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The Word and the Law

For Sarah, Scott, Virginia, Richard, and Christina

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INTRODUCTION

THIS IS AN EXPERIMENTAL JOURNEY. It begins with depictions of several people who work with law. These practitioners are not a randomly chosen cross-section of the bar. Two are not lawyers in the currently official sense. All have been selected according to an uncomplicated rule: I cannot think about law apart from such people and their specific practices. Their stories are set down next to literary and biblical texts, primarily William Faulkner's *The Sound and the Fury,* Toni Morrison's *Beloved,* the Gospel of Mark, and the Book of Isaiah. The aim of this juxtaposition is to open possibilities for a nonscientific dynamics of law.

Some fifty years ago, Jerome Frank, who was first a teacher, then a judge, and always a legal realist, inveighed against what he saw as a wrong turn taken late in the nineteenth century and early in the twentieth, when professionals began to present law as though it is a science. He urged students of law to correct the error of exclusive focus on the narrowly conceptual by attending to what lawyers and judges actually do. Although academic jurisprudence has yet to complete a fundamental alteration of the basic direction set a hundred years ago, deviations and course corrections are increasing. With differing degrees of acceptability in the law schools, various discourses have been made available for teaching and writing about law: social science, literary criticism, critical and feminist legal studies, minority narrative scholarship. Even clinical training has become a regular part of the curriculum.

Judge Frank would doubtless take heart from this diversity in the academy and from growing debate about what constitutes legitimate legal scholarship. He might even detect, here near the turn of another century, the makings of an essential revision of priority whereby the actual is preferred over the conceptual. He would surely applaud the triumph of the actual in popular culture, as represented by *The Bonfire of the Vanities, L.A. Law,* and media coverage of Supreme Court nominations. The actual practices and politics of law are irresistibly alluring; they have gained the better hearing they could not forever be denied. Insofar, then, as this book draws on nonlegal sources and directs attention to practitioners, it belongs to a general trend and is not exceptional.

Also unexceptional in a profession growing tolerant of different methods for writing about law is the formal, structural medium for the book's substantive experiment. 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. By constructing juxtapositions, I hope to create occasion for the reader's participation and invention. It may not work. But that is the question that concerns me—does it work?—rather than whether it is right or wrong.

A performance that works requires the same discipline of the author as an argument that prevails, but it requires something different of the audience. Instead of demanding a willingness to engage in contention, it asks for trust, or at least a provisional suspension of disbelief. Such a claim on the reader has been pressed by other recent legal scholarship. Its repetition here should not be found novel.

The present experiment may fall outside the range of currently familiar legal scholarship insofar as it is also an experiment in theology. Even in this particular, however, precedent has been set by others whose recent books have established the legal-academic legitimacy of inquiry into the historical, personal, and political relationships between law and religion. Possibilities for misunderstanding still attach to such undertakings—especially one like this, whose primary concern is theology and not religion. And especially when it explores the potential of nonreligious theology, something that, out of context, sounds hopelessly oxymoronic, esoteric, or idiosyncratic.

Instead of arguing that theology is relevant to law, I shall do theology and either perform its relevance or fail to do so. I am clearly eager to engage others in conversation about these matters, but, equally clearly, I do not intend to proselytize or give religious instruction. (However, I would not object if other theologians closeted in law were encouraged to make public confession of their predilections.) If theological talk is troublesome to others, it is no less so to me. I do not hold in mind a slate of self-satisfying dogma that requires only to be transcribed to the page. This book is written more toward than from understanding.

I employ theological categories because I cannot do without them. This is a question of necessity, not self-indulgence. In *The Promise of American Law* (1981) I described the judicial process as a performance that mirrors our nature as a people. *Lying Down Together* (1985) then addressed the presently dominant conceptual metaphor—law as bulwark against chaos—and suggested an alternative—law as medium of community. The first book had a tentative theological beginning. The second was somewhat less tentatively theological. Neither was centered on what lawyers do. As lawyers' practices have claimed increasingly central attention, I have found it increasingly necessary to resort to the explanatory power of theological categories. This convergence has

rendered inescapable my responsibility to make a fuller, more explicit theological statement.

It is also the case that two relationships have overcome my great reluctance to attempt a clarification of theology's moment for contemporary legal practice. One is the education I began to receive several years ago from Native Americans. There is much yet to be learned, but already I have been driven back into examination of my own tradition. In a recent meeting between traditional tribal leaders and a small group of non-Indian theologians, lawyers, and others, a Cheyenne medicine man proposed that non-Indians do not understand his religion because they do not understand their own. In the abstract it may seem paradoxical, but in my experience it is the case that appreciation of others' ways and traditions is bound up with appreciation for one's own. In that meeting, as in prior ones, I was deeply, appreciatively moved by Native American beliefs even as I became more aware of differences between those beliefs and my own.

Too often, Christians have taken such differences as a reason or compulsion to do whatever was necessary, including obliteration, to displace others' religious faith (and thereby also betray their own). I am captivated by the biblical stories. This captivation does not entail destructive rejection of others' constituting stories. To the contrary, it seems to me to lead directly to—to require—respect and gratitude for them. The biblical stories are no warrant for triumphalism. In any event, a better understanding of my own beliefs has led to and followed from a better understanding of the beliefs of others and the respect that is their due.

The other relationship is that to the person and work of Robert Cover of the Yale law faculty, who died long before what should have been the end of his life. One of the memorials to him is an annual study group. Another is a public interest law conference that I refer to in the next chapter. Aviam Soifer, a mutual friend, asked me to lead one of the study sessions. The only condition was that I had to address a text of my choosing. I elected a passage from the Gospel of Mark. The work I did on that text in preparation for the study group lies at the root of a later chapter of this book.

Cover was a Jew. I am a Christian. The choice of a tough, even opaque Christian text and my ensuing struggle to understand it was my way of paying tribute to Cover. We had only begun what promised to be a long, complex conversation about our two theological traditions. He was a student of both Jewish law and American constitutional law, and his later writings were as much essays in biblical-talmudic legal theory as they were essays in the meaning of law for American democracy. He took his theology and his law seriously and together. So do I.

Perhaps, too, there was some commonality of faith in the midst of our differences, or just out of sight beyond them, that, given time, might have been brought into view. Or might not have. The trying might have been the thing. In any event, as has also happened in the instance of Native Americans, respect for the other's faith and practice grew in conjunction with a deeper investigation and clarification of my own.

I begin this journey in chapter 1 with vignettes of seven people who work with law. Many other practitioners could have been written about in addition to these few, and as I think of those other friends now, I have once more the strong urge to include them. Also, much more could be said about the few whose stories have been selected. These are sketches. I hope that, although they are momentary and incomplete, they are nonetheless like snapshots that capture something of the person, the continuing work, and the larger life. I place them first because the emphasis is on these people and their labors. The subjects should stand on their own here as they do in life. They have their individual, complete value quite apart from any interpretation I might practice on them.

All seven, but some more than others, will likely disagree with what I make of them. I understand—have begun to understand—their work as indicative of the Word at work in the world. Because I do not employ the term *Word* in a religious sense, chapter 2 is devoted to distinguishing religion from the reality I am attempting to discern. It is in this chapter that I turn to *The Sound and the Fury, Beloved,* and other secular texts. I was surprised to discover how these texts illuminated the implications of the theological critique of religion mounted by Karl Barth. I suspect that Barth would be surprised, happily, to find himself in the agreeable company of Dilsey and Baby Suggs.

Readers of early versions of this chapter cautioned that I would need to identify Barth as a twentieth-century Protestant theologian from Switzerland and not an American author of long novels, a continental literary theorist, or a humorist (although the Barth I mean was full of genuine laughter). The advisability of such clarification is symptomatic of the difficulties that I or any serious student of theology must reckon with. Even during Barth's lifetime, his theology was thought by many to be inaccessible. I am no Barthian apologist and shrink from the wars fought among theologians, the *rabies theologorum* (although I do appreciate the need for intellectual rigor and dissent in theology as in jurisprudence). The simple fact is that I find Barth's work helpful and wonderfully freeing.

Chapter 3 is a brief afterword. It ties up some of the loose ends left by chapter 2 and attempts to clarify the meaning of a theological but nonreligious approach by addressing some of its implications.

Close reading of a hard text from Mark and an equally hard, related

one from Isaiah occupies chapter 4. The function of the chapter is to locate and give meaning to my usage of the term *Word,* a usage heavily dependent on the biblical notion of *dabar,* the powerful word, the word that accomplishes what it says. This is the reality I discern in the legal practices I describe at the start.

Chapter 5 is another brief afterword meant to clarify, by drawing them out, subjects introduced in the preceding chapter. It offers two contemporary examples of the phenomenon encountered in the text of Mark. One is taken from George Steiner's exposition of aesthetic meaning, the other from Robert Moses' jail-house experience during the struggle for civil rights in Mississippi.

The last chapter opens with a consideration of the deadening force of law and then returns to the vitality evident in the practices I described at the beginning. The book does not build to a great, enlightening climax at the end. My remarks about the common elements in the seven practices will be more or less plain observations about the obvious. As will be noted, I am influenced in the work of writing throughout by the structural example of Mark, and conclude, as does that text, with unresolved openings rather than finalized closures.

ONE

Seven Practices in Law

Henry Schwarzschild

The defendant's lawyer in a capital punishment case might bring a moral challenge to the court. As the trial or appeal begins, she might stand, say that she, as a lawyer, is an essential part of the process that proposes to kill her client, that she will not lend herself to it, and that she refuses to take part, and then walk out. Or so Henry Schwarzschild, provoking audiences of lawyers and law students, proposes as something to think about.

Decades of advocacy—of weighing in and staying and not walking out—have purchased for Henry the right to raise such hypothetical possibilities and expect that they will command serious attention. He has the appearance of a durable veteran from the ancient wars still at service: penetrating eyes intolerant of bombast and passivity, facial lines that mobilize easily to express by turns infectious good humor, remembered pain, resignation, impatience. He has dark hair and generous dark eyebrows. ("I wish I had a great shock of white hair," he says, a wish whose fulfillment is impossible to imagine.) He is a heavy smoker. In one interview he had torn the top off a box of cigarettes for the readier access his need demanded. Another time he had just finished at New York University an expensive course on kicking the habit but had proved incorrigible; with cigarette in gesturing hand and deep into conversation as well as tobacco, he unknowingly burned a hole in the visor of the vehicle I drove to pick him up. The smoking and years of talking have contributed to the rich timbre of his voice. He speaks with a gravity and resonance that would be ideal for intoning rites of solemn worship except that there is laughter riding just under his voice, and urgency. He dresses in the kind of dark suit that is ready to go anywhere, anytime: New York, Chicago, Jerusalem, Jackson, jail.

In 1960, he and his wife, Kathleen, had been in the small crossroads town of Richmond, Kentucky, visiting her mother (an old Kentucky-

Virginia family: Republican, DAR). Some black women had come to nearby Berea College, Kathleen's alma mater, to talk about holding a lunch counter sit-in in Lexington.[1] Henry had gone to hear them. A couple of days later he found himself driving through Lexington on the way home to Chicago. So he stopped by the sit-in and marched up and down in front of a McCrory's store, the lone white among blacks. He wore a sandwich board. He remembers a "hayseed" trying to make out the sign: In the labor of reading, his lips slowly, silently worked the words denouncing lunch counter segregation. There were no arrests.

Henry became engaged by the movement, but, he says, nothing much ensued until the next year, when he went on the Freedom Ride. A decade of civil rights action on the front lines had begun. He did time in Mississippi jails, became a friend of Martin Luther King, Jr., that way, and ran a civil rights lawyers' group from 1964 to 1969. By the close of the decade, he was worn out. He took refuge in jobs as a staff associate of the Field Foundation in New York and then as a fellow of Kenneth Clark's Metropolitan Applied Research Center. In 1972, energy restored, he took over as director of the ACLU's Project on Amnesty for Vietnam War resisters, a position that terminated with victory when Jimmy Carter granted amnesty after he became president in 1977. Henry had by then already begun work on the ACLU's Capital Punishment Project. He would be its director.

He was still operating out of that position when, not long ago, I paid him a visit at the ACLU's national headquarters on Forty-third Street in New York City. His office is minimal. He said he had recently been moved out of the space he had occupied for nine years, and then had been moved twice more. I expect that any of his quarters, however long he had been in residence, would give the impression of temporality, the momentary location of someone en route. In this room a small, institutional-gray metal desk with two drawers is crammed against a wall. At hand is an old typewriter on a stand. There are metal shelves, mostly empty, and three barely comfortable chairs. Letters and papers lie randomly strewn over most of the floor. Filled archival boxes are stacked around.

One of the boxes is open. It contains simply framed black-and-white photographs. In the first one I see, Henry wears dark glasses and a wide-brimmed straw hat of the type associated with Caribbean sugar-cane plantations and rum; he is in the shade of a tree with Martin Luther King, Jr., and others taking a roadside break from marching. In another, Henry is in the background. The foreground is occupied by a Mississippi highway patrolman and his rifle; the one word on his shoulder patch clearly visible is "VIRTUE." And there is a picture of Dr. King delivering the "I have a dream" speech at the D.C. Mall. Just to his

side, standing above Mahalia Jackson, is Henry. The last picture I pick up is one of the stage at a 1961 rally in Norfolk, Virginia. Here the roles are reversed: Henry is giving the speech, and Dr. King is listening. Henry had just been bailed out of jail in Mississippi and was embarked on a speaking tour. He had become, in this episode, William Kunstler's first pro bono client.

In his office now, Henry listens intently and talks easily and thoughtfully in response to questions. What had brought him to that Mississippi jail? There had been the sit-in at Lexington the prior year. What had prompted him to take part then?

His first conscious confrontation with racist treatment of blacks had occurred at a 1944 Passover seder at Fort Bragg, North Carolina. A recreation hall had been filled with 2,000 GIs, including Henry. They were being served by black soldiers. He comments, still exercised: "It is Passover, the celebration of liberation. I am off duty, and the blacks have extra duty." He got out of his seat, walked to the platform laden with VIPs, and, having expressed his outrage to the rabbi on hand, was told to sit down and shut up or be court-martialed. "I left. I was eighteen. I was not involved. It was a momentary impulse. It was the first confrontation."

Why that impulse? Where had that come from?

Henry was born in Germany and grew up in Berlin, the son, as he puts it, of an intellectual, political, theological family, a very old Jewish family that, records show, moved to Frankfurt from Cologne in the fifteenth century. His father had three impulses: pacifist, socialist, and Jewish. He turned toward his Jewish self. Henry was seven when Hitler came to power. The family left Germany for Paris after Kristallnacht in 1939, and then made it to New York two weeks before the war broke out. Henry was thirteen (his Bar Mitzvah had been scheduled for the Sabbath after the Kristallnacht weekend). Five years later he was drafted and on his way back to Germany via Fort Bragg and the offending Passover seder.

As a member of the U.S. Army's counterintelligence corps in 1944–46, he found a difficult moral problem in dealing with defeated Germany and Germans. "Here were people who had had to work. Their resistance to Nazism would have made no difference. They would have died without effect." But there was one lesson he meant to learn: "Whatever the cost, I would not live in a period of major moral, social events and be a bystander. That I would not do. The Germans had been bystanders. I would not be that kind of German." So when the Freedom Rides began, Henry was on board.

Henry has another way of talking about these things. He says he has been "an American Jew acting out of quasi-theological promptings who has deliberately, consciously played the role of witness." In the 1960s, "it

was important for blacks as well as society generally to know that the issues contested could not be resolved as a matter of race or skin color, that they were to be resolved in terms of generally applicable moral principles. I was there, a white, committed to act out of commitment to principle. I avoided the disappointment of white liberals who had come to be benefactors and then found that blacks were as thoughtful and as arrogant as everybody else is entitled to be. I was there because I felt moral responsibility. I took on the role of witness. And for the decade of the sixties that is what I did."

He became a regular commuter to the South. "I needed to be there so I would not have to think of myself as a bystander. I would not look at myself as I had at the Germans. This can be overdramatized, but there were three times during the Movement era when death was imminent: on the Freedom Ride, in Montgomery; in Philadelphia, Mississippi, during the Mississippi march; and during the Highway Patrol attack on us in the schoolyard in Canton, on that same march. I expected to be killed momentarily. Real life is not lived at this high a plane, but I was conscious of what was happening at the time and of what I was doing there as a witness to principle."

The spoken word and the specific deed are closely aligned for Henry; his life has been constituted by particular speech-acts. He was never what he describes as an "abstraction monger," but after the war and college, he did enroll in graduate school at Columbia to do political theory. How had he become involved in something for which he was so unsuited? He explains that he and his family were newcomers to this culture. In Europe, if you were a political animal and wanted to do politics, you would first do a graduate degree in political theory. It was not self-evident that in the United States the ticket to public affairs is a law degree.

He is not a lawyer in the narrow, technical sense of one licensed to practice in the legal profession. He did not attend law school. Generally mandatory though it now is, however, law school is not necessarily the only or best preparation for a life at law. Nor is it necessarily American. At various times in the first half of the nineteenth century, Massachusetts practically abolished requirements for admission to the bar, and New Hampshire, Maine, Wisconsin, and Indiana allowed anyone over twenty-one and of good moral character to practice. In 1835 Lysander Spooner called for overturning "the injustice and absurdity of the restraints" on bar admissions. He did allow that "a decent moral character" might be retained as the only requisite for admission, for the sole reason "that otherwise individuals might sometimes put themselves there, from whom the Court would be in danger of insult." On such terms Henry qualifies for licensure. He would not present to a court the risk of insult,

although he might well dispute the legitimacy of a tribunal prepared to kill a client. In any event, lawyer or not, he is very much a person of the law.[2]

In 1964 he had put together the civil rights lawyers' group, the Lawyers Constitutional Defense Committee, and so had joined his profession to his vocation. (He had been supporting his involvement in civil rights first as business manager for a North Shore Chicago Jewish congregation and then as publications director for the Anti-Defamation League of B'nai B'rith.) In the LCDC's first year, Henry persuaded three hundred lawyers, including Ed Koch, who went on to become the ex-mayor of New York City, to devote their vacation time to volunteer work in the South. For the rest of the decade, in addition to his own continued campaigning in the field, he deployed law and lawyers on behalf of civil rights.

Since 1972, law and arguments for changes in the law have continued to be integral to his life as well as to his work in the ACLU projects on amnesty and capital punishment. The first of these projects ended in victory. In his lifetime, the second will not. It is already the longest battle he has waged.

He recalls being opposed to the death penalty all his life. In the early fifties in Queens he had received a jury summons that bore two qualifying questions: Was the recipient male or female? (Women were excus*able* from jury service.) Against the death penalty? (Men and women opposed to capital punishment were excus*ed.*) He discussed with his wife-to-be the moral obligation of his answer. One person could hang a jury and prevent the death penalty. If Henry were seated in a capital case, he could be the one. But the opportunity would arise only if he gave a false reply on the form. "That was not a difficult dilemma. I did not hesitate." He identified himself as a male but not as one opposed to the death penalty. There was no capital case, and he did not serve on a jury.

A brief summary of the ACLU project describes it as a campaign to provide "vigorous advocacy against capital punishment." The "against" is important. Henry makes it clear that he is not an advocate for the people who have committed capital crimes. They are not nice people, and they have done terrible things. Henry is opposed to those terrible things. He is also opposed to the terrible thing of the death sentence. He is an advocate not *for* murderers but *against* the death penalty.

He is critical of people who claim they are opposed to capital punishment but who also claim they are obligated by the nature of their public calling not to act on that judgment. Some judges say that, as individuals, they are morally opposed to capital punishment and would vote against it if they were legislators. As judges, however, they claim