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Acknowledgments

The chapters in these volumes were written over the course of fifteen years and originally published as individual articles, with most appearing in law journals across the United States. The chapters are collected here, organized sequentially by topic, with each chapter building on the previous chapter. As such, the volumes can be studied as a single work, while at the same time, each chapter can be read and understood on its own. It should be noted that, although the chapters have been lightly edited for inclusion in this collection, they are not presented chronologically, and there remains some repetition in material among the chapters, as well as occasional variation in writing style and citation form. A list of references to the original articles is provided below.

I would like to briefly express my appreciation to family, friends, teachers, and colleagues, who have offered me advice and encouragement over the years, in connection with these chapters and beyond. Among countless others, Russell Pearce, Thomas Shaffer, Kent Greenawalt, Judge Loretta Preska, and the late Abraham Abramovsky provided thoughtful guidance and support, and in my capacity as Director of the Jewish Law Institute at Touro Law Center, I have had the pleasure of working alongside a terrific staff and faculty, under the leadership of Deans Lawrence Raful, Patricia Salkin, and Harry Ballan. In connection with these volumes, I would also like to thank Dr. Alan Kadish, President and CEO of the Touro College and University System, and Dean Michael Shmidman, Editor at Touro College Press, as well as Alessandra Anzani, Senior Editor, and Kira Nemirovsky, Production Editor, at Academic Studies Press.

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Halacha and *Aggada*: Translating Robert Cover's *Nomos and Narrative,* 1998 **Utah Law Review** 465 (1998)

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Section Six

Law and Narrative

CHAPTER 17

Halacha and *Aggada*: Translating Robert Cover's *Nomos and Narrative*

INTRODUCTION

In his groundbreaking 1983 article *Nomos and Narrative*,[1] Robert Cover began to develop the themes that would dominate his writings for the rest of his life. Two of these themes, in particular, would exert a profound influence on legal scholarship, while at the same time, they also illustrate the impact of Cover's ideas on the broader academy as well.[2]

One of the striking elements of *Nomos and Narrative* is its heavy reliance on Jewish sources as a basis for analyzing contemporary American legal theory.[3]

1 Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983) (hereinafter Cover, *Nomos and Narrative*).

2 The breadth of Cover's influence on the academy is apparent in the diversity of journals that have published tribute volumes to him, including 8 Cardozo Studies in Law and Literature 1 (1996); 45 Conservative Judaism 1 (1993); 7 J.L. & Religion 1 (1989); 17 Yale J.L. & Human 1 (2005); 96 Yale L.J. 1699 (1987). Other tributes to Cover can be found in *Narrative, Violence, and The Law: The Essays of Robert Cover* (Martha Minow et al. eds., 1993).

3 Cover continued to rely on Jewish sources in his legal scholarship. See Robert M. Cover, *Bringing the Messiah Through Law: A Case Study*, in *Nomos XXX: Religion, Morality and The Law* 201 (J. Roland Pennock & John W. Chapman eds., 1988); Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & Religion 65 (1987); Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 Cap. U. L. Rev. 179 (1985).

Many scholars have commented on Cover's turn to Jewish sources,[4] including some who have offered careful critiques of Cover's approach.[5]

Another theme that Cover began to develop in *Nomos and Narrative*, as indicated in the title of the article, was the use of "narrative" in legal theory.[6] For Cover, the basis of this theme was the thesis that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning," and "[o]nce understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."[7] Cover's explanation of these ideas coincided with, and contributed to, the emergence of what has become known as "legal storytelling."[8]

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4 See, e.g., Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 Cardozo L. Rev. 229, 339 (1994) (describing Cover as "the prime mover in the reintroduction of Jewish values to contemporary American legal discourse"); Suzanne 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, 820 (1993) (stating that in law, "Robert Cover made it respectable to draw on the Jewish tradition in public discourse"); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225 n.3 (1989) (acknowledging "the liberating effect" of Cover's work on the author's "sense of my own past," showing how the "intellectual abundance of [Jewish sources] can be a profound source of analytic insight").

For discussions of the effect of Cover's Jewish identity on his intellectual commitments, see Joseph Lukinsky & Robert Abramson, *Robert Cover, A Jewish Life*, 45 Conservative Judaism 4 (1993); Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's "Nomos and Narrative,"* 96 Yale L.J. 1836 (1987); Gordon Tucker, *The Sayings of the Wise Are Like Goads: An Appreciation of the Works of Robert Cover*, 45 Conservative Judaism 17 (1993); Stephen Wizner, *Tributes to Robert M. Cover*, 96 Yale L.J. 1707 (1987); Nomi M. Stolzenberg, *Un-covering the Tradition of Jewish Dissimilation: Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. Cal. Interdisc. L.J. 809 (1994).

5 See Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 Geo. L.J. 1785 (1990); Stone, supra note 4.

6 Cover continued to explore narrative and its relationship to law in Cover, *Bringing the Messiah Through Law: A Case Study*, supra note 3; Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 Ga. L. Rev. 815 (1986); Cover, *The Folktales of Justice: Tales of Jurisdiction*, supra note 3; Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986).

7 Cover, *Nomos and Narrative*, supra note 1, at 4-5.

8 The list of scholarship relating to legal storytelling, often referred to as legal "narrative," is a long and varied one, including, for example, Derrick Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice* (1987); Richard Delgado, *The Rodrigo Chronicles* (1995); *Law's Stories: Narrative and Rhetoric in the Law* (Peter Brooks & Paul Gewirtz eds., 1996); Richard Weisberg, *Poethics and Other Strategies of Law and Literature* (1992); Robin West, *Narrative, Authority, and Law* (1993); Patricia J. Williams, *The Alchemy of Race and Rights* (1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); Benjamin L. Apt, *Aggada, Legal Narrative, and the Law*, 73 Or. L. Rev. 943 (1994); Jane B. Baron & Julia Epstein, *Is Narrative Law?*, 45 Buff. L. Rev. 141 (1997); Jane B. Baron, *Resistance to*

In this chapter, I examine the interrelationship in *Nomos and Narrative* between these two themes—the reliance on Jewish sources and the presentation of the concept of "narrative" in law. I suggest that a proper understanding of Cover's use of the two themes requires that they be viewed as interdependent components of his thinking. Specifically, I look to explore Cover's concept of "narrative" in the law through an analysis of how he viewed the parallel concept of *aggada* in Jewish law. Through this study, I aim to show that, although "narrative"

Stories, 67 S. Cal. L. Rev. 255 (1994); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 Duke L.J. 630 (1992); Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 Rutgers L. Rev. 79 (1991); *Colloquium on Legal Scholarship*, 13 Nova L. Rev. 1 (1988); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683 (1992); Mary I. Coombs, *Telling the Victim's Story*, 2 Tex. J. Women & Law 277 (1993); Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 Va. L. Rev. 1229 (1995); Cover, *Nomos and Narrative*, supra note 1; Cover, *The Folktales of Justice: Tales of Jurisdiction*, supra note 3; Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 Tex. L. Rev. 1929 (1991); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 Stan. L. Rev. 607 (1994); *Feminist Jurisprudence Symposium*, 24 Ga. L. Rev. 761 (1990); Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987); Hibbits, supra note 4; Alex M. Johnson, Jr., *The New Voice of Color*, 100 Yale L.J. 2007 (1991); Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. Cal. L. Rev. 2231 (1992); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); *Pedagogy of Narrative: A Symposium*, 40 J. Legal Educ. 1 (1990); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009 (1997); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749 (1990); Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 Colum. L. Rev. 854 (1993); Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989); *Symposium on Reproductive Rights*, 13 Nova L. Rev. 329 (1989); Symposium, *The Voices of Women*, 77 Iowa L. Rev. 5 (1991); Symposium, *Excluded Voices: Realities in Law and Law Reform*, 42 U. Miami L. Rev. 1 (1987); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 Geo. L.J. 251 (1992); Patricia J. Williams, *Commercial Rights and Constitutional Wrongs*, 49 Md. L. Rev. 293 (1990); Patricia Williams, *Reordering Western Civilization*, 43 Stan. L. Rev. 1327 (1991); Winter, supra note 4.

Notably, *Nomos and Narrative* is one of the earliest of these works, and is often acknowledged, explicitly or implicitly, as one of the seminal works in this area of legal scholarship. See also R. Richard Banks, *The Political Economy of Racial Discourse*, 9 Yale J.L. & Human. 217, 218 (1997) (citing *Nomos and Narrative* as evidence of the fact that "the use of narrative in legal scholarship is not a recent development"); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807, 807 (1993) (stating that "the law and literature movement taught us that stories have much to say to lawyers, and Robert Cover taught us that law is itself a story"); Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. Rev. 288, 291 n.21 (1994) (stating that "[o]ver the past several decades, anthropologists, literary critics, and legal scholars have increasingly studied the role of narratives in structuring our experience of the world," and listing Cover as representative of category of legal scholars).

may find expression, at times, in the literary form of storytelling, Cover's conception of "legal narrative" is a broader one, encompassing the wider societal context in which law functions, and one which may best be understood in light of the complex interplay between *halacha* and *aggada* in Jewish law.[9]

Toward the goal of understanding Cover's conception of narrative, part one of this chapter takes a close look at Cover's definition and descriptions of narrative. Though recognizing that Cover examines the relationship between *nomos* and narrative in a number of contexts, this part suggests that focusing on his analysis of the relationship between *halacha* and *aggada* in Jewish law is particularly helpful in shedding light on his understanding of *nomos* and narrative in other contexts as well. In an attempt to flesh out Cover's concept of *halacha* and *aggada*, part two discusses the rich tradition and significance of the interplay between *halacha* and *aggada* in some of the classical sources of Jewish law, including the Torah, the Talmud, and Maimonides' Code of Law. Finally, building on the ideas developed in parts one and two, part three compares Cover's thoughts on the nature of, and relationship between, *nomos* and narrative to parallel observations of Hayim Nahman Bialik, an important Jewish modern literary figure, regarding *halacha* and *aggada*. The article concludes with the observation, based in part on the comments of some of Cover's friends, that his emphasis on integrating the study of *nomos* and narrative with *halacha* and *aggada* seemed to reflect a similarly integrated world-view and way of life.

PART ONE | WHAT ARE *NOMOS* AND NARRATIVE?

A. Cover's Analysis of American Legal Narrative

In contemporary legal scholarship, the term "narrative" is often equated with legal "storytelling." An early example of this equation is found in the opening of

9 In Cover's framework, *halacha* parallels *nomos*, while *aggada* parallels narrative. See infra notes 93-102 and accompanying text.

Because the words *halacha* and *aggada* are transliterations of Hebrew, they appear in English works in a variety of forms. *Halacha* is sometimes written as *halachah*, *halakha*, or *halakhah*, while *aggada* is sometimes written as *aggadah*. In addition, both words are occasionally capitalized even when used in the middle of a sentence, and they are not always italicized in English works.

In the interest of consistency, I have altered the spelling in some quotations to conform with a uniform transliteration of *halacha* and *aggada*, and their adjective forms, *halachic* and *aggadic*. In the interest of faithfulness to the original, however, I have not altered the spellings of the titles of the works cited.

Professor Kim Scheppele's Foreword to the influential 1989 *Michigan Law Review* Symposium, *Legal Storytelling*: "Why is there such a rush to storytelling? Why has narrative become such an important and recurring theme in legal scholarship these days?"[10] In a footnote documenting the emergence of "storytelling" or "narrative" in legal scholarship, Professor Scheppele cites numerous books and law review articles relating to the "law-and-literature movement, in which the legal narrative theme sounds prominently."[11] Professor Scheppele includes Robert Cover among the "founders" of this "movement," and she cites a number of his works, the earliest of which is *Nomos and Narrative*.[12]

Indeed, in *Nomos and Narrative*, Cover does look to "literature"—notably, biblical literature—as a means toward understanding law. In addition, as indicated by his careful attention to, and respect for, societal narratives, Cover recognizes the value of storytelling in legal analysis. Nevertheless, as Cover himself observed, certain terms, such as "Torah," *nomos*, and "the Law," are "amenable to a range of meanings that serve both to enrich the term and to obscure analysis of it."[13] The same can be said of the term "narrative." The aim of this part is to identify the meanings that Cover intended for "narrative," by focusing on the definitions he supplied for this term, and his view of its relationship to what he called a *nomos*. An analysis of Cover's use of the term "narrative" suggests that Cover was developing an idea broader than, though not inconsistent with, legal storytelling.

Cover introduces his article by mapping a connection between *nomos* and narrative. According to Cover, a *nomos* is a "normative universe," a "world of right and wrong, of lawful and unlawful."[14] Although "formal institutions of the law, and the conventions of a social order are, indeed, important to that world," Cover is careful to emphasize that they are "but a small part of the normative universe."[15] Rather, legal institutions and prescriptions must be "understood in the context of the narratives that give [them] meaning," narratives that complement legal precepts to create a *nomos*, "a world in which we live."[16]

Elaborating on the structure of this world, Cover emphasizes the important place of a "legal tradition" within a "complex normative world."[17] Thus, a *nomos*

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10 Kim Lane Scheppele, *Foreword: Telling Stories*, 87 Mich. L. Rev. 2073, 2073 (1989).
11 Id. at 2073 n.1.
12 Id.
13 Cover, *Nomos and Narrative*, supra note 1, at 11 n.31.
14 Id. at 4.
15 Id.
16 Id. at 4-5.
17 Id. at 9.

includes "not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located."[18] It is these narratives, or myths, that give meaning to the corpus juris, so that the law is understood within the broader context of societal norms and actions, ranging from "ordinary legal doctrine at work in mundane affairs," to "utopian and messianic yearnings," to "apologies for power and privilege" and critiques of "the justificatory enterprises of law."[19]

Cover is particularly interested in examining the phenomenon by which communities place legal precepts within their societal narratives. In fact, Cover entertains a "fantasy" in which individual communities inhabit a "somewhat distinct *nomos*," dependent on their narratives and precepts, through which they "create law" and "give meaning to law."[20] Thus, he admires the attitudes of the Mennonite and Anabaptist communities toward the Free Exercise Clause of the United States Constitution.[21] In Cover's view, the Mennonites and the Old Order Amish, like other insular communities, inhabit a unique normative world, in which legal precepts such as the First Amendment have meaning only against the backdrop of the community's historical narrative.[22]

Cover further admires the means through which these communities communicated their concerns, indeed their own "understanding of the First Amendment," which, Cover asserts, "within the domain of constitutional meaning . . . assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court."[23] He observes that the Mennonites' brief, submitted to the court in *Bob Jones University v. United States*,[24] appears "in the form of a simple narrative" that described the historical persecution the church endured, and thus explained the basis for the Mennonites' expansive view of the First Amendment's protections of religious liberty.[25] Similarly, Cover notes, in *Wisconsin v. Yoder*,[26] the Amish depicted, in their brief, a "common narrative" that placed the Amish approach toward First Amendment religious protections within the context of the broader *nomos* they inhabited, a *nomos* that incorporated a history of religious persecution.[27]

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18 Id.
19 Id.
20 Id. at 40.
21 See id. at 27.
22 See id. at 27-28.
23 Id. at 28.
24 461 U.S. 574 (1983).
25 Cover, *Nomos and Narrative*, supra note 1, at 26.
26 406 U.S. 205 (1972).
27 Cover, *Nomos and Narrative*, supra note 1, at 26.

As Cover further examines the Mennonites' brief, he identifies narratives, including "the quasi-sacred tales of martyrs" and "the more recent stories of conscientious objectors," which "help to create the identity of the believer and to establish the central commitment from which [the] law . . . of the state will be addressed."[28] Thus, Cover acknowledges the value of stories as an instrument for conveying the attitudes underlying a community's normative world. Such an expression of a community's narrative can help judges and others outside the community appreciate, and consider the viability of, the community's understanding of the law of the state, as seen through the lens of the community's unique *nomos*.

Nevertheless, when Cover conceives of "narrative," he appears to refer to a concept that goes beyond literary creations taking the form of specific stories or myths that reflect a community's perspectives on legal precepts and their place within a wider normative world. Cover uses "narrative" to refer to the community's broader societal norms, attitudes, and aspirations, which "bespeak the range of the group's commitments" and "provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law."[29] Indeed, according to Cover, basic to the "[c]reation of legal

28 Id. at 28. See, e.g., C. Arnold Snyder, *The Life and Thought of Michael Sattler* 89-107 (1984) (tracing life of Swiss Anabaptist martyr and noting that throughout history, many would follow his example).

29 Cover, *Nomos and Narrative*, supra note 1, at 46. Thus, the word "narrative," in Cover's system, can have more than one meaning, depending on its context. At times, "narrative" denotes the literary device of storytelling. When used in connection and in contrast with the concept of a *nomos*, however, the word "narrative" takes on its broader meaning described above.

The two meanings of "narrative" in this system may parallel the distinct, but complementary, concepts of a "metaphor" and its accompanying "images." See James R. Elkins, *The Stories We Tell Ourselves in Law*, 40 J. Legal Educ. 47, 48 (1990). Professor Elkins writes of his own "various notions about how life works and what it means to be a lawyer and law teacher." Id. at 47. He refers to these "notions" as "metaphors, accompanied, as metaphors inevitably are, by images: the lawyer as hired-gun, the lawyer as friend, the teacher as midwife, life as a journey, life as a story." Id. In Elkins' scheme, metaphors are literary devices that "orient us toward a story" and "connect with and energize the story that we are trying to tell. . . . They . . . fit a story I am living or a story that I hope to live or want to avoid living." Id. Extending his discussion to "images," Elkins describes finding "a metaphor (and an image of yourself) that can take hold of you. The images that accompany the metaphor work their way into your life and your story." Id. at 48. He adds that "[t]o live as I do with the metaphors and images . . . is to adopt—consciously and willingly, quietly and unconsciously, or violently and against my will—a *particular* story. The particularity of the story that I find myself living and trying to articulate is a bundle of metaphors and images." Id.

Elkins' notion of a "metaphor" parallels the use of "narrative" as a specific literary device. Indeed, Elkins defines narrative as "a primary source of metaphors." Id. at 47 n.1. The broader notion of "images" is closer to Cover's use of "narrative" to describe the societal norms, goals, and commitments that contribute to a normative world that a community inhabits.

meaning" is "a commitment to projecting the understanding of the norm . . . [i]nto the teleological vision that the interpretation implies."[30] Therefore, Cover explains, the Amish interpret the legal principle of separation of church and state in the United States Constitution through the perspective of the Amish narrative, which places a supreme value on the community's maintaining its traditional insularity.[31] It is the commitment of the Amish community to its fundamental values—its "sacred narratives"[32]—that gives legal meaning to the community's understanding of the First Amendment, within its own *nomos*.[33]

The Mennonites and the Amish, in their respective briefs to the Supreme Court, used storytelling as an effective vehicle for expressing their communal narratives to those outside the community. Yet, while their approach may illustrate the usefulness and power of storytelling, such stories are not always

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On a communal level, the dual usage of "narrative" in Cover's system may be mirrored in Professor Michael Perry's depiction of the distinct, but related, concepts of a "tradition" and a "foundational text" of a religious community, which he extends to a constitutional community. See Michael J. Perry, *Morality, Politics and Law: A Bicentennial Essay* 136-37 (1988). Perry defines a "tradition" broadly, as "a history or narrative in which the central motif is an aspiration to a particular form of life, to certain projects, goals, ideals." Id. at 137. He adds that "the central discourse, in the case of a living tradition, is an argument—in Alasdair MacIntyre's terms, 'an historically extended, socially embodied argument'—about how that form of life is to be cultivated and revised." Id. (quoting Alasdair MacIntyre, *After Virtue* 207 (1981)). Perry offers a more narrow definition of a "foundational text": "the text that, in the community and tradition in question, is seen to charter, to mandate, the form of life to which the community and tradition aspire, and thus the text that, for the community and tradition, *symbolizes* that mandate." Id.

Perry emphasizes the "writtenness" and "permanence" of the literary form of the text, which he contrasts with the living and more inclusive nature of a communal "tradition." Id. Perry's view of a tradition, which he defines, in part, as a "narrative," parallels Cover's use of "narrative" to depict a combination of communal history, values, and aspirations.

This understanding of Cover's view of "narrative" is also, I think, consistent with that of Professor Steven Winter, who has suggested that

> Cover's "narratives" are themselves best understood not as prototypical stories of specific historical events. Rather, if they are to operate meaningfully as law for the group, they must make the transition from specific historical narratives to stylized cultural constructs that operate as idealized cognitive models. In this view of his work, the phenomenon of polynomia that Cover describes is not a function of the subjective power of the various narrators, but rather a nondeterminate product of the imaginative cognitive constructions of different social experiences.

Winter, supra note 4, at 2270. See infra note 90.

30 Cover, *Nomos and Narrative*, supra note 1, at 45.

31 See id.

32 Id. at 29.

33 See id. at 45.

available, and, even when produced by a community or by individuals within a community, may not sufficiently convey the richness of the societal attitudes that contribute to the creation of a *nomos*.

Indeed, without reference to specific instances of storytelling, Cover identifies a number of insular communities, each of which created its own unique *nomos*, together with the corresponding societal forces that set the boundaries in which the normative worlds functioned. For example, Cover cites Professor Carol Weisbrod's study of nineteenth-century utopian communities—in particular the Shaker community—in which "the voluntaristic character of the ideology of these communities . . . dominated their constitutional thought."[34] Thus, "the center of the Shaker *nomos*" was the strong communal narrative that emphasized "a vivid and literal social contract."[35] Likewise, Cover points to historical instances of "law creation," in which private actors used property and corporation law to assert control over societal norms.[36] This phenomenon, which occurred in settings such as the "company town" of Pullman, Illinois, and the Massachusetts Bay Colony,[37] illustrates the important role that a community's narrative can play, in not only giving meaning to a set of laws imposed on the community, but in actually creating a system of public law that grows out of that narrative.[38]

As much as Cover admires and is fascinated by the capacity of insular communities to create and live within their own *nomos*, such an approach does not satisfy Cover's view of the transformative power of law. Cover describes law as a "bridge, linking a concept of a reality to an imagined alternative . . . a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative."[39] In this vein, borrowing heavily from his own study of judicial and societal attitudes toward slavery,[40] Cover portrays a more ambitious use of communal

34 Id. at 30 (citing Carol Weisbrod, *The Boundaries of Utopia* 61-79 (1980)).

35 Id. at 32.

36 Id. at 30-31.

37 See id.

38 Cover cites Professor Barbara Black's description of "the processes by which a private law document came to have overpowering effect as the public law of the Massachusetts Bay Colony." Id. at 31 n.89 (citing Barbara Black, *The Judicial Power and the General Court in Early Massachusetts (1634-1686)* ch. 1 (1975) (unpublished Ph.D. dissertation, Yale University Department of History)).

39 Cover, *Nomos and Narrative*, supra note 1, at 9; infra text accompanying notes 177-78. For discussions of the concept of law as a bridge, see generally Milner S. Ball, *Law and Prophets, Bridges and Judges*, 7 J.L. & Religion 1, 1 (1989); Ronald R. Garet, *Meaning and Ending*, 96 Yale L.J. 1801, 1808-15 (1987).

40 See Robert M. Cover, *Justice Accused*, passim (1975).

or associative narrative, "redemptive constitutionalism."[41] In contrast to the Garrisonian abolitionists, who employed "nomian insularity" to withdraw from participation in a *nomos* that accepted slavery, the radical constitutionalists held "a vision of an alternative world in which the entire order of American slavery would be without foundation in law" requiring no less than "the transformation of the conditions of social life."[42] Indeed, Cover celebrated the "radical constitutionalists" for asserting their anti-slavery construction of the Constitution against the opposing public *nomos*, thus seeking a redemptive end to slavery in the United States.[43]

In addition to presenting the notion of insular and redemptive models, and their relationship to communal narratives, Cover's discussion of antislavery constitutionalism demonstrates a more subtle function of narrative in relation to legal precepts. As Cover notes, many actions have meaning only with regard to a norm. Indeed, the very same action can convey different symbolic messages, dependent on the actor's relationship to a set of rules governing the action. For example, Cover observes, the action of sleeping late on Sunday takes on special significance when it expresses a refusal of the Sacraments; eating a snack on the tenth day of the Jewish month of Tishrei carries a unique meaning as a conscious desecration of the norm of fasting on Yom Kippur.[44] Similarly, in relation to the institution of slavery and its accompanying norms, such as the fugitive slave acts, rescuing fugitives and assisting them and their rescuers was not only a practical act, but a symbolic one as well.[45] In the context of a public *nomos* that permitted slavery, those who actively violated the fugitive slave acts did so as an expression of a constitutional philosophy, grounded in an abolitionist narrative at conflict with the legal institutions of the time.

Thus, Cover's analysis of the constitutionalism of antislavery provides, on a number of levels, an instructive illustration of his theories of the relationship between *nomos* and narrative. Yet, the most illuminating quality of Cover's focus on slavery may lie not so much in the substantive discussion of antislavery constitutionalism, as in an important conceptual comparison he draws to biblical principles.

Cover dedicates a significant and substantial portion of his article to a discussion of the *nomos* and narrative of the biblical law of succession.[46] Cover writes that "[i]n the Bible there is no earthly or heavenly precept so heavily

41 Cover, *Nomos and Narrative*, supra note 1, at 34.
42 Id. at 38-39.
43 Id.
44 See id. at 8.
45 See id. at 35.
46 See id. at 19-25.

loaded as that of Deuteronomy chapter 21, verses 15 through 17, because there is no precept rendered so problematic by the narratives in which the law is embedded."[47] In introducing his discussion of slavery, Cover poetically suggests that "[i]f there was a fault line in the normative topography of American constitutionalism—akin in significance and expressive power to the principle of succession in biblical life—it was, for four score and ten years, the place of slavery within the union."[48] Similarly, he describes the "expressive potential" of certain rules of slavery, such as the fugitive slave acts, as "comparable to that of Deuteronomy 21:15–17."[49]

These explicit comparisons between the "expressive power" in the biblical passages and American constitutional law suggest that a full understanding of Cover's conception of *nomos* and narrative might require a close look at his conceptual analogue. Thus, a deeper appreciation for Cover's ideas could depend on an analysis of the biblical principles of succession, as well as a broader analysis of the place of *nomos* and narrative in Jewish thought.

B. Cover's Analysis of Biblical Narrative

The passages Cover cites read as follows:

> If a man has two wives, one beloved and the other hated, and they have born him sons, both the beloved one and the hated one; and the first-born son is that of the hated one. On the day that he wills to his sons that which he possesses, he may not grant the son of the beloved wife the birthright in place of the first-born, the son of the hated wife; but he must recognize the son of the hated wife as the first-born, by giving him a double portion of all that he possesses. Because he is the first of his manhood; the birthright is legally his.[50]

Cover considers the legal meaning and significance of the biblical principle of succession in the context of the *nomos* inhabited by "ancient Israel."[51] Cover first imagines a social setting bound by a law identical to the biblical precept, but one in which the precept is "simply stated, routinely obeyed, and subject only to the ordinary tensions of human psychology and ingenuity."[52]

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47 Id. at 21.
48 Id. at 35.
49 Id.
50 Deuteronomy 21:15-17.
51 Cover, *Nomos and Narrative*, supra note 1, at 19.
52 Id. at 19.

Cover contrasts this relatively simplified model against the social environment of the Bible, one filled with narratives creating a complex *nomos* within which the laws of succession had to be understood and applied.[53]

Focusing on narratives found in the book of Genesis, Cover observes a recurring theme in which, contrary to the precept commanded in Deuteronomy, the eldest son was denied the right of primogeniture or a corresponding birthright, which instead was granted to his younger and more deserving sibling.[54] This theme is initiated in the very first family, with the rejection of Cain's sacrifice, his exile, and his younger brother Seth's emergence as the ancestor of Noah, and, thus, of all human beings.[55] The theme continues in Noah's family, as Shem receives a blessing greater than that of his older brother Yefeth, and becomes the progenitor of Abraham and Israel.[56] Perhaps the most dramatic example of the phenomenon Cover identifies, and the one most significant to the communal narrative of ancient Israel, involves the patriarchs. The lineage of the patriarchs consistently travels through a younger son, transmitted from Abraham to Isaac and finally to Jacob, who in turn endows Joseph with the birthright in place of Reuben, the eldest.[57] In Cover's words, "all of the stories of the patriarchs revolve around the overturning of the 'normal' order of succession—a pillar of the legal civilization that is formally enunciated in the code portions of Deuteronomy itself."[58]

Indeed, the narratives in Genesis are striking in their incongruence with the legal rules of succession delineated in Deuteronomy, providing a phenomenon ripe for discussion and discovery. Yet, for the legal theorist interested in construing the place of the biblical rules within the biblical *nomos*, Cover's conclusion that the narratives "can never be wholly squared . . . with the formal rule"[59] raises some questions.

Cover rejects the approaches by "later rabbis" to "reconcile the stories to the rule by creating exceptions or by positing circumstances that would remove the case from the rule."[60] While acknowledging the efficacy of these approaches for "the later legist whose concern is a consistent body of precepts," Cover finds

53 See id. at 19-21.
54 See id. at 20-21.
55 See Genesis 4:1-26; 5:9-29.
56 See id. at 9:26-27; 10:10-26.
57 See id. at 17:19-21; 28:1-4.
58 Cover, *Nomos and Narrative*, supra note 1, at 21 (citing M. Weinfeld, *Deuteronomy and the Deuteronomic School* 188 (1972)).
59 Id.
60 Id. at 21-22.

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