

# The violence of wording: Robert Cover on legal interpretation

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Robert Cover's work is of seminal importance because it opens up a new field of research, and offers a fresh perspective on the practice of law, and thus on the task of legal theory. Cover both emphasises the violence(s) bound up in the practice of law, and especially that of judging; and denies that there is a unitary political community by reference to which such violence could be legitimated or transformed from force to authority. In this regard, Cover could be perceived as responding to Foucault's observation that 'justice no longer takes public responsibility for the violence bound up with its practice' (Foucault 1979, 16), precisely by demanding that 'justice' – and the legal practice within which it is manifested – reconsiders this refusal. Law, according to Cover, cannot be properly understood without acknowledging its connection to – and mediation by – physical violence.

But physical violence tells only half of the story of law, for law is destructive not only at the physical but also at the epistemic level. As Minow has noted, 'Cover's [...] work embraces plural sources of beliefs and values with their accompanying conflicts and power struggles' (Minow 1995, 1). In other words, Cover recognises that under the unifying claims of the legal order there exists a variety of different peoples and groups, each constituted by their own beliefs and commitments. He also recognises, however, that neither law nor 'mainstream' legal theorising perceives or accommodates such peoples and groups. Instead the law is generally claimed to apply impartially and equally to all. From Cover's perspective, that claim is simply untrue.

Cover is interested in both forms of legal violence, and especially on the bridge between them; that is, the way in which the operation of epistemic violence facilitates the authorisation of physical violence. It is in bringing to light the link between physical and epistemic violence, that he makes his most important contribution, by reminding us of the latter, of the existence and impact of violence in legal interpretation.

However, in setting out to create a law which is ‘homicidal and not juristic’, a law which kills ‘only’ people, and not thought, perspectives, and world views, Cover demonstrates just how high the stakes are. The law must be physically violent (Cover 1986, 1628), and any unitary law will also tend towards epistemic violence – denying the laws and commitments of the smaller communities (peoples and other groups) living under its shadow and protection. But these acts of violence, of non-recognition and destruction, will themselves go unrecognised because of the self-perception of the unitary law and its agents.

Thus, Cover reminds us that we do not know what we destroy with epistemic violence, but implies that, by focusing on the actual – the physical and observable – violence inherent in the enforcement of legal judgments, we can at least recognise, and ideally better understand, the epistemic violence on which the physical violence of law depends. Unfortunately, we can have no lived experience of the communities we would regulate, judge, even destroy. It is for this reason that we cannot even recognise epistemic violence, and for that reason that Cover suggests that we look to physical violence as a cue. Even if we are unaware of what we would destroy, at least we could be aware of the fact that we are destroying something; for destroying things is what the law does.

The State has power, and can establish law, but it does not delimit the possibilities of human life. Indeed, on Sarat and Kearns analysis, Cover:

Wrote as if by insistence and repetition he could help his readers know and feel the possibilities for human social life that are all too often erased by law’s violent impositions. (Sarat & Kearns 2001, 53.)

We still cannot understand the worlds we might destroy; however, as a surrogate, Cover suggests, or implies, that we should *live* the experience of our own lives, see beyond law, beyond liberalism, understand existence in a (in any) world of strong normative meaning. In this way, we could learn to value strong meaning *per se*,<sup>1</sup> and thus sensitise ourselves to the consequences of its destruction. In this way, law and its agents, most especially judges, could better accomplish what for Cover is their central task: to facilitate openness and normative plurality under the co-ordination of a centralised (but minimal) legal regime. As Minow puts it:

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<sup>1</sup> Strong meaning is akin to the ideas of ‘the good life’ which liberalism acknowledges – and attempts to maintain a conceptual space for – but never understands or commits to.

Cover set[s] in motion [a] captivating argument [...] [that the] imposition of the state's norms does violence to communities, a violence which may be justifiable but is not to be preferred a priori. (Minow 1995, 2.)

In other words, the State ought to *recognise* alternative, sub-state, normative orders. It may still regulate these, but only in a manner which is 'justifiable'. This is a noble task, and one also pursued here. It is not, sadly, a task which Cover accomplishes, nor could it be accomplished within the intellectual schema he develops.

As Sarat and Kearns demonstrate, Cover misunderstands, or at least underestimates, the link between the physical and epistemic violences. He does not recognise the manner in which the epistemic justifies the physical, and so cannot itself be justified by reference to the physical. They demonstrate that Cover's solution cannot work. But that does not mean his identification of the problem was wrong; nor does it take away the vocabulary he gave us to engage with these issues; the vocabulary of epistemic violence, of pain and death, of the reality of epistemic destruction.<sup>2</sup>

The complex interaction of physical and epistemic violences identified by Sarat and Kearns can be illustrated through an analysis of the international economic order and international human rights; neither system, neither discourse, can give an accurate picture of the needs of humanity, neither deserves strong commitment, but both seek and receive it nonetheless. Both claim to represent a complete picture of the world; both, in Cover's terms, operate as *nomoi*. Nonetheless, Cover would be likely to class each as Imperial forms of law, to present each as demonstrating the proceduralist neutrality of competing visions of liberalism; the framework within which systems of strong meaning could co-exist. This is precisely where Cover's central error lies: he fails to recognise the epistemic violence inherent in liberalism. In light of its apparent lack of the intensity of lived experience, Cover does not acknowledge the *extent* of the epistemic violence of liberalism; its demands for strong commitment, and his and his (ideal) judges' embeddedness within it.

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<sup>2</sup> The theses that judges are men of violence, that legal interpretation is an epistemically violent act, that law application is a physically violent act, and that these two violences are interlinked have their genesis in Cover's '*Nomos* and Narrative'. However, it is with the development and application of these theses in the later 'Violence and the Word' that the importance, but also the weaknesses and limitations, of Cover's project come to light. It is the tension between these two papers which provides the focus of the present analysis.

Nonetheless, Cover has demonstrated the existence of a real problem and a real issue; he has shown how judges and interpretation are implicated; and he has provided a vocabulary within which this implication can be recognised for what it is, an act of unjustified violence. However, his analysis is incomplete, for he has not examined the limits of the judges' implication. He has not examined the implication of the law itself, the text of the law and the procedures by which it was created and recognised. Cover's analysis is incomplete, as it has not accurately portrayed the manner in which liberal epistemic violence operates. Had he done so, he might have realised that it operates twice; and that the violence of interpretation is *derivative* upon the primary violence of law creation.

Cover is not alone here, the unreflected acceptance of a reified text or practice, and/or the image of civilised humanity which this embodies, is a common failure in political theory. Thus Cover's error is analogous to that which undermines Peter Jones' thinking. Both theorists realise that something is required to mediate our thinking in relation to groups whose world views we cannot engage directly. That is, both recognise the existence of (ultimate) and irreconcilable epistemic commitments; both recognise the limitations in thought entailed by the absence of lived experience. Both seek to ameliorate these limitations. However, in order to do so, each relies on a fixed set of categories. It is this taking for granted of categories in Jones' case, and texts in Cover's, which undermines their respective analyses, and thus perpetuates an unjustified epistemic violence. It is in moving beyond such fixed categories, and reified texts, that we can see the outlines of a solution. But before this can be developed, attention must turn to the theses themselves.

### Cover's thesis

Cover's central question is: how can we maintain community in a world where knowledge and ethics are no longer unitary? His answer is procedural, or deontological, in nature: we can do so by sustaining a legally regulated pluralism. To maintain this position, Cover relies on a series of dichotomies, and in particular on those between: 'Imperial' and '*paideic*' communities; 'system creating' and 'system maintaining' forces; and 'weak' and 'strong' commitment to those forces.

The Imperial community is the greater community, the overarching community, the State which plays host to the smaller, but more vital or intense, *paideic* communities. This community is regulated by system maintaining rules, i.e. by a law which imposes, or at least maintains, order without destroying plurality. This commitment to avoid destruction is made clear by Cover:

The universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining ‘weak’ forces. They are virtues that are justified by the need to ensure the coexistence of worlds of strong normative meaning. (Cover 1983, 12.)

Moreover, these are virtues to which the members of Imperial communities grant only a weak commitment. They are embodied in laws which are perceived and understood only as systems of rules. The *paideic* communities are the antithesis of the Imperial, they are the creators and bearers of the ‘worlds of strong normative meaning’, which the Imperial community protects:

The systems of normative life that they maintain are the products of ‘strong’ forces: culture-specific designs of particularist meaning. These ‘strong’ forces ... create the normative worlds in which law is predominantly a system of meaning rather than an imposition of force. (Cover 1983, 12.)

Thus, where the Imperial community is pluralist, and organised around ‘weak’ system maintaining forces, to which its members owe no more than a weak commitment, the *paideic* community is unitary and organised around ‘strong’ system creating forces, to which its members bear a ‘strong’ commitment:

The point that is relevant here is not only that private lawmaking takes place through religious authority, contract, property, and corporate law (and of course through all private associational activity), but also that from time to time various groups use these universally accepted and well-understood devices to create an entire *nomos* – an integrated world of obligation and reality from which the rest of the world is perceived. At that point of radical transformation of perspective, the boundary rule – whether it be contract, free exercise of religion, property, or corporation law – becomes more than a rule: it becomes constitutive of a world. (Cover 1983, 31.)

This idea of *nomos* is critical to Cover’s work, and captures the essence of the *paideic* community. The critical point is that while a *nomos* is a form of law, it is far more than a mere system of rules, which may or may not be applied to a particular setting. Rather, a *nomos* is ‘an integrated world of obligation and reality *from which the rest of the world is perceived*’; a *nomos* is an epistemic grid,<sup>3</sup> it is a way of making sense of the world, not merely a technique for evaluating it:

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<sup>3</sup> Cover appears to underplay the extent to which all cognition manifests epistemological commitments; i.e. the extent to which all ‘facts’ are theory dependent constructions. This is as true of Imperial as it is of *paideic* law, as true of liberalism as it is of religious fundamentalism. Nonetheless, within Cover’s (flawed) schema, a *nomos*

Law becomes not merely a system of rules to be observed, but a world in which we live [a *nomos*]. [...] This *nomos* is as much 'our world' as is the physical universe of mass, energy, and momentum. (Cover 1983, 5.)

It is that quality which distinguishes between the 'weak' commitment owed to imperial law as a system of rules, and the 'strong' commitment owed to *paideic* law as a system of meaning.

Cover does not look to the genesis of either form of community. He fails to shed light on the dynamics of world creation, but simply takes the existence of this plurality of communities for granted:

For Cover, the world outside law is an already constituted social world of communities and associations, each articulating a distinct vision of the good and encouraging commitment to that vision, rather than a world of isolated and alienated individuals. (Sarat & Kearns 2001, 55.)

That is, Cover assumes people to be always already embedded in communities of strong normative meaning. He does not look at the role of law in the *constitution* of the people: 'Jurisgenesis is a process that takes place in communities that already have an identity' (Cover 1983, 50, footnote 137). In other words, Cover appears to reject any idea akin to that of *praxis*;<sup>4</sup> he assumes that, although groups construct their members, the groups themselves have a fixed identity, which is reflected in their law. Normative pluralism is a symptom, not a cause. However, this is a positive state of affairs, and thus, the central issue in Cover's work is a variation on the quintessentially liberal dilemma of the tension between the individual and the group. It is the problematic of how we can constitute and maintain a group, how we can create and sustain the conditions for an over-arching group solidarity, while at the same time recognising and valuing difference between the various (sub)groups. In Cover's analysis, the most valuable difference is not the specificity of individual human beings, but the world views constructed and maintained by distinct sub-groups and, more importantly, the normative advantages of recognising these. There are two types of sub-groups, which Cover

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is equivalent to what MacIntyre has termed a 'culture'; and 'to share a culture' is, 'to share schemata which are at one and the same time constitutive of and normative for intelligible action by myself and are also means for my interpretations of the actions of others'. MacIntyre 1977, 453.

<sup>4</sup> Praxis is the coming together of theory and practice which claims that consciousness can evolve only in its relationship with lived experience (practice).

identifies as ‘insular’ and ‘redemptive’ communities.<sup>5</sup> Such communities are groups, presupposed as extant, presumptively good, and also efficacious. These groups help to construct their members’ world views.

Consequently, Cover suggests, it is the task of the Imperial community to respect and protect *paideic* communities to the greatest extent possible. However, he also acknowledges that the ultimate purpose of the Imperial community is to maintain order. Pluralism should be valued, but it must also be regulated and circumscribed because it represents the constant threat of descent into conflict. This task is accomplished or subverted by the act of judicial interpretation. This is where Cover’s proceduralist inclination is most apparent. The role of the judge is to interpret and apply the rules laid down by the law; but to do so in a manner which, to the largest extent possible, promotes the recognition of pluralism. Cover, in effect, endorses a manifestation of the proportionality principle; with all the disguised violence and subjectivism which that entails.

However, Cover also acknowledges two primary constraining influences on this process of judicial interpretation: first, law is *necessarily* physically violent:

As long as death and pain are part of our political world, it is essential that they be at the centre of the law. The alternative is truly unacceptable – that they be within our polity but outside the discipline of the collective decision rules and the individual efforts to achieve outcomes through those rules. (Cover 1986, 1628.)

Second, there is no objective truth:

But the Temple *has* been destroyed – meaning *is* no longer unitary; any hermeneutic implies another. Keeping the peace is no simple or neutral task.<sup>6</sup>

Therefore, we have a non-neutral State, but within that state we have a plurality of groups; and each group possesses its own normative order, consequently we have a situation of legal pluralism. Both the State and the plurality are ‘good’. However, although this normative overabundance is epistemologically good, it is politically pathological. This is because it may be that there are basic contradictions between the world view of the State and those of the smaller communities comprising

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<sup>5</sup> This is another flawed, or at least radically overstated, dichotomy, see *infra*. ??

<sup>6</sup> Cover 1983, 60. I assume that the reference is to the Temple at Jerusalem, the seat of Jewish worship of Jehovah, and the unity of knowledge before the tribes of Israel were scattered. See, *Oxford English Dictionary* ‘Temple’ definition (b). See also, <<http://www.templemount.org/solomon.html>>.

the state. And it may be that these basic contradictions cannot be resolved. As Cover warns, there is a:

Danger in forgetting the limits which are intrinsic to [...] legal interpretation, in exaggerating the extent to which any interpretation rendered as part of the act of state violence can ever constitute a common and coherent meaning. (Cover 1986, 1628.)

In other words, sometimes one meaning has to be privileged over another. Where compromise fails, order must nonetheless be maintained, thus decision and imposition must take over.<sup>7</sup> Therefore, the ‘Imperial virtues’ come to the fore;<sup>8</sup> judges/courts are called upon not to create law, but to destroy it. The law (for Cover, the US Constitution) is subject to many interpretations, *paideic* communities seek recognition and protection within these interpretations. However, where their interpretations are rejected, their particular form of life, their *paideic* community, is circumscribed (only a certain, and controlled, amount of ‘deviance’ is acceptable as pluralism). Consequently, their *nomos* is rendered contingent; it is compromised and perhaps even destroyed. The demands of Imperial law are hierarchically superior, and implacable. This prompts Cover to speak of law’s ‘Jurispathic’ function:

It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle that creates the problem to which the court and the state are the solution. (Cover 1983, 40.)

## **The fecundity of the jurisgenerative principle and the violence of law**

The act of interpretation is a violent act: in affirming one interpretation it destroys all others. Moreover, not only the interpretations, but also the *nomoi* they manifest come under attack. Cover seeks to explore the effects of this act of interpretative violence, and in particular its realisation as an act of *physical* violence in the world.

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<sup>7</sup> Although important, these insights are, it must be acknowledged, hardly original to Cover. The points do bear repeating, but have also been said, quite bluntly, by *inter alia*, Hobbes (*Leviathan*) and Schmitt (*The Concept of the Political*).

<sup>8</sup> On the ‘Imperial Virtues’, see Cover 1983, 13, and 60-67.

To accomplish this, he sets himself the tasks of first mapping and understanding, and then ‘domesticating’ these violences. However, his aim is to mitigate or eliminate epistemic rather than physical violence. To create a law which is ‘homicidal but not jurispathic’.<sup>9</sup> A law which kills only people, not ideas or worldviews. A law which is physically, but not epistemically, violent.

In other words, Cover, having accepted that the law must be physically violent, seeks a technique by which this violence can be legitimated. In doing so, he brings into relief the *human bridge* between the epistemic violence of interpretation and the physical violence inherent in the execution of the law. Furthermore, he recommends that the judges focus on this bridge itself. By assessing their (the judges’) relationship with the ‘warden and the executioner’ (the ‘roles’ whose incumbents will physically impose the judges’ authoritative interpretations onto their victims) the judges will sensitize themselves to the existence and effects of the epistemic violence inherent in their interpretative activity. Consequently, for Cover, the essence of the Judicial task is to foster openness:

We ought to stop circumscribing the *nomos*; we ought to invite new worlds.  
(Cover 1983, 68.)

The effect of focusing on the *implications* of their decisions will be to chasten the adjudicators. Cover hopes that the judges will thus learn to be more tolerant of difference, Sarat and Kearns have doubts:

Cover could imagine judges gearing up and governing an apparatus of pain-imposing, death-dealing force in one moment, and then judiciously tolerating diverse and provocative normative visions the next. (Sarat & Kearns 2001, 66.)

Nonetheless, Cover believed his approach could effect a reduction in violence. He saw this potential maintained in the possibility of judicial focus upon the human bridge between the epistemic and the physical violence. The judge, in Cover’s analysis, must remain attentive to *what* he is legitimating and this knowledge should feature within – and therefore limit, correct, or mitigate – his reasoning and judgment.<sup>10</sup> That is, a judicial readiness to contemplate the exculpation of the executioner, to allow the executioner to justify his actions (at least to himself), may issue in a greater tolerance. Cover makes this plain when he states:

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<sup>9</sup> Sarat & Kearns 2001, 50. See also Cover 1986, 1610, esp. footnote 22.

<sup>10</sup> Cover 1986, 1628, footnotes 43-48 and accompanying text.

In order to maintain these critical links to effective violent behaviour, legal interpretation must reflexively consider its own social organization. In so reflecting, the interpreter thereby surrenders something of his independence of mind and autonomy of judgment, since the legal meaning that some hypothetical Hercules (Hyporcules) might construct out of the sea of our legal and social texts is only one element in the institutional practice we call law. Coherent legal meaning is an element in legal interpretation. (Cover 1986, 1617-1618.)

But, coherent legal meaning cannot be an end in itself, because it cannot take the place of truth. Cover is far more alert to the *necessary* epistemic violence of legal interpretation than is, for example, Dworkin. Unlike Dworkin, he is ready to acknowledge the double impact on the *loser* in the adjudicative setting: not only their normative world, but also their physical well-being are under threat. Moreover, these two violences are linked, because coherent legal meaning:

is an element potentially in tension with the need to generate effective action in a violent context. And neither effective action nor coherent meaning can be maintained, separately or together, without an entire structure of social cooperation.<sup>11</sup>

It might be that Cover intuits the contingency of liberalism, and its consequence, the necessary violence of the interpretative act.<sup>12</sup> Nonetheless, Cover also remains embedded within liberalism; he remains a procedural liberalist,<sup>13</sup> just a more sensitive one than Dworkin.

Cover is, of course, correct that Hyporcules will not create the effects he desires by merely imagining he is doing so, and so, of course Cover is also correct that the judge must focus on the implementation of his orders. However, there is another, deeper, flaw in Dworkin's approach, a flaw caught perfectly in Cover's sarcastic re-Christening of the Dworkinian hero: Hyporcules. The hypothetical judge relies on another hypothesis: the hypothesis of the unity of knowledge,

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<sup>11</sup> Cover 1986, 1617-1618. Two points merit emphasis here, first is the re-iteration of Cover's commitment to the Realist thesis that law is what is enforced; the second is the repeated gesture toward the disciplinary function of law as facilitating and legitimating its coercive function.

<sup>12</sup> On the contingency of liberalism, see Rorty 1989.

<sup>13</sup> By this I mean simply that Cover continues to believe in the necessity and utility of an 'Imperial' legal system, and presents the plurality of alternative normative/legal orders as existing below, and subject to, that over-arching (and ultimately unitary) state legal order. Put differently, he continues to believe in the potential legitimacy of the imposition of the state system, provided only that certain safeguards are met.

Dworkin – most especially to maintain his ‘single right answer’ thesis<sup>14</sup> – must hypothesise the resurrection of the Temple, and in doing so must *both* assume *and* preclude the unity of knowledge. Only in this way can Hyporcules hide his own hypocrisy: by denying, or disguising, the destruction of knowledges he cannot recognise.

But knowledge *is* no longer unitary, and that is the burden Cover tells us we must bear. Nonetheless, order must be imposed, by physical violence if necessary. That violence must be authorised by a legal decision (itself manifesting the epistemic violence which is entailed by interpretation). Consequently, that decision must be legitimated. This legitimacy can, on Cover’s account, be found by evaluating the justifiability of the *effects* of the legal judgment.

This *modus operandi* encourages sensitivity to the link between epistemic and physical violence, and one effect of this is that the analysis of the legitimacy of one violence can help in the evaluation of the legitimacy of the other. Such, at least, is Cover’s thesis, but it is a thesis based on unstable foundations. This is because the series of dichotomies on which it is predicated, although necessary to the logical structure and rhetorical force of Cover’s argument, are not sustainable. The dichotomies between ‘*paideic*’ and ‘Imperial’ communities, generating respectively the ‘strong’ and ‘weak’ forces of system creation and system maintenance, which give rise to ‘strong’ and ‘weak’ forms of commitment on the part of their members cannot be maintained.

However, before engaging a critique of Cover, it should be noted that his thesis represents a distinct advance over the Rawlsian<sup>15</sup> or Habermassian claims of the neutrality of liberalism or deliberative democracy.

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<sup>14</sup> I do not believe this thesis to be separable from the (living) body of Dworkin’s work. To abandon this claim would be to abandon the political justification of the Dworkinian project, the preservation of the separation of powers *entails* (for Dworkin) that judges may not legislate. On this point, see Gardner 2001, 214.

<sup>15</sup> It could be argued that the ‘later Rawls’ – the Rawls of the 1980 *Dewey Lectures* and of *Political Liberalism* – had abandoned, or moved beyond these claims. Nonetheless, the most influential Rawls, the Rawls of *A Concept of Justice* clearly relied on such a claim. Moreover, the very last Rawls, the Rawls of *The Laws of Peoples* clearly reverted to some form of the strong claim of liberal neutrality, and the legitimacy of liberal judgement.

## **The limits and paradoxes of Cover's thesis: Sarat and Kearns' critique**

Cover's work has been subjected to a searching critique by Sarat and Kearns. This critique is valuable, but also contains limits and weaknesses of its own. Consequently, I shall be drawing on and refining the critique to offer a better understanding of Cover's thesis. However, I shall also attempt to problematise and move beyond this critique, in an attempt to rescue Cover's project from its indiscriminate, and sometimes unnecessary, destructiveness.

The instability of the dichotomies on which Cover relies forms the core of Sarat and Kearns' critique. They demonstrate that, within the limits of his analysis, Cover's ambition of an epistemically non-violent law is a forlorn hope; because the very forces to which Cover appeals are those which undercut his hope. Cover radically overestimates the distinction between 'weak' and 'strong' forces. This would be a not uncommon confusion of the familiar with the natural, but may explain some of the difficulties which plague Cover's engagement with epistemic violence. Even so-called 'weak' forces engage in the violence of exclusion. That is, the strong/weak dichotomy cannot be maintained, and consequently (like the Imperial/*Paideic* dichotomy) cannot carry the burden Cover's thesis requires; even in regard to the so-called 'weak forces', 'law is predominantly a system of meaning rather than an imposition of force.' Granted:

Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. [...] Taken by itself, the word 'interpretation' may be misleading. 'Interpretation' suggests a social construction of an interpersonal reality through language. But pain and death have quite other implications. Indeed, pain and death destroy the world that 'interpretation' calls up. (Cover 1986, 1602; see also 1609.)

Cover is correct that an attentiveness to its violent consequences will focus the judge's mind during the act of interpretation. Consequently, this awareness may mitigate against that violence, may cause the judge to seek an openness, a recognition of plurality; a 'tolera[nce] of diverse and provocative normative visions' in preference to an imposition of violence that can never be justified to its victim. The act cannot be justified (to its victim(s)) because its very existence presupposes the destruction of the victim's normative world.

Cover addresses clashes between ‘frameworks’ or world views.<sup>16</sup> He argues that, where a dispute concerns matters of common concern, dialogue is possible. This remains so notwithstanding the fact that very different interpretations, even *Weltanschauungen*, will be in play. The difficulty arises when these *Weltanschauungen* come into open *conflict*. Then, in at least some cases, dialogue must be abandoned, the violent act *will* be required: order must be maintained. When this is so, the judge must offer a moral justification to the executioner. However, to do so, the judge must substantivise his commitment to the State legal order. To activate the ‘Imperial Virtues’ one must accept the legitimacy of the Empire. The result of this movement, is that the judge reaffirms, re-inscribes, and strengthens his commitment to the State legal order, because ‘the presence of violence requires what might be called strong justification for legal acts’ (Sarat and Kearns 2001, 69). As a result, ‘Legal interpretation that contemplates violence must tell a story that tends to “objectify” the demands it would enforce’ (Sarat and Kearns 2001, 69). Moreover:

It is difficult to contemplate such stories without recalling Cover’s discussion of the creation of legal meaning, a process, he said, that involves commitment, identification, and objectification. (Sarat & Kearns 2001, 69)

Two crucial things have happened here. First Sarat and Kearns have introduced a paradigm shift, transforming Cover’s focus on the psychology of violence (Cover 1986, 1614-1615) into a moral question of the justification of violence. Second, this shift has brought to light the nature of the judge’s implication in this process. Although this point had been acknowledged by Cover:

Any account which seeks to downplay the violence or elevate the interpretive character or meaning of the event within a community of shared values will tend to ignore the prisoner or defendant and focus upon the judge and the judicial interpretive act. Beginning with broad interpretive categories such as ‘blame’ or ‘punishment,’ meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence. I do not wish to downplay the significance of such ideological functions of law. But the function of ideology is much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims. (Cover 1986, 1608.)

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<sup>16</sup> On the idea of ‘frameworks’, see Popper 1994.

In other words, ideology functions to disguise reality from its *beneficiaries*;<sup>17</sup> the ideological structure functions as a *nomos*, generating strong commitment; consequently, even Imperial law is ‘predominantly a system of meaning’, a way of making sense of, and justifying action within, the world. However, that point is unrecognised by Cover, for whom the importance of the judges’ embeddedness was disguised behind the strong/weak dichotomy. This dichotomy functions to disguise, or at least obscure, the true nature of judicial commitment (strong) simply because the object of commitment (the liberal world view) is one in which Cover shares the judges’ embeddedness; and so cannot recognise it. Only ‘alien’ commitments *appear* as strong commitments. Failure to recognise this allows Cover to believe that the (false) dichotomy could ‘neutralise’ the violence of the ‘weak’ forces:

In the world of the modern nation-state – at least in the United States – the social organization of legal precept has approximated the imperial ideal type that I have sketched above, while the social organization of the narratives that imbue those precepts with rich significance has approximated the paideic. (Cover 1983, 16.)

That is, ‘our precepts’ are limited and controlled by our *institutional* commitment to the liberal ‘faith’ of pluralism and toleration (see Fish 1999). However, and most importantly of all, what Sarat and Kearns’ analysis highlights is the effect that the *necessity* of this process of moral justification has *on the judge himself*. The judge must commit to the legal order, he must (learn to) believe in the law.<sup>18</sup> The violence of interpretation is not neutralised, but simply disguised and denied:

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<sup>17</sup> I am less convinced than Cover that this is the primary function of ideology. While it is certainly a function, I believe the requirement of legitimating exploitation to the exploited, and keeping the oppressed docile, to be more fundamental to the working of an ideology. That is, the primary ideological function of law/justice is to distort ‘reality’ for those who suffer to *obey* the law, by not stealing, begging, striking, etc. Such a function also operates against those forcefully opposing Governmental policy (e.g. War) or Globalisation. But, on the other hand, the ideology also functions to underpin the righteousness of those (the indirect beneficiaries of exploitation) whose ‘lives’ (i.e. convenience) would be disrupted by such protests. See also, Sarat & Kearns 2001, 71, note 49 and accompanying text, *infra*. On the function of ideology generally, see Eagleton 1991.

<sup>18</sup> This would appear to be a pragmatic, rather than a conceptual, claim. In either case, no support is offered, but interestingly, the debate echoes a disagreement within (Hartian) legal positivism. Like Sarat and Kearns, Hart *assumed* a requirement that judges bear Strong Commitment to the legal order, that they must hold a ‘committed’, rather than merely a ‘detached’, ‘internal point of view’; Kramer disputes this necessity

The consequence of this fact is transformative; it promotes an imperialistic relationship between the legal order [...] and normative communities whose ideas are at odds with what the law requires. In the face of such challenges, and spurred on by the strong justifications generated to sustain its own violence, the legal order becomes aggressive in its insistence that what it proclaims as right is *the* only acceptable version of right. (Sarat & Kearns 2001, 69.)

Moreover, *any* legal interpretation desiring realisation in the ‘real’ or ‘physical’ world *must* contemplate violence. Thus, where Cover saw the contemplation of violence as the impetus to attentive judgement, Sarat and Kearns demonstrate that it is in fact the opposite. As the judge is required to generate strong justifications it is not sufficient to show that his ‘decisions are technically sustainable, but [also] that they merit *imposition* against those who might resist, that they are worthy of being lived in and through the pain that is done in their name’ (Sarat & Kearns 2001, 69-70). In other words judges must confirm, consolidate, and commit to the Statist law; the Statist *nomos*.

That is where the paradox lies. According to Cover ‘Creating legal meaning [...] requires [...] dedication and commitment, but also the objectification of that to which one is committed’.<sup>19</sup> This, Cover tells us, is necessarily true of the ‘insular’ and ‘redemptive’ communities who comprise the minorities in pluralist States. Sarat and Kearns’ point is that it *must* therefore be no less true of the judges who maintain the Statist legal order. However, to ‘objectify’ that order, is to elide the State’s *nomos* with truth. As this occurs, the competing *nomoi* are likely to be perceived as falsehood. This is a question of degree, however, as the process continues toward the approximation of truth – as the judges’ interpretations harden into ‘truths’ – so the other interpretations (the competing *nomoi*) increasingly take on an unreal, whimsical, appearance. At its logical conclusion, this process must recognise the competing *nomoi* as falsehoods. Consequently, they merit no respect. Cover’s thesis tends toward the imposition of homogeneity, not the celebration of difference within plurality. As Sarat and Kearns conclude:

Law’s capacity to be homicidal tends, against Cover’s fervent hope, to make it jurispatic as well. (Sarat & Kearns 2001, 71.)

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(see Kramer 1999). Within the empirical and self-referential nature of the Hartian methodology, Hart is correct; absent strong commitment the rule of recognition cannot be maintained as a social fact. Outside the strictures of Hartian methodology the position is less clear.

<sup>19</sup> Cover 1983, 45, quoted in Sarat & Kearns 2001, 70.

Consequently, the central tension in Cover's work – the tension between the desire for 'openness', 'tolerance' and 'plurality' in the constitution of the people and the reductiveness inherent in the structure of law – is unresolved; or worse, resolved in favour of reduction. Law maintains its:

Disposition to be hostile to the visions of other normative orders, contrary to the plea at the end of 'Nomos and Narrative' 'to stop circumscribing the nomos' and 'to invite new worlds.' It appears, then, that violence ties thought to action and, as a consequence, makes law less tolerant of multiplicity and difference. (Sarat & Kearns 2001, 71.)

This is an unfortunate state of affairs. The subtext of Sarat and Kearns' critique would appear to be that Cover chose the wrong strategy: 'domesticating' violence through law was impossible. Instead, perhaps, Cover should have sought a non-violent, redemptive law.<sup>20</sup> However, it is also important to understand the structure of the paradox in operation here, as it is only from that understanding that a resolution could be framed. The paradox itself can be simply stated:

1. The act (of interpretative and physical violence) cannot occur *unless it is justified*.
2. The act *cannot be justified*.
3. The act did, nonetheless, *actually occur*.

This entails that something must *function as a justification* (for the act). This 'something' can only be the judge's and executioner's shared commitment to the 'weak forces' maintaining the system. It is these 'weak forces', and the system they constitute, which must be 'objectified'. Consequently, the 'weak forces' cannot but operate as 'a system of meaning' – over-writing all other systems, listening only to its own justifications; in its own register. This leads inexorably to Sarat and Kearns' overarching claim, that there *must* (logically, conceptually, and/or epistemically) be a strong commitment. The weak/strong dichotomy collapses, and a strong commitment becomes inevitable.

It has been suggested, by Minow amongst others (Minow 1995), that these distinctions should be understood not as binary opposites (let alone as dichotomies) but rather more as 'ideal types' conceptually delimiting the opposite ends of a series of continua. This is of course a plausible interpretation of Cover's work, but it seems to me, it does little or nothing to undermine Sarat and Kearns'

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<sup>20</sup> Cover, however, had already discounted this possibility, see Cover 1983, 14.

critique. Whether as binaries, dichotomies, or continua, the distinctions in question simply cannot be maintained, and, in fact, merely serve to disguise an underlying identity between the so-called poles. Thus even Imperial (or civil) communities contain and embody a *paideic* strand.<sup>21</sup>

There are thus two distinct ways of understanding Cover's analysis. The first relies on a sharp distinction between the Imperial and the *paideic*, and thus 'refutes' Cover's analysis by demonstrating the untenability of that distinction. The second reading is more subtle, suggesting that even when judges attempt to operate within the Imperial model, the *paideic* strand which gave birth to that Imperial order (and which is thus embodied *within* Imperial thought) must ultimately assert itself. Although more nuanced, the second approach must itself, ultimately, collapse into the first. Dichotomies and continua are tenable, or they are not; syntheses can disguise, but cannot escape, that fact. Imperial communities *are* disguised (and perhaps 'diluted') *paideic* communities.

In short, Cover's thesis could be stated simply: attentiveness to the effects of, and conditions for, the external (physical) violence of law generates a disposition against the exercise of the internal (epistemic) violence of law (the violence of imposed interpretation). Consequently, such attentiveness encourages movement towards a recognition of, and tolerance for, plurality.

Thus for Cover, the key lies in engendering *in judges* an attitude or disposition toward sensitivity for the impact on those against whom judgment will be rendered and imposed, against whom judgment may be physically *enforced*. The possibility (or necessity) of physical violence thus acts as a *signifier* for the implicit (and otherwise invisible) epistemic violence which judgment and enforcement presuppose and require. Attention to this signifier should serve to concentrate judicial focus, engendering the desired sensitivity.

Sarat and Kearns offer an exact anti-thesis: such attentiveness is impossible; it is precluded epistemologically and institutionally.

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Academic analysis of the conditions for the successful transmission from internal to external violence reveals this impossibility. The judge must *believe* in the system in order to unleash its violence. The judge must accept the *truth* of the system to activate its murderous splendour. This, necessary, embeddedness militates against tolerance, and in favour of the imposition of homogeneity in the name of ‘truth’. Judges must be callous (inattentive) simply in order to function. That is why it is a good thing that they do not have to punish their victims personally.<sup>22</sup> To do so would undermine their commitment to the truth of the system. However, the system cannot operate without this strong commitment, and the system must operate if order is to be maintained.

The focus on the violence of interpretation is insufficient, the analysis engages *after* the problems have been caused. Cover is quite correct – as are Sarat and Kearns – that interpretation is an act of violence, but he underplays the fact that *all thought* is an act of violence. Interpretation is simply one manifestation of the inevitable violence of intelligible thought. *Moreover*, interpretation is, itself, a limited act of violence, and it is limited institutionally not only by the conditions under which its epistemic violence can be translated into physical violence, but also by the law itself. Interpretative violence presupposes and relies upon a strong commitment on the part of the interpreter. Violence of this sort is inevitable, but ought to be justified; but that simply opens the question of what is to count as justification. The burden of justification must be borne by the text. Consequently, the only question which remains is: by what text should this strong commitment be borne? To what should we give strong commitment?

### **The limits of the judges’ implication, the fact of the text**

To engage the issue of the text, we must broaden our focus. We must ask what is *meant* by internal, epistemic, violence; and we must construct a topography of that violence. To anticipate myself in this regard, I shall be attempting to demonstrate that there are not one, but *two* levels (two *forms*) of epistemic violence at work in law; and that the violence of legal interpretation is, in fact, derivative upon the original violence of law creation. Sarat and Kearns put it thus:

it does not follow, of course, that judges must bear full responsibility for the decisions they make since what they decide is powerfully shaped by considerations (pertinent statutes, previous decisions, the conduct being censured) *over which they have no control*. (Sarat & Kearns 2001, 68.)

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<sup>22</sup> Sarat & Kearns 2001, 67. See also Cover 1983, 47.

In other words, the formalist/interpretative dichotomy is flawed, the choice is not between determination or decisionism, but is always mediated. There is *always* a text which requires, and constrains, interpretation. Consequently, the *text itself* is implicated in the process of legal judgment. The text initiates and conditions its application, and consequently the violences embodied in the text will be re-inscribed in its interpretation and application. It is in ignoring, or reifying,<sup>23</sup> the text (in his case the US Constitution) that Cover's work is unnecessarily restricted. It is through attention to the text, and more specifically to its plasticity and to the processes by which it was created, that Cover's ideal, that 'we ought to stop circumscribing the *nomos*; we ought to invite new worlds' can be realised. It is in the creation of the text that the initial, the primary, or originary, violence takes place. Hence it is in the creation, not the interpretation, of the text that the search for solutions must be initiated.

In light of these observations, we can get analytic purchase on the paradox which concerns us here. Cover's thesis ran into contradiction because it focused on the wrong issue. Instead, attention should focus, at least in the first place, on the *creation* of law; which is the *primary* 'consideration over which [judges] have no control'. Only once any problems here have been identified and circumscribed can we hope to move on, to analyse the human bridge between interpretation and implementation (physical violence); the bridge between the *text*, the 'fact' of law, and *its* interpretation. And only at this level does the integration of the physical into the epistemic serve the sensitising function Cover desires.

This creates a more complex topography of interpretation, and exposes the judges' wider implications within the processes of law application. However, it also brings into relief the *limits* of the judges' implication, and the adjoining implication of others, e.g. politicians, drafters, and citizens. The judge's understanding of the Law helps to identify (and to some extent create) the text of the law. That text is then 'interpreted' by the judge (in accordance with his understanding of the Law). However, the text itself is also the product of others, of the legislators. Consequently, the judge's relationship to the legislature determines his identification and interpretation of the text. The relationship between Judge

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<sup>23</sup> Reification is treating the non-extant as extant (e.g. treating the law as a real or natural fact, rather than a social construction), or treating the non-natural as natural, the contingent as necessary. It is the freezing of social norms into natural data; some CLS scholars use the verb 'thingifying' which does capture the phenomenon rather well. In a sense, deconstruction can be understood precisely as a confrontation with reification, specifically given Derrida's definition of deconstruction as "non-naturalising" as refusing naturalisation.

and Legislator is analogous to that between Warden and Judge; it is a relationship of moral exculpation. The *text* bears the burden of this exculpation.

## Formal equality: the role of texts and images

Thus, the judge is both embedded within, and exculpated by, the text. This is the reality of the strong commitment the judges must possess, simply to fulfil their role. Sarat and Kearns' analysis demonstrates both the necessity and the impact of this embeddedness: it is only as an embedded functionary that the judge can offer a justification to the executioner. Consequently, the justifiable decisions available to the judge are provided and limited by the text, but the text cannot represent an absolute truth, for, given the destruction of the unity of knowledge, there *is no absolute truth*.

'Keeping the peace is no simple or neutral task', and so the law is neither simple nor neutral. Law is best understood as an epistemic grid, a world view. *However*, law does not create the worlds it views, social systems are not constructivist, but *reductivist*. The law, like any other social or epistemological system, abstracts from a real reality. (See Searle 1995, 159.) It then classifies that which is abstracted, and constructs perceptions, knowledges, truths. But, it is vital to realise that it is only the perception, not the world, which has been created, and which can be projected.

This distinction is important, as it allows us to understand the necessary epistemic violence of law as being simply an embodiment of the necessary violence of thought itself. Not the violence of destruction, but rather the violence of exclusion:

Where Stendhal describes, in one phrase, Lucien Leuwen's entrance into a room, the realistic artist ought, logically, to fill several volumes with descriptions of characters and settings, still without succeeding in exhausting every detail. Realism is indefinite enumeration [...] realistic novels select their material, despite themselves, from reality, because the choice and the conquest of reality are absolute conditions of thought and expression. To write is already to choose.

[In the end, realism] is born of a mutilation and of a voluntary mutilation performed on reality. (Camus 1956, 235. See also 230-231.)

Internal, or epistemic, violence, resides in exclusion, marginalisation, in de-humanisation, humiliation, and domination.<sup>24</sup> Violence exists in the constitution of a people as unitary entity.<sup>25</sup> This line of thinking seems remarkably akin to that taken by Michel Foucault, in the set of lectures delivered at the *College de France* in 1976.<sup>26</sup> Foucault, like Cover, appears to assume that this violence is inexorable – ‘Society exists in a binary code of Domination/Submission’ – and disguised by official narratives of Sovereignty and Law<sup>27</sup>

Violence resides here, it lies in the (systematic) privileging of some parts of reality over others:

[...] distinct starting points, identifications, and stories make us realise that we cannot pretend to a unitary law. (Cover 1983, 33.)

In this sense, thought itself is violence:<sup>28</sup> ‘to think is already to decide’. (Camus 1956, 235. See also 230-231.) The questions then are ‘how do we decide what to think?’; and ‘which system of thought do/should we institutionalise as law?’. These are the questions with which I propose to engage; my thesis can be stated simply: Law as formal equality *necessarily* involves epistemic violence. *However*, this epistemic violence can be legitimated (though not, perhaps, limited) by closer

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<sup>24</sup> As counterpoised to, inclusion, definition, resolution, integration, interpretation; i.e. to what we might call peace. On the possibility of a law derived from a politics of peace, see Minow 1995, 2, footnote 48, and Rose 1996, 37.

<sup>25</sup> Violence may then be overcome in the constitution of a people as a plurality, this appears to be Cover’s goal as well, see, Cover 1983, 26-34.

<sup>26</sup> Reproduced as ‘*Society Must be Defended*’, Foucault 2003.

<sup>27</sup> Foucault 2003, 15-18; Cover 1983, 40-44. However, it should be noted that Cover’s analysis of the self-understanding of the legal order appears diametrically opposed to Foucault’s; see Cover 1983, 23.

<sup>28</sup> It has been suggested to me that it may be more appropriate to conceive of thought as a reduction rather than a violence, but this is simply not so. “Reduction” infers some kind of order, of logic, a quasi-Hegelian uncovering of essence, a rational move towards the core of an idea or an aspect of reality, and a progress to truth. For me, this is quite alien to both reality and Cover’s arguments. Violence, by contrast, lets us see that knowledge, thought, and understanding are products of conflict and thus of power; that understanding or thinking in any given way presupposes the rejection of other systems of thought. Thus implementing any way of thinking entails destroying the alternatives (or at the very least discrediting, silencing, them). This is a violent process, with winners and losers, and that fact is important – it is also lost or hidden through the gentle language of reduction, or the search for an essence.

attention to law *creation*, and within law creation, on the generation of the *images* which formal equality requires to operate at all.

It is, however, critical to understand that, *contra* Cover, it is not enough – indeed it is not possible – for the judge to look ‘beyond the law’, to ask about the ‘actual justifications’ for the violence which the interpretative act will actually generate. This is because any such attempt will presuppose, and operate within, the judge’s world-view and value-matrix. Thus, thinking about the effect, about the violence itself, even as separated from the law’s direct justification of that violence (the ‘wide categories’ like ‘responsibility’ and ‘blame’ which the law wields), is still not ‘free thought’. The thought is still caught up in the solipsism of (Occidental) exceptionalism, and still conditioned by the very categories of thought which the judge’s inevitable ‘strong commitment’ to the ‘weak forces’ of the system generate. In short, even when we look beyond its instant rules, the law continues to operate as ‘a system of meaning’, indeed as the dominant system of meaning.

That is why *law creation* becomes such a vital locus of attention and analysis. Law creation is the creation of the images which will in turn demand and perhaps receive the inevitably ‘strong’ commitment. If the violence of law is to be domesticated, then it must be eradicated, or at least minimised, at the point where these images are generated. Because strong commitment is unavoidable, attention must focus fully on the bearer of that commitment, on the *images* to which we will be strongly committed; and consequently to *the procedures of image creation* which must produce images which can justifiably bear such commitment.

Violence is operative at every founding moment. However, where Cover focuses on the *nomoi* of minority groups (‘insular communities’ and ‘redemptive communities’) within a host (be it people, nation, or in his case State (the USA)) I wish to consider the constitution of the host, the ‘greater people’ or larger unit, itself. Cover notes that:

Some theories of revolution idealize violence. Such theories should be distinguished from a theory of radical autonomy of juridical meaning such as the one I am proposing. Jurisgenesis is a process that takes place in communities that already have an identity.<sup>29</sup> [...] But although resistant groups affirming their own laws need not realize themselves in violence, they always live in the

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<sup>29</sup> It may be worth noting that this would appear to imply (or even entail) that the process of Jurisgenesis, the law as such, *cannot* function to create (a) community. Law is *separated* from the ontocreation of society, but no reason for this assumption is evident in Cover’s work.

shadow of the violence backing the state's claim to social control. (Cover 1983, 50, footnote 137.)

In short, Cover reifies *both* minority *and* host communities. Both communities are taken as given (fixed), each has their 'law'<sup>30</sup> and the question is one of accommodation: of how far the host should tolerate difference. This question brings to light a central tension (if not, quite, a paradox) within Cover's work. This tension arises in Cover's desire for openness and inclusion in the self-understanding of the 'greater people' which is matched, and undermined, by structural pressure for reduction and closure in law. To make matters worse, this structural pressure is a feature of thought generally, and is magnified in that institutionalisation of thought that is law. It is that tension which threatens to undermine Cover's project as a whole. It is also that tension which can be ameliorated through close attention to the creation of the 'greater people' and, especially, of 'their law'.

Unfortunately, as noted, this is a focus Cover avoids.<sup>31</sup> The question he does not ask, the question he appears to avoid, is: can (and should) we change the Constitution?<sup>32</sup> This is a complex question, the word constitution being especially ambiguous here. It could refer to a written document, but also to the creation of a people, or even to the current composition and 'health' of that people. In short, the idea of a constitution refers to the creation of a people and the law under which it will be maintained. The text in which that creation is embodied, is therefore also the text in which those 'not of the people' are excluded. Consequently, it is to the constitution of the people, and the text of their constitution, that attention must turn.

It must be emphasised that it is not in the interpretation and application, but rather in the *creation* of Law that the foundational and primary violence takes place. The violences, mutilations, and corpses of interpretation are derivative effects, unrecognised battles echoing on from wars presumed long ended.

The very articulation of the common standards – the *images* – on which formal equality depends, as well as the articulation of the corollary standards of similarity and difference on which its deployment is conditional, are themselves

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<sup>30</sup> In *both* senses, as rules and as a system of meaning.

<sup>31</sup> See Cover 1983, 50, footnote 137.

<sup>32</sup> See note 36, *infra*, and Cover 1983, 34–40.

the original acts of violence. The operation of the system – the judicial application of law – merely (re)iterates these original decisions.<sup>33</sup>

In short, both the nature and the role of the text must be understood. The text embodies ‘images’ (categories of thought, definitions of ‘humanness’) by which the judge can interpret, explain, and evaluate the world. These images are never, and can never be, ‘complete’ or ‘true’. Nonetheless, the judge must act – simply in order to act at all – *as if* these images were true: the judge must come to accept their truth. If the judge did not accept the truth of the text, he could *never* justify, and thus facilitate, the violence his decisions demand. That is the fact of judicial embeddedness.

## The text in practice

So, the judge must be embedded, he must bear a strong commitment to the text of the law. This means that the text of the law, its reality, its contingency, and the processes by which it was created, embody the originary violence of the law. Cover’s analysis is inadequate, because it focuses on the wrong questions, the wrong violences. In other words, my one real criticism of Cover’s work, the criticism which focuses my analysis and development of Cover’s work, is his acceptance of a fixed text, the US Constitution.<sup>34</sup>

Cover’s focus on the violence of interpretation presupposes that all the possibilities of a meaningful (American) life are already encapsulated within this text. Revolution and radical change are unnecessary and hence illegitimate.

Certain efforts to interpret the texts of resistance have a strange, almost doomed character. The state’s claims over legal meaning are, at bottom, so closely tied to the state’s imperfect monopoly over the domain of violence that the claim of a community to an autonomous meaning must be linked to the community’s willingness to live out its meaning in defiance. Outright defiance, guerrilla warfare, and terrorism are, of course, the most direct responses. They

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<sup>33</sup> Interpretation is, of course, a contentious issue. In particular the extent to which judicial decisions are constrained or unconstrained by legal texts – statutes, Constitutions, Charters/Bills of Rights etc. – is widely disputed. Nonetheless, even acknowledging an *element* of decisionism (and it is worth noting that even Carl Schmitt did not argue that judicial decisions were *truly* or *completely* decisionist, but rather that they were structured by the prevailing ‘concrete order’) one must maintain the acceptance of *another element*, an element of conditioning or constraint, wrought by text, context, and/or interpretative community.

<sup>34</sup> A criticism which is true *a fortiori* of Ronald Dworkin’s theoretical endeavours.

are responses, however, that may – as in the United States – be unjustifiable and doomed to failure. (Cover 1983, 52.)

Cover can assume that the contours of what it means to be ‘an American’ are relatively fixed,<sup>35</sup> my primary thesis is that the same cannot be said of what it means to be a human being. For this reason, public international law must be more alive to the possibilities of redemptive communities, and even to the redemptive possibilities of the recognition *as equals* of insular communities. Sadly, of course, this has not been the case.

I have resisted the temptation to draw a strict demarcation between ‘insular’ and ‘redemptive’ communities in Cover’s work. The demarcation would be relatively simple: insular communities seek only recognition of their own difference, while redemptive communities seek a reconfiguration of the wider community (see Cover 1983, 34-40). However, this simple demarcation is also misleading. Any successful quest for insular recognition *also* involves a reconfiguration of the host, at least to the extent necessary to preclude the recognition contradicting fundamental commitments of the host society. However, in either case, the general contours of the host can remain relatively clear, defined, and constant. As Cover acknowledges:

For in the normative worlds created around us, not all interpretive trajectories are insular. The worlds of law we create are all, in part, redemptive. With respect to a world of redemptive constitutionalism, the Court must either deny the redemptionists the power of the state (and thereby either truncate the growth of their law or force them into resistance) or share their interpretation. (Cover 1986, 60.)

## **A tale of two worlds. World trade and human rights**

Building *nomoi* is a narrative enterprise, worlds are constructed through the stories we tell, and convince ourselves to believe; this is the point at which ideological conditioning and the epistemological necessity of categorical thought (and hence exclusion) might elide. Each story has a moral, a guiding principle, a dominant standard through which it makes sense of the world. That is, *nomoi* engage with the world in a structured manner, as with all thought, they engage reality through

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<sup>35</sup> Although *not* absolutely fixed, there is still space for contestation (legal interpretation) at the margins, and moreover, the possibility of redemption remains.

a process of abstraction. However, the key to understanding *nomoi* lies in the structure of their processes of abstraction; in the *internalisation* of their violences.

Cover's work focuses in some detail, and in an accessible and provocative manner, on the structures facilitating the physical violence of law. However, it does so only in relation to the spectacular and visible physical violences: confiscation of property, deprivation of liberty, execution. Cover offers provocative theses on how these acts may be carried out by human beings who are presumed to have (at least) a societally conditioned aversion to such practices (Cover 1986, 1615). These are important issues, but they should not deflect attention from the structural violences – or 'banal evil' (Arendt 1963) – of law. Law, as noted, is a reductive world view. It functions by banishing the vast majority of reality from its adherents' vision.

Law tells us how to look at the world, what should be taken into account, what ignored. Again, as noted above, this is a necessary feature of a functioning law or legal system. However, and this is Cover's point, law *also* indulges in real physical violence, and the two violences interact. What I wish to emphasise is the manner in which law also *disguises* – and hence legitimises – physical violences, in effect by *denying* its own epistemic violence. Only once this is reckoned with can the underlying problem of epistemic violence be fully explicated.

Care must be taken here, epistemic violence is not only necessary, but also cunning. A judge – e.g. a member of a WTO Panel or Appellate Body – implements a legal norm. The judge knows he is choosing between alternative meanings in a particular context. The judge knows the chosen meaning will further a particular purpose, a particular understanding of that rule. The judge also knows that the States party to the treaty have ratified it 'voluntarily',<sup>36</sup> and so it can be opposed to them, even against their (instant) 'will'.<sup>37</sup> But, two things are lost amidst the competing justifications of the 'rule'. First, the *consequences* of implementation: human lives and human deaths. Either the judge is unaware of these, or, perhaps more worryingly, unconcerned about them. And second, the symbolic function of law. Implementing the rule, without external (non-legal) considerations coming into effect, *itself* serves as proof that that process will reoccur. This fact *dissuades* others from challenging the rules from extra-

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<sup>36</sup> Pogge quotes *The Economist* thus, 'Poor countries are also hobbled by a lack of know how. Many had little understanding of what they had signed up to in the Uruguay Round', see Pogge 2002, 17.

<sup>37</sup> This is a very Kantian idea of 'Freedom' as subjugation to Reason. For a clear exposition of this idea see Murphy 1994, esp. at 51.

legal perspectives. The banal evil is the self-referential decision to ignore the *consequences* of rule application.

We live in a violent world. We do violence on an everyday basis. In our interactions with others we fail to treat them as particular and unique, we blind ourselves to their qualities and potentialities; they do the same to us. Perhaps this is unfortunate, perhaps it is inevitable. However, our world is also violent in a more physical, visceral, way. This is a wide ranging violence, spanning natural disasters and war, a violence of spectacular destruction of human life. Finally, however, our world is violent in a quieter, more banal, way. It is this quiet violence, and the techniques by which it is kept quiet, which I would like to consider briefly.

A giant tsunami recently ravaged South East Asia. This was a terrible event, in excess of 300,000 people were killed. Perhaps people were to blame, perhaps not. Either way, this was a spectacular catastrophe, a tragic and unjustified loss of human life. The World mourns. I do not wish to detract from that. However, 50,000 human beings die daily as a result of the world's economic order (Pogge 2002, 2); the causes of death range from starvation to disease, but have one common factor, poverty. Every six days the World Economic Order kills as many people as the Asian Tsunami did; but these deaths are not spectacular, they are not news, for many people they are unknown, it is as if they have never happened. The World does not mourn.

And yet, these people are no less dead. Perhaps we could blame the mass media for failing to highlight the deaths.<sup>38</sup> Perhaps we could call for better legal regulation of a media which distorts truths of this magnitude. But that is not my immediate concern. Provoking the masses to action is a fine ambition, but I am more concerned with the actions of those who implement the current world economic system.<sup>39</sup> How should these people be viewed? Objectively, they are part of

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<sup>38</sup> This would be another institutionalised, but perhaps more deliberately manipulated, form of epistemic violence, a deliberate decision to shelter us 'civilised' Westerners from the prices others must pay in blood and death for our comfort. However, the key point here is that, appearances notwithstanding, existence cannot be equated with perception.

<sup>39</sup> This imprecise category stands in need of explanation. I am principally concerned with the actual administrators of the system, the technical experts, lawyers, and judges of the world economic order. From private companies, to state officials, to trade judges, to World Bank and IMF functionaries. However, as should be apparent, the web of implication doesn't stop there. Every consumer or taxpayer who benefits from the structural inequalities of the system bears responsibility, just as did every citizen of Nazi Germany, and every white in *apartheid* South Africa.

the largest, most efficient, most abhorrent mass murder in history. Subjectively, they are probably nice family people, ‘just doing their jobs’. My argument is that it is law which causes this cognitive disjunction.

The world economic system is a *nomos* in Cover’s terms. It is, therefore, an explanation of the world at large, but an explanation restricted by its own structure. This is a system built on corrective justice and dedicated to economic efficiency.<sup>40</sup> Consequently, these two variables shape the world views of those within the system. The dead bodies do not register, only the balance of payments. The question does not resolve around evil or ignorance, but blindness: a wilful or an imposed blindness. This is the unmitigated, unjustified, physical violence of international law.<sup>41</sup>

One obvious solution springs to mind, Human Rights. It is not novel to suggest that the world economic system ought to be subjected to a human rights critique, though it does nonetheless bear repetition. However, the point I wish to emphasise, is the incomplete nature of such a critique. For the human rights critique to work, we must accept human rights as themselves constitutive of a *nomos*, of a world view; human rights must become the Imperial Virtues to which we owe and give ‘strong commitment’. Only in this way could we create something strong enough to counterpoise to the *nomos* of the world economic system, and the market liberalism it embodies.<sup>42</sup> In this clash of *nomoi* the epistemic violence of law would resurface; we have opposed world views, compromise will not occur. Instead, we require the violence of decision. One world must prevail,

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<sup>40</sup> Granted the system also has pretensions toward distributive justice. However, as Pogge explains, these distributive claims serve only to mis-represent the reality of a system which fails to accord with its own commitment to the harm principle (Pogge 2002, 12-14). The token gesture toward distributive justice does not remedy the ongoing harms of structural exploitation. Instead, this movement functions to disguise those harms. It (re)presents them as unfortunate and unavoidable (which they are not); as ‘not our problem’ (which they are); and as subject only to the jurisdiction of charity and compassion. The distributive movement serves to disguise the reality of the system, and our (collective) implication therein.

<sup>41</sup> Obviously, more spectacular examples could be afforded, but none on such a scale, nor of such consistent evil.

<sup>42</sup> There are two separate, but related, and important points here. First is the tendency to ‘de-politicise’ politics, to move toward a technocracy of neutral and scientific rules; rules which, in fact, like all rules embody specific values, but are simply placed beyond critique or debate. The second issue is the necessity to form a counter-Axis to break this scientism by offering another comprehensive world-view. See Hardt & Negri 2001, 21.

must be ‘imposed upon the ashes’ of the other. Human rights and economic liberalism embody different claims for human organisation.

But, regardless of which of the two were to win out, *humanity would lose*. Neither system is adequate in its current form. However, as Sarat and Kearns imply, each must perceive itself as sufficient and adequate merely in order to function. This creates a very awkward position for those (myself included) opposed to the present world economic system. Human rights critique is the obvious weapon of choice, but its own jurispathic and homogenising tendencies cannot be ignored. In the words of one committed advocate:

Human rights are the legal definition of the meaning of human life.<sup>43</sup>

This is an arrogant, spectacular, and absurd claim, and yet it is also true. To function as law, human rights must constitute themselves as a *nomos*, as a baseline for intelligible interaction with the world (MacIntyre 1977, 453). Every time we resort to human rights, as critique or promise, we re-inscribe this baseline; we re-inscribe this *particular* ‘definition of human life’. But that definition is far from universal; the history of human rights is a Western history, the story of human emancipation an ethnocentric history. Worse still, it is a political narrative justifying and legitimising – through their so-called ‘civilisation’ or progress – the very people, consumers, and nations whose lifestyles are *subsidised* by the World Economic Order allegedly under critique.

To make matters worse, this is simply a symptom of the underlying violence of human thought, which creates a paradox of critique: there is no neutral position, no Archimedean point, from which to engage in critique. All of our thought is incomplete and based upon exclusion. In this sense (and almost certainly in more directly manipulative ways too) all of our thought is ideologically conditioned. There is no space outside ideology, and so no neutral thought.<sup>44</sup>

It is undoubtedly true that a world where all human rights were observed would be a better world than that which currently exists. However, it would not

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<sup>43</sup> Chris Sidoti, Human Rights Council of Australia.

<sup>44</sup> See e.g. Marks 2000, ch. 1. It may be worth noting that this absence of a neutral space or perspective undermines the possibility of a kind re-reading of Cover’s thesis. According to this re-reading, Cover may be asking judges to reflect on the violence they intend to inflict as understood outside the context of its legal justification. However, even if we were to attempt to judge violence separated from its legal justifications, we could not escape either the particularity of our own perspectives, nor the common values (the so-called ‘weak’ system-maintaining forces) which structure and embody the legal order.

be a utopia. This fact is generally unacknowledged because the promise of human rights is deferred. This causes attention to focus on the deferral, not the promise; and that is problematic. Attention on the promise requires problematisation of the text of human rights; practical action requires acceptance of that same text. This is the limit point of coincidence between my project and Cover's; it is also I suspect the blindspot, and the potential redemption, of Cover's project. It is only in problematising the constitutive commitments of the overarching *nomos* (the State law in Cover's case, international law and human rights in mine) that we can uncover the possibility of an epistemically non-violent law, but a law which nonetheless has practical utility. A law which is homicidal but not jurispathic.

### Re-thinking the creation of texts and their images

I have claimed that the so-called 'Imperial System' in fact acts as a *paideic* community, over-reaching the narrow bounds of law understood as a 'system of rules' and becoming instead 'an integrated world of obligation and reality *from which the rest of the world is perceived*'; that is, a perspective, an epistemic grid. I have also claimed that Cover fails to recognise this, simply because he is embedded within that very Imperial *Nomos*. To illustrate this, it is worth comparing Cover's observation that:

If I have exhibited some sense of sympathy for the victims of this violence it is misleading. Very often the balance of terror in this regard is just as I would want it. (Cover 1986, 1608.)

With William Rasch's admission:

Now, as far as I am concerned, it would certainly be no tragedy were illiberal and theocratic states to disappear and be replaced by constitutional republics – but then I am an atheist who lives in a liberal, constitutional republic. (Rasch 2004, 58.)

Rasch, although unable to escape his own embeddedness, can at least acknowledge – and thus attempt to ameliorate – this fact and its effects; Cover's position shows no comparable self-reflection. Rather – despite, and undermining, his repeated gestures to openness – Cover demonstrates a callous disregard for those differences, or deviances, which preclude simple recognition within the Imperial Order (which he has not recognised as a system of meaning).

This is a perfect example of the manner in which the so-called ‘weak’ or ‘Imperial’ values seep beyond the legal system, are internalised, and come to function as a *nomos*. *Regardless* of pious exclamations of openness and understanding (explanations in fact facilitated by this internalisation and closure<sup>45</sup>) what is demonstrated here is an internalisation not only of the legal demands, but of the *image* of (civilised) humanity which they embody.

Thus, where Cover can simply note, or at most, perhaps, lament, that: ‘We exercise rigid social control over our precepts in one fashion or another on a national level’ (Cover 1983, 16), Rasch can offer a critical opening to a perhaps genuine openness:

What would be tragic, however, would be to watch that which presents itself as the most liberal of all possible worlds actualize itself precisely as the most *illiberal* of all possible liberalisms. (Rasch 2004, 58.)

But of course, any liberalism which is not identified as a *nomos* will tend precisely toward such a homogenising intolerance. Moreover, all legal texts embody an image of (civilised) humanity, and function (to the best of their ability) to embed, promote, and exonerate that image. Thus, the gesture of openness under common standards disguises a dynamic of self-justification; not a respect for others, but an attempt at tolerance with an underlying dynamic (difference/identity) of homogenisation. The bounds of tolerance are determined by the narrative internalised, the precepts controlled by society, the *nomos* inhabited.

Peter Jones has noted an analogous structure in his analysis of the functioning of identity politics in the recognition (or tolerance) of minority groups within a State. These groups could be considered as ‘insular communities’ in Cover’s sense. They desire recognition as *different*, as unique and valuable; not merely tolerance as sufficiently similar to the norm(al):

Majorities have the power to define what counts as normal in a society and they define their own identity as normal and the different identities of minorities as abnormal or deviant or alien. [...] The majority also resents the demands made by minorities conceiving these as threats to what is, for the majority, the established, normal and proper arrangements of their society. [...] This state of affairs calls for toleration, but not merely toleration that allows minorities the freedom to live as they see fit.<sup>46</sup> Rather, it must be toleration that accords

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<sup>45</sup> See Sarat & Kearns 2001, 67. See also Cover 1983, 47.

<sup>46</sup> There is a potential contradiction here, in that toleration of one minority (say gays) may be an affront to another (fundamental Christians) with the paradox that allowing one to ‘live as they see fit’ may preclude the other from doing so. The extent

recognition to minorities so that they cease to suffer humiliating assaults upon their self-respect and self-esteem and are enabled to function as full members of the society to which they belong. (Jones 2006, 127.)

However, the crux of Jones' argument is that such a direct, 'unmediated' 'subject' recognition (Jones 2006, 133-135) is impossible. (See, e.g. Jones 2006, 135.) Instead, we can seek only tolerance, or 'mediated recognition'. Mediated recognition occurs when:

We accord recognition to the fact that someone embraces a specific identity rather than to the specific identity that they embrace. (Jones 2006, 135.)

That is, our recognition is mediated through a general category of which we approve. We do not recognise, e.g. Muslims *qua* Muslims, but rather *qua* 'persons' (i.e. human beings) who happen to be Muslim:

we do not accord the religious group that immediate form of recognition. Rather we accord it recognition only because we recognise its members as 'persons' and only because, since they are persons, we accept that what matters to them should matter to us because it matters to them. That would be an example of 'mediated' recognition. The religious group as such is not accorded immediate recognition; rather its specific recognition by others depends, for those others, upon its first being recognised under a *different, more general and logically prior, description*. (Jones 2006, 135, emphasis added.)

This 'more general and logically prior, description', 'person', is precisely the 'image' lying behind the text: the image I wish to problematise. Moreover, it is also a category of thought, and as such it is contingent, and plastic; it is also an instance of epistemic violence. The general category curtails and (de)limits the possibilities of recognition. It manifests the narcissism of the 'majority' which defines the over-arching commonality through which, alone, the minority may be recognised. That is the embedded condition within which the judge functions. But, mediated recognition cannot be attentive, it necessarily lacks respect, because, ultimately, it is a *recognition of sameness*, not of difference.

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and function of this contradiction becomes more obvious when consideration turns to less 'nice' minorities, e.g. paedophiles or Fascists. To the extent that these groups should *not* be afforded tolerance (or respect) it becomes apparent that this theory (like all liberal theorising) is based on a hidden assumption: the *selection* and *privileging* of normatively preferable groups. A closed pluralism, an illiberal liberalism; on which, see Simpson 2002, 537.

However, in bringing the necessity of mediation to light, Jones also opens the way toward a solution: we must reconfigure the common category. The ‘majority’ – which, as Jones has noted, may be a numerical minority (Jones 2006, 135, footnote 6) – must not be allowed to define the general category purely in its own terms. We must move beyond this solipsism, the epistemic power accruing to those capable of defining normalcy must be democratised. Only by attempting to recognise the other as equally valuable can we initiate this task.

Of course, this may be ‘damaging’ to one’s own self-respect; and most especially so if one is used to occupying the privileged position. For those who embody the norm have least reason to question it,<sup>47</sup> and their own relationship to it. To find common ground, concessions must be made on *either* side; moreover, fairness dictates that those who possess more should concede more. Norms of trade law and norms of human rights law reflect the power imbalances of the politics of war. Only the *dominant* can make the necessary concessions to initiate a politics of peace. To find consensual images, we may have to abandon some of our most cherished dogmas. Turning to the works of Gillian Rose, it becomes obvious that we must recognise *both* ourselves and others as ‘self-relations’ as ‘enraged and invested’ (Rose 1996, 37), embedded, constructed, conditioned. We must focus on these self-relations, and the norms to which we relate ourselves.

The struggle for recognition between lord and bondsman issues in the education of the bondsman through his experience of fear both of the absolute master – death – and of the relative master – the lord. The bondsman is able to overcome both types of fear by risking his life and by working, by acknowledging the plasticity of the world and hence the otherness of the lord, of matter, of himself, while the lord only discovers his dependence on the bondsman. (Rose 1996, 73.)

However, the task must then relocate to the formal level. Allowing hegemony in the creation of the general categories is no less Imperialistic than allowing laws which reflect only particular values; nor even any less hegemonic than allowing particular values to over-rule or become law. Instead we must seek a procedural openness, which will allow for the consensual generation of new images. Images which in turn will found the general categories through which, alone, recognition is possible. This task cannot be entrusted to a particular group, rationality here is ethnocentric. *That* is why the project must move to the procedural level, and why Human Rights must be renegotiated from the bottom up. Only then could

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<sup>47</sup> As Kierkegaard states, ‘the exception [...] thinks the general with intense passion’; quoted in Schmitt 1985, 22.

they even possibly merit recognition as ‘a legal definition of what it means to be a human being’.

## Conclusions

Cover’s focus on interpretative violence, although important, was insufficient. Judges do have to consider competing interpretations of the texts of the law, but they also have to consider the texts themselves; moreover, they may even encounter situations where the texts of normative orders (e.g. world trade and human rights) collide. However, none of these situations offers a complete picture of the epistemic violence of law as a social practice. Consequently, no matter how much attention is given, no matter how much the epistemic violence of legal interpretation is ameliorated, this focus can never lead to the creation of a legitimate law or legal practice.

Furthermore, within Cover’s limited focus, the judge lacks reasons to prioritise one interpretation over another, let alone to privilege one normative order over others. Each normative order can operate only by assuming its own truth, the judge can function only by adopting the truth of one normative order (or interpretative claim) over its rival candidates. There must always be a strong commitment on the part of the judge, otherwise no interpretation could be presented as meriting imposition in the real world (of pain and death).

Moreover, *contra* Dworkin and Cover, the judge cannot find extra-legal salvation in the truths of any given ethical system, nor in the natural order the law reflects. Each of these options is itself subject to claims of epistemic violence, each is reductive and exclusionary in its focus. Also, as Sarat and Kearns indicate, each is conceptually reliant on the legal order for intelligibility and application. The legal order conditions its own applicability, and that is inescapable. The legal order provides the general categories through which actions and interpretations are rendered intelligible.

Consequently, the search for solutions must be initiated in the understanding of the legal order itself. We must recognise that legal interpretation is a derivative and limited form of epistemic violence. The primary violence resides in the creation of the text which must be interpreted. Attention must focus on the text itself, and more especially on the processes by which the text was created, and recognised as legal. The text demands a strong commitment, the text determines the context of judicial embeddedness. Consequently, the text itself mediates interpretation, and must be justified.

Epistemic violence is inherent in the process of thought itself, the law seeks to limit and structure this violence, to render it consistent. In part, this is achieved through the law's commitment to formal equality, but of course the violence is equally inherent in formal equality itself.

The limits of Cover's thesis, Sarat and Kearns critique, and Jones' analysis of tolerance are co-extensive. Each recognise the impact of the general categories of formal equality – be that in the understanding of human, or in the parameters of interpretation imposed by the legal text – but each also assumes these categories to be fixed: Jones by assuming the abstract category 'human being' the others by reifying the US Constitution. This half-solution is inadequate.

It is only by calling the general categories themselves into question that we can move toward a more comprehensive solution. Violence will remain inherent in formal equality, as it remains inherent in all thought, but it can be mitigated. It can be mitigated precisely by focussing on the contingency and plasticity of the general categories of thought themselves. It is these categories, into which we are all embedded, which constitute the major problem, as these represent the primary instances of epistemic violence; thus these images must be just and justified before any endeavour toward justifying interpretation can even be initiated.

Given the reductive and exclusionary nature of ethics, liberalism, proceduralism, reason, etc. this process can only be initiated at the formal level. It is not the general categories, but the processes by which they are developed, recognised, and imposed, which form the primary site of analysis. These are the primary causes of epistemic violence. If that violence – and the physical violence it facilitates – is to be legitimated, then these processes must be legitimated. That is a starting point, a *sine qua non*, but *never* a sufficient condition, for a legitimate law.

A non-violent law requires a politics of peace to supplant the politics of war. An ideal politics as voiced by a political idealist, Subcommandante Marcos:

When we waged war we had to challenge the government, and now in order to build peace we have to challenge not only the government but the entire Mexican State. There is no table at which to sit in dialogue with the government. We have to construct it [...] Dialogue means simply agreeing rules for the dispute between us to shift to another terrain. The economic system is not on the table for discussion. It is the way we're going to discuss it that is at issue. [...] what the table has to achieve is to allow us to emerge with dignity, so that neither I nor anyone else has to go back and don all that military paraphernalia again. The challenge before us is to construct not only the table, but also our interlocutor [...] War was easier. But in war much more becomes irremediable. In politics, remedies can always be found. (Marcos 2004, 10.)

Marcos here hints at radical possibilities, of real and meaningful change; but only once the rules of engagement have been established and agreed, altered from the orthodoxy: he dreams of a new politics; the politics of peace, not of War:

A process of dialogue and negotiation is unlikely to be successful if each party remains intent on winning. If one side uses negotiations as a test of force to see if it can defeat the other sooner or later the dialogue will fail. In that event, the field of military confrontation is simply being transferred to the negotiating table. (Marcos 2004, 11-12.)

[Instead we must see it] as a struggle between a clock operated by a punch-card, which is [the government's] time, and an hourglass, which is ours. The dispute is over whether we bend to the discipline of the factory clock or [they] bend to the slipping of the sand. It will be neither one nor the other. Both of us need to understand, we and [they], that we have to assemble another clock by common agreement, that will time the rhythm of dialogue and finally of peace. (Marcos 2004, 8.)

It is only through such a change in politics – or in the criteria for the legal recognition of the products of politics – that we could move toward the generation of truly common images, and thence to a non-jurispathic law. However, it must be emphasised that this is not a project of reason, but of hope. There is no reason to assume that such common ground (currently) exists, but that is not a reason not to strive for it. We must possess, and articulate, ideals and aims; only then can we pursue and measure 'progress'. That our aims must be contingent and provisional, and often unrealised or impossible, is not a reason to discard them. Politics is a condition of hope, attempt, failure, reflection, modification, and renewal (of hope and attempt) (Rose 1996, 38).

## Bibliography

- Arendt, Hannah: *Eichmann in Jerusalem: A Report on the Banality of Evil*. Penguin Books, London 1963.
- Camus, Albert: *The Rebel: An Essay on Man in Revolt*. Vintage Books, London 1956.
- Cover, Robert: 'Nomos and Narrative'. 97 (4) *Harvard Law Review* (1983), 4-68.
- Cover, Robert: 'Violence and the Word'. 95 (8) *Yale Law Journal* (1986), 1601-1629.
- Eagleton, Terry: *Ideology: An Introduction*. Verso, London 1991.
- Fish, Stanley: 'Vicki Frost Objects'. In Stanley Fish: *The Trouble with Principle*. Harvard University Press, Harvard 1999, 153-161.
- Foucault, Michel: *Discipline and Punish: The Birth of the Prison*. Penguin Books, London 1979.

- Foucault, Michel: *Society Must be Defended: lectures at the Collège de France, 1975-76*. Picador, New York 2003.
- Gardner, John: 'Legal Positivism: 5 ½ Myths'. 46 *The American Journal of Jurisprudence* (2001), 199-227.
- Hardt, Michael & Negri, Antonio: *Empire*. Harvard University Press, Harvard 2001.
- Jones, Peter: 'Toleration, Recognition, and Identity'. 14 (2) *Journal of Political Philosophy* (2006), 123-143.
- Kramer, Matthew H.: *In Defence of Legal Positivism: Law Without Trimmings*. Oxford University Press, Oxford 1999.
- MacIntyre, Alasdair: 'Epistemological Crises, Dramatic Narrative and the Philosophy of Science'. 60 *The Monist* (1977), 453-472.
- Marcos, Subcomandante: 'The Hourglass of the Zapatistas' in Tom Mertes (ed.): *A Movement of Movements: Is Another World Really Possible?* Verso, London 2004, 3-15.
- Marks, Susan: *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*. Oxford University Press, Oxford 2000.
- Minow, Martha: 'Introduction: Robert Cover and Law, Judging, and Violence'. In Martha Minow, Michael Ryan and Austin Sarat (eds): *Narrative, Violence, and the Law: The Essays of Robert Cover*. The University of Michigan Press, Michigan 1995, 1-12.
- Murphy, Jeffrie G.: 'Marxism and Retribution'. In Antony Duff and David Garland (eds): *A Reader on Punishment*. Oxford University Press, Oxford 1994, 44-70.
- Pogge, Thomas: *World Poverty and Human Rights*. Polity Press, Cambridge 2002.
- Popper, Karl R.: *The Myth of the Framework*. Routledge, London 1994.
- Rasch, William: *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political*. Birkbeck Law Press, London 2004.
- Rorty, Richard: *Contingency, Irony, and Solidarity*. Cambridge University Press, Cambridge 1989.
- Rose, Gillian: *Mourning Becomes the Law: Philosophy and Representation*. Cambridge University Press, Cambridge 1996.
- Sarat, Austin and Thomas R. Kearns: 'Making Peace With Violence: Robert Cover on Law and Legal Theory' in Austin Sarat (ed.): *Law, Violence, And The Possibility Of Justice*. Princeton University Press, Princeton 2001, 49-84.
- Schmitt, Carl: *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, Chicago 1985.
- Searle, John R.: *The Construction of Social Reality*. Free Press, New York 1995.
- Simpson, Gerry: 'Two Liberalisms'. 12 (3) *European Journal of International Law* (2002), 537-572.

