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Who's Afraid of Jurispathic Courts?: Violence and Public Reason in *Nomos and Narrative*

Robert C. Post*

It is impossible for someone of my generation to re-read *Nomos and Narrative* and not be overtaken, once again, by the charisma of Robert Cover. The text irresistibly recalls Cover's passion and intensity, his saintly integrity, his astonishing intellectual force, his forthright moral engagement. Even after twenty years *Nomos and Narrative* still vividly evokes the energy and vitality of its author.

So it came as something of a shock when I recently assigned the article to a seminar I was teaching on popular constitutionalism and found that my students were virtually indifferent. They found *Nomos and Narrative* eloquent, but curious and antique, informed by a sensibility that seemed distant and indecipherable.

The article didn't move them at all. What had originally endowed Cover's article with such explosive power was its insistence that law express *nomos*, that it signify "a world of right and wrong,"¹ and that the law offer a guide to life and action, to serious commitments inscribed in blood. "A legal interpretation," Cover taught, "cannot be valid if no one is prepared to live by it."² This was thrilling stuff, especially when laid against the indifferent positivism of legal process theory, or the knowing irony of legal realism, or the nascent skepticism of critical legal studies. Why was it that my students, otherwise bright and passionate, failed to recognize and respond to Cover's deep and thrilling call for high moral seriousness?

I believe that the answer lies in Cover's belief that "there is a radical dichotomy between the social organization of law as power and the

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

2. *Id.* at 44.

organization of law as meaning.”³ The law that interests my students, the law of the state, is for Cover merely a hollow instrument of violence, “itself incapable of producing the normative meaning that is life and growth.”⁴ In *Nomos and Narrative* the law of the state carries no republican imprimatur. It is not the result of citizens working together in public to produce a government that embodies common civic values. Composed just before the Republican revival and the renaissance of Rawlsian public reason, *Nomos and Narrative* is strikingly uninterested in the normative possibilities of constitutional politics. My best guess is that the students in my seminar could not relate to *Nomos and Narrative* because they regarded these forms of civic engagement as essential to their life’s work.

As against the constitutional politics of the state, Cover associates legal meaning almost invariably with “autonomous interpretive communities.”⁵ These communities can be insular and turn away from the state. Or they can be redemptive and attempt to capture the state. But if and when they do come to control the levers of government power, they seemingly lose their association with nomos. Cover is not entirely explicit about this in *Nomos and Narrative*, but three years later in *Violence and the Word* he was quite clear that law, when it emanates from the state, “takes place in a field of pain and death,”⁶ and that “pain and death destroy the world that ‘interpretation’ calls up.”⁷ The law of the state engages “a violent mechanism through which a substantial part of [the] audience loses its capacity to think and act autonomously.”⁸

The violence of the law undermines the voluntary affirmation of meaning required by nomos and interpretation. “Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.”⁹ “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.”¹⁰

Cover’s perception of violence is so vivid that it eclipses any clear picture of how the nomos of law can be fused with the force of the state.¹¹

3. *Id.* at 18.

4. *Id.* at 16.

5. *Id.* at 44.

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

7. *Id.* at 1602.

8. *Id.* at 1615.

9. *Id.* at 1629.

10. *Id.*

11. “In *Nomos and Narrative*, I . . . 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

In *Nomos and Narrative* Cover portrays the state as unrelentingly evacuated of meaning, as exhausted by its bureaucratic and administrative structures. This is the context within which *Nomos and Narrative* constructs its famous image of jurispathic courts: “Judges are people of violence,” Cover writes, and “because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office.”¹² Although *Nomos and Narrative* leaves unexplained the nature of the “because,” it nevertheless deeply inhabits the truth of the proposition.

In *Nomos and Narrative* judges do not create nomos; they do not call into being a narrative world of right and wrong. They instead use the force of the state to crush the competing nomoi of autonomous communities. Offering a terrible indictment of the Burger Court, Cover concludes that “[t]he result in all cases is deference to the authoritarian application of violence, whether it originates in court orders or in systems of administration.”¹³ The cases “align the interpretive acts of judges with the acts and interests of those who control the means of violence.”¹⁴ Although Cover does not explicitly deny the possibility that judges can create nomos,¹⁵ he does conclude that “the commitment of judges” is “to the hierarchical ordering of authority first, and to interpretive integrity only later.”¹⁶ And he does suggest that “the commitment to a jurisgenerative process that does not defer to the violence of administration is the judge’s only hope of partially extricating himself from the violence of the state.”¹⁷ It is of course the very possibility of such extrication that Cover subsequently denies in *Violence and the Word*.

So *Nomos and Narrative* turns quite palpably away from the state and invites us instead “to look to the law evolved by social movements and communities.”¹⁸ The most to which the state can aspire is what Cover calls an “imperial” or “world maintaining” attitude toward nomoi.¹⁹ The state can embody “the universalist virtues that we have come to identify with modern liberalism,” which are “essentially system-maintaining

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.” *Id.* at 1602 n.2.

12. Cover, *Nomos*, *supra* note 1, at 53 (emphasis added).

13. *Id.* at 56.

14. *Id.* at 57.

15. *See, e.g., id.* at 57 n.158.

16. *Id.* at 58. Thus Cover observes: “[T]he tie between administration and coercive violence is always present, while the relation between administration and popular politics may vary between close identity and the most attenuated of delegations.” *Id.* at 57.

17. *Id.* at 59.

18. *Id.* at 68.

19. *Id.* at 13.

‘weak’ forces.”²⁰ In this mode the state can shelter and protect the communities that produce paideic nomos; it can pursue “virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning.”²¹ But these virtues enact “an organizing principle itself incapable of producing the normative meaning that is life and growth.”²² The state’s sterility is a good thing, however, because a government that sought to impose “a statist paideia”²³ would be positively dangerous. It would use violence to crush and displace the autonomous communities where nomos is actually forged.²⁴

Nomos and Narrative cashes out the imperial virtues in the language of freedom of association.²⁵ “Freedom of association is the most general of the Constitution’s doctrinal categories that speak to the creation and maintenance of a common life, the social precondition for a *nomos*.”²⁶ In this way Cover carves out a passive and ultimately libertarian role for the state.²⁷ The failure of *Nomos and Narrative* to engage my students stems, I believe, from the thin, almost vacant quality of its vision of the American constitutional order. Cover reads American constitutionalism as committed to an odd, listless version of liberalism.

In a famous passage, *Nomos and Narrative* concludes by enjoining us “to stop circumscribing the *nomos*” and “to invite new worlds.”²⁸ But this

20. *Id.* at 12.

21. *Id.*

22. *Id.* at 16.

23. *Id.* at 61.

24. Hence Cover’s palpable ambivalence about the very possibility of a true state paideia:

The weakness of the state’s claim to authority for its formal umpiring between visions of the good is evidenced by the state’s willingness to abdicate the project of elaborating meaning. The public curriculum is an embarrassment, for it stands the state at the heart of the paideic enterprise and creates a statist basis for the meaning as well as for the stipulations of law. The recognition of this dilemma has led to the second dimension of constitutional precedent regarding schooling—a breathtaking acknowledgement of the privilege of insular autonomy for all sorts of groups and associations. . . . The state’s extended recognition of associational autonomy in education is the natural result of the understanding of the problematic character of the state’s paideic role. There must, in sum, be limits to the state’s prerogative to provide interpretive meaning when it exercises its educative function. . . . Any alternative to these limits would invite a total crushing of the jurisgenerative character. The state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternative to those of the power wielders.

Id. at 61-62.

25. *Id.* at 66.

26. *Id.* at 32.

27. At the end of *Nomos and Narrative*, Cover does suggest that the failure of *Bob Jones University v. United States*, 461 U.S. 574 (1983), lies in the fact that it “gives too much to the statist determination of the normative world by contributing too little to the statist understanding of the Constitution.” *Id.* at 66. The formulation is convoluted, because Cover seems to be implying that “a constitutional commitment to avoiding public subsidization of racism” would itself express a *nomos*. *Id.* at 67. But the very possibility that the state might enforce its own *nomos* is worrisome to Cover, so he hedges the point by characterizing the potential perspective of the state as a “statist understanding of the Constitution.”

28. *Id.* at 68.

invitation raises the question of how different worlds can coexist. The state is not uniquely jurispathetic; every nomos exists by virtue of its exclusion and denial of competing nomoi. Jurispathology is in this sense built into the very sociology of human meaning.²⁹ So we must ask how multiple communities, with their competing and mutually jurispathic nomoi, can live together. Of course Cover recognizes the problem,³⁰ which is why he posits an imperial attitude that corresponds to traditional liberal virtues like freedom of association. But Cover denies that this kind of liberalism can itself be jurisgenerative. I myself believe that this denial is mistaken. We are certainly long past the point of regarding liberalism as a transcendent and neutral incarnation of the “right,” as distinct from its own specific form of the good. It is clear enough that liberalism inhabits its own world, asserts its own pieties and values, advances its own narratives of individual self-fashioning.

It is possible that Cover’s refusal to acknowledge the distinctive nomos of liberalism follows from a dilemma in which he was ensnared: if liberalism is its own nomos, and if liberalism is necessary in order to preserve the small autonomous communities that Cover finds so appealing, then the nomos of liberalism acquires a special kind of logical priority. But Cover is unwilling to recognize this priority, because he is concerned to insist upon plural worlds of equal nomoi.³¹ The price of this insistence is that Cover cannot adequately theorize how these plural worlds can continue to co-exist, apart from the “weak” virtues of a “system-maintaining” empire. The potential nomos of liberalism is thus reduced to “an organizing principle itself incapable of producing the normative meaning that is life and growth,”³² and courts are concomitantly characterized as merely “jurispathic.” In *Nomos and Narrative* courts “suppress law” and “impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.”³³ At their worst, courts solve the problem of proliferating nomos by suppressing the multiplicity of laws; at their best they tolerate jurisgenerative communities by exercising the negative virtue of freedom of association.

I do not fully understand the emphasis that Cover places on the jurispathic nature of courts. All nomoi, as I have said, are jurispathic,

29. See, e.g., KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* (1966).

30. “The question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities.” Cover, *Nomos*, *supra* note 1, at 44.

31. “The challenge presented by the absence of a single, ‘objective’ interpretation is . . . the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another.” *Id.*

32. *Id.* at 16.

33. *Id.* at 40.

because all construct their narratives by excluding and suppressing other possible narratives. The problem with courts is not that they are jurispathic, but rather that they are violent, and it is the connection to the organized violence of the state that most deeply troubles Cover and leads him to doubt the possibility of a true statist paideia. This doubt reflects the attitude of a generation, of my generation, who faced a violent state that drafted its citizens to pursue an alien war in Vietnam. In the Vietnam era we had no public life that we could trust. We confronted a state that refused to respond to public dialogue or reason, that resorted to brutal repression whenever its citizens sought to register protest or disagreement. As a consequence my generation fell back on an ethics of authenticity, of personal fidelity, of existential commitment. Cover's critique of the Court's opinion in *Bob Jones University* well expresses this ethics. Cover scores the opinion because it is "uncommitted and lackadaisical . . . unwilling to put much on the line."³⁴ It reflects merely the "passing will of the state."³⁵

We might read *Nomos and Narrative* as a heroic effort to transcend the individualism implicit in this kind of existentialist perspective. But although Cover seeks to recapture the possibility of a rich and dynamic collective life, he locates this life within autonomous communities rather than in the state. Cover evidently believes that at its core the state will always turn soulless bureaucrat, violently imposing its arbitrary will. My students, who were not alive during the Vietnam War, do not experience any such radical mistrust of the state. They view the state instead as the instrument of their beliefs, as the potential embodiment of the nomoi with which they hope to infuse their world.

Ultimately *Nomos and Narrative* denies the state a role in jurisgenesis because it is skeptical of the possibility of a jurisgenerative politics. In a crucial passage criticizing Brandeis's concurring opinion in *Whitney v. California*,³⁶ Cover observes that "by the mid-twentieth century the states had long since lost their character as political communities. . . . American political life no longer occurs within a public space dominated by common mythologies and rites and occupied by neighbors and kin. Other bases are necessary to support the common life that generates legal traditions."³⁷

I read this passage to deny the possibility that politics within the public sphere can create legal meaning. The stories Cover tells about state building are characteristically stories of violence and revolution,³⁸ not of political debate and discussion. It is ironic that *Nomos and Narrative* was

34. *Id.* at 67.

35. *Id.* at 67 n.195

36. 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

37. Cover, *Nomos*, *supra* note 1, at 48-49.

38. Cover, *Violence*, *supra* note 6, at 1606-08.

published just prior to the Republican revival, which attempted to infuse public life with the virtues of ethical dialogue.³⁹ That dialogue has no place within Cover's vision, which instead fills the social space between autonomous communities with conflicts that can be settled only in blood. Cover does not consider the possibility of persuasion or reason. He does not ask how communities in conflict can join together in a larger political community. This skepticism expresses a fundamental truth of the Vietnam era, when the effort to engage in public reason did not carry very far. What mattered most was the commitment to put one's body on the line to stop the juggernaut of the War.

My students, by contrast, inhabit a republican world. They believe in public dialogue. They study social movements and autonomous communities precisely in the belief that associations can persuade the country to adopt their *nomoi*. They regard a decision like *Lawrence v. Texas*⁴⁰ as evidence of the potential for such persuasion, in which groups reconfigure public space and alter common perceptions of justice. They are accordingly bewildered and estranged by the world of *Nomos and Narrative*, which is evacuated of political deliberation. My students need instead a world in which "a common will," to quote Habermas, can be "communicatively shaped and discursively clarified in the political public sphere."⁴¹

In retrospect, Cover's refusal to theorize public reason seems a great blind spot of *Nomos and Narrative*. It virtually guarantees that Cover will characterize the state as jurispathic and incapable of jurisgenesis. Much contemporary work in public law begins with a radically different premise than *Nomos and Narrative*; it begins with the notion that the state can express the *nomoi* of its population, forged through public discussion and dialogue. It is not afraid of jurispathic courts, because it regards the judiciary as voicing narratives in which we believe, and it understands all narratives to be jurispathic. Contemporary public law scholarship recognizes that reason has limits, that the law of the state inflicts violence, and that all law ultimately requires commitment. But it regards these facts as boundary conditions, true *in extremis* but not descriptive of the everyday workings of the liberal state. From the perspective of this work, *Nomos and Narrative* carries counsels of despair and withdrawal.

I myself can only wish, with genuine fervor, that Cover was wrong in his assumption that the public sphere is hollow and meaningless. To engage in the civic life of the nation is to act on the commitment that *Nomos and Narrative* was misguided in this regard. Even in the face of

39. See *Symposium: The Republican Civic Tradition*, 97 YALE L.J. (1988).

40. 539 U.S. 558 (2003).

41. JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 81 (Thomas McCarthy trans., 1987).

the shocking arrogance and rampant intolerance of those who presently dominate America, a belief in the potential of public reason seems the only path forward. Unlike my students, however, who assume that they can bestride this path with confidence, I myself can never quite shake the nagging fear that Cover may have seen more deeply than I care to acknowledge.