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## Remembrance, Group Gripes, and Legal Frictions: Rule of Law or Awful Lore?

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## REMEMBRANCE, GROUP GRIPES, AND LEGAL FRICTIONS: RULE OF LAW OR AWFUL LORE?

*Aviam Soifer*\*

*“History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we would become; only history can tell us how hard it will really be to become that.”<sup>1</sup>*

### ABSTRACT

The rise of groups that honor and seek to advance their particular imagined or real pasts has seemed increasingly dangerous in the years since Bob Cover’s death in 1986. This essay briefly examines the challenges such groups pose to Bob’s hope, and even his faith, that law and legal procedure could be bridges to more just worlds. It may not be ours to finish consideration of how to distinguish the Rule of Law from Awful Lore—both composed of exactly the same letters—but we should continue that task, with remembrance, even within our troubled world.

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He expresses great gratitude to the *Shabbos* group members of ancient days, and to the current staff members and faculty of the Touro Law School. He also extends his thanks to the other Conference presenters and attendees, and to the entire *Touro Law Review* staff—with special appreciation to Samantha Karpman, Chris Palmieri, and Ariel Berkowitz, as well as to his research assistant, Jake Honigman. As always, Marlene Booth, Martha Minow, Carol Weisbrod, and Steve Wizner provided wonderful conversations as well as great help—enlivened by their own loving memories of Bob Cover. Eloquent remarks by Diane and Avidon Cover made the Conference particularly memorable, and—characteristically—Sam Levine was a wonderful, knowledgeable host, and an inspiration.

<sup>1</sup> Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179, 190 (1985).

2011

## I. ORIGINS

It is wonderful that we still gather to remember Robert Cover's work and to honor Bob more than thirty-five years after his sudden death. Someone born the year we lost Bob is old enough to run for President<sup>2</sup>—and it is about time. Yet, this conference itself underscores how fresh and provocative remembrance of Bob still is for those of us gathered for it, and for countless others who have become Bob's students since we lost him in 1986. We share awareness of the enormity of his grievous loss for the world of challenging ideas and genuine inspiration.

My theme in this brief essay is remembrance, and what a vital—and at times dangerous—concept remembrance turns out to be. Specifically, much of what we have learned about remembrance in the years since Bob died contains sobering lessons. It also underscores the importance of Bob's interest in history, myth, and complicity. Since Bob's death, we have learned considerably more about how intricately intertwined these three concepts can be. If only we could question, and undoubtedly argue, with Bob about our current troubled reality!

Bob brilliantly taught many of us about the *jurisgenerative* qualities of community, and also about the *jurispathic* power of law. Poetry, Bob argued, proves no match for the iron fist of legal force, even when the state's legal fist is wrapped in velvet.<sup>3</sup> The pen is not, in fact, mightier than the sword. In virtually any contest for judicial action, state force will win, even within the terms of a judge's explanation. At times, as Bob emphasized, this may require a heavy dose of cognitive dissonance as a judge who feels conflicted about the justice of a law nonetheless insists on following it, often claiming that there is no other choice.<sup>4</sup>

In the time since Bob died, we have developed a greater—and more sobering—understanding of how greatly groups themselves may be dangerous, even as they become what might be termed *jurisretrospective*. Sadly, we now better understand that the past—imagined or real—may easily be used to justify even the unjustifiable,

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<sup>2</sup> U.S. CONST. art. II § 1, cl. 5.

<sup>3</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1606, 1609-10, 1615-16 (1986) [hereinafter *Violence and the Word*]; see also Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 815-17 (1986) [hereinafter *The Bonds of Constitutional Interpretation*].

<sup>4</sup> ROBERT M. COVER, JUSTICE ACCUSED 195-267 (1975).

including horrific violence and overt challenges to the rule of law. To an extent, Bob's hard-nosed and far-reaching analysis of law included a soft spot for groups and for the norms generated by communities.<sup>5</sup> Throughout the bloody years since Bob's brilliant work was cut short, we could have used his assistance in refining his relative embrace of groups.<sup>6</sup> Society seems to be experiencing an overload of what Bob termed "committed action"<sup>7</sup>; the puzzle is how to distinguish the kind of group resistance Bob celebrated from dangerous variations on this theme. Unfortunately, we cannot rely on the "committed actors" themselves. Too often, we have seen that committed contrarians tend to believe that their particular group is engaged in a sacred mission. The entire world has witnessed great danger from such groups, and some who stormed the Capitol on January 6, 2021 only constitute a familiar, recent example.<sup>8</sup> Bob claimed that it is "committed action that distinguishes law from literature,"<sup>9</sup> but we now seem to be encountering too much committed group action that disregards the law entirely.

Groups—many of whom define themselves through their shared specific gripes against government, general society, and other groups—are vital to the lives we actually live.<sup>10</sup> But they have long been, and are still, substantially "undertheorized" in mainstream Anglo-American law.<sup>11</sup> The frictions that groups create in law tend to be papered over, if not entirely ignored. Though the very legal existence

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<sup>5</sup> He celebrated a "cohesive community," the kind "already self-conscious and lawful by its own lights." ROBERT M. COVER, *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 151 (Martha Minow et al. eds., Univ. Mich. Press 1995) [hereinafter *NARRATIVE, VIOLENCE, AND THE LAW*]. It was only such a group that could make "[t]he persistent effort to live a law other than that of the state's officials." Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 50 n.137 (1983) [hereinafter *Nomos and Narrative*].

<sup>6</sup> See *infra* Section IV.

<sup>7</sup> *Nomos and Narrative*, *supra* note 5, at 49.

<sup>8</sup> *Capitol Riot: One Year Later*, AP NEWS, <https://apnews.com/hub/capitol-siege> (last visited Feb. 27, 2022).

<sup>9</sup> *Nomos and Narrative*, *supra* note 5, at 49.

<sup>10</sup> See, e.g., KAI ERIKSON, *WAYWARD PURITANS* (1966); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1905); EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (1895).

<sup>11</sup> I wrote a book about the importance of the diverse groups in which we live and their place in American legal history and constitutional law. At best, I may have wrestled the concept "freedom of association" to a draw. AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* (1995). See also CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* (1980); John V. White, *Nomos and Nation: On Nation in an Age of "Populism,"* 37 TOURO L. REV. 2035 (2022).

of many groups remains anchored in Anglo-American legal fictions, in reality some groups have become increasingly powerful and threatening, at even an existential level. Meanwhile, we have hardly begun to grasp the parameters of the legal rights of dissenters within groups.<sup>12</sup> In addition, we know that governmental officials heavily rely on informants from within groups, but the recruitment and handling of these informants remains largely subterranean.

What would Bob say? Our lived experience has, if anything, deepened the paradox within Bob's description of himself as an anarchist who loves law. It has added pressure, but also emphasis, on Bob's belief that law may be the only bridge between "the 'world-that-is' . . . [and] 'worlds-that-might-be,'"<sup>13</sup> between our troubling reality and our shared longing for a better future. Indeed, law "*is* the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there."<sup>14</sup> Yet even in wrestling with the traditions of the Jews—and Bob happily, deeply and viscerally identified with the Jewish people—he never came to rest. He delved knowledgeably and creatively into Jewish thought, though he did not get to produce the American Talmud he had proposed at age sixteen.<sup>15</sup> And he remained fascinated by internal Jewish dissenters. These included, for example, the rabbis in Safed who sought to restore the rabbinic line in 1535.<sup>16</sup> Bob also often talked about how the Babylonian Talmud dealt with Rebellious Elders, though I never got to read or hear his views about the relatively few examples of Jewish excommunication, which are discussed briefly in Section IV.<sup>17</sup>

Bob's love for, and illumination of, complexities triggered by opposition to mainstream authority provokes a core question: Why did Bob choose to become an expert on jurisdiction, and to do pioneering

<sup>12</sup> Zechariah Chafee, Jr., *Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 990, 993 (1930). See generally CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002).

<sup>13</sup> Cover, *supra* note 1, at 181; *Nomos and Narrative*, *supra* note 5, at 9.

<sup>14</sup> Cover, *supra* note 1, at 181 (emphasis added).

<sup>15</sup> See generally Stephen Wizner, *The Life and Work of Robert Cover*, 37 TOURO L. REV. 1739 (2022); Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes in Robert Cover's Nomos and Narrative*, 96 YALE L.J. 1836 (1987).

<sup>16</sup> Robert Cover, *Bringing the Messiah Through Law: A Case Study*, in RONALD PENNOCK & JOHN W. CHAPMAN, RELIGION, MORALITY, AND THE LAW: NOMOS XXX 201 (N.Y.U. Press 1988); see also Aviam Soifer, *Preface*, in NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 5, at vii, x, xii.

<sup>17</sup> See *infra* Section IV.

work about civil procedure and how and why it matters?<sup>18</sup> There is a clue in the fact that he insisted, as learned and innovative a theoretical thinker as Bob assuredly was, that his office be located within the Yale Law School Clinic. He then would be available to offer practical legal help on procedural intricacies in real cases, while enjoying the zesty tumult of everyday lawyering. Yet, Bob also boldly challenged assumptions about jurisdiction and the other elements of procedure that constitute the grammar of the law. For instance, he wrote: “We construct meaning in our normative world by using the irony of jurisdiction, the comedy of manners that is *malum prohibitum*, the surreal epistemology of due process.”<sup>19</sup> This cryptic sentence reveals much—not least Bob’s abiding commitment to recognizing incongruity and humor, even in unexpected realms.

More than most law professors—and certainly more than most lawyers and judges—Bob recognized that there are high stakes in the irony of the rules and their exceptions within the permeable barrier lawyers call “jurisdiction.” By placing *malum prohibitum* within the “comedy of manners” that we construct, Bob suggested that even when law distinguishes between right and wrong, it is crucial to remember that the malleable categories of what is legal and what is illegal are our own creations, along with the pathways and barriers we then use to distinguish between them. In praising Professor James William Moore, for example, Bob emphasized that procedure demands consistency; he also maintained, however, that shibboleths such as jurisdiction ought not be utilized to block the core concerns expressed in Rule 1 of the FEDERAL RULES OF CIVIL PROCEDURE: “[The Rules] shall

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<sup>18</sup> Wizner, *supra* note 15; Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) [hereinafter *The Uses of Jurisdictional Redundancy*] (celebrating “complex concurrency” in federal and state jurisdiction as a “daring system”); Robert M. Cover, *For James W. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975) [hereinafter *For James W. Moore*] (contrasting trans-substantive procedure and substantive procedure). Bob claimed that the only way a state’s jurispactic act is not revealed as naked force “is through the judge’s elaboration of the institutional privilege of force—that is, jurisdiction.” NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 5, at 156. See generally ROBERT M. COVER ET AL., PROCEDURE (1988); ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE (1979). For a brief, keen comparison of the procedural history of adjudication with alternative dispute resolution mechanisms, see Judith Resnik, *For Owen Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2003).

<sup>19</sup> *Nomos and Narrative*, *supra* note 5, at 8-9.

be construed to secure the just, speedy, and inexpensive determination of every action.”<sup>20</sup>

Bob emphasized the central irony that we make law, but that we also treat law itself as reified.<sup>21</sup> This helps explain his emphasis on the salience of narrative over law, of *aggadah* over *halachah*.<sup>22</sup> To Bob, law exists to fill the gap between our sometimes silly-seeming rules and the potential tragedy in the clash between good and evil.<sup>23</sup> Yet, Bob recognized that “[w]hen the devil is our own creation, he becomes comic.”<sup>24</sup>

The origin of Anglo-American common law is often said to be so long ago, so shrouded by the mists of time, that it remains “a time to which the mind of man runneth not to the contrary[.]”<sup>25</sup> Nonetheless, we recognize that we build Anglo-American law through precedent—the accumulated work product of fallible human beings. Our law may be created, or at least partially justified, through a theoretical rule of recognition<sup>26</sup> or a *grundnorm*<sup>27</sup>; it may be valued as if through a veil of ignorance<sup>28</sup> or as an unfinished work of fiction.<sup>29</sup> Yet

<sup>20</sup> FED. R. CIV. P. 1; *For James W. Moore*, *supra* note 19, at 739-40.

<sup>21</sup> *See generally* Aviam Soifer, *Covered Bridges*, 17 YALE J. L. & HUM. 55 (2005).

<sup>22</sup> To oversimplify enormously, *aggadah* is the traditional term for nonlegal interpretation of Jewish sources, whereas *halachah* is the traditional term for Jewish law. There has been considerable learned criticism of Bob’s use of Jewish law. For some of the best, see Susanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 876-893 (1993); Samuel J. Levine, *Halacha and Aggadah: Translating Robert Cover’s Nomos and Narrative*, 1998 UTAH L. REV. 465, 470-73, 485-87 (1998); Nomi M. Stolzenberg, *Uncovering the Tradition of Jewish “Dissimulation”*: *Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809, 853-55 (1998).

<sup>23</sup> Soifer, *supra* note 22, at 61-62.

<sup>24</sup> *Nomos and Narrative*, *supra* note 5, at 8 n.24.

<sup>25</sup> THOMAS HODGKIN, *THE DEATH OF ROME: THE OSTROGOTHIC INVASION—ITALY AND HER INVADERS* BOOK III 228 (2d ed., 1889). *See also* Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 477 (1897) (discussing competing property claims in a hypothetical dispute about the legal doctrine of prescription, described an older, inactive claim as traceable “further back than the first recorded history[.]” yet reflecting “the deepest instincts of man[.]”). Though Holmes famously shunned references to justice in the work of judges, however, in this instance he favored an active entrepreneur’s claim over the older claim, and he did so “in justice.” *Id.*

<sup>26</sup> H.L.A. HART, *THE CONCEPT OF LAW* 97-102 (1961).

<sup>27</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 115-123 (1949).

<sup>28</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 136-141 (1971).

<sup>29</sup> *See generally* RONALD DWORKIN, *LAW’S EMPIRE* (1986).

wise legal historians, such as Bob Cover undoubtedly was, continue to demonstrate that we need deep skepticism both when we consider law in the past and as we continue to make law today. For example, the next chapter in Ronald Dworkin's serial novel might be supplied by a new group in power who assert—perhaps in the spirit of the fashionable anti-novels of the 1980s—that the entire Dworkinesque *oeuvre* that preceding their ascension was but a dream.<sup>30</sup> In other words, while in theory there may be no difference between theory and practice, in practice there is.

So is there, in fact, no real rule of law?

## II. RULE OF LAW: AWFUL LORE?

As a law school dean, I experienced more than a few boring administrative meetings outside our law school campus. While quietly trying to stay awake by doing anagrams, I discovered that rearranging the letters of “Rule of Law” can yield “Awful Lore.” Even garbed in full jurispathic armor, the former unquestionably can become the latter. This may be so even when law is fully articulated, procedurally proper, and widely applied. Various totalitarian regimes with vastly different ideologies have demonstrated, and sadly still demonstrate, that both the law on the books and the law in action can be used to torture countless victims and kill poets—even if not fully able to destroy all that is poetic.<sup>31</sup> Tragically, there is much history behind Grant Gilmore's famous conclusion: “The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.”<sup>32</sup>

<sup>30</sup> See generally THEODORE HERZL, IF YOU WILL IT, IT IS NOT A DREAM (1997) (I do not mean to lean heavily on the famous saying by Theodore Herzl, regarded as the founder of modern Zionism that “If you will it, it is not a dream.”). Curiously, in an earlier review that Dworkin wrote of Cover's JUSTICE ACCUSED, he stressed the due process violation within the federal Fugitive Slave Act of 1850, which paid officials twice as much for returning slaves than they would be paid if they allowed Blacks to go free. Ronald Dworkin, *The Law of the Slave-Catchers*, TIMES LITERARY SUPPLEMENT, Dec. 5, 1975, at 1437, 1437 (reviewing ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975)).

<sup>31</sup> Bob once said he went to law school to make the world safe for poetry. Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in NARRATIVE, VIOLENCE AND THE LAW, *supra* note 5, at 6 n.16.

<sup>32</sup> GRANT GILMORE, THE AGES OF AMERICAN LAW 99 (2d ed., Yale Univ. Press 2014).



If anything, the twentieth century painfully demonstrated that indeed law can be readily invoked to devastate a vast array of dissenters; it can pulverize idealism along with communities that nurture and try to preserve poetry, ideals, and mutuality.<sup>33</sup> Bob, by carefully studying what judges did—or refused to do—within the slavery context, produced extraordinary, pathbreaking work about judicial responses to what he termed “the moral-formal dilemma.” He examined the conflicted role of judges in the context of slavery by beginning his discussion of antislavery judges, who nevertheless returned fugitive slaves to slavery, with a quote from Albert Camus’s *The Fall*: “He who clings to a law does not fear the judgment that reinstates him in an order he believes in. But the keenest of human torments is to be judged without a law.”<sup>34</sup>

In fact, even-handed procedure is often invoked as a vital aspect of justice. In 1989, for example, Professors Randall Kennedy and Martha Minow—who each clerked for Justice Thurgood Marshall at the U.S. Supreme Court—wrote a wonderful essay together about Justice Marshall that emphasized what a stickler for procedure he turned out to be. This was so even in cases in which the person ousted by a procedural flaw otherwise had a legal claim with which Marshall could be expected to empathize. Kennedy and Minow noted:

Respect for procedural rules affords an historically excluded group the chance to demand equality in its most basic form: “You must treat us as you treat anyone else who obeys your rules when speaking in self-defense or self-righteous complaint. Otherwise, we can call your differential treatment what it is: prejudice, not discretion; injustice, not duly executed authority. And when you, the official, try to deny us a chance to be heard, you must also openly admit that your rules do not apply to us.”<sup>35</sup>

They explained that “[p]ut perhaps too simplistically, the ideal of the Rule of Law demands that the players be given a chance to choose to

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<sup>33</sup> Bob emphasized the importance of “stable cultural understanding,” and he claimed that the *jurisgenesis* he celebrated was “a process that takes place in communities that already have an identity.” *Nomos and Narrative*, *supra* note 5, at 50.

<sup>34</sup> COVER, *supra* note 4, at 195.

<sup>35</sup> Randall Kennedy & Martha Minow, *Thurgood Marshall and Procedural Law: Lawyer’s Lawyer, Judge’s Judge*, 6 HARV. BLACKLETTER L.J. 95, 99 (1989).

obey the rules and to learn to play within them. In this basic sense, the Rule of Law calls for fair play.”<sup>36</sup> It is important also to recognize that Justice Marshall was a terrific lawyer as well as a courageous and innovative social justice wayfinder who maintained his belief in the Rule of Law. A number of Marshall’s former law clerks similarly expressed their initial surprise as they reminisced about encountering examples of his emphasis on procedure, such as observing a very sympathetic plaintiff who was barred for narrowly missing a statute of limitations deadline.<sup>37</sup>

But what might we make of exceptions to the general rule that judges resolve the moral-formal dilemma by choosing the formal path? What of those judges who follow their own moral path—who might even stretch the law to serve justice?

Two intriguing, somewhat opposed, examples within the American legal system complicate the issue of what it means to be the kind of Cover-esque judge who decides to “cheat” in the non-pejorative sense Bob suggested.<sup>38</sup> The first is that of a Vermont Judge, Theophilus Harrington, who had a fugitive slave case before him in 1804.<sup>39</sup>

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<sup>36</sup> *Id.* at 99-100.

<sup>37</sup> See, e.g., Stephen L. Carter, *What Thurgood Marshall Taught Me*, N.Y. TIMES MAG. (July 15, 2021), <https://www.nytimes.com/2021/07/14/magazine/thurgood-marshall-stories.html>; *Second Circuit Celebration of Thurgood Marshall’s Legacy*, C-SPAN (Dec. 14, 2016), <https://www.c-span.org/video/?419830-2/justice-thurgood-marshalls-legacy&playEvent>.

<sup>38</sup> COVER, *supra* note 4, at 197 (“By formal principles I mean: (1) those governing the role of the judge, his place vis-à-vis other lawmaking bodies, his subordination to precedent, statute, Constitution; (2) the hierarchical character of the judicial system and the respect due to both the decrees and the precedents of higher tribunals and especially the Supreme Court; (3) the standards of professional responsibility, articulated more often in schools, treatises, and controversial literature than in decisions and statutes; (4) the sense of the judicial craft.”).

<sup>39</sup> How Harrington came to be a judge is a complex story in itself. His predecessor, Stephen Jacob, bought a slave in New Hampshire and brought her to Vermont in 1783. He won his case claiming that the Town of Windsor was responsible for her care once she was old and feeble. This is because Vermont had formally abolished slavery in 1777 though a constitutional provision found in Article 1, Section 1 which gave Vermont pride of place years before becoming the fourteenth state in 1791. VT. CONST. art. 1, § 1. Section 1 also provided that someone still could voluntarily become “a servant, *slave* or apprentice.” *Selectmen of Windsor v. Jacob*, 2 Tyl. 192, 194 (Vt. 1802). This proved a pyrrhic victory for Judge Jacob. With wonderful irony, his house—the most imposing in Windsor—later became one of the best-known stops on the Underground Railroad. See Aviam Soifer, *De Facto Slavery and*

Known as “the barefoot judge,” because he was known to preside without shoes on occasion, Judge Harrington fully understood that, though he was a state judge, he had taken an oath to uphold the federal Constitution. Therefore, he said that he was obliged to return a fugitive slave to slavery.<sup>40</sup> He only needed to be certain of the title to this “property.” Presented with evidence that both the slave and the slave’s mother had been held in slavery, Harrington responded that he still needed to see “a bill of sale from God Almighty,” and, lacking that, he freed the slave.<sup>41</sup>

The other example involves the renowned Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court and Betty, a slave in Tennessee who was brought to Massachusetts by her mistress and her husband.<sup>42</sup> Shaw was the leading judge to develop the law that involved slavery in Massachusetts, which had national repercussions.<sup>43</sup> Over several decades he had held that a slave brought into Massachusetts voluntarily by an owner was automatically free. On the other hand, a mob of free blacks had rescued a fugitive slave named Shadrach directly from Shaw’s courtroom, even as Shaw personally tried to block the door.<sup>44</sup> Thereafter, many people believed that the entire Commonwealth had been humiliated because Chief Justice Shaw had to bow under the chains that ringed his courthouse before he ordered the return to slavery of a fugitive slave named Anthony Burns.<sup>45</sup> With this background, as well as a chaotic scene around Shaw’s courthouse as people with radically different views sought to

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the “*Syren Songs of Liberty and Equality*”: Carol Weisbrod, *Much Obligated*, 40 CONN. L. REV. 1315, 1321 (2008).

<sup>40</sup> Aviam Soifer, *Constrained Choices: New England Slavery Decisions in the Antebellum Era*, in FREEDOM’S CONDITIONS IN THE U.S.-CANADIAN BORDERLANDS IN THE AGE OF EMANCIPATION (Tony Freyer & Lyndsay Campbell eds., 2011).

<sup>41</sup> Soifer, *supra* note 40, at 1325 (referencing WILBUR H. SEIBERT, VERMONT’S ANTI-SLAVERY AND UNDERGROUND RAILROAD RECORD 5 (1937)).

<sup>42</sup> Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1921-29 (1987).

<sup>43</sup> LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1967).

<sup>44</sup> Soifer, *supra* note 43, at 1919 n.43.

<sup>45</sup> LEVY, *supra* note 44, at 72-108. See also STANLEY CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860 149 (1970); CHARLES FRANCIS ADAMS, RICHARD HENRY DANA, A BIOGRAPHY 182-83 (rev. ed. 1891) (The rescuers “went off toward Cambridge, like a black squall, the crowd driving along with them and cheering as they went.”); Leonard W. Levy, *Sims’ Case: The Fugitive Slave Law in Boston in 1851*, 35 J. NEGRO HIST. 39 (1950).

talk with and influence Betty, Shaw used an unusually personal narrative voice to explain his brief interview with Betty and the decision that followed.<sup>46</sup> Shaw declared that it would be a denial of Betty's freedom—under Shaw's earlier decisions for his Court, Betty clearly was free once voluntarily brought by her owners into Massachusetts—to reject Betty's choice to return to Tennessee, and to her children and husband.<sup>47</sup>

Shaw's opinion made sure to summarize the conflict of law provisions of the era—even in slave states. At least formally, standard conflict-of-law analysis provided that once free, a slave who returned to a slave state nonetheless remained free to change her mind and thereby to be free again. But, he also quietly defied the U.S. Supreme Court's decision in *Dred Scott v. Sanford*.<sup>48</sup> Handed down earlier that year, Chief Justice Taney's opinion clearly denied all Blacks, slave or free, the kind of jurisdictional attention that Shaw gave to Betty.<sup>49</sup> Both Vermont and Massachusetts had some in their legal communities who were receptive to the seemingly rogue actions—judicial cheating—by Judges Harrington and Shaw. But, what of communities further outside the mainstream? What anchors their core ideas about justice?

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<sup>46</sup> *Betty's Case*, 20 MONTHLY L. REP. 455 (Mass. Nov. 9, 1857). The decision was not officially reported. I relied on this unofficial report and contemporary newspaper accounts in an article that contained a detailed discussion of *Betty's Case* and related Coveresque issues. Soifer, *supra* note 43.

<sup>47</sup> Following Chief Justice Shaw's decision, a spirited debate ensued among antislavery activists, extensively covered in William Lloyd Garrison's *The Liberator*, including discussion of missed opportunities such as purchasing Betty's freedom as well as whether it really could be said that Betty had a husband and children back in Tennessee under the law of slavery. I learned many years later that Betty soon appeared to change her mind, that she met her husband in Cincinnati, and that they were free. As the *Liberator* reported, with considerable sarcasm, Betty "suddenly left her mistress whom she loved so much, took passage upon the under-ground railroad, and safely escaped to Cincinnati, where she was joined by her husband, who is a free man." EDLIE L. WONG, NEITHER FUGITIVE NOR FREE: ATLANTIC SLAVERY, FREEDOM SUITS, AND THE LEGAL CULTURE OF TRAVEL 102 (2009) (quoting William Lloyd Garrison, *The Slave Betty*, LIBERATOR, Feb. 19, 1858, at 31). There was no mention of children.

<sup>48</sup> 60 U.S. 393 (1857).

<sup>49</sup> For remarkable research and a cogent discussion of this case and its context, see LEA VANDERVELDE, MRS. DRED SCOTT (2009); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS (1978).

### III. COMMUNITIES AND THE LAW: “‘COLLECTIVITY’... IS THE SMUDGIEST WORD IN THE ENGLISH LANGUAGE.”<sup>50</sup>

#### A. Legal History

The great English historian, Frederic Maitland, spent a significant part of his career wrestling with groups and the history of legal fictions. For example, he pointed out that trusts and other legal fictions created to empower groups proved uniquely able to resist the vigorous centralizing efforts of Henry VIII.<sup>51</sup> Maitland was one of a group of leading legal scholars from 1880 to 1920 who vigorously debated the central role of groups. He argued that voluntary arrangements beyond contract were so important historically that England “knew no formal severance of Public from Private Law.”<sup>52</sup> Moreover, he warned that once a person began to concentrate on the history of groups, other history might seem “superficial” and a scholar might discover that “much the most interesting person that you ever knew was *persona ficta*.”<sup>53</sup>

The work of Maitland, and other leading English legal historians of his time, generally omits the Jews. That is no surprise, as the Jews officially were exiled from England in 1290, following massacres, blood libels, and other forms of violence and overt discrimination against them. Though Jews themselves were not present, ironically, they did turn up in English legal history discussions before a few Jews were allowed to return, and long before their legal rights in England began to be recognized fitfully in the 1800s.<sup>54</sup> Therefore, Maitland and his colleagues did not have to confront two timeless questions about

<sup>50</sup> SOIFER, *supra* note 11, at 73 n.10 (referencing Frederic William Maitland, “*Moral Personality and Legal Personality*,” *Sidgwick Lecture for 1903, Newnham College*, in FREDERIC WILLIAM MAITLAND, *SELECTED ESSAYS* 235 (H.D. Hazeltine et al., eds., Cambridge Univ. Press 1936)).

<sup>51</sup> *See id.* at 72-77.

<sup>52</sup> *Id.* at 74 n.15.

<sup>53</sup> *Id.* at 73. Maitland also maintained that “A fiction that we needs must feign is somewhere or another very like the simple truth.” *Id.* at 71. For my own argument about the breadth of legal fictions, see Aviam Soifer, *Legal Fictions Reviewed*, 20 GA. L. REV. 871 (1986).

<sup>54</sup> *See* Jonathan A. Bush, “*You’re Gonna Miss Me When I’m Gone*”: *Early Modern Common Law Discourse and the Case of the Jews*, 1993 WIS. L. REV. 1225, 1280 (1993) [hereinafter *You’re Gonna Miss Me*]; Jonathan A. Bush, *Include Me Out: Some Lessons of Religious Toleration in Britain*, 12 CARDOZO L. REV. 881 (1990) [hereinafter *Include Me Out*]. *See generally* CECIL ROTH, *A HISTORY OF THE JEWS IN ENGLAND* (2d ed. 1949).

collectivity. Who is a Jew? And how have the Jews survived? These puzzles remain unresolved and still animate intense debate. As Ronald Dworkin noted, associative obligations are “complex, and much less studied by philosophers than the kinds of personal obligations we incur through discrete promises and other deliberate acts,” even though associative obligations are, for most of us, “the most consequential obligations of all.”<sup>55</sup>

In many ways, Bob Cover was a great cross-over artist who was able to connect profound longstanding questions, such as these, with others of pressing contemporary concern. For example, he emphasized the centrality of obligations, which are anchored in Jewish law.<sup>56</sup> In *Nomos and Narrative*, Bob clearly seemed to favor narratives over rules, though he recognized how fundamentally the two strands are intertwined. Bob loved, and often taught, the work of Franz Kafka alongside legal history and law. He also appeared to agree with Mordecai Kaplan, the founder of the Reconstructionist movement, who liked to say: “The past has a vote, but it does not have a veto.”<sup>57</sup> Bob’s last works increasingly reflected his deep immersion in Jewish sources. For example, in his 1984 John E. Sullivan Lecture at Capital University, he declared that “each community builds its bridges with the materials of sacred narrative . . . . The commitments that are the material of our bridges to the future are learned and expressed through sacred stories.”<sup>58</sup>

This pushes one to ponder: “Which are the most meaningful sacred Jewish stories?” Even if a classic Jewish answer might well be: “Who wants to know?”

## B. Remembrance

To many, the answer seems obvious. The Torah and Talmud are the basic sources of sacred Jewish stories. To be sure, Bob hardly denied the vital importance of these books. Yet, he also recognized the importance of the group narratives and the possibility that a group’s

<sup>55</sup> DWORKIN, *supra* note 11, at 215.

<sup>56</sup> See Robert Cover, *Obligation: A Jewish Jurisprudence of The Social Order* 5 J.L. & RELIGION 65 (1987); *Nomos and Narrative*, *supra* note 5.

<sup>57</sup> Kaplan originally said that “*halakha* [Jewish law] should have a vote, but not a veto.” Aviam Soifer, *The Spokesman Conundrum: “Is It Good for the Jews?”*, 40 L. & SOCIAL INQUIRY 1039, 1044 (2015) (quoting HASIA DINER, *THE JEWS OF THE UNITED STATES, 1654 TO 2000* 200 (U. Cal. Press 2004)).

<sup>58</sup> Cover, *supra* note 1, at 182.

collective understanding might rival—or transcend—the sacred text itself. Moreover, the crucial roles of remembrance and redemption figured prominently in Bob’s work.

Like many of us, Bob was intrigued by the Talmudic story of the Oven of Akhnai, with its striking endorsement of leaving the interpretation of rules to living human beings—even in defiance of actual divine intervention.<sup>59</sup> In the Talmud, the rejected intervention included supernatural signs and even the voice of God, which sided with the dissenting rabbi against the prevailing rabbinic majority on a question regarding the laws of *kashrut*, of what is permissible.<sup>60</sup> But the majority stood firm, with Rabbi Yehoshua stating that “[i]t is not in heaven,” which many celebrate as the holding of the case.<sup>61</sup> There is even a well-known story that Rabbi Natan later met the Prophet Elijah, and asked Elijah how God reacted when Rabbi Yehoshua refused to heed even a heavenly voice. Elijah replied, “God smiled and said, ‘My sons have defeated me. My sons have defeated me.’”<sup>62</sup>

The story grows more complicated, however, if one reads just a little further in the Talmud and learns that the winning majority decided to excommunicate the dissenter, Rabbi Eliezer. Eliezer learned this when his own student, the legendary Rabbi Akiva, volunteered to inform him, but could not bear to tell his teacher and instead sat the requisite distance from Eliezer to let him know. Complicated, destructive, and deadly divine punishments followed, even when vulnerability had been created by the performance of an apparent *mitzvah*.<sup>63</sup> At the October conference, I was pleased to learn that Bob’s son, Avidan, knew and had thought carefully about this wrinkle, though it is considerably less well-known than the much more comforting Oven of Akhnai story.

The Talmud is often portrayed as a dry, rigid set of rules; this basic misunderstanding has been invoked in anti-Semitic discourse

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<sup>59</sup> 3 THE TALMUD, THE STEINSALTZ EDITION, TRACTATE BAVA METZIA, PART III 59 (A. Steinsaltz ed., Bava Metzia 59A-59B, at 237-240 (1990)).

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 238-40. For particularly insightful recent discussions, see David Luban, *The Coiled Serpent of Argument: Reason, Authority, and Law in a Talmudic Tale*, 79 CHI. KENT L. REV. 1253 (2004); Jeffrey Rubenstein, *Torah, Shame, and ‘The Oven of Akhnai’ (Bava Metsia 59a-59b)*, in TALMUDIC STORIES: NARRATIVE ART, COMPOSITION, AND CULTURE 34 (Johns Hopkins Univ. Press 1999).

through the centuries.<sup>64</sup> But to read even a little Talmud is to grasp quickly that its rules are disputed and its arguments readily transcend time and space. Dissents are recorded and studied across multiple generations. Further, Talmudic study has a participatory, addictive quality.<sup>65</sup> It also offers surprising tales that, at times, convey a distinct imaginary quality of the sort associated with “magic realism.”<sup>66</sup>

One quite “Coveresque” example, because of its emphasis on *chutzpah* that is somewhat akin to Bob’s proposed Judicial Cheat, involves none other than the Prophet Elijah.<sup>67</sup> This remarkable Talmudic story about Elijah occurs in a section that discusses informants at great length. It seems even Elijah became an informant himself, and he was punished for what he disclosed—which would have allowed a living person to know how to hasten the coming of the Messiah.<sup>68</sup> The angels in heaven themselves became the informants about what Elijah had done. It turns out that Elijah spoke at the behest of Yehudah Ha’Nasi (Yehudah the Prince), one of the greatest rabbis, who is still honored as the redactor of the entire *Mishnah*—the core text of the Talmud itself.<sup>69</sup>

This strange story begins when Yehudah Ha’Nasi had the temerity to ask Elijah, who had been dropping into Yehudah’s yeshiva from time to time, why he had been coming late. Elijah explained that he needed to help Abraham, Isaac, and Jacob awaken, wash, dress, and say their morning prayers. When Rabbi Yehudah asked Elijah why he did not have the three forefathers pray together, Elijah explained that he could not do that because to do that would hasten the coming of the Messiah. Then, Yehudah had *chutzpah* enough to ask Elijah if there might be anyone living who would have the ability to accomplish this.

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<sup>64</sup> Shakespeare’s Shylock quickly comes to mind as an exemplar, yet actors, directors, critics, and scholars have had wildly disparate views about interpreting Shylock. See generally William SHAKESPEARE, *MERCHANT OF VENICE*.

<sup>65</sup> It might also be said that the men who were praised for studying all day, while the women worked to support them—as well as to tend to what were often very large families—were part of an unmistakably long, sexist tradition.

<sup>66</sup> Magic realism is primarily a literary genre, introduced largely by Latin American authors, in which authors and filmmakers insert mythic or fantastical elements into otherwise matter-of-fact, often realistic narratives.

<sup>67</sup> Elijah is not just any prophet. He is said to be the key intermediary between people on earth and God, and it is Elijah who will lead the Messiah when the Messiah finally arrives. 4 LOUIS GINSBERG, *THE LEGENDS OF THE JEWS* 193-235 (1913).

<sup>68</sup> 5 *THE TALMUD*, THE STEINSALTZ EDITION, TRACTATE BAVA METZIA, PART V 145-46 (A. Steinsaltz ed., Bava Metzia 85B (2000)).

<sup>69</sup> *Id.*



Elijah identified Rabbi Hiyah, a favorite student of Yehudah Ha’Nasi, as someone so holy that when he and his sons recited the portion of their regular daily prayer that mentions God’s power to raise the dead, their very recitation could hasten the arrival of the Messiah. Yehudah declared a fast day and sent forth Rabbi Hiyah and his sons to lead the congregation in prayer, and the Talmud relates that “the world trembled in anticipation.”<sup>70</sup> However, once the angels “fingered” Elijah as the informant, Elijah was punished with sixty fiery lashes.<sup>71</sup> Elijah then appeared on earth as a fiery bear and scared away Rabbi Hiyah, his sons, and his followers—leaving the timing of the Messiah’s arrival unchanged.

The issue of whether it is desirable or possible to hasten the coming of the Messiah through words or actions has produced serious disputation among Jews for millennia.<sup>72</sup> Ironically, the Supreme Court’s controversial schedule for dismantling official school segregation in *Brown v. Board of Education II*<sup>73</sup>—“with all deliberate speed”—echoes elements of this fundamental messianic timing dispute.<sup>74</sup>

Many Jews revere the Ba’al Shem Tov, who was the founder of Hasidic Judaism in the 1700s.<sup>75</sup> Considerable attention is paid to his statement: “Forgetfulness prolongs the exile; remembrance is the secret of redemption.”<sup>76</sup> At *Yad Vashem*, the Holocaust History Museum

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

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

<sup>72</sup> This was a major element in Cover, *supra* note 1, at 191-97. See also the posthumously published Robert Cover, *Bringing the Messiah Through Law: A Case Study*, in PENNOCK & CHAPMAN, *supra* note 17.

<sup>73</sup> 349 U.S. 294 (1955).

<sup>74</sup> In *Brown v. Board of Education II*, the Supreme Court’s remedial phase included an order to federal district courts to take local conditions into account and to “enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed.” *Id.* at 301. As one of many examples of a similarly ambiguous direction, Isaiah’s famous prophecy about the arrival of the Messiah states: “The smallest shall become a thousand (a clan), And the least one, a mighty nation. I, the Lord, will quicken it in its [appointed] time.” Isaiah 60, 22.

<sup>75</sup> See, e.g., MURRAY JAY ROSMAN, *FOUNDER OF HASIDISM* (1996); 10 *ENCYCLOPAEDIA JUDAICA* 746 (2d ed. 2006).

<sup>76</sup> See, e.g., Editor of *Yad Vashem Studies*, *More Than a Memorial: The Evolution of Yad Vashem*, *YAD VASHEM Q. MAG.*, Fall 2003, at 7.; Rabbi David Golinkin, *Tisha B’Av: Remembrance is the Secret of Redemption*, SCHECTER INSTS. INC. (July 13, 2000), <https://schechter.edu/tishah-bav-remembrance-is-the-secret-of-redemption>.

in Jerusalem, these words that are carved at the exit, for all visitors to pass as they leave. Yet Jews remember in very different ways. As Yosef Yerushalmi argued in his learned and provocative book, *Zakhor: Jewish History and Jewish Memory*, Jews tend to emphasize memory, rather than history.<sup>77</sup> But, which memories should we emphasize, and what significance should we place on them? A modern translation of the Hebrew Bible explains that the command *zakhor*, to remember, “is not to retain or recall a mental image. It is to focus on the object of memory that results in action.”<sup>78</sup>

There is deep irony concerning memory, however, as it is embedded in our Jewish tradition. We repeatedly note in our prayers during Rosh Hashanah and Yom Kippur, the High Holy Days, that God remembers everything. Nonetheless, during these holidays we also repeat a central, spirited, and poignant prayer—*zachranu l’hayim*—a direct plea to God to remember us in granting life.<sup>79</sup>

The very irony of this pairing increases when the Torah says that God may need to be reminded of his ancient covenant when he threatens to destroy the same Israelites he recently liberated from Egypt. In pleading with God not to carry out this genocidal threat, Moses resorts to a classic argument: “What would the neighbors say?”<sup>80</sup>

For many of us, such prayers and such stories are intertwined with deeply personal memories that greatly enhance whatever we might learn through study. Such vivid memories about past Jewish holidays and those we have lost tend to be vitally important; this kind of remembrance is in no way inconsistent with the centrality the Ba’al Shem Tov attributed to remembrance. It is, after all, not only the

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<sup>77</sup> See generally YOSEF H. YERUSHALMI, *ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY* (1982) (contrasting the Jewish emphasis on memory with substantially little attention paid to history).

<sup>78</sup> ETZ HAYIM: TORAH AND COMMENTARY 326 (David L. Leiber & Jules Harlow eds., 2001). In *Numbers* 14:11, Moses specifically mentions the Egyptians, but he also points out that the Egyptians will tell other people. *Id.*

<sup>79</sup> MAHZOR LEV SHALEM (Rabbinical Assembly 2010). In this special prayer book for the Jewish New Year and the Day of Atonement, for example, a full section of the concluding *Musaf* prayer on Rosh Hashanah is *Zikhronot* (Remembrances) at pages 160-162; similarly, for Yom Kippur, the concluding morning prayer and the final evening prayer similarly stress remembrance is located on pages 125, 187, 214, 253, 301, 376, and 398.

<sup>80</sup> ETZ HAYIM: TORAH AND COMMENTARY, *supra* note 79, at 846-47. In *Numbers* 14:13, Moses specifically mentions the Egyptians, but he also points out that the Egyptians will tell other people. *Id.*

Shoah (The Holocaust) and innumerable past horrors that Jews must remember.<sup>81</sup> As we remember Bob Cover, we can join in celebrating his unique brilliance and his well-read eloquence in seeking a bridge to a better future. Unlike other forceful leaders, particularly those who love to argue as Bob surely did, Bob also knew how to listen and how to do so with care. Yet, even now, it is hard to be as optimistic as was this sweet, mischievous, wise, warm-hearted, and deeply committed friend (*chaver*).<sup>82</sup>

### C. Sweet Memories

Unquestionably, Bob was a *mensh*.<sup>83</sup> Wonderful memories flood back as many of us recall Bob Cover as a person. Beyond his extraordinary writing and teaching, he had a remarkable ability to provoke and inspire; furthermore, he possessed the extremely rare ability to do all these great things with kindness, an even rarer quality among distinguished professors. For me and Marlene, many memories are sweetly personal: attending our regular little *shabbos* group in New Haven<sup>84</sup> and watching Avidan and Leah growing up under the careful,

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<sup>81</sup> Elie Wiesel began his 1986 Nobel Peace Prize address with a Hasidic story about the *Baal Shem Tov*, and went on to claim that memory and hope are inextricably intertwined, even within the context of the Holocaust. “To me,” Wiesel explained, “hope without memory is like memory without hope.” Elie Wiesel, *Nobel Lecture, Hope, Despair and Memory*, NOBEL PRIZE (Dec. 11, 1986), <https://www.nobelprize.org/prizes/peace/1986/wiesel/lecture>. Yet, there is also an old Jewish legend that God had to send an angel to make sure that, before babies are born, they forget all they know—which is why we have indentations just above our upper lips. See, e.g., Abraham Socher, *How the Baby Got Its Philtrum*, JEWISH REV. BOOKS (Summer 2015), <https://jewishreviewofbooks.com/articles/1715/how-the-baby-got-its-philtrum>. To compound the paradox, those who read the Torah regularly are reminded every year to “blot out the remembrance of Amalek under heaven.” Deuteronomy 25, 17-19. See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

<sup>82</sup> One theory regarding the name “Cover” is that it is derived from this Hebrew word for friend, though there are other theories. The Hebrew word *Chaver* also often has been used in left-leaning Jewish circles as the equivalent of “comrade.”

<sup>83</sup> A *mensh* is a person who is unusually upstanding and reliable, but also down-to-earth.

<sup>84</sup> The *shabbos* group—we knew that in modern Hebrew it would be the *shabbat* group, but the older usage was evocative of our roots. We met on Friday night, generally once a month, with the venue rotating among the participants. The initial theory was that we would enjoy each other’s company over dinner, and then study together. Enjoy we did, but the studying never quite occurred. Instead, we gossiped—which Justice Holmes once said was different from philosophy only in how one takes

loving eyes of Diane and Bob—former outstanding Camp Ramah counselors.<sup>85</sup> Later, there were Bob’s visits after a long bike ride from Newton to our house in Cambridge; a celebratory meeting or two for ice cream at Cabot’s in Newton; and scattered, laugh-filled reunions with various *shabbos* group members.

During the early spring of the year Bob died, he and I greatly enjoyed knocking around on Georgia’s Sapelo Island, where we were hosted with incomparable Southern warmth by Milner and June Ball. We stayed in the old R.J. Reynolds mansion, which had been given to the state of Georgia and had a distinct “Last Year in Marienbad” feeling of sudden departure and decline.<sup>86</sup> Descendants of slaves still lived on the other half of Sapelo Island, and they sent their children to school by boat each morning.<sup>87</sup> The old Black man running a barbecue joint had what seemed to be an original Franklin Delano Roosevelt campaign poster inside his shack.

Milner and I walked the beach with Bob for hours, and we talked—and of course argued—about nineteenth century English novels. Bob insisted there was nothing redeeming about any of them. He and I also celebrated the Red Sox—Bill James’s books full of innovative baseball statistics showed that James was onto something important, Bob thought, long before the Red Sox hired James as a consultant.<sup>88</sup> Finally, the three of us agreed about the particularly sorry

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one’s facts. OLIVER WENDELL HOLMES, COLLECTED WORKS 159 (1920). And we argued, often against some apparently outrageous position Bob asserted, which he defended and sometimes expanded as he steadily picked away at one of the two *parve* cakes the host always provided. On a few occasions, we literally rolled up the rug and danced—at least some of us. The group consisted of wonderful characters in addition to Bob and Diane, Avidan, and Leah; Rachel and Steve Wizner and their young sons, Jake and Ben; and Marlene Booth and me. The others were: Mike Churgin, Mary and David Lesser, and Ellen and Jack Shapiro.

<sup>85</sup> See Wizner, *supra* note 15, at 1741.

<sup>86</sup> LAST YEAR IN MARIENBAD (Rialto Pictures Mar. 7, 1962).

<sup>87</sup> See generally WILLIAM S. MCFEELY, SAPELO’S PEOPLE: A LONG WALK INTO FREEDOM (1995).

<sup>88</sup> Bob did not join the suffering when the ball went through Bill Buckner’s legs in the 1986 World Series, but he also missed watching as the Red Sox finally “reversed the curse” in 2004. Bob’s marvelous “Your Law-Baseball Quiz,” which involved matching famous baseball players and Supreme Court Justices, originally published in the New York Times, was reprinted in NARRATIVE, VIOLENCE, AND THE LAW, and is worthy of revival. Editorial, *Your Law-Baseball Quiz*, N.Y. TIMES, Apr. 5, 1979, at 23 (reprinted in NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 5, at 249-252). Bob was objective enough to honor a New York Yankee, Yogi Berra, as the proper match with Earl Warren as “the truly most valuable players” for their teams.

state of the nation politically and legally in 1986. Eventually, an annual public interest conference emerged from Bob's notion that, at a political moment that we naively believed was about as bad as it could get with the rise of Newt Gingrich and his supporters, lawyers and law students who sought to do public interest law could help and even inspire one another. Generally organized by students, the Robert Cover Public Interest Conference has been going on each winter since 1987 (except during the pandemic) and takes place at the snowy Sargent Camp outside Peterborough, New Hampshire. Fittingly, there is also a long-running session in Bob's memory at the annual Association of American Law Schools (AALS) Conference, during which law professors grapple with pressing intellectual issues. At these conferences, and elsewhere, there have been wonderful reconnections to and through our old *shabbos* group gang.

So is that a community? Is the core group that keeps the annual Cover Public Interest Conference going year after year a community, even as the students graduate and move on—many of whom do public interest work? What of the limiting criteria Bob set forth that “each community builds its bridges with the materials of sacred narrative . . . . The commitments that are the material of our bridges to the future are learned and expressed through sacred stories”?<sup>89</sup> Meanwhile, *The Storyteller*, a novel by Peruvian author Mario Vargas Llosa, turns customary notions of authenticity and narrative into something of a Jewish and/or Indigenous pretzel (or perhaps a bowtie *kichel*).<sup>90</sup>

The United States Supreme Court has pulverized the notion that religious beliefs must be tied to sacred texts; moreover, the Court has even held that they need not be connected to established religions or to other believers.<sup>91</sup> There ought to be, and there is in the United States, considerable reluctance to allow a government official—or a jury, for that matter—to inquire as to the sincerity of a person's

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<sup>89</sup> Cover, *supra* note 1, at 182.

<sup>90</sup> MARIO VARGAS LLOSA, *THE STORYTELLER* (Helen Lane, trans., 1989).

<sup>91</sup> See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970) (conscientious objector exemption granted though Welsh struck the word “religious” in his application); *United States v. Seeger*, 380 U.S. 163, 176 (1965) (test for conscientious objector status is “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor that is parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption); *Frazee v. Ill. Dept. Emp. Sec.*, 489 U.S. 829 (1989) (immaterial that applicant not a member of any organized religious group).

beliefs.<sup>92</sup> Thus, sacred texts no longer seem crucial to define a religious community.

#### IV. GROUPS AND THEIR SACRED STORIES

Bob's notion of groups was anchored in Judaism, but it was hardly limited to Jews. Moreover, he knew all too well how divided Jews can be—and usually are.<sup>93</sup> Bob often talked about the treatment of the Rebellious Elder and the intricate procedural protections provided in the time of the Temple to give the rebellious man a chance to change his mind before being strangled. I do not recall, however, any discussion by him of the rare, and much less protective, process of formal Jewish excommunication.<sup>94</sup> Bob struggled with—but did not get

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<sup>92</sup> For important reflections on this paradox, see Robert Burt, *Robert Cover's Passion*, 17 YALE J.L. & HUMAN. 1 (2005); Austin Sarat, *Robert Cover on Law and Violence*, in NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 5, at 255. My favorite statement about this issue was in Justice Jackson's dissent in *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting) ("Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges.").

<sup>93</sup> The rich development of Jewish law and Jewish communal life over millennia may be attributable in part to the absence of sovereignty until the establishment of the state of Israel in 1948. Further, the decentralizing tradition of "choose your own rabbi" also may have aided Jewish survival. Also, the chaotic state of current Israeli politics might suggest that Bob's relatively benign view of groups was anchored, at least to some extent, in the absence of state power intricately entangled with the *jurisgenerative* groups he celebrated.

<sup>94</sup> STEVEN NADLER, SPINOZA, A LIFE 126 (1999) (referencing Yosef Kaplan, *The Social Functions of the Herem in the Portuguese Jewish Community of Amsterdam in the Seventeenth Century*, 1 DUTCH JEWISH HIST. 111 (1984)). The excommunication of Baruch Spinoza in Amsterdam in 1656 is by far the most famous. It seems that members of Spinoza's congregation had many reasons to feel insecure, and they had to send to Italy to find out about proper excommunication procedures. See Soifer, *supra* note 58, at 1044-45. All the others excommunicated in Amsterdam around Spinoza's time were punished, did penance, and re-entered the congregation—except Spinoza. Apparently, he simply walked away. *Id.* at 1045-46. A troubling, more recent example was the excommunication of Rabbi Mordecai Kaplan, the founder of the Reconstructionist movement in Judaism, by an organization of Orthodox Jewish congregations in July 1945. Just as World War II in Europe had finally ended with the defeat of the Nazis, Kaplan was formally excommunicated—and his new *siddur* (prayer book) burned!—in a public ceremony at one of New York City's largest hotels. *Id.*

specific about—how to distinguish among groups, though he specifically refused to use the relatively easy out of identifying the violence versus non-violence binary as the key.<sup>95</sup> At times, Bob seemed to rely on the criterion of a group being well-established, but he also hoped and believed that groups could “invite new worlds.”<sup>96</sup>

Even to think about the vivid scenes of the January 6, 2021 insurrection and its aftermath is to grasp that a broad array of private groups participated: Proud Boys, Oath Keepers, and many more.<sup>97</sup> Further, it is troubling to understand that many of the participants believed they were furthering values grounded in specific sacred texts, including the Declaration of Independence and the U.S. Constitution, not to mention the Bible.

In other words, they seemed to be motivated by their own sacred stories. Much the same, and far worse, can be said about those who encourage and who engage in terrorism, ethnic cleansing, and genocide. We have witnessed a great deal of horrific evidence that these tragic instincts are well within our human capacities—generally perpetrated by and for groups. Bob’s dilemma remains our dilemma.

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<sup>95</sup> Soifer, *supra* note 54, at 63 (stressing the existing identity of groups as well as their “stable cultural understanding”). Bob knew violence first hand. For example, he had been badly beaten as a SNCC volunteer by his fellow prisoners in the Albany, Georgia jail; yet he went back. The details of his experience, supplied by Bob’s brother, Arnie, are quoted in Burt, *supra* note 93. In Bob’s return to Georgia in 1986, he proclaimed himself neither a pacifist nor even an abolitionist regarding the death penalty. *The Bonds of Constitutional Interpretation*, *supra* note 3, at 831. He believed that all groups of resistance to law must come to grips with violence, but he never got to explain how the groups he admired could be distinguished from those who embraced “[o]utright defiance, guerilla warfare, and terrorism.” Cover, *supra* note 1, at 182 (In a way, he punted with a hope for “a radical revitalization” of law to demonstrate that violence is problematic “in much the same way whether it is being carried out by order of a federal district judge, a mafioso, or a corporate vice president.”).

<sup>96</sup> Nomos and Narrative, *supra* note 5, at 68.

<sup>97</sup> See, e.g., Alan Feuer, *Proud Boys Leader Secretly Cooperated With F.B.I. and Police*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2021/01/27/nyregion/proud-boys-informant-enrique-tarrio.html?smid=em-share> (stating at least one of the leaders, Enrique Torres, chairman of the Proud Boys, had extensive experience as an FBI and police informant); Terry Gross, *How a Group of Online Sleuths are Helping the FBI Track Down Jan. 6 Rioters*, NPR (Dec. 23, 2021, 1:46 PM), <https://www.npr.org/2021/12/23/1066835433/how-a-group-of-online-sleuths-are-helping-the-fbi-track-down-jan-6-rioters/> (discussing private individuals who are currently being celebrated for voluntarily assisting the FBI by using video and other technology to identify January 6th participants.).

Furthermore, his focus on the role of judges underscores how far removed we now are from the “redemptive constitutionalism” he encouraged.<sup>98</sup> Nonetheless, Bob taught that efforts towards redemption, and not redemption itself, ought to animate us all. Bob also believed, like Rabbi Abraham Joshua Heschel, that “the law must not be idolized.”<sup>99</sup>

Our relationship with law is permeable, and Bob Cover significantly advanced our understanding of the potential—as well as the *jurispathic* tendencies—of the law we create. There is, after all, intrinsic frustration in the quest for justice, and judges cannot escape what Bob called the moral versus formal dilemma as they go about their work. Neither can the rest of us. Encumbered though we may be by our own groups and laws, redemptive hope may help to sustain us if we continue to seek justice—even if we recognize that justice will remain elusive. In and through law, the quest for justice is what ultimately matters.

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<sup>98</sup> Nomos and Narrative, *supra* note 5, at 66.

<sup>99</sup> ABRAHAM JOSHUA HESCHEL, GOD IN SEARCH OF MAN 326 (1995).