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SLIPPERED FEET ABOARD *THE AFRICAN QUEEN*

Thomas L. Shaffer*

Milner Ball's essay, and all of his work, ring with hope; that is, both with his clear-sighted, scholar's interest in finding and telling the truth, and with the optimism that comes of his belief that chaos has been overcome.¹ His thought is an inspiration; and his lyrical prose is, for all of its somber truth, a joy to read.

In the spirit he brings to his work, I suggest that the Hebraic religious tradition contains a richer theological basis for the claim that law is a medium (or, perhaps more modestly, a conversation) than he seems to allow for;² and I suggest that there is perhaps more hope to be found in human relationships in a lawyer's professional life than there is in the institutional forms provided by the government—more in the law office than in the administrative apparatus that Professor Ball prefers to invoke for examples of medium.³

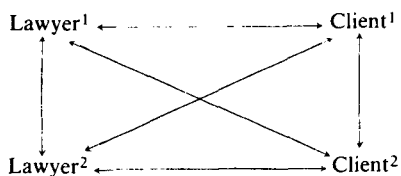
With those suggestions out of the way, I want to argue that Professor Ball's characterization of property ownership as "the apparatus of bulwark law" is premature. I want to suggest that the bulwark-like

* Professor of Law, Washington and Lee University, Lexington, Virginia. This essay is a response to Milner Ball's "*Law Natural: Its Family of Metaphors and its Theology*", and was originally delivered in the colloquium held November 7-9, 1984, in the Francis Lewis Law Center at Washington and Lee University, Lexington, Virginia. Professor Shaffer chaired the colloquium sessions and edited and arranged the papers for publication.

1. Hope is a theological virtue; it is in continuity with the philosophical (moral) virtues of justice, prudence, temperance, and courage, but it reaches into a different territory when it affirms that it is realistic in this world both to tell the truth and to be optimistic. Professor Ball's treatment of the issue of chaos is a precise instance of it. G. MEILAENDER, *THE THEORY AND PRACTICE OF VIRTUE* 27-44 (1984); T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* ch. 19 (1981), written with Stanley Hauerwas.

2. See Shaffer, *Jurisprudence in Light of the Hebraic Faith*, 1 *NOTRE DAME J.L. PUB. POL'Y* 77 (1984).

3. Brown & Shaffer, *Toward a Jurisprudence for the Law Office*, 17 *AM. J. JURIS.* 125, 148 n.456 (1972). Professor Brown's model shows how the simplest two-sided legal situation involves six human relationships.



Dr. Robert S. Redmount developed implications for this model in Brown, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 *U. PA. L. REV.* 972 (1961).

difficulties in property law are less the essence of ownership than a perversion of ownership.

I was inspired, some fifteen years ago, by an aside in an opinion by Judge E. Barrett Prettyman: "The right of a man . . . to warm his slippered feet before his own open fireplace is as great as his right to gather with his neighbors in the corner pub and cuss the government."⁴ I was even inspired to extend Judge Prettyman's image of the slippered feet to business, to the means of production, and to notice what Professor Ball calls "the apparatus of bulwark law" at work in the transportation industry in World War I Africa, not on the sea but at least on water—aboard the river vessel *The African Queen*.

The *Queen* was powered by steam. Its boiler jammed one day; it rattled and hissed and screamed. Humphrey Bogart, who was the crew and the captain of the *Queen*, kicked the boiler, which then started working the way it should have. Katherine Hepburn, a spinster British missionary who had joined scruffy old Bogart, as better than staying behind to face the Germans, asked the captain what was the matter with the boiler. Bogart said a screwdriver had been left inside the boiler, and occasionally the screwdriver moved and jammed a valve. Kicking solved the problem, he said. Hepburn asked Bogart why he didn't take the boiler apart and take the screwdriver out. "You know," Bogart said, "I'm gonna do that one of these days. The only reason I ain't done it up to now is I kinda like kickin' her. She's all I got."

Putting that business policy together with Judge Prettyman's slippered feet has led me to say to property students: "You cannot talk about the captain of the *African Queen* as a person unless you are willing to talk about the *African Queen* . . . as part of his personality."⁵ The metaphor for private property, in either case, is not bulwark; it is *home*. The substance of the metaphor is not security so much as it is a *place to be* and in business, a *way to be*. The home-maker in Robert Frost's poem, "The Death of the Hired Man," called

4. Prettyman, *The Nature of Administrative Law*, 44 VA. L. REV. 685, 698 (1958).

5. T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 18-26 (2d ed. 1979). My friend and colleague Professor Lewis H. LaRue, who is a lover of language, points out that the word "property" derives from the Indo-European word "per," a preposition or adverb meaning forward or through, with extended uses in English words such as veer, paradise, forth, further, foremost, from, furnish, approach, proximate, presbyter, priest, and praise. The verb form generally connotes leading or passing over—in such words as firch, fjord, way-faring, ferry, portal, portage, parade, and parachute. In its compounded form: poor, pauper, foal, and even puerile.

it something you haven't to deserve.⁶ I want to suggest home both as a way to describe what we lawyers serve when we draft deeds, wills, restrictive covenants, and articles of incorporation, and as a way to understand and to advocate a just public policy on ownership.

I mean to claim *that much* for the slippered feet and the river boat. I mean to claim that Professor Ball's neglect of the possibilities of relational metaphors for private property lead him (1) to neglect what Judge Prettyman and the captain of the *Queen* have to say; and (2) to a mistaken reliance on relatively coercive administrative devices that, in my experience and observation, do not promote the virtue of justice but suppress it.

In my Roman Catholic tradition, modern, industrial, economic theology begins with Pope Leo XIII's encyclical *Rerum Novarum*, "On the Condition of Labor" (1891). On one side Leo was being prophetically challenged by Marxism, and by the fact that the Christian nations of Europe and the New World were oppressing workers—were doing everything that Marx had claimed the Industrial Revolution in capitalist economies would do. Pope Leo thought that a small number of very rich men have been able to lay upon the masses of the poor a yoke little better than slavery itself. Marx and his followers had offered the workers a concrete political and economic alternative, and Christianity had not.

On the other side, Leo was pressed by the prosperous faithful to denounce state ownership of industrial property. Leo had much to say about the rights of workers to adequate wages, the dignity of labor, and the fundamental importance of the family; he also, of course, had much to say about the moral erosion caused by socialism. The metaphor to which he turned and returned, however, was neither factory nor commune: it was *home*:

[M]an alone among animals possesses reason—it must be within his right to have things not merely for temporary and momentary use, as other living beings have them, but in stable and permanent possession; he must have not only things which perish in the using, but also those which, though used, remain for use in the future. . . . [R]eason . . . has found in the study of nature . . . the foundations of the division of property . . . as conducing in the most unmistakable manner to the peace and tranquility of human life. . . . [T]he domestic household is anterior both in idea and in fact to the gathering of men into a commonwealth. . . . If the citizens of a State—that is to say, the families—on entering into

6. R. FROST, THE COMPLETE POEMS OF ROBERT FROST 49 (1949).

association and fellowship, experienced at the hands of the State hindrance instead of help . . . such associations were rather to be repudiated than sought after. . . . Men always work harder and more readily when they work on that which is their own . . . they learn to love the very soil which yields in response to the labor of their hands, not only food to eat, but an abundance of the good things for themselves and those that are dear to them. It is evident how such a spirit of willing labor would add to the produce of the earth and to the wealth of the community. And a third advantage would arise from this: Men would cling to the country in which they were born; for no one would exchange his country for a foreign land if his own afforded him the means of living a tolerable and happy life.⁷

No one will leave his home, or try in some new country to make a home for his family, if he can make a home where God put him—if he can, as the flower children used to say, bloom where he is planted. Private property was the home he had to have, or, at least, the home he had to have was private property.

Leo was faithful to the Thomistic heritage. He did not talk, as Professor Ball's Calvinist tradition would have, of covenant. But I doubt that this difference in theological language is vital on the present point: What Leo said is consistent with covenant, with the notion, as Professor Ball puts it, that the world belongs to my neighbor, and particularly so in this way: The metaphor of home, home-for-the-family, is associated, in Leo's thought, with the principle that government is formed by families. That association is consistent with the notion that government is a covenant—more consistent than are metaphors of common ownership. Saying that the world belongs to my neighbor, whom I look out and see, when I am with my family, in our home—that is covenantal. Saying that the world belongs to the state—or even to the community—is not the same thing. It is harder to go from covenant to common ownership than it is to go from covenant to Thomistic (or Aristotelian) politics, including politics that claim private property as a natural right.

When I stand with my family, in our home, and look out at our neighbor, I may, though, have in my mind an image that at first seems to be a bulwark: Good fences make good neighbors. Robert Frost, in the poem "Mending Wall," goes out in the spring, as custom requires, to meet his neighbor at the property line; together they will restore

7. *On the Condition of Labor*, RERUM NOVRUM, in FIVE GREAT ENCYCLICALS 1, 4-6, 22-23 (J. Harney ed. 1940).

the wall to what it was before winter had at it.⁸ Before he goes he says to himself that one who builds a wall ought to wonder what he is walling in and walling out. He asks the neighbor about that, as they work together, and the neighbor says, "Good fences make good neighbors."⁹

Is the fence that neighbors build a bulwark or a medium? Is that Yankee phrase exclusivistic or does it contemplate a world that is the neighbor's? I argue that the fence is not a bulwark, but if you want to agree with me you may have to think, as I do, of justice as a virtue, as something people give to one another and not as something people get from the government. The fence, when looked at—when looked over—as a matter of justice, in this sense, is a boundary to reach across, and home is where I am when I reach across the fence to do justice.

The simplest place to make this argument is in the farm of the Jeffersonian property owner; and that is the socio-economic locus of Frost's poem. Property there is, very much what Leo XIII had in mind, a home for the family; and the good fence is not a bulwark I erect, but a *medium*: My neighbor and I erect it together and we give justice to one another across the fence. Thus:

— in my experience as a rural property owner, I ask my neighbor to help me locate the property line so that I can be sure not to cut down his trees when I go for firewood for next year. My neighbor tells me to cut the trees that are close to the road and not to worry about where the property line is.

— thus, as an urban property owner, I do not know where people in the county court house would say my side lawn ends and my neighbor's begins; my neighbor doesn't know either. We each fertilize and cut two or three mower widths past where the line probably is; the broad strip of lawn over which we communicate—over which we do justice—is the best nourished and best cut part of either lawn. It is a wall we have built together, a wall that each of us traverses in order to give justice.

If, either as a rural property owner or as an urban property owner, my neighbor and I find that we have, in some formal way, to take account of a more precise boundary (and that, as often as not, because of something the people in the court house want) and we go to a lawyer and the lawyer sees the situation for what it is, we will discover a number of other and more formal ways to give justice to one another;

8. R. FROST, *THE COMPLETE POEMS OF ROBERT FROST* 47 (1949).

9. *Id.*

but now, having come to the law of lawyers' offices and court houses, my neighbor and I are at risk. The law, in its corruption, may tempt us with the opportunity to make a bulwark out of what has, until then, been a medium:

— We can, in the circumstance that requires us to be precise about our boundary, grant one another licenses, permission to be where each of us is, even if we are on one another's land.

— We can locate the line and then adjust the line by deeds back and forth—an instance of good neighbors making good fences.

— We can let the matter ride, which may mean that one of us will obtain ownership of the land from the other. When the law has located human wisdom on what justice is in such a situation, it has adjusted the property line to conform to our use, under one view of the law of adverse possession. When the law has been corrupt it has refused to do that—has refused, in my view, to understand justice as a virtue. What the law then failed to see was that our attitude toward one another had been friendly rather than hostile. In this latter, corrupt case, property law is a bulwark, but the bulwark is a corruption of justice (a corruption which, by the way, a lawyer could have helped us avoid).¹⁰

Private property, as home-for-the-family, is fundamentally a medium, not a bulwark, until it is corrupted by, as I see it, institutional justice. Institutional justice is the product (or effluvium) of bureaucracies that have come to regard justice as something dispensed ("administered" as we lawyers now often say) by the government. So long as those who administer institutions understand that justice is a virtue, a virtue the government protects but does not provide, the law of private property is a medium in the same way that social customs of ownership are a medium. Thus, in Morton Deutsch's psychological imagery, five neighbors work together to build five (private) barns; the farmer whose barn is to be the fifth one built works on the other four barns; building barns is a way for farmers to give justice to one another. Working on each barn is not a gamble, or even an investment; it is a medium—just as my leaving my child with a baby-sitter is not a gamble but a medium.¹¹ These are not instances of the virtue of magnanimity (a virtue on which the prudent do not often rely), but instances rather of the virtue of justice (and of tolerance).¹² The law does not

10. See also K. BARTH, *ETHICS* 191-96 (G. Bromiley trans. 1981).

11. Deutsch, *The Effect of Motivational Orientation Upon Trust and Suspicion*, 13 *HUM. REL.* 123 (1960).

12. G. TINDER, *TOLERANCE* (1975).

provide those virtues in human communities; it sometimes locates and builds on them, and less often has the wisdom to leave them alone.

But, as Frost's farmer also came to understand, "something there is that doesn't love a wall."¹³ These Jeffersonian examples seem quaint beside the images of industrial development and exploitation of nature that Professor Ball's essay uses. He could charge that I neglect these assaults on nature, as much as I charge that he neglects the metaphor of home as a way to understand private property.

Often, I think, the occasions of assault on nature are legal institutions, legal institutions that claim for their legitimacy the justice that *can* be administered. The nature that is being assaulted may be tree or mountain or ocean, but it may also be the sort of ordinary, neighborly relationship that the Jeffersonian property owner knows about and that Leo XIII had in mind when he talked of a commonwealth made up of families. Here is an example, from a television drama the American Bar Association (ABA) uses to instruct lawyers and law students on the lawyer's duty to keep the confidences of clients:

The corporate client needs to raise money and has put a lawyer to work on an issue of new securities. The government requires, in such a case, that the corporation file a registration statement in a public office; the registration statement must describe the corporation's property. The lawyer, in preparing the required description, notices that the corporation's principal factory is not entirely on the corporation's land; it encroaches by a foot or two on the neighbor's land. The choices are to attempt to negotiate a new property line—which, in the circumstances may provoke a quarrel—or to suppress information about the encroachment. The law of private property is a bulwark; in this case a bulwark to protect third-party investors, since, but for the issuance of securities, the two business neighbors would not have known about the encroachment, which would in any case have been resolved into a new property line by the passage of time (six months in the story told in the film).

It seems to me that the appearance here of property law as bulwark was caused by the government, not by the property owners. But for the government, the property line would have been resolved as it was between Jeffersonian property owners. But for the government the transition between a quaint eighteenth century example and a modern A.B.A. example would have been a transition *within* the law as medium. The government's purposes were, of course, wholesome

13. FROST, *supra* note 8, at 47.

(protection of investors), but the device it chose resulted in the destruction of the medium. That seems to me true of most of the devices modern administrative government chooses. It exploits and then corrupts the justice people give one another and it answers for itself with analyses of cost and benefit.

There is no *logical* reasoning that I can see why the transition from Jeffersonian property ownership to industrial development would corrupt the possibilities of private property as medium. Opportunities for evil—greed, envy, theft—seem to exist in Robert Frost's world as well as in Lee Iacocca's; and opportunities for justice-as-gift, for the boundary line as a medium rather than a bulwark, are present in both worlds. In fact, I suspect, good fences happen as often among business owners as they do among owners of arms. I suspect more—*more*—difficulties of property ownership occur between business and government than occur between business and business. All of this is only to say that the transition to industrial development does not, logically or empirically, destroy the possibility that good fences are a medium and not a bulwark. Conscience is, more often than law professors think, a possibility in business.¹⁴ Lawyers provide moral leadership in such enterprises, more often than we think, and more often than institutions that claim to administer justice do.¹⁵

Of course, the melancholy facts of human disharmony may mean that the fence will not be a medium. Our property casebooks are filled with cases of squabbling neighbors—and that more than with cases of property owners squabbling with legal institutions. But, it is fair to say, for every two neighbors who squabble over the fence there are two million who do not, and it is easier for almost any of us to get along with his neighbor than it is for most of us to get along with the government. If industrial development rapes the land, as it has in Appalachia and on the coast of Louisiana, institutional remedies are doubtless attractive if not necessary. But those of us who believe that the law is a medium, and I who believe that the good fences that are built by good neighbors are a medium, should call for institutional remedies as a pacifist might call for war.

And so the questions I see presented by industrial development are how quickly the community resorts to coercive institutional devices, and then, which institutional devices it resorts to. I find in-

14. For examples, see O. F. WILLIAMS & J. HOUCK, *FULL VALUE: CASES IN BUSINESS ETHICS* (1978).

15. BROWN & SHAFFER, *supra* note 3; Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 *VILL. L. REV.* 957 (1978).

structive the example Professor Ball gives, of the permit hearing after publication of an environmental impact statement. That is, in my observation, a device that encourages enmity among neighbors, and that invites those whose activities are brought under scrutiny to forsake conscience and hew to regulation instead. It may result in the justice that is administered, but it destroys the justice that is, or might have been, a gift. The other devices Professor Ball mentions or alludes to—the trust, the land-use covenant, the environmental regulation that describes an acceptable use of resources and leaves methods to the owner's creativity more than to government's regulation¹⁶—are more likely to preserve the medium. The devices he seems to recommend most earnestly are likely to result in fences erected, not by good neighbors, but by public force.

At any rate—and here, I think, Professor Ball might agree with me—the community should make certain that it notices, and describes, and esteems, and encourages, the medium already in operation among its citizens, before it imposes a medium that government invents. And when government imposes (rather than discovers) a medium, it should use the device most likely to revive, among neighbors and families, the practice of the virtue of justice.

16. Professor Ball and I participated in April 1984 in a colloquium with Professor Robert Burt that centered on a similar point about political and local processes as encouraged by the federal courts; it is possible at least by way of analogue to compare processes imposed by institutions with processes that occur (naturally?) among people. Professor Burt's essay and the other colloquium papers, including Professor Ball's, are at 42 WASH. & LEE L. REV. 27, 37 (1985). An earlier and also related colloquium *Tensions Between Religious or Ethnic Communities and the Larger Society*, led by Professor Colin M. Turnbull, begins at 41 WASH. & LEE L. REV. 31 (1984).

