

# Law and Redemption: Expounding and Expanding Robert Cover's *Nomos and Narrative*

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*This Article explores two interrelated themes that distinguish much of Robert Cover's scholarship: reliance on Jewish sources and the redemption of American constitutionalism. Two pieces of Cover's, *Nomos and Narrative* and *Bringing the Messiah Through the Law: A Case Study*, explore these themes, providing complementary views on the potential and limitations of the redemptive power of law. In *Nomos and Narrative*, Cover develops a metaphor of the law as a bridge, linking the actual to the potential. *Bringing the Messiah Through the Law: A Case Study* extends the metaphor through the lens of Jewish legal history. Building on Cover's foundation, this Article further examines the transformative power of law in Jewish tradition, using examples that illustrate Cover's redemptive vision for the law. The unrealized redemptive potential of the American legal system ultimately reflects the failure of American law and society to grapple with our past wrongs, a necessary first step on the bridge to Messianic harmony.*

## INTRODUCTION

More than thirty-five years after his untimely passing, Robert Cover stands as a towering figure in the legal academy and beyond. Over the years, Cover's articles have been cited in thousands of works by scholars across a broad range of disciplines,<sup>1</sup> conferences have been organized in Cover's memory,<sup>2</sup> and tribute volumes have appeared in venues cutting across

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1. See, e.g., *Symposium, Rethinking Robert Cover's *Nomos and Narrative**, 17 *YALE J.L. & HUMAN.* 1 (2005); *A Commemorative Volume for Robert M. Cover*, 8 *CARDOZO STUD. L. & LITERATURE* 1 (1996); 45 *CONSERVATIVE JUDAISM* 3 (1993); Milner S. Ball, *Law and Prophets, Bridges and Judges*, 7 *J.L. & RELIGION* 1 (1989); *Tributes to Robert M. Cover*, 96 *YALE L.J.* 1699 (1987); see also Andrew Jensen Kerr, *The Law According to the Most-Cited Law Review Articles of All Time*, 20 *GREEN BAG* 2d 371, 377 n.45 (2017).

2. See, e.g., *Symposium, supra* note 1; *Symposium Will Re-Examine Seminal Essay by Late Law Professor Robert Cover*, *YALE BULLETIN & CALENDAR* (Apr. 23, 2004), <http://archives.news.yale.edu/v32.n27/story20.html>. Most recently, Touro Law Center hosted a two-day

various academic fields.<sup>3</sup>

This Article explores two interrelated themes that distinguish much of Cover's scholarship: Cover's reliance on Jewish sources<sup>4</sup> and his efforts to redeem American law and constitutionalism.<sup>5</sup> These themes figure most famously, and in some ways most notably, in Cover's groundbreaking *Nomos and Narrative*,<sup>6</sup> published in 1983 and widely considered among the most significant law review articles ever written.<sup>7</sup> Though less well-known, Cover's unfinished and posthumously published book chapter, *Bringing the Messiah Through the Law: A Case Study*,<sup>8</sup> expands upon these themes, relying more directly on Jewish law and legal history to illuminate Cover's conceptions of legal redemption. This Article maintains that, taken together,

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conference, *The Life and Work of Robert M. Cover*. See *Conferences*, TOURO UNIV. JACOB D. FUCHSBERG L. CTR., <https://www.tourolaw.edu/Academics/1229> (last visited Jan. 11, 2023); *Life and Work of Robert M. Cover Examined in New Journal Issue*, YALE L. SCH., <https://law.yale.edu/yls-today/news/life-and-work-robert-m-cover-examined-new-journal-issue> (last visited Jan. 11, 2023). In addition, Yale Law School co-sponsors an annual Robert M. Cover Retreat, "bring[ing] to life the vision of Robert Cover, a Yale Law School professor and social change activist." See *33rd Annual Robert M. Cover Retreat*, YALE L. SCH., <https://law.yale.edu/33rd-annual-robert-m-cover-retreat> (last visited Jan. 11, 2023).

3. See *supra* note 1; *Conference: The Life and Work of Robert M. Cover*, 37 TOURO L. REV. 1735 (2022); *Tributes to Robert M. Cover*, 96 YALE L.J. 1699 (1987). Tributes are also included in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha Minow et al. eds., 1993).

4. See Robert M. Cover, *Bringing the Messiah Through the Law: A Case Study*, in *NOMOS XXX: RELIGION, MORALITY AND THE LAW* 201 (J. Roland Pennock & John W. Chapman eds., 1988) [hereinafter Cover, *Bringing the Messiah*]; Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos and Narrative*]; Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987); Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179 (1985) [hereinafter Cover, *The Folktales of Justice*]; see also Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 339 (1994) (describing Cover as "the prime mover in the reintroduction of Jewish values to contemporary American legal discourse"); Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465 (1998), *reprinted in* 2 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 1 (1998) [hereinafter Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*]; Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 n.3 (1989) (acknowledging "the liberating effect" of Cover's work on the author's "sense of [his] own past," showing how the "intellectual abundance of [Jewish sources] can be a profound source of analytic insight").

5. See, e.g., Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 832 (1986) [hereinafter Cover, *The Bonds of Constitutional Interpretation*]; Cover, *Bringing the Messiah Through Law*, *supra* note 4; Cover, *Nomos and Narrative*, *supra* note 4; see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) [hereinafter COVER, *JUSTICE ACCUSED*]; see generally Stephen Wizner, *Repairing the World Through Law: A Reflection on Robert Cover's Social Activism*, 8 CARDOZO STUD. L. & LITERATURE 1 (1996).

6. See Cover, *Nomos and Narrative*, *supra* note 4.

7. See, e.g., Kerr, *supra* note 1, at 377 n.45; Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward A Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1625 (1999) ("*Nomos and Narrative* is one of the most heavily cited law review articles of recent years, and it has been called 'seminal,' 'pathbreaking,' 'brilliant,' and 'compelling.'") (citations omitted). See generally Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, *supra* note 4; Stone, *supra* note 4.

8. Cover, *Bringing the Messiah*, *supra* note 4.

these two pieces provide complementary views of Cover's approach, demonstrating, at once, both the potential and the limitations of the redemptive power of law within the American legal system.

Part I of the Article begins with a close reading of *Nomos and Narrative*, focusing on the themes of law and redemption, which Cover develops through the central metaphor of law as a "bridge linking a concept of a reality to an imagined alternative."<sup>9</sup> Noting Cover's disappointment with American law's failure to implement a redemptive response to the legal and societal wrongs of slavery and racial discrimination, this Part then turns to *Bringing the Messiah*, which extends and applies Cover's vision of law as a bridge to an alternative future, considered through the express lens of Jewish legal history. Expanding upon Cover's framework, Part II of the Article further examines the redemptive and transformative power of law in the context of both legal and narrative areas of Jewish tradition, suggesting that the law must acknowledge and respond to the faults of the past to allow for repentance and reconstruction toward a redeemed future.

Building on Parts I and II, Part III of the Article returns to the metaphor of law as a bridge, drawing upon examples in Jewish law that illustrate and actualize Cover's ambitions for the law to serve as a means toward bringing about a Messianic harmony.<sup>10</sup> Finally, the Article closes with the proposition that perhaps Cover's frustration with the redemptive failure of the American legal system reflects a failure of American law and society to undertake a full accounting of collective culpability for past wrongs, leaving unfulfilled a prerequisite for reconciliation, reconstruction, and redemption.

#### PART I: LAW AND REDEMPTION IN THE WORK OF ROBERT COVER

##### A. *Law and Redemption in Nomos and Narrative*

The tensions—or paradoxes—between law and redemption, between the real and the ideal, between brokenness and reconstruction, infuse *Nomos and Narrative* with an essential and somewhat mystical—if not elusive—quality.<sup>11</sup> The article opens dramatically, with a verse from Wallace Stevens: "A. A violent order is disorder; and/B. A great disorder is an order.

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9. Cover, *Nomos and Narrative*, *supra* note 4, at 9.

10. It should be noted at the outset that Cover's vision of Messianic harmony, as developed throughout both *Nomos and Narrative* and *Bringing the Messiah*, builds upon concepts drawn from decidedly Jewish eschatological tradition. Accordingly, along with citations to Biblical depictions of physical and spiritual peace, among nations and perhaps among all creatures, Cover consistently references Jewish legal sources, including the Torah, the Talmud, and Jewish legal authorities and philosophers—particularly Maimonides—who describe Messianic times as characterized by a fulfillment of the Divine legal order as well. *See, e.g.*, MAIMONIDES, MISHNEH TORAH, *Laws of Kings* 11:1-4; *see also* ARYEH KAPLAN, 2 THE HANDBOOK OF JEWISH THOUGHT 374, 378 n.40 (Abraham Sutton ed. 1992).

11. *See* Steven L. Winter, *Keeping Faith with Nomos*, 36 TOURO L. REV. 345, 360 n.84 (2020) ("Cover's thought . . . is often dialectical in this . . . paradoxical (that is, post-Hegelian) way.").

These/Two things are one (Pages of Illustrations).”<sup>12</sup> These lines capture an insight that runs through *Nomos and Narrative*, as well as much of Cover’s broader work, acknowledging, at once, both the power and limitations of law, which imposes a sense of order but often only through the threat or use of violence.<sup>13</sup> Moreover, as *Nomos and Narrative* develops in great detail, the imposition of order, “creat[ing] and maintain[ing] a world of right and wrong, of lawful and unlawful, of valid and void[,]” takes place within a “*nomos*—a normative universe[,]” extending beyond the “rules and principles of justice, the formal institutions of the law, and the conventions of a social order.”<sup>14</sup> As Cover famously put it: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”<sup>15</sup> Thus, “[a] legal tradition” is “part and parcel of a complex normative world . . . includ[ing] not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it.”<sup>16</sup>

In fact, Cover premises much of the analysis in *Nomos and Narrative* on the basic proposition that “[l]aw may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative.”<sup>17</sup> To be sure, Cover insists that “the concept of a *nomos* . . . is neither utopia nor pure vision.”<sup>18</sup> Instead, “[a] *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures.”<sup>19</sup> Despite these caveats, however, visions of utopia play a central role in Cover’s *nomos*, “hold[ing] our reality up to us as unredeemed.”<sup>20</sup>

Indeed, in depicting “the alternative worlds of our visions,”<sup>21</sup> Cover employs idealistic and explicitly Messianic imagery: “the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away.”<sup>22</sup> Furthermore, Cover declares, these

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12. Cover, *Nomos and Narrative*, *supra* note 4, at 4. See Winter, *supra* note 11, at 359-60 (“Robert Cover radicalizes our understanding of law as *nomos* in large part by subverting the conventional antinomies of obedience and disobedience, legal precept and social meaning, nature and nurture. . . . Indeed, he plainly announces this dialectical methodology in the epigraph of *Nomos and Narrative*, which quotes the first stanza of a poem by Wallace Stevens . . .”).

13. See e.g., Cover, *Nomos and Narrative*, *supra* note 4, at 40 (“[T]he 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.”); Cover, *The Bonds of Constitutional Interpretation*, *supra* note 5; Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) [hereinafter Cover, *Violence and the Word*].

14. Cover, *Nomos and Narrative*, *supra* note 4, at 4.

15. *Id.*

16. *Id.* at 9.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

alternative worlds “dictate no particular set of transformations or efforts at transformation[.]”<sup>23</sup> If anything, he suggests, “law is that which holds our reality apart from our visions and rescues us from the eschatology that is the collision in this material social world of the constructions of our minds.”<sup>24</sup> And yet, Cover recognizes, “[t]o live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs.”<sup>25</sup> Accordingly, Cover identifies “narrative” as comprising “[t]he codes that relate our normative system to our social constructions of reality and to our visions of what the world might be, . . . models through which we study and experience transformations.”<sup>26</sup>

Tensions between the real and the ideal, between the present and utopia, between law and redemption, similarly dominate Cover’s legal analysis, in the context of both Jewish thought and contemporary controversies in the American legal system. In Cover’s words, the underlying “thesis” of *Nomos and Narrative* posits that “the creation of legal meaning—‘jurisgenesis’—takes place always through an essentially cultural medium.”<sup>27</sup> Strikingly, Cover introduces the concept of jurisgenesis through an explication of Jewish sources, juxtaposing “one of Judaism’s oldest rabbinic traditions” with another ancient Jewish teaching, from centuries later.<sup>28</sup> According to the first statement, attributed to Rabbi Shimon HaTzadik, the “world stands” upon Torah, Temple service, and deeds of kindness.<sup>29</sup> In contrast, the second statement, attributed to Rabbi Shimon ben Gamliel, teaches that the “world exists” upon justice, truth, and peace.<sup>30</sup> Relying on the commentary of Rabbi Joseph Caro, Cover notes the dividing line between the two statements: the destruction of the Temple in Jerusalem.<sup>31</sup>

Thus, Cover understands Rabbi Shimon HaTzadik as enumerating the “strong” forces that “*create* the normative worlds in which law is predominantly a system of meaning,” while Rabbi Shimon ben Gamliel delineates “system-maintaining ‘weak’ forces . . . justified by the need to ensure the *coexistence* of worlds of strong normative meaning.”<sup>32</sup> Cover draws a similar distinction between two “corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a *nomos*”: the first, “world-creating”—“paideic”—which views “[o]bedience” to the law as “correlative to understanding,”<sup>33</sup>; the second,

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23. *Id.*

24. *Id.* at 10.

25. *Id.*

26. *Id.*

27. *Id.* at 11

28. *Id.*

29. *Id.* (quoting MISHNA, *Avoth* 1:2).

30. *Id.* at 12 (quoting MISHNA, *Avoth* 1:8).

31. *Id.*

32. *Id.*

33. *Id.*

“world maintaining”—“imperial”—in which norms must be “*enforced* by institutions.”<sup>34</sup>

Further elaborating on an “ideal type of the paideic *nomos*,” Cover suggests that “we may purport to distill some purer essence of unity” in which “that which must be done, the meaning of that which must be done, and the sources of common commitment to the doing of it stand bare, in need of no explication, no interpretation—obvious at once and to all.”<sup>35</sup> Alluding to the first of the Talmudic teachings, which he correlates with world creation, Cover adds that “divinely ordained normative corpus, common ritual, and strong interpersonal obligations that together form the basis of such a paideic legal order may indeed be potent.”<sup>36</sup> Within such a *nomos*, legal precepts are “infused with the full range of connotation that only an integrated set of narratives can provide.”<sup>37</sup>

Still, even within such an idealized paideic order, Cover quickly emphasizes, “[t]he unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary, [as d]ifferences arise immediately . . . .” Because “real integration occurs around particular constellations of creed and ritual—Torah and Temple worship[,] . . . the very act of constituting tight communities . . . is jurisgenerative by a process of juridical mitosis.”<sup>38</sup> As a result, “[t]he Torah becomes two, three, many Torahs as surely as there are teachers to teach or students to study.”<sup>39</sup>

In turn, “the problem of the multiplicity of meaning . . . leads at once to the imperial virtues and the imperial mode of world maintenance,”<sup>40</sup> a task that falls upon “jurispathic courts.”<sup>41</sup> Significantly, according to Cover, though seemingly less profound—certainly less exciting or dramatic—than creating the world, “[m]aintaining the world is no small matter.”<sup>42</sup> Without it, “the worlds created would be unstable and sectarian . . . dissociative and incoherent . . . wary and violent.”<sup>43</sup> Thus, Cover concludes, in an allusion to the second of the Talmudic teachings, “[t]he sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.”<sup>44</sup>

Cover’s reliance on ancient Jewish teachings, including both legal

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34. *Id.* at 13.

35. *Id.* at 14.

36. *Id.*

37. *Id.* at 14-15.

38. *Id.* at 15.

39. *Id.*

40. *Id.* at 16.

41. *Id.* at 40.

42. *Id.* at 16.

43. *Id.*

44. *Id.*

precepts and narrative—*halacha* and *aggada*<sup>45</sup>—remains groundbreaking, insightful, and compelling.<sup>46</sup> Yet, the most innovative—if not surprising—elements of Cover’s analysis in *Nomos and Narrative* may lie in his characterizations of the Anabaptist *nomos* within the context of constitutional interpretation and authority.<sup>47</sup> As Cover observes, despite the United States Constitution’s self-declaration as “supreme Law,”<sup>48</sup> the creation of “legal meaning” takes place within the “interpretive communities.”<sup>49</sup> Cover pays particular attention to “insular communities”—for example, the Anabaptist community, for whom “the aspiration to life as a member of a first century primitive church has become a stronger referent than the external constraints imposed by contemporary reality.”<sup>50</sup> Taking the Anabaptist narrative seriously, Cover concludes that “[i]t is the internal law of the Anabaptist community that creates the bridge between the vision and the reality.”<sup>51</sup>

Turning the Mennonite brief in the Supreme Court case *Bob Jones University v. United States*,<sup>52</sup> Cover “mak[es] the very strong claim . . . that within the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court.”<sup>53</sup> The strength of Cover’s claim rests in the recognition that “from a position that starts as neutral . . . the interpretations offered by judges are not necessarily superior.”<sup>54</sup> Cover further develops the themes of “nomic insularity” through the example of “nineteenth century utopian communities,” specifically the Shakers.<sup>55</sup> Nevertheless, Cover contends, neither the insular nor even the utopian “can ever manage a total break from other groups with other understandings of law.”<sup>56</sup> As such, although “the Amish, the Shakers, and the judge are all engaged in the task of constitutional understanding[,]” Cover concludes that “their distinct starting points, identifications, and stories make us realize that we cannot pretend to a unitary law.”<sup>57</sup>

But Cover’s ambitions for the Constitution go beyond the recognition of distinct interpretations and alternative visions, because Cover’s project goes

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45. See Levine, *Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*, *supra* note 4, *passim*.

46. See *id.*; Hibbits, *supra* note 4, at 339; Stone, *supra* note 4, at 820 (“Robert Cover made it respectable to draw on the Jewish tradition in public discourse”); Winter, *supra* note 4, at 2225 n.3.

47. See Cover, *Nomos and Narrative*, *supra* note 4, at 26.

48. *Id.* at 25 (quoting U.S. CONST. art. VI, § 2).

49. *Id.* at 26.

50. *Id.* at 27.

51. *Id.*

52. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

53. Cover, *Nomos and Narrative*, *supra* note 4, at 28.

54. *Id.* at 29.

55. *Id.* at 30.

56. *Id.* at 33.

57. *Id.*

beyond conflicting forms of conventional constitutional interpretation. Cover tackles themes that dominated his scholarship and personal activism,<sup>58</sup> themes that implicate—and complicate—the heart of the American constitutional experiment: slavery and racial discrimination. To address such weighty and confounding matters, Cover proposes a model of “redemptive constitutionalism,” defined as “the positions of associations whose sharply different visions of the social order require a transformational politics that cannot be contained within the autonomous insularity of the association itself.”<sup>59</sup> In sum, “[r]edemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other.”<sup>60</sup>

Cover’s similarly ambitious invocation of religious imagery likewise goes beyond specific aspects of Jewish or Anabaptist tradition. Cover embraces the term “redemptive” as necessary to capture “the religious connotations of both personal and cosmic freedom and bondage,” because both radical antislavery constitutionalism and the civil rights movement “set out to liberate persons and the law and to raise them from a fallen state.”<sup>61</sup> If the Constitution can be analogized to the Bible as “foundational—a beginning—and generative of all that comes after[.]”<sup>62</sup> the reality of slavery, and other forms of racial discrimination, may be analogized to the fall from Eden, and other instances of Biblical sin—as it were, the Nation’s “original sin.”<sup>63</sup> As Cover eloquently puts it, “[i]f there was a fault line in the normative topography of American constitutionalism . . . it was, for four score and ten years, the place of slavery within the union.”<sup>64</sup> Accordingly, taking the analogy one step further, the sin of slavery stood in need of redemption, through a transformative process of repentance and

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58. See, e.g., COVER, JUSTICE ACCUSED, *supra* note 5; Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Wizner, *supra* note 5.

59. Cover, *Nomos and Narrative*, *supra* note 4, at 34.

60. *Id.*

61. *Id.* at 35.

62. *Id.* Cf. Samuel J. Levine, *The Constitution As Poetry*, 49 SETON HALL L. REV. 737-38 n.1 (2019) (citing sources).

63. See, e.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 20 (2005) (“Slavery was the original sin in the New World garden, and the Constitution did more to feed the serpent than to crush it.”); Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 271 (2019) (“Slavery was the original sin of the American Republic, and segregation marked a second fall. The Court was complicit in both evils.”); Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 434 (2013) (“The Founding and Slavery: Memory of Our Original Sin”); Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283, 321 (2008) (“Slavery is still the touchstone for all of our discussions about race in America—as it should be, because race was born out of slavery. It is our nation’s original sin.”).

64. Cover, *Nomos and Narrative*, *supra* note 4, at 35. Cf. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 53 (2019) (“In short, slavery was constitutional.”).



reconstruction.<sup>65</sup>

In Cover's typology, one response to the dissonance between constitutional idealism and the reality of slavery involved retreat to "nomic insularity."<sup>66</sup> Cover grounds this position, attributed to the Garrisonian abolitionists, in a vision of perfectionism, requiring "withdrawal" and "disengagement from participation in the state,"<sup>67</sup> thereby renouncing "any emphasis on the process of transformation."<sup>68</sup>

Cover contrasts the insular response against a redemptive model, "radical constitutionalism," which he explores through the experiences and aspirations of Frederick Douglass.<sup>69</sup> According to Cover, just as, on a personal level, Douglass's escape from slavery "constituted a redemption and the beginning of his real life," so too, "Douglass[s] greatest need was for a vision of law that both validated his freedom and integrated norms with a future redemptive possibility for his people."<sup>70</sup> Therefore, unlike the Garrisonians, Douglass adopted "a vision of an alternative world in which the entire order of American slavery would be without foundation in law."<sup>71</sup> Such a vision is characterized by "the utopian's inability to bear the dissonance of the lawfulness of the intolerable."<sup>72</sup> Therefore, "the vision of slavery destroyed by the power of law requires for its fulfillment the participation of the larger community that exercises state power," and indeed, "[w]hile their movement lasted," the radical constitutionalists "contributed to an immense growth of law."<sup>73</sup>

Nevertheless, Cover concludes, "[a]ll utopian or eschatological movements that do not withdraw to insularity risk the failure of the conversion of vision into reality and, thus, the breaking of the tension. At that point, they may be movements, but they are no longer movements of the law."<sup>74</sup> Apparently, the tensions between reality and redemption, between what is and visions of what might be, remained too powerful to overcome through the mechanisms of legal interpretation.

A redemptive dynamic accompanied more recent efforts at effecting racial justice within the confines of the American legal system, embodied in the civil rights sit-in movement from 1961 until 1964. Exploring the "special case of civil disobedience," Cover posits that "[f]rom its own point

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65. Cf. George H. Taylor, *Racism As "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 *Mich. J. Race & L.* 269 (2004).

66. Cover, *Nomos and Narrative*, *supra* note 4, at 30, 36. See generally COVER, *JUSTICE ACCUSED*, *supra* note 5.

67. Cover, *Nomos and Narrative*, *supra* note 4, at 36.

68. *Id.* at 37.

69. *Id.* at 38.

70. *Id.*

71. *Id.*

72. *Id.* at 39.

73. *Id.*

74. *Id.*

of view, . . . the community that has created and proposed to live by its own, divergent understanding of law makes a claim not of justifiable disobedience, but rather of radical reinterpretation.”<sup>75</sup> Viewed in this light, the sit-in movement’s community “affirmed that the Constitution of the United States has a valid moral claim to obedience from the members of the community” while concomitantly affirming “an understanding that the Constitution’s guarantee of equal protection includes a right to be served in places of public accommodation without regard to race.”<sup>76</sup> Dissatisfied with either begrudging acceptance and acquiescence or ineffective withdrawal, the protesters thereby declare: “‘We *do* mean this in the medium of blood’ (or in the medium of time in jail); ‘our lives constitute the bridges between the reality of present official declarations of law and the vision of our law triumphant’ (a vision that may, of course, never come to fruition).”<sup>77</sup>

Finally, returning to the issues of racial discrimination in *Bob Jones University*,<sup>78</sup> the vexing case decided near the end of the 1982 Supreme Court term,<sup>79</sup> Cover introduces the last section of *Nomos and Narrative* with a reminder that “in contrast to the paideia of Torah . . . , the Temple has been destroyed—meaning is no longer unitary . . . not all interpretive trajectories are insular.”<sup>80</sup> Moreover, because “[t]he worlds of law we create are all, in part, redemptive,” Cover declares that “the Court must either deny the redemptionists the power of the state (and thereby either truncate the growth of their law or force them into resistance) or share their interpretation.”<sup>81</sup> Although Cover notes that courts may utilize mechanisms of avoidance, such as “the jurisdictional screen and rules of toleration to avoid killing the law of the insular communities that dot our normative landscape[,]” he insists that courts “cannot avoid responsibility for applying or refusing to apply power to fulfill a redemptionist vision.”<sup>82</sup>

Applying the framework developed throughout *Nomos and Narrative*, Cover characterizes Bob Jones’s views as asserting the claim of “a normative community entitled to protection against statist encroachment,” constituting “a nomic insularity that would protect it from general public law prohibiting racial discrimination.”<sup>83</sup> In turn, Cover continues, Chief

75. *Id.* at 46-47.

76. *Id.* at 47.

77. *Id.*

78. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

79. See Perry Dane, *The Public, the Private, and the Sacred: Variations on A Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15, 18-19 (1996) (“It was Bob’s genius . . . to take seriously not only the relation between law and narrative, but the relation between law and violence. And *Bob Jones* was, in all its practical topicality, a perfect illustration of that relation, highlighting a terrible juxtaposition of the imperial state’s violence against a paideic community with that paideic community’s own violence against persons of color.”).

80. Cover, *Nomos and Narrative*, *supra* note 4, at 60.

81. *Id.*

82. *Id.*

83. *Id.* at 62.

Justice Burger's opinion "countered the claim of insularity with a narrative of redemption,"<sup>84</sup> premised on the Court's finding that "discrimination against blacks in an otherwise tax-exempt religious school contradicted the central redemptive narrative of the struggle for racial equality and for desegregation of the nation's schools."<sup>85</sup> Still, while approving of the outcome, Cover considers the Court's interpretation in *Bob Jones* to be "very weak," because "[t]he grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong."<sup>86</sup>

For Cover, there existed "a powerful response to the insular claim—the counterclaim of constitutional redemption. Such a redemptive claim would pose no general threat to the insular community . . . save the kind of commitment that goes with the articulation of the constitutional mandate." However, Cover laments, "[t]his claim the Court did not make."<sup>87</sup> Much to Cover's disappointment, the Court avoided the constitutional question "by simply throwing the claim of protected insularity to the mercy of public policy."<sup>88</sup> Ultimately, the Court's response did not satisfy Cover's expectations and ambitions for the redemptive power of law: "The insular communities deserved better—they deserved a constitutional hedge against mere administration. And the minority community deserved more—it deserved a constitutional commitment to avoiding public subsidization of racism."<sup>89</sup>

Cover closes *Nomos and Narrative* with prose passages that in some ways expound and in other ways expand the poetic verses that open the article, cryptically exploring themes of violence, order, and disorder, with a nod toward achieving a harmonious—if not Messianic—redemption. Cover writes of "an end" that arrives "in some unruly moment—some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of the indifference or opposition of the state."<sup>90</sup> And yet, Cover rejects the "romance of rebellion . . . lead[ing] us to look to the law evolved by social movements and communities."<sup>91</sup> Instead, "[j]ust as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimize, within a different framework, communities and movements."<sup>92</sup> Therefore, Cover exhorts us: "We ought

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84. *Id.* at 65.

85. *Id.*

86. *Id.* at 66.

87. *Id.* at 67.

88. *Id.*

89. *Id.*

90. *Id.* at 67-68.

91. *Id.* at 68.

92. *Id.*

to stop circumscribing the *nomos*; we ought to invite new worlds.”<sup>93</sup>

The ending of *Nomos and Narrative* leaves the reader with tantalizing questions: What are these new worlds, and how do we invite them? What is the relationship between law and redemption? How do we employ the jurisgenerative impulse to bridge present reality and a transformative, if not utopian, vision of the future?<sup>94</sup>

### B. Law and Redemption in Bringing the Messiah Through the Law

Cover seemed to begin answering these questions in his scholarship that followed *Nomos and Narrative*, focused in large part on the effort to renew formal Rabbinic Ordination among leading Jewish legal authorities in sixteenth-century Safed.<sup>95</sup> Just a year after the publication of *Nomos and*

93. *Id.*

94. Cf. Michael J. Madison, *Social Software, Groups, and Governance*, 2006 MICH. ST. L. REV. 153, 170 (2006) (“The optimistic view of Cover’s argument, which is what I borrow here, relies on his conclusion: ‘Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to invite new worlds.’ In concrete terms, though Cover framed his argument primarily in terms of the narratives that define interpretive communities, he invited law to recognize the legitimacy of the lawmaking function of informal groups. Not all collectives generate the meanings that Cover suggested be recognized.”) (quoting Cover, *Nomos and Narrative*, *supra* note 4, at 68); Robert C. Post, *Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 YALE J.L. & HUMAN. 9, 12–13 (2005) (“In a famous passage, *Nomos and Narrative* concludes by enjoining us ‘to stop circumscribing the *nomos*’ and ‘to invite new worlds.’ But this invitation raises the question of how different worlds can coexist. The state is not uniquely jurispathetic; every *nomos* exists by virtue of its exclusion and denial of competing *nomoi*. Jurispathology is in this sense built into the very sociology of human meaning. So we must ask how multiple communities, with their competing and mutually jurispathic *nomoi*, can live together.”) (quoting Cover, *Nomos and Narrative*, *supra* note 4, at 68); Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. 1785, 1803 (1990) (“With this insight into the paradoxical tension that simultaneously constitutes law’s meaning and law’s order, we may also better understand Cover’s urging us to ‘stop circumscribing the *nomos*’ and ‘invite new worlds.’”) (quoting Cover, *Nomos and Narrative*, *supra* note 4, at 68); Aviam Soifer, *Covered Bridges*, 17 YALE J.L. & HUMAN. 55, 79 (2005) (“We cannot know, of course, if Bob Cover actually moved any of us closer to redemption. . . . Yet if the active pursuit of significant ideas about law and justice can ever be a bridge to redemption, no one in our time has done as much as Bob Cover in that effort.”); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1958 (1987) (“[I]t is worth remembering that Bob Cover never lost hope, not even for law. . . . I think that the Second Reconstruction after a century of tragic delay, and Bob’s own involvement in it, helps explain his optimism in the face of the sobering complexity he helped us see in legal history. He urged that we keep on telling and creating heroic tales—what Bob celebrated as sacred narratives of jurisdiction and as myths of constitutional constraint and entitlement. . . . Bob was iconoclastic, not nihilistic. He emphasized that law matters in specific decisions. He also passionately sought to rethink and to use law ‘to invite new worlds.’”) (quoting Cover, *Nomos and Narrative*, *supra* note 4, at 68); Doug Williams, *A Harder “Hard Case”*, 57 ST. LOUIS U. L.J. 931, 972 (2013) (referring to “[t]he abstraction of Professor Cover’s notions of ‘jurisgenerative’ processes that enlarge and enrich the ‘*nomos*’”).

95. See Eliav Shochetman, *Renewal of the Semicha According to Maimonides*, SHENATON HA-MISHPAT HA-IVRI, ANN. INST. RSCH. JEWISH L. 217-43 (1988-1989); see also Rabbi Dr. David Horwitz, *The Semikah Controversy of the 1500’s*, RABBI ISAAC ELCHANAN THEOLOGICAL SEMINARY: THE BENJAMIN AND ROSE BERGER CJF TORAH TO-GO SERIES 16 (Adar 5774); ARYEH KAPLAN, 1 THE HANDBOOK OF JEWISH THOUGHT 210-11, n.115 (1979).

The most immediate legal significance of efforts in sixteenth-century Safed to renew formal Rabbinic Ordination revolved around the adjudicative authority of rabbinic judges. See KAPLAN, *supra*, at 209-11; HERSHEL SCHACHTER, *ERETZ HATZEVI* 225-37 (1992). Cover’s analysis situates the legal import of the events within broader historical and societal context, focusing on Messianic aspirations and implications potentially connected with renewed rabbinic authority. See Horwitz, *supra*, at 18-24. Cf.

*Narrative*, in a lecture that explored “The Folktales of Justice,”<sup>96</sup> Cover further developed the categories of law and narrative, relying heavily on Jewish legal sources, both ancient and more modern, including a relatively brief discussion of the events in Safed.<sup>97</sup> Cover continued to study these events toward the end of his life,<sup>98</sup> producing the posthumously published—and aptly titled—*Bringing the Messiah Through the Law: A Case Study*.<sup>99</sup> Here, Cover offers a detailed description of the events in Safed and, more importantly—and intriguingly—a detailed description of his interest in these events as an outgrowth of his thinking in *Nomos and Narrative*.

In a dramatic sense, *Bringing the Messiah* reads like an intended—if more modest—sequel to the sweeping and majestic *Nomos and Narrative*, expounding and expanding—in some ways, also subverting—the earlier, epic blockbuster. Indeed, Cover breaks the fourth wall, as it were, ruminating candidly on both the ambitions and limitations of his previous work. For example, reflecting upon the image of law as a “bridge in normative space . . . [connecting] the world we have to a world we can imagine,”<sup>100</sup> Cover admits to his own “excess of metaphoric rhetoric”<sup>101</sup> in the earlier declaration that “[l]aw is that which holds our reality apart from our visions and rescues us from the eschatology that is the collision in this material social world of the constructions of our minds.”<sup>102</sup>

More significantly, and somewhat remarkably, Cover acknowledges “the obvious fallacies in [the] line of reasoning” he had previously adopted, having accepted the “suppos[ition] that Messianism in its customary apocalyptic form was the antithesis of lawful transformation,” and therefore having concluded—“elliptically,” as he puts it—that “law ‘rescues us from . . . eschatology.’”<sup>103</sup> Demonstrating a strong commitment to intellectual honesty and integrity, Cover displays self-awareness—if not contrition, setting forth a “defense” for his previous position and attempting to “plead in retrospect” by offering an explanation for the basis of his earlier assumptions.<sup>104</sup> Specifically, Cover suggests that he “was not making an argument about the logical or necessary relation between law-life and eschatologies, but one about tendencies”—though he expresses doubt even

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KAPLAN, *supra*, at 211.

96. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U.L. REV.* 179 (1985).

97. *See id.* at 191-97.

98. Cover, *Bringing the Messiah*, *supra* note 4, at 202 (“I have been exploring in an intense way over the past year or so, at least one very significant case of Messianic immediatism that is powerfully and positively related to religious law.”); Stephen Wizner, *Tributes to Robert M. Cover*, 96 *YALE L.J.* 1707, 1711 (1987) (“Bob’s last scholarly project[] was a summation of his vision of law as a sacred art, a bridge from reality to a new world.”).

99. Cover, *Bringing the Messiah*, *supra* note 4.

100. *Id.* at 201.

101. *Id.*

102. *Id.* at 201 (quoting Cover, *Nomos and Narrative*, *supra* note 4, at 10).

103. *Id.* at 202 (quoting Cover, *Nomos and Narrative*, *supra* note 4, at 10).

104. *Id.*

about the accuracy of his previous estimation of those tendencies.<sup>105</sup>

Substantively, *Bringing the Messiah* considers at some length the importance of “the case of Messianic immediatism” for the “idea of law” that Cover developed in *Nomos and Narrative*.<sup>106</sup> More prominently, a “lawful [M]essianism entails a special form of commitment that holds to the immediacy of a privileged and strange transformation while insisting on a highly unusual capacity for familiar transformational institutions.”<sup>107</sup> In fact, Cover identifies several elements of the events in Safed, both historical and theological, exemplifying components he deems crucial for a legal transformation aimed at achieving the redemption of a broken world. As such, Cover’s study complements and further explicates his analysis from *Nomos and Narrative*, in which he explored attempts to redeem the constitutional brokenness brought about by slavery and racial discrimination.<sup>108</sup>

Cover situates the events of Safed in the context of the pivotal and traumatic historical episode that had previously befallen the same community, the exile of the Jews from Spain in 1492.<sup>109</sup> Cover observes that the refugees from that exile included “many who had undergone at least nominal conversion to Christianity,” who “frequently viewed themselves as having committed a grievous sin,” and therefore looked to find “solace, or more precisely penitence.”<sup>110</sup> Relatedly, Cover identifies a “wave of Messianic anticipation that attended the disasters in the wake of the exile.”<sup>111</sup>

Perhaps most importantly for Cover’s conception of law as a transformative bridge, a response to both of these phenomena, providing a means for true repentance while setting the stage for the Messianic era, was found in Maimonides’s monumental Code of Law.<sup>112</sup> Specifically, Maimonides had proposed a mechanism for reviving authentic Rabbinic Ordination<sup>113</sup>—seemingly a prerequisite to facilitate a process of complete repentance<sup>114</sup>—while also maintaining that the Messianic era would abrogate neither the natural nor legal order of the world.<sup>115</sup> In short, as Cover’s title acknowledges, contrary to the presumption that “[o]ne of law’s

105. *Id.*

106. *Id.* at 202-03.

107. *Id.* at 204.

108. See *supra* Section I.A. Cf. NOAH FELDMAN, *THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA* (2021).

109. Cover, *Bringing the Messiah*, *supra* note 4, at 206.

110. *Id.*

111. *Id.*

112. See MAIMONIDES, *MISHNEH TORAH*.

113. See *id.*, *Laws of Sanhedrin* 4:11.

114. Cover, *Bringing the Messiah*, *supra* note 4, at 206; see also *supra* note 95

115. See MAIMONIDES, *supra* note 112, *Laws of Kings* 1:2.

*usual functions is to hold off the Messiah[.]*<sup>116</sup> the events of Safed represent an attempt to “bring[] the Messiah through the law.”<sup>117</sup> Thus, as a fitting sequel to *Nomos and Narrative*, *Bringing the Messiah* offers a fascinating and compelling glimpse into Cover’s understanding of the redemptive power of law.

Like *Nomos and Narrative*, however, *Bringing the Messiah* closes on an ambiguous—if not somewhat dejected—note, leaving open further questions of its own. Despite Cover’s admiration for the hope and idealism he finds in the events of Safed, he cautions against the risk that “the gulf between the redeemed world and the unredeemed world will be bridged not by our committed practical behavior, but our ‘inner life’—our spiritual and psychological realities.”<sup>118</sup> Cover concludes that “powerful, expressive movements of the inner life may have revolutionary potential . . . [b]ut such movements, though they bring a Messiah, do not do so through law.”<sup>119</sup> Thus, the reader is again left with the questions prompted by *Nomos and Narrative*—here, possibly even more tantalizing<sup>120</sup>—as to the relationship between law and redemption, between present reality and alternative visions, between brokenness and the Messianic order.<sup>121</sup>

In response to these questions, building on the themes and theses that Cover developed in both *Nomos and Narrative* and *Bringing the Messiah*, the next section will further examine the transformative power of law. Through a look at a number of sources in Jewish law and thought—comprising both *nomos* and narrative, and including examples Cover considered in his work—this section looks to recognize the potential for law

116. Cover, *Bringing the Messiah*, *supra* note 4, at 209.

117. *Id.* Cf. Samuel J. Levine, *Reflections on Responsibilities in the Public Square, Through A Perspective of Jewish Tradition: A Brief Biblical Survey*, 56 CATH. U.L. REV. 1203, 1216 (2007), reprinted in 2 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 271 (1998) (“The Talmud explains that . . . if the nation of Israel so merits, the Messianic era will appear at an accelerated pace . . . Thus, Jewish tradition posits that through fidelity to God and observance of God’s commands, the Jewish people have the capacity to bring about the ultimate redemption of the world.”) [hereinafter Levine, *Reflections on Responsibilities in the Public Square*].

118. Cover, *Bringing the Messiah*, *supra* note 4, at 210.

119. *Id.*

120. Cf. Sherwin, *supra* note 94, at 1804 (referring to *Bringing the Messiah* as a “tantalizingly incomplete essay”).

121. Cf. *id.* at 1811 (“[T]he question remains: What is the lesson Cover would have us learn from this case study in messianism? . . . What does it mean that the law, rather than rescuing us from eschatology, is now viewed as capable of fulfilling the messianic telos? Unfortunately, Cover’s untimely death left the last section of his final essay on the Safed movement unwritten and cut short further exploration of these issues. Nevertheless, we can still try to piece together some of the clues that Cover has left us.”); *id.* at 1812 (“As a matter of history, we know that the Safed proclamation of natural jurisdiction failed. The Jerusalem rabbis refused to go along. But the lesson, for Cover, remains intact. The story of the Safed proclamation may be read as a tale of the law as bridge connecting (and thus transforming) historical reality with messianic vision. As for the analogy Cover may have had in mind between the Safed messianic movement and the possibilities of constitutional redemption within our legal culture today, we can only speculate. Are the fragments of our constitutional texts and their textual interpretations like the authoritative texts and interpretations that informed and inspired the Safed rabbis? Does the Supreme Court (or perhaps some other interpretive agency, such as the legislature, the executive, or the People) represent a familiar transformational institution akin to the Jerusalem rabbis?”)

to serve, at once, as a means for acknowledging the present reality and as a bridge toward Messianic harmony.<sup>122</sup> Expanding upon Cover's analysis of American slavery and racial discrimination and his study of the events of Safed, this section suggests that for law to redeem a broken present, it must fully acknowledge the faults—the sins—of the past, in a way that allows for repentance and reconstruction.

## II. LAW AND REDEMPTION IN JEWISH THOUGHT

### A. *The Garden of Eden*

Perhaps fittingly—and not surprisingly—a survey of the themes of law and redemption in Jewish sources might begin at the start of the Torah, with the account of the events in the Garden of Eden.<sup>123</sup> As both a place and a concept, Eden represents no less than a utopian paradise, where humans were designed to live in simple perfection and in perpetuity.<sup>124</sup> To the extent that Eden incorporated law, the commands were likewise simple, limited largely to a proscription against eating of the fruit from the Tree of Knowledge.<sup>125</sup> Many of the details and meanings surrounding the events in Eden remain cryptic, not the least of which pertains to the nature and identity of the Tree of Knowledge and the reason for its prohibition.<sup>126</sup> Among the various interpretations that have been offered, the view of Maimonides may be particularly notable in connection with Cover's view of the virtues and problems associated with jurisgenesis.

In framing one of the most fundamental issues raised by the command not to eat from the fruit of the Tree of Knowledge, Maimonides poses a basic and straightforward question: Why would God prohibit humans from

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122. See Cover, *Nomos and Narrative*, *supra* note 4, at 9. Cf. Wizner, *supra* note 5, at 10-11 ("Of course, Cover was perfectly capable of imagining worlds. Cover's view of the law as a 'bridge' in the 'normative space' connecting our understanding of the world as it is with our projections of alternative worlds that might be confirms Suzanne Stone's observation that Cover was a messianist. But the worlds that Cover imagined were not imaginary worlds. And the 'bridge' by which he defined law was no mere metaphor, but rather 'the committed social behavior which constitutes the way a group of people will attempt to get from here to there.' Cover's concept of law was messianic. It transformed the Jewish religious belief in the coming of the Messiah, the Jewish longing for the Messianic Age, into a secular political ideal, a progressive, universalistic vision of human progress leading to a world of equality and social justice, of peace and prosperity. Messianism is a powerful idea. It offers an explanation for social activism from deep within Jewish tradition. It portrays Jews as growing up in a future-oriented culture, longing for a better world. It moves the messianic idea from the spiritual realm onto the stage of history. For Cover it was important to 'maintain the connection between law and reality.' Therefore, his legal messianism, religiously motivated and radical though it was, emphasized 'committed practical behavior' in contrast to 'spiritual and psychological realities.'") (citations omitted).

123. See *Genesis* 1:26-30; 2:4-3:24.

124. See, e.g., Samuel J. Levine, *The End of Innocence*, HAMEVASER, Dec. 1989, at 8 (exploring rabbinical insights into the nature of the Tree of Knowledge) [hereinafter Levine, *The End of Innocence*].

125. See *Genesis* 2:17; see also MAIMONIDES, *GUIDE FOR THE PERPLEXED* 1:2; KAPLAN, *supra* note 95, at 40.

126. See Levine, *The End of Innocence*, *supra* note 124, at 8, 10.



“knowing good and bad”?<sup>127</sup> In response, Maimonides reframes the issue, distinguishing between an objective form of knowledge, through which humans recognize the realities of that which is true or false, and a subjective form of knowledge, through which humans impose on reality their own subjective impressions and desires of what is good or bad.<sup>128</sup> In some ways, the new reality that humans experience outside of Eden mirrors Cover’s conception of both challenges and corresponding opportunities that accompany the reality of jurisgenesis. As Biblical commentators observe,<sup>129</sup> although something is undoubtedly lost in the human inability to adhere to an objective truth, something may be gained as well, in striving to achieve virtue amidst multiple views and perspectives—potentially producing, in the lens of *Nomos and Narrative*, a “great disorder” that “is an order.”<sup>130</sup>

Nevertheless, eating from the Tree of Knowledge in defiance of God’s command resulted in an undeniable fall from an exalted state, engendering a disorder of brokenness and leaving in its wake a need for redemption. In fact, according to the view that the Tree of Knowledge was a grapevine, Noah subsequently grew grapes and drank wine after the flood<sup>131</sup> as part of an effort to “go back to the source of [the] downfall and rectify it.”<sup>132</sup>

Although Noah’s attempt fell short,<sup>133</sup> there remains a *tikkun*: a method of correcting or “mending” the mistakes of the past.<sup>134</sup> One approach, adopted by the nazirite,<sup>135</sup> entails abstaining from the consumption of grapes, thereby replicating “the state of [humans] before the sin.”<sup>136</sup> Alternatively, the holiday of Purim<sup>137</sup> incorporates an obligation to drink wine until “devoid” of a degree of “knowledge,” thereby negating the form of knowledge that was proscribed to Adam and Eve.<sup>138</sup> In fact, in the words of one modern rabbinic scholar, drawing upon both legal and mystical sources, “when [the Messiah] arrives, the world order will be rectified” as the “knowledge” that was “corrupted . . . will also be corrected and elevated

127. See MAIMONIDES, *supra* note 125, at 1:2 (quoting *Genesis* 3:22).

128. See *id.* Cf. Levine, *The End of Innocence*, *supra* note 124; ADIN STEINSALTZ, IN THE BEGINNING: DISCOURSES ON CHADSSIDIC THOUGHT 53-63 (Yehuda Hanegbi ed. & trans., 1992); 2 THE ARYEH KAPLAN ANTHOLOGY 186-89, 340-46 (1998).

129. See Levine, *The End of Innocence*, *supra* note 124.

130. Cover, *Nomos and Narrative*, *supra* note 4, at 4.

131. *Genesis* 9:20-21.

132. See ARYEH KAPLAN, THE ARYEH KAPLAN READER 110-11 (1985).

133. See *Genesis* 9:21.

134. See KAPLAN, *supra* note 132, at 111; see also JONATHAN SACKS, TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY (2005); TIKKUN OLAM: SOCIAL RESPONSIBILITY IN JEWISH THOUGHT AND LAW (David Shatz et al. eds., 1997); ARYEH KAPLAN, THE LIGHT BEYOND, ADVENTURES IN HASSIDIC THOUGHT 73 n.64 (1981).

135. See *Numbers* 6:1-21.

136. KAPLAN, *supra* note 132, at 111.

137. See TALMUD BAVLI, *Megillah* 7b; see also SHLOMO YOSEF ZEVIN, HAMOADIM B’HALACHA 203-08 (1955); YITZCHAK HUTNER, PACHAD YITZCHAK, PURIM 81-82.

138. KAPLAN, *supra* note 132, at 111. Cf. MORDECHAI YOSEF OF IZHBITZ, MEI HASHILOACH (explicating TALMUD BAVLI, *Megillah* 7b).

to its original position.”<sup>139</sup> Significantly, the Biblical description of Messianic redemption includes redemption of the “blemished quality of knowledge” that emerged out of “the initial misdeed” of the first humans.<sup>140</sup> Thus, consistent with Cover’s thesis, adherence to the law atones for the sin in Eden and serves as a means toward bringing the Messiah.

Perhaps not incidentally—nor coincidentally—after eating from the Tree of Knowledge, humans were now subject to death.<sup>141</sup> Here too, the reality of death, as a corollary to the newly subjective and divisive qualities of human experience, finds echoes in Cover’s understanding of the jurispathic elements of world maintenance.<sup>142</sup> More broadly, as Cover developed at length in some of his final works, his conception of law and legal interpretation “takes place in a field of pain and death.”<sup>143</sup> In contrast, the peace and harmony of the Messianic era<sup>144</sup> may be associated most prominently, and most dramatically, with defiance of—if not triumph over—death.<sup>145</sup> As such, legal compliance and enforcement, amidst the current reality of death and division, function as a manifestation of Cover’s bridge,<sup>146</sup> toward a utopian future that overcomes death.

### *B. The Story of Joseph*

After Eden, the themes of sin, brokenness, repentance, and redemption appear repeatedly throughout several sections of the Torah, including a series of events that occupy a substantial and important place in Cover’s depiction of Biblical narrative,<sup>147</sup> as well as substantial and significant space in the Book of Genesis:<sup>148</sup> the story of Joseph and his brothers. For Cover, the story’s importance turns on a juxtaposition between the narrative, in which Jacob favors Joseph,<sup>149</sup> and a Biblical precept that prohibits favoring a younger son over an older son.<sup>150</sup> Cover suggests that “all of the stories of the patriarchs revolve around the overturning of the ‘normal’ order of succession,” and he observes that “[t]he motif continues to be prominent in stories beyond the patriarchal narratives; it appears, modified, in tales of political rather than familial succession.”<sup>151</sup>

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139. *Id.* at 110.

140. *Id.* (quoting *Isaiah* 11:9).

141. See *Genesis* 2:17; ARYEH KAPLAN, IMMORTALITY, RESURRECTION, AND THE AGE OF THE UNIVERSE: A KABBALISTIC VIEW 17, 26 n.1 (1993); Levine, *The End of Innocence*, *supra* note 124.

142. See Cover, *Nomos and Narrative*, *supra* note 4, at 16.

143. See Cover, *Violence and the Word*, *supra* note 13, at 1601; see also Cover, *The Bonds of Constitutional Interpretation*, *supra* note 5; Cover, *Nomos and Narrative*, *supra* note 4, at 41.

144. See, e.g., KAPLAN, *supra* note 10, at 372.

145. See, e.g., KAPLAN, *supra* note 141, at 17-44.

146. See Cover, *Nomos and Narrative*, *supra* note 4, at 9.

147. See *id.* at 20-22.

148. *Genesis* 37:2-50:26.

149. See Cover, *Nomos and Narrative*, *supra* note 4, at 20, 22. Cf. *Genesis* 48:22.

150. See Cover, *Nomos and Narrative*, *supra* note 4, at 20 (citing *Deuteronomy* 21:15-17).

151. *Id.* at 20-21.

To be sure, there is much to appreciate in Cover's observation, and maybe, as Cover suggests, the apparent contrast between the legal precept and the dynamic that repeatedly develops in these stories injects into them additional layers of meaning—contributing, in Cover's terms—to the “thickness of legal meaning.”<sup>152</sup> Upon close examination, however, for a number of reasons, Cover's contention that the stories contradict the legal precept—that the precept is “rendered . . . problematic by the narratives in which the law is embedded” and that the stories “can never be wholly squared . . . with the formal rule”<sup>153</sup>—does not quite stand up to scrutiny.

First, although the narratives depict instances in which a younger child rises to success, often in place of an older child, few of the stories involve the reversal of an inheritance—the express and limited subject and setting of the legal precept Cover references.<sup>154</sup> Second, positing a conflict between the practices in these stories and the legal precept rests on the assumption that the actors in these stories were subject to laws that were later prescribed to the Nation of Israel, subsequent to the Revelation at Sinai that followed the Exodus from Egypt—an altogether questionable proposition, and one that simply could not apply to many of the stories.<sup>155</sup> Third, although Cover briefly alludes to, and rather reflexively rejects, the relevance of rabbinic discussions<sup>156</sup>—which would except these cases from the general rule<sup>157</sup>—in the case of Joseph and his brothers, the Bible expressly explains the grounds for Reuben's inability to retain the status ordinarily granted to the oldest son.<sup>158</sup>

That said, the story of Joseph and his brothers may nevertheless hold particular meaning and relevance for the themes of redemption that Cover develops. Before eventually emerging successful, if not somewhat triumphant, Joseph suffers at the hands of his brothers<sup>159</sup> and other figures,<sup>160</sup> who victimize him at various points throughout his early life. Perhaps tellingly, consistent with his thesis that Joseph's success represents yet another instance of a younger son supplanting a presumably more worthy older son, Cover provides a brief summary that portrays Joseph in a fairly unflattering light: “a younger child of the preferred wife—is favored by his father, dreams of his own primacy, provokes retaliation, and comes to rule over his brothers in an improbable political ascendancy in another

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152. *Id.* at 19.

153. *Id.* at 21.

154. *See Deuteronomy* 21:15-17.

155. *See Levine, Halacha and Aggada: Translating Robert Cover's Nomos and Narrative, supra* note 4, at 477.

156. *See id.* at 478-79.

157. *See Cover, Nomos and Narrative, supra* note 4, at 21-22.

158. *See Levine, Halacha and Aggada: Translating Robert Cover's Nomos and Narrative, supra* note 4, at 479-80 (citing *I Chronicles* 5:1-2).

159. *See Genesis* 37:2-28.

160. *See id.* at 39:7-20.

land.”<sup>161</sup> However, a more complete—and more nuanced—account of the story may allow for a deeper understanding of Joseph’s character and personality, as well as his interactions with others.<sup>162</sup>

For example, although Jacob’s favorable treatment of Joseph expectedly brings about negative reactions from the brothers,<sup>163</sup> the text of the Torah indicates that Jacob had a rationale for treating Joseph differently.<sup>164</sup> More to the point, Joseph’s triumphant path is filled with obstacles, which he overcomes largely through his adherence to truth and morality in the face of temptation and adversity.<sup>165</sup> Most notably, while Joseph’s actions toward his brothers raise questions in their own right<sup>166</sup>—perhaps they seem puzzling, or even, as Cover puts it, “provo[cative]”<sup>167</sup>—the brothers’ conduct toward Joseph remains problematic and generally unjustifiable. Indeed, in the later parts of the story, when they reflect upon their actions, the brothers admit to the wrongfulness of their ways,<sup>168</sup> accept Divine retribution for their sins,<sup>169</sup> and worry that Joseph might mete out further punishment following the death of Jacob.<sup>170</sup> For his part, Joseph renounces any resentment he has borne toward his brothers, choosing instead to forgive them, to comfort them, and to effectuate a reconciliation with them.<sup>171</sup>

Thus, the story of Joseph may reinforce the themes of repentance and redemption, central to Cover’s depiction of the events of Safed.<sup>172</sup> If anything, rather than challenging legal precepts, the story presents a narrative in which renewed commitment to law and morality, through the process of repentance, serves as a bridge to a redeemed future.<sup>173</sup> Throughout both Biblical eschatology and rabbinic tradition, the ultimate

161. See Cover, *Nomos and Narrative*, *supra* note 4, at 20.

162. I have proposed, at book-length, an understanding of the story through the lens of contemporary views of autism. See SAMUEL J. LEVINE, *WAS YOSEF ON THE SPECTRUM? UNDERSTANDING JOSEPH THROUGH TORAH, MIDRASH, AND TRADITIONAL JEWISH SOURCES* (2019) [hereinafter LEVINE, *WAS YOSEF ON THE SPECTRUM?*]; see also Ian Hale, *Book Review: Was Yosef on the Spectrum by Samuel J. Levine*, 36 *TOURO L. REV.* 89 (2020); John Elder Robison, *Was Yosef on the Spectrum? Understanding Joseph Through Torah, Midrash, and Classical Jewish Sources: A Review*, 36 *TOURO L. REV.* 1097 (2021); Stephen A. Rosenbaum, *Book Review Essay: Invisibility, Inclusivity & Fraternity: Was Yosef on the Spectrum? Understanding Joseph Through Torah, Midrash and Classical Jewish Sources* (Samuel J. Levine, *Urim Publications* (2019)), 36 *TOURO L. REV.* 215 (2020); Nathan Weissler, *Review of Samuel J. Levine’s Was Yosef on the Spectrum? Understanding Joseph Through Torah, Midrash, and Classical Jewish Sources: Urim Publications, Jerusalem, New York*, 36 *TOURO L. REV.* 1109 (2021).

163. See *Genesis* 37:4.

164. See *id.* at 37:3.

165. See *id.* at 37:13-28; 39:7-20.

166. See LEVINE, *WAS YOSEF ON THE SPECTRUM?*, *supra* note 162, *passim*.

167. See Cover, *Nomos and Narrative*, *supra* note 4, at 20.

168. See *Genesis* 42:21-22.

169. See *id.* at 42:28.

170. See *id.* at 50:15-18.

171. See *id.* at 50:19-21.

172. See Cover, *Bringing the Messiah*, *supra* note 4, at 206-07.

173. See Cover, *Nomos and Narrative*, *supra* note 4, at 9.

reconciliation between the descendants of Joseph and the descendants of Judah—representing the other brothers—plays a leading role toward ushering in the Messiah.<sup>174</sup>

### C. Mount Sinai

Finally, a look beyond the primarily narrative portions of the Torah, featured most extensively in the book of Genesis, demonstrates that the primarily legal sections of the Torah, featured in the latter four books, display similar tensions between themes of law, sin, and redemption. Here too, consistent with Cover's emphasis on close connections between *nomos* and narrative,<sup>175</sup> as well as differences between the jurisgenerative and the jurispathic—between world-creating and world-maintaining<sup>176</sup>—Jewish tradition explores the complex dynamic that accompanies human encounters with the Divine, illustrated most dramatically in the events surrounding the Revelation and the giving of the Torah at Mount Sinai.<sup>177</sup>

Cover expressly references the Torah as paradigmatic of a “world-creating” or “paideic” pattern, which includes “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and . . . community work out the implications of their law.”<sup>178</sup> Similarly, the form of unity achieved by the Nation at Sinai, a prerequisite for receiving the Torah,<sup>179</sup> appears to inform, at least implicitly, Cover's depiction of a “purer essence of unity” that he attributes to “a transparent *nomos*,” in which “that which must be done, the meaning of that which must be done, and the sources of common commitment to the doing of it stand bare, in need of no explication, no interpretation—obvious at once and to all.”<sup>180</sup> In fact, the events at Sinai may be considered world-creating, not only in the sense of creating a new legal universe, but in the sense of redeeming the events of Eden and thereby hearkening back to the initial creation, to the utopia that humans enjoyed for a preciously short period of time before their first sin.<sup>181</sup>

Yet again, however, echoing the events in Eden, the moment of purity

174. See, e.g., *Isaiah* 11:1-16; *Ezekiel* 37:15-28; KAPLAN, *supra* note 141, at 369-70.

175. See Cover, *Nomos and Narrative*, *supra* note 4, *passim*.

176. See *id.* at 11-17, 40.

177. See *Exodus* 19:1-20:18; 24:1-18; 31:18-34:35.

178. Cover, *Nomos and Narrative*, *supra* note 4, at 12-13.

179. See *Exodus* 19:2 (commentary of RASHI); see also YITZCHAK HUTNER, PACHAD YITZCHAK, SHAVUOTH 137 [hereinafter HUTNER, PACHAD YITZCHAK, SHAVUOTH].

180. Cover, *Nomos and Narrative*, *supra* note 4, at 14.

181. See TALMUD BAVLI, *Shabbat* 146a; YITZCHAK HUTNER, PACHAD YITZCHAK, ROSH HASHANA 113 [hereinafter HUTNER, PACHAD YITZCHAK, ROSH HASHANA]; see also YITZCHAK HUTNER, PACHAD YITZCHAK, PESACH 131-32, 209 (correlating the Ten Commandments with the ten statements associated with the creation of the world in Genesis).

that emerged at Sinai would be short-lived.<sup>182</sup> The Nation soon committed the sin of worshipping the Golden Calf, prompting Moses to destroy the Tablets of the Law as he descended from the mountain.<sup>183</sup> Maybe, as Cover suggested, “[t]he unification of meaning . . . stands . . . only for an instant.”<sup>184</sup> Be it destruction of the Tablets or, as Cover references, the destruction of the Temple,<sup>185</sup> the literal and figurative brokenness caused by sinful behavior intrudes upon the seemingly utopian unity, perhaps revealing that beneath the vision of perfect order loomed a reality of disorder.<sup>186</sup>

Still, notwithstanding the tragedies and the calamities that befell the Nation, it must be possible, even amidst destruction, to find features of a broken reality that prove affirming, if not redemptive—maybe because of the brokenness rather than in spite of it.<sup>187</sup> Indeed, to use Cover’s terms, the tensions between the jurisgenerative and the jurispthic, between world-creating and world-maintaining,<sup>188</sup> underly some the paradoxes revolving around the destruction of the Tablets of the Law.

On one level, the destruction of the Divinely-crafted physical manifestation of the covenant between God and the Nation represented an undeniable and unfathomable setback in that relationship, brought about through the sin of the Golden Calf. Strikingly, however, according to the Talmud, beyond acceding to Moses’s decision to break the tablets, God praised Moses for his actions,<sup>189</sup> to the extent that Rashi, the great Medieval Biblical commentator, understands the Torah’s final words—highlighting and praising the bold actions that Moses performed “before the eyes of all of Israel”<sup>190</sup>—as alluding to the strength Moses displayed in breaking the Tablets.<sup>191</sup>

Among various interpretations that have been offered in an effort to understand the seemingly—and startlingly—positive account of events that otherwise had unquestionably detrimental effects, many explain that Moses was acknowledging the spiritual reality of the fallen Nation, which entails the inability to abide by the Divine standard incorporated into the first set of Tablets.<sup>192</sup> On a physical level as well, the second set of Tablets, though

182. See HUTNER, PACHAD YITZCHAK, ROSH HASHANA, *supra* note 181, at 113.

183. See *Exodus* 32:1-19.

184. See Cover, *Nomos and Narrative*, *supra* note 4, at 15.

185. See *id.*

186. Cf. *id.* at 4.

187. Cf. YITZCHAK HUTNER, PACHAD YITZCHAK, CHANUKAH 35-37 [hereinafter HUTNER, PACHAD YITZCHAK, CHANUKAH].

188. See Cover, *Nomos and Narrative*, *supra* note 4 at 11-17, 40.

189. See TALMUD BAVLI, *Shabbat* 87a.

190. *Deuteronomy* 34:12.

191. See *id.* (commentary of RASHI).

192. See, e.g., NECHAMA LEIBOWITZ, *STUDIES IN EXODUS* 433-35.

prompted by Divine command, were carved by Moses,<sup>193</sup> representing the centrality of human action in the process of their production.<sup>194</sup> To use Cover's categories, the first Tablets might have embodied world-creation—uniquely Divine but inherently short-lived—soon to be replaced by the human activity of world-maintenance.<sup>195</sup>

Concomitantly, the destruction of the Tablets had a correspondingly paradoxical effect on the Nation's relationship toward the content of the Tablets, the Divine law. Various sources in Jewish thought, both ancient and modern, depict the first Tablets as encompassing a comprehensive accounting of the corpus of Jewish law, detailing the text of the Torah along with legal interpretations and applications.<sup>196</sup> As such, the first Tablets evoke Cover's notion of a pure paideic: “[T]hat which must be done, the meaning of that which must be done, and the sources of common commitment to the doing of it stand bare, in need of no explication, no interpretation—obvious at once and to all.”<sup>197</sup>

In contrast, in the wake of the destruction of the first Tablets, the contents of the second Tablets were limited to the written text of the Torah, resulting in the ability—and responsibility—of human authorities to interpret and apply legal principles through the logic and limits of human decision making. In turn, the unity that was captured in the comprehensive details of the first Tablets would hereinafter be subject to the divisions endemic to human reasoning.<sup>198</sup> Subsequently, as Cover described, “[n]ew law is constantly created . . . [t]he ‘Torah’ becomes two, three, many Torahs as surely as there are teachers to teach or students to study . . . . The radical instability of the paideic *nomos*” results in “the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis.”<sup>199</sup>

Once again, however, although something is certainly lost, in both the process and the product of relegating previously unified and Divinely articulated legal doctrine to the contentious and inherently imperfect modes and methods of fallible human beings, something is gained as well, in

193. See *Exodus* 34:1-4.

194. See JOSEPH BER SOLOVEITCHIK, BEIS HALEVI, *Lecture 18*; see also SHIMON SHKOP, SHAAREI YOSHER, Introduction.

195. See Cover, *Nomos and Narrative*, *supra* note 4, at 11-17. Cf. TALMUD BAVLI, *Bava Kamma* 54b-55a; HUTNER, PACHAD YITZCHAK, ROSH HASHANA, *supra* note 181, at 113 (noting that the first set of Tablets, carved by God, was destroyed, while the second set of Tablets, carved by a human, was not destroyed).

196. See SOLOVEITCHIK, *supra* note 194.

197. Cover, *Nomos and Narrative*, *supra* note 4, at 14.

198. See HUTNER, PACHAD YITZCHAK, CHANUKAH, *supra* note 187; SOLOVEITCHIK, *supra* note 194.

199. See Cover, *Nomos and Narrative*, *supra* note 4, at 15-16; see also *id.* at 60 (“[T]he Temple has been destroyed—meaning is no longer unitary; any hermeneutic implies another. Keeping the peace is no simple or neutral task. For in the normative worlds created around us, not all interpretive trajectories are insular.”).

expanding the legal corpus to contemplate new and differing opinions and perspectives, subsequently evaluated through the necessary means of argumentation and deliberation in pursuit of arriving at a consensus.<sup>200</sup>

Moving forward, humans henceforth have the power and accompanying responsibility to determine the law in accordance with the human tools of decision making, deriving interpretations and reaching conclusions without resort to divine intercession.<sup>201</sup> As Cover observed:

Maintaining the world is no small matter and requires no less energy than creating it. Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions. The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.<sup>202</sup>

Perhaps most significantly in relation to Cover's broader oeuvre, the events surrounding the destruction of the Tablets stand as a model for *teshuva*,<sup>203</sup> the process of repentance that must follow sin, a process that achieves the seemingly impossible: undoing the past and creating—or reconstructing—a new world.<sup>204</sup> Shortly after Moses destroys the Tablets, he petitions God, at length, to forgive the Nation for its sin.<sup>205</sup> God, in turn, invokes thirteen attributes of Divine mercy,<sup>206</sup> articulating a formulation that would continue to constitute the basis of future communal prayer during times of repentance. In fact, the Talmud employs unusual and arresting imagery depicting God, as it were, donning a prayer shawl and teaching the prayer to Moses.<sup>207</sup>

Rabbi Yitzchak Hunter suggests that the unique—and supernatural—formulation of this prayer was a necessary component of the unique—and

200. See HUTNER, PACHAD YITZCHAK, CHANUKAH, *supra* note 187; SOLOVEITCHIK, *supra* note 194. Cf. Cover, *Nomos and Narrative*, *supra* note 4, at 40-44 (explicating “Justice Jackson’s famous aphorism: ‘We are not final because we are infallible, but we are infallible only because we are final.’”) (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

201. See Levine, *Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*, *supra* note 4, at 493-95; Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 472-75 (1997), reprinted in 1 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 27, 57-60 (1998).

202. Cover, *Nomos and Narrative*, *supra* note 4, at 16; see also *id.* at 40-44.

203. See Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000), reprinted in 2 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 205 (1998) [hereinafter Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement*].

204. See *id.*; YITZCHAK HUTNER, PACHAD YITZCHAK, YOM HAKIPPURIM 40-42 [hereinafter HUTNER, PACHAD YITZCHAK, YOM HAKIPPURIM].

205. See *Exodus* 32:11-34:10.

206. See *id.* at 34:6-7.

207. See TALMUD BAVLI, *Rosh Hashanah* 17b; HUTNER, PACHAD YITZCHAK, YOM HAKIPPURIM, *supra* note 204, at 42-43.



supernatural—process and properties of *teshuva*.<sup>208</sup> Only God can create a world; accordingly, once that world has been broken—or destroyed—through sin, only God can facilitate the creation of a new world, a redeemed world, by availing humans to the opportunity and imperative of *teshuva*.<sup>209</sup> Likewise, only God can account for and create a prayer of *teshuva*, to be implemented by humans while undergoing the process of repentance.<sup>210</sup>

In short, the destruction of the Tablets was followed by repentance, redemption, and, consequently, reconstruction of the new Tablets,<sup>211</sup> within the new world of *teshuva*.<sup>212</sup> In fact, Jewish tradition correlates the Nation's receipt of the second set of Tablets with the date that would emerge as Yom Kippur, the Day of Atonement, characterized by achieving expiation for past sins through the process of *teshuva*<sup>213</sup>—a day distinguished in large part by the recitation of the prayer of *teshuva* that God instructed Moses.<sup>214</sup> Thus, the second set of Tablets represents a law that has likewise been redeemed—to paraphrase the closing words of *Nomos and Narrative*, thereby inviting a new world.<sup>215</sup>

### PART III. LAW AS A BRIDGE TO A REDEEMED FUTURE

Taken together, *Nomos and Narrative*<sup>216</sup> and *Bringing the Messiah Through the Law*<sup>217</sup> provide a fascinating portrait of Robert Cover's ambitious aspirations for American law and society, viewed in large measure through the lens of Jewish law and tradition. While *Nomos and Narrative* relied crucially, if relatively briefly, on Jewish sources,<sup>218</sup> *Bringing the Messiah* was dedicated nearly exclusively to exploring, in great detail and with keen fidelity, a noteworthy event in Jewish legal history.<sup>219</sup> In both pieces, Cover turned to the Jewish legal system as a model for a form of legal eschatology, a paradigm for the powerful metaphor he developed of law as a bridge “linking a concept of a reality to an imagined alternative.”<sup>220</sup> Indeed, the central thesis and primary insight underlying *Bringing the Messiah* rests upon the recognition that in Jewish

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208. See HUTNER, PACHAD YITZCHAK, YOM HAKIPPURIM, *supra* note 204, at 40-42.

209. See *id.*; Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement*, *supra* note 203.

210. See HUTNER, PACHAD YITZCHAK, YOM HAKIPPURIM, *supra* note 204, at 42-43.

211. See *Exodus* 34:1-4.

212. See HUTNER, PACHAD YITZCHAK, ROSH HASHANA, *supra* note 181, at 113; see also YITZCHAK HUTNER, MA'AMAREI PACHAD YITZCHAK, SUKKOTH 309-15.

213. See HUTNER, PACHAD YITZCHAK, YOM HAKIPPURIM, *supra* note 204, at 43-44.

214. See *id.* at 44.

215. Cover, *Nomos and Narrative*, *supra* note 4, at 68.

216. See *id.*

217. See Cover, *Bringing the Messiah*, *supra* note 4.

218. See Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, *supra* note 4; Stone, *supra* note 4.

219. See Cover, *Bringing the Messiah*, *supra* note 4, *passim*.

220. Cover, *Nomos and Narrative*, *supra* note 4, at 9.

tradition, the law may serve not to prevent the Messiah but to hasten the arrival of the Messianic age.<sup>221</sup> Notably, though, in *Nomos and Narrative* as well, Cover provides, perhaps implicitly, a glimpse into a different formulation of law as a bridge to an alternative future.

#### A. *The Sabbatical Year*

In the course of developing his conception of a “*nomos*” as a “present world constituted by a system of tension between reality and vision,”<sup>222</sup> Cover offers illustrations of the “alternative worlds of our visions” that “hold our reality up to us as unredeemed.”<sup>223</sup> Among other examples, Cover presents two powerful images of “the lion lying down with the lamb, the creditor forgiving debts each seventh year.”<sup>224</sup> Cover suggests that “[b]y themselves the alternative worlds of our visions . . . dictate no particular set of transformations or efforts at transformation.”<sup>225</sup> He counters, however, that:

[L]aw gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millennium . . . law is that which holds our reality apart from our visions and rescues us from the eschatology that is the collision in this material social world of the constructions of our minds.<sup>226</sup>

In this context, Cover’s imagery of alternative worlds, including the examples—and particularly the juxtaposition—of the two central images, seems not only striking, but somewhat curious. To be sure, the Biblical image of the lion lying with the lamb<sup>227</sup> resonates as possibly the paradigmatic eschatological symbol, portraying a future world of Messianic bliss in which past enemies will live together in peace.<sup>228</sup> In contrast, however, the image of debt forgiveness in the sabbatical year, *shemitta*, constitutes not a future eschatological vision, separate from the law, but a present command that comprises an important part of the legal order.<sup>229</sup>

If anything, the eschatological implications of the sabbatical cycle may instead represent the kind of transformation that Cover attributes to—or aspires for—law,<sup>230</sup> serving as a means of redemption. The seven-year cycle

221. See KAPLAN, *supra* note 141, at 360-61 n.2; Levine, *Reflections on Responsibilities in the Public Square*, *supra* note 117, at 1215-16.

222. Cover, *Nomos and Narrative*, *supra* note 4, at 9.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 9-10.

227. *Cf. Isaiah* 11:6.

228. See KAPLAN, *supra* note 141, at 376-77.

229. See *Leviticus* 25:1-24; *Deuteronomy* 15:1-11.

230. Cover, *Nomos and Narrative*, *supra* note 4, *passim*; Cover, *Bringing the Messiah*, *supra* note 4, *passim*.

of *shemitta*, which entails not only forgiving debts in the seventh year<sup>231</sup> but also letting the land lay fallow,<sup>232</sup> hearkens back to the first Sabbath, which followed the six days of creation,<sup>233</sup> as well as to the future Sabbath of Messianic times.<sup>234</sup> As such, the law of *shemitta* would appear to serve as a salient and concrete case in point of a law that, at once, works within and impacts the current reality, while also anticipating and foretelling a vision of the future.

Upon further reflection, though, the *shemitta* cycle, particularly the obligation to forgive debts, may demonstrate more broadly the complex interaction between *nomos* and narrative:

The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative—history, fiction, tragedy, comedy—are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the “is” and the “ought,” but the “is,” the “ought,” and the “what might be.” Narrative so integrates these domains.<sup>235</sup>

As it turns out, the narrative of *shemitta* observance in the form of debt forgiveness, played out in the historical reality, reveals a complex dynamic—perhaps even “an extremely problematic psychodynamic.”<sup>236</sup> As the text of the Torah acknowledges, anticipates, cautions, and commands against, lenders may be reluctant to make loans as the seventh year of the cycle approaches, out of the concern that they may not recover the loan before the arrival of the date of mandatory debt forgiveness.<sup>237</sup> Despite the Torah’s admonition to the contrary, over time, lenders did, indeed, resist making loans,<sup>238</sup> consistent with Cover’s description of a *nomos* as “a present world constituted by a system of tension between reality and vision.”<sup>239</sup>

Once again, failure to comply with the law produced a brokenness in need of repair and redemption. In this case, the response arrived in the form of rabbinic legislation, the *pruzbul*, which was devised in Talmudic times to allow for the recovery of debts after the seventh year, thereby assuaging

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231. See *Deuteronomy* 15:1-11.

232. See *Leviticus* 25:1-24.

233. See *Genesis* 1:1-31; 2:1-3.

234. See *Leviticus* 15:2 (commentary of NACHMANIDES); see also KAPLAN, *supra* note 10, at 374.

235. Cover, *Nomos and Narrative*, *supra* note 4, at 10.

236. *Id.* at 20.

237. See *Deuteronomy* 15:9-10.

238. See TALMUD BAVLI, *Gittin* 36a.

239. Cover, *Nomos and Narrative*, *supra* note 4, at 9.

lenders' concerns.<sup>240</sup> Yet, while the advent of the *pruzbul* provided a legal mechanism to resolve the challenges of *shemitta* observance,<sup>241</sup> the method of observance does not match the ideal vision captured in the text of the Torah: willingly lending money to those in need as the seventh year approaches, even at the risk of the debt being cancelled, and thereby meriting God's bountiful blessings.<sup>242</sup> A more direct—and presumably more appropriate and more satisfying—response might have involved a process of communal repentance, resulting in a redeemed commitment to the law as designed in the Torah. Moreover, a commitment to the observance of *shemitta* as a sabbatical year of rest and respite, within the confines of the present and broken reality, evokes a vision of the future and eternal sabbatical of the Messianic era.<sup>243</sup> Once again, the law would serve as a bridge, rather than an impediment, to a redeemed future.<sup>244</sup>

While notable in its historical progression, the example of *shemitta* is far from unique in illustrating the Torah's acknowledgment of tensions between reality and an imagined alternative. Indeed, grounded in the sin and ensuing fall from Eden, the innate brokenness in the human condition serves as a backdrop to various facets of the *nomos* and narrative of Jewish tradition, perhaps most dramatically in the context of the command to "love your neighbor as yourself."<sup>245</sup>

### B. Love Your Neighbor

Though but one of 613 Biblical commandments, "love your neighbor" occupies a special place in Jewish law and tradition. From Talmudic literature through contemporary scholarship, the obligation to love others and to treat them accordingly has informed and impacted derivations and applications of profound areas of both legal precept and communal narrative.<sup>246</sup> Indeed, the principles embodied in the command to love one's neighbor contribute to an expansively constructed realm of interpersonal obligations.<sup>247</sup>

240. See TALMUD BAVLI, *Gittin* 34a, 36a-37b.

241. See HERSHEL SCHACHTER, GINAS EGOZ 156-60 (2007).

242. See *Deuteronomy* 15:9-10; see also AHARON LICHTENSTEIN, 2 LEAVES OF FAITH: THE WORLD OF JEWISH LIVING 182-85 (2004).

243. See *Leviticus* 15:2 (commentary of NACHMANIDES); see also HUTNER, PACHAD YITZCHAK, ROSH HASHANA, *supra* note 181, at 75-77.

244. Cover, *Nomos and Narrative*, *supra* note 4, at 9.

245. *Leviticus* 19:18.

246. See Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511, 522-26 (1998), reprinted in 1 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 171-76 (1998) [hereinafter Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations*]; Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in A Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 549, 571-72 (2003), reprinted in 1 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 289-91 (1998) [hereinafter Levine, *Taking Ethics Codes Seriously*].

247. See Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations*,

Nevertheless, a full accounting of both the *nomos* and the narrative of “love your neighbor” includes a recognition of limitations on the scope of the rule, growing out of a corresponding acknowledgment of limitations on the scope of human feelings and actions amidst an unredeemed reality. In his landmark commentary on the Torah, Nachmanides expounds at length on the significance, centrality, and wide range of obligations subsumed within the command to love others.<sup>248</sup> Nachmanides notes, however, that as both a practical and legal matter, it remains unrealistic for an individual to actually love another as much as oneself. As such, the command retains a somewhat exaggerated—or aspirational—component, beyond the contours of its concrete implementation.<sup>249</sup>

Rabbi Hutner notes the anomaly, if not impossibility, of rendering a command in the Torah entirely aspirational.<sup>250</sup> Instead, explicating Nachmanides’ analysis, Rabbi Hutner suggests that the scope of the command corresponds to the state of the human condition. Specifically, he attributes the limitations on the command, imposed by the reality of human nature, to the limitations on human life, imposed by the reality of death. The existence and inevitability of death prevents people from fully feeling and acting upon the underlying unity of all human beings.<sup>251</sup>

If so, the obstacle that prevents the actualization of the pure and ideal observance of loving one’s neighbor stems from the realities of death and brokenness brought about by the partaking of the forbidden fruit in Eden.<sup>252</sup> It likewise follows that the Messianic era, punctuated by a defeat of death, will concomitantly remedy the brokenness of the human condition, thereby redeeming the connectedness of humanity and allowing for a realization of genuine and complete love for one another.<sup>253</sup> Nevertheless, the present command is articulated in aspirational form, anticipating the redeemed quality of the law in Messianic times. Thus, the command to love one’s neighbor serves, at once, as a present law, observed within the limitations of a broken current reality, as well a bridge that connects to an imagined—and expressly articulated—alternative future.<sup>254</sup>

Viewed in this light, the command to “love your neighbor as yourself”<sup>255</sup> may offer a model for the application of Cover’s various conceptions of the redemptive function of law. First, Eden before the fall typifies world-creation, producing the “ideal type of the paideic *nomos*,” in which “we may

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*supra* note 246, at 522-26; Levine, *Taking Ethics Codes Seriously*, *supra* note 246, at 549, 571-72.

248. *See Leviticus* 19:2 (commentary of NACHMANIDES).

249. *See id.*

250. *See HUTNER, PACHARD YITZCHAK, SHAVUOTH*, *supra* note 179, at 136.

251. *See id.* at 134-35.

252. *See id.* at 135.

253. *See id.* at 135-137.

254. *Cf. Cover, Nomos and Narrative*, *supra* note 4, at 9.

255. *Leviticus* 19:18.

purport to distill some purer essence of unity.”<sup>256</sup> Before the existence of sin and the resultant reality of death, the ideal form of loving one’s neighbor had a locus, in time and space, to find full expression.<sup>257</sup> However, as Cover emphasized, “[t]he unification of meaning that stands at its center exists only for an instant,” giving way to “the problem of the multiplicity of meaning . . . at once to the imperial virtues and the imperial mode of world maintenance.”<sup>258</sup> Along with the consequence of death, the sin in Eden brought about subsequent divisions in human perception and perspective,<sup>259</sup> including an inability to truly love one’s neighbor as much as oneself.

Still, despite the brokenness, “[m]aintaining the world is no small matter.”<sup>260</sup> Though in part aspirational, the command to “love your neighbor as yourself”<sup>261</sup> was given as a law amidst the broken present, articulated in a way that serves as a bridge to a vision of an imagined and redeemed future.<sup>262</sup> At that time, when death and division are conquered, the law will be redeemed as well.<sup>263</sup> Thus, the law will not hold off the Messiah, but will find full expression with the arrival of the Messianic age.<sup>264</sup>

#### CONCLUSION

In both *Nomos and Narrative*<sup>265</sup> and *Bringing the Messiah Through the Law*,<sup>266</sup> Robert Cover expressed a powerful vision of a redeemed law and a redeemed world. Despite the idealism that infuses his work—or possibly because of it—Cover’s scholarship explored not only hopes and dreams, but also disappointment and failure. Indeed, both *Nomos and Narrative* and *Bringing the Messiah* close on mixed notes of optimism and resignation, at once acknowledging the abiding brokenness and still searching for means of redemption.<sup>267</sup>

Perhaps Cover’s frustration with the failure of the American legal system to fully redeem the law that allowed for slavery and racial discrimination, and of the efforts in Safed to bring the Messiah, reflects his further recognition of a failure to fully atone for past sins. Notably, the path to the redeemed future delineated in the Torah—the Jewish eschatology so central to Cover’s redemptive framework—depicts a time of sin and brokenness,

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256. Cover, *Nomos and Narrative*, *supra* note 4, at 13-14.

257. See HUTNER, PACHARD YITZCHAK, SHAVUOTH, *supra* note 179, at 135.

258. Cover, *Nomos and Narrative*, *supra* note 4, at 16.

259. See *supra* Section II.A.

260. Cover, *Nomos and Narrative*, *supra* note 4, at 16.

261. *Leviticus* 19:18.

262. Cf. Cover, *Nomos and Narrative*, *supra* note 4, at 9.

263. See HUTNER, PACHARD YITZCHAK, SHAVUOTH, *supra* note 179, at 137.

264. Cf. Cover, *Bringing the Messiah*, *supra* note 4.

265. Cover, *Nomos and Narrative*, *supra* note 4.

266. Cover, *Bringing the Messiah*, *supra* note 4.

267. See *supra* Part I.

followed by a process of repentance.<sup>268</sup> As further developed in Jewish thought, and in many ways intuitive, true repentance begins with a sincere admission of culpability and an accounting for the commission of sin.<sup>269</sup> Accordingly, Biblical narratives of repentance and reconciliation, such as the story of Joseph and the events surrounding the second set of Tablets of the Law, include sincere expressions of contrition and responsibility, first by Joseph's brothers and later by Moses on behalf of the Nation.<sup>270</sup>

Cover's careful expositions on American law's treatment of slavery and racial discrimination explore both the successes and limitations of the legal system's attempts to remedy past injustices.<sup>271</sup> In both cases, despite acknowledging a measure of progress, Cover finds the response lacking, resulting in missed opportunities for constitutional redemption and commitment. If slavery represented the "original sin" in the founding of the United States,<sup>272</sup> and racial discrimination remains a broken component of American society, perhaps the failure to remedy these wrongs stems from an inadequate recognition and expression of collective culpability, prerequisites for true reconciliation, reconstruction, and redemption.

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268. See *Deuteronomy* 29:9-30:10.

269. See Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement*, *supra* note 203, *passim*.

270. See *supra* Sections II.B, II.C.

271. See *supra* Section I.A.

272. See AMAR, *supra* note 63.