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Robert Cover's Love of Stories: A Rumination on His Wanting to Discuss the Brothers Karamazov With Me Across Five Conversations During the Last Five Years of His Life, With an Application to the Chauvin Murder Trial of 2021

Richard H. Weisberg

ROBERT COVER'S LOVE OF STORIES: A RUMINATION ON HIS WANTING TO DISCUSS THE BROTHERS KARAMAZOV WITH ME ACROSS FIVE CONVERSATIONS DURING THE LAST FIVE YEARS OF HIS LIFE, WITH AN APPLICATION TO THE CHAUVIN MURDER TRIAL OF 2021

Richard Weisberg[*]

ABSTRACT

The field of Law and Literature, perhaps more than any other area of legal studies, has been touched deeply by Robert Cover's life and work.[1] My interactions with Bob over the last half dozen years of

[*] Richard H. Weisberg, Distinguished Visiting Professor, University of Pittsburgh Law School and Floersheimer Chair Emeritus, Cardozo Law School. I would like to acknowledge the excellent assistance of the *Touro Law Review* editors and the hospitality of the faculty and the editors in welcoming my wife and myself **in person** to this symposium.

[1] Approaches taken by others at this Conference were not to the contrary. Professor Chin reported that a google search linking "Robert Cover" and "Law and Literature" yields many more hits than does any other scholarly connection to his work; and Professor Scharff's attempt to implicate Bob in "the death of Law and Literature" was first narrowed by him at the Conference to the "Law *as* Literature"–the move to interpretation within the discipline–and then further restricted to Bob's uneasiness with theories that insufficiently grasp the potential real-world consequences of judicial language. References in this paper to "Law *and* Literature" *solely* involve what otherwise might schematically be called "Law *in* Literature," namely stories about law. The schematic division of the field is usually attributed to Robert Weisberg (no relation). *See, e.g.*, Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1989). Further and briefly at the outset, Robert Cover's skepticism about the "Law as Literature" never implicated even that whole sub-discipline, as he clearly linked himself familialy to the *whole* field. See *infra* Appendix, Illustration 5, for the first few paragraphs of his last, posthumously published article. He would have very much admired, I think, KENT GREENAWALT,

his tragically short life provide an insight, recounted in a somewhat personal vein here, into his profound engagement with *stories*, with the most enduring part of that revitalized inter-discipline. I specify and illustrate five conversations I had with him during conferences, family interactions, or long New Haven walks beginning in 1981 and ending the day before his untimely death in the Summer of 1986. On each occasion, Bob wanted to spin out ideas we were developing together about Dostoevsky's last masterpiece, *The Brothers Karamazov* ("*The Brothers*"), and in these pages, I want to engage the largest issues provoked in Bob's mind by that text: law, religion, and the potential undermining of sound traditions through "revolutionary" interpretive distortions.[2]

Why, I ruminate here, did Bob delve repetitively into the pages of the text he always spoke of affectionately as "The Brothers?" I provide something of an answer in putting part of that novel together with part of the transcript of the recent trial of Derek Chauvin for the murder of George Floyd[3]—with occasional brief allusions to the O.J. Simpson trial of 1988. The focus is on the behavior of *defense* counsel, fictional and real; might the wild manipulation of reality introduced by *The Brothers* brilliant lawyer, Fetyukovich, have motivated Bob to crystallize misgivings about our system's epistemological shakiness more generally? Is there a better way to resolve disputes, perhaps, or—

LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS (2010). He consistently stressed his refusal to see Law as one of the Liberal Arts generally, especially because of what he saw as the former's potential for interpretive violence. Again though, we must be careful: when Bob writes of interpretive violence, he is discussing not *all* judicial words or actions, but only those that lead, as so often happens in *stories* about law, to *error*. For further discussion of this issue, see *infra* text accompanying note 18, suggesting that Cover may well have been uncharacteristically mistaken in failing to see the horrific possibilities for "violence" in some *literary* texts and how they are interpreted!

[2] FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV (David McDuff trans., Penguin Books 2003) (1880). Although Cover wrote in some influential detail about many other stories, to my knowledge there was just *one sentence* about *The Brothers*. *See* ROBERT COVER, Nomos *and Narrative*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 95, 118 n.66 (Martha Minow et al. eds.,1992), which is about "The Grand Inquisitor" chapter of Dostoevsky's novel. Yet that *one sentence*, and the paragraphs around it, *id.*, announce a full program for *nomos* that Bob, I believe, found in the pages of this great novel. *See infra* Part III.

[3] *See Defense Closing Argument Transcript: Derek Chauvin Trial for Murder of George Floyd*, REV (Apr. 19, 2021), https://www.rev.com/blog/transcripts/defense-closing-argument-transcript-derek-chauvin-trial-for-murder-of-george-floyd [hereinafter *Chauvin Def. Closing Argument*].

put differently—to find the pathway to legal accuracy and soundness that Bob insisted on during those long conversations, and during his lifetime generally? Do his favorite stories, including those he wrote about influentially, *Billy Budd, Sailor*[4] and *The Antigone*,[5] indicate that fictional novels, as ironic as it seems, almost uniquely provide a pathway to truthful outcomes, stories read and re-read, argued about, and integrated into a community that elevated them, Midrashically, into the status of law?[6]

Bob's taste in stories was highly selective, and it constantly invited him and his students to the table of Tanakh, Gemorrha, 5th Century Greek Tragedy, Melville, and the Russians. He made me an occasional guest at that table. At a 1981 Brandeis conference on "Terror in the Modern Age: The Vision of Literature, the Response of Law,"[7] I first learned of his fascination with *The Brothers*. Illustration 1 is a photo taken at that conference[8] where Bob and I are discussing, as I recall the moment, the defendant Dmitri Karamazov's terror at finding himself on trial for the murder of his father, a parricide that the reader of the novel already knows should be laid at the hands of his brother Ivan and his half-brother Smerdyakov, who are not in the dock. At that stage in our relationship, Bob knew that I was developing a manuscript about fiction writers' self-awareness when depicting in great detail lawyers, investigations, and trials, and the horror often felt by ordinary people in the face of error-prone narrative power.

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[4] *See* ROBERT COVER, JUSTICE ACCUSED 1-7 (1975) (discussing HERMAN MELVILLE, *Billy Budd, Sailor*, *in* MELVILLE'S SHORT NOVELS (Dan McCall ed., Norton, 2002) (1924)).

[5] *Id.* (discussing SOPHOCLES, ANTIGONE (David Grene et al. eds., Elizabeth Wyckoff trans., Univ. Chicago Press 1954) (441 B.C.)).

[6] The most complex sentences, and the most significant, penned by Bob in Nomos *and Narrative* have to do with the stories that undergird Jewish Law. I am convinced also from our conversations that he was trying to explain to all audiences the special relationship of *nomos* to narrative in the Jewish tradition. As one who had some parallel religious experiences and that specific challenge, I understood his struggle to articulate to non-Jews, and even to many secular Jews, this unique embodiment of his foremost essay's title. He also connected this struggle, I believe, to his engagement with *The Brothers*. For more on this, see *infra* Part III.

[7] *See Symposium: Terror in the Modern Age: The Vision of Literature, the Response of Law*, 5 HUM. RTS. Q. 109 (1983) [hereinafter *Symposium*].

[8] See *infra* Appendix, Illustration 1, for an image from the Brandeis Conference. *See also Symposium*, *supra* note 7.

Illustration 2[9] is a contemporaneous calendar marking for 1982 of the Cover family joining with mine at the beach in Guilford, Connecticut, where our conversations continued at low tide, feet in the Long Island Sound and tossing around a ball. Earlier that year, Bob had participated in what became a well-known Association of American Law Schools ("A.A.L.S.") session on Legal Interpretation that I had convened, which included Owen Fiss and Stanley Fish. At this conference, and elsewhere Bob signaled his lack of interest in the "turn" to interpretation—sometimes called Law *as* Literature.[10] He and I never revisited, in private conversation, that component of the field of Law and Literature.[11] The very next year, my calendar memorializes (Illustration 3) a crucial day for me in New Haven, when—typifying Bob's generosity to fellow scholars and his spiritual yearning for stories—he led me over to the office of Ellen Graham, the formidable literary editor of the Yale University Press.[12] He was bringing to her my manuscript with the working title *The Failure of the Word*. Anciently, this was done in a cardboard box bearing pages of corrasable bond typing paper. Bob had read the manuscript, including significant chapters on *Billy Budd, Sailor* and *The Brothers*, and he wanted the Press to publish it, which (after peer review by law professors and Russian Literature scholars, among others) it was published.[13] From his office to Ms. Graham's, we centered our thoughts on *The Brothers*.

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[9] See *infra* Appendix, Illustration 2, for images of the first of several illustrations taken from my personal calendars for the years 1982, 1983, and 1986. *See also Symposium*, *supra* note 7.

[10] Audio tape: Section on Law and the Humanities, held by the Association of American Law Schools (Jan. 1, 1973). A recording of this session, which has become somewhat famous, is available with the author.

[11] *See infra* text accompanying note 18.

[12] See *infra* Appendix, Illustration 3, for images of my 1983 calendar notation for the meeting first in Bob's office and then in Ellen Graham's.

[13] *See generally* RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984) [hereinafter THE FAILURE OF THE WORD]. The argument of that book had been foreshadowed in several law review articles: Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor, with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982), and Richard Weisberg, *Comparative Law in Comparative Literature: The Figure of the "Examining Magistrate" in Dostoevski and Camus*, 29 RUTGERS L. REV. 237 (1976). In the latter piece, I point out salient differences between our adversarial approach and the inquisitorial one on the continent, but when it comes to the closing arguments analyzed here there is little relevant distinction

I. LEGAL ERROR IN "THE BROTHERS": FROM PROSECUTION TO DEFENSE, AND A PROGRESSION IN BOB'S THINKING

In our conversations, Bob had largely accepted *The Failure of the Word's* idea about prosecutorial error in *Billy Budd, Sailor* and *The Brothers*.[14] In both, much of the story centers on a trial scene; but in Dostoevsky's law-saturated story, fully one-quarter of the immense novel delves in detail into the preliminary investigation as well as the ensuing trial of Dmitri.[15] Little by little, error emerges in the prosecution's detailed ratiocination of the crime. First emphasized by W. Wolfgang Holdheim, one of my dissertation advisers at Cornell, such legal error occurs notably in dominant fictional narratives such as this one.[16] The error occurs, but there is a difference between tracking mistakes to a series of deliberate, malevolent, or grossly negligent prosecutorial manipulations and (as Bob never did!) positing some indeterminacy in law that *inevitably* brings them about. Bob sincerely believed in law—undergirded by sound narrative traditions[17]—as a pathway to justice. The stories he loved indicate what that pathway is and how human manipulators of law willfully or negligently lose sight of it, leaving innocent people to suffer and the guilty to remain free.[18]

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between the two systems. In the former, I noted the unique jurisprudential force of Law and Literature for understanding judicial decision-making, and as to that analytical strand, including a superb reading of *The Brothers*, see Daniel J. Solove, *Postures of Judging: An Exploration of Judicial Decision Making*, 9 CARDOZO STUD. L. & LITERATURE 173 (1997), especially, *id.* at 183-207.

[14] Prominent reviews of the book had begun to appear, some highly supportive of its textual analysis and others skeptical. *See* A.W.B. Simpson, *Disagreeable Rhetoric*, 4278 TIMES LITERARY SUPPLEMENT 342, 342 (1985) (book review); Richard A. Posner, *From Billy Budd to Buchenwald*, 96 YALE L.J. 1173, 1173 (1987) (book review).

[15] *See* DOSTOEVSKY, *supra* note 2.

[16] W. WOLFGANG HOLDHEIM, DER JUSTIZIRRTUM ALS LITERARISCHE PROBLEMATIK (Walter de Gruyter ed., 1969). For superb translations of salient sections of Holdheim's work, see Marguerite DeHuszar Allen, *The Mediator*, 3 L. & HUM. INST. 3 (Dec. 1983). For a photo of Holdheim around the time of publication, see *infra* Appendix, Illustration 7. *See also* W. Wolfgang Holdheim, *Judicial Error as a Literary Theme (1969): "Defining the Theme"*, 7 CARDOZO STUD. L. & LITERATURE 117 (1995); *see infra* text accompanying notes 41-43.

[17] *See generally* COVER, *supra* note 2.

[18] As to the guilty, Bob could be as concerned with legal error in their cases as he was with mistreatments of the innocent. The polestar indication of this is Bob's support for *capital punishment* in appropriate cases, a position that puzzled many of his acolytes. At this conference, I was among the few to bring this feature up, citing

I think now that the prosecutorial error part of things was, for all its importance, the tip of the iceberg for Bob. Even (or perhaps especially?) after *The Failure of the Word* was published, he wanted to continue to delve into *The Brothers*. I was fortunate to engage him in that venture upon two occasions in the year his life tragically ended. One was on Sapelo Island, off the coast of Georgia, the post-conference venue for participants from the Law and Literature conference in Athens organized by Milner Ball.[19] And the last was on a long walk (part walk/part bicycle) in New Haven on what turned out to be the last full day of his life (memorialized in three contemporary notations from my calendar from July 17th to July 20th of 1986).[20]

Towards the end, Bob had started to ponder the slipperiness of adversarial rhetoric notable on the *defense* side in *The Brothers*. My imagination, as we spoke, saw him earmarking the entire final seventy pages ("A Judicial Error") of the novel and especially the long closing argument of Dmitri's lawyer, Fetyukovich.[21] That rising star in a rejuvenated Russian Tsarist-era legal profession[22] had come from St.

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one of Bob's most provocative thoughts: "Law's expressive range is profound, and as with other resources of language, the relation of law's manifest content to its meaning is often complicated. Consider the question of using capital punishment to *express* the *dignity* of human life and its ultimate worth." *Id.* at 100 n.22 (italics in original).

[19] See *infra* Appendix, Illustration 5, for the first, highly relevant paragraph of his article for the proceedings of that conference, published posthumously. There, Bob allies himself with his "brothers[!]" in the field of Law and Literature and draws the line both at conceding that Law is indeed one of the humanities and that legal and literary words are equally capable of producing "violence." He was elsewhere explicitly skeptical of James Boyd White, who "has raised rhetoric to the pinnacle of jurisprudence." See ROBERT COVER, *Violence and the Word*, *in* COVER, *supra* note 2, at 204 n.2. I disagreed with him, but not programmatically, on all these points, see *supra* note 1 and accompanying text, and *infra* note 32, but these differences were a sideshow to our agreement on the vitality and significance for law of *stories*. On the beach at Sapelo, where we both had our sons with us playing touch football, Bob showed me (again) not only that he was a terrific athlete (he had swum about 50 laps in UGA's Olympic sized pool prior to the conference, compared to my 20, and he was a superb drop kicker on the improvised seaside football "field") but also that his thirst for knowledge about *The Brothers* remained strong.

[20] *See infra* Appendix, Illustration 5, which includes the New Haven walk; Bob's shocking death one day later; Guido's tearful call to me the night after; and Bob's funeral.

[21] DOSTOEVSKY, *supra* note 2, at 838-960.

[22] See generally THE FAILURE OF THE WORD, *supra* note 13, for details about the liberal reforms of the profession in Alexandrine Russia as Dostoevsky was writing

Petersburg to the provinces to defend the alleged parricide, the eldest Karamazov son, bringing with him not only a bag of legal tricks but a nihilistic approach to truth.[23] Having listened to the prosecutor's theory of the case, which rehearses erroneously the night of the murder and the motives of the defendant, Fetyukovich had several choices: (1) tear apart the case as false; (2) try to re-direct attention from central realities within it to peripheral details; or (3) deny the existence of facts, realities, and the idea of truth altogether.[24] Before a jury of ordinary provincial Russians, he chooses all three, but as his argument proceeds, he trends more and more toward the third option, a form of nihilism.[25] In doing so, he needlessly loses the case for his client, and he discombobulates the very idea of justice so precious to Bob.

The chapter headings show this undoubtedly misguided (given the jury) rhetorical progression: Book XII, Chapter 10 ("The Defense Counsel's Speech: A Stick with Two Ends");[26] Chapter 11 ("There was No Money. There was No Robbery");[27] Chapter 12 ("Nor was There Even Any Murder");[28] Chapter 13 ("An Adulterer of Thought").[29] In Chapter 14 ("The Muzhiks Stand Up for Themselves"), the jury easily restores common sense to the scene—until we remember that their verdict is simply erroneous![30] They reject the interloper's interpretive and philosophical strategies and find Dmitri guilty after only one hour of deliberation.[31]

The defendant's final words to the jury prior to their deliberation also reject his counsel's approach while still stabilizing the reader, who knows from the long description of the crime earlier in the text that Smerdyakov and Ivan are the guilty parties: "I thank the public procurator,[32] much has he told me of myself that I did not know,

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Crime and Punishment in 1866–reforms that the novelist closely studied over the years leading up to *The Brothers*.

[23] DOSTOEVSKY, *supra* note 2.

[24] *Id.*

[25] *Id.*; see *infra* Part III, for a provocatively similar approach taken by defense counsel, Eric Nelson, in the Chauvin closing argument.

[26] DOSTOEVSKY, *supra* note 2, at 924.

[27] *Id.* at 929.

[28] *Id.* at 936.

[29] *Id.* at 945.

[30] *Id.* at 945.

[31] *Id.* at 959.

[32] David McDuff's fine translation of *The Brothers Karamazov*, DOSTOEVSKY, *supra* note 2, wisely accepted a suggestion I made in *The Failure of the Word* that the differences between continental and English-American criminal procedure be

but it is not true that I killed my father, the public procurator is mistaken!"[33]

The Brothers leads most of its readers to wonder whether justice can be done on this earth. Indeed, its most famous passage, the parable "The Grand Inquisitor," a text devised—as he also devises his father's murder—by Ivan Karamazov, similarly asks how truth can be found in a Christian world that Christ himself has abandoned to his priests and lawyers.[34] Bob was drawn to the question but reached the conclusion that justice was available if a different set of ethical principles (*nomoi*) and a contrary narrative—Jewish rather than Christian—could be adopted.[35] But in looking at the representation of a secular criminal procedure in *The Brothers*, he saw the pitfalls of a system in which defense counsel, as much as—and sometimes more than—prosecutors, are all too prone to distort the truth or to miss it altogether. Although he did not live to experience O.J. or Chauvin, he might have been fascinated to see the closeness of argumentation in two paradigms: *The Brothers'* Fetyukovich failing to see his client's innocence and thus arguing for it but "for the wrong reasons;" and in the Chauvin and O.J. trials, the defense counsel throwing everything at the juries on behalf of clients generally known to be guilty. Such a system, such a discourse, needs fundamental rehabilitation.

II. JUXTAPOSING FETYUKOVICH AND ERIC NELSON (AND THE O.J. "DREAM TEAM?")

A. Defense Counsel's Grotesque Advice to Juries on *How* to Think

Eric Nelson is the reigning Fetyukovich of the 21st century.[36] His representation of Derek Chauvin for the murder of George Floyd culminated on April 19, 2021 with a lengthy closing argument to the

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signaled wherever possible, and the term "prokurator" instead of "prosecutor" signals those differences to the English-language reader. FAILURE OF THE WORD, *supra* note 13, at 46.

[33] DOSTOEVSKY, *supra* note 2, at 956.

[34] *Id.* at 322-45.

[35] *See* Richard Weisberg, *Binaries: Remarks on Chaim N. Saimon's "Halakhah"*, 64 VILL. L. REV. 787, 790-92 (2019); *see also infra* text accompanying note 64.

[36] See *infra* Appendix, Illustration 6, for a picture of Nelson with his client, Derek Chauvin.

jury.[37] While Fetyukovich's unsuccessful closing arguments are in stark contrast to the late 20th century's similar yet "successful" arguments in the O.J. Simpson trial, Chauvin's trial exemplifies the role played deliberately by some defense counsel to confuse the jury as well as the strikingly similar pathway to misleading the jury that Robert Cover found so troubling in the lengthy fictional account offered by *The Brothers*. The following three sections discuss the three salient factors told to the jury that link stories to law—narrative to *nomos*—in this key area of legal (mis)communication.

B. Ignore Specific Facts: Look Instead Elsewhere, Thus Minimizing the Obvious Enormity by "Contextualizing" the Crime

Fetyukovich, faced with a client whom he (wrongly!) believes to be guilty, needs to reckon with Dmitri's having been seen by the old man's servant running wildly from the murder scene, striking that servant, and then going on a spending spree right after the murder in which he, the alleged parricide, spends 3,000 rubles allegedly taken from his father's bedside.[38] In fact, every inference of Dmitri's being the parricide within this scenario is incorrect. But Fetyukovich and his 21st century mirror image, Nelson, play the same game: try to confuse the jury by dissipating the central reality of the crime and absorbing it into some equally fake larger whole. With considerable relevance to legal readers in a Trump and post-Trump political world, the fictional defense counsel says to the jury, early in his remarks: "[I]t is in order to smash this terrible weight of the facts . . . that I have taken it upon myself to defend this case."[39]

In Book XII, Chapter 12, Fetyukovich says:

> For the very reason that the corpse of the murdered father was found, that a witness saw the defendant in the garden, armed and running away, and was himself cast down by him, and consequently it was all performed the way it was written [in a letter produced late in the trial by Dmitri's spurned and resentful lover,

[37] *Chauvin Def. Closing Argument*, *supra* note 3.
[38] DOSTOEVSKY, *supra* note 2, at 509, 517-18.
[39] *Id.* at 926.

> Katerina Ivanovna][40] and so the letter is not ridiculous, but fateful. Thanks be to God, we have arrived at the point of our endeavor: "If he was in the garden, that means he was the murderer." The whole thing, the entire case for the prosecution may be reduced to those two expressions: *if he was*, followed inevitably by *that means*. But what if there is no *that means* even though he was? Oh, I recognize that the weight of the facts, the concurrence of the facts are indeed rather eloquent. I should like you, however, to examine each of these facts separately, without being hypnotized by their combined weight . . . .[41]

In the closing argument for the defense in the George Floyd trial, Eric Nelson stated:

> It's not the proper analysis because the 9 minutes and 29 seconds [during which Chauvin's body weight and knee press down on Floyd's neck] ignores the previous 16 minutes and 59 seconds. It completely disregards it. It says, "[i]n that moment, at that point, nothing else that happened before should be taken into consideration by a reasonable police officer." It tries to reframe the issue of what a reasonable police officer would do. A reasonable police officer would in fact take into consideration the previous 16 minutes and 59 seconds. Their experience with the subject, the struggle that they had, the comparison of the words to actions, it all comes into play, why? Because human behavior is unpredictable. Human behavior is unpredictable, and nobody knows it better than a police officer. Someone can be compliant one second and fighting the next.

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[40] Every character whose name has "Ivan" in it suffers from the vengeful spitefulness of a condition called *Ressentiment* (Russian: zlost'), which is a pervasive condition not only in *The Brothers Karamazov*, but in the modern novel more generally. *See* THE FAILURE OF THE WORD, *supra* note 13, *passim.* In *The Brothers Karamazov*, these "Ivans" include Katatrina "Ivan"ova, who testifies against Dmetri at the trial, the tortured intellectual brother, Ivan, who is actually responsible for the parricide but hardly mentioned in Fetyukovich's closing argument; and the prokurator Ivan Kirillovich, who deeply resents the defendant's attractiveness to the village's women and specifically to his own wife! DOSTOEVSKY, *supra* note 2, at 920, 956.

[41] *Id.* at 938.

> Someone can be fighting and then compliant. Nobody knows it better. But reasonable police officers continue to assess and reevaluate. This is the critical decision-making policy or model. You gather information, you assess the threat versus the risk. Do we have an authority to act? What are our goals and actions? Review and assess. Start over. Because this is not a singular cycle. This is a cycle that as humans we literally make millions of decisions in a day, right? Do I go this way? Do I go that way? Do I go up? Do I go down? We are constantly doing this. This is just human behavior. But in the policing context, you have to gather the information, assess the risk, assess the threat. Do I have authority to act? What are my goals and actions? Review and assess and it's constantly rotating. At the precise moment that Mr. Floyd was laid on the ground, a reasonable police officer would know about those previous 17 minutes.[42]

The job of defense counsel is to distract, mislead, and conjecture as broadly as she wishes. Dostoevsky was perhaps the first novelist to stress this—not casually but at very great length towards the end of his final masterpiece—and the experience of (in)famous 20th and 21st century American trials bears it out. Facts are deliberately jettisoned, or if necessary, kept on board but submerged in a welter of conflicting speculations. *It seems to be of no consequence in such a system whether the defendant is innocent or guilty.* Fetyukovich should have and could have eviscerated the prokurator's reconstruction of the crime by forthrightly examining his opponent's ratiocination, but he chose confusion and chaos. The same choice is made by Nelson (and the O.J. "Dream Team"), perhaps with better reason, since they are arguing inferences that point to "not guilty" verdicts, knowing to a virtual certainty that these men are guilty. It's all smoke and mirrors. It is how we play the game, especially given the constitutional requirement of proof beyond a reasonable doubt. But does the game lack epistemological soundness, ethical authenticity, or moral force? In Bob's terms, what faulty narratives undergird such a *nomos,* and how should they be changed? This is our system of "justice," but there

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[42] *Chauvin Def. Closing Argument*, *supra* note 3.

are other *nomoi* that Robert Cover preferred and that are suggested as *The Brothers* proceeds.

C. Theorize Fact-Denial: Have the Jury Adopt Indeterminacy as its Approach to Reality

I have already noted here that Robert Cover had little interest and no faith in the part of the field he attacks from time to time, namely the Law *as* Literature (or "the interpretive turn" to continental or local theories of meaning) during the early 1980's.[43] One could say that during this exact span of years, he wanted from the continent Dostoevsky and not Derrida, and from the U.S. experience Melville's Whale and not Stanley Fish, *Billy Budd, Sailor*, and not American reader response theories. The second and third strategies deployed by Fetyukovich and Eric Nelson further delineate the perils of "theory" once unbound, however brilliantly, from text.[44] They also lead to this paper's coda: Law, Religion, and Cover's Jewishness.[45]

The ultimate risk of theorizing reality or texts is that in Fetyukovich's case (but not in Nelson's), you might actually hit upon the truth, yet couch it as a falsehood, a Nietzschean "overturning of the table of values"[46] that no legal system should permit, much less be based on.[47] So in the way we might say "even a broken clock is right twice a day," Fetyukovich offers to the jury what *really happened* in the earlier part of the story as a mere hypothetical that they can take or leave as they wish. In the Chauvin case, Nelson's interpretation of his client's keeping his leg on the victim's neck for nine minutes and twenty-nine seconds similarly hypothesizes a "reality" drawn from a range of possibilities, but designed to distract the jury: both lawyers believe they are falsifying in order to "avoid central realities"[48]

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[43] *See supra* note 18 and accompanying text.
[44] *See* Richard Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939, 945-46 (1986), *reprinted in* Richard Weisberg, *On the Use and Abuse of Nietzsche for Modern Constitutional Theory*, *in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 181 (Sanford Levinson et al. eds., 1998).
[45] *Infra* Part III.
[46] *See* THE FAILURE OF THE WORD, *supra* note 13, at 11-42.
[47] *See generally* FRIEDRICH NIETZSCHE, *Guilt, Bad Conscience, And the Like*, *in* 8 THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE 59, 83-88 (Oscar Levy ed., Horace B. Samuel & J. M. Kennedy trans., 1913) (1887).
[48] *See* Richard Weisberg, *Avoiding Central Realities: Narrative Terror and the Failure of French Culture*, 5 HUM. RTS. Q. 151 (1983).

(somewhat like a novelist?[49]). In Book XII, Chapter 12, Fetyukovich says:

> I know the defendant: the wild, wooden heartlessness that is laid by the prosecution at his door is not in keeping with his character. He would have killed himself, that is certain; he did not kill himself for the specific reason that "his mother prayed for him", and his heart was innocent of the blood of his father. He suffered torments, he grieved that night in Mokroye [the inn where he is falsely "shown" to have wildly spent 3000 rubles taken, but in reality not by him!, from his dead father's bedside] only for the old man Grigory whom he had cast down and prayed inwardly to God that the old man would arise and regain consciousness, that his blow had not been fatal and that retribution for it would not come to him. Why not accept such an interpretation of events? What firm proof do we have that the defendant is lying to us? Well, there is the father's corpse, it will be indicated to us once again: he ran outside, he committed no murder—well, who was it, then, murdered the old man?
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> I repeat, here is all the logic of the prosecution, who could have committed the murder, if not he? "There is no one," it says, "whom we may put in his place." Gentlemen of the jury, is that really so? Is there really and truly no one at all whom we may put in his place? We heard the prosecution count on its fingers all who were in that house or who visited it that night. There

[49] THE FAILURE OF THE WORD, *supra* note 13. Here, as I mentioned during the discussion period of this Conference, Robert Cover's own distinction between the interpretation of stories and the interpretation, say, of the Constitution, see, e.g., *infra* Appendix, Illustration 5, stresses the real risk of violence in performing the latter erroneously compared to the relative innocuousness of mis-reading, say, a poem or novel. Here, at least, as I tried to show him during our conversations (albeit unsuccessfully), I believe his distinction is invalid: error is error, and the injustice caused by some stories and the way they are understood (e.g. *The New Testament* and *Hamlet*) unleashes at least as much violence into the world as do all but the most egregious mis-readings of the Constitution. What I think we agreed on was stories like *The Brothers* or *Billy Budd, Sailor* reveal both the risks of distortion in law and the possibility of avoiding legal interpretive violence by finding the just solution to a given textual problem.

> were five people. Three of them, I agree, are completely excluded for obvious reasons: they are the murdered man himself, the old man Grigory, and his wife. There remain, consequently, the defendant and Smerdyakov, and now the prosecutor exclaims with enthusiasm that the defendant has identified Smerdyakov as the murderer because there is no one else whom he may so identify, that were there some sixth person, or even the ghost of some sixth person, the defendant would immediately, in shame, stop accusing Smerdyakov, and point to the sixth person instead. . . . [Now, not for the first time, Fetyukovich appears avant la letter as Donald Trump, anticipating the latter's use of social media gossip to create realities]. Yes, to be sure, the only people who point to Smerdyakov are the defendant, his two brothers and Svetlova, and they would appear to be the only ones. But in fact, there are also others: there is a certain, though obscure ferment in the social circles of this town with regard to a question, a suspicion, there is in circulation a kind of obscure rumor, there is a feeling that something may be expected to come to light. There is, finally, the testimony of a certain juxtaposition of facts, one thoroughly characteristic, thought, I admit, also ill-defined: in the first place, this fit of the falling sickness on the very day of the catastrophe, a fit which the prosecutor was for some reason so painstakingly compelled to defend and vindicate. Then this sudden suicide of Smerdyakov on the eve of the trial.[50]

In the closing argument for the defense in the George Floyd trial, Eric Nelson stated:

> We have all these different opinions in terms of the use of force. We have all of the opinions of Seth Stoughton, Jody Steiger, Barry Broad, Zimmerman, Arradondo, David Ploeger, Lieutenant Mercil, and they all reach very different conclusions about when the force became unreasonable. All you have to know about Barry Broad

[50] DOSTOEVSKY, *supra* note 2, at 940-41.

is what he was talking about. Is this physically managing any person? His opinion was you can use non-deadly force to physically manage a person. It's all within the model of the MPD decision-making model.

I found the most interesting person to be relevant to the use of force Lieutenant Johnny Mercil, considering that he is Derek Chauvin's actual use of force trainer. So the best glimpse that we're going to get into the training of a Minneapolis police officer comes from the trainer who conducts the trainings. He's conducted hundreds of trainings over the years. He corrected the state at certain times in terms of how strike charts don't apply to restraint techniques. He said the knee on the neck is not an unauthorized move and it can be utilized in certain circumstances.

He describes using a knee on the neck and back and stated that it can be there for an extended period of time, depending on the level of resistance you get. He said that once the suspect is handcuffed, it does not necessarily mean that it is time to move your leg because when people are handcuffed, they can thrash around and continue to be dangerous to themselves and others. He talked about the ground defense program because it's safer for both the suspect and the officer. He talked about ground defense as a form of using your weight to control a subject, and therefore replacing the need to punch your [inaudible]. He said there is no strict techniques [sic]. You need to be fluid and adapt to the circumstances, that he personally trains officers to put a knee over the shoulder, up to the base of the neck, and he described this maneuver as routinely trained by the Minneapolis Police Department.

He testified that there are circumstances that an officer would need to use his weight to continue to control a subject. He recognized the concept of awful, but lawful. Sometimes the use of force is just not that attractive. He's experienced himself, arresting people who have claimed to had [sic] a medical emergency. He explained how one way people can resist is through their words. He described how someone resisting can become

> passive and then become resistant again and vice versa. He discussed how officers are trained, not just to focus on the subject, but also the bystanders. He trains officers that if you're fighting with a suspect and that person then becomes compliant, it is a legitimate consideration for the continued use of force to control a subject, that if a subject overpowers more than one officer at a time, that is a legitimate consideration in the continuation of the use of force.
>
> He talked about substance abuse and how that [sic] officers are trained. I understand that superhuman strength is not a real phenomenon. I know there are no Superman or Spiderman. But officers are specifically trained that someone under the influence of certain types of controlled substances exhibit this behavior. They become stronger than they normally would. We've all heard the anecdotal stories of the pregnant mom lifting the car off someone. It's not literally describing a superhero. It's simply describing that someone is exhibiting a greater strength. And the Minneapolis Police Department specifically trains that.[51]

For Dmitri Karamazov, Fetyukovich counsels the jury to pick out an interpretation among several that *might be offered* of who committed the parricide.[52] But Robert Cover, if arguing this case, would have insisted to the jury that the *facts* lead only to Dmitri's innocence. He would not have offered the jury the out provided by Fetyukovich's slippery indeterminacy. Hard work debunks prosecutorial error. Fetyukovich prefers to speculate, and his tone, like Eric Nelson's, convinces no one on the jury.

Nelson for his part, not only asks the jury to accept the interpretation of events offered by *one* witness—Johnny Mercil—but appeals to them through stories, such as "Spiderman" and "Superman," to nudge them to the image of a suddenly revivified George Floyd leaping from the dead and attacking Chauvin.[53] Perversely, Chauvin becomes the (potential) victim. Equally perversely, Dmitri becomes

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[51] *Chauvin Def. Closing Argument*, *supra* note 3.
[52] *See* DOSTOEVSKY, *supra* note 2, at 924-45.
[53] *Id.*

the innocent defendant, not in fact (although he is), but through his counsel's sustained argument that there is no innocence or guilt anyway, no graspable reality that is worth seizing and valuing. These suggestions to the jury of indeterminate interpretive theories of meaning are taken to their logical conclusion in both trials (and in OJ?), as the defense lawyers explicitly become nihilists.

D. Tell the Jury: "Forget Everything You Ever Learned or Have Seen With Your Own Eyes and Join Me on the Path to Philosophical Nihilism" (Fetyukovich Erases the Parricide; Eric Nelson Creates an Enraged Crowd Descending Menacingly on his Client During the Nine and a Half Minutes)

Wolfgang Holdheim,[54] the first to write brilliantly about judicial error in great novels, and especially in *The Brothers*,[55] and whose work has been elegantly translated into English by Marguerite DeHuszar Allen,[56] says the following of Fetyukovich's arguments in chapters entitled "A Stick With Two Ends," "There Was No Money. There Was No Robbery," and "Nor Was There Even Any Murder:"

> Still more profound and consequential is Fetyukovich's critique wherein the thinking intellect undermines itself. . . . [I]f even the single fact is questionable, then how do things stand with the chain of facts? It doesn't stand at all, it's always only interpretation, only perspectival selection out of the chain of reality. Fetyukovich's explanations remind us here of nothing less than David Hume's critique of the concept of causality! As far as psychology is concerned, it is (as the examining magistrate, Porfiry in CRIME AND PUNISHMENT already knows) a double-edged sword: Fetyukovich used the famous metaphor of a stick with two ends, according to which it only depends on how one serves himself. That is no longer romantic subjectivity, such as Dmitri's, it is universal relativism,

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[54] See *infra* Appendix, Illustration 7 for a picture of W. Wolfgang Holdheim at mid-career, as chair of Comparative Literature at Cornell during the 1970's.
[55] HOLDHEIM, *supra* note 16.
[56] Allen, *supra* note 16 (translating Holdheim).

> doubt about the possibility of knowledge/knowing. Every decision/conclusion is individual speculation, which basically can be replaced by another 'x'. Here is the explanation for why the defense attorney plays with all possibilities. That's why he *grazes the truth without stopping*. . . . He has no truth to offer, he says, nothing is true—or perhaps he asks with Pontius Pilate, what is truth?[57]

Professor Holdheim's brilliant analysis dates from 1969, way before deconstructionism's influence on law, for example, had reached full bore.[58] But as a distinguished literature professor at Cornell, he saw what was coming. And I think Robert Cover at that early stage might have had some misgivings, which probably grew over time. *Law and Literature* can be seen in full both as a response to outright nihilism in legal and literary theory and as an appeal to accept the factual basis of an event and the soundness of an interpretive theory or process of ratiocination that tends to grasp and articulate knowable realities.[59] It is here, I believe, that Robert Cover found his self-expressed "brotherhood" within the movement.[60] This is no Critical Legal Studies, nor is this a temporary infusion of continental thought (including bad mis-readings of that non-nihilist Nietzsche!). No, this is neither because the brothers and sisters of Law and Literature, like Robert Cover, believe in facts and trust that once those facts are ascertained by sound interpreters (and not interfered with by questionable nomoi), those facts will lead to justice.[61] And it is in his own adherence to facts that Cover's fascination with *The Brothers* lies, as well as in the religious perspective he would have brought to the novel. Cover was no "Pontius Pilate" nor was he a grand inquisitor; rather, he was a deeply thoughtful Jew.

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[57] *Id.*

[58] *See generally* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 919, 921-1039 (1990).

[59] *See generally* Weisberg, *supra* note 48.

[60] *See supra* note 19 and accompanying text. See also *infra* Appendix, Illustration 5, for an excerpt from Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, The Deed, And the Role*, 20 GA. L. REV. 815, 815-16 (1986).

[61] Accord, among many of Robin West's writings, is her *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 GEORGETOWN UNIV. L. CTR. 129 (1988).

Nihilism becomes explicit as, again, we place Fetyukovich's arguments next to Chauvin's. In Book XII, Chapter 13, Fetyukovich says:

> Yes, it is a terrible thing to spill the blood of a father—the blood of the one who begot me, the blood of the one who has loved me, the blood of the one who has not spared himself for me, the one who has ached with my illnesses ever since I was a child, the one who has suffered all his life for my happiness and has lived only for my joys, my successes! Oh, to kill such a father—why, that is impossible even to think! Gentlemen of the jury, what is a father, a real father, what great word is this, what terrifyingly great idea lies in this designation? We have just indicated in part what a true father is and should be. But in the case before us now, the one with which we are so occupied, with which our souls ache—in the case before us the father, the deceased Fyodor Pavlovich Karamazov, in no way fitted that conception of a father which impressed our hearts just now. That is a misfortune. Yes, indeed, certain fathers resemble a misfortune. But let us examine this misfortune more closely—after all, we must fear nothing, gentlemen of the jury, in view of the importance of the decision we are about to make. We must especially fear nothing now and, as it were, wave certain ideas away, like children or like women easily frightened, to employ the highly talented prosecutor's happy expression. But in his impassioned speech my respected adversary (an adversary even before I had uttered my first word), my adversary several times exclaimed: "No, I will not let anyone else defend the accused, I will not leave his defence to the highly talented counsel who has arrived from St. Petersburg—I am both prosecutor and counsel for the defence!" Thus did he several times exclaim, forgetting, however, to mention that if the fearsome defendant had for an entire twenty-three years been so grateful for a mere pound of nuts received from the only person who had shown him some affection as a child within the home

> of his progenitor, then, vice versa, such a man would not, would he, be able to forget, all those twenty-three years, that he had run about barefoot at his father's house "in the backyard without any boots on and with his little trousers held up by a single button . . ." in the expression of the philanthropic [witness, Dr.] Herzenstube. . . . What greeted my client when he arrived there at his father's house? And why, why depict my client as unfeeling, an egoist, a monster? He is unrestrained, he is wild and violent, that is why we are trying him now, but who is to blame for his fate, who is to blame that with good inclinations, with a noble, feeling heart he received such a preposterous upbringing? Did anyone instruct him in sweet reason, was he educated in science and study, did anyone love him even just a little when he was a child? . . . Let us, also, not bring ruin to a human soul! I asked just now the question: what is a father, and exclaimed that this is a great word, a precious designation. But with the word, gentlemen of the jury, one must treat honourably, and I shall permit myself to name an object by its proper word, its proper designation: a father such as the murdered old man Karamazov cannot and is not worthy to be called a father. . . . [W]e are not fathers but foes unto our children, and they are not our children, but our foes, and we ourselves have made them thus! . . . Nay, let us prove, on the contrary, that the progress of recent years has also touched our moral development, and let us say outright: a begetter is not yet a father, while a father is a begetter and a deserver. . . . How then may it be decided? Like this: let the son stand before his father and ask him in good sense: "Father, tell me: why must I love you? Father, prove to me that I must love you!" . . . [I]f the father is unable to offer proof—then at once an end to this family: he is no father to him, and the son receives his freedom and the right henceforth to consider his father as one alien to him and even as his foe. . . . "Gentlemen of the jury, you recall that dreadful night, of which so much has already been said today, when a son, by climbing a fence, penetrated into the

> house of his father and stood, at last, face to face with the one who begot him, his foe and wronger. With all my might I insist—not for money did he come running at that moment: the accusation of robbery is preposterous, as I have already explained. And not to murder him, oh no, did he force his way into his house *. . . but assume that it were so, so let it be, and let us suppose it for a single moment!* . . . But the father, the father—oh, all was done by the mere sight of the father, his hater since childhood, his foe, his wronger, and now—his monstrous rival! A sense of hatred seized hold of him involuntarily, uncontainably, and reasoning was impossible . . . . A murder of that kind is not a murder. *Neither is a murder of that kind a parricide.* No, the murder of a father such as that cannot be called a parricide. A murder of that kind may be classed as a parricide only out of prejudice! . . . But do you wish to punish him terribly, ferociously, with the most dreadful punishment that one may imagine, but with the purpose of saving and regenerating his soul forever? If so, then crush him with your mercy![62]

Fetyukovich, before this jury of ordinary Russian folks, has just lost his case! Carried away by his nihilistic ramblings, he posits a world with no anchoring in facts or in justice. And Eric Nelson again becomes a 21st century Fetyukovich when he denies, not so much the existence of a murder, but the equally palpable *fact* of a quiescent *crowd* in the vicinity of his client as he was killing George Floyd, a crowd he transmutes—with the help of an explicit philosophy of nihilism—before the amazed jury. In the closing argument for the defense in the George Floyd trial, Eric Nelson stated:

> And before I really kind of start talking about the crowd in some limited detail, I have thought a lot during the course of this trial about the difference between perspective and perception. Perspective and perception are two distinct concepts. Perspective is the angle at which you see something. It's your perspective. Perception is how you interpret what it is that you see.

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[62] DOSTOEVSKY, *supra* note 2, at 946-52 (emphasis added).

> I've thought about this a lot during the course of this trial, because this situation here in the courtroom is incredibly unique. Right? It's not the normal setup for a jury trial. My perspective through the course of this trial, sitting in this chair, is that I cannot see four of the jurors. Very limited opportunity to observe the jurors. They probably can't see me either. Several of the jurors, I have a very good view of. Four of the jurors I don't, and obstructed views of others. My perspective sitting in this chair when witnesses [testify], there's a camera blocking the head. In order for me to see the witness, I have to roll all the way over to the other side. Then I have to look through the plexiglass that has these large reflecting lights. Right? Things block your perspective. Things can affect your perspective. But your perception is how you interpret what it is you see, and what it is you experience. And that is our life, right? This is our experiences [sic]. These are the things that make us who we are. . . . Let's look at this incident on May 25th from the perspectives and perceptions of simply just four of the bystanders. Right? . . . Genevieve Hanson. Right? 27-year-old female firefighter for the city of Minneapolis. She testified that when she walked into the scene, she described the crowd as upset. She said, "I walked into an upset crowd." She said that, "The other voices distracted me from getting the officer's attention." And she testified, again, based on her perspective that Officer Chauvin appeared to have his hand in his pocket. She observed what she believed to be blood from Mr. Floyd's face being pressed into the pavement. She observed fluid coming from Mr. Floyd's body that she presumed to be urine. She testified that nobody ever told her that EMS or an ambulance was on the way. . . . But when you look at the things that Ms. Hanson saw, whether it be from her perspective or her perception, *there can always be more to the story*. The blood coming from Mr. Floyd's nose was why they called EMS in the first place. You've seen the pictures[!]. He injured his nose during the struggle, or his face, during the struggle in the squad car. The fluid

> that she described as potentially being urine, we know that that's fluid coming from the underside carriage of the squad car. . . . Genevieve Hanson has a perspective and a perception and what she observed was not consistent with the actual evidence. But remember, we don't look at this incident from the perspective of a bystander. We do not look at this incident from the perspective of the people who were upset by it. We look at it from the perspective of a reasonable police officer. A reasonable police officer, when confronted with these bystanders would know everything that had occurred up to that point. 20 minutes. 25 minutes. 30 minutes. They know all of that information. The bystanders do not. . . . Right? Reasonable police officers . . . would know if citizens take out their cell phones and start filming. This is the point, at 8:20 and 49 seconds, when Ms. Frazier starts recording. Reasonable police officers are aware when they're using force that sometimes what they're doing does not look good to the general public. A reasonable police officer will hear the frustration growing. Right? A reasonable police officer will hear the increase in the volume of the voices. A reasonable police officer will hear the name calling. Right? Chump, whatever names are being called. They'll hear the cursing there. They'll hear this, and they'll take that into their consideration. . . . You can see Officer Chauvin's body language tells us a lot. Right? That's what we just heard. Looking down, looking up, looking around, looking down, looking over, looking around. He's comparing a reasonable police officer. He's doing what a reasonable police officer would do. He's comparing his actions, his own actions, in response to what the crowd is saying. A reasonable police officer, again, will rely on his training. 2020. March of 2020. Tactics of a crowd. Never underestimate a crowd's potential. Most crowds are compliant. Crowds are very dynamic creatures and can change rapidly. A crowd may contain elements of several types of groups. Now I acknowledged that this is in dealing with massive crowds, protests and things

> of that nature. These are the tactics, but you never underestimate a crowd's potential because a reasonable police officer has to be aware and alert to his surroundings. A reasonable police officer will consider his department's policy on crisis. . . . A reasonable police officer is recognizing that the crowd is in crisis. That all of these things, the members, the bystanders, the citizens, whatever you want to call them, they are in crisis. . . . What are these potential signs of aggression that I may be confronted with? Somebody standing tall, somebody red in their face, raised voice, heavy breathing, tense muscles, pacing. Right? . . . How do you respond to those? You're confident in your actions. You stay calm. You maintain space. You speak slowly and softly and you avoid staring and eye contact. Again, these are things that [witness] Ker Yang discussed in terms of how to deal with a crisis. As this crowd grew more and more upset, or deeper into crisis, a very critical thing happens, at a very precise moment. I cannot, in my opinion, understate the importance of this moment. The critical moment in this case, if you recall from Dr. Tobin's testimony, and nobody disagreed, that Mr. Floyd took his last breath at 8:25:16. 8:25:16. What is happening at the very precise moment that Mr. Floyd takes his last breath? You're taking one piece of evidence and you're comparing it against the rest. This moment, 8:25:16, as Mr. Floyd is taking his last breath . . . . Three things happen. Mr. Floyd takes his last breath. You see Officer Chauvin's reaction to the crowd is to pull his mace and shake it. He's threatening the use of force, as is permitted by the Minneapolis Police Department policy, and Genevieve Hanson walks in at that time from behind him. Startling him. All of these facts and circumstances simultaneously occur at a critical moment. And that changed Officer Chauvin's perception of what was happening.[63]

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[63] *Chauvin Def. Closing Argument*, *supra* note 3 (emphasis added).

III. ROBERT COVER'S JEWISHNESS

Bob's Jewishness and his reading of novels like the ones he and I discussed so often led him to see that standard jurisprudence and black letter criminal law and procedure provided only an incomplete normative portrait of law's true potential to do justice. It is in the novels that so captivated Bob that a better vision of law comes forward. Dostoevsky left for future generations a kind of time capsule in which two conclusions might be drawn: (1) Western law in the 19th and 20th (and 21st, had Bob lived to see it so far) centuries are as grotesque in their approaches to criminal justice as lawyers in those centuries would have described trial by fire, trial by water, and—if some of them were not arguing for it themselves[64]—torture; and (2) there are better methods—sounder pathways to a just resolution of legal struggles—and these begin with considering the narratives that undergird the law, and particularly, which *religious* narratives.

A. Law, Religion, and Robert Cover's Jewish Roots: Some Fault-Lines Jewish *Nomoi* Tend to Avoid, and Some Extensions of Them to a Just Outcome in Law Often Unavailable to Christian-Rooted Words and Arguments

1.Five Errors in "The Brothers" Attributable to Fantastical Thinking

Like most readers of the full novel, Bob and I talked a lot about "The Grand Inquisitor," the thought experiment proposed by the tortured intellectual, Ivan Karamazov, to his younger brother, Alyosha.[65] The parable recounts a return to earth by Jesus, who is

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[64] For arguments in favor of torture, see Alan Dershowitz, *Tortured Reasoning, in* TORTURE: A COLLECTION 257, 257-80 (Sanford Levinson ed., 2004). For further arguments in favor of torture, see also Richard Posner, *Torture, Terrorism, and Interrogation, in* TORTURE: A COLLECTION, *supra*, at 291, 291-98. For a perfect response to Dershowitz's essay, see Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, *in* TORTURE: A COLLECTION, *supra*, at 281, 281-90. For my response, in part, to Posner's essay, see Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, *in* TORTURE: A COLLECTION, *supra*, at 299, 299-305. My answer references the tortured intellectual, Ivan Karamazov. *Id.* at 301.

[65] *See* DOSTOEVSKY, *supra* note 2, at 322-44. See COVER, *supra* note 2, at 118 n.66 for Cover's own very brief citation to "The Grand Inquisitor."

confronted by the religion he created and especially by the religion's highest authority. It is not a pretty picture, and it foreshadows the far longer procedure this paper has focused on.[66] Although deeply religious himself, Dostoevsky offers us only a degraded representation—through the intellectual atheist Karamazov brother, Ivan—of Christian law and authority as it has developed over eighteen centuries.[67] Essential to developments inculcated by the Grand Inquisitor are: (1) programmatically misreading facts; (2) ironically adopting methods of punishment harsher than regimes not predicated on Christian "love" and "mercy"; (3) torturing the innocent through inquisitorial methods unimaginable to Christianity's founder; (4) failing to provide a "narrative" that might soften the effect of law, i.e. outdoing supposed Jewish "legalism"; and (5) losing sight of the "paideic" nature of *nomos*.[68]

The Grand Inquisitor's five points pre-figure, in the novel, the *secular* application of the sad Christian narrative to the *nomos* this paper has been discussing through the figure of Fetyukovich. Bob's interest in *The Brothers* surely related primarily to the linkage of law and *religion* that most significant Law and Literature stories forge. Remarkably, he precisely describes both the specific development represented by "The Grand Inquisitor" and, much more broadly, the effect on *nomos* of what he calls the "subversive force . . . of a revolutionary [allegory]."[69] In the crucial paragraphs surrounding his only reference in that essay to *The Brothers*, Bob describes the taking over of Jewish norms and values by the revolutionary underminer par excellence, Paul:

> [T]he sacred beginning [say of Judaism] always provides the typology for a dangerous return. . . . So it was that Paul could put the [Jewish] narratives to the service of a revolutionary allegorical extension of the typology in his Epistle to the Galatians. There the Jews with their law are compared to Hagar and Ishmael, the firstcomers, whose claim is based on law. The new Christian Church is Sarah and Isaac, the later comers,

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[66] *Id.* The parable, which–prior to Law and Literature treatments of the novel is far better known to the critical and general reader–is 23 pages long, compared to the legal process' 388 pages!

[67] *See* THE FAILURE OF THE WORD, *supra* note 13, at 65-70.

[68] See COVER, *supra* note 2, for all five points expressed.

[69] *Id.* at 119.

> who lack any legal entitlement but who hold the divine promise of destiny. The whole edifice of law is thus torn down through an allegory upon the pervasive narrative motif . . . . It is particularly powerful to use in the critique of the law of Israel an allegory built on the theme that itself expresses the extralegality [sic] of Israel's destiny.[70]

Had Robert Cover seen the fullness of days—at least the threescore and ten promised in the Bible[71]—I am positive he would have written more on *The Brothers*. His insight placed near his evocative footnote mentioning the latter in his best-known essay opens up not only "The Grand Inquisitor" but also the problematic practice of law on earth by the Christian Inquisitor's secular colleagues, represented by Fetyukovich and Eric Nelson (and the O.J. "Dream Team"). The existing Jewish *nomos*, undergirded, when Jesus walked the earth, by centuries of complex and enlightened narrative and epitomized by what Nietzsche—writing exactly what Bob is writing decades earlier—calls "the Jewish 'Old Testament,' the book of divine justice"[72]—is torn down by the singular revolutionary figure of Paul, who grotesquely utilizes that divine book to construct an edifice built on its opposite and to destroy law.

2.St. Paul's Deliberately Erroneous "Defense" of Jesus

As Bob well understood, part of Paul's subversive program involved a "typological" approach to the Tanakh, where A becomes B and meanings are deliberately distorted on behalf of a Revolutionary program that requires such distortions as a hermeneutic necessity,[73] and in which the great Hebrew prophets (especially Isaiah) are made to announce the coming of Jesus, who also situates himself above the entire narrative, waiting both to appear and then to return. The method of transmuting A to B by now is familiar to the reader of this paper in a secular context of Law and Literature.

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[70] *Id.* at 118-20.

[71] *Psalm* 90:10 (referring to the biblical measure of days, threescore and ten).

[72] *See* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 59-60 (Marianne Cowan trans., 1966) (1886).

[73] *See* RICHARD H. WEISBERG, IN PRAISE OF INTRANSIGENCE: THE PERILS OF FLEXIBILITY 56-85 (2014).

Elsewhere in Nomos *and Narrative*, Bob endeavored to explain what Dostoevsky shows might have been available to a Christian interpreter like Fetyukovich (finding the correct outcome in Dmitri's case) but is undermined by the hermeneutic methodology of Christ's emissary on earth, the Grand Inquisitor, who falsifies reality in (literally) the face of his jury of one, Jesus himself. I believe Bob realized that the toughest task he had set himself was to explain, precisely, the sound interpretive approach of the Jewish tradition compared to its undermining by the revolutionary Paul. This was Bob's greatest challenge. Without his mix of traditional Jewish learning and strong secular brilliance, getting this across to an audience of constitutional scholars seems impossible. But only a few pages prior to the citation to *The Brothers* I have just invoked, Cover gives it one of his best tries when he discusses the great 16th century Talmudic scholar, Joseph Karo:

> Karo's commentary and the aphorisms that are its subject suggest two corresponding ideal-typical patterns of combining corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, which according to Karo is world-creating, I shall call "paideic," because the term suggests: (1) a common body of precept and narrative, (2) a common and personal way of becoming educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law. Law as Torah is pedagogic. It requires both the discipline of study and the projection onto the future that is interpretation.[74]

IV. CONCLUSION

Soundness in our legal system requires a return to models available in Jewish thought over three millennia, or so Robert Cover believed. In representing at great length a secular trial that results in error, Dostoevsky, as a Christian writer, recognized the built-in potential for injustice in his own religion that the story's "The Grand Inquisitor" represents fully. The defense's argument in the Chauvin

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[74] COVER, *supra* note 2, at 105-06. For more on this passage in Cover, see Weisberg, *supra* note 35, at 791.

trial of 2021 (and in the O.J. Simpson trial of 1988) negate in an American context the precept that Bob—in my view—carried in his head and heart every day: "Justice, justice, shall ye seek."

APPENDIX

Illustration 1

Illustration 2

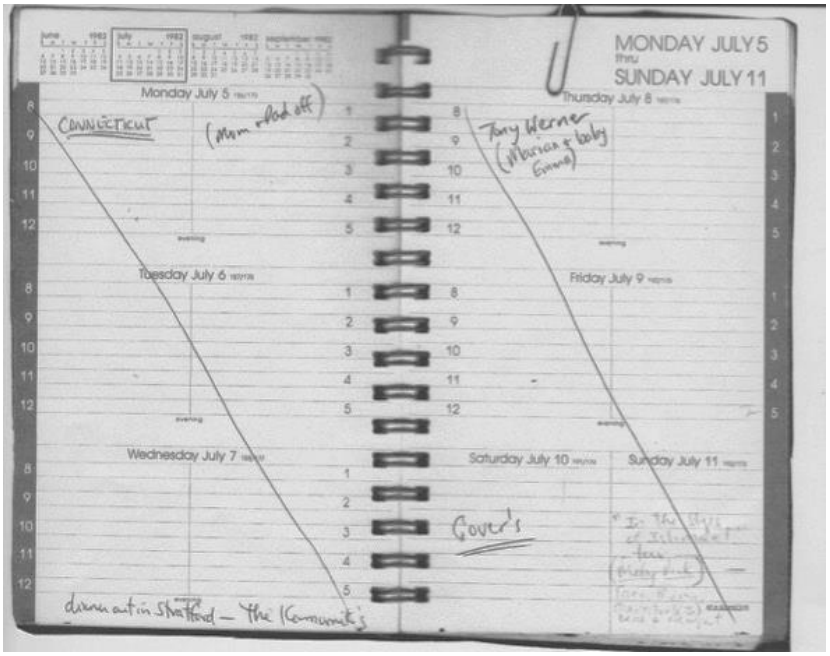

Illustration 3

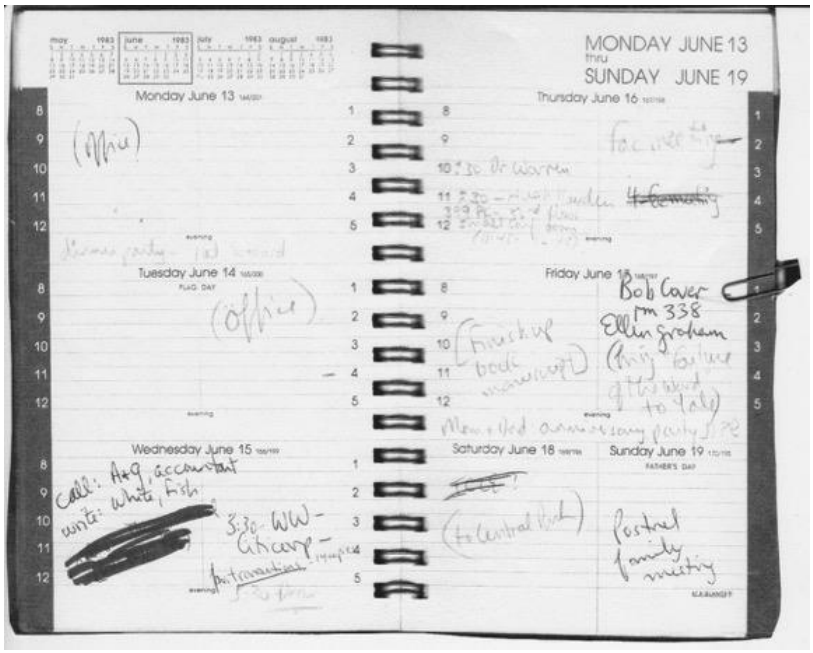

Illustration 4

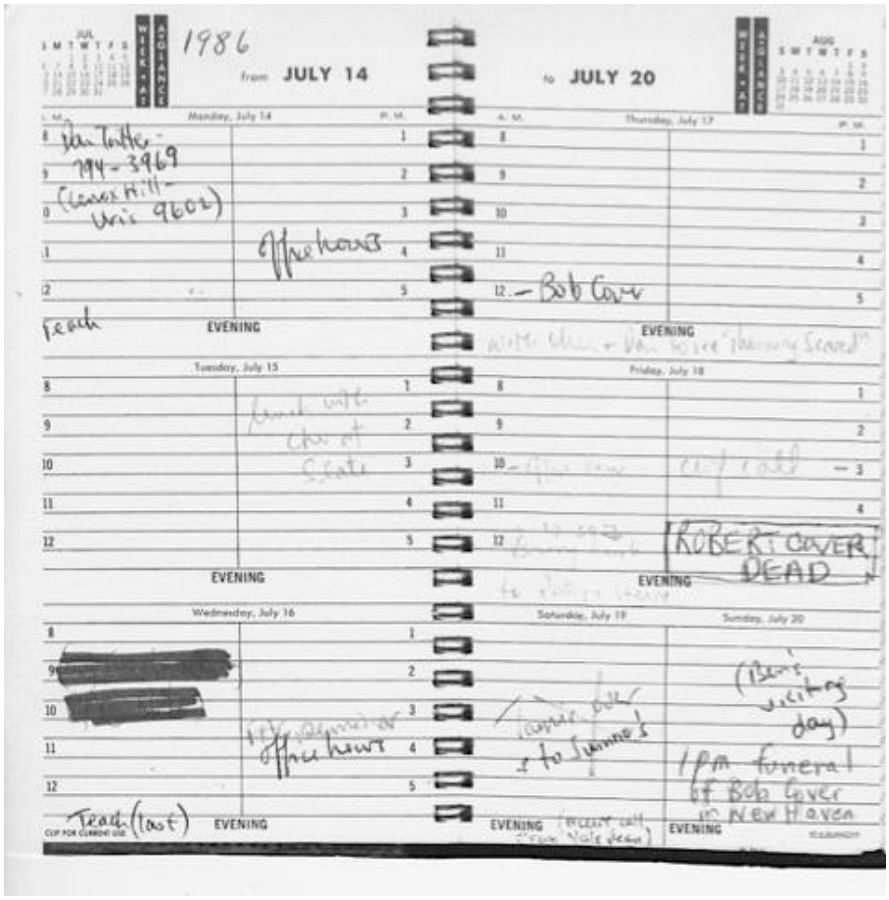

Illustration 5

ARTICLES

THE BONDS OF CONSTITUTIONAL INTERPRETATION: OF THE WORD, THE DEED, AND THE ROLE

*Robert M. Cover**

In these remarks I shall take issue with the theme sounded by several other scholars in this Symposium—that there is an essential unity to the interpretive work of law and literature. Indeed, I shall take issue with one of the principal premises of the Symposium itself—that law is one of the liberal arts.

At first blush this may seem surprising, even contradictory. Since I began teaching almost two decades ago, I have been concerned with the convergence of law and literature. While my attention to the theme is neither as persistent nor as deep in my knowledge of the humanities as that of my brothers White, Weisberg and Ball, I am still not embarrassed to be counted in the fold of the law and humanities flock.

My dissent, then, concerning the claim of "unity" of the interpretive and narrative fields—my dissent from the premise that law is among the "humanities"—is a disagreement among friends engaged in what is, if not a common enterprise, at least a series of enterprises with many commonalities.

Indeed, I dare say some of the distinctions I shall emphasize between constitutional interpretation and other interpretive traditions are distinctions to which others have at least alluded. I am confident that most if not all the participants in this Symposium

* Robert Cover was the Chancellor Kent Professor of Law at Yale Law School until his sudden death in July of this year. In March, when Professor Cover participated in this Symposium, he gave the Editors a manuscript reflecting his remarks. This Article is a sparingly edited version of that manuscript; readers should be aware that Professor Cover was unable to complete his work on the Article.

The Editors offer their deepest condolences to Diane Cover, and thank her for the privilege of publishing Professor Cover's wise and moving remarks.

would concede that the differences exist. The question is how much to make of them.

In this lecture I choose to make of them a great deal. In doing so, I do not wish to be misunderstood. I am not stating that there is nothing that we, as lawyers, can learn from literature. Nor, of course, am I stating that at some sufficiently high level of abstraction there is a common category to which the practice of law and literature both belong. I am stating a modest, but I think real, point of disagreement, and it can be stated simply: The practice of constitutional interpretation is so inextricably bound up with the real threat or practice of violent deeds that it is—and should be—an essentially different discipline from "interpretation" in literature and the humanities.

We might begin the process of distinguishing legal and constitutional interpretation from other forms by noting, first, an element that is always and prominently present with respect to constitutions and which may in fact be shared, though in less prominent ways, by literature and other traditions. This prominent feature of constitutions was noted over forty years ago by a great literary critic who, like many today, aspired to a general theory of discourse that would encompass law as well as literature.

Kenneth Burke wrote, in 1945: "Constitutions are agonistic instruments. They involve an enemy, implicitly or explicitly."[1] Burke went further. He posited that constitutions not only are agonistic but that they establish a normative world on the basis of their opposition to other worlds. "Normative worlds" are my terms. Burke's words are:

> For what a Constitution would do primarily is to *substantiate an ought* (to base a statement as to *what should be* upon a statement as to *what is*). And in our "agonistic" world, such substantiation derives point and poignancy by contrast with notions as to what should not be.[2]

Burke's point about the agonistic element in constitutions is entirely consistent with a view of constitutional law as a "culture of

[1] K. BURKE, A GRAMMAR OF MOTIVES 357 (rev. ed. 1969).
[2] *Id.* at 358.

Illustration 6

Illustration 7