Yale Law School
Yale Law School Legal Scholarship Repository

Faculty Scholarship Series | Yale Law School Faculty Scholarship

1-1-1985

Foreword: Talking and Trading

Bruce Ackerman
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Recommended Citation
Ackerman, Bruce, "Foreword: Talking and Trading" (1985). *Faculty Scholarship Series*. Paper 146.
http://digitalcommons.law.yale.edu/fss_papers/146

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

COLUMBIA LAW REVIEW

VOL. 85 JUNE 1985 NO. 5

FOREWORD: TALKING AND TRADING

*Bruce A. Ackerman**

1. I encounter you and seek your cooperation. You are reluctant. How to proceed?

First: I can talk to you and try to persuade you to define yourself in a way that makes you want to work with me for our common good.

Second: I can take you as you are and try to bargain with you, offering you something you want in exchange for the thing I want.

What to do? Talking offers a distinctive kind of satisfaction. In the end, we may succeed in coming to an understanding of what we are about. And that is no small thing.

2. But talking takes time. Too much time: given the billions of people on this planet, I can reach a deep dialogic understanding with a ridiculously small number of my fellows before I die.

So trading is a way of coping with death, economizing on time. To protest against the market is as futile—and as necessary—as protesting against death.

3. Suppose, then, that I despair of talking to you in a way that may ultimately allow us to come to a deep mutual understanding. I offer, instead, a trade: tit for tat.

But you, unaccountably, refuse. Instead, you threaten me with unilateral action—action threatening my own plans for myself. What next?

4. There is always force. We may simply give up the effort to come to terms with one another, and lose ourselves in the struggle of all against all. Is there another way out?

5. It is here where law enters: granted that we cannot hope to achieve some deep understanding, can't we aim for something that is both less and more than this? Less, in that we will inevitably remain strangers to one another in countless ways. More, in that the law may allow us to achieve a form of mutual understanding that permits us to proceed with the business of life without undertaking the impossible task of befriending the world.

A legal conversation, then, is both alienating and liberating at the same time. Alienating, because we must renounce the hope of intimacy; liberating, because we may come to terms with one another in a way that enables our ongoing cooperation.

And yet, if this hope is to succeed, we must somehow find a vocab-

* Beekman Professor of Law and Philosophy, Columbia University.

HeinOnline -- 85 Colum. L. Rev. 899 1985

ulary that allows us to express this complex form of alienating empowerment.

6. It is here where we may glimpse the promise of law and economics. For economics, no less than law, is a very distinctive form of talk. It concerns human beings strictly in their capacity as traders, hence as people who have already—for the best of reasons—despaired of reaching an intimate form of association with one another. To introduce *homo economicus* into a legal conversation amounts to the following proposal: Granted that we cannot talk to everyone as if he were our friend, can't we at least talk to him as if we might bargain our way to mutually acceptable terms of cooperation?

7. But, you are certain to protest, isn't the proposal of law and economics based on a *non sequitur*? After all, you and I would never have come to the law at all if we had bargained successfully with one another. How, then, can law-talk about hypothetical bargaining permit us to come to a legal understanding of our dispute when our effort at real bargaining has already been in vain?

8. To which I answer: perhaps what law and economics is trying to teach us is to become better bargainers. This suggestion allows us to appreciate one of the more remarkable aspects of this Symposium: for here you will find a series of lawyer-economists taking a remorselessly *ex ante* approach to everything they discuss. *If* we had begun to bargain at a time long before our dispute arose on the surface of everyday life, they seem to be telling us, then we *would* have been able to come to a mutually beneficial agreement. Given the difficulty of sustaining more intimate relationships, should we not, at least, do the best job we can at bargaining our way to mutually acceptable terms?

9. A modest proposal, and surely not one to be disdained by anyone mindful of the finitude of human life. This much, at least, you must concede.

10. If this is so, I hope that you will not allow some loose talk of "efficiency"—which also appears in these pages—to blind you to the value of this Symposium. Long after extreme claims for "efficiency" have been forgotten, law and economics will be remembered for the new rigor with which it allowed the law to emphasize hidden bargaining possibilities that might otherwise be neglected in social life.[1]

Consider, for example, the way that the *ex ante* perspective of the lawyer-economist has revolutionized the study of tort law. No longer do lawyers treat an automobile accident as if the only interesting questions involved the behavior of the parties during the last minutes before the collision took place. Instead, modern tort theory invites us to con-

1. See, e.g., the dialogue between Hoffman & Spitzer, Experimental Law and Economics: An Introduction, 85 Colum. L. Rev. 991 (1985) on one hand, and Kelman, Comment on Hoffman and Spitzer's "Experimental Law and Economics," 85 Colum. L. Rev. 1037 (1985) on the other, concerning the use of experimental methods in law and economics.

HeinOnline -- 85 Colum. L. Rev. 900 1985

sider the ways you and I might have bargained with one another at a time when we had not yet embarked upon a collision course. Would you have agreed to insure against the accident? Would I have agreed to buy a safer car? As the work of the last generation demonstrates,[2] the effort to ask such questions systematically cannot help but enrich our ongoing effort to come to terms with the accident problem in modern society.[3]

11. And yet it is precisely this new rigor that will, in the end, establish ever more clearly the limitations of law and economics as a form of legal discourse. As the lawyer-economist eagerly points out all the ways we could have bargained our way, *ex ante*, to a mutually satisfactory relationship, it will also become clear how many other disputes we never could have resolved through bargaining.

The law and economics of auto accidents, after all, typically takes us back to a time when we were still adults, with a relatively clear sense of who we were and what we wanted out of life. All that you and I are invited to do is to imagine that we did not first encounter one another in the emergency lane of Interstate 95, but could instead bargain over whether you or I should buy insurance, drive a car with rubber bumpers, and so forth.

Things become a good deal trickier when the lawyer-economist invites us to talk about conditions obtaining the day before yesterday: say, at a time when I was receiving a liberal education in expensive schools with caring teachers, while you were cooped up in a place where "education" consisted of low-grade incarceration. Here it makes no sense to speak of the way you and I might have bargained our way to a mutually satisfactory understanding about the best way to allocate education, for the simple reason that you and I were not yet competent bargainers.

While the law and economics of auto accidents directs our attention to hypothetical bargains that could be reached by *real-world* bargainers, the law and economics of primary education involves the hypothetical bargains of *hypothetical* bargainers. And the same thing is true about many of the most fundamental questions with which the law deals: just as you and I could not have bargained over our primary education, so too we could not have bargained over our initial endow-

2. Since the study of accident law has generated an enormous literature, it is not an appropriate subject for a symposium exploring new directions for law and economics. For those wishing to assess the heartland of the discipline, the best starting place remains G. Calabresi, The Costs of Accidents (1970), which, for all the analytic advances of the last 15 years, remains the single best example of sustained and sophisticated legal argument within the ex ante economic framework.

3. For further reflections upon the significance of ex ante thinking, see B. Ackerman, Reconstructing American Law 46–72 (1984); Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 19–33 (1984); Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591, 600–42 (1981).

HeinOnline -- 85 Colum. L. Rev. 901 1985

ments of material goods or genetic abilities. Yet it is these initial endowments that profoundly shape our success in real-world bargaining throughout our lives.

Is it not past time, then, for lawyer-economists to recognize upfront that you and I were not born yesterday?[4]

12. Such a question should, at the very least, force the lawyer-economist to take with far greater seriousness his relationship to the ongoing development of social contract philosophy. After John Rawls, we all should be aware of how small differences in the way in which hypothetical bargainers are described may lead to very large differences in the nature of the *ex ante* social contracts they will reach. If, then, the lawyer-economist is to talk about initial endowments in the bargaining spirit, he must self-consciously attend to the fine-grained structure of his *ex ante* analysis: what *precisely* are we assuming about our hypothetical bargainers? Can we defend these assumptions in a reflective way, drawing on the best of the tradition of social contract philosophy?[5]

13. This, then, is one potentially fruitful direction for law and economics: to develop self-consciously its links to contractarian political philosophy. It is not, however, the road I will travel. Rather than extending bargaining analysis to an unreal world of hypothetical bargainers, I myself believe that we should restrict the domain of bargaining metaphors in legal conversation.[6]

For me, there is a vast difference between speculating about hypothetical bargains you and I might in fact have struck, and the bargains that might appeal to hypothetical you's and I's. While I find the former instructive, I find the latter mystifying: I do not see any good reason to be bound by deals that might be reached by somebody who wasn't me; and calling the deal a "social contract" only serves to obscure the fact that no flesh-and-blood creature could ever in fact have bargained his way to the "contract."[7]

14. But if this is right, then lawyer-economists have their work cut out for them. Rather than overextending bargaining metaphors, we must

---

4. This question cannot be avoided even by lawyer-economists who modestly limit themselves to subjects like torts and contracts which characteristically involve genuine or hypothetical bargains by real-world bargainers. As Alvin Klevorick suggests, such issues are deeply affected by presuppositions about the basic structure of society within which the particular tort, contract, or crime is embedded. See Klevorick, Legal Theory and the Economic Analysis of Torts and Crimes, 85 Colum. L. Rev. 905 (1985).

5. For Rawls' most recent efforts to justify his favored conception of the original position, see Rawls, Kantian Constructivism in Moral Theory, 77 J. Phil. 515, 545-50 (1980) (choice between thick and thin veils of ignorance).

6. I therefore welcome the new interest in the law and economics of inalienability evidenced in this Symposium by Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985) and Epstein, Why Restrain Alienation?, 85 Colum. L. Rev. 970 (1985).

7. For further elaboration, see B. Ackerman, Social Justice in the Liberal State ch. 10 (1980).

HeinOnline -- 85 Colum. L. Rev. 902 1985

learn to put them in their place as part—but only part—of a larger *non*-contractual understanding of the normative aims of the legal system.

Progress will come only by trichotomizing the domain of legal discourse. First, we must recognize the distinctive character of those legal relationships that *do* rest upon genuine bargains by real-world people. Here, we must reflect more deeply upon the normative conditions a bargain must satisfy before it should count as "genuine"[8] and demarcate more clearly the legal problems which may appropriately be treated as genuine bargains. To what extent, for example, should modern corporation law be treated as if it involved genuine bargaining between management and shareholders?[9]

Having answered questions like this, we may proceed to demarcate a second legal domain involving *hypothetical* bargaining by real-world people. Here we encounter legal problems, like those raised by car accidents, where it is obvious that you and I didn't bargain with one another over the terms of our interaction before we collided into one another. Nonetheless, with the aid of law and economics, we might well define terms that we would have agreed upon, *ex ante*, if transaction costs had not made it impossible to deal with one another before we collided.

As I have suggested, much of modern law and economics has been developed to treat problems like this. While much more remains to be done, the increasingly technical character of the modelling should not be allowed to obscure the fundamental normative question raised by the entire analytical procedure. After all, our legal tradition has often sharply distinguished between legal relationships based on genuine bargains and those that might have been, but in fact were not, grounded on a real-world contract. Imagine, for example, that a lawyer-economist demonstrated beyond reasonable doubt that if you and I had encountered one another at Time One, you would have agreed to buy a widget from me for one hundred dollars. Suppose now, at Time Two, that the bottom has dropped out of the widget market and that I try to recover damages from you on the basis of this hypothetical contract. Surely this would not be enough to win a traditional lawsuit. So far as the law of contract is concerned, there is all the difference between hypothetical, and actual, consent. While I will obtain damages if you *did* consent, I won't get anything merely by proving that you would have consented if I had asked.

If, then, I cannot appeal to hypothetical bargaining to create a binding contract, why does the lawyer-economist suppose that I can

8. For a recent penetrating discussion, see Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 472 (1980).

9. For the ongoing debate, see the recent symposium Corporations and Private Property, 26 J. L. & Econ. 235–496 (1983), marking the 50th anniversary of the publication by Adolf Berle and Gardiner Means of their seminal work The Modern Corporation and Private Property (1932).

HeinOnline -- 85 Colum. L. Rev. 903 1985

properly appeal to it to support my legal claims in other contexts? There are, doubtless, many answers to this question—some better than others. There is a danger, however, that the lawyer-economists of the next generation will not even try to frame a discriminating response, but will instead devote themselves entirely to the refinement of their economic models of bargaining behavior. So long as we remain *lawyer*-economists, however, no amount of mathematical sophistication will compensate for a deep and systematic normative analysis of the conditions under which I may legitimately appeal to your hypothetical consent to impose a legal obligation upon you that you otherwise would not have labored under.

Even if such explanations are forthcoming, they should not be extended casually to resolve a third domain of legal dispute. Here we do not deal with the hypothetical bargains of flesh-and-blood human beings, let alone genuine contracts. Instead, you and I must confront the fact that we could *never* have bargained over some of the questions that most profoundly shape the course of our lives—most notably, those involving the distribution of initial endowments of wealth, education, and talent. If this recognition leads us—as I think it should—to abandon bargaining metaphors completely in this third domain of discourse, how *are* lawyer-economists to conduct a plausible legal conversation about the problem of initial endowments?

15. However difficult this question may be, we should never allow it so to unsettle us that we lose touch with the sound instinct that led us to law and economics in the first place. While bargaining talk may be an inadequate response to the problem of initial entitlements, at least it does have one virtue: it permits us to recognize that you and I cannot try to resolve our conflicts by speaking to one another as if we all might become, in the end, members of one big happy family. Whatever else may be obscure, at least this much should be clear: the legal discourse that puts bargaining in its place cannot do so by supposing that all of us could somehow sustain the deep sense of mutual understanding and commitment that is a rare and precious achievement even in small groups.[10]

16. How, then, to proceed? Is there a credible form of legal discourse that allows us to confront the fact that we can't all be friends without pretending that we might solve all our difficulties by bargaining?

---

10. I do not think it necessary to say how small a group has to be before it may plausibly hope for a deeper kind of dialogic solidarity than the kind that the law can hope to provide. Aristotle thought the sound of the human voice set the natural limit; while modern methods do much to amplify the voice, they are less successful in sustaining the complex relationships that make deep dialogue rewarding. See Aristotle, Politics, Bk. 7, ch. 4, at 292 (E. Barker trans. 1952) (In a large state, nobody can govern "unless he has Stentor's voice."). For present purposes, however, it is unnecessary to say whether the limit of deep communication is reached in groups of 100 or 1000 or 10,000 or 100,000. The number remains small in comparison with the population of the United States, let alone the world.

HeinOnline -- 85 Colum. L. Rev. 904 1985