

5-1-1999

## Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law

Franklin G. Snyder  
fsnyder@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Jurisprudence Commons](#)

---

### Repository Citation

Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 Wm. & Mary L. Rev. 1623 (1999), <https://scholarship.law.wm.edu/wmlr/vol40/iss5/6>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

# NOMOS, NARRATIVE, AND ADJUDICATION: TOWARD A JURISGENETIC THEORY OF LAW

FRANKLIN G. SNYDER\*

[T]here seems to be a genus of which State and Corporation are species. They seem to be permanently organized groups of men; they seem to be group-units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units. Let it be allowed that the State is a highly peculiar group-unit; still it may be asked whether we ourselves are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no questions about the origin of species.<sup>1</sup>

— Frederic William Maitland

[W]ithin the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning—if not in the domain of social control—the Mennonite community creates law as fully as does the judge.<sup>2</sup>

— Robert M. Cover

---

\* Abraham L. Freedman Fellow, Temple University School of Law. My colleague Michael Smith, who teaches a course at Temple centered on Robert Cover's *Nomos and Narrative*, was generous in sharing his insights with me and helping me clarify my analysis. Special thanks to Rick Greenstein, Theresa Glennon, Jan Levine, Nathalie Martin, Alicia Kelly, and Jane Baron for their helpful and encouraging comments on earlier drafts, and to Kevin Todd and Elizabeth Fasoldt for their able research assistance. I benefited greatly from the thoughtful comments of participants at a Temple Faculty Colloquium in September 1998, at which I presented an earlier draft of this paper. I am grateful for summer research support from the Temple University School of Law.

1. Frederic William Maitland, *Translator's Introduction to OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE* at vii, ix (Frederic William Maitland trans., 1927) (n.d.).

2. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983).

## INTRODUCTION

The world is bubbling over with law. As the late Robert Cover tells us in *Nomos and Narrative*, it springs up about us incessantly and inexorably in a spontaneous riot of luxuriant foliage.<sup>3</sup> It bursts forth not from gods or kings or parliaments or courts but from the normative universe—what Cover calls the *nomos*<sup>4</sup>—of each group within a society, a process he calls “the creation of legal meaning” or “jurisgenesis.”<sup>5</sup> As there are unnumbered groups in society, all with their unique *nomoi*, all jostling each other, the very air is alive with divergent legal meanings on every contested issue in the law. For any such issue there may be a dozen, a hundred, or a thousand legal meanings clamoring for attention, each claiming to be the one true meaning.

When a judge faces a question in which legal meaning is contested, therefore, the problem is not, as is usually said, that there is a “gap” in the law or that the law is “unclear.” Rather, there is simply *too much* law—a host of meanings competing for recognition. Under this view, the judge does not “make” law to fill a gap, but rather plucks one existing meaning from the host available. The role of the judge therefore is purely negative. It is “jurispathic,”<sup>6</sup> or law-killing, in the sense that the judge will select one of the squalling brood of conflicting legal meanings to elevate and to enforce with the violence of the state—and will slay the rest.

---

3. *See id.* at 4.

4. *See id.* This Article sometimes uses *nomos* but more often uses “normative universe,” which is less susceptible to confusion. The term *nomos* has had a long and varied history; it began with a meaning that can best be translated as “measuring” or “allotting,” later became identified with “custom,” and finally evolved into a synonym for positive or “statute-law.” *See* J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL HISTORY 8 (1992). It has been argued that the modern use of the word to mean “any living group’s way of life”—the meaning upon which Cover builds—was not in fact shared by the ancient Greeks but rather was “buil[t] impressionistically” by modern authors trying to reconstruct the idea of customary law out of the shards of Greek legal thought. *Id.* at 9. One writer has suggested that “ethical diversity” is preferable to *nomos* because the latter “has vaguely mystical connotations.” Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 88 n.7 (1996). The term “normative universe,” however, seems to capture Cover’s meaning more accurately.

5. Cover, *supra* note 2, at 11.

6. *Id.* at 53.

If this is a valid way of looking at what happens when a judge decides a case, there are some significant implications for legal theory. For if law is best seen as arising from some place other than presidents, legislatures, and courts, and if it arises as naturally as breath out of the activities of groups that share a normative universe ("nomic groups"), then standard models built upon top-down structures that presuppose a single, determinable system of law in a polity—whether based on positivist *Grundnorms*,<sup>7</sup> on derivation from some form of natural reason, or on forcible imposition by a dominant hierarchy—may all fail to capture exactly what occurs during the process of adjudication.

The importance of this idea of jurisgenesis has been noted repeatedly. *Nomos and Narrative* is one of the most heavily cited law review articles of recent years,<sup>8</sup> and it has been called "seminal,"<sup>9</sup> "pathbreaking,"<sup>10</sup> "brilliant,"<sup>11</sup> and "compelling."<sup>12</sup> No one to date, however, has looked closely at Cover's central insight—placing the origin of legal meaning within nomic groups—to see where, or if, it might fit into a more general theory of what law is and what judges do.

To be sure, there have been some serious and valuable discussions of the fundamental issues that Cover raises.<sup>13</sup> One of the

---

7. *Grundnorm* is Kelsen's term for the "basic norm" of any society. See *infra* note 273.

8. By one count, *Nomos and Narrative* is the fifth most-cited law review article written in the 1980s. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751, 767-69 (1996). The academic interest has not penetrated the ranks of the judiciary, where the article has been noted infrequently. One of the most interesting cases citing Cover's article is *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), which noted it for the proposition that the Texas Constitution can only be understood through the vision of the Lone Star State's own unique epic, as distinguished from those of the other American states. See *id.* at 15 n.33.

9. Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923, 936 (1997).

10. James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 944 (1997).

11. Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15, 15 (1996).

12. Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISCIPLINARY L.J. 809, 834 (1994).

13. See, e.g., William N. Eskridge, Jr., *Public Law from the Bottom Up*, 97 W. VA.

strands of his thought has been appropriated, more or less unrecognizably, in the cause of Frank Michelman's civic republicanism.<sup>14</sup> Cover's insistence on the inherent importance and dignity of nomic groups has done steady, if unspectacular, rhetorical service in contexts that chiefly involve religious groups<sup>15</sup> and Native Americans,<sup>16</sup> and it also has surfaced in some theoretical postmodernist work.<sup>17</sup> Finally, some of his unusual terminology has begun to slip into the legal lexicon.<sup>18</sup> For the most part, though, his work has been used tactically to claim additional dignity for a party or to provide a little rhetorical punch—Cover bristles with vivid metaphors—to particular contentions. No one has tried to fit Cover's insight into a larger theory of law.<sup>19</sup>

L. REV. 141 (1994) (using Cover's approach to focus on how constitutional meaning is developed at the grassroots level, and not at the Supreme Court); Ronald R. Garet, *Meaning and Ending*, 96 YALE L.J. 1801 (1987) (exploring symbolic and meta-physical aspects of Cover's work); Pope, *supra* note 10 (conducting a case study of jurisgenesis in Cover's sense).

14. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (adapting Cover's principle of "jurisgenesis" to Michelman's view of state creation of legal meaning).

15. See, e.g., Judith Lynn Failer, *The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel*, 72 IND. L.J. 383 (1997) (assessing the practical effect religious enclaves have on the constitutional polity); Jonathan Boyarin, Note, *Circumscribing Constitutional Identities in Kiryas Joel*, 106 YALE L.J. 1537 (1997) (seeking to add the concepts of genealogy and diaspora to Cover's ideas regarding self-governing communities).

16. See, e.g., Richard W. Garnett, *Once More into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433 (1996) (advocating decentralized criminal jurisdiction for Native American tribes to allow them to maintain their constitutional importance and dignity); Robert A. Williams, Jr., "The People of the States Where They Are Found Are Often Their Deadliest Enemies": *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996) (describing the "multicultural legal encounter" between Native Americans and European colonists).

17. See, e.g., Pheng Cheah & Elizabeth Grosz, *The Body of the Law: Notes Toward a Theory of Corporeal Justice*, in THINKING THROUGH THE BODY OF THE LAW 3, 8-16, 22-25 (Pheng Cheah et al. eds., 1996) (coupling Cover's work with that of Nietzsche and Derrida).

18. The term "jurisgenesis" has begun to be used as a general, and more academic-sounding, synonym for lawmaking. See, e.g., Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 333 (1992) (describing "the Founding, Reconstruction, and New Deal" as "great jurisgenerative periods").

19. The work that most seriously analyzes Cover's idea is Pope, *supra* note 10. Pope, however, is interested in applying the concept to a particular situation and does not attempt to develop the idea of jurisgenesis in any depth.

There are several possible reasons why this has not been done, all of them unrelated to the importance of Cover's insight that legal meaning originates from nomic groups. First, Cover himself made no effort to do anything of the sort, perhaps because of his untimely death,<sup>20</sup> but more likely because his interests lay elsewhere.<sup>21</sup> Second, *Nomos and Narrative* manages to be both stridently political and oddly metaphysical, as well as couched in language that is not always easy to follow. That mixture perhaps has led readers to underestimate its significance in the more analytical and less overtly polemical world of traditional jurisprudence. Third, its politics are radical-left, which means that those who do not share its vision of the bloody, violent, imperial American state probably have not engaged it as deeply as they might. Fourth, those who share Cover's politics—and are thus most likely to be receptive to his writings—have tended in recent years to cluster in the critical camps and have by and large abandoned the idea of any grand, overarching legal theory.<sup>22</sup> Fifth, even if those who shared Cover's politics were to attempt such a scheme, it seems unlikely that they would be attracted by a theory that—as noted below<sup>23</sup>—implicitly recognizes that racists, religious fundamentalists, and right-wing private militia groups may have *nomoi* that are worthy of respect.<sup>24</sup>

---

20. See Guido Calabresi et al., *Tributes to Robert M. Cover*, 96 YALE L.J. 1699, 1700 (1987).

21. Barbara Black, in her eulogy to Cover, quotes him discussing his goals in the law:

'Scholarship . . . is not my major concern. I am far more interested in the uses to which knowledge can be put than in the pursuit of knowledge itself. . . .

For the past several years my two major interests have been institutional change and character education. I view these two areas as prerequisites for the type of societal change that I would like to see brought about in the future.'

*Id.* at 1704 (quoting Robert M. Cover). For a detailed review of Cover's activism, see Stephen Wizner, *Repairing the World through Law: A Reflection on Robert Cover's Social Activism*, 8 CARDOZO STUD. L. & LITERATURE 1 (1996).

22. See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13, 33 (David Kairys ed., rev. ed. 1990) [hereinafter THE POLITICS OF LAW] (suggesting that "the most promising direction from left legal scholars has been to eschew the formulation of yet one more grand, integrative scheme of constitutional law jurisprudence").

23. See *infra* notes 156-60 and accompanying text.

24. Cover at one point equates the right-to-life movement with the antislavery,

The purpose of this Article is not to evaluate Cover or to discuss whether his views would lead to results that the reader might find good, bad, or indifferent. Nor is this piece, for present purposes, interested in his moral insights or his prescriptions for a radicalized new and better world. Instead, its goal is more focused: to explore whether Cover's insight has any potential relevance to the questions of what law is and what judges do. To begin to answer those questions, it is necessary to do what Cover did not: develop his insight analytically into a model for how the process of jurisgenesis would work. The context for this exercise comes from looking briefly at the relationship of Cover's insight to one very narrow slice of jurisprudential theory—the debate over what judges do in hard cases.

Part I of this Article explains the central points of Cover's analysis in *Nomos and Narrative* and puts them in the context of a much older tradition of legal pluralism that is in some respects closer to medieval legal theory than to modern jurisprudence. This context is necessary to understand the model as it is subsequently developed. Part II of the Article is a necessary

---

civil rights, and women's movements, suggesting that all four have developed "[r]edemptive" *nomoi*. See Cover, *supra* note 2, at 35. The thrust of the latter part of his argument in *Nomos and Narrative* is that the Supreme Court did not give enough consideration to the *nomos* of those who claimed a religious basis for racial discrimination. See *id.* at 66-67. Other commentators have noted the problems with using Cover's approach in achieving a particular social and political program. See, e.g., Peter Margulies, *The Violence of Law and Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 179, 179 (1996) (arguing that "by advancing such a stark vision, Cover limited the role of courts in combating pervasive ideologies of subordination, such as racism or sexism"). Thus, Critical Legal Studies (CLS) adherents sometimes use Cover's language (particularly the helpful term "jurispathic"), but they usually distance themselves from the implications of his thought. See, e.g., Mensch, *supra* note 22, at 32 (categorizing the efforts of modern liberal scholars such as Cover as "the alchemical goal of turning process into substance"). Some have gone further. "This new cult of 'jurisgenesis,'" sniffs one, "is simply the most recent indulgence by legal scholars" and is "a weak attempt to draw attention away from the marginal importance of constitutional adjudication and to establish constitutional scholarship as an intellectually rigorous endeavor distinct in kind to political prophecy." Allan C. Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 S. CAL. L. REV. 701, 711-13 (1985). Hutchinson goes on to argue that such attempts obscure the fact that "[l]aw is politics, and legal scholarship must embrace, not eschew, that insight," and that "social justice would be so much better served" if scholarship spent more time on "more concrete or constructive concerns." *Id.* at 712-13.

detour. It very briefly summarizes the three most influential modern explanations of what judges do when they decide hard cases, and it shows how the idea of group jurisgenesis differs from each. This background is necessary to understand Part III, which is the core of the Article. Part III is a lengthy reconstruction of the concept of jurisgenesis into a theory—albeit a very incomplete one—that I call the “jurisgenetic model.” This model locates the source of law not in the traditional sovereign or judge or in the apparatus of a government, but in the people and groups who live and breathe the law and in whom legal meaning is ultimately developed. Through this bottom-up approach to law, this part explores the issues of how nomic groups develop legal norms, how those legal norms come to be enforced by the state, and how the recursive process of legislation, judicial decisionmaking, and group norm-formation leads to the dynamic process we call a legal system. Part IV concludes with a brief discussion of how the jurisgenetic model relates to the three dominant strains of modern jurisprudential thought: positivism, natural law, and legal realism.

It has been suggested in recent years that the current debate on the nature of law—once a fundamental question not only for philosophers but for legal writers and citizens—has reached a dead end and has become largely meaningless.<sup>25</sup> If so, a vision that looks at these questions from a new angle—from the bottom up<sup>26</sup>—may give a fresh perspective on how to think about what judges do and why we care about it.

### I. COVER'S JURISGENESIS

Robert Cover had a vision: an image of gore-spattered American judges wielding the violence of the imperial state against the weak and the outcast in a “field of pain and death.”<sup>27</sup> He also had an insight: a picture of laws as ontic entities arising naturally from the differing normative universes of various groups. It

---

25. See ROGER A. SHINER, *NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT* 1 (1992); PHILIP SOPER, *A THEORY OF LAW* at vii (1984).

26. The “bottom up” metaphor is taken from Eskridge, *supra* note 13.

27. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).



is apparent that the insight arose from the vision. Cover was vitally concerned about the interaction of the state with marginal groups—no doubt heavily influenced by his experiences in the South while working in the civil rights movement in the 1960s<sup>28</sup>—and the core of *Nomos and Narrative* is his attempt to demonstrate that the norms of such groups are anterior to those of the state, the only juristic function of which, he claimed, was to select one or another of the preexisting norms to support with the violence (his word) of the state.<sup>29</sup> By denying that the state creates norms, and hence laws, Cover argues the primacy of smaller groups as jurisgenerative entities.<sup>30</sup>

### A. Social Constructs and World-Creation

Modern and postmodern legal thought consistently has stressed the constructed and artificial nature of law, its contingency, and its origins in human choice.<sup>31</sup> Cover agrees that law is a social construct, in the sense that creation of legal meaning “takes place always through an essentially cultural medium,” and has a “social basis,”<sup>32</sup> but it is also, to those subject to it, something perceived as real.<sup>33</sup> It is a force as powerful and pervasive as gravity,<sup>34</sup> “as much ‘our world’ as is the physical universe of mass, energy, and momentum.”<sup>35</sup> We create law in the broad sense of a legal system, but we do not *deliberately* create

28. See Wizner, *supra* note 21, at 1-2.

29. See Cover, *supra* note 2, at 30, 40, 53.

30. See *id.* at 11, 31; Cover *supra* note 27, at 1602 n.2. Cover's division of groups into those that are “insular” and those that are “redemptive” is not relevant to this discussion. See Cover, *supra* note 2, at 25-40. The differences in norm-generation between groups that wish to be left alone (insular groups such as Mennonites) and those that wish to convert the world to their vision (redemptive groups such as Abolitionists) are not substantial enough to affect the analysis.

31. See, e.g., Pheng Cheah et al., *Introduction: The Body of the Law*, in THINKING THROUGH THE BODY OF THE LAW, *supra* note 17, at xi, xi-xii (“[R]ationalist legal theory defines legal obligation as the acceptance of state coercion as legitimate or rationally justified by each individual subject who then internalizes the state's legal rules.”).

32. Cover, *supra* note 2, at 11.

33. See *id.* at 5 (“[L]aw becomes not merely a system of rules to be observed, but a world in which we live.”).

34. See *id.* at 9-10.

35. *Id.* at 5.

it. We are born into it and we exist within it. We influence law and law influences us, just as we affect and are affected by the physical world.<sup>36</sup> We can change the physical world by clearing a forest or draining a swamp; we can change the law by passing a statute or reinterpreting a text. We can no more extricate ourselves from the law, however, than we can escape the physical world.

In such a world, the normative and the descriptive are inseparable.<sup>37</sup> Positivists have maintained for two hundred years that one cannot derive an *ought* from an *is*, that one cannot deduce a normative principle from an observation of behavior.<sup>38</sup> Within the normative universe, though, those nice philosophical distinctions break down. Our view of what *is* influences what we think *ought* to be, and our view of what *ought* to be drives us to change what *is*. The *is-ought* dichotomy that has dominated much of the modern discussion of law can have no place in such a world, where “the ‘is,’ the ‘ought,’ and the ‘what might be’” are always and inescapably integrated into a universal whole.<sup>39</sup>

---

36. Cover's normative universe “constitutes a world in which subjects find themselves; it is not a creation of individuals' subjective value choices. . . . Subjects find themselves in a world of meaning in just the same way that they find themselves in a world of space and time.” Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 *YALE L.J.* 1, 57-58 (1989).

37. This unwillingness to exist in a lawless state, this drive to reconcile our normative universes with the law as given in the books, is perhaps best illustrated by the extraordinary efforts of private militia groups to give themselves an internal legal framework, no matter how absurd some of it seems to outsiders. *See, e.g.*, Phillip A. Hendges, *An Analysis of People, for Michigan Republic, ex rel v. State of Michigan*, 30 *J. MARSHALL L. REV.* 937, 938, 960-63 (1997) (finding political arguments of militia organizations framed in ostensibly legal form with phrases such as “*praecipe*,” “*petition de droit*,” and “*ex rel.*”). Hendges notes that the “common law courts” used by these groups “reference recognizable documents and doctrines, quote cases decided by conventional courts, and sound very legitimate”; the law of such groups is an amalgam of “snippets of American political thought, history, and conventional law” all knotted together in a body of beliefs that “defies comprehensive explication” to an outsider. *Id.* at 949-50. *See generally* Jeremiah W. Nixon & Edward R. Ardini, Jr., *Combatting Common Law Courts*, 13 *CRIM. JUST.*, Spring 1998, at 12, 12-14 (describing tactics of common-law courts). This is, of course, exactly how one would expect the jurisgenesis of a nomic group at the fringe of society to look.

38. *See, e.g.*, Robin West, *Three Positivismisms*, 78 *B.U. L. REV.* 791, 793, 807 (discussing the positivist debates on the “*is/ought*” dilemma from Bentham and Blackstone to Hart and Fuller).

39. Cover, *supra* note 2, at 10.

It is the sharing of a normative universe by two or more people that creates a world, a process Cover calls "paideic."<sup>40</sup> It is through the cultural processes of this shared universe that creation of legal meaning, like all other meaning, takes place.<sup>41</sup> These legal meanings arise directly from the normative universe, and this shared universe requires no state for its creation or validity; it therefore follows that the creation of legal meaning does not flow primarily from the state but from constituent cultural groups.

The relentless flood of these meanings gives rise to a practical problem. The "jurispotence" of the various normative universes threatens their existence.<sup>42</sup> A group cannot survive unless its members share meanings, but the very proliferation of meanings endangers the group. Complete agreement on a group's *nomos* may last but an instant, and that instant itself may be an illusion.<sup>43</sup> The agreement begins almost immediately to splinter into a hundred or a thousand different strands. "Differences arise immediately," Cover writes, "about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters. But . . . like a seed, a legal DNA, a genetic code," that instant of agreement becomes "the template for a thousand real integrations of corpus, discourse, and commitment."<sup>44</sup> The very act of creating a community based on a single normative

---

40. See *id.* at 12.

41. See *id.* at 12-13. Steven Winter locates the drive to create legal meaning in what he calls the "general human capacity for meaning-making." Steven L. Winter, *Foreword: On Building Houses*, 69 TEX. L. REV. 1595, 1624 (1991).

42. See Cover, *supra* note 2, at 15.

43. See *id.*

44. *Id.* As is obvious from the discussion, the biological metaphor was important to Cover; it seems to convey his idea that laws are developed organically rather than invented and imposed by lawmakers or judges through rational deliberative processes. In this use of biology, he echoes Cardozo, who similarly described the judicial process in biological terms. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21-22 (1921) (describing every judgment as having "generative power" that "begets in its own image" and creates "a new stock of descent"); *id.* at 98 (describing laws that "do not function" as "diseased," and arguing that "they must not propagate their kind"). The biological metaphor may be popular both because life on Earth is incorrigibly plural—a point plainly important to Cover—and because it lends a vaguely scientific aura to the discussion without requiring the kind of clean theory expected in chemistry or physics.

order sets jurisgenesis in motion. By a process of “juridical mitosis,”<sup>45</sup> the initial cell splits and the new cells split again like microbes swimming in some rich primordial soup. The divergent legal meanings arise out of the very process of fracture. The result is not a state in which there is no law, but one in which we find “the luxuriant growth of a hundred legal traditions,”<sup>46</sup> each of which is law. The result is a babel of competing legal meanings.

### *B. When Worlds Collide*

The obvious result of all this paideic world-creation is chaos. Conflicting meanings give rise to conflicts among people, with no agreed-upon methods to resolve them. “It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.”<sup>47</sup> The solution—the counterweight to the paideic virtues—is the collection of imperial, order-keeping virtues that are embodied in the state. Absent the imperial virtues, there would be complete disorder. The state creates order out of disorder through violence.<sup>48</sup>

The clash of different legal meanings gives rise to disputes. To maintain order, the state must resolve at least the most important of those disputes. When a state judge faces a dispute, she may have to negotiate the competing legal meanings of various groups. These may be strongly felt and utterly incompatible. If order is to be maintained, though, she must make a decision. To do so, she must examine these variant legal meanings, decide which one is to be exalted into official state law and thus backed by the violence of the state, and destroy the others.<sup>49</sup> Viewed this way, the problem the judge faces is never that there is “no law” on any given topic or that the law is “unclear,” but that

---

45. Cover, *supra* note 2, at 15.

46. *Id.* at 53.

47. *Id.* at 40.

48. *See id.* at 53. This is Cover’s picture of what happens. As described in Part III, *infra* text accompanying notes 154-370, the actual picture is probably much more complex.

49. *See* Cover, *supra* note 2, at 53.

there is "too much" law.<sup>50</sup> The job of the judge is not to "remove . . . uncertainty, lack of clarity, and difference of opinion about what the law is,"<sup>51</sup> but to select which of the competing laws will be enforced and to kill—or at least attempt to kill—the rest.<sup>52</sup>

What is significant about this account for the purposes of this Article is that it divorces the genesis of legal meaning from the decision of whether the violence of the state will enforce such legal meaning. This split allows Cover to make his most radical claim: that judges have no more power to *create* law than anyone else in society.<sup>53</sup> They wield the imperial power of social control, but they do not wield the paideic power that controls meaning. Cover's most startling claim comes in his discussion of the position taken by the Mennonite Church in an amicus brief in *Bob Jones University v. United States*,<sup>54</sup> in which he asserts that, as a matter of constitutional meaning, the understanding of the Constitution by the Mennonites—or, by extension, any other nomic group—is "equal (or superior) to that . . . of the Justices of the Supreme Court."<sup>55</sup> The nomic community, he writes, "creates law as fully as does the judge."<sup>56</sup>

Much of this may sound like semantic sleight-of-hand. If the term "law" connotes, as it does to most of us, not merely a "norm," but a norm that is enforceable by some form of public action,<sup>57</sup> using "laws" as a synonym for "norms," as Cover acknowl-

50. *Id.* at 42. Cover points out that many of our earliest myths of law do not involve situations in which there was no law, but those in which there were conflicting laws, such as Athena's establishment of the law for the Greek polis in Aeschylus's *Eumenides*. See *id.* at 40.

51. *Id.* at 42.

52. Sometimes judges, despite having the necessary "homicidal intent," do not succeed in completely disposing of the victim, and it keeps reappearing. See Eskridge, *supra* note 13, at 152. Eskridge uses the example of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which various nomic communities refused to accept. A more modern example might be *Roe v. Wade*, 410 U.S. 113 (1973).

53. See Cover, *supra* note 2, at 28, 67.

54. 461 U.S. 574 (1983).

55. Cover, *supra* note 2, at 28.

56. *Id.*

57. The anthropological treatment of law itself usually includes the element of enforcement as part of its definition:

edges he does, merely may confuse the issue.<sup>58</sup> Cover, however, is not playing word-games. He is going after something deeper. By isolating the creative aspect of lawmaking ("this is the rule") from the enforcement aspect ("if you break it you'll be very sorry"), he is able to focus on the genesis of the legal rules themselves.

### C. Antecedents

In this account, there is a very strong strain of an old tradition in legal thought—never very popular but never entirely extinguished—that is usually called "pluralism." This is not the strain of "legal pluralism" that has received much attention among sociologists and occasionally has cropped up in the field of international law.<sup>59</sup> Cover's work, rather, draws on a brief but

---

Each people has its system of social control. And all but a few of the poorest of them have as a part of their control system a complex of behavior patterns and institutional mechanisms that we may properly treat as law. For, "anthropologically considered, law is merely one aspect of our culture—the aspect which employs the force of organized society to regulate individual and group conduct and to prevent, redress or punish deviations from prescribed social norms."

E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* 4 (1954) (quoting Sidney Post Simpson & Ruth Field, *Law and the Social Sciences*, 32 VA. L. REV. 855, 858 (1946)).

58. See Brian Z. Tamanaha, *The Folly of the "Social Scientific" Concept of Legal Pluralism*, 20 J.L. & SOC'Y 192, 212 (1993) (protesting pluralists' use of the word "law" to describe "lived patterns of normative ordering").

59. This sort of "legal pluralism" usually is concerned with situations "in which behavior pursuant to more than one legal order occurs." John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 2 (1986). It thus has had its largest application in the field of international law, in which the interactions among different regimes may produce conflicts. See, e.g., SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* 6-17 (1996) (describing moral pluralism); Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 67-68 (1996) (explaining the differences between informal, formal, cultural, and structural pluralism). This approach is narrower than Cover's because Cover is dealing not just with situations in which a separate legal order arguably prevails, as when immigrant groups bring their own legal principles and even structures with them to create a parallel legal system in a community, but with situations in which groups that consider themselves within the same "legal order" develop different legal meanings as to what that order permits or requires. See Cover, *supra* note 2, at 17-18. For a recent collection dealing with the various strains of this particular sociological view of law, see *LEGAL POLYCENTRICITY: CONSE-*

extraordinarily suggestive 1953 essay by Mark DeWolfe Howe.<sup>60</sup> Howe traces his ideas through the "political pluralists" Otto von Gierke, Frederic William Maitland, Harold Laski, and John Neville Figgis.<sup>61</sup> For the pluralists, the modern assumption that all legal and political theories can be reduced to the relationships between Sovereign and Subject or State and Individual—a dominant feature of virtually all modern jurisprudential theories—is false.<sup>62</sup>

Modern legal theory is built on a political theory in which the only important political actors are individuals, as bearers of individual autonomy, and the state, as the embodiment of collective action.<sup>63</sup> This binary theory has been the dominant one in the West since the rise of the European nation-state.<sup>64</sup> The pluralists point out, however, that it is one whose plausibility depends entirely upon the particular conditions of social life in post-Enlightenment Europe.<sup>65</sup> It does a remarkably bad job of describing the actual situations in which most human beings at most times in history have found themselves, including not only primitive states and the classical world,<sup>66</sup> but even the Europe of a few hundred years ago.<sup>67</sup> The role of the intermediate group—

QUENCES OF PLURALISM IN LAW (Hanne Petersen & Henrik Zahle eds., 1995) [hereinafter LEGAL POLYCENTRICITY].

60. See Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953).

61. See *id.* at 91-93.

62. See HAROLD J. LASKI, *AUTHORITY IN THE MODERN STATE* 26-27 (Archon Books 1968) (1919).

63. See KELLY, *supra* note 4, at 253-58 (describing the concept of the "social contract" as the primary source of the state's authority over the individual in the eighteenth century).

64. See *id.* at 168-72.

65. See *id.* at 251-52; Howe, *supra* note 60, at 91-92.

66. Sir Henry Sumner Maine notes that ancient civilizations routinely ascribed precisely the same legal role to the family group that modern political and legal theory ascribes to the individual. See HENRY SUMNER MAINE, *ANCIENT LAW* 121 (Peter Smith 1970) (1861).

67. In the Middle Ages, a theory that attempted to reduce all of law into the relationship between state and individual would have seemed absurd, for there was nothing resembling the kind of single, omniscient state or the notion of an all-encompassing sovereignty with which we are familiar today. See JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* 13, 30 (Harper Torchbooks 1965) (1896) (noting that "the idea of sovereignty in the Austinian sense was unknown in any single nation in the middle ages" and would "have seemed ludicrous to an English lawyer

the human association that is neither individual nor state—has been systematically marginalized in legal theory for the past few centuries, but the pluralist would point out that this marginalization is less the result of advances in wisdom than of a deliberate campaign of extermination.<sup>68</sup> Since the Enlightenment, the two most powerful political and social forces have been the relentless drive of the state to accumulate more and more power and the corresponding aspirations of the individual to gain more and more freedom.<sup>69</sup> Caught between these two

of the twelfth or thirteenth century"). The individual in medieval Europe potentially was subject not merely to laws of the king, but to those of the Church, the Emperor, the lord of the manor, the village, the guild, the order, and a host of other organizations, some of which long antedated the particular political organization and few of which traced their origin to it. See KELLY, *supra* note 4, at 123, 131. Each of these organizations created and enforced its own laws, often in its own courts. See *id.* at 115-16. Each was considered to be sovereign in its field. In the medieval world, the king was only one of many sovereigns—and in many cases not the most important in a practical sense—to which the individual was subject. See FIGGIS, *supra*, at 30. In such a society, the concept of state-versus-individual hardly could arise.

Maitland traces the political forces that ultimately gave rise to the idea of state-versus-individual to the Norman Conquest in England. See Maitland, *supra* note 1, at ix-xliii. The Normans deliberately destroyed the host of indigenous organic structures then existing and replaced them with what was, for the medieval world, a "singularly unicellular State." *Id.* at x. England, where all feudal tenures and offices after 1066 ran directly from the Crown, was thus peculiarly susceptible to the idea that any institution between the Crown and the subject must be viewed as subordinate to and a creature of the Crown. See *id.* at xi. This unity of the state became even more powerful after the English Church was subsumed into the state under Henry VIII, a process in which the most powerful potential rival to the state ultimately became its arm. See DAVID LOCKE, *THE EPISCOPAL CHURCH* 6-8 (1991).

The experience of France and Germany, where much older and more powerful nonstate institutions flourished well into the Enlightenment—and in some cases even into this century—was very different. See Maitland, *supra* note 1, at xv. While the Tudors were creating a modern state in England, Germany was wrestling with a version of divided sovereignty in which kings and princes were not quite states because they were subject to the emperor, but they were more than feudal seigniories because they generally exercised the prerogatives of states. See *id.* at xiv. In no country in which feudalism was still a force, either theoretically or practically, could even "the acutest mind" come up with a theory as strange as "the concept . . . of an omnipotent sovereign." FIGGIS, *supra*, at 30. In such places, the notion of a single omnipotent lawgiver and a class of undifferentiated subjects hardly would have arisen. It is probably no coincidence that the thinkers in whom modern views of a bipolar state-individual world gained currency were post-Reformation Englishmen.

68. See OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800*, at 52 (Ernest Barker trans., 2d prt. 1950) (1868).

69. See *id.* at 165 (noting that by the time of the Enlightenment, there were only



mighty wheels, the intermediate group gets crushed, or at least relegated to the category of a convenient fiction that exists at the pleasure of the state.

The pluralist would note that this situation is a peculiarity of the past few hundred years,<sup>70</sup> and focusing exclusively on this modern conceptualization may produce a very inaccurate theory when applied to systems in which people think very differently.<sup>71</sup> For the pluralist, the individual is part of many groups, only one of which is the state, and each of those groups exercises something of a sovereign power.<sup>72</sup> As Howe wrote:

The heart of the pluralistic thesis is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.<sup>73</sup>

Viewed this way, a galaxy of human associations exists, each association with its own normative universe.<sup>74</sup> These associations are not mere aggregations of individuals, nor are they

“two forces in the field—the State, with its passion for omnipotence[, and] the Individual, with his desire for liberation”).

70. See *supra* notes 64-65 and accompanying text.

71. Cf. MAINE, *supra* note 66, at 114 (cautioning against the unfortunate tendency of legal theorists to “take no account of what law has actually been at epochs remote from the particular period at which they made their appearance”).

72. See Howe, *supra* note 60, at 91.

73. *Id.*

74. See Maitland, *supra* note 1, at xxvii. Maitland writes:

Within these bounds lie churches, and even the medieval church, one and catholic, religious houses, mendicant orders, non-conforming bodies, a presbyterian system, universities old and new, the village community which Germanists revealed to us, the manor in its growth and decay, the township, the New England town, the counties and hundreds, the chartered boroughs, the gild in all its manifold varieties, the inns of court, the merchant adventurers, the militant “companies” of English condottieri who returning home help make the word “company” popular among us, the trading companies, the companies that become colonies, the companies that make war, the friendly societies, the trade unions, the clubs, the group that meets at Lloyd’s Coffee-house, the group that becomes the Stock Exchange, and so on even to the one-man-company, the Standard Oil Trust, and the South Australian statutes for communistic villages.

*Id.*

creatures of the state. Their shared universes and shared commitments give them a reality that is separate and distinct from that of the individual or the state.<sup>75</sup>

Cover's emphasis on law arising naturally from people has some apparent affinities with writings of nineteenth-century historicists such as Savigny, who regarded law as embodying something of the spirit of a people, not merely the structure of its social order,<sup>76</sup> and Maine, who saw law as antedating the state and coming, as it were, out of the air.<sup>77</sup> Nothing like Cover's nomic group, however, plays any role in the works of these writers, at least with respect to societies that have become legally advanced.<sup>78</sup> Maine analyzed law at the level of the Roman Empire,<sup>79</sup> Savigny at the level of the German people,<sup>80</sup> and Cover at the level of the smallest and most marginalized groups.<sup>81</sup>

The nomic group in Cover's account bears a striking similarity to Maitland's description of the old German theory of the "fellowship"—the nomic group is, like the fellowship, "no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own."<sup>82</sup> The concept of the fellowship is archaic to moderns trained to think of corporate entities (except for the state) as convenient fictions. It sounds rather medieval. There is something decidedly nonmodern about Cover's thought, however, and it is probably no coincidence that the

75. See GIERKE, *supra* note 1, at 27-30.

76. See FREDERICK CHARLES VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 27 (Abraham Hayward trans., Thoemmes Press 1975) (1816) (noting the "organic connection of law with the being and character of the people").

77. See MAINE, *supra* note 66, at 7 (noting that the further we trace the history of law, the more we find it existing in the absence of any of the lawmaking apparatuses we normally view as essential).

78. Thus, the family units that provide the original basis for law in Maine's account, *see id.* at 128-41, 250, seem to drop out of his discussion as lawmaking entities once they have been aggregated into the house, the tribe, and ultimately the commonwealth, although vestiges of their rules remain.

79. *See id.* at 14, 43, 110.

80. *See* VON SAVIGNY, *supra* note 76, at 17-23.

81. *See* Cover, *supra* note 27, at 1601 n.2.

82. Maitland, *supra* note 1, at xxvi.

groups on which he focuses are those that deliberately reject most of the tenets of modernity and harken back to strains of life that began to wither in the Renaissance and were moribund by the time of the Industrial Revolution.<sup>83</sup> There is a hint of something very antique about these groups—traces of the old *corpus mysticum* of the canon law, the “mystical body” that is separate and distinct from the individuals who comprise it.<sup>84</sup>

This theme of group reality and group autonomy is most clearly traced in the work of Gierke, the nineteenth-century German legal historian.<sup>85</sup> Writing about German natural-law scholars in the pre-French Revolutionary period, Gierke distinguished between two strands of thought regarding relationships among individuals, intermediate organizations—family, church, guild, local community, voluntary fellowship, all of which are referred to generally as “corporations”—and the state.<sup>86</sup> He called these strands “centralist” and “federalist.”<sup>87</sup>

The centralists believed that if a state exists, all groups in the society are merely part of it and subject to it. Before the state arose, they agreed, there might have been intermediate smaller groups that exercised true sovereignty—the village, for example—but once the state was created, such groups became strictly derivative of it.<sup>88</sup> Prior to the state, groups enjoyed independent existence and sovereignty; after the state arose “[t]hey could only be secondary formations which had come into existence within the state, and after it had been created.”<sup>89</sup> For various reasons—chiefly the growing power of the state and the growing demand of the individual for liberation—most natural law theory ultimately adopted the centralist approach, which “knows

---

83. See Kahn, *supra* note 36, at 63 (arguing that Cover’s “world of jurisgenesis is closer to the feudal world of sect, family and guild, than to the liberal world of free individuals interacting within a nation state. It is, therefore, no accident that Cover’s central example of a meaningful political life is the Mennonite community.”).

84. For a description of the relationships of individuals and groups in the medieval era, see BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150-1625*, at 207-35 (1997).

85. See GIERKE, *supra* note 68, at 76, 81-82, 114-37.

86. See *id.* at 62-79.

87. See *id.* at 62, 70.

88. See *id.* at 163-64.

89. *Id.* at 164.

only the Individual and the State."<sup>90</sup> With these two players as the only ones on the field for political theory, it is not surprising that most theories of law would come to be based exclusively on the binary state-individual model.<sup>91</sup>

The federalists, on the other hand, believed that these intermediate groups, which often antedated the creation of the state, "had their own inherent existence," separate and apart from the state.<sup>92</sup> The creation of the state thus may have modified what these groups could do—the very nature of a state means that it will assume some control over other groups—but it did not fundamentally change their status as independent units whose authority and powers derived from themselves, not from the state. The federalists ultimately concluded that "by Natural Law the Corporation [i.e., the intermediate group, which would include family, fellowship, local community, and church] and the State stood on a footing of equality."<sup>93</sup> The state was a group, but only one sort of group, not different in sort from other groups. The

90. *Id.* (citing political philosophers such as Spinoza, Rousseau, Justi, Fichte, and Kant).

91. The works of Lon Fuller and Ronald Dworkin, two of the most influential of the modern writers to be associated with the "natural law" tradition, consider law from a purely state-versus-individual perspective. Fuller's discussion in *Morality of Law* is centered almost entirely on the formal legal system created by the state and the rules under which it operates. See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969). Dworkin's most important works in this area posit a complex interrelationship between the individual and the state, in which the former is a rights-bearer and the latter is both a protector of those rights and the embodiment of collective action. Again, though, the state and the individual are the only players on the field. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]. The positivist theories all carry the same focus; perhaps the classic model is Kelsen's "Pure Theory of Law," under which individuals create the state and the processes of the state generate the rest of the law. See HANS KELSEN, *AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* §§ 1, 27, 30(a), 31(a) (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (1934).

92. GIERKE, *supra* note 68, at 164.

93. *Id.* Gierke believed the federalists were driven to this position by the notion of the fellowship or community as a group with its own inherent existence based upon and secured by natural law. See *id.* at 164-65. Once such groups are granted inherent existence independent of the state, it follows naturally (though not inevitably) that the state is merely one more group—in Maitland's phrase, a different "species," perhaps, but the same "genus." Maitland, *supra* note 1, at ix.

obvious implication of the federalist approach for legal theory is that it breaks down the state-individual distinction. Those who hold such a view, as William Ewald has noted, tend to view law as not simply the creature of the state, but as "an organic feature of human associations"—*all* human associations.<sup>94</sup> Even within the modern state, such nonstate associations as churches, guilds, universities, and corporations continue to exist and "enjoy their sphere of legitimacy."<sup>95</sup>

#### D. Cover and Natural Law

This last strong form of natural-law federalism sounds remarkably similar to Cover's general attitude toward social groups.<sup>96</sup> The extent to which Gierke's reconstruction of German natural-law theory was a conscious influence on Cover is debatable,<sup>97</sup> and the merits or demerits of the theory are irrelevant for present purposes. For some reason it is easy for most people to view "the United States" as an entity that is somehow real but to view a private corporation or association (e.g., Microsoft or the

94. William Ewald, *Comment on MacCormick*, 82 CORNELL L. REV. 1071, 1074 (1997). Ewald attributes the theory not merely to Gierke, but to Hugo Preuss and Albert Haenel in Germany, and to F.W. Maitland, G.D.H. Cole, and John Neville Figgis in England. *See id.*

95. *Id.*

96. Others have noted the connection between the thought of Gierke and Cover. *See, e.g.,* Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 963-64, 964 n.17 (1991) (noting both Gierke and Cover as major influences in the "body of legal scholarship that refuses to limit the domain of law to the law of the state"); Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 327 n.6 (1993) (viewing Cover's reliance on the Torah for the proposition that "law should be defined by communal acceptance rather than by reference to the law of the state" as closely connected with Gierke's thought); Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 217 n.31 (1991) (identifying both men as "legal pluralists").

97. In *Nomos and Narrative*, Cover cites Gierke's work on "[t]he radical character of 'corporations' and their basis in natural law thought," Cover, *supra* note 2, at 31 n.90, but he does so more as a handy illustration than as a building block of his thought. Cover appears to have been uninterested in the natural law underpinnings but to have liked the medieval model of multiple sovereigns that Gierke offered as a useful example of Cover's view of communities developing law independently. For Gierke's analysis of the multiple sources of medieval law (e.g., the sovereign, the church, the local baron, the town, the law merchant), see GIERKE, *supra* note 1.

ACLU) as a legal fiction, even though both are aggregations of people and property. Whether groups are in some sense real is unimportant for present purposes—even assuming agreement that the question has any meaning—because Cover does not attempt to develop a theory of the natural relationship between the state and the intermediate group. He rather states as an empirical fact that these groups exist, that they develop things that look like law—whether recognized by state courts or not—and that they are in fact the entities that construct legal meanings within our society. The reader may of course be skeptical of any of these claims, but their validity will be tentatively accepted for present purposes.

## II. WHAT JUDGES DO

Before undertaking the chief part of this Article—exploring the idea of jurisgenesis in detail—it is necessary to make a side trip. The jurisgenetic approach outlined in Part III is easier to follow and its significance is more accurately gauged if considered in the context of other competing theories. The field is broad; it therefore is necessary to focus tightly on one aspect. This part examines only the difference a theory based on the jurisgenetic model might make to the analysis of what happens when a judge makes a decision in what has come to be called the “hard case.”

### A. *Easy Cases and Hard Cases*

Most of the legal issues that arise in any society are easy. Most people do not need the advice of a lawyer before they stop at a red light, pay for the goods they take from the supermarket, or refrain from shooting a neighbor. Of all of the issues in which the law impinges on daily life, only a small slice will be doubtful enough to require the services of an attorney. Most of these cases are also easy. Lawyers, to a very large degree, will agree that *A* has no case, or *B* has no defense. Some of these matters are doubtful enough, however, that they proceed to litigation. Even here, most of the *legal* issues are easy. The parties may disagree whether *C* poisoned *D* or whether *E* agreed to buy a number of widgets from *F*, but there is no doubt that if *C* or *E* did so, the law will visit certain consequences upon them.

There are, however, a small number of legal issues on which lawyers will disagree not merely as to the facts, but on what the law requires. In such cases, "perfectly convincing arguments supporting one conclusion can often be countered by perfectly convincing arguments supporting the opposite conclusion."<sup>98</sup> In such a case, even highly capable and disinterested lawyers and judges will disagree strongly about how to decide the legal issues in the case. These cases are the ones that Ronald Dworkin has called the "hard case[s]."<sup>99</sup> This Article uses the term to mean any case in which different outcomes could be defended plausibly within the normal scope of legal discourse<sup>100</sup>—that is, cases on which a significant number of lawyers and judges would reach different outcomes.

### B. *Theories of the Hard Case*

The question of what exactly a judge does when deciding a hard case is one of the foundational questions of any jurisprudence; therefore, subtle differences in the answer at the beginning can create vast gulfs by the time the chain of reasoning reaches its end. At this point, however, subtle distinctions are unimportant because the goal is a view of the broad picture.

---

98. Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 855 (1987).

99. See DWORIN, TAKING RIGHTS SERIOUSLY, *supra* note 91, at 81-130. The concept of the "hard case" and what judges actually do in such cases achieved its most modern currency with the debate between Dworkin and H.L.A. Hart, although the concept is much older. "And Moses chose able men out of all Israel, and made them heads over the people. . . . And they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves." *Exodus* 18:25-26.

100. The emphasis on normal legal discourse might be disputed by some, but it does not significantly impact the discussion. Most of the legal profession believes that in hard cases judges do something slightly different than they do in routine cases. If one disagrees with the fundamental principles of a legal system (private property, for example, or the ability of private individuals to create enforceable agreements), then any case is "hard" because there can be no noncontroversial answer to a question that assumes a controversial situation. Even if true, however, this merely may move the discussion one step back. The lawyer who believes in the concept of the "hard case" must ask what the judge does in such a case; the lawyer who does not think there is a difference between hard cases and routine cases must ask what the judge does in *all* cases.

Viewed broadly, it is convenient, although admittedly crude, to divide the modern combatants<sup>101</sup> into three main camps. These camps are not identical to what have been called the three great “movements’ in legal thought” in the twentieth century: legal positivism, natural law, and legal realism/Critical Legal Studies.<sup>102</sup> They are, rather, three ways of looking at the specific question of what judges do in the hard case. These camps sometimes parallel the traditional distinctions but sometimes do not. For present purposes, the categories of thinkers on this issue are: (i) those who believe judges in hard cases “make” law or “legislate” in the sense that they are “creating” law that did not previously exist; (ii) those who believe that judges, even in hard cases, find preexisting law and “apply” it to given facts; and (iii) those who believe that judges simply make political or moral choices without really involving something called “law” at all, and merely attempt to cover up the process with smoke and mirrors. Because there are no convenient terms for these approaches, the three will be referred to respectively as the *creation*, *application*, and *illusion* models.

The creationists and applicationists generally will agree that in the routine case a legal rule usually will yield a more-or-less certain outcome on a given set of facts. Although the illusionists usually will agree that this at least *seems* to be occurring to the untrained observer, they deny that this is really what is happening.

---

101. Only the jurisprudential theories that have had a significant following in the past 40 years or so are addressed here. More theologically-grounded explanations, such as Christian and Islamic theories of law arising from the will of the Creator, rarely are treated as serious alternative explanations by those who write on the subject. This is true even when the theory has cut a serious swath through the modern world, as Islamic law has done through a fair portion of the Moslem world. Since 1979, the theory that law comes from the will of Allah probably has directly affected—for good or ill—vastly more lives than have all the postmodern legal theories combined. For a discussion of the particular effects of the growing imposition of Islamic law, see Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U. J. GENDER & L. 57 (1996); Kristin J. Miller, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Response*, 10 EMORY INT’L L. REV. 779 (1996); Kathryn J. Webber, Comment, *The Economic Future of Afghan Women: The Interaction Between Islamic Law and Muslim Culture*, 18 U. PA. J. INT’L ECON. L. 1049 (1997).

102. SHINER, *supra* note 25, at 2.



In the hard case, however, the situation is different. Each of the three groups will agree that in such cases the legal rules do not on their face dictate the answer. Each, however, gives a sharply different account of what judges do in those cases.

The sketches of these groups will be caricatures, although hopefully sympathetic ones. Many sophisticated and subtle scholars who have written on this subject have not expressed or stated these propositions with anything like the crudity with which they are set forth here. The particular writers mentioned below certainly are not so simple as they are portrayed. The concepts deliberately are simplified because, differences in degree aside, they do reflect fundamentally different ways of looking at the process. The caricature inevitably distorts the subject, but it also illuminates important differences that may be lost in the details.

### 1. *The Creationists*

The creationist approach most often has been associated with the legal positivism championed most notably by Hans Kelsen, H.L.A. Hart, and Joseph Raz.<sup>103</sup> The creationist camp, however, is not coextensive with those who consider themselves traditional positivists. Natural law figures such as Lon Fuller, Legal Realists such as Justice Cardozo, and law and economics pragmatists such as Judge Posner tend to accept the basic notion that judges create law from the disputes before them.<sup>104</sup> Among legal academics, the creationist approach is the dominant orthodoxy; in this sense it is probably only a slight exaggeration to say that among legal academics, "we are all positivists now."<sup>105</sup> Hart's

---

103. See H.L.A. HART, *THE CONCEPT OF LAW* 124-36, 272-76 (2d ed. 1994); KELSEN, *supra* note 91, at 36; JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 45-59, 96-113, 181-201 (1979).

104. See FULLER, *supra* note 91, at 56; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 197-203 (1990); CARDOZO, *supra* note 44, at 20-21, 167.

105. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 820-21 (1989); see also Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1298 (1995) (book review) (noting that "we are all to some degree positivists now"); cf. Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1989 (1996) (claiming that "[t]he old, self-justificatory bromide that judges do not make the law, but only find it, is generally rejected—even scorned—these days").

arguments provide a useful summary because he is the theorist who developed the paradigmatic modern account—and because minor differences in interpretation do not matter much at this level.<sup>106</sup>

Hart acknowledges that there are legal rules that in most cases will dictate, or at least very strongly suggest, the outcome.<sup>107</sup> He notes, however, that there are situations in which the rules do not seem to render a plain result. What happens then? Hart explains:

[I]n any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete. If in such cases the judge is to reach a decision . . . he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.<sup>108</sup>

Leaving the law in part indeterminate or incomplete means that the conduct at issue has been left “incompletely regulated.”<sup>109</sup> In such a case the judge’s function is one of “filling the gaps” in the law with new law that she has created, a process that is essentially “*interstitial*.”<sup>110</sup> In these cases, then, there will be no single “right” legal answer and, as one commentator has observed, “no legal truth of the matter until a definitive ruling has been obtained.”<sup>111</sup>

---

To the extent judges bother to talk about these issues, the positivist strain is found in many American judicial decisions. *See, e.g.,* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (noting that “law in the sense in which courts speak of it today does not exist without some definite authority behind it” and “the authority and only authority is the State” (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533-35 (1928) (Holmes, J., dissenting))).

106. Raz and the later positivists have added layers of complexity and qualification to Hart’s basic outline, but they do not depart significantly from his fundamental vision. It probably is fair to say that most positivist systems that allow for the “indeterminacy” of law will be driven to adopt some form of the creationist approach.

107. *See* HART, *supra* note 103, at 147.

108. *Id.* at 272.

109. *Id.* at 273.

110. *Id.* at 272-73.

111. Leslie Pickering Francis, *Legal Truth and Moral Realism*, 50 SMU L. REV. 1721, 1735 (1997).

A judge facing a hard case, in this view, is looking at a gap. There are rules, to be sure, but there are lacunae where there simply is no law. These areas are "legally unregulated."<sup>112</sup> In the absence of law, the judge cannot base her determinations on "legal" principles. In such a situation, she therefore is "entitled to follow standards or reasons for decision which are not dictated by the law."<sup>113</sup> There is in effect a blank slate on which the judge is entitled to write. She must not be too free; she must make sure she works within the confines of existing law. If she stays within those bounds, however, the judge has a legislator's freedom to create law in the way she deems best.

## 2. *The Applicationists*

The account that the applicationists would give is very different. If most legal academics are creationists, most of the American public are probably applicationists. Historically, the great natural law schools—religious and otherwise—tended to be applicationist, and modern Catholic and Islamic legal theory seem to operate on that basis.<sup>114</sup> In modern academic circles, however, those groups are marginalized, and the very idea that judges do not "legislate" usually is scorned, often in terms that

---

112. HART, *supra* note 103, at 272.

113. *Id.* at 273.

114. In traditional Catholic legal theory, human laws are subordinate to divine law, and human lawmakers, like all other humans, ultimately derive their power from God. See M.T. Rooney, *Law, Philosophy of*, in 8 NEW CATHOLIC ENCYCLOPEDIA 556, 556 (1967). Law draws its obligatory force from the will of the superior, so long as such will is in accord with reason and is imposed for the common welfare. See J.C.H. Wu, *Law*, in 8 NEW CATHOLIC ENCYCLOPEDIA 545, 545-46 (1967). Obedience is due to the law not because individuals bind themselves, but because the law comes from a superior authority. See *id.* The superior authority, it is important to add, can be the community itself organized as a polity. See *id.* at 546. In this situation, the work of the judge must be to interpret the law rather than to create it, although there is no suggestion that the interpretation is to be slavish. See THE CODE OF CANON LAW: A TEXT AND COMMENTARY 29 (James A. Coriden et al. eds., 1985). For a good brief introduction to Catholic jurisprudence in the context of current issues, see R.J. Araujo, *Thomas Aquinas: Prudence, Justice, and the Law*, 40 LOY. L. REV. 897 (1995). For brief introductions to Islamic theories, see David A. Funk, *Traditional Islamic Jurisprudence: Justifying Islamic Law and Government*, 20 S.U. L. REV. 213 (1993); Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015 (1991).

imply that those who make the claim are not merely wrong, but stupid.<sup>115</sup> The chief champion of the applicationists in the past forty years has been Ronald Dworkin, at least in his early work.<sup>116</sup>

Dworkin's account has some similarities with that of Hart,<sup>117</sup> but it relies on a fundamentally different view of the situation the judge faces. Dworkin, consistent with the creationists, recognizes situations in which "no settled rule dictates a decision either way,"<sup>118</sup> however, he does not agree that such a case presents a gap in the law.<sup>119</sup> On the contrary, there is *always* law, although to make that claim he posits two very different kinds of law. First, there are the "rules," which are "all-or-nothing" standards; if a rule applies and the facts as stipulated in the rule are given, the answer supplied by the rule must be accepted.<sup>120</sup> The requirement that a valid will have three signatures, for example, is a "rule." If a will has only two signatures, it is

---

115. See, e.g., JOHN AUSTIN, LECTURES ON JURISPRUDENCE 634 (Robert Campbell ed., 5th ed. 1885) (ridiculing the "childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing . . . from eternity, and merely declared from time to time by the judges").

116. This discussion focuses on his early work, *Taking Rights Seriously*, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 91, rather than his later integration of his work in *Law's Empire*, see DWORKIN, LAW'S EMPIRE, *supra* note 91, and his application of it to American constitutional law in *Freedom's Law*, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996). The latter works have moved a good deal closer to the traditional creationist position in their insistence that law is so flexible that judges necessarily take their own moral and political views into account in making decisions, see *id.* at 2-3, 10-12, while the first more clearly shows the difference between the two approaches. The later works put Dworkin into a position in which he embraces the idea of judicial legislation while still shunning the positivist language with which creationism usually is associated. See Alan Hunt, *Reading Dworkin Critically*, in READING DWORKIN CRITICALLY 1, 2 (Alan Hunt ed., 1992) (noting the general feeling that later Dworkin "can be read as either a positivist or a naturalist," and when he "purports to be neither [he] turns out to be elusive, ambiguous, and ultimately unsatisfactory"). In *Freedom's Law*, Dworkin even more strongly emphasizes the judge's right—or even duty—to base decisions on her own moral judgments. See DWORKIN, *supra*, at 3.

117. Dworkin uses Hart's version of positivism and much of Hart's language as the basis for his critique. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 91, at 19-22.

118. *Id.* at 83.

119. See *id.* at 81.

120. See *id.* at 24-25.

not "valid."<sup>121</sup> Dworkin draws a distinction between these "rules" and what he calls "principles," the standards upon which courts rely but which do not *alone* compel any particular result.<sup>122</sup> A "principle" for Dworkin is not the sort of policy consideration that normally motivates legislatures—i.e., that it will "advance or secure an economic, political, or social situation deemed desirable."<sup>123</sup> It is rather a "requirement of justice or fairness or some other dimension of morality"—for example, the general principle that "no man may profit from his own wrong."<sup>124</sup> When the rules do not compel a particular result on the given facts, the judge must turn to these principles.<sup>125</sup>

For Dworkin and the applicationists, therefore, the judge is not acting in the interstices of law. There are no interstices. She is always acting within the law.<sup>126</sup> When the rules are silent or when they conflict, there is some legal principle that, at least in theory, will guide the judge to a correct decision.<sup>127</sup> The job of

121. *See id.* at 25. Dworkin argues that what are sometimes considered to be "exceptions" to a rule are, properly understood, merely parts of the rule itself. He illustrates this with a baseball metaphor:

In baseball a rule provides that if the batter has had three strikes, he is out. An official cannot consistently acknowledge that this is an accurate statement of a baseball rule, and decide that a batter who has had three strikes is not out. Of course, a rule may have exceptions (the batter who has taken three strikes is not out if the catcher drops the third strike). However, an accurate statement of the rule would take this exception into account, and any that did not would be incomplete.

*Id.* at 24-25.

122. *See id.* at 22.

123. *Id.*

124. *Id.*

125. Dworkin's critics focus a great deal of attention on the rule-principle distinction. Hart argues that the distinction between the two categories is not one of kind, but merely of degree. *See HART, supra* note 103, at 262-63. Others accuse Dworkin of reducing everything to some kind of fuzzy "principle." *See* Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 739 (1997) (arguing that for Dworkin "rules in effect drop out of the picture, leaving the field to principles"). Still others have found Dworkin's rule-principle distinction useful but have tried to accommodate it within the traditional positivist framework. *See, e.g.,* David A.J. Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069 (1977).

126. She may, of course, act lawlessly, whether by simple error or by deliberately ignoring or distorting the law. The point is that the judge is never free from the requirements of the law, and her decision therefore is either right or wrong. She is never outside the rules, as she may be in the creationist model.

127. This is not because any principle itself is determinative in any factual situa-

the judge is to find the correct law and apply it. The necessary conclusion from this approach is that the judge does not *make* law in the sense that Hart uses the term.<sup>128</sup> She does not “legislate” in the sense of being permitted to enact her own vision of the right outcome in the interstices of the law. She decides a case in accordance with preexisting rules or principles. It therefore follows, under the applicationist view, that there is a correct legal answer to any legal problem.

### 3. *The Illusionists*

The illusionist model is very different from either the creationist or the applicationist models, and it is hardly on speaking terms with them.<sup>129</sup> The basic principle that unites this strand of thought is that all the talk about law is largely nonsense. Courts decide who wins a given case, illusionists contend, based on nonlegal factors that range from class, racial, or sexual animus to political bias to the personal morality of the judge, and the talk of law is little more than a magician’s trick designed to gull the rubes.<sup>130</sup> Into this group fall a great many disparate thinkers more or less wholly unrelated to each other. The views are most popularly associated with Critical Legal Studies<sup>131</sup> (CLS) and its offshoots,<sup>132</sup> although they probably also

tion, for it is not. Moreover, in any given case the principles may cut different ways. Dworkin solves this problem by relying on the concept of “relative weight.” In any given factual situation when principles intersect, one or another of the principles will be judged more important, and thus have more weight than the others. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 91, at 26-27. When the principles are given their appropriate weights, and rules are read in light of them, the answer will emerge. *See id.*

128. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment). Scalia wrote:

I am not so naive . . . as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law is, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.

*Id.*

129. *See* ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 7-8 (1990) (describing the disdain between the liberal and CLS camps).

130. *See id.* at 15.

131. *See id.* at 13-16, 117-20.

132. *See id.* at 3 (discussing “strands” of CLS).

are shared by the political scientists who work with the "attitudinal" model of legal decisionmaking,<sup>133</sup> Marxists,<sup>134</sup> "postmodernists" generally,<sup>135</sup> and presumably fascists of the law-comes-out-of-the-barrel-of-my-gun school.

Of these groups, the CLS approach is presently most popular in the literature. As its underlying empirical claim does not appear to be much different from that of the other illusionist groups, the CLS account is summarized here. This admittedly is dangerous. Unlike Hart or Dworkin, the CLS school has not advanced a theory of what law is and what judges do in deliberate detail.<sup>136</sup> This is understandable; one hardly would criticize an atheist for failing to offer a detailed theory of how the orders of angels are arrayed, and the attitude of many CLS adherents toward law is not much different.<sup>137</sup> Those whose dream is that judges ultimately will wither away along with the state<sup>138</sup> quite reasonably are reluctant to spend much time in fundamental

133. For the leading work, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). For an appreciative but critical analysis of the literature, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997).

134. See KARL MARX & FRIEDRICH ENGELS, *MANIFESTO OF THE COMMUNIST PARTY* (1848), reprinted in 50 GREAT BOOKS OF THE WESTERN WORLD 419, 425-29 (Robert Maynard Hutchins ed., 1952).

135. See generally DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* (1997) (classifying as postmodern the approaches of Nietzsche, Foucault, Derrida, Lyotard, and Rorty, with whom he contrasts such figures as Kant, Descartes, Locke, Rawls, Bertrand Russell, Jefferson, Hegel, Marx, Martin Luther King, Jr., and Edwin Meese).

136. See, e.g., GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 3 (1995) (arguing that CLS and other postmodern movements "seem to be united in their resistance to the sort of conceptual theorization and system building routinely practiced by legal academics and analytical philosophers"). One sympathetic writer believes that the task is likely to be impossible for any theoretical system, such as CLS, that relies on key principles of postmodern philosophy. See LITOWITZ, *supra* note 135, at 156.

137. Cf. Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571, 579 (1977) (arguing that "the 'community' produced by the legal form is no more real than the 'heaven' produced by a religious system").

138. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1771 (1976) (predicting that "[t]he state, and with it the judge, are destined to disappear as people come to feel their brotherhood").

analysis of what those judges do. Even if not elaborated, however, there seems to be a view of what is going on when judges decide cases that is necessary to support the superstructure of the CLS critique.

To generalize, the core of CLS thought is its denial that there is such a thing as legal reasoning apart from political or ethical reasoning, except at a tactical level.<sup>139</sup> Most CLS writers seem to accept generally that there are such things as rules, but deny that they arise out of something called law that is distinct from the political ordering of society. The rules, in this view, do not compel results; it is the results desired by the hierarchy that compel what we call rules.<sup>140</sup> It follows, therefore, that judges are not faced with rules that they must follow, but rather merely use the language of rules to justify some decision that they reach on other grounds.<sup>141</sup> What is usually thought of as legal reasoning is little more than wind.<sup>142</sup> This does not necessarily mean that judges are wicked people who lie about what they do; they may be simply “unknowing objects . . . of the myth”<sup>143</sup> or they may be simply in a form of denial that leads to a “disconti-

---

139. See, e.g., Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW*, *supra* note 22, at 38, 45 (arguing that “[t]here is never a ‘correct legal solution’ that is other than the correct ethical and political solution to that legal problem”). Kennedy agrees that there is a body of “formal rules” and that there are distinctive “argumentative techniques” that lawyers happen to use. *Id.* He argues, however, that these are simply things to be manipulated in order to find the correct ethical and political solution. See *id.* Kennedy’s own theory of adjudication has evolved over the years, and it is now more complex than the summary presented here. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997). His earlier position, though, has helped to shape one popular way of looking at the process today and is therefore still relevant to this discussion.

140. See ALTMAN, *supra* note 129, at 13-16.

141. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 65 (discussing the Purposivism theory, which insists that judges should justify decisions by reference to social norms rather than as compelled by rules).

142. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 671 (1981) (“When the unwarranted conceptualist garbage is cleared away, dominant legal thought is nothing but some more or less plausible common-wisdom banalities, superficialities, and generalities, little more on close analysis than a tiresome, repetitive assertion of complacency.”).

143. David Kairys, *Introduction to THE POLITICS OF LAW*, *supra* note 22, at 1, 4.



nuity between two levels of their consciousness."<sup>144</sup> The entire legal system, in this view, is rather like Hart's "gunman . . . writ large"<sup>145</sup>—a big armed menace that will destroy you if you do not do exactly what it says. To the extent that there are rules and precedents, they are so flexible that they can be assembled to reach any result that the judge desires.<sup>146</sup>

A judge in the illusionist model, therefore, always acts very much like a judge in the creationist model does when dealing with the hard case. For both judges, there is nothing called "law" that would suggest, let alone compel, any particular result. Any discussion of "rules" or "principles" or "finding law" or "legislating" simply is meaningless.

### C. *The Jurisgenetic Synthesis*

Although Cover's conception of judicial behavior does not fit neatly into any of these camps, this is not unusual. It has always been difficult to place the man himself on the jurisprudential spectrum. It generally is agreed, for example, that he does not fall anywhere within the legal positivist circle.<sup>147</sup> Some read-

144. KENNEDY, *supra* note 139, at 20.

145. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958).

146. See MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 191-92 (1988). This radical indeterminacy explains the lack of interest most CLS writers show in judicial opinions. One sympathetic observer writes:

Articles of this genre cite few cases, and discuss even fewer. Critical legal scholars use particular doctrines and cases illustratively, to demonstrate larger claims about legal thought generally; because the claims are broad, cutting across traditional doctrinal boundaries, almost any famous case or doctrine can be used to prove a given point.

Jane B. Baron, *self-Criticism*, 60 TEMP. L.Q. 39, 39-40 (1987) (citation omitted).

147. See, e.g., Steven L. Winter, *Confident, But Still Not Positive*, 25 CONN. L. REV. 893, 897 n.19 (1993). Winter explains:

Cover is a "positivist" in the limited sense that he understands law as the product of human beings and human institutions, rather than of some transcendent set of fundamental moral principles. But Cover is not a legal positivist because he maintains that law is an ongoing cultural production of human communities, rather than an artifact of formal law-making. . . . As such, Cover is a pluralist (and anarchist) who champions the multiplicity of "law" that is inevitably generated by "the too fertile forces of jurisgenesis."

*Id.* (citations omitted); see also William N. Eskridge, Jr., *Metaprocedure*, 98 YALE

ers put him in the natural law camp,<sup>148</sup> while others reject that view.<sup>149</sup> Perhaps the best term for him is "jural pluralist,"<sup>150</sup> largely because the term is ambiguous enough to cover many things. For present purposes, it is safe to say that he is neither purely a creationist (because he does not credit judges with creating law) nor an applicationist (because he argues that judges choose existing rules and principles, rather than merely apply them), nor an illusionist (because he believes there is such a thing as legal meaning that exists apart from the political ordering of the state).<sup>151</sup>

Cover straddles both the creationist and applicationist camps by severing the concept of how the norm is developed (creation of legal meaning) from the issue of legal recognition (enforcement). A judge facing a hard case sees not a Hartian gap in the law, but a myriad of legal norms all jostling for room. She does

L.J. 945, 970 (1989) (reviewing ROBERT M. COVER ET AL., *PROCEDURE* (1988), and claiming that Cover's "view of adjudication is a renunciation of positivism, whether of the strong Hobbesian sort, or the liberal positivism of Hart and Sacks, or even that of [Cover's sometime collaborators] Fiss and Resnik").

148. See, e.g., Eskridge, *supra* note 147, at 970 (finding that "Cover's world of thriving jurisgenerative communities of interpretation is one of rich and amazing natural law").

149. See Winter, *supra* note 147, at 897 (arguing that Cover, "although hardly a legal positivist . . . does not adhere to any version of natural law either").

150. *Id.*

151. The difference with the illusionists is the most stark. Cover's interests in social justice align him squarely with the CLS camp, but nothing could be farther from the general CLS view of law than Cover's picture of it as arising naturally and spontaneously from marginalized groups. Although Cover is an anti-statist, he differs radically from the anti-statists who usually are associated with the CLS movement, such as Peter Gabel. One observer notes:

Where Cover sees a healthy, spontaneous jurisgenesis in group life, Gabel sees rights and similar legal constructions as inevitable reifications "intended to solve the problem of contingency by pretending that the next moment can be colonized in advance" and, thus, displacing "the immediacy and contingency of truly lived encounters." To put the conflict in even clearer relief, Gabel sees law as the product of alienation and the hallucinated State. Cover sees it exactly the other way round: For him, law is the product of the fecund jurisgenerative process of communal life; it is the State's courts that are jurispathic.

Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1225 (1989) (footnotes omitted) (quoting Peter Gabel, *The Phenomenology of Rights—Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1569, 1576 (1984)).

not see a set of Dworkinian authoritative rules and principles, but a host of clamorous legal meanings all competing for attention. One of these existing legal meanings will be recognized; its competitors will not. This does not mean, however, that the judge is merely applying the existing meaning. Her act of selection and recognition itself transforms the existing law into a different thing: a law backed by the force and violence of the state. In this sense, the judge can be thought of as simultaneously creating the thing that she has recognized, just as an organist both recognizes and creates a Bach fugue.

This dualism is more complex than the traditional *is-ought* dichotomy. In Cover's world *is* and *ought* are neither identical, as they are said to be in some natural law schemes, nor sharply distinct, as in some positivist accounts.<sup>152</sup> The *is* in Cover's world cannot exist without the *ought*, for the very utterance of the judge's "*is*" depends upon there being a preexisting *ought*, and the *is* itself will influence what the *ought* will become.<sup>153</sup>

It is at this fundamental level—what judges do—that the idea of jurisgenesis parts company with prevailing contemporary jurisprudential models. It is apparent that if jurisgenesis can provide a solid basis for a coherent legal theory, it might differ significantly from the models that have dominated jurisprudence in this century. *Can* it provide a basis for a coherent theory, though? This is the central question of this Article and the focus of the next part.

152. Of course, the way Cover uses "is" and "ought" is not necessarily the way either a positivist like Austin or a natural-law theorist like Aquinas would conceive the terms. The idea of "ought" in particular can mean a legal duty, a moral duty, or both—it can mean (in Hart's terminology) either "obliged" or "had an obligation." HART, *supra* note 103, at 82-83. Cover's terminology is not always precise, and by his "ought," he appears to mean roughly the same thing that Hart does with "obligation."

153. Dworkin has described a process that seems to yield much this same interaction in the evolution of norms of courtesy in a hypothetical community. An effort to understand the norm, he says, will cause the group to (1) "impose meaning" on it, and then (2) "restructure it in the light of that meaning." DWORKIN, *LAW'S EMPIRE*, *supra* note 91, at 47. He suggests that this will lead them to wrestle with not only why the norm exists (*is*), "but also what, properly understood, it now requires" (*ought*)—with the result that "[v]alue and content have become entangled." *Id.* at 48.

### III. CONSTRUCTING A MODEL

Cover had an insight, but he did not have a theory. He had a vision but, like many visionaries, he left it to others to fit his vision into a framework for analysis. A full theory of law is obviously beyond the scope of an article, but it is possible to lay enough of the foundation to show at least a glimpse of how the final building might look. That is the goal here: to begin to analyze how the idea of jurisgenesis might be developed into a model. If the foundation looks sturdy enough, it will be worthwhile to start building the tower.

It is important to note that what follows is not necessarily consistent with Cover's own views. He might well have disagreed with many of the conclusions reached; however, those who plant new ideas often must suffer to see them bear strange fruit.

#### A. *Some Definitions*

Before beginning, it is necessary to clarify the terms of the discussion.<sup>154</sup> The word "law" has powerful resonances for most people. Such potent words often encourage writers to try to appropriate them for their own side in any particular debate. The process of "tactical definition"<sup>155</sup> is so widespread that even sophisticated writers with the best intentions may get confused by exactly what meaning of "law" is intended. Although they lack the potency of "law," terms such as "norm" and "rule" also can get slippery at times. It is important, therefore, to make clear what is meant by each here. The definitions below are not necessarily *the* appropriate definitions, but merely the ones that will help the reader make sense of what follows.

---

154. Cf. HAROLD J. LASKI, *THE STATE IN THEORY AND PRACTICE* 7-8 (1935) ("We have to begin with definitions; not a little of the barrenness of political philosophy is due to the failure of men to agree upon the meaning of their terms.")

155. See C.S. LEWIS, *STUDIES IN WORDS* 17-19 (2d ed. 1967) (noting the tendency of certain writers to appropriate "a potent word" for their own side in a debate "and to deny it to the other"). "The pretty word has to be narrowed *ad hoc* so as to exclude something he dislikes. The ugly word has to be extended *ad hoc*, or more probably *ad hunc*, so as to bespatter some enemy." *Id.* at 19.

1. "Norm." Much of the discussion below concerns "norms." The term is not used in one of its primary senses (that of an "authoritative" standard),<sup>156</sup> or in another very common sense (that of a pattern or trait typical of a group), but in its third common sense: "a principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior."<sup>157</sup> "Right action" does not mean either action that is morally sound or in accord with a system of natural law—although any individual norm of course may or may not be—but merely any action that is "correct" in the sense that the members of the group recognize it as a standard of proper conduct in the particular situation. "Binding" does not mean "legally enforceable"—which is a separate question—but merely that the standard is one to which a group member knows other members of the group expect her to conform. In this sense the definition does not for the moment draw the distinction between rules and principles that was important to Dworkin. Although the distinction is important in describing *kinds* of norms, they both are norms for present purposes.

Norms accordingly can be big (e.g., do not engage in genocide) or small (e.g., do not chew with your mouth open). They can have obvious moral components (e.g., do not steal; give alms to the poor), be only tangentially related to morality (e.g., drive on the right side of the road; use a knife and fork to eat),<sup>158</sup> or be

---

156. This is so at least to the extent that it would suggest that one norm would be more or less authoritative than another norm. Some of them obviously are, but their authority must come from outside the norm itself.

157. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 792 (10th ed. 1993).

158. There may be moral components in even the most arbitrary rules; the rule requiring the use of a knife and fork when eating may be based on the virtue of courtesy to others, which has an obvious moral component. In such cases, the particular rule is not really the moral standard, but merely an instance for the display of a deeper standard. For example, the courteous person who properly used silverware in a Paris restaurant would with equal courtesy use chopsticks in Beijing without affecting the validity of the knife-and-fork norm in the least. Consider also the situation in which a dinner guest at a formal dinner party through ignorance uses the wrong fork. The host or hostess will, from motives of courtesy, also begin to use the wrong fork. She is not blamed for using the wrong fork in such a circumstance, but praised for her courtesy in making the outsider feel welcome. Such arbitrary norms acquire even more moral force when translated into law:

entirely evil (e.g., do without question whatever the Führer commands). They can be positive (thou shalt) or negative (thou shalt not).<sup>159</sup> They can be mandatory (everyone must) or contingent (everyone who drives a motor vehicle must). The object of defining the term broadly is not to belittle serious ethical norms by lumping them into the same category with Western conventions of restaurant behavior. Some people find norms—whether in natural law, divine revelation, the Constitution, or elsewhere—that they believe ought to be viewed as fundamental, and they may be entirely correct. The point here is merely analytical. Just as there is a useful sense in which Michel Foucault and the virus that killed him<sup>160</sup> were both “organisms,” there is a useful sense in which “thou shalt not kill” and “thou shalt renew thy driver’s license by March 31” and “thou shalt not blow thy nose upon thy sleeve” are all “norms.”

2. “*Legal Meaning*” and “*Legal Norms*.” This Article uses Cover’s term “legal meaning” to indicate a special kind of norm—one that a nomic group believes is substantial enough to be backed by the organized violence of the state. This may seem

Exactly which system is set up may be morally indifferent—the important thing is that there be some system on which people can rely. Morally speaking, it is a matter of complete indifference whether people drive on the left or the right; but the state needs to make an “arbitrary” decision about which it is to be. (And after that decision has been made, it is no longer a morally arbitrary matter which side of the road you drive on—not because rules make morality, but because morality requires you to abide by rules that have been enacted to protect life and limb.).

William Ewald, *Unger’s Philosophy: A Critical Legal Study*, 97 *YALE L.J.* 665, 730-31 (1988).

159. See, e.g., Neil MacCormick, *Institutional Normative Order: A Conception of Law*, 82 *CORNELL L. REV.* 1051, 1054 (1997). MacCormick writes:

In primary form, [norms] are either exclusionary provisions (i.e., negative duties or prohibitions) that rule out certain ways of acting on all occasions on which such action might otherwise be contemplated, or provisions of the converse type (i.e., positive duties or obligations) that call for, or insist upon, certain ways of acting as required of a person despite any contrary temptation, or countervailing reason for action.

*Id.* MacCormick’s interesting distinctions between norms that define conduct as wrong, not-wrong, or right, see *id.* at 1055, are not relevant to this discussion.

160. Michel Foucault, the “famous and controversial philosopher,” died of complications from AIDS in June 1984. See Richard Shusternom, *The Self as a Work of Art*, *NATION*, June 30, 1997, at 25 (book review).

an odd usage and might lead to confusion if not carefully defined. It is, however, consistent with Cover's use of the term, for he describes "creation of legal meaning" as the process by which groups generate norms that they wish to see backed by law.<sup>161</sup> Obviously only certain norms—and not necessarily the most important ones—will be of the sort that will cause groups to invoke the force of the state and thus convert them into law. Such norms are "legal norms"—those norms that carry legal meaning.

3. "*Law.*" If norms are rules for conduct actually used within groups and viewed by members as more or less binding on them, and legal meaning consists of the subset of those norms that nomic groups seriously contend ought to be backed by state force, then "law" in the sense this Article uses the term is the legal meaning that the deliberate action of an organized polity actually enforces.<sup>162</sup> Cover does not always make this distinction; he uses the term "law" to apply to any legal meaning, regardless of whether it is enforced. This may be due to his desire to grant the dignity of the term "law" to norms that do not arise from the state and are perhaps antithetical to it. As a tactical definition that emphasizes the inherent dignity of the norm, there may be merit in doing that. Cover recognizes, however, that laws enforced by the state are different from laws not enforced by the state—if in no way other than the violence that may follow. The concept of legal enforcement of the norm therefore is important.<sup>163</sup> To avoid the unnecessary confusion that may arise from the concept of an "enforced law" as distinct from a "law," this

---

161. Cover, *supra* note 27, at 1601 n.2.

162. This definition is similar to the very practical one given by Henry Abraham. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 7 (6th ed. 1993). It also is consistent with Philip Soper's analysis, under which "morality" is justice without force, "coercion" is force without morality, and "law" is morality joined with force. See SOPER, *supra* note 25, at 55-56. Soper does suggest that mere enforcement of "norms" is insufficient to create "law," but he apparently uses "norm" to mean nothing more than a standard of conduct, because he speaks of "summarily impos[ing] [norms] on subjects," which is contrary to the idea that the norms are shared by those subject to them. *Id.* at 55.

163. Raz also has noted the important conceptual distinction between existence of a norm or legal right and whether that norm or right will be enforceable. See Joseph Raz, *Rights and Politics*, 71 *IND. L.J.* 27, 40-41 (1995).

Article uses "law" merely to indicate the legal meaning that has survived after the judge has wielded her jurispathic axe, the one behind which the polity chooses to put its official weight.

It is thus the commitment of a nomic group that a norm should be backed by state violence that creates legal meaning, and it is the ultimate decision by agents of an organized polity to back that meaning with violence against a transgressor that turns a norm into a law.<sup>164</sup> Many would deny that the mere use of state force to compel adherence to a norm makes law in the sense we normally use the word, insisting that there must be something more, such as principles of regularity or predictability.<sup>165</sup> Others suggest that what distinguishes a law from a norm is the promulgation of orders or commands by a superior to a

164. This qualification is important. Under this definition, the hanging of a victim by law enforcement officers after an obviously sham trial might well be "legal," although the hanging of the same victim by a lynch mob, even made up of the same people (including the judge and the sheriff), would not. The point is not that the former is less wrong than the latter or that the victim is less dead in one case or the other. The point is that mob violence and official action, while they can sometimes be identical, are still different concepts. Not all mob violence is official, not all official action is mob-driven. There may be hazy areas in which a mob begins to mutate into something approaching official status. *See, e.g.,* CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 4-5 (1890) (discussing the law-like character of Judge Lynch and the Vigilance Committees of the Old West). The haziness, however, does not mean that there is no useful distinction to make between the two concepts.

165. *See, e.g.,* FULLER, *supra* note 91, at 33-94 (arguing that failure to adhere to such requirements results in failure to "make law"). Cover's position is antithetical to this, because his concept of legal meaning does not require any particular procedures or principles; it instead requires only that a nomic group be willing to stake its interpretation with violence. Cover also differs sharply with the legal process school over the legitimacy of resistance to judicial orders. The latter considers such resistance to be the ultimate negation of law:

I offer no comfort to anyone who claims legitimacy in defiance of the courts. This [defiance] is the ultimate negation of all neutral principles, to take the benefits accorded by the constitutional system, including the national market and common defense, while denying it allegiance when a special burden is imposed. That certainly is the antithesis of law.

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 35 (1959). Cover, on the other hand, insists that even those—perhaps especially those—who resist the legal violence with violence are "creat[ing] legal meaning." Cover, *supra* note 27, at 1601 n.2; *see* Cover, *supra* note 2, at 18.



subject.<sup>166</sup> It is unnecessary here to debate whether law is *merely* a norm that is enforced by the organized violence of the state. Any practical definition must contain *at least* that,<sup>167</sup> and as at least this much is common to the way lawyers and courts use the term, it is a recognizable definition for present purposes.

If the polity has something resembling a court system, a "law" will be a norm that is enforced through that system. If the polity does not have a judicial system separate from its governing structure (as in some tribal or revolutionary polities or perhaps the ancient Greek city-states), "law" is whatever norms the organized power structure (the elders, the Committee of Public Safety, etc.) enforces.<sup>168</sup>

With these definitions in mind, the next section outlines how law may be created and enforced. Because legal norms are a subset of norms, it is useful to start with a discussion of how norms are generated.

## B. *Genesis of the Norm*

### 1. *The Norm and the Group*

Cover assumes that norms arise from groups. Much of our common experience suggests that this is true. Every society of which we have knowledge has a set of norms, no matter how primitive (or nonexistent) their governing structure.<sup>169</sup> There is

---

166. See, e.g., HART, *supra* note 103, at 25 (summarizing Austin's argument that in any legal system "there must . . . be some persons or body of persons issuing general orders backed by threats which are generally obeyed").

167. Cf. KELSEN, *supra* note 91, § 12 (describing law as a "coercive norm" and explaining that what makes an action unlawful "is simply and solely that the positive legal system responds to this behavior with a coercive act"). Note, however, that this refers solely to the sorts of positive law schemes with which Cover deals. This is not to suggest that other forms of law (such as natural law or international law) are not "law" in an important and even fundamental sense. They simply are not the type of law discussed here.

168. Tiedeman notes that the first English colonists in America applied the common law of England to disputes among themselves—"so far as that law was compatible with the surrounding circumstances"—in the absence of any organized government. TIEDEMAN, *supra* note 164, at 3-4.

169. Hoebel's description of the legal norms of the Eskimo—a people with almost no formal social organization whatsoever—is a striking example. They have a rich

also substantial empirical support for this proposition from sociologists and anthropologists.<sup>170</sup> Every human contact, we are told, involves rules that must be learned and that, if not followed, imperil our very existence.<sup>171</sup> It is the necessity for getting along with others that requires any group to develop norms for acceptable behavior. If the group exists for any length of time, something that looks like law begins to arise.<sup>172</sup>

The point that norms arise out of groups of humans seems uncontroversial. If that point is granted, the next step in the analysis clearly follows: there is no reason to believe that the process of group norm-formation ceases to function when the groups become part of a modern state.<sup>173</sup> On the contrary, it seems plain that their incorporation into a state does not extinguish the process, although it may affect it. The might of the late Soviet empire and its imposition of an official ideology did not eradicate the competing *nomoi* of the Catholic Church in Poland or the Polish trade unions, both of which had norms that challenged and ultimately undermined the *nomos* of the commu-

---

and complex normative life, including the elaborate dispute resolution procedures of the song duel and a ritualized confessional, in almost complete absence of anything resembling a government or legal system. See HOEBEL, *supra* note 57, at 67-99.

170. George C. Homans's study of how norms develop in small groups is the classic work in the area. See GEORGE C. HOMANS, *THE HUMAN GROUP* (1950). For an analysis of Homans's work on how groups form and dissolve, see HOWARD L. NIXON II, *THE SMALL GROUP* 108-31 (1979), and JONATHAN H. TURNER, *THE STRUCTURE OF SOCIOLOGICAL THEORY* 303-27 (5th ed. 1991). The discussion that follows draws broadly on these sources as well as on Cover.

171. See RODNEY W. NAPIER & MATTI K. GERSHENFELD, *GROUPS: THEORY AND EXPERIENCE* 127-31 (2d ed. 1981). Though the reason behind this is the subject of some controversy between behavioral psychologists and communications theorists, they both seem to agree that it takes place.

172. See MAURICE MERLEAU-PONTY, *SENSE AND NON-SENSE* 118 (Hubert L. Dreyfus & Patricia A. Dreyfus trans., Northwestern Univ. Press 1964) (1948) ("All several men need do is live together and be associated with the same task for some rudimentary rules and a beginning of law to emerge from their life in common."); see also THOMAS A. COWAN & DONALD A. STRICKLAND, *THE LEGAL STRUCTURE OF A CONFINED MICROSOCIETY* (Univ. of Cal., Berkeley Working Paper No. 34, 1965) (noting that "[l]aw can be found any place and any time that a group gathers together to pursue an objective"), quoted in Weyrauch & Bell, *supra* note 96, at 328.

173. See Cover, *supra* note 2, at 25-40 (discussing norm-formation in insular and redemptive communities that exist co-extensively with the state).

nist state.<sup>174</sup> It seems safe to say that the process goes on every day, even in liberal Western states.<sup>175</sup>

Given that norms come from groups, the question becomes *which groups* develop the sort of norms that ultimately become legal norms. Which groups will be jurisgenerative? Obviously the group must share a normative universe, but what does that mean? Cover suggests that three elements must be present, each of which is critical and all of which are so interrelated that they are difficult to separate. First, there must be a *narrative*, a story

174. See Wiktor Osiatynski, *Revolutions in Eastern Europe*, 58 U. CHI. L. REV. 823, 835-36, 850 (1991) (book review) (describing the impact of the Church on communism); Michael Sewerynski, *Trade Unions in the Post-Communist Countries: Regulation, Problems, and Prospects*, 16 COMP. LIB. L.J. 177, 178-81 (1995) (describing the genesis of trade unions and their effect on Communism).

175. An interesting and widely publicized recent example of nomic collision between private groups is the case of the Yale Five, a group of orthodox Jewish students who refused to live in mixed-sex dormitories and were threatened with expulsion by the university. See Ron Grossman, *God & Mensch at Yale*, CHI. TRIB., Oct. 3, 1997, available in 1997 WL 3595067. Yale (like Bob Jones University) apparently compels its freshmen and sophomore students to live on campus as a way of creating a community of shared values—the creation of a *nomos*. See *id.* The five students objected because their religious beliefs forbade living in the same dormitories with unmarried students of the opposite sex. See *id.* During the dispute, administrators were quoted as saying that their goal in forcing the students to live in mixed-sex dorms (or at least to pay for rooms there) was to “preserve a sense of community and prevent the Balkanization of Yale.” *Id.* Additionally, one of the five students claimed that a school administrator stated that students with religious views such as those of the students “should not have sought admission to Yale.” *Id.* The protesting students, according to one dean, “can’t be excused from the residency requirements lest it encourage other groups to withdraw from campus and into themselves.” *Id.* These statements are not easily comprehensible unless one recognizes that Yale (like Bob Jones University) conceives of itself as a community and that the community is committed to protecting its own *nomos*—a major part of which seems to be the idea that single-sex housing is an anathema—which would be threatened if *nomoi* that did not accept its fundamental principles had to be tolerated within the community. Because the unity and authoritative status of the *nomos* would be threatened if the group had to tolerate differing *nomoi* (hence, the suggestive term “Balkanization”), the differing nomic groups must either conform to the *nomos* (live in mixed-sex housing) or remove themselves from it and become outsiders. One campus minister at Yale compared the process to the expulsion of the Puritans from the Church of England and their flight to North America, and other parallels come readily to mind. See *id.* (What Cover, an observant Jew who taught at Yale and who was particularly sensitive to the claims of marginalized religious groups, would have made of this conflict makes for interesting speculation.)

that binds people together.<sup>176</sup> A mere aggregation of people without a shared history and a shared narrative does not share a normative universe. Even if the individuals share certain goals, ideas, or characteristics, it is not enough; that sort of identity can be a coincidence.<sup>177</sup> Second, there must be a *social organization*.<sup>178</sup> The members must relate to each other in a formal and organized manner. Third, there must be *commitments* of the group members to each other and to the group.<sup>179</sup> These commitments define the roles that members will play and the risks that they will incur.

The *narrative* shapes the world that the group members see; the *social organization* provides a locus for the story, a framework for the commitments of the group's members, and a structure for enforcing its norms; the *commitments* hold the normative universe together and provide the basis for the commitments that the group itself will make.<sup>180</sup> When one of these three is present over any extended period of time, the other elements naturally may begin to come into existence,<sup>181</sup> but unless each is in place, there is no shared normative universe and nothing jurisgenerative occurs.

Given these requirements, then, which groups in a society look to be jurisgenerative? Here, Cover becomes confusing. He

---

176. See Cover, *supra* note 2, at 4-5.

177. "Commonality of interests and objectives may lead to regularities in social, political, or economic behavior among numbers of individuals. Such regularities, however, can be accommodated within a framework of individual rights." *Id.* at 34. For example, both radical feminists and fundamentalist Christian groups oppose pornography, although the opposition is rooted in different norms. See F.M. CHRISTENSEN, *PORNOGRAPHY: THE OTHER SIDE* 54-57 (1990).

178. See Cover, *supra* note 2, at 10.

179. See *id.* at 7.

180. "The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and others—do determine what law means and what law shall be." *Id.* at 7.

181. Some nomic groups may start with a shared narrative and proceed to organization and commitments, like the Civil Rights Movement of the 1960s. Some may start with a naked organization, and proceed to develop commitments and a shared narrative, like a newly formed Army regiment at the beginning of a war. Some may even start with no organization and no shared narrative, but with mutual commitments, like a group of random survivors stranded on a desert island who band together for survival.

writes that “the creation of legal meaning is an essentially cultural activity which takes place (or *best* takes place) among smallish groups.”<sup>182</sup> That phrasing is oddly equivocal—“takes place” sounds like an empirical claim and “*best* takes place” seems awfully normative—and it leaves more questions than it answers. Is the state itself a nomic group that is jurisgenerative? Are its officers—for example, the judges—a nomic community? Does jurisgenesis occur only in *private* groups? Do the groups *have* to be “smallish”? How small is “smallish”? It will be necessary to explore these questions in some detail.

## 2. *Private and Public Groups*

There is no reason to assume that only private groups are jurisgenerative. In the modern United States, there is a reasonably clear line of demarcation between the state and private groups—although the precise border is still the subject of much litigation<sup>183</sup>—but the line is not nearly so bright in societies that are neither Western nor modern. Some groups that Cover almost certainly would view as nomic communities—the early Mormons at Salt Lake, for example, or a small Greek city-state—are difficult to classify as merely private organizations. When one recognizes that the distinction between public and private groups is itself an artifact of relatively recent vintage—it was not a prominent feature of medieval thought<sup>184</sup>—one can begin to view the two types of groups as different only in their organizational purposes.<sup>185</sup> Sometimes people organize themselves for mutual defense and order, and these organizations are (in the modern world, at least) “public.” Sometimes they organize themselves for

---

182. Cover, *supra* note 27, at 1601 n.2.

183. Compare *Catazano v. Dowling*, 60 F.3d 113, 119 (2d Cir. 1995) (holding that a private home health agency is a “state actor” when it reduces health care to Medicare recipients), with *Corrente v. St. Joseph’s Hosp. and Health Ctr.*, 730 F. Supp. 493, 501 (N.D.N.Y. 1990) (holding that a private hospital is not a “state actor” when it makes employment decisions).

184. Cf. LASKI, *supra* note 62, at 21 (noting that “[t]he medieval state is a church; and the differentiation of civil from religious function is a matter of no slight difficulty”).

185. See Maitland, *supra* note 1, at ix.

charity, or pleasure, or economic gain, and these generally are called "private." Although it is possible that, as Cover seems to suggest, a group organized for worship or educational purposes might be a more fertile ground for jurisgenesis than one organized for mutual defense, there is no reason to believe a priori that the latter group is incapable of generating norms.

### 3. *The State*

It follows, then, that there is no obvious reason to believe that the state—as an organized social group—cannot also be jurisgenerative.<sup>186</sup> It is true that Cover posits the state as the domain of the imperial—order-maintaining—rather than the jurisgenerative virtue.<sup>187</sup> He is not as clear, though, about the issue as he might be.<sup>188</sup>

In any event, the line between jurisgenerative and imperial virtues is not bright. Private groups such as the Amish and the Mennonites<sup>189</sup> are jurisgenerative, but can one conclude that they do not also, in some degree, exercise imperial virtues? They

186. This assumes, as Cover seems to, that "the state" is a single organism. In reality, however, the state probably is best viewed as a group of groups, as John Griffiths notes:

Strictly speaking, the concept of 'state' (and, derivatively, 'law') does not refer to one but to a whole collection of [semi-autonomous social fields]: legislative, administrative and judicial organs (and the constituent units hereof, such as a particular administrative office or a particular court) and the various political fields which lie in the periphery [sic] of these organs. The reification of the 'state' (and 'the legal system'), common among lawyers and social scientists, suggests a far simpler and neater state of affairs than actually obtains. . . .

John Griffiths, *Legal Pluralism and the Theory of Legislation—With Special Reference to the Regulation of Euthanasia*, in *LEGAL POLYCENTRICITY*, *supra* note 59, at 201, 228 n.18.

187. See Cover, *supra* note 2, at 11-19.

188. The thrust of his argument seems to be that the state does not create law, but at one point he backs away from this, saying that "the state is not necessarily the creator of legal meaning." *Id.* at 11 (emphasis added).

189. The two groups sometimes are lumped together. The Amish are a branch of the Swiss Brethren, who themselves are a branch of the Mennonites. See JOHN A. HOSTETLER, *AMISH SOCIETY* 25 (4th ed. 1993). The former group was founded by Jacob Ammann (hence, "Amish") around 1693, as a result of significant theological differences with the leaders of the Swiss group. See *id.* at 31-49. The Amish began coming to America about 50 years before the American Revolution. See *id.* at 50.

certainly have procedures the function of which is to cut off variant meanings and impose orthodoxy.<sup>190</sup> A nomic group, after all, cannot survive without at least *some* orthodoxy, and orthodoxy does not maintain itself without some effort.<sup>191</sup> Do these groups enforce, however gently, order and orthodoxy within their communities? Do they themselves sometimes cut off some of the possibly fertile meanings within their own group? Surely, as Cover would recognize, the mere maintenance of a *nomos* requires that a group constantly deal with new flowerings of meaning that the group must either reconcile with its *nomos* or suppress within the group.<sup>192</sup> The latter seems plainly to be an

190. Amish punishment for those who do not follow the group's norms includes banishment from the group (excommunication and "shunning"). See *id.* at 362; DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* 111-15 (1989).

191. Chesterton, for example, vividly describes the "perilous" and "exciting" task of maintaining orthodoxy in one particular nomic group.

[I]t is exactly [the importance of maintaining orthodoxy] which explains what is so inexplicable to all the modern critics of the history of Christianity. I mean the monstrous wars about small points of theology, the earthquakes of emotion about a gesture or a word. It was only a matter of an inch; but an inch is everything when you are balancing. The Church could not afford to swerve a hair's breadth on some things if she was to continue her great and daring experiment of the irregular equilibrium. Once let one idea become less powerful and some other idea would become too powerful. It was no flock of sheep the Christian shepherd was leading, but a herd of bulls and tigers, of terrible ideals and devouring doctrines, each one of them strong enough to turn to a false religion and lay waste the world. . . . The smallest link was let drop by the artificers of the Mediterranean, and the lion of ancestral pessimism burst his chain in the forgotten forests of the north. . . . Here it is enough to notice that if some small mistake were made in doctrine, huge blunders might be made in human happiness. A sentence phrased wrong about the nature of symbolism would have broken all the best statues in Europe. A slip in the definitions might stop all the dances; might wither all the Christmas trees or break all the Easter eggs. Doctrines had to be defined within strict limits, even in order that man might enjoy general human liberties. The Church had to be careful, if only that the world might be careless.

GILBERT K. CHESTERTON, *ORTHODOXY* 182-83 (2d ed. n.d.).

192. In the Yale Five dispute, for example, Yale University attempted to suppress dissent from its norms or drive away the dissidents. See *supra* note 175 (discussing the dispute). Although its action was jurisgenerative in the sense of creating legal meaning for its own norms, it was imperial in the sense that it picked one of two possible meanings and gave it life, while simultaneously killing the alternative meaning of the dissident students.

exercise of imperial virtues. If private groups can partake of the imperial virtues, the line between the state and other groups is very blurred indeed.<sup>193</sup> One might speculate that the state is not *as* jurisgenerative as other groups, or that its norms are likely to be inferior to those of other groups, perhaps because its fecundity is restrained by its imperial mission. There is no ground, however, for concluding that the state itself cannot create norms.

#### 4. *Government Officials*

Even if there is some support for concluding that the state itself is not jurisgenerative, there is none for assuming that groups of its functionaries are not.<sup>194</sup> The functionaries within the state—even the amalgamation of all the functionaries into “the government”—are not the state;<sup>195</sup> the goals, values, economic interests, and policy aspirations of those who work for the government may differ from official state policy. There is no reason to conclude that a particular group of people, united in an organization (a government) and sharing a *nomos*, cannot create norms in the same sense as any other group, and their views of the law will reflect those norms.<sup>196</sup> A striking example of this is

193. Cover himself does not appear to view the line as bright, although he is far from clear on the issue. The closest he comes is:

Of course, no normative world has ever been created or maintained wholly in either the paideic or the imperial mode. I am not writing of types of societies, but rather isolating in discourse the coexisting bases for the distinct attributes of all normative worlds. Any *nomos* must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible. Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it. It must both ground predictable behavior and provide meaning for behavior that departs from the ordinary.

Cover, *supra* note 2, at 14. Viewing this passage in context, and in light of the slippery move from “normative world” in the first sentence to “societies” in the second, Cover seems to suggest that the line is somewhat hazy.

194. Cover occasionally notes the role of officials in this process, *see id.* at 7 (noting that officials are among those whose commitments are critical to “determin[ing] what law means and what law shall be”), and even mentions a “*nomos* of officialdom” that seeks to gain acceptance from different nomic groups, *id.* at 33.

195. *See* LASKI, *supra* note 154, at 11-13.

196. Think, for example, of the distinctive world views of public defenders and of



William Eskridge's account of the machinations of the Nixon-era EEOC to circumvent congressional intent and broaden the racial discrimination laws it administered.<sup>197</sup> Cover himself at one point suggests that judges, whose office is normally jurispathic, may sometimes be jurisgenerative.<sup>198</sup> Even if one were somehow

---

police officers, two groups of state functionaries who generate very distinctive legal meanings in a variety of contexts, none of which may be the official meaning of the courts or the state.

197. See Eskridge, *supra* note 13, at 153-56.

198. He is far from clear on this point, however. Cover seems to argue that the judicial office itself is primarily jurispathic because it exercises the imperial virtues, not simply that the holders of the office are for some reason resistant to becoming jurisgenerative. See Cover, *supra* note 2, at 53-55. This view seems to be consistent with Kahn's reading of Cover. See Kahn, *supra* note 36, at 60 (explaining that the imperial virtues imposed by judges cannot create "a competing, yet authoritative, meaning, because all meaning is a function of the nomos"). But see Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1724 (1990) ("Reversing the old positivist slogan that judges should apply, not make, the law, Cover argued that the role of judges, like the roles of all who interpret authoritative texts for those who are committed to them, is rightly 'jurisgenerative.'").

The confusion stems from what seems to be a slippery use of "jurisgenerative" in one part of Cover's argument. In one place he suggests that a judge who held the choke hold used by the Los Angeles Police Department unconstitutional was jurisgenerative, but he implies that a contrary holding would not have been. See Cover, *supra* note 2, at 56. He also argues that when judges "oppose the violence and coercion of the other organs of the state, judges begin to look more like the other jurisgenerative communities of the world." *Id.* at 57-58. Given the context, he might have meant two different things: (1) that when they issue decisions against the government, judges truly are jurisgenerative in the sense that they are creating legal meaning, but when they issue decisions in favor of the government they are not; or (2) that the phrase "begin to look more like," *id.* at 58, merely means that the judges have allowed themselves to think more like the nomic communities, and to foster their jurisgenerative activity, although they themselves are not creating legal meaning. The first of these, at least in the context of the rest of Cover's argument, makes little sense. The judges' acts in issuing decisions are the same regardless of the party who is given judgment. Judges must, in Cover's analysis, pick one of the legal meanings of an existing nomic community, which might include some part of the government. If judges' decisions create legal meaning when they decide *Brown v. Board of Education*, 347 U.S. 483 (1954), or *Griswold v. Connecticut*, 381 U.S. 479 (1965), how can it be said that they do not create legal meaning when they decide *Dred Scott v. Sandford*, 60 U.S. (How. 19) 393 (1856), or *Katzenbach v. McClung*, 379 U.S. 294 (1964)? This seems to turn "jurisgenerative" into a term of commendation rather than an analytical concept. Moreover, this interpretation seems incoherent at a more practical level. When the EEOC (an "organ of the state") brings an action against a racist private organization (a "jurisgenerative community"?), it will certainly be attempting to employ the "violence and coercion . . . of the state," Cover, *supra* note 2, at 57-58, against a resister. Is the judge "jurisgenera-

to assume that "the state" is not jurisgenerative, one cannot assume that "the government" or its officials as nomic groups are not.<sup>199</sup>

### 5. *Size of Groups*

As to smallishness, despite Cover's preference, there seems no logical reason why his approach would create a distinction *in kind* between large and small groups. The process of jurisgenesis may proceed more rapidly and with less restraint in small and isolated groups—just as biological evolution may proceed differently in small and isolated ponds<sup>200</sup>—but the fundamental process is the same. It is true that in some cases the smallest groups will be the farthest outliers, the ones most disengaged from their fellows, and hence the ones most likely to develop what, for the majority, seem the most bizarre legal notions.<sup>201</sup> These wild genetic mutations—to continue Cover's biological metaphor—may be valuable and invigorating. This involves differences of degree, however, not kind. Was Nazi ideology more or less jurisgenerative when it was the *nomos* of a handful of Bavarian malcontents than when it was the official ideology of

---

tive" if she finds for the racists but "jurispathic" if she finds for the state? As a result, the second meaning is preferable. A judge who is sensitive to the various nomic communities involved in a decision and who gives them appropriate weight may be more jurisgenerative—in the limited sense of fostering the jurisgenerative process—than one who does not.

199. The concept that jurisgenesis can take place among groups of state officials is the basis of claims that the jurisgenerative function arises from "community of discourse" within particular state organs. See, e.g., Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) (locating jurisgenesis in the community of discourse within the Supreme Court); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (doing the same for Congress). Michelman notes particularly that he is relying on Cover's insights. See Michelman, *supra*, at 15-17. For an explanation and critique of the various views, see Kahn, *supra* note 36.

200. See J.B. Ruhl, *Thinking of Environmental Law as a Complex Adoptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933, 936 ("Darwin heralded the flux of ecosystems as an agent of biological evolution.").

201. A fascinating example is the legal construction given to the Uniform Commercial Code by private militia groups who view it as having displaced the Constitution as the fundamental law of the United States. See Susan P. Koniak, *The Chosen People in Our Wilderness*, 95 MICH. L. REV. 1761, 1781 (1997).

the state? Do five million Muslims in America, where they are a tiny minority, have a more jurisgenerative *nomos* than 180 million Muslims in Indonesia, where they are a vast majority? Did the *nomos* of Jewish Zionists become less legally creative when the State of Israel was formed? Can one say that twentieth-century Mennonites might have a *nomos* that creates legal meaning but, for example, thirteenth-century Catholics did not?<sup>202</sup> Nothing in Cover's approach suggests any basis for drawing these distinctions, and it therefore is fair to conclude that large groups can, in his sense, create norms and legal meaning.<sup>203</sup>

Given this, there is no reason to conclude that groups larger than states cannot be jurisgenerative. There are supranational groups that plainly meet Cover's criteria. The Roman Catholic Church, for example, has many hundreds of millions of members who live on every continent, an organizational structure that encompasses every one of those members into a single body with a single governing structure, a distinctive shared narrative extending back six thousand years, and mutual commitments of the members to each other and to God. Modern times have seen the growth of international groups, including organizations of states themselves and multilateral treaty structures, some of which look at least superficially like nomic groups.<sup>204</sup> Norms de-

202. This is an especially pointed question given that the *nomos* of St. Thomas Aquinas and his contemporaries is far more alien to most of us than are those of the Mennonites. See generally C.S. LEWIS, *THE DISCARDED IMAGE: AN INTRODUCTION TO MEDIEVAL & RENAISSANCE LITERATURE* (1964) (describing differences between medieval, renaissance, and modern world views).

203. We can set aside, for purposes of this discussion, the normative question of whether small insular groups create *better* norms than large cosmopolitan ones. Cover may have agreed with Rousseau, who argued that a society built on ideals of democracy cannot work in anything bigger than a smallish group. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 83 (Charles M. Sherover trans., New American Library 1974) (1762) (arguing that political society functions best only when "every member can be known by all"). That, however, reflects a normative preference for a particular sort of government, rather than an empirical claim about what groups actually do.

204. The North Atlantic Treaty Organization (NATO), for example, is a group of states with a formal organization, a shared narrative (the cataclysm of the Second World War and the ongoing struggle against outside aggressors), and mutual commitments. See STANFORD M. LYMAN, *NATO AND GERMANY: A STUDY IN THE SOCIOLOGY OF SUPRANATIONAL RELATIONS* 71-72 (1995).

veloped within these groups—e.g., the rules of the Geneva Convention on the treatment of prisoners of war<sup>205</sup>—have influenced law and action even in states that are in other respects out-laws.<sup>206</sup> In sum, if the other indicia of jurisgenerative activity are present, size does not seem to be a relevant factor.

### 6. *Nonjurisgenerative Groups*

There remains the question of what groups are *not* nomic groups under Cover's definition. If it requires a shared narrative, a social organization, and mutual commitments, there are some highly visible groups in our society that are not jurisgenerative. Most fundamentally, groups defined by social, economic, and other statistical criteria that are frequently the subject of debate—e.g., "the poor," "the rich," "the disadvantaged," "the elderly," "our children"—are not themselves nomic groups. This is because, although they share certain characteristics (absence or presence of money, for example), they lack a social organization and mutual commitments and, in most cases, a shared narrative that distinguishes them from those who are not poor or wealthy or old or young.<sup>207</sup> Of course, *within* these statistical groups organizations may develop and their shared circumstances may be critical to their ultimate development of a shared narrative and mutual commitments. It may be that there is a continuum here. Plainly, as noted above, the Roman Catholic Church is a nomic group; the group of "Christians" is more

---

205. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135.

206. The norms were strong enough that even Nazi Germany—barbaric in its treatment of some conquered people and national minorities—generally abided by them in its treatment of enemy prisoners. See Bob Moore & Kent Fedorowich, *Prisoners of War in the Second World War: An Overview*, in PRISONERS OF WAR AND THEIR CAPTORS IN WORLD WAR II, at 1, 11 (Bob Moore & Kent Fedorowich eds., 1996) (noting the "correct" handling offered to nearly all captured servicemen in German hands). *But see id.* (noting the "total disregard for treaty obligations that obtained on the Eastern Front").

207. This is true in the economic sphere in the United States, at least, where the general fluidity of economic groups means that a given individual over the course of her life may be defined as poor, middle class, or rich. It is even more apparent with age cohorts, because the same people who are now "our children" will one day be "the elderly."

difficult, because while all Christians share a narrative and various commitments, there is no social organization that binds them all; and "religious people" is a mere statistical category.

### 7. *Individuals*

Finally, one may logically ask why jurisgenesis must take place among groups rather than within a single individual. After all, an individual can come up with a meaning as easily as a group—and where do groups get them if individuals do not think of them first? At first glance, it certainly appears that creation of legal meaning can occur in the individual. In Dworkin's influential analysis of law as interpretation, for example, he discusses how participants in a legal system interact with existing laws and texts to create new meanings, but his discussion plainly focuses not on the group but on the individual.<sup>208</sup> Nor does there seem to be a normative difference; if the most fertile and interesting norms arise from "smallish" groups, one would expect that those arising from atomistic individuals would be even more varied.<sup>209</sup> Cover's answer to this is obscure. He writes:

The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane"—a warrant that we share a *nomos*.<sup>210</sup>

What is one to make of this? These propositions are not proved and they do not seem to be self-evident. It is not obvious nonsense to act "intelligibly" to one's self without necessarily being intelligible to others. Nor does it seem empirically true that one cannot live an idiosyncratic normative life without being mad,

208. See DWORKIN, *LAW'S EMPIRE*, *supra* note 91, at 45-53.

209. Anyone who has spent much time in a large courthouse has run across the novel legal interpretations offered by the wraiths who haunt its halls, carrying voluminous files of smudged and closely written paper relating to "appeals" or "injunctions" in cases that are either long over or that never were.

210. Cover, *supra* note 2, at 10.

unless “mad” means merely “living an idiosyncratic normative life.”

It is not necessary to sort this out, however, to recognize that there is an important distinction between the meanings held by an individual and those held by a group. The concern here is legal meaning as a species of norm, and a norm requires that it be accepted as a standard of conduct by members of a group. Individuals can interact with existing norms, institutions, and texts and create meaning,<sup>211</sup> but although such an internal meaning may guide the idiosyncratic behavior of a single individual, it has no role in structuring the conduct of members of a group—except, perhaps, to move them to suppress it—until it is shared by at least one other person.<sup>212</sup> It does not affect the *shared* normative universe until it has been incorporated into that universe. The meanings generated by individuals thus are not jurigenerative until others share and accept them.

### C. *Creation of Legal Meaning*

Norms, as seen above, arise from groups. Some of these norms will come to carry legal meaning—they will become *legal* norms. The *nomos* of any group includes a great many norms, only some of which are “legal” in the sense that the group believes they ought to be enforced by the organized polity.<sup>213</sup> How do some norms advance to the stage where they obtain legal meaning?

#### 1. *Legal and Nonlegal Norms*

Any normative universe worth living in must contain a good deal more than the norms the inhabitants view as legal. The norms that a group classifies as legal are important, but they are only part of the whole:

211. This role is critically important and is discussed at greater length below. See *infra* notes 218-19 and accompanying text.

212. Even notions of divine law postulate at least two actors, a Creator and at least one created being. See, e.g., CATECHISM OF THE CATHOLIC CHURCH 73-84 (Paulist Press 1994) (discussing the Creator and the created—humans—in Catholic religious laws).

213. See Cover, *supra* note 2, at 9 (noting that law is “part and parcel of a complex normative world”).

The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that [normative] 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.<sup>214</sup>

Different norms require different remedies for their violation. The norms of the group will themselves help the group decide for any particular violation whether legal penalty, moral condemnation, or social disapproval (or all three) is appropriate. Some important nonlegal norms (e.g., thou shalt not kill) are almost always reflected in legal norms, some (e.g., love the Lord thy God with all thy heart) almost never become legal norms, and some (e.g., thou shalt not commit adultery) are sometimes legal and sometimes not. The norms that are viewed as "legal" are not generated in a way different from those that are nonlegal, but some aspect of the normative universe tells the group that these particular norms should be backed by the violence of the state.<sup>215</sup>

Legal and nonlegal norms grow up side-by-side. Though they are conceptually distinct, they are impossible to separate. On any issue of substantial importance, the legal and nonlegal norms will tend to converge. As James Gray Pope showed in his ground-breaking study of jurisgenesis in the labor movement of the 1920s,<sup>216</sup> a powerful nonlegal norm will tend to bend a group's concept of legal meaning into its shape. Likewise, a legal meaning of suitable force will tend to bend other norms into conformity with it.<sup>217</sup> This is not, as it is for the illusionists, because

214. *Id.* at 4.

215. The similarity in development of legal and nonlegal norms has often been assumed. Dworkin, for example, uses development of nonlegal norms to illustrate his account of the development of legal meaning. See DWORKIN, *LAW'S EMPIRE*, *supra* note 91, at 46-49.

216. See Pope, *supra* note 10. Pope surveyed the primary materials of a major labor dispute in 1920 Kansas to produce a rich story of how unionists came to develop legal meaning that led them to defy the courts. See *id.* at 958-1025.

217. The process can be illustrated using any legal issue that generates strong nonlegal issues of right and wrong. Considering affirmative action for racial minori-

legal interpretations are driven solely by the nonlegal preferences of the group. It arises, rather, out of the very manner in which one makes sense of the world; significant dissonance between legal norms and nonlegal norms will give rise to an attempt to move them toward each other.

## 2. *Interactions with Norms*

To live in a human community is to live in a world of rules and stories. Interacting with them is inevitable. For each rule we seek a purpose, an explanation. For every story we demand a moral, a point.<sup>218</sup> In order to make sense of the whole, one must integrate the rules and the stories into a coherent whole. The stories we tell drive the rules we devise, and the rules we devise drive the stories we tell.<sup>219</sup> Thus, concepts of law are affected by concepts of everything else, and concepts of everything else are affected by concepts of law.<sup>220</sup> Accepting a legal rule that, for example, pornography is constitutionally-protected speech will

ties, for example, there are four broad positions people could take: (i) it is constitutional and it is a very socially desirable and morally good thing to do; (ii) it is constitutional but it is a very undesirable and wrong thing to do; (iii) it is unconstitutional but it is a very socially desirable and morally good thing to do; and (iv) it is unconstitutional and it is both undesirable and wrong. Propositions (i) and (iv) are obviously those in which powerful nonlegal preferences of groups will line up neatly with their legal interpretations, and it is not surprising that the vast majority of people seem to fall in one of these polar camps.

218. Cover states it more anthropomorphically: "Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral." Cover, *supra* note 2, at 5 (footnote omitted).

219. Cover's graphic illustration of this is the Biblical stories of how younger sons (e.g., Abel, Jacob, Isaac, Joseph) became favored. *See id.* at 19-24. These stories influence the understanding of the Hebrew laws of succession that favored the eldest son, while the existence of the law itself influences the understanding of the stories and gives them meaning. The story of Esau bartering away his birthright becomes powerful and important only if one understands that he had a birthright with which to barter. *See id.* at 20, 22. The Christian concept of law similarly cannot be understood without the interplay of the narratives of Jesus and the earlier laws of Moses.

220. Modern empirical work suggests that even the perception of one's own economic self-interest is colored dramatically by one's perception of the existing legal rules. *See, e.g.,* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 664-66 (1998) (demonstrating how existence or nonexistence of particular legal default rules changes value perceptions of economic actors).



tend to push a group toward the nonlegal view that it must not be very bad, after all; accepting a legal rule that insider trading is unlawful may lead a group to begin to attach moral opprobrium to conduct that previously was regarded only as unusually shrewd.<sup>221</sup> If the Framers promulgated a rule that there is a fundamental constitutional right to exhibit nude women behind coin-operated windows,<sup>222</sup> we strive to reconcile our idea of right and wrong with it. If the Securities and Exchange Commission created a rule that trading securities on information not known to others is unlawful, we seek to figure out not merely why it is unlawful, but why it is *wrong*. For many “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>223</sup> To follow a rule, it is necessary to understand it and to read it in light of one’s own normative universe.

There is nothing in all this that ought to be strange to a lawyer. The judge of the common-law tradition has for a century been understood to be conducting almost exactly this kind of exercise.<sup>224</sup> A rule that dates from the War of the Roses or even

221. See Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in *NATURAL LAW THEORY* 105, 112-13 (Robert P. George ed., 1992) (noting that laws that punish behavior inevitably will cause such behavior to be viewed as morally reprehensible).

222. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 62 (1981).

223. Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 469 (1897).

224. See generally RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* 9-20 (1997) (describing the process of judicial recasting of prior cases and reemphasizing of facts). Edward Levi emphasizes the importance of this:

It is not what the prior judge [in an earlier precedent] intended that is of any importance [in deciding what the rule is]; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference.

EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2-3 (1949). The only reason for wishing to see the law “as a fairly consistent whole” is to make the rules seem purposeful rather than arbitrary. The difference in normative universes will explain why facts that are not important to the earlier judge suddenly will become important to a later judge. Modern descriptions of judicial reasoning illustrate the inescapable process by which judges impose meaning on prior rules and decisions. See, e.g., Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 *LEGAL STUD. F.* 7 (1996) (exploring the role of narrative

the sack of Rome, for example, turns up in industrial Massachusetts in 1881, in the world of railroads, telegraphs, Protestant churches, and the U.S. Constitution.<sup>225</sup> To apply the rule, in this account, the judges must understand it. To understand it, they must try to deduce the purpose or reason behind it. Their understanding will be colored, if not dictated, by their own *nomos*. Even if they made the effort to get inside the world view of, for example, an illiterate Norman baron of the twelfth century, they could never fully do so. The view is never the same. Once they think they understand it, they then must evaluate it explicitly in light of current *mores* and current conditions and determine its desirability.<sup>226</sup>

### 3. Norms and Violence

This part has referred to legal norms as a species of norms generated in the same manner as other norms. Legal norms are different in an important respect, however: people are committed to placing the armed force of the state behind them. There will be violence involved. The property, the freedom, and the lives of real people will be affected directly by the most coercive force that can be directed against them. How can one tell whether a group's norm is properly characterized as "legal"?

This is one of the areas in which Cover's language becomes difficult to follow. He writes that jurisgenesis requires "subjective commitment to an objectified understanding of a demand."<sup>227</sup> The two elements—*commitment* and *objectification*—therefore must come together for a meaning to become legal.

in interpreting law); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (discussing the use of precedent in judicial decisionmaking).

225. Cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2 (1881) (complaining that in his native Massachusetts "there are some [laws] which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs").

226. For a description of this process with a somewhat more enthusiastic and Darwinian cast, see CARDOZO, *supra* note 44, at 19-28.

227. Cover, *supra* note 2, at 45.

#### 4. *Commitment*

The first requirement is that individuals be committed to the meaning they have discovered:

The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken. Such affirmation entails a commitment to projecting the understanding of the norm at work in our reality through all possible worlds unto the teleological vision that the interpretation implies.<sup>228</sup>

The commitment—the willingness to put one's self on the line—is the key, for “a legal interpretation cannot be valid if no one is prepared to live by it.”<sup>229</sup> What is at stake here is something very far from, for example, Posner's claim that “[l]aw is not a sacred text . . . but a usually humdrum social practice vaguely bounded by ethical and political convictions.”<sup>230</sup> Law is a kind of sacred text in Cover's world. It cannot be anything else. People do not deliberately strap others into electric chairs and fire two thousand volts through them repeatedly in the service of a “humdrum social practice.” People consciously have fought and died serving and defying the thing we call law—and people do not do that for a mere “experiential flux.”<sup>231</sup>

How much commitment is necessary, though? Willingness to engage in violence plainly is enough; it is the state's own violence, after all, that demonstrates *its* commitment to its legal meaning.<sup>232</sup> Acquiescence in existing law is not enough, no matter how just or unjust it is.<sup>233</sup> Mere advocacy is a little better,

228. *Id.* (footnote omitted).

229. *Id.* at 44.

230. POSNER, *supra* note 104, at 467.

231. *Id.* at 467-68.

232. See Cover, *supra* note 2, at 11 n.30.

233. Cover's expression of this point is, again, unclear. “A community that acquiesces in the injustice of official law,” he writes, “has created no law of its own.” *Id.* at 47. This seems to suggest that the justice or injustice of the law has something to do with whether the community is being jurigenerative, but that cannot be right. If the issue is whether the community has created something, one can certainly say that mere acquiescence is not creation. It would be difficult to explain, however, why acquiescence is or is not creation depending upon one's view of the justice of the

but not much; Cover, perhaps surprisingly, has little use for people whose chief form of protest is writing law review articles.<sup>234</sup> Does he expect martyrdom? No, here he backs off. The commitment must be balanced with prudence; a jurisgenerative group does not require the "present and unconditional commitment" of the enthusiast.<sup>235</sup> It requires merely *some kind* of commitment, "however contingent or attenuated that commitment may be."<sup>236</sup>

### 5. Objectification

In any event, once there is a commitment—however one defines it—there must be *objectification*. For the meaning to be "legal," those who are committed must decide that they are bound to do so *because of something outside themselves*.<sup>237</sup> The commitment is posited as a law that then must be obeyed.<sup>238</sup> This objectification, Cover believes, both "disengage[s] . . . the self from the 'object' of law" and requires the self to engage the object as something to which the self must be faithful.<sup>239</sup> Unless the law is separate from the individual self, the self cannot be dedicated to it.<sup>240</sup> It is "the literary genre" of narrative, he writes, that allows values to become objects.<sup>241</sup>

This talk of objectification is dense, perhaps unnecessarily so, and Cover provides little support for it except for a brief passage from Heidegger.<sup>242</sup> At this level, however, it is safe to assume

result. Moreover, if the community really is creating something, the justice or injustice of the creation seems a wholly separate issue. Presumably even the most unjust laws are derived from the *nomoi* of groups in society. How, then, can it be said that those groups do not "make" law when they postulate apartheid or genocide? The best reading, as noted in the text, is that mere acquiescence is not a creative act, regardless of the justice of the meaning to which the group acquiesces.

234. *See id.*

235. *Id.* at 45 n.125.

236. *Id.*

237. As in other areas, Cover's language on this issue is not clear. His discussion of *commitment* seems to focus on individuals, but his discussion of *objectification* seems to be in terms of groups. *See id.* at 44-46.

238. *See id.* at 45.

239. *Id.*

240. As he puts it: "The metaphor of separation permits the allegory of dedication." *Id.*

241. *Id.*

242. *See id.* at 45 n.125 (quoting MARTIN HEIDEGGER, *BEING AND TIME* 188-89

that his argument is not only accurate but common-sensical. Humans *do* create laws, and then they *do* act as if the laws were separate and distinct from them; they speak of "obeying" or "breaking" them. They can do so only because they internally understand or believe that the law has some force or existence apart from their own subjective understanding.

Thus, the two requirements for legal meaning according to Cover are fairly simple: (i) someone must advance a norm seriously and be prepared to live by it, and (ii) it must be advanced as a rule that has existence independent of the subjective understanding of the one advancing it. If a group does this, it is making legal meaning. The next step is to see whether that legal meaning will survive in the jurisprudential bloodbath of the courts and become law.

#### *D. The Individual and the Group*

Before proceeding to the courts, however, it is necessary to raise an issue that Cover ignores but one that is critical: the relationship between the individual and the nomic groups.

##### *1. One Person, One Group*

A quick reading of *Nomos and Narrative* might suggest that the relationship between individuals and nomic groups is simple. All those who share a normative universe belong to a single group. Slaves and slave owners have different *nomoi*; to be a member of one group, one would think, is to *not* share the *nomos* of the other. If, in Cover's example, one is within the *nomos* of the insular Bob Jones University, one does not seem to be within the *nomos* of the organized racial groups who sought to eliminate the University's policies on interracial dating.<sup>243</sup> This reading would be too simple, however. The sharp distinction between nomic groups and the incompatibility of their universes might be a tolerable model in a case like *Bob Jones University v. United States*, in which one group is trying consciously and deliberately

---

(J. Macquarrie & E. Robinson trans., 1962)).

243. See *id.* at 66.

to exclude another,<sup>244</sup> but it does not seem to capture the nuances of everyday life.

Are the individual members of each group mutually exclusive? Do people belong to only one nomic group, or to many? If, as Cover writes, Quakers are a nomic group and radical Abolitionists are also a (presumably different) nomic group,<sup>245</sup> in which group does one who is a Quaker *and* a radical Abolitionist belong? The question is not idle. Cover's article *seems* to assume that if one is a Mennonite or a Quaker or an Abolitionist or a Pro-Lifer, one is a member of that group and will share the particular *nomos* of that group and no other. This itself may be a questionable assumption from an empirical perspective—even among the Amish, differences are much greater than an outsider might suppose<sup>246</sup>—but more importantly, Cover never raises the issue of whether an individual might share more than one *nomos*, and what implications that would have for his thinking.<sup>247</sup>

The omission is striking. It is one thing to talk about the *nomoi* of groups as unusual as the Old Order Amish. If the concept of jurisgenesis applies only to groups of that sort, it is likely to

244. Even this may be oversimplified. Bob Jones University was the child of a family of far from orthodox evangelists. See MARK TAYLOR DALHOUSE, *AN ISLAND IN THE LAKE OF FIRE: BOB JONES UNIVERSITY, FUNDAMENTALISM, AND THE SEPARATIST MOVEMENT 1-2* (1996). Bob Jones, Jr., the institution's leader and spiritual father for 60 years, denounced Billy Graham as too liberal, *see id.* at 2, split with Jerry Falwell over the latter's willingness to build relationships with Catholics, Mormons, and Jews, *see id.* at 3, and once said he would "as soon speak to the devil himself" as to the pope. *Bob Jones Jr. Dies at 86; Headed Fundamentalist Christian University*, BUFFALO NEWS, Nov. 14, 1997, at C10, available in 1997 WL 6474169. The University, however, was supported in its position not only by the Amish and the Mennonites—groups that at least share most of the same Christian narratives—but by some Jewish groups. *See Cover, supra* note 2, at 62 n.180. Moreover, the University also claimed that its policy did not discriminate against any particular group, because all interracial dating was prohibited, no matter what the respective races of the parties, and there *were* at least some black students at the University who presumably shared its *nomos*. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

245. *See Cover, supra* note 2, at 52, 38-39.

246. *See HOSTETLER, supra* note 189, at 277-99. Hostetler notes that within Mifflin County, Pennsylvania, alone, there are 13 different identifiable Amish groups, each with different tenets and practices. *See id.* at 293 fig.15.

247. This is probably not because Cover did not understand the point or because he would have argued for such a simplistic notion. He most likely did not raise the point because his goal was to emphasize the differences between normative universes, not their similarities, to illustrate his ideas more clearly.

be of little use in everyday life and possibly of no use at all in legal theory. It is true that the Amish and the Mennonites may generate a significantly distinctive legal position on an occasional issue of national importance,<sup>248</sup> but more often their litigation is either too narrow to have much significance for most Americans,<sup>249</sup> or involves situations in which their legal positions are indistinguishable from those of any other litigant in the same position.<sup>250</sup> If the only sort of *nomoi* that are "jurisgenerative" are those of groups whose views ensure they will always be on the margins, the concept may not be worth discussing at length.

If the jurisgenetic model is going to be useful in describing pluralistic America, if it is going to aid in understanding law from the point of view of more mainstream groups,<sup>251</sup> it must apply to all groups. Fortunately, it does. In Cover's world, every group with a narrative, an organizational structure, and mutual commitments has its normative universe, and the process of jurisgenesis takes place not only through marginal religious groups but through "all private associational activity."<sup>252</sup>

## 2. *One Person, Many Groups*

A difficult fact remains, though. Each person does not, as Cover writes, inhabit *a* normative universe; she inhabits *multiple* normative universes. In modern Western society, each person

---

248. For example, they had different views regarding parental control over the education of children. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding the prosecution of Amish parents for removing children from compulsory high school unconstitutional).

249. See, e.g., *State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) (holding that the Amish could not be required to display orange triangles on their slow-moving horse-drawn buggies when red lamps and silver reflecting tape would do the job equally well).

250. See, e.g., *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (holding that notice to a mortgagee on foreclosed property was not constitutionally sufficient).

251. This is not to suggest that Cover himself would have wanted his approach to be "useful" in this sense; he seems to have had little interest in legitimizing the kind of bourgeois intellectual *nomoi* shared by many readers of law reviews, who presumably have little trouble finding an audience for their own visions of the law. See Cover, *supra* note 2, at 47.

252. *Id.* at 31.

belongs to many groups, and each of these groups may have its own *nomos*.<sup>253</sup> Groups in this society are not surrounded by rigid walls but by permeable membranes through which members pass more or less freely. Each of these groups has its narrative, its structure, and its commitments. Those who grew up in America share the narratives of George Washington, Daniel Boone, and Abraham Lincoln, of cowboys and Indians, of Simon Legree and Martin Luther King, Jr., of "Manifest Destiny," Reconstruction, and the New Deal. Those whose parents were immigrants might share the Haitian narratives of slavery, French colonialism, and Toussaint L'Ouverture, or the Polish narratives of exploited peasantry, Russian colonialism, and John III Sobieski. They might share narratives of the destruction of the Temple, the Diaspora, and the Holocaust, or those of the Crucifixion, the persecutions of Nero, and the Reformation. They might share the narratives of Yale or of Bob Jones University, of Smallville or Gotham City, of a Wall Street mergers-and-acquisitions firm, a Miami drug cartel, or a San Francisco soup kitchen. Each per-

---

253. This point bears some resemblance to the concept of "semi-autonomous social fields," or "SASFs," groups that are in many respects rather like Cover's nomic communities, except that they do not necessarily have the sort of organization Cover postulates—hence "fields" rather than "groups"—and do not necessarily need any sort of shared narrative. The SASF is a group, organized or not, that "can generate rules and coerce or induce compliance to them." Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC'Y REV. 719, 722 (1973). Cover's nomic groups would fall plainly within the definition of the SASF, but so would many less structured and nonjurisgenerative groups. A significant point regarding Moore's concept of SASFs is that, like the nomic groups discussed here, they are not discrete and autonomous, but rather have members that move in and among different SASFs and simultaneously belong to several of them. A more recent writer explains:

In a society of any size a vast and indefinite number of SASFs can be identified, varying from formal and formidable corporate groups . . . to the most ephemeral and feeble loci of informal social control. . . .

SASFs are not "building blocks" out of which "the society" (as a whole) is constructed. Rather, an essentially endless number and variety of SASFs, in all sorts of relationships to each other and to an encompassing larger society, can be identified. . . . Every member of society is at the same time a member of a variegated array of SASFs, large and small, more or less autonomous, more or less exclusive or overlapping.

Griffiths, *supra* note 186, at 210-11. Although Moore's work was published 10 years before *Nomos and Narrative*, there is no evidence that Cover relied on it in developing his approach.



son will be affected by *each* of the groups to which she is committed.

### 3. *The Individual Universe*

If this is right, it seems to follow that in some sense every person exists in her own normative universe, unique from all others because the narratives and commitments are all slightly different. At the same time, each individual's universe overlaps substantially with those of the people around her. One may share a view of the First Amendment with the American Civil Liberties Union and a view of the Second Amendment with the National Rifle Association. One may agree with the Roman Catholic Church on infant baptism and with Planned Parenthood on abortion. In either case, one may be a passionately-committed member of both groups. Which *nomos* does the person then inhabit? It seems apparent that she is living in *each* of them or, more specifically, that she is living in her own *nomos*, which at various places is congruent with those of the groups to which she belongs.

The picture that one might be tempted to draw from *Nomos and Narrative* is thus too simple. It has done away with atomistic individuals by implying that there are atomistic groups, fundamental nuggets that are each distinct from every other group. That picture has, figuratively speaking, moved the discussion from the atom to the molecule, but the individual molecule remains as separate and independent as the original atom. What is missing from the picture is its complexity, the sheer motion of the process—the interplay among individuals and among groups, and between individuals and groups.

### 4. *Cross-Fertilization*

This point, however, explains a gap in Cover's story. If, as he writes, meaning within a group is constantly being fragmented and shared meanings may last only for an instant before differences occur, *from where do the differences come?* How does a member come to disagree with the group's standard interpretation of the narrative? If she exists in the group's normative universe—which is as real to her as the physical universe—and if she knows no other, how can she come to disagree?

Some disagreement may arise simply from ignorance or confusion, but these are things that the group can correct fairly easily. If there is to be a fundamental and sustained disagreement regarding the previously settled meaning of a group's narrative, it is likely that the disagreement will arise because some members of the group have allowed their normative universe to be influenced by *other narratives*. These narratives may be those of other nomic groups to which the individual belongs, or more broadly, they may be those of alien groups with which the individual comes into contact. One's understanding of the narratives of Columbus's voyages, the American Revolution, or Horatio Alger may change when she encounters the narratives of the indigenous American peoples, the chattel slaves held in the colonies, or *Oliver Twist*. Jefferson's narrative of the stalwart, armed, self-reliant yeoman on his farm<sup>254</sup> collides with Lincoln Steffens's narrative of the corruption in the teeming New York slums.<sup>255</sup>

It is the conflict of narratives *within individuals* that breeds differences within groups.<sup>256</sup> If, as Cover writes, the instant of unified meaning is a seed, a "legal DNA,"<sup>257</sup> it is individuals who carry the virus from group to group, infecting each in turn.<sup>258</sup> The normative universe of each individual is influenced by that of the group and each group's universe by the universes of the individuals who comprise it.

---

254. See NORMAN K. RISJORD, *THOMAS JEFFERSON* 10 (1994).

255. See PATRICK F. PALERMO, *LINCOLN STEFFENS* 27 (1978).

256. A good illustration of this may be Pope's description of two distinctive views of the U.S. Constitution developed by the labor movement during the early part of the century. See Pope, *supra* note 10, at 997-1000. By the nature of their role, union leaders regularly were forced to interact with other groups who shared vastly different normative universes, such as liberal progressives and business leaders, while the rank and file associated chiefly with themselves. Pope describes how the constitutional views of the leaders began to diverge from those of the rank and file, moving much closer to the constitutional views of business leaders or, in some cases, elite progressives. See *id.*

257. Cover, *supra* note 2, at 15.

258. Cf. Moore, *supra* note 253, at 722 (explaining that "[m]any such [groups] may articulate with others in such a way as to form complex chains, rather the way the social networks of individuals, when attached to each other, may be considered as unending chains").

The picture that emerges is amazingly rich. The world is teeming with groups. They are not merely small and, to many people, peculiar groups such as the Amish, but every kind of human structure that shares a narrative, from a church to a civic organization to a political committee to an organization of manufacturers. Each group has its organization, each its story. Each is capable—to some degree, at least—of generating legal meaning.

### 5. *The Convergence of Meaning*

Just as the members of these groups will overlap, so too will their normative universes. Each person is driven to make sense out of conflicting information; therefore, the individual efforts at coherence will tend to drive the meanings and norms of these groups *closer together*. They will move toward consensus on most issues.<sup>259</sup> This is an important corollary to Cover's point concerning group fragmentation. A group's distinctive meanings are constantly breaking apart, but these meanings—at least many of them—constantly will be growing closer to those of other nomic communities. As disparate meanings rooted in different narratives meet each other, and as individuals move back and forth among the narratives, the meanings and norms of these groups on most issues—at least those not viewed as fundamental to the group—will converge.

Most of what makes up any given normative universe thus will be similar to most of the other universes. Even the most dissimilar groups will have much more in common with each other than they have differences. As Raz reminds us, it is easy to forget “the considerable measure of agreement [we all share] on the nature and importance of common goods; an agreement that is no less secure for being often unspoken, consisting in what we so much take for granted that we do not notice it.”<sup>260</sup>

Bob Jones University, for example, is a distinct nomic community, but though it has some colorful disparities, an outside observer certainly would find a great many more similarities with

---

259. See Eskridge, *supra* note 13, at 169-70.

260. Raz, *supra* note 163, at 38.

Yale University than there are differences.<sup>261</sup> Although the school has some doctrinal differences with other Christian groups—chiefly the ban on interracial dating—the school’s creed hardly would cause a ripple in any major Christian denomination.<sup>262</sup> Similarly, the Mennonites and the Amish—more extreme examples—share many more narratives of the rest of America than one might suspect. Their nuclear family life, their houses and food, their general cosmology, and their theology are much closer to those of the rest of modern America than they are to those of the modern Chinese, the ancient Babylonians, or the Trobriand Islanders.<sup>263</sup> Their “legal meaning,” for example, is often more closely allied with mainstream, and even liberal elite, thought than one might think at first glance. The Mennonite position in *Bob Jones University* may have put them on the opposite side of the divide from liberal secularists, but their position in *Stanford v. Kentucky*<sup>264</sup> arrayed them squarely with such worldly, elite, and establishment organizations as the American Bar Association, the National Association of Criminal

261. Bob Jones students arguably dress more formally and probably fornicate less than Yale students. They do not live in mixed-sex dormitories and they attend chapel every day. A visit to the University’s very professional web site, however, shows a place that has much the same sort of educational structure, student activities and organizations, academic curriculum, and cultural resources as any other university. See generally Bob Jones Univ., *Welcome to Bob Jones University* (visited Jan. 27, 1999) <<http://www.bju.edu>>.

262. Each day in chapel students recite the University Creed, which is “a concise statement of the most important truths” that the community holds:

I believe in the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Savior, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

Bob Jones Univ., *University Creed* (visited Nov. 1, 1998) <<http://www.bju.edu/aboutbju/creed>>. Depending on exactly how one interprets “direct act” and “gift . . . by . . . grace,” *id.*, there is probably nothing in this with which Catholics, mainline Protestants, Mormons, or fundamentalists would disagree.

263. See DONALD B. KRAYBILL & MARC A. OLSHAN, *THE AMISH STRUGGLE WITH MODERNITY*, at viii (1994). For a complete discussion of Amish society, see HOSTETLER, *supra* note 189.

264. 492 U.S. 361 (1989).

Defense Lawyers, the National Parents and Teachers Association, the American Society for Adolescent Psychiatry, the State of Florida, and the National Council of Churches<sup>265</sup>—from whom their position was indistinguishable. In sum, the range of issues on which groups will have significant differences in their understanding of what the law requires is actually very small when compared to the range of possible disputes.<sup>266</sup>

Accordingly, most groups in any society will share a vast number of norms with other groups. A core of those norms will be shared by most groups, although it is possible that no group will share them all. Most groups in America, for example, will believe that murder is bad, that slavery is wrong, that children should live with their parents, that the press should be free, that people should be allowed to choose what kinds of jobs they want, and so forth. There will be disputes about the exact nature of these beliefs; some will count as “murder” what others call “choice,” some will exclude pornography from the idea of “free press,” while others will remove racist invective. In the broad picture, however, there is a remarkable level of correspondence.

### *E. Selection and Enforcement of Legal Meaning*

With that point clear, the next step of Cover’s law-making process is the jurisprudential action of the courts. Cover’s language in discussing the issue is, as has become apparent, inflamed with images of violence and blood. The following discussion is

---

265. *See id.* at 388 n.4 (Brennan, J., dissenting).

266. Frederick Schauer has emphasized the fact that the legal issues on which people disagree are remarkably narrow, given the vast number of norms that operate in everyday life. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 400-04 (1985). Even if one considers the Constitution—the fundamental norm and a hotbed of contentious normative clashes—the range of issues that reach the litigation stage is much smaller than one might expect. The vast bulk of constitutional law is so well-settled and accepted that it gives rise to few problems. Schauer notes that the all-but-unlitigated provisions of Articles I, II, III, and V play at least as important a role in shaping the collective view of law and one’s relation to it as do the heavily-litigated clauses of the First, Fourth, Fifth, Thirteenth, and Fourteenth Amendments. *See id.*

easier to follow if one steps outside the emotional image of judge-as-butcher and looks simply at the analytical core of the matter. One then sees that legal meaning does not become law until the judge selects the meaning and commits to it by putting the violence of the state behind it.<sup>267</sup> How does the judge go about doing this?

### 1. *The Normative Foundation of the Judge*

Before going further, it is necessary to address briefly the issue of why nomic groups accept the rulings of judges at all. It is one thing to argue that the judge wields power in the name of the state and that she needs no other warrant. The fact remains, however, that most people do not view a judge's decision the way they view the order given by a gunman. They view it as something that they are—at least *prima facie*—*bound* to obey. Obeying the law and the judge is good; disobedience, absent some highly unusual circumstance, is bad. Something must account for this belief.

The previous point regarding convergence of meaning is relevant here. Given the human drive for community building and the experience of these communities with the calamities that come from violent conflict, or at least the narratives of past conflict, it is fair to say that most nomic groups would have developed norms calling for the peaceful resolution of disputes.<sup>268</sup> As groups interact, these norms converge. This convergence also is happening within the nomic group that is the state, with its practical role of making social choices in the absence of unanimity and securing practical unanimity in following the choices made.<sup>269</sup> The norms of the nomic groups, which favor peaceful

---

267. Cover uses the word "violence," Cover, *supra* note 2, at 53, rather than "force" or "enforcement" or "power" or some such euphemism, presumably to stress the reality of the force used. This Article in general follows his usage.

268. The relatively horizontal societies detailed in the anthropological literature certainly seem to have them. See generally, e.g., HOEBEL, *supra* note 57 (discussing the legal systems of a number of primitive civilizations); K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) (outlining the various ways in which the Cheyenne civilization resolved disputes amongst its people).

269. See John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY*,

resolution of disputes, and those of the state, which favor peaceful cooperation among elements in society, will converge further, until the normative universes of the various groups all tend to share the same view regarding the resolution of disputes and the state's role in resolving them. One would expect these groups to come to common norms on some fundamental matters: (i) a mechanism should exist for the peaceful resolution of those disputes that inevitably will arise among individuals and groups; (ii) disputants should submit their disputes to that mechanism rather than engage in immediate violence;<sup>270</sup> (iii) such a mechanism should operate fairly within the limits of the other norms of the society;<sup>271</sup> and (iv) disputants should defer to the ultimate decision of the mechanism even if they do not agree with the particular outcome.<sup>272</sup> The normative universe of nearly every group in the society will contain a similar concept of dispute resolution.<sup>273</sup> The judge operates under this framework.

*supra* note 221, at 134, 141-42.

270. Obviously some groups will prefer to resort to violence in some circumstances; the terror inflicted on blacks in the South in the decades following the Civil War comes to mind. See HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 5-29 (1988). The same people whose norms permitted them to settle disputes with blacks by violence, however, likely settled their disputes with other whites through peaceful legal mechanisms.

271. This does not necessarily mean "fair" in the Western sense. It is possible to imagine a system in which most groups perceive it as "fair" if the higher-caste disputant always wins, or the meek or the poor always win, or the one who pays the most to the judge always wins.

272. Deference is due at least so long as the decision is not a farce. Cf. *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923) (holding that a trial that is so dominated by mob violence that the judge has little choice but to convict violates due process under the Fifth Amendment).

273. There is an obvious connection here with Kelsen's "basic norm" (*Grundnorm*), see KELSEN, *supra* note 91, § 30; and Hart's "rule of recognition," see HART, *supra* note 103, at 94-95. Cover himself draws this comparison, calling his approach the "mythic or narrative restatement" of those principles, the narratives that embody the group's story of how the legal order arose from a previous state of lawlessness. Cover, *supra* note 2, at 23. Cover explicitly uses the "rule of recognition" language in discussing the conflict between religious and secular views of the law:

Within the dedicated nomic refuge, there is an accommodation to a religious rule of recognition expressed in Acts 5:29—"We ought to obey God rather than men"—instead of submission to the principle, embodied in article VI, section 2 of the Constitution, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land."

Assuming that judges are entitled to make such decisions, and assuming that in the hard case there are multiple legal meanings competing for a judge's attention, how does she pick one? How does she select the one that will survive?<sup>274</sup>

## 2. *The Judge as Agent of Violence*<sup>275</sup>

Cover rejects the picture of the judge as a mere interpreter of the law, a neutral arbiter between conflicting norms, or as the umpire in some sort of "convention of legal discourse."<sup>276</sup> Cover apparently took this image of judge as neutral arbiter from the writings of his sometime collaborator Owen Fiss. Fiss argues that people recognize that disputes exist and that *somebody* must decide them.<sup>277</sup> They understand that a neutral decisionmaker is in their general interest. They agree to accept judges and obey their decrees because judges are the "somebody" whose job it is to decide and because judges are "part of an authority structure that is good to preserve."<sup>278</sup>

*Id.* at 30. For Hart, the rules of recognition are the features by which the group decides which norms will be supported by the organized pressure of the group. See HART, *supra* note 103, at 94-95. The rules of recognition in any given society may be very simple or very complex—it may be whatever the oldest member of the Dingbat Clan says or it may be whatever is passed by both Houses of Congress, signed by the President, and upheld as constitutional by the Supreme Court—but the point is that the group's norm specifies a procedure by which it determines which norms are *legal* norms. Hart's model ultimately is too simple for Cover. In dealing with the issues Cover wants to reach, it is not sufficient because it does not explain the *different* legal meanings that can be ascribed to the same product of the rulemaking process, nor does it explain the ability of groups to reject legal meanings that meet all of the formal criteria of the rule of recognition—*Dred Scott*, for example—while still claiming that their own meanings are the true or correct law. Hart's basic point that groups accept some features as authoritative legal meaning is, however, fully consistent with Cover's ideas.

274. Eskridge explicitly raises this question in the context of jurisgenesis, but does not attempt to answer it explicitly. See Eskridge, *supra* note 13, at 151. The thrust of his argument, however, seems to be that the courts chiefly watch the election returns to see which conflicting law is more likely to be accepted.

275. Part of Cover's answer to the following questions—to the extent he gives an answer—comes in *Nomos and Narrative*, and part is found in his later article, *Violence and the Word*. The following discussion will piece together the argument from both sources.

276. Cover, *supra* note 2, at 42-43.

277. See *id.* at 43.

278. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 756 (1982)



Cover finds Fiss's position too easy. He thinks Fiss's image "confuses the status of interpretation with the status of political domination."<sup>279</sup> He stresses the "brute force" that the state will apply in imposing its decision and suggests that interpretation accompanied by force is something different from the sort of disembodied meaning-creation he posited as arising within nomic groups.<sup>280</sup> The presence of that threat makes the judge something other than merely another interpreter or the sort of private mediator whose goal is to work out an amicable resolution between the parties but who has no power to enforce such a judgment. The upshot for Cover is that the judge can never truly share a world with the litigants before her, because she forcibly imposes meaning on them in the shadow of violence.

To illustrate this idea, Cover uses what he admits is the extreme analogy of torturer and victim to emphasize the role of law as a dominating and world-destroying force.<sup>281</sup> The fact that one party—presumably the judge—will dominate the other for Cover means that the two cannot share a normative world:

It is ultimately irrelevant whether the torturer and his victim share a common theoretical view on the justifications for torture—outside the torture room. They still have come to the confession through destroying in the one case and through having been destroyed in the other. Similarly, whether or not the judge and prisoner share the same philosophy of punishment, they arrive at the particular act of punishment having dominated and having been dominated with violence, respectively.<sup>282</sup>

The claim that domination precludes the sharing of a normative world, however, seems to depend upon the dubious and unsupported assumption that obedience to lawful authority is not itself a fundamental part of the normative universe.<sup>283</sup> History

(discussing the intellectual authority that citizens award judges); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 370-71, 394-95 (1978) (arguing that the judge acts as a neutral arbiter who chooses between parties rather than imposing her own will on them).

279. Cover, *supra* note 2, at 43.

280. See *id.* at 44.

281. See Cover, *supra* note 27, at 1609.

282. *Id.*

283. Historically, the virtue of obedience has played a powerful role in shaping the

suggests that in many such universes the virtue of obedience to wrong-headed orders that inflict pain and death is itself world-creating. Socrates preferred drinking the cup of hemlock to resisting the unjust orders of a polis whose *nomos* commanded him to obey;<sup>284</sup> Pakenham's British troops at New Orleans chose to stand as still as tin soldiers and be cut down like wheat in stoic obedience to stupid and obviously suicidal orders.<sup>285</sup> In both cases, it was obedience unto death at the hands of superiors that helped to create and sustain the *nomos*, while the alternative of fleeing would have betrayed it.<sup>286</sup> Moreover, even in the case of torturer and victim, it is extreme to say that they cannot share a normative world when their universes may be identical in every respect except, perhaps, that one believes that the Holy Spirit comes from the Father and the other believes it comes from the Father and the Son (*filioque*).<sup>287</sup>

### 3. Interpretation and Violence

Cover certainly is correct, however, that the presence of violence makes an important difference, that "[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another."<sup>288</sup> One can agree that any legal interpretation that is not "played out on the field of pain and death" is not "legal," but rather is "something less (or more) than law."<sup>289</sup> One also can accept that there is an "unseverable connection" between legal interpretation and violence, and that

normative universes of politics. See, e.g., FIGGIS, *supra* note 67, at 221 (noting the critical importance of ideas of nonresistance to authority in all political thought of the seventeenth century).

284. See Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. VA. L. REV. 281, 299 (1991-92).

285. See DONALD BARR CHIDSEY, *THE BATTLE OF NEW ORLEANS—AN INFORMAL HISTORY OF THE WAR NOBODY WANTED: 1812*, at 152-56 (1961).

286. Cf. *Job* 13:15 ("Though he slay me, yet will I trust in him: but I will maintain mine own ways before him.").

287. The point here is not to belittle the importance of that particular dispute, which has great consequences for Christian theology; it is merely to point out that even in the eras when it was the most important issue of the day, it made up a very small part of any group's normative universe.

288. Cover, *supra* note 27, at 1601.

289. *Id.* at 1606-07.

the former "is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way."<sup>290</sup> This is plausible enough, and, as a warning to those who sometimes forget that legal rulings are effected by force, it is a useful corrective.

Similarly, there is no reason to disagree with the contention that the looming shadow of violence will itself influence the choice of interpretation.<sup>291</sup> Ordinary experience suggests that every interpretation is colored by what is perceived as its likely consequences. Most people tend to be much more careful about their convictions when they know that the life, liberty, or happiness of someone else depends upon their being correct. "The gulf between thought and action," writes Cover, "widens wherever serious violence is at issue, because for most of us, evolutionary, psychological, cultural and moral considerations inhibit the infliction of pain on other people."<sup>292</sup> Given the potentially extreme consequences, a legal interpretation can never be "free" in the sense that literary interpretation is "free." Nor is it enough that, in the social science sense, a legal interpretation simply meet some sort of standard of accord with all relevant data. Rather, it must be the type of interpretation that can be converted to practical action that will compel behavior on pain of violence. To do this, it must be strong enough to overcome the normal inhibitions concerning the application of force.<sup>293</sup> In the abstract, a hundred legal interpretations may be plausible, but as the threat and magnitude of force increases, the range of practicable meanings shrinks drastically.<sup>294</sup>

Having agreed with these points, it by no means follows that the judge's interpretive activity is somehow different *in kind*

290. *Id.* at 1610.

291. *See id.* at 1612 ("The practice of interpretation requires an understanding of what others will do with such a judicial utterance and, in many instances, an adjustment to that understanding, regardless of how misguided one may think the likely institutional response will be.").

292. *Id.* at 1613.

293. *See id.* at 1617.

294. *Cf.* Austin Sarat, *In the Shadow of Originalism: A Comment on Perry*, in *NOMOS XXIX: AUTHORITY REVISITED* 254, 258 (J. Roland Pennock & John W. Chapman eds., 1987) (noting that law's "coercive force must severely limit the range of acceptable interpretive positions").

from those of other individuals and groups. The whole thrust of Cover's argument is to separate the creation of legal meaning from the enforcement of that meaning by the state. Yes, the two are intertwined; the interpretation conditions and authorizes the violence, and the violence influences and shapes the interpretation. The core of his position, however, is that creation of legal meaning and its imposition by force are nevertheless analytically distinct; otherwise, groups who do not directly wield violence could not create legal meaning, which he obviously insists they do. The nomic group makes a commitment to back a norm with state violence; the judge does precisely the same thing.

#### 4. *Legal Interpretation*

The way to make sense of this is to recognize that the essence of any *legal* interpretation is the interpreter's willingness to channel state force in one way and not in another.<sup>295</sup> It is the interpreter's commitment that state violence should or should not be visited upon others under a given set of circumstances that makes the interpretation "legal" in the sense that most would use the term. Those who favored racial segregation and those who favored racial integration thus both necessarily created their competing legal meanings in light of the violence that would follow either approach. The specter of state violence lies behind *Brown v. Board of Education*<sup>296</sup> as surely as it did *Plessy v. Ferguson*.<sup>297</sup> Both interpretations are, using Cover's term, "implements of violence"<sup>298</sup> because they are warrants to use the force of the state against those who resist. It therefore seems apparent that the influence of violence extends to *all* legal interpretations, not merely the one the judge happens to announce.

Cover argues that judges are different from other interpretive communities because it is the judge who acts "to restrain, hurt,

---

295. Cover seems to recognize this point. He writes that the force inherent in the system "necessarily engages anyone who interprets the law in a course of conduct that entails either the perpetration or the suffering of this violence." Cover, *supra* note 27, at 1601 n.1.

296. 347 U.S. 483 (1954).

297. 163 U.S. 537 (1896).

298. Cover, *supra* note 27, at 1608.

render helpless, even kill the prisoner."<sup>299</sup> Many people may create legal meanings, but he suggests that it is "quite another thing" to act upon that meaning; it requires an "act of will."<sup>300</sup> It is the judge who actually "authorize[s]" the "deed[s]" performed by others, including "lawyers, police, jailers, wardens, and magistrates."<sup>301</sup> She therefore stands apart from the other nomic communities; *her* interpretation is the one that will be "writ in blood."<sup>302</sup>

Surely this is too simplistic, however. The judge plays an important role in the imposition of state violence, but hardly the only one; she is an important link, but still only a link.<sup>303</sup> Cover himself recognizes this:

This social organization of violence manifests itself in the secondary rules and principles which generally ensure that no single mind and no single will can generate the violent outcomes that follow from interpretive commitments. No single individual can render any interpretation operative as law—as authority for the violent act.<sup>304</sup>

The legislators who write the statute, the voters who demand it, the victim who files the complaint, the officers who arrest the defendant, the prosecutors who bring the case, the witnesses who testify, the jailers who incarcerate, and the governor who supervises the jailers are all participants in the system. When federal troops marched into Oxford, Mississippi, to enroll James

299. *Id.* at 1609.

300. *Id.* at 1611.

301. *Id.* at 1620.

302. Cover, *supra* note 2, at 46; see also Cover, *supra* note 27, at 1625 ("No wardens, guards or executioners wait for a telephone call from the latest constitutional law scholar, jurisprude or critic before executing prisoners, no matter how compelling the interpretations of these others may be.").

303. Cover notes that "[t]he judicial word is a mandate for the deeds of others," that it is the judge whose word licenses the violence that will follow. Cover, *supra* note 27, at 1611. The judge's word is itself contingent, though; it cannot issue unless a host of conditions exist. In a criminal proceeding, there must have been an action of the legislature that prohibits the act; there must have been an indictment or information brought by a prosecutor, a plea, a trial, and findings by a jury, the absence of any of which may mean that the judge's word cannot be issued.

304. *Id.* at 1628.

Meredith at Ole Miss,<sup>305</sup> who exactly was wielding state violence? The appellate judges who ordered him admitted?<sup>306</sup> The President who called in the Army? The officer in charge of the troops? The soldier with his rifle? The NAACP? Or Meredith himself?

Given Cover's own premises, it seems very strange to say that the judge's role in *interpreting* the law in this sense is fundamentally different from that of Meredith. This is particularly true when one recalls that it is by no means certain that the judge will be the only one inflicting violence. Cover himself recognizes that groups that disagree with the judge's decision may resort to rebellion or revolution.<sup>307</sup> Moreover, even private groups operating below the level of "rebellion" may cause their interpretations to be enforced through (threatened) violence upon the person of the judge.<sup>308</sup> What Cover likes to call "resistance" to a judicial order<sup>309</sup> is not always martyrdom; sometimes it is violence.

In sum, there is no reason to believe that judges, when they interpret the law, are doing anything different in kind from what is done by other participants in the system; they are selecting a meaning that they intend the violence of the state to back.

---

305. See *United States v. Barnett*, 346 F.2d 99, 109 (5th Cir. 1965).

306. See *Meredith v. Fair*, 305 F.2d 343, 361 (5th Cir. 1962).

307. See Cover, *supra* note 27, at 1605 ("Rebellion and revolution are alternative responses when conditions make such acts feasible and when there is a willingness not only to die but also to kill for an understanding of the normative future that differs from that of the dominating power.").

308. Recent years have witnessed the campaign of assassination against Italian judges by the Sicilian Mafia—a normative community if there ever was one—and the extermination of "virtually the entire Colombian judiciary." Frank O. Bowman, III, *Playing "21" with Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 979 (1995). Closer to home, intimidation of judges by those worried about the outcome of a trial is not exactly unknown. Perhaps the most vivid example is *Moore v. Dempsey*, 261 U.S. 86 (1923), in which the Supreme Court described the mob domination of a courtroom as "threaten[ing] the most dangerous consequences to anyone interfering with" the defendants' conviction. *Id.* at 89. Cover has raised the Italian example and what he considers the similar "failures of Weimar justice," Cover, *supra* note 27, at 1618 n.42, but only in the context of arguing that social domination is essential to our understanding of law. He does not explicitly consider the degree to which this violence by normative groups is similar in its influence on interpretation to the power wielded by judges.

309. See Cover, *supra* note 2, at 49-50.

### 5. *The Effect of Coercion*

Returning to the basic point, Cover suggests that the presence of coercion makes the role of the judge something other than that of a purely neutral arbitrator.<sup>310</sup> One can accept this contention without finding it unduly troublesome. Coercion is at the core of law and of any judicial system. As noted above, the norms of most groups, at least in the modern state, require reference of disputes to state courts and accept the enforcement of court decisions by coercion. In such a situation it is difficult to see why the state cannot claim with perfect legitimacy the right to make and enforce these decisions.

Apparently, Cover is claiming that so long as some groups do not accept this nomic convention of judicial decisionmaking, there is no such thing. As he writes, “[i]nsular communities often have their own, competing, unambiguous rules of recognition. They frequently inhabit a *nomos* in which their distinct *Grundnorm* is supreme from its own perspective.”<sup>311</sup> This statement looks like a powerful objection; a judge whose status as a decisionmaker is not granted by a participant in the dispute does then seem to be, in the group’s normative universe, a mere gunman. One cannot be an arbiter if one of the disputants does not recognize the office.

The point may be overstated, though. In only a tiny fraction of cases does the supremacy of a different *Grundnorm* become relevant. A practicing Christian, for example, certainly understands that her *Grundnorm*—“Thou shalt have no other gods before me”<sup>312</sup>—is “supreme” and that certain human laws that conflict with it might require resistance,<sup>313</sup> but this belief does not in any way imply that law that is not “supreme” in the religious sense is not worthy of obedience.<sup>314</sup>

310. *See id.* at 48.

311. *Id.* at 43.

312. *Exodus* 20:3.

313. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶ 2242 (Paulist Press ed. 1994) (“The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel.”).

314. The duty of resistance is an exception to the broader obligation to obey lawful civil authorities. *See id.* ¶ 2239 (“Submission to legitimate authorities and service of

Cover seems to postulate a binary relationship between group and court; either judges are considered legitimate decisionmakers *and* make all decisions in accord with the group's *nomos*, or they are illegitimate and mere wielders of coercion. The reality, however, almost certainly is more complex. The vast majority of *nomoi* accept the desirability of state courts, their general power to make decisions, and the duty of citizens to obey them. The extent of agreement may sometimes be obscured by the relative handful of important and highly-charged legal issues that involve clashes of *nomoi*. In the vast majority of cases on the vast majority of issues, though, nomic groups accept the decisions of state courts as a matter of course. This tendency is, after all, an important part of the concept of the rule of law, a powerful feature of the normative universes of most American groups. Even the most rabidly redemptive groups, who may disagree to the point of violence on issues of abortion, affirmative action, same-sex marriage, and whether courts should be deciding such issues at all, generally accept the state's judicial role in prosecuting rapists, settling wills, and determining whether bills of lading are negotiable. It is noteworthy that some of the insular religious organizations Cover most admires have had little problem invoking the jurisdiction of state courts on various secular issues.<sup>315</sup> Certainly, there are groups that deny the legitimacy of the state itself, but one would be hard pressed to find a group that accepts the state as legitimate but denies the legitimacy of all state courts over all issues.<sup>316</sup>

---

the common good require citizens to fulfill their roles in the life of the political community.”).

315. For example, the Mennonites—for all their distinctive *nomos* and their general wish to be let alone—had no difficulty opposing an action to quiet title, with the goal of setting aside a tax sale of a property on which they held a mortgage. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).

316. The Amish are perhaps the closest question, because they generally shun litigation unless forced to participate in it, as by the state criminal prosecutions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). “Filing a lawsuit” is one of the things expressly forbidden by the *Ordnung*, the code of conduct by which the Amish live. See KRAYBILL, *supra* note 190, at 98. Elsewhere is recounted the story of Amish elders, who on the courthouse steps on the day of trial decided not to go forward with a suit they had brought against the IRS, which had seized horses for back taxes. See HOSTETLER, *supra* note 189, at 276. Yet an Amish man *did* sue the federal government (unsuccessfully) for a tax refund in *United States v. Lee*, 455 U.S. 252, 254-55



Certainly, in the great run of cases, then, the norms of affected groups will lead them to grant the state and its courts the authority to decide cases, to precisely the same degree that they are led to obey the laws because they are, in fact, laws.<sup>317</sup> They have a "habit of obedience" that is a fundamental part of their normative systems.<sup>318</sup> Given Cover's point that all adjudication involves competing legal meanings, the judge, of necessity, must pick one.

### 6. *Constraints on the Judge*

This leads to an important question: Is the judge constrained in the legal meanings she can announce? If she is completely unconstrained—if she can come to any result she chooses and justify it how she pleases—then Cover's whole approach comes apart. In that case, meaning will come solely from the judge with no necessary antecedents. Law cannot arise simultaneously from the wholly unfettered discretion of the judge<sup>319</sup> and be the

(1982) (holding that Amish must pay social security taxes, even though doing so violates their religious beliefs), without any suggestion that he was thereby expelled from the community. The original *Schleitheim Articles* (1527), which are still the "basic guidelines" of the Amish today, specifically recognize state authority and enforcement of laws: "The sword [government] is an ordering of God outside the perfection of Christ. It punishes and kills the wicked, and guards and protects the good." HOSTETLER, *supra* note 189, at 29. Nothing about Amish thought suggests that they would deny, for example, the right of a Pennsylvania court to enter a judgment against an Amish man who had killed or broken a contract with a nonmember. They apparently have little difficulty with the idea of their children being subject to the criminal jurisdiction of the Pennsylvania state courts. Amish leaders have reportedly encouraged police to crack down on the wilder elements of their youths; they even urged Lancaster County, Pennsylvania, police to release to the newspapers the names of Amish youths arrested and charged with offenses, which included reckless driving, underage drinking, and occasional shoplifting and passing a bad check. *See id.* at 350.

317. *Cf.* TIEDEMAN, *supra* note 164, at 5-6 ("Municipal law is not intended to control the actions of the masses. The great majority of a people are a law unto themselves. . . . [T]he life of a rule of law is derived from its habitual and spontaneous observance by the mass of the people.")

318. The phrase, of course, is Austin's. *See* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 193-94 (H.L.A. Hart ed., Noonday Press 1954) (1832 & 1863) (noting that "[t]he *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior").

319. "Unfettered" discretion is emphasized here. Discretion to select a legal mean-

result of the jurisgenerative process working in groups, because there will be no necessary connection between the groups and the law as announced. To view legal meaning as bubbling up from under is to recognize at least some sort of substantial constraint that leads the judge to select from among the group-derived norms.

A substantial body of literature claims that the judge is completely—or virtually completely—unrestrained in the choices she makes.<sup>320</sup> Cover is not of that camp. The normative universe itself contains “bodies of rules or doctrine,”<sup>321</sup> and Cover frequently talks about the “rules” of particular cases. These rules do, in his world, control and guide behavior.<sup>322</sup> One of the important themes in Cover’s own historical work, in fact, is that constraints on judges are more significant than a model of free-ranging interpretation would suggest.<sup>323</sup>

What limits judges? First, they are constrained by the fact that only *some* possible legal meanings will be even remotely plausible. Given the general inhibitions on inflicting violence, only interpretations of a certain substantiality—Cover calls them “capable of massing a sufficient degree of violence”<sup>324</sup>—will collect enough weight to justify the imposition of state force. “Some interpretations,” he writes, “are writ in blood and run with a warranty of blood as part of their validating force. Other

---

ing from among those competing for attention is not “unfettered.”

320. See, e.g., Kairys, *supra* note 143, at 8 (claiming that “[t]hose robed people sitting behind ornate oversized desks are not controlled or bound by law”).

321. Cover, *supra* note 2, at 6.

322. A central section of *Nomos and Narrative* is Cover’s analysis of the inheritance rules in the ancient Near East. These rules provided that the eldest son succeeded as head of the family and received a double portion, and that the son of a disfavored wife could not be supplanted by the son of a favored wife. Cover then explores the conflict raised by Biblical narratives in which younger sons (e.g., Abel, Isaac, Jacob, Joseph) are favored and ultimately displace their elder brothers. See *id.* at 19-24. The point of the argument is not that the story of Isaac means that the rule does not explain behavior; on the contrary, the story only becomes important if the rule ordinarily constrains people to act in a particular way.

323. Cover’s most important historical work was his extensive study of antislavery judges who very much believed that they were constrained to reach decisions they found morally repulsive. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 119 (1975).

324. Cover, *supra* note 27, at 1617.

interpretations carry more conventional limits to what will be hazarded on their behalf."<sup>325</sup> Some meanings are powerful enough to mandate the imprisonment or killing of people if they ultimately resist them; those ultimately will become law. Others will drop by the wayside. It is, for example, theoretically possible to interpret a statute that deals with carrying a weapon so that it would reach grocers who sell legs of lamb,<sup>326</sup> city councilors who vote to privatize city sanitation services,<sup>327</sup> or male human beings generally.<sup>328</sup> As a practical matter, though, most of the theoretical possibilities, such as those just mentioned, will seem absurd to *every* nomic group in society because they make neither linguistic nor practical sense. Of the rest, most of the non-absurd will still be too strained or tentative for any nomic group to be willing to back the meaning with the violence of the state. There may well be alternative legal meanings put forth—some groups might consider a pocketknife to be a weapon and some might not—but the range of meanings that any group will advance seriously as *legal* meanings is unquestionably narrower than the possible range of semantic or literary meanings.<sup>329</sup>

- Second, the judge cannot, as a practical matter, select just *any* legal meaning advanced by *any* nomic group. The nature of adjudication is such that it involves particular parties and a concrete

325. Cover, *supra* note 2, at 46.

326. Merchants who sell goods are said to "carry" them. See II OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989). For a practical example of how a leg of lamb could be used as a lethal weapon, see Roald Dahl, *Lamb to the Slaughter*, in THE BEST OF ROALD DAHL 108, 111 (Vintage Books ed. 1990).

327. To "carry" is "to get [a motion] passed or adopted by the whole or a majority of the votes." II OXFORD ENGLISH DICTIONARY, *supra* note 326, at 920. The very institution of private property has been viewed as a weapon of violence directed against segments of society. See generally MARX & ENGELS, *supra* note 134, at 378; Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT; DISCOURSE ON THE ORIGIN OF INEQUALITY; DISCOURSE ON POLITICAL ECONOMY 105, 140, 148 (Donald A. Cress trans. & ed., Hackett Publishing 1983) (1754).

328. The *Oxford English Dictionary* notes that "weapon" is a coarse synonym for "penis." II OXFORD ENGLISH DICTIONARY, *supra* note 326, at 45.

329. Thus, Cover arrives at the same place as Hart—that the range of actual choices is narrower than the universe of possibilities. Hart, however, arrives via his rule of recognition, see HART, *supra* note 103, at 92-107, while Cover gets there by reliance on the general reluctance to impose violence on the basis of questionable or tentatively held meanings.

dispute. The parties, who may include *amicus curiae*, each will advance the meanings they advocate. Other possible legal meanings held by members of other nomic groups may never surface in the context of the litigation.<sup>330</sup> In most cases, the competing interpretations will be those of the parties (or the nomic groups to which they belong) and those that arise from the judge's own *nomos*, which presumably include the principles of adjudication and interpretation widely shared in the legal profession. Thus, the range of legal meanings available to the judge in any particular dispute usually will be less than the number of meanings that are actually held by all nomic groups.

Third, judges are constrained, at least in developed legal systems, by the hierarchical ordering of the courts.<sup>331</sup> Authority in such systems comes from the top down. Lower courts defer to the rulings of appellate courts, which in turn defer to the rulings of a supreme court. In the American system, Cover writes, the judges' own commitment to this hierarchy is such that they will allow "rules" dictated by higher authority to bind them even when they believe the ruling to be erroneous:

Consider, for example, the lower court judge supposedly constrained by superior authority to apply a rule that he believes to be wrong—not simply morally wrong, but wrong in law as well. In such a case, the lower court affirms a hierarchical principle in place of his interpretive convictions and thereby directly affirms his commitment to the triumph of the hierarchical order over meaning.<sup>332</sup>

---

330. For example, in a dispute between a New York City landlord and a tenant over whether the landlord has discriminated on the basis of race, it is unlikely that it would even occur to a judge to raise and address interpretations advanced by racist groups that hate racial minorities or communist groups who hate landlords. Thus, legal meanings that have their basis in firmly held nomic positions, such as "Nonwhites should not be permitted to live with whites" and "All control over housing should be in the hands of the people, not profiteering landlords," will not even factor into the judge's consideration.

331. In any system in which the political ruler and the single dispute-resolving judge are not identical—that is, in any system more complex than the tribal—the element of hierarchy remains. It seems likely that at some point the political ruler would exercise at least some sort of control or check upon the power of the judge, and a judge who wishes to remain in office must respect the views of her political superiors as to which rules are appropriate.

332. Cover, *supra* note 2, at 58.

Surely Cover's "triumph of the hierarchical order" language is too harsh, though. This commitment to authority is, in fact, a constituent element of the *nomoi* of the judges themselves and, to be fair, that of most nomic groups within the United States. If a district judge refused to follow a Supreme Court interpretation of a statute because the interpretation was "wrong in law," her act of *affirming* the meaning of that statute simultaneously would *deny* meaning to the Constitution and the statutes creating the federal courts. What is at issue is less a conflict between "meaning" and "hierarchy" than a clash of meanings.

As Fiss points out, if one postulates that there are legal rules in a society, one must assume that those rules are binding in some sense.<sup>333</sup> "Rules are not rules unless they are authoritative," he writes, "and that authority can only be conferred by a community."<sup>334</sup> Here, he is making much the same point made earlier in the discussion of objectification. The concept of any "authoritative" rule is necessarily hierarchical; it assumes that someone or something is superior and entitled to direct one's behavior. If the community is conferring such authority, it can only do so by creating or recognizing a hierarchy that is part and parcel of the rule structure itself.<sup>335</sup>

In fact, it is doubtful that any creation of legal meaning, in American society at least, can take place outside the concept of hierarchy. How can one advance anything like a "legal meaning" in the United States without taking into account the gradations of authority among the Constitution, acts of Congress, decisions of the Supreme Court, treaties, executive orders, state laws, county laws, municipal ordinances, decisions of state and lower federal courts, administrative regulations, acts of quasi-governmental authorities, and so forth? Most people create legal mean-

---

333. See Fiss, *supra* note 278, at 744-45.

334. *Id.* at 745.

335. The idea of jurisdiction—the notion that some disputes go to the courts and some do not—depends on the existence of some sort of hierarchy. As Schauer has noted, "[e]ven Weber's picture of a totally *ad hoc qadi* justice needs jurisdictional rules, for something must determine that it is the man under the tree and not someone else whose role it is to dispense justice." FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 169 (1991).

ings by saying, "the Constitution says," or "the court held," or "the legislature provided"—all of which are impossible to explain except on the ground that they posit a higher authority that must be followed.<sup>336</sup> The crux of the religious groups' legal arguments in *Bob Jones University* was not the narratives of separateness and oppression that Cover quotes in *Nomos and Narrative*,<sup>337</sup> but the hierarchical principles that an act of Congress (which did not explicitly deny the tax exemption) is superior to a regulation of the IRS (which did), that the Constitution is superior to Congress, and that the Supreme Court had the legal power to reject the legal meaning advanced by the IRS and supply its own.<sup>338</sup>

Regardless of how one characterizes it, however, Cover's point that the hierarchical structure of legal authority constrains the judge's freedom to choose which legal meaning she will adopt is valid. When this is put together with the practical limitations that the possibility of violent coercion and the institutional nature of adjudication place on the likely range of legal meanings, the number of meanings a judge reasonably can consider in any case is certainly limited, and perhaps sharply limited.<sup>339</sup> Given these limitations, in the routine case there may be only one meaning that is legally possible; in other cases there may be two or three or even several.<sup>340</sup> The judge necessarily will select one of these.<sup>341</sup>

336. The necessity for this organization is implicit in the idea of what Schauer calls "jurisdictional rules." *Id.*

337. See Cover, *supra* note 2, at 62-67.

338. Cover described this rationale as evidence of a weak commitment to redemptive constitutional ideology. See *id.* at 66.

339. This is not to suggest that these are the *only* constraints that bind judges, but merely that under Cover's approach there are at least some substantial constraints. As noted above, the point here is merely to show that the jurisgenetic model is coherent in that the judge is not completely free but must select *some* group-generated norm as the basis for her decision.

340. The analysis here thus arrives at the same position as Kelsen, although by different paths. See HANS KELSEN, *PURE THEORY OF LAW* 348-56 (Max Knight trans., 1967) (explaining that in hard cases a norm will generate "frames" that will hold several possible meanings from which a judge must choose).

341. For practical purposes, then, the judge's situation in her *nomos*, the substantiatedness of the meanings advanced by litigants, and the hierarchical structure of authority seem to put her in much the same position as she would be in under Fiss's ap-

### F. *The Role of the Legislator*

There is a glaring omission from this account of how legal meaning comes into existence and how it becomes law: the legislator. Those who are used to thinking about laws as things passed by legislatures and signed by executives may be troubled by an account that seems to make the U.S. Congress less important in the creation of legal meaning than, for example, Hare Krishnas, the Branch Davidians, or the Patriot Movement.

#### 1. *Law as a Product of Processes and Institutions*

The focus on law as a product of institutional machinery has, of course, been a primary element of positivist jurisprudence for two centuries. Perhaps the purest version appears in the work of Kelsen, who posits a "Chain of Creation" in which each legal norm is created by and out of a more fundamental norm by a process that is recognized as law-creating.<sup>342</sup> "A norm," he explains, "is valid *qua* legal norm only because it was arrived at in a certain way—created according to a certain rule, issued or set according to a specific method."<sup>343</sup> This has obvious resonances with the concept of law explored here. Law is a product of formalities, rituals, and procedures that instruct that "this is law" and something else is not:

People assemble in a hall, they give speeches, some rise, others remain seated—this is the external event. Its meaning: that a statute is enacted. Or, a man dressed in robes says certain words from a platform, addressing someone standing before him. This external event has as its meaning a judicial decision.<sup>344</sup>

---

proach. See FISS, *supra* note 278, at 744 (postulating "disciplining rules, which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged," and the existence of "an interpretive community, which recognizes these rules as authoritative").

342. See KELSEN, *supra* note 91, § 28.

343. *Id.* The idea of provenance or pedigree remains important in nearly all positivist writing, even though most positivists are quick to point out that other factors than provenance (e.g., moral principles) may be important in actual adjudication. See HART, *supra* note 103, at 250.

344. KELSEN, *supra* note 91, at 2.

Thus, one regards a bill passed by both houses of Congress and signed by the President as law, but not a resolution passed by the membership of the Kiwanis Club of Fulton, New York, and signed by its secretary. This is true even if one believes that the Kiwanis resolution is ethically, morally, economically, and practically superior to the act of Congress.

The concept of a formal state lawmaking apparatus is singularly absent from Cover's work. It is, however, the sort of feature that has to be accommodated for the present description to be useful. How can the concept of a legislator—and here the term is used broadly to include any formal lawgiver, whether singular or plural, democratic or authoritarian—fit into the jurisgenetic model?

## 2. *The Legislature as Nomic Community*

The first thought might be simply to accept the legislature as a nomic community. A modern Congress or Parliament is obviously an organized group with shared narratives and mutual commitments, and one would expect it to be jurisgenerative. One might argue that a legislature is a nomic community that, perhaps because of its official function, is particularly fertile in development of legal meaning.

There may be something to this, but as an explanation it has two flaws. First, it only applies to societies in which the legislative power resides in a group, a situation by no means universal in human history. If the legislator of a polity is a single individual whose will is law—Justinian's *lex animata in terris*,<sup>345</sup> for example—there is no "group" that is generating the legal meaning, and therefore no nomic community. This difficulty might be circumvented by viewing the monarch's court, with its attendant viziers, chancellors, courtiers, and functionaries, as the nomic community that is really creating legal meaning, and the mon-

---

345. The principal repository of law in Justinian's time was his *Digest*. See W.W. BUCKLAND & ARMOND D. MCNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* 12 (reprint ed., Wm. W. Gaunt & Sons, Inc. 1994) (1936).



arch as merely an important participant and mouthpiece.<sup>346</sup> The more important problem is that, in simply positing that the legislature is a jurisgenerative community, there is no explanation as to why other such communities defer to it. That they do is plain; the very essence of a legislature is that groups within the polity generally obey its norms. It is important to know why other jurisgenerative groups routinely assume that norms developed by the legislature are appropriately backed by state force, even in situations—such as acts regulating commodity futures trading or telephone rate tariffs—when most groups have not the slightest idea what those norms are.<sup>347</sup>

### 3. *The Forum for Conflicts of Interests*

A second approach to understanding what the legislator is doing is to look at the situation as public choice theorists have: the legislature, at least in a complex democratic society, is a forum in which various interest groups are allowed to clash. Legislators fight out the political preferences of various groups, and one group or a coalition secures its own selfish preferences as law.<sup>348</sup> This approach, however, also does not answer the question. It may be a very accurate description of how the process works—e.g., how particular interest groups get particular bills through Congress—but it does not explain why the legislature is the place where such battles should be fought, let alone why members of disfavored groups should view the results as some-

---

346. This probably is not a bad description of the real process. In societies in which the sovereign is posited as the origin of all human law—the Roman empire of Justinian or the France of Louis XIV—the vast majority of what counted as law probably resulted more from the workings of groups surrounding the sovereign than from any personal involvement or will of the individual sovereign.

347. Paul Kahn has argued that this problem of explaining why a society ought to grant authority to legal rules is endemic to every attempt to create a theory of law as arising from a deliberative community. See Kahn, *supra* note 36, at 79-81.

348. See generally ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 31-54 (1982) (discussing autonomous groups as a strength and weakness of democratic systems).

how normatively binding.<sup>349</sup> What happens within the legislative process does not explain why people pay attention to its results.

#### 4. *The Delegated Norm-Speaker*

A third and more fruitful approach is to remember that the polity is itself a jurisgenerative community in the sense that it has potent narratives, complex structures, and both makes and receives powerful commitments. Members of the polity share in its narratives, which include powerful stories of the lawful order arising from the unlawful.<sup>350</sup> As participants in the normative universe of the polity, most individuals and groups within it will understand that they live in an organized polity. Given the dangers of the world, they will recognize that an organized polity is a good thing, and that structures and rules that define the conduct of members of the polity are necessary and desirable.<sup>351</sup> Once the desirability of an organized polity is accepted, it becomes apparent that there are only two possible ways to achieve the necessary coordination: unanimity or authority.<sup>352</sup> Because

---

349. In fact, when people start to believe this interest group politics version of the legislative role, the result is usually anger and hostility and a *decreased* respect for its authority. See, e.g., WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 105-22 (1992) (describing "bargaining over the law itself" as providing rich benefits for special interest groups); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 62-83 (1995) (surveying and analyzing popular opinions about Congress, which are not high); Dan Balz & Richard Morin, *A Tide of Pessimism and Political Powerlessness Rises*, WASH. POST, Nov. 3, 1991, at A1 (reporting that "seven in 10 Americans believe the government is controlled by special interests" and concluding that "the political system is in crisis"). Concern over such undue influence has even led to calls for forcibly muzzling some voices in the marketplace in order to ensure full and fair public debate. See OWEN M. FISS, THE IRONY OF FREE SPEECH 4, 18 (1996).

350. These include, for example, the Hebrew narratives of Moses bringing down the Decalogue from Mount Sinai and the American narrative of revolt against arbitrary and capricious government and establishment of a new, more just order.

351. In general, the point seems self-evident. Historically, the most prominent apparent exception is the substantial anarchist movement that flourished in the century between 1840 and 1940 and refused to accord any authority to the state. Even here, however, the issue is not clear. For an interesting exchange of views as to whether anarchism rules out all authority and coercion or only such authority as is "imposed from above," see NOMOS XIX: ANARCHISM 91-140 (J. Roland Pennock & John W. Chapman eds., 1978).

352. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 232-33 (1980) (arguing

unanimity in a polity is a practical impossibility on any issue that has more than one possible solution,<sup>353</sup> and because the perceived necessity for coordination is great, the polity as a nomic group will be driven to develop (i) mechanisms that provide for direction in the absence of unanimity, and (ii) norms that require deference to such direction.

Having accepted the binding power of norms and the necessity for authority, members of the polity inevitably will recognize the authority of a lawgiver for two reasons. The first is practical: In a group the size of a modern state—and probably in a polity of any size—offices and responsibilities within the group necessarily will be delegated to members of the polity.<sup>354</sup> Some members will be responsible for enforcing the norms, some for interpreting them, and, in any system that recognizes the validity of human-made law, some for declaring what at least some of those norms are, or “legislating.” Certain norms may be anterior to the polity (e.g., bans on murder, theft, incest), but many others necessarily arise *out of* the polity or reflect new norms that have developed and become widely shared by members. Someone must have responsibility for declaring the norms of the polity. It may be an assembly of the citizenry as a whole or it may be a hereditary monarch, but in a jurisgenerative world of conflicting meanings someone necessarily has the task of declaring the basic laws. It will be a fundamental norm of nearly every group in the society that the norms declared by the legislator generally must be followed and enforced. This norm is itself a legal norm; the group has determined that pronouncements of the legislator on certain subjects that are announced in a certain manner will be backed with the violence of the state.

The second reason the role of the legislator is accepted is inherent in the concept of legal meaning used here, which requires

---

that such concepts as exchanges of promises are merely variants of the idea of consensus).

353. Finnis notes that the problems of obtaining unanimity are difficult enough in any group, but they are “particularly far beyond the bounds of practical possibility” in a political community, where the common goods are the most complex, the range of individual and group goals is limitless, the issues are always open-ended, and “intelligence and dedication” are mixed with “selfishness and folly.” *Id.* at 233.

354. See DAHL, *supra* note 348, at 47-53.

that the legal order be objectified.<sup>355</sup> The very concept of law, Cover notes, entails the notion that it is something *outside* oneself, to which one can pledge faith or against which one can issue defiance.<sup>356</sup> A person cannot “obey” herself or “defy” herself in any meaningful way—all she is doing is changing her mind—but she can obey or defy the law. She can do so because she sees it as separate and apart from herself. She can see it that way in large part because it comes from a *source* outside herself. This idea of an external source is critical. Any given society may find its source in God, nature, reason, monarch, or parliament, but it will recognize a source for its law. For any society that regards human-made law as valid, one important source will be the persons or structures designated to announce what the laws are.<sup>357</sup>

Participation in the normative universe of any peaceful state normally will carry with it a commitment to follow the norms set down by the legislator.<sup>358</sup> The group will regard the failure to do so as grounds for infliction of state violence. The individual who commits to such a norm in one nomic group—the state—will carry it with her when she moves among the other nomic groups in which she participates. Nomic groups within the state usually are made up of individuals who also participate in the *nomos* of the state; it therefore seems likely that these nomic groups will come to regard the function of the legislator as legitimate and desirable.<sup>359</sup>

355. See *supra* notes 237-42 and accompanying text.

356. See Cover, *supra* note 2, at 45. The commitment to law as an external force helps to solidify human organizations, and probably makes people more willing to use force against malefactors who violate it. Cf. Cover, *supra* note 27, at 1613-15 (discussing institutional influences on judicial willingness to inflict violence).

357. Obviously, nothing in this suggests what the scope of any particular legislative authority must be. In some societies, the legislature is theoretically omnipotent, and in some it is sharply limited. This is due simply to the fact that in some societies, such as the United States, there are multiple sources of law (e.g., Congress, the Constitution, the individual states), and any particular legislature exercises only some of that authority.

358. For example, it is difficult simultaneously to accept the American narrative, engage in the reciprocal commitments involved in American citizenship, and recognize the supremacy of the Constitution without also agreeing that Congress has the power to make laws. One can, of course, deny any of those points, but if the individual holds them as part of her normative universe, it requires a great deal of effort and ingenuity to conclude that the U.S. Code is not law.

359. Groups as normatively different as the Chamber of Commerce and the AFL-

### 5. *Legislator, Judge, and Community*

The legislator, in this account, performs the function of announcing some of the norms that individuals and nomic communities will tend to follow. There are two qualifications here. It is only *some* of the norms because some societies with relatively advanced legal norms do not have a separate legislative function,<sup>360</sup> and even in those that do, many legal norms may be developed solely through the judicial process, as in the classic common law tradition. Noting that groups merely *tend* to follow these norms raises an important distinction. Law is not words on paper in this or that form that are issued following particular kinds of ceremonies.<sup>361</sup> It is, rather, a set of mutual commitments, and an act of a legislator only becomes law if people are committed to obeying it and the state is committed to enforcing it.<sup>362</sup> When the legislator creates a text, oral or written,<sup>363</sup> the legislative "cluster of practices" that are "taken together and acknowledged as legitimate by the larger society"<sup>364</sup> will help

CIO, the NAACP and the Ku Klux Klan, the Mennonites and the Secular Humanist Society, therefore, will all generally accept Congress's *power* to make laws even when they disagree strongly with particular exercises of that power.

360. See RAZ, *supra* note 103, at 45-52.

361. Cf. VON SAVIGNY, *supra* note 77, at 30 (explaining that law forms within groups "by internal silently-operating powers, not by the arbitrary will of a law-giver").

362. Cf. I THE DIGEST OF JUSTINIAN 1.3.32 (Theodor Mommsen et al. eds., 1985) (explaining that "statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace"); RAZ, *supra* note 103, at 43 (arguing that "a legal system is not the law in force in a certain community unless it is generally adhered to and is accepted or internalized by at least certain sections of the population").

363. The term "text" is used here as Cover uses it, to include "not only self-conscious, written verbal formulae, but also oral texts . . . and 'social texts,' which entail the 'reading' of meaning into complex social activity." Cover, *supra* note 2, at 40 n.115 (citations omitted); see also JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 4 (1984) (including within a definition of "text" any situation in which "a person uses language [whether written or oral] to claim a meaning for experience, to act on the world, or to establish relations with another person"). Thus, such things as the oral traditions and customs of the Amish are "texts" from which legal meanings may be constructed. See Cover, *supra* note 2, at 29-30.

364. Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1089 (1997).

groups to recognize that they should regard it as a *legal* text. When judges construe the text, another rule of recognition will signify, in a modern Western society, that this judicial decision is also a *legal* text. It is the interaction of these legal texts, as noted above, that leads to jurisgenesis.<sup>365</sup>

The jurisgenerative process thus is endlessly recursive. Nomic groups create norms. These norms influence a legislator to enact statutes to enforce them. (They may also, of course, directly influence judges to enforce them even in the absence of a statute.) The statutes become embodied in texts, which, given the limits of human language, can never be perfect embodiments of the norms.<sup>366</sup> Different nomic groups thus will generate different legal meanings. The statutory texts and the divergent legal meanings that surround them then influence judges in making their decisions. The judges' decisions create new judicial texts, which in turn influence the legislator. The nomic communities, faced with new legal texts, must interact with them again to create new legal meanings, which will again diverge.<sup>367</sup> These new com-

---

365. The role of the judge in creating a legal text is much more important in systems in which judges generally exercise interpretive authority and issue opinions in written texts. Even in systems that deny such authority to judges and in which judges do not create oral or written texts, though, the perceived pattern and practice of judges in actually deciding cases may itself become a social text which is "read" by those who perceive the patterns.

366. The norm that the legislator announces must be communicated in language. Language is for most purposes a reasonably clear tool and legislators are, by and large, unusually clear speakers. Language is, however, never so precise that every possible question is excluded. It is not necessary to agree that language is always "radically indeterminate," STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 190 (1994), to understand that questions sometimes will arise concerning the meaning of a particular text. Cover himself uses the familiar example of whether an airplane is a "vehicle" for purposes of a statute prohibiting "vehicles" in a park, see Cover, *supra* note 2, at 7, an example presumably taken from Hart, see HART, *supra* note 103, at 126. Difficulties arise here mainly because English has no convenient term that includes automobiles, trucks, horse-drawn carriages, hot-dog pushcarts, rickshaws, and airplanes, but excludes horses, motorboats, bicycles, motorized wheelchairs, and baby carriages. There is thus at least some play in the language. A better understanding of what the norm means and what it requires will emerge as it comes to be applied in particular situations, as people interact with it.

367. Cover sometimes couches this process more in the context of violence than of debate. See Cover, *supra* note 2, at 53 (explaining that "the state influences interpretation: for better or worse, most communities will avoid outright conflict with a

peting legal meanings developed by the nomic groups influence the legislator and the judge—and so on. As James Gardner explains:

[T]he process whereby various groups within society generate interpretations of the law—what Cover called the “jurisgenerative” process—does not take place in some kind of pristine setting independent of actual judicial interpretations. Rather, judicial interpretations help constitute the conditions under which jurisgenesis takes place, and in fact occupy a special role in constituting these conditions precisely because society understands judicial power to be legitimate and authoritative. To oversimplify somewhat, members of society are predisposed (though never required, of course) to say: “If the court ruled that we hold such-and-such values, then, by golly, we must hold them.” Indeed, for an authoritative institution like a court to make such a ruling is part of what it means for a society to hold certain values.<sup>368</sup>

In any functioning state, the relationship between sovereign and subject is never completely that of one-who-orders and one-who-obey. It is a dialogue, though frequently a very imperfect one, in which individuals and groups interact with each other and with the hierarchy of the state, and in which each is changed in the process.

### G. A Brief Recapitulation

By now, the first sketched outline of a jurisgenetic model of law should have begun to appear. For clarity’s sake, it is worth summarizing these basic points, which would form the basis for a larger and more detailed theory.

---

judge’s interpretations, at least when he will likely back them with violence”). This violence indeed may cause a community that disagrees with a decision to “elaborate the hermeneutics of resistance or of withdrawal,” *id.*, but as he recognizes, elsewhere there are more possible responses than fighting or fleeing: the community may change its normative universe. Bob Jones University, for example, when under threat of unfavorable tax status, reinterpreted its biblical texts to permit unmarried blacks to be admitted as students. *See id.* at 51.

368. James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1041 (1993) (footnotes omitted).

1. Nomic groups are those which share (i) a common narrative, (ii) a social organization, and (iii) a set of mutual commitments. Size is irrelevant. The modern state is a nomic community and contains within its borders countless other nomic communities—some private, some governmental. Some communities cross state boundaries.

2. Each nomic group has a distinctive shared normative universe, a world of right and wrong, lawful and unlawful, which is as real to its members as the physical universe of space and time and can be affected by them in much the same way. The shared normative universe is a human artifact, but it is not a deliberately constructed one. Members of the group exist within that shared universe and see it as something outside themselves. They perceive and understand events and texts through and in the context of the normative universe.

3. Each individual is a member of multiple nomic groups. She therefore exists within multiple normative universes, and her own internal world view is influenced by the shared normative universe of each group to which she belongs. Her internal world view thus may not be entirely congruent with the normative universe of any single group. It overlaps to a greater or lesser degree those of the groups to which she belongs.

4. Each individual who participates in more than one nomic group faces internal dissonance when the shared normative universe of one group conflicts with that of another group to which she belongs.

5. The individual will be driven to resolve the dissonance. She can do so either by leaving a particular group, or by attempting to alter the group's shared normative universe in order to make it more consistent with her own.

6. Each nomic group is made up of individuals who not only share its universe but also participate in the shared universes of other nomic groups. As these individuals strive to reduce their dissonance, they exert pressure on the group to alter its normative universe to take account of the different meanings that they have learned from their other groups. The group's universe begins to fracture as its members, influenced by the normative universes of other groups to which they belong, dissent from some of its principles.



7. At the same time that the group's shared normative universe is splitting into different strands, members are pushing parts of it closer to the normative universes of other groups in society. The process of breaking apart and coming together is continuous.

8. As a result of this process of splitting and recombining, the normative universes of most groups within a polity will, if one examines the vast universe as a whole, look very similar to those of most other groups in the polity, although important differences will remain. The appropriate picture of any society is not a checkerboard of self-contained normative universes, but a series of transparencies which, overlaid one on top of another, reveal a general, overall pattern of light and shade that is not identical to that of any one transparency, but bears a strong resemblance to nearly all of them.

9. The members of every nomic group within the state are also members of the nomic group that *is* the state. Because of the interaction of the members of the state with other nomic groups, the norms of the state will be driven to reflect the norms of most of the other nomic groups—or at least the dominant ones—while those of the other nomic groups will be driven to reflect the norms of the state.<sup>369</sup> There may be sharp differences between a particular nomic group and the state, but the normative universe of any given nomic group usually will be much more similar to that of the state than it will be different.

10. Nomic groups generate norms, which are standards of conduct accepted by the members of the group as binding rules of correct action. Norms are generated constantly and spontaneously for the ordering of the group and its dealings with others. They arise from the interactions of group members with each other, with outsiders, and with various narratives and other texts.

---

369. This is not to say that all state norms will be widely shared. It is perfectly possible for a particular state to have one or more norms that conflict with those of most other groups within a society. It is likely that, for the purely practical purposes of keeping peace and order, the state will try to have relatively few of these, and it will attempt to convince other groups, through education or otherwise, to accept the norms of the state as their own.

11. A core norm of nearly all nomic groups in a state is that it is appropriate to enforce certain norms through the use of organized and controlled violence. The state's own narratives and organization will cause it to assume that responsibility. Nearly all nomic groups in a state will agree that it is appropriate for the state to control and wield such violence when legal norms are involved.

12. Norms become legal norms when (i) the members of a nomic group make a subjective commitment that they be backed by the violence of the state, and (ii) the norms are objectified and posited as something existing independently of the individual.

13. Objectification will lead each nomic group to identify one or more *sources* of what it considers to be law. The sources of law will be external to the individual member of the group.<sup>370</sup> In large polities—such as the modern state—in which human-made law is recognized, the polity as a nomic group will itself delegate the authority to declare group norms to one or more members, a function called legislation. The legislator's role is to declare that certain norms are those of the nomic group that is the state, to act as a source for the state's legal norms.

14. These legislated norms will reflect the preexisting legal norms of some or all of the nomic groups in society. These norms will be embodied in texts, which because of the imperfections of language—and perhaps the lack of explicit agreement on details—will only imperfectly embody the norm.

15. The legal norms created by any nomic group arise from the interaction between the normative universe of the group and the legal texts—oral, written, or social—that have come from the group's sources. Unclear language, unforeseen circumstances, and lack of agreement on detail will, when filtered through the lens of the group's normative universe, cause groups to understand the texts, and thus the legal norms, differently. The same text thus will give rise to multiple legal meanings depending on the normative universe of the reader.

---

370. The source may be human or divine, living or dead. In the case of a direct democracy, where all members of the polity vote on the law, the source is still external to the individual because the collective body of citizens is seen as something separate and distinct from the individual citizen.

16. The meanings that any nomic group takes from its legal sources, when channeled through its own shared normative universe, will lead the group to come up with a meaning that it objectifies and is willing to have backed by the violence of the state. This is the creation of legal meaning, or *jurisgenesis*.

17. All creation of legal meaning takes place in the shadow of violence. The specter of violence controls and constrains the creation of legal meaning, because the range of possible meanings that any nomic group is willing to enforce by violence is narrower than the range of all possible meanings. Each actor in the process of adjudication—and each group member—makes her interpretations with the understanding that violence will follow that meaning.

18. The *jurisgenerative* process is recursive. The norms created by nomic groups influence legislators to enact certain norms in the form of statutes. The norms and the statutes together influence judges to reach certain decisions. The judicial decisions and the statutes in turn influence the norms of the nomic groups. This continues in an endless loop, driven by the perceived need to bring coherence out of dissonant materials.

19. On the great majority of legal questions, the great majority of the nomic groups within the state will share the same legal meaning. These are the easy cases, in which the law is viewed as settled because there are no substantial alternative legal meanings being seriously advanced by any significant nomic group. On some issues, however, nomic groups will have arrived at different meanings that may compel different results in any given case. These are the hard cases.

20. In a hard case, a judge is faced with competing legal meanings and must choose one. In so doing, the judge will elevate one of the competing meanings into the official state-enforced law, and the remainder will be ruled not to be law at all.

21. In making the decision among competing legal meanings, the judge is constrained by (i) the fact that only a fairly narrow range of meanings can plausibly be advanced as legal; (ii) the structure of litigation, in which only some legal meanings will be advanced; and (iii) the hierarchical nature of legal authority and the courts, which will further narrow the range of possible choices. The judge thus will pick from among the competing legal

meanings advanced by nomic groups and will not herself create law *ex nihilo*.

22. The judge's selection of a legal meaning simultaneously recognizes a preexisting legal meaning and creates a text that makes that preexisting meaning into something new and more potent: a legal meaning backed by the violence of the state, or "law."

23. The judicial decision then becomes a text—oral, written, or social—which is then absorbed and reinterpreted by the nomic groups in light of their shared normative universes. When the vast majority of nomic groups accepts the judge's meaning, the law becomes "settled"; when some do not, the process of jurisgenesis continues apace.

#### IV. CONCLUSION

The jurigenetic model outlined above provides the beginnings of an explanation for where law comes from and what judges do. It is obviously incomplete—a complete theory of law is manifestly beyond the scope of this Article—but there is enough here to see that this bottom-up approach can provide a very different account of law from the top-down reasoning common to most twentieth-century legal theories. In particular, there is a reasonably coherent account of what a judge does when faced with a case of clashing legal interpretations, an account that is different from that held by those previously labeled creationists, applicationists, and illusionists.

The striking advantage of this approach is that it may offer a simpler explanation for much of what one sees when observing the actual operation of a modern legal system, without relying on the sort of error theories—e.g., lawyers are ignorant, judges are deceptive—often used to explain why many modern legal theories do not seem to mirror what those within the legal system actually experience.<sup>371</sup> It potentially offers different answers to some very common questions that legal theory has had trouble answering to everyone's satisfaction. For example:

---

371. Soper notes the disjunction between theory and observed practice. See SOPER, *supra* note 25, at 1-7.

*Why do litigants act as if they believe there is really a correct answer, even in a hard case, and they are entitled to a decision? Why don't all of them act like Holmes's bad man,<sup>372</sup> viewing the courts like large casinos in which probability is the only relevant question? The jurisprudential model suggests that they believe there are correct answers because their view of the law is integrated into their entire normative universe. Their legal meaning is consistent with the fundamental right/wrong concepts of their normative universes, and thus they view any decision in the case as either correct or incorrect, not simply more or less likely. They may understand that honest people disagree about an issue, but they do not think the case is *hard* once all the relevant issues are analyzed. They see themselves as correct and the other party as simply wrong. A decision against them is therefore not merely unfortunate, as the bad man would see it, but wrong.*

*If judges do indeed legislate, why do judicial procedures look so different from those seen in legislative assemblies? Legislators conduct public hearings, take polls, consult independent experts, and meet with lobbyists. Judges generally do not. The jurisprudential model suggests that the procedures differ because judges really see themselves as performing different functions than legislators. Legislators are declaring a new norm or a modification of an existing norm, based on their view of what norm ultimately is best for the polity. Judges are merely trying to determine what the norm is. It is true that they are, in fact, choosing among a variety of legal meanings, but the fact that they are themselves situated in a normative universe means that they will view the alternatives not as equally plausible options to be selected, but as proffered solutions that are either correct or incorrect, to greater or lesser degrees. In such a case, the judge will tend to think of her decisions as either right or wrong from the perspective of the legal meanings. Determining what the law *is* requires consultation of the legal texts in light of the competing legal meanings being advanced (and often some substantial thought), but it does not require the kind of procedures a legislator would need to determine whether a particular norm is socially desirable.*

---

372. See Holmes, *supra* note 223, at 459.

*If in hard cases the judge has discretion to decide as she chooses, why do lawyers in such cases spend so much time making legal arguments when they should be making policy arguments?* Experience suggests that even in hard cases, arguments made to judges are much more likely to focus on purely legal issues than on the issues of policy that would most likely influence a legislator.<sup>373</sup> Lawyers are taught that even in hard cases it is critical to argue that the law is already on their side, rather than attempt to convince the judge that she ought to make a new rule in their favor.<sup>374</sup> The jurisprudential model suggests that this is because the

---

373. This can be seen in any random sample of recent cases from the U.S. Supreme Court. The arguments actually made to the Justices and the questions they ask are summarized in *United States Law Week*. Looking at several recent cases from the Court's last session, in which at least two justices dissented (presumably hard cases), it is apparent that purely legal issues dominated the oral arguments. In each case, the summaries show the parties essentially trying to convince the Court that the text and history of particular statutory provisions and the rules of prior cases compel results in their favor. In no case did a lawyer attempt to argue that the law was unclear and the Court should create its own rule. The cases consulted include: *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) (holding that an employer can be vicariously liable for sexual discrimination without personal culpability), *oral argument summarized* 66 U.S.L.W. 3633 (Mar. 31, 1998); *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) (holding, in part, that a sexual harassment action does not necessarily fail for lack of proven adverse job consequences), *oral argument summarized* 66 U.S.L.W. 3697 (Apr. 28, 1998); *United States v. Balsys*, 118 S. Ct. 2218 (1998) (holding that the privilege against self-incrimination does not apply to a concern over foreign prosecution), *oral argument summarized* 66 U.S.L.W. 3729 (May 12, 1998); *Clinton v. City of New York*, 118 S. Ct. 2091 (1998) (striking down presidential line-item veto), *oral argument summarized* 66 U.S.L.W. 3713 (May 5, 1998); *Calderon v. Thompson*, 118 S. Ct. 1489 (1998) (holding that Ninth Circuit's recall of mandate in death penalty case was grave abuse of discretion), *oral argument summarized* 66 U.S.L.W. 3441 (Jan. 13, 1998); *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927 (1998) (holding that an administrative interpretation of the Federal Credit Union Act was unreasonable), *oral argument summarized* 66 U.S.L.W. 3273 (Oct. 14, 1997); *Regions Hospital v. Shalala*, 118 S. Ct. 909 (1998) (holding that the Secretary's interpretation of the Medicare Act was reasonable), *oral argument summarized* 66 U.S.L.W. 3426 (Dec. 23, 1997).

374. The sample briefs in popular first-year legal writing texts are almost invariably written this way. See, e.g., RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* app. E (3d ed. 1998); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *LEGAL WRITING AND OTHER LAWYERING SKILLS* app. V (3d ed. 1998). The sample briefs in a lawyer's text, written by a respected federal judge, have the same characteristic. See RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* §§ 13.4.3 to 5.1, at 250-59 (rev. 1st ed. 1996).

judge is never truly legislating from scratch, but rather is selecting a preexisting legal meaning. Judges generally are trying to determine what the legal norm is, and not what the best social policy is for the state.<sup>375</sup> Arguments made to them therefore generally focus on showing the judge that the particular interpretation advanced by the litigant is the *correct* one.

*Why do judges insist that they are not legislating?* Even in hard cases, judicial opinions hardly ever suggest that the issue they face is one to which there is no right answer or admit that they are simply choosing the result they think is best.<sup>376</sup> They vehemently deny the charge that they are "legislating."<sup>377</sup> The jurisgenetic model suggests that the judge is neither stupid nor deceitful—which she often is accused of being—but that she is being honest and accurate. She really does not perceive what

This is particularly significant, because for pedagogic reasons the briefs in such texts are deliberately chosen to represent hard cases in which the issues are fairly evenly balanced.

375. Of course, there are individual judges who for political reasons actively use their office to push their own social agendas, just as there are executives who for political reasons refuse to enforce particular laws, and legislators who for political reasons vote for legislation they know is harmful. These are individual acts of lawlessness, though. A theory of the executive power of the state does not require us to justify the Watergate burglary, and a theory of judicial power does not require us to justify every decision ever made by any judge.

376. See, e.g., Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 188-89 (Peter Brooks & Paul Gerwitz eds., 1996) (complaining that judges never admit that a case is close). Another writer notes, not without acerbity, that:

The one thing a judge never admits in the moment of decision is freedom of choice. The monologic voice of the opinion can never presume to act on its own. It must instead appear as if forced to its inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all thought of an unfettered hand.

Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J.L. & HUMAN.* 201, 206-07 (1990).

377. See, e.g., *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 (1995) (noting "[o]ur obligation to avoid judicial legislation"); *Peralta Community College Dist. v. Fair Employment & Hous. Comm'n*, 801 P.2d 357, 369 (Cal. 1990) (in bank) (criticizing other courts for "patent judicial legislation"); *Nixon v. Blackwell*, 626 A.2d 1366, 1380-81 (Del. 1993) (refusing to engage in "inappropriate judicial legislation" to protect minority investors); *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (explicitly denying that it is engaging in "judicial legislation" in legalizing same-sex marriages); *People v. Coe*, 522 N.E.2d 1039, 1041 (N.Y. 1988) (refusing to engage in "impermissible judicial legislation").

she is doing as creating new rules in the absence of law. Faced with competing preexisting legal meanings, her role is to choose the one that seems most correct, the one that is closest to what the norm *really* means. She may agonize over the issue, but she ultimately will choose the one she thinks is correct. Her opinion thus will focus on proving why the decision is correct. Other judges may disagree with her conclusion because they see the competing legal meanings in light of their own *nomoi*, but she will regard them as having chosen incorrectly.

These are simply a few of the questions about which modern theories have given conflicting answers. There are many others. Why do people obey the law? How can one reconcile the judicial office with democratic theory? Why does the legal reasoning taught in law schools have its peculiar shape? Is tribal law really "law"? A full exploration of any of these questions would take us too far afield, but it seems clear from even this brief consideration that a jurisgenetic model may generate answers substantially different from those given by some of the dominant theories of our day.

This Article focuses on the descriptive aspects of the jurisgenetic model. It deliberately does not examine the normative question of whether jurisgenesis in Cover's sense is a good thing that ought to be encouraged. This is partly because it is fatally easy to get confused when one begins conflating a description of a process with one's normative evaluations of it. There is certainly some of that in Cover; the very Babel of meanings presupposed by the model is for him a positive good.<sup>378</sup> The legacies of Social Darwinism and Marxism, however, have perhaps taught us that coupling descriptive claims of an inevitable process with enthusiasm for its results can sometimes lead to unfortunate consequences. Jurisgenesis may be "both relentless

---

378. Ronald Garet believes that, for Cover, any reduction in the Babel of meanings would have been a bad thing—even if reducing those meanings could have ensured a regime of true justice on Earth. This ultimate vision of justice ("the Messiah") is, for Cover, something to be kept away at all costs, lest it impair the "tension" between our visions and our reality. See Garet, *supra* note 13, at 1821 (arguing that for Cover, "law is a device for warding off the Messiah, not a device for bringing him"); cf. Kahn, *supra* note 36, at 57 (noting that, for Cover, "discreetness and insularity are marks of political virtue; they are not the source of a political defect").



and endless,<sup>379</sup> but it will be just as relentless and endless whether one likes it or not.

The lack of any normative discussion is also partly because—despite claims that jurisgenesis “give[s] voice to the voiceless”<sup>380</sup> and prevents the creation of legal meaning from being “the exclusive province of a small group of elites”<sup>381</sup>—there really is remarkably little normative content in this account. Even Cover himself, confronted with an actual nomic clash in *Bob Jones University*, proved in the end unable to explain how his approach would lead the Supreme Court to have held for one side or the other.<sup>382</sup> His warmest admirers have been troubled by the lack of any substantive normative standard.<sup>383</sup> A variety of critics have pointed out, with some justification, that if the norms of sociopathic racists are formally equal to those of saints and civil rights leaders, society may find itself having to tolerate a great many intolerable things.<sup>384</sup>

379. Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1541 (1990).

380. Anthony E. Cook, *The Temptation and Fall of the Original Understanding*, 1990 DUKE L.J. 1163, 1197 (book review).

381. *Id.*

382. See Cover, *supra* note 2, at 66-67.

383. Martha Minow, in her sympathetic summary of Cover's work, asks, “Is there a normative content or direction from this decidedly pluralistic vision?” Martha Minow, *Introduction to NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 1, 10 (Martha Minow et al. eds., 1992). The answer she produces is not exactly ringing: the best that Cover offers, she writes, is the principle that people “must exhibit enough mutual respect at least to coexist.” *Id.* at 11. William Eskridge, in his study of jurisgenesis, notes wryly that “[r]ecognizing that law is created by nomic communities from the bottom up does not tell us which community's views should prevail.” Eskridge, *supra* note 13, at 179.

384. Mark DeWolfe Howe made this point a half-century ago. See Howe, *supra* note 60, at 95 (discussing *Terry v. Adams*, 345 U.S. 461 (1953), in which the private Jaybird Democratic Association refused to permit blacks to participate in political caucus); see also Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong “Marriage by Capture” Case in Fresno, California*, 4 S. CAL. INTERDISCIPLINARY L.J. 1, 4 (1994) (describing the problems of the “traditional Hmong ‘marriage by capture’ ritual” in the context of a California rape prosecution); Margulies, *supra* note 24, at 179 (suggesting that Cover's vision would legitimate pervasive ideologies of racism and sexism). Some have argued that Cover's analysis systematically ignores the intolerance and lack of democratic processes within these groups. See, e.g., Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 752 (1992) (noting that Cover ignores “the hierarchical structure of jurisgenesis—in the insular religious communities or the legal

This Article should not close, however, without drawing attention to some substantial affinities between the jurisgenetic model and traditional positivist, natural law, and legal realist/CLS theories. Cover uses very different terminology, but the focus on public acceptance as the root of law is not as far from positivism as it might look. In both cases, law is posited in the very human sense. Law is contingent and would be different if human beings had made different choices. The major difference between traditional positivism and the jurisgenetic model arises chiefly from different vantage points. Positivists tend to focus on law from the top down, through the lens of the organized legal system, while the present analysis has regarded it from the bottom up, through the lens of the individual who is subject to the laws and the groups who make up society. The positivist focuses on the legal texts, which are clearly known and plainly finite. One who takes this point of view is, perhaps inevitably, driven to the binary notion that there is "law" where the texts are clear and "no law" where they are not. In such a situation, there is virtually no choice but to view the judge as filling a gap or removing uncertainty. The jurisgenetic model, on the other hand, focuses on the perceptions of those who are subject to the law—what do *they* think the law is? The answer to that question will, perhaps inevitably, drive one to the notion that there is not one legal system with uncertain aspects and scattered holes, but many competing legal systems that share the same texts and so overlap each other that there are never any holes.

There also may be more affinity with natural law in this account than is first apparent. A model of law as something that bubbles up spontaneously from nomic groups may not seem to

---

system" (citation omitted)); John Valery White, Note, *Reactions to Oppression: Jurisgenesis in the Jurispathic State*, 100 YALE L.J. 2727, 2728 (1991) (arguing that norms of ordinary group members may diverge from those of elites who determine group orthodoxy). Cover himself was not entirely insensitive to these issues. He recognized that some nomic groups may use force to ensure orthodoxy that "brook[s] neither exit nor effective dissent." Cover, *supra* note 2, at 52 (noting an example of the Mormon army at Nauvoo, Illinois). Shortly before his death, he wrote that his work in *Nomos and Narrative* "in no way holds up insular religious communities as a model for law reform," but merely as "examples of divergent understanding of legal meaning." COVER, *supra* note 147, at 730 (quoting an unpublished note written by Cover).

leave much place for any conception that the validity of human law depends upon its being derived from natural law or reason and not being "materially unjust."<sup>385</sup> The model by no means rules out appeals to transcendent values, though. Nothing about it suggests that an unjust law should or should not be obeyed. It focuses merely on *how* humans go about making their human law. In this view, the natural or divine law may be operating, and it ultimately may determine what one views as law, but it is working at a more fundamental level than the mere development of legal rules. It works at the level of universe-creation. It drives the normative universe, and the normative universe then shapes the law.<sup>386</sup> Nothing about this need conflict with any major natural law theorist from Aquinas to Finnis.<sup>387</sup> In an important sense, the jurisgenetic model is more compatible with systems of natural law than are alternative positivist systems because it recognizes that law necessarily reflects, to a greater or lesser degree, the transcendent values of society.

There are more fundamental differences between the jurisgenetic model and the views of the legal realists and the CLS theorists. Cover believed that law is necessary, legitimate, and good. He wanted more of it rather than less, which put him at odds with those who view law as unnecessary, harmful, or even hallucinated. Even here, though, the differences between the jurisgenetic model and the views of most in the CLS camp are not necessarily insurmountable. Those who believe that law, as presently constituted, is merely organized force imposed upon people in the interest of class or racial or sexual domination may argue that a view of law as naturally bubbling up from the bottom downplays the influence of the social hierarchy. That does not logically follow. The model merely says that law is born and flourishes in the normative universes of people; it does not tell

---

385. FINNIS, *supra* note 352, at 27.

386. For an interesting account of how Babylonian and Jewish ideas of justice worked their way into the very practical Roman law, and how that law then exerted an influence over the civilizations of those it touched, see Charles H. Kinnane, *Roman Law as a Civilizing Influence*, 2 DEPAUL L. REV. 28 (1952).

387. See *id.* at 29, 30 (noting that legal rules grew out of notions such as "individual moral personality before the law" and that "certain large elements of freedom are essential to justice").

us how those normative universes came to assume their present shape. The model suggests, for example, that the law protects private property because that is a fundamental conception of the normative universes of most groups in society. It does not a fortiori rule out the possibility, however, that the conception of private property may itself be the result of deliberate campaigns of violence and psychological domination that have been internalized by its victims. The hierarchy, in short, may control the law, but if so it is achieving its domination at a deeper level than is usually assumed.

It would be too much to suggest that the jurisgenetic model offers a way to reconcile these very different strands of legal theory. It is, however, a powerful way of looking at law and at what judges do. Despite the daunting and sometimes high-blown rhetoric, Cover's vision is intensely practical; it makes one look for law not in the high mountains of philosophy but in the everyday realities of ordinary people, in what they do and what they think about what they do. In separating the generation of legal meaning from the imposition of legal enforcement, and in recognizing the role that nomic groups play in shaping that legal meaning, the jurisgenetic model may offer a basis for constructing a very different theory of law, one that will provide better answers to some of the most nagging questions of legal theory. At worst, it presents an interesting and useful perspective on the dominant legal theories of the day. If, as noted at the beginning, the current debate about the nature of law is sometimes thought to be largely meaningless,<sup>388</sup> even a fresh perspective is welcome.

---

388. See *supra* note 25 and accompanying text.