
Jurisprudence on the Frontline

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Scott Veitch. **Law and Irresponsibility: On the Legitimation of Human Suffering.** New York City: Routledge Publishers, 2007. Pp. 168. \$44.95. ISBN: 9780415442510.

1 Introduction

In an article preceding his latest book, *Law and Irresponsibility: On the Legitimation of Human Suffering*, Scott Veitch posed the following challenge to contemporary jurisprudence: '[i]t says a great deal ... about the state of "jurisprudence" in Britain that, while vast amounts of time and intellectual energy are spent debating the values of legal positivism versus natural law theorising, the British government had been involved in a legal enterprise [in Iraq] which was killing vast amounts of people for a number of years, and yet this did not register in jurisprudential debates about the best ways to understand the relation between law and morality'.¹ Veitch's book, *Law and Irresponsibility*, falls like a bomb into what he called, in that article, 'the amnesiac politics of these academic practices'.² The book's central concern is also indicated in the quotation from the above-cited article: Veitch referred there to the British war in Iraq as 'a legal enterprise which was killing vast amounts of people for a number of years' (emphasis added). The UN sanctions regime in Iraq in the 1990s, says Veitch, was not an extra-legal operation. Rather, he says, the deaths of the Iraq people were the result of actions rooted 'firmly in legality'; their deaths were 'authorised by the normative ordering provided by international law' (at 2). Veitch's running theme is that 'legal institutions are centrally involved in organising *irresponsibility*' (at 1; emphasis added) – a theme he pursues vigorously and passionately in the contexts of the sanctions regime in Iraq, the stolen generation in Australia, the legacy of apartheid in South Africa, and the threat of nuclear weapons.

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¹ Veitch, "'Not in Our Name'? On Responsibility and its Disavowal", 16 *Social and Legal Studies* (2007) 281, at 284.

² *Ibid.*

As powerful and timely as Veitch's book is, it is but the first step in a much broader and ambitious endeavour. Veitch does better than any of the critical legal theorists – including those in international legal scholarship, such as Martti Koskenniemi, David Kennedy, Anthony Carty, and others – to reveal the tendency of individuals and communities towards the disavowal of responsibility, inflicting harm in the name of allegedly universal values, distancing themselves from the consequences of their actions. Veitch's critical fervour is unsurpassed in contemporary legal theory. Reading his book feels like being constantly tapped on the shoulder. Veitch does not, however, engage a question that must be tackled: how can we and how ought we to act, given that we must act, in the face of our inevitable limitations, our weaknesses – all those tendencies and dispositions we have towards ignoring the infinity of suffering and vulnerability? The conclusion of this review will return to this question and propose a way forward.

The review is divided into three parts: the first considers the domain of human suffering, and our capacity to see and respond to it – a matter of great importance to understanding Veitch's approach; the second briefly explores some features of Veitch's sociological analysis of disavowals of responsibility; and the third discusses some of Veitch's examples of what he calls 'laws of irresponsibility'. The focus of these three parts is to give the reader something of the unique flavour of Veitch's argument – its style, principal resources, and most important conclusions. In summing up, this review returns to situate Veitch in the context of a broader and more ambitious vision of the role of scholarship in the public sphere.

2 Seeing and Responding to Suffering

It never happened. Nothing ever happened. Even while it was happening it wasn't happening.³

In 2006, Tony Blair, the British Prime Minister, was asked about the consequences of the Iraq invasion: '[h]ow do you sleep at night, knowing you've been responsible for the deaths of 100,000 Iraqis?' He replied, 'I think you'll find it's closer to 50,000' (quoted at 24). Whether or not we think that this response indicates an implicit acknowledgement of responsibility, the high sense of discomfort (to put it mildly) that we feel upon reading it signifies, as Veitch points out, 'the limits of language in comprehending the scale and nature of suffering' (at 8). How can we, asks Veitch, speak of, let alone measure, responsibility 'against the extent of suffering caused by human actions that resulted in over 100 million deaths over the course of the century's political programmes and conflicts' (at 8)? Are we not troubled by even the mere possibility of any sense of symmetry between responsibility and the suffering induced by large-scale violence?

Given the difficulty of seeing and responding to suffering on such scales, many of us may be tempted into silence. But silence, particularly 'where it means

³ Harold Pinter cited at 24.

impunity ... arguably constitutes a second injustice, one that consists of the refusal to listen and respond to – to try to come to terms with – that which cannot be told' (at 9). It seems that however we try – as indeed we have, e.g., via 'quasi-legal institutions', such as truth and reconciliation commissions – we nevertheless find ourselves always up against the immeasurable excess of the suffering we witness. The difficulties we experience can, at least partly, argues Veitch, be attributed to the realization that the extensive suffering in question 'was (and is) often the result not of illegalities ... but rather took place under the auspices of legal organisation' (at 9). We find ourselves steeped in anxiety when we realize that 'the excess is not beyond law, but has its roots within law; what is deemed immeasurable has its roots in the measurable' (at 10).

There are a number of things going on here. One is the sense in which legal institutions cover up, and make invisible, the infliction of large-scale suffering – they are made invisible to us, the citizens, the theorists, the observers of world events. Cloaked in legal propriety, we turn a blind eye to the suffering being inflicted. Another is the sense in which the actors within legal institutions themselves explain (if they do so at all) their own actions to themselves as cloaked in moral authority simply because they are done in accordance with legally prescribed means. That they are so performed is enough: as long as we travel upon the paths of the law, we cannot be held attributable for the consequences, whatever they may be. A final sense is a sense of inevitability, of a power bigger than any one of us. No matter what we do, legal institutions will always be part of some of the extensive suffering inflicted. Large-scale suffering can often only be carried out with the assistance of legal institutions and the ordinary social processes they invoke (division of labour, hierarchies, bureaucracies), the 'cumulative effect of which is often to splinter any coherent sense of congruity between acts and consequences' (at 11). Let us take each sense in turn.

The specific issue that the first sense may invoke is that of the complicity of citizens in organized irresponsibility: an issue which is dealt with by Veitch in the fourth and final chapter (and considered briefly in part four of this review). The more immediate point here is not whether citizens can or should be held responsible for the acts of their government, but how it is that citizens do not acknowledge the consequences of a government's actions as suffering. Why does the harm caused not register as harm? How does that harm become invisible to us – as harm? How is it – as Veitch passionately describes it (at 12–19) – that the deaths of 200 Iraqi children a day, and the chronic malnourishment of countless others, during the imposition of the UN sanctions regime in the 1990s struck only some of us as unacceptable? It was not the lack of publicly available knowledge. The deaths were 'reported (if inadequately) in the press and academia, scrutinised by national and international governmental committees, and yet [the suffering] failed to register in the public, political and moral consciousness in any meaningful way' (at 17). As Veitch says, it arguably still has not registered: there are, he notes, 'no memorials to mark this brutality in the West' (at 17). Part of the answer, for Veitch, is the blinding feeling of superiority in the West, of the imperial goal, the righteousness of the civilizing mission. But another – the focus of Veitch's effort – is that 'we do not usually think of actions according to law as

excessive, or extreme; rather, it is rule-breaking behaviour that is usually characterised' as such (at 19).

The failure then, according to Veitch, is one of insensitivity 'to the voices of those whose position is not our own, but who, in fact, know far more and far better than we do: the victims or their relatives' (at 18). The problem, indeed, is one of beginnings – of how we come to see the suffering around us. If our judgement emerges from within the already existing rules, then the suffering is veiled, appearing behind that cloak – its immediacy, its horror, already stultified, if not nullified. The question, then, is 'how do we come first to realise that a situation demands an ethical response from us?' How did we, for example, come to realize that the environment is a value, that it itself demands respect from us – not only because of the effects it will have on future generations of human beings, but because it itself is a source of value? Why did it take the peoples of the West so long to realize that minorities deserved equal treatment? Even within the West, that women or immigrants or homosexuals, deserved equal treatment? How is it that it was necessary to assert, in shamefully recent times, that 'women are also human'? When our access to the domain of value is restricted to that of the guidance provided by already articulated rules, embedded in already existing institutions, it is too poor, too feeble a guide to make us see the immense variety of suffering and vulnerability around us – indeed, to make us sense and respect the infinity of suffering and vulnerability.

The feebleness of already existing rules and institutions as beacons of value was recognized by John Stuart Mill in his perennially important work, *On Liberty*.⁴ There, Mill warned of the ethical blindness of embedded normative language⁵ – when such a language becomes too embedded in a culture, we tend to hide behind it, become comfortable with its capacity to lead us, to help us live without the burden of that relentless sensibility, that constant awareness of the infinity of suffering and vulnerability. We become subservient, as Lon Fuller noted, to the morality of duty.⁶ Veitch expresses this same worry in reference to what he calls the juridical architecture of social relations. Following Robert Alexy's discussion of the law's claim to correctness,⁷ Veitch notes how the juridical brings with it two features, not necessarily fused at first: coercion or force on the one hand, and correctness or rightness on the other. Coercion is required in order to make law socially efficacious. The claim to correctness, on the other hand, is required to exclude an understanding of law as the mere command of the powerful. What happens, however, over time is that the normative (the claim to correctness) and the factual (the social efficacy) dimensions combine to transform the law's claim to correctness *as correct de facto*. Put another way, 'given law's claim to correctness and its ability to enforce it, law attains a level of priority and prominence in social life and its normative hierarchies even when its effects may, in fact, be claimed to be unjust' (at 26).

⁴ J.S. Mill, *On Liberty* (1859, G. Himmelfarb (ed.), 1974).

⁵ *Ibid.*, at 86–87, where he speaks specifically of religious norms.

⁶ L. Fuller, *The Morality of Law* (1964).

⁷ Alexy, 'A Defence of Radbruch's Formula', in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: the Limits of the Legal Order* (1999), at 15.

In conditions, such as ours, of intensive and ever-intensifying juridification – to use the terminology of Jürgen Habermas⁸ – and under the combination of the correctness and force of law, ‘the juridical form permeates, structures and organises the available range of normative understandings, expectations and responses in the wider society’ (at 26). In doing so, as Habermas recognized, the juridical form ‘relieves the judging and acting person of the considerable cognitive, motivational and ... organisational demands of a morality centred on the individual’s conscience’ (Habermas, quoted at 26).⁹

That awareness of the ethically debilitating potential of embedded normative language is not altogether ignored in contemporary moral and legal philosophy. Theorists of legal professional ethical education, or even company regulation, speak of the inefficiency of codes – when we are taught that the right thing to do is to act in accordance with a set of predetermined rules, we tend to hide behind them, letting them do the ‘ethical’ work for us, sometimes going further to fit our more or less sinister ambitions under the justificatory canopy of those rules. Philosophers speak then of the importance of moral particularity,¹⁰ of situation ethics,¹¹ of moral attention,¹² of the moral imagination,¹³ of moral perception,¹⁴ of moral vision,¹⁵ of the power of love,¹⁶ of the naked face of the other¹⁷ (this literature will be returned to in the conclusion of this review). Of course, it may be impossible to demand a vision of everyday life as one subsumed by particularity: we need well-trodden paths, distractions, veils, and other social or personal techniques of amnesia or decomplexification of infinite particularity. But we also need instruments of seeing, for the first time, for beginning, and finding the energy to begin, again and again, without those distractions and methods of making suffering and vulnerability invisible dominating us. Given the importance of the notion of suffering, and the capacity of laws and legal institutions to make us disavow responsibility for it, it is unfortunate that Veitch does not delve into the more positive task of understanding how we may come to see suffering, recognize its infinity, and how we may come to use that understanding to inform or change the rules and institutions we have.

We have considered the sense in which laws and legal institutions make us, the citizens, less capable of seeing suffering, as well as the sense in which law and its institutions makes actors and decision-makers lose their ability to feel responsible for the consequences of their actions. Just like citizens, decision-makers use the rules and

⁸ J. Habermas, *Between Facts and Norms* (1996).

⁹ *Ibid.*

¹⁰ See the work of Jonathon Dancy, but see also the collection of essays in B. Hooker and M.O. Little (eds), *Moral Particularism* (2000).

¹¹ J. Fletcher, *Situation Ethics* (1966).

¹² Weil, ‘Attention and Will’, in S. Weil, *An Anthology* (2005), at 231.

¹³ S. Fesmire, *John Dewey and the Moral Imagination: Pragmatism in Ethics* (2003).

¹⁴ L. Blum, *Moral Perception and Particularity* (1994).

¹⁵ I. Murdoch, *The Sovereignty of the Good* (1970).

¹⁶ Z. Bankowski, *Living Lawfully: Love in Law and Law in Love* (2001); see also R. Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (2nd edn., 2000).

¹⁷ E. Levinas, *Totality and Infinity* (trans. A. Lingis, 1969).

procedures of the law to distance themselves – even if, most commonly, unreflectively so – from the cumulative effects of their actions. But the matter, in the case of the latter, is more complicated – and it is made so because of the social structures within which those decision-makers work. In that way, the importance of the third sense – that of the causal efficacy of systems of social organization in the imposition of suffering – is invoked. It is to a brief explication of those social structures that we must now turn.

3 Social Structures

There are three elements of the sociological analysis of disavowals of responsibility discussed by Veitch: first, the division of labour, leading to role responsibility; secondly, individualization, leading to the irresponsible mentality; and, thirdly, ‘responsibility transference’ (the term is Veitch’s; see 60ff). Given space restrictions, this review will be confined to considering the first two. Having considered them, albeit too briefly, we will be in a better position to understand how they facilitate what Veitch calls the laws of irresponsibility.

As stated above, the first feature is that of the division of labour, i.e., the manner in which work is increasingly specialized and compartmentalized, leading, allegedly, to far greater productivity than would be the case if one person performed the work alone. As Veitch notes, it is precisely because these features are so familiar to us that their effects may have become so invisible. The link between individual action and consequences becomes so disaggregated – so lost in the bric-à-brac of a collectively produced outcome – that the worker becomes responsible solely for performing his or her task well. Responsibility becomes limited to the technical proficiency with which one performs one’s role. The individual may perform his or her work with zest, laced with technical brilliance, but may yet be involved in the proliferation of the grossest cruelty. The individual is dehumanized, becomes a conduit, but at the same is praised for his or her ability to follow the rule and fulfil the role – to perform the required activities rationally and effectively. The activities themselves become worthy *in themselves* (at 44–45; original emphasis). Division of labour, then, achieves separation between intention and consequence – or, perhaps more accurately, it limits the object of one’s intention to the consequence of adequately performing a certain task, as assigned by one’s role. As Veitch notes, ‘beyond the defined role is a realm of non-responsibility’ (at 48).

None of this will come as a great surprise to sociologists, and Veitch is right to rely on, and to remind us of, the perennial importance of work done on the effects of the division of labour by Max Weber¹⁸ and, more recently, Zygmunt Bauman.¹⁹ In the

¹⁸ Veitch relies on Weber, ‘Bureaucracy’, in G. Roth and C. Wittich (eds), *Economy and Society* (1978), ii, at 253.

¹⁹ Z. Bauman, *Modernity and the Holocaust* (1989) and *Society under Siege* (2002). It is a pity that Veitch does not consider the important contribution made by John Dewey to the deleterious effect of the division of labour on the plasticity of habit that Dewey saw as necessary for moral maturity: see J. Dewey, *Democracy and Education: an Introduction to the Philosophy of Education* (1944), at 53.

context of this book, Veitch's reminder of the importance of this literature looms large – as he says, it can lead us to a 'most profound implication: the perpetuation of harm and suffering may come about *not* through so many broken promises, but rather through something far more disturbing, its opposite—promises fulfilled, bargains kept and *jobs well done*' (at 50; original emphasis). Veitch might be taken to be presenting us with a tragic hypothesis: as role responsibility intensifies – as it has been intensifying, and arguably continues to intensify, in the contemporary world – so organized irresponsibility proliferates. Paradoxically, role responsibility is not a route towards responsibility, but towards its disappearance.

The second feature is more complex. It concerns the process of individualization in modernity. Again a paradox ensues: accompanying the celebrated rise of the individual in modern Western society is the rise of 'unprecedented institutional power' of complex organizations which sees the individual 'increasingly subject to forces over which it [has] no control' (at 52). Individual choice is there, certainly, more prominent than ever – but its prominence is a symptom of institutional power, and not its driver. Agency reigns, but only as a mirage – moreover, a standardized mirage. Individualization, in Ulrich Beck's memorable phrase, quoted by Veitch, 'becomes the most advanced form of socialisation' (at 54).²⁰ Via the initial dependence on the labour market, the individual 'becomes dependent on education, consumption, welfare state regulations and support, traffic planning, consumer supplies, and on possibilities and fashions in medical, psychological and pedagogical counselling and care' (Beck, quoted at 54).²¹ Individuals are encouraged, indeed pressured, to see themselves as masters of their own fate, as the mainsprings of meaning, while simultaneously, and not despite, but because of, the internalization of choices from the outside. Their autonomy is not only diminished, but made perfectly manipulable:

Such autonomy as there is now expresses itself most emphatically not as the self-determining autonomous subject, but as the focal point of so many choices to be made, choices that are set out only within the parameters of the options made available according to the logic of the dominant social systems – work choices; health choices; identity choices; insurance choices; and hence, most decisively (for all these choices sooner or later come to be expressed in these terms), consumer choices. [at 56]

The tragedy here is that the individual cannot see that he or she is being duped. 'Busy with its choices, the modern Western individualised self does not, cannot, see conflict as genuinely incommensurable or tragic because there is nothing that will be beyond all measure, nothing that will not be able to be dealt with through the right form of social treatment: the right policy; the right product; the right therapy; the right price' (at 57). The conclusion for Veitch, in the context of this book, is that this phenomenon leads to what he calls the 'irresponsible mentality': when faced with the burden of responsibility for our actions, we invoke our immersion in 'the "solutions" of social structures and in the "rational" ordering of social systems' (at 58). Our responsibilities disappear into our fates – the fates of the 'consumer economy, administrative

²⁰ See U. Beck, *Risk Society: Towards a New Modernity* (trans. M. Witter, 1992).

²¹ *Ibid.*

decision-making, accounting and auditing; educational (teaching and research) assessments, etc.; all of these measurements and more' (at 58). We need not be – indeed, we arguably are not – aware of having internalized this irresponsible mentality. We may be responsible for the choices we make, but not for the production of the smorgasbords from which we make our choices. Once again, the production of suffering is mediated – the structures of government, the bureaucracy, and the economy lie between us and the consequences of our choices as mirrors: we see, and bask in, the reflection of our own 'autonomous' selves, but behind those mirrors is a world of consequences that we can only, and perhaps only at the best of times, reflect upon in some form of anxious, ambivalent, and opaque nostalgia.

Despite its importance in the context of the book, Veitch's sociological analysis cannot, of itself, lay claim to any originality. Others, such as perhaps most prominently in contemporary Anglo-American legal theory, Roger Cotterrell²² and Brian Tamanaha,²³ have attacked jurisprudence for its excessive formality and inwardness. Not only, as Cotterrell puts it, does much of contemporary legal theory 'explain the character of law solely in terms of the conceptual structure of legal doctrine and the relationships between rules, principles, concepts and values held to be presupposed or incorporated explicitly or implicitly within it',²⁴ but it argues that that conceptual structure can be accessed only by adopting the internal point of view. To understand law we must capture the meaning of legal ideas. To capture that meaning we must adopt the lawyer's professional approach to knowledge of law. As Cotterrell further says, 'the construction of a professionally plausible and logically coherent concept of law as doctrine is both the starting point for and the final expression of knowledge of the nature of law'²⁵ in contemporary legal theory (at least, he argues, in its normative guise). That such concerns are also dominant in international legal theory is obvious to anyone familiar with the latest report of the International Law Commission on the fragmentation of international law.²⁶

What is missing from such theoretical scholarly orientations – at least in the light of this chapter of Veitch's book – is the sociological concept of law. As described by Cotterrell, such approaches deliberately distance themselves 'from the professional viewpoint of the lawyer'.²⁷ Such a distancing then enables the 'revealing [of] the social

²² See, most recently, R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006).

²³ See B. Tamanaha, *A General Jurisprudence of Law and Society* (2001).

²⁴ Cotterrell, 'The Sociological Concept of Law', 10 *J Law & Society* (1983) 241, at 241.

²⁵ *Ibid.*, at 242.

²⁶ See M. Koskeniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, adopted by the International Law Commission at its Fifty-eighth session* (2006) and M. Koskeniemi, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, adopted by the International Law Commission at its Fifty-eighth session*, (2006), both available at: www.un.org/law/ilc/ (last accessed on 24 May 2007). The anxiety expressed in that report is over the formal inconsistency between international legal norms. What such anxiety arguably ignores is the importance of responsiveness of international legal institutions – a responsiveness at least partly facilitated by institutional fragmentation in the international legal order. For more detail see Del Mar, 'System Values and Understanding Legal Language', 21 *Leiden J Int'l L* (2008) 29.

²⁷ Cotterrell, *supra* note 24, at 242.

consequences, environment or causes of legal policy or doctrinal or institutional development'.²⁸ Conceived of in this way, jurisprudence may, as Cotterrell insists it should, be 'constructively subversive'.²⁹ The sociological concept of law is hardly new, and it would be grossly unjust to place the many theorists who have contributed to it under one umbrella. A survey of their great diversity would add endless pages to Veitch's sociological toolbox. Where Veitch's approach is unique (at least in comparison to the bulk of that literature) is in his use of the sociological concept of law, i.e., to unveil the centrality of legal norms and legal institutions in the infliction of large-scale suffering – a suffering, importantly, which, according to Veitch, we become prone to ignoring precisely because we hide inside the world of legality.

4 Laws of Irresponsibility

The first and most intuitive link between the sociological analysis in Chapter 2 of the book and that of the analysis of the contribution of laws and legal institutions to the organization of irresponsibility in Chapter 3 is the role of legal norms and institutions in 'defining forms of acting that simply are constitutive of role responsibilities' (at 74). Legal scholars will recognize examples without blinking: tenant; landlord; employee; employer; taxpayer; citizen, etc. Together with assigning responsibilities to these roles, legal norms 'circumscribe the range of rights and obligations that attach to the role' (at 75; original emphasis). Indeed, that circumscription is seen to be 'a distinctive achievement of legal norms and institutions, in that they offer certainty and predictability across relations over time' (at 75).

Veitch's specific interest here is in the cracks between or in the abysses beyond the defined roles. Is it really the case, he asks, that shareholders are in no way implicated in the manner in which the corporation causes harms – given that those shareholders benefit from the corporations actions (at 79)? Similarly, and to return to an issue mentioned earlier in this review, 'are citizens in no sense responsible for the harmful acts of their governments, when these acts are paid for by the citizens' taxes and they democratically elect the government?' (at 79). The first step in the reconsideration of the scope of responsibility is the recognition that 'the "legal technology" of responsibility ... provides an expert means for connecting benefits and disconnecting harms within the same activities', doing so, moreover, in a 'legally objective, coercive and socially effective manner' (at 81). And, as we saw previously, because of the efficacy and intensification of juridification in modern society, law becomes 'the only medium in which it is possible to reliably establish morally obligated relationships of mutual respect even amongst strangers' (Habermas, quoted at 81–82).³⁰

A second step – in the case, for example, of the responsibility of citizens – might be to consider how it might be possible to use laws and legal institutions to make citizens

²⁸ *Ibid.*

²⁹ See Cotterrell, 'Pandora's Box: Jurisprudence in Legal Education', 7 *Int'l J Legal Profession* (2000) 179, though it must be acknowledged that Cotterrell's argument in that article is primarily focused on the role of jurisprudence in legal education (and not the role of jurisprudential inquiries in the public sphere).

³⁰ Habermas, *supra* note 8.

responsible for the acts of their governments. However, in dealing with this issue, as with others in the book, Veitch does not propose to take the second step: his task, as he sees it, at least in this book, is to make a strong case for the first step, and thereby to raise the challenge of the second. He does, nevertheless, have a warning against what we might think, at first blush, to be a clear example of ethical concern amongst the citizenry: mass protests against the war in Iraq. Observing the protests (principally in Britain), Veitch recalls that one of the most prominent banners against the proposed invasion stated simply '*Not in our name*' (at 135). Veitch's analysis here is striking: rather than demonstrating ethical concern, this was, he says, 'an explicit statement of withdrawal from a potential complicity with the proposed actions of the government and an attempt to disconnect those actions ... with the personal benefits or consciences of the citizen' (at 135). While it signified dissent, the protest simultaneously provided an opportunity, an all too easy opportunity according to Veitch, for the protestors to distance themselves from the harm caused or likely to be caused by the acts of their government. Isn't this a case, asks Veitch, of mere indulgence in a consoling psychological mechanism?

It gets worse for the protestors. Like other citizens, these protestors pay taxes. Those taxes, in turn, are used by the government to carry out acts which lead to the very infliction of suffering that the protestors cry out is being done '*Not in our name*'. The paradox here has not been ignored: readers may recall the *Peace Tax Seven* case³¹ – an action brought against the United Kingdom Treasury by a group committed to pacifism which claimed that the portion of their taxes (they estimated 10 per cent) that would be used for military expenditure (including the war in Iraq) should be withheld and diverted into a special peace fund. Veitch revels in the outcome and justification of this case: the case was lost, with the English Court of Appeal arguing that 'no taxpayer can influence or determine the purpose for which his or her contributions are applied, once they are collected' (quoted at 140). The effect, as Veitch notes, is an absurd one: 'no one pays for military expenditure' (at 140). Here, then, once again, is a case of the isolation and dispersal of responsibility – of the morality-eroding mechanisms of juridical architecture.

There are many other laws of irresponsibility that Veitch unveils in this third chapter. They include the response of the common law of Australia to the dispossession of land belonging to the Australian Aboriginal people (at 96–107); the legal response to the case of the stolen generation in Australia (at 107–114); the advisory opinion of the International Court of Justice regarding the legality of nuclear weapons (at 114–132); and others. Legal theorists and legal practitioners alike will do well to proceed through these examples carefully. Veitch's discussion of the first mentioned above – the case of dispossession of Aboriginal peoples in Australia – will be a welcome reminder of the constitutive element played by colonialism in the rise of sovereignty. The second – the case of the forcible removal of Australian Aboriginal children from their families – will also serve to offer further resources for those who argue against the continuing domination of tests of intentionality in legal responsibility

³¹ *Boughton & Ors (R on the application of) v. HM Treasury* [2006] EWCA Civ 504.

(a domination that Veitch explains well at 34–41). The specific case that Veitch focuses on – that of *Kruger v Commonwealth*³² – where the Australian High Court found that the Australian government was not responsible for genocide because of a provision which authorized the ‘Chief Protector of Aboriginals’ to exercise his power in the best interests of Aboriginal children (at 111), reveals just how easy it is for a government to disavow responsibility by hiding behind an intentionality, attributed entirely on the basis of a formal legal document. Real intentions and real consequences don’t matter, for we can hide behind the law. Finally, in the case of the ICJ’s legality of nuclear weapons opinion,³³ Veitch’s admonition of the Court’s willingness to use the mass killing or environmental degradation (capable of being caused by nuclear weapons) as a factor to be taken into account when assessing the proportionality of the use of nuclear weapons (at 126) is certainly unorthodox, and some readers may find that Veitch’s characterization of the legal imprimatur as ‘madness’ (at 128) too strongly worded. His point, however, is well made: whether one agrees with the Court’s use of the suffering capable of being caused by nuclear weapons as a factor to be taken into account (rather than as a trump that would immediately and unconditionally outlaw the use of nuclear weapons), what is clear on Veitch’s view is that this was not, as Martti Koskeniemi insisted,³⁴ the collapse of law’s reason or the implosion of law’s objective rationality; rather, ‘it exemplifies – it *embodies* – law’s reason’ (at 127; original emphasis).

In all these cases, one cannot but admire the critical energy with which Veitch unveils the ugly faces of the laws of irresponsibility. He is, of course, not alone in both general and international legal theory in espousing that critical spirit: the writings of Koskeniemi are also well-known for making the audience – such as the audience of the inauguration of the European Association for International Law³⁵ – squirm uncomfortably. However, Veitch’s message, and the analysis of the examples he gives, is original and unique: where other critics, like Giorgio Agamben, will point to the state of exception, arguing that the contemporary state ‘obliterates law’,³⁶ Veitch shows that, on the contrary, it is in the very upholding of law that the state is able to disavow responsibility and, furthermore, to provide us, the citizens, with resources to be complicit in that disavowal. The most obvious contemporary precursor to Veitch’s argument – and one, furthermore, that Veitch acknowledges – is that of Robert Cover, whose paper, ‘Violence and the Word’, also spoke of the sense in which ‘legal interpretation takes place’, perhaps inevitably (and also due, in part, to the legal division of labour), ‘in a field of pain and death’.³⁷ Earlier, Walter Benjamin’s writings on violence

³² *Kruger v Commonwealth*, 146 ALR (1997) 126.

³³ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] IJ Rep 226, also available at: www.ich-cij.org.

³⁴ See Koskeniemi, ‘Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons’, 10 *Leiden J Int’l L* (1997) 137.

³⁵ See Koskeniemi, ‘International Law in Europe: Between Tradition and Renewal’, 16 *EJIL* (2005) 113.

³⁶ See G. Agamben, *State of Exception* (2005).

³⁷ Cover, ‘Violence and the Word’, 95 *Yale LJ* (1986) 1601, at 1601.

(which, unfortunately, Veitch does not discuss)³⁸ also recognized that violence, suffering, pain, and death are already there, within the law. Benjamin insisted that ‘what a parliament achieves in vital affairs can be only those legal decrees that in their origin and outcome are attended by violence’.³⁹ In that respect, Veitch might have found further support in Benjamin’s writings for the recognition that in setting boundaries of the justifiable, the reasonable, the compensatable, the law already excludes, disavows, makes certain kinds of pain, vulnerability, and suffering invisible.⁴⁰ Had Veitch been writing his book more recently he would also have found support in Slavoj Žižek’s analysis of ‘systemic violence’.⁴¹ For Žižek, as for Veitch, systematic violence is the consequence of the smooth functioning (and not the malfunctioning) of our economic and political systems. Further, again according to Žižek but in keeping with Veitch, systematic violence is liable to become invisible as the State focuses our attention on the so-called ‘normal violence’ (i.e., the disobedience of the State’s laws) that the State persecutes in the courts.

5 Conclusion: Two Imaginations in the Public Sphere

Critical legal studies – both generally and in international legal scholarship – delight in unveiling values laced with ideology and programmes driven by self-interest and power-amassing individuals, communities, conglomerates, and states. It is a world in which nothing is as it seems, but also in which there is little that we can describe or prescribe in any comprehensive fashion, little that we can determine in advance, little that we can guarantee, and little that we can look forward to. It is a world, in short, crammed to the brim with self-reflexivity. Its champions seek out the irresolvable, the impossible, the inarticulate, and the invisible – especially where these turn out to be machinations of oppression, emerging from the dark and sinister corridors of power. There is much to be learnt from this enterprise – there is great value in being reminded of one’s own limitations, of the incredible power of discourses, of the blindness of technology and institutions, of the thirst for the control of others, of the fragility of sincerity and accuracy, and much else besides that is often eloquently, passionately, and playfully offered on the pages of the works of Martti Koskenniemi, David Kennedy, Anthony Carty, and others. Though Veitch cannot easily be cast as an orthodox critical legal studies scholar – one of his strongest and most consistent philosophical influences is Isaiah Berlin – he shares with them, at least in this book, the penchant for paradox, drama, and contingency; the taste for hidden meanings, sparkling particulars; and the distrust of existing patterns, hierarchies, structures, and dogmas. As is

³⁸ Benjamin, ‘Critique of Violence’, in W. Benjamin, *Selected Writings* (1996), i.

³⁹ *Ibid.*, at 244.

⁴⁰ As Benjamin Morgan put it in writing about Benjamin’s remarks on violence, ‘law cannot serve as a framework for determining whether or not violence is inherently just or unjust, since law itself depends upon violence both in its origin and in its continued existence’: see Morgan, ‘Undoing Legal Violence: Walter Benjamin’s and Giorgio Agamben’s Aesthetics of Pure Means’, 24 *J L and Society* (2007) 46, at 50.

⁴¹ S. Žižek, *Violence* (2008).

the case when reading their works, to read Veitch's book is to eat a good deal of humble pie. One cannot help but be roused from one's dogmatic slumbers.

However, there is a sense in which the practice of relentless criticism is itself a disavowal of responsibility: the responsibility of scholarship to contribute to the public sphere. Veitch does us a great favour in revealing to us our tendency to ignore the infinity of suffering and vulnerability, to isolate ourselves from it – both as individuals and as communities (of any and every size). However, he does not offer us any suggestions for how we might go about noticing and recognizing some of that suffering and vulnerability; nor does he consider the efforts of those who have made such suggestions. Furthermore, we can readily agree – and it is indeed very important to understand – that we can never measure, let alone compensate, or even avoid, a good deal of suffering. We can readily agree, for example, that the Human Development Index is, though an improvement on previous attempts, not even close to capturing the particularities of the plight of peoples all over the world. However, the responsibility of scholarship does not rest solely on the recognition of these inevitable limitations; it rests also on the courage to act despite them, but not without learning from them.

The responsibility of scholars in the public sphere requires the exercise of two imaginations: first, the imagination of concern; and, secondly, the imagination of solutions. Although each is important in its own right, the rub is in how they relate to one another. The first has both a negative and a positive aspect. On the negative side, and of most resonance with critical scholarship (and with Veitch's book), it reminds us of the infinity of suffering and vulnerability, of the inevitable limitations of any attempts at representing it, and of our tendency to use normative concepts for our own benefit, either material or psychological (as with the disavowal of responsibility, which allows us not to become too burdened by guilt, to live on). On the positive side, it presses us to represent and keep representing that infinity of suffering and vulnerability. This exercise requires not only the use of many different normative concepts (not letting any one dominate, including the language of 'suffering and vulnerability'), but also the use of many different kinds of media. In this way, the social sciences can combine with the arts. It is here, too, that we can have recourse to the literature mentioned above at footnotes 11–18: this literature provides us with suggestions for exercising moral vision (as in Murdoch and Weil), and different ways of imagining suffering and vulnerability (as in Nussbaum, Levinas, and Gaita). Martha Nussbaum's work often combines the two aspects effectively: in *Hiding from Humanity*,⁴² for example, she combines our tendencies to hide from what she calls our animal bodies with careful and detailed attention paid to the suffering and vulnerability of those subjected to shaming and other such punishments (which themselves might be understood as having emerged from the abovementioned tendencies).

The exercise of this imagination of concern must inform the exercise of the imagination of solutions. It is the task of this second imagination to provide strategies for agreement on, as well as the substance of, systems of justice. Constructing a system of distributive justice behind the veil of ignorance and under the principle of distributing

⁴² See M. Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (2004).

to the maximum benefit of the least advantaged is an example of both a strategy of agreement (behind the veil) and a substantive principle of justice (of maximum benefit to the least disadvantaged). Both, however, depend on certain relevant differences being taken into account. Behind the veil we are stripped of everything, but that ‘everything’ is necessarily selective: how much we may earn, what gender or sex we are, our race, how much intelligence we are born with – whatever it may be, it will be a selective and necessarily limited list. The crucial point – under the perspective of the exercise of the two imaginations in the public sphere – is that we allow the imagination of concern to inform the imagination of solutions. In the above example, history itself can point us to how lacklustre we have been in paying attention to the particular difficulties of, say, being a black, lesbian, poor, and disabled woman. But we ought never to think that our solutions (in the above case, of relevant differences to take into account behind the veil) are complete. We cannot afford to think – and there is much danger in thinking, as Veitch’s book illustrates so well – that our solutions capture and appropriately respond to the infinity of suffering and vulnerability.

The point, in short, is that we must act; we must respond; we must have some kind of overlapping consensus, reach some kind of agreement; we must govern; we must have solutions. The imagination of solutions, however, is always revisable, always challenged, by the imagination of concern. The imagination of concern is itself also informed by the realities brought to light by the imagination of solutions: after all, we do not propose solutions from scratch; we already have existing rules, institutions, norms, practices; we also have current pressing problems, political realities, personalities, powerful groups, and lobbies. An imagination of concern cannot be exercised in isolation from the circumstances we find ourselves in, and from our peculiar understandings of what has come before and what may be on the horizon. As above, the rub is in the detail of how the two imaginations can most effectively work together, combining all the various arms and branches of scholarship and human endeavour (scientific, social scientific, humanistic, and artistic).

Veitch’s book plays an important part in this vision of scholarship in the public sphere. As important as it is, however, it is a limited part. It ought to be complemented by a struggle with how the immensely powerful lessons it helps us to learn can and should help us to respond, as we must respond, in our personal everyday life and in the governance of societies. The public sphere demands that we combine, as effectively as possible, awareness of the inevitability of our limitations with the courage and realism of responsiveness. Veitch has taken us a great deal forward in the right direction. To ignore his work, to fail to build on his insights and warnings, would be to disavow the responsibility of scholarship.