

# HEAR TODAY, GOD TOMORROW?: TO BE IN BUT NOT OF THE LAW WITH MOSES, AND MILNER BALL

*Aviam Soifer\**

Milner Ball may be the most active, intense, quiet, careful listener in the entire world. In hearing and writing about varied voices and the voiceless, he undoubtedly is foremost within the realm of American law—and far beyond law and the United States as well. Yet Milner is no mere passive, tolerant listener. He hears with his heart. With masterful artistry, he gleans the meanings that others convey, no matter how halting or varied the means used. Then Milner's own eccentric, punctilious, and proper passion creates anew through words and wonder—and the world is better for it.

In fact, Milner delights in exploring the metes and bounds suggested in the provocative point once made by our late friend Henry Schwarzschild: “‘No important social matter is a legal issue, including important questions about law. Important questions about law are never legal questions.’”<sup>1</sup> Yet simultaneously, Milner has been strikingly successful in teaching and engaging his students as well as a myriad of others in some of the most significant aspects of the lawyerly craft. He has done this through ground-breaking clinical work, “regular” teaching, and genuinely pioneering scholarship.

Throughout Milner's teaching, writing, goading, lawyering, preaching, and directly bearing witness, he somehow manages to ask the most direct and challenging questions, while also provoking

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\* Dean and Professor, William S. Richardson School of Law, University of Hawai'i. The author wishes to thank (profusely) the members of the *Georgia Law Review* and his raucous fellow panelists Danny Greenberg, Erica Hashimoto, and Steve Wizner, as well as the other participants in the memorable Symposium. He expresses particular gratitude to Milner and June Ball and to their children for decades of friendship, laughter, inspiration, and more.

<sup>1</sup> MILNER S. BALL, *THE WORD AND THE LAW* 12 (1993) (quoting Henry Schwarzschild). Milner vividly described Henry's commitment to not being a bystander, and to not being “that kind of German.” *Id.* at 9. To Milner, Henry was a non-lawyer model within the sparkling Chapter 1, “Seven Practices in Law” in *The Word and the Law*. For my attempt to convey a little of Henry's irascible but prophetic presence, see generally Aviam Soifer, *Born Classified, Born Free: An Essay for Henry Schwarzschild*, 19 *CARDOZO L. REV.* 1369 (1998).

the search for justice. He inspires a more promising quest than we knew we could undertake, and it begins right here, right now. He is wonderfully adept at what he once described as “making contextual thinking about law self-conscious.”<sup>2</sup>

This has led, for example, to Milner’s profound explorations of law as theatre, the importance of making and living by metaphors, and the overlap between vital issues in theology and law. His latest book, *Called by Stories*, underscores Milner’s longstanding attention to the importance of “the image of the word in circulation.”<sup>3</sup> Throughout his calling, which has been considerably more than a career, Milner remains unequalled in his ability to enlighten and to provoke simultaneously. It helps, of course, that he is very funny in a highly original way. It also may be no mere coincidence that if one rearranges the letters of his first name, Milner becomes a *limner*, one who describes or depicts by drawing or painting, a word in turn probably derived from a word meaning “to illuminate.”<sup>4</sup> But always there is his lovingly careful mastery of the craftsmanship of words.

It is increasingly clear, Milner once wrote, that “the external world keeps reflecting back what we bring to it.”<sup>5</sup> He extends his emphasis on reciprocity between observer and observed from nature and language to the realm of faith. Those who seek to be observant only of settled rules or texts have missed the crucial roles of context, reciprocity, and change. In the Hebrew Bible, for example, Milner argues that Moses hears and speaks as “counsel for a situation” as someone whose word “does not return empty.”<sup>6</sup> Indeed, Moses is able to be “mouth for the people exactly because he is mouth for God.”<sup>7</sup> What is asked of the people, over and over, is to give ear and to hear. And though, as Milner notes, God does not seem to have a metaphoric ear, “[e]ntailed in God’s speaking is a return hearing and in the hearing a return speaking.”<sup>8</sup>

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<sup>2</sup> MILNER S. BALL, *THE PROMISE OF AMERICAN LAW* 1 (1981).

<sup>3</sup> MILNER S. BALL, *CALLED BY STORIES* 42 (2000).

<sup>4</sup> WEBSTER’S II NEW COLLEGE DICTIONARY (3d ed. 2005).

<sup>5</sup> MILNER S. BALL, *LYING DOWN TOGETHER* 6 (1985).

<sup>6</sup> BALL, *supra* note 3, at 30, 197 n.12.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

The concept of reciprocity may never be simple in everyday life, in teaching and learning, and certainly in theology. Yet reciprocity has been a central theme Milner has tackled and explored throughout his career. Biblical stories should be read, he claims, to “engender[ ] critique and liberation.”<sup>9</sup> They must subvert and offer alternatives, even as “‘one generation tells another how the future shapes the present out of the past.’”<sup>10</sup>

Insights about reciprocity, ecology, and faith could be thought to lead to complacency or to despair.<sup>11</sup> Yet Milner has repeatedly and effectively developed the commitment that must follow recognition of kinship between ecological systems and law. He made a profound suggestion decades ago in *Lying Down Together*, for example, that the metaphor of a coral reef is much to be preferred to our usual comparison of law to a rock or a foundation. He remains greatly intrigued by “the complexity of the possible,” as well as deeply committed to challenge and “[t]o bend the ordinary, breaking it open.”<sup>12</sup>

Even delightful intellectual paradoxes must yield to the real world quest for justice. This search requires “discernment of the internal structure and dynamics of the daily.”<sup>13</sup> Further, if it is crucial to be “in but not of a world, including the world of law,” as Milner argues, then we also must grasp that, even given the deep complexities and tensions inherent in such a role, it is “the *environment* of decision, not the *rules* of decision” that remains most significant.<sup>14</sup>

<sup>9</sup> *Id.* at 37.

<sup>10</sup> *Id.* at 6 (quoting Milner’s teacher, PAUL LEHMANN, *THE TRANSFIGURATION OF POLITICS* 24 (1975)).

<sup>11</sup> Anyone who knows or even briefly encounters Milner knows this not to be the case. To read any of his discussions of religion carefully, as Steve Wizner has done so well for this Symposium, is to sense how deep is Milner’s active challenge to religious talking but not listening, and how probing his critique of much religion, following Karl Barth, as “‘the contradiction of revelation [and] the concentrated expression of unbelief.’” BALL, *supra* note 1, at 80 (quoting 1 KARL BARTH, *CHURCH DOGMATICS*, pt. 2, 302–03 (G.T. Thomson & Harold Knight trans., 1963)).

<sup>12</sup> *Id.* at 48, 72.

<sup>13</sup> *Id.* at 72.

<sup>14</sup> BALL, *supra* note 3, at 21, 36 (quoting PAUL LEHMANN, *ETHICS IN A CHRISTIAN CONTEXT* 347 (1963)).

Milner mentions that it was only in retrospect that he realized that the image of “the word going forth and fruitfully returning”<sup>15</sup> had become a principle theme in his work. It is undoubtedly revealing that he explicitly views “the word” as akin to a hydrologic system of rain/snow—water—rain/snow, and so forth. Indeed, he is brilliant in his textual readings, and in his ability to link water imagery and the tears of various women in the Bible, for example, to contemporary life and law. But the “fruitful” return of the word is the key challenge identified and responded to in Milner’s work.<sup>16</sup>

To be sure, Milner’s own words have been fruitful and they have multiplied across many years and a multitude of different audiences. Yet he remains almost otherworldly in his graciousness and his humility.<sup>17</sup> Strikingly, he combines these rare and generally ethereal qualities with a remarkable rootedness in this world. He is constantly in, but not of, all the disappointments and dangers and everyday undermining of a better future in our own place and time.

Milner is a consummate wordsmith and scholar who nonetheless is still a penetrating listener and an observer who pays careful attention to all his surroundings. He is able to carry his listeners or readers directly to another place—to the soup kitchen in Athens where law students must learn not to be afraid of the poor, to the barrier island beach where the loggerhead turtles struggle to survive and a son and father commune, to a very busy tribunal engaged in hearing the testimony and sharing the tears of displaced Native Hawaiians, and to a host of other locations where words call us all to seek practical, unusual, everyday progress on the multitude of rocky paths to a better world.

Paradoxically, Milner’s abiding and deeply genuine humility may be a carefully contained outgrowth of an impressively strong ego. This paradox seems a key element of his remarkably disciplined ability to do the very hard daily work of writing, reading, observing,

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<sup>15</sup> *Id.* at 2.

<sup>16</sup> In other theologies, some might consider it “water over the damned.”

<sup>17</sup> Milner offers a touching account of his encounter with Karl Barth and explains that Barth had “a strength of humility that I have come to associate with faithfulness.” BALL, *supra* note 1, at 75. In what could be a self-portrait, Milner explains that Barth “was both demanding and freely approachable, in the manner of a teacher who cares passionately about both his subject matter and his students.” *Id.*

and thinking—while also managing to question and to inspire. It helps explain Milner's delight in being different and in challenging the mundane while somehow simultaneously embodying composure, regard for propriety, and self-sacrificial courage.<sup>18</sup> Such a rare combination also helps to explain the extraordinary and enduring relationship that Milner and June have enjoyed—notwithstanding the independent-mindedness and deep commitment to creativity and difference that each embodies—and the remarkable closeness and strength of their entire family.

In 1981, Milner dedicated *The Promise of American Law* to June. June, in Milner's words, "has taught me the amazement of daily beginning again." Together yet differently, Milner and June have done and continue to do just that for many others, too. They challenge by example in arts and letters and law and life. In the penultimate sentence of *Called by Stories*, Milner suggests that greatness is to be found within a group or family's "humility of their service to others, the quality of their binding together, and the authority of their story."<sup>19</sup> Milner here discusses specifically the birth of Christianity, and he concludes, "So the story holds."<sup>20</sup>

This basic theme appears throughout Milner's life and lines, no matter what the text. It is vividly illustrated in a letter he quotes concerning the ancient religions of Mesopotamia: "[T]he sign of the

<sup>18</sup> These were the qualities of a generation, Milner wrote, and he proclaimed them a personal inspiration in his dedication of *Lying down Together* to his and to June's parents. BALL, *supra* note 5, at v.

Milner's extraordinary combination of such traditional qualities with his amazing zest for life and his willingness to be different has produced "favorite Milner story" after "favorite Milner story" for anyone who has known him well. For instance, Marlene and I still sometimes talk about the fifty pounds of Vidalia onions, a wonderful Bar Mitzvah gift for our son. And I can hardly forget being shown around at Washington and Lee University School of Law some years ago where I was to give a fancy endowed lecture. My guide was a student with considerable reverence for Confederate symbols and heroes, and we were moving slowly. Suddenly Milner Ball crested a hill wearing the most extraordinary purple Hawaiian running shorts; I then heard his unmistakable laugh as he zoomed off, literally disappearing into the mist. There also have been the mules in the backyard, his careful note-taking and unusual participant-observer role at so many of the Robert Cover Memorial Public Interest Conferences, followed by his stunning, quiet, and yet soaring recap/preaching non-sermon on the final Sunday morning year after year . . . and so many other stories to be delighted with and borne along by knowing Milner.

<sup>19</sup> BALL, *supra* note 3, at 149.

<sup>20</sup> *Id.*

god or goddess is the capacity to raise the hand to the ear and hear what another is saying."<sup>21</sup>

For many people, it is not too much to say, Milner serves as our Moses, the leader and inspiration we turn to in the context of the most trying situations we confront. There is no one better to ask for advice in a tough spot, or to read to find rare and provocative insight. His words and thoughts go wonderfully far beyond whatever box it is that we are supposed to think outside. This is because Milner exemplifies the complex need to ask the right questions, to give ear to the answers, and actually to follow up.

In fact, Milner has an exquisite ear for hearing, heeding, conveying, and acting upon words and even "the silent sigh"<sup>22</sup> of people all around us. As Rabbi Abraham Joshua Heschel, rightfully famous as a theologian and a civil rights activist, once wrote, "Right living is like a work of art, the product of a vision and of a wrestling with concrete situations."<sup>23</sup> With June, Milner Ball is a great artist who lives right.

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<sup>21</sup> This is from a letter written by James Luther Adams, Milner's former teacher, who in turn summed up a conversation he had had years earlier with the expert, Thorkild Jacobsen, about religion and primitive democracy in an ancient Mesopotamian village. *Id.* at 201-02 n.6.

<sup>22</sup> Being attuned to the "silent sigh" was a key quality that Rabbi Heschel attributed to the ancient prophets. ABRAHAM J. HESCHEL, *THE PROPHETS* 5 (rev. ed., Harper & Row 1969) (1936).

<sup>23</sup> ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN* 296 (1955).