADBRUCH, *supra* note 163.

186. H. HART & A. SACKS, *supra* note 172, at 1407 (quoting Radbruch, *supra* note 163).

of the judicial function that one finds elaborated in the legal process materials.

The alternative conception, as Radbruch states it, fairly describes the judicial function as it would be under Ackerman's proposed system, but by the same token it is one that the legal process materials squarely reject:

> In contrast, the rationalism of the Age of Enlightenment, for which human nature is reduced to egotism and cleverness, cannot rely on such irrational factors. If the deepest human trait is egotism, every influence of character on the judicial function must be eliminated. Only the intellect, carefully insulated from character . . . , may assert itself in the discharge of the judicial function . . . .
>
> The judge sitting on the bench is nothing but an engine of subsumption, a judgment machine, a legal automaton or whatever other term may be found for the new judicial ideal of an intellect that does not make choices among values and thus is devoid of individuality. And since the intellect is incapable of formulating value judgments and since the judge who operates merely as an intellect cannot create legal norms, the judicial function must also be confined to the application of the law.[187]

It is difficult to imagine a more perfect description of Ackerman's own proposed new jurisprudence. Little wonder, then, that Ackerman felt a need to dismiss the jurisprudence of the legal process school: it so completely contradicts his own.

C. *The "Character" of Ackerman's Jurisprudence*

The question of "character" is finally central to understanding why Ackerman fails as completely as he does here. But where does one find character in a work such as this? It is reflected primarily, it seems to me, in Ackerman's own performance—a performance characterized, in ways we have not yet even begun to indicate here, by its arrogance, intolerance, and superficiality, by its fundamental *illiberality*.[188] Recall, in this respect, that passage where

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187. *Id.* at 1408 (quoting Radbruch, *supra* note 163).

188. *See, e.g.*, B. ACKERMAN, *supra* note 17, at 44, 65, 69, 90, 91. Critics on the left have described Ackerman's style as "pompous, arrogant, condescending, self-involved and self-aggrandizing." Freeman & Schlegel, *supra* note 140, at 856. But they are not the only ones who have criticized Ackerman's style. It is significant that even those who profess support for Ackerman's basic undertaking have been embarrassed and dismayed by the tone that Ackerman adopts in this work. *See, e.g.*, Schauer, *Lawyers and Lawmaking*, 83 MICH. L. REV. 1141 (1985). After commenting that Ackerman's central argument is both important and "lucidly presented," *id.* at 1145, Schauer goes on to observe:

> With reference to matters of style, however, I am troubled by Ackerman's petulant dismissiveness with movements or perspectives with which he disagrees. This is most apparent with respect to the people in the Critical Legal Studies movement. . . . In addition, there are also snide references to certain members of the law and economics movement, references in a style that ought to have no part in a scholarly work.

Id. at 1145 n.13. Schauer's attempt here to draw a bright line between the substance of

Ackerman is discussing the competing views of those on his political left and right with whom he does not agree: "While I *suppose* all of us *will have to endure* an *extended shouting match* pairing outrageous and self-congratulatory Chicagoan against obscure and critical Ungero-Marxist . . . ."[189] What do we make of the tone of weary superiority that we find reflected here? There is not much to make, perhaps, except to observe that this is one of the ways we know that the intelligence we see at work here is not a liberal one. It is one of the ways we know that *Reconstructing American Law* is not, in the final analysis, a work of liberal jurisprudence.

Another place character is reflected, it seems to me, is in the system that Ackerman proposes. For all its elaborate rationality, Ackerman's proposed new system strikes one in the end—certainly when compared to "the precious inheritance" of the common law—as such a tinny and insubstantial thing. It reminds one of the mechanical nightengale in the old fairly tale. Ackerman's fabricated system is like the "new" mechanical bird that the emperor received as a gift, and that so facinated the emperor and his court with its novelty, with its wonderfully elaborate machinery and intricate song, that the natural nightengale, which had for centuries serenaded the court with its lovely song, was ignored—it was dismissed as just a plain, brown, ordinary bird—and shortly thereafter banished back to the forest from which it had originally come.

It is not just the system itself, moreover, but the pretentiousness of thinking that this little fabrication could possibly substitute for the experience-forged wisdom of the common law. It is a form of delusion to think that a system constructed primarily of market forces, and bounded by a couple of thin theory-derived principles, could ever adequately replace the in some ways simple, but in others infinitely complex, ethical heart of the common law. One need not have any great romantic view of the common law to appreciate this point either—just a decent respect for the wisdom that comes from experience, for the struggles and achievements of those who have come before.

Finally, the character of Ackerman's jurisprudence is reflected in the language he would have us adopt: his "new language of power." It is a language that opens upon the sort of jurisprudential world that Radbruch imagines: a world where the activity of judicial decision is essentially a mechanical activity, deprived of any trace of ethical judgment and individ-

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Ackerman's argument and his "style" is misplaced, it seems to me, because it fails to recognize the extent to which the character of Ackerman's performance reflects the ethical inadequacies of his underlying vision.

Ackerman's tendency to resort to glib dismissal when something more is called for has given rise to the *apercu* currently making the rounds that what Ackerman really stands for is not liberalism at all, but *glib*eralism.

189. B. ACKERMAN, *supra* note 17, at 44 (emphasis added).

uality, and where the judicial decisionmaker is nothing more than "an engine of subsumption, a judgment machine, a legal automaton." It opens upon a jurisprudential world, to recall the passage from Mailer set forth at the outset of this section, where the lawyer would be transformed into the legal embodiment of "technological man." Were we to adopt Ackerman's proposed new language, we too would become, like Mailer's astronaut, like the Ackerman that appears on these pages, "powerful, expert, philosophically naive, jargon ridden, and resolutely divorced from any language with grandeur to match the proportions of [our common] endeavor."

Yet there is a paradox of sorts here. For if this work is not liberal in character, it is—and it would be foolish not to recognize it—liberal in motivation. When we stand back and view Ackerman's performance in its entirety, what we see reflected, it seems to me, is a classic example of the tragic syndrome to which, as Trilling observed,[190] the liberal sensibility is particularly susceptible: the tendency to try to make rationality do too much work, to organize experience too rigidly and mechanically, to reduce experience to the terms of *system*. When Trilling described the self-destructive tendencies of the "organizational impulse"[191] of liberalism, it is almost as if he had Ackerman in mind. There is no more perfect demonstration than Ackerman's performance here of the way that, under the influence of the organizational impulse, liberalism "tends to select the emotions and qualities that are most susceptible of organization,"[192] of the way it "unconsciously limits its view of the world to what it can deal with, and . . . tends to develop theories and principles, particularly in relation to the nature of the human mind, that justify its limitation."[193] There is no more perfect demonstration of the way, in seeking to organize and rationalize experience, liberalism tends—if not inspired and constrained by a deeper set of commitments—to bureaucratize it.[194] This, in the final analysis, describes both the central characteristic and the fatal character defect of Ackerman's jurisprudence: it is a "bureaucratic" jurisprudence. And precisely to that extent, and for that reason, it is a jurisprudence utterly incapable of expressing liberalism in the "large" sense.

IV. A Step Backward Taken: Reopening the Liberal Jurisprudence of the Post-War Scholars

> [T]he future of American Law . . . lies not along lines of an ever more rigidly controlled and "scientifically" accurate statement of the law . . .

190. *See supra* text accompanying notes 1-11.
191. *See supra* text accompanying note 1.
192. *See supra* text accompanying note 11.
193. *Id.*
194. *See supra* text accompanyin note 1.

> but in a philosophic reexamination of basic premises.
>
> —Lon Fuller[195]

The failure of these two works to come to meaningful terms with the liberal tradition can be explained at least in part, it seems to me, by the attempt in both works to reduce the expression of that tradition to the language of system—in Rotunda's work, to the language of mechanical behaviorism; in Ackerman's, to that of mechanical rationality. The consequence is that neither work begins to convey what it means to live in a culture governed by liberal principles and sentiments. Indeed, the worlds we encounter in these two works are in many respects fundamentally at odds with the basic expectations and requirements of such a culture. This leads one to wonder if there may not be a fundamental incompatibility between the scientific or theoretical organization of language and experience and the expression—at least the *full* expression—of liberal culture. It leads one to wonder if there is not something about the nature of the liberal vision itself that resists expression in the regimented language of system or theory.

The difficulty, however, is finding an alternative mode of organizing language and experience, one that *is* compatible with the basic expectations and requirements of the liberal tradition. Here I am not sure I can be very helpful, but let me offer two fairly simple suggestions. First, if we want to find such an alternative approach, one place to look[196] is in the pre-law-and-theory jurisprudential literature: in the writings of Jackson, Fuller, Hart & Sacks, Bickel, and the other post-war "legal process" scholars. However heretical that suggestion may seem, and whatever the shortcomings of that literature, it seems to me it does a much better job of expressing the liberal vision than any of the theoretical efforts that have appeared more recently. And the reason it is more successful, I want to suggest, is that the "amateur" language employed by the pre-theory scholars is more versatile, more resilient, more capable of expressing the complex tensions and of uniting the opposed impulses that underlie the liberal vision, than the language of science or of rationalist theory.

Second, if we want to discover the special character of language that is required to give meaningful expression to the liberal vision, there is no better place to go than back to the beginning: to the great original expression of

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195. L. FULLER, *supra* note 146, at 48.

196. Another possible place to look is in the writings of other contemporary liberal theorists, such as Rawls, *see, e.g.*, J. RAWLS, A THEORY OF JUSTICE (1973), and Dworkin, *see* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Dworkin, *What is Equality,* 10 PHIL. & PUB. AFF. 185, 283 (1981). But although these writers do not mutilate liberalism to quite the same extent that Ackerman does, still the liberalism that appears in their works is so regimented and theory-bound—so *reduced* to system—as to be almost unrecognizable as such. Here again we can see the same reductive influences at work, as, indeed we can in the writings of other liberal theorists going all the way back to Locke. The task then is to find a way to break out of the lock of rationalist theory.

what it means to live in a liberal culture: Pericles' famous Funeral Oration. Pericles' oration brings home to us in a way that nothing else can do, I believe, the extent to which the liberal vision is dependent for its vitality upon the embrace of the paradoxical reconciliation of contraries, and the extent to which it is centered in terms like "trust," "openness," "gift," "sacrifice," and "love." It stands as an important reminder of something of which we need constantly to be reminded: that liberalism is not just a political creed or jurisprudential mechanism, but a way of life.

In this section my effort will be to "reopen"—I realize I cannot do anything more than that here—consideration of post-war legal process jurisprudence, a jurisprudence that has been badly neglected in recent years, and neglected precisely because it does not take the form of theory. In the next following section, I will turn to consideration of Pericles' Funeral Oration as a demonstration of the sort of language and performance that is required to give full expression to the liberal vision.

A. Jackson's Opening Statement at Nuremburg

There is perhaps no better introduction to post-war liberal jurisprudence than Justice Jackson's opening statement as Chief Prosecutor for the United States at Nuremburg.[197] Jackson's statement clearly captures the essence of post-war liberalism. It does so in part because of its content but also because it proceeds, not in the language of theory, but in the language of ordinary discourse; moreover, it draws heavily—as did the literature of this period generally—upon the common law tradition. It represents all of those old-fashioned characteristics, in other words, that Ackerman thinks should be displaced. But to Jackson's own generation, to scholars such as Lon Fuller, for example,[198] Jackson's opening statement represented the quintessential expression of the liberal vision; it epitomized what liberal jurisprudence was all about.

For us, moreover, Jackson's opening statement holds an added important significance in the striking *contrast* it offers to the "systems" approach to the organization of language and experience we find reflected in works like Rotunda's or Ackerman's, and, generally, in works of legal scholarship and theory produced over the past couple of decades. The chief difference is that Jackson's approach is not theory-dependent or system-dependent in the way these more recent works are. In that difference, I want to argue, lies

197. 2 INTERNATIONAL MILITARY TRIBUNAL: TRIAL OF THE MAJOR WAR CRIMINALS 98-155 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS]. Jackson's opening statement can also be found in R. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS 3-91 (1946). For an excellent brief description of Jackson's performance at Nuremberg, see Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488 (1955).

198. *See* L. FULLER, THE PROBLEMS OF JURISPRUDENCE 718-19 (temp. ed. 1949).

an important clue as to what is required for the effective expression of the liberal vision.

Jackson's initial challenge at Nuremburg was to justify holding a trial for the Nazi war criminals in the first instance.[199] Why waste the time? Why not simply proceed with summary executions? Would not the trial of the defeated Nazis by the victorious Allies be in effect just a glorified kangaroo court? The first large question Jackson had to address, then, was the same question that Ackerman seeks to address in a very different way in his own work: the question of where *process* fits into the larger liberal vision. The crucial thing to notice is the character of the language in which Jackson's vision unfolds. Jackson begins:

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.
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> . . . .
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> . . . The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.
>
> . . . The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.[200]

The first thing to notice about this passage is the character of the language in which it proceeds: it is not the language of theory, but the language of ordinary discourse—the language of, to borrow Jackson's phrase, "the common sense of mankind." This has a very important consequence, because it appeals to us not as elitist philosophers or as technician specialists, but as *whole* persons. In this respect alone the language Jackson employs here is integrative in a way that Ackerman's proposed "new language of power" is not.

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199. *See* Taylor, *supra* note 197, at 496-503.

200. 2 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 197, at 98-101.

Second, notice that the language Jackson uses is also a deeply ethical language: there is no pretense of trying to be "value neutral." Again and again in the course of his opening statement, Jackson asks us to make ethical choices and distinctions. In the passage just quoted, for example, he asks us to draw a line between "the unthinking cry for vengeance" and "the demand for a just and measured retribution." Jackson's language is an ethically integrated language in this sense in a way that the language of Ackerman's proposed new jurisprudence is not.

Third, Jackson's statement is informed by a deep awareness of how much we owe to our inherited traditions. The central thrust of this passage is the invitation it issues to us to live up to the ethical expectations that are deeply embedded in our cultural traditions. "To pass these defendants a poisoned chalice is to put it to our own lips as well"—how different the sensibility expressed here is from that we find reflected in either Rotunda's or Ackerman's works. And the primary difference is that Jackson draws upon the deep ethical well of the Western liberal tradition—a tradition that in Rotunda's world, you will recall, has virtually no existence, and in Ackerman's exists, if at all, only in theory.

But the appeal of Jackson's statement goes beyond that: the very language that Jackson uses carries with it the implication and awareness of *belonging* to a cultural tradition, to a civilization. And it is that sense of belonging, more than anything else, that is missing from Rotunda's world of mechanical behaviorism and from Ackerman's world of mechanical rationality.

Jackon's second major challenge at Nuremberg was in some respects even more difficult than the first. It had to do not with the process by which the Nazi leaders were to be tried, but with the substance of the underlying offenses for which they should be held accountable. Jackson felt it was important to charge the principal defendants with the crime of initiating and waging an aggressive war. But to do so meant rolling forward international law to include offenses that until that time had not been formally recognized as such.[201] It is here particularly that Jackson turned to the common law for inspiration, to a tradition that represented, as he understood it, the slow, gradual embrace by the law of fundamental expectations of justice and decency embedded deep within our western culture.[202]

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201. *See* Taylor, *supra* note 197, at 498.

202. Jackson put it this way:

> International law is not capable of development by legislation. . . . Innovations and revisions in International Law are brought about by the actions of governments designed to meet a change in the circumstances. *It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations.*

U.S. DEP'T OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 52 (1949) (emphasis added).

Notice once again how he carries the liberal tradition forward, now into new territory, upon the wings of ordinary language:

> The real complaining party at your bar is Civilization. In all our countries it is still a struggling and imperfect thing. It does not plead that the United States, or any other country, has been blameless of the conditions which made the German people easy victims to the blandishments and intimidations of the Nazi conspirators.
>
> But it points to the dreadful sequence of aggressions and crimes I have recited, it points to the weariness of flesh, the exhaustion of resources, and the destructions of all that was beautiful or useful in so much of the world, and to greater potentialities for destruction in the days to come. It is not necessary among the ruins of this ancient and beautiful city, with untold members of its civilian inhabitants still buried in its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes. The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.
>
> Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, it precepts, it prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have "leave to live by no man's leave, underneath the law."[203]

"[T]he destruction of all that was beautiful and useful," "the ruins of this ancient and beautiful city:" these phrases carry with them a view of the world radically different from that we find in either Rotunda's or Ackerman's writings. The primary difference is that the language that Jackson employs proceeds centrally upon an appreciation for the achievements of the past and of what is lost when they are destroyed. In a very real sense this *is* the voice of "Civilization," and the language in which it addresses us is the language of "the moral sense of mankind."

But there is also a curiously paradoxical quality—or so it might seem to one accustomed to a systems approach to liberalism—about the vision Jackson embraces, and about the ethical language he employs. Notice, for example, how terms like "beautiful" and "useful" are not relegated here to separate spheres of discourse, but go hand in hand. This is not *just* an aesthetic language, not *just* a utilitarian language, not *just* a moral language, but something much more complex in both its composition and operation.

How strikingly different in these several respects is the language that Jackson employs from the language of theory or "system." To appreciate this consider how impossible it would be to express what Jackson manages to express in these few short paragraphs in either Rotunda's language of

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203. 2 TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 197, at 155.

empirical behaviorism or Ackerman's language of mechanical rationality. Think of what would be lost, for example, if one were to try to translate Jackson's opening statement into the language of "Pareto optimality" or "Rawlsian maximum" or "moral hazard" or "contingency contracts."

What distinguishes Jackson's approach from Rotunda's and Ackerman's is that it proceeds upon the language of ordinary discourse, a language, it paradoxically turns out, uniquely capable of integrating those contrary impulses that lie at the heart of the liberal vision: of combining thought with feeling, utility with beauty, reason with sentiment, respect for the past with a deeply ethical vision of the future. In this respect, Jackson's opening statement is a classic illustration of the "compositional," as opposed to theoretical, organization of language and experience.[204] By drawing upon the resources of our inherited cultural rhetoric, and by turning for inspiration to the common law, Jackson finds a way to express a truly integrated vision of a world grounded in liberal principles and sentiments.

B. Relation to Jurisprudence of Other Post-War Scholars

The fascinating thing is that the same sort of creative enterprise is reflected in the jurisprudential writings of other post-war scholars—although here I can suggest in only the most sketchy way the respect in which this is so. One might be tempted to downplay the significance of Jackson's opening statement (from the perspective of our immediate concern, at any rate) by saying that it was, after all, an *opening statement,* and insisting that there is a difference between such appeals to the heart and the stuff of serious jurisprudence. But that, interestingly, turns out not to be so. In fact, the "serious jurisprudence" of the post-war legal scholars reflects the same deep impulses that are reflected in Jackson's statement, and it adopts the same basic "compositional" approach to the organization of language and experience.

1. Fuller's Jurisprudence

Lon Fuller is generally regarded as one of the most influential jurisprudential writers of the post-war period—some would say of the twentieth

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204. Essentially there are two basic approaches to the organization of language and experience. One is theoretical and proceeds upon the linear structure of rational argument. The other is compositional and proceeds upon a structure that is, as is reflected in Jackson's statement, associative and imaginative. The critical mode of the former is typified by the language and approach of civilian theory; of the latter, by that of the common law. The primary distinguishing feature is that the first is a *systems* language, and the second is not. *See generally* J. WHITE, *supra* note 78, at 201-02, 208, 229 (discussing the "integrative force" of Burke's compositional organization of language and experience in his *Reflections on the Revolution in France*).

century.[205] It is a matter of some significance, then, that Fuller adopts the same basic approach to the organization of language and experience as that reflected in Jackson's opening statement.[206] In Fuller's jurisprudence, the central integrative notion is "the principle of polarity:"[207] the notion—very much akin to Keats' notion of "negative capability"[208]—that things that seem opposed in fact often turn out to form indispensible complements for one another.

Polarity to Fuller represents not so much an idea as the creative activity of reconciling the opposed terms of the classic antinomies that underly our jurisprudential culture: law versus morality, reason versus fiat, formalism versus realism, logic versus policy, justice versus efficiency, substance versus procedure, means versus ends, and so on. Fuller takes these seemingly opposed terms and weaves them together almost magically into a truly integrated vision of the world.

It is this activity of "weaving" itself that ultimately forms the heart of Fuller's jurisprudence. It is the "integrative activity" of:

> making connections between "what is" and "what ought to be;" developing a mode of philosophical discourse that is not separate and apart from but continuous with ordinary language; expanding the perspective backwards and forward through time, so that the "illusory present instant" can be seen and understood in the context of the experience of those who have come before and of those who will follow; establishing correspondences which link our lower with our higher natures, our individual with our collective selves; carving out an ethically integrated language capable of recognizing once again "the fact of soul" and "the soul of fact;" and, in these ways and others, . . . forging anew out of the inherited materials of our culture and out of repeated encounters with experience . . . "the uncreated conscious of [our] race."[209]

This integrative activity and the ethical vision to which it gives expression, moreover, are deeply grounded in the traditions of the common law.[210]

One encounters in Fuller's jurisprudence, in other words, not the construction of some elaborate theoretical system, but the composition of a liberal vision of experience out of an on-going integrative activity. And it is in part because Fuller adopts a compositional, rather than theoretical, approach to the organization of language and experience, that his jurisprudence succeeds as it does in giving expression to a truly integrated liberal vision.

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205. *See* R. SUMMERS, LON L. FULLER 151 (1984). *See generally* Winston, *Introduction* to THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (K. Winston ed. 1981); Teachout, *supra* note 154, at 1073.

206. *See* Teachout, *supra* note 154, at 1073-1105.

207. Fuller, *supra* note 154, at 381 (discussed in Teachout, *supra* note 154, at 1105).

208. J. KEATS, SELECTED POETRY AND LETTERS 308 (Rinehart rev. ed. 1969) (original capitalization and emphasis removed). The affinity of Fuller's "principle of polarity" to Keats' "negative capability" is discussed in Teachout, *supra* note 154, at 1106-07.

209. Teachout, *supra* note 154, at 1146 (quoting JOYCE, *supra* note 165, at 253).

210. *See* Fuller, *supra* note 154, at 391-94.

2. Hart and Sacks' Legal Process Materials

Since I have already discussed the Hart and Sacks' *Legal Process* materials above,[211] I will not do so again here except to observe that underlying these materials is the same fundamental impulse that underlies both Jackson's opening statement and Fuller's jurisprudence. These materials also resist the regimentation of theory and system, and find their inspiration in the traditions of the common law. The central integrative notion in this instance, however, is the notion of "character."[212] One might expect to find a radical separation of technique and value in the legal process materials, as one does in Ackerman's jurisprudence. But that is not the case. In the Hart and Sacks' materials, rather, "technique" is transformed into "craft," and "value" into "character," and craft and character are so completely merged that the one finally becomes just the reflection of the other—they appear as two sides, or faces, of a single ethically integrated vision.

It is not just the ethical vision that distinguishes these materials, moreover, but the care and workmanship that have gone into their composition. The "problems" out of which these materials are composed have been so thoughtfully developed, and made to fit together so perfectly, that it seems at times as if they had been laid in place by ancient stonemasons—it is that sort of care, and thoughtfulness, and workmanship. Another distinguishing feature is their lack of dogmatism. These materials stand in stark contrast to Ackerman's jurisprudence in this respect. One finds here definiteness of ethical commitment, but it is definiteness of commitment combined with genuine humility and openness to correction. One finds, that is to say, whatever is meant when it is said that a work reflects in its composition and realization a "liberal temper." Unlike Ackerman's jurisprudence, the Hart and Sacks' materials do not form a literature of arrogant assertion and glib dismissal, but a literature of constant questioning.[213]

To be sure, one comes across passages in these materials that seem to belong to an earlier world, to a world long since left behind (as one does,

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211. *See supra* text accompanying notes 167-87.

212. *See supra* text accompanying notes 180-86. It might be argued that the heart of the legal process approach is not "character" but "institutional competence," given the central attention paid in these materials, and generally in legal process literature, to the possibilities and limitations of the various institutions that comprise the overall legal process. That emphasis is there in the Hart and Sacks' materials, but it is important to see that it takes the form not of narrow concern with the technical possibilities and limitations of the various institutions within the legal process but of broad concern with their ethical possibilities and limitations as well—their possibilities and limitations for contributing to a just and sound body of law. The uniting conception is that of "constitution." In the same way that these materials are concerned with the development of the ethical character of the lawyer, they are concerned with the ethical constitution of the overall legal process.

213. In these materials, the questions are not (except rarely) rhetorical questions, nor are they distractions from the main enterprise. In the best liberal tradition, the questions *are* the enterprise.

it should be observed, in the writings of Samuel Johnson, or Jane Austen, or Edmund Burke).[214] But in terms of basic approach to the organization of legal experience, these materials continue to have remarkable relevance and vitality. Even though initially published almost thirty years ago, these are still the materials to which one goes if one wants to know what it means to be a "good lawyer." Indeed, it is difficult to think of *any* set of legal materials that are more successful in developing an ethically integrated approach to the law, or that are likely to be more enduring in their influence.

3. Bickel's Jurisprudence

Another writer from this same tradition, although coming along slightly later, is Alexander Bickel.[215] In Bickel's jurisprudence we find once again that refusal to organize language and experience in terms of rationalist theory, that refusal to engage in system building—that refusal to *over-rationalize* legal experience.[216] Consider, for example, the following passage in which Bickel is discussing the importance of allowing room in the development of a jurisprudence for the play of non-rational forces:

> The lesson, rather, is that in dealing with problems of great magnitude and pervasive ramifications, problems with complex roots and unpredictably multiplying offshoots—in dealing with such problems, the society is best allowed to develop its own strands out of tradition; it moves

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214. These materials—like Jane Austen's *Emma*—are open to the charge of being sexist. They very much reflect the view that existed at the time of their publication that law school was predominantly a male domain. Thus the law student is addressed as one who will marry a "girl." H. HART & A. SACKS, *supra* note 172, at 7; the central (although admittedly not very attractive) figure in one of the problems is a college student who seduces and abandons the daughter of the school janitor, *id.* at 75; it is a "housewife" who puts up the preserves, *id.* at 1162; and it is the "son" who gets the toy train as a gift, *id.* at 1173. Yet in their underlying thrust—in this respect also like Austen's *Emma*—these materials are deeply subversive of the order of inequality that they inadvertently reflect.

215. Bickel's most significant works are A. BICKEL, THE LEAST DANGEROUS BRANCH (1962), A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970) [hereinafter IDEA OF PROGRESS], A. BICKEL, REFORM AND CONTINUITY (1971), and A. BICKEL, THE MORALITY OF CONSENT (1975).

216. Professor Kronman, in an excellent recent article on Bickel's "philosophy of prudence," cribes the anti-theoretical thrust of Bickel's jurisprudence in the following terms:

> What we require, if we are to remain both a good society and a viable one, are "the arts of compromise," the "ways of muddling through" that permits us to reach an accomodation between our principles and the complex, murky, and often resistant reality on which these principles operate. This is the business of politics, and politics requires in its practitioners not "theory and ideology" but prudence, what Bickel calls "good practical wisdom"—the ability to "resist the seductive temptations of moral imperatives," to live with the disharmony between aspiration and historical circumstance, and to search with "balance and judgment" for those opportunities that permit the marginal and evolutionary reconciliation of our principles and practices.

Kronman, *Alexander Bickel's Philosophy of Prudence,* 94 YALE L.J. 1567, 1570 (1985) (footnotes omitted). Bickel's notion of "prudence" is discussed *infra* text accompanying notes 220-23.

> forward most effectively, perhaps, in empirical fashion, deploying its full tradition, in all its contradictions, not merely one or another self-contained aspects of it, as it retreats and advances, shifts and responds in accordance with experience, and with pressures brought to bear by the political process.[217]

One can see reflected in this passage a deep, almost Burkean, respect for the incomprehensibility of the forces that carry a culture forward, and a similar distrust for the efforts of those theorists who would attempt to reduce it all to system.[218] Although Bickel does not mention it by name, one can *feel* the presence in this passage of the common law: for it is the common law, after all, that provides the primary vehicle by which the culture deploys "its full tradition, in all its contradictions, not merely one or another self-contained aspect of it, as it retreats and advances, shifts and responds in accordance with experience."

Yet it is important to note that Bickel's openness to the non-rational forces that shape the character of a culture does not lead him to reject utterly any role for reason in the law.[219] Indeed, it is difficult to think of any body of jurisprudential literature where the critical power of reason is more fully appreciated—or more effectively demonstrated—than in Bickel's own writings.

Anyone who has read Bickel's jurisprudence cannot fail to be deeply impressed, moreover, by the ethically integrated vision to which it gives such complete expression. One stands almost in awe watching Bickel at work, watching his expert and honest hands working the rough clay of legal and political experience into a finished figure at his pottery wheel. The central integrative notion in Bickel's case, however, is still a different one: it is the idea—or, perhaps more accurately, virtue—of "prudence."[220] As Professor Kronman observes in his recent excellent essay on Bickel,[221] "prudence" to Bickel was at once "an intellectual capacity" and "a tempermental disposition."[222] It was an ethic that combined within itself, as it were, all the many faces of liberalism: vision, performance, capacity, temperment. Kronman explains:

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217. A. BICKEL, IDEA OF PROGRESS, *supra* note 215, at 175.

218. *See supra* note 216.

219. Bickel explicitly rejected the notion that law was, or should be, the reflection of "unchanneled, undirected, uncharted discretion" as advocated by some realists. A. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 215, at 132. To reject a regime of pure rationality or pure principle, Bickel wrote, "is not to concede decision proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned. The antithesis of principle in an institution that represents decency and reason is not whim or even expediency, but prudence." *Id.* at 132-33.

220. A. BICKEL, THE MORALITY OF CONSENT, *supra* note 215, at 11, 25. *See* Kronman, *supra* note 216, at 1569; *see supra* note 216.

221. Kronman, *supra* note 216.

222. *Id.* at 1569.

> A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the "unruliness of the human condition," but is nevertheless able to devise successful strategies for the advancement (however gradual or slow) of his own favored principles and ideals. A prudent person is also one with a distinctive character—a person who feels a certain "wonder" in the presence of complex, historically evolved institutions and a modesty in undertaking their reform; who has a high tolerance for accomodation and delay and is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency; who values consent but is not demoralized by the process of irrational compromise that is often needed to achieve it. In the prudent person these qualities of intellect and character are joined. It was Bickel's view that prudence is an indispensable condition for success in the activities of both the politician and the judge; indeed, Bickel believed prudence to be the defining excellence of their respective crafts. By the same token, he considered the impatient, uncompromising, and overly philosophical insistence on principles for their own sake, which he regarded as the antithesis of prudence, to be a disabling vice in both statecraft and adjudication.[223]

In the ethic of prudence, in short, Bickel found a way to unite the language of the law with the language of politics, principle with practicality, aspiration with circumstance, intellect with character, statecraft with adjudication, and liberal vision with liberal performance.

This perhaps accounts for the sense one gets from Bickel's writings of a deep underlying integrity. Nowhere is that integrity more fully reflected than in Bickel's criticisms of the "liberal" decisions of the Warren Court.[224] Bickel brought to bear on those decisions the full critical powers of the liberal imagination, exposing the false and often self-destructive consequences that flow from pursuing liberal ends by illiberal means. In Bickel's criticisms of the Warren Court jurisprudence we find demonstrated as it is nowhere else in modern literature, except perhaps in Trilling's own essays, the capacity of liberalism at its best for self-criticism and self-correction.

4. Summary

In the writings of these post-war scholars—Fuller, Hart and Sacks, and Bickel—we find then three very different jurisprudential visions, each with its own distinct center of gravity. In Fuller's case, that center of gravity is supplied by the idea or ethic of "polarity," which works itself out through the creative reconciliation of contraries. In Hart and Sacks' *Legal Process* materials, the ethical center is provided by the idea of "character," and the

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223. *Id.* (footnotes omitted).
224. *See, e.g.*, A. BICKEL, IDEA OF PROGRESS, *supra* note 215.

arching theme is the relationship of "character" to "craft." In Bickel's jurisprudence, the integrative notion is the ethic of "prudence." Yet for all their differences, these three jurisprudences share a great deal in common: all three reject the regimented approach of rationalist theory, and adopt instead what we have called the "compositional" approach to the organization of language and experience; all three proceed largely in the "amateur" language of ordinary discourse; all three embrace at their very core and extend outward from the common law tradition; and finally all three, although each in a somewhat different expression, find a way to combine liberal vision with liberal performance. In these several respects, they share with Jackson's opening statement at Nuremburg, and with each other, a common approach. However described, it is an approach that seems to make possible, in a way that has been denied to the current generation of liberal legal theorists and scholars,[225] the integrated expression of liberalism.

But is this *liberalism*? What claim do performances like these lay to what we have called the "classic" liberal tradition?[226] To answer this question we must go back to the beginning.

We began this essay by suggesting that the central problem with Rotunda's and Ackerman's works—and these are representative, in this sense, of much of contemporary writings about liberalism—lies in the failure to come to terms with liberalism in the "large" sense. We began with the challenge that Trilling laid down in his preface to *The Liberal Imagination*: the challenge or invitation to "recall liberalism to its first essential imagination." [227] But is there such a thing as liberalism "in the large sense?" Or is it simply a bugaboo? *Is* liberalism simply, as Rotunda would insist, whatever one wants to make it?

This brings us to the final step in our inquiry, a step that carries us back to the roots of the liberal tradition. The key is provided by Morris Cohen. Although he wrote these words long ago, Cohen could have been responding directly to Rotunda or Ackerman when he wrote: "Liberalism is older than modern capitalistic economics. It has its roots in the Hellenic spirit of free critical inquiry . . . on which modern civilization rests."[228] Nor, Cohen might have gone on, is it just in the spirit of free critical inquiry. For the roots of liberalism ultimately lie in the character of ancient Greek civilization itself, in an entire way of life. Nowhere is that way of life given more complete or perfect expression than in Pericles' famous Funeral Oration as

225. A noteable exception is the writing of Professor James B. White. His three major works, J. WHITE, THE LEGAL IMAGINATION (1973), J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984), and J. WHITE, HERCULES' BOW (1986), all clearly fall in the classic liberal tradition—but, by virtue of that fact, also clearly swim against the current of contemporary jurisprudential writing.

226. *See supra* text accompanying note 14.

227. *See supra* text accompanying note 15.

228. Cohen, Book Review, 47 HARV. L. REV. 145, 169 (1933-34).

it is reported to us in Thucydides' *History of the Pelopennesian War*.[229] This is the final step in our journey. If there is a language capable of carrying the burden of the liberal song, the place we must go to discover it is in the moment of its first creation.

V. Recalling Liberalism To Its "First Essential Imagination"

> Here are your waters and your watering place
> Drink and be whole again beyond confusion
>
> —Robert Frost[230]

Pericles' idealized description of Athens in the Funeral Oration is the great original statement of what it "means" to live in a culture governed by liberal principles and sentiments. This famous oration is not centrally about "democracy," as many readers have supposed, but about the unique spirit of liberality that governed public and private life in Athens. Its central and unifying idea is *the idea of a liberal culture.*

The occasion for Pericles' Funeral Oration was a public ceremony to commemorate fallen Athenian soldiers at the end of the first year of the war. In turning to consider Pericles' performance, there are two things to keep in view, both intimately interrelated: the character of liberal culture as Pericles envisions it, and the character of the language in which he expresses that vision. Pericles' oration reveals, as we shall see, not only the essential elements of liberalism "in the large sense," but also the character of the language that is necessary for the expression of a liberalism so conceived.

Pericles' major effort in this speech is to try to understand what is unique about the Athenian way of life, what it is that is worth the sacrifice of those who died in battle. He begins, significantly, by recognizing the importance of the "acquisitions" inherited from the past and the obligation of the current generation to preserve and pass on this inheritance:

> I shall begin with our ancestors: it is both just and proper that they should have the honour of the first mention on an occasion like the present. They dwelt in the country without break in the succession from generation to generation, and handed it down free to the present time by their valour. And if our more remote ancestors deserve praise, much more do our own fathers, who added to their inheritance the empire which we now possess, and spared no pains to be able to leave their acquisitions to us of the present generation.[231]

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229. Thucydides, The Complete Writings of Thucydides: The Pelopennesian War 102-09 (J. Finley trans. Modern Library ed. 1951) [hereinafter Thucydides].

230. R. Frost, *Directive,* in Complete Poems of Robert Frost 520-21 (1949).

231. Thucydides, *supra* note 229, at 103.

Pericles goes on:[232]

> I have no wish to make a long speech on subjects familiar to you all: so I shall say nothing about the warlike deeds by which we acquired our power or the battles in which we or our fathers gallantly resisted our enemies, Greek or foreign. What I want to do is, in the first place, to discuss the *spirit* in which we faced our trials and also our *constitution* and the *way of life* which has made us great.[233]

There are several things to note about this passage. The first is the reflection it offers of what we might be tempted to call (were it not so clearly anachronistic to do so) a Burkean or "common law" sensibility: the reflection of a deep awareness of how much we owe to our traditions, and the recognition of the bonds that connect one generation to another. The idea of preserving, maintaining, and improving upon inherited traditions which Pericles expresses in this passage lies at the very heart of the liberal vision of experience.

The second thing to note is something that needs a little elaboration: the inheritance Pericles refers to is not a material inheritance but something else entirely—a certain "way of life." All of Pericles' statements in the Funeral Oration tend toward establishing the single large point that Athens' greatness is not to be judged, as is the greatness of other cities, by material wealth or monuments, but by the unique *character* of its culture, by its unique habits of mind and action. That is reflected in the emphasis Pericles gives here to the Athenian "spirit", to Athens' unique "constitution," to Athenian "character."[234] And later, when Pericles invites the Athenians to become lovers of their city, he does so by asking them to contemplate, not the great monuments they have established or even their own prosperity, but the city as it is revealed *in its daily life*.[235] This notion—that liberalism is not just a set of ideas, not just an ideological system, but a way of life—is an extremely important one. To express such a vision of liberalism, it should be apparent, one needs language of great richness, versatility, and integrative power.

As Pericles proceeds, notice how the language he employs embraces, without shift or break in character, both public and private life:

> Our constitution does not copy the laws of neighboring states; we are rather a pattern to others than imitators ourselves. Its administration favours the many instead of the few; this is why it is called a democracy. If we look to the laws, they afford equal justice to all in their private differences; if to social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere

232. I shift here to the Warner translation since it is a superior translation of the next passage.

233. THUCYDIDES, HISTORY OF THE PELOPENNESIAN WAR 145 (R. Warner trans. Penguin Classics ed. 1954) (emphasis added).

234. *Compare* THUCYDIDES, *supra* note 229, at 106 ("I have dwelt at some length upon the character of our country. . . .").

235. *Id.* at 107. *See infra* text accompanying note 253.

> with merit; nor again does poverty bar the way, if a man is able to serve the state, he is not hindered by the obscurity of his condition. The freedom which we enjoy in our government extends also to our ordinary life. There, far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbor for doing what he likes, or even to indulge in those injurious looks which cannot fail to be offensive, although they inflict no positive penalty. But all this ease in our private relations does not make us lawless as citizens. Against this fear is our chief safeguard, teaching us to obey the magistrates and the laws, particularly such as regard the protection of the injured, whether they are actually on the statute book, or belong to that code which, although unwritten, yet cannot be broken without acknowledged disgrace.[236]

This passage expresses what might be considered the core ideas and commitments of classic liberalism: the idea that participation in government should be open to the "many" and not just the "few"; the idea of establishing conditions that will allow each member of the community to realize his or her full possibilities unhindered by interference from the state or by conditions of social or economic status (by "poverty" or "social standing" or "class considerations"); the commitment to provide real equality of opportunity to every member of the community; and the celebration of the openness and freedom of both public and private life.

There are some things in this passage however that require comment. First, it is important to note that in portraying Athens this way, Pericles is clearly intending to contrast the spirit of liberality that governs life in Athens with the regimented character of life in Sparta. In the words of one commentator:

> Here [Pericles] adverts to that *liberality of spirit* at Athens, which was in strong contrast to the intolerance and interfering spirit of the Lacedaemonians, which required that every one's manners and habits should be formed after its own model; that carping censoriousness and judging for the worse, which makes no allowance for the frailties of others, but would sit in self-constituted judgment over them.[237]

Second, notice that Pericles is talking not just about a political system but about a culture. And what gives that culture its essential integrity are the continuities that exist between the character of public life and the character of "ordinary life." It is an essential feature of liberal culture, at least as Pericles envisions it here, that public life and private life reflect the same fundamental *constitution.*

The third point relates to the question of what to make of Pericles' use of the word "fear" in this passage. It is one of those words that tends to stop us in our tracks, because the idea that citizens fall into line out of fear

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236. *Id.* at 104.

237. 1 THUCYDIDES, THE HISTORY OF THE PELOPENNESIAN WAR 258 (S. Bloomfield trans. Longman, Brown, Green & Longmans ed. 1842) (commentary by the translator) (emphasis in original).

of the law seems in some ways so inconsistent with the spirit of liberality that otherwise is supposed to prevail in Athens. Our problem here, let me suggest, is in large part is one of anachronistic reading: of reading into Pericles' terms modern connotations and understandings. To capture the essence of Pericles' point here the translator might better have used the term "awe," because the sentiment expressed is much more akin to that we find expressed by the injunction in the *Psalms:* "Stand in awe, and sin not."[238] Once we have understood the word fear in this new light, we can begin to appreciate the real and important thrust of this passage. It is that the Athenians' freedom from unnecessary restraint does not lead to licentiousness, as the Spartans might charge, but is tempered by deep respect for law. It is respect not just for written law and legitimated authority moreover, but, as importantly, for the deep ethical principles embodied in the "unwritten" law, civilizing principles of decency and justice and honor.

The most curious passage in Pericles' speech in some ways is the next one:

> Further, we provide plenty of means for the mind to refresh itself from business. We celebrate games and sacrifices all the year round, and the elegance of our private establishments forms a daily source of pleasure and helps to banish the spleen; while the magnitude of our city draws the produce of the world into our harbour, so that to the Athenian the fruits of other countries are as familiar a luxury as those of his own.[239]

What are we to make of the emphasis Pericles gives in this passage to "pleasure" and "luxury" and "recreation"? Should we take it as an indication that hedonism and materialism in fact lie at the core of liberal culture? If that is what a surface reading suggests, let me attempt what I think is a better reading. Pericles' intent here, it seems to me, is again to contrast the severity and moroseness of Spartan life with life in Athens. Unlike the situation in Sparta, he seems to be saying, in Athens individuals do not work themselves to death. "Pleasure" and "luxury" and "recreation" have a place in the life of a well-rounded individual, and they have a place in the life of Athens. What emerges from this, then, is the portrait of a people whose natural love of pleasure is not repressed but encouraged within limits of moderation. By pursuing such a course the quality of life for everyone in the city is enhanced and enriched. Liberal culture, Pericles seems to be saying, rejects the notion that there is a radical dichotomy between the pursuit of pleasure and the pursuit of virtue. Its large aim is the cultivation of a well-rounded humanity.[240]

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238. *Psalms,* 4:4.

239. THUCYDIDES, *supra* note 229, at 104.

240. Professor Finley describes the Periclean ideal as it is expressed in the Funeral Oration as that of a "full and rounded humanity." J. FINLEY, THUCYDIDES 149 (1942).

Pericles next turns to describe the openness of Athenian society. Does that openness, he asks, make Athens vulnerable to infiltration and overthrow? Or does it, paradoxically, make her stronger?

> If we turn to our military police, there also we differ from our antagonists. We throw open our city to the world, and never by alien acts exclude foreigners from any opportunity of learning or observing, although the eyes of an enemy may occasionally profit by our liberality; trusting less in system and policy than to the native spirit of our citizens; while in education, where our rivals from their very cradles by a painful discipline seek after manliness, at Athens we live exactly as we please, and yet are just as ready to encounter every legitimate danger.[241]

In this passage Pericles addresses directly the paradoxical quality of the liberal ethic underlying the Athenian way of life. The paradox here is that a culture built upon the cultivation of openness and trust, upon a policy of "liberality," is *better* equipped by virtue of that fact to defend itself against danger and invasion when the time comes. The Athenians do not have to rely upon all sorts of precautionary and defensive strategies, Pericles argues, because they can rely upon their own strength and courage fostered by traditions of freedom and self-sufficiency. They do not have to rely upon "system" because they can rely upon native spirit and versatility.

As Pericles continues, the paradoxical character of liberal culture becomes an increasingly dominant theme. Athens' critics had charged that the Athenian propensity for extended deliberation indicated that they were, in the current jargon, "all talk and no action." But Pericles rejects this as a false antithesis. "[I]nstead of looking on discussion as a stumbling-block in the way of action," he argues, "we think it an indispensable preliminary to any wise action at all."[242] These seemingly opposed qualities—the propensity to deliberation and reflection on the one hand, and the capacity for decisive action on the other—are in fact indispensable complements of one another. Indeed their combination forms Athens' special strength: "[I]n our enterprises we present the singular spectacle of daring *and* deliberation, each carried to its highest point, and both united in the same persons. . . ."[243]

Notice that the vision of liberal culture to which Pericles gives expression here is very much centered in paradoxical relationships. It is the vision of a world where the encouragement of private initiative and the pursuit of private pleasure and recreation do not detract from but contribute to a life of civic virtue; where the cultivation of openness and trust leads not to greater vulnerability but to greater strength; where the promotion of individual freedom and self-sufficiency leads not to licentiousness but to an enhanced sense of responsibility and sacrifice. To express such a world one

241. THUCYDIDES, *supra* note 229, at 104.
242. *Id.* at 105.
243. *Id.* (emphasis added).

needs a special kind of language: a language capable of expressing a culture characterized by, to adopt the words of another commentator, "the reconciliation of contraries and a balance of counter tendencies."[244]

Nowhere is this "balance of counter tendencies" more perfectly expressed than in the words in which Pericles continues: *"[W]e love beauty with simplicity, we pursue wisdom without softness."*[245] Professor Finley explains the meaning and significance of these words:

> φιλοκαλοῦμέν τε γὰρ μετ' εὐτελείας καὶ φιλοσοφοῦμεν ἄνευ μαλακίας, "we love beauty with simplicity, we pursue wisdom without softness." The phrase μετ' εὐτελείας, "with simplicity," means that beauty does not depend on monetary value and can be available to all. The words ἄνευ μαλακίας, "without softness," express his faith that inquiry does not spoil men for action. The restrained grace and measured optimism of the Greek spirit at its best could not be more fitly described.[246]

For "the Greek spirit" we might fairly substitute "the liberal spirit," because in a very real sense Finley's "Greek spirit at its best" *is* what Trilling means when he refers to liberalism in the "large" sense.[247] A world of "restrained grace" and "measured optimism": there is no better way to describe the world upon which the liberal vision opens.

At the very heart of Pericles' vision of liberal culture is a central paradoxical relationship: cultivation of individual freedom and self-sufficiency on the one hand, and the idea of sacrifice for the common good on the other. But on what terms can these two seemingly opposed impulses be reconciled? There are times when Pericles seems to give primary emphasis to the former—to the idea of individual freedom and self-sufficiency—as the distinguishing feature of Athenian life: "In a word, I say that our city as a whole is the education of Hellas and that Athenians as individuals would seem to me supremely fitted to meet the varied circumstances of life with grace and self-reliance."[248] The emphasis Pericles gives in this sentence to the idea of individual self-reliance—perhaps more appropriately translated as individual self-reliance *and* self-fulfillment[249]—seems to run counter to the idea of sacrifice for the common good.

There is a puzzle here, however, because elsewhere Pericles clearly makes the pursuit of private interest subservient to the advancement of the communal good. As Pouncey has observed, the world of Pericles' thought is "dominated by the primacy of national [or communal] interest over individual concerns."[250]

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244. W. R. CONNOR, THUCYDIDES 69 (1984).
245. This is Finley's translation. J. FINLEY, *supra* note 240, at 147 (emphasis added).
246. *Id.*
247. *See supra* note 12.
248. J. FINLEY, *supra* note 240, at 149.
249. *See* W. R. CONNOR, THUCYDIDES, *supra* note 244, at 67 n.39 (1984).
250. P. POUNCEY, THE NECESSITIES OF WAR: A STUDY OF THUCYDIDES' PESSIMISM 77 (1980).

> The very organization of the Funeral Oration stresses this priority: the praise of the city (its constitution, its way of life, and the national character of its citizens, who developed and preserved it) precedes the praise of the dead, who have died for it: "For such a city they fought and died, in their nobility refusing to be deprived of her, and it is right that all of us who survive would be willing to toil for her. That is why I have elaborated the qualities of our city, trying to convey the lesson that the struggle is not conducted on the same terms for us, as for those who do not share our advantages.'
>
> . . . .
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> At the start of the last speech, the priority is again starkly stated: "I believe that when the whole city prospers, it benefits the individuals in it more than when they all thrive on their own, while the city as a whole fails. For when a man does well on his own, but his country fails, he is destroyed just the same along with it, but when he fares ill, and his country prospers, he still has a better chance of reversing his fortune."[251]

One might be tempted to conclude from this that Pericles is simply advocating modern market ideology cloaked in ancient Greek terminology. But that very clearly is *not* what Pericles is saying.[252] He is not saying, in effect, maximize your own individual self-interest and it will have the effect of maximizing the collective interest. Indeed, he describes (and goes on to condemn) just the opposite scenario: where individuals in pursuit of their own self-interest "thrive," while "the city as a whole fails." The theme of *sacrifice* is too prominent a feature of his vision to admit a market interpretation. The central metaphor that Pericles employs here is not the metaphor of the self-regulating market, it is clear, but something else.

The dominant image of Pericles' speech, rather, is that of a city that has a special reciprocal bond with its citizens. Athens sustains individual freedom and fulfillment and is in turn sustained by the willingness of its citizens to fight and die to preserve the Athenian way of life. The central metaphor of reciprocity and reconciliation is not that of the free market but of *falling in love:*

> [Y]ou should fix your eyes every day on the greatness of Athens as she really is, and should fall in love with her. When you realize her greatness, then reflect that what made her great was men with a spirit of adventure, men who knew their duty, men who were ashamed to fall below a certain standard. If they ever failed in an enterprise, they made up their minds that at any rate the city should not find their courage lacking . . . and they gave to her the best contribution they could. They gave her their lives . . . .[253]

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251. *Id.*

252. Elsewhere in the Oration Pericles makes clear that "calculations of expediency" do *not* form the basis for the Athenian, or liberal, way of life, contrasting such calculations directly with the "confidence in liberality" which underlies Athenian culture: "And it is only the Athenians who, fearless of consequences, confer their benefits not from calculations of expediency, but in the confidence of liberality." THUCYDIDES, *supra* note 229, at 106.

253. THUCYDIDES, HISTORY OF THE PELOPENNESIAN WAR, *supra* note 233, at 149.

Or, as another translator renders the penultimate words, they brought to her "[t]heir communal gift."[254] "Gift," "sacrifice," "love": these words lie at the very heart of this first great expression of liberal culture. Without them—as Pericles understood, and as did Thucydides after him—liberal culture is nothing.

It is important to appreciate that what Pericles' speech is "about" is not just a *way of life* but is also, as importantly, *a way of talking* about that life. To express the ethically complex culture that Pericles envisions here—a culture constituted at its core by the "reconciliation of contraries and a balance of counter tendencies"[255]—one needs an ethical language of extraordinary richness and discriminating power. A "systems" language will not do. That is why, when Pericles comes to describe the way of life that Athens represents, the language to which he turns is the language of ordinary discourse. He does so because it is the only language capable of expressing the paradoxical relationships that lie at the core of liberal culture, the only language capable of describing a world, to recall Finley's description, of "measured grace" and "refined optimism."[256]

Like the culture Pericles sets out to describe it is a language accessible to the many and not just the few, a language free from the regimentation of system. It is a language uniquely equipped to unite public with private life, thought with feeling, the idea of individual self-fulfillment with the idea of sacrifice for the common good, the love of reason with the reason of love. In the language of ordinary discourse Pericles finds a language capable—at least for a moment—of pulling it all together, of expressing what it "means" to live in a culture shaped by the liberal bond.

VI. Conclusion

At least for a moment. It is one of the hard lessons of history that liberal culture, by its very constitution, is a precarious achievement, an achievement of civilization that requires for its survival and perpetuation the greatest exertions of human understanding and creativity. It is particularly appropriate in this respect that the first great expression of what it means to live in a liberal culture occupies the place that it does in Thucydides' *History*. For what Thucydides goes on to show in the *History* is how tragically vulnerable the liberal "way of life" that Pericles describes is to the depredations of cynicism and self-interest, how vulnerable the acquisitions of liberal civilization *always* are to such forces.

It is significant in this last respect that the two principle forces that ultimately brought about Athens' destruction were not forces from without

254. W. R. Connor, *supra* note 244, at 69.
255. *See supra* text at note 244.
256. *See supra* text at note 246.

but forces from within. There is for us a certain irony perhaps in the fact that one of these forces was the development of a manipulative attitude toward language very similar to that which plays such a central role in Rotunda's work. One of the things that led to Athens' downfall was the transformation of what had been a character-shaping language into a language of manipulation.[257] The other corruptive force was the elevation of the language of expediency and self-interest (the Greek equivalent of what today would be the language of sophisticated economic theory) to a position of dominating relevance.[258] In combination these two developments transformed the essential character of the language in which the culture was expressed and, in doing so, destroyed all that was good and decent and worthy in the culture itself.

The remarkable thing in this light is not that throughout history liberalism has been so constantly attacked from without and undermined from within, or that so many times it has lost sight of what it stands for or where it is going, but that it has survived at all. Yet not only has it survived, it has

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257. This is the thrust and import of that famous passage in which Thucydides describes how "[w]ords had to change their ordinary meaning":

> The sufferings which revolution entailed upon the cities were many and terrible, such as have occured and always will occur, as long as the nature of mankind remains the same. . . . [W]ar takes away the easy supply of daily wants, and so proves a rough master, that brings most men's characters to a level with their fortunes. Revolution thus ran its course from city to city, and the places which it arrived at last . . . carried to a still greater excess the refinement of their inventions, as manifested in the cunning of their enterprises and the atrocity of their reprisals. *Words had to change their ordinary meaning and to take that which was now given them.* Reckless audacity came to be considered the courage of a loyal ally; prudent hesitation, specious cowardice; moderation was held to be a cloak of unmanliness; ability to see all sides of a question inaptness to act on any. Frantic violence became the attribute of manliness; cautious plotting, a justifiable means of self-defence. The advocate of extreme measures was always trustworthy; his opponent a man to be suspected.

THUCYDIDES, *supra* note 229, at 189 (emphasis added). For an imaginative treatment of this theme as it pertains to other classic works of literature and to the activity of law, *See* J. WHITE, *supra* note 78.

258. The critical turning point in Thucydides' narrative is the famous Mytilenian Debate in which the Athenians meet to decide the fate of the rebellious but now vanquished Mytileneans. The debate is between Cleon, who represents the rhetoric of justice, albeit primitive justice, and Diodotous, who represents the rhetoric of sophisticated economic calculus. Diodotus's speech is particularly interesting because he offers the Athenians the equivalent of Ackerman's proposed "new language of power," a language that in its application in this instance would lead to a merciful result. Professor White comments: "Diodotus concedes that arguments from justice and compassion for the Mytilenians are irrelevant; he rests his case solely on rationality and self-interest. But in this case a proper calculation of interests shows that the right course is the one that would usually be called merciful." J. WHITE, *supra* note 78, at 74; *See* Teachout, *supra* note 78, at 859-61. Because Diodotus's rhetoric coincides with a merciful result, his appeal ultimately prevails. But the adoption by the Athenians of Diodotus's "new language of power"—the language of economic calculus—ultimately leads to their downfall. It contributes to a tragic degeneration of character that is finally and fully revealed in the Athenians' shameful and self-destructive performance of power at Melos. *See* J. WHITE, *supra* note 78, at 76-91.

retained, in the face of powerful forces of corruption, a surprising vitality. Virtually all the great works in our western culture in one way or another find their inspiration in the liberal tradition. So even those who want to be radical opponents of liberalism cannot entirely escape its influence. The greatest enemy of liberalism is not the critics from without, however, but the confusion from within, the confusion brought on by those who claim to be liberals but have no understanding or appreciation of liberalism in the large sense. It is a final measure of Pericles' achievement that when we find ourselves confused about what "liberal" means, we can go back to his great original expression of liberal culture, and there once more, to recall the words of the poet, "[d]rink and be whole again beyond confusion."[259]

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259. *See supra* text at note 230.