HOW VIOLENCE KILLED AN AMERICAN LABOR UNION

*Duane Rudolph**

I don't accommodate myself to the violence that goes on everywhere. I'm still surprised. That's why I'm against it, why I can fight against it. We must learn how to be surprised, not to adjust ourselves. I am the most maladjusted person in society.
Abraham Joshua Heschel.[1]

I cannot accept the laws and statutes blindly, but I must ask myself again and again: Is this particular law addressed to me and rightly so?
Martin Buber.[2]

The challenge is to write another sort of history altogether, one that filters the past and fits it together through a particular definition rather than dividing and transmitting it as if transparently.
Christine Desan.[3]

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1. Interview by Frank Reynolds with Abraham Joshua Heschel, Rabbi, in N.Y. (Nov. 21, 1971).

2. Letter from Martin Buber to Franz Rosenzweig (June 24, 1924) *in* DONALD J. MOORE, MARTIN BUBER: PROPHET OF RELIGIOUS SECULARISM 197 n.38 (1996). I am grateful to the Jewish Museum in New York City for bringing the quotation to my attention.

3. Christine A. Desan, *Writing Constitutional History Beyond the Institutional/Ideological Divide,* 16 LAW & HIST. REV. 391, 396 (1998).

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The headlines could make one lose hope. "Is This the End for Organised Labour in the US?"[4] "The Decline of Unions Is Your Problem, Too".[5] "Unions Are Dying. What Will Replace Them?"[6] "Not With a Bang, But a Whimper: The Long, Slow Death Spiral of

4. John Logan, *Is This the End for Organised Labour in the US?,* GUARDIAN (Mar. 11, 2011, 9:00 AM), http://www.theguardian.com/commentisfree/cifamerica/2011/mar/11/us-unions-wisconsin.

5. Eric Liu, *Viewpoint: The Decline of Unions Is Your Problem Too: The weakness of labor hurts all employees in every sector*, TIME (Jan. 29, 2013), http://ideas.time.com/2013/01/29/viewpoint-why-the-decline-of-unions-is-your-problem-too.

6. Kevin Drum, *Unions Are Dying. What Will Replace Them?*, MOTHER JONES (Feb. 27, 2014, 11:09 AM), http://www.motherjones.com/kevin-drum/2014/02/unions-dying-income-inequality.

America's Labor Movement."[7] In some places, organized labor's rigor mortis appears to have set in as political candidates steer clear of the topic.[8] And, in others, if it hasn't yet, organized labor's detractors intend to hasten its arrival with their determination "to eliminate coercive union power and compulsory unionism abuses through strategic litigation, public information, and education programs."[9]

And yet, the loathing of organized labor is old as the republic. In 1806, "the federal society of journeymen cordwainers,"[10] a forerunner of the nation's labor movement,[11] was tried in Philadelphia on two counts.[12] The first was "for contriving, and intending, unjustly, and oppressively, to [i]ncrease and augment the wages usually allowed them."[13] The second made Philadelphia's bootmakers answerable for "endeavouring to prevent, by threats, menaces, and other unlawful means, other journeymen from working at the usual prices, and that they compelled others to join them."[14] Barely thirty years after The Declaration of Independence, and twenty years after the adoption of the Constitution, both in Philadelphia, an allusion to the union's

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7. Richard Yeselson, *Not With a Bang, But a Whimper: The Long, Slow Death Spiral of America's Labor Movement*, NEW REPUBLIC (June 6, 2012), http://www.newrepublic.com/article/103928/rich-yeselson-not-bang-whimper-long-slow-death-spiral-americas-labor-movement.

8. *See* Peter Nicholas, *Wisconsin Race Signals Historic Shift In Power of Unions; Candidate Mary Burke Bases Her Challenge of GOP Gov. Scott Walker on Lack of Job Creation*, WALL ST. J. (Apr. 28, 2014), http://online.wsj.com/news/articles/SB10001424052702304163604579529902106518512.

9. National Right to Work Legal Defense Foundation Inc., http://www.nrtw.org/en/b/foundation_faq.htm (last visited Mar. 27, 2015).

10. THOMAS LLOYD, THE TRIAL OF THE BOOT AND SHOEMAKERS OF PHILADELPHIA, ON AN INDICTMENT FOR A COMBINATION AND CONSPIRACY TO RAISE THEIR WAGES 44 (1806).

11. ELIAS LIEBERMAN, UNIONS BEFORE THE BAR: HISTORIC TRIALS SHOWING THE EVOLUTION OF LABOR RIGHTS IN THE UNITED STATES 1 (1950).

> When this trial took place—at the beginning of the nineteenth century—there was hardly any labor movement in existence in the United States. There were no mass production industries, there were no large employers, and there was no collective bargaining with labor to speak of. The only type of so-called workers' organizations in existence then were 'friendly societies,' organized mainly for fraternal purposes to which employers or masters, as well as workers, belonged.

Id.

12. LLOYD, *supra* note 10, at 73-74. Although, for the court and prosecution, there were only two charges, for the defense, there were three: (1) refusal to work at the usual wages; (2) use of threats and other means; (3) combining and enacting bylaws. The indictment supports the defense's reading. Indeed, the most powerful charge was the cordwainers' combination and enactment of bylaws. *See also id.* at 74-82.

13. *Id.* at 69.

14. *Id.*

"secret association"[15] was powerful. Exposed to a dramatic telling of alleged union violence and imposition of high prices for fine footwear, the jury in the case succumbed.[16] Union members had been compared to "dogs."[17] Such "dogs" were said to attack immigrants, and were said to have no stake in the community.[18] Philadelphia's shoe exports were said to have fallen as a result.[19] The jury had to pass on this "usurpation"[20] and "rebellion."[21] It had to choose "whether it is to be continued or suppressed."[22]

B. Definitions

Largely inspired by the late Robert Cover's seminal work,[23] legal scholars have pursued the relationship between law and violence in some detail.[24] In his article on the *nomos,* Cover explored the pathologies of legal meaning relating to "smallish groups."[25] For Cover, a normative landscape creates tension to which its minorities must attend.[26] Violence arises as an effect or by-product of judicial[27]

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15. *Id.* at 67.

16. *Id.* at 149.

17. *Id.* at 70.

18. *See id.* at 67.

19. *Id.* at 37.

20. *Id.* at 73.

21. *Id.* at 72.

22. *Id.* at 69.

23. To the extent that Cover made it impossible for us to deny what we "knew" about the violent functioning of the judicial machinery, he denied us a familiar refuge when faced with an unpleasant situation: "'I know, but I don't want to know what I know, so I don't know.' I know it, but I refuse to fully assume the consequences of this knowledge, so that I can continue acting as if I don't know it." SLAVOJ ŽIŽEK, VIOLENCE 53 (2008). There may lie Cover's strength; he made his insight about violence at law indispensable to our perception of the law. As Proust would put it, Cover quite simply created his own posterity.

24. *See* LAW'S VIOLENCE (Austin Sarat & Thomas R. Kearns eds., 1992) [hereinafter LAW'S VIOLENCE]. *See also* PAIN, DEATH, AND THE LAW (Austin Sarat ed., 2001); LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE (Austin Sarat ed., 2001).

25. Robert M. Cover, *Violence and the Word,* 95 YALE L.J. 1601, 1602 n.2 (1986) [hereinafter *Violence and the Word*].

26. Cover's work was an example of a resurgence of interest in the Jewish legal tradition in legal interpretation. *See* Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,* 106 HARV. L. REV. 813, 818 (1993); Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative,* 1998 UTAH L. REV. 465, 466 (1998); Samuel J. Levine, *Emerging Applications of Jewish Law in American Legal Scholarship: An Introduction,* 23 J. L. & RELIGION 43, 43-44 (2007).

27. I use "judicial" not only to summarize Cover's argument here, but also, later, to more accurately reflect the focus of my argument than might "jural." While I do reflect on the wider meaning of violence at law writ large ("jural'), particularly at the end of my paper, my focus is mainly on a court case and the court's engagement with the

commitments to majoritarian values since "[j]udges are people of violence . . . [c]onfronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest."[28] Violence is inherent both in the judicial order and in judicial interpretation.[29] Though pervasive, violent effects are largely felt as a *result* of the disposition of a case.

Cover returned to his evaluation of law and violence in *Violence and the Word*. His essay issues its first salvo in its statement that "[l]egal interpretation takes place in a field of pain and death."[30] Cover pursues his insight with an assessment that, through interpretation, "[t]he judges deal pain and death."[31] The violence to which Cover refers remains largely undefined. His argument both surrenders some of its argumentative force and remains evocative since the nature of Cover's violence is always suggested. Violence appears primarily physical,[32] and arises mostly in criminal cases.[33] It appears in a court's

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proceedings ("judicial").

28. Robert M. Cover, *The Supreme Court: 1982 Term – Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 53 (1983) [hereinafter *Nomos and Narrative*].

29. "The violence of judges and officials of a posited constitutional order is generally understood to be implicit in the practice of law and government. Violence is so intrinsic to this activity, so taken for granted, that it need not be mentioned. For instance, read the Constitution. Nowhere does it state, as a general principle, the obvious—that the government thereby ordained and established has the power to practice violence over its people." *Violence and the Word*, *supra* note 25, at 1610 n. 22.

30. *Id.* at 1601.

31. "Why, then, should we not conclude that interpretation *is* the master concept of law, that the interpretive work of understanding 'punishment' may be seen as mediating or making sense of the opposing acts and experiences of judge and defendant in the criminal trial?" *Id.* at 1608-09.

32. *See* Peter Fitzpatrick, *in* Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials,* 27 LAW & SOC'Y REV. 19, 21 (1993)

> In its narrow, perhaps popular sense, violence is equated with unrestrained physical violence. . . . A standard history of the West would connect a decline in violence with an increase in civility. Others would see civility itself as a transformed violence, as a constraining even if not immediately coercive discipline. . . . The dissipation of simple meaning is heightened in recent sensibilities where violence is discerned in the denial of the uniqueness or even existence of the 'other' . . . . These expansions of the idea of violence import a transcendent ordering--an organizing, shaping force coming to bear on situations from outside of them and essentially unaffected by them.

See also ROBERT MUCHEMBLED, UNE HISTOIRE DE LA VIOLENCE (2008) (arguing that, although violent crimes in the West have decreased since the Middle Ages, physical violence, particularly homicide, has predominantly been the province of males aged 20 to 29 since the Middle Ages. "Civilization" has thus involved the harnessing and redefining of masculinity over time); STEPHEN PINKER, THE BETTER ANGELS OF OUR NATURE (2011) (concluding that physical violence has decreased over time due to the enduring impact of the Enlightenment).

33. To be fair, Cover seems to pay attention to criminal law not as a limitation on the meaning of violence but as the clearest demonstration of violence and the law.

jurisdiction over the defendant's body, in forced martyrdom, torture, imprisonment, separation of families, and in the death penalty. It is the *result* of judicial interpretation. Symbolic violence, to the extent that "[j]udges, like all readers and writers of texts, do violence to their literary—i.e., judicial—forebearers,"[34] is also the result of interpretation. For Cover, such symbolic violence "will not do"[35] since actual judicial violence inscribes itself directly on the prisoner's body, which "displays its mark."[36] Physical violence at law displays material effects that are the result of judicial fiat, which symbolic violence lacks.

Cover's essay title "Violence and the Word" becomes more salient given its privileging of the interpretive act. Cover unearths minority communities' sufferance of judicial violence.[37] His judge is always interpreting the "word" as a threshold matter. Cover conflates the word with interpretation.[38] In Cover's narrative, at the beginning is no longer the word-as-law, but interpretation-as-law (the word reborn through its interpreter). Legal interpretation arises both as the constitutive act of any community, and as a likely cause of the community's eventual fragmentation and violent disintegration.[39] If there is actually a word at the beginning, it is fused with—and indissoluble from—interpretation. In the beginning, then, is interpretation. Judicial interpretation hurts, bleeds [others], and kills. At the end [of the word], too, is interpretation.

Cover's work remains attractive for its exposure of the violent

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34. *Violence and the Word*, *supra* note 25, at 1609 n.20.

35. *Id.* at 1609-10.

36. *Id.*

37. I use this word both in its archaic sense, meaning "to tolerate" (as minority communities are often compelled, as Cover shows, to tolerate the effects of imposed legal interpretation), and also in its modern sense, meaning "to suffer" (as such communities, even as they bear the weight of legal interpretation, often resist it as part of their suffering). Cover's most poignant example in this regard is that of Rabbi Akiba who suffers martyrdom but resists the narrative that torture and martyrdom would compel him to accept. *Violence and the Word*, *supra* note 25, at 1604.

38. *But see* Martha Minow, *Interpreting Rights: An Essay for Robert Cover,* 96 YALE L.J. 1860, 1875 n.53 (1987) ("My notion of interpretation includes civil disobedience, and moreover, includes the activities of those who adopt the 'community' interpretive framework as part of a tactical effort to be heard, and as a signal of a shared heritage and shared life.").

39. Stone, *supra* note 26, at 825.

> Cover's vision of law as the expression of autonomous interpretive communities exposes the weakness in traditional constitutional theory, which grounded authority in consent. His theory also undermines contemporary theoretical models, which ground constitutional authority in interpretation. Once we understand the jurispathic aspect of interpretation, we see that interpretation does not support authority; rather, authoritative interpretation kills law. It is the 'triumph of the hierarchical order over meaning.'

Id.

judicial machinery that is always a part of a state apparatus that includes officers of various sorts.[40] It also includes an incarceration system in which inmates are isolated, and some are killed by the state.[41] Judicial violence, as Cover insists, is a matter of life and death in this context.[42] What a judge says, subject to appeal, has unequivocal effects on a defendant's body in a criminal proceeding.[43] The judge is largely insulated from the effects of her decision, since she neither participates in the incarceration, nor does she attend the execution.[44] Cover divulged the judicial system's coercive effect in its most extreme forms. Judicial interpretation in such a context cannot—and must not—pretend to be of the same order as literary interpretation, no matter the similarities that may be drawn.

SUMMARY OF ARGUMENT

Although I am indebted to Cover's work, my essay on organized labor does not isolate judicial violence in the interpretive act in criminal cases. Nor is my definition of violence a predominantly physical one in which the body is privileged. While I do not deny Cover's observations about physical "displays" of judicial violence, there is room for my approach, which extends the definition of "violence" to incorporate other judicial acts.[45] True, I may risk calling everything "violent." However, as Christine Desan has noted in an article on constitutional historiography, "[t]hat [these phenomena] occur everywhere extends rather than dissipates their importance."[46] Courts neither order the incarceration nor the execution of defendants *ex nihilo.* Counsel's arguments, depictions of the defendant and the plaintiff, the setting of the trial, and the constitution of the jury, to name a few factors, urge a result on the court. Context matters.[47] Surroundings kill before executioners do. Speech is often an indication

40. *See Violence and the Word*, *supra* note 25, at 1601 n.1.

41. *See id.* at 1601.

42. *See id.*

43. *See id.* at 1601, 1625.

44. *See id.* at 1601, 1608-09.

45. *See id.* at 1607-10.

46. Desan, *supra* note 3, at 395.

47. *See* ŽIŽEK, *supra* note 23, at 1.

> At the forefront of our minds, the obvious signals of violence are acts of crime and terror, civil unrest, international conflict. But we should learn to step back, to disentangle ourselves from the fascinating lure of this directly visible 'subjective' violence, violence performed by a clearly identifiable agent. We need to perceive the contours of the background which generates such outbursts. A step back enables us to identify a violence that sustains our very efforts to fight violence and to promote tolerance.

Id.

of intent as well as a signal of an engagement with a *nomos*.[48]

Criminal law acknowledges this to some extent given its inference of intent from a defendant's speech acts and the context surrounding a crime. It is thus insufficient to place judicial violence solely at the judge's feet at the end of a trial without evaluating the context,[49] language,[50] and strategic positions advocated by both the plaintiff and the defendant in the judicial process. Violence is not only a judicial result, it is also process.[51] At stake in my argument, therefore, is not

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48. *See, e.g.,* CHRIS HEDGES, WAR IS A FORCE THAT GIVES US MEANING 21 (2002) (noting how speech can indicate violent intent and incite violence in the context of war) ("It took Milošević four years of hate propaganda and lies, pumped forth daily over the airways from Belgrade, before he got one Serb to cross the border into Bosnia and begin the murderous rampage that triggered the war.").

49. As regards context, Žižek's observation that "[p]erhaps the most elementary hermeneutic test of the greatness of a work of art is its ability to survive being torn from its original context[,]"is troubling. ŽIŽEK, *supra* note 23, at 152. As Žižek might himself agree, a work does not survive solely through some inherent power ("ability") distinct from the violence attending the work. The greatness of a work, the guarantor of its long-term survival, even within its "original context," is the violence engendered in its name. *Id.* Shakespeare, to whom Žižek refers, was "abl[e] to survive" abroad because he traveled in the company of a repressive colonial apparatus intent on creating communities in which his work would always find a home. *Id.* It is not so much a work's ability to survive that is great, but the violence done in its name that may be great. Great, too, are those upon whom that violence is visited and are somehow "abl[e] to survive" it. Only an examination of context permits such a conclusion.

50. I am aware that the existence and use of language itself implies violence as language:

> simplifies the designated thing, reducing it to a single feature. It dismembers the thing, destroying its organic unity, treating its parts and properties as autonomous. It inserts the thing into a field of meaning which is ultimately external to it. When we name gold "gold," [for example] we violently extract a metal from its natural texture, investing it into our dreams of wealth, power, spiritual purity, and so on, which have nothing whatsoever to do with the immediate reality of gold.

Id. at 61. Although few, if any, of the words I explore in my argument have a reality as concrete as "gold," the words in my analysis do have a history and they issue from a context, which I explore in some detail to reinvest the words with the breadth and depth that is part of them, all the while analyzing the visions that imbue those words with a particular meaning for a community.

51. *See* ON VIOLENCE: A READER 11-12 (Bruce B. Lawrence & Aisha Karim, eds., 2007).

> *One must elect at the outset whether to view violence as product or to view it as process.* Violence as product is always depicted as a sporadic, singular episode or set of such episodes. When a violent episode occurs, it does so as the exception to the norm. It erupts at a specific time and in a particular place. It is both marked and limited by its temporal and spatial occurrence . . . . Precisely because one must recognize the porous boundaries of each violent act, whether individual or group-specific, whether erupting in the private or in the public domain, violence is always and everywhere process. As process, violence is cumulative and boundless. It always spills over. It creates and recreates new norms of collective self-understanding. Violence as process is

the existence of judicial violence but the nature of its shifting contours and intensity. Symbolic violence may not be physical violence, but symbolic and structural violence can—and do—lead to physical destruction, damaged lives, and death.[52]

My approach is different from Cover's commentators, as I begin at the beginning of symbolic violence. I dwell on the word.[53] "Violence" means something. It has always meant something(s), even at the founding of the republic, and its meanings have evolved. Legal actors have always understood something or *things* when confronted with the word. True, there is also a theoretical discussion of violence. But that discussion assumes the word. Although the word's meaning[54] has changed over time, it is a remarkably resilient word, retaining most—if not all—of its original Latin and Middle French meanings. Etymology is also useful since courts rely on it to understand which interpretation of a word to favor.[55]

> often not recorded because it is internalized; it becomes part of the expectation of the living, whether framed as revenge or fear, but, most important, its creation must remain transparent, its instrumentality evident beyond all attempt to reify or essentialize both its origin and its function.

Id.

52. *See generally id.* at 11. ("The epistemic lesson to be learned and relearned, then applied again and again, is the need to confront rhetorical violence.").

53. To be sure, Cover's commentators are well aware of the complexity inherent in the word and of its implications for the legal system. *See* Fitzpatrick, *supra* note 32, at 19-20. To my knowledge, however, none of Cover's commentators delves into etymology to adopt a more expansive—and evolving—reading of violence through a detailed analysis of the language of a particular trial and the effect of local and global contexts on the trial's outcome.

54. *See* Minow, *supra* note 38, at 1899-1900.

> To explore the meanings of violence is to wager that violence itself is made more and less possibly by patterns of meaning; that certain kinds of people become victims of violence, in part, because social meanings fail to constrain that violence; and that violence committed in the name of the state can, in part, be understood, and maybe channeled, through vigilant attention to its meanings.

Id.

55. The use of etymology was known in Phildadelphia at the time of the trial. *See* BENJAMIN SMITH BARTON, HINTS ON THE ETYMOLOGY OF CERTAIN ENGLISH WORDS : AND ON THEIR AFFINITY TO WORDS IN THE LANGUAGES OF DIFFERENT EUROPEAN, ASIATIC, AND AMERICAN (INDIAN) NATIONS (Philadelphia, 1803). Etymology also figured in trial arguments elsewhere in the nation in the period leading up to--and after--the trial. *See, e.g.*, Comm'rs of Pub. Accounts v. Boquet, 1 S.C Eq. (1 Des.Eq.) 599, 601 (1795) (discussing the etymology of "prerogative" to decide whether the king's prerogative applied in case dealing with a public official's debt); The Ulysses, 24 F. Cas. 515, 515 (C.C.D. Mass. 1800) (No. 14,330) (indicating that the "etymology of the word ['felony'] was investigated" to see if mutiny had occurred); Livermore v. Bagley, 3 Mass. 487, 491-93 (1807) (discussing the meaning of "*graunte* [now *grant*]" in a case dealing with transfer of land, noting that Lord Coke was the first to use the word in English and that he uncharacteristically fails to provide the word's etymology, but refusing to admit the

Thus, inspired by Cover's assessment of the *nomos,* I not only rely on the word "violence," but also proceed to interpret it, as Cover would say, "in the context of the narratives that give it meaning."[56] As other commentators have observed, "context matters. Violence always has a context. Context shapes not just the actors or victims but also those who represent them."[57] I read the historical context surrounding Philadelphia's cordwainers into their story, and consider words as starting points freighted with a history, not only an etymological one, but also a physical one in which people suffer and die. Words used in court are messengers urging the imposition of an alternative reality (suffering of some sort) on the defendant's life. Words' constellation and force—and a court's willingness to espouse them or not—can be the cause of *more* pain and death.[58] Cover implicitly authorizes this approach when he notes that "[h]istory and literature cannot escape their location in a normative universe."[59] Here, they do not.

My argument is both burdened and freed by its ambition. It aspires to an evaluation of the totality of the contextual "violence" precipitating a judicial outcome. Such extravagance makes the quest risky. Yet the argument is freed from privileging any unfolding of violent circumstances as preeminent in the generation of a judicial outcome. To prove that violence is a constitutive part of the entire judicial process, my argument need not rely on an actual judicial opinion, although it may be buttressed by it, provided that my argument has access to other judicial sources like trial transcripts, historical documents, and the outcome of the case. The approach has at least one other advantage. Judges excise material that they consider extraneous to their opinions. Even within their opinions, secondary reasoning is "dictum" and is not considered binding. Yet, the extraneous material can be revealing since it shows what the court has discarded as less persuasive in its justification for its holding.[60]

There is little novelty in my approach. Historians and other

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etymology of "conveyance"); Pringle v. M'Pherson, 2 S.C. Eq. (2 Des. Eq.) 524, 531-32 (1807) (discussing the etymology of "family" in a case dealing with a bequest of slaves); Hillhouse v. Chester, 3 Day 166, 182 (Conn. 1808) (mentioning Blackstone and the etymology of "contract" in a case dealing with a deceased's estate).

56. *Nomos and Narrative*, *supra* note 28, at 4-5.

57. ON VIOLENCE: A READER, *supra* note 51, at 1.

58. *See generally* Minow, *supra* note 38, at 1905. ("Law talk can be searing, and words may shake the world.").

59. *Nomos and Narrative*, *supra* note 28, at 5.

60. Indeed, an important part of current American legal training is to make law students accept that almost everything they need to know about a case and its litigants is to be found in the judicial opinion before them. For more on the strictures of legal training, see Ducan Kennedy, *Legal Education and the Reproduction of Hierarchy,* 32 J. LEGAL EDUC. 591 (1982).

"fuzzy" academics consider a wide variety of materials all the time.[61] Scholars of legal violence, however, have not considered the totality of the circumstances, a detailed analysis of the deployments of language, historical context, and so on, in relation to specific legal arguments and violent outcomes. There is at least another advantage to my approach. It need not draw on any particular court to assess judicial violence, but it does invite the scholar to assess which court is most "violent" given its impact. Many claims are resolved in courts deemed of lesser importance, whose records are, as a result, slimmer, yet whose impact still can be vast given that not all cases are appealed and that higher courts do not take all appealed cases.[62] Should lower courts not be privileged as areas where judicial violence is concentrated?

Aware of these challenges, I have chosen *Commonwealth v. Pullis* (1806), also known as *The Trial of the Journeymen Boot & Shoemakers of Philadelphia*,[63] to examine judicial violence. The case was tried in the Philadelphia Mayor's Court,[64] and a judicial record of the case does

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61. Implicit in my approach is the Jeffersonian belief that law is "'a branch of the history of [humanity].'" Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic,* 47 AM. J. LEGAL HIST. 35, 43 (2005) (citing Merrill Peterson, THOMAS JEFFERSON, AND THE NEW NATION 14 (1970)). Indeed, I would venture even further and argue that law is a *coequal* branch in humanity's history.

62. Although written with particular attention to trial judges in Wisconsin in 1977, Austin Sarat's observation is germane:

> Trial judges are among the least studied and least well understood of all political actors. Unlike the judges on appellate courts, trial judges have received relatively little attention . . . . This inattention is partially attributable to the judges' low visibility, the difficulty of gathering data on their behavior and the difficulty of determining what about their job and their activities is most worthy of study. Unlike appellate judges, who are frequently involved in the making of policy decisions which are both controversial and important to large 'constituencies,' the actions of trial judges do not appear, at first glance, to have broad political impact. Furthermore, while the most important activity of appellate judges comes in deciding cases and writing opinions, the activities of judges at the trial court level are much more varied and difficult to rank. Sentencing, deciding on the admissibility of evidence, conducting arraignments and pre-trial conferences, these are just a few of the highly consequential tasks which trial judges carry out.

Austin Sarat, *Judging in Trial Courts: An Exploratory Study,* 39 J. POL. 368, 368 (1977).

63. LLOYD, *supra* note 10, at 1.

64. Allen Steinberg, *"The Spirit of Litigation:" Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia,* 20 J. SOC. HIST. 231, 233-34 (1986).

> The courts of record were the second level of criminal jurisdiction. Two such courts served Philadelphia for the period under consideration here. One was the Mayor's Court, which was abolished in 1836. Created by the Act of Incorporation, the Mayor's Court was composed of the mayor or recorder of the city and at least any three aldermen. This court could try any criminal charge originating within the city which would be tried in a county court of Quarter Sessions elsewhere in the state. . . . Each court held sessions four times a year

not appear available.[65] Instead, a book was published in 1806 from the shorthand notes of Thomas Lloyd, the "Father of American Shorthand."[66] My choice of an observer's shorthand challenges how courts construct judicial narratives, as the story told here is not recounted by the bench but by an observer. In *Pullis*, members of an American union were fined, and the union was crushed.[67] The case, as the defense feared, created a (thirty-six year) national precedent that would only be dissolved in 1842 when judicial power was exercised in favor of organized labor.[68]

Violence, then, is what courts do in their engagement with—and their creation of—precedent, and it is "equivalent to power."[69] My argument refines Foucault's distinction between violence and power, as applied to law. For Foucault, like for Cover, violence has telling effects on bodies:

> A relationship of violence acts upon a body or upon things; it forces, it bends, it breaks on the wheel, it destroys, or it closes the door on all possibilities. Its opposite pole can only be passivity, and if it comes up against any resistance it has no other option but to try to minimize it. On the other hand a power relationship can only be articulated on the basis of two elements which are each indispensable if it really is to be a power relationship: that 'the other' (the one over whom power is exercised) be thoroughly recognized and maintained to the very end as a person who acts; and that, faced with a relationship of power, a whole field of responses, reactions, results, and possible inventions may open up.[70]

Foucault's violence is an active force that "bends . . . breaks . . .

> early in the century. . . . Courts of record tried before judge and jury the indictable offenses on which justices and aldermen held primary hearings but upon which they were not permitted to render a final decision. Grand juries would first consider each case reported by an alderman or justice, and if the merits suggested that the case was worth pursuing, would then turn it over to the deputy attorney general for trial. If the case did not seem worth pursuing, the grand jury would 'ignore' it, or refuse to issue an indictment. This was the court system Philadelphia's citizen prosecutors negotiated - and manipulated- when they invoked the authority of the criminal law in their daily affairs.

Id.

65. A search on both Westlaw and LEXIS returned no results. As a commentator has noted, there is a "virtual non-existence of record books from [Philadelphia's] aldermen's and justices offices, and court records which provide little information about the parties to criminal cases." Steinberg, *supra* note 64, at 240.

66. MARTIN I. J. GRIFFIN, 20 THE AMERICAN CATHOLIC HISTORICAL RESEARCHES, Oct. 1903, at 148.

67. LLOYD, *supra* note 10, at 149.

68. LIEBERMAN, *supra* note 11, at 16.

69. ON VIOLENCE: A READER, *supra* note 51, at 13.

70. PHILIP BARKER, MICHEL FOUCAULT: AN INTRODUCTION 37-38 (1998).

destroys . . . or . . . closes. . . ."[71] It is not passive. It creates congealed positions, and is, as one commentator has noted, "reduc[tive] of every possibility for independent action."[72] Foucault's power, on the other hand, implies recognition and even identification of "the other." Power can be "reversed, transformed,"[73] "because it is a relation. . . ."[74] In sum, power for Foucault is more pervasive, diffuse, and generative than violence.[75]

Foucault's argument here is not only "very particular and limited,"[76] but its perceptive limitations discourage it from appreciating that power is, as Walter Benjamin implied, a manifestation of violence.[77] As a result of Foucault's definition, violence risks becoming more insidious since its definition is restricted. My definition of violence against organized labor reaches into the American past to incorporate, from the founding of the republic, much of what Foucault ascribes to power. For me, violence is

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71. *Id.* at 37.

72. *Id.* at 38.

73. *Id.* at 37.

74. *Id.*

75. I similarly reject Hannah Arendt's distinction between power and violence. For Arendt, "violence is an act of desperation on the part of a government that is losing power. 'Power and violence are opposites,' since power emerges when the threat of violence is not needed, when all freely consent to a certain action and act of their own volition." Gail M. Presbey, *Hannah Arendt on Power, in* PHILOSOPHICAL PERSPECTIVES ON POWER AND DOMINATION: THEORIES AND PRACTICES 29 (Laura Duhan Kaplan & Laurence F. Bove eds., 1984).

76. BARKER, *supra* note 70, at 37.

77. Some will question not only how my work engages with Foucault, but also how it responds to Walter Benjamin's *Critique of Violence.* Benjamin sees his task as "a critique of violence [which] can be summarized as that of expounding its relation to law and justice." WALTER BENJAMIN, REFLECTIONS 277 (Peter Demetz, ed., Edmund Jephcott, trans., Schocken Books 1986). He explores violence as a means, and, while cognizant of ends, Benjamin dwells instead on how "[a]ll violence as a means is either lawmaking or law-preserving. If it lays claim to neither of these predicates, it forfeits all validity. It follows, however, that all violence as a means, even in the most favorable case, is implicated in the problematic nature of law itself." *Id.* at 287. Benjamin sees violence in the possibility of contract since contract "confers on both parties the right to take recourse to violence in some form against the other, should he break the agreement." *Id.* at 288. Benjamin thus reads violence widely, and, even as he discusses labor conditions in his native Germany after the First World War, he pursues a wide definition of violence when he notes that labor organizes "to escape from a violence indirectly exercised by the employer. . . ." *Id.* at 281. Benjamin anticipates Foucault when he distinguishes between the divine and the mythical and aligns the divine with justice, and the mythical with power. *Id.* "Lawmaking," Benjamin notes, "is power making, and, to that extent, an immediate manifestation of violence." *Id.* at 295. Violence guarantees power. *Id.* My argument is thus consistent with Benjamin's vision of violence at law, and I engage with Benjamin's argument, as appropriate, in my footnotes, not only because Benjamin's treatment of violence is brief, but also because Cover and the cordwainers are my focus.

pervasive. It controls. It projects ideals whose absence in others it punishes. It is a complex disciplinary mechanism. It assumes complex relationships between actors. It is generative. It is not neutral. It enthralls, disturbs, and infuses. It informs and shapes the social sphere. Violence reshapes the possibility of meaning.[78]

Like Cover, I admit the necessity of some violence at law but deplore many of its applications.[79] Unlike Foucault and Cover, however, I reject any attempt to restrain my definition of violence. For, if violence is an evolving process, then a definition that rebuffs any request to limit its parameters is well-placed to account for its protean nature. My argument thus leaves entirely open the possibility that today's violence may reappear tomorrow "reversed, transformed" but it will still be violence no matter its permutation and no matter how reasonable it appears in its newest iteration.[80] My argument welcomes

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78. Note, for example, Chris Hedges' description of the creation and prosecution of the extreme violence that is war. Hedges' experience shows how even the violence of war presumes the complex inter-subjective relations, disciplinary mechanisms, and alterations in self-understanding that Foucault imputes solely to power:

> The rush of battle is a potent and often lethal addiction, for war is a drug, one I ingested for many years. It is peddled by mythmakers--historians, war correspondents, filmmakers, novelists, and the state--all of whom endow it with qualities it often does possess: excitement, exoticism, power, chances to rise above our small stations in life, and a bizarre and fantastic universe that has a grotesque and dark beauty. It dominates culture, distorts memory, corrupts language, and infects everything around it, even humor, which becomes preoccupied with the grim perversities of smut and death. Fundamental questions about the meaning, or meaninglessness, of our place on the planet are laid bare when we watch those around us sink to the lowest depths. War exposes the capacity for evil that lurks not far below the surface within all of us. And this is why for many war is so hard to discuss once it is over.

HEDGES, *supra* note 48, at 3.

79. *See generally* Austin Sarat, NARRATIVE, VIOLENCE, AND THE LAW 260 (1995).

> Cover hoped that law's violence could be, despite the tragic shadow it casts, different than and preferable to other forms of violence--the violence of the lynch mob or the lawless state--which, in their own way, cast even more destructive shadows. Law's violence is to be reluctantly preferred as a way of containing intolerance and counteracting that other violence, as a way of saving us from the darkest possibilities of human experience.

Id. But see Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory,* LAW'S VIOLENCE, *supra* note 24. While we admire Cover for taking the violence of law seriously and for facing to the way that violence is both an indispensable feature of law and, at the same time, deeply antagonistic to it, we do not think that he saw fully the difficulty of accommodating violence and law. How could this self proclaimed 'anarchist' and visionary legal thinker nonetheless embrace and defend the violence of law? How could Cover so clearly understand the dangers of organizing and deploying violence and not recoil from the danger that such violence would destroy any normative vision that opposed it? How could he make peace with law's violence?

80. I refuse to close my definition of violence for at least one reason, which Martha Nussbaum evokes in her book on shame and disgust at law.

other identifications of violence on which it does not dwell, and it admits that suppression of one form of violence does not necessarily imply its eradication. If violence is a process, then I accept that violence, by definition, is "boundless."[81]

Some will argue that my definition cheapens or dishonors truly violent experiences by making all violence equal.[82] It does no such thing. It tacitly reiterates Christine Desan's observation, recited earlier, that because "[these phenomena] occur everywhere extends rather than dissipates their importance."[83] My argument neither minimizes the presence nor the impact of violence. Instead, it unearths how different kinds of damage are done, and implicitly argues that, "not only is this damaging, but also this, and this. . . and, potentially, that."[84] The intensity of the damage and its attendant suffering may differ from one litigant to another, but it is damage nonetheless, the work of violence.[85] As Walter Benjamin argued, "from the point of view of violence, which alone can guarantee law, there is no equality, but at the most equally great violence."[86]

In Part I of my argument, I focus on the prosecution's definition of a "violent" union. Relying on etymology, I examine how the prosecution

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> Today we probably hold some views that are just as mistaken as [those of the past we criticize], but it is difficult to know which views these are, and if we are somewhat merciful with ourselves we might say that if we have made a good faith effort to be reasonably independent critical thinkers, we are not unreasonable for holding such mistaken normative beliefs as we hold. Thus, if a man in ancient Athens believed that women are inferior, we may judge his view to be mistaken but reasonable, or at least not unreasonable, while such a belief in today's America would be both mistaken and unreasonable.

MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 34 (2004). To be sure, Nussbaum is not talking about violence as I am. Nevertheless, her insight is useful here.

81. ON VIOLENCE: A READER, *supra* note 51, at 12.

82. *See* LAW'S VIOLENCE, *supra* note 24, at 10 ("If everything is violent, then the word and the idea lose their meaning and their normative and critical bite. If the critique of violence must take on all cognitive, linguistic, and cultural practices, then it is overwhelmed and undone.").

83. Desan, *supra* note 3, at 395.

84. In some sense, my argument incorporates the "resentment" to which Žižek refers in his work. It involves "the unremitting denunciation of injustice." ŽIŽEK, *supra* note 23, at 189. Resentment:

> [s]tands . . . for a refusal to "normalise" the crime, to make it part of the ordinary/explicable/accountable flow of things, to integrate it into a consistent and meaningful life-narrative; after all possible explanations, it returns with its question: 'Yes, I got all this, but nevertheless, *how could you have done it*? Your story about it doesn't make sense!'

Id. at 189-190.

85. *See* Minow, *supra* note 38, at 1905. ("Litigants use judicial power to inflict injury on one another").

86. BENJAMIN, *supra* note 77, at 296.

argued that the union was violent and why it did so. The union was presented as a usurpatory legislature injurious to the survival of the republic. That the union had its own constitution and laws was suspicious. These were presented as signs of the union's attempt to foment anarchy and disunion. I examine how "violence" was conflated with "coercion,"[87] and I incorporate the constitutional and economic context to understand the impact of the prosecution's arguments.[88] The prosecution aligned the cordwainers with all that was wrong with pre and post-Revolutionary America. The union's actions were analogized to those of slave rebellions, tyrants, illness, and foreign aristocrats deemed odious to the social edifice. By extending the definition of "violence" to incorporate the full range of meaning of the word, it becomes possible to see the extent of the damage imputed to—and urged upon—organized labor, from the founding of the republic.

In Part II, I examine the prosecution's violence. Since an allegation of a conspiracy to commit violence can act as a shield protecting the alleging party, the prosecution was able to hide its own violence.[89] One of the private prosecutors had served as Attorney General, and he had chosen not to prosecute the "masters" of business, even though they themselves had unionized before the cordwainers had done so.[90] There had been at least one other labor stoppage, and many clubs, societies, and associations existed in Philadelphia at the time of the trial, yet only the shoemakers were targeted.[91] Hypocrisy, in both its etymological and other senses, comes to mind, yet I argue

87. As Žižek indicates when talking of the systemic violence: "We're talking here of the violence inherent in a system: not only direct physical violence, but also more subtle forms of coercion that sustain relations of domination and exploitation, including the threat of violence." ŽIŽEK, *supra* note 23, at 1.

88. In using an expanded definition of "violence," I therefore reject, in part, the definition of violence provided in ARMAND J. THIEBLOT, JR. & THOMAS R. HAGGARD, UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB 11-14 (1999). The authors consider violence "the nonprivileged physical interference with the person or property of another, or the threat, express or implied, of such interference." *Id.* at 14. Their definition is meant to include physical violence, passive violence by those whose refusal to provide a public service (police, fire personnel etc.) can result in consequences similar to those of intended actions, and psychological violence. The definition "is intended to exclude purely 'competitive' or 'economic' injuries,'" which, for me, are central to the definition and constitution of violent acts in labor union cases. *See id.*

89. K. G. KANNABIRAN, THE WAGES OF IMPUNITY: POWER, JUSTICE, AND HUMAN RIGHTS 10 (2004) notes that even "acquittals really obscure the abuse of power and the law" in conspiracy cases. "They also obscure the violence employed using the law as a shield." *Id.* Displaying sensitivity reminiscent of Cover to the effects of judicial charges, Kannabiran is attentive to how "the accused [in Indian conspiracy cases] were held for long periods. The anguish and mental stress suffered by their families, the uncertainty of their return, the near bankruptcy to which these families are reduced, all these are factors that are critical to the assessment of the system." *Id.*

90. *See* LLOYD, *supra* note 10, at 91.

91. *See id.* at 92.

that the trial was an exercise in projection. What revolted the "masters" in their own demeanor, they attributed to the union. I therefore expand the definition of judicial violence to incorporate hypocrisy and projection as the means through which violence might occur at trial. Hypocrisy and projection can insulate those making the charges, and can mask the true perpetrators of violence in judicial proceedings. The stakes in the cordwainers trial were thus high. The outcome of the trial risked subordinating the union to the monopoly power of their "masters." The trial was about fundamental differences concerning the reality and the vision of Philadelphian and American constitutional communities over the long term.

In Part III, I extend the meaning of judicial violence to incorporate legislative acts. Judicial violence can be seen in the manner in which the legislature writes laws reflecting the interests of a particular group. A court then deploys those laws against those least able to bear their weight. The judge in the cordwainers' case relied on a legislative act, and urged a guilty verdict on the jury by endorsing the prosecution's argument in his instructions.[92] That the union was prosecuted also reflected the antagonism between the Jeffersonians and the Federalists in the Pennsylvania legislature. The Federalists had assumed power and had enacted legislation targeting the union.[93] The jury found the shoemakers guilty, and destroyed the evidence of their verdict, deeming it of little importance.[94] The trial reflected the impunity infusing the trial. Impunity becomes central to a discussion of judicial violence since the legal order decides whom to pursue and whom not to, sanctioning some violent behavior while condemning others. In the cordwainers' case, the legislature, prosecution, judge, and jury enjoyed impunity at the expense of a labor union.

In my conclusion, I argue that such violence risks becoming cyclical unless redemption is achieved. Redemption is possible when defeated communities recall their experience and refuse to impose their suffering on others. Such communities thus enrich the law and legal experience. They have often suffered great violence, yet their experience has empowered them to engage with the law in creative and often transcendent ways. They transform yesterday's violence through memory and service.

I. ETYMOLOGY AS GUIDE: THE UNION'S VIOLENCE

A. Beginnings and Meanings

Etymology helps show why an allegation of violence was appealing

92. *Id.* at 37.
93. Blinka, *supra* note 61, at 99.
94. LLOYD, *supra* note 10, at 149.

at the cordwainers' trial.[95] It helps understand how the prosecution could rely on a claim of violence against the union, and why courts would have been amenable to such an allegation.[96]

Etymologically, "violence" comes from the civilization that was expert in its uses.[97] In Latin, violence can be effected through shock;[98] transgression;[99] profanation;[100] infraction of "any law, right, obligation, relationship etc., regarded as sacred;"[101] pollution and defilement (of the sacred);[102] "interference or intrusion;"[103] a failure to respect ownership of land;[104] disrespecting boundaries;[105] or the subjection of others to dishonor or outrage.[106] In "uiolentia" is an

95. Etymology has also figured in more recent jurisprudence. *See, e.g.*, U.S. v. Lopez, 514 U.S. 549, 586 (1995) (citing to the Oxford English Dictionary when discussing the meaning of "commerce"); Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1024 (10th Cir. 2008) (noting that the district court had deployed "a nifty bit of forensic etymology" in trying to understand the origins of the city's name). *But see* Chisesi v. Auto Club Family Ins. Co., 374 F. App'x 475, 477 (5th Cir. 2010) ("Wild accusations that a routine insurance dispute is motivated by nefarious corporate motives and extended, irrelevant discussion of etymology and Chaucer have no place in a brief to this court.").

96. Indeed, dictionary usage appears to be more prevalent in courts cases. "Before 1864, the [United States Supreme] Court used dictionaries as authority only three times, but they were used to define 220 terms during the 1990 through 1998 terms, and continuing the trend, in 23 cases in the 2008-2009 term alone." Marcia Coyle, *Webster's Third fails Justice Scalia's word test*, LEGAL TIMES, Feb. 27, 2012, at 19.

97. "In Roman society, violence was endemic and had been accentuated by the political chaos of the Late Republic." Thomas W. Africa, *Urban Violence in Imperial Rome,* 2 J. OF INTERDISC. HIST. 3, 7 (1971); ANDREW LINTOTT, VIOLENCE IN REPUBLICAN ROME 4 (2nd ed.1999).

> Roman tradition tolerated and even encouraged violence in political and private disputes, and both the law and constitutional precedent recognized the use of force by private individuals. This had wide influence, especially on aristocratic politicians, when great issues were at stake and feelings were running high. Moreover, it was reinforced by the Roman cult of expediency in matters where the physical coercion of people, whether legal or illegal, was involved. The surge of violence in the late Republic was all the more difficult to control as the state lacked a proper police force, and the character of the constitution denied adequate executive powers to magistrates who had the will to exercise them.

Id.; *see also* Zsuzsanna Várhelyi, *The Specters of Roman Imperialism: The Live Burials of Gauls and Greeks at Rome,* 26 CLASSICAL ANTIQUITY 277 (2007).

98. OXFORD LATIN DICTIONARY 2069 (P. G. W. Glare ed. 1982).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 2068-69.

106. *Id.*

abundance ("entus")[107] of such forceful[108] acts ("violo").[109] Etymological violence is about force. It is about the uses to which force can be put to ensure ascendance to—or maintenance of—a position. It implies a hierarchy. Given that subordination is the goal, violence ranges from the deployment of shock to the penetration of boundaries. It is a tearing-down, a trampling upon, and a targeting of whatever is valued by the party to be dominated. Through violence, the sacred is reduced to profanity, and the honorable rendered dishonorable and outrageous.[110]

Nineteenth century American courts were sensitive to the linguistic uses of "violence" and "violation" of the law.[111] Just a year before the cordwainers' trial in 1806, the Supreme Court of the United States wondered if a government act was "in direct violation of the constitution [sic]."[112] It worried that the Court itself might "violate the manifest *intention* of the legislature."[113] Implicit in these concerns was an avowal of the integrity of legal boundaries, which risked being infringed upon by illicit approaches. Judicial concern about "violation" implied the centrality of the legislature to the creation of law and regulations. It showed that courts must en*force* enacted boundaries, and it acknowledged that rhetoric could be injurious in its effect. Indeed, boundaries in this context appear central to the staying of violence and violation at law.

Infraction of boundaries was a form of "violence" known to

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107. *Id.* at 609.

108. "Uiolentia" "derives from the Latin *vis,* denoting 'force' or 'vigor'. . . ." MUCHEMBLED, *supra* note 32, at 15 (« qui derive du latin *vis,* designant la « force » ou la « vigueur » . . . . »). Translation is mine.

109. OXFORD LATIN DICTIONARY, *supra* note 98, at 2069.

110. My approach to violence is akin to the third trend within legal scholarship to which Sarat and Kearns refer.

> [W]e find increasingly ingenious and surprising pathways to the subject of violence; thus Samuel Weber says, "To render impure, literally, 'to touch with' (something foreign, alien,) is also to violate. And to violate something is to do violence to it. Inversely, it is difficult to conceive of violence without violation, so much so that the latter might well be a criterion of the former: no violence without violation, hence, no violence without a certain contamination."

LAW'S VIOLENCE, *supra* note 24, at 9.

111. So was the prosecution in the cordwainers' trial. Consider, for example, the presence of "violence" and "violation" in the following extract from the trial proceedings.

> The first feature of compulsion in this society, to compel the employers to give the wages they demand . . . is, that strangers are forced to join their body on the penalty of embarrassment, and being denied the means of earning their own support . . . the members are denied the liberty of separating, and their rules are inforced by pains, penalties, and fines; threats, and even violence. It has appeared to you, that the public peace has been violated by the members of the society as well upon the journeymen as the employers . . . .

LLOYD, *supra* note 10, at 126.

112. United States v. Fisher, 6 U.S. 358, 379 (1805).

113. *Id.* at 402.

nineteenth century American courts. In an 1804 opinion, the Supreme Court of the United States had noted that "marine trespass" was a form of violence.[114] "But [this act] rather seems," the Court said, "to be an act of violence, a marine trespass, not warranted even by the law which the defendant has produced."[115] That the plaintiff in the case had argued that "a violent outrageous trespass [had been] committed by the governor" showed how "violence" and outrage were associated in American English at the time, as they had been in the Latin.[116] Even in the fluid marine sphere, trespass amounting to violence was possible, and the trespassory act was shocking to the observer ("outrage").

In the cordwainer's case, the prosecution implied that the union had infringed constitutional boundaries by "combining" to create a "secret" constitution. Philadelphia, said the prosecution, was "affected by such private confederacies: that they are injurious to the public good and against the public interest."[117] "[T]hey regulate the whole trade under the most dreadful pains and penalties, such I believe as never was heard of in this or any other civilized country."[118] The claim was highly allusive and strategically calculated to incite "the blaze of passion and of prejudice."[119] As the defense also observed, talk of conspiracy in Philadelphia would, for a politician, "instantly present the picture of a combination to subvert the constitution, and an insurrection or rebellion to overturn the government."[120] "Violence" was thus something the cordwainers were said to have done (by engaging in a combination), something they would continue doing (until the republic was undone), and something that the court must do (to arrest cordwainer desecration).

Indeed, if the Constitution was a hallowed expression of the public weal, then the union's existence was considered a threat. The union was said to have failed to respect legal boundaries by creating its own regulatory "secret association". It had chosen to "confederate"[121] and "combine."[122] The cordwainers were guilty of "unlawfully *perniciously*, and deceitfully designing and intending to form and unite themselves . . . and to make and ordain unlawful and arbitrary bye laws, rules and orders among themselves and thereby to govern themselves."[123] What's more, the cordwainers' alleged conspiracy implied a profound

114. Church v. Hubbart, 6 U.S. 187, 198 (1804).
115. *Id.*
116. *Id.* at 218.
117. LLOYD, *supra* note 10, at 8.
118. *Id.* at 9.
119. *Id.* at 90.
120. *Id.* at 110.
121. *Id.* at 2.
122. *Id.*
123. *Id.* at 5.

and militaristic threat of "insurrection or rebellion to overturn the government."[124] The prosecution had thus crafted an argument that charted the union's alleged ascendancy and the nation's demise. Organized labor intended to act like a belligerent usurper and subordinate constitutional norms for whose enshrinement the nation had recently been at war.

Symbolic violence—involving the use of words— thus mattered. Whether it be a marine trespass, or an act of "outrage," nineteenth century litigants were aware that the language of violence was persuasive, and they used it so that the court might endorse and adopt it as its own.[125] In the cordwainers' case, the court was invited to deal with the union's "evil."[126] Who knew what other "design[s]"[127] this "club"[128] had since it had behaved in a "secret"[129] manner? Had it not imposed its own judicial system since it was "merely a society for compelling by the most arbitrary and malignant means, the whole body of journeymen to submit to their rules and regulations[?]"[130] Indeed, the union's contamination had "spread to an extent of which you cannot as yet form an idea."[131] It constituted a "tyranny"[132] that had to be restrained. Legal speech thus espoused the etymology of violence—something had been infringed, broken, outraged, desecrated, destroyed, or violated—and the court had to suppress it.

B. Acts and Compulsions

As "violence" often denotes physical acts, the cordwainers' acts were roped into the trial. In what physical acts had the cordwainers engaged? How might their acts inform an understanding of violence?

The union was said to have compelled journeymen to join it "or be shut our [sic] from every shop in the city, if he presumes to work at his own price."[133] Those who did not join the union were said to have been "driven from the city."[134] Or, as a witness alleged, if he had refused to abide by union rules, the union might have killed him.[135] Those who disobeyed union rules were called "scabs."[136] "The name of a *scab,"* one

124. *Id*. at 110.
125. Church v. Hubbart, 6 U.S. 187, 236 (1804).
126. LLOYD, *supra* note 10, at 3.
127. *Id*. at 7.
128. *Id*. at 5.
129. *Id*. at 67.
130. *Id*. at 8.
131. *Id*. at 8-9.
132. *Id*. at 8.
133. *Id*. at 9.
134. *Id*.
135. *Id*. at 25.
136. *See* Walter Nelles, *The First American Labor Case,* 41 YALE L. J. 165, 167 n.7 (1931) (citation omitted) ("The word 'scab' was already in common use, carrying its full

witness avowed, "is very dangerous; men of this description have been hurt when out at nights . . . . I was obliged to join, for fear of personal injury, and to stop two apprentices . . . [;] and [was] confined to market work and *cobbling* for a livelihood."[137]

So injurious was "scab" that, when called a "scab," one man "flogged" a union member and was hailed before a court.[138] The union was also said to have "tantalized"[139] men in the streets, and "there was a good many rough threatenings."[140] The union was implied to have "pinned" one man "so close that [he] could not get over it."[141] It was implied to have beaten others.[142] It was said to have fined another "for being a hypocrite."[143] The cordwainers allegedly went even further and threatened the "masters" in whose shops they worked:

> They [union members] would often come by the window and abuse me: one, two or three nights they broke my shop window, and they took care I should not mistake the quarter from which it came; they did not wish to break my windows, and let me supposed it done by any others than themselves.[144]

The union's alleged actions were forceful, and the union's alleged words were forceful. Inherent in the prosecution's allegations was also the concession that language can have physical consequences ("scab" is so outrageous that one person flogs another, and is hailed before a court); that language can be coercive (union members feel compelled to obey the union's dictates); and that the refusal to participate in a linguistic act (joining a union) can have actual consequences on bodies (union members being driven from the city). Violence appears linguistic first.

It was remarkable that the allegations did not clearly attribute

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modern connotation. A spectator at the cordwainers' trial was fined five dollars for his contempt in exclaiming in court, 'A scab is a shelter for lice.'").

137. LLOYD, *supra* note 10, at 29.

> MR. HOPKINSON.
>
> They told me if I did not come to the body, I was liable to be *scabb'd;* I did not know at that time what it was to be *scabb'd;* but some of the men explained it, and I told them that I was willing to be as good a member of their body as any other man.
>
> MR. RECORDER.
>
> *Q.* How did they explain themselves?
>
> *A.* Their meaning was, that if I did not join the body, no man would set upon the seat where I worked; that they would neither board or work where I was unless I joined.

Id. at 11-12.

138. *Id.* at 31.

139. *Id.*

140. *Id.*

141. *Id.*at 14.

142. *Id.*_at 33.

143. *Id.*at 16.

144. *Id.* at 36.

physical violence to the union. Shutting out disobedient members or driving them out of the city did not necessarily mean using force; a "rough threatening" to a member's safety may have only been a threat; an allegation of being "pinned" without much more was merely suggestive; and, general mention of being beaten or hurt did not mean that the union hurt such people or that such injury occurred at the union's instigation. In fact, those who seem to have indulged in physical violence were the man who flogged a union member and was taken to court, and an employer who admitted that he "fell foul and beat [the union member]."[145] Even the hurling of the stone through the employer's window, although attributed to the union, was not clearly caused by union members; the employer surmised that the union was behind it. In other words, the prosecution's portrayal of the cordwainers was attentive to the importance of physical acts in its definition of violence, but it relied more generally on the suggestion of physical violence, which it imputed to the union.[146] As the defense would establish in its cross-examination of the sixth witness for the prosecution, no one had "ever attempt[ed] to hurt [him]."[147]

The prosecution pressed on with its rhetorical onslaught. "We shall shew you the nature of the pains and penalties they affix to disobedience . . . ."[148] The first witness for the prosecution, a recent immigrant, testified of illness and coercion:

> I mentioned that I had a sick wife and a large young family, and that, I knew I was not able to stand it: they would grant me no quarters at all [boarding facilities], but I must turn-out [strike]. All the remonstrances I could make were of no use. I must turn-out [strike]; unless my employer would pay their price for making boots I must refuse to make shoes. At that time I was from hand to mouth, and in debt, owing to the sickness of my family, and market work was only from 3*s*. to 3*s*. 6*d*. per pair.[149]

Other testimony would similarly allege union coercion:

> Dobbin was in great distress, he had lost his wife, and had a large

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145. *Id*. at 33.

146. *See* Nelles, *supra* note 136, at 177 ("There was no evidence, however, of any violence within five years of the 1805 turn-out, or that any of the defendants had ever done more than take part in strikes and live up to the no-association-with-scabs rule of the society.").

147. LLOYD, *supra* note 10, at 32.

> *Q*. Was there any personal violence threatened to them?
>
> *A*. What am I to understand by personal violence?
>
> *Q*. Why, to hurt or beat them.
>
> *A*. Never to my knowledge; there is no punishment inflicted on a *scab,* it is his own act which excludes him from the society."

Id. at 50.

148. *Id*. at 9.

149. *Id*. at 13.

> family of small children to maintain; he was working at soldiers work for his employer, but was ordered to stop till the meeting: at the meeting he solicited to be allowed to work, as he could not otherwise support his children, the motion was rejected.[150]

Applying Cover, the union was said to be a competing *nomos,* replete with enforcement mechanisms that reached into the family.[151] Such a *nomos* was allegedly "violent" in the most painful sense of the word since it destroyed families and threatened death.[152] The cordwainers were said to be callous in their treatment of the vulnerable, oblivious in their approach to loss, dictatorial in their approach to suffering.[153] Unwilling men were "coerced into this society," the prosecution noted.[154] It therefore fell to the prosecution "to promote the common good of community: and to prevent in future the pernicious combinations, of misguided men, to effect purposes not only injurious to themselves, but mischievous to society."[155]

It was telling that the prosecution moved from the language of physical acts ("insurrection," "rebellion," broken windows etc.) to the language of compulsion. "Violence" had presented a new guise: "coercion."[156] The union "coerced" its members.[157] Etymology again proves useful, this time to understand the relationship between "coercion" and "violence". We return to the Romans, who also gave us "coercion." In Latin, "coerceo" can imply the imposition of restraint,[158] confinement,[159] or the preservation of certain qualities.[160] It may involve enclosure,[161] bounding something in,[162] checking it,[163]

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150. *Id.* at 14-15. *But see id.* at 53:

> *Q.* Does your society ever releive [sic] their members in distress?
> *A.* I have known it done, independent of any turnout from charitable motives, though it is not an article of the constitution.

151. *Violence and the Word*, *supra* note 25, at 1602 n.2.

152. *Id.*

153. LLOYD, *supra* note 10, at 69.

154. *Id.* at 70.

155. *Id.* at 7.

156. *Id.* at 70.

> The stress of the prosecution was upon the coercions incident to the activities and objects of the association, without regard to whether they were brought home either to the defendants or the association, and without distinction between whether they were effected by acts then recognized as unlawful (beating of strike-bearers) or by acts which were not (refusal of association).

Nelles, *supra* note 136, at 187.

157. *See* LLOYD, *supra* note 10, at 63 (noting how the masters tried to compel one of their own to discharge his workers).

158. OXFORD LATIN DICTIONARY, *supra* note 98, at 343.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

preventing it from escaping,[164] restricting its growth,[165] constricting it,[166] pruning,[167] or inhibiting it.[168] Whereas "violence" implies excess, "coercion" can imply restraint. Whereas "violence" implies an abundance of force, "coercion" can imply a measured response. "Coercion" can appear somewhat agrarian in scope. In some of its iterations, it suggests the enclosure of animals, and the restriction of growth where such restraint is fertile to domination.[169] "Coercion" also smacks of imprisonment, limitation of movement, and an abrogation of the coerced entity's ability to move and choose.

"Abrogation," with its legal echoes, is indeed the right word. In Latin, "coercion" could not only mean "to suppress by war, bring to submission,"[170] but, when referring to a magistrate, it could also mean to "inflict summary punishment."[171] Coercion refers to "[t]he infliction

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. On the use of restraint at law, see KANNABIRAN, *supra* note 89, at 3-4:

> The law is employed to restrain the exercise of rights and to manage and contain any unrest that may signal rebellion. The state confronts the very first protest with ruthless dispersal and informs the citizen that force will be used to contain public expression of discontent, no matter how weak the protest.

Although Kannabiran considers the promulgation of some laws as violence, his definition of judicial violence appears less capacious than mine given its attention to "arrest and use of force."

170. OXFORD LATIN DICTIONARY, *supra* note 98, at 343.

171. *Id.*; Joseph Plescia, *Judicial Accountability and Immunity in Roman Law,* 45 AM. J. OF LEGAL HIST. 51, 52 (2001). Not only were Roman magistrates endowed with the power of *coercitio,* but they were also:

> [S]ubject to the *Coercitio* of a superior magistrate and to the veto power of a magistrate of equal rank, and certainly to that of the Plebeian Tribunes. . . . *Coercitio* consisted in the official authority to compel others to do (or not to do) something by using force or simply threatening to use force. Such an authority was inherent in the government, embodied in the *imperium* and *potestas* of the magistrates.

It should be noted, however, that "magistrate" had a wider meaning than it does now and was distinguishable from "judge." Plescia notes that under *imperium,* a magistrate could "command an army . . . summon the people . . . summon the Senate . . . declare the law . . . issue edicts and interdicts as well as . . . appoint private judges . . . to resolve disputes between citizens over controversial facts." *Id.* More pertinently, *imperium* invested the magistrate with *coercitio:* "the power to impose fines . . . the power to seize movable property . . . the power to protect the private interests of the citizens . . . the power to imprison . . . the power to flog . . . and even the power of life and death . . . though this could be replaced with exile (temporary or permanent; voluntary or forced)." *Id.* A magistrate endowed with *potestas* could "issue edicts within the sphere of the magistrate's jurisdiction . . . enforce his orders within the sphere of his jurisdiction, namely: the right to impose fines, to seize movable property, to flog . . . and even, in the case of the Censors, to remove someone from rank (such as Senate and the citizens' album)." *Id.* As for "judges", "[i]n Roman law the term judge can refer to various judicial persons," many of whom are appointed by magistrates for temporary purposes. *Id.* at

of summary punishment by a magistrate or other person in order to secure obedience to his will; also the right of doing so."[172] "Coercion" thus ranges in potential from bellicose suppression by war to less belligerent pruning and enclosure. It is a word, like "violence," whose intensity depends on its deployment, whose deployment depends on its target, and whose target depends on the threat it represents. Gradations of coercion and violence exist. The more extravagant the presumed threat, the more coercive and violent the means deployed to subjugate it.

That dissident union members were driven from Philadelphia, however, implied the inefficacy of union coercion. After all, if the cordwainers were powerful, how could they not compel all of their members to abide by their will, which would have made redundant the expulsions from Philadelphia? If the cordwainers were "pernicious" and "malicious" how were they unable to confine or "enclose" those among them who would subsequently testify against them? Indeed, how were the usurpatory cordwainers unable to bring to submission everything that threatened union survival? The allegation of coercion thus possessed an element of logical unrestraint. It suggested the linguistic extravagance of the prosecution's claims and the utility of a coercion claim at trial. Like violence, coercion possessed suggestive and actual force.

But etymology yields more. Before "coercion" arrived in English, it passed through the Middle French in which "coercer" meant to repress[173] or to constrain.[174] A "sedicion" could be "coerced."[175] Those who "disturb the rest and peace of a city" could be "coerced."[176] All "vices" and all "crimes" could be "restrained and coerced."[177] An individual might submit "himself, his successors and all his goods as well as those of his successors to the king's coercion and jurisdiction."[178] Individuals might "submit themselves to the jurisdiction, coercion, and constraint of the royal court of Paris."[179] In

56. For more on the legal status of magistrates during after their magistracy, see E.J. Weinrib, *The Prosecution of Roman Magistrates*, 22 PHOENIX 32 (1968).

172. OXFORD LATIN DICTIONARY, *supra* note 98, at 343.

173. 2 FRÉDÉRIC GODEFROY, DICTIONNAIRE DE L'ANCIENNE LANGUE FRANCAISE 169 (1883). All translations from the French are mine.

174. *Id.*

175. *Id.* ("*Cohercer* la sedicion. (BERSUIRE, *T. Liv.*, ms. Ste-Gen., f° 84$^{b.}$)").

176. *Id.* ("Afin de *cohercer* ceulz qui troublent le repos et la pais de la cité. (BERSUIRE, *T. Liv.*, ms. Ste-Gen., f° 62$^{b.}$)").

177. *Id.* ("Refraindre et *cohercier* tous vices et tous crimes. (BERSUIRE, *T. Liv.*, ms. Ste-Gen., f° 31$^{c.}$)").

178. *Id.* ("A submiz soy, ses successeurs.. et tous ses biens et les biens de ses successeurs a la juridiction et *cohertion* du roi. (30 juill. 1365, *Cart. de la ville d'Aux.*, f° 41, Lebeuf, *H. d'Aux.*)").

179. *Id.* ("Se soubzmettent a la jurisdiction, *cohertion* et contraincte de la prevosté de Paris. (11 sept. 1479, Grand-Beaulieu, Mitry, 1^{e} l., n° 2, A. Eure-et-L.)").

Middle French, "coercion" often means submission and subordination to the source and force of law. The individual delivered himself and surrendered to the ruler and his court's effect.[180] The court's effect was not always benign. As the judge and essayist, Michel de Montaigne, would later warn in the 16th century:

> I will never, if I can help it, put myself into the hands of a man who may determine as to my head, where my life and honour shall more depend upon the skill and diligence of my attorney than on my own innocence.[181]

Coercion thus moved from the Latin to the Middle French where it became a predominantly legal term implying prostration before the rule of law. It became a legal event in which high crimes against the ruler were checked, and the ruler's power was underscored as the party to be coerced subordinated himself. Coercion was thus something that judges did, and that those subject to judicial mandate recognized as a judicial attribute, which is why they "submit[ted] themselves to the jurisdiction, coercion, and constraint" of the court.[182]

The jury in the Philadelphia cordwainers' trial would likely have understood that legal "coercion" was another form of "violence." In an 1801 essay on "the different religions received into" Virginia, Thomas Jefferson showed how coercion and violence were related in turn of the century American English. Jefferson deplored the religious "intolerance"[183] of "[t]he first settlers in this country."[184] He referred to some early Virginian laws providing the death penalty against Quakers.[185] Such examples were part of "the coercion of the laws."[186] "And why subject [individuals] to coercion? To produce uniformity. But is uniformity of opinion desirable?"[187]

> Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity. What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. [T]o support roguery and error all over the earth.[188]

While "violence" is not explicit in the Jefferson extract, it is an associate of the coercive power of intolerant laws. Coercion at law

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180. It is, unfortunately, "he" as France's Salic Law made it almost impossible for a woman to reign.

181. MICHEL DE MONTAIGNE, *Of Experience, in* THE ESSAYS OF MONTAIGNE (William Carew Hazlitt ed., Charles Cotton trans., 1877).

182. BERSUIRE, *supra* note 175.

183. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 232 (1801).

184. *Id.*

185. *Id.*

186. *Id.* at 235.

187. *Id.* at 237.

188. *Id.*

means burning, torture, fines, and imprisonment. Burning, torture, and imprisonment, following Cover's attention to their effects on bodies, are acts of physical violence, while fines are a form of legal coercion. Coercion can be seen as a way of enforcing a *nomos;* a way of pruning dissent from the trunk of assumed interpretative consonance. Coercion is meant to foment uniformity of interpretation. It is what courts do, and what courts do is violence by another name.

Court cases support this reading. At least two cases between 1789 and 1806, the year of the cordwainers' trial, acknowledged that American courts engaged in coercion. In 1791, the Supreme Court of Pennsylvania noted in an admiralty case that "no coercion was used by the [lower] court; that all was voluntary, and not only by consent, but on the application, of the defendants."[189] In 1805, the Supreme Court of the United States indicated in an estate case that a "voluntary deed, in the act, means a deed by a person unable to pay all his debts, made without coercion of law."[190] Litigants thus presented themselves to the court's coercion, as citizens had done at least since Antiquity, and the court decided how it would apply its force against those before it. Granted, "presented themselves" may be misleading; it suggests a voluntary act. Refusing to subordinate one's self to a court does not sluice one of the court's coercion; it simply means that one is not physically present to experience it immediately.[191] Coercion is thus indissoluble from the functioning of law.[192]

C. Local Context

Words exist in context. Words take on much of their force against the backdrop of contemporaneous events that contribute to their evolving meaning. Here, I explore how the prosecution alluded to and relied upon the turbulent local context to make a more powerful case for cordwainer suppression.

Less than two decades before the cordwainers' trial, pervasive was the belief "that the federal Constitution could rescue both Philadelphia and the nation from postwar troubles."[193] The federal Constitution had become binding on June 21, 1788 with New Hampshire's

189. Respublica v. Lacaze, 1 Yeates 55, 69 (Pa. 1791).

190. United States v. Hooe, 7 U.S. 73, 85 (1805).

191. Minow, *supra* note 38, at 1906. ("One potential meaning of judicial violence is its threat of punishment should a party refuse to appear, argue, and submit to judgment. Coercion to participate is certainly coercion.").

192. *See* SCOTT VEITCH, LAW AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING 25 (2007) ("Coercion, in other words, is that which makes law socially efficacious. It does this by channelling force through the form of authorised legal institutions, thereby differentiating it from other forms of normative or physical coercion or social forces.").

193. PHILADELPHIA: A 300-YEAR HISTORY 168 (Russell F. Weigley et al. eds., W. W. Norton & Co. 1982).

ratification,[194] and the Constitution provided that the government would meet on March 4, 1789.[195] In mid-April, Philadelphia, the eventual site of the cordwainers' trial, was excited about the arrival of General Washington on his way to New York.[196] Preparations were underway for his inauguration, and banners in Philadelphia told of the city's hopes. "LET COMMERCE FLOURISH," said one of them.[197] Philadelphia had ambitions of being "the largest, wealthiest, and most centrally located city in the Union."[198] The Constitution not only embodied the hopes of a nation, but also the ambitions of a city in which the new federal government would meet. The Constitution was both the conclusion of a contested relationship with Great Britain, and the inauguration of an autonomous American republic that had just exited the Revolutionary War a few years before. Philadelphia was its heart. Violence was on the national mind.

The cordwainers' trial took place in Philadelphia seventeen years after the ratification of the Constitution, and allusions to local history at the trial were apparent. With the British occupation of Philadelphia during the Revolutionary War, many Philadelphians had died. The judge and members of the jury of the cordwainer trial were familiar with these events. In his instructions to the jury, the judge referred to "the spirit of '76 [1776] when men expected to have no law but the constitution, and laws adopted by it or enacted by the legislature in conformity to it."[199] Given that the conspiracy charge against the union would, for a politician, "instantly present the picture of a combination to subvert the constitution, and an insurrection or rebellion to overturn the government[,]"[200] the conspiracy charge was thus an implicit treason charge. It drew on the local context, and appealed to the recent communal experience of violence and the fear of its immanent return.

Also feared were more recent examples of communal suffering and instability. Philadelphia had barely survived "the plague" in the period leading up to the 1806 trial. Often referred to as the "contagion," yellow fever arrived in Philadelphia some time in summer 1793.[201] Transmitted by mosquitoes, it caused "a severe fever accompanied by nausea, eruptions of the skin, a black vomit,[202] and eventually deep

194. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 5 (2001).

195. *Id.* at 6.

196. PHILADELPHIA: A 300-YEAR HISTORY, *supra* note 193, at 168.

197. *Id.*at 169.

198. *Id.*

199. LLOYD, *supra* note 10, at 148.

200. *Id.* at 110.

201. PHILADELPHIA: A 300-YEAR HISTORY, *supra* note 193, at 180.

202. JOHN HARVEY POWELL, BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793 (1993).

lethargy, rapid feeble pulse, incontinence, and morbid yellow coloring of the skin."[203] A mosquito infestation in Philadelphia had followed a rainy season that had saved the city from a drought.[204] The disease ravaged the city. By mid-September 1793, at least 600 people had died.[205] If *The General Advertiser's* numbers were correct, toward the end of September 1793, 4,031 people had perished from Yellow Fever.[206] Over 17,000 had fled.[207] The 1790 United States census had counted 54,484 people in all of the County of Philadelphia.[208]

To get a better sense of the "contagion's" implications for the trial, a drastic portrait of the plague's effect lies in the following summary of Philadelphia in mid-September 1793:

> By then perhaps half the population had fled. Philadelphia, the federal capital, was a ghost city. Business withered away; not only were there too few merchants, clerks, or workers of any kind, but the external commerce on which almost everything else depended could not continue because other ports refused to receive ships and goods out of Philadelphia, lest they receive the infection as well. Almost all government was suspended, federal, state, and municipal. Persons obliged to walk the streets stayed in the middle to avoid infected houses . . . . Tales circulated of husbands abandoning wives, parents abandoning children, victims dying forsaken and uncomforted; in confirmation of some of the rumors, many collapsed alone in the streets.
>
> President Washington departed on September 10. He usually went to Mount Vernon at this time of year, but the absence of his imposing, reassuring presence worsened the demoralization.[209]

The fever killed from 1793 until at least 1805. In 1793 it killed roughly 5,000 of 22,866 people who remained in the city;[210] in 1794, an estimated 800 of 46,820;[211] in 1795 an estimated 800 of 47,500;[212] in 1796 another estimated 800 of 48,000.[213] Its deaths would rise again in 1797. That year, it felled 1,292 of 36,500 remaining people.[214] A year later, another 3,645 of 15,000 remaining people died.[215] In 1799, 1,015

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203. PHILADELPHIA: A 300-YEAR HISTORY, *supra* note 193, at 180.
204. *Id.*
205. *Id.* at 185.
206. Reverend Mathew Wilson, *Diseases from the Air*, THE GENERAL ADVERTISER, September 21, 1793.
207. POWELL, *supra* note 202, at x.
208. U. S. CENSUS BUREAU, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (1793).
209. PHILADELPHIA: A 300-YEAR HISTORY, *supra* note 193, at 185-86.
210. 3 J. THOMAS SCHARF & THOMPSON WESCOTT, HISTORY OF PHILADELPHIA 1609-1884 1726 (1884).
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*

more people of 16,500 perished.[216] In 1802, 835 of 76,000 remaining died.[217] In 1803, 199 of an unknown population size died;[218] and in 1805, 943 died in a population of 89,630.[219]

Poor Philadelphians would submit to the disease in ways that wealthier citizens would not. If "self defence"[220] prompted Philadelphia's journeymen to found The Federal Society of Journeymen Cordwainers in 1794,[221] their letter to the Pennsylvania public just before their trial suggested that it was also yellow fever that informed their desire to unionize. Roughly 1,900 words long, and published on page 2 of the *Aurora*, the journeymen's 1805 letter detailed their struggle with the fever's effects on their well-being and survival:[222]

> Every citizen must know that in this city, and the other capital cities which are so often exposed to the ravages of yellow fever, the man who acquires his bread and the bread of his family by the labor of his hands, does not labor upon equal terms of advantage with those who live in towns where disease does not so often prevail, and where the necessaries of life and house rent are so much cheaper.[223]

As misfortune has a penchant for overstaying its welcome among the poor, it was "in the narrow, working class streets where the plague struck hardest."[224] There, impoverished living conditions and scant access to medical facilities exacerbated the fever's violence.[225] To be

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 92.
221. *Id.* at 91.
222. *See generally* ŽIŽEK, *supra* note 23, at 67.

> [W]hen workers protest their exploitation, they do not protest a simple reality, but an experience of their real predicament made meaningful through language. Reality in itself, in its stupid existence, is never intolerable: it is language, its symbolisation, which makes it such. So precisely when we are dealing with the scene of a furious crowd . . . we should never forget the placards they are carrying and the words which sustain and justify their acts.

Id.

223. James Ghegan, *The Address of the Working Shoemakers of the City of Philadelphia to the Public,* AURORA GENERAL ADVERTISER (Phila.), Nov. 28, 1805, at 2.
224. PHILADELPHIA: A 300-YEAR HISTORY, *supra* note 193, at 185.
225. POWELL, *supra* note 202, at 58:

> With both the hospital and Almshouse barred to them, there was no place left for where the indigent, homeless ill could be cared for—or the solitary custodians of abandoned homes, or lonely people who lived in rented rooms, or those turned out by their families as soon as they fell sick. In doorways and alleys, in yards and courts, in open streets people lay dying. The Guardians of the poor were confronted with an impossible situation. And they were impelled by urgent necessity. Diseased paupers were a menace to the diseased rich, and to the whole city, sick or well.

Id.

sure, the plague struck the entire city, from its wealthiest residents to its poorest. However, that the "plague" struck the journeymen hard was indicated not only in their letter to the public, but also in their court testimony.[226] They lived from week to week, and illness, and misfortune affected them particularly. Some of the cordwainers lived in boarding houses, which often placed as many people into as little space as possible. [227] The omnipresence of disease and poverty when economic activity had fallen constituted both a shock to Philadelphia's workers and an intrusion into their subsistence, especially since the city had tarried in its response.[228] The fever's force, coupled with ignorance surrounding its cure, injured their livelihood and defiled their bodies—now subject to the ravages of disease.

In this environment, claims that the cordwainers had made survival difficult for their own ("At that time I was from hand to mouth, and in debt, owing to the sickness of my family, and market work was only from 3*s.* to 3*s.* 6*d.* per pair"), together with other claims of coercion and work stoppages, carried particular force at trial.[229] The prosecution relied on this context when it compared union members to opportunistic "dogs":

> The dogs of vigilance [the cordwainers] find their scent, the emigrant in his cellar or garret: they drag him forth, they tell him he must join them; he replies, I am well satisfied as I am. . . No. . . they chase him from shop to shop; they allow him no resting place, till he consents to be one of their body; he is expelled society; driven from his lodgings, proscribed from working; he is left no alternative, but to perish in the streets, or seek some other asylum on a more hospitable shore.[230]

The cordwainers were said to have one answer to those who requested respite, "we will not relax . . . you may perish, but we will not permit

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226. *See* LLOYD, *supra* note 10, at 29-31, 54, 56.

227. *Id.* at 117.

228. *See* POWELL, *supra* note 202, at 56.

> Actually, the city's revenues were not great. Philadelphians paid about £8,600 in taxes every year; rent charged the public markets produced about £1,200, public wharves £500, the High Street ferry over Schuylkill around £840. With these and other resources of revenue (including sale of manure from the streets), the total income of the city government was about £15,000. Of this £4,000 was spent 'watching and lighting the city,' another £4,000 paving and cleaning the streets; the street commissioners received salaries, pumps had to be sunk and repaired, wharves and docks kept clean and in good order, clerks of the markets paid, the ferry maintained, all sorts of other things done, so that out of the whole budget there was nothing left to devote to the Guardians [Overseers and Guardians of the Poor who took care of the city's indigent] in sudden emergencies.

Id.

229. LLOYD, *supra* note 10, at 13.

230. *Id.* at 70.

you to work."[231] In a city like Philadelphia, which, as a result of the contagion, had witnessed the ravages of the disease, such allusions were powerful:

> Persons obliged to walk the streets stayed in the middle to avoid infected houses. Old friends refused to pause to speak to one another. Tales circulated of husbands abandoning wives, parents abandoning children, victims dying forsaken and uncomforted; in confirmation of some of the rumors, many collapsed alone in the streets.[232]

The cordwainers' alleged violence could only align them with not only with external threats, like foreign occupiers, but also with internal threats, like the contagion, all of which had to be eliminated.

The local context surrounding the trial thus infused the prosecution's allegations of violence and coercion with additional strength. The analogy—that favored legal tool—was the substance of the infusion. For, if violence entrenches a hierarchy by elevating some at the expense of others, it relies on constant comparisons to justify its existence. The cordwainers were implicitly *like* the British because they threatened the Constitution, issued their own regulations, and because they allegedly deployed force to ensure submission. The effect of the cordwainers' presence was *like* the work stoppages during the plague and the occupation, *like* the helplessness that many felt during those times, *like* the suffering that many had known and still knew, given that the contagion had not been fully contained. The language of contagion was even present in the prosecution's delivery. The union had "spread to an extent of which you cannot as yet form an idea."[233] A journeyman was "distinguished by the opprobrious name of a *scab;* the shop in which he works is shunned as an infected place."[234] Through allusions to the local context, the union was raised to the level of the worst belligerents.

D. Global Context

Events abroad and their implications for an independent America consumed Philadelphia's newspapers and editorials. Echoes of events in places like France and the Caribbean were audible at the cordwainers' trial.

Roughly a year after the federal constitution became binding, Russia and Turkey had been at war for about eighteen months,[235] Russia and Sweden had been at war for about ten months, and their

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231. *Id.*

232. PHILADELPHIA: A 300-YEAR HISTORY, *supra* note 193, at 185.

233. LLOYD, *supra* note 10, at 8-9.

234. *Id.* at 129.

235. *See generally* JOHN PAXTON, IMPERIAL RUSSIA: A REFERENCE HANDBOOK 134 (1st ed. 2001).

antagonism had drawn in Denmark-Norway.[236] Philadelphia's newspapers devoted substantial coverage to European matters. *The General Advertiser,* which became *The Aurora*, had sections devoted to "Foreign Intelligence," which reproduced accounts, proclamations, and reports of war and politics abroad in some detail. Of particular interest was the unfurling revolution in France. France had been an ally in the American Revolution, and *The General Advertiser* and *Aurora* would repay that support with intense focus on French political and military affairs throughout the 1790s until at least the year of the cordwainers' trial in 1806.[237]

At the beginning of 1789, French aristocrats and bourgeois killed each other at Rennes.[238] On April 27, there was a riot in Paris,[239] and on April 30, the date of General Washington's inauguration as president,[240] another riot occurred in Marseille,[241] while the Jacobin club was formed in Paris.[242] That the prosecution in the cordwainers' trial referred to the union as a "usurpation"[243] and a "detestable"[244] "aristocracy"[245] was telling. The prosecution's language was not merely language about violation of the law; it was consistently about high crimes against the republic. Like a usurper, the union had illegitimately entered the city, founded a legislature, issued a constitution and regulations, and was about to incite "rebellion."[246] Like an aristocracy, it assumed more power than was its due, and it threatened the legitimate ruler in a democratic republic: the people.[247]

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236. *See generally id.*

237. *See, e.g.*, AURORA FOR THE COUNTRY, March 20, 1793. "Latest European Intelligence" mention of the fall of Louis XVI. *Id.* All of pages two and three are devoted to French matters. *Id*. The following headline also appears: "SENTENCE PRONOUNCED AGAINST LOUIS THE SIXTEENTH, Paris January 17." In bold: "DEATH SHALL BE INFLICTED ON HIS Most Christian Majesty." *Id.*

238. R. S. ALEXANDER, BONAPARTISM AND REVOLUTIONARY TRADITION IN FRANCE 118 (2002)*; see also* A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 67 (François Furet & Mona Ozouf eds., Arthur Goldhammer trans., 1989).

239. 1 MAURICE TOURNEUX, BIBLIOGRAPHIE DE L'HISTOIRE DE PARIS PENDANT LA REVOLUTION FRANÇAISE 147 (1789).

240. IAN RANDAL STROCK, THE PRESIDENTIAL BOOK OF LISTS 179 (2008).

241. JOSEPH HAYDN & BENJAMIN VINCENT, HAYDN'S DICTIONARY OF DATES 882 (Dover Publ'ns 1969).

242. 2 HIPPOLYTE A. TAINE, THE FRENCH REVOLUTION: THE JACOBIN CONQUEST 37 (2006).

243. LLOYD, *supra* note 10, at 73.

244. *Id*. at 125.

245. *Id.*

246. *See id*. at 72 ("Then, shall a secret body exercise a power over our fellow-citizens, which the legislature itself is not invested with? The fact is, they do exercise a sort of authority the legislature dare not assume.").

247. *See* Nelles, *supra* note 136, at 168 (arguing that "[t]he legal controversy, both out of court and in, was part of the major political controversy of the time—then still usually expressed as between 'aristocracy' and 'republicanism' (which meant

It was therefore right to overthrow the union.

The defense countered that Europe figured negatively in the relationship between the union members and their employers. "The master shoemakers, as they are called after the slavish style of Europe," the defense noted, were what that union members rightly opposed.[248] Indeed, although Philadelphia was not a slave city, the city was acutely aware of the slave revolts in Haiti (known then as the slave revolts in Santo Domingo), which had begun in 1791 and had ended with Haitian independence in 1804 from France, two years before the cordwainers' trial. As a port city, Philadelphia had a large population of foreigners, including a rising number of French speakers who had fled Haiti.[249] In 1793, just a year before the yellow fever outbreak, many had fled Haiti for Philadelphia:

> [O]ne ship, then another, then whole fleets of ships came in from the West Indies, discharging from their crowded holds great hordes of refugees, white, black, mixed, from the French Island of Santo Domingo. Gaunt, hungry, sickly, they poured into the city, bringing news of a great revolution in the sugar islands, of a horrible carnage and slaughter, of the destruction of towns and the ruin of merchant houses.
>
> They told of three years' warfare, how the slaves rebelled, and how the great port of Cap François flamed against the sky. They told of a pestilential fever which had ravaged the islands—Grenada, Dominica, Hispaniola, Jamaica, even Barbados, Antigua, and all the Leewards . . . "Would to God I had the courage to take my life and escape from the horror of such a cruel recollection," one of them wrote.[250]

British ships attacked those fleeing Santo Domingo, and took prisoners, confiscated property, and provisions.[251] The immigrants had come to Philadelphia from a place where labor had revolted and the result was carnage and economic damage.

Slavery thus unfurled in the background of the trial, and in the arguments at trial. The prosecution referred to the West Indies, the American south, and to American rivalry with England in its argument against organized labor:

> This is a large, encreasing, manufacturing city. Those best acquainted with our situation, believe that manufactures will, bye and by, become one of its chief means of support. A vast quantity of

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Jeffersonian democracy)"). I deal with the differences between the Jeffersonians and the Federalists in Part III of my argument, and their implications for the trial.

248. Gheghan, *supra* note 223, at 2.

249. *See* 1 ENCYCLOPEDIA OF SLAVE RESISTANCE AND REBELLION xliv (Junius P. Rodriguez, ed. 2007). Between 1789 and 1806, there were many other examples of slave rebellions.

250. POWELL, *supra* note 202, at 4.

251. *Id.* at 6.

> manufactured articles are already exported to the West Indies, and the southern states; we rival the supplies from England in many things, and great sums are annually received in returns. It is then proper to support this manufacture. Will you permit men to destroy it, who have no permanent stake in the city; men who can pack up their all in a knapsack, or carry them in their pockets to New-York or Baltimore?[252]

Two of these locations, the West Indies and the South, held large slave populations. Even in a city without a slave population, the prosecution seemed to ask, what might happen if Philadelphia's labor rebelled against its "master?" What would the effect be on the economy?

Etymology reminds us that "violence" includes the infraction of "any law, right, obligation, relationship etc., regarded as sacred;"[253] as well as "interference or intrusion."[254] The union was thought to infringe upon and interfere with the sacred relationship between "master" and worker. It was alleged to interfere with exports. The court at the cordwainers' trial proved susceptible to this line of reasoning, when the City Recorder, who sat as judge, rhetorically asked counsel if raising "prices of such necessary articles on the citizens"[255] was "not a very essential injury,"[256] and did "it not tend to diminish the exports?"[257] The court had identified a hierarchy of injuries among which were "essential" injuries, which, considered "on a large scale, as operate[d] on the city and port of Philadelphia" had a devastating effect.[258]

A broad definition of "violence" thus permits the observation that a word in context is no longer a word. It is a community of meanings,[259] each infused with contextual depth. Counsel's arguments become part of the machinery of law that privileges some analogies and allusions to context instead of others. In this machinery, lawyers, like Cover's judges, identify targets and make choices among "the luxuriant growth of a hundred legal traditions, [in which] they assert that *this one* is law and destroy or try to destroy the rest."[260] To be sure, Cover focuses on judges who hack away at "suspicious" judicial growth even if it is fecund with a flowering of alternative possibilities. While Cover is right to fault such judges, in the cordwainers' trial counsel was similarly armed for the task, wielding symbolic scythes. It was counsel that made coercive arguments urging the destruction of *this*

252. LLOYD, *supra* note 10, at 67-68.
253. OXFORD LATIN DICTIONARY, *supra* note 98, at 2069.
254. *Id.*
255. LLOYD, *supra* note 10, at 37.
256. *Id.*
257. *Id.*
258. *Id.*
259. *See* Minow, *supra* note 38.
260. *Nomos and Narrative, supra* note 28, at 53.

interpretive growth instead of that. It was counsel that urged the killing of an opposing argument, and counsel that deployed local and global rhetorical allusions to help the court do so. As the defense in the cordwainer's case would itself indicate, the decision to prosecute was not ""not originated from motives of friendship."[261] It was a "masked battery."[262]

E. Violence "Of This Sort"

That the cordwainers were considered violent and coercive is unsurprising. Economic hierarchies that privilege "masters" rely on the law to entrench their position and augment their power.[263] They fear that other constituencies might act similarly, which they attempt to prevent. As the prosecution would say, manufacturing was threatened:

> What was done by the journeymen shoemakers, may be done by those of every other trade, or manufacturer in the city. . . A few more things of this sort, and you will break up the manufactories; the masters will be afraid to make a contract, therefore he must relinquish the export trade, and depend altogether upon the profits of the work of Philadelphia, and confine his supplies altogether to the city.[264]

First the cordwainers ("journeymen shoemakers") would act, then those in *every other trade* in the city were sure to follow. "A few more things of this sort" would lead to the end of manufacturing, panic among the masters, the death of exports, loss of profits, and affected supplies. To prevent this, a panacea was available for immediate administration: "Will you permit men to destroy [this manufacture] . . . ?"[265] "Your verdict must determine, whether [the cordwainer's "spirit of exaction"] is to be continued or suppressed."[266] In language that would anticipate the Civil War half a century later, the prosecution would say that unrestrained labor would make "the whole community . . . into hostile confederacies, the prelude and certain forerunner of bloodshed and civil war."[267]

The argument was about threats to profit and law—in that order. In a city containing "2200 persons who might properly be denominated *manufacturers*, or over one-fourth part of the 8600 adult males the city was supposed to contain," an economic argument bore weight.[268]

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261. LLOYD, *supra* note 10, at 93-94.
262. *Id*.
263. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 63-70 (1979).
264. LLOYD, *supra* note 10, at 68.
265. *Id*. at 67-68.
266. *Id*. at 69.
267. *Id*. at 137.
268. SCHARF, *supra* note 210, at 2230.

Threats to the freedom of contract would have been taken seriously, since business involved a large portion of the city's adult male population, and the jury was a male affair. The prosecution thus trotted out its old refrain like a specter at a séance—this time sporting constitutional garb. The union's legislature might be said to have impaired "the [constitutional] obligation of contracts."[269] "Have the citizens of Philadelphia," the prosecution asked, "imposed upon the employers a duty of paying the wages demanded by the defendants? We claim no immemorial custom: we say it is a matter of contract."[270] The union was said to interfere with the freedom of contract since "[c]onsent freely and voluntarily given, is the only legitimate foundation for governmental authority."[271] Coercion threatened contract.

The argument that governmental authority relied on voluntary consent was itself problematic. Did the mechanism of law en*force*ment not imply that many were unwilling or unable to abide by the law or to accept governmental authority? Were government regulations not intended to restrain impermissible behavior or punish it? [272] If, however, the prosecution's argument was that the people empowered the government in a democratic process that saw them consent to governmental authority at the ballot box, then the argument elided the fact that democracy often appeased the majority ("the people") at the expense of minority rights. Consent, then, must be something that those who endorse a given governmental action as "legitimate" give.[273] It must be something that those who agree with a courts' interpretations—or the power inherent in them—give. In matters of contract, the "freedom" to engage in contract must be something that those who are "free" under the law to agree to such a contract do.

The union's existence thus questioned the "freedom" of contract without questioning the freedom of contract. If citizens were free to enter into contracts, were union members not equally free to "combine" their efforts and agree to protect themselves? In other words, the union implicitly asked, why must one constitutional right trump another? Must freedom of contract run roughsod over freedom of association? If,

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269. U.S. CONST. art. I, § 10, cl. 1.

270. LLOYD, *supra* note 10, at 136.

271. *Id.* at 130.

272. *See generally* KANNABIRAN, *supra* note 89, at 1.

> There is an overwhelming play of violence as power and power as violence, sometimes in breach of the law and sometimes as a tool for its enforcement. If violence in society is perceived as a breach of law, the law itself is equally violent and in fact has an even more debilitating effect because of its systematic and thorough ruthlessness, backed by official sanction.

Id.

273. Of course, a counter-argument is that the mere presence of such groups in a society is evidence of their consent to the actions taken on their behalf.

however, freedom of contract is primordial, then could the union and the "masters" not enter into contracts regarding the price of their labor? There was little evidence that the union opposed such an idea. Union actions reflected the absence of the masters' acceptance of the cordwainers' need to contract in their own interests. The court, in its instructions to the jury, disagreed, and asked if the union's "arbitrary" regulations would not have an adverse effect on contracts?[274] "It renders it impossible for a man," the court noted, "making a contract for a large quantity of such goods, to know whether he shall lose or gain by it."[275]

Violence "of this sort" thus implied a constitutional hierarchy. It identified a group of citizens free to consent to contracts of a type preferred by law at the expense of those protected by another constitutional provision effectively rendered inferior. Preferred citizens enjoyed constitutional protection and aggressively exploited the apparatus of law, through prosecutions, for example. It was their consent that legitimated governmental authority in a given domain, and their consent that justified it. They were the "masters" of contract, and the "masters" for whom the law of contract was shaped.

II. THEORY AS GUIDE: THE PROSECUTION'S VIOLENCE

A. The Process of Violence

The power of preferred groups depends in part on their ability to deny who they are and the privileges they enjoy. They employ legal actors who will obscure what they do not like about themselves but see in their critics. The violent judicial act is no longer Cover's result at the end of the trial, but a process facilitated by many legal actors. In that process, a constitutional vision emerges in which those deemed repulsive to the legal edifice are excluded from the community that shapes constitutional discourse. In the cordwainers' case, such differential treatment began with the state's decision not to prosecute the "masters" themselves.

The cordwainers were not the first to unionize. The "masters" had beaten them to it by four years, and had "combined" in 1789.[276] On April 13 that year,[277] Philadelphia's Master Cordwainers "entered into an association . . . several years before the journeymen associated."[278] In their own words, the "masters "unanimously agreed to the following CONSTITUTION,"[279] whose goal was "to provide remedies" for "the

274. LLOYD, *supra* note 10, at 143.
275. *Id.* at 143-44.
276. *Id.* at 60.
277. *Id.*
278. *Id.* at 92.
279. *Id.* at 60.

many inconveniences"[280] under which they "labour,"[281] and to properly regulate them.[282] They would regulate their trade,[283] elect a President, Treasurer, Secretary, and would confer on the "admission of future members."[284] They would hold four meetings a year and fine any absentees.[285] "Unworthy" members were to be dealt with by fine and exclusion.[286] "A committee of seven" would meet in the masters' name and transact business.[287] Majority voting obtained on all questions.[288] Significantly, the "masters" forbade each other the sale of any footwear "in the *public market* of this city."[289] They also forbade advertising among themselves "in any of the *public papers* or *hand-bills*."[290] Thus, the Master Cordwainers "had combined in a society for the purpose of maintaining prices and other mutual protections for themselves."[291] They had provided punitive measures against those among them who did not agree.[292] They had committed the first act of constitutional coercion and "legislative" violence.

If the "masters" were themselves guilty of the prosecution's most grievous charge, why did they escape it? Indeed, if the journeymen had only formed their own union in 1794, and their last "violent" strike had been in 1799,[293] why were they only prosecuted in 1805 and brought to trial in 1806?[294] "Were the prosecuting officers of the state, asleep all this time? Have the grand juries been slumbering at their posts, and suffered a flagitious, a notorious offence to be repeated with impunity, and to continue its operation without notice or check?"[295] There were

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280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*at 61.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 60-61.
290. *Id.* at 61.
291. LIEBERMAN, *supra* note 11, at 10.
292. LLOYD, *supra* note 10, at 39-40, 55. Forty-six masters appear to have also met in 1805, but a year before the trial, and appear also to have unanimously signed a document rejecting the union's request for increased wages.
293. *Id.*at 79.
294. *Id.* at 10.

> There was no testimony of any violence in connection with the 1805 turnout for which the eight defendants were indicted. Neither was there any testimony that the eight defendants had done any wrong, except that they had participated in the turnout and agreed to conform to the society's rule not to associate with the scabs. Neither was there any testimony that the defendants, with the exception of one, had been members of the society at the time a union member was fined or the "master's" shop scabbed in 1799.

Id.
295. *Id.* at 91.

at least two answers. First, the "masters" could be tried independently but that was not the question currently before the court.[296] Second, one of the private prosecutors[297] employed by the "masters" had been Attorney General of Pennsylvania during the period in question, and had chosen not to act against the "masters."[298]

"Violence" as a judicial *result* or outcome thus ignores the targeting of the union. It is blind to the violence in the choices preceding the outcome. Private prosecutions made against unpopular causes were a point of concern in Philadelphia the year before the trial. As *The Aurora* lamented in 1805:

> It is now decided that Pennsylvania is to be *blessed* with the governance of Thomas M'Kean for another term of three years. This election has been warmly contested and the result is of a nature to alarm every man, who is in heart a democratic republican . . . . The spirit of federalism, which we had hoped had been deposited in the 'tomb of the Capulets,' has burst its cearments, and again stalks forth, with hideous front, to appal and petrify the energies of the people. Prosecutions have already been instituted, and ere long, perhaps the prison walls of Pennsylvania will groan beneath the pressure of incarcerated republicans; of men whose Lives have been devoted to the advancement of political liberty and national glory."[299]

The *Aurora* can be criticized as a partisan newspaper aligned with the Jeffersonians.[300] Yet, behind its rhetoric is the truth of prosecutions

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296. *Id.* at 65.

297. *See generally* Steinberg, *supra* note 64, at 231.

> One of the immediate consequences of American independence in Philadelphia was the rise of a popular form of private criminal prosecution, which occurred in the city's multi-tiered court system and included both the prosecution of serious crimes and a process of dispute resolution concerning matters which were 'criminal' only by the broadest stretch of the imagination. Private criminal prosecution became popular so quickly that as early as 1804, the state legislature made a first attempt to discourage it.

Id. Despite the legislature's reluctance to endorse such prosecutions, they appear to have helped deal with crime in Philadelphia as "[i]n a city without a professional police force, the legitimacy and authority depended on the active [litigious] participation of the citizenry." *Id.* at 241.

298. LLOYD, *supra* note 10, at 91.

299. AURORA FOR THE COUNTRY, November 13, 1805, at 2.

300. *See* Blinka, *supra* note 61, at 100. The *Aurora's* vehemence may, in part, be due to the fact that, roughly seven years before:

> [f]ederal prosecutors used both the common law and the Sedition Act to suppress opponents of Federalist policies, including politicians and newspaper publishers. Grand juries returned indictments against Democratic-Republican editors in New York and Philadelphia. In early November [1798] Jefferson reported to Madison that their political ally, the colorful Mathew Lyon of Vermont, had been indicted, convicted, and sentenced to four months imprisonment under the Sedition Act for uttering words that amounted to 'only general censures of the proceedings of Congress and of the President.'

made against unpopular subjects. Only fifteen days after the above article ran, the cordwainers published a letter to the Pennsylvania public in the *Aurora* in which they documented the difficulties they faced:

> They [the "masters"] suppose that they have a right to limit us at all times, and whatever may be the misfortunes of society, the changes in the value of necessaries, the encrease or the decrease of trade, they think they have a right to determine for us the value of our labor; but that we have no right to determine for ourselves, what we will or what we will not take in exchange for our labor.
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> In this spirit they have within a few days past caused to be arrested by written warrants and committed to prison certain members of the association of working shoemakers; and under oath made in the mayor's court of a dangerous conspiracy against their interests and that of the community in general.[301]

As Cover was sensitive to incarceration as a violent means of separation of individuals from family members,[302] even before the cordwainers' trial occurred, judicial violence was apparent both in its selection of a target, and in the effect of that choice on its victim's livelihood; it was in process.[303]

Thus, judicial violence is a process that includes the decision to prosecute or not, and whom to prosecute. It includes the date of the prosecution, the identity of the lawyers, and their ties to those by whom they may eventually be employed. The process extends from the choices lawyers make to the disposition of the case by an "objective" judge and jury. It involves those brought into positions of governmental authority and those who leave the public service at the end of their employment as public lawyers. Each act occurs along a chain of causation—a continuum—that drives the jury's verdict, and the court's decision, to suppress the weaker party.

Id. The prosecution itself would charge that "[t]he newspaper called the Aurora, has teemed with false representations and statements of this transaction; and the most insolent abuse of the parties, who have brought it before this tribunal, with a view (if not with the declared intention), to poison the public mind, and obstruct the pure streams of justice flowing from the established courts of law." LLOYD, *supra* note 10, at 7.

301. Ghegan, *supra* note 223, at 2.

302. *Violence and the Word, supra* note 25, at 1608, 1616, n.37.

303. *See generally* Steinberg, *supra* note 64, at 234. Indeed, it is equally stunning that Philadelphia's "criminal courts were dominated by privately-initiated cases over which the mostly poor and working class litigants maintained considerable control." *Id.* Even as late as 1853, it was recognized that litigation was "[t]he greatest luxury of all" in which Philadelphia's "poor indulge[d]". *Id.* at 235. Yet, as Steinberg notes further, "[t]he process of bringing cases to aldermen however, was not always what it seemed. Frequently prosecutors were simply using the law to gain an advantage against or prevent legal action by other persons with whom they had disputes." *Id.* at 238.

B. The Repulsion in Violence

Just as violence destroys, it also entices and repels. As Cover observed, "almost all people are fascinated and attracted by violence, even though they are at the same time repelled by it."[304]

Violence is indeed repulsive. The repulsive "disturbs . . . system, [and] order. What does not respect borders, positions, rules [is repulsive]."[305] The repulsive "appears as a rite of defilement and pollution"[306] and threatens notions of wholeness and integrity.[307] As such, the repulsive is violent to those disgusted by its abjection:

> There looms, within abjection, one of those violent dark revolts of being, directed against a threat that seems to emanate from an exorbitant outside or inside, ejected beyond the scope of the possible, the tolerable, the thinkable. It lies there, quite close, but it cannot be assimilated. It beseeches, worries, and fascinates desire, which, nevertheless, does not let itself be seduced. Apprehensive, desire turns aside; sickened, it rejects. A certainty protects it from the shameful—a certainty of which it is proud holds on to it. But simultaneously, just the same, that impetus, that spasm, that leap is drawn toward an elsewhere as tempting as it condemned.[308]

Within the repulsed individual lies an extraordinary threat thought to originate from without. The threat lies outside the bounds of the acceptable, the conventional, and the logical. As a threat, it cannot be accepted, yet it fascinates, and compels. The threatened entity recoils and buffers its position by relying on the certainty of its disgust. In its disgust, it takes comfort. The disgusting thing continues to trouble, and the threatened entity continues to rebuff. All the while, the threatened entity may gradually succumb to the very thing that both seduced and troubled it. That which was order and system has become—and might always have been itself—the violence against which it identifies.

The portrayal of a union "repulsive" to the early republic makes sense. The prosecution's arguments dwelt on the many ways in which the "odious" union had defiled the sacred achievements of recent constitutional history. The new nation had crafted its own rules, regulations, and order. The cordwainers were said to defile those achievements by not being pliant to "system, [and] order."[309] The cordwainers threatened internal cohesion. The truth, however, was

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304. *Violence and the Word*, *supra* note 25, at 1613. What Cover implies but does not say here is that many *enjoy* violence, and its thrall over them is but a symptom or extension of that enjoyment.

305. JULIA KRISTEVA, THE POWERS OF HORROR: AN ESSAY ON ABJECTION 4 (1982).

306. *Id.* at 17.

307. *Id.*

308. *Id.* at 1.

309. *Id.* at 4.

that the cordwainers had always been integral to the American fabric. What they exposed was the fragility of—and dissonance within—assumed constitutional integrity. What they questioned was the belief that violence was something that came from outside. Violence was—and had always been—a constitutive part of the American legal experience. After all, the "masters" had themselves done the same "odious" thing for which the cordwainers were now on trial.

C. Hypocrisy and Projection

The "masters" deployed two theoretical notions in their onslaught. "Hypocrisy" and "projection" were part of the violence of law, as both engaged the coercion of the court.

Hypocrisy implies "the acting of a part on a stage, feigning, pretence," as if in the theater.[310] Thus, aware of the "masters'" own combination, and the fact that one of the masters had himself been a cordwainder and a member of their association, the prosecution dwelt on how defenseless the "masters" were.[311] The "masters" were generous and provided for those union members who had been "scabbed."[312] The "masters" lost up to $4,000 when the union struck.[313] The "masters" lived in fear.[314] They were neither oppressive nor unlawful in their actions.[315] The "masters" lacked any desire to control the journeymen.[316] "They, in truth, are protecting the community. . . . They have no interest to serve in the prosecution; they have no vindictive passions to gratify. . . . they merely stand as the guardians of the community from imposition and rapacity."[317]

Hypocrisy is one word. Another is "projection." Projection can be an effective means of masking one's vulnerabilities by locating and criticizing their presence in another.[318] Like theater, it involves

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310. 7 OXFORD ENGLISH DICTIONARY 575 (2d ed., J. A. Simpson & E. S. C. Weiner eds. 1989).

311. LLOYD, *supra* note 10, at 76.

312. *Id.* at 30.

313. *Id.* at 36.

314. *Id.*

315. *Id.* at 65.

316. *Id.*

317. *Id.* at 68.

318. I adopt and am grateful to Martha Nussbaum's use of "vulnerable" in her book. For Nussbaum:

> What I am calling for, in effect, is something that I do not expect we shall ever fully achieve: a society that acknowledges its own humanity, and neither hides us from it nor it from us; a society of citizens who admit that they are needy and vulnerable, and who discard the grandiose demands for omnipotence and completeness that have been at the heart of so much human misery, both public and private. To that extent, its spirit is less Millian than Whitmanesque: it constructs a public myth of equal humanity, to substitute for other pernicious myths that have long guided us. Such a society remains elusive because incompleteness is frightening and grandiose fictions are

subterfuge. Where projection is concerned, what is manifest in a given deployment of language conceals a deeper truth, which can never be acknowledged or claimed because it is disgusting:

> Projection thus appears as a . . . defense mechanism against internal excitations whose intensity makes them too unpleasurable. The subject projects these outwardly, which allows him to flee from them . . . and to protect himself from them. There exists 'a tendency to treat them as if they were not internally but externally active so as to deploy the defense mechanism against them.'[319]

As Martha Nussbaum has shown, disgust in the law is anchored in visceral fears of contamination by perceived filth, which threatens the body and its borders.[320] The vocabulary of disgust includes words like "alien", "offensive", "debasing", "contagion", "contaminant" and "animal".[321] What disgust cannot accept is an approaching mortality.[322]

Nussbaum also shows that disgust involves "magical thinking."[323] It "revolves around a wish to be a type of being that one is not."[324] That is the case because "[i]n all societies . . . disgust expresses a refusal to ingest and thus be contaminated by a potent reminder of one's own mortality and decay-prone animality."[325] Enter projection:

> Because disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal, it is frequently hooked up with various forms of shady social practice, in which the discomfort people feel over the fact of having an animal body is *projected outwards onto vulnerable people and groups.* These reactions are irrational, in the normative sense, both because they embody an aspiration to be a kind of being that one is not . . . in the process of pursuing that aspiration, they target others for gross harms.[326]

Projection is thus the means through which the disgusted entity

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comforting.

NUSSBAUM, *supra* note 80, at 17.

319. JEAN LAPLANCHE & J. B. PONTALIS, VOCABULAIRE DE LA PSYCHANALYSE 347 (6th ed. 1978). An English translation is available of the French, which I have chosen not to use, given its weaknesses. The translation is therefore mine. ("La projection apparaît alors comme le moyen de défense … contre les excitations internes que leur intensité rend trop déplaisantes: le sujet projette celles-ci à l'extérieur, ce qui lui permet de les fuir … et de s'en protéger. Il existe « … une inclination à les traiter comme si elles n'agissaient pas de l'intérieur mais bien de l'extérieur pour pouvoir utiliser contre elles le moyen de défense …. »).

320. NUSSBAUM, *supra* note 80, at 87-98.

321. *Id.* at 88-94.

322. *Id.* at 93.

323. *Id.* at 102.

324. *Id.*

325. *Id.* at 97.

326. *Id.* at 74-75 (emphasis added).

attempts to flee from its own humanity. The more vociferous the articulation of disgust, one might assume, the more aggressive the flight attempt. The disgusted entity cannot admit that its revulsion was always directed at something that was not alien. It was resident; in some sense, the evil that excites revulsion was always resident.

Through hypocrisy and projection, the prosecution at the cordwainers's trial thus elided inconvenient facts. The shoemakers' actions were hardly unprecedented. Philadelphia had experienced other labor stoppages. There was the recent example of the pilots of the city's port. They had refused to pilot a shipping vessel since they rejected "the rates of pilotage, before usually received."[327] The importance of the city's port commerce, and "the value of the property afloat" attracted the entire city's attention.[328] "[T]he most eminent counsel of the city were consulted,"[329] and "hundreds of thousands, nay millions of dollars in property [was at stake], and danger to the lives of hundreds and thousands of our very valuable citizens."[330] No prosecutions had issued from that event since it was adjudged that "they [the pilots] had the right to say, at what price they would perform the service; and it was apparent, that if you did not give the wages, you could not compel them to pilot your vessels."[331] If the city's shoemakers were prosecuted, therefore, the reason had to be something other than their demand for higher wages or the fact that they had interrupted the flow of commerce.[332]

The union's existence was unremarkable in other ways. Turn of the century Philadelphia was a haven for secret societies and clubs. The Masonic Order was founded in the city in 1730, and Philadelphia was the "mother city of Masonry in America."[333] The city included

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327. LLOYD, *supra* note 10, at 92.

328. *Id.* at 91.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* Indeed, Pennsylvania's unique fusion of Quaker and common law traditions appears to have permitted arbitration. That arbitration seems not to have been pursued in the cordwainers' case indicates the case's perceived gravity as well as the prosecution's unwillingness to see the union survive.

> At virtually the same time as the system of justices of the peace was created in Pennsylvania, a parallel system of arbitrators, or 'common peace-makers' to whom people could bring minor disputes for settlement which held the force of law, was also established. Arbitration was a direct extension of the internal dispute resolution process of the Quaker meeting, and while it was not imposed on non-Quakers, it had a major impact on colonists, who were 'of a querelous nature, quick to argue, quick to threaten each other, and quick to file lawsuits,' [sic] As a consequence, even the courts in Philadelphia instituted the arbitration-like practice of issuing peace bonds - the taking of a surety which would be forfeited if the act proscribed in the bond was committed.

Steinberg, *supra* note 64, at 232-33.

333. SCHARF, *supra* note 210, at 2062.

numerous other clubs, organizations, and guilds. Among its professional clubs, were The Carpenter's Company (1724),[334] The Society for the Benefit of Decayed Pilots, their Widows and Children (1788), The Stone-Cutters' Company (1790),[335] The Mutual Assistance Society of Hair-Dressers, Surgeon Barbers (1796),[336] and The Bricklayers' Company (1799).[337] At least twenty benevolent societies were devoted to specific causes, ranging from a number of immigrant causes to those for women, children, poverty, and abolition.[338] Not to mention the various philosophical and intellectual societies.[339] Although the prosecution stated that it was in favor of "clubs and self-constituted societies,"[340] it emphasized the union's unincorporated status.[341]

If hypocrisy implies staging and pretence, then lawyers in the cordwainers' case were actors in that judicial theater.[342] The prosecution enjoyed the privilege of compelling select people to appear on that judicial stage, and of using the apparatus of law to make what mattered most to those people disappear.[343] Prosecutors absorbed their clients' arguments and rewrote them in language suited for that

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334. 2 J. THOMAS SCHARF & THOMPSON WESCOTT, HISTORY OF PHILADELPHIA 1609-1884 1469 (1884).

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* at 1453-99.

339. *Id.* at 1173-99.

340. LLOYD, *supra* note 10, at 125.

341. *Id.* at 130; *but see id.* at 106 (noting that fire companies may not have been incorporated at the time).

342. *See generally* SUSAN SONTAG, AGAINST INTERPRETATION AND OTHER ESSAYS 126 (2001).

> The trial is preeminently a theatrical form (in fact, the very first account in history of a trial comes from the drama--it is in the third play, *The Eumenides,* of Aeschylus' trilogy, the *Oresteia*). And as the trial is preeminently a theatrical form, the theater is a courtroom. The classical form of the drama is always a contest between protagonist and antagonist; the resolution of the play is the 'verdict' on the action. All the great stage tragedies take this form of a trial of the protagonist--the peculiarity of the tragic form of judgment being that it is possible to lose the case (i.e., be condemned, suffer, die) and somehow triumph nonetheless.

Id. Such a rich vein of thought drawing comparisons between the law and theater has roots radiating both from the Judeo-Christian tradition and from Antiquity. *See* MEIRA Z. KENSKY, TRYING MAN, TRYING GOD (2010).

343. *See generally* ŽIŽEK, *supra* note 23, at 90. It may well be that what the private prosecution abhorred was the cordwainers' ability to *enjoy* the power that came with their unionization. Žižek again proves useful here:

> The subject does not envy the Other's possession of the prized object as such, but rather the way the Other is able to *enjoy* this object, which is why it is not enough for him simply to steal and thus gain possession of the object. His true aim is to destroy the Other's ability/capacity to enjoy the object.

Id. Violence is thus about eliminating the other's ability to enjoy a given thing.

theater. The audience that counted was composed of men selected for the purpose who sat as a jury and decided what to do with those who came upon that stage. A judge observed the audience, instructed it, received its verdict, and then meted punishment out. Projection, then, as an externalization of an unacceptable internal state, became a way of managing the violence in a hypocritical prosecution. Projection was a form of revision, and a road to oblivion. It used language to revise what had actually happened so as to condemn and relegate inconvenient facts to oblivion. It elevated one narrative while it trampled another underfoot. It forgot this fact but insisted on that, which became a judicial narrative, a statement of objective truth, which bound countless others as soon as it received the judicial imprimatur as precedent.

D. The Stakes

In a curious move, the defense underscored the stakes at trial through its appeal to Adam's Smith's *Wealth of Nations*.[344] The "masters" were more injurious to union interests than the union was to theirs.[345] Masters wanted to give less than the workmen desired.[346] "The former are disposed to combine in order to raise, the latter in order to lower."[347] Citing Smith verbatim, the defense implied that the law favored the "masters":

> It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. The masters being fewer in number, can combine more easily; and the law, besides, *authorises, or at least does not prohibit their combinations, while it prohibits those of the workmen.* We have no acts of parliament *against combining to lower the price* of work; but many against combining to *raise it.* In all such disputes the masters can hold out much longer. A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks, which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment.[348]

Smith's *Wealth of Nations* was supposed to make the twelve jurors "sensible"[349] to "how difficult it is for the journeymen to resist the masters, who are rich."[350] The jury was composed of tradesmen among whom were three grocers, two innkeepers, a bottler, a hatter, a

344. LLOYD, *supra* note 10, at 80.
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349 .*Id.* at 77.
350. *Id.*

merchant, a tailor, a tavern keeper, a tobacconist, and a watchmaker.[351] If their professions were anything to go by, they risked being equally "sensible" to keeping organized labor in check.[352] Jurors were "helped" indeed when the prosecution informed them that Adam Smith did not apply in Pennsylvania since laborers were scarce and the union victimized the vulnerable in the state.[353]

Yet Adam Smith helped expose other stakes inherent in the trial. If the "masters" made a claim of economic violence against the union, it was only to entrench the "masters'" position. The case was a dramatization of classic violence. As the defense argued, the "masters" acted as they did both because they could and because they felt entitled to their positions:

> When I hear men who have inherited large fortunes from their ancestors, or to use a familiar expression, have been born with silver spoons in their mouths, advocating distinctions in society, and espousing measures calculated to affect and oppress the labouring classes of the community, I feel a degree of charity for the errors they commit, because they have been taught from infancy to exercise an overbearing, insulting superiority over those who really are their equals. They fancy that there is some inherent quality in themselves, which entitles them to rank and precedence above the common herd.[354]

The trial was about which normative interpretation of a post-revolutionary America would triumph. Which acts constituted true [economic] violence? Was it stopping work to assert robust labor rights, or deploying one's wealth to stop workers from asserting such rights? Against whom would the judicial machinery be directed in order to shape a *nomos* [wealthy] citizens might endorse?

The prosecution stood ready. Even the wealthy had rights. "[W]hen we allow the rights of the poor journeymen, let us not forget those of the rich employer, with his wedges of gold, his bars of silver and his wings of paper stock, mentioned by Mr. Rodney [of the defense]: no, we will not do that [forget the rights of the rich]."[355] Union members, however, were presented as constant flight risks. "They [union members]," the defense observed, "are represented, however, as

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351. *Id.* at 1.

352. At least two of them, innkeepers, are likely to have had strong feelings about regulation of their trade. As the defense would note, "I do not recollect any case in which the legislature have interposed, except in that of the innkeepers and bakers. In these they have been unsuccessful, though there was some plausibility in the attempt to impose restrictions on those to whom the state granted the privilege of a license." *Id.* at 121. *See also* Nelles, *supra* note 136, at 178 ("All such as those jurors, having a head-start upon the competitors who would be sure to arise, stood to fatten their pocket-books through increase in the total amount of money to be spent in Philadelphia.").

353. LLOYD, *supra* note 10, at 129.

354. *Id.* at 96.

355. *Id.* at 125-26.

mere birds of passage, who can at any moment flock and depart in a body."[356] Was it not equally—if not more—significant, that the "masters" "capital" was so volatile that, although "secured by iron doors and bolts" in banks "it can fly across a sea, wider than the Icarian, or alight on some eligible spot in the United States, where it will be the most productive[?]"[357] Was the volatility of capital not as harmful to Philadelphia as itinerant laborers who sought the best possible work conditions?[358] Did the city not need the capital the masters were sending elsewhere just as much as, if not more than, it needed its journeymen? The defense would remind the jury, "Recollect how much of the capital of this city has already flown to other places, where it is actively and profitably employed, and you will believe me without hesitation."[359]

E. Visions of Law

The law's present is the vision of its past violence. Law sings the praises of the triumphant. Their names become precedent, emblazoned across the legal landscape, binding subsequent actors. Cover knew the cost of law. He explored its competing antagonisms, which presented themselves as visions.[360] These competing visions of the law were present at the cordwainers' trial.

Cover noted that the tension in the *nomos,* and in the law, was "between reality and vision":[361]

> A *nomos,* as a world of law, entails 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.
>
> Our visions hold our reality up to us as unredeemed. By themselves the alternative worlds of our visions—the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away—dictate no particular set of transformations or efforts at transformation. But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the

356. *Id.* at 118.
357. *Id.*
358. *Id.*
359. *Id.*
360. *See generally* ŽIŽEK, *supra* note 23, at 99-100. Such visions both motivate and undergo an evolutionary process all their own as they confront and are challenged by other visions. Each vision both lies within the rhetoric conveying it, and it also exists as a visionary shadow to that rhetoric. That is, the vision is only partially reflected in its plain words. Its greater truth remains hidden because it issues from a violent fund that wishes, through rhetorical and other means, to suppress perceived threats to its realization.
361. *Nomos and Narrative*, *supra* note 28, at 9.

shadow of the millennium.[362]

The *nomos* lies between "the now" and "the next."[363] Its current community replicates itself legally so that it might gaze upon its own reflection in the future. As *nomos,* the law exercises dominion over the present ("reality"), and, through it, aspires to an extension of that dominion into an envisioned future ("vision"). The vision conjured serves at least two functions. First, it attempts to vindicate decisions made in the present by anticipating a future turn of events that redeems them. Second, and, more significantly, the vision assumes absence and hope. To envision is to see possibility where reality has been blind to it (absence). It is to work toward an alternative constellation of events that might remedy the ostracisms of the present with their attendant violence and coercion (hope). To envision, then, is to admit that the law is both the means to achieving its own dreams and the obstacle to that achievement. To envision is to survive—or even thrive—at the interstices where the tension abounds, and to dream again of a different reality while using the law to achieve that dream.

What visions of the *nomos* were presented at trial in 1806? The challenge—and the gift—was that there were competing visions. The prosecution's vision was sweeping. It was, in fact, the rejection of a vision. The prosecution rejected an apocalyptic projection of a world in which unions thrived. Conscripted in this attack were the federal Constitution, recent constitutional history, legislative history, state law, and other arguments from context. The prosecution's language and choice of target indicated that some entity was responsible for the violent state of things, and it had to be punished. In the process, the prosecution tacitly admitted that the nation's recent past had not yet been overcome, accepted, and faced. That past involved all the things that were projected onto the future and ascribed to the union: concerns about the constitution, concerns about foreign attacks, concerns about the republic's survival, and concerns about economic prosperity. These concerns had yet to be fully absorbed and integrated into the national narrative so that they could be owned, not as something a union did or might do to the community, but, instead, as a shared internal experience for which the real aggressor was too close to home be

362. *Id.*

363. Here I adapt Dipesh Chakrabarty's distinctions between the "now" and the "not yet." For Chakrabarty, European historicism has thrived by distinguishing between the "not yet" and the "now." "Not yet" has traditionally been the European response to demands for self-rule in the colonies. "Now" has been the subaltern demand. Yet, the postcolonial state swings between the two moments of the "not yet" and the "now." These differences become sites in which representations of the subaltern are contested; the subaltern's reality is infinitely more complex than European historicism or rationality has traditionally accounted for. DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 4-23 (2007).

acknowledged as such.[364]

By denying the cordwainers' ability to unionize, the prosecution presented interpretations of the Constitution that restricted the ways in which other workers would subsequently sell their labor. As the defense warned, if the court accepted such reasoning, it would bind others to the prosecution's profit:

> You are called to decide for the first time, in this free country, and to fix the precedent, in favour of the doctrine contained in this indictment. The prosecutors, not content with building costly mansions, rapidly amassing fortunes, aspire to lay up their *plums* annually, and they will do it, if you once give them the privilege of fixing the prices of those who are to work for them; to discover all this does not require day light; a candle, wax taper, or lanthern [sic] will be sufficient for the purpose.[365]

If our visions present those parts of our reality awaiting a remedy, then the prosecution's vision of America was also one in which "violence" and "coercion" unfurled in the background of the trial only to find themselves injected to the heart of judicial proceedings. As Cover noted, law gives depth to vision.[366] There can be no discussion of violence without law. Without law a vision is a meandering stream with no hold on the land it traverses and no claim to it. Law roots and anchors vision. It authenticates and legitimizes it. No vision can claim its hold on a community without legal sanction. The prosecution urged the court to authenticate its arguments about an America purged of unions. "Masters" would run that America. America's courts would be stages of violence.

The trial, as any discussion of a *nomos* implies, was thus about "community." What would the American community resemble in the future? What could be done now to enable that vision? The prosecution's argument was about insiders and outsiders, about those who belonged and those who did not. Not only were the journeymen said, by dint of their profession, to move about freely, but they were also said neither to belong to Philadelphia nor to Pennsylvania:

> There is evidence before you that shews, this secret association, this private club, composed of men who have been only a little time in your country, (not that they are worse for that,) but they ought to submit to the laws of the country, and not attempt to alter them according to their own whim or caprice.[367]

Implicitly, then, the community preceded and would survive the journeymen. For the prosecution, the community's *nomos* was intact

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364. *See generally* ŽIŽEK, *supra* note 23, at 183. ("[I]t is as if our societies need a major catastrophe in order to resuscitate the spirit of communal solidarity.").

365. LLOYD, *supra* note 10, at 90-91.

366. *Nomos and Narrative*, *supra* note 28, at 9.

367. LLOYD, *supra* note 10, at 67.

and closed to new interpretation—and new arrivals. It was the journeymen who had arrived in the community and had sealed themselves off through "secret" and "private" actions into which they initiated each other before subsequently imposing their private secrets on everyone else.[368] It was a curious argument. The prosecution's first witness was a recent immigrant from England, and his origins had seemed not to matter.[369] The prosecution's argument about insiders and outsiders could thus be said to imply the conditions for admission to the Philadelphian community and its *nomos*. One had to agree with the prosecution's perspective of violence and coercion or be subjected to judicial ostracism.

The defense, on the other hand, argued for a more expansive articulation of the *nomos*. The overarching community informing the American *nomos* had always been open and inclusive. To argue otherwise was to fall into the servitude in contradistinction to which the American *nomos* had originally been justified:

> One word in reply to the observations on the subject of aliens. From the moment we declared independence, we stood with open arms to receive the oppressed of all nations and countries. I shall always rejoice in giving them a hearty welcome to our free shores. We want workmen of every kind. The harvest is abundant, but the labourers are few. Let us preserve this asylum . . . . It is the last retreat of freedom and liberty. If, notwithstanding the blood and treasure expended, to release us from worse than Egyptian bondage, we still lust after the *flesh pots,* we may adopt the English code entire, and return to servitude.[370]

Here was thus a vision was of redemption and deliverance. It was a narrative aligning the American founding with the arrival of new immigrants who had escaped bondage elsewhere to redeem the promise of the nation's founding. In this narrative, the *nomos* was always open to the reception of new laborers since the constitutive act authorizing the community's law was written by fleeing immigrants to enable immigrants. Legal interpretation would thus be remiss to punitively distinguish between those who would still arrive and those who already in place. The founding *nomos* presumed new arrivals, given its proffers of liberty and freedom. It was a vision of an America in which the promise of liberty and freedom were redeemed through ongoing judicial acknowledgment of fresh laborers' rights.[371]

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368. *See id.*

369. *Id.* at 11.

370. *Id.* at 124.

371. *See generally* Minow, *supra* note 38, at 1860. Although referring to the late twentieth century, Minow's insight is useful here: "[p]erhaps, more subtly, the visions of human relationships implied by newly recognized rights disturb and disappoint both those who have faith in traditional cultural forms and those who have hopes for as yet unrealized alternatives."

The vision was, in some sense, messianic.[372] It lived in anticipation of the remediation that would set things right.[373] The vision would be fulfilled. Its fulfillment would involve a coming-together and an overcoming. The charge of conspiracy was hostile to such notions. As Todd Rakoff has observed about community in his work on time:

> The ability of workers to participate jointly in activities other than work is not merely a matter of individual happiness; it has important social consequences as well. Participatory groups build the skills and norms needed for trust, accommodation, and cohesion among members of a society, and also provide the springboard for movements for social change. Groups do exist, of course, in which members each do their activities on their own time. But these tend to be rather passive affairs. The socially more valuable groups thrive on activities that the members do together.[374]

The conspiracy charge was meant to disprove the cordwainers' social utility. It was designed to demonstrate that the shoemakers, as a group, could not possibly guarantee "individual happiness." Conspiracy allegations were meant to leave a group unbundled, and more easily subject to aggression. The allegations were an attempt to defang the bite of a given group, to slough it of any identifiable characteristics it had as self-protecting entity, and to abandon it to predation. The defense countered that laborers—in the plural—were a "meritorious part of the community (for remember the principle is undeniable, that labour constitutes the real wealth of a country."[375] To hold against the workers would "proclaim the decline and fall of Philadelphia."[376]

The defense enumerated the wounds that the prosecution's vision would inflict. The nation as it stood ("reality") was itself in peril since it thrived on myriad combinations. A law society, for example, brought lawyers together under rules, and it "could expel any member who violated [its] rules."[377] Political societies and universities were

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372. *See* Stone, *supra* note 26, at 872-87.

373. LLOYD, *supra* note 10, at 120. Indeed, biblical language infused the language of the trial. The defense argued that

> [I]f we must pass through this dreary wilderness, like the children of Israel, of old, I trust we shall reach the promised land in security: If we must cross this red sea, I do firmly believe, there is a constitutional power in the jury, which will command the waves to recede as we approach, and the waters to divide, that we may gain in safety the shore, where we shall be welcomed by a verdict of acquittal.

Id.

374. TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 46-47 (2002).

375. LLOYD, *supra* note 10, at 103.

376. *Id.*

377. *Id.* at 105.

"founded on the same laudable principles."[378] What of entertainment? What would a community look like that privileged individuals only to isolate them?

> Dancing is a very fashionable and a very pleasing recreation; though according to the principle of my learned friends, a country dance would be criminal, a cotillion unlawful, even a minuet a conspiracy; and nothing but a horn pipe or a *solo* would be stepped with impunity.[379]

What of altruistic acts? Did altruism not presuppose at least two or more people?[380] What of religious gatherings? Did they not thrive on strong notions of a community bound by rules?[381] "An individual who was not able to take a whole pew would be deterred lest he would be guilty of a conspiracy, from joining with a friend, whose resources would be adequate to object."[382] What of funerals? Did they not assume more than one person?[383] "This afflicting duty must be confided to the hands of the lonely undertaker, as not even the nearest connections can unite following their departed kinsman to the tomb!"[384] In other words, community was itself a conspiracy and a combination, an amalgamation of various unions on which the individual, the state, and the nation fundamentally depended.

F. Beyond Vision and Reality

Yet, might there be another approach, one that reaches beyond simple binaries? What might it mean to imagine the cordwainers' trial beyond simple binary distinctions (prosecution/defense; "masters"/slaves; local/global; process/result; violent/harmless; coercion/consent; vision/reality)?

The question in constitutional discussions, Christine Desan has shown, may be more complex than simple binaries. Desan is interested in how evolving constitutional traditions attempt "to construct a justified community from the accident of people who come together at a particular time and place."[385] For Desan, a constitutional project necessarily involves the creation of the collective and the individual.[386] A "constitutional drama"[387] unfolds over time, as boundaries drawn become points of contestation.[388] Implicitly refining Cover's distinction

378. *Id*.
379. *Id*. at 106.
380. *Id*.
381. *Id*.
382. *Id*.
383. *Id*.
384. *Id*.
385. Desan, *supra* note 3, at 391.
386. *Id*.
387. *Id*.
388. *Id*.

of "reality" and "vision," Desan distinguishes between the "institutional" ("realities [that] are the dynamics that define the public in daily practice),"[389] and the "ideological" ("justifications for [institutional] divisions").[390] However, such a division, which has been pursued in constitutional historiography, is insufficient since it reifies the "elemental"[391] and the "air,"[392] obfuscating the space between.[393] In that middle space, Desan reminds us, "the issue is how people assuming very different roles and given dramatically divergent amounts of authority themselves extend, accept, or challenge the order in which they find themselves."[394]

Between reality and vision is thus the messiness of lived experience. In that space occurs the contestation and negotiation of reality's conditions, and the terms of its vision. It is unlikely to be one reality, but multiple realities and visions, each swirling in a chorus of consent and dissent over the terms and conditions that govern a shared experience. It is a space in which no single point possesses absolute privilege since even on the frontier, on the periphery, in what Desan refers to as the "marchlands,"[395] a community might "create a relationship with imperial officials unattainable elsewhere in the empire where the legitimacy and practical power of such agents exert more force."[396] The advantage of Desan's position, therefore, is that it does not require its community or its individuals to inhabit, be situated in, or be constrained by hierarchical positions or locations. Reality and vision become vehicles in an evolving understanding of belonging, meaning, and of community. Each position can be powerful and effective in its articulation, no matter its point of issue.

Applied to the tension between the cordwainers and their "masters," Desan allows us to ask fewer static questions about "reality" and "vision." We look instead for transgression and fluidity, or, at least, for the moments in which a binary fractures as it is troubled by experience. We look for narrative as "a movement of initiative and commitment, despair and default rather than a static matter of choice or consent."[397] For in that middle space between reality and vision is where both cordwainer and "master" become conversant in the ways in which communities attempt and have "attempted" (to use Desan's word) to organize the public.[398] Violence,

389. *Id.* at 392.
390. *Id.* at 393.
391. *Id.* at 395.
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.* at 395-96.
397. *Id.* at 396.
398. *Id.* at 396.

then, becomes an implement of organization, a way of articulating and reinforcing binaries ("master"/cordwainer; reality/vision; inside/outside etc.), an accessible yet highly destructive attempt at managing complex constitutional change. It is an attempt to marshal the multiplicity of voices that hail from the center and from the marchlands of constitutional discourse. It is, finally, a way of attempting to harness the obstreperous reins of change.

Following Desan, the prosecution's attempt to silence the cordwainers becomes an artifact upon which one looks with both curiosity and fear since it advocates a unilateral approach to constitutional discourse. The fundamental error in its design is that any form of violence or coercion can only be an *attempt*, since something always escapes or resists an imposition of meaning. A common interpretation can be imposed, but its meaning cannot. Meaning courses with uncertainty and change. It is a volatile thing that inhabits the interstices, the shadows, and the unknown "marchlands" that come into view when they assert their claim on our understanding of an evolving community, its inclusiveness, and its traditions. A community becomes less a document, or an interpretation, and more the *living* of the document, the *living* of the interpretation; the living is where meaning occurs. And it is for meaning, ultimately, that people commit, attribute, and project violence.

We ask fewer questions about the prosecution's violence and the defense's subordination, and more about the evolving dynamic between the two at trial and beyond. The prosecution ceases to be an actor inhabiting a single coercive position but a series of actors with competing identifications and needs, each of which groans for fulfillment at law. The word "prosecution" is no longer a pillar of violence as much as a series of constitutive acts resembling a pillar, each of which shares enough with other acts so as to come together at trial in their struggle for survival.[399] Such a reading explains the prosecution's rhetorical depth at trial, drawing as it did from a range of foreign and local threats ranging from the aristocratic to the "slavish," and from recent to more distant allusions in time. Each prosecutorial voice competed for triumph within the prosecution's argument, and each risked displacing the other as the focus of its onslaught.

The defense, too, ceases to be an edifice on the verge of collapse. It becomes a marshaling of competing voices that came before the court

399. In other words, there were several competing *nomoi* in the prosecution, as there no doubt were in the defense. *See generally* Perry Dane, *The Public, the Private, and the Sacred: Variations on the Theme of* Nomos and Narrative, 8 CARDOZO STUD. L. & LIT. 15, 16 (1996). ("[T]he encounter of one *nomos* with another is not just a clash of wills, or a test of commitments, but an effort at cognition.").

to support a position, and when that position was killed, fragmentation of the voices in that specific legal incarnation occurred, leading to their dispersal. Their dispersal, however, does not foreclose their re-emergence from Desanian "marchlands," where they submit to an alternative disciplinary regimen and, strengthened, plan their reappearance in the legal theater that previously compelled their disintegration.

III. PRACTICE AS GUIDE[400]: JUDICIAL VIOLENCE

A. The Legislature's Violence

As we abandon binaries, we might now conceive of law as conjunctive. Might law not only be made in the center but also in the "marchlands?" Might it not be made both in courts *and* wherever lawyers make arguments?[401] Might it not be made by judges, jurors, lawyers *and* litigants? Might it not both isolate *and* weave together divergent interpretative strands? Exhaustive answers to those questions merit lengthier study than is possible in this paper. Yet I continue my attempt at answering those questions by examining the role of the legislature in the cordwainers' case. Judicial violence becomes something in which legislators are implicit.

In his essay on violence, Walter Benjamin identifies the violence of the legislative act:

> All violence as a means is either lawmaking or law-preserving. If it lays claim to neither of these predicates, it forfeits all validity. It follows, however, that all violence as a means, even in the most favorable case, is implicated in the problematic nature of law itself.[402]

Benjamin continues his analysis by engaging with German legislative violence. He notes that parliaments "fall[] into decay" when they become ignorant "of the latent presence of violence" that inheres in them.[403] The German parliament at the time Benjamin wrote "lack[ed] the sense that a lawmaking violence is represented by themselves; no wonder that they cannot achieve decrees worthy of this violence, but

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400. *See* ON VIOLENCE: A READER, *supra* note 51, at 7 ("There is no general theory of violence apart from its practices.").

401. *See* Minow, *supra* note 38, at 1861-62.

> In my view, efforts to create and give meaning to norms, through a language of rights, often and importantly occur outside formal legal institutions such as courts. 'Legal interpretation,' in this sense, is an activity engaged in by nonlawyers as well as by lawyers and judges. Interpretive activity appeals not to one overriding authoritative community, but instead to people living in worlds of differences.

Id.

402. BENJAMIN, *supra* note 77, at 287.

403. *Id.* at 288.

cultivate in compromise a supposedly nonviolent manner of dealing with political affairs."[404] Cover is consistent with Benjamin when he argues that legal violence is necessary and when Cover implies that violence at law can be meaningful in its results and impact.[405] If violence inheres in law, then at least some violence is necessary to the survival of the legal order. The legislature's work is "attended by violence".[406]

The cordwainers' trial took place in an atmosphere of legislative hostility between the Federalists and the Jeffersonians. The Federalists had been at odds with the Jeffersonians about many things, especially social and economic policy.[407] Thomas Jefferson had been re-elected President in 1804. "The defeated Federalists proclaimed that Jefferson's election sealed America's doom."[408] Jefferson supported strong individual rights,[409] and feared an oligarchical central government.[410] The animosity between Federalists and Jeffersonians proceeded in the absence of a statute that specifically forbade unionization. [411]

> The clash between these two political philosophies was demonstrated in the Pennsylvania legislature. While the indictment against the eight bootmakers was pending, the Jeffersonians introduced a bill in the legislature to the effect that the English common-law doctrine of conspiracy was not the law of Pennsylvania. Such a law would have disposed of the indictment against the bootmakers. But the Federalists, allied with the Constitutional Republicans, by a vote of 44 to 32 defeated the bill. They wanted the bootmakers to be tried.[412]

The legislature thus identified targets at which laws might be directed and it authorized laws against them. At the basis of judicial violence is thus the legislative act intended to suppress. It is, however, difficult to think of legislative action as violent, even etymologically. The

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404. *Id.*

405. For a discussion of Cover's view on the necessity of legal violence, see LAW'S VIOLENCE, *supra* note 24, at 214-50.

406. BENJAMIN, *supra* note 77, at 289.

407. Blinka, *supra* note 61, at 99.

> The Federalists championed close ties with Britain, both military and commercial, and endorsed Hamilton's designs for a strong federal government dedicated to a thriving national economy. The Democratic Republicans led by Jefferson and James Madison, leaned more toward the French, opposed dependence on Britain, and vigorously criticized Hamilton's economic system.

408. LIEBERMAN, *supra* note 11, at 4.

409. *Id.* at 5.

410. *Id.*

411. *See generally* LLOYD, *supra* note 10, at 114. As the defense argued, "[i]n Pennsylvania, we have no act of assembly, fixing the wages of journeymen shoemakers, or of any other journeymen; and God forbid we ever should! These tyrannous, oppressive statutes, have never been extended to this state."

412. LIEBERMAN, *supra* note 11, at 5.

legislature, after all, is often a legitimate law-making authority, and it can be seen to grant rights or take them away at will. As the oft-repeated legal maxim reveals: "the legislature giveth and the legislature taketh away. [Blessed be its name.]" Yet, in the cordwainers' case, the legislative intention was to specifically target, subdue and subordinate the union—to judicially efface it. The prosecution's violence in court, can thus be seen to extend from legislative authority, which was an implicit grant of authority to deploy the English common law of conspiracy as a sword against the union.

The former attorney general (now of the prosecution) gloated. The judge had told the defense that "[t]he common law which relates to morals, is what is applicable here."[413] The question before the court was whether English common law applied in Pennsylvania.[414] The defense argued that English statutory law, not English common law, proscribed labor combinations.[415] Whether English common law governing labor combinations applied in Pennsylvania was doubtful.[416] The Pennsylvania constitution guaranteed a right to free assembly that overruled English common law on the subject. [417] The former attorney general informed the jury why he loved the common law:

> Why do I love the common law, especially the criminal part? I will tell you, and I think you will say that I have reason on my side, as I am one of the people . . . . Because, to the common law we are indebted for trial by jury, grand and petit, without the unanimous consent of which latter, I cannot be convicted . . . . Because, it secures me a fair trial by challenges, the laws of evidence, confronting me with my accuser, and exempting one from accusing myself, or being twice liable to trial for the same offence.[418]

It was instructive that the prosecution referred to personal love ("I") of the common law. Its love was an indication of the desired effect of its individualized attacks on a community of workers. In the end were individual subjects ("I") subject to the weight of the law, "especially the criminal part," as endorsed by the legislature, for combining their

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413. LLOYD, *supra* note 10, at 86, 146; *see also* Nelles, *supra* note 136, at 170:

> One of the Republican cries was for repudiation of the English common law. 'English common law meant, concretely, a series of decisions and charges in political cases in which Federalist judges had invoked it, with much violence to what had been Federalist constructions of the Constitution in the campaign to placate opposition to its adoption.

414. LLOYD, *supra* note 10, at 84-89.
415. *Id.* at 84.
416. *Id.* at 85.
417. *Id.* at 86.
418. *Id.* at 139.

efforts.[419] Here, primarily, was not a discussion about engagement with the common law as a community, which one might expect in a discussion of the legislative making of the laws. Instead, there appeared before the court only individual subjects, some of whom had summoned others before it because they, as individuals, had "reason on [their] side."[420]

At English common law, conspiracy could be harsh. Lord Coke had indicated that the punishment for the crime of conspiracy was "grievous and terrible."[421] Convicts would "loose [sic] their freedom and franchise of the law,"[422] be subject to additional rules in the King's courts, "and their houses, lands, and goods, shall be seized into the King's hands, and their houses and lands stripped and wasted, their trees rooted up and erased, and their bodies to prison . . . ."[423] Conviction for conspiracy therefore destroyed its target's life. The charge created a class of legally disparaged individuals. Worse, the charge was meant to destroy the condemned. The charge's intention was that conviction "destroy[] all things that have pleasured or nourished them."[424] "'AND IT IS TO BE OBSERVED' (says Lord Coke) 'THAT THIS VILLAINOUS JUDGMENT IS GIVEN BY THE COMMON LAW.'"[425] The defense argued that the "sanguinary"[426] English common law charge of conspiracy thus violated "enlightened"[427] and reformative[428] Pennsylvania and American laws. To no avail.

B. The Judge's Violence

In his comments to counsel and the jury, the City Recorder, who sat as the judge, made clear his partisan bent by indicating how inimical he felt the cordwainers were to the new republic. As a result,

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419. *See id.*
420. *See id.*
421. *Id.* at 109.
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.* at 109-10.
426. *Id.* at 108. For a discussion of the conspiracy charge's brutal past,, see PERCY HENRY WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE 102 (1921).

> The Star Chamber punished conspiracy by branding in the face and slitting of the nose. Thus in Henry VIII's reign, a priest was branded with an F and A in his forehead for false accusation. So too in James I's reign, Basset and an attorney named Reignolds were convicted in that Court, and the sentence was that Reignolds be degraded and cast over the Common Pleas Bar, and that both defendants should lose their ears, be marked with a C in the face for conspirators, should stand upon the pillory with papers of their offences, should be whipped, and each of them fined £500.

427. LLOYD, *supra* note 10, at 108*; see also* Blinka, *supra* note 61, at 90.
428. LLOYD, *supra* note 10, at 108.

judicial violence can be seen to incorporate the judge's comments.

In a lengthy instruction to the jury, the judge issued what resembled a judicial opinion interpreting the relevant facts, the relevant law, and the union's actions for the jury:

> [I]s this freedom? Is it not restraining, instead of promoting, the spirit of '76 [1776] when men expected to have no law but the constitution, and laws adopted by it or enacted by the legislature in conformity to it? Was it the spirit of '79 [1779] that either masters or journeymen, in regulating the prices of their commodities should set up a rule contrary to the law of their country? General and individual liberty was the spirit of '76 . . . It is not a question, whether we shall have an *imperium in imperio,* whether we shall have, besides our state legislature a new legislature consisting of journeymen shoemakers.[429]

Although the judge insisted that the law considered both "masters" and journeymen similarly, and that none would receive preferential treatment, the case before the jury was indeed a question of whether *the union* was a competing legislature. [430] The judge had implied that the union's actions were incompatible with "the spirit of '76." The union, he had told the jury, had made "an artificial regulation,"[431] which is "an unnatural, artificial mean [sic] of raising the price of work beyond its standard, and taking an undue advantage of the public."[432] The jury had to act accordingly.

The judge proceeded even further, and evaluated the defense's arguments for the jury. The cordwainers, he said, were not like "a society for the promotion of the general welfare of the community."[433] They were neither a religious organization, nor a charitable organization, nor were they benevolent. [434] They did not extinguish fires, nor did they promote "literature and the fine arts."[435] "There is no comparison between the two," he told the jury, "they are as distinct as light and darkness. How can these cases be considered on equal footing?"[436] At the end of his instruction, the judge concluded: "I thought it necessary to say this much, as this trial appears to have excited a great deal of interest in the city."[437] Indeed, as one scholar has observed, the judge was "a stanch [sic] Federalist."[438] "In harmony with the Federalist doctrine that social control should be in the hands

429. *Id.* at 148.
430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.* at 148.
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*at 149.
438. LIEBERMAN, *supra* note 11, at 12.

of 'the rich, the wise and the good' (as the Federalists liked to describe themselves), the recorder appealed to prejudice, patriotism, and the economic self-interest of the jurors."[439]

It might be contended, however, that it was common for judges to instruct juries in the manner the city recorder had done. If it were the practice, then the cordwainers' was a fair trial. On March 31, 1806, *The Aurora* newspaper anticipated such a contention:

> A man who did not know the purposes for which the law contemplated the appointment of recorder to preside in the Mayor's court, would unquestionably have concluded that Mr. Recorder Levy had been paid by the master shoemakers for his discourse in the Mayor's court on Friday last. *Never* did we hear a charge to a jury delivered in a more prejudiced and partial manner. From such court recorders and juries, good Lord deliver us.[440]

The judge had not escaped the dragnet of partisan politics. The Federalists had prevailed, and had obtained an extraordinary instruction to the jury from the City Recorder. In the end, the legislature, prosecution, and judge can be seen to function along the coercive continuum of judicial violence.

C. The Jury's Violence

If one hardly thinks of violent legislatures and prosecutors, then it is unsurprising that one tends not to think of violent juries. What might a violent jury do? Might it not, through its actions and verdict, announce its alignment with the court's coercion, and its approval of applying such coercion to an unpopular cause?

The common law jury, so beloved by the prosecution, unanimously found the cordwainers guilty of combination. When Thomas Lloyd, who took the shorthand notes about the trial, approached the clerks' office and asked for the papers containing the jury's verdict, he was told that jurors had destroyed them as "such papers were of no importance."[441] Verdicts were torn up, and the court apparently took "no cognizance of these sealed verdicts."[442] The verdict was finally entered on the back of the indictment. "And the court fined the defendants eight dollars each, with costs of suit, and to stand committed till paid."[443] About a week's wages was demanded of the defendants, or jail time until the fine was paid.[444]

Their trial had ended in an unceremonious verdict written on

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439. *Id.*
440. *Id.* at 13-14.
441. LLOYD, *supra* note 10, at 149.
442. *Id.*
443. *Id.*
444. *Id.*

papers "of no importance."[445] "No cognizance" was due such a result.[446] The jurors' response to the outcome of a trial in which a labor union had just been destroyed, and its members fined a portion of their wages, was instructive. Even the formalisms that would have granted the union's death dignity were forsaken.[447] Union members had been subjected to violence and to claims of violence during the trial, and, at the end of their trial, encouraged by legislative and by the judge's endorsement of the prosecution's argument, even the jury anticipated oblivion for the union.

It is thus difficult to read of the jury's response to the cordwainers' trial without acknowledging the service of Thomas Lloyd's shorthand record of the trial. Lloyd's record stands in opposition to the violence done to the cordwainers' union. Lloyd dedicated his record to Governor Thomas M'Kean and "The General Assembly of Pennsylvania," hoping that it would attract "their particular attention, at the next meeting of the Legislature."[448] It was an attempt to rescue the entire proceedings of this "most interesting law case"[449] from oblivion,[450] for which violence often predestines its target. For, if violence is a struggle for identity, a means through which a perpetrator reaffirms the superiority of a chosen experience, then precedent and much of legal history celebrate triumph, and warn against loss.[451]

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445. *Id.*

446. *Id.*

447. *See generally* WOLFGANG SCHIVELBUSCH, THE CULTURE OF DEFEAT: ON NATIONAL TRAUMA, MOURNING, AND RECOVERY 28 (2001). Although referring to a period later in the nineteenth century, Eric McKitrick's insight is germane here:

> The victor needs to be assured that his triumph has been invested with the fullest spiritual and ceremonial meaning. He must know that his expenditures have gone for something, that his objectives have been accomplished, and that the righteousness of his principles has been given its vindication. . . . He must have ritual proofs. The conquered enemy must be prepared to give symbolic satisfactions as well as physical surrender; he must . . . 'act out' his defeat.

Id. For all its insight into the psychology of defeat, Schivelbusch's account bizarrely seems to romanticize loss in general. In a curious statement about the American South, Schivelbusch states that, "As with every ideology, there was a kernel of truth to the idea of slavery as a positive good and a human right." *Id.* at 45. There follows roughly a page romanticizing this bizarre argument. *Id.* at 46.

448. LLOYD, *supra* note 10.

449. *Id.*

450. *See generally* EDUARDO GALEANO, UPSIDE DOWN: A PRIMER FOR THE LOOKING-GLASS WORLD 201 (Mark Fried, trans., 1st ed. 2000) (1998) (noting that "[i]nequality before the law lies at the root of real history, but official history is written by oblivion, not memory").

451. *See generally* ŽIŽEK, *supra* note 23, at 72. To paraphrase Žižek, it is a struggle for how both perpetrator and victim will identify themselves subsequently, both in each other's presence and on their own.

D. Impunity[452]

What the legislature provided, and the prosecution pursued in the cordwainers' case, was the cover of law, which other legal actors could also use, knowledgeable that they would not be punished. In other words, impunity would attach.

In *The Wages of Impunity,* Kannabiran argues that the legislature insulates itself, through its [ab]use of the law, from the citizens who elected it. "Ironically," says Kannabiran, "the government brings this provision [of law] into operation around Parliament and Legislative Assemblies when they are in session, thereby protecting elected assemblies from the citizens who elected them."[453] It is unsurprising then that one hardly—if ever—hears of legislators being prosecuted for enacting violent laws. Each generation of legislators freshly ensures that it binds violence other than that beloved by the legislature. Kannabiran's observation is thus useful for it unearths the impunity with which legislatures act. True, the ballot box might defeat unwanted legislators in subsequent elections. However, as Kannabiran notes, by then it is too late because "[a]ny scrutiny of this exercise of power by the state is only possible after the damage has been done."[454]

Such damage reverberates across time and space. Although he is writing about contemporary Indian law (2004) and the aftermath of British colonization, Kannabiran could be describing the violence of the Philadelphia cordwainers' trial in 1806, and the consequences of British rule there when he notes how conspiracy charges can be effective against disfavored causes:

> Radical social movements, for instance, are seen initially as disrupters of public order and later as a threat to state security. The state has the power to invoke criminal laws for the arrest and prosecution of persons it charges with treason and conspiracy to overthrow a lawfully established government. It can accuse them of waging war, which charge divides itself into various ancillary offences like attempt to wage war, concealment of a design to wage war, etc . . . . The violence these prosecutions engender has to be seen to be believed . . . . To leash legitimate protests the state often formulates a vague and inchoate conspiracy charge incapable of

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452. I am grateful to Galeano for drawing my attention to the cords that bind impunity to violence. Galeano argues that "[i]mpunity is the child of bad memory." GALEANO, *supra* note 450, at 211. Galeano illustrates how violent actors attempt to—and often succeed in their attempt to—rewrite their victim's history so that victims fail to recall or have access to the details of their own experience. *Id. See also* VEITCH, *supra* note 192, at 1 (examining in how courts are complicit in creating widespread suffering) ("At stake is nothing less than a re-evaluation of the role of modern law in the production and legitimation of human suffering.").

453. KANNABIRAN, *supra* note 89, at 4.

454. *Id.* at 3.

> precise definition . . . . The charge of conspiracy is a convenient tool to target political movements. The British used it effectively during the freedom struggle.[455]

As we have seen, the cordwainers were considered a threat to the new republic. The charges against them implied treason, rebellion, usurpation, and explicitly alleged conspiracy. War was not too far from the prosecution's mind when it told the judge and jury that the cordwainers' union would turn "the whole community . . . into hostile confederacies, the prelude and certain forerunner of bloodshed and civil war."[456] As one scholar has argued, the British themselves had viewed American independence as a conspiracy since "royal officials in the colonies, as well as their superiors in London, feared that Americans were conspiring against parliamentary authority."[457] Indeed, a royal proclamation later declared the Americans to be in a state of 'open and avowed rebellion . . . . The duty of all officers, civil and military, was 'to exert their utmost endeavours' to suppress the rebellion and bring the traitors to the bar of justice. The King called on his subjects 'to disclose . . . all treasons and traitorous conspiracies.'"[458]

For Kannabiran, then, the conspiracy charge is the legacy of a violent legal order that sought to quash local dissent. The conspiracy charge allowed the British to act largely undaunted.[459] Under the

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455. *Id.*at 4-5.

456. LLOYD, *supra* note 10, at 137.

457. Ira D. Gruber, *The American Revolution as a Conspiracy: The British View,* 26 WM. & MARY Q. 360, 360 (1969). Within England itself was a pervasive fear that "Parliament was on the brink of falling 'under the control of an unscrupulous gang of would-be despots' who would destroy the constitution.'" Bernard Bailyn, *A Note on Conspiracy, in* THE FEAR OF CONSPIRACY: IMAGES OF UN-AMERICAN SUBVERSION FROM THE REVOLUTION TO THE PRESENT 25 (David Brion Davis ed., 1971).

458. SAMUEL B. GRIFFITH II, THE WAR FOR AMERICAN INDEPENDENCE 219 (2002). Americans argued, for example, that the Boston Massacre was "a British conspiracy to deprive them of their liberties and dominate not only Boston, but all of the colonies." PETER KNIGHT, 1 CONSPIRACY THEORIES IN AMERICAN HISTORY: AN ENCYCLOPEDIA 131 (2003). It is, however, crucial to distinguish conspiracy used as a legal charge from its more common use. The King's proclamation has legal tincture when it talks of conspiracy, while general claims of conspiracy against citizen rights might not have the same legal bearing.

459. For a history of conspiracy at common law, see WINFIELD, *supra* note 426. Winfeld notes that conspirators were originally those who abused legal procedure and brought false claims. *Id.* at 8. *See, e.g.*, Blinka, *supra* note 61, at 87. Winfeld also notes that the conspiracy charge also applied to "jurors corrupt enough to confederate in accusing the innocent." WINFIELD, *supra* note 426, at 15. The current sense of the legal term "conspiracy" can be traced back to at least 1641 when it embraced "a confederacy between two or more falsely to indict another, or to procure him to be indicted of felony." *Id.* at 53 (internal quotation marks omitted). A "combination" became essential to conspiracy under the Tudors. *See id.* at 59-66. "Confederacy" also became "roughly equivalent to criminal conspiracy in its broad modern meaning." *Id.* at 99. Paradoxically, as early as the Middle Ages, "by far the commonest use of conspiracy and confederacy is in connection with combinations to restrain or to interfere with trade." *Id.* at 111.

cover of law, the British were able, for a time, to suppress local dissent and punitively reaffirm their precedent. They did so from a position of domination, a spirit of subjugation, and from the knowledge that the laws that they applied ensured impunity. Impunity is thus the aggressor's certainty, and the victim's struggle. Impunity at law means that no legal accountability is mandated of the aggressor. The violent actor has the last word, which is permanently inscribed in the target's experience. In the cordwainers' case, the prosecution, the judge, and the jury enjoyed such impunity. Even if it might be argued that the union might have appealed the decision, as Kannabiran would say, "the damage has been done."[460]

IV. REDEMPTION: REJOICING IN LEGAL MARCHLANDS[461]

Redemption from such violence is possible. Redemption is transformation empowered by memory.[462] The transformative act not only makes of yesterday's defeated new interpretative subjects, but it also renders them tomorrow's visionaries who have not forgotten. From the marchlands the losers of yesteryear return with their experience. If those whom legal interpretation favors have precedent and consensus on their side, those rejected by it have memory, new meaning, transcendent hopes, and patience on theirs[463]:

> Thus conceived, legal interpretation has the capacity to transform the human situation, and, in Cover's conception, to achieve a form of redemption. Cover illustrated this point with an example drawn from the American anti-slavery movement. When Frederick Douglass insisted that the Constitution did not permit slavery, despite professional consensus to the contrary, he engaged in a redemptive form of legal interpretation. Douglass embraced a vision of an American legal system free from slavery. His transcendent

460. KANNABIRAN, *supra* note 89, at 3.

461. *See generally* SCHIVELBUSCH, *supra* note 447, at 4.

> The historiography of the defeated is another matter entirely: 'Their defining experience is that everything turned out other than they hoped. They labor under . . . a greater burden of proof for having to show why events turned out as they did--and not as planned. Therefore they begin to search for middle or long-term factors to account for and perhaps explain the accident of the unexpected outcome. There is something to the hypothesis that being forced to draw new and difficult lessons from history yields insight of longer validity and thus greater explanatory power. History may in the short term be made by the victors, but historical wisdom is in the long run enriched more by the vanquished . . . .

Id.

462. I am grateful to Susan Last Stone's discussion of the redemptive possibility in law for Cover, which, as will soon become clear, has greatly informed my discussion of the subject. Stone, *supra* note 26, at 872-87.

463. *See* Minow, *supra* note 38, at 1907. ("The creation of meaning through discourse may take place more fruitfully further away from the centers of official power while still gaining from their shadows.").

vision eventually led to the transformation of the legal landscape.[464]

Cover's vision of the redemptive legal act is at once "deeply hopeful"[465] and "rich"[466] in its "vision of the possibilities of constitutional interpretation."[467] It is also a troubled[468] vision that notes the possibility of destruction in the "imperial power" at law.[469] That imperial power disperses and reconfigures its defeated subjects, who now exist at the empire's pleasure.[470] Relegated to the marchlands, they might still "create a relationship with imperial officials unattainable elsewhere in the empire where the legitimacy and practical power of such agents exert more force."[471] But how might they distinguish themselves from those who once inhabited the marchlands and have since left for the imperial center?

At the cordwainers' trial, the defense put it simply. Yesterday's losers transform their experience—and that of others—by remembering through action. Those descended from the struggles of immigrants should recall that experience when faced with the new immigrant.[472] Those once defeated by the imperial power should

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464. Stone, *supra* note 26, at 826.

465. *Id.* at 825.

466. *Id.* at 827.

467. *Id.*

468. *Id.* at 826. Stone prefers "troubling" here. I interpose "troubled" instead to focus more on Cover than on his interpreters.

469. *Id.* Stone's vision of liberalism is itself troubling:

> The imperial or 'universalist virtues' of modern liberalism provide social peace; they are necessary to 'ensure the *coexistence* of worlds of strong normative meaning.' But there is a 'tragic limit' to the peace that may be achieved because state action, in destroying some meanings, is inevitably bound up with violence.

Id.

470. *See id.* at 891.

> In *Nomos and Narrative,* Cover drew up [Rabbi] Caro's writings to create a conceptual model of two contrasting legal orders, the paideic and the imperial. In the paideic legal order, law is entirely a system of meaning. Adherence to a set of common obligations flows from commitment and understanding, rather than from coercion. The paideic order is 'celebratory,' 'expressive,' and a source of personal growth. . . . In the imperial order, epitomized by liberal Western communities, 'norms are universal and *enforced* by institutionsin the interest of effective social control. These universal norms are the weaker forces of justice, truth, and peace needed--according to Caro--to maintain a world already in existence. The imperial legal order consists of 'systematic hierarchy,' 'rigid social control over . . . precepts,' and the discipline of institutional justice.' There is little interpersonal commitment, save the minimal requirement to refrain from violence.

Id.

471. Desan, *supra* note 3, at 395-96.

472. In other words, yesterday's denizens of the marchlands must enact a different story from the one imposed on them by their victors. For if violence is the victor's narrative, defeat is the loser's experience, and from that experience must issue a powerful retelling, especially at law, of what happened, why, and why its repetition will

identify themselves in those who currently are. Previous inhabitants of the marchlands must overcome the urge to relegate others to that space simply because they can.[473] Such acts of commemoration, not only as celebrations of individual triumph over adversity, but also as recognitions of the struggle's continuation in others, marks the transformative act.[474] In 1806, the defense would marvel at how spectacularly a failure of memory could cause suffering. Since all "masters" had not been born to wealth, there were among them members who had emigrated from countries where their own labor had been undervalued, who then subsequently made their fortune in Philadelphia, only to treat laborers there poorly.[475] "It is only a matter of astonishment that under such circumstances, they [recent immigrants become "masters"] should have the hardihood to institute the present prosecution."[476] The perpetuation of conflict and its attendant damage is tied to a failure of memory.

Yesterday's losers are thus redeemed by the recognition that the law can inflict pain and death, and they should envision a plurivocal

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be resisted. Whereas victory is often about marshaling an overarching narrative that the defeated must adopt as their own, defeat must involve something unlike acceptance. It must be an acknowledgment of the story that the victor has been able to tell, with all its hyperbole and corruptions of the truth, and it must also involve an immediate rejection of the victor's supposed objectivity. For, defeat is one thing, but acceptance of a violent narrative as a truth—worthy of binding several generations—is quite another.

473. One of the challenges that previous inhabitants of the marchlands face is that of "imprinting" or "attachment". Imprinting is a "phenomenon, in which an early experience . . . determine[s] . . . social behavior." Eckhard H. Hess, "*Imprinting in Animals",* 198 SCI. AM. 81, 90 (1958). "A researcher who studied imprinting in ducklings (Hess, 1970) noticed that if he accidentally stepped on the feet of the duckling that was imprinted on him, the duckling followed him more closely than ever." JUDITH RICH HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO 140 (2009) (noting that the appropriate term for primates is "attachment" and that the duckling example is the "usual" one when psychologists discuss the critical period of a life). As applied to the present discussion, it is likely that the defeated have imprinted upon their victors, and that they have, even unconsciously, developed an attachment to them by virtue of the constant comparison that has occurred in the defeated's effort to rectify what went wrong. The loser's challenge is to be aware of such an attachment and to struggle with its implications.

474. *See generally* James C. Scott's wonderful book on how subordinate groups articulate compelling responses to the performance of the "official story" or "public transcript" regarding their experience. JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS (1990). Subordinate groups deploy a panoply of tools that Scott calls "the arts of political disguise", which allow such groups to manage their humiliation. *Id.* at 1-16. Their subjugation gives way to a "hidden transcript", teeming with meanings and possibilities that are nursed away from official scrutiny until they are ready to be made public in "saturnalia of power" that can often appear like "moments of madness." *Id.* at 136-82. As Scott notes, "[i]f the results seem like moments of madness, if the politics they engender is tumultuous, frenetic, delirious, and occasionally violent, that is perhaps because the powerless are so rarely on the public stage and have so much to say and do when they finally arrive." *Id.* at 182.

475. *Id.*

476. LLOYD, *supra* note 10, at 97.

legal landscape abundant with Cover's luxuriant possibilities:[477]

> The ideal world of the *nomos* rejoices in this plurality of normative orders . . . . It sees the filling of the legal universe with diverse laws of diverse communities as a creative and meaningful process, one that is tragically stifled by the liberal state's insistence on centralizing authority, silencing competing normative perspectives, and reducing law to a mechanism of social control.[478]

The *nomos* rejoices in the possibility of a pluralist legal vision; the ideal that is yet to come. It also rejoices in the arrival of yesterday's defeated from the marchlands. Each arrival from that space, the underside of legal experience, brings with it the promise of a creative redemption. The mere presence of such an arrival is an act of defiance;[479] defiance against the imposition of pain, death, and suffering. Such defiance becomes even more noteworthy when it joins itself to the dialog from the center that would allow the enactment of peripheral visions and bring the law closer to the world in which "the lion l[ies] down with the lamb, the creditor forgiv[es] debts each seventh year, the state all shriveled and withered away."[480]

What might this mean for organized labor in our time? The headlines regarding the death of organized labor document the symptoms and fears of our time. These symptoms and fears endure more than 200 years after the founding of the republic. Continuing violence against organized labor thus asks that we contribute to the realization of Cover's ideal by learning "to interpret our own suffering; [and by] recover[ing] our rights to make meaning."[481] In doing so, we recognize the continuation of the struggle in others and we place our suffering at their service.[482]

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477. *See* Stone, *supra* note 26, at 872-73.

> To transform social life through law, legal argument and interpretation must be framed within a larger vision of future, alternative possibilities. Not all visions of the future ideal world and not all means to realize them, however, engage law in the striving to transform social life. Messianic or utopian philosophies, Cover argued, often preclude the transformation of social life because they fail to ground their visions of the future in pre-existing legal contexts that can support new meaning.

Id.

478. *Id.* at 829.

479. Such defiance is even more noteworthy since it tells the story of absence. Absence becomes a synonym of violence. It implies a banishing, an obscuring, an exile—all imposed. It might also imply the longing that results as the exile longs for return to the particular place, often *the only place,* in which redemption is possible.

480. *Nomos and Narrative*, *supra* note 28, at 9.

481. Minow, *supra* note 38, at 1915.

482. Indeed:

> Cover's belief that law is a call to public service, social change, and community emerges vividly:
>
> Law students and young lawyers who are committed to careers in public service are an important national resource. In almost every law school in the

> land there are a few students who have embarked upon the study of law because they believe the profession to be an important opportunity for social change, an important avenue in the struggle for social justice . . . [O]nly a few are committed to the less secure, less lucrative and more frustrating careers in the public sector. Indeed, as law students are educated not only in law but in the realities of professional life, as they come to understand both what they must give and what they must give up for such a career, fewer and fewer create lives in the public service . . . . [W]hen, as now, public life is dominated by an ideology of gain and privatism, whatever support there is for such choices of a career in public service is generated almost entirely by the students, their families and professional mentors . . . .

Stephen Wizner, *Repairing the World Through Law: A Reflection on Robert Cover's Social Activism,* 8 CARDOZO STUD. L. & LIT. 1, 2-3 (1996).