

# In a Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusals of American History

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*This essay addresses the first century of English colonization of the North American mainland. Rather than narrate a familiar story of events — migration, settlement, the creation of viable Anglophone cultures amid hardship and danger — it pursues a less familiar track by examining the terms upon which English adventurers and their contemporaries understood the world they inhabited, the process of transatlantic expansion upon which they were engaged, and, in particular, the justifications they espoused for their appropriations of space from its existing inhabitants. My examination concentrates in particular on the conjoined discourses, literary and legal, in which the meanings of those terms are most clearly displayed. Through analysis of Shakespeare's early play *Titus Andronicus* (c. 1591), I demonstrate the salience of Tudor political economy — principally of sovereign power and invasion, of land and inhabitation, and of the city and*

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*barbarism — to the discourse of early-modern English colonizing. I show how the same complex of ideas animated the founding legal texts of English "settlement," revealed in the jurisdictional structures created and spaces occupied by the projectors of colonies. Finally, through reference to another foundational text, not of colonizing but of modern American legal history (Willard Hurst's *Law and the Conditions of Freedom in the Nineteenth Century United States*, published in 1956), I show the cardinal importance to contemporary America's historical self-construction of a refusal to acknowledge America's historical origins in a political economy of "colonization" and its violence, and its preference for a narrative of "energy" and "freedom" and their occlusion of violence.*

## PROLOGUE

*Tit.* O happy man! They have befriended thee.  
 Why, foolish Lucius, dost thou not perceive  
 That Rome is but a wilderness of tigers?  
 Tigers must prey, and Rome affords no prey  
 But me and mine.

William Shakespeare, *Titus Andronicus* (III. i. 54) (c. 1591)

This essay has two subjects. First, it addresses the violence inherent in the originating moments of occidental modernity in North America; that is, the first century of transoceanic English colonizing of the Atlantic seaboard. I investigate the terms on which colonizing created America as we know it now by inquiring into conjoined discourses, literary and legal, in which the meanings of those terms were first put on display. Second, the essay addresses the refusals from which modern American history's liberal metanarrative is constituted: refusals, that is, fully to confront the violence of origins. I argue that refusal is a consequence of the subordination of history to national myth, of resort to historical inquiry as a modality of celebration rather than critique.

The violence I address here is in largest part textual rather than behavioral. It endures in narrative rather than activity. The narratives are literary, legal, cartographic, and historical. I start with an attempt to characterize the place of these texts in the origination of violence — how they author and authorize violence, narrate its display, and represent, or conceal, its effects. From here I move to a reading of the texts' relationship to each other and to the English

colonizing project. I conclude with an attempt to assess how American history has dealt with its "origins" question, concentrating in particular on the ruling metanarrative of American legal history.

Joyce Chaplin has recently addressed the origins of English North America by tracing the discursive processes that enabled the English to claim "bodily and cultural superiority over Indians," processes that, she argues, successfully occluded the violence of the English assault upon the continent.<sup>1</sup> Far from an enterprise grounded in foundational assumptions of technological and material ascendancy over a primitive "other," Chaplin argues, English colonization was initially hesitant and self-doubting, unable to construct a stable inferior to overcome. Confident ascendancy was produced only gradually, over the course of a century's experiential interaction between colonists and Indians.<sup>2</sup> The indigenous were stripped of significant presence on the land they inhabited not as a condition for colonizing but as a consequence of it.

The metropolitan texts discussed in this essay suggest that other discursive frames for success in colonizing existed than those generated by experience accumulated over time in America.<sup>3</sup> They suggest, also, the utility of considering a conceptualization of "technology" wider even than Chaplin

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1 Joyce E. Chaplin, *Subject Matter: Technology, the Body, and Science on the Anglo-American Frontier, 1500-1676*, at 14 (2001).

2 As the English consolidated their empire, they made it look as if their using violent means to subjugate or disperse native populations was beside the point. Nature demonstrated that Indians were removed from the prospect of life in America. Their bodies were conceived as unsuited to the places the English had settled, their forms of medicine were inadequate to treat their continuing debility, and their conceptions of nature did not promise an easy transition to English learning. Indians did not belong in the plantations the English had made in America. They were uprooted.

*Id.* at 320.

3 Consider Samuel Purchas:

So good a Countrey, so bad people, having little of Humanitie but shape, ignorant of Civilitie, of Arts, of Religion; more brutish than the beasts they hunt, more wild and unmanly than that unmanned wild Countrey, which they range rather than inhabite; captivated also to Satan's tyranny in foolish pieties, mad impieties, wicked idlenesse, busy and bloody wickedness; hence have wee fit objects of zeale and pitie, to deliver from the power of darknesse.

Samuel Purchas, *Virginias Verger* (1625), *reprinted in XIX Hakluytus Posthumous or Purchas His Pilgrimes: Contayning a History of the World in Sea Voyages and Lande Travells by Englishmen and Others* 231 (1906). *See generally* Rebecca Ann Bach, *Colonial Transformations: The Cultural Production of the New Atlantic World, 1580-1640* (2000).

employs. English notions of legal sovereignty, of rightful occupation, and of exclusive possession were central to the discourse of American colonizing. From the first, law was a technology of description and definition instrumental to the process of realizing colonization as a practice.<sup>4</sup> Chaplin properly criticizes those who ignore the cultural hybridity of early settlement, but seems to me not to give due weight to those texts and technologies that fueled and realized the colonizer's violent ideology of differentiation and exclusion from the outset.<sup>5</sup>

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4 I have explored these themes in Christopher L. Tomlins, *The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History*, in *The Many Legalities of Early America 1* (Christopher L. Tomlins & Bruce H. Mann eds., 2001) [hereinafter *Many Legalities*], and Christopher L. Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 *Law & Soc. Inquiry* 315 (2001) [hereinafter Tomlins, *Legal Cartography*]. Chaplin does not consider law a technology susceptible to historical analysis, but treats it as a "transhistorical constant." Chaplin, *supra* note 1, at 58.

5 For brief but highly informative comments on the trajectory of scholarship on law and colonialism over the last fifteen years, see John L. Comaroff, *Colonialism, Culture and the Law: A Foreword*, 26 *Law & Soc. Inquiry* 305 (2001). On "hybridity," see Chaplin, *supra* note 1, at 202. Ironically, in some hands, the discourses of post-coloniality are threatening to recreate "early America" as a multicultural, participatory project almost before the full implications of Anglo-American colonialism have been accorded adequate historical recognition. The concept of "middle ground" as it has been developed over the last ten years in American history reflects the influence of the postcolonial perspective. First mooted by Richard White, *Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (1991), the middle ground has since developed into a "portrayal of a multicultural society [that] offered an alternative vision of peaceful coexistence and creative accommodation against the acculturationist presumptions of an expansive Anglo-American empire." Andrew R.L. Cayton & Fredrika J. Teute, *Introduction: On the Connection of Frontiers*, in *Contact Points: American Frontiers from the Mohawk Valley to the Mississippi, 1750-1830*, at 9 (Andrew R.L. Cayton & Fredrika J. Teute eds., 1998) [hereinafter *Contact Points*]. For a very different perception of the frontier's "multiculturalism," see James H. Merrell, *Shamokin, 'the very seat of the Prince of darkness': Unsettling the Early American Frontier*, in *Contact Points*, *supra*, at 16. On the specificities of the postcolonial perspective and its impact, see Jeannine Purdy, *Postcolonialism: The Emperor's New Clothes?*, in *Laws of the Postcolonial* 203-29 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

## I. VIOLENCE AND THE WORD

Enter Aron, Chiron and Demetrius at one door, and at the other door Young Lucius and another, with a bundle of weapons, and verses writ upon them.

*Titus Andronicus* (stage direction, opening act IV, scene ii)

Some years ago, in *Worlds Apart: The Market and the Theater in Anglo-American Thought*,<sup>6</sup> Jean-Christophe Agnew addressed the intricacies of the role played by the Tudor-Stuart stage in preparing England for its first encounter with modernity — the world of unbounded market exchange. For Agnew, the subject at hand was the interrelationship of theater and market as spheres of performance: the performative tropes of the stage, he argued, depicted the subversion of boundaries, "ritual, kin and prescriptive bonds," that attended the emergence of the unbounded market economy and the generalization of processes of commodity exchange. They did so not as a reflection of emergent market behavior, nor indeed as commentary on it. Rather, theater and market were clapped together in performative homology. The stage's "formal, narrative, and thematic conventions" acted the "representational strategies and difficulties of the marketplace." So doing, it produced them anew in serial additional forms. The conventions of the stage were active and informative, their product fluidity and uncertainty.<sup>7</sup>

Engaged in the same cultural transformation, theater and market drew upon like traditions of performance and representation. "The marketplace of the Middle Ages, like the vernacular theater that had grown up within its bounds," had been above all else "a 'place for seeing.'" Indeed in both theater and market "visibility was [the] indispensable property," for within their precincts visibility was the ultimate reassurance of truth.<sup>8</sup> The medieval theater was a theater not of illusion but of affirmation: "ritual or quasi-ritual enactment" affirmed certainty by containing representation in "a foreshortened and symbolic narrative keyed to the governing typology of biblical time and to the surrounding structure of social rank." The theater of the Renaissance, in contrast, like the unbounded market, was subversive, no longer confined "to the deliberate representation of common ideals in

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6 Jean-Christophe Agnew, *Worlds Apart: The Market and the Theater in Anglo-American Thought, 1550-1750* (1986).

7 *Id.* at 8, 12.

8 *Id.* at 40.

the negotiated relations between the individual and God." Instead it offered deconstruction — endless "misrepresentation of private meanings in the negotiated relations among men and women."<sup>9</sup> Participants — actors and authors (and audiences) — "deliberately acknowledged the fabricated character of the play world" so as to show "how precarious social identity was, how vulnerable to unexpected disruptions and disclosure." Foremost among the theater's enactments was the collapse of cultural fixedness — the "traditional religious, familial, or class frame" — that had rendered identity suddenly and corrosively problematic, producing "the plastic, polymorphous, performative figure that is both the ideal and the nightmare of modernity," artificial person, social actor.<sup>10</sup>

Agnew's argument, crucial to understanding the processes by which institutions and not just materialities produce consciousness, has less to tell us about the significance of texts in those processes. This is no oversight on his part, for at points Agnew suggests that texts are not much more than scripts.<sup>11</sup> "Some readers will no doubt be disappointed to see so little attention given to the immediate and ultimate purposes for which the theaters were built, that is, the plays themselves." But they are waved off: the significance of the early-modern theater was not located in "*mere text* ... in which to *read* the cultural consequences of an emerging market economy." It was an institution whose effectivity dwelled in the evolving conventions of theatricality that formed its particular way of being. Here, in the very action of representation, lay the theater's point of engagement in England's encounter with modernity, its "sociocultural accommodation with an expansive system of capital formation and commodity exchange," and in the violence with which that accommodation was achieved and enforced.<sup>12</sup>

This is all good and appropriate. Institutions matter. But texts are not so easily rendered "mere" supplements to behavior. Texts have consequences:

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9 *Id.* at 33, 60, 105.

10 *Id.* at 10, 14. As Agnew and others have emphasized, the early-modern theater itself stood physically in culturally polymorphous space, beyond the bounds of the city.

11 Scripts, of course, can be intensely subversive when they tell the subject to do something unexpected or, alternatively, script for the subject action that the subject is no longer certain how to perform. As modernity recreated human subjects as "plastic, polymorphous, performative figures," Agnew shows, scripts became essential in telling them who they were. *Id.* at 73-86.

12 *Id.* at xi, 9-10, 12-13 (emphasis added). See also Buchanan Sharp, In Contempt of All Authority: Rural Artisans and Riot in the West of England, 1586-1660 (1980); Buchanan Sharp, *Popular Protest in Seventeenth Century England*, in *Popular Culture in Seventeenth Century England* 271 (Barry Reay ed., 1985); Keith Wrightson, *English Society, 1580-1680* (1982); *Order and Disorder in Early Modern*

they deliver violence, reveal violence, conceal violence, are violence, sometimes all at the same time. Tudor-Stuart audiences, elites and crowds, knew that perfectly well.<sup>13</sup>

In *Titus Andronicus*, one of his earliest plays, Shakespeare devotes considerable attention to the relationship of text to violence.<sup>14</sup> The play itself — a revenge tragedy — is a documentary of violence. But particular resort to text *as* violence figures in some of its most consequential details. Aron the Moor, lover of the Goth Queen Tamora recently vanquished by Titus, initiates Tamora's cycle of vengeance upon the Andronici not with swords or clubs or knives, but with a "fatal-plotted scroll" — a forged letter — that immediately upon its appearance brings the condemnation (and subsequent execution) of Quintus and Martius, two of Titus' three surviving sons.<sup>15</sup> In turn, once finally aroused from unreflective loyalty — "Rome, I have been thy soldier forty years," time "spent /In dangerous wars whilst you securely slept"<sup>16</sup> — Titus makes texts the instrumentalities of *his* revenge. To Tamora's sons Chiron and Demetrius, who at Aron's instigation have raped and mutilated his only daughter Lavinia, Titus sends a gift of "the goodliest weapons of his armory" wound about with words from the first verse of an ode by Horace. *Integer vitae scelerisque purus /Non eget Mauri iaculis nec arcu* [One who lives with integrity and is free of villainy needs no Moorish javelins nor bow].<sup>17</sup> The boys, dull-witted, shrug. Their comprehension does

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England (Anthony Fletcher & John Stevenson eds., 1985); David Underdown, *Revel, Riot and Rebellion: Popular Politics and Culture in England, 1603-1660* (1985); Andy Wood, *The Politics of Social Conflict: The Peak Country, 1520-1770* (1999).

- 13 If texts were mere supplements to behavior, one might ask why they were publicly burned, gibbeted, nailed to scaffolds, torn to pieces, like bodies. Agnew is, in fact, more sensitive to this than might appear from the main preoccupations of his book, noting, for example, the "lingering distrust of written documents" as representations of fact that persisted into the seventeenth century. Agnew, *supra* note 6, at 29.
- 14 William Shakespeare, *Titus Andronicus* (Russ McDonald ed., 2000) [hereinafter *Titus Andronicus*]. All references are to this edition.
- 15 *Id.* at 32. The letter is later described as a "fatal writ" (*id.* at 42), which indeed it is, for on its evidence alone the emperor Saturninus dispenses with plea, trial, or testimony: "If it be proved? You see it is apparent ... /Let them not speak a word; the guilt is plain" (*id.* at 43). Silence and helplessness in the face of textual authority is a recurrent motif of the play. In a way that underlines a point made by Agnew, the distrustful document has been rendered supremely authoritative, "oral testimony under oath" pointless to the determination of causes. Agnew, *supra* note 6, at 29.
- 16 *Titus Andronicus*, *supra* note 14, at 11, 46.
- 17 For the complete ode in translation, with commentary, see David Mulroy, *Horace's Odes and Epodes 81-82* (1994). The ode's significance extends beyond its opening, for its central conceit is the love of an old soldier for a young woman and his

not extend to the violence of words. But Aron can supply the meaning: "the old man hath found their guilt, /And sends them weapons wrapped about with lines /That wound, beyond their feeling, to the quick."<sup>18</sup> Later, seemingly deranged, Titus has his kinsmen shoot arrows into the air wrapped about with petitions that "solicit heaven, and move the gods /To send down Justice for to wreak our wrongs." His brother Marcus leads the others in directing their aim instead at the palace of the Emperor Saturninus, who has meanwhile taken Tamora as his empress, not as an attack upon the emperor's person but to "afflict [him] in his pride" by "blazoning [his] injustice everywhere."<sup>19</sup> Whether directed to gods or men, the petitions are the point, not the arrows. Immediately thereafter, Titus once more addresses an enemy (Saturninus) by means of a text — a written "supplication" — wrapped around a weapon. Saturninus reacts by instantly causing the unwitting messenger to be hung.<sup>20</sup> As with Aron's letter, so with each of these moves in Titus' pattern of vengeance, the text's effect is unmediated by other agency.<sup>21</sup>

There is more. Titus tells Lavinia that her mutilated, silenced body — her hands chopped off, her tongue cut out by her rapists — has become a text that will deliver to him the meaning of the violence that has been inflicted upon her. "Thou shalt not sigh, nor hold thy stumps to heaven, /Nor wink, nor nod, nor kneel, nor make a sign, /But I of these will wrest an alphabet /And by still practice learn to know thy meaning." As text, her body ceases to be mute and helpless: it becomes instead the means to knowledge and so

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repulsion of a monstrous wolf with nothing but that love: "For while I carelessly wandered unarmed /in the Sabine woods beyond my estate, /singing my Lalage's praise, a wolf /saw me and fled. /Militant Daunias's forests of oak /nourish no similar monster. His like /is unknown in Juba's realm, the arid /nursemaid of lions."

18 Titus Andronicus, *supra* note 14, at 68.

19 *Id.* at 76-77, 80.

20 *Id.* at 78-79, 81.

21 Each gesture might, of course, be read as the delivery of a threat whose potency is created by the accompanying weapon. But in each case, the gesture cannot be read so instrumentally. In the first incident, Titus effectively declares his armory irrelevant by giving it to his enemies. As Aron recognizes, they will have more need of it than he. Titus' "goodliest weapon" here is the text. In the second incident, likewise, the arrows are not aimed to kill Saturninus, and in any case it is not the arrows themselves but the texts in which they are wrapped — "Sweet scrolls to fly about the streets of Rome!" and arouse the populace (*id.* at 80) — that infuriate the Emperor. And in the third, the content of the supplication remains unknown and the knife seems incidental. In all three instances, the text is susceptible to more than one interpretation, and in the last we have almost no clue at all; we can only speculate about its content. Nevertheless, in each case, as in Aron's forged letter, it is the text that is instantly causal, that "moves to the death" of the object of its attention.



to the subsequent silent death of her rapists.<sup>22</sup> On her part, Lavinia too turns to texts to help reveal her story. Grunting and flailing, she draws Titus to the story of the rape of Philomela in a handy copy of Ovid's *Metamorphoses*.<sup>23</sup> Then, with a stick held in her mouth, she names her assailants and their crime, scratching the words, letter by letter, in a patch of wet sand.<sup>24</sup> And at the last, with Chiron and Demetrius dead — gagged, their throats silently slit, their heads baked in a pie and served to Tamora and Saturninus — Titus kills Lavinia, beginning perhaps the most violent climax of any of Shakespeare's plays with yet another silent death, one decreed by "pattern, precedent, and *lively warrant*" — that is, by the customary law that a Roman's daughter should not survive her shame.<sup>25</sup>

*Titus Andronicus* is by far the most elaborately violent of Shakespeare's plays. But the actual weapons with which it is replete — the "goodliest" bundle that Titus sends to Chiron and Demetrius, his arrows, the knife he sends to Saturninus — are at once centralized in our vision (they play parts; they are not simply props) and simultaneously clearly subordinated in the parts they play to the texts that enclose them.<sup>26</sup> In this play, weapons are

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22 *Id.* at 59. Again, of course, the knowledge is quite subjective, literally a reading. Lavinia is silent. Titus constructs authoritative (death-dealing) knowledge from the text he has made of her.

23 *Id.* at 61-64. Chiron and Demetrius know the story of Philomela, raped by Tereus. Tereus cut out Philomela's tongue to ensure her silence. But Philomel wove her testimony into a tapestry and so created a text that condemned him. So Chiron and Demetrius cut off Lavinia's hands too: "So, now go tell, an if thy tongue can speak, /Who 'twas that cut thy tongue and ravished thee. /Write down thy mind, bewray thy meaning so, /An if thy stumps will let thee play the scribe ... . /If thou hadst hands to help thee knit the cord" (*id.* at 43-44). But Lavinia finds texts that visit appalling violence — in silence — upon her tormentors.

24 Titus is anxious to turn this distrustful document (written in sand) into authority: "I will go get a leaf of brass, /And with a gad of steel will write these words, /And lay it by: the angry northern wind /Will blow these sands like Sibyl's leaves abroad, /And where's our lesson then?" *Id.* at 65.

25 *Id.* at 100.

26 In what Francis Barker has argued is the play's most significant, and silent, moment of law-violence — Saturninus' execution of the clown/messenger — no weapon appears at all. Francis Barker, *The Culture of Violence: Essays on Tragedy and History* 167-68 (1993). The cause of death in the clown's case, as in the case of Martius and Quintus, is the appearance of a text followed by Saturninus' word, which is law and so death (this has already been established: see *Titus Andronicus*, *supra* note 14, at 20-23; see also Ian Lancashire, *Understanding Shakespeare's Titus Andronicus and the EMEDD [Early Modern English Dictionaries Database]*, Special Issue 1 Early Mod. Literary Stud. 1, 16 (1997), available at <http://purl.oclc.org/emls/si-01/si-01lancashire.html>). According to Lancashire, Saturninus' name is associated with

mute, just like their victims. Texts speak and deal the violence — weapons simply slice meat after the fact.<sup>27</sup> So too in law? That is a question that liberal jurisprudence has famously soliloquized, but without success.<sup>28</sup>

Virtually at the same moment that Jean-Christophe Agnew was interrogating the non-obvious relationship between theater and market, Robert Cover was doing the same to the relationship between law and violence. "Legal interpretation takes place in a field of pain and death," Robert Cover wrote in 1986, the year of his own death. "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence." That law could have violent consequences was not the issue. Cover appeared to want to take the matter further. There was an "unseverable connection between legal interpretation and violence."<sup>29</sup> Cover, that is, appeared to

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the mount (Tarpeus) from which traitors were pushed to their deaths. The play gives Saturninus both the physical height and the punitive role of Tarpeus, representing the acts of law-giving and death-dealing as one. For example, "Naught hath passed, /But even with law, against the willful sons /Of old Andronicus." He continues, in a confusion of pronouns that makes Saturninus and justice indistinguishable both in their being and their effectivity, "[J]ustice lives /In Saturninus' health, whom if he sleep, /He'll so awake as he in fury shall /Cut off the proud'st conspirator that lives." Titus Andronicus, *supra* note 14, at 80.

It is worth noting that the only death in the play that is explicitly textless in this sense — that of the fly killed by Marcus (*id.* act 3, sc. 2) — is presented in a bizarre scene that verges on farce, in which Titus screams incontinent fury at his brother precisely because the fly's death is utterly textless. All Marcus says, over and over, is: "I have killed a fly." In this death the weapon is unmediated. ("*Tit.* What dost thou strike at, Marcus, with thy knife? *Mar.* At that that I have killed, my lord — a fly.") Titus' fury is alleviated only when Marcus belatedly supplies a text for the fly's death after the fact (the fly reminded him of Aron). *Id.* at 59-60.

27 In this sense the theme of weapons wrapped up in text epitomizes the beginnings of a sense of the body as residual to the mind — "This body is the dead meat, or at its most vivid the extraneous shell, of the subject's more essential consciousness." Francis Barker, *The Tremulous Private Body: Essays on Subjection* at vii (1995).

28 I use "soliloquized" deliberately here, to convey the senses of "extradramatic reflection" (separation between speaker and action) and "solitary rumination" (separation within the speaker, articulation of a speaking self-examining self) that soliloquy conveys. See Agnew, *supra* note 6, at 109, 163-64. As Barker has indicated, *supra* note 27, at 31-32, soliloquy in Shakespeare (*Hamlet* is the best example, of course) traces a transition from the one (essentially, reflection upon the meaning of accessible public action) to the beginnings of the other, of "interiority," of the subject speaking its inner reality, exposing its inauthentic exterior. Here we see foreshadowed the Cartesian figure, "the figure that is to dominate and organize bourgeois culture ... the modern subject."

29 Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1610 (1986) [hereinafter

deny liberalism's fondest claim — that its narrative of civility was one of legality's slow strangulation of violence, its embodiment of the ambitions of an anthropology that counterposed occidental culture to barbarity and celebrated its ascendancy.

Yet what was the nature of this "connection," and how unseverable was it? Cover was torn by his discovery, perhaps as a liberal lawyer should be, so he hedged it both in nature and extent. Connection, after all, supposes essential separation. Further, the connection Cover pursued was not between violence and law *per se*, but between "legal interpretation" undertaken by judges and the violence constituted in the "pyramid" atop which judges sat, the bureaucracies and practices of social control. Law had a "violent side" but, thus, implicitly, a non-violent side too. Legal interpreters, judges, therefore had choices.<sup>30</sup> "The creation of legal meaning is an essentially cultural activity ... not naturally coextensive with the range of effective violence used to achieve social control." In Cover's jurisprudence, then, interpretation took place in a field of pain and death, but neither wholly nor necessarily nor naturally so. Interpretation offered interpreters other options. "Because law is the attempt to build future worlds, the essential tension in law is between the elaboration of legal meaning and the exercise of or resistance to the violence of social control." The unseverable connection reemerges, then, as in fact not a connection at all but an essential tension, a difference, a "radical dichotomy," between law's dark side, "the social organization of law as power," and the good, "the organization of law as meaning."<sup>31</sup> What was inherent in the word was not violence at all, but choice. Indeed, violence, rather than connected to the word, was the negation of word. Violence killed words: "pain and death destroy the world that 'interpretation' calls up. That one's ability to construct interpersonal realities is destroyed by death is obvious, but ... what is true

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Cover, *Violence and the Word*]. This article is Cover's expansion of a commentary that appears under the title *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 Ga. L. Rev. 815 (1986) [hereinafter Cover, *Bonds of Constitutional Interpretation*].

30 Insofar as they did not, Patricia Wald argues, they could not take responsibility (or be held responsible) for their actions. See Patricia M. Wald, *Violence under the Law: A Judge's Perspective*, in Law's Violence 77 (Austin Sarat & Thomas R. Kearns eds., 1995).

31 Cover, *Violence and the Word*, *supra* note 29, at 1602 n.2. On law as meaning, see also Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983). On the contradictions in Cover's jurisprudence and their roots in liberal politics, see Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in Law's Violence, *supra* note 30, at 211.

of death is true of pain also, for pain destroys, among other things, language itself.<sup>32</sup> Violence, Cover seemed to suggest, is inarticulate, not textual, not part of interpretation at all. Violence destroys law.

Cover's article — really a testament — was animated by a civil libertarian's indignant will to expose, but suffused with a liberal politics of regretful hope. Judges acted (through others) "to restrain, hurt, render helpless, even kill." Start, then, with exposure of what they do. "The judges deal pain and death." They had always done so — "from John Winthrop through Warren Burger." Oddly, given his purposes (revelation, critique) and argument (separations, choices), Cover described their violence as "utterly real — a naïve but immediate reality, in need of no interpretation, no critic to reveal it."<sup>33</sup> But then a voice regretting law's violence became dominant. And in the course of regretting, Cover denied what had just been affirmed — the immediate reality of juridical violence, its location in legal text. Instead he blamed the bureaucracy and regretted the violence that its violence did to law by intruding itself upon law's promise that it had not foresworn the possibility of future worlds with different meanings. He blamed the "legitimated authorities characteristic of human hierarchical organization" whose deployment of "institutionally sanctioned commands, orders, or signals" synaptically rendered interpretive act as violent deed by disabling "conscience" and the "autonomous behavior" upon which the possibility of different choices and moral resistance depended.<sup>34</sup> He condemned the irresponsible separations and lethal recombinations of word and deed that were created not in law but by the alchemy of organizational hierarchy:

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.<sup>35</sup>

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32 Cover, *Violence and the Word*, *supra* note 29, at 1602. In fact, Lavinia has shown us that this is not so.

33 *Id.* at 1609.

34 *Id.* at 1614-15.

35 *Id.* at 1627. On Wald's terms, judges are not responsible.

Cover's emphasis on the intervening, executing, pyramid silenced his assertion (which was isolated and not repeated) of the immediacy, the banal reality, of violence in law. Determinative context — bureaucracy's normative positivism — pressed its outcome on law's officials and on its own, recreating (executing) word as lethal action. Bureaucratic agency constructed the field of pain and death in which law "took place." The state's normative violence, not law's violence, had become the target. Cover now evaded the history with which he had begun in favor of a reformative politics that would underline choice as law's essence. He had relapsed into the classic liberal evolutionary separation of word and action, of text and force, of law as a "categorical advancement over force" that his will to expose had appeared for a moment to challenge.<sup>36</sup>

Cover remained enough of a critic to demonstrate the existence of a substantial jurisprudential industry that "systematically ignored or underplayed" the normative field of violent social control whose interplay with law he had made manifest. But what was the effect of the demonstration? Liberal legal scholars concentrated on the practices of interpretation and its potential to the exclusion of institutional practices and their effects because they saw law as determinative of its own meanings, not overwhelmed by the state's necessities. In Dworkin's words their goal was "to impose *meaning* on the institution ... and then to restructure it in the light of that meaning."<sup>37</sup> Liberal scholars' cause was to use law to control the pyramid. And philosophically Cover did not disagree with them. Law might "take place in a field of pain and death," but the field was not law's creation, or responsibility. Hence Cover could castigate the world's Dworkins rhetorically and still conclude that theirs was the traditional and noble cause "that would have us hear the judge as a voice of reason ... the embodiment of principle." In holding constructive reasoned interpretation to be at the heart of law, they were "apologetic neither in ... intent or effect."<sup>38</sup>

Cover's own utopian liberalism required that the unseverable be severed

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36 Carol J. Greenhouse, *Reading Violence*, in *Law's Violence*, *supra* note 30, at 105-06. Contra Cover, Greenhouse argues that violence has textual reality, that violence in texts "extends, circulates, modifies and contains — or fails to do these things — the violence in the world." *Id.* at 111, 121. Pierre Bourdieu has likewise argued that legal texts are quintessentially texts "which produce their own effects." Pierre Bourdieu *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L.J.* 809 (1987) (translated and introduced by Richard Terdiman).

37 Ronald M. Dworkin, *Law's Empire* 47 (1986), *cited in* Cover, *Violence and the Word*, *supra* note 29, at 1602 n.2. *See also* Austin Sarat & Thomas R. Kearns, *Introduction*, in *Law's Violence*, *supra* note 30, at 7.

38 Cover, *Violence and the Word*, *supra* note 29, at 1628. *See also* Sarat & Kearns,

— text from act, law from violence, order from chaos, life from history. There was no perception of inherent violence in his law, any more than in Dworkin's. His exposé was of other legal scholars' empirical shortcomings — their failure properly to acknowledge and investigate law's conjunctions with the institutional structure of state violence — not of the failure of their liberal legal theory *tout court*.

## II. VIOLENCE IS THE WORD

By what right or warrant [can we] enter into the land of these  
Savages, take away their rightful inheritance from them, and  
plant ourselves in their place?

Robert Gray, A Good Speed to Virginia (1609)

To the neat world of separations that liberal modernity invented and upon which it relies for the philosophical coherence it claims, I have counterposed the world of the Andronici, whose Rome is simultaneously law and violence, culture and barbarity, *civitas* and wilderness, one and inseparable. Or rather, *civitas* for some, wilderness for others. Law's violence lies in part in its exquisite and consequential discriminations: between servant and master; between wife and man; between protestor and hegemon; between colonized and colonizer.<sup>39</sup> To help me generalize the significance and meaning of this for American history, I turn to the work of another dead scholar, who was not a liberal.<sup>40</sup>

*The Culture of Violence*, by the late Francis Barker, is in largest part a deep excavation of the discourse of Shakespearean tragedy. From a close reading of certain of Shakespeare's plays (*Lear*, *Macbeth*, *Hamlet*, and, of course, *Titus Andronicus*), Barker distills a common structure of comprehension, intention, and representation — a "project" of cultural

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*supra* note 31, at 223-32. This was, Cover said, "a disagreement among friends." Cover, *Bonds of Constitutional Interpretation*, *supra* note 29, at 815.

39 As Jeannine Purdy writes of Frantz Fanon, "[u]nlike the 'ubiquity of law's violence' posited by Sarat and Kearns [see their *A Journey through Forgetting: Toward a Jurisprudence of Violence*, in *The Fate of Law* 209 (Austin Sarat & Thomas R. Kearns eds., 1991)], Fanon was concerned to show that the function of, and the attitudes toward, law and its violence varied according to which side of the ... divide one stood on." Purdy, *supra* note 5, at 203.

40 This long essay has its origins in a short paper presented at the Francis Barker Memorial Conference, Essex University, Colchester, January 2001.

formation — that he explores for its homologies with the social and political trajectory of the English state during the 150 years following the English Reformation and also as a means to revise conventional historical accounts of that trajectory. At the center of the project, Barker finds a highly ambivalent and deeply conservative reflection on Tudor-Stuart England's encounter with modernity (understanding *modernity* as the first fumbling manifestations, amid tradition, of "bourgeois subjectivism," or what would become the liberal problematic of self and other and of individual identity, a problematic manifest in discourses of economy, of social and political relations, of body and mind, and, above all, of space, its boundaries, and their violent penetration).<sup>41</sup> In this way, we can reinsert the active construction of discourse — the "immediate and ultimate purpose" of institutional formations — into Agnew's world of performances, where we have already encountered the beginnings of modernity in unboundedness — dissolving boundaries (between market and world), dissolving institutions, dissolving bodies, plasticity, dislocation.<sup>42</sup>

The discourse of the tragic project suffused the whole Tudor-Stuart world, to its very extremities. The commonalities that Barker's excavation reveals in Shakespeare's tragic discourse were homologous with, and complicit in, contemporaneous discourses of English transoceanic colonizing, as represented in the works of promoters such as Walter Raleigh, George Peckham, Samuel Purchas, and the two Richard Hakluyts, elder and younger, and in the legal texts in which the process of colonizing was formulated. Here we find the discourse of the tragic project, the phenomenon of colonizing, and the trajectory of violence directly implicating each other. And as Barker is aware, "America" as myth and place stands behind all three. As I have mentioned, both by Barker's account and others, it is precisely modernity that the Shakespearean project confronts. In turn, as he puts it, the formation of occidental modernity's contrapuntal anthropology of civility and savagery, refinement and barbarism, culture and violence, itself may be said to have

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41 Barker, *supra* note 26, at 3-92, 142-206.

42 "The attributes of materiality, reality and agency ordinarily assigned to the sphere of social relations (or to God) were implicitly reassigned to the sphere of commodity relations, as supply and demand took on a putative life of their own." Agnew, *supra* note 6, at 56. Selves that could no longer be "authorized within the traditional religious, familial, or class frame" (*id.* at 10) became "artificial persons" (*id.* at 101-48), or, as Hamlet has it, "piece[s] of work." William Shakespeare, *Hamlet*, Prince of Denmark act 2, sc. 2, line 314 (William George Clarke & William Aldis Wright eds., 1952).

begun "in the moment of first contact with 'America'."<sup>43</sup> Imaginatively, in other words, on stage and at sea, this is a single, highly strategic moment.

*The Culture of Violence* points up the pivotal salience in Shakespearean tragedy of discourses of sovereignty and invasion, of territory and the material and ideological conditions of its actual construction and occupation, of the city and barbarity, and of extravagant expression and silent occlusion of violence. These discourses have quite specific representation in the tragedies. Those same representations are also very familiar to the student of early-modern colonizing. Take for example the city, the *civitas*, the representation of civil association and civilization, the seat of sovereignty, the center of commerce, the source of empire (of armies and authority), and, in the colonial context, the citadel of evangelism. For the elder Hakluyt, setting the city down in the wilderness of transatlantic space was perhaps *the* essential condition for success in colonizing, the most reliable signification of barbarism's displacement. Colonizing meant the creation of actual "cities" — physical emplacements of Englishness, of brick and stone, houses and roofs and walls; but it also meant the establishment of all those other "thinges without which no Citie may bee made nor people in civill sorte be kept together" — legalities, revenues, arms, authority, relations of power and acquiescence. The city meant permanence — "the people there to plant and continue." The city was the fountainhead of statecraft — joining "with this king heere, or with that king there, at our pleasure" — and of force "if we will proceed with extremitie, conquer, fortifie, and plant in soiles most sweet." In all these ways the city was the plantation of occidental ways in the colonized locale, the means to achieve dominion over the colonized locale. It was how the colonizer would "become of all the provinces round about the only governour."<sup>44</sup>

The city was also the signification of sovereignty's spatiality, of its effects and their counterpoint. Shakespearean discourse represents land within the domain of a secured sovereignty as fecund, champion, peaceful, "settled"

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43 Barker, *supra* note 26, at 204-05.

44 Richard Hakluyt [the elder], Notes on Colonisation (1578), reprinted in *The Original Writings and Correspondence of the Two Richard Hakluyts* 116-22 (E.G.R. Taylor ed., 1935). In the New England case, of course, Winthrop's *Arbella* sermon on "Christian Charity" denominated the colonizing project as "a city upon a hill," although in that case the barbarism the city was to surmount was Archbishop Laud's idolatrous Anglicanism. On the city in colonizing, see also Nicholas Canny, *The Origins of Empire*, in *The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century* 10 (Nicholas Canny ed., 1998) [hereinafter *Origins of the Empire*].



(enclosed and improved), the source of abundance precisely because it is constituted by sovereignty's authority and legality. The space beyond is really not land at all, but a howling arbitrary emptiness — a place (Lucius tells us) for feral beasts and discarded barbarian bodies<sup>45</sup> — "heath" or "wilderness" or "waste," all legal terms that signify the absence of the conditions of ordered existence. It is "unsettled" space, *vacuum domicilium*, by presumption both uninhabited and unpoliced (which is also to say unimproved), a site only for licentiousness: lust, incest, cannibalism, gender disorder, masterlessness.<sup>46</sup>

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45 "As for that ravenous tiger, Tamora ... throw her forth to beasts and birds to prey." Titus Andronicus, *supra* note 14, at 106. See also *infra* text accompanying notes 65-71. Discarding the bestial Tamora's body beyond the gates of the *civitas* at the conclusion of the play underlines modernity's discard of the corporeal, a theme that Barker, *supra* note 26, develops to great effect in *The Tremulous Private Body*.

46 See James Tully, *Rediscovering America: the Two Treatises and Aboriginal Rights*, in *An Approach to Political Philosophy: Locke in Contexts* 150 (1993). The space beyond civility is also a place of wild and strange vegetation that might be more than it seems. See David Malouf, *Remembering Babylon* 9-10 (1993); John L. Comaroff & Jean Comaroff, *Naturing the Nation: Aliens, Apocalypse and the Postcolonial State*, 1 *Soc. Identities* 7 (2001). Shakespeare reminds us of this throughout *Titus Andronicus*. As Ian Lancashire (*supra* note 25, at 17) has pointed out, "the association of characters with plants pervades this play. Marcus compares Lavinia's hands to branches and leaves (II.iv.18, 45). Titus likens his own hands to 'with' red herbs' (III.i.177) and later tells Marcus 'we are but shrubs, no cedars we' (IV.iii.46)." The best and most significant example is provided by the name, and fate, of Aron, the Moor. According to Lancashire (*id.* at 18-20) "three EMEDD [Early Modern English Dictionaries Database] dictionaries from 1587 to 1611 make Aron the name of a very common English plant, never the name of Moses' brother Aaron in the Old Testament, the usual critical gloss." Found in England, Africa, and Egypt, Aron was "bespotted heere and there with blackish spots." It grew "in woods neere vnto ditches vnder hedges, euerie where in shadowie places." The root of the plant made the purest form of starch, which, however, was "most hurtfull for the hands." As Lancashire observes, Aron was very hard on the hands of the Andronici, accounting for both of Lavinia's hands and one of Titus'. Aron's fate, decreed at the end of the play by Lucius, is to be planted. "Set him breast-deep in earth, and famish him." This strange wild plant that dwells in the shadows — in thickets and ditches and hedgerows — once planted in the earth of the (reconstituted?) *civitas*, is set to die, a fate to which Lucius adds one more deathly text, decreeing, "If any one relieves or pities him, /For the offense he dies." *Titus Andronicus*, *supra* note 14, at 105-06. Pitiless Aron, that is, is to die a pitiless death of a decree banning the elementary civil virtue of empathy (relief, pity) — one more undermining (as if one more were needed) of the *civitas*/barbarity opposition. For useful observations on the blurring of oppositions relevant to this discussion, see Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, *Law's Violence*, *supra* note 30, at 175-210.

So too, for colonizers, that which lay beyond familiar civil association was a space of deprivation and savagery, inhabited only by barbarism's profound lack of order. "Being thus passed ye vast ocean," wrote William Bradford in his memorable and extraordinary history of the settlement of Plymouth Plantation, "they had no freinds to wellcome them, nor inns to entertaine or refresh their weatherbeaten bodys, no houses or much less townes to repaire too, to seeke for succoure." The "savage barbarians" (the population into whose locale the English had intruded themselves) were "readier to fill their sids full of arrows then otherwise." Surrounding the newcomers was "a hidious and desolate wildernes, full of wild beasts and willd men," the whole untamed, "woods and thickets ... wild and savage," standing profoundly distant "from all ye civill parts of ye world."<sup>47</sup>

As such, in occidental perception, this was space that appeared appallingly dangerous, but also up for grabs. For in Blackstone's familiar phrase it was "terra nullius" (not land), a designation best understood, I think, not materially, as "unoccupied," but conceptually, as space awaiting jurisdiction (or "organization" in later republican parlance).<sup>48</sup> In Plymouth's case this was a legal void filled on arrival, by those "whose names are underwriten," who had voyaged "to plant ye first colonie in ye Northerne parts of Virginia" and

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47 Bradford's History "Of Plymouth Plantation" 94-95 (1898) (from original manuscript) [hereinafter Bradford's History], in William Bradford, *Of Plymouth Plantation, 1620-1647*, at 61-62 (Samuel Eliot Morison ed., 1952). John Smith's well-known account of the beginnings of permanent settlement at Jamestown in 1607 has something of the same tone: ambitions "for the erecting of a great cittie" interspersed with accounts of fighting with Indians, disease, death, famine, want and conflict:

We had no houses to couer vs, our Tents were rotten, and our Cabbins worse than nought ... . [The company] notwithstanding our misery, little ceased their mallice, grudging, and muttering ... most of our chiefest men either sicke or discontented, the rest being in such dispaire, as they would rather starue and rot with idlens, then be perswaded to do anything for their owne reliefe.

And so forth. A True Relation of Such Occurrences and Accidents of Note as hath hapned in Virginia since the First Planting of that Collony ... (1608), *reprinted in Travels and Works of Captain John Smith I*, at 6-9 (Edward Arber ed., 1910).

48 As Anthony Pagden has shown, the concept is co-extensive with English claims on American space, virtually from their first moment. Anthony Pagden, *The Struggle for Legitimacy and the Image of Empire in the Atlantic to c.1700*, in *Origins of the Empire*, *supra* note 44, at 42. On the salience of "jurisdiction" in the legal construction of colonizing, see Tomlins, *supra* note 4, at 315-72, and Lauren Benton, *Making Order Out of Trouble: Jurisdictional Politics in the Spanish Colonial Borderlands*, 26 *Law & Soc. Inquiry* 373 (2001). See generally Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002).

now did "covenant and combine our selves together in a civill body politick, for our better ordering & preservation & furtherance of ye ends aforesaid;" by virtue whereof they empowered themselves "to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete and convenient for ye generall good of ye Colonie."<sup>49</sup>

English colonizing's official legal texts employed identical tropes to narrate similar conjectural histories, then used those narratives to constitute similar altered spaces. The New England Charter invoked a history of chaos and absence as both reason and opportunity for colonizing. The Charter cited the recent "wonderfull Plague, together with many horrible Slaughters and Murthers, committed amongst the Sauages and brutish People there, heeretofore inhabiting, in a manner to the utter Destruction, Deuastacion, and Depopulacion of that whole Territorye," wherefore "those large and goodly Territoryes, deserted as it were by their naturall Inhabitants, should be possessed and enjoyed by ... our Subjects."<sup>50</sup> The phrase "deserted as it were" is a key discursive move from the significance to the insignificance of indigenous presence.<sup>51</sup> Together with "should" it proclaims the land both physically and morally forfeit. Such moves can be observed in all the English texts chartering mainland colonies. Virginia's charter glances briefly at "such people living in those parts" but denominates theirs an existence of "darkness and miserable ignorance," signifying a similar forfeiture ("as it were") of any capacity to exercise the "human civility," the "settled and quiet government" that colonizers could and would bring. "In the law of nature and of nations," according to a sermon preached by John Donne before members of the Virginia Company in 1622, "a land never inhabited by, or utterly derelicted and immemorially abandoned by the former inhabitants, becomes theirs that will possess it."<sup>52</sup> At the far end of the century, the Pennsylvania Charter,

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49 In Bradford's History, *supra* note 47, at 110.

50 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming The United States of America 1828-29* (1993).

51 On the construction of the indigenous economy of mobility as "absence," see Jean M. O'Brien, *Dispossession By Degrees: Indian Land and Identity in Natick, Massachusetts, 1650-1790*, at 1-30 (1997).

52 John Donne, *A Sermon Preached to the Honourable Company of the Virginia Plantation*, 13 Nov. 1622, at 26 (1623), *cited in* Pagden, *supra* note 48, at 43 n.36. See also Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065, 1076-77 (2000). Following Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (1986), Kades, *supra*, at 1077, argues that throughout the history of continental expansion, most Indian land was purchased rather than seized.

so different in so many ways from the Virginia Charter, was at one in its sidelong glance at the existing indigenous population and its denial in the same instant that their actual presence carried any significance as an obstacle to European standing. To "Our Trustie and well-beloved Subject, William Penn, Esquire" acting "out of a commendable Desire to enlarge our English Empire, and promote such usefull comodities as may bee of Benefit to us and Our Dominions, as also to reduce the savage Natives by gentle and just manners to the Love of Civil Societie and Christian Religion," it gave leave "to transport an ample Colonie unto a certaine Countrey ... in the Partes of America not yet cultivated and planted." By the time we get to the Georgia Charter (1732), the land is "waste and desolate," the indigenous population simply a marauding enemy — not even potential converts.<sup>53</sup>

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(Kades, however, understates the extent of warfare, particularly in the nineteenth century.) But as O'Brien, *supra* note 51, at 19-26, points out and as Kades, *supra*, at 1078-80, 1104-09, also argues on outlining his theory of "efficient expropriation," authority to define the rights conveyed by purchase and who were the legitimate parties to land transactions was entirely within the realm of the colonizer. Thus, for example, in the trilogy of "Indian" cases of which *Johnson v. M'Intosh*, 21 U.S. 543 (1823) was the first (the others are *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832)) — cases that have been interpreted as an attempt "to soften colonialism with constitutional-style rules" (Kades, *supra*, at 1117) — the Supreme Court recognized a form of native title of such formidable tenuousness that it can best be described as occupancy at the sufferance of the colonizing sovereign (namely, the English Crown and its successor, the federal government). In *Cherokee Nation*, the Court held that Indian tribes "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases." 30 U.S. at 17. The flimsiness of Indian "possession" is underscored by the Court's recognition that European sovereigns could convey titles before they had extinguished native title. See *M'Intosh*, 21 U.S. at 574-88. For further confirmation of the colonizer's control of the terms of legal debate, even to the extent of "inventing" a customary law for the colonized, see Anne Marie Plane, *Customary Laws of Marriage: Legal Pluralism, Colonialism, and Narragansett Indian Identity in Eighteenth-Century Rhode Island*, in *Many Legalities*, *supra* note 4, at 181. For work theorizing the role of law in establishing the new property regimes of Anglophone settler states, see Jeremy Forman & Alexander Kedar, *Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa / Barrat Qisarya Land Disputes in Historical Perspective*, 4 *Theoretical Inquiries L.* XXX (2003).

<sup>53</sup> Thorpe, *supra* note 50, at 86, 88, 765, 3784. Colonization's texts — the theories of its leading exponents, the charters that licensed its intrusions — were largely metropolitan products. Karen Kupperman, *Indians and English: Facing Off in Early America* (2000), has insisted that historians privilege the texts of the eyewitness, or what Anthony Pagden, *European Encounters with the New World: From Renaissance to Romanticism* 51-54 (1993), has called "the autoptic imagination." Kupperman argues that historians too often

Sovereignty's chartered claims to possess wound the colonizing project in violence in much the same way that Titus used Horace to narrate the real deadliness of his gift to Chiron and Demetrius, and on a far grander scale. Colonizing did not *have* to imply violence. Prominent among the early motivations of English colonizers, for example, were evangelism and

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"prove" their arguments with telling quotes, and often the best quotes come from writers with little or no direct experience of Indian life. Those who stayed home could be much more definite in their judgments than the confused and self-contradictory writings of those who struggled to make sense of their manifold observations and experiences.

Kupperman, *supra*, at x. *See also id.* at 11, 19. But as Pagden has pointed out, what the eye-witness "saw" was decisively marked by the authority of the metropolitan epistemological canon that influenced what could be said about what was seen, and indeed greatly influenced how it was seen. Nor is Kupperman consistent, largely exempting the Hakluyts from her critique of metropolitan writers though neither could claim original autoptic authority; indeed, both quite explicitly labored within, and advanced the assimilative authority of, the metropolitan canon. Finally, when texts clashed, as for example in matters so basic as the interpretation of indigenous economies and their occupation of space, metropolitan discourse achieved a decisive ascendancy. Compare, for example, the Virginia Charter's preference for savages living in "darkness and miserable ignorance" and lacking "settled and quiet government" over the clear lesson of the autoptically-authoritative texts of John White and Thomas Harriot. John White, *True Pictures and Fashions of the People in That Parte of America Now Called Virginia*. Cutt in copper and first published by Theodore de Bry [Richard Hakluyt translator] (1588); Thomas Harriot, *A Briefe and True Report of the New Found Land of Virginia* (1588). *See also* Tomlins, *Legal Cartography*, *supra* note 4, at 331 n.15, 332-33. As Anthony Pagden has remarked of Locke's development of the theory of unoccupied land into a justification for English sovereignty in America,

This account of aboriginal American society bore no resemblance to any of the ethnographic data with which Locke could have been, and probably was, familiar. But no English, and subsequently British, claim to sovereignty in the Americas paid much heed to such data. In natural law any deviation from what were assumed to be universal conditions constituted a violation of those conditions. Any alternative system of property ownership, land tenure or rulership which the Amerindians might practice was regarded not as an alternative, but simply as an aberration.

Pagden, *supra* note 48, at 44; *see generally id.* at 41-52. In discussing Locke, Pagden acknowledges his debt to the work of James Tully, who has demonstrated that the representations of property and political society central to Locke's *Two Treatises of Government* were crafted in the service of Locke's ambition to "vindicate the superiority of European, and specifically English, forms of political society and property established in the new world." Tully, *supra* note 46, at 139. *See generally id.* at 137-76; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* 70-78 (1995).

commerce. Richard Hakluyt's *Discourse of Western Planting* (1584) took as its opening proposition "That this westerne discoverie will be greatly for thinlargement of the gospell of Christe." The Americans, he continued "crye oute unto us their nexte neighbours to come and helpe them, and bring unto them the glad tidings of the gospell."<sup>54</sup> Similarly, of thirty-one *Inducements to the Liking of the Voyage intended towards Virginia* (1585) composed by his cousin, Richard Hakluyt the elder, the first was "The Glory of God by planting of religion among those infidels."<sup>55</sup> Similarly, both Hakluyts extolled commerce. The younger embraced the possibilities for new sources of "marchandize" with "people goodd and of a gentle and amyable nature" to "supplye the wantes of all our decayed trades." His cousin spoke of opportunities for "An ample vent ... of the Woollen clothes of England" for "trafficke and change of commodities," for "iust and lawfull trafficke." Each presented this commerce as if of the same order as English trade with other parts of Europe and the Mediterranean: "Barbary, Egipte, Siria, Persia, Turkey, Greece, all the Ilandes of the Levanty sea, Italie, Spaine, Portingale, ffrance, ffaunders, highe Almayne, Denmarke, Estland, Poland and Muscovye."<sup>56</sup>

Morally, one might argue, evangelism and commerce were indeed the "goodliest weapons" in the English armory, hinting at possibilities of enlightened purpose and mutuality in dealings with indigenous populations. Certainly historians have found degrees of complexity and reciprocity in European evangelical and commercial interactions with the indigenous peoples of North America sufficient to belie their simple instrumentality as tools of invasion.<sup>57</sup>

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54 Recalling Paul: "And a vision appeared to Paul in the night; There stood a man of Macedonia, and prayed him, saying, Come over into Macedonia, and help us." *Acts* 16:9. As is well known, the seal adopted by the Massachusetts Bay Company in 1629 depicts an American Indian delivering from his mouth the script "Come over and help us."

55 Hakluyt, *supra* note 44, at 211, 216, 327.

56 *Id.* at 218-21, 222, 223, 327, 328, 329. Most of the elder Hakluyt's writings on trade and commerce address the opening of English commerce with northeastern Europe and the eastern Mediterranean, a "trafficke" that in no sense involved the creation of plantations or the migration of peoples. See, for example, his *Notes on Dyestuffs* (1579); *Instructions for the North-east Passage* (1580); *Notes on the Levant Trade* (1582); and *Notes for a Factor at Constantinople* (1582) (all reprinted in *The Original Writings and Correspondence of the Two Richard Hakluyts*, *supra* note 44, at 137, 147, 182, 184 (respectively)).

57 See, for example, Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800* (1997); Donna Merwick, *Possessing Albany, 1630-1710: The Dutch and English Experiences* (1990); Kupperman, *supra* note 53, at 110-41.

Yet in each, the possibility of reciprocity was deeply compromised by the design in which it was encased. Compromise was prefigured in the work of the Hakluyts themselves. The younger Hakluyt's *Discourse* segued seamlessly from transcendent moral end (evangelism) to practicalities (planting colonies "of our nation").<sup>58</sup> The same trajectory was followed by his cousin, more elaborately, in the matter of commerce. In the American case, the elder Hakluyt's *Inducements* indicated, commercial success followed not from mutual recognition of the benefits of "trafficke," but from domination. "Trafficke" required an impulse to exchange, but "[i]f the people be content to live naked, and content themselves with few things of meere necessity, then trafficke is not." If, on the other hand, the people "be clothed, and desire to live in the abundance of all such things as Europe doth, and have at home all the same in plentie, yet we can not have trafficke with them, by means they want not any thing that we can yeeld them." Or admit a third variation (also the likeliest) — "that they have desire to your commodities" but "neither Golde, Silver, Copper, Iron, nor sufficient quantitie of other present commoditie to mainteine the yeerely trade."<sup>59</sup> What then was to be done?

In the American case, commerce in the elder Hakluyt's discourse became somewhat like evangelism in his cousin's, a thoroughly contingent outcome, valued but subordinated in its practice to a prerequisite necessity — planting — the pursuit of which induced a major shift in the ends originally articulated. The *Inducements* constantly intone the virtues of commerce, but as focus shifts from East to West, from the Mediterranean and the Baltic to the American Atlantic coast, commerce ceases to describe mutuality — bilateral exchanges of commodities across trading frontiers between peoples — and becomes instead an activity predicated upon the colonizer's appropriation of productive resources for his own use. The commerce invoked by the elder Hakluyt is a commerce to be carried on by the colonizers among themselves. To this, the indigenous inhabitants — those "people goodd and of a gentle and amyable nature" — become at best an irrelevance, at worst a liability: "how the naturall people of the countrey may be made skilfull to plant ... is a matter of small consideration: but to conquer a countrey ... to man it, to plant it, and to keepe it ... were a matter of great importance."<sup>60</sup>

It was the colonial charters that licensed England's appropriation of

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58 See Tomlins, *Legal Cartography*, *supra* note 4, at 319-20.

59 Hakluyt, *supra* note 44, at 215, 332-33.

60 *Id.* at 333. Kupperman, *supra* note 53, at 13, sees this conceptual transformation of commerce developing slowly out of the actual experience of the early settlements. Hakluyt's *Inducements* suggests otherwise.

American space and designed both the manner and the process that appropriation would follow — the manning, the planting, and the keeping. In a scrupulously legal discourse, the charters elaborated the precise statements of relationships between places and people, existing and desired, that were crucial to success in planting. Law thus provided the medium not simply for design and implementation of those relationships, and thus of actually realizing plantations, but also the means that imposed meaning on the activities thus engendered. Considered as parsable documents, the charters in the detail of their legalities largely occluded the violence implicit in the processes they configured. Considered as a sustained discursive act, however, the charters were themselves the very violence they occluded. First, they produced empty space — wilderness — by unilaterally cleansing America of what was, empirically, there. Second, they converted empty space to English "territory" by an assertion of jurisdiction. Third, once territory had been thus produced, the charters enabled it to be made "productive" — bought, sold, farmed, exploited, surveyed, valued, and taxed — through the very detail of their jurisdictional impositions: the division of lands, the construction of fortifications, churches and manors, the establishment of towns and markets, the management of revenues, arms and people, and the making of "All Manner of wholesome and reasonable Orders, Lawes, Statutes, and Ordinañces, Direccõns and Instruccõns not contrairie to the Lawes of this our Realme of England, aswell of setling of the Formes and Ceremonies of Governm<sup>t</sup> and Magistracy, fitt and necessary for the said Plantacõn, and the Inhabitants there."<sup>61</sup> Once territory had been cleansed, claimed, produced, and rendered productive, that is, the charters became the point of origin of the law that constructed the new objects of English attention (fields, barns, houses, fences, roads and boundaries, the characters that inhabited them, the "habits of living, actions, dangers, and rewards" that motivated those characters and informed their transactions): that is, a law of property and of increasingly commercialized exchange.<sup>62</sup> All became subjects of elaborated legal record,

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61 In their attention to the detail of construction, planning, revenues, arms, and people, the charters may be thought of as quasi-cameralist documents. As to the matter of English law, the particular extract quoted is taken from the 1629 Massachusetts Bay Charter (*see* Thorpe, *supra* note 50, at 1857), but the provisions outlined are a commonplace of all the seventeenth-century charters. "Not contrarie to ..." left considerable scope for innovation. George Haskins is only one of scores of historians who have pointed out how colonists "ignored, adapted, and improved upon their English legal inheritance." George Lee Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* 220 (1960). The point here is the scope and effect of the jurisdictional claim itself.

62 *See* Richard Lyman Bushman, *Farmers in Court: Orange County, North Carolina,*



creating an authoritative inventory of the human activities that constituted what "America" now was. As the late J.B. Harley put it, one hundred and fifty years after the first English intrusions on the mainland, the mid-eighteenth century's maps of the interior showed "how successfully a European colonial society had reproduced itself in the New World." Their depictions of place-names, settlements, roads, and local administrative boundaries were a constant reminder of "the structures and consequences," the "European geography," and the European economy that English colonization had created. It was "as if the Europeans had always lived there."<sup>63</sup>

### III. BREAKING BOUNDS

*Bar.* This is the ware wherein consists my wealth.  
 And thus methinks should men of judgment frame  
 Their means of traffic from the vulgar trade,  
 And as their wealth increaseth, so enclose  
 Infinite riches in a little room

Richard Marlowe, *The Jew of Malta* (c. 1592)

Both in the project of early-modern colonizers and in Shakespeare's tragic

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1750-1776, in *Many Legalities*, *supra* note 4, at 388-413. It is worth noting in this context that the earliest identifiable example of Indian writing discovered by Joyce Chaplin is a land deed. Chaplin, *supra* note 1, at 24.

63 J.B. Harley, *Power and Legitimation in the English Geographical Atlases of the Eighteenth Century*, in *Images of the World: The Atlas Through History* 189 (John A. Wolter & Ronald E. Grim eds., 1997). Harley calls these same mid-eighteenth century maps "subliminal charters of colonial legitimation" (*id.* at 191). There is no need to contest the description in order to remind ourselves that the charters actually establishing the colonies had taken care of the matter long before, a point Harley concedes in noting the maps' "unwitting support [for] the legal doctrines of *terra nullis* [sic] and *vacuum domicilium*, which, since the earliest days of the colonies, had featured among the grounds for acquiring land title and assuming political jurisdiction" (*id.*).

The argument advanced here suggests that law is an extremely powerful and authoritative archive of culture. More prosaically, as a discourse organizing the commodification of territory in detail, it long precedes maps. Harley has suggested that cartography could and did perform a similar function. J.B. Harley & Kees Zandvliet, *Art, Science, and Power in Sixteenth-Century Dutch Cartography*, 29 *Cartographica* 10 (1992). It is certainly true that law and cartography are very much alike in this essential representational regard. What distinguishes law from cartography in early English colonizing, however, is that law is the medium not simply for the classification of objects worthy of recording but worthy of *creating*.

project, one encounters the absolute importance of boundaries and definition to identity.<sup>64</sup> How else could colonizers construct their project except by imagining both what lay within familiarity, inside their own locale, their own *civitas*, and beyond it? Hence the plenitude they planned was defined against the waste they encountered, English champion against indigenous alien heath. Once inserted into that other savage space, how could colonizers remain necessarily separated from it, except by conceptually bounding both themselves and the others they encountered? Hence civility fended off barbarity, humanity savagery. Theirs was a mighty struggle, for they were deep within the other — as Bradford had it, separated "from all ye civill parts of ye world ... . When they wandered in ye deserte willdernes out of ye way, and found no citie to dwell in, both hungrie, & thirstie, their sowle was overwhelmed in them."<sup>65</sup>

In fact, boundaries proved brittle and porous: transgression was a constant. In Barker's Shakespeare, as in Virginia, transgression is a threat to rule.<sup>66</sup> How easily in *Macbeth* and *Hamlet* and *Lear* authority turns to powerlessness, alliance to betrayal, civility to savagery, possession to dispossession, the plenitude of sovereignty to chaos, champion to heath. Rule has no steely order of its own. *Lear* is perhaps the most famous example, but *Titus* is the best. Here distinction collapses altogether, the one constantly in the process of becoming its other. Consider the play's plot line: Tamora, queen of the Goths, the barbarian other to Rome, enters the *civitas* with her three sons as its helpless captive, to be confronted not with its grace and serene nobility but with a sudden and brutal slaughter — the sacrificial disemboweling of Alarbus, her first-born. Just as abruptly, the young emperor Saturninus takes Tamora for his wife and empress. Helpless captives are incorporated in the *civitas* and transformed into its rulers.<sup>67</sup> The powerful Andronici are as suddenly rendered powerless, "prey,"

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64 O'Brien, *supra* note 51, at 22-26.

65 *Supra* note 47, at 96, 97.

66 The *Laws, Divine, Moral and Martiall* promulgated in the Jamestown colony in 1610, three years after its establishment, forbade all contact between settlers and Indians and all running away from the colony to the Indians. On the early history of crossing between the communities, see Kupperman, *supra* note 53, at 192-94, 206-07.

67 Tamora says, "I am incorporate in Rome, /A Roman now adopted happily." Publicly she declares herself bound to the civil unity of the *civitas* — "This day all quarrels die" — but her private aside, immediately preceding — "I'll find a day to massacre them all" — has already made nonsense of that unity. Titus Andronicus, *supra* note 14, at 22.

to be one by one entrapped and dispatched.<sup>68</sup> And the Goths are split in two: within the *civitas*, where they have been renamed Romans, Tamora and her remaining sons become murderous savage conspirators; outside, where they remain barbarians, Tamora's former subjects become loyal allies of the few remaining Andronici, aligned with their former enemies against the city that their queen now rules. When the Goth army enters Rome, with Lucius at their head, they do so to hurl the body of their former queen out, "forth to beasts and birds to prey" beyond the walls. "That ravenous tiger, Tamora," says Lucius. "Her life was beastly." Throughout, Rome consumes itself, first dismembering the Andronici just as Lucius dismembered Alarbus, then turning at the end to the last of the Andronici, the same Lucius, victorious leader of the Goth army against Rome, imploring him to "knit again" those "by uproar severed ... broken limbs again into one body."<sup>69</sup> But this is no restoration of the *civitas* — for who was it (it was Lucius) that at the outset demanded "the proudest prisoner of the Goths, /That we may hew his limbs and on a pile /*Ad manes fratrum* sacrifice his flesh"?<sup>70</sup> Who was the barbarian? Rome, the ultimate *civitas*, is simultaneously the ultimate wilderness.<sup>71</sup>

As the homologies of tragedy and colonization accumulate, they reinforce the argument that these texts address the passage from pre-modernity to modernity, from boundaries to ascendancy over a boundless world;

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68 We should note that at the root of the Andronici's sufferings is precisely Titus' loyalty to the ideal of the *civitas*' civil unity. He refuses imperial office because of it; twenty-one of his twenty-five sons die in wars to defend it; the twenty-second (Mutius) is killed by Titus for challenging it; the twenty-third and twenty-fourth (Quintus and Martius) he declares himself willing to yield up to it — "this fell fault of my accursed sons, /Accursed if the fault be proved in them ... . They shall be ready at your highness' will /To answer their suspicion with their lives." *Id.* at 43. Only after Titus finally realizes that *civitas* and wilderness are the same does he abandon it.

69 *Id.* at 106, 101-02.

70 *Id.* at 7. On Lucius, see Anthony B. Taylor, *Lucius, the Severely Flawed Redeemer of Titus Andronicus*, 6 Connotations 138 (1996-97), available at <http://www.anglistik.uni-muenster.de/connotations/taylor62.htm>.

71 Confirmed by the fate of Aron (described in *supra* note 46). Lessons embedded in classical allusion would not have been lost on Tudor-Stuart audiences.

The curious search for the new was unsettling partly because the humanist education of the times looked to the past, to ancient times, for lessons to guide the present ... . The years when the English first planted colonies in America were a time of renewed interest in Roman history, whose lessons seemed particularly applicable to early modern England.

Kupperman, *supra* note 53, at 27.

and with it, from a constraining physical exterior to the unbound (but, hence, deeply disciplined) interiority of accumulation, ambition, and self-reproduction to which Marlowe's Barabbas alludes and which Hamlet more famously explores.<sup>72</sup> It is a passage that the Shakespearean project both admits and simultaneously fends off, in recognition of and horror at the epistemological crisis that it signifies. It is a passage that, in contrast, the promoters of colonization pursue relentlessly. In the singularity of their acquisitive appropriations and commodifications, colonizers were squarely in the vanguard of the modernity that the tragic project feared, constantly pushing outward to breach the spatial and temporal boundaries upon which the old world had relied for its defenses, reaching simultaneously for new internalized boundaries (the Protestant ethic) to discipline their transgressions.<sup>73</sup>

Whether pursued with ambivalence or aggression, both sets of texts reveal that this passage to modernity is one in which violence in no sense at all becomes the antithesis of civility, but rather one of which it is a necessary condition and integral component. The generalized violence of the tragic project's confrontations helps suggest the depth of Shakespearean unease at modernity. But that is not quite the point. In its displays of violence *against* barbarism, on behalf of sovereignty threatened or invaded from without; in its displays of sovereignty's *own* assured and ordered and routine violence within — whether extravagant against transgressors or casual, even silent, against insignificant others (the interior violence, that is, of its legality and

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72 Barker writes of the emergence in the seventeenth century of a discoursing subject which is sceptical of its body and guilty of its sexuality, which is committed to writing and to the domination of the object-world; but one which is forever constrained to its own self-alienation ... . The modern subject, then, is constituted as an effect of the historical production of that great distinction in modernity between the public and the private spheres.

Barker, *supra* note 27, vi; see generally *id.* v-x. On Hamlet, see *id.* at 25-33.

73 Barker, *supra* note 26, at 17. Writing of *Macbeth* (*id.* at 68), Barker observes the temporal breach inherent in the passage to modernity. *Macbeth* stands for the characteristic Shakespearean seduction. It offers impossible choices between, on the one hand, sacred time — the non-time, the non-narrative fullness of the old imagined king; or its complementary opposite, the time of tyranny, mere continuance — and the instrumental time of emergent means-ends structures on the other. In order to provide something approximating to the necessary closure, it is obliged to compromise among these mutually impossible perspectives.

On the spatial breach, see *infra* text accompanying notes 76-77. On the covariance of Protestantism, the political economy of colonizing, and discipline, see, for example, Stephen Innes, *Creating the Commonwealth: The Economic Culture of Puritan New England* 39-159 (1995).

order) — the tragic project proclaims and justifies the violence that is of a piece with sovereignty and law and has remained so.

Here pre-modernity and modernity are seamlessly contiguous. Carol Greenhouse observes that "the roots of sociolegal scholars' concerns with law have been consistently nourished by the distinction they draw between social orders based on personal power and force, and those 'superior,' 'more advanced,' or 'more rational' orders based on the authority of words."<sup>74</sup> Liberal law, we have seen, proclaims the distinction by awarding itself the authority of words, but the words it chooses undermine the boundary it proclaims by, in their turn, awarding a monopoly of violence to law. Violence is not a residue of a pre-modern human brutality that civility combats and contains on our general behalf; nor is it the inevitable but temporary chaos of a "new world order," a social contract coming into being. Violence is not a negation of the legality of the *civitas*, pre- or post-enlightenment; violence is a condition of its existence, its jural order, its political economy. As Weber long ago realized, liberal modernity's achievement is to have gathered words, power, and force all into one grasp.<sup>75</sup>

I will return to this point, but first I want to try to extend analysis of the significance of boundaries to colonizing by turning to another aspect of textual representation, namely, geography and its representation in cartography.

In *Shakespeare and the Geography of Difference*,<sup>76</sup> John Gillies reproduces the "admit" and "fend off" unease of the Tudor-Stuart encounter with modernity through an examination of Shakespeare's cartography. According to Gillies, Shakespeare's cartographic imagination was simultaneously classical and "new." It is classical in its sense of what is mapped — namely, the comfort of sovereignty, the plenitude of order — and in what this places beyond the map's edges, beyond the body of the king (chaos and barbarity, the exterior of order), for this is precisely the purpose and representational discourse of pre-Renaissance cartographic depiction of the world.<sup>77</sup> Shakespeare's tragic project, in other words, is a cartography

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74 Greenhouse, *supra* note 36, at 105.

75 See Max Weber's analysis of political communities in Max Weber on Law and Economy in Society 338-48 (Max Rheinstein ed., 1954).

76 John Gillies, *Shakespeare and the Geography of Difference* (1994).

77 Gillies is particularly effective in his analysis of Giambattista Vico's "vision of how directly and powerfully the 'poetic' dimension of ancient geography mediates key ideological structures, particularly those which articulate identity and difference." Vico, he continues,

derives the archaic origins of the "world" from that of the city. The walls of the city and the borders of its territory are both telescoped into the edges of the

simultaneously of legality and violence (this is quite literally the case in *Lear*). In the anxiety for sovereignty of which Barker speaks, Shakespeare reproduces classical fears of the boundary immanent in classical cartography, its concentration on the center. But, Gillies continues, as have others, in the sixteenth century, a new geography began to countermand the old: "in place of the comfort of the medieval map we find restlessness[;] in place of stasis, dynamism ... . For perhaps the first time in the history of world cartography, world maps post-1492 began to privilege the unknown and unpossessed over the known and possessed."<sup>78</sup> Restlessness, dynamism, energy, possession. As Agnew has already argued, early modernity means a political economy of increasingly unbounded markets and unbounded voyaging, of possession of what lay beyond old boundaries of market and map; a political economy whose significance was situated in an established occidental explanatory discourse of *civitas* and barbarity, one that no longer fended off the boundary, but deliberately encountered and penetrated it.

Here then is the discursive context for the political economy — or, better, the *legal* economy — of colonizing. The texts that originated and realized colonies in the American case — the charters by which patentees laid claim to American space and designed jurisdictions for their claims that wrenched territories for themselves out of that space — were an espousal of the same cultural anthropology of civility and barbarism, the same politics of sovereignty and violence, that was on display in the tragedies. But from these discursive resources they fashioned a new *geography* of sovereignty and an unbounded economy of land and inhabitation. Both figuratively and literally, as we have seen, the charters rendered space beyond the borders of the Christian European *civitas* empty — waste, heath, and wilderness — so as to claim it for the metropolis. As texts, the charters occluded the violence of the extinguishment (always figurative and often literal too) that they licensed, while justifying extinguishment itself by the imputed violence and

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ancient map ... . Inhabited earth and city constantly divide themselves from their opposites. Their thresholds — altars, walls, boundaries, frontiers — threaten transgressors with the sacred violence of sacrifice, law or warfare. The order of city and world is constituted by their violent differentiation from "the infamous promiscuity of people and things in the bestial state".

*Id.* at 6.

78 *Id.* at 62. Gillies elaborates: "The difference between the medieval and Ortelian constructions of geographic space is roughly equivalent to the difference which Michel Foucault finds between the ancient and post-Galilean constructions of cosmic space. One is a 'space of emplacement' characterised by 'localization', the other 'an open space' characterized by amorphic 'extension.'"

savagery of those upon whom it was visited and whose removal from the scene was a condition precedent for the achievement of English plenitude.<sup>79</sup>

Jurisdiction — the implementation of sovereignty — was the condition of possession, possession the condition of improvement. The promise of improvement was what would make "English" land appear beyond the now-defunct boundary of the old map. Locke confirmed it, explicitly and repeatedly, in the *Second Treatise*.<sup>80</sup> The map itself became boundless, infinitely manipulable in the service of colonizing:

For as much as men usually live in houses which are neither spacious enough nor light enough within for them to be able to place or spread out conveniently a large world map in them, it will be most gratifying to many to have a map thought out on the following lines: namely that when spread out to its full extent it is quite fit and suitable for a hall or other spacious place of that kind, and also when rolled up at each end on two smooth revolving rods it lies conveniently on a table about three or four feet square.

All over the metropolis, a new documentary economy was being born in map rooms, treasure rooms, muniment rooms, an economy of little rooms built to contain the means — gold and silver, bits of paper — to manage and manipulate infinite riches the world over. "In this way you will perform a most acceptable service to a number of English lawyers, to the students of both Oxford and Cambridge Universities, to the citizens of London ... ."<sup>81</sup>

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79 Pagden, *supra* note 48, at 37.

80 John Locke, *Second Treatise of Government* 18-30 (C.B. McPherson ed., 1980) (with an Introduction by C.B. McPherson). *See also id.* at 42-44; Tully, *supra* note 46, at 155-66.

81 Letter from Richard Hakluyt, lawyer, of London, to Abraham Ortelius, cosmographer, of Flanders (n.d., circa 1567), *reprinted in* *The Original Writings and Correspondence of the Two Richard Hakluyts*, *supra* note 44, at 81. On Ortelian cosmography, see *supra* note 78. On the relationship between property, money, and paper, Locke, *supra* note 80, at 29-30, writes:

in the beginning all the world was *America*, and more so than that is now; for no such thing as money was anywhere known ... . Th[e] partage of things in an inequality of private possessions, men have made practicable out of the bounds of society, and without compact, only by putting a value on gold and silver and tacitly agreeing in the use of money; for in governments, the laws regulate the rights of property, and the possession of land is determined by positive constitutions.

#### IV. VIOLENCE AND SILENCE

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture

Robert Cover, *Nomos and Narrative* (1983)

The thirst of a tiger for blood is the fittest emblem of the rapacity with which the members of all the new states fly at the public lands. The constituents upon whom they depend are all settlers, or tame and careless spectators of the pillage. They are themselves enormous speculators and land-jobbers. It were a vain attempt to resist them here.

John Quincy Adams, *The Degradation of the Democratic Dogma* 31 (Brooks Adams ed., 1920)

Appropriative colonizing was the real, empirical, point of origin for the Anglo-America that is the stuff of actual formative experience: spatial, temporal, jurisdictional, geographic. Simultaneously, as we have seen, early-modern colonization's constitutive legal and cartographic texts reached beyond the processes that — as technologies — they had facilitated, to construct and maintain what Robert Cover would have called the *nomos* — the normative world "of right and wrong, of lawful and unlawful, of valid and void" — that lent those processes meaning and, inevitably, justification. As Cover argued, the structure of the *nomos* "is no less fundamental" than the structure of the physical world.<sup>82</sup> Indeed, in our case, the homology between normative order — right/wrong, lawful/unlawful, valid/void — and the cultural organization of colonized space underlines the absence of separation between them.

In both its academic and its mythopoeic metanarratives, however, American history has largely insisted on locating America's *nomos* elsewhere than in the originating discourses of colonization. It has done so at the level of piecemeal social history, in the representation of the innocuous routines of seventeenth and eighteenth century migration and settlement as virtually autonomous processes that, in Bernard Bailyn's words, "peopled" the Eastern seaboard and built its economy.<sup>83</sup> It has done so in its denials of significance

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82 Cover, *supra* note 31, at 4-5.

83 See Bernard Bailyn, *The Peopling of British North America: An Introduction* (1986);



to colonizing's founding texts, its insistence that the reality of America was made by its migrants.<sup>84</sup> It has done so in the more general notion, at once epic and anodyne, of "westward movement" across an "unopened" landscape — a movement that in fact manufactured property out of displacement in precisely the fashion of the earliest colonizers.<sup>85</sup> It has done so, finally, at the elevated level of America's dual foundation myths — of an initiating pious journey into a desolate wilderness;<sup>86</sup> and, some 150 years after, of self-creation in a confabulation among fathers.

Each of these historical narratives, from piecemeal routine to elevated myth, participates in the maintenance of a different American *nomos* — not the *nomos* of colonization but its antithesis, the *nomos* of liberty. But this is a *nomos* created by forgetting origins, not remembering them. The founding myths of Plymouth and Philadelphia exemplify this, in their discursive occlusion of colonizing's violence. Both take their stand instead on Anglo-America's supervening modernity and individualism, Plymouth as a foretaste of its insistent subjectivity, figured in the extreme subjectivity of separatist Puritanism and of selective political self-creation,<sup>87</sup> Philadelphia for its even more epochal representation of social formation as contract. Both stand for a *nomos* of right intent and self-fashioning, and hence for the essential truth of original emptiness and the essential rightness of improvement (the two components of Locke's absolutist and highly selective theory of property).<sup>88</sup> Both are singular but disguised acts of appropriation

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Bernard Bailyn, *Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution* (1986).

84 See, e.g., Jack P. Greene, *The Intellectual Construction of America: Exceptionalism and Identity from 1492 to 1800*, at 58, 66 (1991). Instrumentalism is certainly the favorite, perhaps the only, genre of legality admitted by social historians.

85 Hinderaker, *supra* note 57, at 227. The term "unopened" is taken from James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* 8 (1956).

86 Nowhere better epitomized than in the *Wall Street Journal's* annual editorial invocation (ritual resanctification?) of William Bradford's narrative of the pilgrim landing in the new world. *The Desolate Wilderness*, *Wall St. J.*, Nov. 22, 2000, at A22, col. 1.

87 See *supra* text accompanying note 49.

88 [T]he *chief matter of property* being now not the fruits of the earth, and the beasts that subsist on it, but *the earth itself* ... God and [man's] reason commanded him to subdue the earth, i.e. improve it for the benefit of life ...

Nor was this *appropriation* of any parcel of *land*, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all ...

— of space, obviously, but also, like all forms of social contractalism, of universal generative capacity to their highly particularized participants.<sup>89</sup> As made myths, then, they have many commonalities.

It is interesting to note, though, how difficult it is for Plymouth and Philadelphia to coexist as actual origin myths — how the second necessarily displaces the first as the point of "American" departure. This is not simply idle observation. The difficulty is deeply embedded in the conceptual structure of American history itself, for that history has proven unable to articulate a narrative that is not always overwhelmed, fractured, rendered discontinuous, by the revolutionary climacteric of the late eighteenth century and its accompanying constitutive legalities. The implication of discontinuity is false when America is relocated in the *nomos* of colonization. But in fact, the discontinuity imputed to American history by the assertion of a late eighteenth-century self-invention is quite crucial to subsequent American self-understanding, for it is the chief means to the removal of what we know as "America" from the violence done by colonization.

The success of that removal is manifest in the metanarratives of American history and its essential constituent histories.<sup>90</sup> In the case of legal history — a particularly crucial constituent because, as Cover has it, in the world of the *nomos* "law and narrative are inseparably related[, e]very prescription ... insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose"<sup>91</sup> — hardly a trace of law's participation in colonizing's violent assault on the continent is anywhere to be found. The field's own founding father, Willard Hurst, satisfied his commitment to situating American liberalism and modernism within a problematic beyond colonization and its violence, simply by writing off, ignoring, forgetting, the whole history of colonizing.<sup>92</sup> For Hurst and the generations of scholars that he influenced — which means the vast majority of American legal historians of the past forty years (for it remains mostly

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God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and *labour* was to be his *title* to it).

Locke, *supra* note 80, at 21-22.

89 See Carole Pateman, *The Sexual Contract* (1988).

90 For a recent example, see Gordon S. Wood, *The Radicalism of the American Revolution* (1992). *But see* Robert V. Hine & John Mack Faragher, *The American West: A New Interpretive History* (2000).

91 Cover, *supra* note 31, at 5.

92 On this, see Stanley N. Katz, *The Problem of a Colonial Legal History, in Colonial British America: Essays in the New History of the Early Modern Era* 465 (Jack P.

true that, as Lawrence Friedman once observed, if you are an American legal historian you are either a Hurstian or a reviser of Hurst) — nothing that happened in America much before the beginning of the nineteenth century really had any relevance to the meaning of America per se, except as the point from which the America "we" know, liberal and modernizing, departed.

Simply excising the violence of early American colonization from American history in this fashion is disturbing. What is more disturbing about Hurst's project, however, is that in crafting a representation of *American* law as a generative "release of middle-class energy" and of the early nineteenth century as its point of origin, Hurst chose a scenario that was in fact utterly continuous with the primal motive force — relentless expansion — of the first two centuries, a scenario that made historically impossible the dismissal in which he was participating.

For Hurst, what made American law *American* was its purposive dedication to facilitating the "release of energy," the realization of human creativity, through freedom of choice.<sup>93</sup> Hurst figured this unique American legal culture precisely in an emblematic instance of westward movement — that is to say, in an instance of the legal economy of colonizing. But he simply refused to characterize it as such, even though the evidence on that score was unanswerable.<sup>94</sup> Hurst's legendary figuration of the release of energy is his narrative of the establishment in 1836 of a Claimants' Union on the newly-settled banks of Pike Creek, in the southeast corner of what is now the state of Wisconsin, what was then the old Northwest Territory. The documents that he used to construct the narrative show that this group of settlers had originally joined together in a "Western Emigration Company" to remove from Oswego County in New York to what they described as a "new country." Their effort of removal itself gave them entitlement to reward, they said, because it was a transforming journey, conducted on behalf of civilization, into a void. "We have left our friends, deprived ourselves of the many blessings and privileges of society, have borne the expenses, and encountered the hardships of a

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Greene & J.R. Pole eds., 1984). Most relevant for Hurst's impact on study of the colonial period, Katz wrote, was that he "strenuously argued against it," *id.* at 465.

93 Hurst, *supra* note 85, at 3-32.

94 It does seem to me that Hurst had no difficulty in *recognizing* it as such. Indeed, reading and rereading *Law and the Conditions of Freedom* exposes a deep resonance between the actual terms of its account of American expansion ("as we drove inland from the coasts," *id.* at 34) and the analysis of Anglo-American colonization advanced here. The issue is most pithily joined in this way: Hurst's "we" is imperial in both senses of the term, but is used as if the author were conscious of only one sense.

perilous journey, advancing into a space beyond the bounds of civilization." Their civilizing mission was to transform that space, through labor, from open prairie hunted by Indians to enclosed agricultural smallholdings, the exclusive possession of which would be signified by the erection of "a house body, or frame of sufficient dimensions for a family to dwell in, or half an acre ploughed, or a piece enclosed with at least 100 rails."

They considered their place of settlement fruitful but perilous, "a state of nature" prone to "anarchy" and "confusion," to "bitter quarrels, even bloodshed." In advance of government instrumentalities, their "protective union" was constituted to resolve disputes amongst themselves and to guard their claims against threats from others: from other migrants, described variously as "malignant ... unprincipled, avaricious" or the "mob"; from the "unfeeling speculator"; and also from Indians, whose presence threatened possession "as the country had not yet been surveyed," whose competing practices were threatening physically — they "fired the prairies ... for hunting purposes," endangering the settlers' farms — and whose increasingly wretched dependency bred thieving and a "constant desire for whiskey" that was both morally repugnant and a constant source of trouble.<sup>95</sup>

The continuity of the discourse of these emblematic settlers with that that animated English colonizing from its outset is difficult to miss — the polarity of *civitas* and sovereignty and the space beyond, a space of confusion and violence, of barbarism; the penetration of boundaries, the reformation of space (infinite riches in an infinite series of small rooms, moving ever westward); the political economy of the transformation of waste into product; the removal of the indigenous from "occupant" to "threat." Yet the continuity was missed. Or at least it was ignored, as was the reproduction of the same meanings in behavior. Emphatically, we are not observing here an obtuse or narrow mind at work.<sup>96</sup> Hurst acknowledged that the claimants' intimations of moral superiority masked their own illegality. As he says, they were trespassers, "in defiance of law, ahead of official survey, without color of title," whose protective unions were, in their relationship to nonmember outsiders (like all colonizing governments), but assemblages of force. Hurst, in other words, recognized moral ambiguity in his settlers'

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95 Reverend Jason Lothrop, *A Sketch of the Early History of Kenosha County, Wisconsin, and of the Western Emigration Company*, II Wisconsin Assembly J. app. 14, at 450-79 (1856) (especially 461-64, 472-79). I am grateful to Arthur McEvoy for making this material available to me.

96 For the breadth of Hurst's reading and mind, see Carl Landauer, *Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 Law & Hist. Rev. 59 (2000).

position. But it was an ambiguity within a delimited occidental consciousness — their trespass was on lands already public. So inevitably, Hurst resolved the matter decisively in their favor, approving their impatient determination to meet "the challenge of the unexploited continent," approving their seizure of law and the state as instrumentalities to be put to work in that service. Here were historical inevitabilities that dwarfed the detail of behavior, prescriptions "located in discourse ... supplied with history and destiny, beginning and end, explanation and purpose."<sup>97</sup> By enabling and then regulating transactional behavior, law and the state would assist in the generation of material benefits that would tame the mob and actually put the speculator to good use. Law would civilize. In that same service, it would also excise the Indian, although that was not a story that Hurst told at all, except by its very elision. In what was a brilliant observation, Hurst wrote of contract's "capture of the land" as its "first and most dramatic victory." He was ready, it seems, to acknowledge that law was capable of waging war. It could have been a more telling insight yet had he remarked on whom its war was waged. Instead, Hurst rested his meaning entirely on the land's capture by one intra-European principle — market exchange — from another that he termed, rather vaguely, a "feudal type of tenure."<sup>98</sup>

What was the reality of the space that Willard Hurst chose to stage the opening scene of his epic of American law? It seems appropriately pristine, appropriately liberal — safely divorced from the coastal colonies and their compromised histories, far from the pitiless warfare and removals of the South's western frontier, dug deep in the rich yeoman sod of the Upper Mississippi Valley, fully a part of the old Northwest Territory, where America's founding fathers, in Lea Vandervelde's recent words, are supposed to have gotten slavery right (as they did not in their first birthing of the nation), by using the Northwest Ordinance to banish slavery from all the territory northwest of the Ohio, freeing at least that part of the continent from human property.<sup>99</sup> Unfortunately for them, and also for Hurst, who allowed himself to forget slaves as well as Indians,<sup>100</sup> slavery was alive and well in

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97 Cover, *supra* note 31, at 5.

98 Hurst, *supra* note 85, at 12. In one of the very few passages in the book that acknowledges an indigenous population, Hurst wrote, dismissively, "We confronted no elaborate, deepset pattern of Indian institutions which we must overcome or assimilate." *Id.* at 35. This, of course, was a classically Lockean, which is to say deeply self-interested, dismissal of indigenous political society. See Tully, *supra* note 46, at 140-55.

99 See Hine & Faragher, *supra* note 90, at 115; Lea VanderVelde, *Slaves in Free Territory* (2000) (unpublished manuscript, available with author).

100 Hurst, *supra* note 85, at 67-68. Robert Gordon thinks that to point this out would

the Northwest Territory, taken there by the federal army sent to police the line of European settlement.<sup>101</sup> The political economies of colonizing and slavery are of course intimately related — the one the instrument of the other. It is no surprise to find both so intimately related and conveniently forgotten in the construction of a metanarrative of how American law came to be.

What is the significance of these elisions and omissions in a history? To return to *The Culture of Violence*, "If the land is a place of fulsome and abundance, it is at the same moment one of ideal emptiness, a depopulated landscape ... [F]rom the point of view of those for whom there is space and validity, emptiness ... may even be a definition of the ideal."<sup>102</sup> As for earlier colonizers, so for Hurst: America was an empty place, a void. It could safely be appropriated and organized by law and a few squatters.

### AFTERWORD: IN A WILDERNESS OF TIGERS

You know I am not as you are. I am of a quite different Nature  
from you.

Sagughsuniunt, of the Susquehanna Oneida, Lancaster Treaty  
Council, Pennsylvania (1762)

With laws harsh as tigers, I had a taste of all the barbarities

Poem by one named Xu from Xiangshan<sup>103</sup>

This essay has elaborated the proposition that colonization and its violence supply the foundational and enduring meaning of American history. It has in addition offered an account of the construction of the countervailing *nomos* of freedom and its maintenance in texts that do violence to history. Willard Hurst's metanarrative centers American history on the myth of a state created

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be a "relatively cheap shot." See his *Hurst Recaptured*, 18 *Law & Hist. Rev.* 167, 170 (2000) (generally 167-70). I disagree. See also Mary Frances Berry, *New Directions for the Children of Hurst*, 18 *Law & Hist. Rev.* 178 (2000).

101 VanderVelde, *supra* note 99.

102 Barker, *supra* note 26, at 3-4.

103 *Poem by One Named Xu from Xiangshan Encouraging the Traveler* (written on a wall of the federal quarantine station, Angel Island, Port of San Francisco), reprinted in *Island: Poetry and History of Chinese Immigrants on Angel Island, 1910-1940*, at 42 (Him Mark Lai et al. eds., 1980). I am indebted to Lucy Salyer for her assistance in confirming the reference.

from nature by incipient bourgeois proprietors. He occluded their violent intrusion upon what had been — the long story of how they came to be who they were and where they were — indulging instead self-creation as their originary act, emblematic of their Lockean claim, as Carol Pateman has put it, of "an original political right ... to fill the empty vessel," to appropriate to themselves reproductive power and give birth to new political life.<sup>104</sup>

For the sake of argument, but for no other reason, let us allow their claim. What, then, did they use their freedom to create? What they created for themselves was a modernizing liberal regime, in territory expropriated from its inhabitants under the protection of a colonizing army serviced by slaves: a reasonable enough representation, one might suggest, of the political economy of the early American republic.<sup>105</sup> These were the "conditions of freedom" in the creation of which American law was so thoroughly implicated. They had been the conditions of (Anglo-American) freedom from the outset. As Locke wrote in the *Second Treatise*, American land was for the "use of the Industrious and Rational." Anyone who interfered with Europeans' appropriation of that land might "be destroyed as a *Lyon* or a *Tyger*, one of those wild Savage Beasts, with whom men can have no Society nor Security."<sup>106</sup>

In establishing the conditions of their freedom, Hurst's settlers created conditions of savagery and violence for others. There was nothing new in this, either historically, as we have seen, or indeed spatially. It was the reason Sagughuniunt, of the Susquehanna Oneida, declared his own independence of the very *nature* of those who had intruded themselves upon the indigenous inhabitants of the Susquehanna country. It was also the reason the Tswana-speaking peoples of Southern Africa, when undergoing *their* nineteenth-century colonization, called law and its varied manifestations "the English mode of warfare."<sup>107</sup> It was the reason, finally, that on his arrival in America one named Xu, immigrant from Xiangshan, tasted not freedom but barbarity in the laws addressed specifically to *him*. That he found those laws "harsh as tigers" should surprise no one. America, like Rome, was a wilderness of tigers.

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104 Pateman, *supra* note 89, at 87.

105 See, e.g., Hinderaker, *supra* note 57, at 244-67.

106 Locke, *supra* note 80, at 21, 11. See also Pagden, *supra* note 48, at 46.

107 Comaroff, *supra* note 5, at 306.

