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The Legal Universe After Robert Cover

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> 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 Vossler[1]

INTRODUCTION

The idea that law consists of a set of rules emanating from a sovereign authority is so ingrained in our ways of thinking about the law—from professionals to ordinary citizens, from legal academics to those who touch upon law in other fields—that trying to shift that habit of perception may appear a daunting, if not a vain, task. In a single first paragraph, Robert Cover forgoes this cultural commonplace for a whole new world:

> 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]

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1 Karl Vossler, *Positivismus und Idealismus in der Sprachwissenschaft* (Carl Winter, 1904) 25–26, cited in Michael Polanyi, *Personal Knowledge: Toward a Post-Critical Philosophy* (University of Chicago Press, 1974) 102.

2 Robert M Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 4–5 (footnotes omitted). All references to Cover's work in this article are to the place of its original publication. The essays of Robert Cover can also be found in Martha Minow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (University of Michigan Press, 1993).

Cover's opening gambit entails a radical departure from conventional ways of thinking about the law, not as a set of institutional rules and principles, not as a set of policies and mechanisms for social control, but rather as a narrative prism through which we observe and filter the world of right and wrong, valid and void, good and bad. From this perspective, law is best described not as a *system*, but rather as an extremely rich and malleable set of resources for all aspects of the normative life of individuals and communities.

One of the aims of this essay is to reconstruct Robert Cover's metaphor of the legal universe as a viable *paradigm of law*, which includes an *ontology* (an understanding of the basic units and organisational 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 this paradigm is not only alternative to those proposed by the most influential legal philosophers of the 20th century—namely Hans Kelsen,[3] Herbert Hart[4] and Ronald Dworkin,[5] but offers a way out of many of the dilemmas in which they become ensnared. For example, Cover's view of the *nomos* provides an open-ended, flexible, and constantly evolving organisation of the legal materials which overcomes the shortcomings associated with the Kelsenian pyramid. Secondly, it suggests a model for the identification of law that reveals the inadequacies—and compensates for the deficiencies—of the Hartian rule of recognition. Finally, it provides a justification for the role of the judiciary, which, unlike the Dworkinian Hercules, acknowledges the constraints and the limits of jurisdictional practices of courts.

3 The influence of Austrian jurist Hans Kelsen, especially in Continental Europe (and by extension in countries subject to colonial rule) cannot be overstated, to the point that one cannot understand 20th century jurisprudence without him. Kelsen's 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*; his insistence that the law is *prescriptive*, but the science of law is *descriptive*; and that as a science, legal theory is only possible if these two levels (the *is* and the *ought*) are rigidly separated. See, primarily, Hans Kelsen, *Pure Theory of Law*, English trans (University of California Press, 2nd rev edn 1968).

4 The influence of HLA Hart, especially but not only within the Anglo-American world, is unquestionable, and many of his theoretical insights—such as the difference between primary and secondary rules, the concept of the rule of recognition, its foundation in social practice, and the distinction between internal and external perspectives—are current coinage in everyday legal discourse. See HLA Hart, *The Concept of Law* (Clarendon Press, 2nd edn 1994).

5 In the American context we could perhaps add Ronald Dworkin to the list, both for the breadth of his jurisprudence and for its viability as an alternative to dominant legal positivism. See, primarily, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) and *Law's Empire* (Harvard University Press, 1986). To be sure, many more names (even whole movements) can be added to this list, but no individual thinker has had the influence of Kelsen, Hart and Dworkin in the field of jurisprudence.

Cover has been approached from many perspectives:[6] he has been placed in the context of constitutional law,[7] political philosophy[8] and theology,[9] and his insights have been used to reclaim the importance of non-statist actors,[10] to frame the relations of state and supra-statist structures,[11] or applied in more doctrinal contexts of choice of law.[12] My own perspective is that of a legal theorist working in the tradition of law and humanities. By placing Cover in this context I do not attempt to create any 'jurisprudential school' based upon his teachings, but rather to equip humanistic approaches to law with the language and the tools necessary to resist the encroachment of rival philosophies—I think primarily of the analytical streak of jurisprudence of Hart and the Oxford school and the neo-Kantianism of Kelsen and his many followers. My goal is compatible, I believe, with the work of authors such as James Boyd White who warn against the dangers of forging a theory that would obliterate the 'literariness' of law and the conditions of radical uncertainty and contingency in which it operates. Adjusting the theory to such complexities requires acknowledging that every theory, including this one, is only a simplification.[13]

The analysis is divided into four main sections (and a conclusion). Part I speaks of the *nomos* as an individual entity and disentangles the enigmatic yet crucial concept of what it means to inhabit it. In elucidating the constitutive elements of the *nomos*, I will show that Cover bridges the seemingly unbridgeable gap between *is* and *ought*, putting an end to the fruitless discussion between juspositivists and jusnaturalists over the relation

6 In spite of being published more than 25 years ago, 'Nomos and Narrative' still creates considerable ink. In 2005 a Symposium was held with the title 'Rethinking Robert Cover's *Nomos and Narrative*' (2005) 17 *Yale Journal of Law & the Humanities*, with contributions from 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, with articles from Ian Ward, Anthony Bradney, Richard Mullender, John Alder and Thom Brooks. These papers can be accessed at www.bepress.com/ils/iss8.

7 Paul Kahn, 'Community in Contemporary Constitutional Theory' (1989) 99 *Yale Law Journal* 1, 55–63; also Robert Post, 'Who's Afraid of Jurispathic Courts? Violence and Public Reason in *Nomos and Narrative*' (2005) 17 *Yale Journal of Law & the Humanities* 9.

8 Austin Sarat and Thomas R Kearns, 'Making Peace with Violence: Robert Cover on Law and Legal Theory' in Austin Sarat and Thomas R Kearns (eds), *Law's Violence* (University of Michigan Press, 1992) 211; Richard K Sherwin, 'Law, Violence, and Illiberal Belief' (1989/90) 78 *Georgetown Law Journal* 1786.

9 See Suzanne Last Stone, 'In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory' (1993) 106 *Harvard Law Review* 813; see also Samuel J Levine, '*Halacha* and *Aggada*: Translating Robert Cover's *Nomos and Narrative*' (1998) 1998 *Utah Law Rev*iew 465.

10 Jonathan Boyarin, 'Circumscribing Constitutional Identities in Kiryas Joel' (1997) 106 *Yale Law Journal* 1537; Judith Resnik, 'Living their Legal Commitments: Paideic Communities, Courts, and Robert Cover' (2005) 17 *Yale Journal of Law & the Humanities* 17.

11 Richard Mullender, 'Two Nomoi and a Clash of Narratives: The Story of the United Kingdom and the European Union' (Berkeley Electronic Press, 2006) www.bepress.com/ils/iss8.

12 Perry Dane, 'Conflict of Laws' in Dennis Patterson (ed), *A Companion to the Philosophy of Law & Legal Theory* (Blackwell, 1996).

13 Paul Feyerabend, *Conquest of Abundance: A Tale of Abstraction versus the Richness of Being* (University of Chicago Press, 1999).

between law and morality. Next, I shall explain how norms acquire their specific normative grip, through the contrary and cyclical motions of *commitment* and *objectification*. This part concludes with an analysis of the *paideic* and the *imperial* types that enable the growth and confer the stability to the *nomos*.

Part II analyses the interaction between diverse nomic entities. Here, I consider Cover's distinction between *insular* and *redemptive* types, in connection with the process of constitutional meaning-formation. This section elaborates upon the idea that all normative groups are, in one way or another, engaged in the activity of working out the texts and narratives that are to be taken as constitutional in their respective communities, without the need for any *overlapping consensus* in the Rawlsian sense.

Part III considers the distinct possibility of clashes among diverse nomic entities, which brings to the fore the practice of adjudication. Here, Cover offers an innovative conceptualisation 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. Part IV puts the discussion in the context of the decision-making practices of the European Court of Human Rights, in light of a recent decision concerning the dissolution of the Basque separatist party Herri Batasuna. I conclude with a summary of the most salient points and with suggestions that might point legal theory in a different direction.

I. COVER'S LEGAL UNIVERSE

One of Cover's most original insights is that law should be understood not as a system of rules or a set of rules and principles, but as a normative universe or *nomos*. Broadly defined, the *nomos* comprises the entire battery of resources for normative thought and action that are immanent in any living community.[14] This notion of community is not grounded on blood, race, ethnic origin or any other 'essentialist' attribute. Rather, it is closer to the idea of a social group bound together by the belief in forming such a group, which includes socially constructed accounts about their own constitution and sets of authoritative texts and values.[15] In contrast to the famous Sophist dichotomy between *nomos* and *physis*, here the law is not imposed upon the individual, as it were externally, but comes naturally through a process of acculturation and is learned gradually from

14 For a historical evolution of this word (and of Greek values in general), see the excellent study of Werner Jaeger, *Paideia*, 3 vols (esp vol 1), English trans (Oxford University Press, 1939 and 1943–4). Cover (n 2) makes explicit reference to this work (6 n 9). For a short introduction, see also Werner Jaeger, 'Praise of Law: The Origin of Legal Philosophy and the Greeks' in Paul Sayre (ed), *Interpretations of Modern Legal Philosophies* (Oxford University Press, 1947).

15 On how the self-reflective constitution of their collective identity might occur, see Paul Ricoeur, *Soi-même comme un autre* (Seuil, 1990).

childhood.[16] The individual accesses the normative life through the group or groups to which she belongs, even though she may switch membership in the course of her life. Hence different individuals may inhabit different normative worlds (perhaps more than one), but once internalised, the *nomos* becomes part of the psycho-social structure of the individual as much as do the physical phenomena of mass, energy and momentum.

Cover does not explain whether every social group can qualify as a *nomos*. For example, can a band of pirates be said to constitute one? Cover's examples invariably entail: (a) a well-constituted and fully blossomed human collective; (b) a self-consciousness of their 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 life-projects. The lack of a discernible normative project may perhaps exclude the pirates from such a consideration (of if they are a *nomos*, it is not a strong and cohesive one), but could include cultural associations, social movements, NGOs, political parties, movements for reform, and the like. This list cannot be exhaustive and the criteria for granting (or denying) a given social group the status of *nomos* cannot be based on moral likes or dislikes. Be that as it may, Cover affirms that modern heterogeneous societies harbour a multiplicity of nomic entities (or *nomoi*) that create, maintain and live their own law independently from the state.

In the wake of this well-known tenet of legal pluralism, Cover might have argued that normative manifestations other than state law ought to be recognised properly as law, for they share many attributes. His project may have led him further to contrast the *nomos* of smallish communities with the law of the state, for example, by associating the former with the idea of law as meaning and the latter with the idea of law as social control.[17] I shall take a slightly different route and argue that even the law of the state can be examined under the light of Cover's *nomos*. Therefore, in this article I set out to work out the implications of thinking of law as a normative universe through and through, even when the law observed is that of the state. My goal is not to enclose law in a set of 'necessary and sufficient' truths about its nature (which is perhaps a hopeless endeavour[18]), but rather to open it up to a rich array of phenomena that do not often capture the attention of philosophers of law. Whereas I draw on Cover's language to build my argument, I also expand on it when necessary, especially when it helps to confront directly important issues of legal theory.

16 Cover (n 2) 5. For an illuminating account of this process, see Desmond Manderson, 'From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature' (2003) 15 *Law and Literature* 87.

17 Cover (n 2) 18.

18 Danny Priel, 'Jurisprudence and Necessity' (2007) 20 *Canadian Journal of Law and Jurisprudence* 173.

(a) The Thickness of the Nomos: Precept, Mythos, and Language

The best way to imagine the workings of the normative universe is to think of it not as a system (in its mechanistic, enclosed and finished patterns), but rather as a kind of language (open-ended, flexible and constantly evolving). What Cover means by 'language' is not the set of grammatical or syntactical rules for the correct use of legal propositions. Rather, the language of law is, like the *nomos* itself, a world that the speaker inhabits. This language is much richer than the image of law as the syllogistic application of rules would have us think, for it provides the entire arsenal for a full and flourishing normative life. Since 'law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, humiliate or dignify',[19] the greatness of a legal tradition or civilisation is actually measured by the possibilities of expression, argument and judgment that its language avails. To know the law is therefore to learn its language, which one never knows perfectly or completely.[20] To be a competent speaker of this language requires more than knowing how a particular concept or precept is *used* and connects with others; significantly, one must know how it is *charged*, that is, the heavy load of symbols, connotations and values it carries with it. 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*.

Cover's legal universe contains not only a body of precepts but, fundamentally, a set of narratives and myths that validate the former and give them meaning. As Cover understands them, myths are not fictional or irrational stories doomed to disappear with the coming of age of civilisation. 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. As such, myths establish 'a repertoire of moves—a lexicon for normative action'.[21] To illustrate this point, he offers the example of the law of inheritance in the Bible: on 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.[22] 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 myth 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 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.

19 Cover (n 2) 8.
20 See James Boyd White, 'Legal Knowledge' (2002) 115 *Harvard Law Review* 1396.
21 Cover (n 2) 9.
22 Deuteronomy 21:15–17.

Some may want to believe that the positivistic framework of the modern state has overcome the mythical foundations that enliven the biblical world. But every legal system must conceive itself in one way or another as emerging out of that which is itself unlawful, and this always entails a narrative, often in the form of a myth, to explain how the law came to be.[23] Therefore, regardless of differences in the acts 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 can never escape the narrativisation of its origin and source of legitimacy.[24]

'Narrative' is an important term of art that merits some pause. The proper way to discover its meaning is not through the customary dichotomy between fact and fiction, but rather through the one between fact and value. For Cover, fact and value—narrative account and normative assessment—are inextricably linked. As he says, every prescription (norm, covenant, value) is placed within a narrative that explains it and gives it meaning. In turn, every narrative (be it historical or imaginary) is insistent in its demand for its prescriptive point, its moral. Narrative is in fact the act of 'imposing a normative force upon reality', which Hayden White refers to as the 'moralizing effect' of narrative.[25] In other words, narrative gives reality a shape, direction, plot and characterisation that it would otherwise lack, and in doing so, it models reality after the attributes of its rhetorical construction and the world of value implied in it.

This assertion may worry those who think of law as purely objective, and believe that the scientific description of law requires that it be extricated from the realm of values.[26] But upon consideration, it simply brings to legal language what we always suspected was true of language in general, namely, that every description is coloured by the type of relationship we establish and want others to establish with what it is that we are describing (for instance, by adopting an ironic, sarcastic or critical tone). Moreover, those worries should not obstruct one's view to Cover's major contribution: Considering that the act

23 Cover (n 2) 23, 45.

24 Cf Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 920. For Cover, such 'foundation' does not imply a fixed canon of narratives (Cover (n 2) 4 nn 3 and 4). In fact, given that myths of origin can be neither entirely domesticated nor prevented, they always provide the 'typology for a dangerous return' (*ibid*, 23–24 n 66).

25 Hayden White, 'The Value of Narrativity in the Representation of Reality' in WJT Mitchell (ed), *On Narrative* (University of Chicago Press, 1980–1) 14. According to White, 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' (*ibid*, 13). Thus, the various literary genres—history, fiction, tragedy, comedy— can all be seen as the 'imposition of a normative force upon a state of affairs' (*ibid*, 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' (Mikhail Bakhtin, *The Dialogic Imagination: Four Essays* (University of Texas Press, 1981). The relationship between Cover and Bakhtin has received interesting treatment in Mullender (n 11).

26 For all, see Kelsen (n 3).

of narrating adds the element of value to the world of fact, narrative traverses (and allows us to traverse) the seemingly unbridgeable gap between fact and value. To say it differently, by connecting a given reality with its normative significance, narrative is the bridge that connects the world of the *is* with the world of the *ought*.

Regrettably, this 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'. All of 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.[27] Cover's response is ingenious in its simplicity. First of all, to the twofold ontological distinction between 'is' and 'ought' he adds a third category of being, the 'might be'. This is not just an artifice. In fact, it can be said to have its roots in Aristotle's metaphysics, 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 ontological category of norms enables Cover to verify the link between *is* and *ought* and to mark the transition from a given state of affairs to its desired transformation. As the bridge linking a given concept of reality to its imagined alternative, law is neither fully *here* in the realm of social reality nor *there* in the realm of pure normativity. 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'.[28]

The former does not mean that every vision, no matter how ludicrous, can automatically become part of the *nomos*. At the very least, the fact that every 'vision' must be articulated through language and inserted into socially constructed narratives demands that they be made intelligible to others first.[29] In addition, law is anchored in the material world of social forces and constraints, which adds depth to these imaginings and 'rescues us from the … constructions of our minds'.[30] According to Cover, those who are not able to adjust their visions to their surroundings, including the predictable patterns of behaviour of other actors that may oppose them, lose their grip on the legal reality.[31]

27 The Hartian account followed by many, according to which norms are ultimately grounded on social practice (eg recently Andrei Marmor, 'How Law is Like Chess' (2006) 12 *Legal Theory* 347) not only fails as such (see Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 158), it is also surprisingly unresponsive to this dilemma. See, recently, Roger A Shiner, 'Law and its Normativity' in Dennis Patterson (ed), *The Blackwell Companion to Philosophy and Legal Theory* (Blackwell, forthcoming 2010).

28 Cover (n 2) 10.

29 In an argument that echoes Wittgenstein's against private languages, Cover affirms that a purely idiosyncratic *nomos* would be entirely unintelligible. See Cover (n 2) 10.

30 Cover (n 2) 10.

31 This also happens to groups who are consistently unable to convert their vision into reality. For Cover, they are still 'movements', but no longer 'movements of the law'. Cover (n 2) 39.

Therefore, far from an allegedly 'unencumbered *nomos*', it is more appropriate to think of every *nomos* as being part and parcel of a complex and wider cosmos that it attempts to, but cannot fully, control.

The structure of the *nomos* is not to be imagined as a pyramid in which each norm is validated by its immediate superior until we reach the highest normative step of the ladder.[32] The picture is rather one of an enmeshed web of narratives around possible, plausible and desirable states of affairs, which are stored and brought to life by the usual processes of memory and recollection. Such a conceptualisation would help to ease some of the well-known problems associated with the pyramidal model. For one, it would serve to acknowledge the existence of very real normative sources—ie soft law, informal regulation, *contra-legem* customs, non-official practices, extra-legal arguments—that are not acknowledged by, and therefore escape, the shadow of the pyramid.

Likewise, the characterisation of law as a system of rules rejects the existence of antinomies, inconsistencies, gaps and lacunae. In contrast, the normative universe can harbour many potentially contradictory norms and, for the most part, allows for their peaceful coexistence, suggesting the possibility (not contemplated in the pyramidal model) of several contradictory supreme norms at the same time and in the same place.[33] From the resources that are available at any one moment several different reconfigurations of the normative universe are possible, which enable the constant renewal of the *nomos*. Another way to strike the same point is to say that the normative universe is in a constant process of *becoming*, which forces us to speak of law's concrete *location* as well as its *direction* (or trajectory).[34]

One important question from a practical perspective is how it is possible, if the *nomos* is not a system, to know whether a given norm belongs to a particular *nomos* or not. In other words, how are we to identify a valid law and distinguish it from what it is not? Positivist legal theory argues that every legal system sets forth predictable rules to decide the validity of a particular law with conclusive character, for example, by way of the rules of recognition and habilitation. By contrast, the normative universe contains no fixed and *a priori* criteria to decide whether a given norm belongs to it or not. On this view, the doctrinal question of what the law *is* in a given situation is not a proposition that can be answered aprioristically in a true or false fashion (for it always contains potential dimensions of the norm that are not actualised). To make a valid legal claim is rather a matter of argument that can be more or less compelling, and this depends on different audiences and contexts (what might persuade a first instance judge may not persuade the

32 Despite well-known objections, the Kelsenian metaphor is still a favourite in most legal minds. For an excellent critique, see François Ost and Michel van de Kerchove, *De la pyramide au Réseau? Pour une théorie dialectique du droit* (Publications des Facultés Universitaires Saint Louis, 2002).

33 For this same possibility of conflicting fundamental norms in the European context, see Nicholas W Barber, 'Legal Pluralism and the European Union' (2006) 12 *European Law Journal* 306.

34 Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1975) 6.

Supreme Court, and vice versa).[35] The limit of a valid legal claim is hence set by the imagination of the speaker and the persuasiveness of the claim (ie, the ability to frame the legal argument in ways that can be accepted by others as valid).[36] As a result, practical decisions of validity are reached on a case by case basis and according to rhetorically tailored criteria of relevance that are contingent (because they depend on temporal and spatial considerations), heterogeneous (because they are not enclosed in any list of permissible sources), and evaluative (because they depend on judgments).

A second, related issue has to do with the relationship between the normative universe and the outer, non-legal environment, which is essentially this: when the *nomos* enters into contact with the external world, or, to put it differently, when the rest of world is filtered through the normative lens of the *nomos*, the latter acts like a 'magnetic field' with the capacity to *charge* it juridically. In addition to being 'a world in which to live', then, the normative universe is also the prism or pervasive filter through which the rest of the world is perceived (and assessed). As a result, when objects, events or actions existing in the outer world enter the scope of action of the normative universe—ie, for one reason or another they *become* relevant—they are impregnated with the normative force of that *nomos*. This means that just about anything can become legal at a given point (when it falls within the law's area of influence), but not that everything *actually* does (because the law's field of perception is limited). In distinction to the autopoietic theories of Luhmann and (to a lesser extent) Teubner, the division between legal/illegal is never sharp and crispy, but fuzzy,[37] which turns law into an essentially porous entity, distinguishable from, and yet permeable by, its exterior.

A third and final issue has to do with the felt need to distinguish law from other normative realms, especially from morality. As this debate has traditionally been conducted between juspositivists and jusnaturalists—the former saying that an unjust law is still *legal*, the latter that unjust law cannot *properly* be called law—I find the controversy tiresome and not particularly illuminating.[38] As this story is often told, the point seems to have been finally settled by Hart, who circumvented the dilemma by arguing that a legal rule may still be legal even though it is too iniquitous to be obeyed or

35 Naturally, it is unrealistic to question the general validity of a given source in certain contexts—eg a formally enacted statute in a court of law (unless of course the case requires doing precisely so—for example, when the statute is claimed to be unconstitutional). The same statute could be challenged, however, if the case were to arise in a tribal court.

36 For a theory that makes interpretation dependent on the ingenuity of lawyers and the readiness of judges to accept less than obvious meaning of the texts, see Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1978) ch 8.

37 See Oren Perez, 'Law as a Strange Loop' in Gralf Peter Calliess *et al* (eds), *Sociological Jurisprudence: Liber Amicorum Gunther Teubner* (Gruyter, 2009).

38 It is encouraging to hear that self-proclaimed positivists express their discontent with picking sides and advocate putting an end to the hostilities. See, recently, Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) 279 (MacCormick defines his position as a 'post-positivist' one, though he sees himself as an heir to the works of Kelsen and Hart).

applied.[39] However, one cannot but wonder how empty a concept of law is that requires neither obedience nor application. Cover enters this debate to state the obvious (and perhaps for that, all the more in 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.'[40] This argument suggests several things: first, that rules cannot determine their own justice or injustice; second, that depending on their various assessments the *same* rules can look unjust, just, or both. Third, that every legal order 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.[41] 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 subsequent life of such a law (including its interpretation, application, adjudication and enforcement). In short, the vital question is not that of law's being (or its validity), but of its becoming.

(b) The Genesis of Norms and the Growth of Law

Legal theorists still debate what exactly makes a legal norm a *norm*, that is, what marks the transition from a given legal provision found in a legal instrument to a fully-fledged norm capable of modelling human conduct.[42] The debate is not about what it is that makes the norm effective (what makes individuals conform their behaviour to its dictates), rather it is about what it is that makes it *binding* (what makes individuals accept it as mandatory). Clearly, the fact that the legal utterance emanates from the legitimate

39 Hart (n 4) 210. See also his *Law, Liberty, and Morality* (Stanford University Press, 1963). The most famous debate on this issue was held between Hart and Lon Fuller, in the pages of 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 were recently redefined by Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing, 1999). For a recent appraisal of the position of both Radbruch and Alexy, see Brian Bix, 'Robert Alexy's Radbruch Formula' (2006) 37 *Rechtstheorie* 139.

40 Cover (n 2) 7, emphasis added.

41 On the idea of 'tacit knowledge', applied to the realm of science, see Polanyi (n 1).

42 On this debate, although sometimes dressed in different clothes, see Hart (n 4) 255–9; Dworkin (*Taking Rights Seriously*, n 5) 48–58; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon and Oxford University Press, 1979) esp ch 2; more recently, see Greenberg (n 27) (arguing that law practices alone cannot determine their own contribution to the content of law). In what follows I shall use the term 'provision' (or, to use Cover's word, 'precept') to refer to the legal utterance deprived of or still lacking in normative force, and the term 'norm' to the utterance that possesses it already. For the classic distinction between provisions—in Romance languages 'dispositions'—and norms, see Riccardo Guastini, *Dalle Fonti Alle Norme* (Giappichelli, 1990), as explained in Joxerramon Bengoetxea, 'Direct Applicability or Effect' in Mark Hoskins, William Robinson and David Edward (eds), *A True European: Essays for Judge David Edward* (Hart Publishing, 2003).

authority does not explain how that authority is originally bestowed, nor why individuals yield their conformity to the provisions emanating from it. Unlike most legal positivists, Cover does not believe that a legal provision is automatically endowed with actual normative force by reason of its being inserted in an official legal instrument. The shift from a mere legal provision into a norm begins with interpretation, which is an act by which the interpreter attributes a certain meaning to the given provision and decides how it should be read in the concrete circumstances.

However, interpretation is only the first step in the creation of norms. More important is the personal act that Cover calls *commitment*. Commitment can be defined as an act of personal engagement with the legal precept by which the individual affirms its meaning as it pertains personally to him or her. Through the act of commitment, the individual accepts that the provision as it has been interpreted exercises binding influence upon him or her. Thus, while interpretation particularises the meaning of a given provision, commitment is the subjective act that turns the content of that interpretation into a *norm* proper, for it determines what law is and what law shall be.

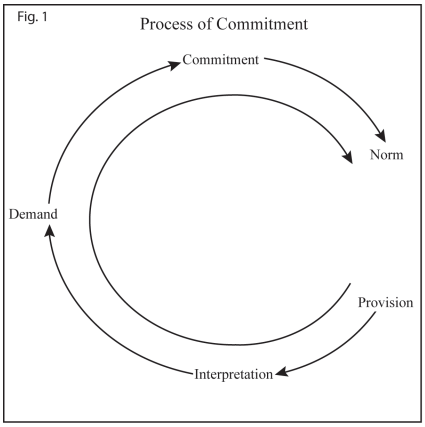
The statement that commitment 'determines' the normative aspect of the law is not metaphorical. Cover offers an example in the form of an anti-slavery group, the Garrisonians, who, using the dominant hermeneutic techniques of the day, interpreted the American Constitution as being favourable to slavery. Despite their public antagonism towards such a proposition, this interpretation of the Constitution agreed with that of Chief Justice Roger B Taney, who declared that the Constitution required the return of runaway slaves to their owners.[43] But 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. To be sure, the Constitution—as interpreted by Chief Justice Taney—was still in force in the rest of the territory and could be enforced against the Garrisonians who resisted it (though as it happened not for long). But from within the normative universe of the Garrisonians, the Constitution was felt as an externally imposed precept and not as a norm in the full sense of the term. In the normative universe of the Garrisonians, the American Constitution (at least in what concerned slavery) was not a valid norm.

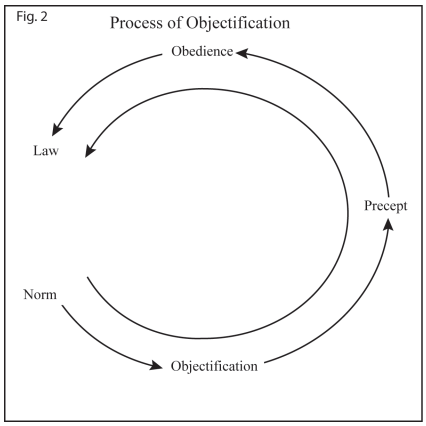
Nothing said thus far should be interpreted as claiming that the realm of law is 'merely subjective'. In fact the very idea of commitment implies by definition that we are committed *to something* other than ourselves. In the juridical field, that which we are committed to obeying is posited as the (external) object of the law. This objectified 'other' generally becomes a text, which is an essential ingredient in 'the language games that can be played with the law and [in] the meanings that can be created out of it'.[44] The process

43 *Dredd Scott v Sandford*, 60 US (19 How) 393, 15 L Ed 691 (1857).
44 Cover (n 2) 45.

of positing an external object of law is what Cover calls *objectification*, and with it, the full process of norm-generation is finally revealed: '[This] entails the disengagement of the self from the "object" of law, and at the same time … an engagement to that object as a faithful "other".'[45]

The analysis can be taken further than Cover takes it by breaking down each motion into two logical sequences, if only as visual representations of a non-linear process. In what concerns the motion of commitment or subjective engagement, the legal utterance is interpreted as establishing a demand which lacks normative force until the individuals commit to it, which can be represented in the following logical steps: (1) provision; (2) interpretation; (3) demand; (4) commitment; and (5) norm (figure 1). In the opposite direction, the committed norm is objectified as an external precept to which individuals owe obedience as law, generating the following sequence: (1) norm; (2) objectification; (3) precept; (4) obedience; and (5) law (figure 2).

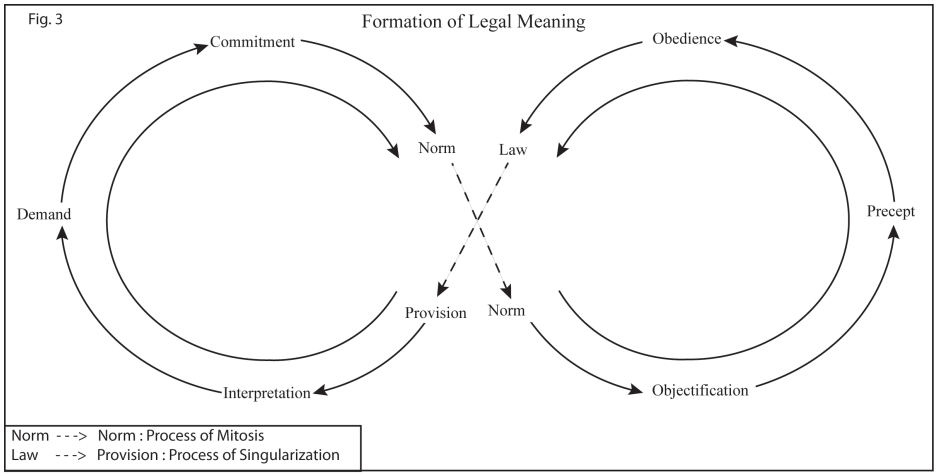




Presented in this way, each sequence is the perfect mirror of the other. Provision, interpretation and demand are mirrored by norm, objectification and precept, respectively; whereas the commitment that leads to the norm is mirrored by the obedience owed to the law. The culmination of each sequence gives a point of stability to legal meaning: in the moment, the commitment to the norm is unreserved and the law is obeyed. But this stability may be non-lasting: the norm reached at the end of the process of commitment will be challenged in unforeseen circumstances and turn into another

45 Cover (n 2) 45.

provision (to be reinterpreted again). In turn, the law that exacts obedience will have to respond to different circumstances and warrant a variety of norms. The formation of legal meaning must be thought of as a never-ending cycle spinning around opposite motions of commitment and objectification, which make the whole process unstoppable and in constant flux (figure 3).



Two final remarks will help us to explain the transition from one motion to the other. As presented in figure 3, it can be seen that both sequences share the common space of the norm. This is because the norm is doubly constituted by the subjective or internal element (the belief of being bound by it) and the objective or external element (the action that the norm commands). In the transitional moment, the norm suffers the *mitosis*[46] of its constitutive cells and splits in two: the subjective or internal element gives way to the aspect of the norm that is to be objectified into a legal precept. Conversely, the law that demands obedience is to be made specific in the concrete situation. This demands that the general and undetermined law follows a process of *singularisation* or individuation by which the particular legal provision (or a group of them) is selected as applicable to the present case. It is important to realise finally that both moments of transition occur through the medium of narrative: narrative helps, on the one hand, to give verifiable content to the purely subjective element of the norm, and, on the other hand, to provide the textual basis for the interpretation of legal provisions. Thus narrative is the bridge

46 In the biological sense, mitosis is the process of cell division by which the nucleus splits into two separate ones, each of which contains a copy of the parental chromosomes. Cover uses this metaphor to refer to the multiplicity of legal meanings that are created out of the same 'legal DNA'.

that connects the subjective and the objective dimensions of legal meaning and brings the world of material reality in contact with our imagination.

At this point, Cover introduces a biological model of legal generation (or, as he appropriately labels it, *jurisgenesis*), in order to explain the patterns of reproduction, transmission and preservation of each individual *nomos*. Although Cover's argument is more complex than my explanation here,[47] he suggests that the sustainable growth of every *nomos* necessitates the activity of two opposite impulses: one expansive and generative, which he calls *paideic*, and another contractive or stabilising, which he calls *imperial*.[48] In a process that can only be called 'organic', the *nomos*, as every other living organism, undergoes continuous mutation of its constitutive cells. This duplication and reduplication of legal meanings by which thousands of further meanings emerge out of the same genetic code make transformation and change possible. At the same time, without some form of ordering principle—a sort of principle of systemic stabilisation—the multiplicity of meanings that are created by the paideic impulse could shatter the unity of the *nomos* and endanger its subsistence. The imperial forces therefore tame or modulate the generative impulse and impose certain coherence to the *nomos*, which allows its preservation (as well as the establishment of narratives and meanings that are shared and respected among the members of the group).[49] Arguably, the paideic and the imperial are interdependent and mutually affecting synergetic forces, jointly necessary for the healthy functioning of the normative body.

II. CONFRONTING THE OTHER: IMAGINING A CONSTITUTIONAL COSMOS

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. Cover draws a distinction between two ways of interacting with the rest of

47 Initially, Cover defines the *paideic* and imperial as forces that coexist in every *nomos* (although perhaps in different measure). In a subsequent move, Cover remarks that some *nomoi* appear typically to operate in one mode rather than in another. Thus, he observes that whereas the *nomos* of smallish communities has approximated the *paideic*, the *nomos* of the state has approximated the imperial. Here, I am solely interested in the first distinction.

48 In the Weberian sense, ideal types are methodological constructs devised with the aim of understanding a given social phenomenon from within. They are constructed by selecting salient features of observable phenomena, by classifying them into types, and by assigning to each an underlying meaning-pattern that penetrates the internal rationality of the observed phenomenon. Assuming their limitations, ideal types allow the observer to pierce through complex human and social phenomena.

49 Cover notes the momentary and essentially unstable nature of that perception: 'the unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary'. See Cover (n 2) 5.

nomoi. The first he calls *insular*, the second *redemptive*, attending to the way each group comes to terms with the 'ontological reality of the other'.[50] Cover discusses the insular and redemptive trajectories[51] in connection with the task of constitutional meaning-formation in which all normative groups, in one way or another, are engaged—without the need for a Rawlsian overlapping consensus.[52] These trajectories do not exhaust all possible forms of social interaction, but they are nevertheless important, as we shall see, when a third party adjudicator is called upon to judge an issue between them.

(a) Insular Trajectories

Insular trajectories are followed by those who create some sort of 'nomic refuge' and wish to keep it free from external interferences, especially from the state: they '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'.[53] As a result, they 'inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion'.[54]

The principle of separation is 'not only a principle limiting the state, but also one constitutive of a distinct *nomos* within the domain left open'.[55] For example, he mentions how 19th century utopian communities used freedom of contract to ground their 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. What matters, however, is not the concrete legal instrument utilised, but how it grows to become the centre around which the normative activity of the group revolves. Whether it be freedom of contract, free exercise of religion, or corporation law, the utilised legal instrument becomes the *boundary rule* upon which the group stands apart and

50 *Ibid*, 29.

51 Cover does not necessarily use this term, but I find it appropriate to underline their sense of directionality as well as their character as tendencies or propensities rather than as fixed attributes.

52 Cover notes that 'many of our necessarily uncanonical historical narratives treat the Constitution as foundational—a beginning—and generative of all that comes after' (Cover (n 2) 25). Still, 'the Constitution must compete with natural law, the Declaration of Independence, the Articles of the Confederation, and the Revolution itself for primacy in the narrative tradition' (*ibid*). Thus, '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' (*ibid*, emphasis added).

53 *Ibid*, 33.

54 *Ibid*, 28. This does not mean that the insular group is hermetically sealed or uninfluenced by the outer world. Quite unequivocally, Cover states that '[n]either 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' (*ibid*, 33): 'each group must accommodate in its own normative world the objective reality of the other' (*ibid*, 29).

55 *Ibid*, 29.

constitutes its world, and its meaning 'differs depending upon which side of the wall our narratives place us on'.[56] From the point of view of statist doctrine, a simple way to interpret the group's normative activity is through the lens of liberty of association. However, to assimilate the jurisgenerative capacity of each *nomos* to the doctrine of associational rights is, according to Cover, to assume the perspective of the state official looking out. Nomic entities do not need the state's recognition or permission to exist and to generate their own normative activity, for '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'.[57] Arguably, each *nomos* establishes itself as the Archimedean point from which to observe the rest of the cosmos and, often, incorporate explicit rules establishing the self-referential supremacy of its own world.[58] Therefore, the significance of the boundary rule also differs depending on which side of the wall we are on: 'From 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.'[59]

(b) Redemptive Trajectories

Redemptive trajectories are used by those whose sharply different visions of the social order require changing not just themselves, but the social world in which they live. While insular *nomoi* want the rest of the world to leave them alone, redemptive groups want the world to become like theirs. Redemptive narratives set out to liberate persons and the law, and to raise them from a 'fallen state'.[60] Accordingly, they postulate: (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.

As an illustration, Cover takes the example of the radical constitutionalists during the anti-slavery era. In a manner diametrically opposed to that of the insular Garrisonians—who believed that the Constitution upheld slavery and that, therefore, it ought not to be obeyed—radical constitutionalists declared that no word could be found in the Constitution that authorised the practice of slavery. 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

56 *Ibid*, 31.

57 *Ibid*, 32.

58 This self-referential supremacy is mitigated, however, 'by the partly principled, partly prudential rules of deference that each manifests in relation to the other' (*ibid*, 30). Indeed, there derive practical benefits from securing the acquiescence of State officials (*ibid*, 43).

59 *Ibid*, 30 n 85.

60 *Ibid*, 35.

foundation in law'.[61] Radical constitutionalists hoped to transform the constitutional order to reflect their vision opposing slavery, and therefore, their redemptive ambition 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. In spite of the short-lived historical experience of the radical constitutionalists, Cover vindicates their efforts as more than 'merely utopian'.[62] For example, 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'.[63]

III. THE PATHOS OF JUDGMENT

(a) Hard Cases

With so many disparate groups wishing to occupy the same normative space, the existence of clashes among them cannot be at all surprising, which brings us to closer to the role of the courts as adjudicators of conflict between *nomoi*. Cover is often said to have claimed that courts are *jurispathic* because their function is not to apply or to create the law, but rather to kill it. What is less known—or at least not sufficiently recognised—is that this statement is part of a serious undertaking to reconceptualise the so-called 'hard cases', for which some background is necessary.

In Chapter Seven of *The Concept of Law*,[64] HLA Hart famously argued that, due to the open texture of language, there were cases that could not be clearly subsumed under the terms of a rule. To these, he opposed other cases in which the language of the rule clearly specifies the conditions that must be present for it to apply. 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 clear whether it applies equally to an electrical motorcar. Hart believed that hard cases arise because they fall within the 'zone of penumbra' of rules, where he recognised that judges could use their discretion to fill in the gaps. However, he also thought them exceptional cases, and believed that most of the time language left no doubt as to which situations were meant to fall within its scope and which were not.

61 *Ibid*, 38 (footnote omitted).

62 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', that is, 'because they fail to posit alternative lives to which we would commit ourselves by stretching from our reality toward their vision' (*ibid*, 44, footnote omitted).

63 *Ibid*, 39.

64 Hart (n 4).

Against this canonical view, it has been sometimes argued that the distinction between easy and hard cases is itself not an easy one,[65] and that the dividing line is blurry and not fixable in advance.[66] Furthermore, it is also argued that the source of 'hardness' is to be found not in *semantic* reasons, but in *substantive* or other *pragmatic* circumstances.[67] For one, Ronald 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'.[68] Concerning hard cases, several questions must be distinguished. First, we want to know *when* we are in front of a hard case. Second, we want to know *why* it is that the case is hard.[69] Third, when in front of a hard case we will ask *what* the task ahead of the judge is, and fourth, *how* she ought to proceed in performing it. In sum, a theory of hard cases must respond to the *when*, *why*, *what* and *how* of these cases.

Hart argues that there is a hard case when the law is unclear, and the case is hard because the language of the rule does not clearly specify whether it falls within its scope or not.[70] Dworkin thinks differently: that we face 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*, Hart suggests that judges can use their discretion, while Dworkin denies this and says that they must at any rate proceed to find the best law that there is.[71] Notwithstanding their notable differences, both Hart and Dworkin agree that the *task* of the judge (the *what*) is to reinstate the unity or integrity of a law that is perceived as having been compromised.

Opposing both, Cover offers a fresh and insightful perspective. 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. That is, the issue is one not of indeterminacy, but of multiplicity.[72] In Cover's view, the

65 Dworkin (*Law's Empire*, n 5) 350–4. For different ways of categorising the distinction between easy and hard cases, see Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press, 1992) 183 ff.

66 MacCormick (n 36).

67 For *substantive* reasons, Dworkin (*Law's Empire*, n 5); for *pragmatic* reasons, MacCormick (n 36) and Bengoetxea (n 65). For a *semiotic* perspective, see Bernard Jackson, 'Rationalité consciente et inconsciente dans la théorie du droit et la science juridique' (1987) 19 *Revue Interdisciplinaire D'Etudes Juridiques* 1. Some authors still defend the *semantic* line of argument, eg Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing, 2nd edn 2005), and Frederik Schauer, *Playing by The Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991). But see Fernando Atria, *On Law and Legal Reasoning* (Hart Publishing, 2001) 101–22 (discrediting these views).

68 See Stephen Guest, *Ronald Dworkin* (Edinburgh University Press, 1992) 162.

69 On the *when* and the *why* of hard cases, see Atria (n 67) 75–76.

70 This is also the view of Raz (n 42) ch 3, who speaks of 'regulated' and 'unregulated' cases.

71 Dworkin (*Taking Rights Seriously*, n 5) esp chs 4 and 13.

72 Some legal realists also realised that the main issue is the multiplicity of the applicable laws (Karl Llewellyn, 'Some Realism about Realism' (1930–31) 44 *Harvard Law Review* 1222), or how to choose between different possible major premises (John Dewey, 'Logical Method and the Law' (1924) 10 *Cornell Law Quarterly* 17). However, they never went as far as to speak of inter-systemic normative conflicts.

origin and justification of courts lies not in the need for law, but rather in the need to suppress it, an argument that is well-grounded in myth and history. For example, in Aeschylus' *Oresteia*, the mythic foundation of the oldest Athenian court, the Areopagus, is the result of the conflict between two bodies of laws, one invoked by the Erinyes and the other by Apollo, one of which must be supressed.[73] Likewise, the historical justification for having one 'supreme' Court is, according to Cover, to produce uniformity out of diversity.[74] As a result, the task of such a court is not simply how to apply the law, but to decide, more radically, which law to apply and which law to kill off.

Cover's particular take on the issue of hard cases is connected to his understanding of the legal cosmos as populated by multiple self-legitimating normative entities, each of which provides its own legal response to every legal issue of substantial complexity. Cover's plural and essentially contested legal cosmos demands a radical relativisation of law which accords no logical or normative priority to the political structures of the state. Consistent with this approach, he argues that we must posit the nomic integrity of each of the laws in conflict and recognise that, for each normative universe, the norm articulated *is* the right legal response. A failure 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. Thus, for Cover, a hard case arises *when* to a single question of law that needs adjudicating there are opposing *nomoi*, each providing its own 'right legal answer'. The conflict is hard *because* we are dealing not with divergent interpretations of a given unclear or unsettled legal provision, but with holistic sets of corpuses, myths and narratives that consider their own *nomos* to be supreme and are ready and committed to maintaining it. The issue then is not how to square the disagreement with an allegedly compromised legal system, but how to choose between two competing systems of law, which is clearly not just an interpretive question. To put it in analytical language, the conflict in hard cases becomes *inter*—and not just *intra*—systemic.

Framed in this 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 ought to have. In order to adjudicate a hard case, one must first be cognisant of the existence of a hard case, and this is not always evident. Let me develop this point further in connection with the place this kind of case has or ought to have in a theory of adjudication. Sometimes it is argued that hard cases are in the minority and therefore

73 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. The reverse phenomenon of 'polynomia' occurs, says Cover, out of the loss or weakness of courts. Cover mentions the Talmudic example of the Court of the Great Sanhedrin, in which, after the destruction of that Court, the Law became two laws. Cover (n 2) 41.

74 Cover cites Alexander Hamilton in *The Federalist*; Cover (n 2) 41.

their relevance to the whole system should be treated as almost insignificant.[75] To respond to this claim, it is necessary, though not sufficient, to say that relevance and significance cannot be assessed by statistical or any other 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, even though it would be not at all surprising to learn that there may be a potential hard case lurking behind 'any normative problem of substantial complexity'.[76] But more importantly, the manner in which a system responds to hard cases illuminates not only these cases but the system as a whole, just as the sociological study of deviant cases teaches us not only about the deviant cases, but about the regular ones as well.

Once hard cases are brought back from the margins, it is easier to see why Cover does not think that what is at stake—the *what* of hard cases—is how better to reinstate the lost unity of the legal system, as both Hart and Dworkin agreed. Nor is the choice one between accepting the judicial articulation of values or the looming void of nihilism.[77] Rather, the fundamental question is how to preserve a sense of legal meaning in spite of the inability to ground the killing of the law in the pretence of an objective and superior hermeneutics. In more striking terms, the *what* of hard cases is how to create value out of the death of law. How this might be achieved while preserving justice—or, in the language we have learned to use, the *how* of hard cases—requires us to approach it from at least two perspectives: the section that follows deals with this question from the perspective of the courts, whereas the next one deals with it from the perspective of the *nomos* affected by them.

(b) The Claims of Jurisdiction

According to Cover, the way for judges to use their authority not as an act of naked violence is through the articulation of the institutional privilege of force, or jurisdiction. Jurisdiction, from the Latin *juris-dictio* (*jus* = law, right; *dictio* = to say, to proclaim) can be defined as the act by which the court claims the prerogative to decide a case with authoritative character. Insofar as jurisdiction establishes the boundaries between law and non-law, every claim of jurisdiction—as well as its denial—is constitutive of a norm. Therefore, more than a set of impartial rules and procedures, jurisdiction reveals the

75 See Frederik Schauer, 'Judging in a Corner of the Law' (1988) 61 *California Law Review* 1717.

76 Cover (n 2) 42. Perhaps, then, it is not that hard cases are rare and exceptional occurrences, but that they fell out of our area of perception: as we shall see in the next section when encountering Cover's reading of *Bob Jones University*, it may be tempting to say that it was easy for the IRS to rule that Bob Jones University was not eligible for tax-exempt status. But for the University the case was notably hard, as it represented a frontal attack on their entire *nomos* and educational *paideia*.

77 Cover rejects this dichotomy as false and too easy, in reference to Owen Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739.

system's deep underlying commitments with regard to a diverse, plural and potentially conflictive environment. On the basis of common jurisdictional practices, Cover denounces the claim that when judges are aligned with the state, that is, when they adopt the perspective of an insider looking out, legal meaning is subordinated to the interest of public order. In contrast, when the judge adopts the role of a potential outsider looking at the activities of the state, the situation is reversed. 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. As a result, jurisdiction becomes slanted in favour of 'those who control the means of violence'.[78]

Wishing to reverse these practices, or, at least, to equalise the relative power of the contenders in a hard case situation, Cover urges judges not to succumb to the hierarchical and mechanical bents of their office; they should begin instead to act like the rest of jurisgenetic forces of the world.[79] Thus, judges ought to pursue their generative and *paideic* impulses in order to create narratives that might enrich their *nomos*, rather than deferring to the sobering imperial virtues of social control and systemic stabilisation. The commitment to such a 'jurisgenerative process' is, for Cover, 'the judge's only hope of partially extricating himself from the violence of the state'.[80] This task requires, first, denouncing the much extended practice of judicial helplessness and the underlying rhetoric and strategies of concealment:[81] despite the strong ideological charge implied in the exercise of jurisdiction, '[t]he judge rarely concedes that these underlying questions are even at issue'.[82] Rather, '[t]he apologetic and statist orientation of current jurisdictional understandings prevents courts from ever reaching the threatening question'.[83] On the pretext of applying mere technical rules, then, the judge is able to ignore the stakes involved in the adjudication of deep or hard normative conflict, and to expel them to some extra-judicial non-legal limbo. The seemingly innocuous manoeuvre allows the judge to camouflage inter-systemic adjudication—the killing off of law—and

78 Cover (n 2) 57.

79 According to Cover, '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'. Cover (n 2) 57. In this task, the authority of judges can only rest on the articulation and the quality of their jurisdictional claims and their opinions, which make their *nomos* look more like that of the rest of jurisgenerative communities of the world. Cover assures us that he does not wish to belittle the 'countermajoritarian difficulty', that is, the idea that a body of non-democratically elected judges may thwart the will of the political majority. However, he also points out that at the dawn of the century, democracy has come to be identified also with the defence of those values that cannot be frustrated, even in the name of the majority. For the view of judicial review as the least intrusive of the alternatives in particularly abhorrent and/or structurally unjust political contexts, see Robert M Cover, 'The Origins of Judicial Activism in the Protection of Minorities' (1982) 91 *Yale Law Journal* 1287.

80 Cover (n 2) 59.

81 Some of these strategies are analysed in his book *Justice Accused* (n 34).

82 Cover (n 2) 54–55.

83 *Ibid*, 56.

to present this task as a more or less difficult maintenance of intra-systemic consistency—the clarification of law.

Secondly, it is important for the judge to recognise the responsibilities she is facing in adjudicating a hard case, as exemplified in Cover's analysis of *Bob Jones University*.[84] 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 which, based on a certain reading of Scripture, prohibited inter-racial dating and marriage. 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. The trouble is that while the insular narrative (the school) is content with being left alone, the redemptive narrative cannot tolerate this and requires the assistance of the state to eliminate these racist practices altogether. This unavoidable conundrum entails that the court must *either* deny the redemptive narrative *or* share their interpretation, but it '*cannot avoid responsibility* for applying or refusing to apply power to fulfill a redemptionist vision'.[85]

In the exercise of such a responsibility, it may be inevitable for the constitutional judge to be confronted with the task of 'redeeming' some of the laws in conflict. The reason for it can no longer be that they are necessarily 'incorrect' or deficient as law (or because the court is endowed with a superior hermeneutic acumen); it must be that some of the competing norms and practices (such as the racist policies of Bob Jones University) might be incompatible and clash with the most fundamental values in a democratic society. Clearly such a 'counter-claim of constitutional redemption'[86] requires an enormous justificatory effort that Cover does not spell out in detail. Still, a general outline of the activity can be drawn by imagining the contours within which it operates.

When deciding to kill off a law on the basis of a redemptive commitment to the Constitution, the court not only interprets the language of the Constitution as it is inherited from the past; it is creating the language in which other cases will be talked about and decided in the future. Therefore, the court does more than make the text of the Constitution the 'best it can be',[87] for it is also defining both the medium and the activity of constitutional meaning-formation in which multiple diverse normative groups, in one way or another, are all engaged. The responsibility is not to the law in the abstract (to the systemic virtues of coherence, consistency and determinacy), but to rendering a decision which advances legal meanings and which will frame future discussions, while responding to the concerns raised by the present case.

84 *Bob Jones University v United States*, 103 S Ct 2017 (1983).
85 Cover (n 2) 60, emphasis added.
86 *Ibid*, 66.
87 Ronald Dworkin, 'Law as Interpretation' (1982) 60 *Texas Law Review* 527.

In advancing such a narrative, the court must consider normative worlds alternative to its own and decide how far the norms derived from each are actually compatible with the Constitution as it is being understood. This forces the court to engage with divergent interpretations of the same (or similarly worded) constitutional precepts, while confronting the various competing commitments (including its own). Therefore, it must pay equal attention to the law as it is being defined, and to the normative claims of the parties, fully aware of the consequences that any eventual decision may have for both. This requires appraising its jurisdictional role and gauging the effects of its decision in the lives of those negatively affected by it (even though the responsibility is equally shared by the parties who must present the case in a way that demonstrates the 'hardness' of the case).

In the case at hand the Supreme Court argued that denying tax-exempt status to Bob Jones fell within the authority of the IRS to make and therefore was not unconstitutional. Cover finds it objectionable that the court endorsed a significant intrusion into the school's *paideia* without articulating the constitutional commitment to explain it, and thus effectively put hierarchy above meaning. What is more, by failing to articulate a constitutional commitment to avoiding public subsidisation of racism, the court conceded no normative status to America's long struggle for racial equality. Thus, he concludes, the court failed to generate a redemptive narrative in which the school's racist practices would be left 'without foundation in law'.[88]

(c) The Other Side of Justice

Serious as the former omission might be from the perspective of the state's *nomos*, Cover assures that, *even from the perspective of Bob Jones University*, the court's uncommitted answer posed more of a 'general threat' than the contrary redemptive one. In one of the most striking sentences of *Nomos and Narrative*, Cover assures us that Bob Jones University 'deserved more and better'.[89] 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?

Pursuing this question demands a reconstructive effort. According to such a reading, had the court created a redemptive counter-narrative against the racist practices of Bob Jones University, the latter would still have had the opportunity to generate a *second hermeneutic* to respond to such a challenge. The jurisgenetic cells of Bob Jones' *nomos* could have been readjusted and regenerated 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

88 Cover (n 2) 38.
89 *Ibid*, 67.

jurisgenerative principle would not be at risk, nor doubted. Despite the negative decision, a redemptive claim would pose no *general* threat to the insular community: the leading forces of the *nomos* would have been preserved, and perhaps even enriched in response to the external imposition of precept. By contrast, the court's quiet endorsement of the IRS's conduct acknowledged no breach in their nomic insularity. The administrative organs were granted permission unilaterally to deprive Bob Jones of its status as a charitable institution, precisely the boundary rule that constituted their nomic insularity. Under the sign of judicial restraint and deference to the political branches, then, the opinion of the court gave the administration virtually unchecked powers to put a stronghold on the school's *paideia*. The school was thus left at the mercy of whatever public policy the administration happened to pursue, without the restrictions and the protections of a more articulate, even if redemptive, decision.

The thing to remember is not Cover's particular reading of *Bob Jones University*.[90] The lesson to be learned seems to be that in judging the *how* of hard cases, what matters more than the particular outcome of the case are the kinds of narratives that are created and the responses they invite, now or in the future. Ultimately, Cover would have judges act upon a committed (redemptive) constitutionalism *only* and *as long as* there is a plurality of *nomoi* ready and able to oppose it.[91] This entails that the demands of justice exceed the exclusive control of the courts. Indeed, there may be a tragic limit to the level of integration or justice that a judge may accomplish on his or her own, which is perhaps the most obvious way in which Cover's position differs from an interpretivism such as Dworkin's.[92] Justice in hard cases appears to rely on the tension between opposing forces and the interplay of legal meanings that keep each other at bay. In the three-poled relationships established between the organs of adjudication and each of the normative groups in conflict, judges may help to constitute the symbolical triangulation of justice—and thus partially extricate themselves from the violence of their office—*only if* they act according to an independent hermeneutics that rejects 'apologetic' alignment with the state, *and only if* there are multiple groups ready to oppose them.[93]

90 For example, Judith Resnik reads the majority decision precisely as exemplary in the kind of jurisgenerative moments Cover might have hoped to achieve from the law. This is so because 'United States law refused that accommodation [of Bob Jones racist practices] through a legal regime rich enough to be sustained not only through constitutional dictates by the Supreme Court, but through regulations by low level bureaucrats who came to know that they were obliged to implement norms of non-segregation'. Resnik (n 10) 42. In Resnik's view, 'the very moderation of the Court in *Bob Jones* that left open space for many levels of government to generate policy has advantages over a juriscentric constitutional practice that so constrains other actors' (*ibid*, 46).

91 Cover (n 2) 57 n 158 *in fine*.

92 This point is most forcefully argued in Cover's 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

93 Contrary to what has been argued, I do not think that this position entails 'making peace with violence' (against Sarat and Kearns (n 8)), for in Cover's view violence remains always 'problematic' (Robert M Cover, 'Folktales of Justice' (1984–5) 14 *Capital University Law Review* 179, 182).

This leads to an important, and perhaps the most significant, point concerning the assessment of hard cases. The critical realisation here is to face the intellectually unbridgeable gap that exists between the experience of exercising jurisdictional power and that of suffering it.[94] That is to say, no matter how well articulated a (redemptive) decision of the judge may be, it will still be experienced quite differently by those who suffer it. Consequently, the appraisal of a decision on a hard case situation ought never to rely upon a single point of view, especially when that point of view is rendered systematically uniform. Justice demands, especially from those of us who comment on the *nomos* of the State, that we do not downplay, ignore or omit the perspective of those who suffer its consequences. In the legal universe that Cover urges us to inhabit, no one can be denied *a priori* the privilege of a point of view.

IV. 'NECESSARY IN A DEMOCRATIC SOCIETY': THE ECtHR AND NORMATIVE PLURALISM

In the previous section I suggested that, in a hard case situation, the court may decide to strike down norms and practices that are believed to be incompatible with fundamental democratic principles and values, which would still require a grand redemptive narrative from the court. I want now to put the discussion in the context of the European Court of Human Rights (ECtHR), which may validate the infringement of one of the rights protected by the Convention (for the Protection of Human Rights and Fundamental Freedoms), precisely because it is 'necessary in a democratic society'.[95] The case I want to analyse concerns the dissolution of the radical left-wing Basque nationalist party Herri Batasuna (HB), on the basis of a perceived link between this party and the Basque terrorist group ETA.[96]

In 2002, the Spanish Parliament approved the Organic Law of Political Parties (LOPP 6/2002), which resulted in the judicial dissolution of HB due to the latter's implicit support and justification of the terrorist activities of ETA. After a lengthy appeal process before the Spanish Supreme and Constitutional Courts, the decision finally reached the ECtHR, which handed down its decision on 30 June 2009, upholding the dissolution. Narrowly defined, the issue before the ECtHR was whether the dissolution had violated the right to freedom of association guaranteed by Article 11 of the Convention and, in

94 This argument is developed more fully in 'Violence and the Word' (n 92). For a recent appraisal, see Stephen Skinner, 'Stories of Pain and the Pursuit of Justice: Law, Violence, Experience and Jurisprudence' (2009) 5 *Law, Culture and the Humanities* 131.

95 See eg Cases 41340/98, 41342/98, 41343/98 and 41344/98 *Refah Partisi v Turkey*, 31 July 2001 (concerning the freedom of association of Art 11 of the Convention).

96 *Herri Batasuna and Batasuna v Spain*, 30 June 2009, Cases 25803/04 and 25817/04.

particular, whether such an extreme measure as dissolution was 'necessary in a democratic society'.[97] But from a wider perspective, the Court's decision necessarily affects the very core and essence of democracy, understood now as the ongoing conversation established among citizens, social groups and institutions in the larger European context. The case presents serious constitutional and political issues, as it deals with the limits of toleration of ideas and projects that exist on the fringes of society. Moreover, political parties are essential for the democratic process and their activities are especially protected as an expression of a robust and vibrant normative pluralism. Outlawing a political party is thus an extreme measure which entails, beyond the mere infringement of the freedoms of association and expression, the destruction of a *nomos*.

Arguing on behalf of the social need for the dissolution, the state presented a long list of charges that amounted to an attempt to legitimise violence as a valid political method, which according to the state could not be tolerated in a democratic society. In turn, Herri Batasuna (HB) argued that the charges levelled against them—charges which included public acts of homage to Basque fighters, the use of logos and anagrams associated with ETA, and the refusal to condemn the killings of ETA—provided insufficient evidence to link them with ETA, and that, in any case, opinions attributed to their representatives should be protected in the interests of freedom of expression. The Court sided with the state and concluded that the acts and speeches imputable to the dissolved political party, when taken together, projected a model of society that was incompatible with democracy, and hence decided to uphold the dissolution.

Rather than offering an exhaustive analysis of the case or of the Court's doctrine, I would like to focus on the kinds of questions raised in the earlier section, for example, the way the Court justifies its jurisdictional role and the narrative it constructs to render its decision. The Court begins by affirming that its role is not to replace the 'margin of appreciation' of the national authorities, but rather to verify, in accordance with the articles of the Convention, whether the state has used its power in a reasonable manner.[98] Even though the Court insists on exercising 'rigorous control'[99] over the state's activity and motives, it may be doubted whether the 'test of reasonableness' goes far enough in probing either. As a matter of general doctrine, the Court does not scrutinise whether the states have exercised their power in 'good faith'; rather it asks whether their alleged motives are reasonable and grounded on an acceptable interpretation of facts.[100] This jurisdictional principle shifts the burden of proof to the party that alleges an illegitimate aim on the part of the state, which tilts the balance in the state's favour.

97 In addition to being 'necessary', the Court had also to consider whether the state measure was 'foreseen in the law' and pursued a 'legitimate aim' (*ibid*, § 53).

98 *Ibid*, § 75.

99 *Ibid*, § 77.

100 *Ibid*, § 75.

In the case at hand, this imbalance can be observed in the divergent hermeneutic principles that the Court applies to assess the activities of each party. In contrast to the 'test of reasonableness' enacted to probe the state's action, the Court applies a rather more stringent 'hermeneutics of suspicion' to Herri Batasuna. In that mode, the Court mentions that the acts and speeches attributed to the latter 'do not exclude' violence as a valid political method and come all 'too close' to an explicit support of it.[101] Regardless of its more or less accurate hermeneutic acumen,[102] the Court shows an inquisitive keenness to read the arguments of the parties against the grain of their explicit articulation, which contrasts in method with the less probing method applied to the state. Arguably, this double set of interpretive standards establishes a great disparity between the parties and favours a strong institutional model of democracy.

Further, the Court does not stop shy at Batasuna's actions and speeches, but includes their 'omissions' and 'silences', which it interprets as tantamount to explicit acts in support of terrorism.[103] The Court is right to assume that silence can speak louder than words, but it is questionable that in this case 'silence' has the same meaning for the two parties. For the state, HB's refusal to condemn ETA's killings is evidence of tacit support of terrorism. In the case of HB, however, the meaning of this silence is less straightforward. HB tends to describe ETA's violence as a reaction to the state's own repressive forces in a never-ending cycle of violent action and reaction that affects all. For this reason, a political representative of HB is able to say that Batasuna 'does not wish for ETA to stop the killings, but rather for all kinds of violence to disappear from the Basque Country and for those who exercise it to cease to exist'.[104] Within this mindset, simply to denounce the violence of ETA would fail properly to translate HB's normative commitments, and most importantly, it would mean accepting the validity of the statist narrative to which HB is radically opposed.

The ECtHR does not consider the inherent clash of narratives that lies at the heart of this decision, and instead engages in a kind of holistic interpretation in which the party's actions, omissions, words and silences are all taken together towards the conclusion that HB projects a model of society incompatible with democracy.[105] The ECtHR accepts the reasoning of the Spanish Supreme Court when it finds a common link between the party's

101 *Herri Batasuna* (n 96) § 86.

102 One case in which the Court's acumen can be questioned is the following. The Court cites a newspaper interview with a political representative of Batasuna, saying that 'ETA does not take on the armed conflict on a whim; it is an organisation that sees a need to use every instrument in its power to oppose the state' (*ibid*, § 85; my own translation). Ought we to interpret these words as the narrative of a person who shares ETA's views, or rather as the descriptive account of someone merely reporting on them? Circumventing this interpretive dilemma, the Court reads and uses these words as evidence of behaviour that is 'too close' to an explicit support of violence (*ibid*, § 86).

103 *Ibid*, § 88.

104 *Ibid*, § 34 (taken as evidence against HB in the proceedings before the Spanish Supreme Court).

105 *Ibid*, §§ 87 and 91.

strategies and ETA, which, in the mind of the Court, can be considered an 'objective threat to democracy'.[106] Although I cannot flesh out the full argument here, there is something disquieting in what I perceive to be the Court's identification between democracy, on the one hand, and the state's determination of it, on the other, which may eventually lead to (mis)take a challenge to the nomos of the state as a threat to democracy itself.[107]

Finally, it is worth noting the narrative construction with which the Court chooses to frame the issue. The ECtHR locates its decision (and those of the national authorities) in the context of international terrorism, and the new global climate generated in the aftermath of the September 11th attacks.[108] The Court cites several European legal instruments and measures adopted after the attacks, outlawing acts of apology, incitement, and any other kind of active or passive support of terrorism.[109] By bringing this larger context to bear upon the present circumstances, the Court places itself and its decision in the first line of defence of democracy against the dangers of terrorism. This narrative creates the sense of a whole new order, where behaviour considered legal in the past shall no longer be protected (after all, HB and Batasuna have been legal formations for many years, and terrorism has existed for over 30 years in the Basque Country[110]). In this new order, those who want to remain within the confines of democracy must clearly and unequivocally commit to its worldview, and abstain from conduct or speech that can be interpreted as equivocal or ambiguous. As the Spanish Supreme Court says in a paragraph cited by the ECtHR:

> We cannot tolerate, from a Constitutional point of view, the existence of political parties which do not take a conceptually clear and non-equivocal position against terrorist activities, or that, with calculated ambiguity, attempt systematically to hide their lack of censure for these criminal acts, by regretting formally their consequences but offering no single word of reproach against the barbaric acts of those who provoke them when resorting to violence to obtain their objectives.[111]

This context brings new challenges for legal interpretation, for in order to be declared intolerable the ambiguity of the behaviour must be dispelled. Thus, the ECtHR interprets the ambiguous acts, speech, omissions and silences of HB as clear signs of complicity

106 *Ibid*, § 89.

107 Consistent with this narrative, the ECtHR says that the states do not have to wait until a given political party takes hold of power and begins implementing a project incompatible with democracy, but that they can take 'preventative measures' once the 'danger' to democracy has been established at the national level (*ibid*, § 81). Therefore, it is up to each state to determine the existence of the threat, which the Court can only verify after the fact.

108 For an excellent study of such narratives and counter-narratives, see Ian Ward, *Law, Text, Terror* (Cambridge University Press, 2009).

109 *Herri Batasuna* (n 96) § 90.

110 *Ibid,* §§ 88 and 89.

111 *Ibid*, § 35.

with ETA. From the perspective of Cover's analysis, what is worrisome is not so much that some of the meanings and narratives are inevitably lost in the process, but rather that the task of 'killing off the law' is presented as a more or less difficult task of 'clarification of law'.

Institutional obstacles notwithstanding, HB's own line of defence reveals serious shortcomings. Batasuna does not undertake the task of demonstrating that their political project is actually compatible with democracy, and instead chooses to argue that the charges against them are either not proven or else should be protected by freedom of expression. Yet the sheer volume (and seriousness) of the accusations, coupled with the mechanical repetition of a purely negative line of defence, renders the argument unpersuasive and weak. The Court, in fact, shields itself against that kind of argument, saying that a political party whose representatives encourage the use of violence, or propose a political project that does not respect the rules of democracy, cannot claim the protections of the Convention.[112] The defence's refusal to engage in this kind of constructive argument about the model of society in which they believe proves to be fatal, as it seems implicitly to accept the very charge that it is trying to disprove: a repudiation of democracy.

What the case seems to be demanding from HB is a well-articulated vision of what their political project might look like. Such a project may be radically different from (and even opposed to) the prevailing conception(s) and practices of democracy in Spain, but it would nevertheless be ideally grounded on what another possible or plausible democracy 'might be'. In other words, it is up to the party to envision a political project which, even though not realisable perhaps under present circumstances in Spain, may in itself be compatible with the larger European democratic tradition or with its imagined future.[113] This task is not unlike that of the radical constitutionalists of the anti-slavery era who challenged the American Constitution as interpreted by Chief Justice Taney and offered a radically alternative vision of what the Constitution should mean. Failing to entertain such a vision, HB appears to be devoid of both normative language and political *logos*.[114] For without an adequate development and rewriting of myths, precepts and narratives that enliven and give meaning to the *nomos*, HB has not helped to sustain or make the *nomos* grow; on the contrary, it may in fact have contributed to its own demise.

This is doubly unfortunate, because generating such an independent hermeneutic would give HB the chance to disprove the main charge against it, namely that it is not a *political* organisation independent of ETA and operationally distinct from it. One may

112 *Ibid*, § 79.

113 The court says that all political projects, including those advocating major legal reform and even structural changes to the state, are compatible with democracy, provided that (a) they are pursued through strictly democratic and legal means, and (b) the proposed changes are themselves compatible with the fundamental democratic principles (*ibid*, § 79).

114 On the connection between 'political *logos*' and democracy, see Jacques Rancière, *Disagreement: Politics and Philosophy*, English trans (University of Minnesota Press, 1999).

speculate about the reasons why the party did not take that route. Perhaps the defence considered that its interests were better served with a technical approach that claimed the protection of classical liberal rights and criminal guarantees (despite the fact that they are being rendered increasingly ineffectual in the face of counter-terrorist rhetoric).[115] Perhaps doing otherwise would have required HB to assert its independence from ETA and to embrace the political process by rejecting violent methods altogether, none of which it was prepared to do. Perhaps doing so required too much deviation from the usual narrative in which HB tends to 'lament' the sad consequences of terrorist acts, but never 'condemns' the acts as such. Or perhaps its *nomos* was simply not strong or rich enough to provide the arsenal of creative normative language that the sustained exercise of democracy demands. Whatever the reason, the failure of HB reads like a missed opportunity to me: an opportunity to have its case heard before a large European audience that might in principle have been more inclined than the Spanish authorities to take a fresh look at the case.

One may also speculate about HB's future, now that it has been outlawed. Perhaps it will try to regain 'legal status', and there are signs that HB is engaging in an internal debate as to how to respond to the new situation. Provided that the *nomos* is able to regenerate its constitutive cells from within, that would prove the 'resilience of the *nomos*'[116] and its ability to adjust to the changing social reality and surroundings. Still, the new European standard demands that norms and narratives be compatible with fundamental democratic principles, including an explicit rejection of violence as a political method. Whatever the future may hold for HB, the case illustrates that even in the extreme form of an illegalisation of a *nomos*, the Court's redemptive narrative does not bring the story to a close, nor is it necessarily the end of law.

CONCLUSION

It is time to retrace our steps. First, we have seen the depth of Cover's understanding of the *nomos*. In order to comprehend it one must engage not only with the body of precept, but also with the language, the narratives and the myths that ground the community in history and in relation to the social and natural environment. Without a 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, interestingly, allows us to progress from the plain world of fact (is) to the normative world of value (ought).

115 Ward (n 105).

116 On this concept, see Joseph Vining, 'The Resilience of Law' in H Jefferson Powell and James B White (eds), *Law and Democracy in the Empire of Force* (University of Michigan Press, 2009).

We have also seen that Cover's model suggests a malleable and not a pyramidal structure, which overcomes crucial shortcomings associated with the theoretical pyramid of Kelsen and others. Significantly, identifying 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 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 (although the same thing can be both legal and non-legal depending on which side of the wall we are on). Yet the *nomos* is not a pure mental construct: it exists within a broader spectrum of socio-political forces, actors and constraints that anchor it in social reality.

Cover has helped us to see that norms are created through simultaneous commitment and objectification, engagement and disengagement. The formation of legal meaning is cyclical and unstoppable, and the stability achieved at a given point is susceptible to being destabilised 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 direction, 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 mobilise the *nomos* from within (paideic/imperial) and from without (insular/ redemptive). As to the former, the analysis has shown that the real danger has to do with the systematic repression of one of the generative forces, which may bring 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 conversely, 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 are engaged, in one way or another, despite the absence of a shared set of authoritative texts and narratives.

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 kill off the law while preserving a sense of justice, in the absence of an objective and superior hermeneutical principle. 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. According to this, adjudicators ought not to surrender, behind strategies of occultation, their responsibility for rendering a decision.

Neither ought they to rely as a matter of course upon the institutional prerogative of jurisdiction. What separates Cover's defence of judicial review from standard forms of the argument is, however, that the court's committed narrative can only be justified as long as there is a plurality of groups ready and capable of opposing it. This is because the articulation of legal principle is not sufficient to strike an appropriate balance between alternative worldviews. In Cover's view such an equilibrium can only be achieved through the interplay of multiple forces and meanings that keep each other at bay. Interestingly, Cover does not want to deprive particular narratives of their singularity, as do most liberal theories of justice. Rather, his vision requires preserving the tension between mutually affecting narratives, each of which could speak and act as they see fit in the face of contrary ones. This is why the issue of hard cases must also be approached from the perspective of those negatively affected by the decisions of the courts.

In what concerns the present and future form of legal theory, 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; but it also differs, perhaps in smaller measure, from the two-way vision projected by dialogical and communicative theories.[117] We could say that Cover entertains three dimensions: first, the personal perspective of the self-legitimating and internally validating *nomos*; second, the level of their mutual interactions, conceptualised more in confrontational than in co-operative fashion (be they insular or redemptive); and third, the triadic order constituted by the context of adjudication.

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 which we might call *concerned reflexivity*, characterised 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. At any rate, the critic must be able to discern the appropriate level of analysis at each time and shift from one perspective to the other when needed. Such a multilayered vision may entail new methods of legal analysis: at the first level, the study of law will likely be enriched by comparative, literary and anthropological methods, especially when the narratives, beliefs and myths contained in the *nomos* are different from our own (but not only then). At the second, it will have to be attentive to the rhetoric and poetics of interactions between diverse narratives, for in legal conflicts all kinds of emotional and expressive resources are valid sources of argument. And at the third, it will have to integrate interdisciplinary and phenomenological insights into the nature and the activity of judgment beyond doctrinal and purely conceptual analysis. In all of these tasks, a thick and textured humanistic approach to law may be a good way to start.

117 See Christine Bateup, 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 *Brooklyn Law Review* 1109.