

Michigan Law Review

Volume 91 | Issue 6

1993

Getting the Word

David Luban
University of Maryland

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Religion Law Commons](#)

Recommended Citation

David Luban, *Getting the Word*, 91 MICH. L. REV. 1247 (1993).
Available at: <https://repository.law.umich.edu/mlr/vol91/iss6/14>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

GETTING THE WORD

*David Luban**

THE WORD AND THE LAW. By *Milner S. Ball*. Chicago: University of Chicago Press. 1993. Pp. 210. \$27.50.

In the introduction to this interesting book, Milner Ball¹ describes himself as a “theologian[] closeted in law” (p. 2). The metaphor is apt. It connotes at least these five things: that theologians in the legal profession often keep their “predilections” (p. 2) hidden; that they do so because their predilections are regarded by dominant prejudice as shameful, bizarre, and incomprehensible; that this dominant prejudice is wholly wrong; that theology, like homosexuality, represents a mode of human existence that is as ancient and venerable as humanity itself; and that it is high time to come out of the closet.

To American legal culture — in the courts, in law practice, and in the academy — theological incursions indeed arouse anxiety and antagonism. They evoke stereotypes of superstition, muzzy-headedness, religious particularism, narrowminded appeals to natural law, and, no doubt, a threat to the separation of church and state. Indeed, lawyers may believe, in a kind of unarticulated and bogus syllogism, that theological thinking in the law violates the Establishment Clause of the Constitution.

One understandable motive for these views arises from our tendency to identify theology with religion, and thus with some particular religion that by definition excludes all others. As we shall see, however, one of Ball’s leading themes is that theology is *not* the same thing as religion; remarkably, Ball’s own theology is skeptical of religion and downright hostile to exclusionary religious factionalism.² Thus, Ball’s theological rendering of the law is not a sectarian brief, but something different or rather, several things different.

It is, first, an assertion that law is a moral achievement and not, therefore, at bottom a technology of governance. Holmes to the contrary, law must not be understood only from the bad man’s point of view, or bathed in cynical acid. In his powerful final chapter, Ball flatly asserts that, to the extent law is *rightly* understood as an imper-

* Morton and Sophia Macht Professor of Law, University of Maryland; Research Scholar, Institute for Philosophy and Public Policy. B.A. 1970, University of Chicago; M.A. 1973, M.Phil. 1973, Ph.D. 1974, Yale.

1. Harman W. Caldwell Professor of Law, University of Georgia.

2. P. 101. Ball’s theology derives principally from that of Karl Barth. I am not competent to judge whether, or to what extent, Ball deviates from Barth’s own theology.

sonal instrument of governance, it is, quite simply, identical to death. "Death is integral to American law," he writes (p. 136). Expanding on this theme, he castigates Felix Frankfurter's insistence that law is "not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce,"³ responding: "In that statement, or so I ask you to consider, in that turn of mind, death takes textual form" (p. 137). The field of social action that we call law is an arena in which God's Word may or may not be enacted; only law animated by the Word can be anything other than death.

Ball's theology of law is, second, an essential step preparatory to thinking about ethics in law — "the kind of description that is necessary to ethics and precedes it" (p. 100). As Ball explains this point:

A book on ethics would be composed of an elaboration of . . . stories and examples . . . that are types of specific, episodic service of the neighbor, including service of the neighbor . . . by remaking dehumanizing institutions. These would be stories and examples of the Word taking form — action that is the responsibility and choice of humans, but action that is responsive to and engendered by the Word. . . . In this book, I am attempting a description of the environment of decision in a given field of activity: the Word active and present in the practice of law. [pp. 99-100]

Third, and most important in the economy of the book, Ball's theology offers him a vantage point for making sense of the lives and works of seven legal professionals, five of them lawyers, whose stories occupy two fifths of Ball's pages. The remarkable opening chapter, almost seventy pages long, in which Ball describes their seven practices, is the heart of the book. Ball's portraits are lovingly painted, and their subjects are lovingly chosen. In the order that Ball presents them, the subjects are:

- Henry Schwarzschild, director of the ACLU's Capital Punishment Project;
- John Rosenberg, founder and director of Appelred, eastern Kentucky's federally funded legal services agency;
- Margaret Taylor, a housing court judge in Manhattan, exceptional for her compassion and stubborn defense of the legal rights of indigent tenants;⁴
- David Harding, a Turtle Mountain Chippewa who is a tribal judge for the Burns Paiute Tribe and has been a tribal judge for various other Northwest tribes;
- Tim Coulter, head of the Indian Law Resource Center;
- Steve Wizner, director of Yale's clinical law program; and

3. *Francis v. Reswerber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring).

4. This is a genuinely unusual phenomenon in urban housing courts. See the recent study by my colleague Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

- Carla Ingersoll, a law student in Wizner's program who represents homeless clients.

Clearly, these are not a representative slice of the legal profession. All of them are poor people's or public interest lawyers — a point, as we shall see, of some theological importance for Ball. All of them are people of extraordinary competence, and most seem to be people of extraordinary energy as well. Ball presents all of them as doing the Lord's work — that, indeed, is Ball's explicit point about them. What moral we are to draw from such a remarkable group of people about law, or about lawyers, or about how one should live is not plain, and this is a question to which I shall return. Yet Ball structures the book as an attempt to develop theological categories for understanding these seven people; thus, the seven portraits he paints provide confirming or disconfirming data for the categories he develops.

What, then, is Ball's theology? Ball warns his reader at the outset:

I do not here make a linear argument or advance a set of propositions toward a conclusion designed to compel readers' assent by the force of its logic. I make an argument, but in the sense in which we talk about the argument of a ballet or poem. I try for a performance, for affect and understanding more than agreement. [pp. 1-2]

Subsequently, he repeats his warning that he will abjure "hard-driving, irresistible arguments, for I covet your understanding more than your agreement" (p. 76). He is as good as his word and operates with a kind of bipolar exposition, alternating between clean, categorical, and dogmatic statements of his theological propositions, shorn of speculative or abstract argument to support them, and readings of literary and Biblical texts in the light of those propositions. The theological propositions are fairly easy to state, but summarizing them in a credo or catechism falsely suggests that the propositions, rather than the reading performances, occupy center stage. Keeping this warning in mind, we may nevertheless proceed.

Central to Ball's position is a distinction between religion and God's Word. "Religion is the attempt to know God" (p. 100). It is a set of practices, or investigations, or rituals that begin with what is human and attempt to bridge the chasm between the human and the divine. That, however, is impossible, for "[i]n the biblical stories God gives himself and makes himself known. This self-revelation does not correspond to religion, to human striving toward God" (p. 79). Like the Kantian thing-in-itself, God's Word, Ball twice tells us, is "incorrespondent" (pp. 85, 86). It reaches and affects us solely and uniquely by the agency of God, while religion, the human effort to invoke the Word, "misdirects by deflecting the search for God back upon the self" (p. 84). In this way, "from the biblical perspective, religion is unbelief" (p. 81). That is because "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" (p. 80). Religions try to launch the ladder to heaven, but, as the story of the tower of Babel signifies, the attempt exemplifies the sin of pride and ends in discord.⁵

Ball therefore cannot accept that "the present, active power of the Word should be restricted to performance in history only through faith, and then only through Christian faith" (p. 101). Manifestations of the Word are due entirely to God, not to the Christian religion. Christianity "cannot claim superiority over other religions; it can only claim solidarity with them" (p. 101). Sectarian Christians must remember that "Christian religion can only apply first to itself the judgment that religion is unbelief" (p. 101).

All this does not mean that religion is antithetical to the Word; Ball does not go so far as to identify religion with idolatry. Rather, religion can be "adopted by the Word" (p. 86). He illustrates his meaning through powerful readings of texts from William Faulkner's *The Sound and the Fury* and Toni Morrison's *Beloved*, in which religious services become occasions for genuine inspiration by the Word. In logical terms, Ball's view is this: Religion is not a sufficient condition for realizing the Word. Nor is it a necessary condition for realizing the Word. In his seven lawyer stories, Ball does not suggest that all of his practitioners are religious, though in his view their practices all manifest the Word in action. But religion is not inconsistent with the realization of the Word — even a religious service can be an occasion for God's grace. This ironic way of putting the last point I think captures Ball's paradoxical view of religion. While many orthodox Christians believe that the Church is the sole path to salvation, Ball's view seems instead to be the doubly negated proposition that the Church is not necessarily *not* the path to salvation.

This does not mean that God chooses the site of salvation arbitrarily, or even unpredictably. Ball twice quotes a passage from Karl Barth: "Almost to the point of prejudice — [God] ignored all those who are high and mighty and wealthy in the world in favour of the weak and meek and lowly."⁶ Ball comments that "[p]overty and self-giving rather than power, wealth, and self-aggrandizement still constitutes the likely sites for gathering evidence of the Word taking positive form" (p. 152). Hence, in his opening chapter, Ball focuses exclusively on legal practitioners who concern themselves with issues central to the lives of the poor, and who have elected to forego financially enriching practices of law. In this light it is significant that Ball's chosen passages from Faulkner and Morrison, which he takes to manifest the Word, both describe services in ministries by poor and suffering Afri-

5. But compare Richard Hyland, *Babel: A She'ur*, 11 CARDOZO L. REV. 1585 (1990), for a fascinating and sympathetic interpretation of the Tower of Babel story and the multiplicity of languages consequent upon it.

6. Pp. 99, 152 (quoting 4 KARL BARTH, CHURCH DOGMATICS 168 (1958)).

can Americans.⁷ The Word is unlikely to manifest itself in the midst of power and plenty.

The next central point of Ball's theology concerns his use of the word *Word*. To put the point quickly, Ball gives it the sense of its Hebrew counterpart *dabar* rather than its Greek counterpart *logos*. The difference is this:

Logos means that by which inward thought is expressed. But it also means the inward thought itself, and so could be translated into Latin as *ratio*, "reason." In the Greek tradition, *logos* bore the sense of rationality and so made its way directly into the English language as "logic."

The Hebrew for "word," *dabar*, has the sense of power: the word that accomplishes what it says, be it doom or redemption, interpretation or the foreclosure of interpretation. The Hebraic *dabar* is different from the Greek *logos*. Something of the difference may be captured this way: If I speak logically, I speak with correct reasoning; but if I speak *dabarly*, I speak with effective power. I would associate the Hebrew *dabar* with the Greek *dunamis*, which gives us the English words *dynamite* and *dynamics*. [pp. 119-20]

As Ball puts it elsewhere: "What is said is done" (p. 109); "[t]he word does what it says as God performs mighty acts" (p. 119).

When the Word manifests itself, therefore, we are not to understand that a communication has issued from God to man, nor are we to imagine an alteration of belief. Rather, we are to imagine a transformation of the person herself, of her character, accomplished by the Word, that enables her to receive the Word or, alternatively, prevents her from receiving the Word. Ball's doctrine thus includes a robust concept of *epistemological predestination*: what we know or do not know of the Word depends on aspects of our selves that are literally out of our control and in the control of God. Recall two passages from Ball that I have already quoted: the Word "accomplishes what it says, be it . . . interpretation or the foreclosure of interpretation"; God's "self-revelation bears its own possibilities for being known or not known" (pp. 119-20, emphasis added).

Ball develops his doctrine of epistemological predestination rather fully in chapter four. There he expounds *Mark* 4:10-12:

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."⁸

7. Faulkner's scene describes a sermon in one of his protagonists' churches by the Reverend Shegog, a visiting preacher from St. Louis. Morrison's is a powerful scene in which Baby Suggs preaches through speech and dance.

8. Pp. 106-07. I am quoting the translation from Ball's text; I am unsure which edition of the Bible he is using.

Ball interprets this passage in the light of the verses from *Isaiah* to which Jesus was alluding:

And he said, "Go and say to this people:
 'Hear and hear, but do not understand;
 see and see, but do not perceive.'
 Make the heart of this people fat,
 and their ears heavy,
 and shut their eyes;
 lest they see with their eyes,
 and hear with their ears,
 and understand with their hearts,
 and turn and be healed."⁹

As Ball points out, *Isaiah* responds with the question "How long, O Lord?" and is met with the answer: "Until cities lie waste without inhabitant, and houses without men, and the land is utterly desolate."¹⁰

Ball's interpretation of these passages is complex and learned in biblical scholarship. To a reader like me, who knows nothing of biblical scholarship, it is one of the most instructive parts of the book. The most important point of his interpretation for present purposes is that Ball unflinchingly accepts the exceedingly harsh plain meaning of these verses: that God's Word works to transform its hearers *by deliberately making them worse* — by hardening their hearts so that they cannot repent of their wicked ways and win forgiveness. God then punishes them for unrepented wicked deeds. This is a version of the familiar doctrine of moral predestination, and Ball is attuned to the "alienating effect on the modern reader's sense of fairness" (p. 116) it contains: "If hearts were hardened by the prophetic word commissioned by God, so that repentance became impossible, who was the active, responsible party?" (pp. 115-16); on the next page he concedes that "the hardening of hearts that prevents repentance" is "violently perverse."¹¹ Violently perverse or not, it is the reading of the Bible that Ball endorses.

The transition from moral predestination to epistemological predestination arises from Ball's reading of the Markan verses. In Ball's view, Jesus is not merely the messenger of the Kingdom of God, he is himself the message: "He is the Word given to the disciples" (p. 123).

9. P. 108 (quoting *Isaiah* 6:9-10).

10. P. 110 (quoting *Isaiah* 6:11).

11. P. 117. Later, however, he offers what strikes me as merely verbal resolution to the problem, referring to "the coincidence of divine and human agency" as "a mystery." P. 122. To my ear, "mystery" connotes something that eludes rational explanation but is nevertheless possible, whereas the coincidence of divine and human agency seems logically impossible. Calling the coincidence of divine and human agency mysterious begs the question of whether it represents a coherent possibility. Ball, however, may be unfazed by this worry. At one point he asks, nonrhetorically, "Is God bound by arithmetic?" (p. 192 n.35), suggesting that in his view logical impossibility may not imply divine impossibility.

Thus, the secret given to the disciples is not a piece of esoteric information; rather, it is Jesus himself. And Jesus' self-performing Word in the Markan verses effects a hardening of the hearts of outsiders — ultimately including the disciples inasmuch as each subsequently betrays Jesus (p. 124) — so that they cannot accept the Word. Though these verses, like the verses from *Isaiah*, conclude in an inability to repent — moral predestination — the focus in the Markan verses lies primarily on the inability to see and hear — epistemological predestination.

This theme ties in with Ball's method of argument and his reliance on narrative and literary analysis rather than on "hard-driving, irresistible arguments." For Ball, an irresistible argument is largely beside the point. It can at most compel belief in a conclusion, but getting the Word is not believing in a conclusion; getting the Word depends, moreover, on divine grace rather than a human interlocutor's logical or dialectical skill. To believe that arguing toward "a conclusion designed to compel readers' assent by the force of its logic" can actually make a difference is to miss the point of epistemological predestination. God's power will compel or block the reader's assent by acting on her character, regardless of the force of logic. Like religion, which "misdirects by deflecting the search for God back upon the self" (p. 84), logical argument is an exercise in *hubris*, a misguided effort at self-transcendence that is ultimately a form of unbelief.

One might respond that epistemological predestination renders *all* forms of argument beside the point, Ball's included. I am unsure whether he would disagree with this response. Instead, the answer his book implies is that works of art and literature, such as those that he analyzes and writes, are more likely to be "adopted by the Word" than are linear arguments. He proposes that "aesthetic meaning — the understanding that occurs between reader and narrative — is a secular parable" (p. 129). Or, in an equally subtle aphorism, "[a]esthetic meaning is underwritten by the risk God takes with us" (p. 131). In works of literature, God offers us an opportunity. In support of this thought, Ball points out that the reader's participation is a necessary component of literary meaning, for without the reader a work of literature is nothing but "marks on a page," or "a string of letters" (p. 131). Thus, "[l]iterary texts are *invitational*. They cannot be more. They do not compel us to open their covers or to give them a good reading" (p. 132). Linear arguments, by contrast, are "coercive" (p. 142).

I do not find this argument especially persuasive, for each of Ball's points holds for *any* book, not only works of literature. Without a reader, even the most "linearly" argued technical logic treatise is nothing but "marks on a page," and the logic book cannot compel us to open its covers any more than can the literary text. Yet much of Ball's

self-understanding rests on the distinction that he draws between "coercive," therefore deadening, works of linear argumentation and inspired, dialogical works of literature.¹² Perhaps the distinction is there to be drawn, but Ball's stated grounds for drawing it are inadequate.

This point is important because the book's final chapter, "Morbidity and Viability in Law," makes crucial use of the distinction. I have already quoted his opinion that "[d]eath is integral to American law" (p. 136), and it is an opinion that I have not wrenched out of context. Ball's chapter opens with a scathing denunciation of law, legality, and legal texts as a vast realm of living death, death that "intrudes upon our lives before the end" (p. 136). The opening sentences of the chapter are well worth quoting:

Law locks up deals and people and wants to leave no openings
George Steiner suggests that remembrance safeguards the core of our individuality; what we commit to memory — the poem, the image, the musical score — "is the ballast of the self." I have not seen the contract, statute, brief, or judicial opinion that I should want to memorize. The legal texts are deadening rather than stabilizing and are best not had by heart. [p. 136]

Later he adds:

Death is to be read, too, in leases, deeds, and contracts. Just as some people spread their butter all the way to the edges of a slice of bread, so do lawyers draft all the way to the edges of the permissible. If there is not enough space on the page, we use fine print. We want everything covered. [p. 139]

He illustrates by referring to the Clean Air Act, "the benumbing product of frequent, wholesale amendment, vast political maneuvering, and little clarity. It is massive. And none of it can be set to music" (p. 139).

One's first impulse is to suspect Ball of harboring skewed expectations of the text of the Clean Air Act. Many good and useful books are "best not had by heart" and cannot be set to music. The telephone book, for example, does nothing to nourish the soul, but it is an excellent place to find telephone numbers. The Clean Air Act, likewise, does not express our love of nature as Wordsworth does:

My heart leaps up when I behold
A rainbow in the sky:
So was it when my life began;
So is it now I am a man;

12. I, for one, cannot accept that works of rigorous argumentation are any more deadening, and any less appropriate vehicles for divinity, than works of literature. I think, for example, of the mathematician Paul Erdős, who would describe a particularly beautiful and penetrating mathematical proof, only somewhat wryly, as "one from the Book." Very few proofs are "from the Book" — only a proof that combines great beauty with revelatory insight into mathematical objects wrests that title from Erdős. It is another way of saying that a mathematical proof can be adopted by the Word, and I do not think it idolatrous.

So be it when I shall grow old,
Or let me die!¹³

But Wordsworth will be of little help to an automotive engineer trying to decide what level of fuel efficiency to try to achieve.

I think there is something to this criticism, for Ball's diatribe against the law seems to me redolent of romantic railings against the complexity of modern life and politics — rather like Wagner's contrast in the *Ring* between the stultifying power of contracts and the redemptive power of innocent human love. Surely, the critic may say, it is time to move beyond these romantic oppositions.

This criticism misses Ball's theological point, however. The latter is best understood through the distinction we have been examining between "invitational" works of literature, which are open-ended and dialogical and serve like parables as vehicles for the Word, and legal texts which "want[] to leave no openings" (p. 136) In Ball's words:

When we open a copy of *The Sound and the Fury*, or *Beloved* or *King Lear*, the marks on their pages prompt us to engage in . . . creation But open a copy of the statutes of a state or of the federal government, or unfold an insurance policy or a deed, and marks on their pages, I think, prompt a different response.

Legal texts appear to discourage otherness and creative responsibility. Lawyers' language seems fortresslike and impermeable to transcendence. This is so because such writing is done and received on a wager of the absence of God, not His presence. [p. 140]

Ball's criticism of legal language, we now see, is not that it is tedious or turgid, but that, by aiming to eliminate all surprises and all openness to contingency, it is at once an assault on freedom and a display of faithlessness.¹⁴ Later Ball connects these violent denunciations with academic argument forms. "The presently dominant form of legal argument in the academy is that of social science. It is linear and coercive. It strings together propositions that lead to a conclusion that must be either accepted or rejected It is the form death takes in academic legal discourse" (p. 142). Noteworthy in this passage is the connection of linear discourse with coercion, a connection implicit as well in passages I have quoted earlier. Linear argument aims to compel, not to invite; it means to foreclose possibilities rather than create them. That is why it is a form of death, the final forecloser of possibilities.

These and similar observations lead Ball to find whatever hope there can be in law outside of legal texts. He finds it, in fact, in the lives of the seven practitioners he introduced in Chapter One — Christian lawyers, in Ball's version of Christianity, notwithstanding the fact

13. William Wordsworth, *My Heart Leaps Up When I Behold*, in *SIX CENTURIES OF GREAT POETRY* 341 (Robert Penn Warren & Albert Erskine eds., 1955).

14. See Ball's discussion of faith. P. 100.

that most of them are not Christians. Their efforts on behalf of the poor, their attempts to build community, and their professionalism all bespeak law that has been adopted by the Word. Thus, the book circles back to the lives with which it began.

Though *The Word and the Law* is in many ways a deep and admirable book, I find myself disquieted both by much of what Ball says and by how he says it.

Let me propose, as a first point, that Ball's view is radically incompatible with the very possibility of religious epistemology. There is no place in his system for asking how one tests the authenticity of revelation, or, for that matter, how one justifies a theology whose central concept is the *inconsistent Word*. These are really two sides of the same problem. If the Word is truly inconsistent, how does one come to know that fact about it or, for that matter, any other theological proposition? Ball's answer seems to be that the Word will make itself known. *Dabar* will act upon us and exalt us.

But, as every skilled propagandist knows, many things act upon us and exalt us, though they do not come from God. Hitler's Nazi rallies at Nuremberg, with Albert Speer's "cathedral of light" effect achieved by shining searchlights directly upward on the bottoms of clouds, exalted the rallying masses, as is plain to viewers of Leni Riefenstahl's documentary *The Triumph of the Will*. Music, rhythmic chanting, and mob sentiment can all be manipulated to exalt an audience and instill a sense of revelatory certitude. A former Moonie told me how enforced sleep deprivation, fasting, collective rituals, authoritarian supervision, and a practice of "bombing with love" (group hugging and so forth) filled him with a sense of community and of the imminent numinous.

There is a theological category in which these examples fall: it is the category of *temptations*. And the problem of religious epistemology is how to distinguish the authentic Word from the temptations that mimic its effects. Ball offers no solution to this problem, and epistemological predestination makes it unclear whether there *could* be a solution. God will open our eyes and ears, or close them, at His sufferance. To suppose that any human effort to distinguish truth from temptation could succeed is to commit the same fallacy as religion does. To rely on human effort rather than divine action is tantamount to unbelief.

The problem of religious epistemology reflects itself in the structure of Ball's argument, which I have described as alternation between dogmatic, because unargued, assertions of his central theological propositions and "performances" of literary and biblical texts that are to bear the burden of persuasion. The question is this: How are his readings of *The Sound and the Fury* and of *Beloved* supposed to exemplify the power of the Word? Both of them are beautiful and inspiring

works of art; the scenes on which Ball focuses — scenes of ministry and revelation — depict authentic, saving, inspiring acts of the Word.

However, precisely because these books are works of art — of artifice — the problem of distinguishing truth from temptation does not arise. It does not arise because the artist has taken care of the problem for us. We know that the Reverend Shegog's preaching and Baby Suggs' dancing represent the authentic power of the Word because Faulkner and Morrison have composed their stories to make that truth manifest. Things are not so plain in actual life, every instant of which is fraught with ambiguity.

As Nietzsche argued, art can deceive. He came to appreciate the gravity of the problem when Wagner composed *Parsifal*, an opera that contains some of the most compelling music ever written, but whose Christian message was totally antithetical to the equally compelling message of the *Ring*. Nietzsche came to understand that, one way or another, he had been had.¹⁵ Ball's theory of aesthetic meaning attempts to obviate this problem but in the end merely restates it. "Aesthetic meaning is underwritten by the risk God takes with us" (p. 131). How do we know? Ball's answer seems to be that if you need to ask the question, you have missed the point, betrayed the wager that God made by adopting the work of art. Ball's position suggests, moreover, that this was your destiny, that God has hardened your heart so that you had to betray that wager. But how do we know any of that? At this point, Ball can do little more than repeat that if you need to ask the question, you have missed the point.

Perhaps this is why he insists that he is interested in understanding, not in agreement. His explicit disowning of rationalist ambition — the offering of evidence and justification for what he says — reflects itself in the fact that he explicitly disowns truth-claims. When he calls his argument a performance, the implication is that it cannot be called "true" or "false."

This brings me to my second source of disquiet. Ball repeatedly contrasts his own "invitational" way of proceeding with the coercive nature of linear argument. But disowning a truth-claim is in its own way just as coercive as logical argumentation, because it offers the interlocutor no space to register difference. What Ball says about social-scientific argument seems equally true of exposition that offers no truth-claim: "It strings together propositions that lead to a conclusion that must be either accepted or rejected" (p. 142). To be interested in the reader's understanding rather than her agreement (p. 76) sounds

15. See FRIEDRICH NIETZSCHE, *The Case of Wagner*, in *THE BIRTH OF TRAGEDY AND THE CASE OF WAGNER* (Walter Kaufmann trans., Vintage Books 1967) (1888); *THE NIETZSCHE-WAGNER CORRESPONDENCE* 285-312 (Elizabeth Foerster-Nietzsche ed. & Caroline V. Kerr trans., Liveright Publishing Corp. 1921).

noncoercive, but it also signals a kind of immovability: unlike understanding, agreement can be achieved only through give and take.

On the other side, it is unclear that the social scientific argumentation that Ball excoriates is "coercive" (p. 142). When it is well done, social science consists in the patient gathering and ordering of facts about society that are in doubt or not well known. I would point to the work of scholars such as Marc Galanter, Herbert Kritzer, and other law-and-society researchers as cases in point.¹⁶ The presentation of facts is *coercive* only in the sense that, once one has been presented with persuasive evidence, one *must* accommodate this evidence somehow. To do otherwise is simply to disrespect the external world.

The same is true of linear argumentation. Consider one of the most beautiful mathematical theorems, Euclid's proof that the number of primes is infinite. The proof is simple and elegant. Suppose that there were only a finite number of primes, and that N is the largest prime. Form a new integer M by multiplying all the primes together and adding 1. M is not divisible by any of the primes up to N because it has been constructed so that dividing M by any of these primes leaves a remainder of 1. Nor can M be divisible by any prime larger than N , for N was supposed to have been the largest prime. Thus M must itself be prime. M is a prime larger than N , the largest prime. We have a contradiction. Hence there cannot be a largest prime. Hence the primes are infinite in number.¹⁷

This "linear" proof is "coercive" only in the sense that, once I have understood it, I can deny its conclusion only by sheer willfulness. Doing so would be tantamount to denying that anything outside my own self can exercise a claim on me. Denying the proof is, to paraphrase Ball's characterization of religion, a form of unbelief. Oliver Wendell Holmes once referred to his "secret fountain of faith . . . the belief that I am in the universe, not it in me . . ."¹⁸ Denying the proof is tantamount to believing that the universe is in me, and not that I am in the universe. The proof thus offers me the opportunity to display respect for the world outside my own wishes. Call such respect *humility*. Alternatively, I can insist that nothing can change my mind. Call this insistence *pride*. What Ball regards as being coerced by linear argument is in my view nothing other than resisting a temptation to

16. See Marc Galanter & Thomas Palay, *TOURNAMENT OF LAWYERS* (1990); Herbert M. Kritzer, *LET'S MAKE A DEAL* (1991); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983); Herbert M. Kritzer et al., *The Use and Impact of Rule 11*, 86 *NW. U. L. REV.* 943 (1992); David M. Trubeck et al., *The Cost of Ordinary Litigation*, 31 *UCLA L. REV.* 72 (1983).

17. Book 9, Proposition 20, in 2 *EUCLID, THE THIRTEEN BOOKS OF THE ELEMENTS* (Thomas C. Heath trans., 2d ed. 1956).

18. Holmes to Baroness Moncheur, December 30, 1915, quoted in *SHELDON M. NOVICK, HONORABLE JUSTICE* 319 (1989).

the sin of pride. Coercion by linear argument or social scientific fact is, in fact, no different from that experienced by Jeremiah, in a passage quoted approvingly by Ball:

If I say, "I will not mention him,
or speak any more in his name,"
there is in my heart as it were a burning fire
shut up in my bones,
and I am weary with holding it in,
and I cannot.¹⁹

Ball explains: "It is impossible not to prophesy. When God utters his word, prophetic speech . . . is one of the possible, irresistible consequences" (p. 118). Likewise, in the face of fact or proof, belief is one of the possible, irresistible consequences.

Clearly, disagreeing with Ball about the coercive character of social-scientific or logical argument will affect one's assessment of Ball's extraordinary hostility to legal scholarship, as well as to law itself. I am simply unable to go along with Ball that "[t]he presently dominant form of legal argument in the academy . . . is the form death takes in academic legal discourse" (p. 142).

On the other hand, I *do* agree with Ball that narrative forms of explanation, particularly those giving pride of place to excluded voices, must take primacy over causal laws in legal argument as well as social science. The reason, however, concerns the nature of social explanation rather than the moral inadequacy of linear argument.

Causal explanations are standpoint- and purpose-relative. A surge of electricity through a wire will not cause it to ignite unless oxygen is present, so in one sense the presence of oxygen has just as much a claim as the surge of electricity to be the cause of the wire's igniting. The electricity, like the oxygen and other factors such as the wire's conductivity, are *contributing conditions* of the wire igniting. Ordinarily, however, we would say that it was the electricity, not the oxygen, that caused the wire to ignite: if, in answer to the question "What made that wire burn up?," someone replied "The air did it," we would treat the reply as a wisecrack. All contributing conditions are created equal, but for practical explanatory purposes we must inevitably distinguish background conditions (such as the presence of oxygen) from foreground conditions, such as the surge of electricity.²⁰ The ones in which we are interested move to the foreground, and precisely these we dignify by calling them *causes* of events.

It should be clear that the distinction between foreground and background conditions is not a part of nature, but rather what is nowadays called a "social construction." Change our explanatory interest

19. P. 118 (citing *Jeremiah* 20:9).

20. H.L.A. HART & TONY HONORÉ, *CAUSATION AND THE LAW* 34-35 (2d ed. 1985); see also J.L. Mackie, *Causes and Conditions*, 2 *AM. PHIL. Q.* 245 (1965).

and the distinction might be drawn differently, leading us to call a different contributing condition of the event its cause. If, for example, we are trying to explain why a leaky lightbulb burned out, we would say that it was the oxygen in the bulb that caused it to burn out. We would not say, except as a joke, that the lightbulb burned out because someone turned on the electricity. In this example, our explanatory purposes make the oxygen a foreground condition and the surge of electricity a background condition — the diametrical opposite of our usual explanatory priority.

We are now in a position to see why causal explanations of complex human events are inadequate. Though we can sometimes agree on the contributing conditions leading to an event, the choice of which of those conditions belongs in the explanatory foreground and which belong in the background is apt to be controversial. It is, in fact, precisely what the disagreement is about. From the point of view of different groups, or sometimes different individuals within a group, the events that concern salient features of their experience are the foreground events, whereas those irrelevant to that experience belong in the background. If we must decide among competing explanations, we will do so on the basis of narratives that are more performatively persuasive than their competitors. That is why narrative, rather than social-scientific causal argument, is the primary instrument of authentic understanding in law.²¹ But this primacy of narrative within historical and legal explanation has nothing to do with the deadening character of social-scientific argument.²² Where Ball opposes narrative performance to rational argument, I suggest that narrative performance is the form that rational argument takes in law. When one is used to the narratives of dominant social groups, the need to hear and respond to the stories of previously excluded voices becomes an epistemological imperative. For the same reason, I do not share Ball's rather passionate sense of the law's all-pervasive awfulness. That awfulness stems, recall, from the fact that "[I]aw locks up deals and people and wants to leave no openings" (p. 136). While poetry, art, and music are

21. For further development of these themes, see DAVID LUBAN, *LEGAL MODERNISM* (forthcoming), particularly the introduction and chapters four and five.

22. Indeed, abstract argument is often an essential antidote to the seduction of our understanding by a narrative that overemphasizes certain features of cases at the expense of others. As Robin West has noted, appeal to narrative at the expense of arguments about rights has become a favorite strategy of proponents of the death penalty. By stressing the gory details of a murder, they are able to press concern for the circumstances that led to the murder, as well as the circumstances under which the defendant was convicted, into the background. Robin West, *Narrative, Responsibility and Death: A Comment On The Death Penalty Cases From the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161 (1990); see also Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245 (1992) (arguing that our determination to blame criminals for their behavior notwithstanding such contributing causes as their addiction or intoxication falsely isolates their deeds from the surrounding contributing conditions that, from a medical rather than punitive point of view, constitute the true foreground conditions — hence causes — of the wrongful behavior).

vehicles of transcendence (p. 140), “[l]awyers’ language seems fortresslike and impermeable to transcendence As though God were dead. It is assumed that there is no real presence to reinsure meaning, so everything has to be set out on the page” (p. 140). That is why “[l]egal texts appear to discourage otherness and creative responsibility” (p. 140).

Yet human spontaneity can be destructive as well as creative, malicious or exploitative as well as responsible. Ball understands this. In the paragraph immediately following the damning criticisms I have just quoted, he writes in objection to his arguments:

Do we not want a Bill of Rights and a Clean Air Act with teeth and bite rather than poetry? A close friend of mine, a fine lawyer, represents a musical group. Negotiations with a recording company, covering every contingency, produced a document of eighty-nine close pages. Both sides wanted music, but they were right not to want it in their contract.
[p. 140]

The point is stronger than Ball suggests, however. *Without the contract there might be no music.* Indeed, the music industry is notorious for managers and record companies who swindle artists whose business acumen does not match their musicality. The eighty-nine-page contract does not “lock up” the musical group by sewing up every contingency — on the contrary, it frees the group from a host of worries and enables the musicians to make music. As Stephen Holmes has written, there are a lot worse things people can inflict on each other than stable expectations.²³ If everything is open, everything possible, everything on the agenda all the time, we will be unable to shake free of permanent distraction to devote ourselves wholly to things that matter. It is only an apparent paradox that legal documents that lock up contingencies can enhance, not impede, creative responsibility.

Nor does it strike me as a sign of morbidity that the Clean Air Act is the product of “frequent, wholesale amendment, vast political maneuvering, and little clarity” (p. 139). These features of the Act reflect the fact that it was produced by many hands, by the negotiation and compromise of many interests, rather than by a single author. That is the sign of democratic dialogue — predictably corrupt, conspicuously venal, disgracefully biased, inconceivably vulgar, but not the mere *ipse dixit* of a Hobbesian sovereign. Solitary authors can produce laws of greater clarity, but only when they assume autocratic power. The complexity of the Clean Air Act is like the complexity of a medieval cathedral, constructed over generations, part Romanesque and part Gothic, its architectural vision blemished by the whims of errant bishops, refracted through changing styles, dissipated by the work of stonewrights and artisans who apprenticed in a dozen regional

23. Stephen Holmes, *The Professor of Smashing*, THE NEW REPUBLIC, Oct. 19, 1987, at 30 (reviewing ROBERTO UNGER, *POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987)).

schools, and spoiled by ambitious additions that there was not enough money to complete. The cathedral's inconsistencies are a visible token of its history and the history of its community. To wish for greater unity of vision and purer beauty is to dismiss the cathedral's role in the community's life. The Clean Air Act is the opposite of what Ball calls it: "a bureaucratic voice from on high" (p. 139). Its voice is bureaucratic, to be sure — it is, after all, legislation of technological minutiae — but it would be a "voice from on high" only if it were *not* the product of "vast political maneuvering."

By no means do I intend these remarks as an apology for American law, which is shot through with injustices and irrationalities. My point is that whatever critique we level at American law should focus on its substance, on specific callous decisions, unjust institutions, and oppressive practices, not on "legal texts" as a general category, or law as such.

These doubts about Ball's critique lead me finally to wonder, if only a bit, at his remedy. It appears that precisely because there is so little in American law that he finds "viable," to use his own word, the only lawyers he can offer as a last bulwark against morbidity are lawyers who in many ways verge on saintliness. Please do not misunderstand: I agree entirely that the public interest practitioners Ball depicts in his first chapter are the soul and conscience of legal practice. Without them and their kind there would be little excuse for the legal profession, and none whatever for the laws that would inundate their clients without their unremitting efforts. For this reason, I believe that every lawyer should devote a significant portion of her time to poor people's and public interest representation.²⁴ But Ball, through his omnidirectional denunciation of conventional legal practice and his reiterated theological argument that the Word will manifest itself predominantly among the poor and lowly, seems to imply that *only* legal practices like his seven examples are morally endurable. Like Rubens' *Fall of the Damned Into Hell*, Ball's theology seems to consign the multitude of legal practitioners to the realm of living death.

In his seven examples, two themes repeatedly recur. First, virtually all of his seven lawyers have confronted the question of whether participation in the legal system in itself implies morally unacceptable co-optation. Henry Schwarzschild, at the chapter's opening, proposes as a thought experiment that a death penalty lawyer might walk out of the courtroom in midtrial as a protest against capital punishment (p. 7). Later, he recollects that at one point he considered lying about his beliefs in order to be able to vote for acquittal as a juror in capital cases; he did not lie (p. 11). John Rosenberg, by contrast, elected to remain in the Nixon-Mitchell Justice Department out of concern for

24. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 169-73, 277-89, 381-91 (1988).

the kind of lawyer who would likely replace him (p. 21). Margaret Taylor worries that her participation in Housing Court lends it legitimacy that it does not deserve (p. 37). David Harding fatally undermined his own judicial authority by refusing to be co-opted by showing favoritism to the niece of the Tribal Council chairman (p. 48). Ball himself reflects on "troublesome questions about gaining prestige and power within an alien system" (p. 72), and he reflects that "John, Margaret, Steve, David, Carla, Tim — and Henry, too — cannot avoid being 'officers of the system' after all" (p. 160).

Parallel to this theme — the question of whether a decent lawyer is morally permitted to move any distance from herself into "the system" — we find the repeated joy Ball's practitioners take in the unity of their work and their beliefs. "It is satisfying," says Rosenberg's wife, "when there is not a difference between your principles and your work" (p. 22). Margaret Taylor abandoned corporate law because "[t]here was a difference between my clients and my beliefs" (p. 34). David Harding "distinguishes his approach from that of the white tribal attorney, who, he says, 'divided law from his life and community'" (p. 45). Wizner and Ingersoll "talk about the disjunction between what many lawyers do and what they care most about in life" (p. 70).

Clearly, these concerns are variations on the theme of moral authenticity. Yet it seems obvious that most lawyers, for a significant portion of their time, will confront work that is not on an exalted plane, that is morally indifferent — though I am *not* suggesting that lawyers should engage in work that they think is morally wrong — work such as going over the lease of a shopping mall shoe store. Presumably, there is often a difference between such a lawyer's principles and her work. Is this lawyer debarred from the life of the Word?

In one of his most inspired pieces of theological writing, Søren Kierkegaard considers the plight of a Christian contemplating a recreational outing to the Deer Park.²⁵ He has come from a Sunday sermon in which the pastor has insisted on a life of divine dedication, not merely during the hour of church on Sunday, but every moment of the week as well. This dedication, the pastor has made clear, is the true meaning of faith, for man can do nothing by himself, nothing without God. This being so, Kierkegaard asks, how can our Christian even consider anything so frivolous as an outing to the Deer Park?

Gradually, ironically, Kierkegaard brings us to see that it is the pastor, with his half-hollow oratory, who is the truly frivolous one. To be a Christian, a "knight of faith," does not mean to do great deeds, to achieve the Holy Grail, or to seek the cloister.

Our religious individual chooses the way to the Deer Park, and why?

25. SØREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 422-45 (David F. Swenson & Walter Lowrie trans., 1941).

Because he does not dare to choose the way to the cloister. And why does he not dare? Because it is too high-flown. So then he takes the outing. "But he does not enjoy himself", someone will say. Oh yes, he certainly does. And why does he enjoy himself? Because it is the humblest expression for his God-relationship to admit his humanity, and because it is human to enjoy oneself.²⁶

Here, as elsewhere in his authorship, Kierkegaard insists that the leap of faith need not be signified by external acts of renunciation, and, indeed, that those who aim to demonstrate their faith through renunciation have committed a kind of category mistake. In *Fear and Trembling*, Kierkegaard imagines someone eager to meet a genuine knight of faith, who expresses disappointment upon actually encountering him because in exterior demeanor the knight of faith is indistinguishable from a tax collector.²⁷

Now I am surely not suggesting that the seven lawyers Ball depicts have chosen the way of the cloister. Quite the contrary — as Ball depicts them, they are filled with an irrepressibly exuberant love of life. Nor do I mean to give uncritical endorsement to Kierkegaard's drastic disidentification of faith with any exterior signs. That way of thinking is, I suspect, peculiar to a strain of northern Protestantism — the same strain that yielded Kant's insistence that moral goodness means good will rather than good action. In my own Jewish tradition there is no place for a purely interior faith; the emphasis lies entirely on deeds, and in this respect Ball's theology comes closer to Judaism than to Kierkegaard's Protestantism.

My point in invoking Kierkegaard's dilemma of the Deer Park is merely to suggest that holding every lawyer to the high standard of devotion and energy set by the seven practices Ball eulogizes may be theologically too literal-minded. Kierkegaard's point is not to make the requirements of faith less demanding. On the contrary, the reigning theme of Kierkegaard's argument is that genuine faith is impossibly and incomprehensibly *more* demanding than conventional Christendom makes it out to be. His point is rather that the "leap of faith" does not necessarily manifest itself in a heightened devotion to moral duty. Indeed, Kierkegaard takes the story of Abraham and Isaac to show that ethics and faith — human duty and duty to God — occupy different categories of existence.

This argument is very close in spirit to Ball's own insistence on the radical incommensurability of religion and God's Word, of the human and the divine. Why, then, does Ball hold back from the conclusion that holiness may manifest itself in unsuspected and unpromising vessels? Perhaps the hundreds of thousands of lawyers whose practices

26. *Id.* at 440-41.

27. SØREN KIERKEGAARD, *Fear and Trembling, in FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* 21, 49 (Walter Lowrie trans., 1954).

are not like these seven may nonetheless escape the stern judgment that their professional careers amount to nothing more than death that "intrudes upon our lives before the end" (p. 136). After all, even the seven individuals Ball writes about found that they could not go through life without compromise. Unalienated labor is not a luxury available to all of us, and even a life containing more compromises and fewer good deeds than these seven may yet be adopted by an incorrespondent Word.