

Stanley Diamond presents a detailed historical anthropology of law, with a variety of case studies. He contrasts "law" and "custom" as modes of social regulation. His perspective raises questions about social organizations in a wide range of times, places, and circumstances.

These readings take us far into the world of law enforcement, from the incidents of ordinary policing to their overarching structures and historical eras. The questions raised by these readings are relevant to all law enforcement: What are the relations between "right" and "might," between law and society?

8.1 The Violence of Legal Acts *Robert M. Cover*

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

The deliberate infliction of pain . . . we call torture. The interrogation that is part of torture, [Elaine] Scarry* points out, is rarely designed to elicit information. More commonly, the torturer's interrogation is designed to demonstrate the end of the normative world of the victim—the end of what the victim values, the end of the bonds that constitute the community in which the values are grounded. Scarry thus concludes that "in compelling confession, the torturers compel the prisoner to record and objectify the fact that intense pain is world-destroying." That is why torturers almost always require betrayal—

a demonstration that the victim's intangible normative world has been crushed by the material reality of pain and its extension, fear. . . .

. . . But the relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts. The act of sentencing a convicted defendant is among these most routine of acts performed by judges.¹ Yet it is immensely revealing of the way in which interpretation is distinctively shaped by violence. First, examine the event from the perspective of the defendant. The defendant's world is threatened. But he sits, usually quietly, as if engaged in a civil discourse. If convicted, the defendant customarily walks—escorted—to prolonged confinement, usually without significant disturbance to the civil appearance of the event. It is, of course, grotesque to assume that the civil facade is "voluntary" except in the sense

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*Author of *The Body in Pain* (1985), an analysis of pain.—ED.

¹I have used the criminal law for examples throughout this essay for a simple reason. The violence of the criminal law is relatively direct. If my argument is not persuasive in this context, it will be less persuasive in most other contexts. I would be prepared to argue that all law which concerns property, its use and its protection, has a similarly violent base. But in many, perhaps most, highly visible legal transactions concerning property rights, that violent foundation is not immediately at issue. My argument does not, I believe, require that every interpretative event in law have the kind of direct violent impact on participants that a criminal trial has. It is enough that it is the case that where people care passionately about outcomes and are prepared to act on their concern, the law officials of the nation state are usually willing and able to use either criminal or violent sanctions to control behavior.

that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry. . . .

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

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

. . . The best known study and theory of social codes and their role in overcoming normal inhibitions against inflicting pain through violence is Milgram's *Obedience to Authority*. In the Milgram experiments, subjects administered what they thought were actually painful electric shocks to persons who they thought were the experimental subjects. This was done under the direction or orders of supposed experimenters. The true experimental subjects—those who administered the shocks—showed a disturbingly high level of compliance with authority figures

despite the apparent pain evinced by the false experimental subjects. From the results of his experiment, Milgram has formulated a theory that . . . relies heavily on the distinction he draws between acting in an "autonomous" state and acting in an "agentic" state. Milgram posits the evolution of a human disposition to act "agentially" within hierarchies. . . .

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

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

. . . Judges, officials, resisters, martyrs, wardens, convicts, may or may not share common texts; they may or may not share a common vocabulary, a common cultural store of gestures and rituals; they may or may not share a common philosophical framework. There will be in the immense human panorama a continuum of degrees of commonality in all of the above. But as long as legal interpretation is constitutive of violent behavior as well as meaning, as long as people are committed to using or resisting the social organizations of violence in making their interpretations real, there will always be a tragic limit to the common meaning that can be achieved.

The perpetrator and victim of organized violence will undergo achingly disparate significant experiences. For the perpetrator, the pain

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

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

Notes and Questions

1. In thinking about Cover's analysis of the violence of legal acts, consider the following comment on the link between punishment and social values:

... The social values which are given the protection of the law, the rules which are enforced by the political power of the state because they are embodied in the criminal code, are those which are deemed desirable by those social groups within the state who have the power to make law. This fact is not so easy to discern when we confine our observations to democratic states, but in other forms of political organization it is obvious. The class distinctions in the criminal law—different penalties for masters and slaves, for nobles and commoners, for instance—furnish good illustrations. Fundamentally, then, the aim of all punishment is the protection of those social values which the dominant social group of a state regard as good for "society."

The multiplicity of theories of punishment and the confusion of thinking they have produced seems to be due to a confusion of ends with means. The means to secure the protection of "society" have varied greatly because the law-enforcing powers of different societies have chosen those means which they believed to be at a given time most likely to secure obedience to their law. These beliefs are in turn dependent on tradition, the level of knowledge, and the nature of social and economic institutions and conditions. The sanguinary punishments and tortures of old are no evidence of blood-thirstiness or sadism on the part of those who used them. They rather testify to the fact that those who

designed them could conceive of no better, that is more efficient, way of securing protection for the social values which they treasured. The character of punishments, then, is inextricably associated with and dependent on the cultural values of the state that employs them.[†]

2. Consider as well the following:

The ideas of the ruling class are in every epoch the ruling ideas: i.e., the class, which is the ruling material force of society, is at the same time its ruling intellectual force. The class which has the means of material production at its disposal has control at the same time over the means of mental production, so that thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it. The ruling ideas are nothing more than the ideal expression of the dominant material relationships, the dominant material relationships grasped as ideas; hence of the relationships which make the one class the ruling one, therefore, the ideas of its dominance. The individuals composing the ruling class possess among other things consciousness, and therefore think. In so far, therefore, as they rule as a class and determine the extent and compass of an epoch, it is self-evident that they do this in their whole range, hence among other things rule also as thinkers, as producers of ideas, and regulate the production and distribution of the ideas of their age: thus their ideas are the ruling ideas of the epoch.[‡]

3. In thinking further about how law enforcement officials may justify the violence they deploy, consider the following account of how Mengele, the Nazi doctor, once explained why he killed Jewish women together with their children at Auschwitz:

Orli had told me once how Mengele explained to her why he killed Jewish women together with their children. "When a Jewish child is born, or when a woman comes to the camp with a child already," he had explained,

[†]George Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York: Columbia University Press, 1939), pp. v-vi.

[‡]Karl Marx, "German Ideology," trans. by T. B. Bottomore (1845), in Erich Fromm, ed., *Marx's Concept of Man* (New York: Ungar, 1966), pp. 212-213.