

Symposium

Rethinking Robert Cover's *Nomos and Narrative*

Robert Cover's Passion

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Bob Cover was not content with the world. In his legal scholarship, this discontent expressed itself as a demand that law be “redemptive” in its aspiration, acknowledging the “unredeemed character of reality as we know it” and seeking to replace it with a “fundamentally different reality.”¹ Bob lived in this normative aspiration not only in his secular legal scholarship but in his absorbing involvement with Torah. Indeed, he would not recognize the secular and religious dimensions of law as distinct in any important sense. There was no part of Bob’s life—whether characterized as legal, religious, personal—that was not touched by his passion for redemptive transformation.

Bob’s involvement in the Civil Rights struggle was a central experience in his commitment to transform the “unredeemed character of reality.” Though his deep aversion to coercion deployed by constituted social authority spoke directly to our generation’s experience of the Vietnam

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1. Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 34 (1983).

War, the Civil Rights movement was more formative for him, especially in his confrontation with the raw violence of racist subordination that the movement brought into open view in the early 1960s. I had known from Bob that, as a college and law school student, he had gone South as a civil rights worker and I knew too that he had been arrested and spent what I gathered was a brief time, perhaps even just one night, in a rural Southern jail. In my oral presentation at this conference, I mentioned these facts as part of my understanding of Bob's thinking.

After my presentation, Bob's brother Arnie told me that I did not know the complete story. I am sure that the limitations of my knowledge came from Bob's modesty, his unwillingness to make any show of his virtues. I asked Arnie if he would write a fuller account of Bob's experience, which I might quote in this published version of my presentation. Arnie agreed, and this account followed:

As you requested, I am sending you some information about Bob's imprisonment in Georgia. Bob went down to work in the voter registration campaign of the Student Nonviolent Coordinating Committee after completing his sophomore year at Princeton in 1963. He intended to work there only for the summer; he had received a fellowship to study in Taiwan for his junior year (he had been taking Chinese and was considering majoring in Economics of the Far East). Not long after he went through SNCC's training, there was a crackdown and all of the civil rights workers in the area were arrested on various charges. One young woman avoided arrest, and she hid out in the basement of a black church. The church had no phone, so she would sneak out after dark to call the families of the others on a pay phone. We heard from her that Bob had been arrested a few days after it actually happened. We were told that SNCC workers did not want to be bailed out, since the authorities were wont to arrest civil rights workers on charges that would not stand up under constitutional scrutiny, and after they were bailed out the government would simply keep the money and never call up the cases.

We did not receive much information while Bob was in jail. I believe that they were transferred to a different facility after a night or two in a horrendous lock-up where huge cockroaches crawled over them through the night (perhaps this followed their conviction). I do not have the expertise to access all of the details, but I did find on the internet that the case was *Albany v. Giddens, Cover, Allen*.² They were arrested for handing out notices of a civil rights meeting and charged with violating an ordinance prohibiting the distribution of

2. Civil Liberties Docket, 55.49 (Aug. 1963), at http://sunsite.berkeley.edu/meiklejohn/meik-8_4/meik-8_4-4.html (last visited Nov. 28, 2004) ("Def's. handing out notices of civil rights meeting. Arrested: violating ordinance prohibiting distribution of advertising matter. Convicted; 30 days or \$55. Two Defs. beaten when put in jail with 6 white men. Appeal pending.").

advertising material. They were convicted and sentenced to thirty days or a \$55.00 fine. Bob was in a cell with one other SNCC worker (I believe it was Ralph Allen) who later that summer was one of the civil rights workers charged with attempting to incite an insurrection—a capital offense—in Americus, Georgia, and six other white prisoners.

The two SNCC workers refused to report for work detail, and they went on a hunger strike. The reason for the strike was to up the ante for the authorities, who would have to pay for a doctor to examine them each day. I believe that the hunger strike lasted for seventeen days. Finally, the authorities told the other prisoners, one of whom I recall was a sergeant in the army with martial arts training, that they would be released early if they saw to it that the SNCC workers reported for work detail. Bob and the other SNCC worker were severely beaten. At that point it had become too dangerous to remain in jail, and they secured their release. There was, at some point during or just after their ordeal, an article in the *New York Times* about their situation.³

When Bob was able to communicate with our parents, he informed them that he was not badly hurt and that he and his cellmate had been checked out by a doctor. He wrote to me (I was at camp), and instructed me not to tell our parents that the doctor who had checked them out was a veterinarian, since there was no medical doctor in southwest Georgia who would treat a civil rights worker (at least when not in custody).

Bob felt that working for civil rights was more important than studying in Taiwan, so he forfeited his fellowship and stayed in Georgia. I believe that it was in early December that Bob was home for a brief visit. He was trying to find a market for homemade quilts that were being produced by a cooperative that had been formed to try to develop a source of income for blacks that was not dependent on the white power structure. While he was addressing a United Synagogue Youth convention about the struggle for civil rights, Bob was informed that the house in which he stayed in Georgia had been machine-gunned, and the woman whose house it was had been injured. Bob felt that he could not remain safely in the North at a time of such danger to those in the Movement in his community. He borrowed money for a plane ticket (SNCC workers received \$3.86 a week—when there were sufficient funds to pay them) and a ride to the airport from a friend, and he flew back to Georgia without even going home for his things.

3. Claude Sitton, *Students Persist in Georgia Drive*, N.Y. TIMES, July 9, 1963, at 17.

Since Bob had taken the year off instead of studying at Princeton, he lost his student deferment from the draft. He had to return home to appear before the draft board, and he was eventually able to get his II-S restored.

While in law school, Bob returned to Albany, Georgia, for the summer to work for civil rights lawyer C.B. King (I am sure that neither of them could have imagined that the Federal Courthouse in Albany would be named after King in 2002). In his letters to Diane, Bob frequently talked about how dangerous things were at that time.

One day, Bob and several black associates were driving in a county that had a notoriously racist sheriff. When they passed a store in front of which a number of white men were hanging out, the young men saw them, grabbed things like ax handles and baseball bats, ran to a car, and took off after them at high speed. Bob's car accelerated, with Bob attempting to get low enough that the racial make-up of the car might not be obvious (apparently a warrant was later issued for a white male with a large head). The road got narrower and narrower as it entered some woods, and finally it just ended. The driver of Bob's car turned it around and began racing back in the opposite direction; they knew that a face-to-face confrontation would be extremely serious and probably fatal (this was after the deaths of Schwerner, Goodman, and Chaney, among others). They sped towards a head-on collision with their pursuers, and when the other car swerved at the last moment they veered over the edge of the road and were able to get past the other car and escape.⁴

Beneath the elegant sweep of *Nomos and Narrative*, the entire article could be read as a re-enactment of Bob's head-on confrontation with his murderous pursuers. It comes to life, it leaps from the pages of the *Harvard Law Review* because of the risks Bob was willing to take in his pursuit of redemptive possibility. But the brute power of Bob's adversaries, and his narrow, even improbable, escape also speak to the intimations of "despair and withdrawal" that Robert Post sees in this article.⁵ As Post also notes, these intimations do not mean that Bob was wrong in what he saw or said. As I understand Bob's vision, he struggled continuously with the question whether his thirst for redemptive transformation could ever be satisfied—in any context, legal, religious, personal.

The distinction between jurispathic and jurisgenerative social institutions is central to *Nomos and Narrative*. This distinction is one

4. E-mails from Arnold Cover to Professor Robert A. Burt (Apr. 26, 2004, 3:01 pm and Apr. 27, 2004, 2:39 pm) (on file with author).

5. Robert Post, *Who's Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 *YALE J.L. & HUMAN.* 9, 15 (2005).

expression of Bob's struggle, a claim that redemptive communal life was possible only insofar as violence was entirely purged from the communal relationship. Thus judges, like all state actors with coercive sanctions at their disposal, were intrinsically disqualified from the true transformative enterprise. Bob's famous dictum that "judges are people of violence . . . [and therefore] do not create law but kill it,"⁶ does not, however, adequately acknowledge the pervasiveness of violence in all social life. Contrary to Bob's apparent claim, judges and other state officials are not unique avatars of violence.

It may be that officials' easy, even routine, access to overwhelming coercive weaponry makes them more inclined to redemptive failures in Bob's terms. It may be that Bob's loving absorption in Torah took hold for him from the historical contingency that Jewish law developed in the diaspora without access to any directly coercive state enforcement apparatus. But this contingent characteristic of Jewish law does not support the strong categorical distinction that Bob posits.

If we more clearly acknowledge than Bob did, that state-administered violence is not the only communal instrument for coercive impositions of submission, then we must discard Bob's strong categories and instead choose between two alternatives for avoiding violent social coercions. One is that state officials, including judges, are in principle capable of eschewing violence in the service of social transformations, even though this does not frequently occur in practice. (A variant of this alternative could be that judges charged with the enforcement of constitutional norms are, unlike other state officials, uniquely capable of this transformative practice because they possess no power of the "sword or the purse . . . but merely judgment."⁷) A second alternative is that redemptive transformation of the kind Bob envisioned cannot be achieved in any communal setting, that notwithstanding Bob's contrary longing, some coercive structure is necessarily embedded in all social relations. Perhaps one might say that coercion must accompany any aggregate social relationship but can be avoided or transcended in direct, face-to-face, interpersonal relationships. Or perhaps this is not attainable in any social relationship but is only a possibility for individuals in contemplative solitude. Or perhaps not even in solitude, conscience-driven as we may be by internalized images of external authority that deprive us of any subjective conviction of freely chosen acquiescence.

Bob never chose among these alternatives. I believe that Bob romanticized the jurisgenerative potential of non-statist communal enterprises because, if forced to choose between the alternatives I have

6. Cover, *supra* note 1, at 53.

7. So Alexander Hamilton classically observed, in THE FEDERALIST NO. 78, at 378 (Terence Ball ed., Cambridge Univ. Press 2003).

posited, he could only see his way toward choosing the second—and he was unwilling to accept the implications of social isolation, of “despair and withdrawal,” that this choice implied. There was thus an ineradicable tension in Bob’s thinking, captured nicely by Avi Soifer’s observation that Bob was “an anarchist who loved law.”⁸

This tension can be seen in Bob’s treatment of *Bob Jones University v. United States*,⁹ the climactic and most extensively considered Supreme Court decision in *Nomos and Narrative*. From a conventional liberal perspective, the decision was easy: the University forbade interracial dating or marriage among its students, the Internal Revenue Service concluded that this racist policy disqualified the University from tax exempt status as a charitable institution, and the Supreme Court upheld the IRS ruling. This result was not easily justified, however, from Bob’s perspective. The University based its policy on a fundamentalist reading of a Biblical reference to race separatism and could claim respect in Bob’s terms “as a normative community entitled to protection against statist encroachment.”¹⁰ Bob’s rejoinder was that the University’s claim of “nomic insularity” might only be overridden by the “narrative of redemption” expressed in a national commitment to repent our history of racist subordination.¹¹

Bob was, however, critical of the Supreme Court’s affirmation of the IRS ruling on the ground that the Court treated the case only as an issue of statutory interpretation, by explicitly holding that the IRS correctly interpreted congressional intent in the tax code and implicitly affirming that Congress had constitutional authority to withhold favorable tax status from racially discriminatory enterprises. Bob demanded more than this from the Court. He insisted that the only possible path toward justifying the Court’s result would be its holding that Congress was constitutionally obliged to withhold federal tax favors from all racial discriminators, including Bob Jones University.

The University’s claim could itself be understood in Bob’s terms as an aspiration to transform the “unredeemed character of reality” of the post-*Brown*¹² universe with a “fundamentally different reality” of biblically commanded racial separation.¹³ This understanding raised the stakes for the University’s adversaries; nothing less than an equivalent ambition to transform an unredeemed world could even begin to assert justifiable priority over the University’s normative claim. In American

8. Aviam Soifer, *Covered Bridges*, 17 YALE J.L. & HUMAN. 55, 59 (2005).

9. 461 U.S. 574 (1983).

10. Cover, *supra* note 1, at 62.

11. *Id.* at 62, 65.

12. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

13. Cover, *supra* note 1, at 34.

jurisprudence, Bob argued, this kind of redemptive commitment only exists in constitutional commandments, not in discretionary acts of Congress. The University's normative claim, Bob concluded, could therefore not be overcome by a mere statute but only by a direct constitutional command.

This position has, however, the ironic consequence that the University's claim for normative autonomy—for "insularity" from the national commitment against race discrimination—could only be overridden if the Court was prepared to crush it entirely and irreversibly. By restricting its ruling to statutory grounds, the Court provided the University with an opportunity for appeal to Congress, an opening to argue that their scripturally based normative vision might obtain a respectful exemption from the generally applicable national policy against race discrimination. Notwithstanding his claim that judicial deployment of coercive force is violent and "jurispathic" at its core, Bob was unwilling to endorse the Court's offer of some negotiating possibilities in refusing to deploy its most coercive weaponry, the irresistible force of the Constitution as such, against Bob Jones University. Having understood the struggle between the federal tax authorities and the University in Manichean terms, as a conflict between irreconcilable, diametrically opposed visions of Good and Evil, Bob appeared to demand nothing less than Armageddon.

Bob's embrace of redemptive struggle led him not only to criticize the Court but all of the participants in the litigation. He disparaged the University's position on the ground that it had "once interpreted its controlling biblical texts to require that no unmarried black person be admitted to the school" and that it had altered this policy to admit blacks but forbid interracial dating or marriage only "after the power of the state was invoked to deny the University favorable tax status."¹⁴ Thus, Bob concluded, the University "seemed uncommitted and lackadaisical in its racist interpretation—unwilling to put much on the line."¹⁵ It may seem comical that Bob would criticize the University on the ground that it was insufficiently rigorous in its disrespect toward Black people. But Bob was dead serious; he did not respect the University because it was "unwilling to put much on the line."

This was the basis for Bob's disdain toward everyone involved in the case. The "whole show," he said, "was built on shoddy commitments, fake interpretations"—not just the University's "uncommitted and lackadaisical" racism, but all others:

The IRS ruling was left shamefully undefended by an administration unwilling to put *anything* on the line for the redemptive principle.

14. Cover, *supra* note 1, at 51.

15. *Id.* at 67.

The Justices responded in kind: they were unwilling to venture commitment of themselves, to make a firm promise and to project their understanding of the law onto the future. *Bob Jones University* is a play for 1983—wary and cautious actors, some eloquence, but no commitment.¹⁶

Bob did not acknowledge that this wariness and caution on the part of all of the participants could work toward the goal of controlling, or at least attenuating, the violence endemic to law, that it offered room for negotiation and compromise among adversaries initially committed to defeat one another.

Disdain for those “casting their cautious eyes about” and passionate commitment for always putting “much [if not everything] on the line” were at the core of Bob’s life.¹⁷ This conviction not only pervaded his scholarship. It was apparent to anyone who spent even a moment in his presence. As a friend and colleague, I was awed and intimidated by this aspect of Bob’s character. I never could decide whether I aspired to emulate him and was embarrassed, even ashamed, at my shortfall, or whether I was content to have followed a more cautious and well-protected course. The lesson that Bob lived, however, was that choices must be made, that no one can honestly expect to walk both sides of this line. Risk-filled, full-hearted commitment was his chosen path.

16. *Id.*

17. *Id.*