

**NOMOS, CONFLICT, AND THE TRAGEDY OF ADJUDICATION:
THE JURISPRUDENCE OF ROBERT COVER**

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ABSTRACT

Robert Cover is known for having argued that in every plural society there exist, along with the State, multiple normative entities that create and maintain their own sense of normativity, that is, their own holistic modes of assessing good and bad, valid and invalid, right and wrong. Beyond that, few systematic attempts have been made to pursue this view as a comprehensive theory of law. The principal aim of this piece is to demonstrate that Cover offers a novel and viable *paradigm of law*, which must at least include an ontology (an understanding of the basic units and organizational structure of law), an epistemology (an account of legal knowledge, reasoning, and interpretation), an axiology (how legal value is created, assessed, and maintained), and a sociology (how law relates to and fits in the larger non-legal environment).

I shall argue that such a paradigm is not only alternative to that of the most influential legal philosophers of the twentieth century, but offers a way out of many of their dilemmas. Among these, Cover's view of the *nomos* provides a flexible structure which overcomes the shortcomings associated with the Kelsenian pyramid. It suggests a model for the identification of law that reveals the inadequacies—and compensates for the deficiencies—of the Hartian rule of recognition, and a justification for the role of the judiciary, which, unlike the Dworkinian Hercules, does not obliterate but builds upon the constraints of jurisdiction.

My analysis is divided into four sections: In Part I, I speak of the *nomos* as an individual entity and disentangle the enigmatic, yet crucial concept of what it means to inhabit it. I will ask questions such as: What are the constitutive elements of the *nomos*?

How is it structured? What forces impinge on it? Can the *nomos* be changed? Are there limits to the *nomos*? Incidentally, I will show that Cover opens up a bridge to cross the seemingly unbridgeable gap between *is* and *ought*, putting an end to the fruitless discussion between juspositivists and jusnaturalists over the relation between law and morality. Next, I will explain how normativity is constructed in connection to both *commitment* and *objectification* (I. 2), followed by an analysis of the typology distinctively employed by Cover, namely the *paideic* and the *imperial* ideal-types (I. 3). Part II takes a broader perspective to observe the plural normative space in which diverse nomic entities interact. Here, I analyze Cover's distinction between *insular* and *redemptive* types, in connection to the process of constitutional meaning-formation. This section realistically elaborates upon the interconnectedness of the constitutional meaning, without presupposing, on the other hand, a (political) *overlapping consensus*. Part III considers the distinct possibility of clashes among diverse nomic entities, which brings to the fore the context of adjudication. Here, Cover offers an innovative conceptualization of the *when*, *why*, *what*, and *how* of the so-called "hard cases." This section culminates in a triadic theory of justice that challenges prominent discursive and dialogic ones. Finally, part IV delineates the politics that can be inferred from Cover's perspective, and assesses—in contraposition to the very different appraisals of Robert Post and Austin Sarat—its relationship (or lack thereof) with political liberalism. I conclude with a short summary of the most salient points and with suggestions to direct legal theory away from its current state of lethargy towards a new beginning.

NOMOS, CONFLICT, AND THE TRAGEDY OF ADJUDICATION: THE JURISPRUDENCE OF ROBERT COVER

The true artists of speech remain always conscious of the metaphorical character of language. They go on correcting and supplementing one metaphor by another, allowing their words to contradict each other and attending only to the unity and certainty of their thought.

Karl Vossler¹

INTRODUCTION

I am not the only one to think that *Nomos and Narrative* is one of the most original, thought-provoking, and illuminating law articles ever written. Already in one single first paragraph, Robert Cover created a whole normative world for us to imagine:

We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. [T]he formal institutions of the law ... are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.²

Arguably Cover presents an innovative concept of law. But as important as this might be, *Nomos and Narrative* is much more than that. To me it is first and foremost an invitation to look at the richness and multiplicity of diverse manifestations of law, as well as to resuscitate our sense of sheer wonder for the complex, ubiquitous, and fascinating phenomenon of law. Indeed, Cover urges us to rescue the ideals, motives,

¹ K. VOSSLER, POSITIVISMUS UND IDEALISMUS IN DER SPRACHWISSENSCHAFT, Heidelberg (1904), cited by M. POLANYI, PERSONAL KNOWLEDGE: TOWARD A POST-CRITICAL PHILOSOPHY, The University of Chicago Press, Chicago, paperback 1974, at 102 (1st ed. 1958).

² Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, at 4-5 (1983), footnotes omitted. [Hereinafter Cover, *Nomos and Narrative*: all page references are to this article, unless otherwise noted.]

and themes that made us love law to begin with and, in some cases, even to adopt it as a form of life. In contrast to this sentiment of mine, Robert Post recounts that when he assigned this text to his students, it did not move them at all; rather, they found it distant and indecipherable, informed by a sensibility of another generation.³ In a sense, I conceive this essay as an attempt to unravel what I found so enlightening about *Nomos and Narrative*. At the same time, I am trying to persuade the generation of Post's students—which is mine—that Cover's insights are as timely as ever.⁴

Cover can be and has been approached from many perspectives: He has been placed in the context of constitutional law,⁵ political philosophy,⁶ and theology;⁷ and his insights have been used to reclaim the importance of non-statist actors,⁸ to frame the relations of state and supra-statist structures,⁹ or applied in more doctrinal contexts of

³ R. Post, *Who's afraid of Jurispathic Courts? Violence and Public Reason in 'Nomos and Narrative'*, 17 YALE J. L. & H. 9, 9 (2005) [hereinafter Post, *Who is afraid*]. (We shall speak about Post in section IV).

⁴ In spite of being published more than twenty years ago, *Nomos and Narrative* still creates considerable ink. In 2005 there was a Symposium with the title *Rethinking Robert Cover's Nomos and Narrative*, published in the Yale Journal of Law and Humanities [17 YALE J. L. & H. (2005)] and collaborations of Robert Burt, Robert Post, Judith Resnik, Aviam Soifer, Steven Fraade, Suzanne Last Stone, and Beth Berkowitz; and in January 2006 another Symposium was inaugurated in The Berkeley Electronic Press, Issues in Legal Scholarship, and articles of Ian Ward, Anthony Bradney, Richard Mullender, John Alder, and Thom Brooks, articles which can all be accessed at <http://www.bepress.com/ils/iss8/> [last accessed November, 2006].

⁵ P. Kahn, *Community in Contemporary Constitutional Theory*, in 99 YALE L. J., 1, 55-63 (1989) [hereinafter Kahn, *Community*]; also Post, *Who is afraid*, supra note 3.

⁶ A. Sarat & T. R. Kearns, *Making Peace With Violence: Robert Cover on Law and Legal Theory*, in LAW'S VIOLENCE, ed. by Sarat and Kearns, The U. of M. Press, Ann Arbor, 1992, 211; R. Sherwin, *Law, Violence, and Illiberal Belief*, in 78 GEO. L. J. 1786 (1989/90); J. Alder, *Robert Cover's 'Nomos and Narrative': The Court as Philosopher King or Pontius Pilate?*, Issues in Legal Scholarship # 4, THE BERKELEY ELECTRONIC PRESS 2006 (<http://www.bepress.com/ils/iss8/>).

⁷ See S. Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993); see also S. J. Levine, *Halacha and Aggada: Translating Robert Cover's 'Nomos and Narrative'*, 1998 UTAH L. REV. 465.

⁸ J. Boyarin, *Circumscribing Constitutional Identities in Kiryas Joel*, 106 YALE L. J. 1537 (1997); J. Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J. L. & H. 17 (2005).

⁹ R. Mullender, *Two Nomoi and a Clash of Narratives: The Story of the United Kingdom and the European Union*, Article # 3 Issues in Legal Scholarship, THE BERKELEY ELECTRONIC PRESS 2006 (<http://www.bepress.com/ils/iss8/>).

choice of law.¹⁰ My own perspective is that of a legal theorist. I think that in this respect his views have not been given enough credit.¹¹ Ultimately, I aim to show that Cover offers an interesting alternative paradigm of law,¹²—alternative that is, to the two most influential legal philosophers of the twentieth century, Hans Kelsen and Herbert Hart.¹³

My analysis is divided into four sections (and conclusions). First, I will speak of the *nomos* as an individual entity and disentangle the enigmatic, yet crucial concept of what it means to inhabit it (I. 1.). I will ask questions such as: What are the constitutive elements of the *nomos*? How it is structured? What forces impinge on it? Are there limits to the *nomos*? Is it possible to separate it from other normative systems? Next, I will explain how normativity is constructed in connection to both *commitment* and *objectification* (I. 2.). This section ends with the analysis of the typology distinctively employed by Cover, namely the *paideic* and the *imperial* (I. 3.). The second section will take a broader perspective and observe the plural normative space in which diverse

¹⁰ P. DANE, *Conflict of Laws*, in A COMPANION TO THE PHILOSOPHY OF LAW & LEGAL THEORY 209 (Dennis Patterson, ed., 1996).

¹¹ I found one exception, F. G. Snyder's *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623 (1999). However, Snyder's article seems more to develop a personal theory of law than to reconstruct Cover's own.

¹² In order to qualify as a paradigm, a theory of law needs at least to incorporate an ontology (an understanding of the basic units and organizational structure), an epistemology (an account of legal knowledge, reasoning and interpretation), and an axiology (how legal value is created, assessed, and maintained).

¹³ The influence of Austrian jurist Hans Kelsen in Continental Europe (and by extension in countries subject to colonial rule, as well as in Latin America) cannot be overstated, to the point that one cannot understand 20th century jurisprudence without him. Kelsen taught in North America for over thirty years, but inexplicably, his work is rarely considered in this context. However, his contribution to legal thought is so pervasive that it is sometimes taken for granted—such as the pyramidal structure of law, its constitution as a *system*, or his insistence that the law is *prescriptive*, but the science of law is *descriptive*, and that as science, legal theory is only possible if these two levels (the *is* and the *ought*) are rigidly separated. The influence of H.L.A. Hart, especially but not only within the Anglo-American world, is unquestionable, and many of his theoretical insights—the difference between primary and secondary rules, the concept of the rule of recognition, its foundation in social practice, or the distinction between internal and external perspectives—are current coinage in everyday legal discourse. To be sure, more names (and whole movements) can be added, but no *individual* thinker has the stature of these two giants. In the American context we could perhaps add a third name to the list, Ronald Dworkin, both for the breadth of his jurisprudence and for its viability as an alternative to legal positivism.

nostic entities (or *nomoi*) coexist and are forced to interact. In particular, I will analyze Cover's distinction between *insular* and *redemptive* (II. 1 and 2) types. In the third section, I will consider the distinct possibility of clashes among disparate nomic entities, which will bring to the fore the context of adjudication, and the role Cover reserves to courts in this regard (III. 1 and 2). This section concludes with the singular theory of justice that can be attributed to Cover (III. 3.). Finally, I will delineate the politics that can be inferred from Cover's view of the juridical arena and assess its relationship (or lack thereof) with political liberalism (IV). I will conclude with a short summary of the most salient points.

I. NOMOS: A NORMATIVE UNIVERSE

Cover is known for having argued that in every (plural) society there exist, alongside with the state, multiple normative entities that create and maintain their own sense of normativity, that is, their own holistic modes of assessing good and bad, valid and invalid, right and wrong.

Beyond that, few systematic attempts have been made to pay Cover's legal theory its due, which is, I believe, inconsistent with the attention he has otherwise received. Several reasons may explain this. First, Cover's poetic style of writing defies all academic conventions; his writing is evocative more than argumentative, metaphorical more than analytical, prophetic more than systematic. Cover writes to enlighten the reader and make him see, not to prove or demonstrate; he writes to inspire and awaken, not to reason and persuade. He rarely stops to explain or justify; either you follow, or you are lost. Secondly, Cover is an intellectually demanding thinker: the

authors he cites are not part of the common lore of legal education and push the reader in more than one direction at once; his citations are often obscure, almost cryptic, and the reader is often left on her own to fill in the gaps. Finally, there is the fact that Cover is taking up the challenge of going against deeply ingrained habits of mind, and the bulk and landmarks of twentieth century legal scholarship. All these things entail an extra effort of attention and perseverance that not everyone is willing to make.¹⁴ My purpose here is to show that the effort is amply worth our while.

Before I begin, I must warn the reader that, in order to reconstruct Cover's jurisprudence, I must expand on certain allusions, follow up some of his threads, mark invisible signposts, stop at significant crossroads, and frame some of his thoughts in a different envelope. In short, I must write against the grain of Cover's writing, attending not to his metaphorical language, but to the unity and certainty of his thought—as remarked by Karl Vossler in the opening citation. Also, I shall be answering to criticism that has been or may be raised against Cover—obviously, not as he effectively answered it (how could he?), but how he might conceivably have done so. This requires imaginatively recreating the mental universe of another person out of a blueprint, which will hopefully still be attributable to its main architect. Notwithstanding, I do not deny that my own personal perspective and interests do—necessarily and inevitably—pervade such interpretation. I say this not to disclaim responsibility, but rather for the opposite. I admit that, incidentally, I entertain the idea of presenting a theory of law that can stand independently from Cover's own concerns. To assist the reader, I have tried to keep separated both what Cover said, and what can be safely attributed to him, from my

¹⁴ To be sure, there may be other kinds of reason that reflect not a lack of appreciation, but of disagreement, political or other, with his jurisprudence.

interpretation of it—including the illumination of obscurities and elucidation of controversial points—and even from expansions on his thoughts which ought to be marked with a more personal pronoun. Bearing all this in mind, I hope the reader will judge that I have not done *violence to his word*.¹⁵

I. 1. The Thickness of Cover's Nomos: *Precept, Mythos, and Language*

One of Cover's most original insights is that law should be understood not as a system of rules but as a *nomos*, or normative universe. This conceptualization pushes us to ask questions such as: How is the *nomos* constituted? What does it mean to inhabit it? How is it learned? How can one master it? Can it be changed and transformed? Are there limits to it? Is it possible to distinguish it from other similar manifestations? In this section we will try to answer each one of these questions.

We must begin with the very term *nomos*. Cover's use of the Greek word *nomos* is subject to misinterpretation. Generally speaking, *nomos* can be translated variously as law, norm, habit, regularity, or convention, but as the great classical historian Werner Jaeger explains, such is a derivative usage.¹⁶ In its original sense it referred not to a

¹⁵ The pun is intended and must be explained: In the course of his academic life, Cover naturally wrote other scholarly pieces [these can be found in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER*, Minow, Ryan, and Sarat eds., The Univ. of Michigan Press, Ann Arbor (1992)]. As a method, however, I have taken *Nomos and Narrative* as a self-sufficient piece of writing. Thus, I have not felt obliged to square the views presented here with those presented elsewhere, notably in his very much publicized *Violence and the Word*, 95 *YALE L. J.* 1601 (1986). This is not just a question of convenience but of consideration: *Violence and the Word* is written to address other kind of concerns and, I feel, with a sensibility altogether different from the one informing *Nomos and Narrative*. Personally, I find the Cover of *Nomos and Narrative* more constructive—open and eye-opening—than the Cover of *Violence and the Word*. It is the former and not the latter I want to pursue.

¹⁶ For the historical evolution of this word (and of Greek cultural, i.e., normative values in general), as well as for its fundamental seat in juridical, philosophical, and medical thinking, see the excellent work of W. JAEGER, *PAIDEIA*, 3 vols. (esp. v. 1), translated into English by Gilbert Highet, New York, Oxford Univ. Press. 1939 and 1943-4. Robert Cover makes explicit reference to this work (at 6 n. 9). For a shorter and very useful historical evolution of the term *nomos*, see, same author, *Praise of Law: The*

particular law or single piece of legislation (positive law), but to the sum total of that which was respected by all as living tradition with regard to what is right or wrong.¹⁷ Cover returns to this original meaning and uses the term to signify not an individual law, but the whole normative corpus of a living community. On the other hand, it is also important to dispel a second possible misconception due to the famous Sophist dichotomy between *nomos* (convention) and *physis* (nature). In this dichotomy the laws of convention are said to be followed merely by force of habit or fear (hence unnaturally), whereas the laws of *physis* such as the “law of the stronger” and “might is right” are said to follow untrammelled human nature.¹⁸ By the time of the Sophists, however, the word *nomos* had suffered a great semantic transformation. The work of prior thinkers like Hesiod, Solon, and pre-Socratic philosophers like Heraclitus shows no essential dichotomy between *physis* and *nomos* because the laws that govern the cosmic and the moral worlds are basically thought to be in agreement.¹⁹ Cover returns to the original meaning of the term. In his view, the *nomos* is not imposed upon the individual as it were externally, but comes naturally through a process of acculturation and learned gradually from childhood (at 5).²⁰ Once internalized, the *nomos* forms part

Origin of Legal Philosophy and the Greeks, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, New York, Oxford. Univ. Press, 1947 [hereinafter, Jaeger, *Praise of Law*].

¹⁷ Jaeger, *Praise of Law* (supra note 16), at 361.

¹⁸ For the harshest expression of the law of the stronger, way before Nietzsche’s will to power, see Plato’s characters Thrasymachus (in the *Republic*) and Callicles (in the *Gorgias*). For the law of the stronger applied to real world politics, see Thucydides, *The Peloponesian War*.

¹⁹ In archaic and classical Greek thinking, *nomos* is deeply related both to *Dike* (justice) and to *logos* (order, reason). It is only in the late fifth and the fourth centuries B.C. that the negative connotations of the word *nomos* as something imposed artificially, and hence felt as a constraint, began to surface. For the deep interconnection between the ideas of the universe and moral ideas of justice see, among others, the pre-Socratic philosopher Anaximander who described the universal process of coming to be and passing away like a juridical process of atonement [W. JAEGER, THE THEOLOGY OF THE EARLY GREEK PHILOSOPHERS 34-6 (The Gifford Lectures 1936, Wipf & Stock Publishers, Oregon, 2003)].

²⁰ Cover cites the work of pedagogues, developmental psychologists, and moral psychologists such as Piaget, Kohlberg, Erikson, or Gilligan. For a jurisprudential treatment of the views of Piaget and Kohlberg, see B. JACKSON, MAKING SENSE IN JURISPRUDENCE 19-25, Deborah Charles

of the psycho-social structure of the individual as much as do the physical phenomena of mass, energy, and momentum.

Generally, the *nomos* can be said to inhere in the social life of the community. In other words, every social group with enough sense of its own differentiation with respect to its worldview and life-project is liable to generate its own normative activity and constitute itself as a *nomos*. An interesting question is whether every social group qualifies as a normative community. For instance, can a band of pirates be said to constitute a *nomos*? Cover is not explicit about this, but his examples (Amish, Mennonites, Garrisonians, Radical Constitutionals, Bob Jones University, Pro-Life and Women's movements) entail invariably: a) a well-constituted and fully blossomed human collective; b) a self-consciousness of collective identity (to think of themselves *as* a group); c) a perception of sharing and being bound by common authoritative texts; and d) certain normative projects-of-life. This characterization would possibly exclude collectives united on a purely contingent basis, or on instrumental reasons alone, with no normative aspiration. What is clear is that the criteria for denying a particular social collective the category of a *nomos* cannot be based on particular moral likes and dislikes. Also, it is important to remark that *nomos* and community are two separate things. As Cover says, the *nomos* is the creation of a community that *already* has an identity (at 50 n. 137). Nevertheless, once created, these norms to which the group now feels bound help to shape their life-in-common. As a result, the *nomos* also creates the community. Conceivably the relationship between *nomos* and community is a metonymic one, where the former stands for the normative identity of the latter. At any

Publications, Liverpool (1996). About how law is learned see, more recently, C. Engel, *Learning the Law*, PREPRINTS OF THE MAX PLANCK INSTITUTE ON COLLECTIVE GOODS, Bonn, 2004-05. The paper can be accessed at <http://ssrn.com/abstract=539982>.

rate, variances in the *nomos* help to distinguish one given social group from another, as well as members of one group from members of another.

Not only does the *nomos* inhere in the life of the community, but is itself inherently communal. Indeed, law makes no sense except as a social or collective phenomenon. In an argument that echoes Wittgenstein's against private languages,²¹ Cover affirms that a purely idiosyncratic *nomos* would be utterly unintelligible, presumably because the very idea of a normative behavior—as behavior that *must* be followed—is pointless in a world inhabited by only one person. At the very least, “any person who lived an entirely idiosyncratic normative life would be quite mad” (at 10).²² Further, no legal precept can be properly understood without the social mapping provided by the narratives in which it is located, and these, Cover says, are inherently communal.²³ As a result, the community and not the individual is, for Cover, the basic unity of normative life. Not only that, taking to heart the Aristotelian definition of man as a political animal (*zoon politikon*), it seems that no one can live without or outside the *nomos*. All this entails that the individual accesses the normative life through the social group to which she belongs, not meant to deny that she may switch memberships and learn other normative vocabularies in the course of her life. Still, these new languages will be added on top of the old ones and acquired through the social and cultural medium.

²¹ L. Wittgenstein, *PHILOSOPHICAL INVESTIGATIONS* sections 241-271 (3rd ed. 1999).

²² For those unconvinced by Wittgenstein, I recommend Jorge Luis Borges' short-story *Funes el Memorioso*, an unsurpassed narrative about the absurdity of conceiving a language that only one person could speak.

²³ As he puts it: “[t]he intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior” (at 10). He continues: “the part that your or I choose to play may be singular, but the fact that we can locate it in a common ‘script’ renders it ‘sane’” (id.). Cover acknowledges that groups can also generate madness: however, he still sees a difference between collective and idiosyncratic acts (at 10 n. 28).

What, then, are the elements that constitute the *nomos*? Traditional legal theory has it that law is ontologically structured in discrete units, namely rules and principles, and made functional by the use of certain logical and deontic operators. Cover deems this model unnecessarily restrictive of the richness of the *nomos*, as well as oblivious to the real forces that make the normative universe spin. In light of the Kuhnian concept of paradigm, Cover's *nomos* incorporates not only a body of precepts, but also a *language* and a *mythos* (at 9).²⁴ I trust that the meaning of the "body of precepts" is quite straightforward and needs no special attention. What needs explaining now is Cover's understanding of both "language" and "mythos," for they are thicker than their common use in legal and analytical discourse. First, legal language is not just the specialized system of grammatical or syntactical rules for the correct utterance of legal propositions. Rather, the language of law is, like the *nomos* itself, a world that the speaker inhabits.²⁵ As a *normative* language, it provides the lexicon by which things, persons, or actions are judged as being right/wrong, good/bad, noble/ignoble, licit/illicit.²⁶ However, being a competent inhabitant of this language requires more than knowing how a particular word, concept, or precept is *used*; significantly, one must know how it is *charged*, that is, the heavy load of symbols, images, and values it carries which defies rationalization. Cover suggests that in the legal sphere there are terms so heavily charged that no use (not even a competent one) can lift. One can think, for example, of the term

²⁴ Cover says his understanding of the *nomos* holds a "rough correspondence" to Kuhn's scientific paradigm that integrates method, belief, and propositions (at 6 n. 10).

²⁵ In Heideggerian fashion, to say that the speaker inhabits a language is to say that language construes its speaker as much as the speaker construes her language. As we shall see, legal language is both repository and constitutive of communal identity. Cover's understanding of the relationship between language and community is indebted to the work of James Boyd White, as he acknowledges (at 6-7 n. 11 in fine).

²⁶ As Cover says, "... law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, humiliate, or dignify" (at 8). In fact, the greatness of a legal tradition is perceived in the possibilities of expression, argument, and judgment that its language avails (at 6).

“unpatriotic” in the American context, where such a charge puts that person in an untenable position—just like being called a “communist” fifty odd years ago; or think of the storm that terms such as “occupied territories” and “self-determination” can cause in other contexts. Cover’s insight applies also to entire legal institutions: without such charge, it is virtually impossible to explain the virulence of contemporary debates about the legal definition of marriage or adoption, generated precisely between alternative conceptions of normative life or, we may now call them, *nomoi*.

In regard to myths, these are not fictional or irrational stories doomed to disappear with the coming of age of civilization. Rather, the myth is the symbolic form by which every human group conceives its relations to its own distant past, locates itself in the course of history, and presents itself to the outer world.²⁷ For that reason, it does not matter whether or not the myth is “pure invention,” because its workings are *real* both in the social imagination of that group and in its interactions with the exterior world. To illustrate this point, Cover offers the example of the law of inheritance in the bible: In the level of legal precept, the rules that regulate the institution of inheritance seem clear and unproblematic. They state, for instance, that the oldest son will succeed his father as head of the family.²⁸ However, such a simple rule is made problematic by the narratives in which it is embedded, and which flatly contradict it. Particularly interesting is that whenever the rule of inheritance is undermined, the mythos associates it with the workings of the divine hand. Therefore, to understand the law of inheritance in the bible, or as Cover puts it, to be an inhabitant of the biblical normative world, is to

²⁷ As such, “[myths establish] a repertoire of moves—a lexicon of normative action” (at 9).

²⁸ Cover at 20, citing *Deuteronomy* 21:15-17.

know not only that this rule can be overturned, but that God's will is likely to be behind the overturning of this specific rule (at 22).

If precept, myth, and language—including the range of images and symbols that we have called *charge*—are constitutive elements of every *nomos*, such a world is held together by the force of the *interpretive commitments* of those who inhabit it (at 7). In other words commitment, and not logical or deontic operators, is the primary force behind the *nomos*. Although we shall speak further about it, we can already advance that commitment is an act of personal engagement with the legal precept that determines what law means and law shall be (*id.*). Noticeably, this definition puts commitment in intimate relationship with legal interpretation. For Cover, this process is not amenable to a set of operational or linguistic activities, such as that of determining whether an electrically propelled vehicle falls within the scope of the “no vehicles in the park” rule.²⁹ Nor does interpretation come as something of a supplement to the rule after the identification of valid law, but simultaneously with it and as precondition of legal meaning.³⁰ In addition, Cover stresses that legal interpretation occurs always within the constraints (institutional or other) of the interpretive setting.³¹

In sum, Cover's jurisprudence suggests that a comprehensive theory of law must integrate all these elements in order to have an adequate glimpse of its object of study.

²⁹ Cover at 6. This is an example used by Hart in *THE CONCEPT OF LAW* (1961); hereinafter references are to the 2nd. ed., Oxford Univ. Press, Oxford (1994), with an added Postscript edited by A. Bulloch and J. Raz.

³⁰ The view that the law is inherently interpretive is associated with Ronald Dworkin. However, Cover criticizes Dworkin for not taking into account the constraints of the interpreter (at 35 n. 98).

³¹ From this perspective, one is reminded of Gadamer's bounded interpreter, although Cover takes issue with Gadamer for not having adequately struggled with what is specifically *legal* of legal hermeneutics (at 6 n. 11). In defense of Gadamer one may say that he is not interested in expanding the concept of legal hermeneutics, but in bringing back into a general theory of hermeneutics one of the former's fundamental insights, the importance of application. Application is, for Gadamer, the way of incorporating the interpreter's present situation into the text (yet recognizing at the same time that there is an applicable text to begin with), and he shares many of Cover's own concerns.

Some may want to believe that the positivistic framework has overcome at least the mythical foundations that enliven the biblical world. However, Cover is right to point out that every legal system must conceive itself in one way or another as emerging out of that which is itself unlawful (at 23). And this, Cover states, always entails a narrative about how the law came to be (at 45). Thus, regardless of the act of origin (revolution, migration, catastrophe, or theogony), and the narrative device used to explain it (the Pilgrim fathers, Robinson Crusoe, Mount Sinai, or the positivistic rule of recognition and *Grundnorm*), the foundation of law is still mythical (at 23).³²

As many before him, Cover believes that there can be no pure or unmediated access to normativity.³³ But then, how is it possible to reach the normative realm and, more importantly, to express it? Cover suggests that narrative may be the key that opens that door. *Narrative* is an important term-of-art that merits some pause. The proper way to frame the issue is not through the customary dichotomy between fact and fiction, but rather through the one between fact and value.³⁴ Indeed, Cover places narrative in the context of the latter dichotomy but only to overcome it. For Cover, fact and value—narrative account and normative assessment—are inseparably related. As he says, every prescription (norm, covenant, value) is placed within a narrative that explains it and gives it meaning. At the same time, every narrative (be it historical or imaginary) is insistent in its demand for its prescriptive point, its moral (at 5). Cover, whose views on

³² Cf. J. Derrida, *Force of Law: The 'Mystical Foundation of Authority'*, 11 CARDOZO L. REV. 920 (1990). For Cover such “foundation” does not imply a fixed canon of narratives (at 4 n. 3 and n. 4). In fact, given that myths of origin can neither be entirely domesticated nor prevented, they always provide the “typology for a dangerous return” (see at 23-24 with n. 66).

³³ Cover does not believe in the world of “pure” prescription, for even if there was one, it would be as inaccessible as the law in Kafka’s known parable *before the law*.

³⁴ Sometimes Cover associates narrative with imagination and thus seemingly with fiction. However, he does so to stress that no matter whether narrative is the result of what did happen (history) or might have happened (literature)—that is, either as historical or fictionalized account of a *fact*—it is always and invariably in search of *value*.

narrative are influenced by Hayden White, argues further that narrative is in fact the act of imposing a normative force upon reality.³⁵ In other words, narrative gives reality a shape, and a sense of direction, plot, and trajectory that it would otherwise lack.³⁶ This implies that the normative significance of a given state of affairs, real or imaginary, is inevitably tainted by the world of value implied in its narrative construction. Yet this need not be cause for alarm but for celebration: if the act of narrating adds value to the world of fact, narrative traverses—and allows us to traverse—the seemingly unbridgeable distance between fact and value.³⁷ In other words, by connecting a given reality with its normative significance, narrative serves to connect the world of the *is* with the world of the *ought*.

Regrettably, such a critical contribution to legal philosophy has gone largely unnoticed. Still, today the world of law is largely thought to be that of the “ought,” completely different from that of the “is.” Legal positivism has it with Hume that there exists an unbridgeable gap between the “is” and the “ought.” All this creates an insuperable dilemma for legal theory that cannot explain—except as the result of acts of pure will—how it is possible for social practices to become norms.³⁸ Cover’s response is

³⁵ This is what Hayden White refers to as the “moralizing effect” of narrative. As he writes narrative “is intimately related to, if not a function of, the impulse to moralize reality” and, in fact, “presupposes the existence of a legal [a social-political] system” [H. White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE*, ed. by W. Mitchell, The University of Chicago Press, Chicago and London, (1980-1), 1-23; citations are to pages 14 and 13 respectively].

³⁶ As Cover says, the various literary genres—history, fiction, tragedy, comedy—can all be seen as the “imposition of a normative force upon a state of affairs” (at 10). This recalls Mikhail Bakhtin’s definition of genres not as sets of conventions or instrumental devices, but as fundamental ways of shaping the world or “form-shaping ideologies”; M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS*, M. Holquist ed. (1981). The relationship between Cover and Bakhtin has been interestingly explored by R. Mullender (supra note 9).

³⁷ This does not preclude being suspicious about the normative value created by each particular narrative. For a good example of such critical attitude, see Kenji Yoshino, *The City and the Poet*, 114 *YALE L. J.* 1835 (2005).

³⁸ H. KELSEN, *PURE THEORY OF LAW* (1934; 2nd rev. ed. 1968). The Hartian account followed by many according to which norms are ultimately grounded on social practice (e.g. recently A. Marmor,

ingenious in its simplicity. First of all, to the twofold ontological distinction between “is” and “ought” he incorporates a third category of being, the “might be.” This is no simple artifice. In fact, it can be said to have its roots in Aristotle,³⁹ for whom things are not just how they actually are, but how they will be if they reach their *potential*, or, one could say, how they *might be*. The reinstatement of this third category of existence of norms serves Cover to verify the link between *is* and *ought*. This *might be* serves precisely to link a given social reality to the ideal world of normativity and makes an imagined alternative (as well as movement, change, and transformation) possible. This is why Cover defines law precisely as a bridge linking a given concept of reality to its imagined alternative [at 9]. And law is neither fully *here* in the realm of social reality nor *there* in the realm of pure normativity. Rather, law partakes of all three of these categories at once, for of every norm one can reasonably say that the norm *is*, that it *ought to be*, and that it *might be*. Therefore, “to live in the legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be’” (at 10).

Does it mean then that every vision, no matter how ludicrous, can become a norm and form part of the *nomos*? This is another way of asking about the limits of the *nomos*. Cover does not address this issue directly, but I think one can make the necessary connections. The first limit derives from the collective nature of law. The presence of more than one individual ensures that the participants will have to find a

How Law is Like Chess, USC LEGAL STUDIES RESEARCH PAPER No. 6-7) not only fails as such [see M. Greenberg, *How facts make law*, in 10 LEGAL THEORY 158 (2004)], but it is surprisingly unresponsive to this very dilemma.

³⁹ ARISTOTLE, METAPHYSICS.

common intelligible language in which to articulate their visions. This process necessarily filters at least the most incongruent fantasies. However, in light of some collective quixotic acts the former limit appears insufficient. Cover sets up a second limit in the material reality in which law is supposed to be anchored. For Cover, law adds depth to utopia or pure vision and “rescues us from the eschatology that is the collision in this material world of the constructions of our minds” (at 10). In his view, groups who are consistently unable to convert vision into reality can be called movements, but no longer movements of the law (at 39). This would exclude chimeras unable to accommodate or adjust to their social and material surroundings.⁴⁰ Among these surroundings we find, as a third limiting factor, the wills, visions, and agendas of other actors, with the potential ability to thwart and oppose an alleged “unencumbered *nomos*.” As a slightly different point, the *nomos* must take into account the predictable behavior of these other actors. This leads on occasion to the internal modification of the normative tenets of the group. This is what Cover refers to as *second hermeneutic* and brings about an additional (fourth) limit to the *nomos*. Lastly, a fifth limit derives from the general perception of law as something with the power to bind us. This perception implies that at a given point the subjectivity of the interpreter must give way to postulate an object to which one owes obedience as law. This is the process that Cover calls *objectification* and represents yet another curbing signpost. In conclusion, it appears that the *nomos* is part and parcel of a complex—and wider—normative world (at 9) that it attempts to but cannot fully control.

⁴⁰ To these we must add the communities founded for purely contingent or instrumental reasons, and which do not espouse some sort of normative project (see *supra*).

Once we understand the *nomos* as a holistic form to organize the normative life and not as a system of rules, many a question which has seized the imagination of legal scholars becomes moot. Getting rid of old and exhausted questions and substituting them for new and more illuminating ones is, some say, the only way to define intellectual progress.⁴¹ Yet providing an answer for the old questions from the new framework would speak in favor of one tradition over another.⁴² Cover does not deal with these questions himself and it is only my own jurisprudential analysis which compels me to do so here. Yet I will try to answer them as I imagine Cover would have tried to do.

One of those perennial issues is about the structure of the legal system. The *nomos* is not to be imagined as a pyramid in which each norm is validated by its immediate superior until we reach the higher normative step of the ladder.⁴³ Rather, it is to be thought of as being organized internally through a language, elaborated through narrative, and stored like the rest of social memory. Such conceptualization would help to ease some of the well known problems associated with the pyramidal model. I shall mention four of the most pressing ones. First, the existence of very real normative sources—i.e. soft law, informal regulation, non-official practices—that are not acknowledged by, and therefore escape, the gaze of the pyramid. Second, the apparition of what philosophers of law François Ost and Michel van de Kerchove denominate as *boucle étranges* (strange loops) in which an inferior rule takes precedence over the

⁴¹ R. RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY*, Cambridge University Press, Cambridge (1989).

⁴² A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* University of Notre Dame Press, Notre Dame: Indiana (1988).

⁴³ Despite well-known objections, the Kelsenian metaphor is still a favorite in most legal minds. The Hartian *rule of recognition*, seemingly devised to take over the pyramid, does in fact reproduce the same structure.

superior, which subverts the hierarchy and therefore the very foundations of the pyramid.⁴⁴ Third, the inability of the pyramid to contemplate several and conflicting supreme norms at the same time and place.⁴⁵ Finally, the rigidity of the pyramidal model and its inadequacy to explain legal change except as a result of deliberate and willful action.

Cover's view of the *nomos* suggests, in contrast, a system flexible enough to incorporate sources and materials traditionally kept out of the legal frame. In fact, the *nomos* is radically open and contains no fixed rule for the identification of valid law. In other words, no pedigree or ladder is there to decide beforehand whether a given norm belongs to the *nomos* or not. Yet this does not mean that the *nomos* has no mechanism for doing so, but only that such determination can only be achieved as a result of a constructive effort. Significantly, the determination of what counts as law within a given particular *nomos* at any given point in time depends, I would venture, on the *evolving communal grasp of what is or is not legally relevant*, for that *nomos*, at that time. On the other hand, given that the *nomos* is not hierarchically structured, the puzzles derived from the subversion of the pyramid do not arise. To be sure, some precepts are more important than others; but the status and meaning of these norms is permanently challenged.⁴⁶ Indeed, considering that "prescriptive texts change their meaning with each new epic we choose to make relevant to them," in a true sense, then, "every version of the framing of the Constitution creates a 'new' text" (at 4 n. 4). In fact, only

⁴⁴ In their excellent *DE LA PYRAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT*, Publications des Facultés Universitaires Saint Louis (FUSL) # 94, Brussels (2002).

⁴⁵ See, recently, N. W. Barber, *Legal Pluralism and the European Union*, 12 *EUROPEAN LAW JOURNAL* 306-29 (2006).

⁴⁶ This is so because, as James Boyd White argues, "[t]he rule is often the subject as well as the source of argument." J. B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 *CHI. L. REV.* 684 (1985), at 689.

when the text proves unable to assimilate the meanings of new narratives, affirms Cover, does the need to create a new text through formal amendment arise (*id.*). As a result, the *nomos* is in continuous adaptative mode and allows for the interesting—and very real—possibility that at any given point there might be several contradictory fundamental norms at play.

One final old question is the felt need to separate law from other normative systems, namely morality. Judging from how this debate has been conducted between juspositivists and jusnaturalists—the former saying that an unjust law is still *legal*, the latter that unjust law cannot be *properly* called law—I find the controversy tedious and not particularly illuminating. As this story is often told, the point seems to have been finally settled by Hart, who circumvented this dilemma by arguing that a legal rule may still be legal even though too iniquitous to be obeyed or applied.⁴⁷ However, one cannot but wonder what kind of empty concept of law is one which requires neither obedience nor application. Cover enters this debate to state the obvious, and perhaps for that, in dire need of being said: “If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless *differ essentially in meaning* if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust” (at 7, emphasis added). This suggests several things: First, that rules cannot determine their own justice

⁴⁷ HART, *supra* note 29, at 210. See also his *LAW, LIBERTY, AND MORALITY*, Stanford Univ. Press, Stanford: California, 1963. The most famous debate about this issue was held between Hart and Lon Fuller, in the pages of the 71 *Harvard Law Review* (1958). Yet, there are other important actors. Among these, Gustav Radbruch declared that an intolerable law could not be called law. His views have been recently redefined by Robert Alexy [*A defence of Radbruch’s Formula*, in D. Dyzenhaus, ed. *RE-CRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER*, Hart Publishing: Oxford and Oregon (1999), 15-39]. For a recent appraisal of the position of both Radbruch and Alexy, see B. Bix, *Robert Alexy’s Radbruch*, UNIVERSITY OF MINNESOTA LAW SCHOOL, LEGAL STUDIES RESEARCH PAPER SERIES No. 06-13, Draft Jan 2006.

or injustice; second, that depending on their various assessments the *same* rules can look unjust, just, or both. Third, that every legal system is imbued with and will be necessarily affected by at least the *tacit moral judgment* of the people that utter, receive and use the law.⁴⁸ And fourth, that the true issue seems not one of determining whether an unjust law may be *valid*, but what it *means* to declare a law to be unjust, and how this declaration affects the *application* (and subsequent life) of such a law.

This leads not, on the other hand, to conflate law and morality. Cover grants that “a law may be successfully enforced but actively resented” (at 7). In other words, a law may still be *legal* in spite of its being unjust. As I understand it, Cover is pointing out that in modern legal systems, it seems to be the case that, what the organs of the State declare to be the law may be enforced *as* law, regardless of what the addressees think about it.⁴⁹ However, he also indicates that when a law is perceived as being unjust by the addressees and touches fundamental aspects of their lives, such a law will likely be greeted with rejection and, in some cases, with active resistance. If so, the way the law is judged (and this includes how it is judged morally) may affect the law’s subsequent life, and how it is understood, interpreted, complied with, and applied.

⁴⁸ About the idea of *tacit knowledge*, applied to the realm of science, see M. POLANYI, note 1.

⁴⁹ Certainly, it is not likely that those who enact the law will proclaim it as being unjust and profoundly immoral. This point is taken up by Alexy as a requirement of rationality or correctness [*On Necessary Relations Between Law and Morality*, 2 *RATIO IURIS*, 167-183 (1989); and again, replying to criticism, in *On the Thesis of a Necessary Connection between Law and Morality: Bulygin’s Critique*, 12 *RATIO IURIS* 138-147 (2000)]. But cf. Bix, *supra* note 47. Bix presents the hypothetical example of a country that would dismiss concerns of justice from the legal system altogether and substitute them for other kind of arguments (e.g. efficiency). This case is not unthinkable, and in fact Thucydides reports that such was the case of Athens during the Peloponnesian War. Still, I think that Bix’s example is more the description of an outsider looking in on the system than what the insiders would say about it (this is the case with Thucydides too). At any rate, Thucydides seems to suggest that the attitude of Athens was not only a complete subversion of what was hitherto the case in the entire civilized world, but also that it led directly to and precipitated the political disaster and ultimate downfall of such a system. About this inevitable outcome, see J. B. White, *The Dissolution of Meaning: Thucydides’ History of His World*, in *WHEN WORD LOSE THEIR MEANING*, Chicago Univ. Press, Chicago and London (1985), 59-92.

Some legal thinkers have found it advisable not to conflate law and morality in order to leave some room for the moral criticism of law. I find this argument convincing, but cynical when advanced by those who would exclude moral judgment altogether from the realm of law.⁵⁰ Cover finds a difference between law and morality, but not in the alleged lack of coercive power of morality (as in Kelsen) or of secondary rules (as in Hart). (One needs only to remember the Spanish Inquisition to realize that morality can be as coercive, enforceable, and structurally complex as the most coercive, elaborate, and immoral of the legal systems, if not more so.) This difference lies in their distinct rapprochement to social reality. Whereas law seeks inherently to transform vision into reality, argues Cover, morality can dispense with reality and remain as pure vision. The real interest of this argument is not the force of the distinction per se, as much as the power to navigate through it: indeed Cover sees both law and morality as similarly embedded in *vision* and thus sharing the same threads of ideals, aspirations, and goals. This means that every judgment of legality carries within it the germs of a potential moral judgment, without entailing, on the other hand, their mutual identity.

In the final analysis, the *nomos* can be defined as a pervasive filter through which things, persons, and acts are observed and assessed. In other words, in addition to being a world in which to live, the *nomos* is also the prism through which the rest of the world is judged. The *nomos* provides its inhabitants with a thick sustenance of images, symbols, and narratives to understand, frame, and respond to the surrounding world. In this last respect, I would suggest that the rapport of the *nomos* with the outer (not normative) world is this: when the *nomos* enters in contact with the external world, or to

⁵⁰ If law does not incorporate within itself the tools for its effective criticism I find it illusory that something other than law will. In this absence, the argument for not conflating law and morality (to leave room for the critical assessment of law) becomes toothless sophism.

put it differently, when the world is filtered through the normative lens of the *nomos*, the *nomos* acts like a *force field* with the capacity to *charge* the world juridically. In other words, when objects, events, actions, narratives, or persons existing out in the world enter within the scope of action of the *nomos*—i.e., for one reason or another they happen to be relevant—they are impregnated with the normative force of that *nomos*. According to the same principle, I would imagine, when two *nomoi* that share the same space collide they exercise an influence upon one another, that is, each affects the course of the other normative world.

We shall speak further about mutually effecting interactions in section II, but now we must understand how legal meaning is constructed and becomes normative (i.e., binding) within the *nomos*.

I.2. The Construction of Normativity: *Commitment and Objectification*

Legal theorists still debate what exactly makes a legal norm a *norm*,⁵¹ that is, what marks the transition from, or mediates between, a given legal provision found in a legal instrument and a full-fledged norm capable of modeling human conduct.⁵² I should warn at once that I am not talking about what it is that makes the norm effective (what makes individuals conform their behavior to its dictates), but rather, about what it is that

⁵¹ About this debate, although sometimes dressed in different clothes, see Hart, *supra* note 29, at 255-9; R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, Harvard Univ. Press, Cambridge, 1977, at 48-58; J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, Clarendon and Oxford Univ. Press, Oxford and New York, 1979, especially chapter 2; see, more recently, M. Greenberg, *supra* note 38, arguing that law practices alone cannot determine their own contribution to the content of law.

⁵² In what follows I shall use the terms “provision” (or to use Cover’s words “precept”) to refer to the legal utterance deprived of or still lacking in normative force, and the term “norm” to the one that it has it already. For the classic distinction between provisions—in Romance languages “dispositions”—and norms, see R. GUASTINI, *DALLE FONTI ALLE NORME* [Torino, 1st ed., 1990; in J. R. Bengoetxea, *Direct Applicability of Effect*, in *A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD*, Hart, Oxford (2003), 353-366].

makes it *binding* (what makes individuals accept it as mandatory). Clearly, the fact that the legal utterance emanates from the legitimate authority does not explain how authority is originally bestowed, nor why individuals yield their conformity to the provisions created by it.⁵³ Without having to answer for now the foundations of the whole *nomos*, we may still want to say something about how the individual precept acquires normative significance. Unlike most legal positivists, Cover does not believe that a legal provision is automatically endowed with normative grip for reason of its being inserted in an official legal instrument. Rather, he states that every precept must be interpreted before it can become binding.⁵⁴ However, in addition to interpretation a more personal act of engagement with the precept is also required. Interpretation particularizes a given precept as making a demand on the individual, but in order for this demand to acquire its full normative grip, adds Cover, the addressee must *commit* herself to the content of such an interpretation. Thus, “the transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken” (at 45). Commitment is, then, the personal act by which an individual asserts the meaning of a given precept and makes it his or her own.⁵⁵ In doing so, the individual accepts the practical consequences derived from the legal precept as applied to her. In the process, the general and unspecified legal utterance becomes *normatively charged*.

⁵³ This is the known problem of grounding the law to which, I submit, the positivistic tradition has yet to provide a fully satisfactory answer.

⁵⁴ In this he does not deviate from the views of those who accept the general distinction between provisions and norms.

⁵⁵ Although commitment is linked to praxis and in Cover’s view helps us distinguish between *legal* and *speculative* interpretations (at 45 n. 125), we should not assume that commitment is inexorably linked to a particular course of action. Logically, commitment does not determine action nor is it causally antecedent to it. How commitment eventually translates into praxis depends on many other factors, to name just one, on the possibilities left by the actions of other actors.

Considering that such personal engagement transforms the content of the law accordingly, it is not exaggerating to say that “interpretive commitments determine what law means and what law shall be” (at 7). The statement that commitment determines legal meaning is not metaphorical. As we saw, Cover affirms that “if there existed two legal orders with identical legal precepts ... they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust” (at 7). Cover offers an instance of this intimation in the case of the anti-slavery group the Garrisonians. Applying the dominant hermeneutic techniques of the day, the Garrisonians interpreted that the American Constitution gave support to slavery. In a sense, then, their interpretation agreed with that of Chief Justice Taney, when he declared that the Constitution dictated the return of runaway slaves.⁵⁶ However, the Garrisonians were not committed to the principle of obedience to the Constitution that Taney took for granted. For them, a Constitution that permitted slavery could never be binding and ought not to be obeyed. On this basis alone Cover argues compellingly that their respective normative worlds differed radically (at 35-7). This example illustrates that no legal norm may be properly understood without accounting for the subjective rapport that the individual establishes with it. It also suggests that the subjective element is not something of a supplement to the norm, but forms part of its structure of signification. Accordingly, “to know the law—and certainly to live the law—is to know not only the objectified dimension of validation, but also the commitments that warrant interpretations” (at 46).

⁵⁶ *Dredd Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857).

The assertion may strike those who believe that law and legal knowledge are or need to be objective and purely descriptive.⁵⁷ But upon consideration, it simply brings to legal language what we always suspected was true of language in general, namely, that every description is colored by the type of relationship we establish and want others to establish with what we describe.⁵⁸ And this applies always and without exception. In his excellent book *Personal Knowledge* Michael Polanyi argues quite convincingly that every assertion of knowledge, even those we think of as scientific, carries within it an ineradicable act of personal engagement.⁵⁹ In a passage that echoes many of Cover's own concerns, Polanyi writes that such a personal form of knowledge "commits us, passionately and far beyond our comprehension, to a vision of reality. Of this responsibility we cannot divest ourselves... [f]or we live in it as in the garment of our own skin."⁶⁰ "According to the logic of commitment", concludes Polanyi, "truth is something that can be thought only by believing it."⁶¹

Nothing said above should be interpreted as affirming that law and legal knowledge are merely subjective. In fact the very idea of commitment implies by

⁵⁷ For all see H. KELSEN, *supra* note 38. Hart's internal point of view seems to accommodate some of what it is being said here, but at the end the day he still points out that what truly matters is *convention*—practice—and not *conviction*—belief; see Hart's own admission of this point in the Postscript to the 1994 ed. of *THE CONCEPT OF LAW* (*supra* note 29) as a response to a criticism raised by Dworkin.

⁵⁸ The attitude of the speaker towards his own speech can make the *same* speech look sarcastic, ironic, cynical, or critical, and present its conclusions as something to be welcomed or to be afraid of.

⁵⁹ M. POLANYI, *supra* note 1. Cover cites Polanyi's book in connection to the Kuhnian concept of scientific paradigm that integrates not only propositions and methods, but also *beliefs*. Cover affirms that such an understanding of science holds a "rough correspondence" with his own view of the normative world (n. 10 and accompanying text).

⁶⁰ POLANYI, *supra* note 1, at 64.

⁶¹ POLANYI, *supra* note 1, at 305. This is not to say that knowledge is merely subjective. On the contrary, Polanyi stresses that "[t]he inherent structure of this fundamental act of personal knowing makes us both necessarily participate in its shaping and acknowledge its results with universal intent." This means that "it is the act of commitment in its full structure that saves personal knowledge from being merely subjective" (at 65). Also in law, one can be said to participate in the creation of knowledge as well as to claim validity beyond it. For what it means to have legal knowledge, see James Boyd White, *Legal Knowledge*, 115 *HARV. L. REV.* 1396 (2001-2002).

definition that we are committed *to something* other than ourselves. In the juridical field, that to which we are committed is posited as the object of law: “The community posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law” (at 45). This objectified “other” generally becomes a text, which is an essential ingredient “to the language games that can be played with the law and to the meanings that can be created out of it” (id.). This process of positing an external object of law is what Cover calls *objectification*: “Frequently, perhaps always,” says Cover, it “entails a narrative—a story of how the law, now object, came to be, and more importantly, how it came to be one’s own” (id.). Narrative is, we have seen, the “literary genre for the objectification of value” (id.). With it the full structure for the construction of legal meaning is finally revealed: “The creation of legal meaning”, explains Cover, “entails the disengagement of the self from the ‘object’ of law, and at the same time requires an engagement to that object as a faithful ‘other’” (id.). In other words, legal meaning is created by the “subjective commitment to an objectified understanding of a demand” (id.). Thus, “in the normative universe, legal meaning is created by *simultaneous* engagement and disengagement, identification and objectification” (at 44, emphasis added).

Apparently, commitment and objectification, subjective engagement and objective disengagement, spin the cycle in two opposite directions at once. Although Cover does not quite put it in this way, I find it useful to break down each motion into separate logical steps. First, on the direction that goes from the legal utterance to the norm, the legal utterance is interpreted as establishing a demand which lacks normative force until the individuals commit to it. These steps can be put in the following

sequence: 1) legal provision; 2) interpretation; 3) demand; 4) commitment; and 5) norm. It must be clear that these steps serve only as logical representation of a non-linear sequence: the norm reached at the end must be interrogated on each separate occasion, giving rise to a multiplicity of possible provisions that require further commitments. The stability achieved with the normative determination of the precept is therefore apparent (though not less real). Second, in the opposite direction from commitment to the object of law, one can say that commitment is objectified as an external precept to which individuals owe obedience as law, generating the following sequence: 1) commitment; 2) objectification; 3) precept; 4) obedience; and 5) law. Again, the law that exacts obedience as law must be interrogated in each separate occasion and thus leaves room for a multiplicity of possible commitments.

Two final observations: First, it will be noted that each sequence is the perfect mirror of the other. Provision, interpretation, and demand are mirrored by commitment, objectification, and precept, respectively; whereas the commitment that leads to the norm has its correlative in the obedience owed to the law. In turn, the extreme that initiates each sequence has its correlative in the extreme that culminates the other: The legal provision that propitiates the process of commitment has its correlative in the law that culminates the process of objectification; and vice versa, the norm that culminates the process of commitment has its correlative in the commitment with which objectification begins.⁶² The second observation relates to the fact that these motions occur simultaneously and make the whole process a bi-directional one. As a result, the formation of legal meaning must be thought of as a never-ending cycle spinning around the opposite motions of commitment and objectification.

⁶² It goes without saying that “beginning,” “end,” “initiation,” and “culmination” are relative terms.

The question we must answer now is how these separate motions impinge on the constitutive elements of the *nomos* to affect its internal configuration.

I. 3. The *Nomos* as a Living Organism: *Paideic* and *Imperial*

Following an insight of sixteenth century Jewish codifier, commentator, and mystic Joseph Caro,⁶³ Cover identifies two distinct principles of organization of the *nomos* or, he says, two “ideal typical patterns for combining corpus, discourse, and interpersonal commitments” (at 12). On the one hand, Cover distinguishes the *paideic* or world-creating “strong” forces; on the other hand, the *imperial* or world-maintaining “weak” forces (at 12-3). In this section I will explain what he means by these, how they relate to one another, and what Cover is reaching at through them. So what does it mean to say that the *paideic* and the *imperial* are two “ideal-typical patterns of combining corpus, discourse, and interpersonal commitment?” Are they forces that coexist in *every nomos* though perhaps in different measure? Or are they rather forms of combining the constitutive elements of the *nomos* that give rise to different *types of nomos*?

⁶³ Joseph Caro comments on an apparent discrepancy between Simeon the Just and Rabbi Simeon ben Gamaliel about the three pillars that hold the (Jewish) normative world: according to the first the world stands upon the Torah, temple worship, and deeds of kindness; according to the latter, it stands upon justice, truth, and peace. Caro explains the discrepancy by arguing that unlike Simeon the Just, Rabbi Simeon ben Gamaliel spoke only after the destruction of the Temple in Jerusalem. Caro’s conclusion is that the world was created on the basis of the three principles of Simeon the Just, but after it had already been created, it could continue to exist upon the basis of Rabbi Simeon ben Gamaliel’s three. What is relevant about Caro’s insight is not, I think, the identification of particular values—although Cover is quick to point out the similarity of the world-maintaining values of Simeon ben Gamaliel and the “universalist virtues that we have come to identify with modern liberalism”—but rather the identification of two very different kinds of forces: one to create the world, another to maintain it, for “there is a difference between the [force needed for the] preservation of that which already exists and the [force needed for the] initial realization of that which had not earlier existed at all.” [Joseph Caro, *Beit Yosef at Tur: Hoshen Mishpat 1*, in Cover, *Nomos and Narrative*, at 12, the parenthetical thoughts are Cover’s own].

Before anything, we must clarify that Cover is not speaking of types of societies or normative communities, but of “ideal types” in the Weberian sense.⁶⁴ Ideal types are methodological constructs devised with the aim of understanding a given social phenomenon from within. They are created by selecting salient features of observable phenomena, by classifying them into types, and by assigning to each an underlying meaning-pattern from which to interpret the internal rationality of the phenomenon under observation. This process is *ideal* not in the usual sense of idyllic but in two other senses: first, in that the selection of salient features, the classification into different types, and the attribution of distinct patterns of signification make the whole process necessarily sketchy; and second, in that the types claim to correspond to reality *ideally*. As Cover says, his use of the paideic and imperial types aims not to represent this or that concrete attribute of a given normative world, but rather to “[isolate] in discourse the coexisting bases ... of all normative worlds” (at 14). Thus, it is not to find fault in the types but to note their expected behavior that “no normative world has been created or maintained wholly in either the paideic or the imperial mode” (id.). Provided that one does not lose sight of their scope and range of action, ideal types allow the observer to penetrate complex human and social phenomena, which then must be contrasted with the necessarily richer reality. Indeed, ideal types “touch” reality at the moment when they are being created, as well as later, when they are trying to explain it. This has a curious effect that must be noted. As we shall see, depending on the social reality that one wants to explain—and our own coordinates within it—ideal types may be used to signify different things. Thus, whether one wants to explain the inner life of an

⁶⁴ About Max Weber’s ideal types and their application to law, see R. COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION*, Butterworths, London (1984).

individual *nomos* or to compare it with others in the broader normative space, the paideic and imperial will seem, respectively, either to coexist within every *nomos*, or to characterize one *nomos* but not another. In the former case, they act as active principles enlivening each and every *nomos*; in the latter, they are distinctive ways of organizing the *nomos* and give rise to different types of *nomos*.

Once this methodological concern has been clarified, we can concentrate on Cover's analysis. In his description, the paideic is a way of combining corpus, discourse, and commitment—the constitutive elements of the *nomos*—characterized by the strong sense of integration, cohesion, and purpose of its inhabitants. According to Cover, the term suggests: (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth (at 12-13). The use of the Greek word *paideia* (which can be translated as culture, education or even as “cultural education”) is especially appropriate, for, as Werner Jaeger describes, *paideia* is not only the content of the education that is transmitted—its episteme—but also the principles that direct this acculturation, as well as the action of learning itself.⁶⁵ This point will prove to be quite important when applied to the *nomos*, because the paideic is both the normative impulse that gives direction to the *nomos*, as well as the particular outcome derived from it. The Greek genealogy is also suitable because for a long time the Greeks lacked an official or statist education, yet managed to create, maintain, and pass on a significant body of their common normative lore from one generation to the next—informality yet assurance of continuity that Cover wants to

⁶⁵ Insofar as it also encompasses not only the principle but the action of *learning* itself, the *paideia* of a culture is broader than the Foucauldian concept of episteme [THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1966), English trans. 1970]]. See Werner Jaeger's seminal study PAIDEIA, *supra* note 16. Cover cites Jaeger's work several times in the course of *Nomos and Narrative*.

suggest also in regards to the paideic type of *nomos*.⁶⁶ In short, the paideic can be defined as the purposeful molding of the individual character into the normative universe of that community. In this regard, Cover points out the initiatory, celebratory, and performative nature of these pedagogical practices (at 13). Also, he stresses that the reliance on a common corpus, shared narratives, and strong interpersonal bonds confer upon the members of the paideic *nomos* a sense of belonging and location “in relation to the cosmos, to its neighbors, [and] to the natural world” (at 14).

Opposite to the paideic, Cover identifies the *imperial* or the world-maintaining *weak* forces (at 12-13). Not surprisingly, the imperial is marked rather by the absence of a common corpus that is taught, believed in, and recognized as the moving normative force of the community (at 14). Cover describes the imperial as grounded upon minimalist interpersonal obligations, expressed through norms that need not be shared as long as they are effective, and premised upon a discourse that aims not at personal expression but at objectivity (at 13). Whereas the paideic can be said to be generative and celebratory, the imperial serves in contrast to inhibit the unruly creative impulse of the *nomos* (at 13, n. 35). As Cover puts it, “the sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, [and] imposes the discipline of institutional justice upon norms” (at 16). This is why Cover states that, if the paideic may be associated with the idea of law as social meaning, the imperial alludes rather to the idea of law as social control (at 10 and 12-19).

⁶⁶ Note here that we are already making the move from one perspective to the other, and have used the paideic type first to explain the inner workings of any given *nomos* and then to characterize its kind (which can potentially separate it from another).

One problem often associated with the use of ideal types is their disjointed and stationary character. Nothing further from their use here, Cover understands the paideic and the imperial to exist in a mutually dynamic interaction. This idea connects with the never-ending cycle of legal meaning described in the previous section, but now within a more precise structure. At this point, Cover introduces his biological model for the process of norm-generation or, as he appropriately labels it, *jurisgenesis*. The jurisgenetic sequence shows that one ideal pattern grows naturally from the other in a process that can only be called “organic.” As every other living organism, one can say, the highly compact paideic *nomos* undergoes the continuous mutation of its constitutive cells. The duplication and reduplication of legal meaning by which thousands of further meanings emerge out of the same genetic code is what Cover refers to as “juridical mitosis” (at 15).⁶⁷ This process is continuous and unstoppable, and without the existence of a counteracting principle, its very potency⁶⁸ would endanger the continued existence of the *nomos*. Thus, says Cover, “it is the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance” (at 16). Without the sobering influence of the imperial mode, the worlds created solely in a paideic mode would be “unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions” (id.). And we can only imagine the sclerotic rigidity of a world operating exclusively in the imperial mode. In effect, the imperial imposes coherence “upon the fertile but

⁶⁷ The biological analogy is intentional: technically, the process of mitosis is the process of duplication and reduplication of chromosomes. Cover speaks of legal DNA to refer to the commonality of meaning that stands at the center of the *nomos* and makes possible its further reproduction.

⁶⁸ Cover uses the term “jurispotence” (at 15).

weakly organized jurisgenerative cells,” but such a principle is by itself “incapable of producing the normative meaning that is life and growth” (at 16). Arguably, the paideic and the imperial are interdependent and mutually effecting synergetic forces, jointly necessary for the healthy functioning of the normative body.

This notwithstanding, once we shy away from the *nomos*, individually considered, and set our sight on the variety of nomic entities populating the normative territory, the paideic and the imperial ideal types can also be used to characterize diverse types of *nomos*. Not without realizing this fundamental shift of perspective are we in a position to assess Cover’s following claim: he affirms that in the context of the modern nation-state, the social organization of state law—the most sophisticated normative manifestation of modern societies—has approximated the imperial type, whereas the social organization of the smallish normative groups has approximated the paideic.⁶⁹ Again, this is not to say that the law of the State is just imperial, or that the State is by nature incapable of speaking in paideic language.⁷⁰ Cover states quite clearly that “*any nomos must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible*” (at 14, emphasis added). There is no contradiction here: to the extent that the State avails everyday normative life, it *must* contain within it the germs of the paideic. However, Cover argues that modern states are no longer capable of the level of cohesion, integration, and purpose that characterize the paideic. In its place, other smallish communities—religious groups, social movements, movements for legal and political reform—have taken up the task of

⁶⁹ Cover (at 16) speaks explicitly about the modern nation-state, although he then circumscribes his assertion to the state he knows most, the United States. The fact that I come from a different State and legal tradition yet feel perfectly at home with his depiction of the “state-of-(legal)-affairs” makes me suspect that his statement covers much more territory than he cares to vindicate.

⁷⁰ Neither does the paideic cease in front of the State (at 11 n. 30).

providing individuals with a rich texture of normative action and significance. In these, Cover suggests, “that which must be done ... and the sources of common commitment to the doing of it stand bare, in need of no explanation ... obvious at once and to all” (at 14). It is precisely this promise of a “shared sense of a revealed, transparent normative order” (id.) which the modern state can no longer deliver.

Before presenting Cover’s defining conclusion, two potential distractions must be dispelled. First, eloquences such as “pure and revealed transparent normative order” should not make us lose sight of the fact that Cover’s communities are not grounded on “essences” such as blood, race, or ethnic origin. Cover speaks rather about “intentional communities” (at 14), by which he means those communities “whose members *believe* ... to have common meanings for the normative dimensions of their common lives” (at 14-15, emphasis added). Furthermore, the imagined *integration* that stands at their center is just that, an *imagined* integration: “the unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary” (at 15).⁷¹ Certainly, “differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters” (id.). This is why the longing for an absolute pure essence is but a chimera: “Were there some pure paideic normative order for a fleeting moment, a philosopher would surely emerge to challenge the illusion of its identity with truth” (id.). The second concern is about the idyllic aspect of Cover’s idea of the *communal* life. In light of many passages of *Nomos and Narrative*, it seems obstinate to deny that some idealization exists. However, Cover acknowledges that paideic communities often make use of coercive mechanisms to assure and maintain the

⁷¹ This does not mean that it has no *real* implications: “the imagined instant of unified meaning is like a seed, a legal DNA, a genetic code ... for a thousand real integrations of corpus, discourse, and commitment” (at 15).

perceived unity and coherence of the group. As one clear negative example, he mentions the case of the Massachusetts Bay Colony in which “the holistic integrity of the colony was maintained by exclusion and expulsion” (at 16 n. 41). And as it was hinted earlier, Cover is not unaware the social groups can be “sectarian,” “dissociative,” “wary,” and “violent” (at 16).

If both smallish communities and State are paideic to some extent, and both State and groups do also exercise certain imperial prerogatives, what is exactly the state of affairs to which Cover wants us to direct our attention? Probing into this question will help us to understand one of the crucial concerns of *Nomos and Narrative*. First of all, the association of State law with the imperial mode of norm-articulation suggests that the law of the State no longer avails its citizens with the kind of normative activity that molds their character and galvanizes social action. As Cover says speaking in the context of American Constitutionalism, “authoritative precept may be national in character ... but the meaning of such a text is always ‘essentially contested’ in the degree to which this meaning is related to the diverse and divergent traditions within the nation.”⁷² Even were one version of the story to be declared authoritative, affirms Cover, “alternative stories still provide normative bases for the growth of distinct constitutional worlds” (at 19). This in itself may not be a problem, and some would argue not without reason that it is rather a virtue of modern liberal democracies that they

⁷² Cover writes in this regard: “All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance. And even were we to share some single authoritative account of the framing of the text—even if we had a national history declared by law to be authoritative—we could not share the same account relating each of us as an individual to that history. Some of us would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis. [...] Thus, the narrative strand integrating who we are and what we stand for with the patterns of precept would differ even when were we to possess a canonical narrative text” (at 17-18). As I said earlier (supra note 69), these observations apply to contexts way beyond American constitutionalism.

“disclaim control over narrative.”⁷³ However, Cover notes an additional phenomenon that complicates things exceptionally, I believe. It is part of the common lore of the legal profession—and thus “only partially enforced in practice, but fully operative in theory” (at 16)—that the State is thought to entertain the monopoly in the determination of what counts as law. As Cover says, “the precepts we call law are marked off by strict social control over their provenance” (at 17) and thought to respond to a pattern of nested consistency (at 17-8).⁷⁴ This means that, in spite of its inability to generate a paideic *nomos* of its own, the State is still believed to retain, and to have the right to retain, absolute dominion in the determination of law. This creates the paradoxical situation that, on the one hand, normative manifestations that do not come from the State are dispossessed of legal status, while on the other hand, the law of the State does not live up to the promise of providing normative life with meaning. This leads to Cover’s main argument. As he puts it, “[t]he conclusion emanating from this state of affairs is simple and very disturbing,” says Cover: “there is a radical dichotomy between the social organization of law as power and the organization of law as meaning” (at 18). Again one may want to ask what exactly makes this situation so disturbing. The key word here is, I think, *dichotomy*. If our analysis showed that both paideutic and imperial forces are necessary for the maintenance of a healthy living organism, the systematic repression of the former becomes symptomatic of a grave social illness. Insofar as law’s generative, enlightening, and educative function is subdued, the ability of law to function as a

⁷³ In the context of modern pluralistic societies, one may think that it would create more problems than it would solve if suddenly the State would adopt a strong paideutic attitude. One need not be reminded of the excesses of States that adopt an ultra-nationalistic grand narrative. I shall argue, however, that Cover is not advocating a return to any such statist *paideia*.

⁷⁴ The common places cited by Cover here are J. GRAY (THE NATURE AND SOURCES OF THE LAW (1909) and H.L.A. HART (supra note 29). Cover argues further that despite Dworkin’s criticism of Hart (supra note 51), Dworkin “does not deny the social control over precept articulation that I am positing here” (at 17 n. 44).

bridge between a given state of affairs and its imagined betterment is undermined, if not eradicated. Cover is not alone in thinking this quite distressing.

II. CONFRONTING THE OTHER: IMAGINING A CONSTITUTIONAL COSMOS

Thus far we have spoken of single and self-enclosed normative worlds (at 19), but the socio-legal *cosmos* is populated by heterogeneous nomic entities. Thus, from the world of one, we must move now to the world of two. If the analogy of the living organism serves Cover to describe the patterns of reproduction, transmission, and preservation of each individual *nomos*, the metaphor of the cosmos serves him now to imagine the space wherein heterogeneous *nomoi* coexist and relate to each other at any given point in time.

Cover draws a distinction between two ways of interacting with the outer world (i.e., other *nomoi*). The first he calls *insular*; the second *redemptive*. These two *ideal-types*⁷⁵ are defined by the relationship between groups and their socio-legal environment, or to put it differently, by the way each group comes to terms with the “ontological reality of the other” (at 29).⁷⁶ Cover discusses the insular and redemptive types in connection to the task of constitutional meaning-formation. At this point, one may wonder why he chooses to place the Constitution at the center of his analysis.

Certainly, it cannot be because the Constitution declares itself to be the supreme law of

⁷⁵ Cover sometimes speaks of insular and redemptive *communities*, and for convenience, sometimes so will I, but properly we should keep in mind that they are “ideal types” in the sense described above (or as he also calls them “interpretive trajectories,” at 60) and not concrete communities.

⁷⁶ Cover argues that these heterogeneous *nomoi*—each of which claim their own sense of meaning—effect each other through human contact. Each *nomos* is, as a result, “a force, like gravity, through which our worlds exercise an influence upon one another” (at 9).

the land, for such a self-referential clause does not bind the *nomoi* that do not recognize it as such. However, Cover notes that “many of our necessarily uncanonical historical narratives treat the Constitution as foundational—a beginning—and generative of all that comes after” (at 25).⁷⁷ If true, *pragmatic* but not political reasons appear to justify why the Constitution should be given such a prominent place. Indeed, as a matter of historical and sociological argument, one may find reasons to support that “the Constitution is a widespread, though not universally accepted basis for interpretations; it is a center about which many communities teach, learn, and tell stories” (at 25).

Such an explanation, however, does not engage groups for whom the Constitution is not at the center of their teachings. In fact, the lack of a single text to which all groups owe allegiance compromises any theory that would place a particular text as its stepping stone.⁷⁸ However, I find an additional argument to defend Cover’s focus on constitutional meaning-formation. Arguably, one might think of constitutional meaning not as the task of determining the meaning of the constitutional *text*, but rather as the *activity* through which distinct *nomoi* engage in determining what counts as the fundamental text (or texts) in their respective communities. In other words, the construction of constitutional meaning is the task of working out the text, texts, and accompanying narratives that are to be taken as the fundamental, and hence

⁷⁷ “This is true,” affirms Cover with the American context in mind, “even though the Constitution must compete with natural law, the Declaration of Independence, the Articles of Confederation, and the Revolution itself for primacy in the narrative tradition” (at 25).

⁷⁸ Cover finds a way to respond to this concern based on what he calls the “interconnectedness of legal meaning” (at 33). According to this argument, all normative groups inhabit a common cosmos which forces them to interact whether they like it or not, and where one is forced to take into account the normative world presented by the other. This entails that when groups for whom the Constitution is not central encounter groups for whom it is, the rhetorical configuration of their engagement forces the former to take into account the latter (namely the Constitution). In this rhetorical context both are engaged with the same constitutional text. I find this argument illuminating, but by itself insufficient to prioritize any one single *text*, whatever that might be.

constitutional, in that community. In this task the (State) Constitution may be just one among many—certainly not the only—legal instruments to be considered. In addition to pragmatic reasons, then, one can articulate *epistemic* and hermeneutic arguments to wanting to comprehend the actual development of a constitutional cosmos; in this light, one could say without inconsistency that in one way or another, nomic groups are “all engaged in the task of constitutional understanding” (at 33).

II. 1. Insular Constitutionalism

Insular communities are those who create some sort of “nomic refuge” and wish to keep it free from external interferences, especially from the State.⁷⁹ In their social organization, insular communities are instituted by a principle of separation that draws the boundaries between the inside and the outside. “The principle of separateness is constitutive and jurisgenerative” (at 29). In other words, “[i]t is not only a principle limiting the [S]tate, but also one constitutive of a distinct *nomos* within the domain left open” (at 29). As a result, these groups “inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion” (at 28).

Cover draws from the scholarship of Carol Weisbrod and others to illustrate how, from time to time, insular communities utilize well-known legal instruments to create and emerge as an entire *nomos*, that is, as “an integrated world of obligation and reality from which the rest of the world is perceived” (at 31).⁸⁰ For example, he mentions how nineteenth century utopian communities used freedom of contract as a

⁷⁹ From the perspective of insular communities, the State is perceived more as a historical contingency in which they happen to find themselves (at 27 and 31 in fine) than as the logical culmination of primeval societies, as in the contractarian tradition, or in historicist accounts such as Hegel’s.

⁸⁰ Cover cites the example of Massachusetts Bay Colony.

ground for their nomic insularity; or how property and corporation have been bases for company town, mine, or plant, often to assert a right to law creation and enforcement with respect to social relations (at 31). What Cover wants us to notice, however, is not the concrete legal instrument utilized, but how it grows from there to become not one among many available legal instruments, but the rule around which the normative activity of the group revolves. In effect, the utilized legal instrument—whether it be contract, free exercise of religion, property, or corporation law—becomes the boundary rule upon which the group stands apart and constitutes its world.⁸¹

It is important to remark that the meaning of the boundary rule differs ostensibly depending on the side of the wall we are on. From the point of view of state doctrine, a simple way to interpret the group’s normative activity is through the lens of liberty of association (at 32). However, to assimilate the jurisgenerative capacity of each *nomos* to the doctrine of associational rights is, according to Cover, to assume ourselves the perspective of the state official looking out (at 32). This we ought not lightly to do, says Cover, because from without—or from within another normative world—the *nomos* of the officialdom is also particular (at 33). In other words, to frame this normative activity solely within the logic of liberty of association is anything but neutral; rather, it is a move charged with heavy political implications. It does not take much to realize that “the State’s explicit or implicit acknowledgement of a limited sphere of autonomy is understood from within the association to be the State’s accommodation to the extant reality of nomian separation” (at 32). To state it clearly, nomic entities do not need the

⁸¹ Through a process of *normative mitosis*, says Cover, “[a] world is turned inside out; a wall begins to form, and its shape differs depending upon which side of the wall our narratives place us on” (at 31).

State's recognition or permission to exist and to generate their own normative activity.⁸² But even more importantly, considering that not only the meaning but also the *significance* of the boundary rule differs depending on which side of the wall we are on, to adopt a single statist perspective may also be epistemically misguided: as Cover writes, "[f]rom a secular perspective on the Constitution, the free exercise clause's creation of small dedicated, nomic refuges appear to be merely an (unimportant) accommodation to religious autonomy. But for the Mennonites, the clause is the axis on which the wheel of history turns" (at 30 n. 85).⁸³ Arguably then, each *nomos* establishes itself as the Archimedean point from which to observe the rest of the world and, often, incorporate explicit rules establishing the self-referential supremacy of its own system (at 30 and 43).⁸⁴ An important methodological principle seems to derive here: in order to understand in full the interactions between distinct nomic entities, the critic must be willing to shift her position from one perspective to the other.

Cover's characterization of insular communities endowed with collective nomic autonomy⁸⁵ may be impugned on two separate grounds. In what concerns the internal aspects of the group, first, it may project a vision of homogeneity that does not

⁸² In spite of it, Cover states that it would be absurd not to concede the practical benefits of securing the acquiescence of the State officials (at 43).

⁸³ This is true not of the Mennonites, but of many normative conflicts around the world: for reasons of personal proximity, this touches the core constitutional controversy between Basque autonomists and Spanish centralists. The best scholarly exposition of the Basque *nomos* is MIGUEL HERRERO DE MIÑÓN'S *DERECHO HISTÓRICOS Y CONSTITUCIÓN*, Taurus, Madrid, 1998.

⁸⁴ As Cover says, "[t]his norm-generating autonomy might be formally granted in charter language. It might be implicit in a principle of religious liberty, freedom of contract, or protection of property. Typically, however, communities with a total-life vision, a *nomos* entirely of their own, find their own charters for the norm-generating aspects of their collective lives" (at 31-32, footnotes omitted). This self-referential supremacy is mitigated, assures us Cover, "by the partly principled, partly prudential rules of deference that each manifests in relation to the other" (at 30).

⁸⁵ Cover insists that his description of norm-creating capacities of the groups is not amenable to the logic of individual rights, nor is it a variant of the distinction, often found in liberal legal doctrine, between (individual) *titularity* and (collective) *exercise*. In Cover's view, the only way to make full sense of these "rights" is to think of them as pertaining to the group *as a collective*, I would suggest, as the State's right to impose punishment does not make sense any other way.

adequately represent (unless it otherwise represses) the necessarily heterogeneous composition of every human collective.⁸⁶ Moreover, the very idea that a group may have a discernible *identity* may also be doubted. I can think of two lines of argument to help us soften this kind of criticism. The first is to notice that projecting an identity often comes encapsulated within a claim for recognition—social, political, religious, economical. Thus, the group’s self-portrayed identity is shaped by the rhetorical need to present itself as distinct from an outer world and as entitled to respect, precisely because of this difference. In the interests of presenting such a claim, the likely heterogeneity of the group’s internal beliefs, myths, and narratives may be sacrificed, it is true. This is why it is important to bear in mind that “the unification of meaning that stands at [the group’s] center exists only for an instant, and the instant is itself imaginary” (at 14). Behind closed doors, the image of the group may be considerably or altogether different.

Still, is not ascribing an identity to groups already to commit an ontological fallacy? In other words, what kind of identity can we legitimately ascribe to groups? Cover’s nomic groups share a common body of narratives, myths, and language, it appears, but these are bound together by their *belief* in forming such a group (at 15). This suggests that, insofar as the members of a group think of themselves as a group, they are self-conscious of their own identity, which they help to institute by this very act (at 50 n. 137). Arguably, the bare commonalities of the group are not enough to constitute identity properly. For it to be perfected those commonalities must be affirmed by a self-reflexive act. Let me argue this point in connection to Paul Ricoeur’s theory on

⁸⁶ For a development of this argument, see J. Resnik, *supra* note 8. Certainly, Cover focuses above all on the commonalities that confer a sense of unity to the group.

the reflexive constitution of subjectivity.⁸⁷ The author explains that personal identity is properly constituted when the self can think of *itself as an other*.⁸⁸ For Ricoeur, identity is an attributive and relational concept, and links certain qualities and actions to whoever answers with his or her personal name to the question, “Who?”⁸⁹ Likewise, by thinking of themselves as groups, Cover’s communities seem able to respond with the first plural personal pronoun “we” when they are addressed, questioned, or threatened. This way they attribute to themselves (and we can attribute to them) a collective identity.

A second, quite different ground for criticism has to do not with the internal aspects of the group, but with its relations with the exterior. To speak of *insular* communities gives the impression that the group is hermetically sealed or uninfluenced by the outer world, which seems quite an untenable position in our era of global communications and networks. Far from it, Cover states quite explicitly that no group can manage a total breakthrough with the outside world: “Neither religious churches, however small and dedicated, nor utopian communities, however isolated, nor cadres of judges, however independent, can ever manage a total break from other groups with other understandings of law” (at 33). Although to speak about communities does inevitably entail some level of differentiation, Cover points out many areas of overlap and mutual influence. For instance, Cover notes that “the Amish concept of church-state relations is not entirely independent of secular, libertarian concepts of such relations”

⁸⁷ Ricoeur develops the idea of the identity-ipse (the self that thinks of itself “as an other”) as complementary to the more common concept of identity-idem (the identical to oneself, or what is thought to define oneself as opposed to another person). See PAUL RICOEUR, *SOI-MEME COMME UN AUTRE*, Seuil, Paris (1990).

⁸⁸ Like Cover, Ricoeur stresses the importance of narrative in this task.

⁸⁹ Ricoeur, *supra* note 87.

(id.). However, Cover stresses the fact that “each group must accommodate in its own normative world the objective reality of the other” (at 29). This is not to be seen only as a form of ethical or political response to otherness, but as a far more fundamental ontological recognition of the intersubjective constitution of the self: the acknowledgement that personal identity is partly constituted by the other, and vice versa.

In sum, despite these caveats—as well as those that stem from the use of an ideal-type—one can still conclude with Cover that insular communities “characteristically construct their own myths, lay down their own precepts, and presume to establish their own hierarchies of norm. More importantly, they identify their own paradigms of lawful behavior and reduce the state to just one element, albeit an important one, in the normative environment” (at 33).

II. 2. Redemptive Constitutionalism

Cover writes: “[p]eople associate not only to transform themselves, but also to change the social world in which they live” (at 34). The ideal type that Cover labels “redemptive” refers to those associations whose sharply different visions of the social order require a transformational politics that cannot be contained within their own autonomous insularity (id.). The transformation of the conditions of social life is in fact their very *raison d’être* (at 39).

The term “redemptive,” Cover acknowledges, bears a heavy weight of meaning, but he deems it appropriate to the deeply religious, personal and cosmic connotations distinguishing these from other less integral or holistic reformist movements (at 34-5).

Redemptive movements set out to liberate persons and the law, and to raise them from a fallen state (at 35). Accordingly, says Cover, redemption postulates: (1) the unredeemable character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other (at 34). It can be said that if insular communities want the rest of the world not to interfere with their world, redemptive groups want the world to change to reflect theirs. Thus, the internal structure of redemptive groups differs from that of insular communities. This is so because, “any group that seeks the transformation of the surrounding social world must evolve a mechanism for such a change,” including, for instance, some sort of consciousness-raising, a form of deliberative politics, and a certain apostolic ministry (id.).

As illustration, Cover takes the example of the radical constitutionalists during the antislavery era.⁹⁰ In a manner diametrically opposed to that of the insular Garrisonians—who believed that a Constitution which upheld slavery ought not to be obeyed, and who did not feel committed to obeying it—radical constitutionalists declared that no word could be found in the Constitution that authorized the practice of slavery (at 38). In Cover’s view, it is not that the radical constitutionalists were unaware of historical and legal reality, but rather, that they chose to embrace a vision “in which the entire order of American slavery would be without foundation in law” (id., footnote omitted). Radical constitutionalists hoped to transform the constitutional order to reflect their vision opposing slavery, and therefore, an alternative like the Garrisonians’ acceptance of what the officialdom declared to be the meaning of the Constitution seemed almost like a dereliction of duty.

⁹⁰ Another example Cover analyzes is civil disobedience during the civil rights movement.

As one can immediately perceive, the strength of such an interpretive move is, at the same time, its major weakness. For the radical constitutionalist view to cohere, “its adherent must either give up his connections with what is the case, including the predictable patterns of behavior of other actors, or give up the vision” (at 39). Moreover, the redemptive ambition of the constitutionalists could not content itself with finding a safe haven for runaway slaves—as may have been the case of the Garrisonians—but necessitated instead the full power of the state to destroy, altogether, all safe havens for slave owners. These reasons make redemptive narratives extremely unstable and prone to an ephemeral existence. In spite of the short-lived historical experience of the radical constitutionalists, Cover vindicates that their efforts were extremely productive and contributed to the overall growth of law. Cover says, among other things, that, in mounting their attack upon slavery from the general structure of the Constitution, they developed arguments for “extending the range of constitutional sources to include at least the Declaration of Independence” (at 39).

This being said, the idea of groups trying to redeem the world to reflect their particular view of heaven is liable to produce some political vertigo. In particular, not everyone is likely to share their absolute sense of pressing urgency, approve of the acts of martyrdom to which they may give rise, or welcome the mandatory evangelization of ideals. Certainly, not every group attempting to redeem society may be as commendable as the anti-slavery movement; and we may do well to protect ourselves from intolerant sects that want us simply to submit to their swords.⁹¹ At the same time, it may be advisable to grow a healthy sense of distrust for groups that want to model the face of the world on their own image (especially when they claim to have a direct—and often

⁹¹ As Cover puts it, insular associations are “shields,” but redemptive associations are “swords” (at 33).

exclusive—line to divinity). Although Cover does not often show this attitude himself, he gives us some pointers to help us to develop it ourselves.⁹²

First of all, there are limits inherent in Cover's definition of law. In effect, "if law reflects a tension between what is and what might be, law can be maintained only as long as the two are close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation" (at 39). This means that if and when the line is broken—not unlikely, considering the difficulties involved in transforming their total vision into reality—they cease being movements of the law (at 39). In other words, the more these groups distance themselves from the realm of social reality and the predictable behavior of other actors, the more likely they are to inhabit the realm of "mere utopianism", i.e., the world without (legal) influence.⁹³

The second set of limits arises from Cover's pluralistic understanding of the social world and the imperatives derived from the mutually effecting nature of social interactions. As Cover says, "just like living in the economic world entails an understanding of price, so living in the normative world entails an understanding of the measures of commitment to norms in the face of contrary commitments of others" (at 53). This is to say, on the one hand, that the group must be cognizant of the existence of other actors that will likely oppose it, but more importantly, that such likely opposition does ultimately affect the group's own normative options. For example, each

⁹² In the last paragraph of *Nomos and Narrative* (at 68) Cover states quite unequivocally that it is with an attitude of *distrust* that we must approach the norm-generating capacities of these groups (yet realizing at the same time that, regardless of what we may think of them, they will undoubtedly continue to exist, and to create law).

⁹³ This is what ultimately happened with the radical constitutionalists, Cover reports: they became increasingly sectarian and finally dissolved (at 38-39). To be dismissed as "merely" utopian, Cover says, is the result not of presenting radically different standards of living, but rather of the failure to present them as "real" or "livable"; or, in Cover's words, "because they fail to posit alternative lives to which we would commit ourselves by stretching from our reality toward their vision" (at 44, footnote omitted).

group may have created narratives of resistance in which maintaining the primacy of its *nomos* above all the rest require its members to resist contrary normative worlds.

However, when violence ensues effectively (or is very likely to ensue), the group must decide how it will respond to it. This requires, says Cover, a new elaboration of its own *nomos* (at 49). In other words, “the development of an understanding of what is right and just in the violent contexts that the group will encounter” (id.). Consequently, even when from the outside it may seem that narratives of redemption are particularly prone to “impel a man . . . to rise up in arms against any law whatever that he happens not to like,”⁹⁴ texts of resistance “are always subject to an interpretation process that limits the situations in which resistance is a legitimate response” (at 50). Cover remarks that, at first, the Declaration of Independence seems to confer the inalienable and unencumbered right to resist. Yet, this text goes on to concede to prudence “that we must ‘suffer, while evils are sufferable’ [and acknowledge] that ‘a decent respect to the opinions of mankind’ imposes upon us an obligation carefully to recount the reasons that led to the decision to resist” (at 49, citations in the original).

Finally, another limit is suggested by what we may call deontic boundaries: means of resistance that are violent in the extreme are, perhaps, incompatible with (because destructive of) legal meaning. In the context of the American political order, Cover says, actions such as guerrilla warfare and terrorism may go beyond legitimate normative action (at 52).⁹⁵

⁹⁴ Quoting J. Bentham in reference to the American Declaration of Independence, in A FRAGMENT ON GOVERNMENT 149 (1776), in Cover, at 50.

⁹⁵ It is not clear, however, whether these limits apply in all times and places. It may well be the case that in some extreme circumstances violence is the most reasonable form of resistance. As Cover appears to confirm: “resistance”—which may include *violent* resistance—“is not evil per se; its merits depend upon what is resisted and upon the quality of the rebel’s hermeneutic of resistance” (at 54 n. 146).

III. THE PATHOS OF JUDGMENT: EXPLORING THE DIMENSION OF JUSTICE

III. 1. Hard Cases

With so many disparate groups that occupy (and that want to occupy) the normative realm, the existence of clashes cannot be altogether surprising. So far, we have considered the State just as another particular *nomos*, but now we must face the organs of the State in another capacity, that of adjudicators of conflict. Cover is often quoted for having said that courts are *jurispathic* because they kill off the law; what is less known—or at least not sufficiently recognized—is that this statement is part of a serious undertaking to reconceptualize the so-called “hard cases.” In order to assess Cover’s originality (or lack thereof), some general background is necessary.

In Chapter Seven of *The Concept of Law*,⁹⁶ H. L. A. Hart famously argued that, due to the open texture of language there were cases that could not be clearly subsumed under the terms of the rule. To these, he opposed the situations in which “the language used [in the rule] fixes necessary conditions which anything must satisfy if it is to be within its scope” (at 128-9). The latter he called clear, or paradigmatic cases; the former are those we know as hard. For instance, Hart explained that it is clear that the rule prohibiting vehicles in the park applies to motor-vehicles, but it is less so whether this rule applies equally to an electrically powered motorcar (at 126-9). Hart believed that hard cases arise because they fall within the zone of penumbra of rules, where he recognized judges could use their discretion to fill in the gaps. However, he also thought

⁹⁶ HART, *supra* note 29.

that these cases were exceptional, and believed that in most cases language left no doubt as to which cases were meant to fall within its scope and which were not.⁹⁷

Against this canonical view, it has been sometimes argued that the distinction between easy and hard cases lends itself to being problematized.⁹⁸ If applicable at all, some argue, the line is blurry and not fixable in advance.⁹⁹ In addition, the source of hardness has been found not in *semantic* reasons, but in *substantive* or other *pragmatic* circumstances.¹⁰⁰ For one, Dworkin believes that “a hard case is a situation in the law that gives rise to genuine argument about the truth of a proposition of law that cannot be resolved by recourse to a set of plain facts determinative of the issue.”¹⁰¹

Several questions must be distinguished. On the one hand, we want to know *when* we are in front of a hard case; on the other hand, we also want to know *why* it is that the case is hard.¹⁰² In addition, when in front of a hard case we will also ask *what* the task ahead of the judge is, and finally, *how* she ought to proceed in performing it. From what we gather, Hart argues that there is a hard case when the law is unclear, and the case is hard because the language does not clearly specify whether it falls within the

⁹⁷ Further, “because we are men, not gods” (at 128), Hart thought it inadvisable to try to make rules the application of which would leave no room for further interpretation (at 128 ff.). However, his way of pursuing the argument makes it clear to me that he thought this task *feasible*, if not *desirable*.

⁹⁸ See R. DWORKIN, *LAW’S EMPIRE*, Harvard Univ. Press (1986), 350-4.

⁹⁹ See N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY*, Clarendon Press, Oxford, 1994 (1st 1978), 197 and ff.; for different ways to categorize the distinction between easy and hard cases, see J. BENOÛT-XEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE*, Clarendon Press, Oxford, 1992, 183 ff.

¹⁰⁰ For *substantive* reasons, see DWORKIN (note 98); for *pragmatic* reasons, see MACCORMICK (note 100) and BENOÛT-XEA (note 99). For an interesting *semiotic* interpretation of why cases become hard, see B. JACKSON, *Rationalité Consciente et Inconsciente dans la Théorie du Droit et la Science Juridique*, 19 REVUE INTERDISCIPLINAIRE D’ÉTUDES JURIDIQUES (1987), 1-18. Some authors still defend the *semantic* line of argument [see e.g. A. MARMOR, *INTERPRETATION AND LEGAL THEORY*, 1992 (2nd ed 2005); and F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE*, Clarendon Press, Oxford-Oxford Univ. Press, NY (1991); and well-taken criticism of these views by F. ATRIA, *ON LAW AND LEGAL REASONING*, Hart Publishing, Oxford-Portland Oregon (2001), 101-22].

¹⁰¹ See STEPHEN GUEST, *RONALD DWORKIN*, Edinburgh Univ. Press, Edinburgh (1992), 162.

¹⁰² About the *when* and the *why* of hard cases, see ATRIA, *supra* note 100, 75-6.

scope of the rule or not, in which case judges can use their discretion.¹⁰³ Dworkin thinks differently, that we are in front of a hard case when decent arguments can be advanced for competing interpretations of a legal point, and that the case is hard because the disagreement is substantive, as opposed to merely conceptual. As to the how, while Hart suggests that judges can use their discretion, Dworkin denies it and says judges must at any rate proceed to find the best law that there is.¹⁰⁴ Notwithstanding their notable differences, both Hart and Dworkin agree that the *task* of the judge (the *what*) is to reinstate the unity of a law that is perceived as being compromised.¹⁰⁵

Opposing both, Cover offers a fresh and insightful outlook. In his view, the true problem in hard cases is one not of lack of (clear or settled) law, but one of too much law. This can be redescribed, in a more technical language, as a problem not of indeterminacy, but of multiplicity.¹⁰⁶ In Cover's view, the origin and justification of courts lies not in the need for law, but rather, in the need to suppress it (at 40). Cover's argument is well-grounded in myth and history. For example, he notes quite perceptively that "in Aeschylus' literary re-creation of the mythic foundation of the Areopagus [the oldest Athenian court], Athena's establishment of the institutionalized law of the polis is addressed to the dilemma of the moral and legal indeterminacy created by two laws, one invoked by the Erinyes and the other by Apollo" (id., referring

¹⁰³ This is also the view of J. Raz, who speaks of "regulated" and "unregulated" cases (RAZ, supra note 51, chapter 3).

¹⁰⁴ DWORKIN, supra note 51, esp. Chs. 4 and 13.

¹⁰⁵ Dworkin may criticize Hart's insistence on semantics and discretion, but he still thinks that there is a hard case when and because there is uncertainty or disagreement as to what the law is.

¹⁰⁶ Some legal realists also realized that the main issue is the multiplicity of the applicable laws (K. Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1930-1931) or how to choose between different possible major premises (J. Dewey, *Logical Method and the Law*, 10 CORNELL L. QUART. 17 (1924)). However, they never went as far as to speak of inter-systemic normative conflicts.

to the *Oresteia*).¹⁰⁷ And the reverse phenomenon of “polynomia” occurs, says Cover, out of the loss or weakness of courts.¹⁰⁸ In many instances, the explicit (historical or theoretical) justification for having one “supreme” Court is precisely to produce uniformity out of diversity.¹⁰⁹ In sum, Cover submits that the fundamental issue is therefore not how to apply the law, but the more radical one of which law to apply and which law to kill off. This is why, he says, the function of the courts is *jurispathic*. Let us have a closer look at the argument.

Cover’s particular take on the issue of hard cases is connected to his understanding of *nomos* as a self-legitimizing normative world. Consistent with this approach, Cover believes that as critics (and by implication also as adjudicators), we must posit the nomic integrity of each of the laws in conflict and recognize that, for each normative community, the norm articulated *is* the right response. Failing to do so, Cover warns, is to fall victim to the hubris of presupposing the hermeneutic superiority of one perspective over another, or to confuse the reality of legal meaning with the status of political domination (at 42). Thus, a hard case arises *when* to a single question of law that needs adjudicating there are multiple *nomoi*, each of which provides its own right legal response.¹¹⁰

On the other hand, the conflict is hard *because* we are dealing not with divergent interpretations of a given legal provision, but with holistic sets of corpuses, myths, and narratives. The argument is then not how to square the disagreement with the legal

¹⁰⁷ Examples can be multiplied: the issue of deciding which of the laws (mortal or divine) should prevail is at the heart of the conflict between Antigone and Creon in Sophocles’ *Antigone* too.

¹⁰⁸ He mentions the Talmudic example of the Court of the Great Sanhedrin, in which, after the destruction of that Court, the Law became two laws (at 41).

¹⁰⁹ Cover cites Alexander Hamilton in *The Federalist* n. 22, but similar arguments can be found in many other jurisdictions.

¹¹⁰ Many would accept that, potentially, two views can be legally defensible arguments, but that they may not be equally right as a matter of law.

system, but how to choose between two competing systems of law. In other words, the conflict is *inter*—and not just *intra*—systemic. This presents two complementing sources of challenge: one is that each normative determination makes sense only from within a *nomos* and in connection to its own structure of meaning, which creates all sorts of barriers to mutual understanding and translation between different ones—what Cover refers to as the problem of the *interpenetrability of traditions* (at 17 n. 45).¹¹¹ But more importantly, given that each *nomos* considers itself to be supreme (and sometimes even incorporates clauses to that effect), the main question we must ask ourselves is about our own point of reference, which is clearly not a simple interpretive question.¹¹²

Once the problem is seen in this wholly new light, one is likely to agree that Hart's example of the rule prohibiting cars in the park does not even scratch the surface of hard cases. Nor is the issue, as it often appears in the literature, one of deciding how much leeway or discretion judges have, or are allowed to have. Cover forces us to realize that the issue of hard cases is much more complicated than that, and hence the name. In order to adjudicate a hard case, one must first acknowledge and be cognizant of the existence of a hard case, and this is not always evident. Let me argue this point in connection to the place this kind of cases has or ought to have in a theory of adjudication. Sometimes it is said that hard cases are a minority and therefore their

¹¹¹ See A. MACINTYRE, *supra* note 42; see also J. B. WHITE, *JUSTICE AS TRANSLATION*, The Univ. of Chicago Press, Chicago and London (1990). However, belonging to different *traditions* does not explain why they disagree (see B. BIX, *LAW, LANGUAGE, AND LEGAL DETERMINACY*, Clarendon Press, Oxford (1993), at 55), nor does this necessarily make a disagreement hard. It is then important to stress that, in a hard case situation, groups in conflict are committed to live by and ready to fight for their particular normative determination. (To this, we must add the problems derived from the potentially uncompromising attitudes of the contestants; the special sensitivity of certain issues; and the heavy load of meaning that they usually carry with them.) I think, for instance, of the case of I.R.A. prisoners who died hunger striking in British prisons in 1981 (in close temporal proximity with Cover's article), well dramatized in the film *Some Mother's Sons* (1996).

¹¹² We shall deal with what we may call the *politics of perspective* in the next section.

relevance to the whole system should be treated as almost insignificant.¹¹³ To respond to this claim, it is necessary, though not sufficient, to argue that relevance and significance cannot be assessed by statistical or any other purely *quantitative* method because they are inherently *qualitative*. That is, it is beside the point and adds nothing to the discussion to list *how many* cases are hard.¹¹⁴ Beyond this, one must argue that the understanding of hard cases affects not only these but all cases, just like the sociological study of deviant cases illuminates not only them, but all the rest.¹¹⁵ Cover argues both. His most significant argument is, as we shall have occasion shortly to appreciate, that the way a system answers—and sets up mechanisms for answering—a hard case is a good barometer of the system as a whole. Furthermore, Cover questions the commonplace idea that hard cases are rare occurrences, and quite to the contrary, affirms that there may be a potential hard case lurking behind “any normative problem of substantial complexity” (at 42).

In the conflict between the I.R.S. and Bob Jones University, the example Cover chooses to analyze (at 62 ff.), it may be tempting to say that it was easy for the IRS to rule that racially discriminatory schools such as Bob Jones University are excluded from the clause that recognizes tax-exempt status to charitable institutions; but for the University, as well as for the Amish, Mennonites, etc... that concurred as *amici curiae*, such definitional fiat is felt as a major attack on their whole *nomos* and educational *paideia*. The example is instructive for several reasons: for one, because it shows that *the same case* may be easy for one party and hard for the other; but another, more

¹¹³ See F. Schauer, *Judging in a Corner of the Law*, 61 CAL. L. REV. 1717 (1988).

¹¹⁴ See ATRIA, *supra* note 100, at 74.

¹¹⁵ In sociological discourse, deviant cases have overall methodological significance (see, e.g. Patricia Kendall and Katherine Wolf, *The Analysis of Deviant Cases in Communications Research*, in LAZARFELD AND STANTON, COMMUNICATIONS RESEARCH, Harper and Bros. (1949).

important reason is that it shows that the very idea of what constitutes a hard case is relative to our perspective. Perhaps it is not so much that hard cases are rare and exceptional occurrences, but that they fall out of our sight or area of interest.

Once hard cases are brought back from the margins, it is easier to see why Cover does not think that the stakes—the *what* of hard cases—are how to better reinstate the lost unity of the legal system, as both Hart and Dworkin agreed, but rather, to face the terrible consequences of attempting to do so. Cover argues, against Owen Fiss, that the alternative is not between accepting the judicial articulation of values or the looming void of nihilism.¹¹⁶ This is a false and too easy dichotomy, according to Cover. Instead, “the challenge presented by the absence of a single, ‘objective’ interpretation is ... to maintain a sense of legal meaning despite the destruction of any pretense to superiority” (at 44). In other words, the question is how to create value out of the death (or the killing) of law, a question first brought to mind by Nietzsche.¹¹⁷ This brings into legal theory matters that are hardly ever put into legal language. In what concerns the role of the State as adjudicator of conflict, this is to question “the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of meaning” (id.).

In the sub-section that gives closure to this chapter, we shall see how Cover suggests this can be done preserving some sense of justice, or, in the language we have learned to use, about the *how* of hard cases. Before dealing with that issue frontally, however, we must first articulate the intersecting point between different normative systems.

¹¹⁶ Cover (at 44) refers to Fiss’s *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

¹¹⁷ This is the meaning of Nietzsche’s famous aphorism about the death of God. Although this is not the place or the time to make the full case, it must be said contrary to popular belief that Nietzsche was not nihilist. On the contrary, he aimed at his own (and pushed others to their own) system of values (see especially *THUS SPOKE ZARATHUSTRA*, 1892).

III. 2. The Hermeneutics of Jurisdiction

In the preceding subsection we have described the judicial office and the courts as being jurispathic, but Cover concedes that judges may be also people of peace. Indeed, courts may be well suited to perform a regulative function among warring sects that commits them to coexistence rather than to mutual destruction (at 53). The way for judges to use their authority not as an act of naked violence is, Cover says, through the articulation of the institutional privilege of force, that is, jurisdiction (at 54).¹¹⁸ Jurisdiction, from the latin *juris-dictio* (*jus* = law, right; *dictio* = to say, to proclaim; and having roots in the Greek *dikē* = justice) can be defined as the prerogative to determine what falls within a given normative realm and must be decided by it, and what falls outside it and ought to be left for others to decide.¹¹⁹ In other words, it is the determination not so much of the *content* but of the *boundaries* of the legal system.

Cover speaks of jurisdiction in the context of resistance and confrontation—examples of hard cases if I may add—because it is in the face of opposition to the law of judges by communities who insist upon living their own law that *commitments* emerge. On the one hand, “resistance . . . raises the question of the judge’s commitment to the violence of his office,” whereas “[c]onfrontation, on the other hand, challenges the judge’s implicit claim to authoritative interpretation” (at 53). It is not that in the rest of cases judges have no commitments, but that they become apparent *only* in the face of

¹¹⁸ “The most basic of the texts of jurisdictions,” says Cover, “are the apologies for the [S]tate itself and for its violence” (at 54).

¹¹⁹ However, insofar as it *determines* what cannot be decided, every denial of jurisdiction is constitutive of a norm (at 8 n. 23).

contrary ones. Here again, we see that a hard case situation is revelatory not in and of itself, but as it happens, of the experience as a whole.

With the aim of testing the alignments of the judiciary, Cover proceeds to analyze the particular situation of jurisdiction in contemporary America. Thus, he finds that when judges are aligned with the State, that is, when they adopt the perspective of an insider looking out upon the committed acts of those whose law is other than the State's, legal meaning is subordinated to the interest of public order (at 55). For example, he says that a rule such as that of *Walker v. City of Birmingham*—holding that an injunction is to be obeyed (and to be enforced), even though found to be incorrect¹²⁰—allows the judge to be aggressive in confronting private resistance, because his authority will be vindicated even if in error (*id.*). Moreover, Cover says, this rule puts the resister in a very weak position, because “even were he to convince the judge that his interpretation was correct, he would still be punished for his persistent and active commitment to it” (at 56). In sum, Cover finds that when the judge sides with the power of the State, his authority is made greater than what the Constitution or the law would warrant, for “even when wrong, the judge is to act and is entitled to be obeyed” (*id.*).

In contrast, Cover says, when the judge adopts the role of a potential outsider looking at the activities of the State, the situation is just the opposite. Often in the name of principles such as separation of powers and political deference, the violence of the administration is placed out of the reach of the effective control of courts (at 56). For

¹²⁰ 388 U.S. 307 (1967).

example, Cover cites cases such as *Rizzo*,¹²¹ in which the court deemed a given police practice illegal but, relying on a principle of deference, rejected the only possible equitable remedy. This is, Cover believes, not an isolated practice, but a structural allocation of power: “When the question is whether judicial interpretations that *circumscribe* the authority of the wielders of [S]tate violence will be given full effect, jurisdictional principles require that judges’ interpretations be given *less* than their intrinsic authority” (at 56, emphasis in the original).¹²² In sum, when the judge is placed as a counterweight to the power of the State, the system sets up mechanisms to downplay his jurisgenerative impulse (*id.*) and to submit it instead to some form of hierarchical ordering (at 58).

From the perspective of legal theory, what is important to retain is not the contingent rules of jurisdiction—although it would be interesting to study how contingent these rules in fact are—nor the particular commitments of the judiciary in the American legal order—although it would also be interesting to ascertain how particular these in fact are. The significance of Cover’s analysis lies in showing that jurisdiction, more than a set of procedural rules, reveals the backbone of any legal system. Considering, on the other hand, that these principles define how the system conceives of and exercises authority, the study of jurisdiction can be a good barometer of its democratic health: namely, about how it deals with a diverse, plural, and potentially conflictive environment.

¹²¹ *Rizzo v. Goode*, 423 U.S. 362 (1976) (denying injunctive relief against practices of the Philadelphia police).

¹²² As Cover says, “equity is ‘strong’ when the court is aligned with [S]tate violence and ‘weak’ when the court is a counterweight to that violence” (at 56).

What is then the predicament of current jurisdictional practices as identified by Cover? We can distinguish two separate but interrelated sets of issues. The first derives from the non-recognition of the plights of jurisdiction, or to put it differently, from not taking jurisdiction *as a plight*. Cover argues that despite the ideological charge implied in its determination and the heavy repercussions that derive from it, “[t]he judge rarely concedes that these underlying questions are even at issue” (at 54-5).¹²³ Rather, “[t]he apologetic and statist orientation of current jurisdictional understandings prevents courts from ever reaching the threatening question” (at 56). Under the pretext of applying mere technical rules, the judge is thus able to ignore the stakes involved in the adjudication of deep or hard normative conflict, or else to expel the issue to some extra-judicial non-legal limbo. The non-recognition of the plights of jurisdiction allows the judge to camouflage inter-systemic adjudication—the killing off of law—and to present this task as a more or less difficult maintenance of intra-systemic consistency—the clarification of law.

The second set of problems has to do with the alignment of judges and the implications this has for their function in the administration of justice. We have seen that as per their current jurisdictional practices, judges are prone to align themselves with the state and to put the interests of legal order above the creation of substantive legal meaning. This is dangerous because justice is then slanted in favor of “those who control the means of violence” (at 57). This leads, Cover believes, to an overall

¹²³ In this they may not be different from other *nomos*. However, Cover seems to require more self-consciousness from the State. Cover wants the State not to give up but to live up to its responsibilities. This remark will prove to be relevant to what concerns the *politics of the perspective* (section IV).

escalation of brute force,¹²⁴ which is per se problematic. I would argue it is also problematic because it jeopardizes judges' ability to perform the regulative function that could presumably redeem their jurisprudential role. As we shall see in a moment, the slanted alignment with the State power impedes the formation of the symbolic structure of justice.

III. 3. Cover's Vision of Justice

Cover believes that "the structure of jurisdiction need not have the largely state-serving implications it generally has today" (at 58). For example, in a situation of authoritarian abuse of power, the judge might courageously "defend his own authority to sit over those who exercise extralegal violence in the name of the state" (at 59). Indeed, in such a situation Cover affirms that nothing is more revolutionary than the judges' insistence on exercising jurisdiction (*id.*). However, the exercise of jurisdiction can be justified, says Cover, only insofar as the judge engages in "the articulation of legal principle according to an independent hermeneutic" (*id.*). That is also, at the same time, the judge's only hope of partially extricating himself from the violence of his office (*id.*).¹²⁵

To do the contrary is the much extended practice of judicial helplessness. For instance, Cover considers the example of the judge who submits to the rule of a superior judge in spite of his believing that it is both morally and legally wrong (at 58).

According to Cover, such rhetoric of submission rests on the fallacy that judges are not

¹²⁴ As Cover warns, "[judges] destroy the worlds that might be built upon the law of the communities that defer to the superior violence of the state, and they escalate the commitment of those who remain to resist" (at 60).

¹²⁵ Cover does not expressly explain why, but one can infer that such articulation would at least force the judge to explicate his or her own commitments, exposing him or her to criticism.

personally responsible for their normative determinations. This is certainly not to deny the existence of institutional constraints. Still, the rhetoric of helplessness exaggerates the powerlessness of judges, while abetting strategies of occultation.¹²⁶ In particular, this rhetoric conceals that in order for these constraints to be binding the judge must first commit to them hence accepting their normative value. All in all, Cover would have judges act on an independent hermeneutics that would not defer to the hierarchy of the political structures, but would put meaning above it. In his view, this would open the way for a more aggressive yet articulate judicial review that would be grounded on the judges' *committed constitutionalism* (at 57, n. 158, in fine).¹²⁷

But would this not just shift the problem to the judiciary? Cover assures us that he does not want to belittle the “countermajoritarian difficulty,” that is, the fact that a body of non-democratically elected judges may thwart the will of the majority.¹²⁸ However, Cover points out that “majoritarianism” ought not to be our only democratic concern. First of all, the democratic ascendancy of the elected political branches must not be taken for granted. More often than we care to admit, there is but a tenuous

¹²⁶ Some of these *exaggerations* are analyzed in his book JUSTICE ACCUSED; see M. Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in NARRATIVE, VIOLENCE, AND THE LAW, supra note 15, 1-11, at 2-5.

¹²⁷ Cover's committed constitutionalism does not necessarily entail that judges ought to attend to principle to the point of disregarding all other considerations, e.g., prudence. Rather, Cover's committed constitutionalism forces judges to take up the challenges and responsibilities of their decision-making. I can see that on occasions accepting this task may lead to putting prudence over principle.

¹²⁸ The term was coined by Alexander Bickel in 1962, but according to Cover, counter-majoritarianism has been one of shaping factors of American constitutionalism at least since the work of James Thayer (*The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129; 1893). See also Barry Friedman, who defines this issue as an “obsession” [B. Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153 (2002)]. Cover distinguishes three doctrinal positions: The quietist view, defended by A. BICKEL (THE LEAST DANGEROUS BRANCH, 1962), and L. HAND (THE BILL OF RIGHTS, 1958); the moderate view, which justifies judicial action only insofar as it helps the democratic process, L. LUSKY (BY WHAT RIGHT?, 1975); J. ELY (DEMOCRACY AND DISTRUST, 1980); and the more active view of judges as articulators of fundamental values, defended by M. PERRY (THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, 1982) and O. FISS (*The Forms of Justice*, 93 HARV. L. REV. 1, 1979). Cover's own position is closer to the latter, but it differs in the form that we shall shortly see.

relationship between administration and popular politics, whereas “the tie between administration and coercive violence is always present” (at 57).¹²⁹ On the other hand, democracy ought not to be assimilated with majoritarianism. Twentieth century politics has made painfully clear that popular majority can lead to a tyrannical regime that is antithetical to democracy, as well as conducive to the systematic enslavement of whole segments of society. At the dawn of this century, democracy has also come to be identified with the defense of those values that cannot be frustrated, even in the name of the majority.¹³⁰ It is natural that a healthy political system set up mechanisms to put a check on potential abuses committed in its name. Nothing precludes—and in fact there are good reasons to support—that such a function could be entrusted to an independent judiciary.¹³¹

Indeed, Cover sees the judiciary as a counterweight to the violence of the State. According to him, “the more judges use their interpretive acts to oppose the violence of the governors, the more nearly they approximate a ‘least dangerous branch’ with neither sword nor purse” (p. 57). In this regard, it is true, the authority of judges rests on the articulation and quality of their interpretative acts and opinions, which make their *nomos* look more like that of the rest of jurisgenerative communities of the world (p. 57-8).

However, does this not make judges’ *nomos* “particular”? If so, why is it important that

¹²⁹ It is true, however, that the administration may have strong popular support and that the veto exercised by a group of unelected judges may appear unjustified. This situation creates “an insoluble conflict between principle and process” (at 57). It ought to be said that democracy does not rest only upon process, nor is the rule of the majority the only democratic one.

¹³⁰ Perhaps, democracy had better be measured not by the level of respect granted to the majority—which shows a natural tendency to take care of itself—but by that granted to the minority.

¹³¹ One good reason may be the correlative weakness of the alternative in which the administration and the organs of the state monitor themselves. For the view of judicial review as the least intrusive of the alternatives in particularly abhorrent and/or structurally unjust political contexts, see Cover, *The Origins of Judicial Activism in the Protection of Minorities*, originally 91 YALE L. J. 1287 (1982). In fact, not even those who are most suspicious of judicial activism would like to abolish the institution, but rather to tame it. See A. Kronman, *Alexander Bickel’s Philosophy of Prudence*, in 94 YALE L. J. 1567 (1985).

they develop an independent hermeneutics? Pursuing these questions will help us finally to clarify Cover's *vision of justice*.

It is no secret that Cover accords no privileged position to the work of judges and, in that sense, their hermeneutics is in fact particular.¹³² Yet this does not hinder the fulfillment of a more general function which has to do, I believe, with their position in the structure of adjudication. As described, on one side there is a normative group; on another side, the State; and thirdly, there is the institutional position of the person called to adjudicate the conflict. Ideally, the structure of adjudication is constituted by the triangulation of these three personal perspectives.¹³³ Together, all three can be said to avail the *symbolic configuration of justice*, which suggests that when any one of these personal perspectives is lacking the structure of justice cannot be properly constituted. This can be explained. Without the triangulation perfected by the third personal perspective, the interactions between the first and the second perspectives are prone to fall into patterns of domination and hierarchy, especially when the power of both is as disproportionate as that which obtains between smallish communities and the state. This is one of the reasons why, I argued previously, the court ought not to align itself with the State. Therefore, the importance of judges developing their own normative determination (without collapsing into that of the State) lies not so much in the particular narrative they happen to articulate, but in that doing so they facilitate the symbolic triangulation of justice. In other words, judges' hermeneutic is important not

¹³² In fact, this is what sets Cover apart from other theorists who advocate aggressive judicial review (see Cover, at 57 n.158, referring to the work of M. Perry and O. Fiss, *supra* note 128).

¹³³ The first personal perspective is that of the *nomoi* when considered from within; the second personal perspective requires a plurality of *nomoi* where each adopts the perspective of the other looking in. The third personal perspective is constituted by whoever occupies the position of adjudicator, when he or she 1) articulates an independent hermeneutic, that 2) justifies the jurisdictional role; and 3) does not collapse upon either the first or the second personal perspectives.

in and of itself—although the articulation of legal meaning is always an enrichment of the *nomos*—but as an *enabler* of the said configuration. This interpretation is supported *a sensu contrario* when we realize that Cover would have judges act on the basis of such committed constitutionalism only when there is a plurality of groups ready and capable of opposing it (at 57 n. 158 in fine). In other words, the judges’ “aggressiveness” is justified as long as it does not stifle one of the necessary cornerstones of justice. This is, in my view, the subtle yet crucial point separating Cover’s defense of judicial review from other standard forms of the argument.¹³⁴ In Cover’s normative cosmos balance is assured not through meaning or hierarchy, but through meanings and hierarchies (i.e., perspectives) that keep each other at bay.

How well does this particular vision translate into a real case scenario? Let me answer this question in connection to Cover’s analysis of Bob Jones University.¹³⁵ Formally, the case was about taxes, namely about the decision of the IRS to deny tax-exempt status to Bob Jones University on account of its racist policies. On a deeper level, however, the case presented serious constitutional issues, and confronted the school’s claim for nomic insularity and liberty of education with the converse interest of ensuring the eradication of racism and discriminatory practices from schools. Ultimately, the case raises questions about the character, purposes, and principles of the *paideia* that ought to constitute the world of children, as is often the case in disputes over educational issues.¹³⁶

¹³⁴ See supra note 128.

¹³⁵ *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983).

¹³⁶ Education is a particularly sensitive (and controversial) issue because it is the point of entry into the *nomos* and ensures the generation of the social bonds that ground it. Precisely for this reason, says Cover, education is the target of any redemptive constitutional ideology that would want antagonistic abhorrent practices eradicated from schools altogether (see at 66).

The school's claim for educational insularity, Cover explains, was well-grounded in constitutional precedent. Its position was strengthened on the other hand by the danger associated with the imposition of a single statist *paideia*. However, the State's interest in eradicating racial discrimination was equally compelling. Indeed, it connected with America's long struggle for racial equality and desegregation in schools. Faced with such a conflict, the court had to decide which of the competing claims (the school's claim for autonomy versus the State's claim for redemption) was to be given primacy. The problem is that while the insular community (the school) is content with being let alone, the redemptive (anti-racist) narrative cannot tolerate this and requires the assistance of the organs of the State to eliminate these racist practices. In this last regard, the court must *either* deny the redemptive narrative *or* share their interpretation, that is, it "cannot avoid responsibility for applying or refusing to apply power to fulfill a redemptionist vision" (at 60).

In the case at hand, the Supreme Court upheld the determination of the IRS and ruled against Bob Jones University. Although Cover is no racist sympathizer, he reprimands the court for not having adequately responded to the challenges presented by the case. In particular, he stresses that the court did not articulate a redemptive narrative in which the school's racist practices would be left "without foundation in law."¹³⁷ Rather, in characteristic uncommitted fashion, the court argued that denying tax-exempt status to Bob Jones fell within the authority of the IRS and therefore was not unconstitutional. This rationale appears problematic for several concurrent reasons: first, by not acknowledging what was really at stake, the court did not own up to its responsibility for killing off the law, and instead hid behind the law; second, without the

¹³⁷ At 38, referring to Douglass' antislavery constitutional vision.

articulation of a redemptive “constitutional commitment to avoiding public subsidization of racism,” the grand travail against discrimination and the struggle for racial equality are given “no normative status” (at 66-7); third, by aligning with the power of the state without contributing a bit to the enrichment of its *nomos* (at 66), not only did the court put hierarchy above legal meaning, but it was prevented from constituting itself as an enabler of the structure of justice; and fourth, because in its absence, the school was left at the mercy of power relations or, as Cover says, at the mercy of whatever public policy the administration happens to have (at 66).

In sum, under the sign of judicial restraint the opinion poses more of a general threat to the communities which, Cover assures us, “deserved better” (at 67). This sounds paradoxical: How can it be that “quietism” poses more of a threat than “aggressive” judicial review? More paradoxical still, how can this be better not from the perspective of the State, but from that of the groups affected negatively by the decision? One could argue, perhaps, that when a legal case is submitted to adjudication, no one can legitimately expect to be declared to be right, yet one can at least expect to be *treated* right. And as far as Bob Jones University is concerned, this the court did not do. Yet, Cover seems to be saying more than that: he seems to suggest that, had the court articulated such a redemptive narrative, the insular community would have been not only treated better, but simply *better off*. I think this is one of Cover’s most enigmatic as well as interesting suggestions, the clarification of which can shed valuable light on his whole vision of law. The argument requires some reconstructive effort, but I trust it can be legitimately inferred from the analysis. As I interpret it, had the Court created a redemptive narrative against the racist practices of Bob Jones University, the latter

would still have to generate a second hermeneutic to respond to such a challenge. Thus, it would still have the chance to reconstitute its own *nomos* from within, attending only to the reality of an external imposition of precept. In any event, the primacy of its *nomos* as well as of its jurisgenerative principle would not have been put at risk, nor doubted. In my view, this explains that “a redemptive claim would pose no general threat to the insular community . . . save the kind of commitment that goes with the articulation of the constitutional mandate” (at 66). In spite of being affected negatively by the decision, the leading forces of their *nomos* would have been preserved. Perhaps even an enrichment of the whole normative cosmos would have ensued, for the continued production of legal meaning is “an enrichment of social life” (at 68).

Clearly, Cover’s vision of the legal cosmos and justice contrasts heavily with the hierarchical and one-dimensional image we gather from the top of the legal pyramid;¹³⁸ but it also differs, perhaps in smaller measure, from the two-way vision projected by dialogical and communicative theories.¹³⁹ We could say that Cover entertains three dimensions: first, the personal perspective of the self-legitimizing and internally validating *nomos*; second, the level of their mutual interactions, conceptualized more in confrontational than in cooperative fashion (be they insular or redemptive); and third, the triadic order constituted by the context of adjudication. Such multilayered vision requires both critics and observers to pay attention to more than one dimension at once, which may even have repercussions on our methods of analysis. On the first level, it will

¹³⁸ The most conspicuous advocate of the pyramid of law is, no doubt, Hans Kelsen, but the image can be traced back, perhaps, to Austin and Bentham, and continues mostly unchanged with Hart and beyond, in the imagination of most lawyers and legal theorists (see *supra* note 43). For a truly lucid criticism of the pyramid of law and its substitution for images that reflect the new era of mutual interconnectedness, see OST and VAN DE KERCHOVE, *supra* note 44.

¹³⁹ See Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOKLYN L. REV. 1109 (2006).

likely have to be enriched by a comparative and an empathetic hermeneutics, especially when the narratives, beliefs, and myths contained in the *nomos* are not our own. On the second, it will have to be attentive to the rhetoric as well as to the pragmatics of their mutual interactions. And on the third, it will have to integrate institutional and self-reflective considerations. At any rate, the critic must deploy the ability to shift from one perspective to the other and to discern the appropriate level of analysis at each time. No doubt, Cover makes the work of lawyers, judges, scholars, critics, and commentators much more difficult, yet at the same time, all the more interesting.

IV. THE POLITICS OF PERSPECTIVE: LIBERALISM AND VIOLENCE

In this last section we must confront the political outlook that can be inferred from Cover's singular vision. In particular, one must grapple with the problem of law's violence, which is but another way to inquire about Cover's relationship with liberalism. In order to do so, I will follow more closely than in other sections the trail of other scholars and Cover's other writings.

Cover has depicted a legal cosmos that is no longer unitary but plural, and in which legal meaning is essentially contested. The existence of conflict then appears unavoidable, especially when noticed that the worlds we all create are partly redemptive and mutually exclusive. In this context, Cover argues that the structure of jurisdiction locates the responsibility for decision-making upon the courts *as a matter of statist positive law* (n. 166 and accompanying text). However, once the radical autonomy of juridical meaning and of jurisgenesis is accepted, why ought one to conform to statist law? If, in *reality*, courts are allocated the jurisdictional function, could not this be

questioned at least as *vision*?¹⁴⁰ And if Cover does not question it—nor does he offer a reason other than state law not to do so—could it be that he takes the framework and political structure of the liberal state for granted, without acknowledging his debt?

This is one of the criticisms that emanates from Robert Post’s critical assessment of Cover.¹⁴¹ Post sees Cover’s work as antedating the theorization of public reason and the so-called “republican revival.”¹⁴² According to him, Cover remains uninterested in the possibilities of constitutional politics and reduces the normative capabilities of the state to its bare minimum. However, the life of the communities Cover finds so appealing seems to depend, considers Post, on the existence of the framework of the liberal State. This implies, then, that liberalism must be accorded a sort of logical priority that Cover is unwilling to recognize. Post argues against Cover that most recent work in public law departs from completely different premises: namely, it begins with the idea that the State can express the *nomoi* of its population and forge a notion of “common will” through public discussion and dialogue. In addition, it is not afraid of the work of courts, because it regards the judiciary as voicing narratives in which one might also believe. In sum, Post espouses a more dialogical vision of law that acknowledges that the state performs violence, but relegates it to the extremis.

Post’s criticism deserves a more extensive consideration than what I am able to give it here. Yet, I hope to have shown already that Cover does not want the State to shy

¹⁴⁰ For a compelling argument questioning this in cases of incommensurability, see S. VEITCH, *MORAL CONFLICT AND LEGAL REASONING*, Hart Publishing, Oxford and Portland (1999).

¹⁴¹ R. Post, *Who is afraid*, supra note 3.

¹⁴² For the theorization of public reason, one thinks especially of the well-known works of John Rawls and Jürgen Habermas. For the “republican revival,” see *Symposium: The Republican Civic Tradition*, in 97 *YALE L. J.* (1988). F. Michelman, one of the leading theorists in the republican revival who uses some of Cover’s key concepts such as that of *jurisgenesis* [*Law’s Republic*, 97 *YALE L. J.* 1493 (1988)], sees his work as “extending but not deepening” that of Cover (ref. in Kahn, supra note 5, at 28. n. 120).

away from, but on the contrary, to live up to its responsibilities.¹⁴³ Nor do I think that Cover is hostile, but in fact begs for a well-articulated theory of participative democracy.¹⁴⁴ Now, I want to focus instead on Cover's particular relationship with liberalism, for what it may reveal of the politics or *perspective* he urges us to adopt. The charge seems to be that Cover is insufficiently liberal for, on the one hand, he does not recognize the primacy that the liberal state attains towards the preservation of the paideic communities; and, on the other hand, focuses too much on the violence and coercion of the State, which does not reflect the everyday workings of it.¹⁴⁵

To respond to this charge one must begin by saying that it is simply not true that the liberal state is "necessary" for the life of the communities, either in Cover's theory, or as a matter of historical development. Indeed, one of Cover's most forceful arguments is in fact that the existence of the paideic communities does not depend upon, nor is logically connected to, what the State does or does not do. Certainly none of the communities mentioned by Cover (Amish, Mennonites, or the Jewish religious communities) had to wait for the liberal state to live their law; and one could surely find

¹⁴³ I agree with Judith Resnik (supra note 8 at 26) when she says that Cover seems fascinated by the interactions between state and paideic communities.

¹⁴⁴ Post may be right in that Cover does not *develop* a theory of public reason. However, if he does not develop it (at least to the satisfaction of Post), he most definitely points out the challenges that such a theory would have to overcome (at 48-9). According to Cover, attacking the problem of law's violence by constitutionalizing the principles of an uncoerced politics, based on the ideas of free speech and decentralization of power, may be praiseworthy, but not entirely successful: first, because speech requires the correlative power to act upon it, and this cannot be guaranteed without allocating power upon groups (not just individuals) that want to *live* (not only *speak*) their law; on the other hand, Cover believes that the image of the modern state as the agora for political discussion is imbued with a romantic ideal that does not hold true in the modern State. The contemporary State is no longer a community of common myths and narratives, nor can it aspire to become one. It seems to me that it is up to Post to demonstrate that modern theories of deliberative democracy are able to overcome the specific difficulties identified by Cover. At any rate, to say as Post does (supra note 3 at 15) that courts may "voice narratives in which we believe," or that "the State can express the *nomoi* of its population" does not do much to dispel the charge of romanticism. For a thorough and systematic appraisal of modern theories of constitutional dialogue, including that of Post, see Christine Bateup, *The Dialogic Promise*, supra note 139.

¹⁴⁵ A similar charge can be found in R. Sherwin, supra note 6.

a historian ready to argue that many normative sub-communities thrived within the Roman Empire, which is not to say that imperial Rome was liberalism in disguise. Moreover, liberal theory often finds itself at odds with the idea of collective rights, as well as with conceiving a normative space for discrete nomic entities between the individual and the State. All these reasons suggest that Cover's conception of the *nomos* and the framework of the liberal state do not *necessitate* each other.

The second charge concerns Cover's insistence on conflict and violence, rather than on dialogue and consensus. Post admits that, to be sure, the State expresses its own parochialism and forms of violence, but argues that this is true only as a boundary condition. By now, it must be clear that concepts such as core and boundary, central and marginal, extreme and everyday, are evaluative, and depend not on statistics but on judgment. This is why, in the wake of the so-called global war on terror—with frightening revelations of practices of, and legal memos about, torture, secret centers of detentions, denial of International covenants to detainees, and general programs of eavesdropping without a warrant, not to mention the specious grounds for an unprecedented pre-emptive war—it is disingenuous, to say the least, to think that Cover's warnings about the coercion and violence of the state are marginal, or have been left behind.¹⁴⁶ In my opinion, stressing the conflictive (and sometimes violent) nature of many social interactions is not to deny the possibility for argument and reason, but to contextualize them. In contrast, many theories that privilege consensus have a tendency to view disagreement as an intermediate step towards a final perfect equilibrium. As Isaiah Berlin would say, conflict then becomes merely a nuisance, or a

¹⁴⁶ Post ends up by saying that in the face of the “shocking arrogance and rampant intolerance of those who presently dominate America ... Cover may have seen more deeply than I care to acknowledge” (supra note 3 at 16). Yet this seems to me just a rhetorical concession.

bother to be eliminated, instead of a potential source of enrichment and vitality.¹⁴⁷ All in all, it seems to me that Cover's perspective does not close but opens the door to democracy.

If Post criticizes Cover for being insufficiently liberal, Austin Sarat and Thomas Kearns accuse him of the contrary.¹⁴⁸ According to them, Cover was caught up in one of the central dichotomies of liberal political thought, that between order and freedom.¹⁴⁹ Because he could not free himself from this dichotomy, he reconciled himself (albeit tragically) to law's violence.¹⁵⁰ He did so by first imagining a world of freedom, diversity, and meaning, and then embracing, albeit reluctantly, the necessity of the ordering force of law. As they read it, freedom is exemplified in the meaning-generating activity of the communities and associations that form the *nomos*, which is the task of the law to promote and tolerate. However, if let loose and unfettered, Cover seems to fear that the worlds created would be unstable and sectarian. This is when, in order to manage all this unruliness, the ordering force of law becomes necessary, and meaning gives way to discipline. Thus, when one would expect the rejection of violence and a vision of law without force or coercion, the self-proclaimed anarchist¹⁵¹ legitimates the external imposition of force. In other words, Cover imaginatively tames and makes

¹⁴⁷ I. BERLIN, *FOUR ESSAYS ON LIBERTY*, 1969 [there is a new edition incorporating Berlin's four original essays plus another one—hence making it *Five Essays on Liberty*—just as Berlin had originally devised; see the editor's note in *LIBERTY*, Oxford Univ. Press, Oxford and New York (2002)].

¹⁴⁸ The charge is one of being a "reluctant liberal"; see A. SARAT & T. R. KEARNS, *supra* note 6. A shorter version is to be found in A. Sarat, *Robert Cover on Law and Violence*, in *NARRATIVE, VIOLENCE, AND THE LAW*, *supra* note 15, 255-65. For convenience, I shall draw from both interchangeably.

¹⁴⁹ A similar point is made by P. Kahn, *supra* note 5 at 62, arguing that Cover finds a dichotomy between meaning and authority.

¹⁵⁰ However, they also recognize that "Cover was able to rescue the phrase 'legal violence' from the status of near-oxymoron and almost single-handedly reverse received assumptions regarding law and its own violence" (*supra* note 6 at 222).

¹⁵¹ In his article *Folktales of Justice*, originally 14 *CAP. U. L. REV.* 179 (1984-85) [hereinafter *Folktales*], Cover defined the position staked out in *Nomos and Narrative* as being close to a classical anarchist one, understanding anarchism to mean the absence of rulers, not of rules (at 181).

peace with violence without paying any price for it. This, Sarat and Kearns defend, no amount of theoretical ingenuity can do. For this reason, they conclude, Cover's vision becomes another liberal apology for law and its reliance on force.

Again, more than what I can argue here is required to respond to this criticism. I ought to begin by saying that what distinguishes the nomic groups from the State is not the absence of violence in the former, but the lack of state machinery to back it up. Hence, the found dichotomy between *nomos* and State does not fit neatly into that between freedom and order. As we saw, Cover believes that the sustainable growth of every *nomos* necessitates the activity of two opposite generative impulses: one expansive, the other contractive, which are both necessary for a healthy body politic.¹⁵² Cover argues explicitly that without some form of ordering principle—a sort of principle of systemic stabilization—the very subsistence of the *nomos* would be in peril.¹⁵³ Therefore, “order” ought not to be straightforwardly assimilated with the external imposition of (State) coercion, for it is also the result of the internal configuration of the *nomos* or, to put it differently, part of a *nomos* that regulates itself.¹⁵⁴

On the other hand, Cover deals with violence—to say that he “embraces” it seems an exaggeration—as an inescapable element not just of law but of life. Indeed,

¹⁵² For the full argument, see *supra* section II.2. See, however P. Kahn, *supra* note 5, considering that “[a] choice must be made... between the anarchy of meaning and the politics of violence” (at 62, footnote omitted).

¹⁵³ Cover explains that “[t]he unity of every *paideia* is being shattered ... in fact, by its very creation” (at 16). And continues, “[t]hus, as the meaning in a *nomos* disintegrates, we seek to rescue it—to maintain some coherence in the awesome proliferation of meaning lost as it is created—by unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle” (*id.*)

¹⁵⁴ To be sure, “order” can also be imposed from the outside, but it is the very subsistence of the *nomos*—and correlative instability of a *nomos* that would function exclusively as jurisgenerative impulse—which requires it, not the order of the (liberal) world. See, however, P. Kahn, arguing that the “constraint on this potential anarchy of jurisgenesis must come from outside ... [because] authority is simply not built into the structure of the *nomos*” (Kahn, *supra* note 5 at 60).

Cover forces us to face both that law takes place in a violent world, and that it is sometimes *itself* violent. On the contrary, to think that one can articulate a “vision of law without coercion or violence” is utopian, I would say, in the sense that one can merely dismiss it.¹⁵⁵ This is not, in my view, to make peace with violence, for violence is, Cover tells us, always “problematic.”¹⁵⁶ This is why Cover urges judges not to succumb to the bureaucratic and hierarchical violence of their office, and that they begin to tolerate the richness of diverse normative worlds. However, collision is sometimes unavoidable and violence will happen. In these cases, adjudicators ought at least to be cognizant of and acknowledge that they are exercising violence. Further, they ought to articulate an independent hermeneutics to set up the conditions, restrictions, and the alleged redemptive value that its exercise is supposed to bring forward. And all this ought to be accomplished without flattening the triadic structure of justice. From here, a distinction can be drawn between bureaucratic (mechanical, hierarchical, blind, and systematic) and hermeneutic (articulate, horizontal, self-conscious, and individualized) forms of violence.¹⁵⁷ This is not to say that violence is legitimated by the principle upon which it is based.¹⁵⁸ I agree with Sarat and Kearns that it would be dangerous if the argument were that violence disappears, or is magically inoculated along with the justification of those principles. But this does not seem to be Cover’s contention. Rather, he insists that the function of courts—at least when confronting mutually exclusive

¹⁵⁵ Paraphrasing Cover, at 44. Cover also refers to a world without violence as an “imaginary world” (at 40).

¹⁵⁶ See Cover, *Folktales*, supra note 150, at 182. Also *Nomos and Narrative*, supra note 2 at 25.

¹⁵⁷ A third possible form of violence is the pure and simple, naked and indiscriminate abuse of force, which does not even pretend to be integrated within any justificatory scheme.

¹⁵⁸ This is the view that SARAT AND KEARNS (supra note 6 at 214) associate with Ronald Dworkin.

nomoi—is inherently jurispathic.¹⁵⁹ Thus, no matter how well articulated a (violent) decision of the judge may be, it will still be suffered as violent. To say it clearly, violence exists *before* the law, and it will continue to exist *after* the law.

This leads us to an important, and perhaps the most significant, point concerning violence and its assessment. The critical realization here is to face the intellectually unbridgeable gap that exists between the experience of exercising violence, and that of suffering it.¹⁶⁰ The person who does violence may think that he or she is legitimated to act in such a way, but the one suffering it is not likely to *feel* the same. Consequently, the appraisal of violence ought never to rely upon a single (and above all systematically the same) point of view. If we are to be sensitive at all it is required, especially from those of us who comment on the violence of the wielders of the State and law, that we do not downplay, ignore, or silence the perspective of those who suffer violence. In the normative world that Cover urges us to inhabit, no one can be denied a priori the privilege of a point of view.¹⁶¹

The fact remains that the state is reserved a prominent place within Cover's theory of law. The interesting issue is not, however, whether he does or does not accept the liberal state, but what kind of acceptance this is. In my view this "acceptance" stems out of Cover's acute sense of realism. Just like living in the economic world entails

¹⁵⁹ Save in those few cases in which they are able to carry out a regulative function among warring sects (Cover, at 53, and supra section III.2.).

¹⁶⁰ This argument is developed in *Violence and the Word*, supra note 15 at 1602-3, in particular as it concerns the practice of torture.

¹⁶¹ Could it not be that Cover's insistence of being fair to all perspectives already embodies an important liberal ideal? The question is not trivial, but it is overstated. Treating all persons as centers of meaning is an important liberal principle that has its philosophical statement in Kant's realm of ends, but as James Boyd White argues, in one form or another it can be found in many religions and traced back even to the Greeks (see *Heracles' Bow: Persuasion and Community in Sophocles' "Philoctetes"*, in *HERACLES' BOW: ESSAY ON THE RHETORIC AND POETICS OF LAW*, The University of Wisconsin Press (1985); see also his chapter on the *Iliad*, the "fundamental value [of which] is its recognition of the equal humanity of those who must die" (in *WHEN WORDS LOSE THEIR MEANING*, supra note 49, at 53).

being cognizant of price (at 53), his understanding of the normative world leads him to treat the State as a reality to be reckoned with. In this, he is like the nomic groups which find themselves within a state that they do not control (at 31) and whose law they even denounce as void (at 43), yet who concede the superior practical effects of securing the acquiescence of its organs (id). This attitude is already observed in his very first paragraph, in which he acknowledges the importance of the formal institutions of law and social order, yet denies—of which the rest of the article is a demonstration—that they alone ought to claim the attention of legal scholars. Realism aside, clearly a more positive outlook emanates from the suggestion that courts may fulfill a regulative function among warring sects that permits a life of law, rather than violence (at 53). Again, can this be interpreted as an apology for the liberal state? Not necessarily. First, because even if courts are said to fulfill a pacifying function, keeping the peace is never a neutral task (at 60). That is, liberal principles are not pre-political or *procedural* in the sense that many a liberal theory would have them. And second, because in no way does this more positive role of judges entail that their narrative ought to be privileged or credited with a plus of legitimacy. If judges may help to replace the world of violence with that of law, that is, I submit, because they may help to constitute the symbolical triangulation of justice, and thus to overcome the bilateral structures of domination in which violence operates (e.g., the master-slave dialectic). Still, that is possible if, and only if, judges extricate themselves from (the violence of) the State and act according to an independent hermeneutics, which needs to oppose any “apologetic” alignment.

In conclusion, one could perhaps argue that Cover is a liberal and not an anarchist, when compared with the extremist forms of the latter. Still, if liberal, his

liberalism is infused with the tragic character we may find in the writings of Isaiah Berlin, but with less of an individualistic character than Berlin.¹⁶² Indeed, Cover thinks that the community and not the individual is the basic unit of normative life. In this, one may be reminded of Karl von Savigny's insistence that the true source of law is in a community's *volksgeist*. But I would argue that Cover's view of community(ies) and their law (*nomos*) is not infused with the same romanticism that animated Savigny.¹⁶³ Cover does not delude himself into thinking that smallish communities are ideal, except perhaps insofar as its members are able to *imagine* or to fictionalize it.¹⁶⁴ Moreover, the social environment in which these *nomoi* live is often cruel and inhospitable. Yet, it is not the brutal, bleak, and treacherous one of Hobbes or Machiavelli. And certainly it does not justify transferring all the authority to a *Leviathan* or to a *Princeps*. Cover believes that power is better counteracted by a power (or powers) working in the other direction, which requires a polynomial body politic and a multi-focal perspective. On the other hand, human nature is such in Cover's view that individuals are endowed with an immense potential for creativity, solidarity, and mutual understanding. Nevertheless, he does not contemplate a society based upon an overlapping consensus such as John Rawls'; nor is he espousing, on the other hand, an anti-foundational, yet asserting liberalism, such as Richard Rorty's. Neither is his panoptic vision of violence enchaind to the pessimistic and inevitable conclusions of a Foucault. If anything, Cover is a

¹⁶² Cf. S. VEITCH, *supra* note 140, chapter 3 (arguing for the social dimension of Berlin's liberalism).

¹⁶³ For a provocative yet well argued re-evaluation of Von Savigny as instrumental in the scientificism and subsequent positivization of law, see R. Berkowitz, *From Reason to History: Savigny's System and the Rise of Social Legal Science*, in his book *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION*, Harvard Univ. Press, Cambridge and London (2005), 103-136.

¹⁶⁴ As I already argued, this fiction is sometimes maintained only as a convenient façade towards the outside world and, it is often exaggerated for rhetorical purposes. See however, Sherwin, *supra* note 6, arguing that Cover offers a romanticized or "purified" view of the narratives that inspire the resistance of the communities.

paradoxical liberal thinker. But again, why should we dress him with clothes he was not comfortable wearing? Why not simply respect his wishes to be called an anarchist who loved the law, yet aimed at a radical relativization of it?¹⁶⁵ This is one way to understand the enigmatic poem of Wallace Stevens that opens *Nomos and Narrative*: for within a law radically relativized a violent order is a disorder, and a great disorder is an order.

CONCLUSIONS

I hope that by now the originality and breadth of Cover's jurisprudence has been more than established. An outline of its most salient features will serve as reminder. First, we have seen the depth of his understanding of the *nomos*. In order to comprehend it one must engage not only with the body of precept, but also with the language that avails normative activity and the mythos that ground the community in history and in relation to the social and natural worlds. Without deepened understanding of these, for instance, one could not understand the *charge* of many contemporary socio-legal debates. Among the sources that provide the *nomos* with a rich sustenance for normative life, narrative is of particular significance. Narrative opens up the gate to a third ontological existence of norms, and suggestively, allows us to traverse from the plain world of fact (is), to the normative world of value (ought).

We have also lingered on the idea that Cover's model suggests a malleable and not a pyramidal structure, which overcomes crucial shortcomings associated with the pyramid. Significantly, the identification of what counts as law depends not upon a fixed rule or set of rules (of recognition and habilitation), but on the shifting communal grasp and articulation of relevance. This entails that anything can become part of the *nomos* at

¹⁶⁵ Cover, *Folktales*, supra 151 at 181-2.

a given point, but not that everything counts at all times. In other words, although every object is liable to fall under the normative influence of the juridical field, not everything actually does. Yet the *nomos* is not a pure mental construct: it exists within a broader spectrum of socio-political forces, actors, and constraints. Indeed, law is anchored in social reality which incidentally, Cover suggests, may separate it from morality.

Still, law is made up also of subjective engagements. Cover has helped us to explain that normativity is constructed through simultaneous commitment and objectification, engagement and disengagement. As described, the formation of legal meaning is cyclical and unstoppable, and the stability achieved at a given point is susceptible to being destabilized when legal commitments are once again interrogated, most clearly, in the face of contrary commitments of others. This process goes in two directions at once: in one direction, the provision is interpreted as a demand that requires commitment before becoming a norm; in the opposite one, the norm is objectified as a precept to which one owes obedience as law. This process assures that the same legal code will generate multiple further integrations. By the same token, it also opens the possibility of alternative normative worlds.

We have also seen the different forces that impinge on the *nomos* from within (paideic/imperial) and how each *nomos* generates distinctive responses to its environment (insular/ redemptive). As to the former, the analysis has shown that the vital issue has to do with the systematic repression of one of the generative forces, which brings the whole social body to a halt. As to the latter, it was stressed that, despite the label, no insular group can manage a total break with the exterior, and additionally, that every *nomos* is partly redemptive. This suggests the interdependence of whole

segments of normative life, such as the activity of constitutional meaning-creation in which all groups seem to be engaged, in one way or another.

The inevitable encounters and clashes between disparate nomoi call for mechanisms of conflict resolution that are respectful of all the parties and mindful of the stakes involved. Cover delineates an insightful and comprehensive framework to understand the when, why, what, and how of hard cases. Considering that each *nomos* sees itself as the Archimedean point, the fundamental question is not how better to restore the unity of the legal system, but how to face the dangers of attempting to do so; in other words, the issue is how to preserve a sense of meaning in spite of the inability to ground the killing of law in the pretense of an objective (and superior) hermeneutics. According to Cover, adjudicators ought not to surrender, behind strategies of occultation, their responsibility for articulating an independent hermeneutic. Neither ought they to rely as a matter of course upon the institutional prerogative of jurisdiction.

However, a committed and articulate hermeneutic (including the elaboration of jurisdiction) is only the first cornerstone of justice. For its proper configuration, I have argued, it is necessarily the symbolic triangulation between the first, the second, and the third personal perspectives. Interestingly, Cover does not want to deprive particular narratives of their singularity, as do most liberal theories of justice. Rather, Cover's vision requires preserving the tension between mutually effecting narratives, each of which could speak and act as they see fit in the face of contrary ones. From here a methodological principle seems to derive. According to this, adjudicators and critics alike ought to observe an attitude not of impartiality and neutrality, but one we may call *concerned reflexivity*, characterized by a predisposition to shift from one personal

perspective to the next, while retaining the critical ability to reflect upon one's own momentary position.

Finally, I have suggested that although Cover does not provide a theory of participative democracy, he is not inimical to it, and in fact offers some pointers as to what obstacles any such theory should overcome. Among these, he mentions the necessity of empowering social actors, and the need to de-romanticize ideas of public forums as agoras of free exchange. Cover views social interactions as inherently conflictive, which disowns the idea of the public space based on agreed upon conditions or universal criteria for valid argument. Rather, Cover demands not merely a liberal apology of the modern state, but a realistic vision for its betterment. If, in this world of violence in which we move and among the words of violence it commands, a new paradigm is to emerge, this will have to be not discursive and dialogic, but tragic. Yet this is already the topic for another chapter...