Yale Law School
Yale Law School Legal Scholarship Repository

SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers

Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers

1-1-2003

VIOLENCE AND THE LAW: NOTES UNDER THE INFLUENCE OF AN EXTREME VIOLENCE

Efrén Rivera Ramos

Follow this and additional works at: http://digitalcommons.law.yale.edu/yls_sela

Recommended Citation
Rivera Ramos, Efrén, "VIOLENCE AND THE LAW: NOTES UNDER THE INFLUENCE OF AN EXTREME VIOLENCE" (2003). *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers*. Paper 27.
http://digitalcommons.law.yale.edu/yls_sela/27

This Article is brought to you for free and open access by the Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

VIOLENCE AND THE LAW:
NOTES UNDER THE INFLUENCE OF AN EXTREME VIOLENCE*

By Efrén Rivera Ramos**

I write while the war on Iraq is developing.

It occurs to me that when we chose the topic of violence for this session of SELA, we did not imagine that it would be so relevant. We see emerging from our TV sets, live and in full color, graphic representations of the key questions that we formulated for each panel; questions about: the legitimacy of violence, violence as spectacle, extraordinary violence, the different treatment to people that results from classifying them as enemies or allies, combatants or civilians, heroes or traitors, and, finally, faith in violence as a generator of change.

It occurs to me that in the face of such overwhelming evidence it should be easy to write about violence. But it is precisely its overwhelming character that makes it more difficult to write about violence these days, violent days if there were any. It seems that anything said would only be an empty abstraction unable to express the truth of the violence that we have been forced to experience.

From Iraq our eyes wander to the turbulence in Palestine and Israel; to the daily death that occurs in Colombia; to the havoc wrought by hunger in Africa; to the fatalities produced by the drug wars in the streets of San Juan, Puerto Rico; to the thousands, mainly women and children, killed by their partners and parents; to the two million people jailed in the United States and the hundreds that await execution in death row; and our eyes turn back to the visual violence, no less violent at that, unceasingly visited on us by CNN and the other TV networks of the world.

And one is convinced that nothing that we might say in this seminar will do justice to the immensity of the violence surrounding us and much less to the unspeakable suffering of its victims. One is convinced, furthermore, of the inevitability of violence: of how far seems the day in which we have reduced it to an historical curiosity or to a nightmare vanished from our memory.

It also occurs to me that never before have we had so much law. I ask myself whether law is incapable of containing violence when other forces – strategic, economic, cultural, psychological – need violence to satisfy interests that transcend the law. Or, whether law is really indifferent to certain types of violence. Or, whether it is the case that law's objective has never been to eliminate violence, but only to tame it for certain purposes, preserving all the potential of its fury to be unleashed in crucial moments that need its force to maintain or create order. What is, then, the relationship between law and violence?

---

*Paper for the panel on "The legitimacy of violence" in the Seminar in Latin America on Constitutional and Political Theory (SELA) on the topic of *Violence*, to be held in Perú from June 12-15, 2003.

**Dean and Professor of Law, School of Law, University of Puerto Rico.

My thoughts have led me to the terrain meant to be explored by some of the questions posed to the first panel. Somewhat reluctantly, I venture to say something about the topic. I do it with the flickering hope that, although it may seem like an academic luxury to which we treat ourselves in this beautiful spot in Perú, so distant and so proximate to the daily violence of the world, our discussions may contribute in some way, if not to stop it, at least to better understand what is happening to us and why.

The relationship between law and violence

The paradox

Modern law has lived traversed by a paradox: in order to reduce violence, it legitimates it; but by legitimating it, it prevents its disappearance. It upholds it. It multiplies it. It contributes to its reproduction. This paradox is nurtured by three basic realities: (1) violence is found at the origin of many modern legal systems; (2) modern societies need to discipline violence to maintain order; and (3) law depends partially on violence for its effectiveness.

Before proceeding, I must clarify what I mean by violence.

By violence I understand simply the exercise of potentially harmful force. By force I mean all kinds of force: physical, verbal, symbolic. Not every use of force constitutes violence, but all exercise of violence requires the use of some type of force. The force so deployed does not have to cause harm – although in the majority of cases it will. It would suffice that, when using force, the actor intends to cause harm or may be able to cause it despite his or her intention.

Usually violence is directed against another person. Sometimes, though, it may be applied against oneself. Nevertheless, on occasions, even though the violent act is perpetrated against oneself, the purpose may be to produce an effect on others, like calling their attention, generate sympathy, produce remorse, cause grief, inflict suffering, etc. That is the case of the person who commits suicide seeking to punish his loved ones with his death or "spite" the world for his situation.

I do not adopt, then, the distinction established by some between force and violence, reserving the term violence only for the illegitimate use of force, so that all legitimate use of force would not constitute violence. Such a position washes away the connection between law and violence through the semantic expediency of a definition. I, in turn, believe that although there can be a non-violent use of force, it does not have anything to do with the legality or illegality of the act. On the other hand, there are legally sanctioned uses of force that have the potential to cause harm, and in effect do cause it. Those cases constitute violence legitimated by law, but violence just the same. The recipient will perceive it as violence, even though he or she may accept its legitimacy. After all, the blow to the head given by the police, though allowed by law under the circumstances, can hurt as much as that inflicted by the robber or the irate neighbor. The head bleeds the same. The effect may be equally long-lasting. The harm caused – including brain damage – may result similarly disabling. The sensation of having been assaulted and the deep resentment felt due to the violation of her corporal integrity may be as intense in the person who receives the blow in one case as in the other. There is no material difference. Whatever difference there may be resides in the valuation that people – including jurists – may place on the act and in the consequences attributed to it by law.

The ends of violence may be diverse: force others to do or not to do something, inflict pain, punish, prevent a greater evil, etc. There can be, then, productive violence (that which procures to produce some action or situation), punitive violence (that which punishes or brings about suffering),

and today there is much talk about preventive violence (that which seeks to avert a perceived evil). In concrete cases, at times it is very difficult to determine what is the immediate objective of violence. In fact, several purposes may converge. A sole act of violence may have several effects. In every case, however, there is a close relationship between the exercise of violence and power. Be it because violence is used to obtain or maintain control over others or because it is used as a means to alter the power relationship existing among those involved in the violence. This link between violence and power explains, in part, the connection between law and violence. Law is a power phenomenon and power is frequently exercised through violence.[1]

Violence takes various forms. So that one may speak of physical violence, psychological violence, and symbolic violence. Physical violence requires the use of physical force. Psychological violence usually depends on words, gestures and other acts aimed at transmitting some meaning, almost always a threat, a warning or the announcement of a possible harm. There are examples of violence that run astride physical and psychological violence – like destroying an object valued by someone with the purpose of intimidating her. Symbolic violence, according to Bourdieu, consists in the imposition of ways of seeing and evaluating the world. The exercise of symbolic violence, he reminded us, is a typical operation of law.[2]

The foundational violence of legal systems

The first obvious connection between law and violence lies in the fact that many contemporary legal systems owe their existence to foundational processes marked by violence: revolutions, rebellions, civil wars, military occupations, colonial impositions, national liberation wars, armed overthrows, *coups d'etat*, and similar events. The French Republic, the United States of America, most Latin American states, many independent countries of Africa and Asia, the Puerto Rican legal system, the new constitutional order emerged from the struggles against Apartheid in South Africa, and the legal order that will probably be imposed in Iraq constitute relevant examples. That be said in respect to historical experience. From a theoretical point of view, the phenomenon has been analyzed by Hans Kelsen – in his explanation of how changes in the *grundnorm* occur[3] –

---

[1]I disagree with the proposition put forth by Hannah Arendt that violence and power are opposite phenomena. Hanna Arendt, ON POWER (1979), at pp. 42-56. Hers is a benign conception of power, that treats it as a unidimensional social phenomenon. I prefer a more complex characterization, according to which power is a phenomenon that is at the same time productive and repressive, benign and harmful, positive and negative, etc. See, for example, Michel Foucault, POWER/KNOWLEDGE (Colin Gordon, ed. 1980); POLITICS, PHILOSOPHY, CULTURE (Lawrence D. Kritzman, ed. 1988), esp. Chap. 6: *On Power*. In one of its dimensions, power oftentimes resorts to violence or, at least, to the threat of violence.

[2]Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805 (1987).

[3]Hans Kelsen, TEORÍA GENERAL DEL DERECHO Y DEL ESTADO (1949, UNAM 1995 ed.), pp. 135-140. For a more recent analysis, based on Kelsen, see Óscar Correas, INTRODUCCIÓN A LA SOCIOLOGÍA JURÍDICA (1994), esp. the section titled "La formación de una norma fundante", pp. 109-110.

and has been reformulated more recently, in another language and within another theoretical paradigm, by Jacques Derrida, when referring to the mystical force of law.[4]

Modern law has been a product of violence. Of course, it has not been engendered only by violence. It has been generated also by worldviews, ideals, aspirations, utopias and understandings about the nature of things, human beings and societies. It has been influenced by diverse interests and motives. It has appeared in non-violent forms. All that is true. But it is also true that its birth has been supported, in part, by violence. Law has derived its legitimacy, in good measure, from its foundational acts of violence. By legitimacy I mean both acceptance and justification, that is, factual and normative sustenance. That is precisely one of the sources of the paradox: law, having acquired its legitimacy from its foundational violence, now is forced to domesticate violence. But it can only domesticate it by legitimating it, by making it its own, by keeping it as an exclusive treasure, as a defensive fortified tower to prevent its own displacement by another foundational violence. Law returns violence the favor by according it legitimacy. It is a barter of legitimating acts. Law needs its foundational violence: its recollection, its memory, its mythic presence, in order to maintain its authority. To perpetuate itself, the foundational violence of law, in turn, depends on law for its legitimation. To avoid its exhaustion, its historical fadeout, it needs to engrave itself in institutions, procedures, and shared understandings. In the world produced by modernity only law can achieve that objective. Or, at least, achieve it with an acceptable degree of effectiveness.

The foundational violence of law, then, perpetuates itself in law and law reproduces itself in its remembrance. Thus, law prevents violence from disappearing from the collective memory of the community. In many instances, it turns violence into a source of glory, a source of pride, into a subliminal ideal that informs community life. A peculiar phenomenon then takes place. Even if law has been adopted as a necessary instrument for social life, at bottom it will be regarded by many as a second class substitute for the creative capacity of violence as a generator of order and new possibilities. Under those circumstances, the routine and sluggishness of law eventually give way to the exciting irruption of violence, even though it may be in an episodic and fleeting fashion. Some times the outbreak will come from a disaffected member of the community or from a group with more or less capacity to throw the existing order into disarray. Other times, violence will be exerted by the state itself, directing it inwardly or outwardly, as the case demands, with various purposes, motives and interests in mind. In those moments the foundational violence of the system may act as symbol and stimulus. It may even serve as a justifying argument. Just in case clarification is needed, I wish to stress that I am not referring only to societies still in the process of development or those with scant institutional or democratic structures. Everything I have said is also applicable to the most developed of societies, to the most powerful of contemporary world powers.

Violence disciplined by law

Once constituted, societies cannot submit themselves to the ravage of unfettered violence. Unchecked violence would end causing their extinction. That would spell the demise of the interests, motives, ambitions, advantages, benefits, ideals, dreams and desires sought to be implanted

---

[4]Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 919 (1990).

by the foundational act of violence. Societies (or, rather, those who benefit the most from a certain social order) need to discipline violence.

To discipline means to subject to a given rationality. By rationality I mean certain rules of the game. Those rules include norms about who is legitimated to use violence, when, under what circumstances, with what motives, to what extent and in what form. Thus, for example, the police or the military are allowed to use violent means against others, although not always and in all circumstances. Private persons are also authorized to exercise violence, for instance, when it is judged necessary in order to protect the person's or another's life if it is threatened without legal justification. Motives are also important: thus, it may be prohibited to discriminate against certain groups by singling them out especially for violent treatment. The form of violence is also regulated. Certain forms of violence, characterized as torture or cruel and unusual punishment, are excluded from legal protection in many countries, although some allow them under certain conditions, as when torture is permitted to obtain information that may prevent a disaster or the effects of a terrorist act.

In truth, it must be said that modern law never sought to eliminate violence entirely. In that sense, it cannot be reproached for not having done so. Its purpose, as has been stated above, was to submit violence to a particular rationality. In any event, what must be assessed is how effective its disciplinary task has been.

Law disciplines violence, but it does much more than that. As part of its disciplinary activity, sometimes law prevents or displaces violence; others, it only defers it or holds it in suspense. But still others, its function is to make it less rude, more acceptable, more "civilized" (to subject violence to law is to give it citizenship status, that is, to make it conform to the ways of the city). Violence is turned into an instrument of order or, better still, into an aspect of order itself. It is even made to appear as a tool of justice, as when the guilty are punished and the innocent are defended. When it performs these operations, law highlights the desirable dimension of violence. Sometimes it makes it truly appetizing (the satisfaction produced in some by the imposition of the death penalty on those they consider despicable human beings is a clear example of this reaction). Law acts upon our subjectivities to convince us of the necessity, if not the desirability, of violence. It persuades us that the violence permitted by law and exercised by the state protects us from all other violence. It does so because it needs our consent in order to accord violence its legitimacy. Otherwise, the violent act imposed by law would be too grotesque. Only the most radical pacifist resists this seduction. The immense majority of people assent.

Part of the paradox is thus consummated. Law subjects violence to its discipline, but ends up serving as its promoter.

Law depends on violence

Part of the explanation of these ambiguous relations between law and violence lies in the fact that law depends on violence – not only on the foundational violence from which it originates, but also on present and future violence (that is, on actually imposed violence and on the threat and the possibility of the use of violence). Of course, Kelsen had already alerted us to this reality, when he insisted that legal norms depend on the coercion implicit in legal sanctions.[5] It is interesting in this

[5]Kelsen, *supra* note 3, at pp. 21-23. The term "law", according to Kelsen, refers to the "social technique that consists in provoking socially desirable conduct through the threat of a

regard to examine the definition of coercion (*coacción*) given by the the Dictionary of the Spanish Language. In its first acceptation the term is defined as "force or violence done upon a person to compel her to say or execute something". In its second meaning, referred to law, the dictionary defines coercion (*coacción*) as "the habitual use of legitimate force that accompanies law to exact compliance of its obligations and make efficacious its precepts".[6] The coercion allowed by law is to a great extent, then, force or violence exercised under the law, force that does not lose its violent character just because it is legitimate.

Some sanctions – like the death penalty, the most extreme of violent sanctions – imply the immediate exercise of violence. Others do not. The imposition of a fine, the annulment of a contract, the compensation demanded from the tortfeaser, etc., are sanctions that do not require the immediate use of force. They are legal decrees whose observance allows for the "peaceful" resolution of conflicts. Because those sanctions abound in the legal world and in many societies those upon whom they fall end up complying, the impression is produced that law is a synonym of non violence. However, even those sanctions have as their last guarantee the threat of the use of violence. Thus, he who refuses to pay compensation, exposes himself to have his property attached; if he were to resist the attachment, he is liable to be arrested; if he confronts the arresting officer, he may be subdued against his will; and if he were to offer still more resistance, he is exposed to suffer corporal harm or be forcefully deprived of his freedom. Awareness of those possibilities partially explains why many people obey the legal order.

What may be said is that not all coercion takes on a violent character, at least in its immediate application. But violence is one of the forms of coercion that law uses in some cases and, in all cases, all legal coercion ultimately depends on the threat and the possibility of violence.[7]

To affirm this, however, does not mean in any way to reduce law to violence. Law is not exclusively violence or the use of force. If it were, it would not be law. But it cannot be said either that law is a stranger to violence. If it were, it would not be law either. It would be something else. Law depends for its effectiveness both on coercion and on persuasion.

---

coercive measure that ought to be applied in case of contrary behavior." *Id.*, at p. 22 (translation supplied). For an elaboration of Kelsen's theory nuanced, in part, by a Marxist approach, see Óscar Correas, CRÍTICA DE LA IDEOLOGÍA JURÍDICA (1993), esp. Ch. Three, at pp. 53-70. For another discussion of the internal relationship between sanctions and the legal order, also influenced by Kelsen, see Norberto Bobbio, TEORÍA GENERAL DEL DERECHO (1991). Bobbio discusses several authors who define law in terms of coercion in his book EL POSITIVISMO JURÍDICO (1993), at pp. 157-168.

[6]Real Academia Española, DICCIONARIO DE LA LENGUA ESPAÑOLA (1984), at p. 327. Webster's Third New International Dictionary of the English Language does not use the term "violence" in its definition of coercion. It only refers to the "use of physical or moral force" or to "the application of sanctions or force". But it defines "to coerce" as "to restrain, control, or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation)" and as "to compel to an act or choice by force, threat, or other pressure". At p. 439.

[7]"Hence, in domestic affairs, violence functions as the last resort of power against criminals or rebels – that is, against single individuals who, as it were, refuse to be overpowered by the consensus of the majority." Arendt, *supra* note 1, at p. 51.

Law is a particular mode of regulation that combines coercion and persuasion to achieve its ends.[8] To the extent that it persuades, the need for violence is reduced. But historical experience proves that law has never been able to rely totally on persuasion, so as to eliminate the need for violence absolutely.

Persuasion may be the result of the full or partial consonance between the values incorporated in the legal norm and those of the subject to whom the norm is addressed. Or it could result from a judgement of expediency on the part of the subject. In those cases, the threat of violence is not activated. But in the absence of such an identity of values or calculation of convenience, the threat of coercion becomes necessary.[9]

Since modern societies are complex societies, whose members are bearers of a great diversity of interests, motives, attitudes and values, in them the efficacy of law depends on a combination of multiple mechanisms that operate on a variety of devices. That combination includes many ways of articulating persuasion and coercion. Some subjects will obey because they believe in the intrinsic goodness of the contents of the legal norm, others will be persuaded of its convenience, and still others will comply to avoid its sanctions. Among those who are not persuaded of the goodness or expediency of the specific norm, there will be some who will believe in the goodness or advantage of obeying legal norms in general, because of the values that such compliance promotes or the utility implicit in the existence of some type of order. Since in large, complex societies it is very unlikely that each person will come to agree with the intrinsic merits or utility of all existing legal norms, even each single subject will have different reasons to obey the law: she will obey some laws because she agrees with their content, others, because it will be to her advantage, and still others, in order to avoid the legal or social sanction that non compliance would unleash.

To a certain extent – and for certain subjects – persuasion depends on the threat of coercion. In those cases, the goodness or expediency of obeying is closely linked to the assessment made about the good implied in avoiding the evil of coercion. On the other hand, coercion also depends on persuasion. Let me explain. In many contemporary societies, in order to be effective, coercion has to be considered legitimate, in other words, it must be accepted. Coercion is deemed legitimate either because those to whom it is imposed perceive it to be deserved or, in any case, justified; or because the majority believes it to be justified when visited upon groups or individuals in certain circumstances. Only in those cases can we speak of legitimate legal systems. Or, to express it in another theoretical language, of hegemonic legal systems.[10] In other words, modern legal systems, with their emphasis on legitimacy, depend on the combined effect of persuasion and coercion on the aggregate of community members as well as on the consciousness of individual subjects.

---

[8]For a more extended analysis of this idea, see Efrén Rivera Ramos, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001), at pp. 195-199.

[9]*Id.*, at p. 198. *See also* Efrén Rivera Ramos, *Derecho y subjetividad*, 5-6 FUNDAMENTOS 125 (1997-98).

[10]For Gramsci, hegemony is the result both of coercion and persuasion, operating as much within civil society as within the state. See, generally, Antonio Gramsci, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. N. Smith, eds) (1971); Maureen Cain, *Gramsci, the State and the Place of Law*, in LEGALITY, IDEOLOGY AND THE STATE (David Sugarman, ed.) (1983); and the analysis contained in Rivera Ramos, *supra* note 8, at pp. 196-197.

Furthermore, all known legal systems – some more than others, it is true – allow violent as well as non-violent forms of coercion. Violence is, then, part of contemporary legal frameworks.[11]
Is law possible without this relationship to violence? Should law aspire to eliminate or reduce the experience of violence in the world?

Those are two different kinds of questions.

The second one is of a normative character. To answer it in the affirmative is equivalent to proposing a new role for law: to delegitimate all violence, including the one emanating from the state and not only that which threatens its stability. The answer will depend, among other things, on our valuation of violence.

The answer to the first question calls for a speculative effort based on certain suppositions about the human condition and the nature of social life. The possibility of law without violence requires changes in law itself, but has much more to do with transformations in the wider culture of which law is a constituent part.

We know that violence has been glorified since ancient times. The figure of the hero – a privileged category in all known civilizations – was for too long tied to violence: the violence of war, revolution, rebellion, etc. The 20th Century witnessed a proliferation of positive valuations of violence:[12] the revolutionary violence of the bolsheviks, the cleansening violence of the nazis, the saving violence of the allies, the liberating violence of the decolonizing movements, the transformative violence of the Third World; the vindicatory violence of workers; the violence with or without cause of rebellious youths; the resisting violence of the poor; the protective violence of segregationists; the stabilizing violence of the Latin American military; the civilizing violence of the rich democracies hoisted on the poor poor countries. Violence all over. Violence as an expression of culture. Violence against culture. Violence as culture. Violence as an inseparable part of contemporary culture. Violence carries too much culture on its back. So much that its weight seems unmovable.

The 20th Century also saw the emergence of movements that seemed to speak another cultural language. Mahatma Gandhi's and Martin Luther King's advocacy of civil disobedience, the anti-war movements, some modalities of the discourse of human rights, some versions of feminism, some ecological platforms, some currents of democratic thought, to mention but a few, promised not only non violent transformations, but alternatives to the very culture of violence. The discovery of victims as subjects began to focus the attention on the effects of violence and not so much on its motives, forms or purposes. It seemed that what was being questioned was all violence, regardless of its origin, the motivations of its perpetrators or the ends sought by them. There seemed to be afoot a new vision on how to build the world that would not depend on violence. At times law was invoked as an auxiliary to such a transformation. New possibilities were being opened, at least in the realm of the imagination.

As the 21st Century unfolds many of the new utopias have been dealt a severe blow. Let us take two dramatic examples: the attack on the twin towers on September 11, 2001 and the war in

---

[11]For Robert Cover, the very act of legal interpretation constitutes an exercise of violence. Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601(19). *See also* Martha Minow, Michael Ryan, and Austin Sarat, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (1992).

[12]For this general idea, see Arendt, *supra* note 1. The examples that follow are mine.

Iraq in 2003. The terrorist act opened our eyes to the vulnerability of contemporary societies in light of the attraction that violence seems to be exerting among those who feel subjugated by the overpowering violence of the dominant economic, political and cultural order. States hardened their positions and launched a new violent offensive against the civil rights of all in the name of a so-called war on terrorism. The language of war became dominant again. That is, we reclaimed the language of violence once more.

The war in Iraq – a sequel of the above phenomenon – has done much more than to overthrow a bloody regime. The choice of war against the express will of millions of inhabitants of the planet made a trifle of the peace movement. The equalizing notion of human rights became irrelevant with the disproportionate appraisal of the life and security of the dozens of American and British soldiers who have been killed or wounded in comparison to the thousands of Iraqis, civilian and military, who have lost their lives or have been mutilated. The glorification of women soldiers during the conflict poses new challenges to all feminisms. The savage destruction of the natural and human ecosystems in that country derides ecological ideals. The return of colonial administrators in the midst of a supposed post-colonial era should dissipate the illusions of those who dreamt of the end of empires. The deep contradiction of an imposed democracy should cause every convinced democrat to wince. Those who predicted a new order based on the information society have seen the mass communication media become bearers of disinformation and active instruments of war. And law...well, the truth is that law has been reduced to a secondary, if not inconsequential, phenomenon in this new violent adventure. Little has it had to do with the justification, commencement, and development of the war. If anything, law has been impotent against this war. In Iraq, as in Puerto Rico, law will follow the occupation and will be able to survive only if it does not oppose it, only if it agrees to legitimate it.

In order to end in a less pessimistic note, let me add a few final thoughts.

My analysis has been basically a descriptive exercise. But it operates on the basis of an intimate value preference: I would like to see violence reduced to its minimal expression, given the fact that probably it will never disappear totally. I have felt the duty, nevertheless, of avoiding fooling myself and others. I believe that societies subjected to law, as we know it, offer better possibilities for a peaceful life for a reasonable number of its members than societies with very weak legal systems. But I hold no illusions. I do not have any doubts about the ineffectiveness of law to deal with certain types of violence or about law's own violent vocation in certain circumstances. Neither do I believe that ours are the only desirable societies.

If I am asked whether law should try to reduce the experience of violence to the utmost, I will say yes, because I do not like violence. If I am asked whether that will be possible, I will say that it depends...it depends on the possibility of very deep transformations in social structures and in our culture. I would say also that, if those transformations were achieved, we would really be before a new kind of law, so different from the one we know that maybe we would have to give it another name.[13] The rootedness of violence in our culture makes those transformations very difficult. But

[13]This thought may be an echo of the statement made by Kelsen: "It is a very important sociological question that which consists in knowing what are the social conditions that make such technique [law] necessary. I do not know if we can satisfactorily answer such a question. I do not know either whether it is possible for humanity to rid itself totally of such a social technique. But if the social order were not to have in the future the character of a coercive order

the attempts we have seen in the past to transcend the culture of violence may serve as points of departure for the enterprise.

I believe, very tentatively, that maybe the clue lies in the promotion of a new sensibility that places the OTHER at the center of our concerns, so that we are prevented from causing her harm, no matter how much benefit such harm may seem to yield to that secular divinity we call society. It would require nurturing a new mindfulness for the other person that would produce such a devaluation of violence, due to its effects, that we are led to adopt as an imperative its elimination or its reduction to the maximum extent possible. Such attitude would imply the development of a true aversion to the suffering imposed upon others, so that we become prone to always refusing being the perpetrators of such suffering.

As far as law is concerned, it would have to incorporate that new sensibility at all levels. It would have to overcome the paradox in which it finds itself. It would have to detach itself of its own foundational violence, even to the extent of repudiating it if necessary. More than trying to discipline law, it would have to delegitimate it at every turn. It would have to become less dependent on coercion and rest more on persuasion. It would have to become less and less a rule that is imposed and more a value that is embraced. The question is whether all of this is possible.

The paradoxical relationship between violence and law as we know it – as an axis of persuasion and coercion, that is, as a conjugate of patience and violence – has become so strong that we would really have to think of making law disappear or transforming it into something else. The problem is that that something else does not have a parallel in history: neither religion, nor morality, nor politics, all of which have been petri dishes for violence. Perhaps law should look more like love, although a popular saying warns us that love sometimes kills. Or maybe it would behoove law to be more like art – which has not been exempt from violence either, although probably to a greater extent than law. In that case, law may have to abandon its preferred resource: the repeated imposition of solutions dictated in the past (in statutes, court decisions, administrative decrees), to harbor a new attitude leading to the unending creation of new ways of handling each critical situation, each conflict, each particular claim for justice. In other words, maybe what is needed is a new resolve to imagine what has never been: the formation of a kind of law – although we give it another name – that consists in the perpetual creation of new solutions. It would mean renouncing violence on behalf of patience. But not patience as passivity, but as affirmative action that transforms conflicts into opportunities that generate superior conditions of community life.

Of course, all of this is predicated on a huge perhaps: on a challenging speculation.

I am perfectly aware of the fact, moreover, that I have written these notes under the influence of the spectacle of an extreme violence.

---

and society could exist without 'law', then the difference between the society of the future and ours would be incommensurably greater than that which exists between the United States and ancient Babylon..." Kelsen, *supra* note 3, at pp. 22-23 (translation supplied).