Essays

Violence and the Word

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I. Introduction: The Violence of Legal Acts

Legal interpretation[1] takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. This much is obvious, though the growing literature that argues for the centrality of interpretive practices in law blithely ignores it.[2]

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There are always legends of those who came first, who called things by their *right* names and thus founded the culture of meaning into which we latecomers are born. Charles Black has been such a legend, striding across the landscape of law naming things, speaking "with authority." And we who come after him are eternally grateful.

I wish to thank Harlon Dalton, Susan Koniak and Harry Wellington for having read and commented upon drafts of this essay. Some of the ideas in this essay were developed earlier, in the Brown Lecture which I delivered at the Georgia School of Law Conference on Interpretation in March, 1986. I am grateful to Milner Ball, Avi Soifer, Richard Weisberg and James Boyd White for comments made in response to that lecture which have helped me in reworking the ideas here.

I am particularly grateful to my summer research assistant, Tracy Fessenden, for research, editorial and substantive assistance of the highest order.

1. I have used the term "legal interpretation" throughout this essay, though my argument is directed principally to the interpretive acts of judges. To this specifically *judicial* interpretation my analysis of institutional action applies with special force. Nonetheless, I believe the more general term "legal interpretation" is warranted, for it is my position that the violence which judges deploy as instruments of a modern nation-state necessarily engages anyone who interprets the law in a course of conduct that entails either the perpetration or the suffering of this violence.

2. There has been a recent explosion of legal scholarship placing interpretation at the crux of the

Taken by itself, the word "interpretation" may be misleading. "Interpretation" suggests a social construction of an interpersonal reality through language. But pain and death have quite other implications. Indeed, pain and death destroy the world that "interpretation" calls up. That one's ability to construct interpersonal realities is destroyed by death is obvious, but in this case, what is true of death is true of pain also, for pain destroys, among other things, language itself. Elaine Scarry's brilliant analysis of pain makes this point:

> [F]or the person, in pain, so incontestably and unnegotiably present is it that "having pain" may come to be thought of as the most vibrant example of what it is to "have certainty," while for the other person it is so elusive that hearing about pain may exist as the primary model of what it is "to have doubt." Thus pain comes unshareably into our midst as at once that which cannot be denied and that which cannot be confirmed. Whatever pain achieves, it achieves in part through its unshareability, and it ensures this unshareability

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enterprise of law. A fair sampling of that work may be seen in the various articles that have appeared in two symposia. *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982); *Interpretation Symposium*, 58 S. CALIF. L. REV. 1 (1985) (published in two issues). The intense interest in "interpretation" or "hermeneutics" in recent legal scholarship is quite a different phenomenon from the traditional set of questions about how a particular word, phrase, or instrument should be given effect in some particular context. It is, rather, the study of what I have called "a normative universe . . . held together by . . . interpretive commitments . . . ." Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983). Or, in Ronald Dworkin's words, it is the study of the effort "to impose ***meaning*** on the institution . . . and then to restructure it in the light of that meaning." R. DWORKIN, LAW'S EMPIRE 47 (1986) (emphasis in original). Dworkin, in *Law's Empire*, has written the most elaborate and sophisticated jurisprudence which places the meaning-giving, constructive dimension of interpretation at the heart of law. James Boyd White has been another eloquent voice claiming primacy for what he has called the "culture of argument." White has raised rhetoric to the pinnacle of jurisprudence. *See* J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); J.B. WHITE, HERACLES' BOW (1985).

The violent side of law and its connection to interpretation and rhetoric is systematically ignored or underplayed in the work of both Dworkin and White. White, in chapter nine of *Heracles' Bow*, comes closest to the concerns of this essay. He launches a critique of the practice of criminal law in terms of its unintelligibility as a "system of meaning" in the absence of significant reforms. White does not see violence as central to the breakdown of the system of meaning. But he does contrast what the judge says with what he does in the saying of it. Still, White reiterates in this book his central claim that "law . . . is best regarded not as a machine for social control, but as what I call a system of constitutive rhetoric: a set of resources for claiming, resisting, and declaring significance." *Id.* at 205. I do not deny that law is all those things that White claims, but I insist that it is those things in the context of the organized social practice of violence. And the "significance" or meaning that is achieved must be experienced or understood in vastly different ways depending upon whether one suffers that violence or not. In *Nomos and Narrative*, I also emphasized the world-building character of interpretive commitments in law. However, the thrust of *Nomos* was that the creation of legal meaning is an essentially cultural activity which takes place (or *best* takes place) among smallish groups. Such meaning-creating activity is not naturally coextensive with the range of effective violence used to achieve social control. Thus, because law is the attempt to build future worlds, the essential tension in law is between the elaboration of legal meaning and the exercise of or resistance to the violence of social control. Cover, *supra*, at 18: "[T]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning." This essay elaborates the senses in which the traditional forms of legal decision cannot be easily captured by the idea of interpretation understood as interpretation normally is in literature, the arts, or the humanities.

> in part through its resistance to language . . . . Prolonged pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.[3]

The deliberate infliction of pain in order to destroy the victim's normative world and capacity to create shared realities we call torture. The interrogation that is part of torture, Scarry points out, is rarely designed to elicit information. More commonly, the torturer's interrogation is designed to demonstrate the end of the normative world of the victim—the end of what the victim values, the end of the bonds that constitute the community in which the values are grounded. Scarry thus concludes that "in compelling confession, the torturers compel the prisoner to record and objectify the fact that intense pain is world-destroying."[4] That is why torturers almost always require betrayal—a demonstration that the victim's intangible normative world has been crushed by the material reality of pain and its extension, fear.[5] The torturer and victim do end up creating their own terrible "world," but this world derives its meaning from being imposed upon the ashes of another.[6] The logic of that world is complete domination, though the objective may never be realized.

Whenever the normative world of a community survives fear, pain, and death in their more extreme forms, that very survival is understood to be literally miraculous both by those who have experienced and by those who vividly imagine or recreate the suffering. Thus, of the suffering of sainted Catholic martyrs it was written:

> We must include also . . . the deeds of the saints in which their

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3. E. SCARRY, THE BODY IN PAIN 4 (1985).
4. *Id.* at 29.
5. *Id.*

> Pain and interrogation inevitably occur together in part because the torturer and the prisoner each experience them as opposites. The very question that, within the political pretense, matters so much to the torturer that it occasions his grotesque brutality will matter so little to the prisoner experiencing the brutality that he will give the answer. For the torturers, the sheer and simple fact of human agony is made invisible, and the moral fact of inflicting that agony is made neutral by the feigned urgency and significance of the question. For the prisoner, the sheer, simple, overwhelming fact of his agony will make neutral and invisible the significance of any question as well as the significance of the world to which the question refers . . . . It is for this reason that while the content of the prisoner's answer is only sometimes important to the regime, the form of the answer, the fact of his answering, is always crucial. . . . [I]n confession, one betrays oneself and all those aspects of the world—friend, family, country, cause—that the self is made up of.

Id. While pain is the extreme form of world destruction, fear may be as potent, even if not connected to physical pain and torture. The fact of answering and the necessity for "world destruction" through betrayal were also central to the reign of fear of McCarthyism. *See, e.g.*, V. NAVASKY, NAMING NAMES 346 (1980) (informer destroys "the very possibility of a community . . . for the informer operates on the principle of betrayal and a community survives on the principle of trust").

6. On the "fiction of power" that torture creates, see E. SCARRY, *supra* note 3, at 56–58.

> triumph blazed forth through the many forms of torture that they underwent and *their marvelous confession of the faith.* For what Catholic can doubt that they suffered more than is possible for human beings to bear, and did not endure this by their own strength, but by the grace and help of God?[7]

And Jews, each year on Yom Kippur, remember—

> Rabbi Akiba . . . chose to continue teaching in spite of the decree [of the Romans forbidding it]. When they led him to the executioner, it was time for reciting the Sh'ma. With iron combs they scraped away his skin as he recited *Sh'ma Yisrael*, freely accepting the yoke of God's Kingship. "Even now?" his disciples asked. He replied: "All my life I have been troubled by a verse: 'Love the Lord your God with all your heart and with all your soul,' which means even if He take your life. I often wondered if I would ever fulfill that obligation. And now I can." He left the world while uttering, "The Lord is One."[8]

Martyrdom, for all its strangeness to the secular world of contemporary American Law, is a proper starting place for understanding the nature of legal interpretation. Precisely because it is so extreme a phenomenon, martyrdom helps us see what is present in lesser degree whenever interpretation is joined with the practice of violent domination. Martyrs insist in the face of overwhelming force that if there is to be continuing life, it will not be on the terms of the tyrant's law. Law is the projection of an imagined future upon reality. Martyrs require that any future they possess will be on the terms of the law to which they are committed (God's law). And the miracle of the suffering of the martyrs is their insistence on the law to which they are committed, even in the face of world-destroying pain.[9] Their triumph—which may well be partly imaginary—is the imagined triumph of the normative universe—of Torah, Nomos,—over

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7. P. BROWN, THE CULT OF THE SAINTS 79 (1981) (emphasis added) (quoting from the DECRETUM GELASIANUM, PATROLOGIA LATINA 59.171).

8. The quotation is from the traditional Eileh Ezkerah or martyrology service of Yom Kippur. I have quoted from the translation used in MAHZOR FOR ROSH HASHANAH AND YOM KIPPUR, A PRAYER BOOK FOR THE DAYS OF AWE 555-57 (J. Harlow ed. 1972).

9. The word "martyr" stems from the Greek root *martys*, "witness," and from the Aryan root *smer*, "to remember." Martyrdom functions as a *re*-membering when the martyr, in the act of witnessing, sacrifices herself on behalf of the normative universe which is thereby reconstituted, regenerated, or recreated. One of the earliest sources dealing with martyrdom as a religious phenomenon, 2 MACCABEES, stresses the characteristic of the phenomenon as an insistence on the integrity of the Law of the martyr and of obligation to it in the face of overpowering violence. At one point the book describes the horrible torture and killing of seven sons before their mother's eyes, each death more horrible than the one before. The last and youngest child, encouraged by his mother, answers the King's demand to eat pork with the words: "I will not submit to the King's command; I obey the command of the law given by Moses to our ancestors." 2 MACCABEES 7.30.

the material world of death and pain.[10] Martyrdom is an extreme form of resistance to domination. As such it reminds us that the normative world-building which constitutes "Law" is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. The torture of the martyr is an extreme and repulsive form of the organized violence of institutions. It reminds us that the interpretive commitments of officials are realized, indeed, in the flesh. As long as that is so, the interpretive commitments of a community which resists official law must also be realized in the flesh, even if it be the flesh of its own adherents.

Martyrdom is not the only possible response of a group that has failed to adjust to or accept domination while sharing a physical space. 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.[11]

Our own constitutional history begins with such an act of rebellion. The act was, in form, an essay in constitutional interpretation affirming the right of political independence from Great Britain:

> We therefore the representatives of the United States of America in General Congress assembled, appealing to the supreme judge of the world for the rectitude of our intentions, do in the name, and by the authority of the good people of these colonies, solemnly publish and declare that these United Colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.[12]

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10. In extreme cases martyrdom may be affirmatively sought out, for it is the final proof of the capacity of the spirit to triumph over the body. That triumph may be seen as a triumph of love or of law or of both, depending upon the dominant motifs of the normative and religious world of the martyr and her community. The great jurist and mystic, Joseph Karo (1488–1578), had ecstatic dreams of martyrdom and was promised the privilege of dying a martyr by a "maggid"—a celestial messenger who spoke through his mouth and appeared to him in visions. (The promise was not fulfilled. He died of very old age.) *See* Z. WERBLOWSKI, JOSEPH KARO: LAWYER AND MYSTIC 151–54 (2d ed. 1977). Note also the phenomenon of communities slaughtering themselves in the face of an enemy. Compare the complex mythos of the Jewish martyrs before the crusaders, elaborated in S. SPIEGEL, THE LAST TRIAL: ON THE LEGENDS AND LORE OF THE COMMAND TO ABRAHAM TO OFFER ISSAC AS A SACRIFICE: THE AKEDAH (J. Goldin trans. 1969) with the myth of the White Night enacted by Jonestown in our own day, recounted in J. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN 102–20, 126–34 (1982).

11. The archetype for the transition from martyrdom to resistance is found in 1 MACCABEES, with the dramatic killing carried out by the Priest Matathias in Modi'in. 1 MACCABEES 2, 19–28. His act assumes dramatic significance in the work in part because it stands in marked contrast to the acts of heroic martyrdom described in 2 MACCABEES. *See supra* note 9.

12. The Declaration of Independence (1776). For the senses in which the Declaration should be seen as interpretive of the constitutional position of America in the Empire, see Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976).

But this interpretive act also incorporated an awareness of the risk of pain and death that attends so momentous an interpretive occasion:

> We mutually pledge to each other our lives, our fortunes and our sacred honour.[13]

Life, fortune, and sacred honour were, of course, precisely the price that would have been exacted from the conspirators were their act unsuccessful. We too often forget that the leaders of the rebellion had certainly committed treason from the English constitutional perspective. And conviction of treason carried with it a horrible and degrading death, forfeiture of estate, and corruption of the blood.[14] Great issues of constitutional interpretation that reflect fundamental questions of political allegiance—the American Revolution, the secession of the States of the Confederacy, or the uprising of the Plains Indians—clearly carry the seeds of violence (pain and death) at least from the moment that the understanding of the political texts becomes embedded in the institutional capacity to take collective action. But it is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes *legal* interpretation from the interpretation of literature, from political philosophy, and from constitutional criticism.[15] Legal interpretation is either played

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13. The Declaration of Independence (1776).

14. *See* IV BLACKSTONE'S COMMENTARIES *92-93:

> The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while yet he is alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.

On forfeiture and corruption of the blood, see *id.* at *388-96. It is, therefore, not unexpected that among the few specific protections incorporated into the body of the original Constitution were those which closely defined treason, set procedural safeguards for conviction of treason, and forbade the extension of attaint and corruption of the blood as vicarious punishment upon the family or descendants of those convicted of treason.

15. Every interpretive practice takes place in some context. Among recent critics, Stanley Fish has been as insistent as any concerning the dominance of institutional contexts even in understanding literary texts. *See generally* S. FISH, IS THERE A TEXT IN THIS CLASS? (1980); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1332 (1984) ("To be . . . 'deeply inside' a context is to be already and always thinking (and perceiving) with and within the norms, standards, definitions, routines, and understood goals that both define and are defined by that context."). I do not wish to dispute Fish's central point about literature. I do think, however, that the institutions that are designed to realize normative futures in part through the practice of collective violence stand on a somewhat different footing than do those which bear only a remote or incidental relation to the violence of society. I am prepared to entertain views such as those of Fredric Jameson, who argues for "the priority of the political interpretation of literary texts." F. JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT 17 (1981). But while asserting the special place of a political understanding of our social reality, such views do not in any way claim for literary interpretations what I am claiming about legal interpretation—that it is part of the *practice* of political violence.

out on the field of pain and death or it is something less (or more) than law.

Revolutionary constitutional understandings are commonly staked in blood. In them, the violence of the law takes its most blatant form. But the relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts. The act of sentencing a convicted defendant is among these most routine of acts performed by judges.[16] Yet it is immensely revealing of the way in which interpretation is distinctively shaped by violence. First, examine the event from the perspective of the defendant. The defendant's world is threatened. But he sits, usually quietly, as if engaged in a civil discourse. If convicted, the defendant customarily walks—escorted—to prolonged confinement, usually without significant disturbance to the civil appearance of the event. It is, of course, grotesque to assume that the civil facade is "voluntary" except in the sense that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.[17]

There are societies in which contrition or shame control defendants' behavior to a greater extent than does violence. Such societies require and have received their own distinctive form of analysis.[18] But I think it is unquestionably the case in the United States that most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk. They do not organize force against being dragged be-

16. I have used the criminal law for examples throughout this essay for a simple reason. The violence of the criminal law is relatively direct. If my argument is not persuasive in this context, it will be less persuasive in most other contexts. I would be prepared to argue that all law which concerns property, its use and its protection, has a similarly violent base. But in many, perhaps most, highly visible legal transactions concerning property rights, that violent foundation is not immediately at issue. My argument does not, I believe, require that every interpretive event in law have the kind of direct violent impact on participants that a criminal trial has. It is enough that it is the case that where people care passionately about outcomes and are prepared to act on their concern, the law officials of the nation state are usually willing and able to use either criminal or violent civil sanctions to control behavior.

17. A few defendants who have reached their own understandings of the legal order have overtly attempted to deny the fiction that the trial is a joint or communal civil event where interpretations of facts and legal concepts are tested and refined. The playing out of such an overt course of action ends with the defendant physically bound and gagged. Bobby Seale taught those of us who lived through the 1960's that the court's physical control over the defendant's body lies at the heart of the criminal process. The defendant's "civil conduct," therefore, can never signify a shared understanding of the event; it may signify his fear that any public display of his interpretation of the event as "bullshit" will end in violence perpetrated against him, pain inflicted upon him. Our constitutional law, quite naturally enough, provides for the calibrated use of ascending degrees of overt violence to maintain the "order" of the criminal trial. *See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970); Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 1-3, 10-11 (1970) (commenting in part upon *Allen*).

18. On the distinction between "shame cultures" and "guilt cultures," see generally E. DODDS, THE GREEKS AND THE IRRATIONAL (1951), and J. REDFIELD, NATURE AND CULTURE IN THE ILIAD (1975). For an analysis of a modern "shame culture," see R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE (1946).

cause they know that if they wage this kind of battle they will lose—very possibly lose their lives.

If I have exhibited some sense of sympathy for the victims of this violence it is misleading. Very often the balance of terror in this regard is just as I would want it. But I do not wish us to pretend that we talk our prisoners into jail. The "interpretations" or "conversations" that are the preconditions for violent incarceration are themselves implements of violence. To obscure this fact is precisely analogous to ignoring the background screams or visible instruments of torture in an inquisitor's interrogation. The experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated.[19]

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

The ideology of punishment is not, of course, the exclusive property of judges. The concept operates in the general culture and is intelligible to and shared by prisoners, criminals and revolutionaries as well as judges. Why, then, should we not conclude that interpretation *is* the master concept of law, that the interpretive work of understanding "punishment" may be seen as mediating or making sense of the opposing acts and experiences of judge and defendant in the criminal trial? Naturally, one who is to be punished may have to be coerced. And punishment, if it is "just," supposedly legitimates the coercion or violence applied. The ideology of punishment may, then, operate successfully to justify our practices of criminal law to ourselves and, possibly, even to those who are or may come to be "punished" by the law.

There is, however, a fundamental difference between the way in which "punishment" operates as an ideology in popular or professional literature, in political debate, or in general discourse, and the way in which it

19. This point and others very similar to it are made routinely in the literature that comes out of prisons. *See, e.g.*, E. CLEAVER, SOUL ON ICE 128–30 (1968); J. WASHINGTON, A BRIGHT SPOT IN THE YARD: NOTES & STORIES FROM A PRISON JOURNAL 5 (1981).

operates in the context of the legal acts of trial, imposition of sentence, and execution. For as the judge interprets, using the concept of punishment, she also acts—through others—to restrain, hurt, render helpless, even kill the prisoner. Thus, any commonality of interpretation that may or may not be achieved is one that has its common meaning destroyed by the divergent experiences that constitute it. Just as the torturer and victim achieve a "shared" world only by virtue of their diametrically opposed experiences, so the judge and prisoner understand "punishment" through their diametrically opposed experiences of the punishing act. 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.

II. The Acts of Judges: Interpretations, Deeds and Roles

We begin, then, not with what the judges say, but with what they do. The judges deal pain and death.

That is not all that they do. Perhaps that is not what they usually do. But they *do* deal death, and pain. From John Winthrop through Warren Burger they have sat atop a pyramid of violence, dealing . . . .

In this they are different from poets, from critics, from artists. It will not do to insist on the violence of strong poetry, and strong poets. Even the violence of weak judges is utterly real—a naive but immediate reality, in need of no interpretation, no critic to reveal it.[20] Every prisoner displays

20. On the violence that strong poets do to their literary ancestors, see H. Bloom, The Anxiety of Influence (1973), H. Bloom, The Breaking of the Vessels (1982), and much of Bloom's other work since *Anxiety*. Judges, like all readers and writers of texts, do violence to their literary—i.e., judicial—forebearers. For an interesting application of Bloom's central thesis to law, see D. Cole, *Agon and Agora: Creative Misreadings in the First Amendment Tradition*, 95 Yale L.J. 857 (1986). Cole acknowledges that the connection of law to violence distinguishes legal from literary interpretation, though he does not, unfortunately, develop the point. *Id.* at 904.

The anxiety of juridical influence was rather aptly and nicely stated somewhat earlier by Learned Hand in his tribute to Cardozo, *Mr. Justice Cardozo*, 39 Colum. L. Rev. 9 (1939). My point here is not that judges do not do the kind of figurative violence to literary parents that poets do, but that they carry out—in addition—a far more literal form of violence through their interpretations that poets do not share. It is significant, and has been much noted, that the immediacy of the connection between judge and violence of punishment has changed over the centuries. *See, e.g.*, M. Foucault, Discipline and Punish: The Birth of the Prison (A. Sheridan trans. 1977). Certainly in the United States today, the judge's obvious responsibility for the violence of punishment requires an appreciation—which all who live in this society acquire—of the organizational form of action. In that sense "naive" reality should not be taken to signify too much. One need not be sophisticated to understand the violence of judging, but neither is it as naive a form of violence as it would be if judges carried out their own sentencing. On the implications of this point, *see infra* pp. 1626-27.

its mark. Whether or not the violence of judges is justified is not now the point—only that it exists in fact and differs from the violence that exists in literature or in the metaphoric characterizations of literary critics and philosophers. I have written elsewhere that judges of the state are jurispathic—that they kill the diverse legal traditions that compete with the State.[21] Here, however, I am not writing of the jurispathic quality of the office, but of its homicidal potential.[22]

The dual emphasis on the *acts* of judges and on the violence of these acts leads to consideration of three characteristics of the interpretive dimension of judicial behavior. Legal interpretation is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way. In order to explore the unseverable connection between legal interpretation and violence, each of these three elements must be examined in turn.

A. *Legal Interpretation as a Practical Activity*

Legal interpretation is a form of practical wisdom.[23] At its best it seeks to "impose *meaning* on the institution . . . and then to restructure it in the light of that meaning."[24] There is, however, a persistent chasm be-

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21. Cover, *supra* note 2, at 40–44.

22. The violence of judges and officials of a posited constitutional order is generally understood to be implicit in the practice of law and government. Violence is so intrinsic to this activity, so taken for granted, that it need not be mentioned. For instance, read the Constitution. Nowhere does it state, as a general principle, the obvious—that the government thereby ordained and established has the power to practice violence over its people. That, as a general proposition, need not be stated, for it is understood in the very idea of government. It is, of course, also directly implicit in many of the specific powers granted to the general government or to some specified branch or official of it. *E.g.*, U.S. CONST. art. I, § 8, cl. 1 ("Power To lay and collect Taxes . . . and provide for the common Defence"); *id.*, cl. 6 ("To provide for the Punishment of counterfeiting"); *id.*, cl. 10 ("To define and punish Piracies"); *id.*, cl. 11 ("To declare War"); *id.*, cl. 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"); *id.*, art. IV, § 2, cls. 2–3 (providing for rendition of fugitives from justice and service).

23. On practical wisdom, see ARISTOTLE, THE NICOMACHEAN ETHICS 1140a(24) to 1140b(30).

24. R. DWORKIN, *supra* note 2, at 47. Dworkin's opus, celebrating what he calls the "integrity" of coherent and consistent interpretation, stands within a long tradition of work elaborating on Aristotle's fundamental insight into the nature of deliberation. Aristotle assigned the broad area of normative deliberation, of which legal interpretation consists, to practical wisdom or *phronesis*, which he distinguished from speculative knowledge. ARISTOTLE, *supra* note 23, at 1139b(14) to 1140b(30). On *phronesis*, see also H. ARENDT, WILLING 59–62 (1977). Practical wisdom, according to Aristotle, is a form of applied understanding: it does not consist, like knowledge, of pre-existing truths. It entails deliberation—an activity which is senseless with respect to logical truth. Deliberation engages the relevance of past to present understandings through a reflexive "discovery" of what is implicit in past understanding. Technical knowledge also has applied character, but practical wisdom, being in the normative sphere, cannot be measured by an external standard such as usefulness, because it consists of the application of understanding to the shaping of self.

Hans Georg Gadamer elevated these characteristics of practical wisdom to the central place in what he called "the human sciences." H. GADAMER, TRUTH AND METHOD 5–10 and *passim* (G. Barden & J. Cumming eds. 2d ed. 1975). Gadamer found these interpersonal, constructive acts of understanding—hermeneutics or interpretations—most clearly exemplified in what he called "legal dogmatics." Gadamer's project may be understood in some measure as an attempt to comprehend all human

tween thought and action. It is one thing to understand what ought to be done, quite another thing to do it. Doing entails an act of will and may require courage and perseverance. In the case of an individual's actions, we commonly think such qualities are functions of motivation, character, or psychology.

Legal interpretation is practical activity in quite another sense, however. The judicial word is a mandate for the deeds of others. Were that not the case, the practical objectives of the deliberative process could be achieved, if at all, only through more indirect and risky means. The context of a judicial utterance is institutional behavior in which others, occupying preexisting roles, can be expected to act, to implement, or otherwise to respond in a specified way to the judge's interpretation. Thus, the institutional context ties the language act of practical understanding to the physical acts of others in a predictable, though not logically necessary, way.[25] These interpretations, then, are not only "practical," they are, themselves, practices.

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understanding in terms of *phronesis*; that is, to take the category of applied thought that defines our situation as moral actors and generalize that situation to include all of life. "Understanding is, then, a particular case of the application of something universal to a particular situation." *Id.* at 278.

For Gadamer, Aristotle is the source—the one who places action and striving at the center of moral philosophy. "Aristotle's description of the ethical phenomenon and especially of the virtue of moral knowledge . . . is in fact a kind of model of the problems of hermeneutics . . . . Application is neither a subsequent nor a merely occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning." *Id.* at 289. Gadamer proceeds from Aristotle by incorporating Heidegger's fundamental insight that we are always situated in the world, building the future worlds we shall inhabit. We do this through interpretation which is simultaneously a discovery of what we know and a new understanding of this "known" that enables us to discover more about what we know. Building on Heidegger, Gadamer posits the unity of all hermeneutics, all interpretive activity. Because all understanding is a building of both self and the world, it is in some measure practical and social, and therefore never divorced from ethics.

The practice of legal interpretation by the judge is no different from any other hermeneutic exercise. It exemplifies the mutually and reflexively constructive effects of text, of prior understanding of text (tradition), of present application and understanding-as-applied, and of future commitment. And legal dogmatics are for Gadamer the "model for the unity of dogmatic and historical interest and so also for the unity of hermeneutics as a whole." J. WEINSHEIMER, GADAMER'S HERMENEUTICS, A READING OF *Truth and Method* 194 (1985).

Gadamer's placement of legal dogmatics at the center of the general enterprise of understanding the human sciences represents an invitation—or perhaps a temptation—to those legal academics who conceive law as the building of a system of normative meaning. If one can begin to understand the entire world of the humanities, i.e., the many forms of interpretive activity, in terms of law, it should be possible to put this common element of interpretation at the heart of law itself. That, indeed, seems to have been the effect of the slow trickle down of ideas about interpretation to the legal academy in America.

Ronald Dworkin synthesizes these interpretativist ideas in his new work, *Law's Empire*. R. DWORKIN, *supra* note 2. *Law's Empire* is a major elaboration of the reflexive, deliberative form of practical wisdom rooted in Aristotle's *phronesis*. It also builds upon Dworkin's own earlier critique of legal positivism to render "interpretation" the central activity in the judicial act while keeping the judicial act central to law. I fully agree that the dominant form of legal thought ought to be interpretive in the extended sense of the term. However, the emergence of interpretation as a central motif does not, by itself, reflect upon the way in which the interpretive acts of judges are simultaneously performative utterances in an institutional setting for violent behavior.

25. One might say that institutions create the context for changing the contingent to the necessary.

Formally, on both a normative and descriptive level, there are or may be rules and principles which describe the relationship between the interpretive acts of judges and the deeds which may be expected to follow from them. These rules and principles are what H.L.A. Hart called "secondary rules."[26] At least some secondary rules and principles identify the terms of cooperation between interpretation specialists and other actors in a social organization. Prescriptive secondary materials purport to set the norms for what those relations ought to be; descriptive secondary rules and principles would generate an accurate prediction of what the terms of cooperation actually will be. Of course, in any given system there need be no particular degree of correspondence between these two sets of rules.

Secondary rules and principles provide the template for transforming language into action, word into deed. As such they occupy a critical place in the analysis of legal interpretation proposed here. The legal philosopher may hold up to us a model of a hypothetical judge who is able to achieve a Herculean understanding of the full body of legal and social texts relevant to a particular case, and from this understanding to arrive at the single legally correct decision.[27] But that mental interpretive act cannot give itself effect. 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. Failing this, the interpreter sacrifices the connection between understanding what ought to be done and the deed, itself. But bridging the chasm between thought and action in the legal system is never simply a matter of will. The gap between understanding and action roughly corresponds to differences in institutional roles and to the division of labor and of responsibility that these roles represent. Thus, what may be described as a problem of will with respect to the individual becomes, in an institutional context, primarily a problem in social organization. Elsewhere I have labeled the specialized understanding of this relation, between the interpretation of the judge and the social organization required to transform it into a real-

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See H. ARENDT, *supra* note 24, at 14; *see also* J. SEARLE, SPEECH ACTS (1969).

26. H.L.A. HART, THE CONCEPT OF LAW 77-106 (1961). Dworkin has ably challenged the supposedly central role of secondary rules in a theory of law. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Dworkin's critique is most telling in undermining the idea that rules of recognition adequately account for certain principles which have the effect of law. *See also* Cover, *supra* note 2. However, some secondary rules of recognition are designed not to generate recognition of content of rules or principles but to recognize outcomes that are to be effectuated. That is, some secondary rules organize social cooperation in the violent deeds of the law. By and large the secondary rules that organize the law's violence are clearer and more hierarchical than those that organize the ideational content of the law. For an excellent review of the significance of Dworkin's position for the viability of legal positivism as a system, see Coleman, *Negative and Positive Positivism*, 11 J. LEG. STUD. 139 (1982).

27. *See* R. DWORKIN, *supra* note 26, at 105-30; *see also infra* note 61.

ity, the hermeneutic of the texts of jurisdiction.[28] This specialized understanding must lie at the heart of official judging.

B. *Interpretation within a System Designed to Generate Violence*

The gulf between thought and action 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. Of course, these constraints are neither absolute nor universal. There are some deviant individuals whose behavior is inconsistent with such inhibitions.[29] Furthermore, almost all people are fascinated and attracted by violence, even though they are at the same time repelled by it.[30] Finally, and most important for our purposes, in almost all people social cues may overcome or suppress the revulsion to violence under certain circumstances.[31] These limitations do not deny the force of inhibitions against violence. Indeed, both together create the conditions without which law would either be unnecessary or impossible. Were the inhibition against violence perfect, law would be unnecessary; were it not capable of being overcome through social signals, law would not be possible.

Because legal interpretation is as a practice incomplete without violence—because it depends upon the social practice of violence for its efficacy—it must be related in a strong way to the cues that operate to bypass or suppress the psycho-social mechanisms that usually inhibit people's actions causing pain and death. Interpretations which occasion violence are distinct from the violent acts they occasion. When judges interpret the law in an official context, we expect a close relationship to be revealed or established between their words and the acts that they mandate. That is, we expect the judges' words to serve as virtual triggers for action. We would not, for example, expect contemplations or deliberations

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28. Cover, *supra* note 2, at 53-60.

29. There are persons whose behavior is both violent toward others and apparently reckless in disregard of violent consequences to themselves. Moreover, this behavior is frequently accompanied by a strange lack of affect. The classification of such persons as suffering from mental illness is a matter of great dispute. Nonetheless, at the present time there are a variety of labels that may be appropriately applied on the basis of one authority or another. *See, e.g.*, AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 317-21 (3d ed. 1980) (diagnosing persons similar to those described above as suffering from "antisocial personality disorder"). For some earlier classifications, see W. MCCORD & J. MCCORD, THE PSYCHOPATH 39-55 (1964).

30. *See, e.g.*, C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR 64-65 (1951) (varying cultural responses to linking pain and sexuality). Whether there is a deeper sado-masochistic attraction to pain or violence involving more serious forms of imposition or suffering of pain that is similarly universal is a matter of dispute. The attraction to violence may also be accounted for in terms of an impulse of "aggression." *See generally* K. LORENZ, ON AGGRESSION (M. Wilson trans. 1966).

31. *See, e.g.*, S. MILGRAM, OBEDIENCE TO AUTHORITY (1974). The Milgram experiments are discussed and placed in the context of a much larger body of experimental work and anecdotal material on decisionmaking in I. JANIS & L. MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICTS, CHOICE, AND COMMITMENT 268-71 (1977).

on the part of jailers and wardens to interfere with the action authorized by judicial words. But such a routinization of violent behavior requires a form of organization that operates simultaneously in the domains of action and interpretation. In order to understand the violence of a judge's interpretive act, we must also understand the way in which it is transformed into a violent deed despite general resistance to such deeds; in order to comprehend the meaning of this violent deed, we must also understand in what way the judge's interpretive act authorizes and legitimates it.

While it is hardly possible to suggest a comprehensive review of the possible ways in which the organization of the legal system operates to facilitate overcoming inhibitions against intraspecific violence, I do wish to point to some of the social codes which limit these inhibitions. Here the literature of social psychology is helpful. The best known study and theory of social codes and their role in overcoming normal inhibitions against inflicting pain through violence is Milgram's *Obedience to Authority*.[32] In the Milgram experiments, subjects administered what they thought were actually painful electric shocks to persons who they thought were the experimental subjects. This was done under the direction or orders of supposed experimenters. The true experimental subjects—those who administered the shocks—showed a disturbingly high level of compliance with authority figures despite the apparent pain evinced by the false experimental subjects. From the results of his experiment, Milgram has formulated a theory that is in some respects incomplete. The most developed part of the theory relies heavily on the distinction he draws between acting in an "autonomous" state and acting in an "agentic" state. Milgram posits the evolution of a human disposition to act "agentically" within hierarchies, since the members of organized hierarchies were traditionally more likely to survive than were members of less organized social groups. Concurrently, the "conscience" or "superego" evolved in response to the need for autonomous behavior or judgment given the evolution of social structures. It is this autonomous behavior which inhibits the infliction of pain on others. But the regulators for individual autonomous behavior had to be capable of being suppressed or subordinated to the characteristics of agentic behavior when individuals acted within an hierarchical structure.[33] In addition to his theories of species-specific evolutionary mechanisms, Milgram also points to the individual-specific and culture-specific forms of learning and conditioning for agentic behavior within hierarchical structures. Thus, in Milgram's explanation of the "agentic state," "institutional systems of authority" play a key role in providing the requisite

32. S. MILGRAM, *supra* note 31.

33. *Id.* at 135–38. Milgram even suggests that there may be chemoneurological regulators of that subordination.

cues for causing the shift from autonomous behavior to the agentic behavior cybernetically required to make hierarchies work.[34] According to Milgram, the cues for overcoming autonomous behavior or "conscience" consist of the institutionally sanctioned commands, orders, or signals of institutionally legitimated authorities characteristic of human hierarchical organization.[35]

There are, of course, a variety of alternative ways to conceptualize the facilitation of violence through institutional roles. One could point, for example, to the theory that human beings have a natural tendency, an instinctual drive, to aggression, and that a variety of learned behaviors keep aggression within bounds. The institutionally specified occasions for violence may then be seen as outlets for the aggression that we ordinarily would seek to exercise but for the restraints. Some scholars have, from a psychoanalytic perspective, hypothesized that formal structures for the perpetration of violence permit many individuals to deny themselves the fulfillment of aggressive wishes by "delegating" the violent activity to others.[36]

There is an enormous difference between Milgram's theory of institutionalized violence and Anna Freud's or Konrad Lorenz's, and between the assumptions about human nature which inform them. But common to all of these theories is a behavioral observation in need of explanation. Persons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously. When judges interpret, they trigger agentic behavior within just such an institution or social organization. On one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience. But on another level they are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act autonomously.

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34. *Id.* at 123–64.

35. *Id.* at 125–30, 143–48. Milgram also quite properly subjects his theory to the question of whether the behavior elicited in his experiments might be better explained by postulating a general impulse or tendency to aggression which is built into the human being and which is normally suppressed by social factors. The experiments might then be understood as opportunities created by the removal of the social constraints upon violence for the pre-existing aggression to emerge. *Id.* at 165–68. It is not clear that the two theories are mutually exclusive.

36. Anna Freud follows Stone in calling the phenomenon "delegation." "The individual denies himself the fulfillment of aggressive wishes but concedes permission for it to some higher agency such as the state, the police, the military or legal authorities." A. Freud, *Comments on Aggression*, in PSYCHOANALYTIC PSYCHOLOGY OF NORMAL DEVELOPMENT 161 (1981) (Vol. VIII of THE WRITINGS OF ANNA FREUD). I am indebted to Diane Cover for this reference.

C. *Interpretation and the Effective Organization of Violence*

A third factor separates the authorization of violence as a deliberative, interpretive exercise from the deed. Deeds of violence are rarely suffered by the victim apart from a setting of domination.[37] That setting may be manifestly coercive and violent or it may be the product of a history of violence which conditions the expectations of the actors. The imposition of violence depends upon the satisfaction of the social preconditions for its effectiveness. Few of us are courageous or foolhardy enough to *act* violently in an uncompromisingly principled fashion without attention to the likely responses from those upon whom we would impose our wills.[38]

If legal interpretation entails action in a field of pain and death, we must expect, therefore, to find in the act of interpretation attention to the *conditions of effective domination*. To the extent that effective domination is not present, either our understanding of the law will be adjusted so that it will require only that which can reasonably be expected from people in conditions of reprisal, resistance and revenge,[39] or there will be a crisis of

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37. My colleague, Harlon Dalton, reports a view among some people who have clerked for judges on the Second Circuit Court of Appeals that the judges seem reluctant to affirm convictions from the bench when they believe the defendant to be in the courtroom. Dalton suggests two reasons for the tendency to reserve decision in such cases. First, the judges desire to give the appearance of deliberation in order to minimize, to the extent possible, the loser's dissatisfaction with the outcome; second, and more important, the judges desire to avoid having a disgruntled defendant (whose inhibitions against perpetrating violence are not what they might be) decide to "approach the bench," as it were. Dalton relates the scene he witnessed when clerking for a then-quite-new district judge who made the mistake of pronouncing sentence in the small robing room behind the courtroom. (The courtroom was temporarily unavailable for one reason or another.) The defendant's request that his family be present during sentencing was of course granted. As a result, the judge had to confront a weeping wife, dejected children, a lawyer who was now able to emote on an intimate stage, and a defendant who was able to give his allocution eye-to-eye with the judge from a distance of, at most, ten feet. It was impossible, therefore, for the judge to hide or insulate himself from the violence that would flow from the words he was about to utter, and he was visibly shaken as he pronounced sentence. Even so, neither he nor Dalton was prepared for what followed. The defendant began alternately shouting and begging the judge to change his mind; his wife began sobbing loudly; the defendant lurched forward with no apparent purpose in mind except, literally, to get to the judge who was doing this awful thing to him. Because the seating in the robing room was not designed with security in mind, it took the marshall a moment or two—a long moment or two—to restrain the defendant. Then, because the room's only exit was behind where the defendant and his family had been seated, the judge had to wait until they were, respectively, forced and importuned to leave before he could make his exit, thus witnessing first hand how his words were translated into deeds. I am grateful to Harlon Dalton for these accounts.

38. It is the fantasy of so acting which accounts for the attraction of so many violent heroes. Where systems of deterrence and justice do in fact depend, or have depended, upon high risk acts of violence, there have been great temptations to avoid too high principles. In many feuding societies the principle social problem appears not to have been how to stop feuds, but how to get reluctant protagonists to act in such a manner as to protect vulnerable members or avenge them. Miller, *Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England*, 1 LAW AND HIST. REV. 159, 160-62, 175 (1983).

39. See the corpus of Miller's work on the Icelandic feuds. *Id.* at 175-94. *See also* W. Miller, *Gift, Sale, Payment, Raid: Case Studies in the Negotiation and Classification of Exchange in Medieval Iceland*, 61 SPECULUM 18-50 (1986); *cf.* E. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH 18 (1984) ("Honor and legalism . . . are

credibility. The law may come over time to bear only an uncertain relation to the institutionally implemented deeds it authorizes. Some systems, especially religious ones, can perpetuate and even profit from a dichotomy between an ideal law and a realizable one.[40] But such a dichotomy has immense implications *if built into* the law. In our own secular legal system, one must assume this to be an undesirable development.

D. *Legal Interpretation as Bonded Interpretation*

Legal interpretation, therefore, can never be "free;" it can never be the function of an understanding of the text or word alone. Nor can it be a simple function of what the interpreter conceives to be merely a reading of the "social text," a reading of all relevant social data. Legal interpretation must be capable of transforming itself into action; it must be capable of overcoming inhibitions against violence in order to generate its requisite deeds; it must be capable of massing a sufficient degree of violence to deter reprisal and revenge.

In order to maintain these critical links to effective violent behavior, legal interpretation must reflexively consider its own social organization. In so reflecting, the interpreter thereby surrenders something of his independence of mind and autonomy of judgment, since the legal meaning that some hypothetical Hercules (Hyporcules) might construct out of the sea of our legal and social texts is only one element in the institutional practice we call law. Coherent legal meaning is an element in legal interpretation. But it is an element potentially in tension with the need to generate effective action in a violent context. And neither effective action nor coherent meaning can be maintained, separately or together, without an entire structure of social cooperation. Thus, legal interpretation is a form of bonded interpretation, bound at once to practical application (to the deeds it implies) and to the ecology of jurisdictional roles (the conditions of effective domination). The bonds are reciprocal. For the deeds of social violence as we know them also require that they be rendered intelligible—that they be both subject to interpretation and to the specialized and constrained forms of behavior that are "roles." And the behavior within roles that we expect can neither exist without the interpretations which explain the otherwise meaningless patterns of strong action and inaction,

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incompatible . . . .").

40. For example, the account of the dispute within Shi'ite legal theory as to whether it was permissible to set up an avowedly Shiah government before the advent of the Twelfth Imam reflects this dichotomy in a religious context. *See* R. MOTTAHEDEH, THE MANTLE OF THE PROPHET: RELIGION AND POLITICS IN IRAN 172-73 (1985). According to Shi'ite belief, only the advent of this "Imam of the age" would bring the possibility of a perfect Islamic political community. *Id.* at 92-93.

nor be intelligible without understanding the deeds they are designed to effectuate.

Legal interpretation may be the act of judges or citizens, legislators or presidents, draft resisters or right-to-life protesters. Each kind of interpreter speaks from a distinct institutional location. Each has a differing perspective on factual and moral implications of any given understanding of the Constitution. The understanding of each will vary as roles and moral commitments vary. But considerations of word, deed, and role will always be present in some degree. The relationships among these three considerations are created by the practical, violent context of the practice of legal interpretation, and therefore constitute the most significant aspect of the legal interpretive process.

III. Interpretation and Effective Action: The Case of Criminal Sentencing

The bonded character of legal interpretation can be better appreciated by further unpacking a standard judicial act—the imposition of a sentence in a criminal case—this time from the judge's perspective. Such an act has few of the problematic remedial and role complications that have occupied commentators on the judicial role with regard to affirmative relief in institutional reform litigation or complex "political questions" cases.[41] In imposing sentences in criminal cases, judges are doing something clearly within their province. I do not mean to suggest that there are not disagreements about how the act should be carried out—whether with much or little discretion, whether attending more to objective and quantifiable criteria or to subjective and qualitative ones. But the act is and long has been a judicial one, and one which requires no strange or new modes of interaction with other officials or citizens.

Taken for granted in this judicial act is the structure of cooperation that ensures, we hope, the effective domination of the present and prospective victim of state violence—the convicted defendant. The role of judge becomes dangerous, indeed, whenever the conditions for domination of the prisoner and his allies are absent. Throughout history we have seen the products of ineffective domination in occasional trials in our country and in many instances in other nations.[42] The imposition of a sentence thus

41. My argument is not simply that there are prudential considerations in some sub-class of cases that render it wise or politic or necessary for the judge to defer to supposed wishes or policies of other political actors. Rather, my point here is that in every act—even one thought to "belong" to judges—there is a necessary element of deference to the requirements of transforming judicial thought into violent action.

42. Ineffective domination has resulted, for example, in the extraordinary security precautions that take place in the more significant mafia trials in Italy. It is reflected in the failures of Weimar justice. *See* P. Gay, Weimar Culture: The Outsider as Insider 20-21 (1968). We ought not to

involves the roles of police, jailers or other enforcers who will restrain the prisoner (or set him free subject to effective conditions for future restraint) upon the order of the judge, and guards who will secure the prisoner from rescue and who will protect the judge, prosecutors, witnesses and jailers from revenge.

The judge in imposing a sentence normally takes for granted the role structure which might be analogized to the "transmission" of the engine of justice. The judge's interpretive authorization of the "proper" sentence can be carried out as a deed only because of these others; a bond between word and deed obtains only because a system of social cooperation exists. That system guarantees the judge massive amounts of force—the conditions of effective domination—if necessary. It guarantees—or is supposed to—a relatively faithful adherence to the word of the judge in the deeds carried out against the prisoner.

A. *Revealing Latent Role Factors*

If the institutional structure—the system of roles—gives the judge's understanding its effect, thereby transforming understanding into "law," so it confers meaning on the deeds which effect this transformation, thereby legitimating them as "lawful." A central task of the legal interpreter is to attend to the problematic aspects of the integration of role, deed, and word, not only where the violence (i.e., enforcement) is lacking for meaning, but also where meaning is lacking for violence.

In a nation like ours, in which the conditions of state domination are rarely absent, it is too easy to assume that there will be faithful officials to carry out what the judges decree, and judges available to render their acts lawful. Just how crucial this taken-for-granted structure is may be appreciated by examining a case in which it is lacking. The decisions by Judge Herbert Stern in *United States v. Tiede*[43] display an unusually lucid appreciation of the significance of the institutional connections between the judicial word and the violent deeds it authorizes.

Judge Stern was (and is) a federal district judge in New Jersey. In 1979 he was appointed an Article II judge for the United States Court for Berlin. This unique event, the only convening of the Court for Berlin, was a response to the reluctance of West Germany to prosecute two skyjackers

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assume that our own legal system is entirely free from such problems. While judges, on the whole, have fared remarkably well given the number of people whom they injure, there are occasional instances of violence directed at judges. And the problem of protecting witnesses is a persistent and serious one for the criminal justice system.

43. 86 F.R.D. 227 (U.S. Ct. for Berlin 1979). The reported opinion encompasses only certain procedural questions that arose in the trial, primarily the question of whether the defendants were entitled to a jury trial. A comprehensive account of the trial and the various rulings made during its course can be found in H. STERN, JUDGMENT IN BERLIN (1984).

who had used a toy gun to threaten the crew of a Polish airliner en route from Gdansk to East Berlin and had forced it to land in West Berlin. The formal status of Berlin as an "occupied" city enabled the Germans to place the responsibility for prosecution of the skyjacker-refugees upon the Americans.[44]

Stern wrote a moving account of the unusual trial which ensued, including his long struggle with the United States government over the general question of whether the Constitution of the United States would govern the proceedings. After a jury trial, opposed by the prosecution, and a verdict of guilty on one of the charges, Stern was required to perform the "simple" interpretive act of imposing the appropriate sentence. As a matter of interpreting the governing materials on sentencing it might indeed have been a "simple" act—one in which relatively unambiguous German law was relatively unambiguously to be applied by virtue of American law governing a court of occupation.[45]

Stern brilliantly illuminated the defects in such a chain of reasoning. The judicial interpretive act in sentencing issues in a deed—the actual performance of the violence of punishment upon a defendant. But these two—judicial word and punitive deed—are connected only by the social cooperation of many others, who in their roles as lawyers, police, jailers, wardens, and magistrates perform the deeds which judicial words authorize. Cooperation among these officials is usually simply assumed to be present, but, of course, the conditions which normally ensure the success of this cooperation may fail in a variety of ways.

This is Judge Stern's account of his sentencing of the defendant, Hans Detlef Alexander Tiede:

> Gentlemen [addressing the State Department and Justice Department lawyers], I will not give you this defendant. . . . I have kept him in your custody now for nine months, nearly. . . . You have persuaded me. I believe, now, that you recognize no limitations of due process. . . .
>
> I don't have to be a great prophet to understand that there is probably not a great future for the United States Court for Berlin here. [Stern had just been officially "ordered" not to proceed with a civil case brought against the United States in Stern's Court. The case was a last ditch attempt in a complicated proceeding in which

44. H. STERN, *supra* note 43, at 3–61.

45. There were several significant interpretive issues involved in the sentencing other than the one treated below: for example, whether an offer of a deal by the prosecution to the defendant in return for not persisting with the demand for a jury trial should operate to limit any sentence imposed to one no more severe than the proffered deal, *id.* at 344–45, and whether the judge was obligated to apply German law which carried a mandatory minimum sentence of three years for the offense of which Tiede was convicted, *id.* at 350–55.

> the West Berlin government had acquired park land—allegedly in violation of German law—for construction of a housing complex for the United States Army Command in Berlin. The American occupation officials had refused to permit the German courts to decide the case as it affected the interests of the occupation authority. American Ambassador Walter Stoessel had officially written Stern on the day before the sentencing that "your appointment as a Judge of the United States Court for Berlin does not extend to this matter."[46]]
>
> . . . .
>
> Under those circumstances, who will be here to protect Tiede if I give him to you for four years? Viewing the Constitution as nonexistent, considering yourselves not restrained in any way, who will stand between you and him? What judge? What independent magistrate do you have here? What independent magistrate will you permit here?
>
> When a judge sentences, he commits a defendant to the custody—in the United States he says, 'I commit to the custody of the Attorney General of the United States'—et cetera. Here I suppose he says, I commit to the custody of the Commandant, or the Secretary of State, or whatever . . . . I will not do it. Not under these circumstances. . . .
>
> I sentence this defendant to time served. You . . . are a free man right now.[47]

Herbert Stern's remarkable sentence is not simply an effective, moving plea for judicial independence, a plea against the subservience which Stern's government tried to impose. It is a dissection of the anatomy of criminal punishment in a constitutional system. As such, it reveals the interior role of the judicial word in sentencing. It reveals the necessity of a latent role structure to render the judicial utterance morally intelligible. And it proclaims the moral unintelligibility of routine judicial utterance when the structure is no longer there. Almost all judicial utterance becomes deed through the acts of others—acts embedded in roles. The judge must see, as Stern did, that the meaning of her words may change when the roles of these others change. We tend overwhelmingly to assume that constitutional violence is always performed within institutionally sanctioned limits and subject to the institutionally circumscribed, role-bound action of others. Stern uncovered the unreliability of that assumption in the Berlin context and "reinterpreted" his sentence accordingly.[48]

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46. *Id.* at 353.

47. *Id.* at 370.

48. Judge Stern confronted an unusual situation—no independent system of courts, and no *explicit* denial by those in control of official violence that their power was constitutionally limited. In a sense the situation was one of *de jure* lawlessness. But Stern's reasoning reaches beyond the case at hand; it may be extended to include, for example, the *de facto* state of lawlessness that attends life in many United States prisons. Institutional reform litigation—whether applied to prisons, schools, or

B. *The Death Sentence as an Interpretive Act of Violence*

The questions of whether the death sentence is constitutionally permissible and, if it is, whether to impose it, are among the most difficult problems a judge encounters. While the grammar of the capital sentence may appear to be similar to that of any other criminal sentence, the capital sentence as interpretive act is unique in at least three ways. The judge must interpret those constitutional and other legal texts which speak to the question of the proper or permissible occasions for imposition of a capital sentence. She must understand the texts in the context of an application that prescribes the killing of another person. And she must act to set in motion the acts of others which will in the normal course of events end with someone else killing the convicted defendant. Our judges do not *ever* kill the defendants themselves. They do not witness the execution. Yet, they are intensely aware of the deed their words authorize.[49]

The confused and emotional situation which now prevails with respect to capital punishment in the United States is in several ways a product of what I have described as the bonded character of legal interpretation—the complex structure of relationships between word and deed. To any person endowed with the normal inhibitions against the imposition of pain and death, the deed of capital punishment entails a special measure of the reluctance and abhorrence which constitute the gulf that must be bridged between interpretation and action. Because in capital punishment the action or *deed* is extreme and irrevocable, there is pressure placed on the *word*—the interpretation that establishes the legal justification for the act.[50] At the same time, the fact that capital punishment constitutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence makes the imposition of the sentence an especially powerful test of the faith and commitment of the interpreters.[51]

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hospitals—entails complex questions of judicial remedial power. Very often these questions are framed around problems of discretion in the administration of remedies. When deciding whether to issue an injunction, judges often "interpret" the law in light of the difficulties involved in effectuating their judgments. But Stern's decision in *Tiede* pursues a different path. A judge may or may not be able to change the deeds of official violence, but she may always withhold the justification for this violence. She may or may not be able to bring a good prison into being, but she can refrain from sentencing anyone to a constitutionally inadequate one. Some judges have in fact followed this course. *See, e.g.*, Barnes v. Government of the Virgin Islands, 415 F. Supp. 1218 (D.V.I. 1976).

49. Contrast the discreet distance judges now keep from capital sentences with the pageant of capital punishment in Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 28-29 (1975).

50. This pressure for more certain justification of the death sentence lies behind the development of the "super due process" position with regard to death penalty cases. *See, e.g.*, Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (describing Supreme Court's Eighth Amendment procedural safeguards). No more powerful statement of the ultimate implications of this position is to be found than in C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).

51. The decade-long moratorium on death sentences may quite intelligibly be understood as a

Not even the facade of civility, where it exists, can obscure the violence of a death sentence.

Capital cases, thus, disclose far more of the structure of judicial interpretation than do other cases. Aiding this disclosure is the agonistic character of law: The defendant and his counsel search for and exploit any part of the structure that may work to their advantage. And they do so to an extreme degree in a matter of life and death.[52]

Thus, in the typical capital case in the United States, the judge is constantly reminded of that which the defense constantly seeks to exploit: The structure of interdependent roles that Judge Stern found to be potentially lacking in Berlin in the *Tiede* case. Consider. Not only do the actors in these roles carry out the judicial decision—they await it! All of them know that the judges will be called upon, time and again, to consider exhaustively all interpretive avenues that the defense counsel might take to avoid the sentence. And they expect that no capital sentence will in fact be carried out without several substantial delays during which judges consider some defense not yet fully decided by that or other courts.[53] The almost stylized action of the drama requires that the jailers stand visibly ready to receive intelligence of the judicial act—even if it be only the act of deciding to take future action. The stay of execution, though it be nothing—literally nothing—as an act of *textual* exegesis, nonetheless constitutes an important form of constitutional interpretation. For it shows the violence of the warden and executioner to be linked to the judge's deliberative act of understanding. The stay of execution, the special line open, permits, or more accurately, requires the inference to be drawn from the failure of the stay of execution. That too is the visible tie between word and deed.[54] These wardens, these guards, these doctors, jump to the

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failure of will on the part of a majority of the Court which had, at some point in that period, decided *both* that there was to be no general constitutional impediment to the imposition of the death sentence, *and* that they were not yet prepared to see the states begin a series of executions. Of course, throughout the period, new procedural issues were arising. But it does not seem far-fetched to suppose that there was also a certain squeamishness about facing the implications of the majority position on the constitutional issue. *See* Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 354 (1985) (citing Court's "often uncertain and tortuous" death penalty jurisprudence during this period).

52. *See, e.g.*, Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring in denial of stay) (Chief Justice Burger accused death penalty lawyers of turning "the administration of justice into a sporting contest").

53. The current Court (or a majority of it) is very hostile to such delays. Barefoot v. Estelle, 463 U.S. 880 (1983), Zant v. Stephens, 462 U.S. 862 (1983), California v. Ramos, 463 U.S. 992 (1983), and Barclay v. Florida, 463 U.S. 939 (1983), mark a reversal of the trend to permit or encourage a full hearing of all plausible claims or defenses. Nonetheless, even with this new impatience to be on with the execution, there are usually substantial delays at some point before execution.

54. Consider the opinions of the various Justices in Rosenberg v. United States, 346 U.S. 273 (1953), vacating, in special term, the stay of the sentence of death that had been granted by Justice Douglas. For an analysis of the deliberations, see Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805–42 (1977).

judge's tune. If the deed is done, it is a constitutional deed—one integrated to and justifiable under the proper understanding of the word. In short, it is the stay, the drama of the possibility of the stay, that renders the execution constitutional violence, that makes the deed an act of interpretation.

For, after all, executions I can find almost anywhere. If people disappear, if they die suddenly and without ceremony in prison, quite apart from any articulated justification and authorization for their demise, then we do not have constitutional interpretation at the heart of this deed, nor do we have the deed, the death, at the heart of the Constitution. The problem of incapacity or unwillingness to ensure a strong, virtually certain link between judicial utterance and violent deed in this respect characterizes certain legal systems at certain times.[55] It characterized much of the American legal system well into the twentieth century; lynching, for example, was long thought to be a peculiarly American scandal.[56] It was a scandal which took many forms. Often it entailed taking the punishment of alleged offenders out of the hands of courts entirely. But sometimes it entailed the carrying out of death sentences without abiding by the ordered processes of appeals and post-conviction remedies. Such was the outcome, for example, of the notorious "Leo Frank" case.[57]

The plain fact is that we have come a good way since 1914 with respect to our expectations that persons accused of capital crimes will be given a trial, will be sentenced properly, and will live to see the appointed time of the execution of their sentence. In fact, we have come to expect near perfect coordination of those whose role it is to inflict violence subject to the interpretive decisions of the judges. We have even come to expect coordinated cooperation in securing all plausible judicial interpretations on the subject.[58]

Such a well-coordinated form of violence is an achievement. The care-

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55. *See, e.g.*, R. BROWN, STRAIN OF VIOLENCE, HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 144–79 (1975) (discussing legal attitudes toward American vigilantism).

56. *See* R. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, at 9–11 (1980).

57. Leo Frank was a Jewish New Yorker managing a pencil factory in Georgia. He was accused of having raped and murdered a 14-year-old employee of the factory. The trial (and conviction) took place amidst a mob atmosphere in which the Court was required to warn the defendant and his counsel not to be present in the courtroom at the rendering of the verdict lest they be violently harmed. After Frank's conviction he was forcibly removed from a prison labor gang and lynched. The case was instrumental in the formation of the B'nai Brith Anti-Defamation League. Collateral relief was denied by the Supreme Court in Frank v. Mangum, 237 U.S. 309 (1915), over the strong dissent of Justice Holmes and Justice Hughes.

58. I am not, of course, suggesting that unauthorized violence on the part of police, jailers, etc., no longer exists. But the quasi-public position that the "justice" of the mob should supplant the ordered process of the courts is no longer prevalent. See the extraordinary article by Charles Bonaparte, *Lynch Law and its Remedy*, 8 YALE L.J. 335, 336 (1899) (arguing that underlying purpose of lynching is "not to violate, but to vindicate, the law; or, to speak more accurately, . . . its 'adjective' part . . . is disregarded that its 'substantiative' [sic] part may be preserved").

ful social understandings designed to accomplish the violence that is capital punishment, or to refrain from that act, are not fortuitous or casual products of circumstance. Rather, they are the products of design, tied closely to the secondary rules and principles which provide clear criteria for the recognition of these and other interpretive acts as, first and foremost, *judicial* acts. Their "meaning" is always secondary to their provenance. 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. And, indeed, they await the word of judges only insofar as that word carries with it the formal indicia of having been spoken in the judicial capacity. The social cooperation critical to the constitutional form of cooperation in violence is, therefore, also predicated upon the recognition of the judicial role and the recognition of the one whose utterance performs it.

There are, of course, some situations in which the judicial role is not well-defined but is contested. Nonetheless, social cooperation in constitutional violence as we know it requires at least that it be very clear who speaks as a judge and when. The hierarchical ordering among judicial voices must also be clear or subject to clarification. We have established, then, the necessity for rules and principles that locate authoritative interpreters and prescribe action on the basis of what they say. The rules and principles that locate authoritative voices for the purposes of action point to the defect in a model of judicial interpretation that centers around a single coherent and consistent mind at work. For here in the United States there is no set of secondary rules and principles more fundamental than those which make it impossible for any single judge, however Herculean her understanding of the law, ever to have the last word on legal meaning as it affects real cases. In the United States—with only trivial exceptions—no judge sitting alone on a significant legal issue is immune from appellate review. Conversely, whenever any judge sits on the court of last resort on a significant legal issue, that judge does not sit alone. A complex of secondary rules determines this situation. These rules range from the statutes which generally give a right to at least one appeal from final judgments of trial courts, to special statutes which require that there be appellate review of death sentences, to the constitutional guarantee that the writ of habeas corpus not be suspended.[59] Final appellate courts in the United States have always had at least three judges. Some state constitu-

59. *See, e.g.*, 28 U.S.C. § 1291 (1982) (providing for appeals as of right from final decisions of district courts); *id.* §§ 46(b), 46(c) (providing for hearing of cases by U.S. Courts of Appeals in panels of three judges unless rehearing en banc is ordered); U.S. CONST. art. I, § 9, cl. 2 (protecting writ of habeus corpus).

tions specify the number. No explicit provision in the United States Constitution defines the Supreme Court in such a way that requires that it be made up of more than a single judge. But both invariant practice and basic understandings since 1789 have made the idea of a single-Justice Supreme Court a practical absurdity. Given the clarity of the expectation that Supreme judicial bodies be plural, it seems doubtful to me whether such an imaginary Court should be held to satisfy the constitutional requirement that there be a Supreme Court.[60]

If some hypothetical Herculean judge should achieve an understanding of constitutional and social texts—an interpretation—such that she felt the death penalty to be a permissible and appropriate punishment in a particular case, she would be confronted at once with the problem of translating that conviction into a deed. Her very understanding of the constitutionality of the death penalty and the appropriateness of its imposition would carry with it—as part of the understanding—the knowledge that she could not carry out the sentence herself. The most elementary understanding of our social practice of violence ensures that a judge know that she herself cannot actually pull the switch. This is not a trivial convention. For it means that someone else will have the duty and opportunity to pass upon what the judge has done. Were the judge a trial judge, and should she hand down an order to execute, there would be another judge to whom application could be made to stay or reverse her decision. The fact that *someone else* has to carry out the execution means that this someone else may be confronted with two pieces of paper: let us say a warrant for execution of the sentence of death at a specified time and place and a stay of execution from an appellate tribunal. The someone else—the warden, for simplicity's sake—is expected to determine which of these two pieces of paper to act upon according to some highly arbitrary, hierarchical principles which have nothing to do with the relative merits or demerits of the arguments which justify the respective substantive positions.

It is crucial to note here that if the warden should cease paying relatively automatic heed to the pieces of paper which flow in from the judges according to these arbitrary and sometimes rigid hierarchical rules and principles, the judges would lose their capacity to do violence. They would be left with only the opportunity to persuade the warden and his men to do violence. Conversely, the warden and his men would lose their capacity to shift to the judge primary moral responsibility for the violence which

60. 28 U.S.C. § 1 (1982) (providing for Supreme Court of nine Justices, of whom six constitute a quorum). The one rather significant historical exception to the generalization in the text gives me some pause with respect to the conclusion about the constitutionality of a single-Justice Supreme Court. It is true, of course, that the Chancellor was, in form, a single-justice high court. And, while it has not been the rule, some American court systems have preserved a chancery, though often with multi-judge appellate courts in equity.

they themselves carry out. They would have to pass upon the justifications for violence in every case themselves, thereby turning the trial into a sort of preliminary hearing. There are, indeed, many prisons in this world that bear some resemblance to this hypothetical situation. There are systems in which the most significant punishment decisions are made by those who either perform or have direct supervisory authority over the performance of the violence itself.

We have done something strange in our system. We have rigidly separated the act of interpretation—of understanding what ought to be done—from the carrying out of this "ought to be done" through violence. At the same time we have, at least in the criminal law, rigidly linked the carrying out of judicial orders to the act of judicial interpretation by relatively inflexible hierarchies of judicial utterances and firm obligations on the part of penal officials to heed them. Judges are both separated from, and inextricably linked to, the acts they authorize.

This strange yet familiar attribute of judging in America has the effect of ensuring that no judge *acts* alone. Ronald Dworkin's "Judge as Hercules"[61] may appear to be a useful construct for understanding how a judge's mind ought to work. But it is misleading precisely because it suggests, if it does not require, a context which, in America, is never present. There may or may not be any sense in thinking about a judicial understanding of the law apart from its application. But one thing is near certain. The application of legal understanding in our domain of pain and death will always require the active or passive acquiescence of other judicial minds. It is possible to wear this point down to the most trite observation of professional practice. A judge who wishes to transform her understanding into deed must, if located on a trial court, attend to ensuring that her decision not be reversed. If on an appellate court, she must attend to getting at least one other judge to go along. It is a commonplace that many "majority" opinions bear the scars or marks of having been written primarily to keep the majority. Many a trial court opinion bears the scars of having been written primarily to avoid reversal.

Now the question arises, which is the true act of legal interpretation? The hypothetical understanding of a single mind placed in the admittedly hypothetical position of being able to render final judgments sitting alone? Or the actual products of judges acting under the constraint of potential group oversight of all decisions that are to be made real through collective

61. Dworkin's Hercules appears first in the article "Hard Cases." Dworkin, *Hard Cases*, 89 HARV. L. REV. 1057 (1975). Hercules lives on in LAW'S EMPIRE, *supra* note 2, at 239–75, wherein he assumes the mantle of a model judge of "integrity," which seems not to be primarily a personal quality for Dworkin but an interpretive posture which values intellectual consistency and coherence. *Id.* at 164–67.

violence? The single decision of a hypothetical Hercules is likely to be more articulate and coherent than the collective decision of many judges who may make compromises to arrive at that decision. But Hyporcules does not and cannot carry the force of collective violence. This defect is intrinsic to the definition of legal interpretation as a mental activity of a person rather than as the violent activity of an organization of people.

So let us be explicit. If it seems a nasty thought that death and pain are at the center of legal interpretation, so be it. It would not be better were there only a community of argument, of readers and writers of texts, of interpreters. As long as death and pain are part of our political world, it is essential that they be at the center of the law. The alternative is truly unacceptable—that they be within our polity but outside the discipline of the *collective* decision rules and the individual efforts to achieve outcomes through those rules. The fact that we require many voices is not, then, an accident or peculiarity of our jurisdictional rules. It is intrinsic to whatever achievement is possible in the domesticating of violence.

Conclusion

There is a worthy tradition that would have us hear the judge as a voice of reason; see her as the embodiment of principle. The current academic interest in interpretation, the attention to community of meaning and commitment, is apologetic neither in its intent or effect. The trend is, by and large, an attempt to hold a worthy ideal before what all would agree is an unredeemed reality. I would not quarrel with the impulse that leads us to this form of criticism.

There is, however, danger in forgetting the limits which are intrinsic to this activity of legal interpretation; in exaggerating the extent to which any interpretation rendered as part of the act of state violence can ever constitute a common and coherent meaning. I have emphasized two rather different kinds of limits to the commonality and coherence of meaning that can be achieved. One kind of limit is a practical one which follows from the social organization of legal violence. We have seen that in order to do that violence safely and effectively, responsibility for the violence must be shared; law must operate as a system of cues and signals to many actors who would otherwise be unwilling, incapable or irresponsible in their violent acts. 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. While a convergence of understandings on the part of all relevant legal actors is not necessarily impossible, it is, in fact, very unlikely. And, of course, we can-

not flee from the multiplicity of minds and voices that the social organization of law-as-violence requires to some hypothetical decision process that would aggregate the many voices into one. We know that—aside from dictatorship—there is no aggregation rule that will necessarily meet elementary conditions for rationality in the relationships among the social choices made.[62]

While our social decision rules cannot guarantee coherence and rationality of meaning, they can and do generate violent action which may well have a distinct coherent meaning for at least one of the relevant actors. We are left, then, in this actual world of the organization of law-as-violence with decisions whose meaning is not likely to be coherent if it is common, and not likely to be common if it is coherent.

This practical, contingent limit upon legal interpretation is, however, the less important and less profound of the two kinds of limits I have presented. For if we truly attend to legal interpretation as it is practiced on the field of fear, pain, and death, we find that the principal impediment to the achievement of common and coherent meaning is a necessary limit, intrinsic to the activity. Judges, officials, resisters, martyrs, wardens, convicts, may or may not share common texts; they may or may not share a common vocabulary, a common cultural store of gestures and rituals; they may or may not share a common philosophical framework. There will be in the immense human panorama a continuum of degrees of commonality in all of the above. But as long as legal interpretation is constitutive of violent behavior as well as meaning, as long as people are committed to using or resisting the social organizations of violence in making their interpretations real, there will always be a tragic limit to the common meaning that can be achieved.

The perpetrator and victim of organized violence will undergo achingly disparate significant experiences. For the perpetrator, the pain and fear are remote, unreal, and largely unshared. They are, therefore, almost never made a part of the interpretive artifact, such as the judicial opinion. On the other hand, for those who impose the violence the justification is important, real and carefully cultivated. Conversely, for the victim, the justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear that is suffered.

Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.

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62. K. Arrow, Social Choice and Individual Values (1951).