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The Word on Trial

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BOOK REVIEW

THE WORD ON TRIAL

THE WORD AND THE LAW, by Milner S. Ball,* University of Chicago Press, 1993. Pp. 216. $29.50

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I. INTRODUCTION

Milner Ball's extraordinary book, *The Word and the Law*,[1] begins with a narrative account of "seven practices in law."[2] The seven practitioners Ball brings to life for the reader share two powerful traits: they all, in quite different ways, use law to lessen the multiple sufferings of various communities of poor people, and they all, by doing so, strengthen the communities within which and for which they labor. One is a landlord-tenant city judge, who both cares about the needs and protects the rights of poor tenants.[3] Another is a tribal judge, who immerses himself in the lives of the residents of the reservation over which he presides in order to dispense an organic and communal, as well as orderly and moral, justice.[4] A third is a law student, who prepares herself to advocate for the homeless by sharing their lodging in the New Haven Amtrak Rail Station.[5] A fourth, her colleague and teacher, is a dedicated Yale clinician who tirelessly devotes himself to the needs of sometimes desperate clients and the less desperate but nonetheless pressing concerns and interests of law students.[6] Another is an ACLU lawyer and ac-

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1. MILNER S. BALL, THE WORD AND THE LAW (1993).
2. *See id.* at 7-72.
3. *Id.* at 24-38.
4. *Id.* at 38-49.
5. *Id.* at 60-72.
6. *Id.*

tivist, a larger-than-life veteran of the Freedom Rides and anti-war movements, who, driven by a life long passion for justice, agitates against this society's tolerance, even embrace, of the death penalty.[7] Another is a legal services lawyer in eastern Kentucky, deeply involved in the lives, illnesses and struggles of the coal miners for whom he labors,[8] and the last is the head of the Indian Law Resource Center, committed to retaining or reclaiming the *land*—not just rightful compensation—on which displaced tribes can reestablish their society.[9] Ball's descriptions of these legal practices are effective, and affecting. These people—two judges, a student, a teacher, an advocate for the rights of Native Americans, an activist on behalf of a cause, and a poverty lawyer—do come to life, and vividly so. These stories work. The reader gets a good sense of the humor, the sadness, the motivations, the daily toils, and the emotional color of the lives of these seven practitioners.

The stories work in another sense as well. The reader gains from these accounts not only a sympathetic understanding of the lives of seven lawyers, but a renewed sense of the *possibilities* their practices present. This can be put any number of ways. Perhaps most simply, Ball's retelling of these practices opens the possibility of finding in "legal practice" a vehicle for helping people, for attending with care to the needs of people, for making a change in the world for the better, for acting with compassion toward the end of social justice. These practices deserve our admiration, but they are by no means beyond our grasp. They are human-sized practices that suggest the feasibility, and not just the nobility, of a professional life committed to social justice.

Put differently, these practices open the possibility for finding spiritual satisfaction in legal work: for "sleeping well at night" as one judge puts it,[10] for resolving what the *Tikkun* recently has called "the crisis of meaning" in our contemporary lives,[11] for discovering the joy that comes from losing oneself in the

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7. *Id.* at 7-16.
8. *Id.* at 16-24.
9. *Id.* at 49-60.
10. *Id.* at 37.
11. Michael Lerner, *Memo to Clinton: Our First Hundred Days*, TIKKUN, Jan.-Feb. 1993, at 8, 8.

service of something greater. These lawyers serve the poor and will not, do not, and have not made money from their practice of law, but they are demonstrably happier with themselves, their pasts, and their world, than their more financially successful brethren. Not many students come to law school with the professed desire to achieve spiritual satisfaction. But these stories, and the practices they describe, are important evidence that those who do enter law with that ambition can surely succeed in fulfilling it.

Another way to describe the "possibility" opened by these practices, and one that may be closer to the core of Ball's concerns, is that these practices open the possibility of "enlivening" the dead letter of law· of putting the Ghost back in the machine, of investing law with the possibility of transcendence, of finding in the nailed-shut crossed-t's and dotted-i's finality of the legal text the possibility of multiple meaning, nuance, and subtlety, and hence the unspoken promise of a better, other world. To use Ball's language, we might find in these legal *practices* what we rarely find in the legal statute, commercial contract or judicial opinion: some evidence of our trust in the "presence of God," or some evidence of *his* trust in our creativity, rather than evidence of our wager on his absence, as we expect to find in the legal documents we read and often intend to plant in the legal documents we draft.[12] These practices open the possibility, in other words, of a spiritual awakening of law itself. They remind us, to quote one of the subjects, of that "shining moment" when the "system" was actually attentive to the voices and needs of the poor.[13] They underscore the simple truth that it is an ever-present possibility that it might become so again.

Put yet another way, these practices open the possibility of using the law, which so often oppresses, as a vehicle for liberation: of finding, *against all odds*, in the ambiguities of the Constitution the message of deliverance for Native American tribes, rather than the expression of mendacity and a policy of reckless

12. This is the concern of Chapter Six, entitled *Morbidity and Viability in Law*. See especially BALL, *supra* note 1, at 136-42.

13. *Id.* at 38 (referring to the Warren Court).

annihilation;[14] of finding in the fine print of the Housing Code the message of protection against the elements rather than the free alienability of land and shelter;[15] of finding in the complexities of the Federal Coal Mine, Health and Safety Act the promise of compensation for injury rather than the bleak prospect of "uphill lawyering" within the shadow of a four-out-of-a-hundred success rate;[16] of finding in the eloquent language of the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution a means of redeeming the world through justice, and nothing more and nothing less—certainly not a "sacred text" possessing its own intrinsic value but also not an empty promise legitimating an unjust status quo;[17] of finding in the simple communal folkways of a people a roadmap for a just rule of law rather than the end product of centuries of confinement and oppression;[18] or of finding in the eyes of the Amtrak security guards the possibility for human empathy and warmth rather than the thirst for order and the threat of eviction.[19] All of these lawyers see in law, legal institutions, documents, and laws' enforcers the possibility that they might be used toward the end of liberating the human spirit and nurturing and sustaining the body Through their practice, they make those possibilities ever the slightly more real.

Finally, these practices open the possibility of redeeming, in a sense, civilization itself. In various ways they realize the possibility of using words, rules, laws, and clear linguistic structures, coupled with force and the organized power of the state, in order to create, strengthen, sustain, or unify, rather than destroy, flatten, alienate, or oppress, a beloved people, or a blessed community The practices Ball describes open the possibility of employing law toward the end of life rather than death, and, more specifically, of putting law to the service of the supplications of the weak rather than the exploitative tendencies of the

14. *Id.* at 49-60 (the story of Tim Coulter, activist Native American lawyer).
15. *Id.* at 24-38 (the story of Margaret Taylor, committed housing court judge).
16. *Id.* at 16-24 (the story of John Rosenberg, who represents coal miners).
17. *Id.* at 7-16 (the story of Civil Rights crusader Henry Schwarzschild).
18. *Id.* at 38-49 (the story of tribal judge David Harding).
19. *Id.* at 60-72 (the story of Steve Wizner and Carla Ingersoll, tireless advocates for the homeless).

strong.[20] They open the possibility of employing law toward the end of truth rather than power. They open the possibility of moral politics.

These stories "work" in a third sense as well. The practices Ball describes do more than remind us of the possibilities suggested above; they do more than inspire some of us to emulate these practices. They also serve, and I think are intended to serve, as an effective rejoinder to a very specific and heretofore unanswered critique of law and "good lawyering" that has emerged from the law and literature movement, to wit, Richard Weisberg's indictment of "the Word"—legalism and Christendom both—in his remarkable book *The Failure of the Word*.[21] Weisberg's critique is quite different from the more familiar critiques of legalism that have been urged by the Critical Legal Studies movement and related critical movements in legal academia.[22] Because Weisberg's critique is itself an important one, and because Ball's stories at least to some degree are responsive to it (and apparently intended to be so), both the critique and the way in which Ball's seven legal practices might be construed as its rebuttal are worth spelling out in some detail.

In *Failure of the Word*, through a close reading of a handful of literary texts involving lawyer-protagonists, and most notably through an unconventional but largely convincing interpretation of the motives of Captain Vere in Herman Melville's classic novella *Billy Budd, Sailor*,[23] Weisberg argued that the apparently "good" Christian lawyer, through the manipulation of words, "the Word," laws, and the Rule of Law is often, perhaps usually, servicing his own private, "subjective," and perverse ends, themselves fueled by an attitude of resentment, and a thirst for personal revenge.[24] Weisberg's work suggests that the lawyerly or judicial quest for justice through the "verbalizing"

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20. *Id.* at 135, 146-64.

21. RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984).

22. *See, e.g.*, David Kairys, *Introduction* to THE POLITICS OF LAW 1 (David Kairys ed., 1990) (examining the Critical Legal Studies movement).

23. HERMAN MELVILLE, BILLY BUDD, SAILOR (Harrison Hayford & Merton M. Sealts, Jr. eds., 1962).

24. WEISBERG, *supra* note 21, at 131-76.

forms of law, masks, at least on occasion and perhaps typically, an ignoble and perverse quest by the "articulate classes" for revenge against the hated and feared purity of feeling and superior physical and moral strength of the natural and nonverbal human animal.[25] The lawyer, Weisberg argued, even (perhaps especially) the "good lawyer," may be motivated not by a desire to effectuate a just order in an unjust world, but rather, by a repugnance or revulsion, fueled by jealousy, fear and resentment, against the natural, and particularly the pre-verbal, man of instinct, emotion, and physical strength.[26] The "good" done by the good lawyer with both law and Christianity is hopelessly entangled with this twisted urge to use those forms to best the man of natural strength with the artificial forms of civilization—Christian love and legalistic form.

The moral peril that Weisberg's critique uniquely highlights is not the familiar danger to which the Critical Legal Studies movement attends[27]: that *law itself*, although apparently just, masks or legitimates injustice. Rather, Weisberg focuses on the more subtle danger that regardless of the injustice or justice of the substantive legal regime, the personality of the individuals who must be relied upon to realize a legal order is an untrustworthy one. The most ideal legal regime can be put to the furtherance of the perverted ends of the resentful and vengeful lawyer or judge.[28] The use of Christianity to effectuate a victory over the pagan religions, like the use and misuse of legalism to effectuate victories over the Nietzchean natural man, should be understood as a part of this historical struggle. Although perhaps not inevitable, the possibility of perversion fueled by ressentiment is ever-present.

Ball tells us in his acknowledgements that at least his title is inspired in part by Weisberg's thesis.[29] If Ball intended his own book to serve as a rejoinder to Weisberg's critique, the stories are well chosen. The practices portrayed in *The Word and the*

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25. *See id.*, *see also id.* at 1-9.
26. *Id.* at 131-76.
27. *See, e.g.*, Kairys, *supra* note 22, at 1-9.
28. Consider, in this regard, Jean Baptiste Clamence, the protagonist in ALBERT CAMUS, THE FALL (1956).
29. BALL, *supra* note 1, at 166.

Law indeed are effective responses to Weisberg's Nietzchean polarities. These lawyers are not perverse. They seek neither personal wealth *nor* power. They do not suffer from dark, hidden, compromising motives; their actions do not constitute the outward manifestation of a secret contempt for men of action, of blood, of the flesh. They are not twisted intellects, seeking revenge against the directness of nature. They are not real-life Captain Veres, using the forms of law and the rituals of Christianity to disguise sick subjective ends. These lawyers' ends are simple, and even natural. They are "of the flesh."

But nor are Ball's lawyers creatures of animalistic will. Their actions are not the honest, pre- or non-verbal, direct acts of the simple-minded, childlike, innocent, natural man. Just as the reader will find no Captain Veres in these stories, she will not find any Billy Budds. As Ball repeatedly emphasizes, these lawyers are professionals who are good at what they do and enjoy doing it,[30] and what they *do* is use the forces of law, the sanction of the State, and the rules of civility and civilization, in order to achieve ends dictated by compassion, kindness and fellow feeling. To use Weisberg's language, their practices are verbal and powerful.[31] Indeed, they are using the linguistic structures of law to coerce results that could not be achieved through the powers bestowed upon them by nature. But their motivation does not derive from a resentment, fear, or jealousy of the natural realm. Their practices are not responses to a twisted and narcissistic need to quell natural forces toward one's own subjective end, but rather, borrowing Ball's language, they are responses to the Word; they exemplify the *success*, so to speak, rather than the *failure*, of the Word. In a secular context, the practices are aimed at creating community by alleviating the suffering of others and not at imposing a perverse subjective agenda on an unsuspecting world through the apparently innocent forms of law and Christian feeling. Their motives are nonduplicitous, their goals are simple, and their methods are the methods of law—rules, distinctions, arguments, wordiness, civili-

30. *Id.* at 156-58.
31. WEISBERG, *supra* note 21, at 1-7, 177-79.

ty[32] In other words, these lawyers represent the possibility that Weisberg's study denies exists.

Had Ball ended his book with his accounts of these lawyers' practices, he would have produced a remarkable and important book. The descriptions of their practices alone, with almost no needed commentary, bring to life moral ways of living in law that are worthy of emulation, admiration, and consideration. Ball's accounting of them brings to life a subjectivity that seemingly is the antithesis of the "ressentiment" Weisberg finds so prevalent in Western and Christian legal thought and practice.

But of course, Ball's book does not end simply with these descriptions. The second half of the book contains what might be characterized best as a sequence of meditations on some of the possibilities opened up by the lawyers' stories. Most importantly, Ball explores the possibility that the distinguishing feature of these practices is that they are living responses to God's Word. As such, Ball ultimately concludes that, unsurprisingly, they share the traits noted above: that all of these practitioners service the poor and build community[33] Ball wants ultimately to leave us with the possibility that theology can be brought to bear on the attempt to understand these practices, and that by doing so, we can discern a relation between God's Word and the legal work of these seven individuals. The workings of God's Word can be found in these practices.

These meditations resist simple summary or recapitulation. No clear line of argument ultimately builds toward the conclusion noted above; the book is avowedly "experimental" and nonlinear.[34] Ball employs not only theological argument, but also literary interpretation, journalistic reporting, a good deal of personal narrative, and simply, moral reflection to engage the reader directly with both the seven practices and with the texts, biblical, literary, and legal, that he brings to the task of understanding. These meditations are overflowing with insight, suggestion, description, self-revelation, interpretation, and stories within stories within stories. While never sentimental, his medi-

32. *Id.* at 158-64.
33. *Id.* at 150-55.
34. *Id.* at 1, 73.

tations are truly heartening. They tell the story of one man's intellectual attempt to make moral and religious sense of his own life, and the lives of some people he admires, in law It is a story, and an intellectual journey, that is well conceived and well told.

In the remainder of this Review, I will comment very briefly on two of the theological themes that recur in Ball's meditations and note what I think are some possible connections between his theological arguments and some of our legal practices and habits of mind. Thus, in Part II below, I will explore the possibility that the discussion Ball provides of the use of parables in the Bible, and particularly his challenging interpretation of a passage from the Book of Mark regarding the use of parables, might also shed some light on the use of narrative by critical race theorists, as well as some of the recent criticism that narrative jurisprudence has elicited. In Part III, I briefly suggest that the relation for which Ball argues between religion and Belief, or between religious practices and God's Word, may find an echo in the relation between law and justice. I hope that by drawing analogies between the theological arguments Ball makes about religion and the Word, on the one hand, and some of our contemporary debates about law and justice, on the other, I am not trivializing or grossly misstating Ball's positions. I must emphasize that the analogies I draw are mine, not his, and I apologize for any distortion in his positions that may result from my attempt to make a coherent claim that fruitful analogies exist.

II. NARRATIVITY, PARABLE, AND THE LIMITS OF UNDERSTANDING

The most technical, one of the lengthiest, perhaps the most mysterious, and I think the pivotal chapter of this book, entitled *Mark, Isaiah, and the Empty Place*, puts forward an interpretation of *Mark* 4:10-12.[35] In that passage, Mark tells us that Jesus, to the frustration and bewilderment of his immediate listeners and future generations of biblical scholars, explained to his disciples that the reason he couches his teachings in parables is *not* to promote understanding, as one might think, but

35. *Id.* at 106-28.

very much to the contrary The reason he uses parables is to *prevent* understanding:

> And when he was alone, those who were about him with the twelve asked concerning the parables. And he said to them, "To you has been given the secret of the kingdom of God, but for the others everything is in parables; in order that they may indeed see but not perceive, and may indeed hear but not understand; lest they should turn again, and be discharged."[36]

This is, as Ball tells the reader several times, a very difficult passage.[37] Why would Jesus do such a sadistic thing? Why would he say such a perverse thing? What does it mean to *teach* if the point of the teaching is to block understanding? Ball's brave interpretation of this difficult passage alone is worth the price of the book. First, Ball argues, in a largely technical argument well beyond the scope of this discussion, that a close reading of the relevant texts cannot sustain the much more benign rendition of Jesus' words offered by Matthew in *Matthew* 13:13-15.[38] Matthew's Jesus reports that he speaks in parables *because* the people cannot explain his message, not in order to insure that they fail to understand.[39] This reading, Ball argues, while certainly a more comforting one, does not withstand scrutiny.[40]

Of more immediate interest to the general readership of this book, however, Ball also argues against a powerful reading of this passage put forward by Frank Kermode in his justly acclaimed book, *The Genesis of Secrecy*.[41] Kermode uses the passage from Mark to argue, in effect, for the necessary and irreducible opaqueness of narrative texts.[42] The passage, Kermode argues, like Kafka's famous parable "Before the Law,"[43] is evidence of the peculiar way in which narratives, by virtue of their

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36. *Id.* at 106-07 (quoting *Mark* 4:10-12).
37. *Id.* at 106, 111.
38. *Id.* at 107-19.
39. *Id.* at 107.
40. *Id.* at 109.
41. FRANK KERMODE, THE GENESIS OF SECRECY (1979).
42. *Id.* at 33-34.
43. FRANZ KAFKA, PARABLES AND PARADOXES 60-79 (1972).

openness, both invite and defy interpretation.[44] *Because* narrative texts are "open," they require interpretation, but because of that same openness, they defy authoritative interpretation: they cannot be reduced to, or translated into, a series of argumentative propositions. Narrativity "requires and frustrates interpretation; it makes interpretation necessary and virtually impossible."[45] Ball quotes Kermode's conclusion: "Hot for secrets, our only conversation may be with guardians who know less and see less than we can; and our sole hope and pleasure is in the perception of a momentary radiance, before the door of disappointment is finally shut on us."[46]

Ball puts forward a quite different account. Ball reads this passage as Mark's direct testimony, in effect, to the power of God's Word.[47] Mark's accounting of Jesus' profoundly opaque remarks about the opaqueness of parables, Ball argues, in effect prefigures the account Mark gives at the end of the Book of the "empty tomb" found by Mary Magdalene, Mary the mother of James, and Salome, who were expecting to find the body of Christ:

> And when the sabbath was past, Mary Magdalene, and Mary the mother of James, and Salome, brought spices, so that they might go and anoint him. And very early on the first day of the week they went to the tomb when the sun had risen. And they were saying to one another, "Who will roll away the stone for us from the door of the tomb?" And looking up, they saw that the stone was rolled back, for it was very large. And entering the tomb, they saw a young man sitting on the right side, dressed in a white robe; and they were amazed. And he said to them, "Do not be amazed; you seek Jesus of Nazareth, who was crucified. He has risen, he is not here; see the place where they laid him. But go, tell his disciples and Peter that he is going before you to Galilee; there you will see him, as he told you." And they went out and fled from the tomb; for trembling and astonishment had

44. KERMODE, *supra* note 41, at 33.
45. BALL, *supra* note 1, at 107 (summarizing Kermode's position).
46. *Id.* (quoting KERMODE, *supra* note 41, at 144-45).
47. BALL, *supra* note 1, at 108, 128, 129-30.

> come upon them; and they said nothing to anyone, for they were afraid.[48]

The connection between these two passages, Ball argues, is that Mark's account of the "empty tomb" at the end of the Book, *like the empty tomb itself*, and Mark's account of Jesus' explanation of the use of parables, *like the parables themselves*, all create an "empty space," or an "irruption" in settled understandings and expectations, in which God's Word either will or will not be revealed.[49] The parables, like the koan-like account Jesus provides of their opaqueness, "create a space," Ball goes on to argue, into which the reader cannot or should not thrust himself, whether through an act of interpretation, of despair, or of the will.[50] The passage evidences not the necessity and impossibility of interpretation of narrative, as Kermode contends, but the absolute asymmetrical priority of God to the believer, of the divine to the natural, of the Word to the powers of understanding. It is not, so to speak, left to us to "find God" by working through the parables, or even to "find ourselves" by closing the narrative text with our "own" interpretation. Rather, the opaqueness of Jesus' account of the parables, and the opaqueness of the parables themselves, and perhaps by extension the opaqueness of narrativity, provides a different sort of invitation altogether: it invites humility by causing an "irruption" in our understandings, *including* our understanding of our intellectual or interpretive powers.[51] Within the space created by that irruption, Ball suggests, the Word of God may, or may not, be revealed.[52]

At the sizeable risk of sounding outrageous, I'd like to suggest that Ball's understanding of this passage, as well as the understanding of the nature of narrative that it suggests, might cast needed light on the increasing, and increasingly controversial, use of narrativity and parable by critical race theorists, and to a lesser extent by some feminist legal theorists. In the last couple

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48. *Id.* at 125 (quoting *Mark* 16:1-8).
49. *Id.* at 125-27.
50. *Id.* at 125.
51. *Id.* at 124-35.
52. *Id.* at 127.

of years, the use of narrative by these "outsider" jurisprudes has come under a considerable amount of critical attack.[53] In essence, the questions posed by the critics of the "narrative scholars" are the same questions posed to Jesus by his disciples: Why use narratives? Why speak in parables? Why not simply make the argument, explain the point? What, if anything, does narrative add to a legal argument that could not be effected far more cleanly and less ambiguously with straightforward analytic claims?

There is, of course, a conventional explanation for the use of narrative in critical race and feminist jurisprudence. As I and others have argued, the point of using narrativity in this scholarship may be to bring to the fore arguments and understandings that for some reason can not be grasped or articulated in more conventional ways.[54] For example, narrativity may be an important method for feminists because of the peculiar "privateness" of so many of the injuries women sustain. The nature of these injuries must be communicated before their injustice can be made manifest, and narrative is virtually the only possible way this communication might take place. Similarly, narrativity may be an important method for critical race theorists because of the "frequency," as well as the unfamiliarity, and hence the life-altering consequences and profundity, of so many of the injuries inflicted by private racism. Narrativity may be the only—hence the best—way to communicate the felt reality of being an African American in this culture, subject to the

53. *See* Suzanna Sherry & Daniel A. Farber, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticizing some feminists and critical race theorists for de-emphasizing methods of conventional analysis and overemphasizing sometimes atypical or inaccurate stories that have emotional appeal); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (criticizing race theorists' use of narrative jurisprudence).

54. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440 (1989) ("Stories are useful tools for the underdog All movements for change must gain the support, or at least the understanding, of the dominant group."); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (urging legal sanctions for racist speech by focusing on stories of the effects of racist hate messages); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1988) (concluding that literary legal analysis helps people to understand and sympathize with others).

multiple injuries of private, institutional, and unconscious racism. When employed for either reason, or for reasons closely aligned, critical narrativity is then serving utterly traditional jurisprudential ends, albeit through an unconventional method, and it should be judged and criticized by reference to how well or poorly it serves those ends.[55]

Whether or not this "conventional" accounting of the disproportionate use of narrativity in critical race and feminist legal studies—to wit, that critical scholars use narrative when conventional forms of argument are for some reason inadequate to the entirely conventional end of explaining the nature of an injury, and then advocating a particular legal reform for its redress—accurately captures the motives of narrative scholars, for various reasons, it has not satisfied the critics of narrative jurisprudence. According to their mainstream critics, the narrative scholars, or at least many of them, simply have not met the burden of showing that the use of narrative is either necessary or sufficient to meet the shared ends of legal discourse.[56] I do not wish to comment here on the merits of that debate. What I'd like to suggest more simply is that Ball's discussion of the text from *Mark* implies, albeit indirectly, that the premise of this debate might be misguided: both the defenders and the critics may be wrong to assume that this "conventional" account is the best or only account one might provide for the use of narrative by outsider legal scholars.

Of course, one might expect Jesus to have made precisely this "conventional" account of narrative when asked to explain his reliance on parable. Sensibly we might have expected Jesus to explain that parable is used where conventional explanation fails. Partly because of the weight of that expectation, the account Jesus does give in the quoted passage from *Mark*—that the use of parable does and is intended to obfuscate, and to *prevent* rather than promote understanding—seems so alarming.[57] It is a natural question to ask, then, whether Jesus' radi-

55. Perhaps the most exhaustive attempt to explain, justify, and partly criticize narrative jurisprudence along these lines is Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1992).

56. *Id.* at 977-78.

57. BALL, *supra* note 1, at 107-08 ("Jesus's saying *is* deeply disturbing").

cally different explanation for his use of parables, and the theological as well as epistemological debate between Ball and Kermode that that explanation has triggered, has anything to say to our contemporary debate about the use of narrative and parable by critical race and feminist legal scholars.

First, Kermode's account of that passage—that it is testimony to the opaqueness of narrativity—does shed some light on the controversies surrounding the use of narrative by critical race scholars, and it does so in a way that underscores the complaints of their mainstream critics. Kermode's interpretation of Mark's account of Jesus' explanation of his use of parables, quite directly explains, as well as justifies, the discomfiture of mainstream scholars with the critical race scholars' use of narrative. If Kermode is right, then the traditional legal scholars are surely also right to think of narrative as in some way an illegitimate form of discourse: narratives simply *are* opaque, Kermode argues; they truly cannot be translated into a set of claims. Their use will only obfuscate issues rather than further understanding. For all of those reasons, they should not be a part of legal argument, the goal of which must be, at least in part, to communicate, and to communicate clearly

The alternative explanation for the use of narrativity in critical scholarship that Ball's interpretation of Mark's accounting of Jesus' comments suggests is that, at least some of the time, the use of narrative by these scholars may promote and may be intended to promote a transformation in the listener not by broadening understanding, but rather, in effect, by *blocking* traditional understanding and forging in its place an "empty space." Listen again to Ball: "Mark encourages the reader to approach texts with expectant regard for what is unsaid as well as what is said—for their open-endedness, silences, negative spaces, inexplicable disturbances, and omissions as well as for their plain statement. There the Word may be at work."[58] The same lesson, I suggest, may be well applied to at least some of the narratives and parables put forward in scholarship by the outsider legal scholars. Two examples illustrate this point.

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58. *Id.* at 129-30.

In *The Alchemy of Race and Rights*, Patricia Williams tells a story about a black child mauled to death by two polar bears in a zoo.[59] *Unlike* many of the other stories in this book, which I think *can be* "translated" relatively easily into straightforward arguments about the nature of racism and poverty,[60] this particular story, and her treatment of it, both resist and invite interpretation in precisely the way Kermode suggests. One surely can (and many no doubt do, including me) interpret the story as being "about" the lethal effects of a primitive, unthinking, and even oddly "innocent" but brutal form of white racism on the African American community Other interpretations, however, are "equally plausible," and it is indeed that "equal plausibility" that makes it impossible to reduce the story about the polar bears to any particular set of claims about racism—that is the sense in which narrativity renders interpretation impossible. Williams' polar bears story, in other words, seems to be an example of the opaqueness which Kermode finds in narrative generally Because it invites multiple interpretation, it defies authoritative interpretation. Its message is always secret.

But perhaps there is another way that at least *this particular* story operates on readers and listeners; another way it affects or fails to affect people; another way it "works." A student in my law and literature class last semester told me in a fit of pique that "I don't have any idea what the polar bears are supposed to be. I *hate* this quasi-poetic stuff." Then she smiled and said, "but it did make me stop." Two weeks later this student who had claimed no interest in race wrote and presented a fine paper about unconscious racism in various pieces of literature. I don't think it is too much of a stretch to say that at least for this student, the polar bears story created an "empty space" or an "irruption" in her preconceived views of race and racial injury in the sense Ball attributes (if I've got this right) to Mark's understanding of Jesus.

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59. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR 207-08 (1991).

60. I tried to do so in my review of Williams' book. *See* Robin West, *Murdering the Spirit: Racism, Rights and Commerce*, 90 MICH. L. REV. 1771 (1992) (book review).

My second example concerns a piece by Marie Ashe entitled *Zig-Zag Stitching*,[61] in which Ashe, among many other things, narrates the painful and dangerous circumstances of the births of her several children in graphic detail. These stories, like the polar bears story, defy interpretation. In fact, the effect these narratives had, at least on me, and I think on many other readers, wasn't even in the mental *realm*. The effect was physical. Ashe's descriptions of her experiences giving birth made me sick; I went home that day and crawled in bed and stayed there. Those stories made me stop. I was made aware quite literally of an "empty space," a space the borders of which are defined by the maternal experience of birth and its attendant dangers, and a space that is uncovered by legal scholarship and largely uncovered by culture, and a space into which I feared to tread.

Critics of narrative and feminist jurisprudence have criticized *Zig-Zag Stitching* largely because it is not clear how, if at all, Ashe's narratives contribute to the larger argument she is making in the piece, or even what the larger argument might be.[62] In one sense, the criticism is well taken, and even understated. Ashe's piece ultimately argues for the deregulation of the provision of reproductive health care,[63] and if anything, the stories she tells seem to counsel toward the opposite conclusion. But in another sense, the criticism is wildly misplaced. The major effect of Ashe's narratives, I think, and perhaps intentionally so, are Ballian rather than Kermodian. They cause an irruption in the complacent public and cultural wilful blindness to the meaning of the experience of giving birth. This piece, entitled *Zig-Zag Stitching*, tears at the seamless social cloth of silence that surrounds the experience and the danger of giving birth. Whether it does so "successfully" or not has nothing to do with how, and whether, it supports or detracts from arguments for deregulating health care. It has, rather, everything to do with what happens next, with what it prompts, or with what is revealed in the empty space it creates.

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61. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989).

62. *See* Sherry & Farber, *supra* note 53, at 847.

63. Ashe, *supra* note 61, at 383.

At any rate, Ball's interpretation of Mark's account of Jesus' bewildering comments about the opaqueness of narrative is itself, to say the least, somewhat opaque. Ball himself characterizes his interpretation as tentative, as a work-in-progress.[64] I'm not sure I understood what Ball was saying, and I'm sure I don't see what Jesus was saying. But this much is clear: it did make me stop.

III. THE PENULTIMATE "NO" AND THE ULTIMATE "YES"

The second major theme of Ball's meditations is presented in a far more accessible—because less mysterious and less technical—chapter than that discussed above, entitled *Dilsey, Baby Suggs, and the Nonreligious Word*.[65] In that chapter, Ball introduces first a critique of religiosity, and then a partial endorsement: in his words, a penultimate "No" to religion, followed by an ultimate "Yes."[66] Both the critique and the endorsement play a major role in the book and are worth looking at in some detail of their own right. I, however, ultimately will argue that whatever their theological merits, Ball's arguments about religion and God's Word are richly suggestive of a similar or analogous relationship we might be able to articulate between law and justice.

The critique begins with a firm distinction between belief and religious practice, and between the Word of God and religious teachings:

> The characteristic of religion that draws theological criticism is less its weakness than its strength: its attempt to reach beyond the present world toward a god whom it postulates and whose help and protection its adherents invoke. This attempt at self-transcendence is worthy and noble. Its worthiness and nobility are no small part of the difficulty encountered in criticizing it.
>
> The question is whether, by inviting self-transcendence, religion is not a misdirection. In the biblical stories God gives

64. BALL, *supra* note 1, at 106.
65. *Id.* at 73-95.
66. *Id.* at 82, 102.

> himself and makes himself known. This self-revelation does not correspond to religion, to human striving toward God.
>
> The revealed Word does not fill in our various attempts to make our way to God. In the received language for talking about these matters: Grace does not perfect nature, revelation does not complete reason, and mercy does not make up the deficit of good works. God makes his own way to humans, and his self-revelation bears its own possibilities for being known or not known. Jacob's ladder extended from heaven to earth, not the other way around.
>
> If we try to grasp at God, we do not believe. If we did believe we would listen, but in religion, as Barth noted, we talk; consequently, "because it is a grasping, religion is the contradiction of revelation [and is] the concentrated expression of unbelief Revelation does not link up with a human religion which is already present and practiced. It contradicts it."[67]

Ball's critique of religion is not the familiar complaint that religion, much of the time, is the handmaiden of exploitative power. This point Ball fully concedes. This is, Ball explains, religion at its worst.[68] In other words, Ball's critique of religiosity is not a critique of organized religion at its *worst*. It is a critique of religion, and of the religious experience, "at its *best*."[69] The problem with religion "at its best," Ball argues, is that it holds out to the practitioner the invitation to engage in forms of religious devotion which are at their root narcissistic.[70] The quest for the experience of personal transcendence, through the forms of religion, or for a "bridge to heaven" through acceptance of Jesus, to use the Sunday school formulation of essentially the same theological position,[71] paradoxically but inevitably weds the religious devotee to a narcissistic reflection of self. Because of that narcissism, the dance of deliverance and transcendence which religion promises is, at root, a dance of death. It takes us

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67. *Id.* at 79-80 (footnotes omitted).
68. *Id.* at 76-77.
69. *Id.* at 77.
70. *Id.* at 81.
71. For a description of the "bridge to heaven," see *id.* at 79-80.

away from life, away from the world, away from our social ties and away from our community, away from responsibility—in essence, away from the realm in which we may genuinely live a life in response to God's Word.

Ball turns to Faulkner's *Light in August*[72] for an account of the harms done by "religion at its best":

> Some experience of these ["noxious possibilities of religion at its *best*"] is available in *Light in August*. In that novel, an old, discredited, lost minister, the Reverend Gail Hightower, hears the sounds of approaching Sunday evening service in the Presbyterian church that had been his parish years ago From his living room window, Hightower sees members of the congregation exchange greetings as they approach from the streets. Then in his memory he hears their low-toned talking as they enter the church for the Sunday evening prayer meeting: "It has seemed to him always that at that hour man approaches nearest of all to God, nearer than at any other hour of all the seven days. Then alone, of all church gatherings, is there something of that peace which is the promise and the end of the Church." There, in "the cool soft blowing of faith and hope," religion achieves its apex And yet.
>
> > "Yet even then the music has still a quality stern and implacable, deliberate and without passion so much as immolation, pleading, asking, for not love, not life, forbidding it to others, demanding in sonorous tones death as though death were the boon, like all Protestant music Pleasure, ecstasy, they cannot seem to bear: their escape from it is in violence *And so why should not their religion drive them to crucifixion of themselves and one another?* he thinks."
>
> On the following day, the town lynches Joe Christmas.
>
> At the very moment when their religion carried those Presbyterians as close to God as it could, at that same point of highest reach, it also drove its practitioners away from God toward death This is religion at its highest, not its lowest.

72. WILLIAM FAULKNER, LIGHT IN AUGUST (1932).

> It was when Martin Luther King saw southern churches' "lofty spires pointing heavenward" that he was driven to ask, "What kind of people worship here? Who is their God?" The answer to his question is: ordinary white American religious people at the moment of their religious best, religious people may also be at their most moribund.[73]

The penultimate "No," though, is followed by the ultimate (although qualified) "Yes." Religion *can be* a lived, communal, particularized, response to the Word. It is not inevitably the Faulknerian dance of death described above. Religion, and the religious experience, *can* teach a despised people to love themselves. It can infuse a feeling of purpose and solidarity and fellow feeling into an otherwise bleak existence. It can redirect the attention of the believer toward the community of life within which one can live out a genuine response to God's Word. When religion serves these ends, Ball argues, religion in effect has been "adopted" by the Word.[74] *Like secular institutions*, religion holds out possibilities; like secular institutions, God might adopt religion toward His own ends. When He does so, religion becomes "for life" rather than a dance of death; it counsels and creates self love where such self love is needed; it attends to the individual and the community where such attention is otherwise wanting.

Ball again turns to literature (and again to Faulkner!) to provide examples of religion "adopted" by God's Word. The first of two examples he gives comes from Faulkner's *The Sound and the Fury*.[75] In the relevant passages from *The Sound and the Fury*, the central character Dilsey, a servant, takes from an Easter service a feeling of renewal, after which everything is the "same yet different." She becomes, from her engagement with this essentially religious experience, powerful in her position of weakness:

> Like other members of the congregation, she is returned to the world. For her and her family, this means the Compson place

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73. BALL, *supra* note 1, at 77-78 (footnotes omitted).
74. *Id.* at 82-95.
75. WILLIAM FAULKNER, THE SOUND AND THE FURY (1946).

> Dilsey had been unburdened, really unburdened, but in order to return to the burdening world and not in order to escape from it
>
> Dilsey's post-Easter world is unalleviated of ordinariness, but that is not to say it remains the same. Its ground has been fundamentally, radically revised.
>
> The Compson place continues along its customary trajectory But its foundations have been shaken. Dilsey's infinite existence intersects her finite existence, judging the sound and fury of the Compson household. The intersection is both radical and unremarked
>
> Her continuing life in the Compson household may be read together with Jesus' passive conservatism in the face of Roman imperialism and militarism Similarly, Martin Luther King's non-violence and subsequent assassination only highlight the fact that his dream of a racially reconciled South undercut the old racist premises
>
> Animated by Easter, Dilsey was no more acquiescent than revolutionary, although she might appropriately have been either or both
>
> She is ready for what lies ahead. Without romanticism or sentimentality, [s]he could bear the abuse and the burdens of the Compsons, but her life was also a remonstrance against them. She was capable of rebuking as well as of accepting, of war as well as of peace
>
> Dilsey recollects the Lamb in the midst of the kitchen. She sings hymns there not as a religious interlude but in the midst of her life and in support of it. Unburdened, she becomes burdened again: comforting the afflicted Benjamin, protecting Dilsey, rebuking Jason.[76]

The second example comes from Toni Morrison's *Beloved*.[77] Baby Suggs, the non-ordained minister, teaches a people, through her preaching, to "love their flesh," and by so doing,

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76. BALL, *supra* note 1, at 87-90 (pages and footnotes omitted).
77. TONI MORRISON, BELOVED (1987).

teaches a theretofore unloved and despised community to love themselves:

> In the summer, every afternoon, she led the community to a clearing in the woods where her heart "pumped out love" and her mouth "spoke the Word." She called the children to laugh, and the men to dance and the women to cry until the dancing and laughing and crying were all mixed up and exhausting, and then:
>
> > She did not tell them to clean up their lives or to go and sin no more. She did not tell them they were the blessed of the earth, its inheriting meek or its glorybound pure.
> >
> > She told them that the only grace they could have was the grace they could imagine. That if they could not see it, they would not have it.
> >
> > "Here," she said, "in this here place, we flesh; flesh that weeps, laughs; flesh that dances on bare feet in grass. Love it. Love it hard. Yonder they do not love your flesh. They despise it. They don't love your eyes; they'd just as soon pick em out. No more do they love the skin on your back. Yonder they flay it *You* got to love it, *you*! More than eyes or feet. More than lungs that have yet to draw free air. More than your life-holding womb and your life-giving private parts, hear me now, love your heart. For this is the prize." Saying no more, she stood up then and danced with her twisted hip the rest of what her heart had to say while the others opened their mouths and gave her the music.[78]

Both Dilsey's and Baby Suggs' experiences are "religious," but they are religious experiences that return the believer to the community, and the lives, that can nurture life, and, therefore, return the believer to the Word of God.

Ball's explanation of the way in which religion can sometimes "come alive" in the way described above is that God's Word, on occasion "adopts" religion.[79] Religion *can be*, although it by no means inevitably is, the way by which God's Word is revealed.

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78. BALL, *supra* note 1, at 91 (quoting MORRISON, *supra* note 77, at 88-89).
79. *Id.* at 85-86.

But at times it is, and when it is, it is because it has been "adopted" by God's Word toward precisely that end:

> There is nothing here about human fulfillment, or human flourishing, or ethical values, or the power of positive thinking, or what one must do to be saved, or the believing self and its work of belief, or of applications of biblical teachings to daily life. Instead, there is the Word. And there is belief, but belief happens, is enacted, is generated by the communal proclamation.
>
> In the religion it thus adopts, the Word, although incorrespondent, becomes nonetheless accessible—in words and in hearts speaking beyond the need for words The incorrespondent Word, the wholly other, is contextually, particularly human.
>
> This is critical. Religion adopted by the Word is not about religion or the self but about the world and humans, about the struggle "to make and to keep human life human in the world."
>
> Her religion—religion adopted by the Word—is determinative of who she is as a human and of how she is human. It cannot occupy an isolated sphere either metaphysical or private. It gives her humanity and life instead of rescuing her from either.[80]

Thus, the ultimate "Yes" follows the penultimate "No."

Ball's account of religiosity is relevant to contemporary legal practice and scholarship in two ways. The first is simply methodological: Ball's dialectical method, which George Hunsinger calls the "Chalcedonian pattern"[81] and which consists of the "penultimate no followed by the ultimate yes," finds a close parallel in the attitudinal stance of critical feminist and race scholars, and perhaps of progressive legal scholars generally, toward law There too, one finds a penultimate critique of law and its legitimating functions, followed by an ultimate embrace.[82] Con-

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80. *Id.* (footnotes omitted).

81. *See id.* at 102; *see also* GEORGE HUNSINGER, HOW TO READ KARL BARTH: THE SHAPE OF HIS THEOLOGY 85 (1991).

82. For a detailed discussion of this phenomenon, see Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992).

sider, for example, Catharine MacKinnon's account of her own scholarship regarding the meaning of equality in constitutional and federal civil rights law. "The first part of these reflections takes on the complacency of the view that women have rights when we do not; the second part stands against the luxurious cynicism that despairingly assumes women have no rights when we do, or could."[83] Similarly, Mari Matsuda argues explicitly that from the perspective of the "voices at the bottom," law is penultimately an obstacle, but ultimately a potential ally for liberation and equality.[84]

How to explain this ambivalence? It is possible, of course, to view this critical ambivalence as being simply strategic: where law helps, then embrace it, where law hurts, resist it. But "strategy" is not a very satisfying account for the actual experience of the ambivalence described, and felt, above. Particularly the ultimate embrace, but also I think the penultimate critique as well, feels more authentic than instrumental—more substantive and in a sense more "total," than strategic. I have always felt myself at a loss when trying to describe this phenomenon. Ball's description of the relation between religion and God's Word, and particularly of the way in which religion is from time to time "adopted" by the Word, or "intersects" with the Word, suggests what might be a more satisfying account than the strategic one given above, although it is by necessity a metaphorical one.

The account is simply this: Law stands to justice precisely as Ball argues that "religion" stands to God's Word. Law cannot serve as a bridge to justice, any more than religion can serve as a bridge to God's Word. We cannot "reach" justice by striving to make our law evermore pure. Justice is not an abstract state to be achieved through an insistence on the integrity, wholeness, purity, or consistency of laws. To think of law in this way—as the bridge, so to speak, to justice, if only we can get it right—is a "misdirection." It misconceives the nature of justice. Justice,

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83. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1324 (1991).

84. *See* Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

like God's Word, must "direct" its seeker to the realm of life, community and relations among people. The just society is not a metaphysical state of being to be achieved through some sort of purifying legalistic process, just as an individual understanding of the nature of justice is not something to be achieved through an abstracted intellectual pursuit. But nor is it the case that law is irrelevant to justice. Rather, as religion is sometimes adopted by God's Word, or intersects with it, law can sometimes be "adopted" by justice. When it is, justice inheres in law, and when it is, justice is found, not in the law itself, but in the relations between just people serving communities, and doing so with the mechanisms and substance of a just law

Let me try to spell this out in a little more detail. Recall the first step of Ball's argument: religion at its worst is in the service of power, with familiar attendant evils. But religion at its best is also problematic. The problem with religion at its best, is that by putting itself forward as a bridge to God, it turns the believer's quest for transcendence narcissistically inward. "Religion is finally centered on the self. The Word directs to the other."[85] But religion can, from time to time be "adopted" by God's Word, and when it is, it returns the believer toward the work of engagement with communities of life.

Now, of course, law *at its worst* can be, and should be, criticized. And it is. Constantly Law at its worst legitimates, in the sense meant by the critical legal scholars, the commands, whims, will, and interests, of the politically dominant sectors of a legal community There is also, however, a moral problem with law *at its best*, and it is the far more subtle problem suggested by Ball's critical account of religiosity—the penultimate "No." Think for a moment of Ronald Dworkin's inspired liberal legal accounts of law as being constantly defined and redefined by its "best" aspirations.[86] Dworkin's account may be the "best" account of law "at its best." According to Dworkin, the very definition of law, and certainly its substance, ought to be understood by reference to its idealized content. Law "at its best," Dworkin

85. BALL, *supra* note 1, at 98.

86. RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter TAKING RIGHTS SERIOUSLY].

argues, when properly understood, *is* the bridge by which we reach an understanding of the content of political justice,[87] just as, in a strikingly analogous way, religion "at its best," according to Ball, presents itself as a bridge to the Word of God, and acceptance by Him. But in the case of law, just as in the case of religion, by *virtue of that fact*, law "at its best" in effect keeps us away from the realm in which justice may be found and crafted, just as, analogously, religion, by virtue of its self-presentation as a bridge to God, keeps the devotee away from the human realm in which God's Word may be revealed. Because law at its best presents itself as the bridge to justice, it keeps the legal practitioner, scholar, or judge out of the realm of community and life, the realm in which justice may in fact be realized through the medium of just people doing what justice requires for the communities in which they labor, and turned instead toward the realm of the actual and ideal law on the books, constantly bettering itself through interpretation, modification, amendment and change. It keeps the legal practitioner or scholar immersed in the group narrative project of perfecting, through telling, retelling, and reinterpreting, the story of law It promises justice as the end result of this obsession with the perfection of law, but its promise is and must be illusory Law at its best keeps the legal believer in the ultimately narcissistic circle of legal imaginings. The penultimate "No."[88]

But, at least on occasion, this very jurisprudential project—the liberal legal project so well described by Dworkin, of the law, through the work of judges, lawyers and scholars, constantly seeking to render itself more just—can be put to the service of justice, by persons working in the community toward the end of a just world. When it is, I think it makes sense to say that law has been "adopted" by justice. When we use law in such circumstances, we use it not just "strategically," but we *align* ourselves with it; it becomes a moral undertaking. We become

87. Dworkin has made this argument in a variety of ways in many different writings, but perhaps his clearest statement appears in his essay *How Law Is Like Literature*, *in* A MATTER OF PRINCIPLE 146, 160-64 (1985).

88. Robert Cover of Yale makes a similar critique in *Violence of the Word*, 95 YALE L.J. 1601 (1986) (discussing the interplay between legal interpretation and violence).

committed to it through and through, and justifiably so. The ultimate "Yes." Let me present two examples of what I now think of as "law adopted by justice." One comes, again, from a student, and one from the work of a scholar.

A student approached me this semester wanting to discuss a possible law review note in which she wanted to attack, under the First Amendment, the constitutionality of ordinances which forbid protestors from disrupting sport hunting, by demonstrating against the practice in woods and forests where hunting is allowed. The problem with her argument, as she conceded, is that the conduct prohibited by the ordinances is clearly more than just speech. The ordinance is aimed at prohibiting the disruption of the hunt, and the protestors are most assuredly aiming not just to voice their views but to disrupt that lawful behavior.

My student, like the protestors she wants to help, is an ethical vegetarian deeply concerned about our reckless cruelty to animals, and particularly about their casual slaughter and consumption for pleasure. She wants very much to find a way to use the First Amendment to further the protestors' cause and the animals' well-being. The problem, of course, is that it is not at all clear she can do so, given the protestors' avowed intention to disrupt lawful behavior and not merely express lawful dissent. She feels herself stuck on the horns of a dilemma. She can misstate the protestors' goals, by limiting their acts to "speech," and then make a conventional and possibly successful First Amendment argument. Alternatively, she could state their goals correctly, in which case, given her understanding of the law, at best she could use their plight as a springboard for criticizing the unduly cramped and limited reach of the First Amendment. What she could not figure out a way to do, of course, is what she wanted to do, and that was to use law as a bridge to achieve what she strongly saw to be the just conclusion: protecting the protest itself, even assuming that its intent as well as effect would be to disrupt the lawful practice of hunting for sport.

I suggested to this student that she read, in addition to the relevant First Amendment law, Ronald Dworkin's early essays in *Taking Rights Seriously*, and particularly the chapters in that

work devoted to discussions of civil disobedience.[89] She did so, and has since returned to her project with a renewed sense of purpose. I suggest that her use of Dworkin's jurisprudential project might be understood, loosely, as analogous to the "ultimate Yes" that Ball eventually bestows upon some religious practices. Put differently, in the hands of a practitioner concerned to bring justice to and in the world, the jurisprudential liberal legal project so well described by Dworkin might be "adopted" by justice. The "misdirection" noted in Dworkin's project, or the "penultimate no" bestowed upon it, might become from time to time the "ultimate yes."

Dworkin argued, it may be recalled, in his early work that the Constitution does and should protect (despite Supreme Court authority to the contrary) the acts of draft protestors even though their protests involved illegal acts, because of the *ultimate* illegality and unconstitutionality of the war itself, even though the war had not been authoritatively found unconstitutional.[90] The Constitution, understood "in its best light," Dworkin argued, condemns the war as an unconstitutional use of governmental force. Accordingly, the Constitution should protect the "protestors" of that illegal and unconstitutional governmental act against arrest for their concededly illegal activities.[91] Our commitment to vigorous protest and dissent, the spirit of which is captured in our First Amendment, should be deep enough to protect the activities of protest, and the participants against arrest, when the constitutional claim they are making is a colorable one.

That argument is a quite stunning example of law "adopted by" justice. Law, particularly constitutional law, was being read "in its best light" not so as to create an abstract bridge toward a rarified understanding of the requirements of political justice, but rather, so as to be pressed toward a just result in a particular community at a particular time—the protection of the organized protest of the Vietnam War. The idealized account of law

89. *See* RONALD DWORKIN, *Civil Disobedience, in* TAKING RIGHTS SERIOUSLY, *supra* note 86, at 206-22 (1977).

90. *Id.* at 220-22.

91. *Id.* at 214-15, 221.

presented in Dworkin's early work, unlike his later work, was presented as a way by which justice could be *done* in community—not as a way that the meaning of justice could be *grasped* in intellectual or judicial circles.

To return to my student's problem: it is certainly possible to see the acts of the animal rights activists in this situation as in opposition to, and indeed highlighting the shortsightedness of, our constitutional scheme of liberties. The First Amendment does not protect this activity, albeit perhaps it should, and hence the activity exposes the inadequacies of the First Amendment. But it is also possible to argue that although current understanding does not reflect it, the First Amendment does and should protect this activity To put the point minimally, surely it is *possible*, or at least my student is now attempting to argue that it is possible, to view state protection of the activity targeted by these protestors—hunting for sport—as an unconstitutional attack on animals, even though current understanding is uniformly to the contrary Surely it is also possible to argue, by analogy to Dworkin's argument regarding the draft resisters, that our commitment to dissent and protest, institutionalized through the First Amendment, is deep enough to protect that activity accordingly Like Dworkin's argument for the draft resisters, the argument my student wants to make for the hunt protestors (and through them, of course, for the animals) requires an idealized constitution—it is only the Constitution when read "in its best light," and most emphatically *not* the Constitution when read by the current Supreme Court or indeed by any historical Court—that condemns state protection of hunting for sport as an unconstitutional infringement of the rights of animals. But also like Dworkin's original argument, the idealized constitution it articulates is in the service not of an abstract account of the nature of justice, but rather, a concrete result sought on behalf of members of an existing community For that very reason, like Dworkin's actual argument on behalf of draft resisters, this student's constitutional claim on behalf of hunt protestors is an instance, I would argue, using Ball's language, of "law adopted by justice." Neither argument seeks to "perfect the constitutional narrative" as a means of achieving an abstract justice. Both seek to understand law "at its best" not as a bridge

by which the ideal law that is the ultimate outcome of the constitutional narrative might be revealed; but rather, as a means of "doing justice" in the community, as a means of achieving a just result between members of that community

This (modified) Ballian metaphor of "law adopted by justice" captures two strands of our way of thinking about justice that more conventional accounts do not capture well. First, it captures the sense (and it is only a sense) in which justice is "prior" to law, in a way that is analogous to Ball's insistence on the "priority" of God, or the divine, to the human. Justice simply *is*, and when it is, it is *in* and *of* the world—it inheres in human relations, and in human communities. It is not an ideal abstraction that legal doctrine progressively approximates by "working itself pure." To seek justice through the study or purification of law is, to use Ball's word, a misdirection.[92] Rather, justice is in the world, and it may on occasion intersect with law, and when it does so, law is a vehicle for its realization.

Second, the modified Ballian metaphor captures something about the ambivalence toward legal institutions so central to progressive lawyering, which more strategic or instrumental accounts of that ambivalence leave out, and that is, in a sense, the *spirit* of the commitment to law that a seeker of justice may feel, when law has indeed been "adopted" by justice. When we argue, for example, that a certain state of affairs is unconstitutional, it feels like we are saying more than that a certain state of affairs is violative of a legal document that is itself horrifically unjust but that from time to time might be used instrumentally to achieve some gain in justice for subordinated peoples. It feels, rather, like we are *aligning* the constitutional claim with the moral claim from justice, and there is no obvious way the strategic account of the relation between law and justice can fully capture that *feeling* of alignment. The Ballian "adoption" metaphor, though, does capture that feeling, and rather nicely Law is not simply being "used" as a way to "get at" justice; rather, from time to time, law is adopted by justice, law "intersects" with justice. At those points of intersection, it is fully appropriate—it is certainly not a manifestation of legalistic

92. BALL, *supra* note 1, at 73-95 & *passim*.

false consciousness—to align one's moral and legalist commitments, and convictions. At those points, law manifests justice.

One can, I think, find examples of law "adopted by justice" not only in occasional moments of legal practice narrowly understood, but in legal scholarship as well. One notable example is the constitutional scholarship of Akhil Amar.[93] Amar's reconstructive work on the Thirteenth and Fourteenth Amendments seeks an engagement with law in the service of justice that is more than just strategic and that is more than academic. The sense of justice that animates his historical reconstruction of the Civil War Amendments is one that pushes him to find in the historical record evidence of the unfulfilled promise of those amendments to create a just, as well as beloved, community The relation between law and justice realized in Amar's historical jurisprudence on the Reconstruction Amendments is not that of a practice striving toward an ideal. Law is not understood in that work as a practice constantly moving toward an ideal of justice, in turn informed by the demands of consistency, internal coherence or integrity Indeed, justice is not "informing" the direction law should take *at all*; it is not a virtue toward which law strives. Rather, what seems to lie behind Amar's historical constitutionalism is the sense that justice is ever present and may or may not animate law, or a law, *from the start*. Justice is realized in the relations between people and, from time to time, realized through the adopted mechanisms of law The Reconstruction Amendments, Amar might be understood as arguing, themselves are an example of a law "adopted by justice." His own work unearthing the original understanding of the Reconstruction Amendments, it seems to me, is another.

Nor, though, is the sense of justice in Amar's scholarship, and the relationship between justice and law it seems to suggest, the relation of ambivalent strategism suggested above; the point does not seem to be that with enough of the right kind of clever

93. *See* Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil R. Amar, *The Case of the Milling Amendments:* R.A.V v. City of St. Paul, 106 HARV. L. REV. 124 (1992); Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992); Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

scholarship, one can present an infinitely malleable historical text in such a way as to make it appear as though the historical record can serve a present progressive political agenda. Rather, the claim is, instead, that the law in this case *is* just—not that it can be "made" just, or convincingly argued to serve justice, but that it is just, and was just in its inception. This law, these Amendments, were adopted by justice. The commitment to justice, and the commitment to law, in this case, at this historical moment, with respect to this piece of history, are one and the same.

IV CONCLUSION

To return to Ball's work, the seven legal practices Ball describes might themselves be considered examples of the adoption of law by justice. It is highly significant, I think, although I'm not sure precisely what is signified, that *nowhere* does Ball himself describe them in that way Again, Ball presents these practices as examples of lives in law that are responsive to the Word of God. It is interesting to speculate as to why it is that a book called *The Word and The Law* has so little, really nothing, to say about justice. One reasonably might read quite a bit into that pregnant negative. But whatever the author's own views, surely it is not too much of a stretch to see these practices as exemplary not just of a particular and praiseworthy relation with God's Word, but also exemplary of a relation with a quite different virtue.

These practices are all, one might argue, using Ball's vocabulary in a way unintended by him but hopefully not out of line with his overall aims, examples of legal practices that have been "adopted by justice." They all, no doubt, use law to achieve justice. But again, the relation revealed in these practices between law and justice is more than strategic. Law "comes alive" for these practitioners and their clients precisely because the law has been used not merely *for* justice, but *by* justice—it is justice that has effectuated the adoption. The practitioners themselves have indeed been "taken up" by something larger than themselves. Again, Ball identifies that which has "taken them up" as "God's Word." It would not be inconsistent, though, with his description of either those practices or of their moral tenor to iden-

tify the virtue within which they practice as justice. I would say, then, simply, that these are "legal practices" which have been adopted by justice. What these practices, so understood, ultimately reveal is the possibility of a legal practice that is not just aimed "toward the end" of justice, but one that, *because* it is a practice of law, also and for that reason is a practice of justice as well.