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## LAW AND LITERATURE IN THE WORK OF ROBERT COVER

*Tawia Ansah\**

### ABSTRACT

This Article argues that although Robert Cover seems to discount the role and the practical efficacy of literary texts within the context of legal interpretation, Cover's work nevertheless discloses an extensive exploration of literature and of literary interpretation to frame his own legal interpretive practices. This is particularly the case regarding the development of his theory of law's violence. The Article attempts to show that a close reading of Cover's interpretation of literary texts in the service of his legal analyses discloses a buried theme pursuant to the violence of law: the threshold concept, between law and not-law, of the state of exception. The Article suggests that this concept is key to understanding Cover's theory of law's violence.

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## INTRODUCTION

“Among the Romans a poet was called vates . . . a diviner, foreseer, or prophet . . . .”<sup>1</sup>

In several of his works, particularly in his last essay, *Violence and the Word*,<sup>2</sup> Robert M. Cover seems to discount the importance, for law, of literary interpretation. In that essay, Cover makes two points that underline the distinction and hierarchy between literary and legal interpretation. First, he emphasizes the nexus between legal interpretation and law, particularly law’s violence. He writes, “[l]egal interpretation takes place in a field of pain and death,” followed by, “[l]egal interpretive acts signal and occasion the imposition of violence upon others.”<sup>3</sup> He then clarifies: “[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another.”<sup>4</sup> Second, Cover adumbrates the hierarchy between legal and other interpretive practices, particularly literary interpretation. This clarification takes place mostly within the essay’s footnotes. Noting with approval the literary critic Fredric Jameson’s “priority of the political interpretation of literary texts,”<sup>5</sup> Cover notes: “But while asserting the special place of a political understanding of our social reality, such views do not in any way claim for literary interpretations what I am claiming about legal interpretation—that it is part of the practice of political violence.”<sup>6</sup>

For Cover, the interpretation of literary texts differs substantively from the interpretation of legal texts because the former, unlike the latter, “bear[s] only a remote or incidental relation to the violence of society.”<sup>7</sup> Yet within the body of this and his other works, Cover extensively relies on a masterful interpretation of literary texts.

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<sup>1</sup> SIR PHILIP SIDNEY, AN APOLOGY FOR POETRY (Forrest G. Robinson ed., Bobbs-Merrill 1970) (1580) (emphasis added).

<sup>2</sup> ROBERT M. COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203, 203 (1995) (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 210 n.15 (quoting FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT 17 (1981)).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; see also *id.* at 214 n.20 (“My point here is not that judges do not do the kind of figurative violence to literary parents that poets do, but that they carry out – in addition – a far more literal form of violence through their interpretations that poets do not share.”).

His work is imbued with literature, and his interpretations of stories, myths, plays, and other texts frame his theory of law. I will review three works by Cover where stories and myths elucidate the law's project, whereby law is manifest through the judge's decision. Through the decision, the law is violently impressed upon the human body, either physically (torture) or psychologically (constraint, loss of liberty). I will argue that it is through Cover's literary interpretation that we apprehend a *mythos* underwriting his theory of law's violence. That *mythos* is the story of a "state of exception"<sup>8</sup> as both within and outside of law's rule.<sup>9</sup> The concept is borrowed from the German political theologian Carl Schmitt<sup>10</sup> and elaborated within the work of the Italian philosopher Giorgio Agamben.<sup>11</sup> Although Cover does not specifically theorize the concept of the exception, his theory of law's violence is consistent with Agamben's analysis.

I examine the law-literature nexus within three texts by Cover. First, his monumental work, *Justice Accused*,<sup>12</sup> second, the aforementioned essay, *Violence and the Word*, and third, a short essay entitled, *Obligation: A Jewish Jurisprudence of the Social Order*.<sup>13</sup>

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<sup>8</sup> GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 37 (Daniel Heller-Roazen trans., Stanford 1998) (1995).

The state of nature and the state of exception are nothing but two sides of a single topological process in which what was presupposed as external (the state of nature) now reappears, as in a Möbius strip or a Leyden jar, in the inside (as state of exception), and the sovereign power is this very impossibility of distinguishing between outside and inside, nature and exception, *physis* and *nomos*. The state of exception is thus not so much a spatiotemporal suspension as a complex topological figure in which not only the exception and the rule but also the state of nature and law, outside and inside, pass through one another. It is precisely this topological zone of indistinction, which had to remain hidden from the eyes of justice, that we must try to fix under our gaze.

*Id.*

<sup>9</sup> GIORGIO AGAMBEN, *STATE OF EXCEPTION* 29 (Kevin Attell trans., Univ. Chicago Press 2005) (defining state of exception as "a threshold where . . . law is suspended and obliterated in fact [and] a threshold of undecidability is produced at which *factum* and *ius* fade into each other").

<sup>10</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. Chicago Press 2005) (1922).

<sup>11</sup> See, e.g., AGAMBEN, *supra* notes 8-9 and accompanying text.

<sup>12</sup> See generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>13</sup> See generally ROBERT M. COVER, *Obligation: A Jewish Jurisprudence of the Social Order*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 239 (1995) (1987).

In the first, Cover frames his analysis of the role of the American judge when interpreting slave laws before the abolition of slavery through a literary prism: the story of King Creon in Sophocles's *Antigone*,<sup>14</sup> and the story of Captain Vere in Melville's *Billy Budd*.<sup>15</sup> In each of these stories, Cover attenuates the role of literary interpretation, even as his theory of violence depends upon a particular interpretation of these stories.

In the second work, *Violence and the Word*, a continuation of Cover's interpretation of the judge's role within the American criminal justice system, a central character of the work is also the human victim of law's violence, "the body in pain."<sup>16</sup> Cover draws upon Elaine Scarry's study of that body,<sup>17</sup> then situates that body within a series of stories and myths that elaborate his theory of law's violence within the juridical order.

In the third work, *Obligation*, Cover begins with the originary stories—of autonomous individuals, of the social contract, of the state of necessity, of the Western imperial project—that underwrite the human rights narrative as the source and center of the Western juridical imaginary.<sup>18</sup> He compares this origination narrative to the singular biblical story of Mount Sinai as the source and center of the Judaic juridical order.<sup>19</sup> In both analyses, Western and Judaic, the origination story shapes, projects, and constrains the violence and the disciplinarity, respectively, of the two systems.

I suggest that in all three of these works by Cover, when seen in light of his literary interpretations, Cover's legal interpretation subtends a view of law's violence as impressed upon a human subject properly situated both *within* the rule of law as such, its *nomos*, as well as in a region extrinsic to law, what Agamben, a decade after Cover, will call the "zone of indistinction," also known as the state of exception, created by the emergency powers of the state. In a sense, Cover was a *vater*, a seer, in the unfolding of his theory of law's violence. He had already intimated and, through a literary lens, laid

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<sup>14</sup> SOPHOCLES, *ANTIGONE* 159-204 (David Grene et al. eds., Elizabeth Wyckoff trans., Univ. Chicago Press 1954) (441 B.C.).

<sup>15</sup> See HERMAN MELVILLE, *Billy Budd, Sailor*, in MELVILLE'S SHORT NOVELS 103 (Dan McCall, ed., Norton, 2002) (1924).

<sup>16</sup> COVER, *supra* note 2, at 203.

<sup>17</sup> See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

<sup>18</sup> COVER, *supra* note 13, at 239.

<sup>19</sup> *Id.*

bare what we would later experience as the security state and the immanence of the exception after 9/11.

## I. JUSTICE ACCUSED

Cover opens *Justice Accused* with a brief and expressly non-traditional interpretation of Sophocles's *Antigone*. He writes: "Antigone's star has shown [sic] brightly through the millennia. The archetype for civil disobedience has claimed a constellation of first-magnitude emulators. The disobedient—whether Antigone, Luther, Gandhi, King, or Bonhoeffer—exerts a powerful force upon us . . . ." <sup>20</sup>

Cover goes on to say how much such figures are celebrated in literature and history. But the downside of this celebrity swiftly follows, at least for legal interpretation:

Yet, in a curious way, to focus upon the disobedient and the process of disobedience is to accept the perspective of the established order. It is a concession that it is the man who appeals beyond law that is in need of explanation. With the sole exception of Nazi atrocities, the phenomenon of complicity in oppressive legal systems (oppressive from the actor's own perspective) has seldom been studied. Thus, Creon is present only as a foil for Antigone, not himself the object of the artist's study of human character. In *Antigone* note the curious one-dimensional character of the King. How he comes to make his law and at what cost in psychic terms is not treated at all . . . . Much of the simplicity of Creon lies in the choice of a tyrant as model for legal system. The making of law and its applications are wholly confined to a single will unconstrained by any but the most personal of considerations such as the feelings and actions of a son. <sup>21</sup>

Cover's interpretation of Melville's *Billy Budd* similarly moves away from the victim/protagonist of the play and focuses on the prosecutor/protagonist, the judge who interprets the law, in this case Captain Vere. <sup>22</sup> Cover's interpretation of the novella is continuous

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<sup>20</sup> COVER, *supra* note 12, at 1.

<sup>21</sup> *Id.* at 1-2.

<sup>22</sup> *Id.* at 2.

with the theme of his book: An analysis of the role of the American judge during the antebellum period and his or her internal struggle with the enforcement of the fugitive slave laws.

The two literary works, with which Cover begins his book, frame Cover's analysis of those judges. The works are set side by side. On the one hand, a literary text that paints a thin picture of the judge or lawmaker, in the figure of Creon,<sup>23</sup> and on the other, a literary text that provides a richer portrait in the figure of Captain Vere, who becomes a model of the American judge.<sup>24</sup> The stories introduce the main event of the text and, at one register, seem to disappear once their work as framing devices has been performed. In that sense, the literary texts seem to highlight both the subsidiarity of literature to legal interpretation—to our focus on the judges and to Cover himself—and to register the attenuated stakes involved in the former (literary analysis) as compared with the latter (legal analysis). Once Cover has set the frame, he dispenses with the stories.

But the stories raise questions internal to their own unfolding that don't disappear entirely even after Cover has moved beyond them. That is, despite the attempt to cabin the literary stories at the beginning of this book about law and judges, they nonetheless spill into the text in interesting ways. In a sense, the stories act as a lens through which to see the judges as they wrestle with the law at the crossroads where law and morality intersect.<sup>25</sup> Within each of the two framing stories there is a figure, dispatched by Cover, who nonetheless sits in our peripheral vision like a specter, or an actor awaiting their cue. The fictional figure (Billy Budd or Antigone) sits in relation to a fictional judge (Captain Vere or Creon), much as the real-life antebellum slaves were situated in relation to a real one. Cover trains our eye on the latter dyad, the slave and the judge, and particularly on the judge's lived internal struggle between law and morality, and between natural law and positive law.

We see what the judge sees: a liminal person who, having escaped from the plantation is now in suspension before the judge's decision, neither bonded nor free. The slave is outside the law, but within law's rule. Because of the way Cover has framed his legal analysis of the American judge faced with this liminal figure by

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<sup>23</sup> *Id.*, at 1. See also SOPHOCLES, *supra* note 14.

<sup>24</sup> MELVILLE, *supra* note 15.

<sup>25</sup> COVER, *supra* note 12, at 33 (discussing the rise and fall of natural law theories and their impact on legislation).

introducing the reader to similarly situated fictional characters, we cannot help but see, as we read about the judge's moral and legal dilemmas, those fictional figures *in limine*, at the periphery of our attention. Both Billy Budd and Antigone are threshold characters residing on the border between law and morality, or more precisely, between law and not law.

So, we go back to take another look at those characters. First in *Antigone*, next in *Billy Budd*, to see whether they might elucidate the liminal figure of the slave within Cover's analysis of the judge and, through that analysis, Cover's theory of the law's projection. We return to the (literary) frame as the site, in other words, of a threshold of law.

As Cover suggests, *Antigone* may well be celebrated as "the archetype of civil disobedience"<sup>26</sup> and Creon may indeed be a "foil for Antigone" and a "tyrant."<sup>27</sup> But there is something indistinct about the system against which she rebels: it is both the "established order" and an arbitrary ban pursuant to a state of necessity.<sup>28</sup> Creon's ban evinces the crisis of legitimacy in Thebes following the civil war between Antigone's twin brothers Eteocles and Polyneices, both of whom claimed rulership of Thebes after their father Oedipus's death, and both of whom died in battle at the gates of Thebes.<sup>29</sup> The war and the brothers' deaths do not resolve the issue of sovereign authority. But in war's wake, someone must be named as the legitimate heir to Oedipus's throne. Their uncle Creon claims the throne and, as if at the flip of an indifferent, aleatory coin, chooses to honor Eteocles as a hero and Polyneices as the would-be usurper. Creon's ban sentences to death anyone who would honor Polyneices with burial rites.<sup>30</sup>

The ban can be lifted at the behest of the sovereign. The ban, by its very indifference, determines sovereignty within the state of emergency that grips Thebes. Creon lifts the ban toward the end of the play, albeit too late to save Antigone, his son Haemon and his wife Eurydice, all of whom die by their own hands.<sup>31</sup>

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<sup>26</sup> *Id.* at 1-2.

<sup>27</sup> *Id.*

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

<sup>29</sup> SOPHOCLES, *supra* note 14, at 159.

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.*, SOPHOCLES, *supra* note 14, at 96, l. 1105-06. Creon heeds Teiresias and the Chorus: "How hard, abandonment of my desire./ But I can fight necessity no more." *Id.*



Before the ban, the male citizens of Thebes would have had a kind of political subjectivity or agency, at least within the ancient world of the play. However, the women of the play—Antigone, her sister Ismene, and Eurydice, Creon’s wife—would have had a different status. According to Agamben, under the Grecian social order,<sup>32</sup> women would not have possessed this element of subjectivity, this political substance known to the Greeks as *bios*. Agamben defines *bios* as follows:

The Greeks had no single term to express what we mean by the word “life.” They used two terms that, although traceable to a common etymological root, are semantically and morphologically distinct: *zoē*, which expressed the simple fact of living common to all living beings (animals, men, or gods), and *bios*, which indicated the form or way of living proper to an individual or a group.<sup>33</sup>

Agamben notes further that, “[i]n the classical world, however, simple natural life is excluded from the *polis* in the strict sense, and remains confined—as merely reproductive life—to the sphere of the *oikos*, ‘home’ . . . .”<sup>34</sup> In this sense, women did not possess *bios*, only *zoē*. Unlike Eurydice, however, Antigone ventured forth within the public space, perhaps because she was, as the daughter of the king (Oedipus), an exception to the rule of the *oikos*. She has more than a reproductive role; in an earlier play within the trilogy, *Oedipus at Colonus*,<sup>35</sup> Antigone tends to her father, now blinded by his own hand, functioning as his eyes as he navigates the world. When each member of her family dies, she performs the funeral rites.<sup>36</sup> As such, Creon’s ban, forcing her to retreat from her role within the public sphere, but also driving her out of the city gates to “cross the state’s decree,”<sup>37</sup> complicates her status. It strips her of what limited *bios* she possessed, but also invests her with a new, liminal political subjectivity. At the same time, the ban returns her to the “established order,” where women are *zoē*. For

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<sup>32</sup> AGAMBEN, *supra* note 8, at 1-2.

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

<sup>34</sup> *Id.* at 2.

<sup>35</sup> SOPHOCLES, *OEDIPUS AT COLONUS* 77 (David Grene et al. eds., Robert Fitzgerald trans., Univ. Chicago Press 1954) (441 B.C.).

<sup>36</sup> SOPHOCLES, *supra* note 14, at 189, l. 891 (describing her various public and private roles).

<sup>37</sup> *Id.* at 190, l. 908 (to bury her brother, Polynices).

instance, at one point, Creon grows tired of the arguments advanced by Ismene in Antigone's defense and, in reference to both sisters, orders his slaves to "take them in. They must be women now. No more free running." Creon here expresses this sense of these two women, under the ban, as situated within a zone of indistinction, neither one thing nor another.<sup>38</sup>

The ban has disclosed this fluid uncertainty between the *polis* and the *oikos/zōon*, the human and the animal. It is a zone of indifference<sup>39</sup> between the marriage chamber and the tomb,<sup>40</sup> the living and the dead.<sup>41</sup> Antigone is the figure of the exception, of subjection to what Agamben describes as "the very limit of the juridical order."<sup>42</sup> This, as we enter the world of the American judge and the established juridical order, is what we see within the corner of our eye, troubling and unsettling, like the black figure fleeing across the plain and into the law's shadowy horizon.

A closer look at *Billy Budd* suggests a similar configuration of in-between-ness occurring within the world of the novel. Ostensibly, as noted, the novel frames Cover's interpretation of the role of the American judge. The subject of the novel is the law's enforcer, Captain Vere. Cover writes, "Melville's Captain Vere in *Billy Budd* is one of the few examples of an attempt to portray the conflict patterns of Creon or Creon's minions in a context more nearly resembling the choice situations of judges in modern legal systems."<sup>43</sup> Cover then describes the event that precipitated the crisis in the novel:

Struck dumb by the slanderous charges [made by Claggart against Billy Budd], Billy strikes out and kills the mate with a single blow. Captain Vere must instruct

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<sup>38</sup> *Id.* at 179, l. 578-79.

<sup>39</sup> AGAMBEN, *supra* note 9, at 23.

<sup>40</sup> SOPHOCLES, *supra* note 14, at 189, l. 891-92. Antigone says, "O tomb, O marriage-chamber, hollowed out/ house that will watch forever, where I go." *Id.*

<sup>41</sup> *Id.* at 195, l. 1068. Teiresias says to Creon: "For you've confused the upper and lower worlds. You sent a life to settle in a tomb; you keep up here that which belongs below/ the corpse unburied, robbed of its release." *Id.*

<sup>42</sup> AGAMBEN, *supra* note 9, at 23 ("In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order.").

<sup>43</sup> COVER, *supra* note 12, at 2.

a drumhead court on the law of the Mutiny Act as it is to be applied to Billy Budd—in some most fundamental sense “innocent,” though the perpetrator of the act of killing the first mate.<sup>44</sup>

A central tension of the story is Captain Vere’s acquiescence in following the law of the King, subject to which Budd is guilty, rather than the law of nature or his own conscience, under which Budd is in some originary sense “innocent.” The “scruples” of the judge’s conscience in enforcing an unjust law, in the case of the slave laws, is then the subject of Cover’s analysis in *Justice Accused*.<sup>45</sup>

*Billy Budd* is similar to *Antigone* in that it takes place outside the *polis* and is set in a time of crisis: mutinies on various of the navy’s fleet are rampant, and the war ship sails on the high seas under the shadow of an “Undeclared War” with France.<sup>46</sup> The story also raises the question of jurisdiction: whether the law to be applied on board the war ship, named “HMS Bellipotent,” is maritime law or martial law.<sup>47</sup> As with *Antigone*, the novel takes place within a legal, moral and political zone of indistinction.

First, Billy Budd is not really a sailor by training. He is a merchant fisherman, and in these critical times is drafted onto the warship. The “welkin-eyed Billy Budd—or Baby Budd,”<sup>48</sup> is removed from a merchant vessel called “The Rights of Man” and “impressed” into the King’s service on the “Bellipotent,” literally meaning “mighty in war.”<sup>49</sup> He is stripped, therefore, of freedom and of choice: “Billy made no demur. But, indeed, any demur would have been as idle as the protest of a goldfinch popped into a cage.”<sup>50</sup> Much like *Antigone*, Budd is reduced to *zoē* and subject merely to the ban. In this ethereal state of law and/as nature—the blue sky, the goldfinch—he is already slated for death.<sup>51</sup> And like a beast, he will strike out blindly when in pain.

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<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 2.

<sup>46</sup> See e.g., ALEXANDER DE CONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-801* (1966).

<sup>47</sup> COVER, *supra* note 12, at 5.

<sup>48</sup> MELVILLE, *supra* note 15, at 103.

<sup>49</sup> *Id.* at 104-05.

<sup>50</sup> *Id.*

<sup>51</sup> GIORGIO AGAMBEN, *MEANS WITHOUT END: NOTES ON POLITICS* 21 (Vincenzo Binetti & Cesare Casarino trans., 2000) (“When their rights are no longer the rights

Captain Vere knows and sees this. When Budd kills Claggart, Captain Vere says: “Struck dead by an angel of God! Yet the angel must hang!”<sup>52</sup> In short, even before the drumhead trial, the task of interpreting the Mutiny Act, which originated in a state of exception during the Glorious Revolution of 1688 to “restrict” martial law<sup>53</sup> and *persisted* the zone of indistinction within British imperial law, Budd is already a dead man. Budd’s later defense for the crime was that he lost language in the moment: “Could I have used my tongue I would not have struck him. But he foully lied to my face and in presence of my Captain, and I had to say something, and I could only say it with a blow, God help me!”<sup>54</sup> But Budd had already been reduced, stripped of *bios*, of demurrer, and of language. His blow, much like Antigone’s compulsion to bury her brother Polyneices despite the ban and knowing that it will lead to a death sentence,<sup>55</sup> is the only act available to him. And in the end, the story of Billy Budd, Captain Vere and John Claggart was recast, within the official reports, as a “crime” of “extreme depravity”; a knife is involved, Budd is reconfigured as a foreign “assassin” masquerading as an Englishman, and with his punishment the established order is restored: “The criminal paid the penalty of his crime. The promptitude of the punishment has proved salutary. Nothing amiss is now apprehended aboard *H.M.S. Bellipotent*.”<sup>56</sup>

Although he does not name the juridical space within which the story takes place as a state of exception, Cover seems sensitive to this interpretation. He notes the analogy between the legal regime governing the “Bellipotent” and the antebellum slave laws, outlining five “aspects” of the legal system’s formal character, as follows:

First, there is explicit recognition of the role character of the judges...It is a uniform, not nature, that defines obligation. Second, law is distinguished from both the transcendent and the personal sources of obligation. The law is neither nature nor conscience. Third, the law

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of the citizen, that is when human beings are truly sacred, in the sense that this term used to have in the Roman law of the archaic period: doomed to death.”).

<sup>52</sup> MELVILLE, *supra* note 15, at 103.

<sup>53</sup> See, e.g., Mutiny Act, 1 W. & M., ch. 5 (1688).

<sup>54</sup> MELVILLE, *supra* note 15, at 103.

<sup>55</sup> SOPHOCLES, *supra* note 14, at 162, l. 86 (Antigone saying to Ismene: “Dear God! Denounce me. I shall hate you more/if silent, not proclaiming this to all.”).

<sup>56</sup> MELVILLE, *supra* note 15, at 168-69.

is embodied in a readily identifiable source which governs transactions and occurrences of the sort under consideration: here an imperial code of which the Mutiny Act is a part. Fourth, the will behind the law is vague, uncertain, but *clearly not* that of the judges. It is here “imperial will” which, in (either eighteenth- or nineteenth-century terms as applied to England, is not very easy to describe except through a constitutional law treatise. But, in any event, it is not the will of Vere or his three officers. Fifth, a corollary of the fourth point, the judge is not responsible for the content of the law but for its straightforward application.<sup>57</sup>

Elsewhere, Cover notes that “[w]e know Melville’s predilection to the ship as microcosm for the social order,” and adds that, “[t]he fugitive slave was very Budd-like, though he was as black as Billy was blonde.”<sup>58</sup> Furthermore,

[t]he Mutiny Act admitted of none of the usual defenses, extenuations, or mitigations. If the physical act was that of the defendant, he was guilty. The Fugitive Slave Act similarly excluded most customary sorts of defenses. The alleged fugitive could not even plead that he was not legally a slave so long as he was the person alleged to be a fugitive. The drumhead court was a special and summary proceeding; so was the fugitive rendition process. In both proceedings the fatal judgment was carried out immediately. There was no appeal.<sup>59</sup>

The ship, then, embodies a zone of indifference between land and sea, war and peace, soldier and civilian, and between vague, uncertain law and raw fact. The fugitive slave, like Budd, was *zoē*.

Billy’s fatal flaw was his innocent dumbness. He struck because he could not speak. So, under the Fugitive Slave Acts, the alleged fugitive had no right to speak. And, as a rule, slaves had no capacity to testify against their masters or whites, generally. Billy Budd partakes

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<sup>57</sup> COVER, *supra* note 12, at 3.

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.*

of the slave, generalized. He was seized, impressed, from the ship *Rights of Man* and taken aboard the *Bellipotent* . . . . The Mutiny Act was justified because of its necessity for the order demanded on a ship in time of war. So the laws of slavery, often equally harsh and unbending, were justified as necessary for the social order in antebellum America. Moreover, the institution itself was said to have its origin in war.<sup>60</sup>

The figure of the slave, like that of the fictional characters in Cover's framing narratives, founds and centers Cover's unfolding interpretation of the judge's role and, more to the point, his theory of the law and its violent application. The movement of the figure from *bios* to *zoē*, to an undecidable and undeclared threshold in between them within the ban underwrites Cover's later examinations of law's violence. The human body, enmeshed within the framing narratives of human pain, suffering, and silence, becomes the "Word."

## II. VIOLENCE AND THE WORD

In *Violence and the Word*, Cover again turns to the role of the judge and the judge's interpretation of the law as an act of violence:

Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life . . . . Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.<sup>61</sup>

Legal interpretation transforms the legal text into a substantive *act*, an act that has real effects on human bodies. The *logos* of law is an imposition of violence. Once again, Cover turns to stories, to literature and myths, to narrow the lens and specify the law's teleology in acts of violence.

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<sup>60</sup> *Id.*

<sup>61</sup> COVER, *supra* note 2, at 203.

As much as each of the literary characters within the previous section were “impressed” with the word and transformed from *bios* to *zoē*, *Violence and the Word* takes a different turn. In *Violence*, within Cover’s stories of the victim/accused, we see a further development or clarification, something like the transmutation from *zoē* to *logos*. This movement takes place in two seemingly contradictory directions. On the one hand, at the center of the law’s teleological violence is the body in pain, a body destroyed and silenced,<sup>62</sup> as were Antigone, Budd, and the fugitive slave. On the other hand, that very silence subtends or reimagines a “re-membering”<sup>63</sup> of the world destroyed in the wake of law’s inscription.<sup>64</sup> Cover tells the story of Rabbi Akibba’s martyrdom, which involved the opposite of physical inscription: “With iron combs they scraped away his skin as he recited *Sh’ma Yisrael*, freely accepting the yoke of God’s Kingship.”<sup>65</sup> Cover adds in a footnote to the story: “The word ‘martyr’ stems from the Greek root *martys*, ‘witness,’ and from the Aryan root *smer*, ‘to remember.’ Martyrdom functions as a re-membering when the martyr, in the act of witnessing, sacrifices herself on behalf of the normative universe which is thereby reconstituted, regenerated, or recreated.”<sup>66</sup> Scarry herself notes this duality of pain. On the one hand, “pain comes unshareably into our midst as at once that which cannot be denied and that which cannot be confirmed.”<sup>67</sup> On the other hand, and notwithstanding this radical and world-destroying unsharability of pain, Scarry adds that sometimes, even belatedly, pain begets the word:

Though the total number of words may be meager, though they may be hurled into the air unattached to any framing sentence, something can be learned from these verbal fragments not only about pain but about the human capacity for word-making. To witness the

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<sup>62</sup> *Id.* at 205 (“‘Interpretation’ suggests a social construction of an interpersonal reality through language. But pain and death have quite other implications. Indeed, pain and death destroy the world that ‘interpretation’ calls up. That one’s ability to construct interpersonal realities is destroyed by death is obvious, but in this case, what is true of death is true of pain also, for pain destroys, among other things, language itself...”) (citing SCARRY, *supra* note 17, at 4).

<sup>63</sup> *Id.* at 207 n.9.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 207 (quoting MAZHOR FOR ROSH HASHANAH AND YOM KIPPUR, A PRAYER BOOK FOR THE DAYS OF AWE 555-57 (J. Harlow ed., 1972)).

<sup>66</sup> *Id.* at 206-07 n.9.

<sup>67</sup> SCARRY, *supra* note 17, at 4.

moment when pain causes a reversion to the pre-language of cries and groans is to witness the destruction of language; but conversely, to be present when a person moves up out of that pre-language and projects the facts of sentience into speech is almost to have been permitted to be present at the birth of language itself.<sup>68</sup>

Cover makes clear not only that pain and death are at the heart of the judicial act, but that they should be:

As long as death and pain are part of our political world, it is essential that they be at the center of the law. The alternative is truly unacceptable—that they be within our polity but outside the discipline of the collective decision rules and the individual efforts to achieve outcomes through those rules.<sup>69</sup>

Cover calls this movement the “domestication of violence,”<sup>70</sup> and because the torture victim frames the idea of law’s destination, this phrasing carries intimations of the *bios* and *zoē* transmutation within the exception that blurs the lines between *polis* and *oikos*.

Cover concludes the essay with the idea that law’s rule is univocal, unidirectional, creating a “tragic limit” to the common meaning that can be achieved through (legal) interpretation. He elaborates as follows:

The perpetrator and victim of organized violence will undergo achingly disparate significant experiences. For the perpetrator, the pain and fear are remote, unreal, and largely unshared. They are, therefore, almost never made a part of the interpretive artifact, such as the judicial opinion. On the other hand, for those who impose the violence the justification is important, real and carefully cultivated. Conversely, for the victim, the justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear that is suffered.<sup>71</sup>

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<sup>68</sup> *Id.* at 6.

<sup>69</sup> COVER, *supra* note 2, at 203.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 238.



When viewed through the lens of the exception, however, the sense of unsharability of pain is indelible but also part of the false narrative of necessity as a motive for the violence, particularly of torture.<sup>72</sup> It is a way for power to hide its own vulnerability: the torturer “suffers” by “having to do” the deed.<sup>73</sup> The torturer, for Scarry, can only act if he tells a story of his own victimhood:

Every weapon has two ends. In converting the other person’s pain into his own power, the torturer experiences the entire occurrence exclusively from the nonvulnerable end of the weapon. If his attention begins to slip down the weapon toward the vulnerable end, if the severed attributes of pain begin to slip back to their origin in the prisoner’s sentience, their backward fall can be stopped, they can be lifted out once more by the presence of the motive [i.e., for information, under the exigencies of the necessity or the exception] . . . Power is cautious. It covers itself. It bases itself in another’s pain and prevents all recognition that there is ‘another’ by looped circles that ensure its own solipsism.<sup>74</sup>

However, there is no certainty that the subjection of the body to voiceless sentience and, with it, power’s vindication will prevail, as Cover’s story of the martyr indicates. Steve Larocca also argues that “pain is an authoritative and unpredictable ‘semiosomatic’ force: [p]ain demands signification . . .” Larocca further notes that “pain seeks to speak to the world, hailing and troubling us, but not in the

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<sup>72</sup> SCARRY, *supra* note 17, at 58.

<sup>73</sup> *Id.* (“The motive for torture is to a large extent the equivalent, though in a different logical time, of the fictionalized power; that is, one is the falsification of the pain prior to the pain and one the falsification after the pain. The two together form a closed loop of attention that ensures the exclusion of the prisoner’s human claim. Just as the display of the weapon (or agent or cause) makes it possible to lift the attributes of pain away from the pain, so the display of motive endows agency with agency, cause with cause, thereby lifting the attributes of pain still further away from their source. If displaying the weaponry begins to convert the prisoner’s pain into the torturer’s power, displaying the motive (and the ongoing interrogation means that it is fairly continually displayed) enables the torturer’s power to be understood in terms of his own vulnerability and need. A motive is of course only one way of deflecting the natural reflex of sympathy away from the actual sufferer.”).

<sup>74</sup> *Id.* at 59.

limited language of translucent referentiality.”<sup>75</sup> In short, the body in pain tells a story: it signifies the solipsistic narrative loop, the zone of anomie against the grain of law’s ostensible projection as spatiotemporally transcendent, transparent, and indifferent.

The stories within *Violence and the Word*, those of the body in pain, confirm and trouble Cover’s teleological theory of law’s violence. In the end, speaking of legal interpretation as inextricably linked to law’s violence, Cover notes that, “[b]etween the idea and the reality of common meaning falls the shadow of the violence of law.”<sup>76</sup> The shadow signifies the law’s anxiety, a penumbra “where inside and outside do not exclude each other but rather blur with each other.”<sup>77</sup>

### III. OBLIGATION: A JEWISH JURISPRUDENCE

Stories frame and center Cover’s analysis of law’s projection in this 1987 essay, *Obligation*. And like the stories within the previous sections—literary stories in *Justice Accused*, and the tales of the body in pain that are screamed, whispered and silenced in *Violence and the Word*—the stories, or rather the originary myths, within this essay also trouble and haunt Cover’s theory of law and its violence.

*Obligation* compares the two foundational legal traditions: that of the “post-enlightenment secular society of the West” with “Judaism [which] is, itself, a legal culture of great antiquity.”<sup>78</sup> Language is important, Cover notes, and “every legal culture has its fundamental words.”<sup>79</sup> For the Western legal traditions, the word is “rights,” and for the Judaic legal tradition, it is “‘mitzvah,’ which literally means commandment but has a general meaning closer to ‘incumbent obligation.’”<sup>80</sup>

Cover puts the two words “in a context—the contexts of their respective myths. For both of us [sic] these words are connected to

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<sup>75</sup> Clifford van Ommen et al., *The Contemporary Making and Unmaking of Elaine Scarry’s The Body in Pain*, 9 SUBJECTIVITY 333, 336-37 (2016) (“Instead of the appraisal that arises from pain being a matter of brute fact, its phenomenology is related to its intensity, quality, duration, context, and its meaning to the self-in-pain and others.”).

<sup>76</sup> COVER, *supra* note 2, at 203.

<sup>77</sup> AGAMBEN, *supra* note 9, at 23 (explaining that a torture victim indicates the zone “in which the very limit of the juridical order is at issue”).

<sup>78</sup> COVER, *supra* note 13, at 239.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 240.

fundamental stories and receive their force from those stories as much as from the denotative meaning of the words themselves.” He continues:

The story behind the term “rights” is the story of social contract. The myth postulates free and independent if highly vulnerable beings who voluntarily trade a portion of their autonomy for a measure of collective security. The myth makes the collective arrangement the product of individual choice and thus secondary to the individual. “Rights” are the fundamental category because it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else.<sup>81</sup>

As to mitzvah, he writes:

The basic word of Judaism is obligation or mitzvah. It, too, is intrinsically bound up in a myth—the myth of Sinai. Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy. Sinai is a collective—indeed, a corporate—experience. The experience at Sinai is not chosen. The event gives forth the words which are commandments . . . .<sup>82</sup>

The exercise of powers differs between the two systems, predicated on the stories of their origin and the development through time of their execution. Indeed, Cover notes that the western rule of law is violent, whereas the Judaic juridical order might be described as disciplinary: “Nonetheless, there remains a difference between wielding a power which draws on but also depends on pre-existing social solidarity, and, welding one which depends on violence.”<sup>83</sup> The Judaic system depends upon cohesion, whereas Western law depends upon coherence: “In a situation in which there is no centralized power and little in the way of coercive violence, it is critical that the mythic center of the Law reinforce the bonds of solidarity. Common, mutual, reciprocal obligation is necessary.”<sup>84</sup> This standard is juxtaposed

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 242.

<sup>84</sup> *Id.*

against the western law: “The jurisprudence of rights, on the other hand, has gained ascendance in the Western world together with the rise of the national state with its almost unique mastery of violence over extensive territories.”<sup>85</sup> For its legitimacy, the state must, amongst other things, “tell a story about the State’s utility or service to us.”<sup>86</sup>

The line, and the predicate that authority rests with the consent’s narrative of individuals to give up some freedom for the security provided by the collective, is both enfolded by and a check upon the projection of univocal power seen in the article, *Violence and the Word*. But here, see the dual movement between law as outward-looking and indifferent, and the individual at the threshold between consent and silence. “There is a sense in which the ideology of rights has been a useful counter to the centrifugal forces of the western nation state while the ideology of mitzvot or obligation has been equally useful as a counter to the centripetal forces that have beset Judaism over the centuries.”<sup>87</sup> The discourse on human rights, as an originary myth, as mere *telos*, awaits interpretation. It awaits its legal inscription as well as its literary, moral, political substance. Human beings conceived as bearers of rights are aleatory, awaiting their inscription as the *logos*:

Rights, as an organizing principle, are indifferent to the vanity of varying ends. But mitzvot because they so strongly bind and locate the individual must make a strong claim for the substantive content of that which they dictate. The system, if its content be vain, can hardly claim to be a system. The rights system is indifferent to ends and in its indifference can claim systemic coherence without making any strong claims about the fullness or vanity of the ends it permits.<sup>88</sup>

Once again, we see the story as framing and encompassing the legal field: myth becomes *mythos*, fusing the law and the exception: system as not-system, the force of law as “force-of-law.”<sup>89</sup>

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<sup>85</sup> *Id.* at 243.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 244.

<sup>89</sup> AGAMBEN, *supra* note 9, at 39 (“The state of exception is an anomic space in which what is at stake is a force of law without law (which should therefore be written: force-of-law). Such a ‘force-of-law,’ in which potentiality and act are radically

But if the story is “empty,” how can it trouble the juridical order and act to constrain “the most far-reaching claims of the State?”<sup>90</sup> Cover concludes this essay by figuratively fusing the two originary myths with which he framed the interpretation of the law. Noting that “Sinai and social contract both have their place,” he adds: “I do believe and affirm the social contract that grounds those rights. But more to the point, I also believe that I am commanded—that we are obligated—to realize those rights.”<sup>91</sup>

#### IV. CONCLUSION

Cover’s literary interpretive practices within his legal interpretive practices have permitted me to explore the underlying implications of the stories and myths that populate his work in developing and clarifying his theory of law’s rule. I have suggested that Cover’s legal interpretation is on all fours with the elaboration of Carl Schmitt’s political theory of the state of exception, as developed and extended by Agamben. This interpretation is particularly the case when Cover trains his gaze on the victims of law’s violence, actual and imagined: at the Theban gates, or on the high seas, or within the anomie between rule and exception, bondage and freedom, *physis* and *logos*, life and death.

Within each of the stories, whether fictional, mythic, legal, originary, and all too lived within our own time and our own experience, we see the blurring of the line, the indistinction between the rule of law and law’s suspension within a state of exception. Cover’s work shows how the irruption within our time of *zoē*, signified by the body in pain, underpins the entire established juridical order.<sup>92</sup> And when he declares in *Obligation* that it is through a suture of rights and obligations that the law’s violence might be constrained, perhaps

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separated, is certainly something like a mystical element, or rather a *fictio* by means of which law seeks to annex anomie itself.”).

<sup>90</sup> COVER, *supra* note 13, at 239.

<sup>91</sup> *Id.* at 248.

<sup>92</sup> AGAMBEN, *supra* note 8, at 3. (“According to Foucault, a society’s ‘threshold of biological modernity’ is situated at the point at which the species and the individual as a simple living body become what is at stake in society’s political strategies . . . . What follows is a kind of bestialization of man achieved through the most sophisticated political techniques. For the first time in history, the possibilities of the social sciences are made known, and at once it becomes possible both to protect life and to authorize a holocaust.”).

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he is also suggesting – “we can use as many good myths in [the universal struggle for human dignity and equality] as we can find”<sup>93</sup>— that the law needs literature *au fond*, all the way down to its mythic foundations. It might be the law stories, then, or stories that *become* the law, that will mind the tragic gap, the suspension, between the idea of law and its reality.

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<sup>93</sup> COVER, *supra* note 13, at 239.