



**TOURO COLLEGE**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 37 | Number 4

Article 8

---

2022

## Robert Cover and Critical Race Theory

Gabriel J. Chin

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Judges Commons](#), [Law and Race Commons](#), and the [Legal Education Commons](#)

---

### Recommended Citation

Chin, Gabriel J. (2022) "Robert Cover and Critical Race Theory," *Touro Law Review*: Vol. 37: No. 4, Article 8. Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol37/iss4/8>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

## ROBERT COVER AND CRITICAL RACE THEORY

*Gabriel J. Chin\**

### ABSTRACT

Professor Robert Cover is recognized as a leading scholar of law and literature; decades after his untimely passing, his works continue to be widely cited. Because of his interest in narrative, he is credited as a contributor to the development of Critical Race Theory. This essay proposes that in addition to narrative, some of his other, substantive works about race were also important precursors to a more sophisticated appreciation of U.S. race relations. Professor Cover is also entitled to credit for understanding racism as a pervasive system, and one which went beyond Black and White.

---

\* Edward L. Barrett Jr. Chair, Martin Luther King Jr. Professor, and Director of Clinical Legal Education, University of California, Davis School of Law. Thanks to Prof. Sam Levine, the Jewish Law Institute at the Touro Law Center, and the Touro Law Review for hosting the symposium at which this essay was presented.

## ROBERT COVER AND CRITICAL RACE THEORY

Judged by Google Scholar,<sup>1</sup> Robert Cover's most influential works are his law and literature articles *Nomos and Narrative*<sup>2</sup> and *Violence and the Word*,<sup>3</sup> each of which has been cited thousands of times. Among other influences, these papers are said to have been an inspiration for Critical Race Theory ("CRT"), branches of which use narrative and stories to illuminate the experiences of people of color. Professor Rhonda Magee wrote, "Cover invited us to 'stop circumscribing' normative universes, and to 'invite new worlds.' Many people in the critical legal studies and critical race theory community were inspired by Cover's invocation."<sup>4</sup> She notes that a leading CRT anthology referred to the "'pioneering works of the late, visionary legal scholar Robert Cover' as among 'prophetic' precursors

---

<sup>1</sup> *RM Cover*, GOOGLE SCHOLAR, [https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C5&q=RM+Cover&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=RM+Cover&btnG=) (last visited Oct. 12, 2021).

<sup>2</sup> Professor Cover contended:

We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.

Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

<sup>3</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).

<sup>4</sup> Rhonda V. Magee, *Inviting New Worlds, Tuning to New Voices: A Post-9/11 Meditation on "Where Do We Go from Here?"*, 3 SEATTLE J. SOC. JUST. 587, 602 (2005); see also Mari J. Matsuda, *This is (Not) Who We Are: Korematsu, Constitutional Interpretation, and National Identity*, 128 YALE L.J. FORUM 657, 678 (2019) ("Only myth tells us who we would become; only history can tell us how hard it will really be to become that") (quoting Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 190 (1985)); Eric K. Yamamoto et. al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 83 n.160 (1994) ("The term 'jurisgenerative,' along with its antinomic counterpart, 'jurispathic,' were coined by Robert Cover to describe the ways in which courts through language and procedure can destroy or affirm law created by communities.") (citing Cover, *supra* note 2).

to Critical Race Theory.”<sup>5</sup> In addition to emphasizing the importance of narrative, many scholars associated with the CRT movement or other critical approaches have cited Professor Cover’s celebrated assertion that “[l]egal interpretation takes place in a field of pain and death.”<sup>6</sup>

Professor Cover’s substantive race scholarship has earned comparatively less credit among critical scholars. The word “comparatively” is important here, because Professor Cover is a scholar who, generations after his untimely passing, remains one of the currently most cited scholars on, for example, the Hein-Online ranking.<sup>7</sup> This essay proposes that Professor Cover’s 1975 book *Justice Accused: Antislavery and the Judicial Process*,<sup>8</sup> and 1982 article *The Origins of Judicial Activism in the Protection of Minorities*<sup>9</sup> are also prophetic precursors to the insights of CRT about the pervasive and deeply embedded nature of racial hierarchy in the United States.

---

<sup>5</sup> See Magee, *supra* note 4, at 602 n.63 (quoting CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xi (Kimberlé Crenshaw et al. eds., 1995)).

<sup>6</sup> Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 473 (2004) (quoting Cover, *supra* note 3, at 1601). See generally DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2008) (discussing *Violence and the Word*); Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 437 n.143 (2018); Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J. L. & GENDER 183, 184 n.8 (2017); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 994 n.206 (2002); Angela P. Harris, *Teaching the Tensions*, 54 ST. LOUIS U. L.J. 739, 744 n.22 (2010); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 554 (1999) (citations omitted); Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251, 1276 n.109 (2021). Other scholars cite other views of Professor Cover on the connection between law and violence. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 983 n.74 (1998); Anthony Paul Farley, *Thirteen Stories*, 15 TOURO L. REV. 543, 655 n.213 (1999); Francisco Valdes, *Under Construction: Latcrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1131 n.185 (1997).

<sup>7</sup> See *ScholarRank*, HEINONLINE, <https://home.heinonline.org/tools/author-profile-pages/scholarrank/> (last visited Oct. 12, 2021) (ranking Professor Cover 246th on ScholarRank).

<sup>8</sup> ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>9</sup> Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

This essay does not advance a rigid or dogmatic definition of CRT.<sup>10</sup> It is taken to mean that racial discrimination in American law is systematic as opposed to episodic; pervasive as opposed to local, enduring, and operative in a variety of domains, such as economic, political, psychological, and has therefore shaped the world we live in now.

The claims of CRT are also falsifiable rather than being based on faith or precommitment. It would upend the claims of some scholars to learn that in 1920 or 1960 there were significant regions of the United States without, for example, educational, residential, or employment segregation based on race or even for that matter where racial segregation, separate but equal, was genuinely something close to equal, rather than involving reservation of the best for whites. If people of color had simply moved to these hypothetical places, fairness would have prevailed. It would also be an important finding if the economic, educational, and social opportunities of each generation were unrelated to the situations of their parents and grandparents, and therefore past discrimination, once ended, became largely irrelevant for purposes of law, policy, and the lives of individuals. However, those happy circumstances seem not to exist.

Inspired by disappointment with judges who failed to interfere with the execution of the Vietnam War,<sup>11</sup> *Justice Accused* deals with the dilemma of antebellum judges personally opposed to slavery but scrupulous officials of a government which protected it—what should an honest anti-slavery judge do when called upon to enforce slave law?<sup>12</sup> The unscrupulous judge and the pro-slavery judge are unconflicted; presumably judges with both qualities found the burden of decision particularly light. *Justice Accused* explains that the anti-slavery judges studied played the game, carrying out their grim duty to the law as they understood it.

Several scholars have proposed that *Justice Accused* did not criticize this choice. In his 1976 review of *Justice Accused*, Professor Derrick Bell, perhaps the parent and certainly a parent of CRT, writes,

---

<sup>10</sup> See generally KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* (2019); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3d ed. 2017).

<sup>11</sup> Robert M. Cover, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression* by Richard Hildreth, 68 *COLUM. L. REV.* 1003, 1005-06 (1968) (book review).

<sup>12</sup> See generally COVER, *supra* note 8.

“[h]aving discovered in antislavery judges ‘all of the complexities of the process of complicity’, Professor Cover does not make clear whether he is urging conditional condemnation or historical exoneration.”<sup>13</sup> Professor Paul Butler writes, “[a]lthough his subject matter--slavery--is a more extreme example of immorality than the Vietnam War, Cover is less certain about what judges should have done. In the end, he is barely critical of judges who enforced the Fugitive Slave Law.”<sup>14</sup> Michael Stokes Paulsen, another distinguished scholar whose views, presumably, are sometimes not aligned with those of Professors Bell or Butler, writes: “surprisingly absent is any explicit judgment . . . about whether judges should have applied natural law principles to bring positive law into conformity with justice . . . and about whether failure of judges to do so, or to resign, constituted morally blameworthy cowardice.”<sup>15</sup>

Judges also seem to treat *Justice Accused* as withholding criticism of judges. Justice Blackmun’s dissent in *DeShaney v. Winnebago County*<sup>16</sup> insisted that the Due Process Clause of the Fourteenth Amendment and other Reconstruction laws “were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence, which the late Professor Robert Cover analyzed so effectively in his significant work entitled *Justice Accused*.”<sup>17</sup> It seems significant that Professor Cover is credited with “analyzing,” rather than, say, debunking, exposing, or criticizing, the “infection” of formalistic antebellum judicial reasoning.

Similarly, in a remarkable series of opinions, Mark L. Wolf, Senior Judge of the U.S. District for the District of Massachusetts, invoked *Justice Accused* when defending himself from a recusal motion in a capital case.<sup>18</sup> Although Judge Wolf had previously sentenced the defendant to death, the government sought to remove him from the resentencing in part based on the judge’s participation in

---

<sup>13</sup> Derrick A. Bell, Jr., *Justice Accused: Antislavery and the Judicial Process* by Robert M. Cover, 76 COLUM. L. REV. 350, 356 (1976) (citations omitted).

<sup>14</sup> Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1786 (2007) (citations omitted).

<sup>15</sup> Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 45 (1989).

<sup>16</sup> 489 U.S. 189 (1989).

<sup>17</sup> *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

<sup>18</sup> *United States v. Sampson*, 148 F. Supp. 3d 75 (D. Mass. 2015).

a conference where he referred to literary sources about the death penalty.<sup>19</sup>

Judge Wolf conceded that at the conference he referred to what the government claimed were anti-death penalty works—Albert Camus's *Reflections on the Guillotine*, Robert Burt's *Death is that Man Taking Names*, and the Czech author Ivan Klima's *Judge on Trial*.<sup>20</sup> But Judge Wolf pointed out that he cited other works as well:

Alexander Bickel's *Morality of Consent* provided a framework for my remarks in sentencing Sampson to death . . . . Similarly, Robert Cover's *Justice Accused* provided a framework for my analysis in denying Sampson's motion to dismiss because the grand jury was not informed that its findings would make this a capital case, and the book was quoted in support of that conclusion.<sup>21</sup>

In explaining why he went below the guideline range in imposing a sentence for crack cocaine, Judge Stanley Sporkin of the U.S. District Court for the District of Columbia published one of the few (and perhaps the only) judicial opinion reading of *Justice Accused* as critical of judicial inaction. In it, Judge Sporkin states:

I am bound to implement the law. I am also bound to apply the law to the case before me, and to bring the requisite compassion to bear in meting out a punishment that fits the crime. Cf. R. Cover, *Justice Accused* (1975) (describing judicial application of the Fugitive Slave Act).<sup>22</sup>

Professor Cover has departed this earthly life and he is unable to express his own views. Yet, given the beauty and quality of his writing and reasoning, it is tempting to claim his endorsement for one's own views. Put another way, contending that Professor Cover meant something that he did not write explicitly is to risk projecting one's own views onto his scholarship. Nevertheless, the very first page of *Justice Accused* references the German legal system's participation in

---

<sup>19</sup> *Id.* at 107 n.26.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *United States v. Jackson*, 756 F. Supp. 23, 27 (D.D.C. 1991).

Nazi atrocities.<sup>23</sup> *Justice Accused* did not address what constitutes the kind of atrocity warranting resistance, or the kind of resistance called for in particular situations, or something Professor Cover was concerned about: what to do when there is only limited room for effective judicial action.<sup>24</sup> However, since *Justice Accused* was written in light of the Shoah, and what he witnessed and experienced as he worked for civil rights in Albany, Georgia,<sup>25</sup> I do not agree that *Justice Accused* is agnostic about whether judges should participate in atrocities when effective opposition is conceivable. That is, *Justice Accused* is not a book just about slave law, it is about a general problem. I take the risk of asserting that Professor Cover would have said, if asked, that no one, judge or not, should participate in atrocities.<sup>26</sup>

Why, then, did *Justice Accused* not try to convict judges who did not oppose slavery in their judicial decisions? His other work suggests that he thought it would be futile. He discussed *Hudgins v. Wright*,<sup>27</sup> a freedom suit which gave rise to foundational rules about race the presumption of freedom or enslavement for various races. The chancellor, the trial-level judge, ruled that all persons were presumed free<sup>28</sup>; the Virginia Supreme Court held that whites and Indians were presumed free but not persons of African ancestry.<sup>29</sup> Professor Cover was uncritical, for practical, not moral reasons:

An institution so deeply entrenched in the economy and culture of a society as was slavery in Virginia, could not have been demolished by judicial fiat. Tucker [on the Supreme Court] was undoubtedly wise in reversing [Chancellor] Wythe.<sup>30</sup>

---

<sup>23</sup> COVER, *supra* note 8, at 1.

<sup>24</sup> *See generally id.*

<sup>25</sup> Robert A. Burt, *Robert Cover's Passion*, 17 YALE J.L. & HUMAN. 1, 4 (2005).

<sup>26</sup> *See* Cover, *supra* note 4, at 200 (“Moreover, once certain factual premises were accepted, the Nuremberg principles provided the basis for an obligation to oppose [an illegal] war.”).

<sup>27</sup> *Hudgins v. Wrights*, 1 Hen. & M. 134 (1806).

<sup>28</sup> *Id.* at 134.

<sup>29</sup> *Id.* at 144.

<sup>30</sup> Robert M. Cover, *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 70 COLUM. L. REV. 1475, 1493 (1970).

Professor Cover's 1982 article *The Origins of Judicial Activism in the Protection of Minorities*<sup>31</sup> described the problem faced by the Supreme Court in ways that fairly clearly endorsed judicial intervention.<sup>32</sup> Professor Cover also recognized the nature of discrimination in ways that remain fresh and relevant. His vision is compatible with CRT, describing America, at least in the South, as having a system of "racial apartheid."<sup>33</sup>

The article, especially its third paragraph, was a defense and explanation of footnote four of *Carolene Products*,<sup>34</sup> which left open the possibility of protection for "discrete and insular minorities."<sup>35</sup> Professor Cover recognized the value of majoritarianism, but also saw its problems. He explained that "by the 1930's popular government and the institutions of mass democracy had themselves become so problematic that they could not, in and of themselves, serve to justify outcomes that appeared intrinsically unjust."<sup>36</sup> What were those problems?

[T]he rise of bolshevism and fascism, the orchestration of mass oppression of minorities, the cynical manipulations of elections, and the ascendancy of apparatus and party over state and society . . . .

---

<sup>31</sup> See generally Cover, *supra* note 9.

<sup>32</sup> *Id.* at 1300.

<sup>33</sup> *Id.*

<sup>34</sup> 304 U.S. 144 (1938). The Court stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* at 152 n.4 (1938) (citations omitted).

<sup>35</sup> *Id.*

<sup>36</sup> Cover, *supra* note 9, at 1289.

Substantive due process applied to economic regulation *was* properly subject to the criticism that it was anti-democratic. But that did not mean that, in the age of Hitler, majoritarianism itself would not require more in the way of justification than its professedly democratic nature.<sup>37</sup>

Then, this is an important part of the of the case for Robert Cover as CRT theorist. Not Richard Delgado nor Kimberle Crenshaw, not Derrick Bell nor Mari Matsuda, but Robert Cover, who wrote that the U.S. Supreme Court was forced to confront the example of Hitler to determine how to construe U.S. constitutional law.<sup>38</sup> And the claim was not hyperbolic or rhetorical but rather, based on evidence of the actual concerns of the justices and other policymakers.

*Justice Accused* is about judges and judging, not African Americans or enslaved persons. The article, by contrast, paid much more attention to the structure of the law as applied to various groups. The article explained how the situation of African Americans differed from that of other groups. “In modern America disenfranchisement has largely been confined to *racial* minorities.”<sup>39</sup>

As late as 1993, legal scholar Robert Chang could object that legal scholarship had largely ignored Asian Americans: “[t]o focus on the black-white racial paradigm is to misunderstand the complicated racial situation in the United States.”<sup>40</sup> To be sure, we do not find hidden in Professor Cover’s work full appreciation for the decades of scholarship about non-Black and non-whites which would come. Nevertheless, in an article which is understandably largely about African Americans, it is bracing to see—even in a footnote—clear acknowledgement and appreciation for the diversity of the U.S. racial situation: “[t]he mechanism used to disenfranchise orientals was denial of naturalization, which survived challenge throughout the relevant period of large-scale oriental immigration and attendant strong local prejudice.”<sup>41</sup>

---

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1301 n.42.

<sup>40</sup> Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1267 (1993).

<sup>41</sup> Cover, *supra* note 9, at 1301 n.42. It seems reasonable to treat Professor Cover’s use of the anachronistic “oriental” as a venial sin at most, given the empathetic

Professor Cover contended that “[i]n contrast to the deep societal roots of governmental action against Blacks—the close fit between private terror, public discrimination, and political exclusion, directed against Blacks for a century—action against other minorities has usually been sporadic, transitory, and local.”<sup>42</sup> Another footnote stated “[a]gain, the oriental experience in the western states was closer to that of Blacks.”<sup>43</sup> He explained why the situation of other minority groups was different:

If one asks why the political process has served Catholics (or Jews or Germans) despite significant prejudice and virulent hatred directed against them, the answer is that in a competitive political arena the votes of such groups will—rather sooner than later—appear too desirable a plum to leave unplucked. One or another party will befriend them and with their aid will entrench itself. This in fact was the strategy of Democratic machine politics in urban areas throughout the period of mass immigration.<sup>44</sup>

---

context. It does call to mind another interaction between the Asian and Jewish communities in the United States. In the movie *The Big Lebowski* (1998), Walter Sobchak, a convert to Judaism portrayed by John Goodman, objected to his friend’s use of another obsolete term: “Dude, ‘chinaman’ is not the preferred nomenclature. Asian-American, please.” *The Big Lebowski*, IMDB, <https://www.imdb.com/title/tt0118715/characters/nm0000422> (last visited Oct. 12, 2021). Professor Cover’s sensitivity to discrimination against Asians went beyond the domestic context. Writing about the war crimes trials following World War II, he observed:

It is important to note that while the unlawful and evil character of the Nazi War seemed self-evident to most, the "aggressive war" crime was also applied across the world in the trial, conviction and execution of Japanese defendants. In retrospect, the Tokyo tribunal judgments seem to have applied criminal sanctions to a range of conduct which was not discontinuous with "normal statecraft" in the way that Nazi policy had been. Finally, in a series of trials by Military Commission, American tribunals undertook to punish Japanese General Officers for atrocities committed under their command on a theory of command responsibility which was breathtakingly broad and, as applied, seemed to some almost impossibly demanding.

Cover, *supra* note 4, at 199 (citations omitted).

<sup>42</sup> Cover, *supra* note 9, at 1303.

<sup>43</sup> *Id.* at n.53.

<sup>44</sup> *Id.* at 1302.

This strategy, although attempted, failed in the context of African American suffrage:

[T]oo few southerners could perceive any issue or set of issues as more important than preventing Blacks from enjoying the advantages that would have come from full political participation. The temptations for a political solution have always been there, however, and are often quite strong. Whether in a one, two, or three-party system, the probable losers, who perceived an alliance with Blacks as the road to victory and power, confronted a powerful temptation to cheat on the White bargain. Precisely because that tension was present, racist domination required that the politics of the region be violent and extreme. In a more civilized context, the bargain would not have been kept, as it has not been kept since 1965. Thus, terror has always been part of southern regional politics . . . .<sup>45</sup>

Professor Cover mapped out some of the features of the comprehensive system of American racial apartheid:

First, law enforcement was almost exclusively local, political, and non-professional. Second, organized political violence had been sufficiently frequent to bring with it cadres of white hoods who stood ready to act when change threatened. Third, and most important, the region had exhibited many characteristics of colonized areas. Like many colonies, the South expended a great deal of social energy in drawing and maintaining lines between master and servant classes. The distinction between White and Black, between colonist and native, was reinforced so prevalently that the political distinction seemed but part of a natural pattern. The resonance of society and politics in this respect was critical.<sup>46</sup>

---

<sup>45</sup> *Id.* at 1303.

<sup>46</sup> *Id.*

Again, anticipating modern CRT thinking, Professor Cover recognized the criminal justice system was one of the key mechanisms of racial oppression.<sup>47</sup> He explained:

Although the Court had never treated them as race cases, there can be little doubt that the decisions in *Moore v. Dempsey*, *Powell v. Alabama*, and *Brown v. Mississippi* made new criminal procedure law in part because the notorious facts of each case exemplified the national scandal of racist southern justice.<sup>48</sup>

Discriminatory enforcement of the law can have widespread effects. He quoted Gunnar Myrdal, who noted that “[t]he vote would be of less importance to groups of citizens in this country if America had what it does not have, namely, *the tradition of an independent and law-abiding administration of local and national public affairs.*”<sup>49</sup>

None of this is to argue that Professor Cover’s diagnosis of U.S. racial apartheid was in itself perfect or complete. Missing from his argument are any predictions about the future. Perhaps this omission is understandable. In 1982, Jim Crow was still in the process of being dismantled. In 1982 school desegregation continued—it did not peak until 1988.<sup>50</sup> Until 1986, the Supreme Court permitted the racial use of peremptory strikes in criminal and other trials.<sup>51</sup> Strong

---

<sup>47</sup> Professor Paul Butler’s article, which proposes that racial disparity in the criminal justice system is intrinsic, begins with a narrative: “Ferguson police charged a man named ‘Michael’ with ‘Making a False Declaration’ because he told them his name was ‘Mike.’” Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1421 (2016).

<sup>48</sup> *Id.* at 1305-06 (citations omitted).

<sup>49</sup> *Id.* at 1308 n.78.

<sup>50</sup> GARY ORFIELD & DANIELLE JARVIE, THE CIVIL RIGHTS PROJECT, BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY (2020); see also Press Release, The Civil Rights Project, *Black Segregation Matters: New Report Details Status of Black Students—Urges Incoming Biden Administration to Act to Confront Pervasive Segregation*, (Dec. 17, 2020), <https://www.civilrightsproject.ucla.edu/news/press-releases/press-releases-2020/black-segregation-matters-new-report-from-the-ucla-civil-rights-project-details-status-of-black-students-2013-urges-incoming-biden-administration-to-act-to-confront-pervasive-segregation>.

<sup>51</sup> See generally *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986). Many cases candidly recognized that it was permissible to strike jurors because of their race. See, e.g., *Commonwealth v. Henderson*, 438 A.2d 951, 953 (Pa. 1981) (“Put still more reductively, the race,

signals that racial progress was in jeopardy, such as the Supreme Court's 1987 holding that statistical evidence of discrimination in the criminal justice system could give rise to no relief,<sup>52</sup> were not so clearly on the horizon in 1982.

It is also clear, in retrospect at least, that Professor Cover could have paid more attention to apartheid in the north. While it is true that the great migration from the South brought many African Americans to the North, based on a plausible belief, that conditions were better there, it would be a grave mistake to claim that there was only insignificant discrimination in employment, education or housing north of the Mason Dixon line. In addition, much more could have been said about justice for Indians, and Latinx people. Nevertheless, as much as Professor Cover deserves credit for other important observations about the law, he should also be recognized for his insights about race: "At almost every critical juncture in our constitutional history, the structure of authority has been tailored to meet the contemporaneous needs of the prevailing patterns of racial domination."<sup>53</sup>

---

creed, national origin, sex or other similar characteristics of a venireman may be proper considerations in exercising peremptory challenges when issues relevant to these qualities are present in the case.")

<sup>52</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>53</sup> Cover, *supra* note 9, at 1304 n.54.