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## The Promise of American Law: A Theological, Humanistic View of Legal Process

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THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS. By *Milner S. Ball*. Athens: The University of Georgia Press. 1981. Pp. xii, 209. \$15.

Contemporary law, in theory and in practice, has evolved from fundamental rationalist premises deeply rooted in the Liberal<sup>1</sup> political tradition. Mysticism hitherto has won few adherents among lawyers, judges, or legal theorists. Skepticism and at least the pretense of analytical rigor have characterized American jurisprudence. Recent theorists have largely retained rationalist assumptions,<sup>2</sup> but the foundation of Liberal jurisprudence — of belief in law as a check upon rather than an expression of ideology — is being shaken by attacks from either flank. From the right, reformers eager to reverse the pluralistic consequences of the moral skepticism characteristic of contemporary constitutional jurisprudence seek to retrench the powers of the federal courts, leaving the field of social regulation to the more confident partisans of the political arena.<sup>3</sup> From the left, the critical legal studies movement claims to recognize the identity of law and ideology, hoping to ally judicial power with the visionary agenda of the utopian left.<sup>4</sup>

In *The Promise of American Law*, Milner S. Ball raises a more traditional mystic challenge to the rationalist mainstream of legal thought: Ball envisions the unification of law and traditional Christian religious doctrine. Ball's claim (he himself refers to it as a "wager" rather than an argument) is "that the biblical tradition is the most fruitful medium for understanding, judging, and celebrating the secular world, including law" (p. 2).

The author pursues this bold speculation in three principal directions. First, he develops a broad theory of law as theater, performed with the objective of affirming the transcendent state of the biblical "beginning." Second, Ball applies this vision to the concrete problem of judicial review, advancing the defense of powerless minorities mandated by Christian love as the justification for that institution. Finally, Ball challenges the traditional, technical approach to legal education, arguing that this approach isolates the law from the moral universe it reflects and shapes. Ball argues that even for those who do not join in his faith, the perspective he explores can offer "clarification, assessment, and affirmation of what is really going on in what is happening to law" (p. 2). To gain this understanding, the reader need not "share [the author's] theological premises, only . . . grant

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1. Liberal is here capitalized to signify its classic and most general sense. See R. UNGER, *KNOWLEDGE AND POLITICS* 63-100 (1975).

2. Contemporary legal theory acknowledges varying degrees of political influence, but typically remains rationalist in its perspective. See, e.g., G. CHRISTIE, *LAW, NORMS AND AUTHORITY* (1982); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); H.L.A. HART, *THE CONCEPT OF LAW* (1961); F. HAYEK, *LAW, LIBERTY AND LEGISLATION: RULES AND ORDER* (1973); H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (unpublished manuscript 1958).

3. For the flavor of this sort of approach to judicial "reform," see, e.g., *A BLUEPRINT FOR JUDICIAL REFORM* (P. McGuigan & R. Rader eds. 1981).

4. See, e.g., Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983).

them" (p. 3). Unfortunately, the reader cannot grant Ball's assumptions without surrendering the rationalist foundation of Liberal jurisprudence.

## I

Ball begins by rejecting the social contract as the source of legitimate authority in American law. According to Ball, a law professor and Presbyterian minister, the social compact theory fails to account for antecedent events (p. 11), and requires individuals to surrender preexisting rights (p. 14). Ball exalts instead the biblical beginning — the vertical covenant between God and Israel fulfilled for mankind in Jesus Christ. This vertical relationship legitimates authority wherever it is honored because, in Ball's view, it is "the one fundamental principle for individual regeneration and for social reformation" (p. 12). The vertical covenant in turn establishes the basis for the "horizontal community" of the people themselves. The exact meaning of this conception is hidden from rationalists by the mysteries of faith, but here is Ball's description:

In contrast to the social contract, the covenant tradition does not rest on a surrender of a preexisting individual power to another entity. The people and their power are created by the covenant. To consent is to accept the proposition that the people become a people in the election of God. The covenant is a matter of receiving, not preserving, the self or its property. The attendant duty involves no submission, save that of becoming the people that they are. Obedience is not submission to a higher power or greater authority but is a response to the present reality that has called the people into being. The content of the law is the covenant that creates the people. The people are not alienated from their law. It follows that succeeding generations are not made party to a mythic compact by implied consent. They affirm a contemporaneous covenant by participation in, and acceptance of, the identity of the people whom the covenant creates. The covenant thus constitutes the people, and it constitutes them governors. [P. 14.] There is surely no coincidence in the intersection of Ball's covenants to form a cross.

The judicial function in such a society is to reaffirm man's covenant with God. For Ball, the metaphor of the theater ideally models the function of courts in linking the present with the beginning. Judicial theater makes many contributions: "communication of nonverbal information, re-direction of aggression, encouragement of impartiality, inducement of creativity, and the performance of what the law is" (p. 66). In a legitimate legal order — where courts are theaters of justice and not of oppression — the abstract legal rules informing the dramatic action incorporate the biblical beginning as a backdrop of natural law (pp. 27-28).

All of this is provocative, but not compelling. To begin with, resting the authority of the Constitution on theological musings strains against a great deal of the Constitution itself.<sup>5</sup> In an odd concession to secular values, the author admits that all faiths (presumably including atheism) can participate in the religious understanding of the Constitution, since "diversity is in keeping with the beginning and should be encouraged" (p. 28). The reader

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5. See, e.g., U.S. CONST. amend. I.

is left to ponder the elements "in keeping with the beginning" which should be encouraged, such as diversity up to and including blasphemy, and other elements such as slavery and torture which should not.

More fundamentally, mysticism makes bad law. How is Ball to argue with one who disputes that the legitimacy of the Constitution rests on religious grounds? Why should Ball's theology bind those not present at "the beginning," when he grants that they enjoy antecedent rights? A generation ago, the claim that moral legitimacy inhered in the abstract form of legal rules fell before a devastating critique.<sup>6</sup> Why should the claim that idiosyncratic structures of belief invest law with morality prove any more persuasive? The truth assumed is easiest to see.

## II

Ball's discussion of judicial review suffers from the same shortcoming: Christian ethics offer one splendid reason for caring about the oppression of minorities, but that conclusion doesn't really address the relevant issues. If everybody followed that ethic, the problem of discrimination wouldn't require judicial intervention. So why are judges more likely to be good Christians than legislators?

Judicial review and the protection of minority rights present issues in legal and political theory. Viewing the problems in terms of those disciplines, rather than in the mystic light of Ball's theology, recognizes the challenges of containing political power without attempting to "solve" it by assuming normative conclusions millions are unlikely to accept. In the last analysis, appeal to religious doctrine seems only remotely tailored to protect the powerless from majoritarian politics in which religious doctrine may play a major role.

## III

*The Promise of American Law* concludes with a discussion of legal education. Ball condemns the "ideology of technocracy" that pervades much law school teaching, because conceiving the law in technical terms dissociates legal analysis from social reality. Here, Ball offers a theological variation on a theme given humanist dimensions by James B. White<sup>7</sup> and Marxist undertones by Roberto Unger.<sup>8</sup> Stripped of independent significance, the study of law becomes the study of something else; of religion for Ball, of literature for White,<sup>9</sup> of ideology for Unger.<sup>10</sup>

Law review commentary, by its nature, cannot place claims about the relevance of legal education in perspective. Surely the forms of legal reasoning, even as revealed in law school, often conceal less pretentious processes. But if modern American judges think they are engaged in reli-

6. See Hart, *Positivism and the Separation of Law and Morals*, 61 HARV. L. REV. 593 (1958).

7. J.B. WHITE, *THE LEGAL IMAGINATION* (1973).

8. See Unger, *supra* note 4.

9. See White, *Law as Language: Reading Law and Reading Literature*, 60 TEXAS L. REV. 415 (1982).

10. See Unger, *supra* note 4.

gion, politics, or literature while pretending to enforce the law, their masquerade is consistent, subtle, and altogether more effective than they seem capable of bringing off.<sup>11</sup> And if the ideal of legal method has any normative appeal, the student may well look first to the distinguished scholars who have tried to give it substance.<sup>12</sup> For those who reject such efforts as illusory, and who even in this secular age find visionary theology attractive, Ball's book is one alternative.

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11. See H.L.A. HART, *supra* note 2, at 138-43 (judges believe themselves bound by clear legal rules and would lose their powers if they acted otherwise).

12. Within the defense of legal method, there is something for almost every ideological taste. See, e.g., note 2 *supra*.