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BOOK REVIEW

ACKERMAN ON PROPERTY AND THE LAW

DAVID T. OZAR*

ACKERMAN ON PROPERTY AND THE LAW

The conventional wisdom about property law is that the foundations of the field are relatively secure and the vast majority of its applications unequivocal. This view of property law is seriously challenged in Bruce A. Ackerman's Private Property and the Constitution (1977).

Ackerman's thesis is that the foundations of property law are not secure and that its applications are confused and suffer from serious, wide-ranging ambiguities. Focusing on the compensation clause of the fifth amendment, Ackerman argues that we lack a clear understanding of what we mean by property and that we have no clear criteria for determining whose property claims are superior in disputed cases. Ackerman maintains that our legal system and those who function within it are profoundly schizophrenic about the nature of property, sliding back and forth between two incompatible conceptions of property. He also maintains that three incompatible sets of criteria are employed by the courts in determining the merits of competing property claims. These incompatible criteria command the support of reputable legal scholars, yet few seem to recognize the precise differences between them.

To some these claims will seem outlandish. But Ackerman does not make them lightly nor does he support them merely with airy speculation. The heart of Ackerman's argument is, at every turn, a finely worked analysis of cases and scholarly literature. For this reason, Ackerman's claims cannot be taken lightly. His evidence is concrete and specific. It is found in the cases and literature which between them define the current state of legal understanding on this subject. If there is schizophrenia here, it is a serious matter and Ackerman's call to serious thinking is well uttered.

Furthermore, the courts are now facing an increasing number of cases in which compensation is sought for actual or projected losses as a consequence of legislation and administrative action aimed at conservation, protection of the environment, and husbanding of re-

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sources. As these concerns grow in importance, as seems likely, such cases will become more frequent and more urgent as well. It is in these cases that our schizophrenia is most obvious. The increasing volume and complexity of these cases will surely force us to attend to the fundamental ambiguities and instability of our understanding of property. Far better, Ackerman proposes, to begin the reflective process now, before a crisis in our legal understanding is upon us.

Ackerman develops a number of important distinctions in analyzing the accepted methodologies for resolving property disputes. The two most important of these are the distinction between the perspectives of “the Policymaker” and “the Observer” and the distinction between the users of “Ordinary Language” and “Scientific Language.” This article first will explain these two key distinctions and several subsidiary distinctions, and then will proceed to an explanation of Ackerman’s central thesis. In the final sections, several weaknesses of Ackerman’s argument will be discussed.

The Policymaker and the Observer

One of the key distinctions supporting Ackerman’s analysis is the distinction between the Policymaker and the Observer.

1. Ackerman describes his “Policymaker” in this way:

On the Policymaking side, I shall place all those who understand the legal system to contain, in addition to rules, a relatively small number of general principles describing the abstract ideals which the legal system is understood to further. It is this statement of principle, presumed by the Policymaker to form a self-consistent whole, which I shall call a Comprehensive View. The rules of the system are understood to be the product of legislative and judicial efforts to implement the Comprehensive View in the best practical way. Hence, the function of the Comprehensive View is to provide a set of standards by which Policymakers may determine the proper content of legal rules and evaluate the performance of the legal system as a whole. It follows that when a Policymaker is forced to judge the merits of competing rules in the course of making a legally binding decision, he will select the rule which—in his best judgment—best conforms to the Comprehensive View he has imputed to the legal system. To forestall misunderstanding, I do not want you to think a Policymaker must impute to the legal system a Comprehensive View of a Highly Moral variety—like that imagined by Immanuel Kant or Myres McDougal. For present purposes, it will be enough for the analyst to worship a more mundane—if not more intelligible—God, like Bentham’s Utility or Posner’s Efficiency.

2. From the Observer’s point of view, it seems extraordinary to begin analysis by supposing, with the Policymaker, that legal rules ought to satisfy the demands of a Comprehensive View. This is not to say that our Observer is an old-fashioned Realist who argues that judges inevitably decide hard (or easy) cases on the basis of personal predilection. Rather than dealing with straw men, we shall impute a more sophisticated point of view to our ideal type. For him the test of a sound legal rule is the extent to which it vindicates the practices and expectations embedded
The Policymaker asserts that legal rules are best understood as the implementation of general principles which together form a Comprehensive View. The Observer, on the other hand, does not deny that legal rules can be understood as organized around a Comprehensive View, but merely holds that legal rules can only be understood as organized around a Comprehensive View when the society's institutionally based expectations do in fact form such a larger pattern. When social expectations do not form a unitary, internally consistent pattern, i.e., a Comprehensive View, the Observer will select legal rules which best support the society's institutionally based expectations. A Policymaker, observing the absence of a shared Comprehensive View, will seek to promulgate legal rules which perpetuate the ideals embodied in the Comprehensive View which he judges worthy of guiding the law. Understandably Observers and Policymakers will each consider the other to be either naive or superficial.  

Ackerman seeks to present a balanced picture of both of these perspectives. His aim is to demonstrate the theoretical and practical differences between the perspectives, particularly in controversies over the meaning of just compensation. His point is that these mutually incompatible approaches are both used in practice. His aim is not to take sides, but to help us recognize the extent of our confusion.

However, our schizophrenia is not fully manifested in the perspectives of the Observer and the Policymaker. Two very different Comprehensive Views also exercise significant influence over property law. Ackerman labels one of these the Utilitarian and the other the Kantian View. There are many other potential Comprehensive

*in, and generated by, dominant social institutions. It follows that when an Observer is forced to judge the merits of competing rules in the course of making a legally binding decision, his view of the task will be quite different from that adopted by his Policymaking brethren. Rather than grounding his decision in a Comprehensive View stating the ideals the legal system is understood to serve, the Observer will instead seek to identify the norms that in fact govern proper conduct within the existing structure of social institutions. Having articulated the existing pattern of socially based expectations as sensitively as he can, the Observer will then select the legal rule which, in his best judgment, best supports these institutionally based norms.*

*Id. at 12.*

3. So far as the Observer is concerned, the Policymaker's willingness to press his concern for consistency, generality, abstraction beyond the structure of existing social expectations marks him out as an immature mind insisting on a clarity and comprehensiveness intrinsically unsuited for the subject . . . . In contrast, the Policymakers among us will look upon their rivals as rather superficial types who rely on their sense of the social proprieties instead of trying to ground their relatively concrete notions of socially legitimate expectation in a deeper, more abstract account of the social objectives worthy of legal support.*

*Id. at 14.* (footnote omitted).
Views, for example, the Marxist, Maoist, Existentialist, and the Absurdist. Ackerman has focused upon the Utilitarian and the Kantian views because these are the two which most powerfully influence our present legal culture and might reasonably be considered legally binding.4

The Utilitarian Comprehensive View emphasizes legal rules which maximize social utility or, in current terminology, economic efficiency. The Policymaker who adopts a Kantian Comprehensive View will criticize Utilitarianism for its failure to consider individuals and for insisting on the maximization of social satisfactions regardless of their distribution. The Kantian View insists that each individual has certain moral rights as an autonomous being which cannot be overridden by an appeal to general Utility.

Ackerman works out the details of this distinction in connection with the notion of “just compensation” and in conjunction with another set of distinctions based on his analysis of the notions of judicial restraint and innovation. Since Ackerman’s discussion of judicial restraint and innovation is extremely valuable in itself, it deserves some careful attention here.

Judicial Restraint and Judicial Innovation

Ackerman initially focuses on the Policymaking judge. He notes that both Kantian and Utilitarian Policymakers agree that legal work-product should be evaluated in terms of the extent to which it implements the appropriate Comprehensive View. Thus, all Policymakers would understand a perfectly functioning set of institutions as one which always generates a decision that best furthers the Comprehensive View guiding the legal system.

A perfectly restrained judge is therefore one who always reviews the challenged decision before him as if it had been generated by a set of perfectly functioning institutions. The perfectly restrained judge does not necessarily believe that his society is in fact so well ordered. He might believe it to be ill ordered, but thinks it inappropriate for the courts to take account of this in their decisions.

In contrast, the judicial innovator

... thinks it appropriate for a judge to take into account the fact that, in one respect or another, the world he confronts falls short

4. “[A] judge surely is not entitled to roam the range of conceivable Comprehensive Views with the aim of selecting the one that suits his personal fancy. Instead, whatever his own personal predilections, the judge’s choice of a legally binding Comprehensive View must be limited...” Id. at 41.

5. The term “Kantian” is employed by Ackerman only to draw attention to a certain set of general concerns, not to focus on Kant’s own particular ways of formulating those concerns.
of a "well-ordered society." Hence, after defining the respects in which the world falls short of the "well-ordered" ideal, he will see nothing wrong in using his judicial office to improve the existing legal state of affairs.⁶

But there are a variety of ways in which a society can be well- or ill-ordered in relation to a Comprehensive View. Ackerman divides these into three aspects: 1) the distribution of goods and services within the society, 2) the functioning of other governmental institutions, and 3) the attitudes of citizens towards their government.⁷

Since a judge may believe his society well ordered in some or none of these aspects, we can now identify numerous combinations of restraint and innovation. These represent the positions which judges actually take. Applying these distinctions to the Utilitarian and Kantian approaches to "just compensation" enables Ackerman to give us a rich understanding of how these Comprehensive Views might function in practice. He also applies these distinctions to indicate the ways the Observer judge might understand the notion of "just compensation".

**Scientific Language and Ordinary Language**

The second major distinction which Ackerman employs is between "Scientific" and "Ordinary" approaches to legal language. The Ordinary approach stresses a close relation between legal and

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⁶. Private Property, supra note 1, at 36.

⁷. A judge could review a challenged decision before him as if his society were well-ordered or not in each of these three respects. We may articulate this fairly precisely by saying that the judge may either affirm (a restrained approach) or deny (an innovative approach) each of the following propositions:

- **Proposition A:** Judges are to assume that the distribution of property rights prevailing at Time One (i.e. the point in time before the event occurred which is the basis of the complaint before the court) is generally consistent with the Comprehensive View they impute to the legal system, as would be the case in a well-ordered system.

- **Proposition B:** Judges are to assume that nonjudicial organs of government generally act consistently with the Comprehensive View they impute to the legal system, as would be the case in a well-ordered society.

- **Proposition C:** Judges are to assume that the litigants, as good citizens, recognize that they are living in a well-ordered society and so will accept disadvantageous official decisions without a deep sense of grievance, unless they have special reason to believe that they are involved in one of the exceptional cases in which the system has malfunctioned.

Judges who affirm Proposition A, Ackerman calls *conservative*; those who deny it, he calls *reformist*. Insofar as a judge affirms Proposition B, Ackerman calls him *deferential*; insofar as he denies it, *activist*. Insofar as a judge affirms Proposition C, Ackerman labels him *principled*; insofar as he denies it, Ackerman labels him *pragmatist*, because such a judge "think[s] it legitimate to reject a decision [he] would otherwise find legally binding in order to check the disaffection of a significant social group which rejected the reigning Comprehensive View." Id. at 38.
non-legal language\(^8\) while the Scientific approach emphasizes the independence and precision available in a technical legal language.\(^9\) Presumably no one seriously supports the Scientific approach merely to mystify laymen. Rather, the Scientist claims that specialized language enables him to deal more effectively with the issues at hand.

Ackerman’s effort to explain this distinction in general terms does not go much beyond what has just been said and his use of the Scientific/Ordinary distinction involves serious ambiguities. These will be examined after consideration of the two most important applications of the distinction.

One such application, Ackerman’s distinction between “Scientific Property” and “Ordinary Property”, will be examined in the following section. Ackerman’s other application is in conjunction with the Policymaker/Observer distinction. While there are four possible combinations of these approaches to legal disputes, Ackerman carefully examines only two of the combinations, namely the “Scientific Policymaker” and the “Ordinary Observer.” The Scientific Policymaker, predictably, is an analyst of the law who:

(a) manipulates technical legal concepts so as to illuminate
(b) the relationship between disputed legal rules and the Comprehensive View he understands to govern the legal system.\(^{10}\)

In contrast the “Ordinary Observer” is an analyst who:

(a) elaborates the concepts of nonlegal conversation so as to illuminate
(b) the relationship between disputed legal rules and the structure of social expectations he understands to prevail in dominant institutional practice.\(^{11}\)

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8. [L]egal language cannot be understood unless its roots in the ordinary talk of non-lawyers are constantly kept in mind. While legal specialists, naturally enough, will sometimes be called upon to make refinements generally ignored in ordinary language, recourse to everyday, nonlegal ways of speaking can be expected to reveal the basic structure and animating concerns of legal analysis—stripped of the excessive technicality generated by special pleading and adversary confrontation.

Id. at 10.

9. [T]he Scientist conceives the distinctive constituents of legal discourse to be a set of technical concepts whose meanings are set in relation to one another by clear definitions without continuing reliance upon the way similar-sounding concepts are deployed in nonlegal talk. While the practitioner of Ordinary analysis will find that nonlegal discourse will provide a useful perspective upon basic concepts that may otherwise be lost in a sea of legalism, the Scientist will look upon such an appeal to ordinary talk as the surest sign of muddle.

Id. at 10-11 (footnote omitted).

10. Id. at 15.
11. Id.
Part of what is interesting about Ackerman's focus upon these two approaches are his reasons for not giving serious attention to the other two, the Ordinary Policymaker and the Scientific Observer. Ackerman grants that Scientific Observing has played an important role in legal theory in times past. But, given his purposes, he does not judge this approach worthy of serious attention here.

With regard to Ordinary Policymaking, Ackerman argues that ordinary talk about our current social situation neither points to nor expresses an underlying Comprehensive View. For this reason, the pursuit of a Comprehensive View for the law, the adoption of a Policymaking approach, requires a language specifically designed to implement that Comprehensive View, i.e., a scientific language. The approach of the Ordinary Policymaker, therefore, can make no serious claim on our attention.

12. The Ordinary Policymaker will hold that:

[ Deep reflection upon ordinary language and practice will reveal that [ordinary conversation] can best be understood as organized around a set of self-consistent principles and policies sufficiently abstract and general to qualify as a Comprehensive View. [On such an approach, it would be] unnecessary to devise a Scientific vocabulary for the purpose of clearly and systematically developing the implications of the governing Comprehensive View to each kind of dispute brought before the legal system. One could then operate as an effective Policymaker by thoughtfully employing the concepts of ordinary discourse in evaluating each particular dispute. ]

Id. at 19-20.

13. Like the Ordinary Observer, the Scientific Observer seeks to identify the legal rules that best support dominant social expectation. But the Scientific Observer thinks that the patient elaboration of the structure of ordinary discourse is an unlikely means to this end. Legal concepts, he will argue, must be based on a Scientific understanding of socially based expectations to be gleaned, for example, from such disciplines as anthropology, history, psychology, or sociology. Id. at 17-18.

14. During the half century between 1870 and 1920, legal scholarship was dominated by a group of scholars who believed that the disciplined investigation of the historical common law tradition would reveal the basic principles defining legitimate social expectations. Hence the Scientific challenge to the Ordinary Observer is not a lifeless theoretical possibility but a very real force indeed.

Despite the potent claims of the Scientific Observer to attention, however, I have chosen to slight his contribution. . . . [It is our present thesis that the conceptual tools of Ordinary Observing are sufficiently powerful to illuminate the existing structure of compensation doctrine in a way that a lawyer would find most revealing . . . . [If the Scientist only succeeds by his more complex and expensive procedures in telling the Ordinary analyst what he already knows, this cannot count as an important contribution to substantive constitutional law . . . .

It is always possible, of course, that a Scientific Observer would not simply confirm his Ordinary counterpart's understanding of social reality. . . . Nonetheless, I think this theoretical possibility sufficiently unlikely that I shall postpone its serious consideration until one or another Scientific Observer presents an account that makes the latent tension between the two forms of Observing a concrete problem for just compensation law.

Id. at 18-19 (footnotes omitted).

15. [The approach of the Ordinary Policymaker] requires certain empirical
Moreover even if Ordinary Policymaking is not internally contradictory, Ackerman claims that there is no important Policymaking work on the current legal scene that has adopted the Ordinary approach, while Scientific Policymaking efforts multiply. Therefore, again, this approach does not merit serious attention here.

Scientific Property Talk and Ordinary Property Talk

Ackerman also applies the Scientific/Ordinary distinction to “talk of property”. “Scientific Property Talk” is the technical legal terminology of property relations, used by educators and practitioners. “Ordinary Property Talk” is laymen’s talk, presumably a non-technical form of language which laymen employ in their ordinary dealings with one another. In applying this distinction, Ackerman considers the notion of property both generally and more specifically with regard to the notion of “taking” under the compensation clause.

Those who engage in Scientific Property Talk speak of property in terms of relationships between people with respect to things. Recognizing that all rights, including property rights, are conditional, they understand that more than one person may claim a valid interest in a particular thing. Such claims will normally relate to different parts or aspects of the thing.\(^{16}\)

assumptions about existing social practices that seem to me to be plainly false. While, as we have seen, it is possible to imagine a Utilitarian or Kantian paradise in which all important social practices were in fact organized around a particular Comprehensive View, I cannot believe that I live in such a world. And if social practices are not organized around a single Comprehensive View, it would be most surprising if ordinary language could be so organized. After all, ordinary talk makes sense within ordinary social structures; if these structures do not form a larger, consistent, normative pattern, there is every reason to think that common speech will reflect this underlying social disarray. Hence, I do not believe Ordinary Policymaking is a coherent mode of legal analysis in the social world as it is presently constructed. If the law is to further a determinate Comprehensive View, lawyers will require a language organized on clearer normative lines than the talk generated by laymen having to deal with the tensions and inconsistencies of their common forms of life.

Id. at 20 (footnote omitted).

16. I think it fair to say that one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. They learn that only the ignorant think it meaningful to talk about owning things free and clear of further obligation. Instead of defining the relationship between a person and “his” things, property law discusses the relationships that arise between people with respect to things. More precisely, the law of property considers the way rights to use things may be parcelled out amongst a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-a-vis other potential users; indeed in the modern American system, the way in which user rights may be legally packaged and distributed are wondrously diverse . . . . Hence, it risks serious confusion to identify any single individual as the owner of any particular thing . . . . Once one begins to think sloppily, it is all
Given this conceptualization of property, a "taking" will be any deprivation of any user right whatsoever whether this be by the transfer of the right or by its elimination.\(^7\) Of course the compensation clause does not prohibit takings simpliciter, but rather \textit{without just compensation}. Thus, whenever something qualifies as a taking, the courts may be petitioned to determine what counts as just compensation. The Policymaker will resolve this question in one way and the Observer in another as each formulates criteria for determining which property claims are superior.

Ackerman's explanation of Ordinary Property Talk is somewhat more complicated than his explanation of Scientific Property Talk. This is a bit surprising, in that Ackerman is presumably articulating the ordinary layman's non-technical notions. First, Ackerman has us consider a perfectly socialized middle-class child and ask ourselves just what he would need to learn about property in order not to be labeled deviant. The child will first learn to distinguish his things from those of others. He next learns that, barring exceptional circumstances, permission is required before one person may use another's property. He also learns that he may not use his own things in a manner unduly harmful to others.\(^8\)

\textit{Id.} at 26-27.

17. The real question for the law—Scientifically understood—is not to identify "the" rights of "the" property owner through some mysterious intuitive process but to determine in whose bundle one or another right may best be put.

It follows that when the Scientific eye scans the constitutional text, it will have little difficulty interpreting the first part of the clause which commands "nor shall private property be taken ..." Scientifically understood, this phrase can only have an extraordinarily wide application. \textit{Whenever the state takes any use right out of Jones's bundle and puts it in \textit{any} other bundle, private property should be understood to have been taken.} For it is precisely the Scientist's main point to deny the propriety of a muddled search amongst the diverse bundles of user rights in quest of those that contain "the" rights of property. Even if Jones's bundle contains but a single user right, it is nonetheless protected against a taking by the clause. And surely others should not be disadvantaged simply because their bundles contain more user rights than does that of poor Jones. It follows that a taking has occurred whenever the law removes \textit{any} user right formerly resident in one bundle and places it in \textit{any} other.

\textit{Id.} at 27-28 (footnote omitted).

18. From a very early point, young Layman has been taught to distinguish between things that are his and things that are not his. If something belongs to him, others are under a prima facie obligation to ask his permission before using it; they are justified in using his things without obtaining Layman's permission only if they have some especially compelling reason for this extraordinary action. In contrast, Layman may properly use his things in a large number of ways without asking...
On this view, in order to answer the question whether a taking has occurred, we must answer two questions:

1. Has the state taken one of Layman’s things away from him?
2. If a taking has occurred, can it be justified on the ground that it was necessary to stop Layman from engaging in conduct he ought, as a well-socialized adult, to have recognized as unduly harmful to others?

But even this does not give us a complete picture of Ordinary Property or of a taking of it. Ackerman offers a further distinction on which much of his analysis of Ordinary Property depends. He distinguishes between “Social Property” and “Legal Property”. Ackerman’s aim is to capture the notion that, from the Ordinary perspective, “it makes good sense to discriminate between two types of rights bundle (sic) and to think of one set as realizing the ‘true nature’ of property far more completely than the other.”

What is the difference between these two types of “rights bundle”? With regard to most things, Layman has no need of a lawyer to determine if something is his property. But with regard to a relatively few things, Layman cannot determine, without lawyers’ help, whether the thing is his property or not. Ackerman calls the former “Social Property” and the latter “Legal Property.”

... anybody’s permission. Even Layman, however, cannot use his things in absolutely any way he wants; instead he is taught to refrain from actions that, as a well-socialized child, he should know are unduly harmful to others . . . .

... While I would anticipate different subcultures to hold disparate ideas of what constitutes an “exceptional” circumstance that justifies somebody else (Johnny) in using Layman’s bicycle without his permission, I would not expect a great deal of dispute on the point that there must be something exceptional about the situation to justify the use of the bike. Otherwise the bike was not Layman’s in the first place but belonged, at best, to both Johnny and Layman . . . .

... While the Scientist rebels at the thought that a single person can be properly identified as the owner of a thing, the Ordinary Observer takes a very different view. A particular thing is Layman’s thing when: (a) Layman may, without negative social sanction, use the thing in lots more ways than others can; and (b) others need a specially compelling reason if they hope to escape the negative social sanctions that are normally visited upon those who use another’s things without receiving his permission.

Id. at 97-100 (footnote omitted).

19. Id. at 116.

20. If Layman usually does not perceive the need of a lawyer’s advice before saying that something is his, upon what precisely does he ground his claim?

He bases it on the fact that his right to control the use of his thing is generally recognized in his everyday dealings with other well-socialized individuals. That is, others will ask his permission to use his thing before doing so; similarly, they will not interfere with many of the ways he can make use of his thing . . . .

... Some of the time Layman will himself perceive the need to consult a lawyer before he can knowledgeably claim some thing as his. On rare occasions, for example, another well-socialized person will make a claim of right to one of Lay-
Layman can identify his Social Property. He considers himself the full-fledged "owner", and this judgment is supported by existing social practices. "In contrast Layman must recognize that his claim upon Legal Property is far more tenuous — since only a lawyer could tell him whether it was his in the first place."

This distinction between Social and Legal Property is particularly important when applied to takings. The ease with which Layman can identify his Social Property means that he will have no difficulty recognizing a taking of that property. But when Layman's property claim is supportable only by reference to the opinion of a legal expert, rather than to manifest social practice, then he is less certain when such property has been taken. That is, with regard to Legal Property, Ordinary Property Talk is unable to clearly identify a taking.

**Ackerman's Central Thesis**

Now we are in a position to explain Ackerman's central thesis that two mutually incompatible conceptions of property, and three fundamentally different sets of criteria for resolving conflicting property claims, are currently operative in our legal system. With the help of the distinctions examined above, Ackerman constructs sophisticated models of judicial reasoning, models of both Kantian and Utilitarian Scientific Policymaking and a model of the Ordinary Observer. Ackerman uses these models to interpret dozens of court opinions involving the compensation clause and to analyze the writings of legal scholars and theorists as well. Against this background he reaches several conclusions.

First, there is a long tradition of interpreting and applying the compensation clause in the manner of the Ordinary Observer. The Ordinary conception of property has tended to dominate in judicial opinions for many years and there is a long tradition of determining criteria for "just compensation" on the basis of the structure of dominant social expectations, identified by ordinary means.

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man's things. It will then be necessary for both to consult lawyers (and perhaps judges) to determine who has the better claim. Similarly, the rights that Layman possesses over a thing may be of such a kind that they cannot be evidenced by a reference to existing patterns of social restraint and practice . . . Layman will make a fundamental distinction between his social property and his legal property. As to social property, Layman will claim to be in a position to point to existing social practices which any well-socialized person should recognize as marking a thing out as Layman's thing. If, however, Layman does not believe himself justified in claiming something as his without appealing to the opinion of a legal specialist, then I shall say he has only legal, but not social, property, in the thing in question.

Id. at 116-17 (footnotes omitted).

21. Id. at 118 (footnote omitted).
Nevertheless, in spite of its historical position, the Ordinary Observer's approach has proved inadequate to deal with conflicts involving Legal Property because of the difficulty of determining when Legal Property has been taken. Consider for example, *Pennsylvania Coal Co. v. Mahon*, which Ackerman examines in somewhat simplified form.

A coal company sold the surface rights to a certain parcel of land, \( L \), to a certain person, \( P \), reserving the right to extract the subsurface anthracite even if this should cause damage to \( P \)'s surface activities. These mining rights had recently been rendered worthless by a Pennsylvania statute making extraction illegal if it caused subsidence. The company went to court to recover compensation. The Scientist would have no trouble recognizing a taking here and would move immediately to ask what constitutes "just compensation." It is less clear whether, from the perspective of Ordinary Property Talk, a taking had occurred.

If \( P \) had attempted to mine his land and had accordingly paid rent, or if the company's claim to the subsurface was in some other manner based on actual social practice, then the company's claim to the subsurface would have been Social Property. But the company's claim rested only on an impressive piece of paper in which subsurface mining rights were reserved to it. Consequently, the company's claim was merely a matter of Legal Property. It was therefore not clear whether a taking had occurred or not.

The choice before the court, which approached the case from an Ordinary point of view, was clear. Either Legal Property, something not clearly owned, was to be treated like Social Property, the things held by full-fledged owners, and the coal company was to be granted compensation; or alternatively, the coal company was to be treated, not as the owner of something, but as someone possessed of certain legally packaged expectations having no basis in social practice and so beyond the scope of the compensation clause. Mr. Justice Holmes's opinion in this case, written from the Ordinary point of view, opts for the former approach, even though it apparently contradicts in effect, if not in word, the distinction between Social Property and Legal Property on which it is founded.

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22. 260 U.S. 393 (1922).
23. Holmes took the first path. As was to be expected, however, he did not justify his choice by arguing its affirmative attractions but by emphasizing the dangers that might possibly be hidden down the second highway. Down this road, it was claimed, the far-sighted Ordinary jurist could discern the end of all constitutional protection of property, social as well as legal: if the state can take Lawyer's things [Legal Property] without compensation, why can it not take Layman's things [Social Property] as well? . . . . Of course, even the most committed Ordinary judge cannot be affirmatively happy with this result, since it is Ordinary only
The third point of Ackerman's thesis is that there is a growing tendency, especially on the part of academic lawyers, to reject the Observer's criterion of dominant social expectations and to replace it with the more orderly and systematic reasonings of the Policy-maker. Current trends of legal thinking, associated with names like Posner and Calabresi, stress the notion of economic efficiency within a Utilitarian Policymaking approach. At the same time, though with less measurable impact on the courts, there is a growing interest among legal scholars and theorists in the Kantian approaches to law embodied in the philosophical work of such thinkers as John Rawls, Robert Nozick, and Ronald Dworkin. Thus, three fundamentally different ways of establishing criteria for resolving property disputes exist within our legal culture: that of the Ordinary Observer, the Scientific Utilitarian Policymaker and the Scientific Kantian Policymaker.

Those who support Scientific Policymaking face the fundamental question of whether the Comprehensive View ought to be Utilitarian, Kantian, or some other. Ackerman holds that it remains an open question which, if any, of the Scientific Policymaking approaches ought to be considered legally binding. None of these approaches can seriously claim to represent the current animating spirit of our legal system. But the alternative, the approach of the Ordinary Observer, seems seriously flawed by an inadequate conception of property. Moreover, the extent of this inadequacy will continue to increase in direct proportion to the community's increasing concern with environmental problems and conservation.

Ackerman sums up his diagnosis of current legal culture regarding property in these words:

On the one hand, traditional doctrine is in fact grounded upon the principles of Ordinary Observing. On the other hand, sophisticated lawyers and judges of the present day—especially those apt to write articles or opinions that have a general impact—are increas-

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ingly inclined to think about the law in Scientific Policymaking terms. . . . [T]he subterranean conflict between the two forms of legal thought expresses itself on the surface of professional life by the common perception that takings law is incoherent, its principles altogether mysterious. If I am right, before we can hope to demystify the law it will be necessary to take a self-conscious position on the relative merits of Scientific Policymaking and Ordinary Observing as alternative modes of legal analysis.

It is true, of course, that this call for methodological self-consciousness is an unfamiliar one. At least so far as I can see, our legal culture is sufficiently disorganized (or should I say schizoid?) that many of its principal actors—lawyers, judges, legislators—move back and forth between the perspectives of the Ordinary Observer and Scientific Policymaker quite effortlessly with no sense of impropriety . . . .

It takes little foresight, however, to predict that this age of happy ignorance is drawing to a close.27

We shall soon have little option but to respond, in one way or another, to the ambiguities and instability of our system of property law. Ackerman’s book summons us to serious reflection, theorizing and philosophizing about the law, so that the changes in our property law will be brought about self-consciously, as a consequence of rational deliberation on the alternatives.

Ordinary Laymen’s Property and Ackerman’s Notion of “Ordinary”

In the pages that follow, I shall examine some of the weaknesses of Ackerman’s position and shall propose an important perspective on property which I believe he has overlooked. Ackerman’s analysis of Ordinary Property Talk is, as I mentioned above, surprisingly complicated for something that is supposed to be “ordinary” and non-technical. In order to explain the layman’s distinction between ownership as such and other, lesser property relations, Ackerman introduces the abstract and quite technical (i.e. “Scientific”) notion of Legal Property. No laymen that I know include such a notion in their ordinary property talk.

How does Ackerman come to talk of Legal Property? He first asks how a layman would explain his conviction that he owns a particular thing. Ackerman says Layman would answer this question by pointing to a pattern of existing social practices, including restraint from using the thing without Layman’s permission, and not interfering with Layman’s use. This focus on social relations is why Ackerman calls this kind of property claim “Social Property”. Surely

27. Private Property, supra note 1, at 168-69.
these practices do typify factors indicative of ownership. But they are the consequences of ownership, not the bases of the claim to ownership. Laymen do not look to these things to find out if they own a thing.

If some individual, or even the entire community, were to fail to act according to these patterns, it is unlikely that a layman, sincerely convinced that he owned something, would therefore consider changing his conviction. Rather he would claim that those failing to conform to these practices were failing to respect his ownership. Moreover, if asked how he knew that he owned the thing, even under circumstances in which the whole community was acting as if he did not, he would not necessarily have nothing to say, as Ackerman’s position would require.

Indeed the social practices which Ackerman focuses upon are not conclusive indications of ownership. For the same social practices would generally exist if Layman had only been loaned the thing or had rented it. Thus, Ackerman’s social practices do not necessarily point to ownership, as such, at all.

The explanation of ownership claims offered most frequently by ordinary laymen is probably, “I bought it.” The explanation behind the owning of the money used to buy things, is most often, “I earned it.” Another important explanation is, “I received it as a gift (from someone who owned it).” And in other situations there are several others: “I found it,” “I made it,” and “I exchanged something (which I already owned) for it.”

These explanations, as part of a framework of human social practices, point to a conception of ownership quite different from either of the conceptions examined by Ackerman. Moreover, this third conception of property, once formulated clearly, seems more likely to represent the actual practice of ordinary laymen than Ackerman’s notion of Ordinary Property.

To strengthen this claim, consider Ackerman’s analysis of the layman’s view of the “lesser property claims,” i.e., property claims which fall short of being full-fledged ownership. The layman’s typical understanding of these claims, according to Ackerman, is that Layman is unable to be certain about them without the aid of a lawyer. Thus, Ackerman calls these claims “Legal Property.” Claims of this sort, he says, are inherently tenuous. In fact, however, the vast majority of laymen are quite able to explain the bases of lesser property claims. In general their explanations will point to:

(i.) an express or implied contractual agreement actually agreed to or, under special circumstances, reasonably imputed to
(ii.) an owner (who could, in turn, justify his claims as the owner of the thing by reference to the six explanations noted above).
My first point in criticism of Ackerman, then, is that his analysis of ordinary laymen's conceptions of property is incorrect. First, he is incorrect in attributing the conception which he calls "Ordinary Property" to ordinary laymen. Second and more important, he misses the conception of property which ordinary laymen actually employ. This third conception of property, which I shall call "Ordinary Laymen's Property" to distinguish it from Ackerman's Ordinary Property, is probably the dominant understanding of the nature of property in our society.

It is, however, one thing to say that Ordinary Laymen's Property is the dominant conception of the nature of property in our society, and quite another to claim a concomitant influence upon judicial opinion or legal theory. Such a claim could be substantiated only by the same kind of careful analysis of case law and legal scholarship which Ackerman undertakes for his two conceptions of property. Nevertheless, it is worth suggesting that this third conception of property might be as socially pervasive as the other two in our current legal culture, so that our schizophrenia might be even more complex than Ackerman claims. Alternatively, we might find the opinions and legal theories, which Ackerman explains by reference to his notion of Ordinary Property, might be better understood in terms of Ordinary Laymen's Property.

Admittedly, I have only barely sketched the conception which I am calling "Ordinary Laymen's Property." Before expanding this notion more fully it seems worth asking how so careful an investigator as Ackerman could have overlooked the dominant conception of property among laymen in our society, particularly when he claims to be looking directly at laymen's ways of thinking when he constructs his notion of Ordinary Property. I think the reasons are twofold.

Ackerman's analysis of the Ordinary conception of property is deficient due to an ambiguity in his notion of "Ordinary." Ackerman employs this notion in four or five different ways in the course of his analysis. The main elements of Ackerman's central thesis are in no way weakened by this confusion, especially when the primary meaning of the Scientific/Ordinary distinction as it functions in relation to the central thesis is explained. But such confusion does mar the clarity of his analysis and explains, in part, why he overlooks Ordinary Laymen's Property.

The first meaning of "Ordinary" is that used in connection with the Scientific/Ordinary distinction. There Ackerman says the Ordinary approach holds that "recourse to everyday, nonlegal ways of speaking can be expected to reveal the basic structure and animat-
ing concerns of legal analysis." The Scientist, on the other hand, "conceives the distinctive constituents of legal discourse to be a set of technical concepts whose meanings are set in relation to one another by clear definitions without continuing reliance upon the way similar-sounding concepts are deployed in nonlegal talk." The focus is on the contrast between the technical language of professional lawyers, which obtains its conceptual clarity by means of stipulative definitions accepted by the profession, and the language of non-lawyers regarding the same matters.

Ackerman apparently has the same notion of Scientific/Ordinary in mind when he designates the conception of property which he attributes to lawyers as "Scientific" and the conception which he attributes to laymen as "Ordinary". Unfortunately, Ackerman's Ordinary Property is not the conception of ordinary laymen at all. Besides this, Ackerman's Ordinary Property is a fairly technical notion, involving as it does the distinction between Social Property and Legal Property, concepts which are associated with the notions of ownership and other lesser property relations by a process much akin to stipulative definition. Thus there is a second use of "Ordinary" which appears when Ackerman contrasts the Scientific and the Ordinary conceptions of property. The contrast intended here is between lawyers' and laymen's ways of thinking about property. So "Ordinary" here really means simply "lay." As I have argued, however, the conception Ackerman calls "Ordinary" is not the conception of property that laymen embrace.

A third use of the Scientific/Ordinary distinction occurs in Ackerman's discussion of "Scientific Observing." In this context, "Scientific" refers to the employment of a specialized investigative methodology (e.g. anthropology, history, psychology, sociology) and the technical language that goes with it. By implication, "Ordinary" in this context refers to the absence of such a specialized investigative methodology. Thus the Ordinary Observer is one who would determine dominant patterns of social expectations simply by the normal processes of observation and reflection.

A fourth use of the Scientific/Ordinary distinction appears in Ackerman's account of the difference between Scientific and Ordinary Policymakers. Here, what the Ordinary approach lacks, which the Scientific approach has, is the capacity for developing a relatively general system of normative principles and for systematically deriving consequences by applying these principles in particular cases. Ackerman tries to attribute this difference to the different

28. Id. at 10.
29. Id. at 10-11 (footnote omitted).
levels of technical sophistication in language. But the thrust of the
difference relates less to linguistic power and more to the difference
between a Policymaker and an Observer. In other words, Ackerman
assimilates the notion of what is Ordinary here to the approach of
the Observer. Given this, it is not surprising that he finds the idea
of an Ordinary Policymaker all but self-contradictory, or at least
self-defeating. For, on these terms, an Ordinary Policymaker is an
Observer Policymaker, which is impossible in principle.

Thus the shifting character of Ackerman's notion of "Ordinary"
makes his argument against the possibility of an Ordinary Policymaker
suspect, and suggests one reason why his notion of Ordinary Property misses its intended mark, the conception of property of the
ordinary layman. But this confusion does not weaken Ackerman's
central thesis. For, in every key argument relevant to the central
thesis, Ackerman consistently employs the Scientific/Ordinary distinc-
tion in a single way. At every turn of the argument, "Scientific"
can be taken to indicate that the conception of property which
Ackerman calls "Scientific" is being used and "Ordinary" can be
taken to indicate that the conception of property which Ackerman
calls "Ordinary" is being used. Thus a Scientific Policymaker is a
Policymaker who employs the conception of property labeled "Sci-
centific" by Ackerman, and an Ordinary Observer is an Observer
who uses the conception of property labeled "Ordinary." Here we
have a fifth use of the Scientific/Ordinary distinction, but one which
he uses consistently and predictably throughout the book when the
arguments for the central thesis of the book are at stake.

Ordinary Laymen's Property and the Possibility of Ordinary
Policymaking

In this section I shall briefly outline the main elements of the
conception of property which I have labeled "Ordinary Laymen's
Property." Then I wish to propose the possibility of an Ordinary
Policymaking approach to property law and compensation based on
that conception of property. In order to do this I shall also need to
examine again Ackerman's arguments against the feasibility of an
Ordinary Policymaking approach.

The central idea of Ordinary Laymen's Property is that persons
control things. That is, persons determine how things are to be used,
modified, and consumed in furtherance of their goals and purposes.
Certain kinds of this control are respected, protected, and if neces-
sary restored by their fellow men. Both ownership and lesser prop-
erty relations are relationships of control between person and thing
which the person's fellowmen respect, protect, and if necessary res-
tore. The difference between ownership and lesser property relations
lies in the fact that the fellowmen of the holder of a lesser property relation will respect, etc., only such acts of control on the part of that person as are assigned to him, explicitly or implicitly, by the person who actually owns the thing, while the relationship between owner and fellowmen is not necessarily dependent on the will of any identifiable third party.

In the previous section I mentioned six types of explanation that a layman might give, depending on the circumstances, to justify his conviction that he owned something. All six refer to the acquisition of control over a thing. Two concern the original initiation of control: “I found it,” and “I made it.” The rest refer to transfer of control: “I exchanged something for it,” “I received it as a gift,” “I earned it,” and “I bought it.” (The question whether these are four distinct explanations or whether one or other of the last two is an instance of the first one is a question beyond the scope of this paper.) Notice, however, that these six are not the only conceivable ways of initiating or transferring control. These are ways whose consequences our fellowmen do respect etc. There are other ways (e.g. “I burgled it,” “I robbed someone of it,” “I defrauded someone of it,” and the like) whose consequences our fellowmen will not respect, protect or restore.

This then is the general framework within which ordinary laymen buy, sell, own, loan, give gifts, earn their living, and so on. Obviously this is only a preliminary sketch of Ordinary Laymen’s Property. Much more is needed to explain how it applies, for example, to owning by groups and to owning of things other than chattels and land. But here I have tried to sketch the conception only enough to give the reader a sense of its general approach and to raise the question in the reader’s mind whether this conception does not represent ordinary laymen’s understanding of property more accurately than Ackerman’s Ordinary Property.\(^{30}\)

Would it be possible to construct a Comprehensive View which would take Ordinary Laymen’s Property as its conception of property in the same way that the Scientific Policymaker works with what Ackerman calls the “Scientific” conception of property? The crucial question here is whether a system of relatively general normative principles could be developed which would justify practices of respect, protection, and restoration on the part of the community for certain specific kinds of control of (certain specific kinds of) things and which would justify the community’s respect etc. for the

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30. This conception of property, particularly the emphasis on control of a thing, is explained in much greater detail in my doctoral dissertation, D. Ozar, The Concept of Owning (March, 1974) (Yale University).
consequences of the various types of original initiation of control and of transfer of control listed above. There seems to be no reason in principle why this could not be done. It is possible that no one would ever actually do it and it is possible that our actual practice, our acceptance of all six of the above explanations, involves some hidden incoherence. But Ackerman has shown nothing self-contradictory or self-defeating about such a project that would detain a serious thinker from attempting it.

There is, moreover, positive evidence that a Comprehensive View employing the conception of Ordinary Layman's Property can be constructed. This evidence is of two sorts. First, political philosophers and social, political, and legal theorists have tried to articulate Comprehensive Views incorporating this basic conception of property. John Locke's effort to justify property claims in terms of labor is one example.\(^3\) Robert Nozick's recent explanation of "entitlement theory" is another.\(^3\) It might be argued that these theorists have not yet succeeded in articulating a single Comprehensive View based on Ordinary Laymen's Property; but then neither have Ackerman's Utilitarian or Kantian Policymakers with their Scientific conceptions of property. I suggest that the property language of ordinary laymen is not an impossible foundation for a Comprehensive View.

Additionally, many ordinary laymen who depend on the six explanations noted above to support their property claims consider these explanations to provide not merely a legal, but also a moral justification for their claims. That is, many laymen believe that if any of these explanations were not accepted as a legal justification for property claims, then it ought to be. Such convictions, while perhaps not as widespread as the conception of Ordinary Layman's Property itself, are surely not confined to a few individuals. However, such convictions make no sense except in the presence of a supporting rationale, including a moral justification for the claims of those who initiated control over particular pieces of property along with basic moral principles to be used in judging the adequacy of exchange transactions. Admittedly, few who believe their property claims to be both legally and morally justified have developed such a comprehensive rationale embodying and articulating all relevant normative principles. However, the evidence of serious efforts to understand and formulate support for these convictions demonstrates that those who employ the notion of "Ordinary Layman's Property," are not necessarily trapped into the pattern of nonsyste-

\(^{31}\) J. Locke, Two Treatises of Government: of Property (P. Laslett ed. 1963).

\(^{32}\) See note 25, supra.
matic and merely particularized judgments suggested by Ackerman's argument against an Ordinary Policymaker.

In light of these reflections, I draw the following conclusions. First, Ackerman overlooks the conception of property employed by the vast majority of laymen in our society. While the impact of this oversight on Ackerman's central thesis is uncertain, the oversight is still significant, partly because of the light this conception might cast on Ackerman's analysis and partly because of its own importance within our society.

Second, Ackerman overlooks, indeed wrongly rejects, the possibility of a Comprehensive View employing the ordinary laymen's conception of property. This rejection may be more understandable once we realize its dependence on Ackerman's ambiguous use of his notion of "Ordinary." It is also more understandable when we consider the conception of property which Ackerman attributes to laymen. But Ackerman's rejection of Ordinary Policymaking still sounds very much like a rejection of the possibility of systematic reflection by laymen generally. Ackerman implies that only a professional, armed with his technical linguistic tools and exposed to his professional associates, can possibly articulate a coherent system of general principles for human life. Yet Ackerman offers no strong argument to show that careful reflection on ordinary practices and ordinary ways of speaking cannot really provide a solid base for such a coherent system.33

Third, I have made a positive proposal that Ordinary Laymen's Property serve as the basis of a Comprehensive View in an Ordinary Policymaking approach to property law. The positive evidence that I have offered supporting such an approach is suggestive only, not conclusive. Sincere attempts to identify the layman's conception of property, followed by serious philosophical and theoretical reflection on the basis of that conception are needed to formulate a Comprehensive View to guide our resolution of property conflicts. We must also examine the significance of this conception of property and the Comprehensive View associated with it in judicial opinions.

33. One wonders if Ackerman has decided ahead of time that laymen cannot be trusted with this task. Ackerman never says such a thing and might be chagrined that such an impression could be read from his words. But the role of laymen in the determination of what the law ought to be gets short shrift throughout the book. This is particularly obvious in his rejection of Ordinary Policymaking and in his discussion of the "critical" state, in which judges and legal theorists alone are mentioned in the role of "critics" determining the principles and policies which satisfy the state's standards of right. PRIVATE PROPERTY, supra note 1, at 180-81.

At least some notice of the role of the rest of the community and of the political process by which they participate in these determinations would enrich the picture of a legal system which Ackerman presents.
and in legal theory. But the first step in this long process is the articulation of the conception I have called “Ordinary Laymen’s Property” and the formulation of a Comprehensive View based on that conception.

Finally, however, I must say that Ackerman’s arguments for his central thesis are impressive. Though I find flaws in some of the details, his claim that our current legal culture is schizophrenic in its understanding of the nature of property and in the criteria it employs to resolve competing claims is well defended. His call to serious reflection and philosophizing about our property law is certainly well uttered. He leaves us with a new awareness of a task to be undertaken and he has provided us with some valuable tools to use in undertaking it.

CONCLUSION

In my opinion, the best way for the interested reader to begin this task would be to read Ackerman’s book. Despite its flaws and oversights, Private Property and the Constitution is extraordinarily valuable for the penetrating new questions it asks, the rich new insights it prompts, and the powerful analytical tools it makes available. This is a book that I recommend highly to everyone: to practicing lawyers with a theoretical bent in need of stimulation; to law students desirous of a powerful, self-contained learning experience; to teaching lawyers seeking a rich learning experience or a useful teaching text; to legal scholars and theorists; and to laymen in search of a challenging but comprehensible initiation into legal theory on a topic that is very close to home.
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