

1994

# The Ethics of Violence: Necessity, Excess, and Opposition (Book Review Essay)

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## Recommended Citation

Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition (Book Review Essay)*, 94 *Colum. L. Rev.* 1721 (1994).

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# BOOK REVIEW ESSAY

## THE ETHICS OF VIOLENCE: NECESSITY, EXCESS, AND OPPOSITION

LAW'S VIOLENCE. Edited by Austin Sarat and Thomas R. Kearns. Ann Arbor: The University of Michigan Press, 1992. Pp. 261. \$34.50

*Reviewed by Anthony V. Alfieri\**

### INTRODUCTION

Wanda Field<sup>1</sup> never learned to read or write. She grew up in the deep South during the 1940s where she attended school until the fourth grade. In the 1950s, like many Southern blacks, Field migrated North, married, and raised a family. For thirty years, she worked in a variety of unskilled, part-time jobs.<sup>2</sup>

When her health began to deteriorate in the early 1980s, Field applied for Supplemental Security Income for the Aged, Blind, and Disabled (SSI).<sup>3</sup> Initially, the U.S. Department of Health and Human Services (HHS) denied Field's SSI claim. Field twice appealed that denial:

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I am grateful to Laura Brill, Michelle Brownlee, David Abraham, Bill Blatt, Caroline Bradley, Michael Froomkin, Ellen Grant, Carol Greenhouse, Lisa Iglesias, Sharon Keller, Austin Sarat, Steve Schnably, Jonathan Simon, Judge Patricia Wald, Bruce Winick, Steve Winter, and many of my ethics students for their comments and support. I also wish to thank Felicity McGrath, Eileen Moorhead, and the University of Miami School of Law library staff for their research assistance.

This Essay is dedicated to Ellen.

1. The name Wanda Field is fictional; her character is not. Field's character is based on an impoverished woman of color I represented in a disability case. My case analysis is part of a growing interdisciplinary effort within the legal academy to construct a theoretic of practice. Like many social scientists, participants in this effort understand that the agents of practice—lawyers, clients, decision-makers—are bound up in a *process* of observation distorted by "great ruptures between signs and what they are meant to signify." Austin Sarat, *Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law*, 15 *Law & Soc. Inquiry* 155, 163 (1990).

2. For a study of historical trends in black women's participation in the workplace, see Bette Woody, *Black Women in the Workplace: Impacts of Structural Change in the Economy* 65–66 (1992).

3. See 42 U.S.C. §§ 1381–1383d (1988). The SSI program provides for the payment of benefits to individuals on the basis of age, blindness, and disability, as well as need. See 42 U.S.C. §§ 1381a–1382 (defining income and resource levels). The program requires a means test, rather than "a given amount of previous work" or "past earnings experience." See Robert H. Haveman et al., *Public Policy Toward Disabled Workers: Cross-National Analyses of Economic Impacts* 55 (1984) ("As a means-tested program, SSI has totally removed the link between contributions and benefits."); Susan G. Mezey, *No Longer Disabled: The Federal Courts and the Politics of Social Security Disability* 29 (1988) ("The

first, at a reconsideration case review, where she proceeded pro se; and later, at an administrative law judge (ALJ) hearing, where I served as counsel.<sup>4</sup> At the ALJ hearing, I argued that HHS had misapplied its own regulations governing the disability determination process,<sup>5</sup> specifically in assessing Field's education under applicable medical-vocational guidelines.<sup>6</sup> In particular, I complained that HHS had erred in finding Field illiterate.

HHS regulations define a claimant's illiteracy as "the inability to read or write."<sup>7</sup> Under this definition, HHS will "consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name."<sup>8</sup> In general, according to HHS, "an illiterate person has had little or no formal schooling."<sup>9</sup> Had HHS properly applied its regulatory guidelines, I contended, adjudicators would have found Field illiterate and, given her age, work experience, and medical impairments, therefore concluded that she was disabled.

Reversing HHS's determination at the ALJ hearing required more

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creation of the SSI program has helped blur the conceptual distinction between disability insurance and public welfare.").

4. HHS regulations establish a three-stage administrative review process. See 20 C.F.R. §§ 416.1407-.1482 (1993).

5. HHS regulations institute a five-step sequential evaluation process for determining disability. See 20 C.F.R. § 416.920 (1993).

6. HHS promulgated the medical-vocational guidelines as regulations in 1978. See 43 Fed. Reg. 55,349, 55,466-70 (1978) (codified, as amended, at 20 C.F.R. pt. 404, subpt. P, app. 2 (1993)). The guidelines set out tables, or "grids," that classify exertional activities in terms of sedentary, light, and medium work. See 20 C.F.R. pt. 404, subpt. P, app. 2 (1993). The tables reflect specific matrices of vocational factors: age, education, and work experience. They apply at step five of the sequential evaluation process after the claimant shows that she is unable to perform "any" of her past work due to the severity of her impairments. See 20 C.F.R. § 416.920(f)(1) (1993). Upon this showing, HHS "will consider [the claimant's] residual functional capacity and [her] age, education, and past work experience to see if [she] can do other work." *Id.* If the claimant "cannot" perform such "other work" as classified under the grids, HHS "will find [her] disabled." *Id.*

For commentary on the medical-vocational guidelines, see John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds With One Stone or Pigeon-Holing Claimants?*, 42 Md. L. Rev. 329, 383 (1983) (citing failings of the medical-vocational guidelines in making accurate, consistent, predictable, and fair disability determinations). Cf. Kathleen Pickering, Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. Rev. 575, 618 (1983) (finding that the medical-vocational guidelines increase uniformity and efficiency of the disability determination process notwithstanding their susceptibility to misapplication).

In 1983, the United States Supreme Court upheld HHS's use of the guidelines. See *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (holding HHS's reliance on medical-vocational guidelines, rather than on vocational expert testimony, to be reasonable in appropriate cases).

7. 20 C.F.R. § 416.964(b)(1) (1993).

8. *Id.*

9. *Id.*

than a showing of Field's minimal grade level education.<sup>10</sup> Reversal required proof of Field's inability to read or write. I planned to produce such evidence through direct testimony from Field<sup>11</sup> and corroborating testimony from Field's family and friends.<sup>12</sup> At the hearing, upon direct examination, Field testified that she attended school until the fourth grade, but never learned to read or to write. Field also stated that she never learned to do arithmetic.

Before Field could complete her direct testimony, however, the ALJ interrupted.<sup>13</sup> The ALJ pressed Field to disclose any informal education and training acquired from her previous work, community projects, hobbies, or daily activities.<sup>14</sup> He asked Field to describe her past work experience, especially how she mastered duties that required instruction. He questioned the nature of her community activities, notably the extent to which those activities demanded reading or writing. Moreover, he questioned the scope of her daily activities and travel, particularly her ability to shop and to travel via public transportation.

Although the ALJ's examination spanned only twenty minutes, it visibly upset Field. At times, her answers seemed contradictory. Field testified, for example, that she received no employment training but received training on several jobs. At other times, her answers seemed incoherent. Field stated, for example, that she understood but could not read bus or subway signs. Further, she stated that she learned about news by looking at newspapers and magazines. The apparent inconsistency of Field's flustered responses, I feared, threatened to undermine her credibility.

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10. HHS regulations provide that "the numerical grade level that [a claimant] completed in school may not represent [her] actual educational abilities." 20 C.F.R. § 416.964(b) (1993). The regulations note that a claimant's educational abilities in fact "may be higher or lower." *Id.* Nonetheless, when "there is no other evidence to contradict it," HHS "will use [a claimant's] numerical grade level to determine [her] educational abilities." *Id.* For the purposes of this determination, HHS presumes "formal schooling at a 6th grade level or less" to fit within a category of "marginal education." *Id.* § 416.964(b)(2) (1993). HHS defines marginal education to mean an "ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs." *Id.*

11. See *Eggleston v. Bowen*, 851 F.2d 1244, 1248 (10th Cir. 1988) (finding ALJ's employment-related inference of literacy rebutted by claimant's direct testimony).

12. See 20 C.F.R. § 416.1450(e) (1993) ("Witnesses may appear at a hearing."); see also *Albritton v. Sullivan*, 889 F.2d 640, 642-43 (5th Cir. 1989) (approving spousal testimony regarding a claimant's illiteracy).

13. On bureaucratic patterns of ALJ intervention, see Jerry L. Mashaw et al., *Social Security Hearings and Appeals* 53 (1978) (commenting on the consistent pattern of ALJ independent evidentiary development); see also Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 172 (1983) (describing the bureaucratic model of administrative justice as "investigatively active").

14. HHS regulations permit this line of inquiry. See 20 C.F.R. § 416.964(a), (b)(6) (1993); see also *Millner v. Schweiker*, 725 F.2d 243, 244-45 (4th Cir. 1984) (finding no evidence of a claimant's formal training); cf. *Vega v. Harris*, 636 F.2d 900, 904 (2d Cir. 1981) (bemoaning absence of ALJ findings on a claimant's literacy).

To bolster Field's credibility, I requested that the ALJ grant me an opportunity to conduct a redirect examination. Earlier, upon entering the hearing room, I had noticed a Metropolitan Museum of Art poster hanging behind the ALJ's bench. Now I directed Field's attention to that poster. I asked: "Mrs. Field, do you see the poster behind the judge's bench?" Field answered: "Yes." Next I asked: "Do you see the writing—the letters and the words—across the top of the poster?" Field again answered: "Yes." Then I asked: "Please Mrs. Field, would you read the writing: the letters and the words." Field did not answer. I repeated the question. Field kept silent. I repeated the question again. At this, Field began to sob softly. Without pause I asked: "Mrs. Field, why won't you read the poster?" Field continued to sob. I asked again: "Mrs. Field, why won't you read the poster?" Field hesitated. I asked a third time: "Mrs. Field, why won't you read the poster?" Sobbing loudly, Field responded: "*Because I can't read.*"

Following these words, I turned away from Field to look up at the ALJ. During my direct examination, he had leaned forward in his chair, often interrupting me by shaking his head or waving his hand to object or to interpose his own questions. Now he sat back in his chair watching Field stoically. Hunched over and downcast, Field blew her nose and wiped her face with a tissue, muffling a cough when she tried to clear her throat. After a few minutes of awkward silence, the ALJ renewed his examination, but his questions no longer challenged Field's illiteracy.

Field and I never spoke of the incident. We talked about the case: the investigation of new medical evidence, the pending ALJ decision, the exhaustion of administrative remedies. I gave her a new treating physician report to pass on to her doctor for updating. I told her to call me when she received the ALJ decision or any other HHS correspondence. I explained the next stage of the administrative review process and the procedures for seeking judicial review. Beyond this, we said nothing about the hearing.

Had we tried to talk about the hearing, we would have found no words adequate to describe, explain, and justify what had happened. To describe Field's experience solely in terms of humiliation is to oversimplify. To explain my redirect examination only as a strategic gambit to rehabilitate her credibility is inadequate. To justify that strategy simply on the instrumental ground of winning is unsatisfactory. Yet, legal education and training provide us with no alternative vocabulary to describe, explain, or justify the events of Field's hearing.

In a prior work,<sup>15</sup> I fashioned the rudiments of an alternative vocabulary out of Robert Cover's writings on law's violence.<sup>16</sup> Cover's ideas of violence provide a vocabulary to describe and to explain, at least partially,

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15. See Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *Yale L.J.* 2107 (1991).

16. See Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 *Ga. L. Rev.* 815 (1986) [hereinafter Cover, *The Bonds of*

the sociolegal experience of people like Wanda Field: women of color living and working in impoverished communities. Enlarging that vocabulary, I argued that poverty lawyers bring a pre-understanding of indigent dependency to their relationship with poor clients.<sup>17</sup> Moreover, I maintained that poverty lawyers employ methods of interpretive violence—marginalization, subordination, and discipline—that effectively reproduce dependency among their clients.<sup>18</sup>

In response to my argument, Lucie White added that “the violent interpretive practices of poverty advocates are themselves embedded in worlds where other violent practices . . . pervade people’s lives.”<sup>19</sup> White observed that violence in poor communities is “so common” that it is “often invisible” to the “outside world.”<sup>20</sup> The violence, she explained, takes many forms: employment firings, housing evictions, welfare terminations.<sup>21</sup> Frequently, White pointed out, the violence is linked to racial animus.<sup>22</sup> This link enables state and private agents of violence to reinflict and to suppress “the horror of past atrocities” in poor communities.<sup>23</sup>

Wanda Field’s case is about the horror and invisibility of racial violence manifested in educational inequality, school segregation, and adult illiteracy. To understand how I both reinflicted and suppressed racial violence in representing Field requires an alternative vocabulary that describes, explains, and justifies the intersection of law, lawyers, legal institutions, and violence. The task of locating this intersection urges us to revisit Cover’s work and to reread his lexicon of violence.

In this Essay, I renew my reading of Cover’s writings under the guidance of Austin Sarat and Thomas Kearns’s recent collection of essays entitled *Law’s Violence*. The essays expand the foundation for an alternative vocabulary describing, explaining, and justifying law’s violence. Even as it expands, however, the foundation stands lacking. Nowhere in the growing vocabulary of violence is there reference to lawyers as jurispathic agents or to lawyers’ interpretive practices as discrete forms of normative violence. Without an account of lawyers as agents of interpretive violence, we overlook the normative, rather than the physical or psychological, pain experienced by the objects of law: plaintiffs, defendants, victims—in short, clients. It is plain error to overlook the pain experienced by clients when we—as lawyers—act to erase their identities, to silence

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Constitutional Interpretation]; Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986) [hereinafter *Cover, Violence and the Word*].

17. See Alfieri, *supra* note 15, at 2123–25.

18. See *id.* at 2125–30.

19. Lucie E. White, *Paradox, Piece-Work, and Patience*, 43 *Hastings L.J.* 853, 856 (1992).

20. *Id.* at 857.

21. See *id.*

22. See *id.*

23. See *id.* (footnote omitted).

their narratives, and to suppress their histories during advocacy. The purpose of this Essay is to cure that error.

The Essay is divided into four parts. Part I examines the jurisprudence of violence conceived by Cover and extended by Sarat and Kearns. Employing Wanda Field's hearing as a case study, I enlarge that jurisprudence to address lawyers' interpretive violence and clients' normative pain. Part II assesses the argument from necessity offered to explain and to justify lawyers' acts of interpretive violence. Citing Field's case, I note the forces of law and institutional logic that urge this necessitarian defense. Part III analyzes the limits of the necessitarian justification for lawyers' violence. Calling again on Field's case, I distinguish between descriptive and performative speech acts in legal advocacy in order to establish a boundary line of excess violence. Part IV considers an alternative strategy of opposing and thereby curbing lawyers' necessitarian justification. Pointing to the intersection of normative and narrative violence in Field's case, I propose reopening lawyers' meaning-making practices of reading and speaking to test the limits of the speakable in advocacy. The strategy of reopening, testing, and mapping the limits of the speakable allows client identity, narrative, and history to emerge in the lawyering process.

## I. VIOLENCE

Curing analytic, normative, and strategic errors in the lawyering process revives interest in Cover's jurisprudence of violence, particularly his concept of jurispthic practice. This core concept warrants special heed because it expands to encompass lawyers' acts of knowing, interpreting, and speaking, even when the acts are implicit and private. Situated at the intersection of law and violence, Field's case demonstrates how such acts inflict normative pain on a client by erasing her identity, silencing her narratives, and suppressing her history.

In *Law's Violence*, Sarat and Kearns study the jurisprudential turmoil surrounding the intersection of law and violence.<sup>24</sup> Sarat and Kearns find the linkages between law and violence at once troubling and intriguing.<sup>25</sup> They especially puzzle over the ways that law denies or conceals the infliction of violence by legal agents upon legal subjects.<sup>26</sup>

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24. Sarat and Kearns's investigation is part of an ongoing project to build a jurisprudence of violence. See Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in *The Fate of Law 209-73* (Austin Sarat & Thomas R. Kearns eds., 1991); Austin Sarat, Robert Cover on Law and Violence, in *Narrative, Violence, and the Law: The Essays of Robert Cover 255-76* (Martha Minow et al. eds., 1992).

25. See Sarat & Kearns, *supra* note 24, at 211 ("[T]he general link between law and violence and the ways that law manages to work its lethal will, to impose pain and death while remaining aloof and unstained by the deeds themselves, is still an unexplored and hardly noticed mystery in the life of the law.").

26. See *id.* at 209.

Sarat and Kearns define law's agents broadly to include police officers, judges, and prison guards. They assert that "[t]he association of law and violence is visible in the discrete acts of law's agents—the gun fired by the police, the sentence pronounced by the judge, the execution carried out behind prison walls" (pp. 1, 6). Both the physical and interpretive acts of these agents help shape the law's "violent constitution" (p. 3).

To Sarat and Kearns, violence constitutes law by enacting, affirming, and enforcing the logic of a legal order. Backed by violence, that logic establishes the superiority of a particular order. In law, as in lawyering, superiority is demonstrated not by "ferocious displays of force," but by "subjugating, colonizing, 'civilizing' acts of violence" (p. 3). Logic deems such acts, like Field's direct and redirect examinations, rational.

The rationality of violence turns on the purposes and norms of a legal order. Violence that advances the purposes and ratifies the norms of a regime is presumptively rational and legitimate. Capital punishment, however reprehensible, meets this presumption. Conversely, violence that contradicts the purposes or breaches the norms of a regime is irrational and illegitimate. Lynching exemplifies such a transgression. Even without evidence of contradiction or breach, Sarat and Kearns fear that violence may overwhelm the rationality of law (p. 2) and thereby render legitimacy impossible.

Fear of law's delegitimizing violence is absent from important strands of contemporary jurisprudence.<sup>27</sup> Sarat and Kearns point to this absence in the humanist's emphasis on the "meaning-making," rather than the "coercive," character of law (p. 7). They note a similar absence in the social scientist's "disaggregation" of violence into isolated acts unfastened to theory (p. 8).<sup>28</sup>

Weaknesses in the jurisprudence of the humanities and social sciences prompt Sarat and Kearns to search critical theory for an account of violence that recognizes the interplay of coercion in law, legal relations, and legal institutions. Yet critical accounts that incorporate epistemological, interpretive, and linguistic practices in explicating lawyers' acts of violence apparently err in labelling certain coercive, pain-imposing events

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27. See Anthony V. Alfieri, *Stances*, 77 *Cornell L. Rev.* 1233, 1240–41 (1992) (noting the violent "effacement" of a client's identity and social world in the jurisprudence of the law and humanities movement).

28. The disjunction between theory and practice fosters the oversimplification of sociological phenomena. See Austin Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 *Legal Stud. F.* 23, 30 (1985) (warning of "overly simplified conception[s] of power"); see also Austin Sarat, *Donald Black Discovers Legal Realism: From Pure Science to Policy Science in the Sociology of Law*, 14 *Law & Soc. Inquiry* 765, 784 (1989) (criticizing Black's "scientific sociology of law"); Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 *Law & Pol'y* 97, 122 (1988) (mentioning the normal characterization of legal empirical sociology in the "language of science").



violent.<sup>29</sup> For Sarat and Kearns, an expansion of usage and a diffusion of meaning threaten to dilute the idea of violence, "to undo the subject itself" (p. 10).<sup>30</sup> To stabilize the meaning of violence, they attempt to construct a jurisprudence of violence that provides a critique of the law's coercive force deployed primarily by state institutional agents, namely judges.<sup>31</sup>

In this way, Sarat and Kearns's jurisprudence of violence builds on the account developed by Cover.<sup>32</sup> Cover conceives of law's violence in both normative and physical terms. Normative violence is jurispatic:<sup>33</sup> it destroys the values of a community. For Cover, community values constitute a *nomos*.<sup>34</sup> When state authority and community values conflict over the application of law, judges serve as jurispatic interpreters<sup>35</sup> decreeing "imperial" narratives<sup>36</sup> that kill alternative community values.<sup>37</sup> Some-

29. See, e.g., Alfieri, *supra* note 15 (applying the concept of interpretive violence to the lawyer-client relation in the context of poverty law). Compare Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 *Law & Soc'y Rev.* 19, 23 (1993) (exploring "the ways lawyers use linguistic structures to represent different kinds of violence" in capital trials).

30. Sarat and Kearns contend that "[i]f everything is violent, then the word and the idea lose their meaning and their normative and critical bite" (p. 10).

31. Sarat and Kearns's jurisprudential construction assembles three themes. The first gauges the design of institutional procedures authorizing and deploying the force of violence. See, e.g., Elaine Scarry, *The Declaration of War: Constitutional and Unconstitutional Violence* (p. 23); Patricia M. Wald, *Violence Under the Law: A Judge's Perspective* (p. 77). The second traces the cultural and historical meaning of violence across cultures and over time. See, e.g., Carol J. Greenhouse, *Reading Violence* (p. 105); Douglas Hay, *Time, Inequality, and Law's Violence* (p. 141). The third measures the impact of violence on law and society. See, e.g., Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example* (p. 175); Sarat and Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory* (p. 211).

32. See Cover, *The Bonds of Constitutional Interpretation*, *supra* note 16; Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4 (1983) [hereinafter Cover, *Nomos and Narrative*]; Cover, *Violence and the Word*, *supra* note 16.

33. See Cover, *Nomos and Narrative*, *supra* note 32, at 40–44. See also Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in *Narrative, Violence, and the Law*, *supra* note 24, at 1, 1–2 ("[Cover] coined the term *jurispatic* to refer to the power and practice of a government that rules by displacing, suppressing, or exterminating values that run counter to its own.").

34. See Cover, *Nomos and Narrative*, *supra* note 32, at 9. Cover explains: "A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision." *Id.*

35. See Cover, *The Bonds of Constitutional Interpretation*, *supra* note 16, at 819.

36. See Cover, *Nomos and Narrative*, *supra* note 32, at 13.

Normative meaning is implanted in narrative. When the state decrees law, it imposes an incontestable narrative order on a social world composed of diverse communities and contested narratives. See Michael Ryan, *Meaning and Alternity*, in *Narrative, Violence, and the Law*, *supra* note 24, at 267, 274.

37. See Cover, *Nomos and Narrative*, *supra* note 32, at 53, 60. Significantly, Cover approves the killing of *nomoi* when the norms of such communities involve political exclusion and disenfranchisement on the basis of race, notwithstanding his anarchistic

times that interpretive killing is "writ in blood,"<sup>38</sup> as in the case of capital punishment.

Cover's allusion to blood confirms the physical character of violence.<sup>39</sup> To Cover, legal interpretation is "inextricably bound up with the real threat or practice of violent deeds . . ." <sup>40</sup> Even routine, practical acts of interpretation take place on "a field of pain and death."<sup>41</sup> When serving as the trier of fact in criminal proceedings, for example, a judge must evaluate the evidentiary record, make findings of guilt or innocence, and pronounce sentence. These interpretive acts carry coercive force, inflicting the pain of imprisonment and even death.

Sarat and Kearns seek to understand the necessity of law's reliance on force, the tendency of law's agents to impose excess force, and the possibility of opposing such force (pp. 20–21). Entirely absent from Sarat and Kearns's catalogue of state agents, however, is the role of lawyers in the context of advocacy. Lawyers too act as law's jurispathic agents. Like judges, police officers, and prison guards, they apply epistemological, interpretive, and linguistic practices to kill alternative normative meanings embraced by individuals and communities. Unlike state agents,<sup>42</sup> those killing practices stem from a benevolent impulse to intervene on behalf of a client's best interests, rather than from a homicidal impulse to impress the pain of imprisonment or the sentence of death.

distrust of state authority. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *Yale L.J.* 1287, 1301–02 (1982) [hereinafter Cover, *Origins of Judicial Activism*]. See generally Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975) [hereinafter Cover, *Justice Accused*]. Cover reasons:

Despite the growth of national bureaucratic and administrative penetration, I would suggest that the judiciary's special, active role in protecting minorities may well have resulted in a less intrusive and pervasive centralized administration than would have been the case with other, alternative courses to integration. Put differently, *given* the objective of ending Apartheid, the activist federal judiciary as spearhead was the mode of action least likely to destroy the ultimate values served by fragmentation of political power and local political control over administration. Government by injunction may often appear highhanded, undemocratic, even tyrannical; but, in fairness, one must always ask compared to what.

Cover, *Origins of Judicial Activism*, *supra*, at 1313–14 (footnote omitted).

Cover limits his concession to centralized authority by supporting the "relatively unrestrained redundancy" of concurrent federal and state court jurisdiction, citing the advantages and disadvantages of interest, ideology, innovation, and "polycentric norm articulation." Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *Wm. & Mary L. Rev.* 639, 658–80, 682 (1981).

38. Cover, *Nomos and Narrative*, *supra* note 32, at 46.

39. See Mark Tushnet, *Reflections on Capital Punishment: One Side of an Uncompleted Discussion*, 7 *J.L. & Religion* 21, 21 (1989) (noting Cover's recognition of law as an instrument of physical violence).

40. Cover, *The Bonds of Constitutional Interpretation*, *supra* note 16, at 816. To Cover, "[i]nterpretation always takes place in the shadow of coercion." Cover, *Nomos and Narrative*, *supra* note 32, at 40.

41. Cover, *Violence and the Word*, *supra* note 16, at 1601, 1607, 1610.

42. Prosecutors stand within the definition of state agents.

Sarat and Kearns implicitly distinguish between pain-imposing and death-dealing acts of violence. But, they fail to distinguish between the normative and physical qualities of pain experienced by the objects of law: plaintiffs, defendants, and victims. By normative pain, I mean the pain experienced by parties and nonparties during the lawyering process when their identities are erased, their narratives are silenced, and their histories are suppressed. Sarat and Kearns privilege physical over normative forms of pain, creating a hierarchy of pain-imposing violence. This dichotomy may be defensible, but Sarat and Kearns offer no defense. They seem in fact to dismiss the subject of normative pain and to ignore the jurispathic practices of lawyers that inflict such pain.

Cover's jurisprudence of violence, albeit unfinished, encourages recognition of normative pain as a distinctive form of violence engendered by lawyers' jurispathic practices of knowing, interpreting, and speaking. To be sure, lawyers do not act alone; they act in concert with laws and institutional decision-makers. Yet, in poor communities, their actions are especially glaring.<sup>43</sup>

Although Cover's work shows a deep commitment to the poor,<sup>44</sup> his account of violence omits sustained treatment of poor people as objects of violent acts and of lawyers as agents responsible for such acts.<sup>45</sup> His

43. In his essay, *Time, Inequality, and Law's Violence*, Douglas Hay argues that socioeconomic status dictates the experience of violence. It is the poor, he observes, who frequently suffer the "coercive impact" of the law and, hence, represent the "most direct victims of its violence" (p. 169).

44. Cover's early writings clearly evince a commitment to the poor. See generally Robert M. Cover, *Establishing Federal Jurisdiction In Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged—Part I*, 2 *Clearinghouse Rev.* 5 (Feb.–Mar. 1969); Robert M. Cover, *Establishing Federal Jurisdiction In Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged—Part II*, 3 *Clearinghouse Rev.* 7 (May 1969); Robert M. Cover, Note, *Federal Judicial Review of State Welfare Practices*, 67 *Colum. L. Rev.* 84 (1967).

His later writings echo that commitment. See Robert M. Cover et al., *Procedure 37–105* (1988) [hereinafter Cover, *Procedure*] (reviewing the welfare litigation history of *Goldberg v. Kelly*, 397 U.S. 254 (1970)); Robert M. Cover, *Federalism and Administrative Structure*, 92 *Yale L.J.* 1342, 1343 (1983) (mentioning "local elite domination over beneficiary groups" under federal-state cooperative programs); Robert M. Cover, *Social Security and Constitutional Entitlement*, in *Social Security: Beyond the Rhetoric of Crisis 69–87* (Theodore R. Marmor & Jerry L. Mashaw eds. 1988) (proposing the assignment of a "modest" constitutional status to Social Security entitlement programs).

Friends and commentators also mention Cover's longstanding commitment. See, e.g., William N. Eskridge, Jr., *Metaprocedure*, 98 *Yale L.J.* 945, 945–46, 951–53, 966–67 (1989) (reviewing Cover, *Procedure*, supra) (noting the dignitary and empowerment interests of the socially disadvantaged and economically marginalized highlighted in Cover's pedagogy); Stephen Wizner, *Tributes to Robert M. Cover*, 96 *Yale L.J.* 1707, 1707–08 (1987) (describing Cover's work at the Center for Social Welfare Policy and Law).

45. Unlike other readers of Cover's work, I make no attempt to locate Cover within an express philosophical or theological tradition. Compare Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 *Geo. L.J.* 1785, 1822 (1990) (lauding Cover's commitment to the "institutionalization of discursive diversity" within the liberal democratic state) and

attention centers instead on the more public agents of violence: judges. Like judges, lawyers' routine labor entails practical acts of interpretation.

In Field's case, for example, the routine labor of lawyer direct and redirect examination involved acts of regulatory and doctrinal interpretation concerning the meaning of disability and literacy.<sup>46</sup> Field lacked the requisite instruction, skills, and training to satisfy HHS's measure of literacy. When combined with evidence of her medical impairments, age, and work experience, Field's minimal education directed a finding of disability. To ensure that finding, I interpreted and therefore portrayed Field as a disabled woman of color victimized by illiteracy.

To my surprise, Field resisted this interpretation. Field's expressed *identity* drew from her experience of functional literacy, not from a regulatory definition of formal education and employment skills. Her *narratives* of employment training, public transportation, and semiotic reading described this experience. Her *history* of surviving racial inequality and school segregation, and rearing a family affirmed that experience. Interpreting Field's identity, narratives, and history in this light risked enlarging the meaning of literacy to stress functional competence and, hence, threatened to provide the ALJ with an easy opportunity to deny her benefits. Field's own ambiguous statements magnified this risk, causing me to disrupt her prior scripted testimony and to suppress her identity, narratives, and history of functional competence in determining the meaning of literacy.

Cover confirms that the interpretive process endows law's agents with the power, exerted through words and deeds, to determine the meaning of law,<sup>47</sup> in this case the meaning of disability-related literacy.

Bryan Schwartz, *Individuals and Community*, 7 J.L. & Religion 131, 147-48 (1989) (portraying Cover as sympathetic to philosophical liberalism) with Milner S. Ball, *Law and Prophets, Bridges and Judges*, 7 J.L. & Religion 1 (1989) (studying biblical texts for lessons of prophecy, law, and judging recited in Cover's work) and Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813, 819-20 (1993) (connecting Cover's vision of law to the Jewish legal tradition).

46. Legal interpretation distorts meaning. Hay attributes this distorting influence in part to law's codification of "socially destructive force" in doctrinal and statutory forms (pp. 143-44). The force may be market driven. Disability law, for example, reduces Field to the status of a labor commodity, applying vocational guidelines and work classification tables to evaluate her market worth.

47. See Cover, *The Bonds of Constitutional Interpretation*, supra note 16, at 833; see also Cover, *Violence and the Word*, supra note 16, at 1618. Cover observes:

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.

Id.

Lawyer-determined meaning does violence to client identity, narrative, and history. Clients experience this violence as normative pain. My direct and redirect examinations of Field inflicted such pain by highlighting her disabling impairments and illiteracy. Because racial inequality and segregation are irrelevant to disability law, I omitted historical narratives of race from the examinations. Accordingly, I did not ask Field why she stopped going to school or how segregation affected the quality of her education. Had I asked, I might have learned that Field dropped out of school to work with her father, a tenant farmer. Additionally, I might have discovered that Field's teachers had little training, that her books were antiquated, that her schoolhouse lacked plumbing, heat, and electricity, and that her school district lacked the buses needed to transport children daily to and from school. The absence of these historical narratives suppressed the racial violence—reconstruction,<sup>48</sup> lynching,<sup>49</sup> inequality,<sup>50</sup> and segregation<sup>51</sup>—underlying Field's illiteracy.<sup>52</sup>

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48. On Reconstruction era racial violence against schools, see George C. Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction* 97–98 (1984).

49. For sociolegal studies of lynching, see Jacquelyn D. Hall, *Revolt Against Chivalry: Jessie Daniel Ames and the Women's Campaign Against Lynching* 129–57 (1993) (describing lynching as a ritualistic instrument of racial discipline and repression); Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909–1950* (1980) (analyzing NAACP's local and national campaign against lynching waged in executive, legislative, judicial, and popular forums); Amii L. Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892–1920*, 3 *UCLA Women's L.J.* 1, 4 (1993) (citing lynching and rape as “interdependent links” in the Southern system of racial inequality, sexual exploitation, and subjugation); Susan Olzak, *The Political Context of Competition: Lynching and Urban Racial Violence, 1882–1914*, 69 *Soc. Forces* 395, 399–402 (1990) (pointing to political and economic competition as causal mechanisms of mobilizing urban violence and lynchings against blacks in the South).

50. On educational inequality, see James D. Anderson, *The Education of Blacks in the South, 1860–1935* 122 (1988) (discussing historical caste system of “second-class” black education in postbellum South); Edward L. Ayers, *The Promise of the New South: Life After Reconstruction* 420 (1992) (noting that while Southern “state legislatures spent money for whites on longer school years, on lower student-teacher ratios, and on higher salaries for teachers, those same legislatures allowed salaries for black teachers to decay and class sizes to grow larger”); William Bagwell, *School Desegregation in the Carolinas* 41–43 (1972) (documenting race-based spending discrepancy in North and South Carolina public schools); Robert Coles, *Children of Crisis* 160, 169–70 (1967) (citing the “second-rate” quality of “Negro education”); David R. Goldfield, *Black, White, and Southern* 55 (1990) (finding deficient classrooms, buildings, and equipment in black school districts); Albert B. Hart, *The Southern South* 308–22 (1910) (describing the impoverished conditions of “Negro education” in the South); Edward E. Redcay, *County Training Schools and Public Secondary Education for Negroes in the South* 23 (1935) (noting race-based differences in Southern secondary school facilities); Carter G. Woodson, *A Century of Negro Migration* 155 (1918) (reviewing diminishing public school appropriations for Southern “Negroes”); Michael Aiken & N.J. Demerath III, *Tokenism in the Delta: Two Mississippi Cases, in Our Children's Burden: Studies of Desegregation in Nine American Cities* 41, 43–107 (Raymond W. Mack ed., 1968) (depicting separate and unequal educational conditions in Mississippi and Georgia); Ruth P. Simms, *The Savannah*

My examinations also suppressed Field's narratives of functional literacy. In his essay, "Time, Inequality, and Law's Violence," Douglas Hay contends that the privileging of one text, in this case illiteracy, requires "the partial or entire silencing of others" (p. 169), here functional literacy. When a text is privileged, that is when "those with the power to make texts can disseminate one version of a case,"<sup>53</sup> law's violence becomes imperceptible (p. 169). Lawyers, Hay asserts, find virtue in law's ability to silence texts.

Silencing or withholding testimony of Field's functional literacy was an implicit act of violence. In her essay, "Violence Under the Law: A Judge's Perspective," Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia Circuit mentions the danger of failing to acknowledge law's implicit violence (p. 103). In the context of the family,<sup>54</sup>

Story: Education and Desegregation, *in* *Our Children's Burden*, supra, 109, 111-40 (portraying similar conditions in Georgia); Mark V. Tushnet, *Organizing Civil Rights Litigation: The NAACP's Experience*, *in* *Ambivalent Legacy: A Legal History of the South* 171, 176 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984) (mentioning "grossly unequal" per capita expenditures in black and white schools).

51. On segregated education, see Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 153 (1993) (discussing the adverse impact of segregation on educational environments); Judy J. Mohraz, *The Separate Problem: Case Studies of Black Education in the North, 1900-1930*, at xiv (1979) (observing that "segregation produced inferior education for black children because of inadequate facilities and frequently diluted academic programs"); Kenneth B. Clark, *Segregation and Educational Quality*, *in* *The Black American and Education* 216 (Earle H. West ed., 1972) (commenting on the "consistently inferior" education provided to black children in segregated schools); cf. John B. Martin, *The Deep South Says "Never"* 148-49 (1958) (remarking upon "low Negro achievement" in desegregated schools).

52. On race, poverty, and illiteracy, see Carman St. John Hunter & David Harman, *Adult Illiteracy in the United States* 43 (1979) (citing statistical interrelationships in illiteracy among the variables of poverty, education, and racial or ethnic origin); National Center for Education Statistics, *Adult Literacy in America* 35 (1993) (attributing literacy rate disparities between white and black adults to variations in educational quality and differences in socioeconomic status); National Center for Education Statistics, *NAEP 1992 Reading Report Card for the Nation and the States* 121-22 (1993) (finding that advantaged urban students showed higher average reading proficiency than students attending schools in communities classified as "extreme rural" or "disadvantaged urban"); Lawrence C. Stedman & Carl F. Kaestle, *Literacy and Reading Performance in the United States from 1880 to the Present*, *in* *Literacy in the United States: Readers and Reading since 1880*, at 75, 123 (Carl F. Kaestle et al. eds., 1991) (observing that "women, blacks, other minorities, the poor, southerners, and the foreign born have been less literate on average than their male, white, middle-class, northern, native-born counterparts").

53. See also Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *Law & Soc'y Rev.* 93, 117 (1986) ("Lawyers . . . legitimate some parts of human experience and deny the relevance of others . . .").

54. Judge Wald has voiced skepticism about federal court "self-imposed abstention" from the private sphere of the family. See Patricia M. Wald, *Some Unsolicited Advice to My Women Friends in Eastern Europe*, 46 *SMU L. Rev.* 557, 571-72 (1992) ("The lesson our history teaches is that women and their families are still presumed not to be significant enough 'national interests' of the United States to merit federal consideration except through the side entrance and on an ad hoc basis.").

for example, Judge Wald argues that federal courts have withheld their power to hear the testimony of vulnerable women and children (p. 103).<sup>55</sup> Withholding of this kind suppresses evidence of both public and private violence.

Although demeaning, the violence of disrupting Field's testimony to underscore the painful inferiority and stigma<sup>56</sup> of illiteracy served the instrumental purpose of defeating the ALJ's attempt to impeach her credibility.<sup>57</sup> Both lawyers and decision-makers commit normative violence for instrumental or remedial gain. Lawyers classify violence as a transaction cost.<sup>58</sup> Erasing client identity, silencing client narrative, or suppressing client history is simply the price of lawyer benevolence. Decision-makers endorse remedial acts of violence but concede balancing the risk of violence against competing legal values (pp. 78, 103).<sup>59</sup> To fulfill the responsibility of balancing, Judge Wald urges judicial decision-makers to engage in "very particularized fact finding and prediction making" (p. 99).<sup>60</sup> When sufficient evidence of "anticipated violence" (p. 100) is ad-

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On judicial competence in the family law context, see Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 *Law & Soc'y Rev.* 371, 394-403 (1980) (studying the role of courts in "related-party" cases).

55. Judge Wald has previously mentioned such vulnerability. See Patricia M. Wald, *Government Benefits: A New Look at an Old Giffhorse*, 65 *N.Y.U. L. Rev.* 247, 263 (1990) ("The neediest of our citizens are most conspicuously dependent on government largesse for the satisfaction of their most basic needs.").

56. On race-based inferiority and stigma, see Tristan L. Duncan, *Narrative Jurisprudence: The Remystification of the Law*, 7 *J.L. & Religion* 105, 107 (1989) ("Brown's pain [in *Brown v. Board of Education*, 374 U.S. 483 (1954)] was stigmatization, second class inferiority, racial inequality."); Henry L. Gates, Jr., *Writing "Race" and the Difference It Makes*, in "Race," *Writing, and Difference* 1, 6 (Henry L. Gates, Jr. ed., 1986) ("[L]iteracy . . . is the emblem that links racial alienation with economic alienation.").

57. There is some evidence that Cover might approve of my manipulation of Field's participatory rights to achieve valid substantive ends. See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *Yale L.J.* 718, 731 (1975) ("Purposeful manipulation of the scope of [litigant] participation to achieve substantive ends is permissible and appropriate.").

58. In employment discrimination cases, for example, lawyers regard the plaintiff's burden of producing evidence of psychological harm as merely a cost of transacting civil rights advocacy. But see *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993) (holding that judicial finding of a discriminatorily abusive work environment does not require evidence of concrete psychological harm or injury under Title VII of the Civil Rights Act of 1964).

59. Judge Wald has approved balancing jurisprudence before. See Patricia M. Wald, *Constitutional Conundrums*, 61 *U. Colo. L. Rev.* 727, 731 (1990) ("Our constitutional law is embedded in the notion of defining and balancing strongly felt interests in our society—it is not likely to change soon; many of us would regret such a change."). Her approval arises in the context of the "grander debate over judicial discretion," namely, "whether to acknowledge that it exists, how to justify it, how to use it, and how to restrain it." Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 *Harv. L. Rev.* 887, 895 (1987).

60. Judge Wald has repeatedly addressed the fact-finding process in judicial decision-making. See Patricia M. Wald, *Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions*, 67 *Wash. U. L.Q.* 661, 665 (1989) (remarking that appellate judges reviewing administrative law judge agency

duced, she explains, judges must decide whether that quantum of violence is "tolerable" (pp. 99–100) given the weight of countervailing values.<sup>61</sup>

Erasing Field's identity of functional competence, silencing her narratives of functional literacy, and suppressing her history of suffering racial inequality and segregation constituted private acts of violence as well. In his essay, "Private Violence as Moral Action: The Law as Inspiration and Example," Robert Weisberg denotes private violence as a form of violence "perpetrated by private individuals against each other" (p. 175).<sup>62</sup> He analyzes how such violence comes to signify "an act of lawmaking or law enforcement" and to serve as the "operative law" in a specific cultural context (p. 175).<sup>63</sup>

The motive or inspiration for private acts of violence may be found in the acts of lawmaking and law enforcement embedded in legal advocacy. In Field's case, I attempted an act of lawmaking when I tried to establish the condition of illiteracy as practically disabling. Similarly, I attempted an act of law enforcement when I worked to ratify Field's illiteracy-based SSI claim of entitlement. In this respect, private violence comes to serve both moralistic and remedial ends (p. 178).<sup>64</sup>

findings "have limited expertise and resources to absorb, synthesize, and accommodate all of the facts and evidence presented by parties throughout the adversarial process"); Patricia M. Wald, Making "Informed" Decisions on the District of Columbia Circuit, 50 *Geo. Wash. L. Rev.* 135, 149 (1982) (citing "the need of appellate judges for more information and expertise" in handling complex technical cases).

61. Judge Wald's defense of countervailing values, such as free speech and assembly, is well known. See Patricia M. Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 *Minn. L. Rev.* 1, 21 (1987) (asserting that the judiciary's "paramount function under the separation of powers doctrine [is] to enforce the rights of individuals against the government"); cf. Patricia M. Wald, Two Unsolved Constitutional Problems, 49 *U. Pitt. L. Rev.* 753, 761 (1988) (noting that "critical areas exist in which first amendment rights—to speak out, to associate, to know, to obtain judicial redress for violation of one's constitutional rights—may be curtailed under the rubric of national security"); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 *Emory L.J.* 649, 681–82 (1984) (stating that "tension between claims of national security and open government is not an unhealthy condition—at least not until we have more reliable evidence that it is producing critical harm").

62. Weisberg cites the role of the law, and by extension, the state in "punishing, permitting, accommodating, encouraging, or inspiring the very private violence it purports to suppress or replace" (p. 176).

63. Weisberg remarks that nonstate agents "often subjectively, and even sometimes objectively, engag[e] in acts of lawmaking or law enforcement disturbingly analogous to public legal authority" (p. 178). See also Tushnet, *supra* note 39, at 25 (citing "an unavoidable connection between the practice of social violence through law, with which Cover was primarily concerned, and the practice of individual violence").

64. Weisberg identifies several forms of private violence I will call regime-subverting, regime-preserving, and regime-destroying. Regime-subverting violence arises from the perceived illegitimacy of state law. It is a form of private remedial action aimed at illegitimate laws (p. 182). Weisberg notes the long "tradition of self-help violence associated with attacks on legal regimes that lack legitimacy" (p. 183). This tradition



Under the analogy of private violence, Weisberg explains, people do not so much violate the law as they uphold it (pp. 178–79). To explicate this anomaly, Weisberg describes private violence as “a dominant and legitimate mode of law enforcement” (p. 179). Its legitimacy rests on its remedial character, factual undergirding, and moral substance (p. 180).<sup>65</sup> For Weisberg, the private violence of lawmaking and law enforcement constitutes a purposive act of meaning-making tied to the construction and enforcement of an imagined moral order.

Field inhabited a law- and lawyer-imagined moral order without identity, narrative, or history. My efforts to make and to enforce the disability law of literacy at Field’s ALJ hearing limited her opportunity to assert her racial identity or history with dignity.<sup>66</sup> Effacing clients’ identities, narratives, and histories permits lawyers to construct a moral order imbued with demeaning values and false stories. That order distorts the legal imagination, transforming the meaning of advocacy from an act of hope into an act of pain. Lawyers’ necessitarian reasoning justifies that pain.<sup>67</sup>

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employs criminal conduct as a law-establishing “instrument” (pp. 184–85). In a sense, such conduct is an attempt to overturn the “political and economic prejudice” Weisberg finds “at the heart of the substantive criminal laws.” Robert Weisberg, Foreword: Criminal Procedure Doctrine: Some Versions of the Skeptical, 76 J. Crim. L. & Criminology 832, 853 (1985).

Regime-preserving violence springs from individual and community action against a named “outsider” (p. 185). See also Robert Weisberg, Criminal Law, Criminology, and the Small World of Legal Scholars, 63 U. Colo. L. Rev. 521, 554 (1992) [hereinafter Weisberg, Small World] (“Nothing so inspires group violence against outsiders or perceived transgressors as the sense that the group is carrying out a lawmaking or law-preserving mission.”). It is a private remedy against the perceived threat to a community’s cultural “integrity” (p. 185). Collective criminal conduct induces a sense of community cohesion and meaning. Weisberg mentions that incidents of community misrule are oftentimes marked by carnival or ritual violence (p. 185). In American history, slavery and lynching are especially malevolent examples of such violence. See Dickson D. Bruce, Jr., Violence and Culture in the Antebellum South 137–60 (1979) (describing the violence, conflict, and arbitrary rule of slaveholder plantation authority).

Regime-destroying violence is a “subtler” category of private violence (p. 185). In this category, violence *feels* like law (p. 185), but the element of law and community are “‘purely’ psychological and analogic” (p. 185). In regime-destroying violence, Weisberg contends, “there is no question of any legal recognition of excuse or justification” (p. 185). For Weisberg, the self-help killer belongs to this category. This modal killer considers violence a form of moral revenge and law enforcement.

On the criminal as a postmodern moralist, see Weisberg, Small World, *supra* at 550.

65. Weisberg observes that “[m]uch violence is committed by people thoroughly persuaded that they are enforcing legitimate legal or moral norms” (p. 182).

66. Limiting a client’s opportunity to be heard may induce client self-blame. See Austin Sarat & William L.F. Felstiner, Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction, 22 Law & Soc’y Rev. 737, 764 (1988) (discussing the role of spousal fault and blame in divorce cases).

67. Lawyers often articulate this necessitarian logic in seemingly intuitive terms. See Austin Sarat & William L.F. Felstiner, Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office, 98 Yale L.J. 1663, 1671 (1989) (“Lawyers often talk about what can or cannot be done or what is or is not likely to happen without explicitly noting that their

## II. NECESSITY

Lawyers rationalize their pain-imposing acts of interpretive violence on the basis of necessity. Although arguments that posit violence as a necessary part of advocacy are intelligible and justifiable,<sup>68</sup> they are overbroad. Field's case illustrates the problem of overbreadth in necessitarian reasoning. Here, the argument from necessity arises out of the constraints of disability law and legal relations. Field's identity, narratives, and history, however, do not fit the formal discourse of disability law.<sup>69</sup> Likewise, her assertions of functional competence do not meet the conditions of dependency that shape lawyer-client relations. Overriding these conflicts in reliance upon an unchecked necessitarian logic legitimizes distorted laws and domesticates hierarchical legal relations.

Neither Field nor I spoke about the distorted content of disability law or the hierarchical quality of our relationship. Advocacy traditions celebrate lawyers' willingness to come to the "valiant" defense of their clients,<sup>70</sup> in Field's case the defense of a claimed entitlement to SSI benefits, not a defense of law or legal relations. Erecting a defense through law and legal institutions pushes lawyers to think and to talk about their clients in ways that erase identity, silence narrative, and suppress history. Disability law, for example, compelled me to fit Field's identity into the regulatory categories of medical impairment, age, work experience, and illiteracy. Narratives that helped institutional decision-makers fit Field into these categories, commonly the narratives of treating physicians and employers, were relevant. Narratives that did not help tailor this fit were irrelevant. To deal with the necessities of law and institutional decision-making, lawyers construct partial, and sometimes false, client identities and histories. This construction, forged of necessity, inflicts pain—in Field's case the pain of humiliation and silence.<sup>71</sup>

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views are shaped by statutes or court decisions, although the trained ear would recognize that their formulations are clearly rooted in an understanding of rules.”)

68. Arguments from necessity may be cast positively or negatively. The positive claim, at bar in Field's case, justifies lawyer conduct on the ground of achieving material benefit for a client. The negative claim rationalizes lawyer behavior on the basis of protecting a client from material deprivation.

69. The clash between Field's identity and disability law necessitated what Carol Greenhouse aptly calls Field's "performance of credibility." Letter from Carol J. Greenhouse to Anthony V. Alfieri (Apr. 5, 1994) (on file with the Columbia Law Review).

70. On the self-celebration of lawyer valor, see Sarat & Felstiner, *supra* note 67, at 1682 ("[L]aw talk [in the divorce context] suggests distance between lawyer and legal order, with the former portrayed as struggling valiantly within the confines of a process that seems neither equitable nor just." (footnote omitted)).

Given the unstable meaning of virtue, it is perhaps unfair to cast the lawyer as villain. Cf. Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 *Stan. L. Rev.* 3, 13–21 (1986) (demonstrating the conceptual instability of mercantile images of virtue and villainy).

71. For a discussion of the doctrinal and institutional framework of necessitarian logic in disability law, see Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 *Hastings L.J.* 769 (1992).

The necessity of lawyer-imposed violence also stems from the requirements of disability rights advocacy and interpretation. In Field's case, the effort to achieve a "commonality of interpretation" with respect to the meaning of disability rights was constrained by the "divergent experiences" of the institutional agents who constitute such meaning:<sup>72</sup> lawyers, policy-makers, and judges. Common meaning was further narrowed by the "abstract and formal" nature of rights discourse.<sup>73</sup> Thus confined, prevailing disability rights discourse of literacy overlooks the dignity of functional literacy and the history of race-based educational inequality and segregation.<sup>74</sup> Lawyers accustomed to constructing demeaning roles for their clients and distant, exalted roles for themselves fail to detect this oversight.<sup>75</sup> That failure may be attributed to lawyers' belief that certain

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72. See Cover, *Violence and the Word*, supra note 16, at 1609. Cover remarks: "[A]s 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." *Id.* at 1629; cf. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *Yale L.J.* 1860, 1862 (1987) ("Interpretive activity appeals not to one overriding authoritative community, but instead to people living in worlds of differences.").

73. In spite of these obstacles, Minow nonetheless encourages the use of rights discourse. See Minow, *Interpreting Rights*, supra note 72, at 1909. Minow observes:

The use of rights discourse affirms community, but it affirms a particular kind of community: a community dedicated to invigorating words with power to restrain, so that even the powerless can appeal to those words. It is a community that acknowledges and admits historic uses of power to exclude, deny, and silence—and commits itself to enabling suppressed points of view to be heard, to make covert conflict overt. Committed to making available a rhetoric of rights where it has not been heard before, this community uses rights rhetoric to make conflict audible and unavoidable, even if limited to words, or to certain forms of words.

*Id.* at 1881 (footnotes omitted).

74. On objectification and omission in legal discourse, see Duncan, supra note 56, at 107 ("The more law is pushed in the direction of objectification, the more removed it becomes from the reality of pain.").

75. See Anthony V. Alfieri, *Impoverished Practices*, 81 *Geo. L.J.* 2567 (1993) (examining lawyers' adoption of the role of moral and political prophet).

Norms of practice distance lawyers from the violence they impose upon clients in the same way that the norms of sentencing distance judges from the violence they impose upon defendants. In exploring the meaning of law's violence in the everyday work of judges, Judge Wald discerns trends that "distance" judges from awareness of and responsibility for court-ordered violence noteworthy in the sentencing process (p. 103).

Judge Wald asserts that the system of Federal Sentencing Guidelines "profoundly distances the judge from the violent consequences of the sentence," thus "strip[ping] the process of any personal dynamic between the deliverer and the recipient of that violence" (p. 82). As a result, she opines, "The imposition of law's violence has been depersonalized" (p. 83). Indeed, Judge Wald notes that during her five year tenure (1986–1991) as Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, the Circuit accumulated a total affirmance rate of greater than 83% under the Federal Sentencing Guidelines. See Patricia M. Wald, ". . . Doctor, Lawyer, Merchant, Chief," 60 *Geo. Wash. L. Rev.* 1127, 1142 n.33 (1992).

"conditions of effective domination"<sup>76</sup> are necessary to carry out their institutionally assigned role of legal rights interpreter. These conditions dictate client dependency, marginality, subordination, and discipline.<sup>77</sup> Poor clients sometimes view the conditions of lawyer domination as an institutional manifestation of the impoverishing violence of the state.<sup>78</sup>

For Cover, the authority and force of law's violence derives from the state. Like Cover, Sarat and Kearns point out that "force is translated routinely, though not without studied and careful organization, the marshaling of strong justifications, and recognizable roles and structures, into pain, blood, and death" (p. 218). Moreover, like Cover, they observe that the translation of force through word, deed, and institutional role distorts sociolegal meaning (pp. 219-20). Unlike Cover, however, Sarat and Kearns focus not on the "fact" that violence distorts meaning, but on the "way violence distorts when compared to other distorting factors" (p. 220). By this comparison, they seek to elucidate "the way violence distorts law and limits the possibilities and prospects of law itself" (p. 223). For Sarat and Kearns, the hope that law transcends violence to attain a stance "other-than-violence" is folly (p. 213). Violence reveals and purchases too much of law.

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For studies of the federal sentencing process in criminal cases, see Stanton Wheeler et al., *Sitting in Judgment: The Sentencing of White-Collar Criminals* (1988); Kenneth Mann et al., *Sentencing the White-Collar Offender*, 17 *Am. Crim. L. Rev.* 479 (1980).

76. Cover, *Violence and the Word*, supra note 16, at 1616. While lawyers may bond to their institutional roles and to the practices of client domination in word and deed, they may experience a tension between the pull of formal institutional values and the moral imperatives of individual dignity. Cover identified a similar moral-formal tension in the context of antebellum adjudication. See Cover, *Justice Accused*, supra note 37, at 197-259; Michael S. Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 *J.L. & Religion* 33, 38 (1989) (locating moral-formal conflict at the center of *Justice Accused*).

Sarat and Kearns discern the acts of an apologist in Cover's effort "to identify the conditions for the *effective*, but domesticated, organization and deployment of law's violence" (p. 214). Indeed, they are not sanguine about identifying those conditions (p. 214). Neither are they optimistic about "a reconstruction of the premises of law's relationship to society" (p. 215), for which such conditions are a prerequisite. Nor do they "share" in the belief that "law could be homicidal without being 'jurispathic'" (p. 215). In sum, though they express admiration for Cover, Sarat and Kearns raise doubts concerning his overall appreciation of "the difficulties of accommodating violence and law" (p. 215).

77. On the imposition of these conditions through practices of interpretive violence, see Alfieri, supra note 15, at 2123-30; see also Rae Langton, *Speech Acts and Unspeakable Acts*, 22 *Phil. & Pub. Aff.* 293, 302-03 (1993) (defining subordinating speech acts as acts that confer "inferiority or loss of power, or [acts that] demean or denigrate").

78. Cover notes that "deeds of violence are rarely simply suffered by the victims without conditions of domination, conditions that are themselves frequently, perhaps always, tied to a history of violence which conditions the expectations of the actors." Cover, *The Bonds of Constitutional Interpretation*, supra note 16, at 820; see also Austin Sarat, ". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 *Yale J.L. & Human.* 343, 352-53 (1990) (finding that welfare recipients view legal services lawyers to be part of and to operate "inside" the bureaucratic apparatus of the welfare state).

Sarat and Kearns ascribe Cover's tolerance of law's violence to his "ties" to philosophical liberalism. They uncover these ties in Cover's "use of the polarities of freedom and order to describe the tensions of human social life" (p. 223 n.55). In a deft move of deconstruction, they show that this usage overlooks "[t]he internal coherence of systems of meaning and the order already within freedom" (p. 227). In the same way, they demonstrate that such usage neglects "the fragility of power and the possibilities of freedom already within the domain of order" (p. 227). These omissions, Sarat and Kearns comment, combine to situate power and violence "outside" the domain of meaning and interpretation (p. 228).<sup>79</sup> Cover's approval of that disjunction transforms law's violence into an instrument of "peace" (p. 232).

Sarat and Kearns cite Cover's decreed transformation of natural violence into legitimate state force and, ultimately, into peace as an earmark of the "liberal vision of law" (p. 233). They mention, for example, Cover's parallel move "from power against freedom to rules against disorder" (p. 234). For Cover, this shift renders law's violence intelligible and justifiable. And yet, Sarat and Kearns remain skeptical.<sup>80</sup> They push Cover to answer how law can commit homicidal acts of physical violence without committing corresponding jurispathic acts of normative violence (p. 241).<sup>81</sup> Their testing of Cover's jurisprudence for evidence of reconciliation provides a kind of endgame. The conclusion itself is unambiguous: Cover's reconciliation of law's homicidal and jurispathic impulses fails.

Law's violence, Sarat and Kearns argue, undermines normative values and hope (p. 242 n.129). Law and violence, they exclaim, "can never adequately and satisfactorily be reconciled" (p. 242). Practical institutional forces—the roles, relations, and organization of violence—"undercut and oppose any self-limitation" on the jurispathic "impulse" (p. 242), save meeting the requirement of a "justificatory story" (p. 246).<sup>82</sup>

The justification of homicidal acts of violence, Sarat and Kearns explain, demands "strong" moral convictions or positivist reasons (p. 246 &

79. Sarat and Kearns assert that "hierarchies of power proliferate in all meaning-generating activities" (p. 228).

80. Sarat and Kearns maintain that "Cover had neither such a romantic aversion to violence, nor such an unqualified sympathy for freedom over order, that he rejected violence entirely" (pp. 240–41 n.127).

81. Sarat has previously remarked on the "irresolvable contradictions" embedded in the "paradigms of liberal legalism." Austin Sarat, Book Review, 94 Harv. L. Rev. 1911, 1924 (1981) (discussing the "ideas and ideals of access to justice").

82. For Sarat and Kearns, the jurispathic impulse of judges and legal agents prevails because it is "ineliminably personal" (p. 245). Judgments are personal when "they bear the marks of their author," and therefore "bespeak a perspective, a set of assumptions, a point of view that is the decider's own and that cannot help but have an effect on the content of the judgments made" (p. 245). For legal decision-makers, the consequence of personal normative involvement in judging is the responsibility to decide thoughtfully, "to get it right" (pp. 245–46). Fulfilling that responsibility requires a "justificatory story" (p. 246).

n.145).<sup>83</sup> Those convictions both domesticate and transform law's violence in the sense that strong convictions establish a hierarchical relationship between the dominant legal order and subordinate normative communities. Hierarchy permits the legal order to "insist[ ] that what it proclaims as right is *the* only acceptable version of right" (p. 247). Like necessitarian logic, the jurispathic impulse triumphs because legal interpretation must "show not only that its decisions are technically sustainable, but that they *merit imposition* against those who might resist, that they are worthy of being lived in and through the pain that is done in their name" (p. 247).

Field's case illustrates the necessitarian transformation of interpretive acts into jurispathic deeds of excess violence. The interpretive acts at issue concern my reading of disability law, particularly the meaning of literacy. Jurispathic deeds refer to the conduct of my direct and redirect examinations in erasing Field's dignity, silencing her narratives of functional literacy, and suppressing her history of suffering racial inequality and segregation in education. Typically, as here, such deeds are manifested in speech acts. Law and legal institutions assign well-defined speech acts to lawyers, clients, and decision-makers. For lawyers and clients, the allocation of such institutionally-designated acts follows the precepts of consent theory. Consistent with standard consent procedure,<sup>84</sup> a client delegates her power as an original speaker to a lawyer who, in turn, assumes the authority to intervene on her behalf. Too often, the necessitarian logic of intervention leads to excess violence.

### III. EXCESS

Excess normative violence occurs when lawyers displace clients as original, nonsubstitutable speakers. This displacement collapses the distinction between descriptive and performative speech acts. Once lawyers declare nonsubstitutable performative speech acts, their sentences misfire, overstating or understating the character of the material world. Accurate performative speech acts involve client declared narratives that are exactly repeatable by lawyers, resistant to dismantlement by decision-makers, and enriched by the inlaying of community voices.

Field's adopted role of a disability claimant designates her as an original speaker. This designation conveys the authority to speak, but it does not establish the existence of her illiteracy. This condition is not given; it must be brought into existence. Bringing the history of Field's illiteracy into existence requires a speech act—a narrative—that only Field can

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83. On the character of legal and moral justice, see Thomas R. Kearns, *Socratic Jurisprudence: The Province of Legal Morality—Undetermined*, 91 *Yale L.J.* 1508, 1518 (1982) (book review).

84. On the materiality and mystifications of consent and consensual relations in the contexts of medicine and political philosophy, see Elaine Scarry, *Consent and the Body: Injury, Departure, and Desire*, 21 *New Literary Hist.* 867 (1990).

perform. Silencing or suppressing Field's performative act inflicts excess violence.

In her essay, "The Declaration of War: Constitutional and Unconstitutional Violence," Elaine Scarry invokes the Austinian distinction between descriptive and performative speech acts.<sup>85</sup> Scarry argues that descriptive speech constrains the spoken word (p. 76). It registers events "already" in existence (p. 55). In a descriptive speech act, *what* is spoken is crucial (p. 76). The sentence, rather than the speaker, is the locus of representation. Because the content of the descriptive sentence is determinative, the speaker is substitutable (p. 42). Performative speech, by comparison, constrains the speaker. It "originates" events in the world (p. 76). In a performative speech act, *who* is speaking is critical (p. 76). The speaker is the locus of representation. Yet, because the speaker of the performative sentence is determinative, she is nonsubstitutable (p. 42).

The nonsubstitutability of the speaker in performative sentences derives from the power of performative speech to actualize material acts (p. 43). A performative sentence summons real acts and consequences into existence.<sup>86</sup> It "creates a material replication of its own already existing verbal action" (p. 61). In a sense, "[i]t predicts the reality that it then brings into being" (p. 61).

Scarry suggests that performative and descriptive speakers bear responsibility for their speech acts (p. 56). The nature of that responsibility, she contends, differs in accordance with the substance of the act—the type of sentence—and its relation to the material world (pp. 42–43).<sup>87</sup> A descriptive sentence, for example, "represents" or aspires to represent, the world as given" (p. 43). The material world "exercises referential control over the *content* of the sentence" (p. 43). A performative sentence, in contrast, "bypasses (hence, derealizes or annihilates) the material reality as given in order to bring new sets of arrangements into being" (p. 43). The material world exerts referential control over the speaker of the sentence (p. 43).

Scarry makes two findings concerning the relation of descriptive and performative acts to the material world.<sup>88</sup> She alleges that many descriptive sentences fail to represent the world "accurately" (p. 76). Further, she avers that many performative sentences are spoken by the "wrong

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85. See generally John L. Austin, *How To Do Things With Words* (1962).

86. See Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 *Yale L.J.* 259, 265 (1993) ("Performative utterances are speech acts that, by being uttered, accomplish the state of affairs to which they refer . . .").

87. For a more sustained investigation of the relation between language and the material world, see Elaine Scarry, Introduction to *Literature and the Body: Essays on Populations and Persons*, at vii (Elaine Scarry ed., 1988) [hereinafter *Literature and the Body*].

88. On the materiality and materialization of social practices, see Elaine Scarry, War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 *U. Pa. L. Rev.* 1257, 1287–1316 (1991).

speaker" (p. 76). Scarry seeks to encourage accurate descriptive sentences and rightly spoken performative sentences (p. 76).

Descriptive sentences commit errors of inaccuracy through acts of overstatement and understatement. Overstatement occurs when the sentence sweeps over descriptive features of the world. Understatement arises when the sentence omits descriptive features. In Field's case, I committed both errors of speech. In my direct and redirect examinations, I overstated Field's illiteracy, denying the dignity and silencing the narratives of her functional literacy. At the same time, I omitted and therefore understated her history as a woman of color struggling in an educational context of racial inequality and segregation.

Overstatement and understatement result from a lawyer's attempt to usurp a client's position as "authentic speaker" (p. 32).<sup>89</sup> Lawyer usurpation distorts the material world. My description of Field's illiteracy, for example, denigrated her functional skills and obliterated the inequality and racism infecting her education. Usurpation also bars new sociolegal arrangements from coming into being. This bar rises from the "enunciation of the performative act by the wrong speaker" (p. 28). Thus enunciated, the sentence " 'misfires' " (p. 29). By misfires, Scarry means that the performative act in fact "never takes place and, hence, neither do its effects" (p. 29). Because I am the wrong speaker to bring Field's illiteracy into existence, my declaration of her illiteracy at the ALJ hearing misfired. Misfiring condemned Field's narratives of racial inequality and segregation to silence. Indeed, they were never heard.

To render descriptive sentences accurate and performative sentences valid, Scarry considers alternative methods of legitimating speech acts: delegability and transmissibility (pp. 32-33). A speech act is delegable if the speaker originally obligated to carry out the act chooses a substitute speaker and transfers the obligation to perform it (p. 32). A speech act is transmissible if the original speaker performs, rather than transfers, the act and that performance enacts material consequences (p. 32). The performance of the speech act by the original speaker grants transmissible authority insofar as that performance "permits and creates the conditions under which many other actions can take place" (p. 32). In this manner, the performance of the original act "radiate[s] outward in its consequence[s]," enabling other speakers to perform "parallel, duplicate, or derivative" acts (p. 32). The accumulation of speech acts results in a "wider materialization" of the performative sentence (p. 32).

Scarry argues that the performative materialization of a declarative sentence evolves through the accrual of adjunctive features of materiality:

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89. The distinction between authentic and inauthentic speakers, like the distinction between descriptive and performative speech acts, is unstable and thus subject to contest. In certain instances, for example when a victim of police brutality dies in custody, lawyers may make a strong claim to the position of authentic speaker. In these circumstances, lawyers' descriptive speech acts may produce the material consequences of performative acts.



exact repeatability, the inlaying of voices, and dismantlement (pp. 43–44). The first two features combine to “thicken” the material content of a sentence (pp. 43–44, 47–49). The exact repeatability of a sentence and the “cohabitation of multiple voices” (p. 45) pronouncing that sentence, Scarry contends, “thicken[ ] and give[ ] substance to the verbal performative” (p. 44). Field’s declaration of functional competence, for example, is exactly repeatable by the multiple voices of lawyers, witnesses, and decision-makers. Repeatability thickens the materiality of the sentence, thus helping Field to bring her functional literacy into existence.

The inlaying of voices (pp. 44, 63–64) furnishes material weight to the performative sentence in a more “overt” fashion (pp. 54–55).<sup>90</sup> Often the inlaying of voices occurs in “highly formal” acts of testimony expressing the “cumulative weight” of a community (p. 47), such as the testimony of Field’s family and friends. The site of the inlaying may be located inside the hearing room in testimony or outside on the street in words of protest. Whatever the site, the inlaying establishes a “correspondence” (p. 63) between a verbal utterance and material reality. This material correspondence, in turn, “*stabilizes and constrains*” the performative speech act (p. 63).

The third adjunctive feature—dismantlement—works both to “thin out” (pp. 43–44, 47–49) and to thicken a declarative sentence. The sentence is thinned out by decoupling and reattaching its component parts. It is thickened by challenging its baseline assumptions and by garnering stronger arguments (p. 55). Consider the following sentence: *Field is literate*. Decoupling formal and functional notions of literacy thins out the sentence to read: *Field is functionally literate*. Challenging the institutional assumption that functional literacy implies the ability to perform “other work” in the national economy thickens the sentence to read: *Field’s functional literacy is insufficient to render her able to perform “other work” in the national economy; therefore, she is disabled*.

Field’s self-abasing testimony of illiteracy on direct and redirect examination represents an unsatisfactory performative speech act. To be accurate and valid, this performative act must enable Field to express both a dignitary narrative of functional literacy and a historical narrative of racial inequality and segregation. Only Field’s performative speech, repeated by her lawyers, dismantled by decision-makers, and thickened by the inlaying of the testimony of her family and friends, can enact a material reality accurately reflecting those narratives. That enactment, accompanied by the voices of Field’s community, engenders opposition to excess violence.<sup>91</sup>

90. For earlier mention of the notion of inlaying, see Elaine Scarry, Donne: “But Yet the Body Is His Booke,” in *Literature and the Body*, supra note 87, at 70, 96.

91. Scarry observes: “The fact of acknowledging a people’s existence is . . . only a half-step away from acknowledging its capacity to resist” (p. 64).

On the subject of resistance in Cover’s writings, see Robert M. Cover, *Bringing the Messiah Through the Law: A Case Study, in Religion, Morality, and the Law* 201, 203 (J.

## IV. OPPOSITION

Opposition constitutes an alternative strategy of curbing lawyers' necessitarian logic. This strategy forms at the intersection of normative and narrative violence, the point where violence is inscribed in the text of narrative. Necessitarian reasoning suggests that some violence is unspeakable. In fact, some violence is unspeakable not because it adheres to the logic of necessity, but because it exceeds the text of narrative. The strategy of opposition tests the limits of the speakable in advocacy, requiring lawyers to disrupt and to negotiate the *given* limits of texts by reopening the meaning-making practices of reading and speaking, and equally important, by recentering client identity, narrative, and history in the discourses of law and legal institutions.

In her essay, "Reading Violence," Carol Greenhouse attempts this reopening and recentering by asserting the intersectionality of physical and narrative violence.<sup>92</sup> Greenhouse asserts that narratives represent oral texts in which experiences of violence are "temporarily inscribed and reappraised" (p. 120).<sup>93</sup> In this respect, violence is embedded or incorporated into the sociocultural text of narratives (p. 120). As such, "vio-

Roland Pennock & John W. Chapman eds., 1988) (contending that Messianic and apocalyptic narratives resist and challenge the authority of social controls); Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *Cap. U. L. Rev.* 179, 190 (1985) (noting the importance of the "gesture and aspiration of resistance" in myth and history); Robert M. Cover, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression*, 68 *Colum. L. Rev.* 1003, 1005 (1968) (book review) (praising the turn to draft resistance by young men opposed to the Vietnam War); see also Paulsen, *supra* note 76, at 92 (reiterating Cover's concerns regarding the timing and form of resistance).

92. Greenhouse borrows her methods from legal anthropology and from the writings of Robert Cover. The tie binding these two bodies of sociolegal research is the distinction between force and words (pp. 105-06). She argues that this distinction informs the language, methods, and traditions of sociolegal research (p. 106). The result is a field divided roughly along an interpretivist-empirical axis, an "axis dividing symbolic, hermeneutic, and interpretivist approaches on the one hand from empirical studies of social action (politics, economy, courts, and so on) on the other" (p. 108). Greenhouse's espoused purpose "is to strengthen the intellectual bridge across that divide" (p. 107).

Greenhouse argues that interpretivists and empiricists jointly underestimate law's role "in the *circulation* of violence in social systems" (p. 110) and understate the linguistic presence of "coercion, power, and violence" in the composition of texts (p. 110). She defines interpretivists in terms of their primary approach to the law "as text" (p. 110). Citing the "proximity of textual and physical forms of violence" (p. 111 n.13), she challenges the settled distinction between "a real-world domain of power and violence and an 'imaginary' world of symbols that 'operates' apart from it" (p. 110). For Greenhouse, violence is both physical and textual. See also Reginald L. Robinson, "The Other Against Itself": Deconstructing the *Violent Discourse* Between Korean and African Americans, 67 *S. Cal. L. Rev.* 15, 24 (1993) (describing the physical violence between African and Korean Americans as "a form of talk—a means of communicating").

93. Greenhouse employs ethnographic case studies to establish the intersectionality of physical and interpretive violence. The first of these studies examines the historical narratives of the Ilongot, an indigenous people located in the uplands of Northern Luzon, the Philippines (p. 112). The Ilongot narratives, Greenhouse contends, demonstrate the

lence is not outside the symbolic language of the community, but is central to it, as the theme, medium, and syntax of their narrative texts" (p. 121). These texts "are in part legible because of the way they 'speak' the violence of the everyday . . ." (pp. 120–21). Textual violence merely "extends, circulates, modifies, or contains" the physical violence found in the world (p. 121).

Greenhouse claims that the "textuality of violence" contains limits (p. 122). Those "textual limits are not fixed, but change with culture, consciousness, and context" (p. 122). At times, "some violence surpasses—or falls awry of—the text" (p. 122). Greenhouse remarks that "texts do not contain or express all of the violence that people are capable of unleashing on each other" (p. 123). Violence may be "excessive," a violence "out of proportion," a violence of the "extreme" (pp. 120–21). For Greenhouse, as for Field, excess violence is experienced as narrative disruption, even though violence is itself "not uniformly disruptive" (p. 120).

To the extent that violence is "encoded" in the narratives of everyday life and the texts of the social order, Greenhouse argues, interpretation in no way precludes "contact" with violence (p. 122). Interpretation in fact explodes the distinction between "real" and "symbolic" violence (p. 120). The site of both violence and opposition is the text. On this definition, "textual interpretation is itself a practice that absorbs and generates a certain amount of violence, as it probes the textual limits of the speaka-

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"double proximity of violence and narrative on the one hand, and, close by, the social landscape and the physical landscape on the other" (p. 116).

The second study considers the narrative episodes of the Kaluli, an indigenous people located in Papua New Guinea (p. 116). The Kaluli narratives narrow the proximity of physical and textual violence, integrating violence into the very syntax of narrative.

The third study traces the arguments presented to the United States Supreme Court in a recent death penalty case, *Perry v. Louisiana*, 494 U.S. 1015 (1990). Greenhouse reads the arguments as a series of contests juxtaposing violence and order, killing and healing, murder and execution (p. 131). Central to these tensions are issues of time, place, and self-representation (p. 132).

Perry's lawyers, Greenhouse explains, advance a notion of personhood couched in a temporal framework. Put simply, they argue that "forced medical 'treatment' will hasten his execution. . ." (p. 132). This self-representation or biography is time-bound. The State of Louisiana, Greenhouse notes, offers a contrasting self-representation that is timeless in quality. The State argues: "Perry is ill and must be treated; he is a criminal and must be punished" (p. 132).

Greenhouse counterposes the text of the arguments in *Perry* to demonstrate not only their "temporal incongruity" (p. 133), but also their "mutually exclusive meanings" (p. 133). The geographic and hierarchical setting of the arguments compounds those contradictions. Greenhouse points out that *Perry* establishes a "hierarchy of readers" shared between "two places": the Supreme Court and Louisiana (p. 134). It is this hierarchy, Greenhouse submits, that permits the "textual containment of radically different—even contradictory—logics and goals . . ." (p. 134).

Greenhouse also suggests the intersectionality of physical and interpretive violence in her account of community narratives of local Civil War battles. See Carol J. Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town* 61–69 (1986) [hereinafter Greenhouse, *Praying for Justice*].

ble" (p. 135). Greenhouse asserts that "an essential task of textual interpretation is to discover the contours of the text against the unspeakable that it claims to keep at bay" (p. 123). These limits, according to Greenhouse, are "never fixed, but are negotiated within the text . . . through successive readings" (p. 135).<sup>94</sup> The negotiation of textual violence determines the boundaries of necessity, excess, and opposition.

Field's direct and redirect examinations demonstrate the inscription of normative violence into a textual form. Moreover, the examinations show the normative, and sometimes linguistic, contradictions of textual negotiation among lawyers, clients, and decision-makers. Greenhouse challenges the power of legal institutions to "control or deny" (p. 137) those difference-based contradictions. She locates that challenge in everyday "habits of reading" (p. 138).

To Greenhouse, reading is a form of "critical engagement" (p. 139) capable of "discovering" and "transgressing" institutional strategies of meaning-making (p. 137). The practical and ethical task is "constantly" to reopen the question of how we "frame meanings from among the possibilities that language, common sense, and [our] personal expertise make available" (p. 137). The reopening of lawyers' epistemological, interpretive, and linguistic practices stands as an act of opposition.

Reopening lawyers' meaning-making practices is the first move toward opposing law- or lawyer-inflicted normative violence. Encouraging client resistance to such violence is the second move.<sup>95</sup> In Field's case, lawyer violence deals in the pain of humiliation, the silencing of narra-

94. Greenhouse adverts to such negotiation when she observes: "although there were several historical vocabularies in Hopewell, there was more or less one canonical version of the past." Carol J. Greenhouse, *Revisiting Hopewell: A Reply to Neal Milner*, 17 *Law & Soc. Inquiry* 335, 339 (1992). That version represents a set of community "self-affirmations." See Carol J. Greenhouse, *Signs of Quality: Individualism and Hierarchy in American Culture*, 19 *Am. Ethnologist* 233, 236 (1992).

On the construction of community, see Greenhouse, *Praying for Justice*, *supra* note 93, at 107 (classifying the local concept of the "community of Christ" in three time frames: "past (the historical community), present (the living congregation), and future (the community rejoined in heaven)"); see also Carol J. Greenhouse, *Book Review*, 8 *Law & Hist. Rev.* 144, 146 (1990) (reviewing Sally F. Moore, *Social Facts and Fabrications: "Customary" Law on Kilimanjaro, 1880-1980* (1986)) (noting that "anthropological definitions of 'law' have broadened to encompass the normative dimensions of a general way of life").

95. Jody Freeman asserts that "recognizing signs of resistance does not erase the effects of objectifying and reductive representations." Jody Freeman, *The Disciplinary Function of Rape's Representation: Lessons from the Kennedy Smith and Tyson Trials*, 18 *Law & Soc. Inquiry* 517, 543 (1993) (reviewing *Rape and Representation* (Lynn A. Higgins & Brenda R. Silver eds., 1991)). Freeman states:

[T]he form and substance of the resistance may itself be influenced and constrained by the dominant discourses of race or gender. Resistance can appear in many forms and be partial; it does not necessarily require a wholesale rejection of all stereotypes or scripts. It may amount merely to the suggestion that other identities are possible, without displacing existing ones.

tive, and the suppression of racial inequality and segregation. The text of my direct and redirect examinations shows Field already resisting humiliation by trying to negotiate the meaning of illiteracy in the alternative terms of functional competence.<sup>96</sup> Field's reluctance to admit publicly her own inability to read signifies opposition to juridical inscriptions of violence in her own life.

Field's testimony and the unheard narratives of her family and friends confront the text of law's and lawyers' violence with a different text embedded with different meanings.<sup>97</sup> Those differences hold the jurigenerative potential for opposition. It is the lawyer's ethical responsibility to help make those differences speakable. That responsibility extends to counseling clients regarding the potential costs and benefits of speaking out.

Unlike judges, lawyers lack the heroic power to declare redemptive narratives.<sup>98</sup> Instead, their narratives are descriptive; their powers are interventionist. The task in poverty law advocacy, as in all moral-political dilemmas entangling the anxiety of law and lawyering, is to decide when to "intervene" and describe client narratives, and when to stand apart and permit the client to perform her own narratives.<sup>99</sup> No universal rule is available to guide this decision-making,<sup>100</sup> though some will urge pragmatic or utopian solutions.<sup>101</sup> Others will advise restraint,<sup>102</sup> offer tech-

96. Michael Ryan explains the multiplicity of meanings available in the sociolegal world. See Michael Ryan, *Meaning and Alternity*, in *Narrative, Violence, and the Law*, supra note 24, at 267. He states:

Meanings and interpretations emerge from a multiplicity of sites. And those sites are themselves temporary stabilizations of dynamic situations, of intersecting lines of determination that are social, psychological, economic, sexual, and so on. Each singular meaning conceals a multiplicity, and there is a multiplicity of meaning as much because there is a multiplicity of social locations as because there is a multiplicity of semantic possibilities.

Id. at 274.

97. For Greenhouse, interpretive meaning and understanding flow out of difference, not solidarity (p. 134). Interpretation requires not "a solidary community of readers" but information and discipline (p. 134). Difference enables interpretive communities to contest allegedly common meanings and convergent understandings.

98. Weisberg encourages rejection of the image of the "heroic judge." See Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 *Stan. L. Rev.* 213, 256 (1983) (discussing images of judging in common-law and statutory adjudication).

99. See Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 *Yale L.J.* 1916, 1957 (1987) (examining the moral-formal dilemmas posed in Cover's work).

100. Cf. Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 *Law & Soc'y Rev.* 165, 170 (1987) (admonishing law and society scholars against turning "bounded" sociolegal observations into "universals").

101. On the prevalence of pragmatic and utopian reasoning, see Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *Yale L.J.* 1035, 1050 (1977) (cataloguing the divergent positions of "utopian" and "pragmatic" constitutional approaches in habeas corpus jurisprudence).

102. See Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 *Yale L.J.* 1727, 1755 (1987) (addressing volitional acts of restraint).

nique,<sup>103</sup> or appeal to discretion.<sup>104</sup>

Neither technique nor discretion, however, will eradicate interpretive violence. Lawyers' interventionist reflexes are too strong.<sup>105</sup> To the extent that participation in the interpretive process of law and lawyering is unavoidable, violence is inevitable. Opposing violence through meaning-making practices of reading and speaking involves restoring client normative values to lawyer descriptive and client performative narratives in advocacy. In Field's case, the normative values of dignity, competence, and race have been severed from both lawyer and client narratives. The material referents of Field's life—the dignity of functional literacy and the violence of racial inequality and segregation—are invisible. My direct and redirect examinations did not and cannot invoke the normative or material content of her world.

It is not simply that we—lawyers—are ignorant of Field's world.<sup>106</sup> Our language lacks the "material possibilities,"<sup>107</sup> the capacity to give voice and to reenact the historical text of her world. Our law discounts this historical text as irrelevant and therefore inadmissible. Lacking the capacity for and the possibility of sustained opposition to interpretive violence, for now we must hope that "[t]he substantiveness of language—its capacity to mime, and perhaps eventually acquire, the actual weight of what it describes"<sup>108</sup> will lead us away from violence to other worlds. The goal is to reposition our language and ourselves to speak to and work with others without violence.

#### CONCLUSION

In this Essay, I have attempted to reopen Cover's jurisprudence of violence by identifying lawyers as jurispthic agents of violence and by

103. But see Robert M. Cover, *Dispute Resolution: A Foreword*, 88 *Yale L.J.* 910, 914 (1979) (expressing skepticism toward reform that "proposes a remedy to substantial indecency or injustice via technique").

104. See William H. Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083, 1083 (1988) (approving a professional duty of reflective and discretionary judgment in assisting clients to pursue actions that promote justice).

105. On the interventionist reflex in materialist practice, see Elaine Scarry, *Literature and the Body*, *supra* note 87, at xxiii ("Because materialist practice assumes language acts on the real world and because it continually credits the possibility that literature acts on historical reality, it also gives rise to a genre of criticism which itself acts to alter (rather than merely describe) the literary text."). Scarry's materialist conception of language rests on two assumptions: "first, that language is capable of registering in its own contours the contours and weight of the material world; second, that language itself may enter, act on, and alter the material world." *Id.* at xi.

106. Hay cites the ignorance of politics and history as a causal link in establishing the legitimacy of powers outside law (i.e., the offense of "scandalizing the court"). See Douglas Hay, *Contempt by Scandalizing the Court: A Political History of the First Hundred Years*, 25 *Osgoode Hall L.J.* 431, 483 (1987).

107. See Elaine Scarry, *Donne: "But Yet the Body Is His Booke," in Literature and the Body*, *supra* note 87, at 70, 74.

108. *Id.* at 70, 81.

defining lawyers' interpretive practices as pain-imposing forms of normative violence. Reopening is spurred by my reading of Sarat and Kearns's *Law's Violence*. In conjunction with that text, I have tried to formulate an alternative vocabulary that describes, explains, and justifies the intersection of law, lawyers, legal institutions, and violence. I undertake these efforts because violence is frequently submerged in the daily motions of law, legal institutions, and lawyers. A similar motive inspires the insights of *Law's Violence*. Yet in the end, what recommends *Law's Violence* is not merely the elegance of its insights, but its ability to confront the institutional necessity and the cruel excess of violence in law and nevertheless to glimpse the possibility of opposition, and with it, the hope of reconstruction.