Beyond Nomos and Narrative. Unconverted Antinomianism in the Work of Susan Howe

Marie Ashe

Follow this and additional works at: https://digitalcommons.law.yale.edu/yjlf

Part of the Law Commons

Recommended Citation
Marie Ashe, Beyond Nomos and Narrative. Unconverted Antinomianism in the Work of Susan Howe, 18 YALE J.L. & FEMINISM (2006). Available at: https://digitalcommons.law.yale.edu/yjlf/vol18/iss1/2
Beyond *Nomos and Narrative*: Unconverted Antinomianism in the Work of Susan Howe

Marie Ashe†

INTRODUCTION ..............................................................................................................2
I. LAW AND RELIGION IN *NOMOS AND NARRATIVE* ........................................6
II. UNCONSCIOUS GENDERING IN *NOMOS AND NARRATIVE* ..........................16
   A. “Jurisgenesis” and Patrilinearity .......................................................................18
   B. Robert Cover’s Intellectual Kin ........................................................................21
      1. Male Intellectual Kin ......................................................................................22
      2. Antinomian Women’s Writings ......................................................................23
      3. Mark DeWolfe Howe: Intellectual Father ....................................................30
         i. The 1953 *Foreword* .................................................................................32
         ii. *The Garden and the Wilderness* ..............................................................36
III. UNCONVERTED ANTINOMIANISM IN THE WORK OF
     SUSAN HOWE ......................................................................................................46
     A. Deconstruction in Law and Literature ..............................................................48
     B. Deconstruction and “Unconverted Antinomianism” ......................................52
CONCLUSION ............................................................................................................59

† Professor of Law, Suffolk University Law School. Many thanks: to my family—and especially Tim—for their patience; to my friend, Mary O’Brien for years of conversation about literature, religion, and gender; to Susan Sweetgall and Ellen Delaney of the Suffolk University Law School Library for their research assistance; to Suffolk University Law School for support of this project; and to Aarti Khanolkar and other editors of the Yale Journal of Law and Feminism for their most helpful readings.

Copyright © 2006 by the Yale Journal of Law and Feminism
Choosing ancestry is a serious business with major implications.¹
– Robert Cover

Each of us is entirely free to find his history in other places than the pages of the United States Reports.²
– Mark DeWolfe Howe

The ambiguous paths of kinship pull me in opposite ways at once.³
– Susan Howe

INTRODUCTION

Nomos and Narrative (N&N) is often recognized as an originary text in the field of Law and Literature.⁴ At the time of its publication in 1983, its configuration of law as merely one form of narrative—one that exists within a normative universe constituted by a multiplicity of narratives—was received by many readers as a powerfully original contribution to legal theory. In the twenty-plus years since then, scholars have continued to cite N&N for its insistence that law cannot be reduced to rules and for its reminder that "preceptual" law must be understood as only one contributor to the governing normativity that in fact constitutes the real universe in which we, as individuals and groups, construct the meanings of our lives.

N&N has received renewed attention as the subject of books and law review articles during the last several years.⁵ In 1997, Carolyn Heilbrun and Judith Resnik, in an essay including its authors' joint and separate contributions, noted the striking absence of any "serious contemplation of women"⁶ on law school reading lists and recommended the definition of a "new canon"⁷ for Law and Literature courses, in which N&N might be included.⁸

7. Id. at 31.
8. Id. at 41.
Resnik specified that the "new canon" should differ from the original canon both in content and in method: "different texts" should be included; already-included texts should be "read differently." On the basis of an assessment that N&N had "turned" toward and "helped to lead the way – to the examination of the lives of women and minorities," Resnik identified N&N as an important text, regretting that it had not "made [its] way onto the reading lists" of Law and Literature courses.

In 2005, Resnik offered further commentary on N&N. While venturing to criticize some of Cover's arguments and attempting to supplement N&N by "taking up" some gender-related issues that Cover did not address when he wrote in 1983, Resnik does not retract her earlier, highly-positive characterization of N&N and its relevance for Law and Literature. In spite of the concerns she had earlier expressed, Resnik forgives, or perhaps excuses, N&N's failure to address gender issues, characterizing that failure as an effect of its author's "generational" identity. Noting that Cover belonged to a generation more focused on the problem of race discrimination than that of sex inequality, Resnik proposes that N&N offers a level of "guidance, wisdom and insight" that "transcends" these generational conflicts, assuring its continuing relevance and, presumably, its claim to canonicity.

The notion of "canonicity" has been problematized during the last decades, in legal theory as well as in broader critical approaches. As has the notion of "gender." But I understand Resnik, in her advocacy of a "different canon," to be making two arguments. First, she is arguing for "different writings"—urging that the body of writing that receives attention from Law and Literature scholars should include more writing by women. Secondly, she is arguing that "different readings"—that is, readings done differently—need to be undertaken. My argument here is with Resnik's strong endorsement of N&N as an example of the "different" writings and readings that she wants to see. I once shared Resnik's positive assessment of N&N as inviting more consciously
gendered perspectives in law and legal theory. In my re-reading, however, I have come to recognize that N&N actively excluded important and relevant writings by women (the kinds of “different writings” that Resnik wants to include in her “new canon”), which would have unsettled N&N’s confident valorization of religious groups.

I have come to recognize also that N&N neither constitutes nor identifies the kind of “different reading” of legal and literary texts that might energize future projects of Law and Literature commentators. My concern is that an insufficiently critical approach to N&N and a continuing willingness to overlook the limitations of its reading method will contribute to a dangerous diversion away from precisely the kinds of “different reading” that might be useful to future developments in Law and Literature.

While my perspectives in this writing are more critical and more cautionary than Resnik’s, I do write with great respect for Robert Cover’s personal history and with respect for the personal and working relationship that Resnik shared with him. In this Article, I want to respond to Resnik’s call for “different writings” by introducing to Law and Literature the work of Susan Howe, an American poet and literary critic, a contemporary of Robert Cover, and the daughter of the man I consider to be Cover’s “intellectual father”: Mark DeWolfe Howe. Susan Howe is a writer who has received major national and international recognition but has not drawn the attention of the Law and Literature movement. Beyond introducing Susan Howe’s work as “different writing,” I want to identify it as embodying and enabling deeply “different reading” of a kind that holds promise for legal theory in general and for Law and Literature in particular at the present moment, in which urgency and crisis surround issues of law and religion. To accomplish both of these ends, I re-read N&N here, through the critical lens(es) of Susan Howe.

Like Robert Cover’s work, Susan Howe’s writing addresses American religious history as well as literature and law. Unlike N&N, Susan Howe’s work explicitly concerns itself with the treatment of gender and with gendered antinomianism in American religious history and American literature—something that Cover, in spite of his focus on the antinomian narratives of religious groups, ignored. In N&N, Cover analyzed the intersection at which civil law is confronted and challenged by the narratives of religious groups.

19. See infra Section II.B.2 for discussions of the writings of Carol Weisbrod and of Carol Gilligan.
20. See infra Part III.
21. See Talisman Interview, with Edward Foster, in SUSAN HOWE, THE BIRTH-MARK: UNSETTLING THE WILDERNESS IN AMERICAN LITERARY HISTORY 155, 161 (1993) [hereinafter Talisman Interview]. See infra Section II.B.3 for a discussion of Mark DeWolfe Howe as Cover’s intellectual father; like Cover, Mark DeWolfe Howe wrote extensively in the domain of American legal history relating to religion.
22. The “paideic communities” Cover valorized were, typically, religious groups. See infra notes 45-46 and accompanying text.
Beyond Nomos and Narrative

In re-reading N&N today, it becomes important to assess whether Cover's work can enable analyses of the intersections at which law and narrative and religious groups and gender—all together and all at once, with increasing visibility and increasing intensity—collide. Resnik's recent article reflects a recognition that N&N did not account for such complex intersections. Susan Howe's focus on precisely such complex intersections distinguishes her work from Cover's and makes it more relevant and useful in the face of present challenges.

The content (what she reads/writes) of Susan Howe's work is more encompassing and more relevant than that of N&N. Beyond that, the method of Susan Howe's reading/writing is very different from that of N&N. That method, which makes Susan Howe's work more theoretically relevant for current legal theory, involves Susan Howe's brave venture into an historicized location—one not readily characterized as modern or post-modern, and one unquestionably not pre-modern. In that space beyond the reach of multiculturalism, individual antinomian voices that are not merely "different" but that are barely legible (in religion, in literature, and in law) begin to be uncovered. In that space, Howe contributes to contemporary thought her own refusal to avoid the uncertainties exposed and activated when those uncovered voices sound.

Part I of this Article provides a brief summary of the content and coverage of N&N—of its treatment of law, of religion, of narrativity; of the values of each of these; and of the relations among the three. Part I notes the positive value that Cover attributes to the narratives of religious groups because of their jurisgenerative potential, as well as his advocacy for the constitutional protection of religious groups' autonomy. Part II considers the gendered genealogical themes and the intellectual kinship connections through which Cover develops the arguments of N&N, exploring the relationships that Cover claims for himself—and the ones that he rejects—as he locates his commentary within a broad range of work in law and in other disciplines. Uncovering the unconscious male-gendering that marks N&N, this Part explores the identities of the writers whom Cover introduces as his intellectual kin and considers the identities and the work of his overlooked, or minimally-mentioned, female contemporaries. Part II speculates about the possible motivation for and the real effects of Cover's gender exclusivity and argues that this exclusivity significantly limits the relevance of N&N for contemporary legal theory, particularly for considerations of law, narrative, and religion in their intersections with gender.

Part III discusses writings of Susan Howe published from the mid-1980s to the present, identifying some of the features that contribute to the power and originality of her theoretical undertakings. Susan Howe's works address

23. Resnik, supra note 12, at 47.
N&N’s subject matter—law, narrativity, and religion; at the same time, they explicitly attend to issues of gender and they employ sophisticated theoretical perspectives. In these latter respects Susan Howe’s works differ significantly from N&N and, indeed, constitute a radically “different” method of reading/writing. Part III’s discussion of Susan Howe’s work—about American law, about American literature, about American religion and about gender—is offered in the hope that readers may find inspiration in it, recognizing in it a deep and true capacity to, in Cover’s much-cited phrase, “stop circumscribing the nomos.”

Part III argues that “learning Howe”—that is, reading Howe in dialogue with N&N and with Cover—generates new possibilities and new directions for the continuing study of law’s engagement with narrativity, with religion, with gender, and with every unconverted antinomianism.

Part III presents the most expansive treatment of the implications of Susan Howe’s work. However, I have attempted to incorporate, throughout this Article, what I have learned from my reading of Howe. For that reason, I have invited her writing, in the forms of forceful interruption and of insistent and sometimes peremptory challenge, into my own text. Fragments from Susan Howe’s writings appear throughout this Article; they are recognizable by their appearance in this font.

I. LAW AND RELIGION IN NOMOS AND NARRATIVE

Robert Cover’s Nomos and Narrative appeared in 1983 as the Foreword to the Harvard Law Review issue surveying the 1982 Term of the United States Supreme Court. Published at a time when Cover was already well-known for his study of judicial acquiescence to—or collusion with—“the injustices of Negro slavery,” N&N emerged onto a scene in which legal theory had already begun to be marked by significant new directions. N&N followed by eight years the deeply critical perspectives expressed in Roberto Unger’s Knowledge and Politics, a major originary text of the Critical Legal Studies movement, and it followed by ten years James Boyd White’s publication of The Legal Imagination. Focused, like White’s book, on the nature of the processes that give rise to “legal meaning,” N&N consciously situated itself by reference to White’s Legal Realist writing.

Nomos and Narrative was received as a startling contribution because of its strong configuration of law as only one form of narrative within a universe of narrativity and also because of its urgent insistence that law must be understood as a narrative forged by a multiplicity of groups and associations that produce

24. Cover, supra note 1, at 68.
28. See Cover, supra note 1, at 6 n.10.
alternative contending narratives and contending nomoi. N&N laid bare the violence of statist law and of the “jurispathic” nature of judging, and it seemed inspiring in its optimistic invitation for new narratives able to challenge that violence. N&N involved a new attention toward hermeneutics, an early gesture in the “turn toward interpretation” that would come to characterize much of the most original legal scholarship that would develop throughout the 1980s and 1990s. While N&N transmitted its Legal Realism heritage, it also openly manifested a literary and religious sensibility attributable to Cover’s own life experience. The “energy and vitality” of the essay, noted in Robert Post’s recent comments on N&N, are attributable in large measure to the individuality and singularity of Cover’s voice. My voice formed from my life belongs to no one else.

While N&N introduces a survey of the Supreme Court’s 1982 Term, most of the essay is in fact dedicated to Cover’s own theoretical enterprise. Its eight concluding pages offer critical evaluation of the Supreme Court’s decision in Bob Jones University v. United States; however, its other fifty-six pages are devoted to expansive considerations of the concepts of “nomos” and “narrativity” and to commentary illustrating the relationships between those concepts. Cover begins N&N not with any preliminary account of the provenance of the term “nomos,” but with the broad proposition: “We inhabit a nomos—a normative universe.” He further posits that the “formal institutions of the law” are “but a small part of the normative universe...” This “normative universe” is the central object of investigation in N&N. Cover explicitly states that his interest reaches beyond the narrower and more limited hermeneutical projects taken up by other scholars who have examined “the problem of ‘meaning’ in law.” Instead, Cover defines his own work as

29. This theme was further developed in Cover’s later writing, Violence and the Word, 95 YALE L.J. 1601 (1986).
31. It will be argued, in Part III, infra, that N&N did not itself deploy the strategies that would become broadly apparent in American jurisprudence during the decade after its publication, when Continental deconstructive practices had already given rise to critical theory in various disciplines of the humanities in American universities, and when those practices became visible to legal theorists.
33. HOWE, supra note 3, at 13.
35. Cover, supra note 1, at 4.
36. Id.
37. Id. at 5 n.11, citing William R. Bishin & Christopher D. Stone, LAW, LANGUAGE AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD (1972). Cover distinguishes his effort from the work of Bishin and Stone. He also makes clear that he will undertake a project different from the work of Hans-Georg Gadamer, which he regards as having—disappointingly—understood “legal hermeneutics” as a narrow or limited project. Cover, supra note 1, at 5 n.11, citing Hans-Georg Gadamer, TRUTH AND METHOD (Garrett Barden & John Cumming trans. 1975). Cover notes:

The entire discussion of legal hermeneutics in Truth and Method is disappointingly provincial in several ways. First, it is entirely statist and therefore does not raise the question of the hermeneutic problems particular to all systems of objectified normative texts (statist
Yale Journal of Law and Feminism  

"indebted" to that of James Boyd White, whose projects he characterizes as having begun a more inspiring exploration of "the range of meaning-constituting functions of legal discourse." It is the grace of scholarship. I am indebted to everyone.

In perhaps the best-remembered contribution of N&N, Cover expounds upon the general concept of "jurisgenesis," or "the creation of legal meaning," a process that can occur in the absence of any state. It is here that Cover explains the origins of the term "nomos": "The Hebrew word Torah was translated into the Greek nomos in the Septuagint and in the Greek scripture and postscriptural writings, and into the English phrase 'the Law.'" It is at this point, perhaps, that we begin to sense why the word "nomos" had seemed so strangely both familiar and unfamiliar. As Cover widens his focus to include religion, we are reminded of the centrality of issues of "nomianism" to American religious history and of the Antinomian Controversy, which divided the Massachusetts Bay Colony in the seventeenth century and culminated in the banishment of Anne Hutchinson.

Discourse in the Massachusetts Bay Colony, religious or otherwise, stirred by millenarian activism, fraught with puzzlement and rapture, fury and passivity, was charged with particular risks for women, who were hedged in by a network of old-world property values. Charged: "But now having seen him which is invisible I fear not what man can do unto me" said Mrs. Anne Hutchinson at her Examination at the Court at Newtowne/Cambridge. Cover makes clear that when he uses the term "nomos" he intends to invoke its most extended meaning, referring "to law in the sense of a body of regulation and, by extension, to the corpus of all related normative material and to the teaching and learning of those primary and secondary sources. In this fully extended sense, the term embraces life itself, or at least the normative dimension of it . . . ." Cover proposes that a nomos may exist in two forms.

and nonstatist alike). But it also inadequately addresses the question of the destruction of the hermeneutic in the necessarily apologetic functions of officialdom.

Cover, supra note 1, at 5 n.11. See generally Binder & Weisberg, supra note 4.

38. Cover, supra note 1, at 5, citing White, supra note 27, and James White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev 415 (1982).


40. Cover, supra note 1, at 11.

41. Id. at 11 n.31.


43. Howe, supra note 39, at 3.

44. Cover, supra note 1, at 11 n.31. Cover notes that his broad interpretation of "nomos" will parallel the broad meaning given to the term "Torah" in "later rabbinics." Id. Tapping into Mishnaic text, Cover provides an account of interpretations of obligations of Judaic law offered by Simeon the Just; these are invoked to illustrate and support the proposal that the nomos is characterized by the
A nomos can be seen as “paideic,” or “world-creating,” when it involves communities that are marked by strong personal commitments, by the education of the community’s members into a common corpus of “law” that includes both precept and narrative, and by “a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”

Religious communities may be “paideic” communities. On the other hand, a nomos may be “world-maintaining” rather than “world-creating.” The “world-maintaining” nomos will be characterized by universal norms enforced through institutional discourse premised on objectivity, by weak interpersonal commitments, and by minimalist obligations—obligations just “to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms.”

Unlike the “world-maintaining” civil community, paideic communities are radically unstable; processes of interpretation that occur within them give rise to “juridical mitosis” as multiplicities of meaning are generated. Sometimes paideic communities will expel or exile members whose interpretations of the community law are felt to be too disruptive, and Cover reminds us of this, though he does not discuss the phenomena of expulsion and exile. Anne Hutchinson was banished by the founders of the Massachusetts Bay Colony, then murdered in the natural wilderness by history. The “sober imperial mode of world maintenance”—the nomos of the civil community—is needed to maintain social stability in the face of unstable paideic communities.

In dynamic relationship with the supporting or competing narratives of paideic communities, the civil community will seek to bolster its own stability by claims of authority; but such authoritative claims, Cover insists, are suspect. In illustration of this point, Cover notes that Americans do not share “an authoritative narrative” about the significance of the Constitution. Early narratives of conversion and first captivity narratives in New England are often narrated by women. . . . During a later Age of Reason eighteenth-century Protestant gentlemen signed the Constitution in the city of Philadelphia. These first narratives from wide-open places re-place later genial totalities.

---

45. Id. at 12.
46. Id. at 13 (stating that the law of Torah constitutes paideic nomos, as does the community that Christians refer to as “the Church”).
47. Id.
48. Id. at 15.
49. Id. at 16 n.41, 23 n.66.
50. HOWE, supra note 39, at 4.
51. Cover, supra note 1, at 17.
52. HOWE, supra note 39, at 50.
even if it were possible to define an authoritative history, the relationships of individuals to that history would be disparate. With regard to the Thirteenth and Fourteenth Amendments, for instance, “Some of us would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis. Choosing ancestry is a serious business with major implications.” Cover does not identify any other parents or precursors whom we might claim in “choosing” our nineteenth-century ancestry. He will, later in N&N, mention William Lloyd Garrison as a radical abolitionist, but there will be no mention of the nineteenth-century narratives of Harriet Beecher Stowe, of Susan B. Anthony, of Elizabeth Cady Stanton, of Matilda Joslyn Gage, of Emily Dickinson, or of any other woman. “My Life had stood— a Loaded Gun—” was written during the Civil War. Emily Dickinson, who is so often accused of avoiding political issues in her work, certainly did not avoid them here. As she well knew, the original American conflict between idealism and extremism was being acted out again. John Brown was another Puritan zealot invoking Jehovah, set out to fight the Lord’s battle, the Bible’s way. Liberators and the righteous were, as always, burning, looting and destroying.

Cover also illustrates his propositions about “law-creation” in paideic communities through an examination of “legal ordering” that focuses on the relatively pure, pre-statist form in which such ordering occurred in Jewish communities whose governing norms included Biblical texts. Within paideic communities, acts of prophecy and claims of revelation may present powerful challenges to existing orders, he notes, and stories of precept-violation will raise problems of political legitimacy.

53. Cover, supra note 1, at 18.
54. Id. at 35-40.
56. Cover finds in the Biblically-documented paideic communities a “thickness of legal meaning” produced where “precepts and narratives operate together to ground meanings,” Cover, supra note 1, at 19, and he explores the tensions that become evident when challenges to the existing precepts are developed. Illustrating those tensions, Cover points to the contradictions that are recorded between, on the one hand, the preceptual law stated in Deuteronomy and, on the other hand, the acceptance of violation of the precepts expressed in other Biblical narratives. Id. at 19-21.
57. In the course of this account of how even a “single self-enclosed world...produces a system of normative meaning,” Cover, supra note 1, at 19, and how narratives sometimes support the overturning of preceptual law, Cover states that stories of precept-violation suggest that a “bearer of destiny” may be able to support his transgression of precept through elaboration of a narrative that characterizes that transgression as divinely ordained. Id. at 22. When such an event occurs, it becomes possible that the “objective, universalized norm” may cease to operate. Id. at 23. Acts of prophecy and claims of revelation typify challenges to existing orders, and stories of precept-violation raise problems of political legitimacy. Id. at 22-24. Cover notes: “Every legal order must conceive of itself in one way or another as emerging out of that which is itself unlawful.” Id. at 23. And “[t]he return to foundational acts can never be prevented or entirely domesticated...[B]iblical narratives always retained their subversive force—the memory that divine destiny is not lawful.” Id. at 24.

Some of the themes raised by Cover appear to anticipate ones that would later be more radically explored by Jacques Derrida, in his reading of Walter Benjamin. Jacques Derrida, Symposium,
Having outlined this theoretical understanding of the relationship of nomos to narrative—and of both to religion—Cover develops that theory more fully in application to events in American law. **There are . . . characteristic North American voices and visions that remain antinomian and separatist. In order to hear them I have returned by strange paths to a particular place at a particular time, a threshold at the austere reach of the book.**

Relying heavily on briefs filed on behalf of the Mennonites in *Bob Jones University* and on briefs filed on behalf of Old Order Amish communities in *Wisconsin v. Yoder*, Cover explores how “legal meaning” develops in the “insular communities” constituted by particular religious groups, and he explores the tensions that arise when the nomos of an insular group contradicts or challenges the nomos of the civil government. This discussion is relevant to Cover’s critique of *Bob Jones University* because he configures the concerns of the Amish and Mennonite paideic communities—their interests in religious freedom and in education—as very much akin to those asserted by Bob Jones University in its challenge to the IRS ruling that denied its tax-exempt status.

According to Cover, Bob Jones University, at the times relevant for review by the IRS and during the United States Supreme Court’s 1982 Term, practiced race discrimination through its policy of forbidding “interracial dating, interracial marriage, the espousal of violation of these prohibitions, and membership in groups that advocate interracial marriage.” In spite of his personal record of activism and scholarly work dedicated to the Civil Rights movement, Cover acknowledges and accords great significance to the First Amendment constitutional claims—involving rights of “free association” and rights of “religious liberty”—asserted by Bob Jones University. He criticizes what he sees as an act of avoidance by the Court: its failure to engage adequately, or even respectfully, with those claims asserted by a religious group.

Pursuing his interest in the origin of legal meaning, Cover first directs his attention to texts that provide the self-narratives of particular religious force. 

---


58. **HOWE, supra note 39, at 2.**


61. Cover, *supra note* 1, at 60-68.

62. **Id. at 62.**


64. Cover, *supra note* 1, at 67.
First: the Law holds gibberish off. Thus, he quotes from the Amicus Brief filed by the Mennonites on behalf of Bob Jones University and from the Brief filed for the Old Order Amish in the Yoder case. These Briefs constitute the narratives of lawful religious groups; they are not the narratives of isolated religious individuals. The particular antinomian texts with which Cover engages here are legible writings, texts entirely recognizable and authorized by a particular American legal order, asserting canonical social power, whose predominant purpose seems to have been to render isolate voices devoted to writing as an physical event of immediate revelation. The excommunication and banishment of the early American female preacher and prophet Anne Hutchinson, and the comparison of her opinions to monstrous births, is not unrelated to the editorial apprehension and domestication of Emily Dickinson. Cover engages with these writings of and on behalf of the Mennonites and the Amish because he perceives those groups as having properly identified with and supported the University's claim that no “mere ‘public policy’ however admirable, [should] triumph in the face of a claim to the first amendment's special shelter against the crisis of conscience.”

Cover's sympathy for the claims of Bob Jones University as precisely constitutional claims, along with his sympathy for the self-accounts of the communities recorded in the Mennonite and Amish Briefs, is rooted in his perception that, often, religious groups will be the sources of the most powerful challenges to the law embodied in the nomos and narrative of the civil community. A religious group may produce a significantly challenging alternative narrative when it strives to protect its “insular autonomy” or when, going beyond that, it asserts a vision of “redemptive constitutionalism”: a vision of—and perhaps a program for—transformation of the social world. In

65. It will be argued in Part III, infra, that this selection of a readily intelligible form of antinomian writing marks a limit of the theoretical range and present relevance of N&N.

67. See Brief of Amicus Curiae, supra note 59.
68. See Brief for Respondent, supra note 60.
69. Howe, supra note 39, at 1.
70. Cover, supra note 1, at 28.
71. Cover notes that he invokes this term specifically for its religious connotation, to highlight the eschatological quality of visions that postulate:

(I) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other. The term redemptive also has the connotation of saving or freeing persons, not only worlds or understandings. I have chosen a word with the religious connotations of both personal and cosmic freedom and bondage, because the paradigmatic cases I have in mind require just such a heavy weight of meaning.

Id. at 35. Examples of movements for “redemptive constitutionalism” include the radical antislavery movement of the 19th century and the Civil Rights movement of the late 20th century—both of which originated in part from sectarian-religious commitments, and both of which tended to remain “tied to the religious traditions that invoke the vocabulary of redemption.” Id.
Beyond *Nomos and Narrative*

his consideration of *Bob Jones University*, specifically, Cover emphasizes and valorizes the religious nature of the University’s claims, arguing that their religious nature was avoided and effectively devalued by the Court. Cover insists that the claims should not have been displaced lightly with the Court’s invocation of “public policy” and its upholding the statutory interpretation of an IRS bureaucrat. He urges that the Court ought to have engaged fully with the religion-based claims attached to the constitutional principles of freedom of association and of free exercise that belong to religious *groups*.

*N&N* includes an examination of the role of courts in the universe of contending narratives, characterizing courts as “jurispathic” because of their involvement in “killing law”: in rejecting or destroying certain forms of *nomos* in order to preserve an existing civil order.

Here Cover develops the notion that courts’ impositions of legal meaning and judges’ forcible suppressions of certain nomic communities on behalf of statist governments that enjoy no hermeneutic privilege must be characterized as violent. There is no virtue of the state that gives it a superior claim to obedience with regard to its law. **Antinomy. A conflict of authority. A contradiction between conclusions that seem equally logical reasonable correct sealed natural necessary** It is “[b]y exercising its superior brute force [that] the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities.”

If such violence is ultimately unavoidable, the central question for Cover is the degree to which jurispathic violence against religious *groups* can be reduced: “The question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities.”

The scope of inquiry of *N&N* is narrow: Cover examines the contest between the prevailing civil *nomos* and the contending narrative of the religious group. He avoids the more perilous inquiry into the violent force exercised by the religious group against its own individual members’ antinomian utterances or claims of revelation closer to the boundaries of *what wilderness and absolute freedom is the nature of expression*. In so limiting its scope, *N&N* is not uncharacteristic of American writing about law. **Anne Hutchinson’s verbal expression is barely audible in the scanty second- or thirdhand records of her two trials. Dorothy Talbye, Mrs. Hopkins, Mary Dyer, Thomas Shepard, Mrs. Sparhawk, Brother Crackbone’s wife, Mary Rowlandson, Barbary Cutter, Cotton Mather... They express to me a sense of**

72. Cover, *supra* note 1, at 66.
73. Howe, *supra* note 39, at 141.
74. Cover, *supra* note 1, at 44.
75. Id.
unrevealedness. . . . [or] a sense of Substance/Being seeking to be self-conscious. 77 This limitation of scope may be produced, in part, by the sinuous wall that separates law and legal theory from literature. If she is absent from N&N’s study of American law’s governance of religion, the specter of Anne Hutchinson and her association with religion and with the violent force of law will sometimes surface in American literature. Antinomian Anne Hutchinson roams through Nathaniel Hawthorne’s imagination in The Scarlet Letter. 78 It will not, however, always do so. In 1830, “Mrs. Hutchinson” was one of Hawthorne’s first published stories. He removed it from later collections gathered into books. 79 If even a more capacious literature will not reliably make room for the individual antinomian, how will law and legal theory come to do so?

Cover sees judges as contributing to the violence of statist law whenever they defer to “the violence of administration.” 80 In Bob Jones, he claims, the Supreme Court permitted such a violence to occur by deferring to the IRS and holding merely that the IRS decision against the University had been “not unconstitutional.” 81 The Court had failed to engage fully with any narrative of “redemptive constitutionalism”—with a narrative about liberty of religious autonomy and of educational association, for example; or with a narrative about “the grand national travail” against race discrimination. 82 Thus, the Court had failed to do justice to either the “insular communities” or the “minority community,” failing to provide for the former “a constitutional hedge against mere administration,” 83 and failing to assure to the latter “a constitutional commitment to avoiding public subsidization of racism.” 84

In its critique of “jurispathic judges,” N&N appears to invite a proliferation of alternative nomoi and to offer support for a multiplicity of antinomian or alternative-nomian forces. But N&N in fact supports only a narrow category of the antinomian forces that have operated and continue to operate in American society. Cover’s focus on the interplay between constitutional text and the argument of the Amicus Briefs in Bob Jones University avoids the existence of antinomian discourse that is not readily translatable into the language of a

77. Id. at 4.
78. Id. at 6, citing NATHANIEL HAWTHORNE, THE SCARLET LETTER AND OTHER TALES OF THE PURITANS 50 (Harry Levin ed., 1961) (“This rose-bush, by a strange chance, has been kept alive in history; but whether it had merely survived out of the stern old wilderness, so long after the fall of the gigantic pines and oaks that overshadowed it,—or whether, as there is fair authority for believing, it had sprung up under the footsteps of the sainted Ann Hutchinson, as she entered the prison-door,—we shall not take upon us to determine.”).
80. Cover, supra note 1, at 59.
81. Id. at 66.
82. Id.
83. Id. at 67.
84. Id.
group, let alone into the language of law. "It is one thing for me to come before a public magistracy and there to speak what they would have me to speak and another when a man comes to me in a way of friendship privately there is difference in that": Mrs. Hutchinson to Governor Winthrop at her examination by the Court at Newtowne, 1637. "What if the matter be all one," the Governor answered. 85

It is true that Cover does not advocate entirely uncritical acceptance of all the policies and visions advanced by resistant religious groups. He notes that we must "examine the nomian worlds" created by any social movement—taking the measure of "[t]he stories the resisters tell, the lives they live, the law they make in such a movement." 86 But his critique of nomianism (to the degree that that term connotes "jurispthy" and "law-killing") supports a set of religious groups susceptible to the power of a jurispathic civil law, and it does not address the plight of individuals within those groups who are vulnerable before the force of religious law. The privileging of group antinomianism marks a theoretical limitation of N&N, for antinomianism is the mark of an individual. An antinomian is a religious enthusiast. 87 The enthusiast...is a solitary, who lives in a world of his own peopling. 88 [T]he real Anne Hutchinson was excommunicated and banished by an affiliation of ministers and magistrates for the crime of religious enthusiasm. 89 One aspect of this limitation involves the simple gender-exclusivity produced by Cover’s ignoring women: there is no focus in N&N on particular risks for women. 90 Another limiting aspect derives from the fact that Cover wrote N&N before the publication of such critical work as Alice Jardine’s Gynesis in the mid-1980s and Judith Butler’s radical deconstructions of gender in early twenty-first century queer theory. 91 Unable to have been informed by the complex understandings expressed in such writings, N&N is naïve in its blindness to the operation of gendering throughout the communities whose antinomianism it valorizes.

85. HOWE, supra note 39, at 13, citing THE ANTINOMIAN CONTROVERSY, supra note 42, at 319.
86. Cover, supra note 1, at 68. See Resnik, supra note 12, at 31 n.7, pointing to Cover’s disavowal, some years after the publication of N&N, that the essay had presented “insular religious communities as a model for law reform.” See also ROBERT M. COVER, OWEN M. FISS, & JUDITH RESNIK, PROCEDURE 729-730 (1988) (reporting a discussion between Cover and Owen Fiss). While Cover’s disavowal should not be ignored, it should perhaps be given only the weight due to an author’s statement of authorial intent; it cannot undo or diminish the religion-valorizing impact produced by the text of N&N itself.
87. HOWE, supra note 39, at 11.
88. Id. at 12, quoting 12 SAMUEL TAYLOR COLERIDGE, MARGINALIA I, ABBOT TO BYFIELD, in THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE 495-97 (George Whalley ed., 1980).
89. HOWE, supra note 39, at 9.
90. Id. at 3.
Cover felt hopeful, in 1983, about the "jurigenerative" potential of religious groups. His solicitude embraced those groups, as he argued that religious communities and movements might enrich social life with new meanings and might force judges to face the commitments entailed in their judicial office and in their law. But Cover paid no attention, in \textit{N&N}, to the force exercised by religious groups themselves in their interactions with individual group members; he paid no attention to such groups' suppressions of the antinomian narratives of critical members and no attention to what Resnik calls "the problem of the interaction among internal dissidents, paideic communities, and the secular state."\textsuperscript{92} His optimism included \textit{law} with its capacity for growth, \textit{narrative} able to encourage such positive growth, and \textit{religion} able to generate transformative narrative. Thus he concluded: "Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the \textit{nomos}; we ought to invite new worlds,"\textsuperscript{93} On its face, this invitation might seem to invite the "new worlds" of women and the "different" readings and writings that Resnik wants to include in her "new canon" of Law and Literature. But a close reading of \textit{N&N}, as engaged in the following Part, shows Cover's text, underneath its inviting language, actively excludes women's worlds in law, literature, and religion. It also shows that the differences advanced by Cover's text are not sufficient to permit its escape from a worn-out legal liberalism.

\section{Unconscious Gendering in Nomos and Narrative}

While the content of \textit{N&N}, outlined in Part I, could be described as consisting of propositions about law, narrative, and religion, it is inadequate to read the essay without acknowledging one of its most striking features: its elaboration of and privileging of male kinship relationships. From beginning to end, \textit{N&N} narrates a "universe" that is uncritically male-dominated and that is almost exclusively male-occupied. \textit{N&N} asserts an intent to open the door of law and legal theory broadly, to "stop circumscribing the \textit{nomos},"\textsuperscript{94} and to accommodate the challenges that jurisgenerative narratives may create for existing law. Ironically, however, \textit{N&N} itself excludes and refuses to engage with women's accounts of women's experiences of law, narrative, and religion. Careful reading of \textit{N&N} will demonstrate that, in both its structure and its content, \textit{N&N} is highly gender-exclusive. Such a reading forcefully suggests that \textit{N&N} actively impeded the generation of narratives arising out of women's experiences. It also evokes skepticism regarding claims that \textit{N&N} "led the

\begin{footnotesize}
\begin{enumerate}
\item Resnik, \textit{supra} note 12, at 47.
\item Cover, \textit{supra} note 1, at 68.
\item Id.
\end{enumerate}
\end{footnotesize}
way” for women’s writing95 and that it “transcends”96 the limitations produced by its gender-exclusivity.

Cover noted in N&N that “[c]hoosing ancestry is a serious business with major implications.”97 N&N can be read as a record of Cover’s own chosen ancestry and of his self-constructed intellectual family tree, consisting of scholars from many disciplines who had engaged with his law, narrative, and religion themes. My re-reading of N&N explores its privileging of various male kinship connections and particularly the intellectual ancestry that Cover has chosen. In considering the “major implications” of his choices, this Part, while highlighting the familial or tribal bonds that Cover affirms, attempts also to acknowledge some of the intellectual relatives not included in N&N’s genealogy. It attempts to shed light on the ways in which the gendered nature of Cover’s intellectual bondings limited both the “reading” that N&N accomplished and the “writing” that it constituted.

N&N’s almost exclusively male kinship structure figures in every element of the essay and has been surprisingly unremarked. N&N’s treatments of each of its three central preoccupations—law, narrative, and religion—function to facilitate a dense elaboration of homo-intellectual bondings. To demonstrate this, it will be useful to consider the relationships Cover avows throughout N&N. In this consideration, the gendering promulgated by N&N’s selective preferencing of homo-intellectual connections (and its exclusions of other possibilities) will become evident. Its exclusively male gendering greatly limits the critical force of N&N, and this limitation must not be overlooked or minimized either in future Law and Literature projects or in future considerations of American law regarding religion.

Exploring the gendering operative in N&N, I note, first, that Cover modeled his “pure” theory of jurisgenerativity upon the nomos of a specifically male kinship network. Secondly, I show that Cover engaged with only male kin and developed his argument in conversation with only male predecessors and peers—a homo-intellectual network of fathers and brothers that excluded women’s perspectives and avoided discussion of relevant writings by women. I suggest that the effects of this exclusion were not trivial, that the exclusion worked both to constrain and to shore up the particular critique elaborated in N&N—its valorization of one kind of antinomianism and its overlooking of other kinds. Cover urged his readers to measure any given nomos according to what it offers for the narratives we may want to elaborate, for the lives we may be able to lead, and for the law-making to which we hope to offer some contribution.98 If N&N is to enjoy a certain normative space within libraries of

95. Heilbrun & Resnik, supra note 6, at 41.
96. Resnik, supra note 12, at 53.
97. Cover, supra note 1, at 18.
98. Id. at 68.
Law and Literature, if it is to deserve the new canonization that Resnik advocates, Cover's work should be able to survive those same measures.

My critique of the unconscious gendering evident in N&N is focused entirely on its text and not on its author. I never met Robert Cover in person, but from my first encounters with his writing I have thought of him as akin to myself. I had heard of his involvement in civil rights activism in the South and work with SNCC, in which I myself had participated in the 1960s.99 I felt a kinship with him on the basis of that common experience, one that I continue to feel. I experienced grief when I learned of his death: I had wanted more of his words. I engage with N&N now because I recognize the current, renewed attention to this work, and I believe that N&N may continue to shape and constrain both the Law and Literature project and projects concerning law and religion. I engage also because my sense of connection to Cover has, for more than twenty years, drawn and re-drawn me to his work. While I am unable to join the highly positive assessment of N&N that Resnik offers, because I do not see Cover's work as "transcending" its exclusive gendering, I do recognize the originality and strength that marked its appearance in 1983. So, in this Part, I offer a hermeneutic that is as troubled as it is appreciative. The ambiguous paths of kinship pull me in opposite ways at once.100 With regard to N&N, I record my deep ambivalence.

A. "Jurisgenesis" and Patrilinearity

In some ways it seems particularly appropriate to map N&N through a grid of kinship, precisely because its central explication of the processes of "jurisgenesis" and of "the thickness of legal meaning" involved Cover in his own examinations of kinship—specifically male kinship—relations. Looking into prescriptions regulating relationships of ancestry and offspring, Cover inquires into the Biblical "law" constructing the meaning patriarchal relationships between progenitors and their sons. His elaboration of these notions leads him to read the "precept" stated in Deuteronomy that defines the law of primogeniture:

If a man has two wives, one loved and the other hated, and both the loved and hated have borne him sons, but the first born is the son of the hated wife—when he leaves his inheritance to his sons he may not prefer the son of the beloved wife over the elder son of the_hated wife. He must acknowledge the first born son of the hated wife and give him the double portion. For he is the first fruit of his loins and to him is the birthright due.101

100. Howe, supra note 3, at 7.
101. Cover, supra note 1, at 20 (quoting Deuteronomy 21:15-17).
The law expressed in Deuteronomy is of interest to Cover because of its contrast with a number of Biblical-canonical narratives that recount violations of the primogeniture-birthright mandate. Cover cites several of these:

1. The story of Cain and Abel, in which God accepts the sacrifice of Abel, the younger son, rather than that of Cain, the elder, and in which Seth, the third born, ultimately becomes the progenitor of the human race;
2. The story of Ishmael and Isaac, in which Ishmael, the first fruit of Abraham’s loins, is cast out so that the birthright might pass to Isaac, the later son born of the preferred wife;
3. The story of Esau, the first-born son of Isaac, who is denied his birthright by the trickery of Jacob, his younger brother; and
4. The story of Joseph and his brothers, in which Joseph—a younger child of the preferred wife—is favored by his father, dreams of his own primacy, provokes retaliation, and comes to rule over his brothers in an improbable political ascendancy in another land. Indeed, 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.

The tales invoked by Cover to illustrate his general theory of “jurisgenesis” are almost entirely tales of men, not women, engaged in conflict and struggle; this is true not only of the Biblical texts he examines, but also of other literature on which he comments. Thus, in his footnote 66, wherein Cover surveys literary and historical manifestations of the power of revelation and prophecy, he cites as a paradigm Dostoevsky’s 19th Century novel of fraternal conflict and patricide, The Brothers Karamazov.

Only once in that lengthy footnote does Cover refer to a woman, and this single reference is a brief comment: “The extraordinary trial of Anne Hutchinson in Massachusetts Bay in 1637 also demonstrates the dangerous character of a return to revelation in a legal world founded on revelation.”

The inclusion of merely passing reference to a single woman is particularly striking in this writing purportedly engaged with American law and American religion, given the reality of female-gendered American religious controversy and persecution. The three most serious threats to the political and religious stability of the Commonwealth of Massachusetts in the Seventeenth century—the Antinomian controversy—1636, the Quaker persecutions of

102. Id. at 20-21 (citations omitted). The Deuteronomic law of primogeniture and the challenges raised against it by competing Scriptural narratives constitute the “pure” (that is, the non-statist) model of “law creation” central to the thought of N&N. These tales are relevant as illustrative of Cover’s claim that the rejection of preceptual law tends to be supported by claims of “divine destiny” or justified by invocations of a higher force. The discontinuity in the legal order that is produced by the violation of the precept, justified by reference to divine destiny, amounts to a “dangerous return” to a “sacred beginning.” Id. at 23. Cover identifies revelations and prophecy as “the revolutionary challenges to an order founded on revelation.” Id.

103. Id. at 23 n.66.

104. Id.
the 1650s and the Witchcraft hysteria in 1692—all directly involved women.105

While he treats extensively the structure of law governing male family relationships, Cover offers no discussion at all of women's family issues and the law governing them, even when constitutional case law would readily invite such discussion. **Motherly Piety: an anonymous old woman of Ipwsich, swaddled in silence, stranded in darkness, serves as Governor Winthrop's exemplary version during the disorderly days of the birth of his colony, when Mrs. Hutchinson, a mother and a midwife, impiously dared to Breach and prophesy.**106 Cover cites in only the most summary fashion to *Roe v. Wade,*107 with no exploration of how that opinion governing women's "generative" capacities, women's decisions about reproduction and birth will actually affect women. Likewise, he refers just in passing, in the course of his discussion of "redemptive constitutionalism," to both the "women's movement" and the "right-to-life movement;" Cover emphasizes their similarities while merely noting that both of these movements participate in a "way of thinking about law and liberty" that wants to "liberate persons and the law and to raise them from a fallen state."

And Cover references in an extraordinarily summary and entirely uncritical way the case of *Santa Clara Pueblo v. Martinez,*109 in which the Supreme Court tolerated the dis-privileging of matrilineal lineage by an Indian tribe. The tribe discriminated in its differential treatment of male and female members who had married outside the tribe, permitting tribal membership to children of such male members, while denying that status to children of similarly-situated female members.110 Cover's citation to *Martinez* provides absolutely no account of the facts of the case, referencing it only to support his broad proposition that the constitutionally-protected right that derives from "freedom of association" is "not a liberty to be but a liberty and capacity to create and interpret law—minimally, to interpret the terms of the association's own being."111 Further expanding on this proposition without any acknowledgement that the case raises an issue of gender discrimination that may have been treated inadequately (or "violently," perhaps, in Cover's own terminology) when avoided by the *Martinez* Court, Cover comments:

The religion clauses of the Constitution seem to me unique in the clarity with which they presuppose a collective, norm-generating community whose status as a community and whose relationship with

105. Howe, supra note 3, at 113.
106. Howe, supra note 39, at 27.
108. Cover, supra note 1, at 35.
110. Id. at 52.
111. Cover, supra note 1, at 32.
the individuals subject to its norms are entitled to constitutional recognition and protection.

Respect for a degree of norm-generating autonomy has also traditionally been incident to the federal government's relations with Indian tribes. ¹¹²

Cover's attempt to privilege a kind of sovereignty in religious groups has the effect of banishing to the distant margins the realities of discrimination against individuals—and particularly against women—perpetrated by religious or quasi-religious associations. He does not explicitly characterize the exclusions and oppressions perpetrated against women as instances of the "violence" of religious or other communities to which these women are attached, nor does he seriously discuss the failure of Martinez Court to provide constitutional or statutory protection against sex discrimination significantly disfavoring women. The absence of any discussion of these issues is a remarkable omission in a writing so deeply preoccupied with law's "violence."

Resnik's recent commentary on N&N alludes to Cover's omission in this case; she observes: "The Supreme Court's conclusion [in Martinez] was the kind of jurisdictional decision Cover identified as a failure."¹¹³ But this observation is misleading to the degree that it seemingly implies that Cover himself made any such criticism of Martinez. It is Resnik (and not Cover) who first makes the argument that federal courts fail when they avoid issues of sex discrimination (as the Court did in Martinez). Cover's concern in N&N was about access to the courts by "paideic communities"—that is, by groups (and, especially, religious groups)—not about access by an individual woman such as Julia Martinez, complaining about the group's discrimination against her and her child. Thus, Resnik's reading of N&N, while properly and importantly pointing to some limits of Cover's essay, involves a maneuver of avoidance that resembles the very avoidance maneuvers made by courts and canon-makers that both she and Cover want to expose and to subvert.

B. Robert Cover's Intellectual Kinship in Nomos and Narrative

The focus on patrilineality evident in Cover's examination of "jurisgenerativity" is paralleled by his elaboration of a broad intellectual-kinship network that is almost entirely male. ¹¹⁴ If Cover's focus on patrilinearity reflected a rather uncritical foregrounding of "natural" father-son relationships and contests, Cover did understand the genealogical location of his work as involving conscious and deliberative construction, involving

¹¹² Id. at 32 n.94.
¹¹³ Resnik, supra note 12, at 47-48.
¹¹⁴ The concept of "kinship" has, of course, been problematized. See JUDITH BUTLER, Is Kinship Always Already Heterosexual?, in UNDOING GENDER 102-130 (2004).
choices, and generating "major implications." In writing \textit{N&N}, Cover made particular choices of ancestry and of kinship. Although, at the time of its publication, there were women authors engaged in important work that related to the themes and preoccupations of \textit{N&N}, Cover's chosen intellectual kin were almost entirely male. His exclusionary choices carry "major implications"—limiting implications—for the theoretical value of \textit{N&N}.

1. Male Intellectual Kin

\textit{N&N} asserts a multitude of interdisciplinary connections, many of which can be characterized as fraternal; the text includes numerous references to intellectual brothers who inhabit, along with Cover, the intellectual sphere involving law and legal theory. Other scholars referenced by Cover could be characterized as male cousins, at work in the other disciplines that Cover will investigate for their relevance to legal theory. Thus, Cover cites the legal scholarship of Owen Fiss,\textsuperscript{115} of John Noonan,\textsuperscript{116} of William Bishin and Christopher Stone,\textsuperscript{117} of Richard Kluger,\textsuperscript{118} of Gary Gilmore,\textsuperscript{119} and of H.L.A. Hart and Ronald Dworkin.\textsuperscript{120} He cites literary critic George Steiner,\textsuperscript{121} novelist Norman Mailer,\textsuperscript{122} and philosopher H. Gadamer.\textsuperscript{123} He references prominent psychologists, Erik Erikson, Lawrence Kohlberg, Jean Piaget and John Bowlby.\textsuperscript{124} All of these are men. Additionally, Cover cites many religious thinkers, representing a variety of religious traditions—Jewish: Simeon the Just of approximately 200 B.C.E.,\textsuperscript{125} and Joseph Karo (or Caro) of the sixteenth century;\textsuperscript{126} Christian: Karl Barth\textsuperscript{127} and John Hostetler;\textsuperscript{128} and Hindu: Mahatma Gandhi.\textsuperscript{129} These, too, are all male. Among the men predominately featured in \textit{N&N} are legal scholar Mark DeWolfe Howe and two writers who have been of significance for Law and Literature: Wallace Stevens and James Boyd White.\textsuperscript{130}

\begin{itemize}
  \item \textsuperscript{115} Cover, \textit{supra} note 1, at 5 n.7.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id. at 6 n.11.
  \item \textsuperscript{118} Id. at 8 n.20.
  \item \textsuperscript{119} Id. at 9 n.25.
  \item \textsuperscript{120} Id. at 17 n.44.
  \item \textsuperscript{121} Cover, \textit{supra} note 1, at 9 n.27.
  \item \textsuperscript{122} Id. at 8 n.21.
  \item \textsuperscript{123} Id. at 6 n.11.
  \item \textsuperscript{124} Id. at 16 nn.42 & 43.
  \item \textsuperscript{125} Id. at 11 n.31, 12-13.
  \item \textsuperscript{126} Id. at 12.
  \item \textsuperscript{127} Cover, \textit{supra} note 1, at 13-14.
  \item \textsuperscript{128} Id. at 29-30 nn.82 & 85.
  \item \textsuperscript{129} Id. at 49 n.133.
  \item \textsuperscript{130} Mark DeWolfe Howe, Wallace Stevens, and James Boyd White are discussed in Part II.B.3, \textit{infra}.
\end{itemize}
2. Antinomian Women's Writings

While broadly inclusive of male intellectual peers and predecessors, *N&N* references only a very few intellectual sisters—women working in relevant interdisciplinary areas, who were Cover's contemporaries and whose work had appeared before the publication of *N&N*. These women include Carol Weisbrod, Barbara Black, and Carol Gilligan. Cover acknowledges that both Barbara Black and Carol Weisbrod wrote about the intersection of law and religion, an issue central to *N&N*. But his treatment of each of these writers is minimal. In support of his own proposition that private law may be nomos-generative, he references Barbara Black's unpublished doctoral dissertation, authored in 1975, which he characterizes as having "eloquently described the processes by which a private law document came to have overpowering effect as the public law of the Massachusetts Bay Colony for the colony's entire first charter period."[131] Yet, despite this endorsement, Cover provides no real engagement with—nor even any summary account of—the argument that Black had developed in her dissertation.

While the unpublished status of Black's writing might account for Cover's decision not to discuss it in detail, his treatment of Carol Weisbrod's work cannot be similarly justified. At the time of the publication of *N&N*, Carol Weisbrod's book *The Boundaries of Utopia*[^1] had been in print for three years, and Cover was certainly familiar with it. Weisbrod's work is closely related to Cover's; *The Boundaries of Utopia* explores the role of contract law in the formation and support of a variety of Utopian communal projects of nineteenth-century America. Many of the projects Weisbrod studied were religious communistic societies: the Shakers, the Harmony Society, the Oneida Perfectionist community, and the Zoar community, which bear some resemblance to the Mennonite and Amish groups so positively characterized by Cover. However, Cover's treatment of Weisbrod's work, which he does characterize as "excellent,"[133] is highly selective. Cover cites Weisbrod's work for the ways in which it parallels his own; he describes Weisbrod's focus on the function of contract law as paralleling his own focus on the Free Exercise Clause, as both involve characterizations of insular communities as deriving support from internal legal principles.[134] Cover also invokes Weisbrod to link the Shakers to the Amish (whom he has already discussed) when he proposes that both the Shakers and the Amish understand the nature and the foundation of their communal associations from perspectives different from the

[^133]: Cover, *supra* note 1, at 30.
[^134]: *Id.* at 12.
perspectives of the state. Yet Cover does not mention Weisbrod’s non-parallel themes or her arguments in tension with his own.

Entirely absent from N&N is any engagement with the major themes of The Boundaries of Utopia that deal with the “dark side” of insular religious communities and that therefore raise notes discordant with Cover’s attitude toward religious associations. Weisbrod focuses extensively on the litigation initiated by “ex-Utopians,” or individuals who had once been members of these insular communities, but who had either left voluntarily or been expelled. The Boundaries of Utopia attends to the internal divisions that afflicted the communities, while at the same time exploring conflicts between the religious community’s law and the civil law. Weisbrod examines, for example, ways in which the concentration of property in a “religious group” might be inconsistent with “mortmain” laws intended to assure the free transfer of property. She also records how individuals outside the insular societies sometimes perceived particular groups as threatening because of their claims to group autonomy. Much of the litigation she recounts involved property issues and contract theory. When a group of English Puritans entered into an explicit contract they called a Covenant with God and left the European continent in what later came to be known as the Great Migration of the 1630s, they were trespassers. They were also anxious not to be considered Separatist. These separating non-Separatists were lawless in their particular northwestern settlement abroad in the world at the eastern margin of a continent.

Insular communities typically required, often through the mechanism of contract, that an individual granted membership give all his property (both real and personal) to the group upon admission. In return, the individual would receive support while he remained a member. However, members—and their children—would have no legal claim to take any property with them if they left the group. Weisbrod notes that these practices were sometimes perceived as oppressive; she cites, for example, the criticisms of Shaker society formulated by Samuel Tilden:

If its internal police extends to the supervision and control of the minutest personal concerns; if its fundamental law is an unqualified submission of its members to their irresponsible rulers, and if the penalty with which those rulers are armed is a forfeiture of all he possesses by any member who shall be ejected from or shall leave the association,—can it be that a society so constructed and possessing

135. Id. at 33.
136. WEISBROD, supra note 132, at xv.
137. Id. at 29-30.
138. Id. at 44.
139. HOWE, supra note 39, at 3.
140. WEISBROD, supra note 132, at 38-40.
such powers shall not frequently work great individual wrong and oppression?"\textsuperscript{141}

Weisbrod herself criticizes the application of contract law by courts of the "outside society," which failed to probe into the ability of second-generation communitarians to have truly "chosen" the insular life.\textsuperscript{142} She questions specifically the failure of courts to probe into issues of lack of capacity and of duress or undue influence.\textsuperscript{143} She also problematizes courts' refusals to probe into the religious doctrines of particular societies that had ejected members on the basis that those members had deviated from the doctrines. Illustrating the hardship that could be produced by such refusals, she cites \textit{Grosvenor v. United Society of Believers}.\textsuperscript{144} That case involved two sisters, Maria and Roxalana Grosvenor, who had gone to live with the Shakers as children in 1819, along with their parents and two brothers. In 1834, the Grosvenor sisters had become members of the Shaker society by signing a covenant. After they had lived in the Shaker community at Harvard, Massachusetts for forty-six years, Maria and Roxalana Grosvenor were expelled from the community for "doctrinal deviance."\textsuperscript{145} They sued, alleging that their doctrines (which involved some interest in mesmerism) were not deviant. The sisters were unable to obtain any relief in the Massachusetts courts and, indeed, were not permitted to present evidence that their beliefs were not deviant and that they were not in violation of their covenant with the community.\textsuperscript{146}

Weisbrod also problematizes the American history of respect for "church autonomy," as that had developed by the time of her own and Cover's writing in the early 1980s, in a way that strongly differentiates her work from \textit{N&N}. She characterizes the "separationist" tradition as involving a combination of "statements of religious toleration with statements of the limitations on state and judicial action. The American constitutional position was that courts would not judge religious questions."\textsuperscript{147} Weisbrod's attitude toward religious groups and their claims to group autonomy is much more ambivalent and much less sanguine than that of Cover. Weisbrod criticizes judicial avoidance of the injuries to individuals—often women—perpetrated by religious groups. In contrast, Cover criticizes judicial avoidance of claims asserted by the religious groups themselves.

The differences between Weisbrod and Cover are significant. Weisbrod notes that "[w]e are accustomed to thinking well of the utopians, seeing them as

\textsuperscript{141} \textit{Id.} at 44, \textit{citing Considerations in Regard to the Application of the Shakers for Certain Special Privileges}, in \textbf{1 SAMUEL J. TILDEN, THE WRITINGS AND SPEECHES OF SAMUEL J. TILDEN} 95 n.41 (John Bigelow ed. 1885).

\textsuperscript{142} \textit{WEISBROD, supra} note 132, at 127-128.

\textsuperscript{143} \textit{Id.} at 192-194.

\textsuperscript{144} \textit{Grosvenor v. United Soc'y of Believers}, 118 Mass. 78 (1875).

\textsuperscript{145} \textit{WEISBROD, supra} note 132, at 205.

\textsuperscript{146} The \textit{Grosvenor} case is discussed in \textit{WEISBROD, supra} note 132, at 149-52.

\textsuperscript{147} \textit{Id.} at 168.
sincerely motivated individuals working collectively to accomplish fundamentally commendable objectives." Certainly it would seem fair to characterize *N&N* as embodying such a sanguine view of the Amish, the Mennonites, and the Quakers. But Weisbrod is careful, herself, to acknowledge the limits of Utopia; she notes the criticism of the Utopians that was articulated in their own time. She cites Henry James's review of Charles Nordhoff's (positive) assessment of communal societies. Weisbrod reports that James noted the "friendly spirit" of Nordhoff, but that James also noted it would have been possible "for an acute moralist to travel over the same ground as Mr. Nordhoff and to present in consequence a rather duskier picture of human life at Amana, Mount Lebanon, and Oneida."  

[A] utopian exodus can't allow negligence. Lawlessness seen as negligence is at first feminized and then restricted or banished. Weisbrod notes that James perceived the Shaker society as "grotesque and perverted in many ways," but also as being "both the source and the fruit of a considerable personal self-respect." It seems fair to characterize Cover as having the Nordhoff-type of "friendly spirit" toward the religious groups he considered and as lacking the more complicated understandings and critical perspectives expressed by Henry James and, in measured ways, by Weisbrod herself.  

At the theoretical level, a contrast between Weisbrod and Cover is also apparent in their differing emphases upon Mark DeWolfe Howe's writing about religion and law. Weisbrod cites to Howe after she has offered an account of various utopian communities that have expelled members "at the sole discretion of the leader, without trial, process, opportunity for rebuttal, written charges, notice." She acknowledges Howe's formulation of a constitutional argument that could be asserted in support of the religious groups: "Is it possible, perhaps, that a church is denied its constitutional liberty in a state which compels it to adopt a form of government which its tradition repudiates?" Nonetheless, while raising that question as relevant, Weisbrod—perhaps because of her focus upon the harm to individuals, such as the Grosvenor sisters, produced by unconstrained liberty in religious groups—does not appear to share Cover's enthusiasm for elevating all claims of religious groups to constitutional status. Weisbrod finds Howe's suggestions about a such a "possibility" to be *perhaps* relevant; Cover, on the other hand, wants to convert Howe's "possibility" into a "reality" of constitutional status for religious groups' liberty claims, and he is willing to do that without the counterbalancing

148. *Id.* at 35.  
150. HOWE, *supra* note 39, at 3.  
151. *Id.* at 1.  
152. WEISBROD, *supra* note 132, at 243 n.5.  
153. *Id.* at 206.  
force that Mark DeWolfe Howe had proposed (ensuring protection for “non-believers” in constitutional provisions other than the Religion Clauses). 155 Had Cover considered The Boundaries of Utopia more fully, his overwhelmingly positive assessment of the autonomy of religious groups would have been challenged. Real engagement with Weisbrod’s work might have demanded that Cover pay attention to the antinomianisms of individuals—especially women—unheard and unheeded by either their religious communities or the “outside” law.

The assessment of the nature of religious groups offered by N&N sometimes seems to be either willfully blind or naïve. For example, Cover appears to have accepted entirely the narratives he extracts from the Mennonite and Amish briefs that he cites. 156 Abandoning any posture of critique, Cover does not question whether those groups were really cohesive and homogeneous; instead, N&N accepts at face value the accounts of community formulated by the brief-writers. In only the most minimal way does Cover acknowledge the reality of internal division within religious groups; while internal divisions may have afflicted “the Mormons at Nauvoo,” he appears to suggest, they are unlikely to be a problem for the “peaceful” Amish, Mennonite and Quaker communities. 157 But recent historical work belies Cover’s depiction of the insular religious groups—in their paideic communities—as homogeneous and coherent. A study of the Old Order Amish community, for example, documents the deep internal divisions underlying the litigation commenced in Wisconsin v. Yoder. 158

More importantly, Cover’s model of paideic community ignores the reality of injustices committed by such religious groups against their own members. N&N fails to address the reality of the violent force of religious law. In its valorization of religious groups it does not engage with the realities of injustices perpetrated by antinomians—become-nomian. John Cotton was... Anne Hutchinson’s minister, friend, and eventually persecutor. Sometime during the antinomian controversy in New England a spark from the fire of Scripture singed the heart of the minister-scholar [John Cotton]. “If we be hemm’d in with this Covenant we cannot break out,” he once wrote. 159 It is, of course, not necessary to look to nineteenth-century utopian communities, or even to insular contemporary religious groups, to find instances of troubling or oppressive actions. It is possible to see a connecting line in Massachusetts that links Anne Hutchinson of the seventeenth century to the banished Grosvenor

155. See discussion infra at note 220 and accompanying text.
156. See supra notes 59-60 and accompanying text.
157. Cover, supra note 1, at 51-52.
159. HOWE, supra note 39, at 3.
sisters of the nineteenth century, and to Sister Jeannette Normandin, who was banished from Boston’s Jesuit Urban Center in 2000.160 Each of these situations involved the action of a religious group confident of its authority to banish members and of its liberty to expel—into a “wilderness”—a (not-entirely-incidentally female) member on the basis of her “deviance.”

Besides eliding Carol Weisbrod’s writing, Cover also barely addresses the work of Carol Gilligan, whose book, In a Different Voice, was published in 1980, three years prior to the publication of N&N.161 Cover cites Gilligan’s work, which is concerned about differences in the moral development of male and female children, for its relevance to the model of psychological separation that occurs within communities. Cover addresses this kind of separation primarily by reference to the writings of Erik Erikson, Lawrence Kohlberg, Jean Piaget, and John Bowlby.162 N&N’s treatment of Gilligan is striking in its dual advance/retreat character. Cover comments:

I am tempted at least to invite comparison between the psychological dimension of the paideic/imperial distinction and the differences some scholars have suggested exist between male and female psychologies of moral development.163

Cover is “tempted” to invite comparison between a distinction that he offers in N&N and a distinction that Gilligan elaborates, but he does not yield to the temptation. What if he had done so? Is Cover suggesting that his paideic:imperial distinction corresponds to a male:female distinction? Or is he suggesting the opposite? Would further inquiry into Gilligan’s work have perhaps disturbed N&N’s model of jurisgenesis, which is so attached to tales of males alone? Which of the differing moral tales told by Gilligan’s models of male and female moral decision-making would correspond to which of Cover’s models? Would Gilligan’s proposition that gender is an important marker of difference have disturbed the apparently homogeneous and unconflicted “insular communities” idealized in N&N? Is Cover’s resistance to the “temptation” of Gilligan’s work consistent with the particular account of “law-

160. Sister Jeannette Normandin, a seventy-two-year-old nun, had worked for many years at the Jesuit Urban Center in Boston, in a ministry devoted to women with AIDS. During the course of administration of the Sacrament of Baptism to two infants by a Catholic priest at the Jesuit Urban Center in Boston, Sister Jeannette participated in the baptismal ritual by anointing one child with chrism oil and pouring water on the second child, “violating a church tenet that allows only ordained deacons and priests—all of whom are male—to perform baptisms, except in emergencies.” Michael Paulson, I Couldn’t Believe This Was Happening to Me: After Ouster, a Nun Struggles to Rethink and Rebuild Her Life, BOSTON GLOBE, Mar. 4, 2001, at 1, available at 2002 WLNR 2228747. In response to this action, she was “banished” from the Urban Center and evicted from her housing. “The Jesuits fired Normandin. She had to leave her residence . . . .” Id. at 3.

161. CAROL GILLIGAN, IN A DIFFERENT VOICE (1980), cited in Cover, supra note 1, at 16 n.43.

162. See Cover, supra note 1, at 5 n.8 (discussing ERIK ERIKSON, CHILDHOOD AND SOCIETY (1950); LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981); JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932); and JOHN BOWLBY, ATTACHMENT AND LOSS (1969-1980); id. at 16 nn. 42 & 43 (further discussing the writing of John Bowlby).

163. Id. at 16 n.43 (emphasis added).
creation” and “religion” that N&N offers, in which patriarchs and their sons are featured, and in which the heretical and banished Anne Hutchinson receives only passing mention? N&N’s avoidance of engagement here is a mark of limitation.

It is “tempting,” indeed, to speculate about the meanings of Cover’s having resisted the temptation to think about gender in its connections to law, to narrative, and to religion—each of which is closely associated with “moral decision-making.”

The history of antinomianism in the Massachusetts Bay Colony (1635-37), encoded in the story of Anne Hutchinson, is gendered from the beginning. Certainly Gilligan’s work proved to be a major point of reference and/or departure for the feminist theory that would develop during the 1980s, in which feminist writers of every ilk felt the need to engage, whether appreciatively or critically, with In a Different Voice. Some of the critique of Gilligan’s work has seen it as implicated in the “essentialism” of “cultural feminism”—in its insistence on a clear difference between male and female moral decision-making processes.

This criticism seems well-founded. Yet, perhaps it is possible recognize a critical “difference” in “feminine” voice without locating that difference in a female speaker. If there is Woman in [Charles] Olson’s writing (there aren’t women there), she is either “Cunt,” “Great Mother,” “Cow,” or “Whore.” But the feminine is very much in his poems in another way . . . . It’s voice . . . . It has to do with the presence of absence. With articulation of sound forms. The fractured syntax, the gaps, the silences . . . . The problematizing of gender that has occurred since the 1980 publication of In a Different Voice, which has supported critiques of Gilligan’s work, may mark it as less interesting now than it seemed at the time of its publication. But Cover’s utter lack of engagement with it, his resisting the temptation of Carol Gilligan, seems inexcusable. Meaningful engagement with Gilligan might have prompted Cover to interrogate his own reliance on explicitly patriarchal models of

164. Howe, supra note 39, at x.
165. For an early assessment of In a Different Voice, identifying various schools of “equality theory”—the “sameness” or assimilationist model; the “respect-for-differences” model; and the “limited-differences” model—and locating Gilligan’s work in the middle grouping and identifying some of its “normative and narrative failures,” see Ashe, Feminist Jurisprudence, supra note 18, at 1137-1149.
166. See, for example, Zillah Eisenstein, The Female Body and the Law 110-116 (1988), pointing to the limitations of the “cultural feminism” associated with Gilligan’s work, and noting, in particular, that Gilligan’s “difference” theory was utilized to the detriment of female employees in the case of Equal Employment Opportunity Commission v. Sears, Roebuck & Co. See 628 F. Supp. 1264, 1308 (N.D. Ill. 1986), aff’d, 839 F.2d 302 (7th Cir. 1988) (relying on testimony by an expert witness for Sears that women’s traditional values accounted for their lower-paid positions within the Sears work force).
167. Talisman Interview, supra note 21, at 180.
jurisgenerativity and would have challenged him to articulate a justification of his own gender-exclusivity.

Cover could hardly have engaged deeply with Weisbrod's and Gilligan's perspectives without having to re-think his central argument, because these writings challenge N&N's own narrative and the normativity to which it would itself contribute. In light of Weisbrod and Gilligan’s work, N&N seems to be an uncritical narrative about the value of insular and patriarchal religious groups, contributing to a normativity within which such groups are entitled to particular privilege. Weisbrod's writing exposes the harms inflicted by religious groups upon their individual members. Gilligan's writing challenges—by providing an alternative to—what she characterizes as male-gendered processes of moral decision-making that support patriarchal societies. Each of these writings is a counter-narrative that challenges Cover's own nomos. Relative to N&N, these writings (by women) are antinomian. Cover's legal theory focuses on the nomianism of civil government and the antinomianism of religious groups; it ignores the nomianism of religious groups and the antinomianisms of individual members of those groups. Finally, it ignores the antinomianisms of female critics of patriarchal groups and of male-gendered theories.

Cover's passing references to Weisbrod, Gilligan, and Black constitute the totality of his inclusion of women among his intellectual siblings. This almost total failure to engage with important relevant work by his women contemporaries contrasts dramatically with Cover's engagements with male writers. The male writers who occupy favored positions in terms of Cover's claim of relationship to them are James Boyd White, Wallace Stevens, and Mark DeWolfe Howe. Cover's active choice of these particular kin and their writings locates N&N and its author within a lineage and a kinship network of liberal male writers, whose work is marked by troubling treatment—or non-treatment—of women and of women's narrativity.

3. Mark DeWolfe Howe: Intellectual Father

The scholar whose work figures most prominently in the text of N&N—warranting his designation as Cover's "intellectual father"—is Mark DeWolfe Howe. I use the term "intellectual father" here to point to the enormous influence that Howe exercised on Cover (evident in the many parallels that mark their writings) and the coincident anxiety about that influence manifested by Cover in N&N. In this Section, while describing the father-son intellectual bond between Howe and Cover, I will at the same time include some relevant commentary selected from writings of Susan Howe, Mark DeWolfe Howe's

168. Harvard Law School professor Mark DeWolfe Howe was the biographer of Justice Oliver Wendell Holmes.
actual daughter and Cover’s generational contemporary. These fragments are introduced here to record some of her experiences as a daughter and sister in relationship to the writings of both Mark DeWolfe Howe and Robert Cover.

A major American legal historian, Mark DeWolfe Howe took as his most significant scholarly enterprise the writing of a multi-volume biography of Oliver Wendell Holmes—a work to which he devoted his life. I remember him in his study late in the evening with his light-shade on because his eyes must have tired from so much reading for the Holmes book and students’ papers, etc., but he would be bent over some old Mather or Sewell diary for relaxation! Howe’s work connects to Cover’s through their three common concerns: First, with issues of law in general; second, with issues of religion as they intersect with law; and third, with social and cultural forces outside preceptual law that are expressed in a universe of narratives.

In N&N, Cover discusses two of Howe’s notable law and religion writings: his 1953 Harvard Law Review foreword and his 1965 book The Garden and the Wilderness, a volume that has long been of interest to students of law and religion and that has recently received new attention. Examination of both these writings demonstrates remarkable parallels between the Howe and the Cover projects. Howe’s law and religion subject matter immediately evidences a commonality of interest; additionally, Howe’s Legal Realist focus can be read as to some degree anticipatory or predictive of the model of narrativity expressed in N&N. Reading N&N for its connection to Howe’s work, however, we can discern something beyond parallelism and influence; we can see, in addition, Cover’s intent to surpass and to supercede what Howe had already accomplished, to prevail in an agonic struggle with an influential predecessor-father. I will point here to some of the strong parallels between Howe and Cover and will argue that Cover did, in fact, surpass Howe by virtue of the originality of his development of the meaning of “narrativity.” Still, I will argue that Cover’s surpassing of Howe included an amplification of a serious error—one perhaps invited by Howe’s early writing—involving the definition of law and religion.


170. Talisman Interview, supra note 21, at 161.


172. Howe, supra note 2.


of the proper relationship between "preceptual law" and religious groups. I will suggest, further, that the writings of both Howe and Cover involve errors—both of omission and of commission—that have important continuing implications limiting their usefulness for present considerations of the problems of law, religion, and gender. **Now I know that the arena in which Scripture battles raged among New Englanders with originary fury is part of our current American system and events, history and structure.**\(^{175}\)

i. The 1953 Foreword

Mark DeWolfe Howe's *Harvard Law Review Foreword* predated by exactly thirty years the publication of *N&N*. Like Cover's Foreword, Howe's was interdisciplinary in its focus. But while Cover's *N&N* would reach out to connect with writings in many disciplines, and to connect many of those to law or to legal theory, Howe's *Foreword* included only one field of study in addition to law: political science. Writing in 1953, Howe felt the need to offer something of an apology for his step toward political theory; he asks to be "forgiven," because of his status as an "academic lawyer," for "concern[ing] himself with a problem of political theory rather than a problem of constitutional law."\(^{176}\) That apology may have seemed, to Howe, particularly necessary because the Supreme Court's 1952 Term had been one of unusual legal moment.

Howe notes that in its 1952 Term, "the Court had before it the tragic drama of the Rosenbergs and was confronted with that greatest domestic challenge to American statesmanship—racial segregation in education."\(^{177}\) But Mark Howe offers no further comment and not even any citation with regard to the Rosenbergs and to *Brown v. Board of Education*.\(^{178}\) The legal liberalism within which Howe wrote in the 1950s was not a site of deep critique. **It was leftist in the sense that Democrats were considered to be leftists during the fifties. The shadow of the McCarthy hysteria was heavy over Cambridge then. And my father, unlike some others, was outspoken and very courageous. But he was a solid Truman**

175. *Howe*, supra note 39, at 47.
177. *Id.*
178. The Supreme Court in June 1953 had specified to the parties in the *Brown* case questions to be briefed for hearing at the start of the following term. *See Brown v. Board of Educ.*, 345 U.S. 972 (1953). The efforts of Julius Rosenberg and Ethel Rosenberg to obtain a stay of execution of their death sentences had been rejected by the United States Supreme Court for the final time on the evening of June 19, 1953, hours before they were put to death. *See Rosenberg v. United States*, 346 U.S. 273 (1953). The erasure of Ethel Rosenberg's name from the caption of this case should be noted. For discussion of Law and Literature and the *Rosenberg* case, with a focus on Ethel Rosenberg, see Marie Ashe, The Bell Jar and the Ghost of Ethel Rosenberg, in *SECRET AGENTS: THE ROSENBERG CASE, McCARTHYISM, AND FIFTIES AMERICA* 215 (Marjorie Garber & Rebecca L. Walkowicz eds., 1995).
Beyond Nomos and Narrative

Democrat. Nor was the Fifties America during which Mark Howe wrote his Foreword a place of broad equalities. Harvard was very privileged during the forties and fifties, so male. The Matthiessen book [F.O. Matthiessen, American Renaissance: Art and Expression in the Age of Emerson and Whitman]: an intellectual and poetic Renaissance minus Emily Dickinson. Minus Harriet Beecher Stowe. Minus Margaret Fuller. Of course, minus Frederick Douglass as well. Women weren’t the only ones subtracted. . . . I can’t quite so simply say I grew up in a false community—a community that fancied itself as liberal. . . . But you see, it was false if you were a girl or a woman who was not content to be considered second-rate.

Not lingering over Brown or the Rosenberg matters, Mark Howe instead selected for his focus a case about church and state: Kedroff v. Saint Nicholas Cathedral. The subject-matter parallel to N&N is immediately apparent in the common focus on law and religion. But the parallel goes beyond that. Like Cover, Howe chooses to focus on a story that is specifically about patriarchal power. While the central narrative for N&N is Biblical primogeniture, Howe’s Foreword treats the scope of (literally) patriarchal power, with the “patriarch” in question being the Russian Orthodox Patriarch of Moscow. In Howe’s example, competing claims would be evaluated in terms of their connection to a patrilineage—“whether the appointment of Benjamin by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American churches.”

Kedroff involved a challenge to a New York statute that had transferred control of the property of the Russian Orthodox Church, taking it away from an Archbishop who had been appointed by the church in Moscow and vesting it with an Archbishop who had been chosen by the Orthodox Church located in the United States (which had separated itself from the Russian hierarchy). The Supreme Court found the New York statute unconstitutional. Yet, what interested Howe was that the Court had surprisingly not employed an Establishment Clause analysis, but rather had based its decision upon an interpretation of the meaning of “religious liberty.” The Kedroff majority defined this constitutionally-protected “liberty” as existing not in individual members of the Church, but in the Russian Orthodox Church itself; what was wrong with the New York statute, according to the Kedroff Court, was that it

179. Talisman Interview, supra note 21, at 159.
180. Id.
182. Id. at 98.
183. Id. at 96-97.
184. Id. at 107.
"directly prohibited the free exercise of an ecclesiastical right." Howe understands the Court to have meant that "the Church as a spiritual body has liberties which will be given protection directly rather than derivatively, but it gives that protection to liberties which, in their essence, differ from those possessed by the members of the Church." It is the Court's location of religious liberty rights in the religious "group" that motivates Howe's excursion into political theory.

In developing his argument that the Court in Kedroff was adopting a particular theory of political science, Howe suggests that Justice Reed, writing for the Kedroff majority, may have been convinced "that liberties of every type are best secured through a commitment to pluralism, or...[that] pluralism offers a peculiarly fitting set of principles for the resolution of issues of Church and State." Thus, his argument is that, in Kedroff, the Court made a contribution to the "growth of political theory as well as to the substance of constitutional law." In discussing Kedroff's recognition or construction of a constitutionally-protected "ecclesiastical right," Howe highlights the significance of this move by observing that the "liberty" being recognized and protected is not a liberty of individuals. He observes: "[T]he body which secured protection in Kedroff was neither the New York corporation nor the associated American members of the Church, but the international body of believers. Not only has the Court recognized the liberty of the group as something different from the individual liberties of its members but it has extended this recognition to an international body with its home office for spiritual government in a foreign country."

Howe ventures to suggest that perhaps the Kedroff Court's move toward religious pluralism could be justified by reference to the language of the First Amendment itself. In support of this proposition, he cites, seemingly uncritically, Justice Douglas' comment in Zorach v. Clauson that "We are a religious people..." He also suggests that because of Establishment Clause obstacles to governmental support of religion, "the Court may feel that it is essential that other agencies of government than the state have effective powers in religious matters. Accordingly, the Court may have been persuaded that a

185. Id. at 119.
186. Howe, supra note 171, at 92.
187. Id. at 93. Making this point, Howe reviews writings of John Figgis, a Scottish jurist who had advocated recognition of a kind of "corporate liberty" of churches, and also writings of Figgis' secular disciple, Harold Laski, whose notions of political pluralism had been framed to justify recognition of group rights in non-religious entities such as labor unions and universities. Id.
188. Id. at 95.
189. Id. at 91-92.
190. Id. at 92-93 (emphasis added).
191. Zorach v. Clauson, 343 US 306, 313 (1952), cited in Howe, supra note 171, at 94 n.7. In Zorach, the Court upheld public schools' "release time" programs, through which students were permitted to be released from their schools at specified times during the school week in order to attend religious classes offered and provided by religious denominations outside of the public school.
church must enjoy prerogatives of sovereignty which are not to be conceded to other social groups.\textsuperscript{192} Howe’s assessment of the merit of the Court’s move in \textit{Kedroff} is not entirely unequivocal,\textsuperscript{193} though his tone is generally quite detached and “neutral.” In commentary expressive of the limits of legal-realist critical perspectives, Howe points to an American \textit{status-quo}, a social reality of preference for religion, noting: “[In the winter of 1953, Americans, by and large, showed small sympathy for the teacher suspected of Communist sympathies. Later in the year the same Americans showed considerable concern for suspected ministers.”\textsuperscript{194}

Howe’s exposition and analysis of the incorporation of a “pluralist theory” by the \textit{Kedroff} Court is notable for its seeming detachment. Howe does not identify his own subject-position; he does not identify his own religious or political perspectives. Howe does not make clear, for example, in the \textit{Foreword}, his own opinions with regard to religion and to religious organizations. \textit{I emphatically insist it does matter who’s speaking.}\textsuperscript{195} \textit{[My father] worshipped the American Constitution. It really was his faith.}\textsuperscript{196} Howe does point to concerns of “non-believers,” but he does so only to note that those preferences will likely have to yield to large social forces: “Whether or not the non-believer approves of the sympathy which popular opinion gives to churches as compared to other groups, or of the special advantages which the law has given to churches, that sympathy and those advantages stand as \textit{social and constitutional realities which the Court may, and perhaps should appropriately recognize.”}\textsuperscript{197}

Although Howe’s endorsement of the \textit{Kedroff} court’s move is somewhat tentative, his attitude is certainly not strongly critical. He can, perhaps, be properly characterized as a “straddler.”\textsuperscript{198} While Howe’s \textit{Foreword} highlights

\begin{itemize}
  \item \textsuperscript{192} Howe, \textit{supra} note 171, at 94. His comments here anticipate the contention that Howe will state more broadly in \textit{THE GARDEN AND THE WILDERNESS} that a “de facto Establishment of Religion” exists in the United States. \textit{See} Howe, \textit{supra} note 2, at 11-12,
  \item \textsuperscript{193} \textit{Id.} at 93. Howe notes that the move might have comforted “the ghost of Figgis.” \textit{Id.} But he notes, at the same time, that it might have troubled Laski because of its preference of non-religious groups, its providing for religious groups greater rights than those enjoyed by non-religious groups. \textit{Id.} at 93-94.
  \item \textsuperscript{194} Howe, \textit{supra} note 171, at 94. Howe does not specify to which teacher and to which ministers he is referring, apparently assuming that the 1953 reader will recognize those persons without their having been named.
  \item \textsuperscript{195} Howe, \textit{supra} note 39, at 20.
  \item \textsuperscript{196} Talisman \textit{Interview, supra} note 21, at 159. \textit{See also} Joshua Glenn, \textit{Bewildered in Boston, BOSTON GLOBE,} Mar. 7, 2004, at 2, available at \textit{www.boston.com/news/globe/ideas/articles/2004/03/07/bewildered_in_boston}. Glenn quotes Fanny Howe, Mark Howe’s daughter and Susan Howe’s sister: “My parents were ironic and witty about everything. . . Although their ‘materialist-skeptical’ view, as I’ve come to call it, was seductive, I rebelled against it and adhered instead to an ‘invisible-faithful’ view.” \textit{Id.} Glenn characterizes this outlook of Fanny Howe as amounting to “an optimistic political-religious belief in both a future social utopia and a divine scheme for the world.” \textit{Id.}
  \item \textsuperscript{197} Howe, \textit{supra} note 171, at 94 (emphasis added).
  \item \textsuperscript{198} Howe characterized himself this way in his later writing. \textit{See} Howe, \textit{supra} note 2, at 139 (“Straddlers, like me, search out new grounds of technical criticism with which to belabor the Court.”).
\end{itemize}
connections between Supreme Court opinion and political theory, he does not take a stand that either strongly supports or strongly critiques the move that he perceives the Court to have taken when it recognized "group" constitutional rights in the Russian Orthodox Church. His adoption of a much more explicitly positive posture—going beyond acceptance to active encouragement of the Court's recognition of special constitutional protections for religious groups—would occur twelve years later, with the 1965 publication of The Garden and the Wilderness.

ii. The Garden and the Wilderness

The Garden and the Wilderness is a 180-page book dedicated to the examination of the history, in American thought and in constitutional law, of the metaphor of the "wall of separation between church and state." That metaphor, first invoked by the United States Supreme Court in 1878, in Reynolds v. United States, was subsequently invoked frequently during the post-World War II years, during which the Court articulated a broad interpretation of the Establishment Clause. [My father] wrote a book about American law called The Garden and The Wilderness. Now, most books about the period and place must hesitate over the word wilderness. Because it wasn't a wilderness to Native Americans. Still, it's a resonant typological word. A necessary emblem.

In the Establishment Clause cases of the mid-twentieth century, as in Reynolds, the Court cited the 1802 Letter to the Danbury Baptists, in which Thomas Jefferson had used the "wall of separation" metaphor to gloss the meaning of both the Religion Clauses of the First Amendment:

I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State . . . .

"Sovereignty" has been an important concept in American constitutional law, and it continues to be. Even today, "dueling" visions of sovereignty contend in

200. See Everson v. Board of Education, 330 U.S. 1 (1947). The majority in Everson had opined, in the portion of its holding of most interest to Howe, because of its extension of constitutional protection to non-religious people: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."Id. at 18.
201. Talisman Interview, supra note 21, at 161.
the Supreme Court. Outside the U.S. Reports, however, other understandings surface. Amerindians found, to their cost, trust in the code word 'sovereign' could mean all or nothing. . . . Dickinson takes sovereignty away from God and bestows it on the Woods.

The Garden and the Wilderness was published in 1965, at a point when, according to Mark DeWolfe Howe, the opinion expressed by Justice Douglas in Zorach—that "We are a religious people whose institutions presuppose a Supreme Being"—had given way to the "new Douglas doctrine" of Engel v Vitale.

In Engel v. Vitale, the Court invoked the "wall of separation" metaphor, interpreting the Establishment Clause as prohibiting prayer in public schools. Mark DeWolfe Howe was troubled by this new doctrine, because, as he argued, this doctrinal change took place without the Court's explicitly acknowledging it. Against this background, The Garden and the Wilderness interrogates the Court's use of the Jeffersonian metaphor.

Mark DeWolfe Howe's argument is that the Court need not have relied on the Jeffersonian understanding of separation—an understanding that expressed political principles of Enlightenment rationalism and of anticlericalism. Rather, the same metaphor could as well—or better—have been traced to Roger Williams' earlier expression of a theological principle that insists upon protecting the "garden" of "the church" against encroachments by the "wilderness" of the "world."

Schismatic children of Adam thought they were leaving the "wilderness of the world" to find a haven free of institutional structures they had united against. They were unprepared for the variability of directional change the
wilderness they reached represented. Even John Winthrop complained of "our wildernes troubles in our first plantings."208 First-generation leaders of this hegira to new England tied themselves and their followers to a dialectical construction of the American land as a virgin garden preestablished for them by the Author and Finisher of creation.209 The invocation of a solely Jeffersonian justification of "separation," Howe argues, erases both the history and the contemporary reality (in the year 1965) of the strongly respectful attitudes toward religion consistently prevalent in American society and culture.210 Why is the church compared to a garden?211 The Court's reliance solely on the Enlightenment-model of separation, and its consequent misreading of history, has important contemporary consequences. Amplifying the legal-realist perspectives earlier expressed in his Foreword, Howe identifies the core problem: "By building constitutional law upon history thus simplified, the Court has widened the gap between current social reality and current constitutional law."212 The "current social reality" to which Howe is referring here is one that includes an American history of sympathy for religion—sympathy strong enough that it had produced "what may fairly be described as a de facto establishment of religion."213

Howe's motivating concern in The Garden and the Wilderness was to interrupt the course being taken by the Court in post-Zorach years and to correct the "disreputable history" of the Religion Clauses of the First Amendment.214 Much of the book is therefore devoted to exploring matters overlooked or avoided by the Court, namely, the historical "conditions which begat the prohibitions of the First Amendment."215 Howe believed that the Court's mistaken interpretation of American history might be largely attributable to its desire—throughout constitutional history, but most strikingly during the twenty-five years prior to the publication of The Garden and the Wilderness—to protect and advance the value of equality. That concern, he suggests, led the Court to force an interpretation of the non-Establishment Clause as requiring equality, or governmental neutrality, not only among all religions, but also between religion and non-religion.216 This equality-

208. Howe, supra note 39, at 48, citing The Antinomian Controversy, supra note 42, at 201.
209. Howe, supra note 39, at 49.
210. The Court, Howe says, particularly in the school "release-time" and prayer cases of the early 1960s, treated the Religion Clauses as expressions of purely Enlightenment values. But the historical reality is that the First Amendment codified both "the believing affirmations of Roger Williams" and "the questioning doubts of Thomas Jefferson." Howe, supra note 2, at 9.
211. Howe, supra note 39, at 55.
212. Howe, supra note 2, at 10-11.
213. Id. at 11.
214. Id. at 16.
215. Id.
216. Id. at 149-155.
mandating interpretation of the Religion Clauses, he insists, is not warranted by history.\textsuperscript{217}

Howe's critique of the court's reading of the Religion Clauses, particularly in the various public education cases,\textsuperscript{218} does not involve a criticism of the outcome of those cases. He takes care to assure his readers that he believes the cases produced sound outcomes by prohibiting prayer and Bible-reading to protect certain interests of non-religious school children and their parents.\textsuperscript{219} However, he wants to stress that the protections of non-religious individuals should be based not on grounds defined by the Religion Clauses of the First Amendment (whether free exercise or non-establishment) but on alternative constitutional grounds (such as First Amendment Free Speech, Fourteenth Amendment Equal Protection, or Fourteenth Amendment Due Process protections of liberty and property).\textsuperscript{220} Howe suggests that the Court might have more forthrightly acknowledged that it was committing itself to furthering the "movement toward equality" that has been recognized as a national goal from the "outset of our national existence."\textsuperscript{221} Nonetheless, the central purpose of Howe's argument in \textit{The Garden and the Wilderness} is not to justify and develop the equality claims of individuals, but to valorize the claims of religious groups.

Some of the parallels between Howe and Cover have already been suggested: Each authored a \textit{Foreword} dedicated to law and religion issues that involved claims rooted in patriarchy; each introduced interdisciplinary work; each treated a particular case primarily to illustrate a theory derived from interdisciplinary consideration. Beyond the parallels demonstrating influence, Cover's engagement with each of the two Howe writings outlined here suggests that he consciously attempted, in \textit{N&N}, to overcome Howe's influence through his own originality.

This posture is evident in \textit{N&N}'s reading of Howe's \textit{Foreword}. Cover agrees with Howe's recognition that judicial interpretations are not privileged. He approves what he characterizes as Howe's appreciation of the need for the judiciary to protect the "norm-generating autonomy" of groups\textsuperscript{222}—to protect groups' "liberty" not merely "to be" but also "to create and interpret law."\textsuperscript{223} Perhaps prompted by enthusiasm for the concept of religious group sovereignty that he will himself assert, Cover actually provides a mistaken rendering of Howe's \textit{Foreword} position regarding the sovereignty of groups: Cover mischaracterizes that position as more akin to his own than it actually is. Thus,

\begin{itemize}
\item \textsuperscript{217} Id. at 156.
\item \textsuperscript{219} Howe, supra note 2, at 173.
\item \textsuperscript{220} Id. at 159-167.
\item \textsuperscript{221} Id. at 158.
\item \textsuperscript{222} Cover, supra note 1, at 32.
\item \textsuperscript{223} Id.
\end{itemize}
Cover characterizes as Howe’s opinion the proposition that “government must recognize that it is not the sole possessor of sovereignty and that private groups... are entitled to... exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.”

But Howe did not in fact state, in his Foreword, any such position unequivocally favoring the autonomy of religious groups. Howe had been quite precise in his writing. The interesting thing about my father was, he was obsessed by footnotes... I grew up with my father’s “So-and-so wrote a very bad footnote,” or “That footnote was wrong,” or “The way the English put footnotes on the page is much better than the Americans”—with frantic worry over footnotes and bibliographies. Cover reads into Howe’s Foreword something that was actually not there, effectively claiming a stronger relationship to Howe than actually existed; this amounts to an unfounded claim by Cover that Howe agreed with a central theme of *N&N*: the privileging of religious group autonomy.

By exaggerating his resemblance to his predecessor in legal theory, Cover misreads Howe. But Cover also writes to explicitly distance himself from the intellectual father’s influence, criticizing Howe for not having gone far enough in *The Garden and the Wilderness*. Cover criticizes Howe for failing to elaborate upon a “largely undeveloped observation” Howe had made about the Court. Howe had written:

> Among the stupendous powers of the Supreme Court of the United States, there are two which in logic may be independent and yet in fact are related. The one is the power, through an articulate search for principle, to interpret history. The other is the power, through the disposition of cases, to make it. ... I must remind you, however, that a great many Americans... tend to think that because a majority of the justices have the power to bind us by their law they are also empowered to bind us by their history. Happily that is not the case. Each of us is entirely free to find his history in other places than the pages of the United States Reports.

Cover reads this passage as an example of Howe’s simultaneous notation of and avoidance of the full range of complexity in the relationship of narrative to law. Cover sums up:

---

224. Cover, *supra* note 1, at 32 n.93, cites Howe’s *Foreword*, in which Howe stated: “The heart of the pluralistic thesis is the conviction that government must recognize that it is not the sole possessor of sovereignty and that private groups... are entitled to... exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.” Howe, *supra* note 171, at 91 (emphasis added). In his footnote, Cover implies that Howe stated this proposition about group sovereignty as his own position, rather than merely describing it as “the pluralistic thesis.”


Beyond *Nomos* and *Narrative*

The question Howe addressed concerned which narrative tradition should inform the Court's decisions. What he did not write with sufficient clarity is that, whichever story the Court chooses, alternative stories still provide normative bases for the growth of distinct constitutional worlds through the persistence of groups who find their respective meanings for the first amendment in the radically different starting points of Roger Williams and Thomas Jefferson. In this respect, as we shall see, the first amendment's religion clauses are not atypical.\(^{228}\)

Cover is here proposing that the interdisciplinarity of Howe's book is insufficient; Cover argues that Howe's focus on history and contemporary "social reality" avoids the directional differences that will be initiated not only from the "radically different starting points" of Jefferson and Williams, but from other different starting points by a multiplicity of contending *groups*, both religious and non-religious. Cover wants to emphasize that neither any authoritative history nor any sociological theory will settle conflicts of church and state and that unending challenges will be brought by groups that take very seriously—indeed as a matter of religious commitment—both the freedom and the obligation to "find [their] history in other places than the pages of the United States Reports."\(^{229}\)

I have proposed that the connection between Howe and Cover can be read as one between intellectual father and son, and I have urged recognition that their intellectual relationship was marked by agonistic features.\(^{230}\) Cover's explicit engagement with Howe's work includes a claim to have superceded Howe's understandings. Cover claims that, in *N&N*, he has defined a model of "law-creation" stronger than Howe's and a notion of "narrativity" so original as to have escaped the realm of Howe's influence.

What Cover accomplished in *N&N* did exceed, in some respects, what Howe had mapped out both in his *Foreword* and in *The Garden and the Wilderness*. First, Cover went far beyond Howe in tapping into a broad range of interdisciplinary perspectives to generate a model of "jurisgenesis." And Cover's model of contending narratives is not limited either to the *written* texts of history, political science, and law nor to the construction of an obdurate "social reality" that can properly arrest the practice of critique of law. Those elements of *N&N* highlight its unquestionable originality. Second, the degree of personal commitment evident in *N&N* distinguishes that writing—*as writing*—from Howe's. No reader of *N&N* would be likely to characterize Cover—as Howe had characterized himself—as a "straddler."\(^{231}\) In its breadth,

\(^{228}\) Cover, *supra* note 1, at 19.

\(^{229}\) Howe, *supra* note 2, at 5.

\(^{230}\) See Cover, *supra* note 1, at 5 n.7.

\(^{231}\) Howe, *supra* note 2, at 139; see *supra* note 198.
in its quality of personal commitment, and in its vitality, \textit{N&N} does surpass Howe's work.

But while \textit{N&N} evidences that Cover had partially removed himself from certain constraints of Legal Realism, \textit{N&N} also contributed, unfortunately, to amplifying or compounding the move that Cover (mistakenly) thought Howe had made, by specifically privileging religious groups. Cover surpasses Howe in his own uncritical readiness to claim constitutional protection for religious groups per se, to afford religious groups constitutional protections not available to other groups, and to overlook the problem of equality involved in that move. Certainly, Howe had perceived the Supreme Court as offering that kind of preference in \textit{Kedroff} through its interpretation of free exercise as protecting groups, and he did not criticize that preference. Cover, on the other hand, saw the Court in \textit{Bob Jones University} as not having taken that step, and, on that basis, he characterized the Court as having failed its judicial responsibility. In \textit{The Garden and the Wilderness}, while urging that the Religion Clauses do not offer sound bases for the protection of non-religious persons, Howe remained careful to identify the necessity of extending such protections on other constitutional grounds and proposed alternative bases on which those protections might rest. Cover, however, evidences no concern whatsoever about the many forms of inequality that may be produced by affording governmental preferences to religious groups. Cover fails to push the inquiry into equality even as far as Howe had taken it in \textit{The Garden and the Wilderness}, nearly twenty years prior to the publication of \textit{N&N}.

Not showing a concern about "equality" as careful as Howe's, Cover justifies the privileging of religious groups by ascribing to religious groups the capacity for generating alternative \textit{nomoi} that might constructively challenge existing law. Cover's privileging, however, is deeply problematic; it relies on assumptions that largely erase the reality of religious groups' \textit{destructive} potential. Moreover, it entirely fails to recognize as problematic the degree to which religious groups contribute to the continuing inequality of "non-religious" people (that is, people not affiliated with religious groups) and of women even when they are "religious."

It has been noted, above, that Cover's valorization of "ecclesiastical liberty" can occlude the claims to protection that might be asserted by individuals within a particular religious group; that Cover is interested in internal division only to the degree that it relates to the issue of normative conflict between a particular religious group and the civil government; and that he does not engage with the meanings of internal divisions for \textit{individuals} within the religious group. But when Cover avoids encounter with the reality of this issue, he is executing precisely the same move that he criticized when it was made by Howe: the move of simultaneously noting a reality and refusing to pursue its implications. Cover fails to engage with what it means to
constitutionally privilege religious groups that themselves have long histories of practicing exclusion, banishment, excommunication, abuse, and other discriminatory treatment of individuals. This is a serious omission in a work focused on American law and on a history of American religion—a history that that developed out of Massachusetts Bay. Antinomians, Separatists, and Quakers (often inspired and led by women) were summarily silenced, or driven from the borders of this modern Canaan.\(^\text{232}\)

The failure to consider American antinomianism is extraordinarily striking in a work with a focus on nomos. And Cover’s uncritical valorization of religious groups entirely overlooks the reality of the often gendered nature of such groups’ exclusions and banishments.

During the years since Cover advocated the privileging “ecclesiastical liberty,” and particularly since 1990, Congress and state legislatures have enacted a plethora of statutes privileging religious groups and religious individuals.\(^\text{233}\) Winnifred Fallers Sullivan has recently highlighted a problem with privileging “religious” claims: American law has no coherent basis for distinguishing between “religion” and “non-religion.”\(^\text{234}\) Sullivan has pointed out that claims asserted on the basis of conscientious conviction, without reference to membership in churches, or without a claim that conduct is required by the tenets of a particular religious group, may be rejected in ways that amount to dis-preferencing of individual conscience.\(^\text{235}\) This reality is somewhat shocking in an American culture in which increasing numbers of people report being unaffiliated with institutionalized religion.\(^\text{236}\)

Beyond the dis-privileging of individual conscience claims (as opposed to religious group claims), it is troubling to see the value of “ecclesiastical liberty” vaunted in N&N and made available for invocation by religious groups whose policies and practices involve egregious gender-based discriminations. This concern is not a symbolic or abstract one. The notion of “ecclesiastical liberty” recognized by Howe and by Cover has taken on a life of its own in American

\(^{232}\) Howe, supra note 3, at 39. N&N’s merely passing reference to Anne Hutchinson has already been noted. See Cover, supra note 1, at 16 n.41, 23 n.66.


\(^{234}\) See generally WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005).

\(^{235}\) Id. at 138-159.

law. It has, this year, been apparent in Massachusetts, in the political process through which the Catholic Church, in association with other religious groups, defeated proposed legislation that would have required churches—like other non-profit entities—to make their financial records available for inspection by the Commonwealth’s Attorney General. The troubling nature of the “ecclesiastical liberty” has also recently become apparent, as the principle has been invoked defensively in cases of torts—particularly cases involving the sexual abuse of children—perpetrated by members of the clergy. It has also become evident in accounts of American law’s protection of Amish insularity and in the degree to which this protection has permitted incest to escape the reach of the criminal law. My argument here is that entirely insufficient attention has been given to the ways in which the privileging of religious groups contributes to the persistence of social inequality among group members, and particularly for women. N&N’s active participation in that privileging process makes highly problematic the proposal that it be included in the Law and Literature canon.

The engagement of Cover with Howe’s work makes it appropriate to characterize Howe as Cover’s intellectual father—a father whom Cover adopted and claimed as his immediate predecessor and progenitor in the world of legal theory involving law, society (or the “normative universe”), and religion. It would be not at all difficult to trace the male lineage back to an earlier generation and to connect both Cover and Howe with the most pre-eminent figure of American legal pragmatism, Oliver Wendell Holmes. And that genealogical tracing would clearly locate Cover’s work as continuous with the patrilinearity of American legal liberalism elaborated during the twentieth century in the movements of pragmatism and legal realism.

Wallace Stevens, a major American poet of the twentieth century whose poetry serves as the epigram for N&N, has also been attached to the intellectual currents of these traditions, and the other major influence, whom Cover


238. Sexual abuse scandals have afflicted the Catholic Church and other denominations and have received extensive media coverage in the past few years. For summary and discussion, see HAMILTON, supra note 233, at 238-72. See also Jeffrey Anderson et al., When Clergy Fail Their Flock: Litigating the Clergy Sexual Abuse Cases, 91 AM. JUR. 2D Trials § 151 (2005).


240. Regarding the Howe-Holmes connection, see supra notes 168-169 and accompanying text.

241. See Cover, supra note 1, at 4 n.1, citing WALLACE STEVENS, Connoisseur of Chaos, in THE COLLECTED POEMS OF WALLACE STEVENS 215 (1954). See also THOMAS C. GREY, THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY 103 (1991) (noting that “if the poet Stevens speaks to lawyers, it is to teach us pragmatic philosophy”). See also Grey’s consideration of the often androgynous and sometimes “feminine” voice of Wallace Stevens, id. at 48-49, and Susan Howe’s commentary on the “feminine” in the work of poet Charles Olson, supra note 167 and accompanying text.
explicitly acknowledges as close kin, is James Boyd White, the "founding father" of the contemporary Law and Literature project.\textsuperscript{242} White's book, \textit{The Legal Imagination},\textsuperscript{243} published at the time of Cover's writing, is highly original and has a kind of \textit{sui generis} quality; it would be reductive to pigeonhole it under the heading of legal liberalism that identifies so much of Cover's intellectual lineage. Nonetheless, White's work at the time of publication of \textit{Nd&N}, and for years thereafter, did resemble the works of the "legal liberalism" school in its focus on male authors and its lack of attention to women and to women's writings. While White's Law and Literature work commenced in 1973 with publication of \textit{The Legal Imagination}, it was only twenty-one years later that White directed his attention to Emily Dickinson.\textsuperscript{244} Not an insignificant omission and delay: \textbf{Dickinson is a poet of the order of Shelley and Holderlin. She is one of the greatest poets who ever wrote in English. The trace of her unapprehended passage through letters disturbs the order of a world where commerce is reality and authoritative editions freeze poems into artifacts.}\textsuperscript{245} Yet, not an entirely surprising omission and delay. Emily Dickinson has been long overlooked. \textbf{In 1941, Emily Dickinson is a blank in F.O. Matthiessen's \textit{American Renaissance: Art and Expression in the Age of Emerson and Whitman}.}\textsuperscript{246} Both Emily Dickinson and Gertrude Stein, major experimental writers, have received slight attention in American literary criticism. \textbf{To this day canonical criticism from Harold Bloom to Hugh Kenner persists in dropping their names and ignoring their work.}\textsuperscript{247}

Within legal theory in 1983, \textit{Nd&N} seemed quite singular in its invitation of new narratives. At the same time, the invitation extended by \textit{Nd&N} recorded its own preference of group narratives over individual narratives, excluded individual narratives while privileging group narratives, and almost entirely excluded narratives by or about women. Howe's writing had not manifested any concern about inequalities experienced by women in particular. \textbf{There was the sense, I suppose from my father, that because I was feminine, anything would do except law or history. Those disciplines were for men. Civil rights activist he was, yet he was adamantly opposed to women being admitted to Harvard Law}

\textsuperscript{242} See Jacqueline St. Joan & Annette Bennington McElhinney, \textit{Introduction to BEYOND PORTIA}, supra note 6, at 1 ("The law and literature movement generally is identified as starting with the 1973 publication of James Boyd White's \textit{The Legal Imagination.}"). For a fine study of White's work, see JEANNE GAAKEER, \textit{HOPE SPRINGS ETERNAL: AN INTRODUCTION TO THE WORK OF JAMES BOYD WHITE} (1998). See also Cover's acknowledgment of White's influence, Cover, supra note 1, at 6 n.10.

\textsuperscript{243} WHITE, supra note 27.

\textsuperscript{244} See James Boyd White, \textit{Dickinson's Poetry: Transforming the Authority of Language, in ACTS OF HOPE} 224 (J. B. White ed., 1994).

\textsuperscript{245} HOWE, supra note 39, at 19.

\textsuperscript{246} Id. at 28.

\textsuperscript{247} HOWE, supra note 3, at 11.
School. He thought standards would plunge immediately if they were. And Cover did not himself manifest in N&N any concern whatsoever about the unequal treatment of women supported by religious groups or about the advancement of women’s equality through constitutional interpretation.

Feminist criticism has for two decades or more pointed to exclusions or omissions or elisions that erase women’s experiences. These omissions are now widely recognized as bases for indictment in themselves. Such omissions mark the inadequacy of the content of N&N. Beyond the limitation of content based on gender exclusivity, N&N is a work that lacks significant relevance for the development of legal theory in the present and in the future. This second limitation of N&N has to do with the method of its reading of the texts that it did consider and its failure to embody the kind of “different reading,” informed by critical theory, that is called for by the exigencies of the present times.

III. UNCONVERTED ANTINOMIANISM IN THE WORK OF SUSAN HOWE

Parts I and II of this Article have been interrupted by the words of Susan Howe. I have attempted to indicate, through my inclusion of Howe’s words, the force of her consciously gendered approach to the relationships between insular religious groups and the individual members of those groups—especially women. This final Part turns to a more expository account of Susan Howe’s writing, in order to examine and explicate its relevance for legal theory in general and its relevance in particular for work relating to matters of religion and gender.

A key question for such a critical reading involves subject-position: Who is speaking? Howe appreciates the centrality of this question: I cannot murmur indifferently: “What matter who’s speaking?” I emphatically insist it does matter who’s speaking.

Susan Howe makes no secret of her own subject-position, identifying herself as a woman, a poet, a North American, an interdisciplinarian, and a daughter of a major American liberal-legal theorist. In my reading I have come to feel that Howe is well characterized, in words with which she herself characterized Emily Dickinson, as an “unconverted antinomian.” Her writings, precisely because they express her “unconverted antinomianism,” have already been recognized as powerful contributions to the study of gender and religion in American literary history. My purpose here is to identify the equally powerful contribution they offer for the study of gender and religion in American legal thought.

---

249. Howe, supra note 39, at 20.
250. Id. at 140.
In their article, Heilbrun and Resnik lamented the absence of work relating to women in the canon of law and literature. Reviewing the history of feminist literary criticism and providing an account of writings through which women’s perspectives had become incorporated into literary criticism, Heilbrun commented ruefully on the oddness of having to recite that history for law and literature readers at a time when it was already very well understood by students of literature. Commenting on the development of “feminist literary criticism,” Heilbrun noted, with particular regret, the “virtual absence of its mark on law and literature,” or the failure of writing in the Law and Literature school to be informed by feminist perspectives. She identified as the “central issues facing feminist studies”:

- the definition of gender; the definition of women; the importance of race and class; the interpretation of sexuality and of work; the legitimacy of the personal as women have begun increasingly to use it in critical studies; and the conflict between theoretical feminism and political action.

Heilbrun’s definition of the work to be done in informing both feminist studies and Law and Literature, particularly her identification of pertinent questions of gender, sexuality, race, and class, as well as general questions about “women,” remains timely. The issues she identified continue to be central. A still further issue that Heilbrun did not identify—one that has now, with the recent “return of religions,” emerged as critically important for legal theory—involves the intersection of gender and law with religion.

In further commentary on the limitations of the Law and Literature school, Heilbrun noted its failure to have become informed by the poststructuralist literary-critical perspectives and strategies that by 1990 had already strongly influenced literary criticism outside legal studies. Heilbrun cited this lack as an impediment to the production of what Resnik would call “different writings” and “different readings.”

Echoing each of the concerns that Heilbrun expressed, in my reading of N&N up to this point, I have identified features of that work that necessarily mark it as problematic, because of its omission of feminist—or, more broadly, “gendered”—perspectives. I have examined focal points of N&N at which

251. Heilbrun & Resnik, supra note 6, at 25.
252. Id. at 26.
254. Heilbrun & Resnik, supra note 6, at 31-32.
women's experiences and women's work could have received attention. I have highlighted \textit{N&N}'s unconscious genderings: its foregrounding of particular texts and its ignoring others; its considering certain stories of male relationships while ignoring stories of women and their family and kinship connections; and its invoking a broad array of interdisciplinary writings by men while "resisting the temptation" to engage with relevant contributions by women in the same fields. And, while doing these things, I have argued that \textit{N&N} consistently situates women in positions of marginality or virtual invisibility and that for this reason alone, Cover's writing clearly cannot be seen as an example of the \textit{different writing} (inclusive of women) for which Resnik calls.

Taking up the Heilbrun criticism that focuses on Law and Literature's omission of poststructuralist perspectives, in this Part, I will explicitly demonstrate how \textit{N&N} lacks the requisite features to be a \textit{different reading}, and I will argue that Resnik's continuing commendation of the essay\textsuperscript{255} seems inconsistent with the insights that Heilbrun expressed in their jointly-authored essay.\textsuperscript{256} More importantly, the extolling of \textit{N&N} can be seen as emblematic of the resistance to postmodernist perspectives that has characterized American liberal-legal theory in the decades since Cover wrote. Notably, the postmodernist approaches recommended by Heilbrun continue to be expressed with infrequency in Law and Literature writings and in legal studies relating to religion and gender.

The remainder of this Article responds to Heilbrun's advocacy of poststructuralist reading and writing strategies. I begin by considering Heilbrun's recommendations in general and by identifying and examining some recent contributions to legal theory that do show increasing recognition of the possibilities that can be opened up by the moves she endorses. Secondly, I discuss Susan Howe's work as an instance of postmodernist critical practice. Pointing to ways in which Howe's work exceeds Cover's and achieves a greater extrication from the limits of legal-liberalism, I advocate her particular relevance for Law and Literature and for studies focused on law's intersection with gender and with religion.

\textbf{A. Deconstruction in Law and Literature}

In her 1990 comments on the Law and Literature movement, Heilbrun expressed regret and surprise that Law and Literature appeared not to have benefited from the exposure to poststructuralist theory that had already greatly enriched literary criticism, particularly feminist literary criticism. Heilbrun noted specifically that: "The use by feminist critics of French theory brought great theoretical sophistication to the genre, as did the works of the French

\textsuperscript{255} See Resnik, \textit{supra} note 12, at 53.
\textsuperscript{256} See generally Heilbrun \& Resnik, \textit{supra} note 6.
masters Foucault, Lacan, and especially Derrida, who introduced deconstruction. Heilbrun regretted finding no comparable enrichment of writings in Law and Literature. She continued:

[T]he really bad old days of literary criticism [exclusive of women's perspectives] have been left further behind by literature than by legal studies. Feminist criticism and poststructuralist criticism have had almost twenty years in which to perfect theories and techniques, and to revise ideas of what to read and what to value. Surely law could well benefit from the fruits of those two decades, both in the reading of the new literature by women and in the reading and interpretation of texts not usually read in law classes.

In the years that have passed since 1990, poststructuralism—in both its Continental and American versions—has certainly found some place in American legal theory. A major event in the turn of legal studies toward poststructuralist thought occurred with the Cardozo University Law School Conference of 1989, at which Jacques Derrida delivered his Force of Law lecture, insisting upon the necessity of deconstruction for law and insisting that "[d]econstruction is justice." Since then, some incorporations of deconstruction and other poststructuralist perspectives into feminist legal writing have occurred, but they have not been typical or representative of the dominant strains in legal writing that define themselves as feminist, or in Law and Literature writings, or in legal theory in general. The failure of most American feminist legal thought to engage meaningfully with deconstruction has persisted; it has been noted by American commentators and has been noted, with some recent frequency, by non-American feminist legal scholars involved with Law and Literature.

This widespread failure of American legal theory—evident even in feminist legal studies and in Law and Literature—to engage with the perspectives of deconstruction unquestionably has something to do with the editorial control of legal writing, with the extremely traditional attributes of law review writing, for example, and with review editors' resistance to change.

257. Heilbrun & Resnik, supra note 6, at 26.
258. Id. at 25.
259. Derrida, supra note 57.
260. Id. at 945.
263. Heilbrun and Resnik comment on one instance of this resistance. They were able to persuade their Yale Law Journal editors, in 1990, to permit their including both first and last names of authors in
More deeply, it has to do with the anxiety about the potential loss of normativity triggered by postmodernism’s anti-foundationalism. This anxiety often gives rise to a mistaken equation of philosophical anti-foundationalism with moral relativism.

In their *Literary Criticisms of Law*, Guyora Binder and Robert Weisberg have suggested that sometimes writing that is not at all relativist—for example, narrative writing outside the tradition of legal-liberalism—will be mis-read by commentators unwilling to confront the “unacceptably dangerous” implications of anti-foundationalism.

Some adventurous legal writing has largely turned its back on theory. But it remains the case that postmodernist thought is, as Ruthann Robson notes, “the dominant intellectual discourse” of the present. And it may be possible to gather a sense of the richness and promise offered by postmodernist theory by considering some recent commentaries of contributors who are both informed by deconstructive perspectives and consciously alert to issues of gender. Anne Orford, for example, who has written about international law and globalization, has recently expressed appreciation for what she has learned through “reading Derrida.”

Regarding the value of Derrida for this “condition,” she notes: “Derrida offered me a lesson in how to be surprised by the world.

Citations (which constituted a departure from “legal footnote conventions”), but they were not successful in obtaining permission to include the full names of the parties in the cases they discussed: “The exclusions of litigants’ first names reinforces their facelessness and genderlessness, but we were unable to persuade the editors to alter this convention.” Heilbrun & Resnik, supra note 6, at 41.

264. Stanley Fish is identified by Carolyn Heilbrun as an “exception” among male writers in Law and Literature, in that he had “allowed feminist contributions in literary studies to affect his writing and thinking.” Heilbrun & Resnik, supra note 6, at 22, citing Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989). Fish has seemed to take pleasure in a teasing of legal-liberals with titles calculated to alarm. See, e.g., Stanley Fish, There’s No Such Thing as Free Speech and It’s a Good Thing, Too (1994); Stanley Fish, The Trouble With Principle (1999); Stanley Fish, Mission Impossible: Settling the Just Bounds Between Church and State, 97 COLUM. L. REV. 2255 (1997) [hereinafter, Mission Impossible].


266. Binder & Weisberg, supra note 4, at 243-244 (reviewing Marie Ashe, Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law, 13 NOVA L. REV. 355 (1989)).


269. See Anne Orford, Reading Humanitarian Intervention (2003).

270. Orford, supra note 262, at 31.

271. Id. at 33.
Since reading Derrida, I have begun to find myself in a new relation to the resources of language, and to hear words 'otherwise.' With regard to the promise of Derrida for gender concerns, Orford notes, characterizing the writing of The Post Card:

Derrida here seems to me to accept the risks of seduction and to recognize that reaching out to an other involves a loss of faith in a whole, autonomous self. He fails to constitute himself as an upright, indifferent, reliable figure who masters himself, embraces the law and is able to possess and thus exchange one feminized figure for another. Instead, Derrida writes himself as an embodied, melancholy love, one undone by his desire for the singular, unique other to whom all that he writes is addressed. In doing this in a philosophical text, he shows a lack of respect for the father’s law, something very desirable in a masculine body.

Orford is not alone among legal feminists in her appreciation of Derrida. Katherine Sheehan, for example, writing in 2000, thoughtfully identified resistances to—and misunderstandings of—Derridean deconstruction in various liberal-legal projects, including the feminist writing of Robin West. It remains the case, however, that such deconstructive writings remain exceptional, rather than typical, within feminist legal theory and in Law and Literature. Most writing in these fields continues to be contained, as was N&N, within the confines of a worn-out liberal legalism. But new directions for Law and Literature will open up, as Heilbrun and others have now urged for many years, only through the paths of postmodernism.

Apart from its value for legal theory in general and for perspectives on gender in particular, deconstruction offers something different at a time in which legal liberalism and multiculturalism appear threatened by—and inadequate in the face of—religious divisions presenting themselves nationally and globally. The lack of philosophical foundation for American law’s liberal tradition in general has been sharply critiqued. In particular, its approach to “settling the just bounds between church and state” has been incontrovertibly characterized as a “mission impossible” within the confines of liberal-legalism’s understanding of “tolerance.” At the start of the 21st Century, alternative undertakings are needed. Jacques Derrida’s attention to religion

272. Id. at 32.
273. JACQUES DERRIDA, THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND (Alan Bass trans. 1987). I intend to contrast Derrida’s posture, described here, with Cover’s attitude of “resisting the temptation” to engage with Carol Gilligan. See supra notes 161-166 and accompanying text.
274. Orford, supra note 262, at 40.
275. See generally Sheehan, Caring for Deconstruction, supra note 261 (discussing, among other writings, ROBIN WEST, CARING FOR JUSTICE (1997)).
276. For argument that feminist legal theory cannot indefinitely avoid engagement with poststructuralism see generally Ashe, Inventing Choreographies, supra note 261.
277. See Fish, Mission Impossible, supra note 264.
becomes particularly noteworthy at this juncture. And Susan Howe’s work, with its direct focus on religion and on gender, becomes especially relevant.

**B. Deconstruction and “Unconverted Antinomianism”**

Susan Howe’s work defies categorization by genre. It has been characterized as experimental and “avant-garde,” and as constituting “acts of non-conformity.” As far as I have been able to determine, Howe has not been discussed within Law and Literature commentary, in spite of the wide celebration that has elsewhere greeted her work. Howe has been elected to the Board of Chancellors of the Academy of American Poets, a testament to her high reputation as a poet. Her writing has also been recognized for its importance as history or as counter-history. In 1988, for example, James Clifford cited *My Emily Dickinson* for its power to interrupt the “narrative continuity of history and identity” in a determination to “find a different way through capitalist America.” Since then, Susan Howe has continued to produce work of originality and force. *The Birth-Mark: Unsettling the Wilderness in American Literary History* is one of several powerful writings exploring the histories of American law and religion and literature. Some of Howe’s subject matter coincides precisely with that of the Law and Literature canon. For example, an excerpt from Herman Melville’s *Billy Budd* appears as an epigraph to *The Birth-Mark,* and her essay *Scattering as Behavior Toward Risk* can be read as a meditation on Captain Vere and Billy Budd. At the same time, as suggested in Parts I and II, above, Howe engages with the “barely legible” and often female-gendered texts of American religion and American history.

A major theme of both *My Emily Dickinson* and *The Birth-Mark* is the significance for American literature—and for women’s writing—of the religious and civil trials of Anne Hutchinson in the Massachusetts Bay Colony in 1637. Howe reads and re-reads the trials and the banishment of Hutchinson,

---


283. Among Susan Howe’s other major writings are *MY EMILY DICKINSON*, supra note 3; *SINGULARITIES* (1990); and *THE MIDNIGHT* (2003).

284. Howe, supra note 39, at overleaf.

marking these as defining events whose effects on American consciousness continue to resonate. Assiduously examining texts that are often highly controlled and not easily accessible, Howe traces all that can be uncovered from the margins and from the physical records documenting the prosecution of Anne Hutchinson by her erstwhile friend and minister, John Cotton. Her searches are determined: tracking down “the marginal,” she retrieves omissions and erasures from “authoritative” texts; she documents the telling physical features of texts that have gone unmentioned in prevailing accounts of the religious history of the Massachusetts Bay Colony, and she uncovers the “taming” that has limited full access to Emily Dickinson’s manuscripts. She tracks and exposes what she sees as a consistent and continuing suppression of the antinomian in American history. This suppression has often involved the dominance of religious forces marked by a narrow range of tolerance for the expression of contradictory (often female-gendered) experience. Howe is convinced that fear of antinomianism continues to predominate and that American life and literature are committed to suppressing antinomianism. Her understanding of the operation of power, as expressed through editorial control as well as through civil government, persuades her that strongly antinomian themes will not find prominence or protection in American culture and American law and that antinomian vision in North America is gendered feminine.

Howe’s work offers, in Resnik’s terminology, both different writing and different readings, and in both of these capacities it exceeds N&N. Some of the texts and narratives that Howe selects for study are different from the ones selected by Cover; she fully understands the legal liberalism of her father and of Robert Cover, but in texts that they found complete and authentic, she finds gaps and silences. If you are a woman, archives hold perpetual ironies. Because the gaps and silences are where you find yourself. While Howe inherits the modernist lineage that produced her

286. For example, Howe catalogues the distortions of Dickinson’s manuscripts, recording the “corrections” and omissions she discovers both in the Thomas H. Johnson editions of Dickinson’s writing and in the Ralph Franklin edition of 1986. See Howe, supra note 39, at 131-53.

287. Howe, for example, records a history of “rational corrections” made by editors of the manuscript of Thomas Shepard, the minister of the Cambridge First Church who prosecuted Anne Hutchinson. She introduces a counter-history that includes a record of the physical characteristics as well as the words of Thomas Shepard’s unpublished manuscript “autobiography,” commenting on the blank pages, on the lack of margins, and on the inclusion of writings beginning at both ends of the notebook. Howe wants to demonstrate the distorting effect of reductive edits, which eliminated from Shepard’s text evidence of his religious doubt and uncertainty. Howe, supra note 39, at 43-86.

288. Howe, supra note 39, at 131-153; see generally Howe, supra note 3. In her commentary on Dickinson, Howe insists upon attention to the physicality of the Dickinson manuscripts and to such realities as the punctuation, spelling, spacing, and length and angle of dashes inscribed by Dickinson. She notes the “editorial emendations” perpetrated by Thomas H. Johnson and by R. W. Franklin, in their editions of Dickinson’s work, through which “the subject-creator and her art in its potential gesture were domesticated and occluded by an assumptive privileged Imperative.” Howe, supra note 39, at 131.


290. Talisman Interview, supra note 21, at 158.
father and Cover, her own work is positioned at the juncture of modernity and postmodernity. It is unquestionably located in a place from which the ambiguous paths of kinship pull me in opposite ways at once.291 Susan Howe chooses a different ancestry— which, as Cover has told us, “is a serious business with major implications;”292 she finds a different history— something that, as Mark DeWolfe Howe has told us, “[e]ach of us is entirely free” to do.293 She seeks out women hard to track down: Genealogical trace of them has vanished with their surnames.294 Her alternative choices expose gendered constraints on liberty that operate through both law and religion. Robert Cover worried about judges who colluded with history. Susan Howe’s work attempts to collide with history and to collude with narratives that have continued to be suppressed (that were suppressed in N&N) and that continue to be overlooked in legal writing about religion and gender.295 If Law and Literature is to become energized by different writing, Susan Howe’s work provides a singularly relevant departure point.

Yet, Howe’s work of writing also constitutes the kind of different reading that distinguishes it from N&N and from other texts of legal-liberalism. Characterized by scholarly rigor as well as by experimentation, Howe’s writing is deeply informed and influenced by postmodernist and deconstructive perspectives. These attributes push it far beyond the perspectives expressed in N&N and beyond the bounded perspectives of contemporary legal-liberalism. It is these perspectives that enable Howe’s “un-settling” of the closed narratives most typically produced by liberal-legal theory, including feminist legal theory and Law and Literature writings about women, gender, sexuality, and religion.

It has already been suggested that Howe attends to particular antinomianisms that Cover ignored: those of individuals (often women) countering the normativity of insular religious groups. But her un-covering is not limited to an exposure of ignored or suppressed narratives; Howe’s work involves a deeper epistemological venture. Beyond and against the limited antinomianism of N&N, Howe offers an “unconverted antinomianism,” which may be another name for deconstruction. Unlike Cover, Howe has no interest in the (even temporary) resolution or settlement of issues that could be produced by the production of new nomoi that would privilege new narratives. While legal theory reaches for settlements, Howe wants not to settle, but rather

291. HOWE, supra note 3, at 7.
292. Cover, supra note 1, at 18.
293. HOWE, supra note 2, at 5.
294. HOWE, supra note 39, at 67.
295. “Collision or Collusion with history” is a line from one of Susan Howe’s poems, collected in Articulation of Sound Forms in Time, in SINGULARITIES, supra note 283, at 33. Robert Cover was centrally concerned with “collusions” of judges. The “process of “judicial complicity” in crimes and injustice is the topic of JUSTICE ACCUSED. See supra note 25.
to un-settle, the wilderness. This rejection of "settlement" marks the deconstructive nature of Howe's critique of legal and religious nomianisms; her privileging of the "wilderness" identifies a non-naive commitment to the search for something beyond law. [A] dark wall of rule supports the structure of every letter, record, transcript: every proof of authority and power. I know records are compiled by winners, and scholarship is in collusion with Civil Government. I know all this and go on searching...

Howe brings poststructuralist perspectives to many of the issues that Heilbrun defined as central to contemporary feminist studies, including the definition of "gender," the definition of "women," and the interpretation of sexuality. Explicitly identifying the major figures in poststructuralist theory and deconstruction who have influenced her work, Howe cites Michel Foucault as the direct inspiration of her writing about Anne Hutchinson. She identifies Julia Kristeva, Luce Irigaray, and Alice Jardine as influencing her understanding of gender. And it should be noted that although Howe's work focuses predominantly on women suppressed by law and by religion, her feminism—or, more precisely, her understanding of gender, as informed by poststructuralist perspectives—appears to escape the essentialism for which various American legal feminisms of the 1980s and 1990s have been indicted. When she writes of gender, Howe evidences the postmodernist recognition that the "gendering" apparent in the suppression of antinomianism does not affect women alone. In contrast to some forms of feminism and feminist legal theory, Howe's construction of gender is not inconsistent with the analyses of sexuality developed by Eve Kosofsky Sedgwick and by Judith Butler.

The issue that Heilbrun called "legitimacy of the personal as women have begun increasingly to use it in critical studies" is advanced in Howe's writing. It is advanced not by an invocation of the "I" of lyric poetry, but by Howe's consistent emphasis on the attachment of subjectivity to history. Rachel Blau DuPlessis has characterized Howe's work as "an astonishing self-portrait of an artist, a woman, trying to inherit herself, to work herself into her

296. "Unsettling the Wilderness of American Literary History" is a central theme of The Birth Mark. See generally HOWE, supra note 39.
297. Id. at 4.
298. Id. at 37, citing MICHAEL FouCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS (Donald Bouchard ed., 1977)
299. Id. at x, citing JULIA KRISTEVA, Semiotics of Biblical Abomination, in POWERS OF HORROR: AN ESSAY ON ABJECTION 90 (1982).
300. Id. at 170, citing LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE (1985).
301. Id., citing JARDINE, supra note 91.
303. See Butler, supra note 17.
304. Heilbrun & Resnik, supra note 6, at 26.
own—‘patrimony’? ‘anarchy’? No, into her own ‘liberty.’” Krzysztof Ziarek has also discussed this impulse toward liberty in Howe’s work, perceiving her as reaching toward an understanding of liberty that goes beyond “agency” and beyond a “patriarchal model of identity” and that is “opposed to the idea of the subject as the locus of meaning and intelligibility.” Ziarek also identifies the experimental and avant-garde features of Howe’s experimental play with language, defining her work as “part of the critique of modernity’s reliance on forms of thought and discourse which seek to foreclose the play of possibilities . . .” Ziarek identifies what he sees as deep political implications of Howe’s work of de-mythologizing history and of refusing to offer any alternative “uniform vision of history.”

In all the respects discussed here, Howe’s work undertakes major tasks that Heilbrun identified as central for future endeavors of Law and Literature. I have gone beyond Heilbrun to identify the articulation of religion with gender and law as a key site for the engagement of legal theory. And I think it is here that Susan Howe’s contributions, with their incorporation of postmodernist perspectives on law, gender, and religion, are particularly important.

Within legal theory, remarkably little attention has been given to law’s reinforcement of religious groups’ gender and sexual oppressions. This is the case in spite of a tradition of critical writing that has been part of American feminist commentary on American religion from the 19th-century critiques of Elizabeth Cady Stanton and Matilda Joslyn Gage to the 21st-century critiques of Mary Daly. It becomes particularly notable when we consider Carolyn Heilbrun’s observation that the women students in her Law and Literature classes often expressed intense reactions of both anxiety and anger as they came to “realization of the ways in which the culture and often the religion in which [they] grew up were male-centered.” Feminist legal-theoretical critiques of religion during the last twenty years or so have been few in number and they have tended have tended in the direction of modesty. For example, in her 1985 commentary on Bob Jones University, Judith Miles quite broadly criticized the provision of tax-exempt status to any religious group. But in

306. ZIAREK, supra note 279, at 287.
307. Id. at 285.
308. Id. at 288.
309. Id. at 289.
310. Id. at 276.
312. Heilbrun & Resnik, supra note 6, at 17 (emphasis added).
1993, Mary Becker, while echoing Miles’ criticism of the IRS practice, recommended a far more modest remedy than the one proposed by Miles.\(^{314}\) And neither one of these entirely sound proposals has been pursued in spite of a national public policy that purports to honor gender equality.

More recently, despite *N&N’s* focus on American religious groups, Judith Resnik’s evaluation of Cover’s essay only very indirectly addresses the patriarchy-enforcing practices of those groups. Resnik highlights the unique problems associated with sex discrimination in religious and other “paideic communities” under her exoticized heading “Tribes and Veils.”\(^{315}\) She concentrates not on the operation of laws currently subsidizing patriarchal religious institutions across the entire United States, but on the operation of laws within a Pueblo tribe and in France.\(^{316}\) This commentary is not unimportant, but it avoids confrontation with more widely applicable issues of American law, such as the questions of how law and public policy should address the reality that, in the United States, the national government is increasing its financial subsidization of patriarchal religious groups; and how law and policy should respond to religious groups seeking or claiming an entitlement to discriminate on the bases of gender and sexual orientation, even while receiving governmental subsidies. At the beginning of the twenty-first century, we need more writing examining the intersections of law, religion, and gender.

At a time of escalating governmental subsidization of patriarchal religious groups, the implications of governmental support for religious groups that disparage and suppress women are heightened, and the appropriateness of consciously gendered commentary on this aspect of church-and-state interaction is particularly apparent. Yet, at the same time, articulating how law should relate to religion is also increasingly difficult. Liberalism’s commitment to “toleration” is widely experienced, as Stanley Fish defined it, as a “mission impossible.”\(^{317}\)

In the face of a need for new understandings of “toleration”—understandings more capacious than legal liberalism’s “tolerance”—I believe Jacques Derrida’s writing about religion to be particularly germane,\(^{318}\) and I find many points of connection between Derrida’s and Howe’s understandings

---


315. Resnik, *supra* note 12, at 47.

316. *Id.*


of religion. An obvious commonality involves their mutual focus on antinomian voices. Susan Howe's attention to this issue has already been pointed out. Derrida's was obvious in his remarks at an international conference on religion in 1994. Commenting on the conferees, Derrida noted that they were:

Christian, barely even Judaeo-Christian. No Muslim is among us, alas, even for this preliminary discussion, just at the moment when it is towards Islam, perhaps, that we ought to begin by turning our attention. No representative of other cults, either. Not a single woman.\footnote{319}

We should have . . . begun by allowing them to speak.\footnote{320}

I see, beyond that commonality, a deeper connection between Derrida and Howe, traceable to their common retention of a faith in language that survives the loss of other foundations and stabilities. This faith in language permits their speaking beyond the dimensions of Western liberalism and its binarisms. I have discussed elsewhere what Derrida discovers as “sources” underlying thought, and underlying both “faith” and “reason,” that he terms either “messianicity without messianism” or chora.\footnote{321} Derrida discovers, in the extremity of his abstraction and “at the limits of reason alone,” a condition of uncertainty, of “indecisive oscillation” that may constitute the only presently available “chance . . . of a new ‘tolerance.’”\footnote{322} I believe that this space of uncertainty and possibility is similarly approached by Susan Howe. It is the space of an “unconverted antinomianism”—an antinomianism that remains unsatisfied, that goes on searching.

Like Derrida, Susan Howe puts her faith in language. And this faith takes her to the place that Derrida has entered. The Puritans, she posits, though lawless in their own invasive settlement of New England, could not permit lawlessness. Law had to be instituted and settled. The “Absolute Boundary of Reformation” \footnote{323} was too immediately unsettling. But it is toward the “immediately unsettling” that Howe turns. Her turn and movement in that direction implies departure from her—and our—lineage of liberalism. For Howe’s father, the Constitution was the sacred text; for Cover, the sacred texts included both the Constitution and Judaic scripture. For Susan Howe, I think, as for Derrida, language itself is the “sacred” text. If you follow the word to a certain extent, you may never come back.\footnote{324}

\footnote{319}{Derrida, Faith and Knowledge, supra note 278, at 5.}
\footnote{320}{Id. at 7.}
\footnote{321}{Id. at 17-18. See also Ashe, Limits of Tolerance, supra note 57, at 617-618.}
\footnote{322}{Derrida, Faith and Knowledge, supra note 278, at 19-20; Ashe, Limits of Tolerance, supra note 57, at 618-19.}
\footnote{323}{HOWE, supra note 39, at 3.}
\footnote{324}{Id. at 178.}
Susan Howe pursues language, encountering the “barely legible” and the “stammer,” and she finds in those what Derrida finds in *chora*: “soundings of uncertainty.” In moving there, she enters a space not discovered by *N&N*; a space not recorded in present theorizing about law and gender and religion; a space traced only rarely and fitfully in Law and Literature.

I think that space is the one we have to enter.

CONCLUSION

My re-reading of *Nomos and Narrative* has been a major focus of this Article. Some of us may feel about Robert Cover—I know I do—something analogous to what Susan Howe feels for her father: *I would dearly love to sit down and show my father what I know now. We would talk about the garden and the wilderness together, and all would be well. All manner of things would be well. Yet this place I want to come home to was false to women in an intellectual sense. It was false.* Re-reading *N&N* through the critical lenses of Susan Howe’s work, I have tried to show the limits of the liberal-legal project in application to American law’s under-explored intersections with religion and gender. At the same time, I have sought to introduce Susan Howe’s work of “unconverted antinomianism” to people thinking and writing about legal theory under the headings of Law and Literature, of feminist legal theory, and of law and religion. I have done this in the belief that her searching—beyond law, beyond language, beyond gender, beyond certainty—illuminates the only path of possibility that I can discern: *I... go on searching for some trace of love’s infolding through all the paper in all the libraries I come to.*

325. *Id.* at 161.
326. *Id.* at 4.