THE RISKS OF POWER: WRITING ABOUT TORTURE, TERROR AND FORCE IN LEGAL THEORY

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1. INTRODUCTION

‘[T]here may even be a little pride involved in being silent when too many—or only many—are speaking.’¹

It is perhaps suggestive of the kind of problem that tends to occupy legal theorists today that one would find oneself asked to write upon the topics of torture or terror. Of course there are always certain topics one would find impossible *not* to write about; the point about these wouldn’t be to try and avoid them but to produce in them a whole other sense. On the other hand, there are problems that no-one takes any interest in anymore and thus get bypassed or forgotten about. In that field which we can still call ‘jurisprudence’, writing about a topic is like borrowing an image. When William Blackstone for example writes about sovereignty, and then of property, and then of crimes...² it is like a set of problems or a series of metaphors produced in order that law should maintain its ‘touch’ with reality. That these images—if *not the law itself*—inevitably lose touch, or lose their ideological hold on life, would be nothing unusual. They are abandoned in favour of other figures and other motifs more amenable perhaps to the metaphysical uncertainties that mark a particular era.

A trend toward writing about terror or torture in legal theory suggests an uncertainty concerning the relation between violence and law. The problematization of law and violence is often traced from Walter Benjamin’s ‘Critique of Violence’³ through Jacques Derrida’s reading of it in ‘Force of Law: The “Mystical Foundation of Authority”’⁴, where the question is posed in aporetic terms. Another way would be to follow the biopolitical path opened up by Michel

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¹ Nietzsche Friedrich *Human, All Too Human* (1984) University of Nebraska Press, Lincoln, trans. Marion Faber and Stephen Lehmann, 211.

² See Blackstone William *Commentaries on the Laws of England* (1978) Garland Publishing, New York.

³ Benjamin Walter ‘Critique of Violence’ in *Reflections: Essays, Aphorisms, Autobiographical Writings* (1986) Schocken, New York, trans. Edmund Jephcott, 277–300.

⁴ Derrida Jacques ‘Force of Law: The “Mystical Foundation of Authority”’ (1990) 11 *Cardozo Law Review* 921–1045.

Foucault. Foucault—following Nietzsche’s critique of Kant—anticipated terror’s relationship to law by undoing or reversing the traditional relationship between the *sense* of power and the juridical *form*, so that it could be no longer the form or formality of the juridical that was to give sense to power (‘what is the legitimacy of power?’), but power which of itself was to formalize and make sense of the juridical and the non-juridical. The opening of *Discipline and Punish* would give torture a new significance in its relation to normative discourses and call into question all of those paradigms used to account for the law’s existence upon non-violent terms.

A return to the problem of the laws, or to the problem of the origin of laws in all of these accounts required a somewhat more raw account of the relation between life and power than that which had been inherited from the thinkers of the Enlightenment, or even as it were, the common law tradition. Theory could no longer be content to presuppose the inherited forms or images of law—in a social contract or rule of law for example—in order to explain its power or modes of power. The genesis of law, to put it differently, needed to be thought together with nothing less than the genesis of power; a thought in which new images and forms would no doubt become necessary. So it would perhaps not surprise too many to find that, just as the prison was to be replaced paradigmatically by the camp (and the model of ‘confinement’ replaced by the ‘ban’) in Giorgio Agamben’s work,⁵ the themes of crime and punishment are also today being replaced respectively by those of terror and torture, for example in this collection of works, as we become increasingly affronted by—and thus more attentive to—those scenes and settings in which the juridical order itself appears most ambiguous, uncertain, ‘outside itself’ and therefore most radically at stake.

This article will attempt to re-encounter at least some of these scenes of law’s relation to violence in order to reflect upon and continue a particular strand of jurisprudence addressing the question of force in law. As such, I wish to approach the problems of terror and torture—and the very reasons why we might identify them as problems—from within a less conventional dialogue or discipline. More specifically, my aim is not only to assess some of the trends and moments in legal theory, through H.L.A. Hart and Robert Cover for example, that may have in recent times made violence, force and terror necessary figures for understanding law, but also to retrace—through a reading of Friedrich Nietzsche and Gilles Deleuze—certain concepts for the evaluation of the force of law beyond the perspective of normativity. These discussions are necessarily implicated within a broader thematic concern of legal scholarship. Yet whether we are too many or only many speaking on a particular theme, there are those who have already begun to reserve the right to make it speak to a select few and to be selected among this few.

2. FROM FORM TO FORCE

There is a certain style in which writers like Immanuel Kant or H.L.A. Hart pose problems for themselves. One poses a problem only to account for the solutions and answers one already

⁵ See in particular, Agamben Giorgio *Homo Sacer: Sovereign Power and Bare Life* (1998) Stanford University Press, Stanford, trans. Daniel Heller-Roazen.

has—answers that everyone recognizes or takes for granted. No-one can deny this or that, ‘but let me suspend your belief for just a moment!’ The intellectual work or rigor happens neither in the setting nor answering of the problem, but just in this moment of suspension during which one lays down all the rules or conditions upon which one rediscovers what one already knew to begin with. Kant knew how to make this particularly systematic—we’re not even asking whether something is true or not in itself, just under what conditions it would appear to be so.

In Hart I am thinking of a terrorist—his famous figure of the ‘gunman’ in *The Concept of Law*.⁶ Hart uses the gunman to make a point about the nature of law to critique the positivist John Austin: that law is constituted not by orders but by a system of rules. It’s necessary that the reader already agrees with him that the gunman is not part of the law. He says something like: ‘everyone knows that the man who points a gun at your head and orders you to do something does not speak the law, but let’s just figure out exactly why...’ He reveals in a way his inheritance of a very peculiar and traditional way of approaching problems in legal theory: that is via an *apologetics*.⁷ Why is the gunman just a criminal and not a sovereign in his own right? Why can pure force not constitute law? It’s a worthy question but Hart only asks it because he already knows the answer or wants to defend the legal institution against a coming accusation.

Hart did not understand Austin very well—the completeness of the relationship between commands, habit and obedience. If law is just orders backed by threats, he asks about Austin, how can we distinguish the gunman from the law? Certainly not by an evaluation of their force! We can’t distinguish the force of the gunman from the force of law. We can distinguish them only because law has a particular form; it is a system of rules or norms that we recognize as authoritative. Hart is putting it in this way: given that we all know that the order of a gunman does not constitute law, what would be the conditions of such knowledge? How, in other words would it be possible to know what is and isn’t law. The answer, in Kantian terms, would be not simply that we happen to obey but that in law we necessarily apply the same categories or forms or rules to all possible objects of experience. There is a rule of recognition in law. Hart poses the problem of the gunman then to show—not that there would be a difference in the force of the gunman compared with the force of law—but rather that the gunman’s order does not have the form of a *rule*.⁸ Nothing the gunman orders you to do refers to any rule; therefore if you happen to obey, it may be *in fact* but it will not be *in principle*.

Hart had a broad influence in restoring the self-image of common law in a post-war period. But the formalism to which his concept of law gave rise, already contained certain seeds of uncertainty. If legal authority was to be constituted solely by the character of a system of authoritative rules operating independently of the mere contingencies of force, how could the force of law itself be accounted for? A different and more radical theoretical approach or premise

⁶ Hart H.L.A. *The Concept of Law* (1994) Clarendon Press, Oxford, 18–25.

⁷ On the apologetic tradition in common law see especially Goodrich Peter *Oedipus Lex: Psychoanalysis, History, Law* (1995) University of California Press, Berkeley.

⁸ The order of a gunman could also therefore not follow Kant’s categorical imperative: ‘Act only on that maxim by which you can at the same time will that it should become a universal law.’ See Kant Immanuel *Groundwork of the Metaphysics of Morals* (2003) Oxford University Press, Oxford, 222.

would become necessary: that it is precisely an *evaluation of force* that is at stake in the question of law's authority.

Robert Cover touched the issue of violence and law in his article 'Violence and the Word'. It is here that Cover introduces the scene of torture or violence as a paradigm of legal interpretation. Legality is a morbid business for Cover. 'Legal interpretation,' he begins, 'takes place in a field of pain and death.'⁹ This figure will express a kind of paradox in jurisprudence because legal interpretation, which it was in fashion among legal theorists to say at the time exemplified the fact that we create shared meanings in the world, on the other hand could only be 'legal' *per se* by connecting itself to a machinery of force or violence that necessarily destroys and corrupts any shared meaning in the world. Thus torture, which in Elaine Scarry's account would figure the end of the normative world for the victim,¹⁰ also figures the limit of legal interpretation itself. In Cover's words:

It is ultimately irrelevant whether the torturer and his victim share a common theoretical view on the justifications for torture—outside the torture room. They still have come to the confession through destroying in the one case and through having been destroyed in the other. Similarly, whether or not the judge and prisoner share the same philosophy of punishment, they arrive at the particular act of punishment having dominated and having been dominated with violence, respectively.¹¹

We will note something very simple about Cover, because he himself does not make grand claims. Like Hart he will put forward very straightforward things, and yet we can notice an important shift in thinking; a foreshadowing of a different way of thinking about legal relations which will make a turn toward scenes of violence all the more necessary in legal theory. It's not unique to Cover, but he rediscovers it and hints at it in his own way. He is hinting that the paradigms used in legal theory so far have been too optimistic or too institutional; that they still haven't accounted for one of the very simplest of facts about legal discourse and legal interpretation—that it occasions or implicates violence; that implicit in the concept of law is also the fact of its violent enforcement.

Why is this an important thing to note? It's not a difficult or controversial idea. Yet Cover realizes that he will be accused of turning everything on its head; of somehow siding with the criminals or of making legally sanctioned violence indistinguishable from criminal or terrorizing violence and hence as making them in some way equally reprehensible. Only a terrorist would call that jurisprudence! Cover too then has a moment of apology: 'If I have exhibited some sense of sympathy for the victims of this [legal] violence,' he writes, '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.'¹²

⁹ Cover Robert 'Violence and the Word' 95 *Yale Law Journal* 1601 at 1601.

¹⁰ Scarry Elaine *The Body in Pain: The Making and Unmaking of the World* (1985) Oxford University Press, New York.

¹¹ Cover above note 9, 1609.

¹² *Ibid*, 1608.

What this reveals is that this necessary violence of law is the site of a responsibility addressed toward the moment of its discourse. But it should also be the site for a *differentiation of forces*. Cover's claim is not that, being necessarily connected to the institution of violence, law would become no better than a gunman, but that since rules themselves do not operate without having to be violently enforced, it is also toward force rather than just to rules themselves that the evaluation of law must be directed. From this perspective, the question of force must be addressed more directly in jurisprudence. It must be addressed more directly because any understanding of law depends upon an understanding of differences in force, and these differences cannot be assessed on the basis of forms or on the basis of a norm, for it is this formal or normative basis itself that is in question and must be accounted for or wagered upon.

3. TERROR: THE BALANCE OR EQUALIZATION OF FORCES

The normative way of assessing force asks only whether force is capable of supporting a norm. The normative is thus taken as a given or *a priori* of force, that is, force is forceful and effective only to the extent that it must produce and carry its own normativity. It overcomes its resistance only by fulfilling and accepting the normative. Thus, even though we do not have a complete knowledge of the normative universe or universal law, the closer our action coincides with the *form* of the universal (the rule), the more force this action has in existence.

In an essay entitled 'Force' published in 1989, Stanley Fish conjures up Hart's character of the gunman once again to figure the question of the relationship between force and legal interpretation. Fish's argument looks a little like Cover's because he is suggesting that the nature of institutional discourse, whether it is in the form of law or something else, is that it brings with it a relation of force, violence and submission. The gunman, in Fish's estimation, exercises the same kind of authority and the same measure of force as a court of law when viewed from the perspective of the helpless or abandoned individual.

[T]he individual is no less at risk when he is at the mercy of an interpreting court than when he is at the mercy of an armed assailant. In both cases he is nakedly exposed to an agent who has seized authority and is in the accidental circumstance of being able to get away with it.¹³

Fish would have been astute to the fact that rules do not apply to the real world without constituting and carrying with them a degree of force. But Fish is drawn to posit an absolute identity between force and value, in which 'the force of law is always and already indistinguishable from the forces it would oppose. Or to put the matter another way: *there is always a gun at your head*.'¹⁴ Fish's argument is that whatever it is that makes you do or think or believe something—there is its force, which is as crude and brutal and inescapable as a gun at your head.

¹³ Fish Stanley 'Force' in *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) Duke University Press, Durham, 505.

¹⁴ Ibid, 520.

No doubt the positing of an identity between force and value would pose a serious problem for the evaluation of forces. All values would be constituted by force. In fact, Fish is sticking very closely to Hart's problematic. What made Hart abandon first of all any definition of law in terms of its force was the fact that the latter could ultimately be equalized; that there was something equal in the force of the gunman and the force of law that made them indistinguishable on this account. Hart was not able to say that the force of law was any greater in any circumstance than the force of a man with a gun; therefore force could not be an essential aspect of law; rather its image in the form of a system of rules or norms etc was a more definitive element.

What is intriguing is perhaps that this same realization for Fish—the impossibility of differentiating between types of force or ‘the identification of force... with interpretation’¹⁵ as he puts it—brings him also to the point where all that is left (once forces nullify themselves) is only a pure *form of recognition*. The act of interpretation is nothing but the recognition of force. All forces are absolutely constitutive of values for Fish, therefore—since you already necessarily recognize them as your own—don't bother thinking you can avoid or oppose or resist any of them! In this estimation, forces are equalisable if not in some kind of equilibrium; the active is equivalent to the reactive, insistence to resistance. Thomas Keenan in his close reading of this dialogue in *Fables of Responsibility* names this relation of the equalization of forces ‘terror’, which he suggests is figured purely as *ambivalence* in Fish, but must also nonetheless figure our *responsibility*. In the context or paradigm of guerilla war, he claims:

The economy of the trade-off between weapons of persuasion and of assault is left elegantly unspoken, and for this gesture of ambivalence I think we must indeed reserve the name of “terror.” But the name cannot simply function as a condemnation, for terror would also be the most powerful example of the superimposition of responsibility and publicity that defines our exposure to alterity.¹⁶

Terror is the experience of the equalisation of force; the equality of master and slave. Cover had tried to show this with the example of torture adopted from Scarry: under torture for example, in the scene of torture, the problem is not to have good or just values, it is just to manage somehow to have a value. We can start to see perhaps in what sense Cover was in fact pointing in a very different direction to Fish which would be taken up more fully by others. Yes, force and violence *are* necessary to the theorization of legal interpretation, but not because law would be total or monopolizing in its force or power; not in other words because forces would be equal or reducible to one another, but because they are *unequal*, unable to be equalized or made equivalent.

It is this inequality of force that necessitates an evaluation or interpretation, but no longer an interpretation which would be overcome by the force of established values. I'm not using Keenan's language, but he's also saying it—this is why violence must be accounted for rather than

¹⁵ Ibid, 507. Fish here admits that he is able to do in four pages what Hart took one hundred and forty pages to do.

¹⁶ Keenan Thomas *Fables of Responsibility: Aberrations and Predicaments in Ethics and Politics* (1997) Stanford University Press, Stanford, 15–16.

simply condemned. Forces always need to be distinguished, differentiated, evaluated. Which forces are active and which reactive; which are dominant and which dominated? Fish would say that it doesn't matter because they are identical in measure. Hart might say that they are distinguishable only by the criterion of a rule. But Cover, I believe, is trying to say that the form of a rule is secondary or derived; it is only the difference in force as the object of an interpretation that matters first of all. If we are prepared to make a distinction as Hart did between the terrorist and the law, it can only be—paradoxical as it may seem—on the basis of their *force*, not on the basis of the normative order or any other formal measure by which we recognize one and the other. This indeed is what is most challenging or difficult or risky.

An evaluation of the force of law cannot rely upon the sphere of representation. What does this mean? It means that it is only from a very limited perspective that the law can be defined by the forms under which it has authority. For example, representations such as contract or crime—you can make your own list according to your own preferences: tort, restitution etc. if that's what interests you—by which we recognize or represent to ourselves the fact that we have obligations. It may be fascinating how these will always work in a paradigmatic sense; seemingly covering the broadest and the subtlest difference in the sphere of legal relations. But Cover is calling for a different more visceral type of analysis, an analytics of the relation between interpretation and power or between violence and justice, which he terms 'jurisdiction'.¹⁷ Not just an analysis of the meanings of juridical statements in other words or their limitations, but an analysis of the relation between these meanings and the institutional force they occasion, or command or act out in flesh.

In this way interpretation is not just a question of finding the better or more correct meaning among a number of possible meanings, it is a matter of producing meaning itself from the meaningless. Representation may account for the formal differences in value which may be mirrored in a legal system, but it does not account for the difference in force necessary for there to be value at all as an original quality. Thus, beyond representation, the law is definable only by a degree of intensity, its innovation, what kind of force it commands, who it can rule over—that is, irrespective of whether anyone recognizes it.¹⁸ This requires—and requires us now—not only to explore different modes of analyzing law's relation to those scenes which mark the ends of representation and normativity (such as terror and torture), but also to move toward a possible method for the evaluation and differentiation of forces.

¹⁷ For a reading of Robert Cover's work as elucidating a theory of jurisdiction see especially, Rush Peter, Young Alison and McVeigh Shaun, 'A Judgment Dwelling in Law' in *Law, Violence and the Possibility of Justice* (2001) Sarat Austin (ed.) Princeton University Press, Princeton, 101–141.

¹⁸ Those who recognize the law are often designated by the term 'legal subjects', but the law rules over legal subjects only in the sphere of representation. Beyond representation, the subjects who can be ruled over designate original qualities of force and power. They are perspectives which correspond to differing intensities of value that must be increased through interpretation. It is not a subject therefore which interprets on the basis of certain values (the scheme of representation), but interpretation itself which gives rise to nascent subjects which actualize either an increase or decrease in value and power.

4. NIETZSCHE'S EVALUATION OF FORCE: THE UNEQUAL

How does one evaluate force? Gilles Deleuze in his *Nietzsche and Philosophy*, makes Nietzsche tell us a few things about force and value. First of all, it's not enough to begin with what is equal in measure. To take our example once more—the gun-up-against-the-head on the one hand and the persuasive discourse of law on the other—these can only be deemed to be equal in force from a very peculiar perspective: *the perspective of the one who obeys*. The whole of Nietzsche's philosophy works through this type of perspectivism—what Deleuze calls elsewhere a 'method of dramatization'¹⁹—not 'what is...?' but 'which one...?' Which one interprets—or what kind of existence must one have to interpret these forces as being equal...? From the perspective of the one who obeys, forces always seem equal or equivalent when they are able to make you do the same or equivalent things, and difference in force is assessed purely in opposition or in contrast to this equivalency (always 'not enough' or 'too much' force). It's not a particularly lively principle. It's like submitting artists to the judgment of paint. Hart couldn't quite get past it. How can there be difference in force when the outcomes appear the same? It's the wrong sort of question, for the *essence* of a force is precisely in its *difference in quantity* from other forces, or its *intensity*.

The second principle follows from this: that we make a very poor evaluation of force when we as a principle assign its greater value to the one who triumphs. The triumphant are deemed to have superior force in other words only from the perspective of those who always need to lose; for example the resentful or the guilt-ridden or the impotent. Who needs to lament the fact that certain forces triumph in the world except for those of us who make losing necessary, or the mode of our existence?

Cover confronts this issue with his examples of martyrdom in 'Violence and the Word'. 'Martyrdom,' he writes, '...is a proper starting place for understanding the nature of legal interpretation.'²⁰ In what sense is he speaking? Cover wants legal interpretation to be an assessment of force as well as meaning. That is, he wants to address specifically the relationship between force and justice. But the 'torture of the martyr,' he writes, '...reminds us that the interpretive commitments of officials are realized, indeed, in the flesh.'²¹ The problem or paradox relating force and justice then is: how to reconcile the fact that pure force is a destroyer of shared meaning or justice in the world, with the fact that meaning or justice is nothing and can be nothing without force? Cover is going to make the martyr a symbol of the paradox itself: he undergoes the violence—becomes 'nothing' in the name of justice by denying force the right to be in the name of law. It is the martyr who interprets and 'gives meaning' to violence and suffering—and thus best inhabits the paradox for Cover.

Is the martyr the best interpreter of the relationship between force and justice? Nietzsche in fact devotes the whole third treatise of his *On the Genealogy of Morals* to a discussion of

¹⁹ See Deleuze Gilles 'The Method of Dramatization' in *Desert Islands and Other Texts 1953–1974* (2004) Semiotext(e), Los Angeles, trans. Michael Taormina, 94–116.

²⁰ Cover, above note 9, 1604.

²¹ Ibid, 1605.

martyrdom, or as he terms it ‘the ascetic ideal’.²² It’s an inverted world, the world of the martyr, a very sick idea or a particularly poor interpretation. It’s all very much like bad air for Nietzsche—the worship of impotence. So why does he need to write about it? Nietzsche writes about it because he still wants to know whether there is a different way to evaluate force other than from the perspective of the impotent, the martyr or the self-denier. How to evaluate force other than from the perspective of those who can’t do anything about it and thus simply suffer it or passively undergo it or indeed just *experience* it?

We can see that if there was any such perspective—a perspective from which we would be able to say that superior force is *not* the force which necessarily prevails or triumphs—it would be a perspective from which we would have to risk being considered unjust through force. One would have to risk violence and injustice in order to exercise and command the greater force; in order to assess force from the viewpoint of the strong rather than from the weak. Cover’s paradox—which was also incidentally Pascal’s paradox²³—is still firmly in place but is interpreted by Nietzsche as a principle for the affirmation of force, rather than as a principle for the negation of injustice. For the moment that is, there are two perspectives on it. The martyr who submits to any force or wills nothingness in order to avoid the risk of injustice or to preserve at least the spirit of justice; and the strong or powerful who on the other hand take the risk of ‘injustice’ so as never to submit, so as to avoid the risk of leaving force unfulfilled; to always take it to the limit of what it can do.²⁴ Nietzsche is saying that the weak have a very different conception of justice than the strong. ‘The active, the attacking, encroaching human is still located a hundred paces nearer to justice than the reactive one.’²⁵ Justice is not a shared view in other words but a singular and dangerous insight. It does not care for the weak who triumph everywhere, on the contrary, it is the principle by which the strong rule to their fullest extent over the weak.

In the discussion of Plato’s *Gorgias*, Socrates misunderstands Calicles on this same point. Concerning the question: is it better to have suffered an injustice than to have done an injustice; Socrates wants to show Polus that to do an injustice is worse than to suffer because from an objective point of view doing injustice involves both sickness and evil, whereas to suffer involves only sickness. Calicles on the other hand—who Deleuze claims is very close philosophically to Nietzsche here²⁶—interjects and claims that Socrates’ answers keep changing depending on what

²² Nietzsche Friedrich *On the Genealogy of Morality* (1998) Hackett Publishing, Indianapolis, trans. Maudemarie Clark and Alan J. Swensen, 67–118.

²³ See Pascal Blaise *Pensées* (2005) Hackett Publishing, Indianapolis, trans. Roger Ariew, 29–30. ‘It is just to follow the just. It is necessary to follow the strongest. Justice without might is powerless. Might without justice is tyrannical. Justice without might is challenged, because there are always evil people. Might without justice is indicted. We must therefore combine justice and might and, to that end, make what is just strong, or what is strong just.’

²⁴ Nietzsche points toward the ordinary sense of *shame* involved in submission, even in the submission to something as ‘upright’ as the law. ‘Submission to the *law*,’ he writes, ‘—oh with what resistance of conscience the noble dynasties everywhere on earth renounced vendettas and granted the law power over themselves! For a long time the “law” was a *vetitum*, a wanton act, an innovation; it appeared with force, *as* force, to which one could not yield without feeling ashamed of oneself.’ Nietzsche, above note 22, 81. Submission therefore is opposed in all respects to the force of innovation and experimentation; the question would be not to give submission an ‘ironic’ sense, but to make the sphere of submission worthy of one’s shameless innovations.

²⁵ Nietzsche, above note 22, 49.

²⁶ Deleuze Gilles *Nietzsche and Philosophy* (2002) Continuum, London, trans. Hugh Tomlinson, 58.

perspective he takes; the perspective of nature or the perspective of rule or convention which, he claims, have fundamentally different conceptions of justice.

For by nature everything is more shameful which is also worse, suffering injustice, but by rule doing injustice is more shameful. For this isn't what happens to a man, to suffer injustice; it's what happens to some slave for whom it's better to die than to live — for if he suffers injustice and abuse, he can't defend himself or anyone else he cares about. But in my view those who lay down the rules are the weak men, the many. And so they lay down the rules and assign their praise and blame with their eye on themselves and their own advantage... [T]hey are satisfied, I take it, if they themselves have an equal share when they're inferior. That's why by rule this is said to be unjust and shameful, to seek to have more than the many, and they call that doing injustice. But I think nature itself shows this, that it is just for the better man to have more than the worse, and the more powerful than the less powerful... the just stands decided in this way — the superior rules over the weaker and has more.²⁷

Socrates is going to reply: but there is no difference between law and nature, because it is natural that the law should prevail and that it indeed prevails only by forming a greater force than the strong, or rather by overcoming those with mere brute or rhetorical strength. Callicles however, is trying to express the fact that the weak don't prevail by becoming strong, by banding together and forming a greater force, but on the contrary that the weak stay forever weak and only prevail by everywhere limiting and 'shaming' life; that is, as Deleuze writes of this dialogue: 'not by forming a greater force but by separating force from what it can do.'²⁸

It is more obvious perhaps what kind of complicity there is between the martyr and the tyrant. Cover still wanted to oppose the martyr to the tyrant as a kind of figure for the opposition between justice and injustice, but we can see that the two have something more fundamental in common. The tyrant and the martyr offer a very similar perspective on life—they both have a very powerless existence. Nietzsche wants us to see in what sense they *need each other*. The strong and the weak are qualities in a relation of force, but the martyr and the tyrant dramatize a certain perspective on these qualities. The sick perspective on the world is a double perspective, and one that needs to see sickness everywhere. Martyrs who need everyone to be tyrants and tyrants who need everyone to be martyrs. It's not a matter of exercising 'too much force', for they can feel power only by ruling over lifeless bodies and negated forces, by reducing all life to a state of sadness. Their measures are not extreme enough for Nietzsche. This is what martyrs and tyrants have in common; to interpret force from the most banal and docile perspective, to make impotence the object of a will. We can summarize two very peculiar symptoms of it—1) to presume that forces are equalizable or reducible in measure (ie. that ledgers can be squared); and 2) to assess superior force to be the one that factually triumphs.

²⁷ Plato *Gorgias* (1979) Clarendon Press, Oxford, trans. Terrence Irwin, 483.

²⁸ Deleuze above note 26, 59.

5. PARADIGM OF THE EXCEPTION

Nietzsche has by no means—and even less perhaps in the Anglophone world—had an overwhelming influence in the field of legal theory. Books such as *Nietzsche and Legal Theory*²⁹ have gone some way in recent times toward rectifying the misperception that his philosophy would have made no serious contribution to legal or political studies. In fact it should not be surprising if a critique of law and power that went as far as Nietzsche's would divorce itself from all previous discussions on law or power. Those borrowing their methodology from Foucault for example would also be faced with a dilemma concerning the relation between power and law. If Foucault was to show through Nietzsche that power operated in society at a completely different level than what was understood as the 'juridical' or 'institutional', then how would it still be possible to address a question of law seriously? Giorgio Agamben would have at least found a figure in jurisprudence through which it would be possible not to completely exclude Nietzsche from the theory of law. The figure was a theory of sovereign power taken from Carl Schmitt.

Why did Agamben think that it was Schmitt and not Hart or Hans Kelsen who had made the most fundamental insight regarding legal theory in the twentieth century? Was it not that the latter two had been content to represent the mode of authority of a normative system such as law only through the reconstruction of fact, without that is accounting for the system of power into which both norm and fact had necessarily to enter in order to be related? Schmitt however notes the ambiguous place that power occupies in relation to law.

Power proves nothing in law for the banal reason that Jean-Jacques Rousseau, in agreement with the spirit of his time, formulated as follows: Force is a physical power; the pistol that the robber holds is also a symbol of power. The connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty. All difficulties arise here. What is necessary is a definition that embraces this basic concept of jurisprudence.³⁰

Agamben takes up this jurisprudential challenge explicitly in *Homo Sacer* which in his own words, 'concerns precisely this hidden point of intersection between the juridico-institutional and the biopolitical models of power.'³¹ Hart and Kelsen were not much use in this project because they had both left the most crucial problem in legal theory unspoken: not the relation of one norm or rule to another, but the problem of the *application* of norms in general which, according to Agamben, was to be a purely practical rather than a logical operation.³² The operation has to be practical rather than logical (or Kantian) Agamben tells us, because the norm can in no way be said to contain any reference to its own applicability, therefore its connection to a state of reality or to the concrete case is necessarily marked by a degree of force or related by a degree of power. It was Schmitt then, first and foremost, who had been audacious enough to theorize the form of

²⁹ Goodrich Peter and Valverde Mariana (eds) *Nietzsche and Legal Theory* (2005) Routledge, New York.

³⁰ Schmitt Carl *Political Theology: Four Chapters on the Concept of Sovereignty* (1985) MIT Press, Cambridge Mass., trans. George Schwab, 17–18.

³¹ Agamben above note 5, 6.

³² Agamben Giorgio *State of Exception* (2005) University of Chicago Press, Chicago, trans. Kevin Attell, 39–40.

this relation of power—the decision on the state of exception—into the very structure of the juridical order itself.³³ Neither the rule in itself nor power in itself could prove anything about law for Schmitt, yet the state of exception nevertheless revealed a decision that simultaneously *guaranteed* the rule and also *authorized* power.

The state of exception was a way to think the ‘limit-concept’ of law. ‘In its factual substance... it cannot take a juridical form,’³⁴ but nevertheless, in not taking a juridical form, it can therefore reveal two formal elements of the law: the norm and the decision. The norm in other words must guarantee in some way its factual existence by force, and it is this which Schmitt says is the mode of a sovereign decision, not on the norm but on the exception.

Obviously Hart and Kelsen, by focusing exclusively on the norm or rule, had both taken for granted the decision which would guarantee the existence of the normative order itself. Perhaps what they had presupposed more precisely was not so much the uniformity of such a decision, but just that it was for someone else to make: a sovereign perhaps, or just the next person along a chain, in short as I am myself a part of a legal system ‘not me!’ Schmitt would have seen with Nietzsche that ‘facts’ as such come into vision all the more clearly once one takes on this perspective; in other words, once there is someone or something competent to guarantee them for me. Yet Agamben doesn’t want to leave everything to Schmitt in terms of the definition of sovereign power. This is why the dimensions of a ‘state of exception’ itself must be drawn in more detail in his work and not simply left to the somewhat arbitrary function of a ‘decision’. In fact Schmitt’s ‘decisionist’ language becomes more difficult to maintain because Agamben does not see power as a form of agency but instead as belonging to relations or to a particular structure. The state of exception is regarded as ‘a threshold of absolute indistinction between law and fact’³⁵ held in relation by power or by an interpretation of force.

It is only in the state of exception, where laws or norms are suspended, that a norm can be related to a segment of reality. It is thus more like a paradigm or plan than a factual state of affairs, even though it seems to become especially cognizable in such situations as Guantanamo Bay. More specifically, it is a paradigm that accounts for the connection between ‘actual’ power and ‘legal’ power—to modify Schmitt’s terms—by calling into question ‘every theory of the contractual origin of state power and, along with it, every attempt to ground political communities in something like a “belonging”’.³⁶ Crime and punishment as models for the object and exercise of legal power are also therefore somewhat dependent upon this notion of ‘belonging’, while terror and torture on the other hand become increasingly instructive in their relation to an area where what is at stake is not just the possibility of judgment according to law, but indeed *the production of bodies capable of being judged*. Terror and torture, unlike crime and punishment, evoke the sense in us that violence may first of all have no normative register. Therefore it may better engage us with the problem of force and justice or the problem of our existence under a normative system which legal theory has begun to rediscover.

³³ See however Agamben’s reconstruction of a debate between Benjamin and Schmitt over the state of exception in Agamben, above note 31, Chapter 4, 52–64.

³⁴ Carl Schmitt quoted in Agamben above note 32, 33.

³⁵ Agamben above note 5, 187.

³⁶ Ibid, 181.

Like Hart's or Rousseau's gunman, who should have been a terrorist rather than a criminal—for the criminal is such only within the terms created by the juridical order³⁷—this figure of terror poses for us the question whether, in the suspension of the juridical normative order, forces are still able to be evaluated in some way. The state of exception was to be precisely that paradigm which would express our intellectual engagement with this problem—how do we assess force other than according to a normative principle? Or who is sovereign?

6. UNRECOGNIZABLE POWER

Agamben would obviously have seen sovereignty to be a far more complex problem than say John Austin or other of the nineteenth century jurists for whom power was still unambiguously related to the state and its prerogatives. Yet what exactly marks this complication of power and sovereignty? What in other words would happen to the concept of sovereignty once power is begun to be thought, no longer in terms of prerogatives or formal functions but in terms of techniques and technologies that place life itself in a bind with authority? Nasser Hussain writes that in a sphere of law understood in normative terms—whether that is in a Hartian or Foucauldian sense—‘to raise the question of sovereign power is to invoke the figure of the archaic.’³⁸ Yet Agamben's engagement with Schmitt indicates that those who have wanted to exclude sovereignty from the analyses of power structures or legal systems, have done so at the risk of losing sight of the point which defines the strength (or weakness) of those structures themselves.

The disciplinary conception of power has meant not so much that sovereignty is an outdated or meaningless concept, but simply that the sovereign becomes more difficult to identify. Schmitt was perceptive enough, given the trend to view law as inherently normative rather than simply positive, to want to ask once more ‘who is the sovereign?’ His answer to the question however—‘he who decides on the exception’—would tell us nothing about the *personality* of the sovereign, particularly since ‘the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege.’³⁹ Agamben on the other hand uses various examples of persons to illustrate the liminal quality of the state of exception. Thus ‘in the person of the Führer bare life passes immediately into law, just as in the person of the camp inhabitant (or the neomort) law becomes indistinguishable from life.’⁴⁰ Sovereignty here appears at the disjunction, and as that which

³⁷ See Anidjar Gil ‘Terror Right’ (2004) 4.3 *CR: The New Centennial Review* 35–69, 43. For Anidjar as well as for Schmitt, ‘the concept of the enemy as a criminal’ is a discriminatory concept, because it presupposes a community of values that still requires a decision on its existence.

³⁸ Hussain Nasser *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003) The University of Michigan Press, Ann Arbor, 12.

³⁹ Schmitt above note 30, 5.

⁴⁰ Agamben above note 5, 187.

effects the disjunction, between law and life. Yet the person of the sovereign does not belong to either order.

Agamben should perhaps have made a proviso to Schmitt's theory. The sovereign who decides on the exception is *not the one you recognize*. Why would it be important to say this? In the first place, as Schmitt notes about all previous accounts of sovereignty, it is considered the 'highest, legally independent, underived power.'⁴¹ In the absence of legal norms then, who is it that can exercise the greatest power? Nietzsche would have liked this formulation. What is repugnant for him is just the idea that the greatest power or force in this situation would be considered as a capacity to make others recognize your power. It is precisely the weak and the reactive whose *power depends entirely upon its recognition by others*. What are they capable of? Nietzsche says: 'What do they actually want? At least to *represent* justice, love, wisdom, superiority—that is the ambition of these "undermost ones", of these sick ones!'⁴² The truly just have no need to represent justice; the truly powerful have no need to convince others of their power. Just as the superior force was not the one which necessarily prevails, the most powerful are not those who would make us recognize their power.

The state of exception is indeed a figure for conceiving power and sovereignty in terms other than that of recognition. Agamben uses a number of examples to illustrate the relation between power and force, law and life in the state of exception in *Homo Sacer*. One of these is the figure of the '*Muselmann*'. The *Muselmann* in the Nazi concentration camp was 'a being from whom humiliation, horror, and fear had so taken away all consciousness and all personality'⁴³ in the camp that various forces would be no longer distinguishable; the cold and the ferocity of the SS are experienced in the same way. 'Because of this,' writes Agamben, 'the guard suddenly seems powerless...'⁴⁴ It is not hard to see why; the forces of the camp inhabitant are diminished together with the forces of the guard. The terror is not so much in the violence itself but indeed in the equalization of forces; the nihilism in the fact that violence has no value or meaning. This zone in which natural forces and juridical forces become indistinct is the zone for a determination of power.

Yet, in what sense can power be figured in this situation? Why does this scene reveal something about the nature of sovereignty for Agamben if not for the fact that it implicates for us a field of anormativity in which a question of power can be raised anew? Like the examples of torture used by Cover, the scene of the concentration camp raises the problem of the relation between force and normativity. It is a sphere in which forces—through their becoming indistinguishable with one another—require a new interpretation. In other words, it raises the question of how to produce meaning in a place where meanings have subsided. This does not mean that the evaluation of force thereby becomes more arbitrary. On the contrary, difference in force—if it cannot be assessed upon normative or moral grounds—must still be assessed as a question of power.

⁴¹ Schmitt above note 30, 17.

⁴² Nietzsche above note 22, 88.

⁴³ Agamben above note 5, 185.

⁴⁴ Ibid.

Force must be related to power by a rigorous principle of repetition. What does this mean? Deleuze writes that: if 'force is what can... power is what wills'⁴⁵—or in other words power is what experiments and repeats and therefore also *interprets* force. It's like a child who discovers she can force things a little and then 'let's see if I can do it again... and again...' On the other hand in another room there is a parent thinking: 'this is the very last time I'm getting up to put her back to sleep...' There it is: a power relation; a mode of existence. Maybe things went so well the second time for the child—'well then, something else perhaps'. The parent and the child in this relation both have their own forces and their own will, but it would have been clear to Nietzsche which of these were active and which reactive, which were weak and which strong, which were dominating and which dominated. The powerful one is not the one which triumphs but the one which comes back. It is meaningless to point out that certain forces triumph 'in the end', for everything done on the condition that it will be 'only once' or 'for the last time' is reactive and does not come back.

Power is only related to force in the sense of returning and affirming; in the sense of making something a mode of your existence. There are those who, for example, in noticing the connections between certain events laugh and say to us: 'no-one ever learns anything; people make the same mistakes; history repeats itself...' It would be enough to turn this principle around upon them and suggest that assuming everything they did was to be some sort of mistake, which of these would they be prepared to make over and over again an infinity of times? This principle of repetition—which he will call the eternal return—is the most joyous piece of wisdom for Nietzsche. Who passes the test? Reactive forces may everywhere prevail but they won't come back! The weak?—well, we'll only have to endure them once, for everything they do they do it saying 'this is the very last time!' Perhaps the guard can't demoralize the camp inhabitant for example without in some sense thinking: 'it will be good once this is finished with.' And maybe a camp inhabitant will need to consider whether it is as useful to resent the cold as equally as one resents being beaten, or on the other hand whether all of these forces can be an object of affirmation in a will that dominates, interprets and differentiates.

No doubt, if the conception and analysis of power in jurisprudence will have developed over the past century, so too has the personality of the sovereign. Moreover, if it seems that juridical and political forces today triumph in certain forms increasingly depersonalized and increasingly indistinguishable from life itself, Nietzsche would have already found it necessary to preserve in this relation of sovereignty and life at least the notion of a 'will'. The sovereign can no longer be the one who is *recognized* as powerful and who wants power to be recognized. In the relation between the weak and the strong, it is only the weak who want recognition. The sovereign is instead the one whose power is unburdened by norms or facts, who dances, whose power reaches out, the one whose power cannot be thought in terms of the normative or juridical order without the latter changing in nature. From the perspective of the strong, force has value not because it would be able to enforce a norm, but because it would be able to will its return or to affirm its difference. The greater force—the force which turns toward strength rather than weakness—is the one which would make itself an object of an affirmative will.

⁴⁵ Deleuze above note 26, 50.

7. CONCLUSION

Any analysis of law that wishes to take into account its relation to force requires a principle adequate to its object. This means not just acknowledging that laws need to be enforced, nor simply assessing the normative grounds upon which that force is deployed, but finding the measure of force itself by which law would have a quantum of value. There are three separate modes in the assessment of force. The first which is normative takes the juridical form as a standard and defines force by its capacity to reproduce the normative universe. The second on the other hand takes all these normative values as misunderstandings of a quantitative scale that measures only the intensity of forces necessary to produce value as an absolute. The third however gives this quantitative scale a principle of difference and non-equalization, such that difference in force itself cannot be reduced or equalized or cancelled out on any scale and therefore force must be subject to a will that at each point qualifies, differentiates and evaluates. 'The will to power,' as Deleuze puts it, 'is thus added to force, but as the differential and genetic element, as the internal element of its production.'⁴⁶ The active and reactive, the dominated and the dominant in a relation of forces are products of the will to power.

What the structure of violence at the heart of law should tell us is not that justice would become a principle of constraint or even deadlock in relation to force, but on the contrary that it would involve discovering how to take our forces to their limit of what they can do. If there is a violence or injustice that from certain perspectives would seem to belong to fate or to be the prerogative of a sovereign, it is a prerogative not by virtue of status or through a structure by which such power would be formally recognized, but by virtue of an affirmative will; a will that returns and says 'yes'. In fact—taken from the perspective of the one who is capable of saying 'yes'—it would no longer be the same 'violence' or 'injustice' for the entire juridical order itself would need to react to it. And thus, if there is still a principle of sovereignty present in all power relations, it would be simply that the reactive and the negative do not return. The normative order itself is not strong enough to come back.

An appreciation of a normative void certainly comes hand in hand with a new appreciation of the meaning of terror. But if terror and torture mark the annulment of representation and normativity in a certain sense, they nevertheless do not annul the necessity to assess force from the perspective of power. It is still for us to find out exactly what we are capable of, how to act things without a certain spirit of resentment, how to dominate in our own particular sphere of action or how to feel a little pride. This is the sense in which ethics and politics belong to a different rhythm than the normative—dominating does not mean making others weaker, but increasing one's affects and powers such that those who will by necessity obey, also increase their affects and powers. The normative is what makes the many speak on *this* topic and what creates the unavoidability of speaking on it. But remaining silent is ethical only when there are too many speaking. It hints at another dimension of disparate voices in which a topic cannot be spoken without being given a new sense and a new value. ●

⁴⁶ Deleuze above note 26, 51.