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### The Gift of Milner Ball

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# THE GIFT OF MILNER BALL

Thomas L. Shaffer\*

My friend and teacher Milner Ball speaks of the law as “systemic injustice.”<sup>1</sup> I find that a bit harsh and tend instead toward a way of looking at injustice that comes from the equally melancholy reflections of Robert E. Rodes, Jr., also my friend—my colleague, too—and also my teacher (in two senses, including the I-once-paid-tuition sense). Bob Rodes has noticed injustice as much as Milner has, but Bob, who tends to be an Erastian,<sup>2</sup> would say it is not the law that is the source of injustice; it is not even the “system”; it is lawyers who are the source of injustice, especially so in our North American, relatively peaceful, lawyer-driven commonwealth.<sup>3</sup>

“We American layers,” Bob has said, “live on the flip side of other people’s misery and degradation. . . . The economic, social, political, and cultural structures that . . . provide our graduates with interesting and remunerative jobs are the same ones that imprison our poor people in a world of hamburger flipping, teenage pregnancy, drive-by shootings, and crack, and inveigle many of our rich people into a world of gilded banality.”<sup>4</sup> Lawyers preside over

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<sup>1</sup> Milner S. Ball, *Law Natural: Its Family of Metaphors and Its Theology*, 3 J.L. & RELIGION 141, 141 (1985) [hereinafter Ball, *Law Natural*] (“I am troubled by American law’s systemic injustice—i.e., its capacity for victimization, its fallenness.”) (citing comments of his own on work of David Kairys and Leonard Levy). He wrote, in a tribute to William Stringfellow: “The legal system is a fallen institution . . . in its morbidity, its aggressions against life, its power to destroy.” Milner S. Ball, *A Meditation on Vocation*, in RADICAL CHRISTIAN AND EXEMPLARY LAWYER 129, 130 (Andrew W. McThenia, Jr. ed., 1995).

<sup>2</sup> Erastus was a sixteenth century Swiss physician who taught (this is Bob’s characterization) that “the institutional church [is] one of a variety of institutions through which a Christian society conforms itself to the will of God. . . . [It places] the church on a par with the other institutions of society” and then tends to view the state as also carrying out the purposes of God. Robert E. Rodes, Jr., *The Last Days of Erastianism—Forms in the American Church-State Nexus*, 62 HARV. THEOLOGICAL REV. 301, 304 (1969); see also LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE 2–14 (1991) (discussing triumph of Erastianism).

<sup>3</sup> See generally Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859 (1993) (locating lawyers generally as source of injustice).

<sup>4</sup> Letter from Robert E. Rodes, Jr. to author (Sept. 15, 2006). Elsewhere, Bob and I have described the preferential option for the poor:

those structures; lawyers invented most of them. And lawyers could do something about those structures, but they do not.

Not that either of these two teachers of mine differ in their emphasis on social justice or on social justice's roots in the Gospel. Milner, as he has focused on the system, has written, "The tradition from which I speak is a theology and politics of the poor. It has to do with their liberation."<sup>5</sup> As this theology leads Milner to be an admirer of the father of liberation theology, Gustavo Gutierrez,<sup>6</sup> it leads Bob to endorse the preferential option for the poor.<sup>7</sup> It is clear, though, from what Milner writes, that he finds precious little redemption in the law.<sup>8</sup> He is discontented with the law; his discontent seems inevitable as he considers particulars in his magnificent scholarship, in his classes on constitutional law, or in the legal-aid clinic he sponsors at the University of Georgia. Bob would agree with Milner's discontent, probably adding "no doubt," but then he would say that there is nothing inevitably unjust in the

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What we must steadily ask of the world . . . if we are to be truthful teachers and scholars, is what effect legal transactions have on the people underneath them. How does our real estate law affect people who need places to live? How does our law on corporate mergers affect working people and their families? How does our criminal justice system affect the ability of the urban poor to walk out on their streets? How does the first amendment affect their ability to teach their children to live decent lives?

The preferential option for the poor, understood in this way, is not an ideology. It does not simply call us to replace our old institutions with new ones. It calls us to examine carefully all institutions, new and old, and take such control of them as is required to see that they serve the whole society.

Thomas L. Shaffer & Robert E. Rodes, Jr., *A Christian Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5, 17 (1988); see also Thomas L. Shaffer, *The Christian Jurisprudence of Robert E. Rodes, Jr.*, 73 NOTRE DAME L. REV. 737, 767-68 (1998) (discussing Rodes's Christian-based theory on career choice as elements of his own jurisprudence).

<sup>5</sup> Ball, *Law Natural*, *supra* note 1, at 160 n.46.

<sup>6</sup> See ROBERT E. RODES, JR., *LAW AND LIBERATION* 214 (1986) ("It insists that those who lack the minimum conditions for a decent and contributing life must be provided with those conditions regardless of the cost in social amenities for anyone else."); Shaffer & Rodes, *supra* note 4, at 17 (calling legal scholars to examine effect of legal system on people, including the poor); see also ROBERT E. RODES, JR., *PILGRIM LAW* 96-107 (1998) [hereinafter RODES, *PILGRIM LAW*] (describing origins, theology, and doctrines of preferential option for the poor).

<sup>7</sup> See RODES, *PILGRIM LAW*, *supra* note 6, at 96-107 (discussing liberation theology and citing Gutierrez).

<sup>8</sup> See, e.g., MILNER S. BALL, *THE WORD AND THE LAW* 160-64 (1993) (noting how evil law has been for oppressed groups).

system, nothing inevitable, either, about the discontent.<sup>9</sup> The problem for Bob is lawyers.

This difference between my two teachers may have something to do with the fact that Milner, a student of Barth and Bonhoeffer and Lehmann, is "inevitably" (here I use the word cautiously) a Calvinist. And Bob is, as I am, a convert to Roman Catholicism and a natural-law lawyer. (Bob and I are perhaps more nearly Marxists than Milner is, but that point is a distraction here, and I will say no more about it.) These are theological differences, if subtle ones, on the subjects of systemic injustice and injustice in the (practice of) law. Both are important and worth exploring.

But for now, at the beginning of this tribute to Milner, I would rather explore theological harmonies. Maybe Milner would include harmonies in the aspiration he adopts for himself from Karl Barth: "The transformation of thought."<sup>10</sup> Perhaps transformation of thought is what we three Christian lawyers are after—each of us. And for each other, as we move among our students, who are blessings for us, and as students move among poor people, who they discover to be blessings for them. What I should want to do here is to salute the theologies of these two teachers of mine, and in so doing help my students (and maybe Milner's) as they represent real people—mostly really poor people—in our legal aid clinics, and as they face the issue these two teachers of mine seem to pose for lawyers who are Christians: the issue of complicity with the oppressors of the poor, (or, Milner might say, the system that oppresses the poor), and what we and our students can do about it.

It can be put as a *whose-side-are-you-on* issue, as my friend Bob put it in the quotation I invoked just above.<sup>11</sup> But—and this is the reason I want to compare my two teachers—it is an *I-am-on-your-side* issue when seen the way Milner has seen it in his essays on the law of the sea,<sup>12</sup> on Native Americans,<sup>13</sup> and on the law as

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<sup>9</sup> See *supra* note 4 and accompanying text.

<sup>10</sup> Ball, *Law Natural*, *supra* note 1, at 141.

<sup>11</sup> See *supra* note 4 and accompanying text.

<sup>12</sup> Milner S. Ball, *Law of the Sea: Expression of Solidarity*, 19 SAN DIEGO L. REV. 461 (1982).

<sup>13</sup> Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (1987).

metaphor.<sup>14</sup> Bob would say, too, I think, that work in a legal-aid law practice is an I-am-on-your-side situation. Here is what Bob is writing, this year, in a manuscript he is working on, one of the many pieces of his that has a Hoosier county-seat lawyer flavor:

Lawyers make their living by interfering in other people's affairs. If they are to lead moral lives, they must exercise moral discernment regarding those affairs as well as regarding their own. . . . People who come to lawyers for advice are apt to be, to a greater or less extent, traumatized. They are very apt, in the unfamiliar situation they are encountering, to do whatever their lawyers say. The lawyer, therefore, has a serious responsibility not to tell them to do anything wrong.

Not only must lawyers refrain from advising their clients to do anything wrong; they must also refrain from helping their clients do anything wrong that they think up for themselves. Lawyers' moral discernment must extend not only to their clients' agendas but also to how far their service to their clients makes them complicit in whatever wrong the clients do.<sup>15</sup>

Bob writes with this paternalistic energy when he is directing his comments to those of his students and graduates who seem to aspire to positions of influence in corporate business. When he and I took our road show to the new law school at the University of Dayton in the late 1980s, he told law students there that it is not enough for law teachers to encourage their students to work in legal-aid offices; "the option for the poor," a principal doctrine of Father Gutierrez, "is not a career choice." He said,

We are very right to give our graduates who go in for legal services or public interest law at least as much

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<sup>14</sup> MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985).

<sup>15</sup> Robert E. Rodes, Jr., *On Lawyers and Moral Discernment* (2006) (unpublished manuscript).

positive reinforcement as we give the ones who make partner on Wall Street, but to be content with that would be . . . false consciousness. The burdens of poverty are fashioned in the Wall Street offices faster and more effectively than the legal services and public interest offices can lift them. If you spend the day on corporate takeovers and plant closings without thinking about the people you put out of work, you cannot make up for the harm you do by giving a woman free legal advice in the evening when her unemployed husband takes out his frustrations by beating her.<sup>16</sup>

Bob's approach to what we lawyers do, and to what our students may, alas, want to do, has seemed right to me. I think Milner would say it is right, even if it does sound a bit like sermonizing. This approach raises interesting questions on the subject of moral education in our clinical communities, in our law school communities, and in the communities in which we live. It raises questions that fit into Milner's insightful work on how the law—the institution of the law, as he sees it, rather than lawyers—functions to build a community or to put bulwarks around privilege.<sup>17</sup> And concern for community among lawyers and law teachers and for law as *medium* raises questions about persuasive (rather than coercive) uses of the law. Milner would get to all this on an occasion such as this one. I will try to get to some of it.

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<sup>16</sup> See Shaffer & Rodes, *supra* note 4, at 17–18.

<sup>17</sup> Milner's work is in significant part a meditation on *Isaiah* 11:6 (King James): "The wolf also shall dwell with the lamb . . . the calf and the young lion and the fatling together," which, to my friend Milner, suggests metaphors for the law of bulwark and medium:

The lion and the lamb will lie down all right, but is there to be no law between them? Is law a function only of social pathology? Will we rise above law? In Heaven there will be no law as bulwark. But what of law as medium? Won't it be plentiful and, like the agreeable medium air, utterly transparent?

Ball, *Law Natural*, *supra* note 1, at 156 n.35. Milner says,

The contrast I want to achieve is not that between the machine and the garden or that between urbanization and pastoralism but between a stifling, monolithic politics and a politics of hope and diversity. I intend my elaboration of the Peaceable Kingdom to be one of Marx's "new symbols of possibility."

*Id.* at 157 n.36 (quoting LEO MARX, *THE MACHINE IN THE GARDEN* 365 (1964)).

Take, for a case, a situation that arose in our clinic, the Notre Dame Legal Aid Clinic, which functions out of an old childcare center in South Bend, Indiana, within a healthy walk from the more verdant university campus. This case presents an ethical dilemma that has energized American lawyers since at least 1820, and that has stretched, in my recent observation, from a taped C.L.E. program in the basement of our local courthouse to the European Court of Human Rights (which divided on the issue 4–3). It is also an issue that got the supervisors in our clinic called, by one of our brothers at the bar downtown, “scurvy lawyers”:

The case arose in the landlord-tenant context. Indiana landlord-tenant law has protections for tenants who make security deposits with their landlord. Our version of one of the protections is a requirement that directs the landlord, when the tenancy is concluded, either to return the tenant’s security deposit or account for the landlord’s legitimate use of it.<sup>18</sup> If the landlord fails to account within forty-five days of the termination of the tenancy, the tenant has a cause of action for the deposit and attorney’s fees.<sup>19</sup> Case law adds to this remedy for failure to account a rule that bars the landlord from recovering anything for damages the tenant has done to the premises or for unpaid rent.<sup>20</sup> A tenant who is evicted for failure to pay rent (two months at, say, \$500 a month) and leaves behind damages that will cost \$1,000 to repair, and who made a security deposit of, say, \$200, stands to gain \$2,200 plus interest and attorney’s fees, if everything works out just right for him. He gets all of that plus the satisfaction of having lived rent free for two months. This situation is one of the rare provisions in property law that actually favors the poor—but only when the lawyer for the poor uses it right.

In this case—one of many in which our law office invoked the security-deposit statute—the tenant (our client) failed to pay the rent; the landlord threatened eviction; the tenant moved and gave the landlord her new address. She paid the landlord nothing, and

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<sup>18</sup> IND. CODE ANN. § 32-31-3-12(a) (West 2002).

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.,* Hill v. Davis, 832 N.E.2d 544, 553–55 (Ind. Ct. App. 2005) (holding that landlord’s claims did not comply with statutory notice requirement and awarding tenants their security deposit).

the landlord sued in small-claims court, pro se, for damages and unpaid rent. By the time the tenant came to us with the landlord's summons in hand, the landlord had not accounted for the security deposit. The clerk had set a hearing date on the landlord's lawsuit forty days from the day the tenant moved. The tenant's coming to us for representation turned out to be a good thing for her to do because we knew enough to ask for a continuance on the hearing date so that, when we all came to court, more than forty-five days would have passed without a security-deposit accounting from the day the tenant, our client, moved. On the day the forty-five days ran (before the continued hearing), we filed a counterclaim for the security deposit, interest, and attorney's fees. We won, of course, and the landlord got nothing. The fees the court ordered the landlord to pay to us went into our account for paying filing and discovery expenses for other clients. And then, after all of this, the landlord finally consulted a lawyer, who reviewed the file and told us we were scurvy lawyers.<sup>21</sup>

The case presented in the Continuing Legal Education program in the basement of the courthouse was similar. The issue there was a probate claim for medical expenses incurred by the decedent, the mother of the presenter's client. The speaker's client's mother had been dead for seven months; she knew her mother owed the hospital five thousand dollars, but her mother left no money with which to pay the hospital bill. She did not need a lawyer to tell her that, but, then, something unexpected happened: She took from her late mother's mailbox a two thousand dollar check from an insurance company, made out to her late mother, consequent on the insurance company's having "demutualized." The deceased's daughter, who sought legal advice from the lawyer who made the C.L.E. tape, wanted to know what to do with the check. The lawyer then proceeded to apply for membership in the league of scurvy lawyers:

Indiana has a fast-track small-estate act under which the check could have been turned into cash for the daughter with an affidavit

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<sup>21</sup> In another such case, where the tenant won a similar victory against a *represented* landlord, the tenant's supervising attorney asked the student-lawyer, as they walked out of court, whether the student thought they should file a complaint with the disciplinary commission, reporting the other lawyer's poor representation of his landlord-client. That case may prove, if nothing else, that the "ethical" snarl can be thrown both ways.



from the daughter. But the presenting lawyer advised his new client, the daughter, to wait a couple of months. Why? Because the non-claim period for probate claims—another special statute of limitations—is nine months.<sup>22</sup> Two months to go and then the hospital's claim is barred, and meanwhile the hospital has no way to know there are funds from which it might, by opening an estate, collect on its debts. (Of course, it could have opened an estate anyway, just to find out if the estate had any assets. If it had done that, the administrator of the estate would have taken control of the decedent's mailbox, and then come upon the demutualization check, which the administrator could then have cashed and from the proceeds paid the hospital.)

The C.L.E. program in the basement of the courthouse was on videotape. After the presenter finished his explanation of this case, a feminine voice could be heard on the tape, saying, "But that would not be ethical!" (I have, in a naughty little fantasy, thought to myself that the invisible person giving that advice to us was the presenter's mother.)

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The moral issue presented here, in both examples, is whether it is scurvy to invoke a statute of limitations. Assuming it would be at least arguably scurvy for a lawyer to routinely invoke limitations in cases such as these, there remains a narrower complicity issue, I suppose, for us lawyers who do not function on what my teacher Rodes calls the flip-side of poverty: whether it is all right for lawyers in legal-aid clinics to do this sort of thing, but not all right for lawyers representing liability insurance companies to do it. (The last time I regularly invoked limitations was when I represented insurance companies, and no one said a thing about it being unethical for me to do it then.)

There are two issues here. Consider, first, a general disapproval of lawyers who invoke limitations, regardless of the wealth of their clients. This first issue is an old one—whether the lawyer's invoking limitations is complicit in his client's wrongdoing (i.e., not paying a bill he owes). David Hoffman (1784–1854), the grandfather

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<sup>22</sup> IND. CODE ANN. § 29-1-14-1(d) (West 2002). *But see* UNIF. PROBATE CODE § 3-803 (11th ed. West) (amended 1989) (describing parallel time period as one year).

of American legal ethics, saw it as complicity. "I will never plead the statute of limitations, when based on the mere efflux of time," he said, "for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery."<sup>23</sup>

Such a moralistic attitude may or may not have changed since Hoffman wrote that tirade against knavery among debtors in 1836. It appears to have changed, at least as to more prosperous clients, before the end of Hoffman's century, by the time lawyers for the robber barons and Wall Street law firms came into prominence.<sup>24</sup> If it has changed on Wall Street, one might expect that it has changed—or that it should have changed—in the legal-aid offices in Harlem. Somehow, though, the complicity issue lingers in places like Harlem (as we scurvy legal-aid lawyers know), if not on Wall Street.

Here is one more current example, one that may show that American law has become callous. (Milner, who enjoys casting his thoughts out across the sea, might agree; Bob might say the system is still just fine, and that it is lawyers who have become callous.) The European Court of Human Rights, in 2005, held (by a vote of 4–3) that application of the English statute of limitations on actions to recover possession of real estate (what property lawyers call "adverse possession") violates the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>25</sup> The members of the judicial majority in Strasbourg were not persuaded by familiar moral arguments for limitations (e.g., that the landowner—former landowner—sat on his rights, as the landlord and the bank did in the examples with which I started this discussion).<sup>26</sup> Nor do they seem to have been moved by the trial

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<sup>23</sup> THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 64 (1985) (quoting 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY*, at Resolution XII (2d ed. 1836)).

<sup>24</sup> See GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 83–84 (5th ed. 1884) ("The party has a right to have his case decided upon the law and the evidence . . . . The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.").

<sup>25</sup> *JA Pye (Oxford) Ltd. v. United Kingdom*, No. 44302/02, slip op. ¶¶ 75 to 76 (Eur. Ct. H.R. Nov. 15, 2005), <http://euronanotrade.com/News/Human%20Rights.doc>.

<sup>26</sup> *Id.*

judge in England, who applied English law with misgivings, hoping perhaps that the European court would eventually do what it eventually did: "[I]t does seem draconian to the owners and windfall for the squatter," the English trial judge said, "that, just because the owner has taken no step to evict a squatter for 12 years, the owner should lose [the] land to the squatter with no compensation whatsoever."<sup>27</sup> David Hoffman would have agreed with the trial judge, as the judges in Strasbourg eventually did (4-3).<sup>28</sup> So would the lady whose voice was heard on the videotape in the basement of our local courthouse. Milner, I suppose, might say that, for lawyers, not squatters, nor tenants, nor heirs, if it is a moral question, it is a question of good law and bad law. And Bob, I suppose, would say it is a question of moral practice in law offices.

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Turning the focus to the "systemic" question, then—and in tribute to my friend Milner—let's see if we can borrow something from his splendid little paper (which I heard given orally, some time ago, at Washington and Lee University) on law as metaphor.<sup>29</sup> The question is whether it is more useful to think first that injustice is a systemic problem for the law or to think injustice is a moral problem for lawyers. (Of course, before we get through, it will be both; this is a question of where to look first.)

Milner wrote, in *Law Natural*, that we speak and write in metaphors in order to reveal reality, but that sometimes metaphors conceal reality as much as they reveal it.<sup>30</sup>

For example, it is said that, 'Labor is a resource.' This is a metaphor. It hides the distinction between meaningful and dehumanizing work. It conceals the oppression and misery of the people we refer to as the 'work force.' If labor is a resource, then it can be exploited as though it were a resource.<sup>31</sup>

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<sup>27</sup> *Id.* ¶ 15.

<sup>28</sup> See *supra* note 8 and accompanying text.

<sup>29</sup> Ball, *Law Natural*, *supra* note 1.

<sup>30</sup> *Id.* at 143.

<sup>31</sup> *Id.*

The metaphorical hand trick Milner noticed there is like saying that the purpose of statutes of limitation is to keep parties from losing track of relevant evidence. In the C.L.E. case, I suppose, it would be a way to hide the fact that from one point of view we would be stiffing the hospital, and, from another, that the system we are stiffing hides the fact that, if the client's mother had had health insurance, or Medicare or Medicaid, the amount paid (and paid in full) would not have been \$5,000; it would have been more like \$1,000. Or, to push that a bit, given the right facts, the metaphor of limitations might be used to hide the situation of poor people who have no insurance and have to get their medical care in expensive emergency rooms. (I think that was where Milner was going with this—where we lawyers watching the C.L.E. tape might have gone with it, if we had wanted to get into metaphors.)

Milner's alternative was to look at the law as a medium—"a device for relating rather than dividing people, something connective . . . the means for keeping a conversation going, the facilitator of dialogue and argument."<sup>32</sup> In the C.L.E. example, suppose the hospital had received \$1,000, not \$5,000 (conceding the fact that it has received nothing yet). Might, then, the client of the lawyer who spoke on the C.L.E. tape have been willing to give some of her \$2,000 to the hospital? Or even half of it (less attorney's fees)? That metaphor, if you think of the law as otherwise systemically unjust, has promise. And it has promise if you think of lawyers as trying not to make things worse. It would be an instance of Milner Ball looking at the law not as a bulwark, but as a method of moral persuasion (medium).<sup>33</sup> This is something he writes about with regard to the law of the sea and with regard to the situation of Native Americans, and where, extending the metaphor to the C.L.E. example, one might avoid, now and then, thinking of land as a commodity.

Milner's work is, in this way, again and again, about uses of the law to build communities. He does that with a theory of narrative<sup>34</sup>

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<sup>32</sup> *Id.* at 144.

<sup>33</sup> Compare *id.* at 144 (discussing medium as alternative), with *id.* at 156–57 (discussing law as bulwark and medium).

<sup>34</sup> See generally Milner S. Ball, *Just Stories*, in 12 CARDOZO STUDIES IN LAW AND LITERATURE 37 (2000) (discussing benefits of narrative and stories); Milner S. Ball, *Stories*

and as he contemplates communities from a Biblical perspective.<sup>35</sup> He has, using stories from lawyers as unlike one another as Robert Cover, William Stringfellow, and Charles Hamilton Houston,<sup>36</sup> taken the lid off metaphors for rights and uncovered a jurisprudence of community:

If law is to be anything other than a bulwark, what transforms the fear, self-protectiveness, and love of power that the bulwark serves?

. . . [A]n alternate conceptual metaphor for law not only belongs with a particular family but also depends upon its family connections for its vitality and fullness of expression. Without that family, law as medium can undergo a metamorphosis into its opposite. Within the family, its integrity is maintained. Law is a medium of solidarity where there is a community needing a medium for its mutuality . . . where . . . politics is an activity of a body with diverse members . . . and authentic humanity is being for others . . . a medium in and for a Peaceable Kingdom.<sup>37</sup>

### CONCLUSION

At the end of Alice McDermott's new novel *After This*, a bride with child, her groom, both families, and Monsignor McShane, the old Irish pastor of St. Gabriel's, are gathered for a discreet wedding that will anticipate the birth by a couple of months.<sup>38</sup> The music is to be on the piano, not the organ, and is to be played by the bride's Presbyterian neighbor, who has come to St. Gabriel's early, to

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of *Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989) (analyzing stories of origin in constitutional context).

<sup>35</sup> See, e.g., BALL, *supra* note 8, at 3 (noting that he takes his theology seriously); BALL, *supra* note 14, at 19 (discussing story of America's constitutional origin); Ball, *Law Natural*, *supra* note 1, at 161 (describing law focused on Christ's coming); BALL, *supra* note 8 (quoting Calvin and noting that wisdom of knowledge requires contemplation of divine).

<sup>36</sup> See generally Milner S. Ball, *Onward Constitutional Soldiers*, 87 MICH. L. REV. 1438 (1989) (reviewing SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988)).

<sup>37</sup> See Ball, *Law Natural*, *supra* note 1, at 161-62.

<sup>38</sup> ALICE McDERMOTT, *AFTER THIS* 273-79 (2006).

acquaint himself with its strange Catholic piano.<sup>39</sup> The neighbor plays beautifully; the monsignor is moved by the music: "sacred, profound, barely apprehensible, inscrutable really, something just beyond the shell of earth and sky . . . that needed only this boy to bring it, briefly, briefly, to his untrained ear."<sup>40</sup>

The pastor asks the boy, as they walk up the aisle of the empty church to meet the wedding party, whether his skill is the product of "a lot of lessons."<sup>41</sup> The boy answers, "[I]t seems like I've always known how to play."<sup>42</sup> Ms. McDermott and the monsignor invite us readers in the last line of the novel to think of that answer and of the piano player, the baby, the bride and groom, the families, and the neighbors, as the monsignor says, "It's a gift, then."<sup>43</sup> The gift might be, as my friend Milner, himself a gift, would say, community. If so, it is a gift as my friend Bob would say, resting on a virtue.

Mary Keane, the mother of the bride and grandmother of the baby that is soon to join the family, noticed something like this the day the bride was born—seventeen years before the wedding. As Mary Keane remembered the kindness of another neighbor who had come to help with the birth of the baby who was to become the bride, she thought, as she heard the neighbor say "hello" at the door, of what Milner would (I think) say community is:

It was simply what you did; you made conversation in elevators, complimented small children in strollers, looked up from your magazine to greet the stranger who took the seat beside you on a bus. You said, with simple friendliness, That's a lovely hat, or Isn't it cold?—because it was another way of saying here we are, all of us, more or less in the same boat. It was the habit of friendliness, a lifetime of it.<sup>44</sup>

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<sup>39</sup> *Id.* at 276.

<sup>40</sup> *Id.* at 278.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 279.

<sup>44</sup> *Id.* at 62.

Aristotle, my friend Rodes, and I would agree with Mary Keane about the virtue of friendliness, the lifetime of it. My friend Ball, himself often a pastor, would agree with the monsignor: "It's a gift."<sup>45</sup> And Piglet, friend of Winnie the Pooh, would say, "Same thing."

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<sup>45</sup> *Id.* at 279.