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Cover Page Footnote

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“EXTRAORDINARILY CALLED UPON BY THE BLESSINGS WHICH WE HAVE RECEIVED”

*Ronald R. Garet**

I. BOB’S BLESSINGS

In many spheres of life, action and contemplation are opposites. But in prayer, they sometimes become two aspects of the same reality, the same seriousness. Thomas Merton describes Dostoevsky’s Father Zossima as a “kind, compassionate man of prayer who identifies himself with the sinful and suffering world in order to call down God’s blessing upon it.”¹ We might use these words to describe Bob Cover.² His students, colleagues, and friends, and those with whom he made up a minyan, and those with whom he suffered in the jails of Georgia,³ knew him to be a kind and compassionate man, who identified himself with a suffering world in a way that can rightly be described as prayerful. But I want to lay special emphasis on the idea of activity undertaken in order to call down God’s blessing on us.

To know Bob, and study with him, and work with him, is to be blessed – to receive blessings. To receive blessings is to be:

- Endowed, as with a gift or trust;
- Authorized, as if one in authority were using that authority to say “yes,” a word of support and permission;
- Challenged, because with this trust and permission come responsibilities and, if this is not too strong a word, peril.

* Carolyn Craig Franklin Professor of Law and Religion, University of Southern California Gould School of Law. I am grateful for the kindness and hospitality that the faculty, students and staff of the Touro Law Center extended to me and to other conference participants. And I wish particularly to express humble respect and admiration for the leadership and friendship of my colleagues Larry Raful and Sam Levine.

¹ THOMAS MERTON, *CONTEMPLATIVE PRAYER* 28 (1971).

² *About Robert M. Cover*, YALE LAW SCHOOL, <http://www.law.yale.edu/about.htm> (last visited Jan. 6, 2014).

³ *Id.*

So the receipt of blessings endows, authorizes, and challenges the one blessed – the blessee, so to speak – in a way that is not only peculiarly binding but especially fraught.

Of course, a great deal depends on whether I stand in the shoes of Ishmael or of Isaac, of Esau or of Jacob. Shall I cry out in anguish, with Esau: “Hast thou but one blessing, my father? Bless me, [even] me also, O my father. And Esau lifted up his voice, and wept.”⁴ Whose story is our story? Narrative is the crux of the *nomos*, whether we are talking of the birthright or the blessing, *bechorah* or *beracha*.⁵

II. BLESSINGS DISPOSE US

Blessings dispose us to feel, act, and believe, in certain characteristic ways.

- Blessings dispose us to be thankful. Saints among us are always oriented in a thankful way. Their attitude of thanksgiving helps steer them away from self-preoccupation and defensiveness, and orients them toward self-giving. But those of us who are not saints lapse constantly into self-preoccupation. Sometimes the receipt of gifts not only fails to lift us out of this self-preoccupation, but even confirms us in a self-oriented stance, as if the gifts were our due, or something to show

⁴ *Genesis* 27:38 (King James).

⁵ In English, the words “rights” and “blessings” neither resemble nor suggest one another. But in the Hebrew Bible, the word for blessing (or the power to bless) – *beracha* – is very similar to the word for birthright, or the right of the firstborn (*bechorah*). THE MIDRASH ON PSALMS 8-9 (Leon Nemoy ed., William G. Braude trans., 1959). Rabbinic commentaries explore this close verbal resemblance. *Id.* What did Abraham give Isaac, as reported in *Genesis* 25:5? “And Abraham gave all that he had unto Isaac.” *Genesis* 25:5 (King James). R Yehuda, R Nehemiah, and the Rabbis disagreed on this matter. THE MIDRASH ON PSALMS, *supra* at 8-9. R Yehuda said this is the *Bechorah* (firstborn rights). *Id.* R Nehemiah said: this is the *Beracha* (blessing, or the power to bless). *Id.* (I am indebted to my student and teacher, Sam Shnider, for this text and translation). Bob Cover’s attention, in *Nomos and Narrative*, was on the way in which Biblical narrative teaches those who inhabit a Biblical *nomos* (Torah) to expect surprises in the succession to the birthright. Cover, *infra* note 7, at 20-22. The birthright comes not to Esau but to Jacob. *Id.* By a simple substitution, though, we can read *Nomos and Narrative* as reminding us to expect surprises in the succession to the blessing. It is as if “we the people,” expecting “to secure the blessings of liberty to ourselves and our posterity,” awoke to the surprise that the blessings of liberty descend where God wills. See Cover, *infra* note 7 (defining the term ‘paideic’). Put otherwise: to inhabit our law-world (*nomos*) is to expect to be astonished at who “ourselves and our posterity” turn out to be after all.

off. Blessings are rather exceptional gifts in that they orient us to give thanks, which is already a release of claims to self-sufficiency.

- Blessings dispose us to give praise.
- Blessings dispose us to act out of a sense of being bound, or claimed, by the blessing. The blessing, if you will, is part of the call; and action undertaken in response to the call, with a spirit of thanksgiving and praise, brings us into the work of *unfolding the blessing*.

In offering such a dispositional account of blessings, I do not mean to deny the validity of the concept of “religious legal theory” that gives our conference its name. Nor would I deny that Bob Cover worked out a theory. What I am saying, rather, is that in his work of prayerful identification with a suffering world, Bob called down God’s blessing upon us, orienting us with a certain attitude or outlook, much as prayer orients us with a certain attitude or outlook.⁶

III. OBLIGATIONS AND THE LAW-WORLD

We might see these observations about the moral psychology of blessings as having their natural home in religious traditions and family life: yet elastic enough to apply also to the teacher-student relationship, and by extension to the academic life that we share together this morning. But I believe that these features of the moral psychology of blessings are also, and equally, features of life in a law-world.

They pertain to what Bob called the Paideic form of law,⁷ and

⁶ MERTON, *supra* note 1, at 34 (“[I]n meditation we should not look for a *method* or *system*, but cultivate an *attitude*, an *outlook*: faith, openness, attention, reverence, expectation, supplication, trust, joy.”).

⁷ For Cover, the term ‘paideic,’ suggests:

(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 his community work out the implications of their law. Law as Torah is pedagogic. It requires both the discipline of study and the projection of understanding onto the future that is interpretation. Obedience is correlative to understanding. Discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic. Interpersonal commitments are characterized by reciprocal acknowledgment, the recognition that individuals have particular needs and strong obligations to render person-specific responses. Such a vision, of course, is neither uniquely rabbinic nor ancient. The vision of a strong community of common obligations has also been at the

especially to the character and ground of legal obligation. The unfolding of the blessing pertains to what Bob called redemptive constitutionalism.⁸ I will briefly illustrate these concepts at work in the nomos of American constitutionalism.

Now we all know that the Preamble to our U.S. Constitution speaks of “the blessings of liberty.”⁹ But some of our state constitutions adopt a more confessional stance and situate the constitutional moment within an attitude of praise and gratitude for blessings. For example, the California Constitution, adopted in 1849, and in this respect unchanged today, begins as follows: “We, the People of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution.”¹⁰ Other state constitu-

heart of what Christians conceive as the Church.

Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV 4, 12-13 (1983).

⁸ *Id.* at 33-35. “I shall use ‘redemptive constitutionalism’ as a label for 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.” *Id.* at 34. Cover goes on to explain:

I use the term ‘redemptive’ to distinguish this phenomenon from the myriad reformist movements in our history. Redemption 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. The term ‘redemptive’ also has the connotation of saving or freeing persons, not only ‘worlds’ or understandings. I have chosen a word with the religious connotations of both personal and cosmic freedom and bondage, because the paradigmatic cases I have in mind require just such a heavy weight of meaning. I shall use the examples of radical antislavery constitutionalism and the civil rights movement to illustrate the phenomenon. Both movements set out to liberate persons and the law and to raise them from a fallen state. This way of thinking about law and liberty – shared as well by the women’s movement and the right-to-life movement – is obviously tied to the religious traditions that invoke the vocabulary of redemption.

Id. at 34-35.

⁹ U.S. CONST. pmbl.

“We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

Id. For discussion of the Preamble’s reference to the blessings of liberty, see Ronald R. Garet, *To Secure the Blessings*, in LEGAL STUDIES RESEARCH PAPER SERIES No. 10-11 (2010) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645526##.

¹⁰ 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE

tions, including the Kentucky constitution of 1890¹¹ and the Florida constitutions of 1868¹² and 1885,¹³ are similar.¹⁴ These constitutions situate themselves within a posture of praise and gratitude for the blessings received. The making of organic law is presented as an expression of praise for the bestower of blessings and as an expression of gratitude for the blessings bestowed. These texts also frame organic law, in more instrumental terms, as a device for securing the blessings. We come close here to the idea of *unfolding the blessings*, but we have not quite arrived at the core idea of obligation, of being bound or claimed by the blessing.

In his paper *Obligation: A Jewish Jurisprudence of the Social Order*,¹⁵ Bob not only explicates the concept of *mitzvot* in Jewish tradition but also assesses the stories that belong to the concept and give it what he calls certain rhetorical advantages: A certain capacity to move us.¹⁶ In that paper, Bob associates obligation primarily with the awareness and memory of being commanded.¹⁷ But in a brief passage, toward the end of the paper, Bob also associates obligation with the awareness of being blessed. Here is the passage in full:

The struggle for universal human dignity and equality

UNITED STATES OF AMERICA 391 (Francis Newton Thorpe, ed., 1909).

¹¹ See 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1316 (Francis Newton Thorpe, ed., 1909) (“We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.”).

¹² See 2 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 704 (Francis Newton Thorpe ed., 1909) (“We the people of the State of Florida, grateful to Almighty God for our freedom, in order to secure its blessings . . . do establish this constitution.”).

¹³ *Id.* at 732-33 (“We, the people of the State of Florida, grateful to Almighty God for our constitutional liberty, in order to secure its blessings . . . do ordain and establish this Constitution.”).

¹⁴ See 3 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1522, (Francis Newton Thorpe ed., 1909) (“We, the people of the State of Louisiana, grateful to Almighty God for the civil, political and religious liberties we enjoy, and desiring to secure the continuance of these blessings, do ordain and establish this Constitution.”).

¹⁵ Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987).

¹⁶ *Id.* at 65-66, 73.

¹⁷ *Id.* at 66-67.

still proceeds on many levels all over the world. There is no question that we can use as many good myths in that struggle as we can find. Sinai and social contract both have their place. Yet, as I scan my own—our own—privileged position in the world social order and the national social order, *as I attend the spiritual and material blessings of my life and the rather obvious connection that some of these have with the suffering of others*—it seems to me that the rhetoric of obligation speaks more sharply to me than that of rights.¹⁸

Now I think that what Bob would call our rhetoric of rights in American constitutionalism sometimes comes close to this position but so far has not quite gotten there.

IV. AN ACT FOR THE GRADUAL ABOLITION OF SLAVERY

Because Bob was a close student of slavery and anti-slavery in American history, it is appropriate to bring these ideas into focus by showing them at work in the law of anti-slavery. I will close with some reflections on one of the state emancipation statutes. In 1780, while the war for independence was still being fought, the Pennsylvania Assembly passed An Act for the Gradual Abolition of Slavery (hereinafter “Pennsylvania Act”).¹⁹ The statute is of particular interest because its preamble, from which I shall quote, came perhaps from the pen of Tom Paine.²⁰ Of course, once you hear the words “gradual abolition,” you can predict how this will look from the standpoint of redemptive constitutionalism and Bob’s ethics of commitment.

The preamble begins by saying that when we contemplate our miraculous deliverance from dangers during the war,

we are unavoidably led to a serious and grateful sense

¹⁸ *Id.* at 73 (emphasis added).

¹⁹ An Act for the Gradual Abolition of Slavery (1780), *reprinted in* THE GENERAL LAWS OF PENNSYLVANIA: FROM THE YEAR 1700, TO MAY, 1853, CHRONOLOGICALLY ARRANGED: WITH NOTES AND REFERENCES, TO ALL THE DECISIONS OF THE SUPREME COURT OF PENNSYLVANIA, GIVING CONSTRUCTION TO SAID LAWS, (TO VOLUME 6, HARRIS REPORTS INCLUSIVE) WITH A COPIOUS AND MINUTE INDEX 126, 126-29 (compiled by James Dunlop, 3d ed., 1853).

²⁰ A. J. AYER, THOMAS PAINE 48 (1988) (“On internal evidence, it is generally supposed that the preamble of this Pennsylvania Act was composed by Tom Paine.”).

of the manifold blessings, which we have undeservedly received from the hand of that Being, from whom every good and perfect gift cometh. Impressed with these ideas, we conceive that it is our duty, and we rejoice that it is in our power, to extend a portion of that freedom to others, which hath been extended to us, and release from that state of thralldom, to which we ourselves were tyrannically doomed, and from which we have now every prospect of being delivered [Thus] we find our hearts enlarged with kindness and benevolence towards men of all conditions and nations; and we conceive ourselves at this particular period *extraordinarily called upon, by the blessings which we have received*, to manifest the sincerity of our profession, and to give a substantial proof of our gratitude.²¹

Here I think we come close to a dispositional view of blessings that stresses the features of gratitude, praise, and the unfolding of the blessing through action under obligation incumbent upon the blessee. But, then we come to a crossroads where the gradual abolition statute goes off in one direction and Bob's redemptive constitutionalism takes us along a different path.

We reach this crossroads when the statute speaks of kindness and benevolence. The authors of the Pennsylvania Act pictured their hearts as enlarged by the blessings, their prejudices overcome, so that they were newly enabled to reach out to others in a spirit of benevolence.²² We hardly need read the operative provisions of the act to know that they are gradual indeed. The Act changed the legal status of children born after its enactment date; but, even as to them, it rendered them indentured servants of their former masters until the age of twenty-eight.²³ While the Act repealed prior statutes that had set up differing bodies of criminal law for blacks, slaves, and whites,²⁴ it

²¹ Dunlop, *supra* note 19, at 126 (emphasis added); Ayer, *supra* note 20, at 48-49; 2 THOMAS PAINE, *Preamble to the Act Passed by the Pennsylvania Assembly March 1, 1780*, reprinted in THE WRITINGS OF THOMAS PAINE 29, 29-30 (Moncure D. Conway ed., 1894).

²² Dunlop, *supra* note 19, at 126.

²³ *Id.* at 127.

²⁴ See, e.g., GENERAL LAWS, *supra* note 19 at 127-28 (discussing examples of repealed slavery statutes such as: An Act for the Trial of Negroes (1705), An Act for the Better Regulating of Negroes in this Province (1725), An Act for Laying a Duty on Negro and Mulatto

continued the typical rule that a slave shall not testify against a free person.

Pragmatically, we can suppose that this is the best that the legislature could have done, given the political positions of the electorate at that time.²⁵ But there is something disturbing, even offensive, about viewing such a limited emancipation as an unfolding of the blessings.

I will close by invoking the title of Bob's great book: *Justice Accused: Antislavery and the Judicial Process*.²⁶ Blessings endow us, authorize us, and challenge us; but, they more than challenge us—they accuse us. Bob saw this clearly. In the ledgers of his moral accounting books, he wrote out “the rather obvious connection that some of these [blessings] have with the suffering of others.”²⁷ He wrote as Jacob but also as Esau, as Isaac but also as Ishmael. And he was so generous in his bestowal of blessings that he had a blessing even for me; yes, even for me.

Slaves Imported into this Province (1761), and An Act for Making Perpetual an Act for Laying a Duty on Negro and Mulatto Slaves Imported into this Province, and for Laying an Additional Duty on Said Slaves (1773)).

²⁵ Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1016-19, 1032.

²⁶ ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

²⁷ Cover, *supra* note 15, at 74.