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Lying Down Together: Law, Metaphor, and Theology

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LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY. By *Milner S. Ball.* Madison: University of Wisconsin Press. 1985. Pp. xiv, 191. $24.

Milner S. Ball's[1] *Lying Down Together: Law, Metaphor, and Theology* is an ambitious, idiosyncratic, and ultimately disappointing attempt to define a new metaphor for understanding and using law. Professor Ball argues that one should think of law in metaphorical terms, insofar as metaphors are ubiquitous in our society. Not only are they descriptive "tools of sportscasters and poets, but [they are also] a kind of fundamental sense whereby we understand the world, perceiving one experience in terms of another" (p. 22).

But while metaphors presumably can enrich human understanding by illustrating abstract concepts (*e.g.,* "labor is a resource" (p. 22)), the danger is that they can also limit our understanding to the point of view embodied in the metaphor. As Ball notes in relation to the above example, "If labor is viewed only as a resource, then exploitation is masked by neutral-sounding economic statements (*e.g.,* the cost of labor, like that of all resources, should be held down; cheap labor is good) which hide human misery behind an unexamined metaphor" (p. 22). Thus, Ball argues, "[w]ithout access to alternate metaphors, we act and think on the basis of limited comprehension masquerading as the whole truth" (p. 22).

In Ball's view, metaphor has equal usefulness, and potential for harm, when applied to the law. More specifically, his basic premise is

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that society has too long languished under the metaphorical strictures of law as "the bulwark of freedom" (p. 23), without attempting to uncover alternate metaphors. Under the "bulwark" metaphor, the law seeks to protect entrenched and powerful interests by erecting barriers that deny weaker interests access to justice. In order to combat the unfairness and insensitivity embodied in such a system, Professor Ball urges that society adopt the alternative metaphor of law as a "medium" instead of a "bulwark."

Law as medium is a defensive metaphor. As opposed to law as bulwark, law as medium seeks not to achieve simple law and order, but rather seeks to promote "responsible human intercourse" (p. 33). Ball believes that in a world in which the law-as-medium metaphor is fully accepted, communication between all classes of people would be perfect, class conflict would be correspondingly reduced, and there would be no need for the limits and barriers of the bulwark.

There are, of course, inherent limitations to the applicability of theoretical models to real-world legal issues.[2] The author attempts to address these limitations by devoting three of the book's six chapters to a discussion of how "law as medium" is manifested in various guises in the developing law of the sea and coast. In these chapters, he seeks to apply the abstract ideas posited in the first two chapters to an important and real legal forum.

Because professor Ball's conception of law as medium presupposes "that [law] is the medium of the human community as community" (p. 34), his attempt to integrate this philosophical, community-oriented framework with the realities of the law of the sea and coast is often unconvincing. While the metaphor of law as medium is, by Ball's own admission, only fully viable in a legal system founded on shared community values, the law of the sea and coast (as well as most other areas of law in our society) is instead rooted in intense interplay among competing, independent interests of parties often motivated by economic concerns.

It is to this dilemma that the book's problematic sixth and final chapter is devoted. In Chapter Six, Ball recognizes that law as medium is a flawed metaphor for the role of law in our society, but instead of concentrating his energies on excising and promoting those aspects of his conception that *are* of value today, he attempts to evoke from theological sources a "Peaceable Kingdom" in which the entire metaphor would be valid. As Professor Ball recognizes in the book's preface, the value of such an enterprise to most readers is not immediately apparent (p. xiii). Although his self-consciousness is admirable, his insistence on moving the book toward a utopian rather than a more

2. As the author himself notes: "There is nothing inherent in the natural world that determines what we make of its figurative possibilities. This is another way of saying again that there is not an objective truth-in-itself out there to which our words are to correspond." P. 28.

limited and practical conclusion obscures obvious inconsistencies and counterarguments, and bypasses opportunities to emphasize the practical applications of his insights.

Professor Ball often merely illustrates the obvious notion that man's preconceptions are a negative force insofar as they limit his ability to reason creatively and to take account of alternative points of view. He considers, for example, the loggerhead turtle, a threatened species that conservationists (including Ball's son) are working to protect. One distinguishing characteristic of the loggerhead is its inability to blink. Thus, in their infrequent forays onto the beaches, these great turtles must shed tears to wash out the sand that gets into their eyes. Experienced turtle watchers like Professor Ball's son understand that this physiological reaction is entirely mechanical. Tourists, however, insist on making human attributions. Even after Ball's son explains the tears, tourists repeatedly ask: "Yes, but why are they so sad?" (p. 4).

As this anecdote illustrates, reality is what we make of it. Although the tourists presumably are not disturbed by the blatant inaccuracy of their perceptions of the loggerhead, the son's understanding of the turtle is not only more knowledgeable but also more responsible, because it is an understanding based on "livelier, richer realities" (p. 11). Professor Ball quite correctly points out that this ability to look beyond the strictures of preconceived realities has been an invaluable part of major scientific advances.

But what of law? Professor Ball insists that if law is a science, it must necessarily be at least as creative a science as biology, physics, or astronomy, for "far more than turtles and black holes, law is our creation. There is no external, objective law or legal system for which we are the mere messengers and instruments" (p. 16). While Ball argues that law should be infused with creativity to move *away* from the law-as-bulwark metaphor, he fails to acknowledge that the flip side to this argument is also plausible; that is, the very fact that no objective legal truths exist may be the strongest argument for *preserving* law as a bulwark. In defining limits, law protects society as a whole by keeping the powers that be in check.

The law depends upon the consent of powerful interests to be viable precisely *because* it is not founded on objective truths. Revolutionary scientific advances have the power to effect great upheavals because they represent a demonstrable movement toward truth. But having no similar source of independent power, law necessarily depends upon consensual grants of power. In the modern world, law seeks "justice" not in an absolute sense, but rather within the parameters delineated by those with economic and military might. Those with such might delegate power to legal systems because the resulting benefits of order and stability outweigh the reduction of power that is

necessarily incurred. Thus, in areas of the world in which legal systems are not effective in achieving order and stability, there is correspondingly less incentive for powerful interests to work within the law.

Implicit in Professor Ball's arguments against law as bulwark is a recognition of law's indebtedness to the consent of powerful interests. Indeed, he devotes the bulk of Chapter Two to the injustice engendered by such a system, noting that "[t]he law-as-bulwark metaphor . . . allows injustice to harden into law which then commands obedience" (p. 25). As obvious examples, he cites tax and zoning laws, which in his view seek to preserve not justice but rather "maldistribution of wealth" and "economic-racial oppression" (p. 25). From this perspective, "law becomes the systemic, degenerative brute force of the powerful."[3]

These observations contain quite a bit of truth, but to some extent the use to which Professor Ball puts them is an exercise in sophistry. Few champion a legal system that spews forth injustice unflinchingly for the sake of preserving the economic status quo. To be sure, our present legal system has such unjust aspects; however, it also has many beneficial aspects. By presenting examples that illustrate only the ugliness of the present system, however, Ball prepares the reader to accept his "alternative metaphor," law as medium. In contrast to the bulwark, law as medium lets "justice flow like water, and integrity like an unfailing stream."[4] For Ball, law can be a means for communal communication; as society approaches the metaphoric ideal, this communication would become so perfect as to obviate the need for explicit law. "In heaven," Professor Ball asserts, "law will become plentiful and, like the agreeable medium air, utterly transparent" (p. 35; footnote omitted). This argument is no less beautiful, and no more realistic, than was Marx's vision of the communist ideal.

The problem is that while law as medium speaks to the processes of law, law as bulwark speaks to the purposes of law. While better communication can certainly make the law more equitable, it can never serve as the basis for law itself. This can be seen by examining an anecdote Professor Ball uses to illustrate his conception of law as medium:

> Defensively, talk may prevent the use of force and may actually provide better protection than force — a cycle of words more satisfying than

3. P. 27. These observations are, of course, not entirely true. Ball's discussion of particularly noxious zoning and tax laws cannot be generalized to include all zoning and tax laws. For example, while the author is correct in pointing out that some zoning laws hurt the poor because they are exclusionary, it is also true that many zoning laws primarily protect the interests of the whole community, even though they hurt the rich by preventing development. Environmental zoning comes immediately to mind. In these cases, zoning ordinances that impede development are upheld (and are not a "taking" requiring "just compensation") where they work to prevent a public harm. *See* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

4. P. 33 (quoting *Amos* 5:24).

> a cycle of vengeance. I once visited in a Maine summer home built by a person whom experience had taught that the casement windows in such a place could never be completely sealed against rainstorms blowing in from the Atlantic. He had devised a means for both accepting the inevitable and simultaneously protecting the interior from water damage. Fixed to the inside wall under each window . . . were small lead troughs he had fashioned. . . . The apparatus caught and returned the vagrant, invading runnels of rain that blew in. It was a fit defensive works. For protection we may not need law-enforcement officers and uniformed troops. We do need ingenious plumbers and gutterers . . . who keep the flow going. [pp. 31-32; footnote omitted]

While the imagery in this passage is certainly alluring, its implications for law enforcement are obviously unrealistic within the context of our society. Is Ball to be understood as saying that instead of trying to punish the criminal, we should concentrate on adapting victims to the effects of crime? Enhanced communication and understanding between individuals can certainly help make law more responsive, but as this example illustrates, it is a woefully inadequate substitute for the many practical roles that law as bulwark fills.

Related problems engendered by the metaphor/reality dichotomy present themselves quite apparently in Chapters Three, Four, and Five, in which the author examines the use of law as medium in the context of the law of the sea and coast. Chapter Three opens with a discussion of the development of the doctrine of "Mare Liberum" — freedom of the seas. Initiated by Hugo Grotius in the seventeenth century, this doctrine holds great superficial allure for proponents of law as medium. After all, as Professor Ball notes, "[i]n the economy of God, according to Grotius, no nation has been supplied with all the necessities of life. Human fellowship is thereby engendered through mutual needs and dispersed resources" (p. 39). Unfortunately, as Ball notes, "Grotius's arguments for the freedom of the seas were a piece of advocacy undertaken on behalf of a nationalistic client for commercial effect" (p. 43). Grotius wrote not as a prophet, but as an advocate for his client, the Dutch East India Company.

Similarly, over three and one-half centuries later, the third United Nations Conference on the Law of the Sea (UNCLOS III) — for all of its very real advances in enhancing cooperation among nations — still, in Ball's words, "constitutes an accommodation to capitalism" (p. 55). UNCLOS III not only produced the International Seabed Authority (a unique organ designed to share among all nations the riches of the seas), but it also made effective use of innovative negotiating rules which stressed consensus rather than antagonism.[5] Nevertheless, even

5. The tenor of the UNCLOS III negotiations has received considerable attention in legal periodicals. For a particularly interesting account of the Canadian ambassador's experiences, see Beesley, *The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners — A Pattern for Future Multilateral International Conferences?*, 46 LAW & CONTEMP. PROBS. 183 (1983).

this noble effort to create community-oriented law depended upon the consent of the powerful, a fact that was underscored when the United States abruptly refused to sign the treaty after the negotiations were completed. While the world had produced a treaty that arguably was the most effective use to date of law as medium, its effectiveness was largely emasculated by the noncooperation of a powerful nation looking out for what it perceived to be its own best interests.

In Chapter Four, Ball concentrates on examining the systems that the United States government has employed in various regulatory matters — particularly in leasing the Continental Shelf for oil exploration. As the author perceptively notes, the permit-approval process has come to encompass far more than mere technical evaluation. As controversies about offshore leasing become more heated, and as Congress finds itself less willing (or able) to choose from among competing interests, administrative agencies (and the permit-approval system that they oversee) become political forums in which groups can have their say. The "former cozy system involving only oilmen and the Secretary of the Interior" (p. 83) is a thing of the past, and such devices as "the environmental impact statement together with judicial review" (p. 83) have taken its place.

To be sure, this system has had the desirable effect of more fully representing adverse interests in the political process. However, as Ball once again realizes, this enhanced medium can do little to change the ultimate position of the powerless in society. In discussing the endangered lifestyle of native Alaskans, he notes that: "If the viability of an indigenous people is to be balanced against the existence of the oil industry and American demand for oil, the people will not win. . . . For federalism to have meaning and to survive, it cannot consign any powerless minority's survival to a balancing test" (p. 90). Interestingly, taken to its logical extreme, this argument actually supports the proposition that, where the minority is outgunned, law as bulwark may do more to help the powerless than law as medium. If a minority gains a voice through the hearing process (law as medium), its voice means little if it is easily overwhelmed by the majority so as merely to legitimate the majority's designs. On the other hand, real protection for the native Alaskans could be accomplished by direct grants of autonomy and protection (law as bulwark). Powerful interests would, of course, be motivated to make such grants not by altruism, but rather by a pragmatic realization that they will gain from the increased order and stability that result from such actions. Thus, while elements of the law-as-medium metaphor would be useful in revealing the problems of weaker interests, any real satisfaction of their concerns must arise from the bulwark.

Professor Ball's fifth chapter extends his concern for the protection

of the powerless to the regulation of coastlands under state law. Quite correctly, he points out that the relatively unrestrained private development of coastal properties has led, in many cases, to waste and destruction. The real losers in this system are those who have absolutely no voice — future generations. Professor Ball notes that law as medium has already been used to address this problem through the "public trust" doctrine. Under this elegantly simple system, private ownership of coastal property can only extend to the high-tide line, and any "[a]ctivities on private property that have impacts below the high-tide line may require permits and public hearings" (pp. 116-17).

Of course, it must be remembered that any permit system has limitations; there is no assurance that such a system (utilizing law as medium) will not serve merely to legitimate the plans of powerful interests. But the public trust doctrine is most interesting for the use to which it puts law as medium. The doctrine utilizes law as medium as an adjunct to, not a replacement for, law as bulwark. This plan does not abolish private property rights, but merely confines them within new boundaries (an extension of the bulwark) that mark the beginning of a public trust. It is in this context that the idea of law as medium can be most useful. In such an arrangement, private property rights would still be protected to the extent necessary to achieve consent of the powers that be, while in the most environmentally sensitive areas of the shoreline, elements of law as medium could be productively used to give a voice to unrepresented (or very weak) interests. It must again be emphasized, however, that law as medium is not doing away with the bulwark here. In fact, the public trust *depends* upon the creation of new boundaries; that is, law as medium can make the legal *process* work more effectively, but the law's *purposes* (here, to allocate property rights) remain the same, delineated by the competing interests that make up the conception of law as bulwark.

Ball's digression into the fanciful utopian "Peaceable Kingdom" in Chapter Six is not only disappointing, but also unproductive for the legal reader.[6] The legal issues posed by the problems of the sea and coast, as Ball demonstrates, provide fertile ground for attempts to make the law more responsive to the needs of the powerless. Although completely replacing "law as bulwark" with "law as me-

6. Professor Ball is a former theology student, and it must be pointed out that his description of "The Peaceable Kingdom" is so laden with theological and expressly religious musings as to be all but inaccessible to the average reader in some passages. The following is a good example of Ball's use of religion to underscore his call for a more community-oriented role for law:

> The penultimate always verges toward the ultimate. In fact we know what is penultimate only from the ultimate, which is immediately present. The kingdom of God, or the presence of God, occurs and is always about to occur at the center. It is always at hand in the specific, present form of the neighbor. To be directed toward the coming of Christ is to be directed by the neighbor. Natural life is an expectant political life, one lived in a nexus of responsibility for others and with others.

P. 129 (footnote omitted).

dium" makes little sense in the context of today's world, this does not require the invention of a new world. Rather, law as medium might best be used as a tool for highlighting the insensitivities of our present legal system, and for identifying the areas in which those insensitivities can be mitigated through improved communication.

— *Jon M. Lipshultz*