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Creating Rights, Terminating Rights, Overcoming Legal Conflicts

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Abstract

At the heart of this paper are judges and their obligations to ensure that conflicts over fragmented rights are cured, that fundamental rights are stewarded, and that justice prevails. There are several respected legal theories that have never been examined together before, but when three of them are placed in a nexus of constitutional law, we find that these ideas support broad powers for courts to control the distribution and allocation of rights, enabling the resolution of conflicts at many social levels. First, a succession of scholars has identified the risks of 'fragmenting rights', of allocating overlapping rights to too many parties. The danger presented is that those rights-holders may lose the use of their legal rights or privileges; this outcome is known as the 'Tragedy of the Anticommons'. Too many rights held by too many parties, a 'fragmentation of rights', can lead to a lack of access to rights and a lack of access to justice. Second, the legal theories of Nobel Laureate Ronald Coase, who found that initial allocations of rights across a community might have been allocated in a manner that frustrates negotiations and other means to avoid conflicts; but judges have an opportunity and an obligation to reset those allocations of rights to better enable society to flourish. Third, Yale constitutional scholar Robert Cover wrote that judges can and should terminate claims of overlapping rights so that the litigious parties, and society at large, can return to a more harmonious co-existence. Cover wrote that this methodology of 'jurispathic' judges was both an ethical and a robust means of solving Dworkin's 'hard cases'. This paper investigates the nexus of these three jurisprudences and what the impact of their nexus is for constitutional

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scholars. This paper delivers original theoretical legal findings and provides functional approaches to best enable the resolution of conflicts before courts and the maintenance of rights and privileges for all parties. This paper documents an argument that courts, especially constitutional courts, have more power to solve social conflicts and other conflicts arising from legal rules and cultures than many constitutional law scholars may have previously assumed feasible.

Keywords: Anticommons, Jurispathic Judges, Rights, Legal Conflict, Robert Cover, Ronald Coase.

I. INTRODUCTION: CREATIVE ALLOCATION OF RIGHTS AND ITS RISKS

There are several well-known legal theories that have never been examined together before, but when three of them are placed in a common nexus of constitutional law, we find that these ideas support broad powers for courts and especially constitutional courts, to play leading roles in controlling the distribution of rights and enabling the resolution of conflicts at many social levels.

First, a succession of scholars, from Cournot to Buchanan to Heller, have identified the risks of 'fragmenting rights', of allocating potentially overlapping rights to too many parties. When too many parties hold such rights, especially rights of an exclusive nature, then there arises what is known as an 'anticommons' in the legal literature. The danger presented, known as the 'Tragedy of the Anticommons', is that all parties become blocked from access to the use of their legal rights or privileges, thereby denying all parties from access to rights, privileges, or justice. Too many rights held by too many parties, a 'fragmentation of rights', can lead to a lack of access to rights and a lack of access to justice.

Second, the legal theories of Nobel Economics Laureate Ronald Coase, who found that initial allocations of rights often prevented or frustrated the ability of parties to resolve their conflicts and that a political power, such as a court, could reallocate the disputed rights to better enable cooperative bargaining and negotiations that might lead to conflict resolution. Often, rights have been allocated in a manner that frustrates negotiations and means to avoid conflicts; so, judges have an opportunity and an obligation to reset those allocations of rights to better enable society to flourish.

Third, Yale constitutional scholar Robert Cover wrote that judges and courts must sometimes work to eliminate conflicting rights to better enable social cohesion and access to social justice. Cover noted that this methodology of 'jurispathic' judges was a more robust means to solving 'hard cases', the question originally debated by Ronald Dworkin and H.L.A. Hart. Judges are at their core assigned to terminate claims of overlapping rights so that the litigious parties, and society at large, can return to a more harmonious welfare.

This paper investigates the nexus of these three classical intellectual concepts and what the impact of their nexus is for constitutional scholars. The author delivers original theoretical legal findings and provides functional approaches to best enable the resolution of conflicts before courts and the maintenance of rights and privileges for all parties. Moreover, this paper documents an argument that courts, especially constitutional courts, have fundamental powers to solve social conflicts and other conflicts arising from legal rules and cultures than many constitutional law scholars may have previously assumed feasible.

The first three sections of this paper explore the intellectual and jurisprudential ideas of the three camps of anticommons: theorists, Coase, and Cover. Each of these sections will provide both an introduction and focal discussion on how that camp's ideas apply to the thesis of this paper.

After those three sections, the next section will dovetail the ideas together to present a harmonized analytical discussion, revealing how these three sets of ideas support creative reallocations of rights to achieve justice while also requiring caution on those reallocations to prevent further injustice. In short, the finding of this paper is that courts do have a liberty and perhaps an obligation to creatively reallocate rights to achieve justice in the cases before them, but the act of creative reallocation of rights must be tempered and limited to avoid the injustices that might result from the tragedy of the anticommons, where very little justice might result at all.

Finally, the last section will reflect on the earlier sections and suggest future lines of research.

II. ANTI-COMMONS: TRAGEDY FROM EXCESSIVE RIGHTS?

What happens when the rights of multiple parties interlock in such a manner so that no one is able to operate or rely on their rights? This is the question addressed by scholars who study the concept known as the 'anticommons'.

2.1. Introduction to Theory of Anticommons

An anticommons is present when multiple parties hold exclusionary rights over a resource.[1] As the number of parties holding such exclusionary rights increases, then the likelihood that the resource will remain unused or non-accessed increases. Once the resource is blocked from use, then scholars call that a 'tragedy of the anticommons', as the community will gain no social welfare, nor private gain, from the resource. As several decades of scholarship have revealed, anticommons are ubiquitous in legal cultures and legal institutions, and are a prime source of legal disputes or legal frustrations.

An anticommons is the functional inverse of a commons.[2] Whereas a commons presents a resource with few or no exclusionary rights to control its use, an anticommons presents a resource with many or a 'total' set of exclusionary rights to control its use.

In the case of a commons, since no or few exclusionary rights exist, any party can use the resource and thus the resource will become depleted from overuse and thereafter provide no value to the community at large. This loss of social welfare from a lack of exclusionary rights is called the '*tragedy of the commons*'.[3]

In the case of an *anticommons*, many parties can operate their exclusionary rights to prevent anyone's access to the resource, thus very few parties will ever be able to use the resource. This lack of permissions leads to the resource not being used or exploited at all and thus it will provide no value to the community

[1] A naïve example of an exclusionary right is the right to sit in a chair. If a person is sitting on a particular chair, then other people cannot sit on that chair, at least not in the normal, simple way. Another way to express this concept, is that the person sitting in the chair has a right to refuse to yield their chair, they can veto the idea that they will arise to yield their right to remain seated in the chair.

[2] In mathematical terms, the relationship between the mathematical models of commons and anticommons are known as a 'dual' or 'duality'; the problem spaces and solutions sets of the two ideas are fundamentally connected.

[3] Garret Hardin, "The Tragedy of the Commons." *Science* 162, no. 3859 (1968): 1243-1248.

at large. This loss of social welfare from an excess of exclusionary rights is called the '*tragedy of the anticommons*'.[4]

The simple concept of exclusionary rights is the core concept of anticommons, that some rights function in a way that the use of the right by one party means that another party cannot have access to that right.[5] The ability to exercise such a right, to be able to decide to exclude someone from a resource, is tantamount to having a veto over their ability to access the resource. So stated, it is clear than an exclusionary right is the functional equivalent of a right to a veto vote. And if an actor has the ability to decide over a necessary ingredient or service, what economists call complementary goods or services, then the actor can similarly approve or veto the use of a complementary input. In the anticommons literature, the concepts of exclusive rights, of veto votes, and of complementary goods and services are considered equivalent concepts.

Whenever an exclusionary right is present, or a veto right is present, or a combination of complementary goods or services are present, then the environment surrounding that resource is rich in anticommons and will have a propensity for that resource to not be usable or exploitable. And if the resources in discussion are legal rights or constitutional rights, then the community will be at risk of being deprived of the value or use of those rights that had been granted to them. And that denial of access to rights is in most cases evidence of injustice caused from an abundance of rights to the point that the collective set of rights frustrates the exercise and enjoyment of some of those same rights.

2.2. Models of Anticommons

The literature for anticommons was thought to have begun with Heller's paper in the late 1990s, but as part of a joint research project by the Japan Society for Promotion of Science (JSPS) and UK Research and Innovation (UKRI), it was discovered that a wide range of scholars had previously encountered this concept of anticommons in various forms and had reported it to the scientific

[4] Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," *Harvard Law Review* 111, no. 3 (1998): 624.

[5] For this purpose, the phrases 'rights of exclusion' and 'exclusionary rights' are identical in meaning.

community under various names. Scholarship on the subject existed in a wide range of disciplines, including economics, political science, law, and even in mathematics and computing science.

2.2.1. Economic Literature

The earliest variations of the models were found in the separate economic research projects of Ellet and Cournot,[6] who were researching oligopolistic markets. They both independently discovered that when several monopolies each produce a complementary input into a second manufacturing process, like copper and zinc for bronze, then the functional problems of anticommons arise. As any of the monopoly producers can choose to exclude their good or service from the secondary production, they are able to prevent the secondary production process from occurring.

In both Cournot and Ellet's models, that power is used to extract abusive rents from the secondary producer, rents that exceed the value to the producer from producing the secondary product, so none is produced; a tragedy of the anticommons, but one that relies on a threat of exclusion set by a high price that exceeds affordability. Ellet's research has the bonus of empirical analysis to support his findings.

Cournot and Ellet's work on oligopolies continues to influence anticommons models and economic policy. Economic models of anticommons have produced substantial advances in our understanding of the operational modalities of anticommons and of the risks presented by tragedies of anticommons.

Major, King, and Marian provided what is perhaps the most explicit 'economic' definition of an anticommons, focusing on the strategic thoughts of the actor:

> "The core prerequisites are merely that each actor knows that there are several necessary complementary inputs, that she controls at least one of them, and that successful bundling of all inputs will generate positive benefits available for allocation, giving rise to a non-cooperative strategic game."[7]

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[6] Michael A. Heller, "The Tragedy of the Anticommons: A Concise Introduction and Lexicon," *Modern Law Review* 76, no. 1 (2013): 20, with reference to Antonin Auguste Cournot, *Recherches sur les Principes Mathematiques de la Theorie des Richesses* [Researches into the Mathematical Principles of the Theory of Wealth] and to Ellet Jr, Charles, *An Essay on the Laws of Trade in Reference to the Works of Internal Improvement in the United States*.

[7] Ivan Major, Ronald F. King, and Cosmin Gabriel Marian, "Anticommons, the Coase Theorem and the Problem of Bundling Inefficiency," *International Journal of the Commons* 10, no. 1 (2016): 151.

Buchanan and Tullock may have presented an economic model of anticommons as early as 1962, claims Hsiung, who identified that their model of constitutional law reflected voters with veto-like powers.[8] Buchannan and Yoon are the standard citation for the first economic model of an anticommons in 2000, but their model was fairly naïve; they primarily evidenced the duality of the commons and anticommons problem sets.[9]

Thereafter, there were many discoveries and proofs; key findings include; The mathematical models of Buchanan and Yoon,[10] of Parisi, Schulz, and Depoorter, and of Major, King, and Marian have all rigorously proven that the risk of a tragedy of the anticommons increases as the number of actors with veto powers or exclusionary rights increases. These mathematical proofs have been buttressed by empirical studies by Stewart and Bjornstad, to boot, they found that the risk of tragedy increased more quickly in reality than most formal models had predicted (likely due to additional behaviors not included in the formal models).[11]

Parisi, Schulz, and Depoorter demonstrated that anticommons can arise in two fundamental ways,[12] first, 'horizontal' when all of the decisions are made simultaneously; second, 'vertical' when decisions are made sequentially. Of course, both characteristics of horizontal and vertical can be present in the same anticommons environment, adding complexity and chaos to the risk of tragedy.

Parisi, Schulz, and Depoorter found that anticommons that arise from complementary goods and services do not need to be predicated on 'perfectly complementary' goods or services, but rather that anticommons might arise from

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[8] Bingyuan Hsiung, "Commons, Anticommons, and in-Betweens," *European Journal of Law and Economics* 43 (2017): 378-380, with reference to James Buchanan and Gordon Tullock. *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Michigan: University of Michigan Press¸1962).

[9] James Buchanan and Yong J. Yoon, "Symmetric tragedies: Commons and Anticommons," *The Journal of Law and Economics* 43, no. 1 (2000): 1-14. *See* Yoon's later commentary on their 2000 model and his comments on his later modelling of anticommons which were more sophisticated, Yong J. Yoon, "Buchanan on Increasing Returns and Anti-commons," *Constitutional Political Economy* 28 (2017): 270–285.

[10] Buchanan and Yoon, "Symmetric Tragedies: Commons and Anti-commons."; Francesco Parisi, Norbert Schulz, and Ben Depoorter, "Simultaneous and Sequential Anti-commons," *European Journal of Law and Economics* 17 (2004): 183; *See also* Major, King, and Marian, "Anticommons, the Coase Theorem," 247-248.

[11] Steven Stewart and David J. Bjornstad, "An Experimental Investigation of Predictions and Symmetries in the Tragedies of the Commons and Anticommons" (Research Report No. JIEE 7, Joint Institute for Energy & Environment, 2002), 3.

[12] Parisi, Schulz, and Depoorter, "Simultaneous and Sequential Anti-commons,"176-177.

"[c]ases of partial exclusion rights".[13] This finding greatly widens the risks of when a tragedy might arise. Empirically, Depoorter and Vanneste similarly found that "Anticommons deadweight losses *increase with the degree of complementarity* between individual parts, and *with the degree of fragmentation*."[14] (Italics added)

Oligopolistic competition can occur by either pricing or by quantity decisions; Dari-Mattiacci and Parisi found that both modes of competition could result in anticommons but that quantity competition is far more likely to result in tragedy outcomes than pricing competition.[15]

Vanneste, Van Hiel, Parisi, and Depoorter performed multiple empirical studies to examine how humans responded to tragedies from commons and those from anticommons. They found that "Anticommons dilemmas are more prone to underuse than Commons dilemmas are to overuse (Study 2). *If Commons lead to "tragedy"[16], Anticommons may well lead to "disaster."* (Italics added)

Perhaps most importantly, King, Major, and Marian delivered a mathematical proof that the origins of the anticommons and of the potential tragedy resultant, are purely mechanical and logical outcomes once the initial requirements of multiple actors with exclusionary rights or veto-like powers are enabled:

> "Yet, importantly, inefficient underutilization is likely even when *all the separated actors unanimously grant permission* and *sale is a success*, as a consequence of them autonomously selecting the best available strategic position while recognizing that the others are calculating similarly. *Behaviour that is individually rational and maximizing thus results in outcomes that are collectively perverse and systematically suboptimal.* It is a logical consequence when the owners of a scarce resource play against each other as well as against the player who wishes to purchase some share of that resource.

[13] Ibid., 180.

[14] Ben Depoorter and Sven Vanneste, "Putting Humpty Dumpty Back Together: Experimental Evidence of Anticommons Tragedies," *Journal Law, Economics & Policy* 3 (2006): 21.

[15] Giuseppe Dari-Mattiacci and Francesco Parisi, "Substituting Complements," *Journal of Competition Law and Economics* 2, no. 3 (September 2006): 338-340. The implications of this for anti-trust or competition law are profound; their findings suggest that ministries should generally regulate mergers to protect consumer welfare but that ministries should encourage mergers when the corporations produce complementary goods or services to avoid tragedy of the anticommons in those market sectors.

[16] *See Hardin,* 1968.

> The implication is that the Anticommons Tragedy is deeply inherent and widely pervasive whenever *separated owners* possess *rights of exclusion* over a *product or activity* requiring *complementary approvals.*"[17] (Italics added.)

Thus, the economic theorists have provided rigorous models that anticommons can arise from a variety of non-perfect conditions, but that once those initial requirements are met, the tragedy of anticommons is guaranteed like clockwork.

2.2.2. Political Science Literature

Political scientists have studied the role of veto voting in political affairs, inclusive of legislature, empaneled multi-judge courts, and other political committees. It turns out one does not need an absolute veto; one can exercise something less than a full-powered veto to obtain results consistent with anticommons theory. Thus, anytime a vote is strategically used in a way that presents that a voter might withhold an important vote, or that the voter will not support a whole set of policy issues on a plank, then anticommons can emerge.

Anticommons models from political science literature include:

- 'Critical Player Models', which include classical power analyses from scholars such as Penrose, Shapley, Shubik, and Banzhaf.[18]
- 'Sequential Voting by Veto' models, from scholars such as Mueller, Winter, Felsenthal and Machover, and Yuval.[19]
- Tsebelis developed a complex geometrical and topological model of veto powers and how they impact policy and legislative formation, enabling a new methodology for comparative political analysis. Yet again, a veto model reveals the existence of a tragedy of the anticommons, seen as policy stability

[17] Ronald F. King, Ivan Major, and Cosmin Gabriel Marian, "Confusions in the Anti-commons," *Journal of Politics and Law* 9, no. 7 (2016): 67.

[18] L. S. Penrose, "The Elementary Statistics of Majority Voting," *Journal of the Royal Statistical Society* 109, no. 1. (1946): 53-57; Lloyd S. Shapley, "A Value for n-Person Games," in *Contributions to the Theory of Games, vol. II*, ed. H. W. Kuhn and A. W. Tucker (Princeton, New Jersey: 1953), 307-17; Lloyd S. Shapley and Martin Shubik, "A Method for Evaluating the Distribution of Power in a Committee System," *American Political Science Review* 48, no. 3 (1954): 787-792; John F. Banzhaf II, "Weighted Voting Doesn't Work: A Mathematical Analysis," *Rutgers Law Review* 19, no. 2 (1965): 317-344.

[19] Dennis C. Mueller, "Voting by Veto," *Journal of Public Economics* 10 (1978): 57-75; Eyal Winter, "Voting and Vetoing," *The American Political Science Review* 90, no. 4 (1996): 813-823; Dan S. Felsenthal and Moshé Machover, "The Majority Judgement Voting Procedure: A Critical Evaluation," *Homo Oeconomicus* 25, no. 3 (2008): 319-334; Fany Yuval, "Sophisticated Voting Under the Sequential Voting by Veto.," *Theory and Decision* 53 (2002): 343-369.

by Tsebelis.[20] Francis Fukuyama presented a similar anticommons 'vetocracy' concept in his book *Political Order and Political Decay*.[21]

2.2.3. Legal Literature

Legal scholars first came across anticommons in Michelman's theory of property law,[22] wherein he contrasts the rules of traditional private property with four other alternative property law designs, one of which presents anticommons as follows:

> "2. Regulatory regime (REG). The converse of SON [State of nature] is a regulatory regime (REG), in which everyone always has rights respecting the objects in the regime, and *no one, consequently, is ever privileged to use any of them except as particularly authorized by the others.* (Rules for determining when such authorization exists may vary along several axes. *At one extreme, authorization would require near-simultaneous unanimous consent* ...)"[23] (Italics added)

Heller was the first property law scholar to abstract this concept to administrative law and regulatory activities of the state.[24] He observed how multiple city officials could hold veto-type powers over various licensing and approval requirements necessary for opening a business. This distributed set of veto powers would then have a foreseeable effect of too few businesses being approved and opened for business, resulting in a tragedy of the anticommons.

Heller and Eisenberg explored how intellectual property rights could also lead to a tragedy of the anticommons,[25] by the necessity of approvals for a subsequent researcher to use the results of an earlier researcher, if that earlier researcher's ideas were protected by intellectual property (IP) rights; for use of

[20] George Tsebelis, "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism," *British Journal of Political Science* 25, no. 3 (1995), 289-325.

[21] Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014).

[22] Frank Michelman, "Ethics, Economics, and the Law of Property," *Tulsa Law Review* 663, no. 39 (2004): 663-690.

[23] Ibid., 665.

[24] Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets." *See* Heller, "The Tragedy of the Anticommons: A Concise Introduction and Lexicon" for a more recent update on the research program.

[25] Michael Heller and Rebecca S. Eisenberg, "Can Patents Deter Innovation? The Anticommons in Biomedical Research," *Science* 280, no. 5364 (1998): 698-701.

an IP right requires assent and consent from the owner and that implies that the owner holds a veto power over the use of those rights. Further in the IP context, careless granting of permissions or licenses to use IP rights can risk the owner losing their rights of ownership and control, so the law enables a choice but places a risk on permitting usage while it does not place such a risk on not permitting usage.

Finally, Dagan and Heller investigated how different traditions of inheritance planning could doom a family to poverty when mixed with the normal rules of immovable property law (real property laws).[26] They document that families that left all or most of their land to a single heir were able to retain effective control over their land for generations and enable the farm to remain in productive use for the family. But they also demonstrated how families that divided the land across a larger number of heirs rapidly lost control over the land and lost the ability to farm at economies of sufficient scale, dooming the former independent farmers to share-cropping or other forms of economic collapse. And this was due, again, to the splitting of control across many individuals, each of whom were able to exercise veto votes on the use of their lands or the contribution of their complementary lands to the greater farming project. Tragedy of the anticommons strikes again.

Anticommons has been found in wide range of substantive legal areas; e.g., in copyright law,[27] in patent law, [28] in many areas of administrative law,[29] in

[26] Hanoch Dagan and Michael A. Heller, "The Liberal Commons," *Yale Law Journal* 110 (2000): 549-623.

[27] Taylor Bussey, "You Got Too Much Dip on Your Chip! How Stagnant Copyright Law Is Stifling Creativity," *Journal of Intellectual Property Law* 27 (2020): 277-301; Clark D. Asay, "Software's Copyright Anti-commons," *Emory Law Journal* 66, no. 2 (2017): 265-332.

[28] Jeffrey R. Armstrong, "Bayh-Dole under Siege: The Challenge to Federal Patent Policy as a Result of Madey v. Duke University," *Journal of College and University Law* 30, no. 3 (2004): 619-640; *see* Giuseppe Colangelo, "Avoiding the Tragedy of The Anticommons: Collective Rights Organizations, Patent Pools and the Role of Antitrust" (*LUISS Law and Economics Lab Working Paper* No. IP-01-2004, 2004). *See* Lee A. Greer and David J. Bjornsta, "Licensing Complementary Patents, the Anticommons and Public Policy" (Joint Institute for Energy and Environment, Technical Report 2004), 3-11.

[29] Matt J. Van Essen, "Regulating the Anticommons: Insights from Public-Expenditure Theory," *Southern Economic Journal* 80, no. 2 (2013): 523-539. José António Filipe, "Tourism Destinations and Local Rental: A Discussion around Bureaucracy and Anti-Commons: Algarve Case (Portugal)," *International Journal of Latest Trends in Finance and Economic Sciences* 4 (2014): 821-830; Marian Cosmin Gabriel, "Education in the Anticommons: Evidence from Romania," *Central European Journal of Public Policy* 12, no. 1 (2018): 32–40; *See* Matthew Mitchell and Thomas Stratmann, "A Tragedy of the Anticommons: Local Option Taxation and Cell Phone Tax Bills," *Public Choice* 165 (2015): 171-191. *See also* Mitchell and Stratmann, "A Tragedy of the Anticommons: Local Option".

environmental and climate change laws,[30] in public international law,[31] and in corporate and commercial law.[32] There are many more examples, but essentially everywhere that legal scholars have searched for anticommons and tragedies of the anticommons, they have found anticommons and its tragedies present in legal rules and legal institutions.

The legal paradigm of anticommons has been found in many diverse contexts, but it was always found that whenever a fragmenting of rights occurs, resulting in an excess of rights, that action leads to multiple voices having exclusionary rights or veto-like powers over an underlaying resource, which might include a wide range of legal and constitutional rights. This means that the concept of anticommons, of too many rights being held by too many parties, can lead to a lack of justice for a community, and that such risks have been found throughout many areas of legal discourse.

2.3. Summary and Conclusion on Anticommons and Rights

The fragmentation of rights or the over-creation and over-granting of exclusionary rights, or the creation of legal institutions and processes of law that enable too many actors to operate veto-like powers, or legal processes that require too many coordinated, 'complementary', processes to achieve a legal outcome, then the fundamental rights and privileges of citizens will be at risk of a tragedy of the anticommons, wherein everyone becomes deprived of their legal rights or constitutional expectations of justice.

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[30] Giuseppe Bellantuono, "The Regulatory Anticommons of Green Infrastructures," *European Journal of Law and Economics* 37, no. 2 (2014): 325-354; Bing Shui, "China: Fragmented Rights and Tragedy of Anticommons: Evidence from China's Coastal Waters," *Journal of Civil Law Studies* 9, no. 2 (2016): 501-533; Lea-Rachel Kosnik, "River Basin Water Management in the US: A Regulatory Anti-commons," *Environmental & Energy Law & Policy Journal* 5 (2010): 365- 395.

[31] Roy Andrew Partain, "Anticommons in Public International Law: Consideration of a New Approach for Legal Research," *Gachon Law Review* 13, no. 1 (2020): 211-264; Benjamin David Landry, "A Tragedy of the Anticommons: The Economic Inefficiencies of Space Law," *Brooklyn Journal of International Law* 38 (2013): 523 – 578; Peng Wang, "Tragedy of Commons in Outer Space: The Case of Space Debris" (DRAFT FOR IAC 2013, School of Law, Xi'an Jiaotong University, China, 2013).

[32] Matthew W. McCarter, Shirli Kopelman, Thomas A. Turk, and Candace E. Ybarra. "Too many cooks spoil the broth: Toward a theory for how the tragedy of the anticommons emerges in organizations." *Negotiation and Conflict Management Research* 14, no. 2 (2021). 60-74; Timothy Simcoe, "Governing the Anticommons: Institutional Design for Standard-Setting Organizations," *Innovation Policy and the Economy* 14 (2014): 99-128; Alfredo Canavese, "Commons, Anti-commons, Corruption and 'Maffia' Behavior," *Economics Working Paper Archive EconWPA*, Law and Economics Series (2004).

Judges and justices should take care to be aware and to prevent or mitigate the harm that can arise from the fragmentation of rights or the over-creation and over-granting of exclusionary rights, to best protect the public and to ensure the preservation and stewardship of the constitutional intent of the rights allocated under constitutional law.

III. COASE: CREATIVE REALLOCATIONS OF RIGHTS

Ronald Coase is well known as one of the early founders of the economic analysis of law approach to jurisprudence. His seminal work on the institutional drivers of why companies and corporations exist opened up the new field of institutional economics. His research on the conflicts of rights, especially those allocated by processes of administrative law, led to a broader rethinking of Pigou's externalities and into tort law in general, opening up new pathways and options for judges in determining 'hard cases'. Hereunder, the deeper connection between these two accomplishments will be explored with an attention to how these breakthroughs occurred.

3.1. Pre-Coordination of Rights Enables Firms

Coase in 1937 wrote 'The Nature of the Firm',[33] a seminal paper that explored why people would organize into firms, such as companies and corporations, if the markets worked in the manner described by most micro-economists in the early 1900s. If an open and free market existed, then the theories of that era suggested that the socially optimal mode of production was to rely on the open and free market.

Except, the world really did not rely on the open market; it relied on firms with many non-market features built into them, primarily the long-term contracts and the centralization of decision-making powers around an inner core of entrepreneurs. Coase asked, why would such firms exist at all if the market is so effective? His answer to that question was as stunning as it was functionally simple: firms exist because operations on the market bear costs, and firms are

[33] Ronald Harry Coase. "The Nature of the Firm." *Economica* 4, no. 16 (1937): 386-405.

designed to bear fewer 'transaction costs' than would otherwise be required for an entrepreneur operating on the open and free market.

> "The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism.[34]

> "We may sum up this section of the argument by saying that the operation of a market costs something and by forming an organisation and allowing some authority (an "entrepreneur") to direct the resources, certain marketing costs are saved."[35]

This simple understanding, that the 'free and open market' was itself an economic creature and like all economic creatures had its own costs of operations, unlocked (albeit not immediately) a huge wave of scholarship into the origins of social institutions, especially those engaged in economic activities. The scholarly benefits from these insights cannot be understated, but as a means of evidencing the point, Coase earned a Nobel Prize for his economic insights into these social institutions and so did others who followed his interest in social institutions.[36]

At the very core of Coase's insight is the idea that while the market has its efficiencies, an entrepreneur bears costs to find items on the market, to appraise their value and functionality to his or her line of business, and to construct a dataset of prices and values of sufficiently many goods as to be able to know when a price is a good one or not, vis-à-vis other offers on the market. And there is a massive cost to bear from opportunity costs, for the longer the entrepreneur takes to establish this collective set of information, the greater the likelihood that he or she misses an opportunity to be productive on a given venture. So the entrepreneur faces costs from multiple vectors in his or her efforts to work with the market and the goods and services it renders.

And the solution is for the entrepreneur to legally pre-coordinate the rights to many factors of production, so that more effort can be placed on producing

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[34] Ibid., 390.

[35] Ibid., 392.

[36] Ronald Coase won the Nobel Prize for Economics in 1991, *see* "Ronald H. Coase-Facts, " The Nobel Prize, accessed on 8 August 2022, https://www.nobelprize.org/prizes/economic-sciences/1991/coase/facts; Oliver Williamson won the Nobel Prize for Economics in 2009, alongside Elinor Ostrom; *see* "The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2009," The Nobel Prize, accessed on 8 August 2022, https://www.nobelprize.org/prizes/economic-sciences/2009/summary. Technically the 'Nobel Prize in Economics' is not a Nobel Prize but the 'Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel'.

goods and services efficiently rather than constantly bearing transaction costs on the market.

> "It may be desired to make a long-term contract for the supply of some article or service. This may be due to the fact that if one contract is made for a longer period, instead of several shorter ones, then certain costs of making each contract will be avoided.[37]
>
> "A firm is likely therefore to emerge in those cases where a very short term contract would be unsatisfactory." [38]

This gathering of legal rights is the very beginning of the economic analysis of law. The careful reallocation of rights can enable more efficient social institutions to emerge from a free and open market.

3.2. Overlapping Rights and the Origins of Injuries

Almost 20 years later, Coase had a second inspiration that led to two more papers. What if transaction costs also reduced the ability of parties to negotiate to prevent frustration from overlapping claims to otherwise exclusive rights? Or more succinctly, what if transaction costs underlay the emergence of tortious events and litigation?

First, in 1959, Coase laid out the core of the new idea in 'The Federal Communications Commission'. The problem under inspection was how to allocate radio spectrum zones so that radio broadcasters could transmit effectively and efficiently without clashing with other broadcasters.

Coase made four major discoveries. First, he observed for the first time the 'reciprocity of harms', that a conflict of rights hurt both sides;[39] this is in contrast to the earlier tort assumptions of an injurer and a victim.

> "The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has

[37] Coase, "The Nature of the Firm," 391.
[38] Ibid., 392.
[39] Ronald Harry Coase, "The Federal Communications Commission," *The Journal of Law and Economics* 2. (1959): 1- 40.

> to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."[40]

Second, he went on to show that a reallocation of rights can enable negotiations to reach settlements.[41] Third, he demonstrated that the performance of the reallocation of rights and the final negotiated use of the resources is actually independent of each other; that is to say, that no matter how the rights are allocated or reallocated, the most productive use will be the final outcome of a negotiated discussion.[42]

Fourth, Coase put forward a revolutionary observation, that the most beneficial outcome for productivity is not a state of zero conflicts over legal claims, but rather to find the optimizing level of disputes. That is to say, it is not socially productive to 'perfectly' delineate ownership over rights, that it may well be more beneficial to society to leave some rights in dispute or conflict.

> "*What this example shows is that there is no analytical difference* between the right to use a resource without direct harm to others and the right to conduct operations in such a way as to produce direct harm to others. In each case something is denied to others: in one case, use of a resource in the other, use of a mode of operation. *This example also brings out the reciprocal nature of the relationship* which tends to be ignored by economists who, following Pigou, approach the problem in terms of a difference between private and social products but fail to make clear that *the suppression of the harm which A inflicts on B inevitably inflicts harm on A. The problem (ie the Goal) is to avoid the more serious harm."*[43] (Italics added)

And,

> "It is sometimes implied that the aim of regulation in the radio industry should be to minimize interference. But this would be wrong. The aim should be to maximize output. All property rights interfere with the ability of people to use resources. What has to be insured is that the gain from interference more than offsets the harm it produces. There is no reason to suppose that the optimum situation is one in which there is no interference."

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[40] The quote here is from "The Federal Communications Commissions", but it accurately reflects the discovery made earlier; *see* ibid., 2.

[41] Ibid., 26-27.

[42] Ibid. It is also possible that Coase was not the first to make this fundamental discovery of independence, that economist Rottenberg did in his article on contract laws and sport labor. *See* Simon Rottenberg, "The Baseball Players' Labor Market." *Journal of Political Economy* 64, no. 3 (1956): 242-258.

[43] Coase, "The Federal Communications Commissions," 26.

By 'output' in this second quote, Coase meant social welfare from the permitted activity. And we can see that Coase is recognizing that to grant a right to one party necessarily requires a loss of potential rights to another. And thus, Coase reminds us, "[w]hat has to be insured is that the gain from interference more than offsets the harm it produces," that the value of the reallocation of rights needs to ensure a net gain for society and that the goal is not *per se* to prevent all harms.

As a reminder to the reader, in the 'The Federal Communications Commission', Coase's primary focus was on rights to radio wave allocations and secondarily on commercial rights more generally. The broader application of these thoughts to society and law at large is to be found in his 'The Problem of Social Cost', which was published in 1960.

In 'The Problem of Social Cost', Coase explores the ideas he published in 'The Federal Communications Commission' with a broader legal analysis from case law into the subject matter of torts (or delicts) as a general matter. He creates a model of two parties with overlapping claims over an activity or a property, wherein the mutual simultaneous use of those rights would prevent either from using their rights in full. If one party takes initiative to use their rights, then then the other party is prevented from using their claimed rights. Thus, damage is caused by both parties claiming overlapping rights, but wholly preventable if the parties would (or *could*) simply negotiate before using their rights as to who has usufruct and when;[44] and like explored in 'Federal Communications Commissions', the negotiations would usually lead to the most productive use of the underlaying activities or assets.[45]

Yet, we don't observe this negotiated harm-free world in real life. So Coase reintroduces the concept that each party is facing transaction costs on determining how to use their resources, and like in the market search functions explored in 'The Nature of the Firm', each party bears costs in considering negotiations over unclearly assigned rights; it's equally costly to learn if your assumed rights are

[44] Ronald Harry Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1-44.

[45] Noting the caveats Coase provides that underwrite the argument for why sometimes the super-firm of the government should reallocate inalienable rights. *See* ibid., 850-851.

unclearly assigned. Thus, given non-infinite budgets of resources, especially for time, negotiations may be well out of reach in most situations. Coase returns to the idea of reallocating rights to better facilitate and enable negotiations so that the parties can solve their conflicting rights claims via discussions and negotiations.

> "In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other.
>
> "But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved."[46]

And indeed, once again, the idea of independence of outcomes from the allocation of rights is presented again, but now it reveals that no matter how society initially allocates, or how courts reallocate rights, that if negotiations are viable then the most productive use of the rights will result.

Ultimately, Coase unifies all of these ideas, recognizing that the state itself can be more efficient and effective than firms in some conditions, that the state is a 'super-firm' that can enable even better 'coordinated' legal outcomes:

> "An alternative solution is direct Government regulation. Instead of instituting a legal system of rights which can be modified by transactions on the market, the government may impose regulations which state what people must or must not do and which have to be obeyed.
>
> "Thus, the government (by statute or perhaps more likely through an administrative agency) may, to deal with the problem of smoke nuisance, decree that certain methods of production should or should not be used (e.g. that smoke preventing devices should be installed or that coal or oil should not be burned) or may confine certain types of business to certain districts (zoning regulations).
>
> "The government is, in a sense, a super-firm (but of a very special kind) since it is able to influence the use of factors of production by administrative decision."

[46] Ibid., 850-851.

In essence, Coase is recognizing that the state's ability to reallocate rights can achieve results better than privately negotiated use of rights allocated to private parties. But this is in itself a recursive argument, in that these 'regulations' are once again nothing less than a reallocation of rights albeit a type of rights that the individual citizen cannot negotiate away at a price; is this not the quintessence of constitutionally granted rights and of fundamental human rights?

With this argument, Coase is recognizing that the state, particularly via its courts, can allocate and reallocate rights, and that the state can choose which (re)allocations of rights are alienable and which rights are not alienable. This is a very strong argument for the fundamental power and obligation of courts to understand their powers over the allocation of rights and to what privileges travel with those rights, inclusive of whether the rights are alienable or not via juristic acts of private law.

But Coase also warns that a government must carefully balance those efforts made to enhance the rights of some parties against the loss of rights to other parties:

> "It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. *But in choosing between social arrangements* within the context of which individual decisions are made, *we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others*. Furthermore we have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. *In devising and choosing between social arrangements we should have regard for the total effect*. This, above all, is the change in approach which I am advocating."[47] (Italics added)

It is important to state that merely establishing the optimal productive use of rights does not also result in the most beneficial distribution of the fruits of that usage; the matter of ideal distribution of those fruits is a wholly distinct question.

[47] Ibid., 877.

3.3. Summary and Conclusion on Coase

In brief review, Coase provided a theoretical foundation to the idea that coordination of legal rights exists in an environment of transaction costs. Without external support, many parties will find the transaction costs of solving their legal conflicts to be beyond their budgetary capacities, especially if timeliness is a major factor in avoiding a conflict of rights.

Coase recommends that governments, inclusive of courts, could and should take action to reallocate rights to better enable negotiated outcomes to achieve more productive use of the resources for all involved parties. This is distinctly different from asking courts to completely solve problems; rather, it is an observation that many disputes could be more efficiently addressed by courts and by the societal players involved if the rights were to be reallocated, that the court can 'nudge' the actors to better solve their own disputes to the greater benefit of all involved.

IV. COVER: SACRED LEGAL CULTURES AND JURISPATHIC JUDGES

Robert Cover,[48] within a brief period in the mid 1980s, produced a new theory of jurisprudence that is simultaneously one of the most cited and yet least fully understood approaches to law and justice.[49]

In a nutshell, he described law as a universe of sacred narratives and rules to ensure the attainment of justice based on the values found in those narratives, a *nomos*-laden universe. He also described law as something that bubbles up from daily life yet requires a mode of formal constraint to ensure that it remains

[48] Robert Cover was a professor of law at Yale University's School of Law from 1971 until his early death in 1986.

[49] With regard to being well cited, Shapiro and Pearse in 2012 ranked Cover's 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' the 16th most cited law review article of all time. *See* Fred Shapiro and Michelle Pearse, "The Most-Cited Law Review Articles of All Time," *Michigan Law Review* 110 (2012): 1483-1520. As to the next aspect, that his jurisprudence theory is more popular than it is understood, a comparative Google Scholar search for the terms [Cover law "narrative"] results in over 2.35 million hits whereas the terms [Cover law "paideic"] results in approximately 500 hits. (Searches performed on 27 July 2022.) While this simple example is not empirically rigorous, the results are sufficiently clear that Cover's concept of cultural materials being part of a continuum of legal interpretation are disproportionately more frequently cited than his actual legal theory of how that continuum is created. As to the lack of general uptake of the broader research agenda posed by Cover, *see* Gal Hertz, "Narratives of Justice: Robert Cover's Moral Creativity," *Law and Humanities* 14, no. 1 (2020): 5.

functionally useful. He called these two aspects of law Paideic Law and Imperial Law, respectively.

His research is well cited as the birth of the Law and Literature movement, as a profound resource in civil rights law, and in trailblazing the new literatures that would emerge on legal norms and their role in jurisprudence.

In rapid order, he published four seminal articles that lay out his new legal philosophy: 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983),[50] 'The Folktales of Justice: Tales of Jurisdiction' (1985), 'Violence and the Word' (1986), and 'Obligation: A Jewish Jurisprudence of the Social Order' (1987). But this burst of intellectual productivity was cut short and the last two articles were published posthumously.[51] Many have held that Cover was the leading constitutional scholar of his era, but the incomplete project he left behind means that we lack the volumes of literature that other greats, such as Hart and Dworkin, have left behind, so we must parse his few key articles carefully.

Cover was fascinated by how laws might not be binding, or how moral and other cultural narratives might bind us to justice where law might not. He was a scholar of Jewish legal traditions, and he was engaged with social justice and the struggle for civil rights in the United States. He comparatively examined two approaches to legal systems, those of religious and obligations based legal cultures and those based on social contracts and rights based approaches.[52] He was particularly interested in how to ensure that constitutional law and the rights constitutional law offers are socially recognized as 'true law' and thus as binding law, even when formal legal institutions failed to either offer why positive enactments were binding or when formal legal institutions failed to enforce a constitutional court's decision.[53] How can law be binding when formal

[50] This article was written in response to a constitutional law issue addressed by the US Supreme Court, in the case of *Bob Jones University v. the United States*, 461 U.S. 574 (1983). Thus, the very origins of Cover's development of his new jurisprudence was predicated on constitutional interpretation of rights. Hertz, "Narratives of Justice," 3.

[51] Cover died of a heart attack in 1986 at the age of 42.

[52] Stephen Wizner, "Repairing the World Through Law: A Reflection on Robert Cover's Social Activism," *Law & Literature* 8, no. 1 (1996): 6-7.

[53] *See* Franklin G. Snyder, "Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law," *William & Mary Law Review* 40 (1999): 1722.

legal institutions fail to advance justice? That is the question that Cover sought to address with his new jurisprudence.[54]

To enable his research agenda, he provided a novel set of definitions for 'law', what it is and how it functions. He provided three definitions:[55]

- Law is the set of normative rules that enable ordinary people the capacity to make socially interactive decisions and take socially interactive actions without crumpling under the eschatology of philosophies applied within a material world.[56]
- Law is a cultural force that authorizes the propriety of societal transactions and the extent to which violence is allowed or encouraged to effect justice within those transactions.[57]
- Law affects us as actors within a legal space, it is a force field not unlike the force field effects of gravity on our physical bodies, in that law pulls our community together from its individual human components, through a 'normative space, influencing and controlling behavior'.[58]

Looking at these definitions of law; normative rules balancing social interactions in a material world, cultural force authorizing violence, and as a defining force that defines a community, it is readily apparent that Cover contrasted with more traditional legal scholars,[59] such as Kelsen or Hart, who saw positive law descending from a state down to the people.[60]

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54 Hertz, "Narratives of Justice," 4.

55 The three definitions below are edited or other updated versions of the same three definitions I published in Roy Andrew Partain, "Ecologies of Paideic Law: Environmental Law and Robert M. Covers Jurisprudence of 'Nomos and Narratives'," *Hanyang Law Review* 24, no. 3 (2013): 434.

56 Underlying all three definitions is the recognition that the narratives establish the Kelsen's *Grundnormen* and that the prescriptions are effectively rules of actions pre-approved as compliant with those *Grundnormen*. Robert M Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983).

57 Cover, "The Supreme Court," 9.

58 Ibid., 10.

59 To emphasize the cognitive distance in Cover's jurisprudence versus those scholars more focused on social contract-based jurisprudence, Wizner quotes Cover, "it seems to me that the rhetoric of obligation speaks more sharply to me than that of rights. Of course, I believe that every child has a right to decent education and shelter, food and medical care; of course, I believe that refugees from political oppression have a right to a haven in a free land; of course, I believe that every person has a right to work in dignity and for a decent wage. I do believe and affirm the social contract that grounds those rights. But more to the point I also believe that I am commanded - that we are obligated - to realize those rights." *See* Wizner, "Repairing the World," 7, citing Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 5, no. 1 (1987): 73-74.

60 Critical of liberal theories of justice and social contract theories of thinkers like Rawls or Dworkin, Cover believes that morality is never culturally neutral. *See* Hertz, "Narratives of Justice," 7.

Cover saw law organically emerging from the cultural matrix that held communities together. Indeed, for Cover, one of law's greatest gifts is to keep a community bound together by ensuring a common sense of justice.

4.1. Nomos and Sacred Narratives of Law

At the core of Cover's scholarship is the idea that it is jurisprudentially invalid to separate our cultural and sacred values, as expressed in our cultural narratives,[61] from the function and role of law to ensure justice. Law inhabits a universe filled with our moral sacraments.

Cover observed that some legal systems did not need to administer violence to ensure compliance. He noted this from the Jewish legal system; a system that had functioned for its community without claim to an official state or state apparatus of enforcement. The lack of a state apparatus for enforcement made more clear the need for community support of its laws, that they saw the connection between the rule and the justice the rules afforded.

Notably, Cover disputed that the mechanics of a parliamentary procedure to create positive law actually imbued those resulting enactments with any legitimacy, with any sense of justice.[62] At the core of his research program is the question, what makes one cluster of words spirited with the force of justice while other clusters of words are just words, descriptive and perhaps bound with enforcement yet hallow of any sense of justice?

Cover wrote that community-held cultural narratives enabled the legal rules of a community to become binding due to the justice that the members of the community believed would accrue from following such rules. And these cultural narratives were often religious in context. Cover notes that while scholars since the 1700s had tried to hide those religious and cultural origins of law and justice,

[61] To be clear, narrative and law are not independent terms for Cover, but rather, narrative is intertwined with law, providing it with definition and context. Cover, however, goes further, viewing nomos and narrative not as two distinct discursive fields but as interdependent. Narrative is not the other of law, particularly of state law, but rather the place where legality, and more broadly, normativity itself is created, suspended, broadened and debated. *See* Hertz, "Narratives of Justice," 6.

[62] Cover saw the struggle to answer Hart's query of "what is law?" as a veneer to hide the real questions, which Cover saw as what gave law its legitimacy. Robert M. Cover, "The Folktales of Justice: Tales of Jurisdiction," *Capital University Law Review* 14 (1985): 181.

the truth remained that the validity of law truly lay in whether the members of the community, informed by their narratives, perceived the laws as achieving justice or not.

Cover holds that sacred narratives are needed as foundations for any law that hopes to achieve justice:

> "Legal positivism may be seen, in one sense, as a massive effort that has gone on in a self-conscious way for over two centuries to strip the word "law" of these resonances. But the *sacred narratives of our world doom the positivist enterprise to failure*, or, at best, to only imperfect success."[63] (Italics added.)

In writing that "this normative world, law and narrative are inseparably related,"[64] Cover expressed that law functions as a force field between the community's behavioral *grundnormen* (basic standards)and the community's narratives that lay out the justifications for those same *grundnormen*.

> "[L]aw becomes not merely a system of rules to be observed, but a world in which we live."[65] Considering this interconnected flow of cultural meaning and rules to ensure cultural values, Cover called this combined matrix of law *nomos*, law with its sacred narratives.[66]

> "A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, *but also a language and a mythos – narratives in which the corpus juris is located by those whose will acts upon it*. These myths establish the paradigms for behavior."[67] (Italics added)

Each nation and state will have its own *corpus juris*, a body of meaning that includes a way of speaking of legal matters and of infusing meaning into those legal affairs via the myths and truths of that society. These 'paradigms

[63] Ibid., 180.

[64] Cover, "The Supreme Court, 1982 Term", 4.

[65] Ibid.

[66] Ibid. *Nomos* is an Attic Greek term meaning law, ordinance, custom, or even a form of structured lyrics. *Nomos* is derived from *nemo*, meaning 'to distribute'. *See* Dmitriĭ Vladimirovich Nikulin, *On Dialogue*, (Lanham: Lexington Books, 2005): 225.

[67] Cover, "The Supreme Court, 1982 Term," 9. The quote continues: "They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves – a lexicon of normative action – that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrines at work in mundane affairs, in utopian and messianic yearnings, imaginary shapes given to less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law."

for behavior' are the very core of law, the kind of law that attains justice, in Cover's vision.

Therefore, no legislature can simply create meaningful law by simple decree or fiat; no, the law has to resonate with the pre-existing *nomos* of the community that the legislature seeks to govern. Nor can the *nomos* from an external community be employed in trying to justify these positive enactments, no matter how noble their *nomos* might be, because laws within a community can only be justified with its own sacred narratives and its own 'paradigms for behavior'.

Similarly, no court can pronounce a new law or a meaningfully different reading of previous cases, statutes, or regulations, unless the new holding aligns with the existing *nomos* of its community. Courts are not immune from Cover's analytical arguments; indeed, his seminal article was addressed to the concerns of the United States Supreme Court.[68]

4.2. Legal Culture Includes Paideic Law and Imperial Law

The mechanics of Cover's legal world are easy to understand if perhaps a bit unconventional. He posits two basic functional aspects of law: paideic law and imperial law. One can observe that Cover chose these two words in clear opposition, one meaning 'to teach' and the other 'to command or to order', and that is indeed their comparative roles, to teach law to its own community and to maintain order over the laws held by that same community.

Paideic law is organic, arising whenever a small group realizes that it needs to coordinate, whereafter repeated encounters at coordination lead to the emergence of rules to provide a ready coordination strategy. Within the group, they may enforce the rule to ensure that it brings the hoped-for coordination. Rules, enforcement, social goals, these are the beginnings of paideic law.

In defining his paideic legal system,[69] Cover states that a paideic legal system will hold in common a cultural body, which can include a wide range of cultural and narrative materials, he calls this a *corpus*.[70] Quite central to the point of the

[68] *See* the title itself: 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative'.
[69] Cover, "The Supreme Court, 1982 Term," 12-13.
[70] Ibid., 13.

paideic legal system, is that it contains materials that teach and train members of the community on its rules and values, a common pedagogic method. [71] To validate the paideic system, the community must hold a commonly shared view as to how its *nomos* and *corpus* develop for its people;[72] the community must acknowledge a shared and sustained legal culture. In essence, a paideic legal culture is an educational matrix that supports both the creation of legal rules and shared education as to the function and values of those rules.

Cover claims that paideic law is 'world creating'.[73] Paideic law is organic in that it arises from a community-shared collection of narratives, narratives shared during each member's initiation or education into the community's identity at large and to the community's norms and legal rules in particular,[74] especially in the way that the paideic legal culture emerges to balance the spiritual and material goals of the community.[75] As such, paideic legal culture informs each member of obedience to the law with understanding of the law.[76] Cover describes the evolution of the paideic legal materials as initiatory, 'celebratory', 'expressive' and 'performative'.[77] Paideic law is what draws and binds a community together, both aspirationally and politico-legally.[78] And there is no assumed consistency, no deep legal principles in play; each group that encounters a scenario needing a rule will create the rule that fits their needs; if two groups come across similar situations they may well create two different yet fully fit rules.

On the other hand, Cover's imperial legal culture is focused on 'world maintaining'.[79] It leverages institutional devices to maintain continuity and prevent excessive change.[80] Within an imperial legal system there is a universal set of norms, enforced and reinforced by the institutions of the imperial institutions.[81]

71 Ibid.
72 Ibid.
73 Ibid., 12.
74 By this, Cover refers to trainings such as a young Jewish male learning to read Hebrew for his coming-of-age celebration, the Bar Mitzvah, or more generally, for rites of passage and initiation.
75 Cover, "The Supreme Court, 1982 Term," 12 -13.
76 Ibid., 13.
77 Ibid.
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid.

This is in contrast to the organic, diverse rules that emerge from the paideic processes.

While paideic legal methods are organic, imperial legal methods are 'critical' and 'analytical'.[82] The value of an imperial legal system lays within its ability enforce the universality of norms across all of the communities or paideic systems within their scope.[83] As a side effect, the rules supported by the imperial system do not *per se* need to be taught to be effective,[84] as the enforcement methods of coercion and related rules of authorized violence might displace the need for paideic legal systems in the short run.[85] And while contrary to the organic character and justice-maintaining narratives of the paideic legal systems, an imperial system of law can be measured by its ability to maintain legal stability without reference to an internal, values-preserving, *nomos-matic* dialog.[86] "The imperial motive aims to limit the pluripotency of the paideic norms into a singular construct to hold the community and its *nomos* to a core of beliefs."[87]

In conclusion, Cover claims that all legal systems contain various admixtures of these two systems of paideic and imperial aspects. He wrote that Jewish legal culture and, by implication, other non-sovereign religious legal systems are high in paideic content while the analytical civil codes of Northern Europe reflect a highly imperial legal approach.[88]

4.3. Jurispathic Judges who Terminate Rights

In Cover's jurisprudence there is a constant oppositional dynamic of rules emerging from the paideic side, responsive to new and emerging issues, while the imperial side attempts to maintain legal stability and reliability to better enable social cohesion across the whole community. The central problem is not a scarcity of rights or legal rules, but rather a surplus.

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[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] In addition, the law deals not only with rights but rather concerns lives, pain and violence. It deals with bodies and not only with ideas. Hertz, "Narratives of Justice," 7. *See also* Cover, "The Supreme Court, 1982 Term," 13.
[86] Ibid., 13.
[87] Partain, "Ecologies of Paideic Law," 438.
[88] Cover, "The Supreme Court, 1982 Term," 12-13.

> "It is the multiplicity of laws, the fecundity of jurisgenerative principle, that creates the problem to which the court and the state are the solution."[89]

It is the multiplicity of laws that enables different parties to claim that they have rights, rights that sit in conflict with other parties' claims to rights. It is this conflict of claimed rights that enables standing of the parties to be in court.

Following Dworkin on using legal principles to add new legal rules or to enable new lines of case-based logic would only add to the chaos[90] if we follow Cover's line of logic, yet Cover has an innovative solution beyond the creative policy innovators and the enforcing imperial institutions. His solution is to place judges and justices squarely at the center of balancing these two sides.

> "But the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. And from this fact we may come to recognize a special role for the courts. Courts, at least the courts of the state, are characteristically 'jurispathic.'

> "It is remarkable that in myth and history that the origin of and justification for a court is rarely understood to be the need for law. Rather, *it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy.*" [91] (Italics and bold added)

This is the genius of Cover, to recognize that judges do not exist to create new laws, but rather, to reduce claims of existing rights to fewer and less conflicting sets of claims, to trim the rule sets so that the community is left with a harmonious set of rules to enable function and unity.[92] By labelling judges as 'jurispathic', Cover recognizes that judges can 'kill off' rights that cause conflicts that prevent justice for the community at large.

The role of a judge or a panel of justices is unique and necessary, as the community at large functions in a paideic manner, seeking new rules and new

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[89] Ibid.

[90] Cover's thought does not conform to the positivist legal tradition of thinkers such as Kelsen or Hart, who see law as a closed system. He also rejects the notion of law as expressing moral ideals practiced through hermeneutical principles, as naturalists like Dworkin claim. Hertz, "Narratives of Justice," 24.

[91] Cover, "The Supreme Court, 1982 Term," 40.

[92] The jurisgenetic model suggests that this is because the judge is never truly legislating from scratch, but rather is selecting a pre-existing legal meaning. Judges generally are trying to determine what the legal norm is, and not what the best social policy is for the state. Snyder, "Nomos, Narrative, and," 1723-1724.

rights, which leads to overlapping rules, rights, and claims, which in turn leads to legal conflicts. The imperial function of the administration part of the state is focused on preservation and conservation of the law, ensuring stability and continuity. Neither process is well-tuned to resolving the surplus of rights created.

Judges are decision-makers on quandaries, their decisions are binding and effective acts of law, and their operational status is somewhat beyond the routine events of political democracy. Judges and justices stand beside, above, and with the law in a manner quite distinct and unique from other actors in our modes of public governance,[93] yet the role of judges and justices is one of the most persistent and ubiquitous roles found across most legal cultures. Their role in Cover's jurisprudence will be equally unique and central to ensuring justice despite the opposing functions of paideic and imperial law.

The history of judges is extremely ancient and predates Athenian democracy by at least a millennium. As far as we can tell, Hammurabi used judges in lieu of his direct presence; we have rediscovered his letters and exchanges with his judges and we know he retained an active interest in their decisions on legal conflicts. We know a variety of ancient cultures had judges, from China to Egypt, where the roles are surprisingly similar: a decision-maker, a decision-maker tasked with finding outcomes that will bring peace to their communities, a decision-maker with authority to employ violence or other measures to ensure that a decision is effected among the parties of the dispute. And this idea often overlaps with a notion of leadership, as seen in the Jewish tradition of judges.

Most centrally, is the role of the judge to decide cases brought before them. Usually that decision is reliably final and binding, even where appeals are possible, they are usually at high cost and on a limited range of issues. Few court systems today enable more than two levels of appeal, from first court to appellate court to supreme court and judges are cautious to render decisions that are readily or foreseeably reversible on appeal.

[93] Legislators conduct public hearings, take polls, consult independent experts, and meet with lobbyists. Judges generally do not. Snyder, "Nomos, Narrative, and Adjudication," 1722.

This all bares the reality that decisions made by judges are usually binding on the parties before them. And these decisions can be made on the most important matters of human life, from marriage and divorce to decisions on human rights or capital punishments. Or even to deciding how law itself should operate, in making constitutional decisions and interpretations; which is where Cover was focused with 'Nomos and Narrative', on the upcoming cases of the US Supreme Court.

And Cover was very aware that the real power of judges lies in the complexity of healing communities via the authorized use of force and violence; judges often hold the power to cancel rights, to remove properties, to terminate marriages, to confine a person to prison, and even in some states, to order executions of criminals.

> "In this [judges] are different from poets, from critics, from artists. It will not do to insist on the violence of strong poetry, and strong poets. Even the violence of weak judges is utterly real – a naive but immediate reality, in need of no interpretation, no critic to reveal it."[94]

And similarly,

> "Whether or not the violence of judges is justified is not now the point – only that it exists in fact and differs from the violence that exists in literature or in the metaphoric characterizations of literary critics and philosophers."[95]

Cover recognizes that judges and justices hold this unique power, so rarely distributed in ministerial or legislative branches, the power to authorize violence. For Cover, this becomes the core issue of how to decide hard cases,[96] i.e., on what basis can a judge authorize force or violence while seeking to balance and harmonize rights in a community? For that solution, he will return to paideic legal culture to ensure that imperial legal culture is functioning properly.

Another aspect that defines a judge or a justice is that their role in law, in most legal systems, is barely democratic. Rarely are judges elected by popular

[94] Robert M. Cover, "Violence and the Word," *The Yale Law Journal* 95, no. 8 (1986): 1609.
[95] Ibid.
[96] *See* a discussion on his earlier works on hard cases, where he researched the efforts of antebellum American judges to grapple with liberty and slavery under the US Constitution. Hertz, "Narratives of Justice," 9-11.

vote, although it does occur in certain jurisdictions.[97] Usually, judges and justices are appointed by an executive branch or a ministerial process, perhaps subject to parliamentary or sub-committee review – but this hardly enables their position of authority to be labelled as democratic.

And that sense of autocracy is not by error but by design, for judges and justices need to render decisions, difficult decisions, that are not well suited to public polling or other democratic processes that engage large numbers of politicians or from the public populace. Judges and justices need to consider the rights of weaker parties, of minority standing, of discriminated parties, and sometimes on parties that might have committed tremendously shocking acts, yet the judges and justices need to ensure that each and every party receives the full benefits of their rights and that the full balance of law is employed in making their difficult decisions on 'hard cases'. [98]

Cover provides this analysis of how judges should decide on 'hard cases' by looking to the narratives of justice that sustain the community:

> "The range of meaning that may be given to every norm – the norm's interpretability – is defined, therefore, both by a legal text, which objectifies the demand, and by the multiplicity of implicit and explicit commitments that go with it. Some interpretations are writ in blood and run with a warranty of blood as part of their validating force. Other interpretations carry more conventional limits to what will be hazarded on their behalf. *The narratives that any particular group associates with the law bespeak the range of the group's commitments. Those narratives also provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law."*[99] (Italics added)

Judges and justices need to look beyond the positive law to the cultural and legal narratives that sustains the public faith that the laws of their communities will render justice to all in those communities. Cover provides several examples that communities' 'positive' laws are not the actual laws in function; this, he

[97] For example, some districts in Texas popularly elect judges, which results in quite unusual campaign finance requests from judges to members of the general public, including attorneys who work in their courts.

[98] The traditional reference is to the legal theory discussions on how judges should decide 'hard cases' as initiated by Dworkin in his 1975 article of the same name. *See* Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, no. 6 (1975): 1057-1109.

[99] Cover, "The Supreme Court, 1982 Term," 46.

tells us, is an example that the legal narratives provide broader understandings of how law is supposed to work in contrast to a more limited vision provided by the positive laws.[100] This goal of Cover is to enable our legal systems to evolve to higher accomplishments of justice.

In Cover's jurisprudence, the function of law depends on society being aware of both the legal rules that need interpretation by the court and of the narrative legal cultures that explain how interpretation should be performed when multiple interpretations are presented by opposing parties.[101]

> "To know the law – and certainly to live the law – is to know not only the objectified dimension of validation, but also the commitments that warrant interpretations."[102]

Cover sees the role of judges as not only central to killing off conflicting rights to enable a functional legal system,[103] but he also sees the role of judges as central to understanding where the paideic legal culture of a community has implicitly called for interpretation of the law to ensure that the imperial aspects are functioning to achieve justice as called for in the paideic legal culture.[104]

In *The Folktales of Justice,* Cover discusses the challenges of interpretation facing judges:

> "... each community builds its bridges with the materials of sacred narrative that take as their subject much more than what is commonly conceived as the "legal." The only way to segregate the legally relevant narrative from the general domain of sacred texts would be to trivialize the "legal" into a specialized subset of business or bureaucratic transactions.
>
> "The commitments that are the material of our bridges to the future are learned and expressed through sacred stories. Paradigmatic gestures are rehearsed in them. Thus, the claim to a "law" is a claim as well as to an

[100] It is not the rules but the narratives that hold the semantic key for coming to terms with this contradicting normativity. These narratives bind together the normative reasoning about the rules and their pragmatic application. Hertz, "Narratives of Justice," 17.

[101] Cover, "The Supreme Court, 1982 Term," 46.

[102] Ibid.

[103] She [the judge] really does not perceive what she is doing as creating new rules in the absence of law. Faced with competing preexisting legal meanings, her role is to choose the one that seems most correct, the one that is closest to what the norm *really* means. Snyder, "Nomos, Narrative, and Adjudication," 1724-1725.

[104] The goal for Cover, which is also performed in the text, is to overcome what he considers as the great threat to law that is posed when it becomes merely *nomos*: a detached form of morality emptied of meaning, thereby becoming merely authoritative state violence. Hertz, "Narratives of Justice," 4.

> understanding of a literature and a tradition. It doesn't matter how large the literature or how old the tradition."[105]

In Cover's jurisprudence, there is no simple, mechanical method to separate our cultures from our laws, to separate out 'legal rules' from our broader cultural universe of our communities.[106]

Furthermore, he argues that hard cases are decided with recourse to force and violence, and that the justifications for that force and violence flow from our paideic legal cultures and associated sacred texts, aiding us all in understanding the task of justice set before judges and justices.

> "As long as death and pain are part of our political world, *it is essential that they be at the center of the law. The alternative is truly unacceptable* – that they be within our polity but outside the discipline of the collective decision rules and the individual efforts to achieve outcomes through those rules. The fact that we require many voices is not, then, an accident or peculiarity of our jurisdictional rules. It is intrinsic to whatever achievement is possible in the domesticating of violence"[107] (Italics added)

Cover seeks to hear the many voices from our sacred texts that guide our paideic legal cultures, that provide the authorization for both our legal rules and their enforcement. He also seeks to ensure that rights are considered with the necessary gravitas, for the role of judges in his jurisprudence is to primarily terminate rights to bring an end to the chaos enabled by overlapping and conflicting claims to rights held by the litigants.

Judicial decisions are made by clarifying for whom the rights exist and for whom rights do not exist, for whom the court will support with the force of law and who will not receive that benefit. And that force of law speaks to the full range of judicial powers inclusive of powers to authorize the use of force and violence to ensure that the judgements are upheld in the community beyond the courtroom.

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[105] Cover, "The Folktales of Justice," 182.

[106] Nomos and Narrative is the formula by which Cover connects phronesis and poiesis. His is a dialectic normativity, in which the two forces of *nomos* and narrative constantly disrupt and limit each other. Hertz, "Narratives of Justice," 22.

[107] Cover, "Violence and the Word," 1628.

That moment is when a judge must be most careful to ensure that the 'sacred texts' that make up the paideic narratives of their community are fully reflected and integrated in their judicial decisions, lest court-endorsed use of force or violence might be incorrectly or injuriously delivered to the community that the judge seeks to heal.

4.4. Summary and Conclusion on Cover

Cover creates a revolutionary jurisprudence that is also one of the most cited bodies of legal literature. In so doing, he places judges and justices at the very center of his legal universe, providing them with the singular role to resolve legal conflicts by terminating rights in conflict, to eliminate claims of rights that give rise to social conflicts and that prevent justice.

V. SUMMARY AND CONCLUSIONS

In this paper, three schools of jurisprudence have been reviewed: the legal theory of anticommons and the tragedy of anticommons, the scholarship of R.H. Coase, and the jurisprudential vision of Robert Cover. Each approach has focused on legal rights and how rights aid or frustrate the delivery of justice to the broader community.

5.1. Theory of Anticommons

The theory of anticommons, established with mathematical models and proof as well as with empirical studies, states that the fragmenting of rights among multiple actors will cause the underlying utility of those rights to vanish. In other words, when multiple legal actors possess exclusionary rights over a resource or activity, be it tangible, intangible, or legal in nature, then that resource or activity will likely not be used or enjoyed by anyone in the community. Similarly, when legal actors possess decision-making powers similar to a veto over legal processes or administrative procedures, then rights to those procedures are likely to be frustrated and not accessible to those citizens dependent on their rights.

When rights have some aspect of an exclusionary nature, or when the reliance on a public right depends on the approvals (or lack of vetoes) of multiple actors,

then those rights are at fundamental risk of not being operable. Fragmenting of claims over rights frustrates the utility of those rights. And the mechanical function of anticommons means that human nature is not the core reason why these rights will become dysfunctional for the community; it is the design or allocation of the rights that enables the tragedy of the anticommons in each case.

Thus, per the theory of anticommons, judges and justices should carefully consider the impact of all decisions on the granting and eliminating of rights, private and public, to best ensure that the bulk of rights expected by the public citizenry under their constitution and under their national law remain functionally available to them.

5.2. Coase

The legal theory of R. H. Coase sets a different argument before us, that rights are often allocated in ways that will lead to social frustration and that judges and justices, as active officers of the state, have the capability to reallocate those rights so that society can achieve a higher level of social welfare.

Coase develops a theoretical argument that all social institutions bear costs, real economic costs, to operate them and that social institutions are responsive to the rights that have been allocated to them. Social institutions may have certain rights from historical sources, perhaps from state allocations, and other rights may have accrued from negotiations under private law, effects transfers of rights from one party to another party. But Coase argues that those allocations are not always the socially optimal allocation of resources, that due to the transaction costs of social institutions, some allocations of rights are more productive and more bargain enabling than other distributions.

Coase argues that courts, as part of the state, can creatively reallocate those rights already allocated so that the set of actors in the community can reach higher levels of social welfare. But Coase also warns that not all rights should remain in the marketplace for private law negotiations, that some rights should be assigned in an unalienable manner, so that the rights of certain parties cannot be bargained away. In this manner, Coase sets judges and courts as a part of the

super-firm called the state, and in this manner, a judge acts as an entrepreneur to make decisions on how rights can be structured to enable higher levels of social welfare.

Additionally, Coase argues that judges need to be mindful of two core caveats. First, that the allocation of rights to one party necessarily means the denial of rights to another party. Second, that the optimal goal in reallocating rights is not to achieve no harm but rather to ensure the maximum good for the public at large. This is tantamount to recognizing that judges that effectively reallocate rights for the greater good will necessarily cause some harm to some parties. Or in the inverse, when judges attempt to eliminate all harms by reallocating rights across the community, then they will certainly reduce the overall social welfare of that community.[108]

Thus, per Coase, judges and justices bear a tremendous weight on their shoulders. They are empowered to allocate and reallocate rights as they weigh the merits of cases before them. But they are also creators of opportunity and improvement in welfare for some while also being destroyers of opportunity and reducers of in welfare for others. Coase advises judges and justices to consider the greater good across the whole of the community and to not to seek the minimal set of injuries possible.

5.3. Cover

Robert Cover brings attention to the role of rights in litigation, particularly to the reality that legal disputes occur because multiple parties claim to possess similar or identical rights yet the enjoyment of those rights precludes either side from enjoying those rights simultaneously. Judges are routinely faced with the decision of whose rights will survive the trial and whose rights will not survive. And because the rights are claimed before the litigants arrive at the courthouse, judges are primarily tasked with determining whose rights will be terminated and extinguished, what he calls the primary task of 'jurispathic judges'.

[108] There is an opportunity here to engage in a discussion on Pareto Optimality and Kaldor Hicks Optimality, and on Calabresi's critique of both, but that is deferred to a later paper. *See* Guido Calabresi, "The pointlessness of Pareto: carrying Coase further," *Yale Law Journal* (1991): 1211-1237.

Cover reminds us that we need to return to our paideic narratives, those sacred texts that enable justice to function within our laws. Judges should be sure include those narrative *nomos*-laden texts alongside the positive laws that enable parties to make their claims to rights. How can we know what will improve social welfare for a given community, especially if we treasure those values that are difficult to evaluate in terms of money or other metrics? How can we evaluate which bundle of allocated rights will ensure optimal welfare, which overlaps of rights are the most harmful, and which tragedies of anticommons are more deleterious than other tragedies, unless we seek our deeper values?

Cover does not provide an escape clause from our positive laws, nor does he argue that our narrative texts override our positive laws, rather, that when judges need to make decisions on 'hard cases,' where the positive law provides support on both sides, then judges should dig into those narratives of *nomos* to consider which outcome best matches the hopes and values of the community.

5.4. Final Conclusions

This paper has examined the role of rights to enable conflicts and the power of judges to steward and govern those rights to prevent and eliminate those conflicts. Importantly, it has also addressed the role of courts to clarify which rights to protect and preserve to enable the greater social benefits from rights.

One school of thought warns that the fragmenting of rights, the creation of too many overlapping rights, can enable tragedies of greatly reduced access to those rights. And that encompasses all kinds of rights, from privately negotiated rights to publicly established rights under constitutions. Thus, judges must carefully consider when to trim rights, how to consolidate rights, and how to prevent the fragmentation of rights from preventing the very goals of those allocated rights. Yet too, a certain utility can be found in fragmented rights, particularly if the goal is to preserve a resource or to ensure that a resource has stability. Indeed, a question for all constitution design is flexibly to allow for change or amendments into a constitution. By properly distributing the powers of approvals

of such changes, who controls the vetoes over such changes, a government can design and engineer how reliable or flexible they want their constitution and the rights it affords will be for their national community.

A second school of thought warns that allocations of rights are often poorly designed or manifested, resulting in reduced social welfare for the community. This school advocates for judges to identify the central rights of any dispute and to consider if any reallocations of those rights might enable superior private outcomes for the community. Also, it advocates that sometimes a judge should declare some reallocations of rights to contain inalienable rights, that private individuals cannot negotiate away those certain rights. Central to this school of thought is that the allocation of rights that we find at the start of a case should not be considered anything more than one of many potential ways that rights could be allocated. If another reallocation of rights could better enable the community to avoid or resolve conflicts, then a judge should take that reallocation into consideration.

And a third school recognizes that law, legal rules, and the identification of rights often emerge organically and are embedded in sacred legal texts, which might include texts far beyond enactments of positive legislation. As such, too many rules and too many rights are likely to exist among the community and even efforts to enforce the law and compliance with the law will not suffice to ensure the integrity of the law. In such cases, judges will be asked to terminate rights, to reduce the number of rights circulating and present in the community, so that greater legal harmony can prevail.

What is common and shared across these three legal schools is the recognition of the centrality and gravity of adjudicating who should have which rights and whose rights might need to be reallocated and whose rights might need terminating, all to afford the community a greater hope for justice under law, a justice that the community believes in and will support.

While a judge might hope for a simpler recommendation, to always choose Cover or to always choose Coase, or perhaps a rule that in 'Case A', a judge should choose Cover but in 'Case B', choose Coase, that is not the way that these understandings of jurisprudence operate. Instead, they are a harmony of complementary ideas; that judges and justices must always remain uncomfortably aware of the powers they delegate by the creation of rights, by the denial of rights, and by the understanding of how different allocations of rights interact with each other's existence and functionalities.

Judges and justices need to be uncomfortable, for as Coase wrote, "A system in which the rights of individuals were unlimited would be one in which there were no rights to acquire;"[109] reminding us that to grant rights to one party is tantamount to denying them to another party. And thus is laid bare the centrality of the modern understanding of rights, that the goal is not the nirvana state of rights for everyone on all things, but rather to realize that all rights bear a cost to other rights and that judges and justices must find a way to balance the assignment and protection of rights so that the maximum benefit is attained for society at large. Judges and justices must remain uncomfortable for they hold the power and responsibility for attaining that vision of justice, not unlimited justice for all, but that allocation of incomplete justice for which the greatest welfare for the whole of society can be achieved – and that means that judges and justices bear the gravitas of the rights denied, of the justice not availed, so that society can best flourish under our reality of rights, a reality reflected in our social and religious narratives of justice holding our societies together.

Together these three schools of thought share a vision that rights are verily the kernel of justice, but that careful consideration must be taken so that judicial efforts to render justice are not frustrated by the very acts and decisions meant to deliver justice. Rights are powerful indeed, able to help and frustrate with equal power. Judges have an obligation to ensure that the correct balance of rights is obtained for one and all.

[109] Coase, "The Problem of Social Cost," 876-877.

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