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## HOW THE FIRST PARAGRAPH OF *VIOLENCE AND THE WORD* KILLED THE LAW AS LITERATURE MOVEMENT

Brett G. Scharffs\*

### I.

Since this conference focuses on the work of a particular individual, Robert Cover, I hope you will not mind a personal detour as I explain how and why Robert Cover's work has had such an outsized impact on me. The title of my remarks, "How the First Paragraph of *Violence and the Word* Killed the Law as Literature Movement" is deliberately provocative, invoking the violence that Cover spoke of in *Violence and the Word*.<sup>1</sup>

I arrived at Yale Law School in 1989, with a newly minted philosophy degree from Oxford University, where my thesis focused on the uses of literary theory in the interpretation of legal texts. In particular, my thesis was an analysis of a spirited, even vituperative, debate that was taking place in law reviews between Stanley Fish, and three philosophically sophisticated lawyers, Owen Fiss,<sup>2</sup> Richard Posner,<sup>3</sup> and Ronald Dworkin.<sup>4</sup> For all their differences, each of

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<sup>1</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601-29 (1986).

<sup>2</sup> For the exchange between Owen Fiss and Stanley Fish, see Owen M. Fiss, *Objectivity and Interpretation*, 34 STANFORD L. REV. 739, 739-63 (1982); Stanley Fish, Fiss v. Fish, 36 STANFORD L. REV. 1325, 1325-47 (1984); Owen M. Fiss, *Conventionalism*, 58 S. CALIF. L. REV. 177, 177-97 (1985).

<sup>3</sup> For the exchange between Richard Posner and Stanley Fish, see Richard Posner, *Law and Literature: A Relation Reargued*, 72 VIRGINIA L. REV. 1351, 1351-92 (1986); Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law*

these three professors were under assault by Fish for their belief that texts could communicate stable and predictable meaning. My thesis was that Professor Fish's arguments fell short because they were based, in each instance, on a severe misconstruction of what Professors Fiss, Posner and Dworkin were saying.<sup>5</sup>

Nonetheless, I arrived at Yale Law School, it is fair to say, in the grip of what Martha Minow and others have called the "interpretive turn," in legal analysis—the belief that literary theory had important and meaningful contributions to make to the interpretation of legal texts.<sup>6</sup> But my understanding of the differences between interpreting literature and interpreting law was forever changed when I encountered Robert Cover's work.<sup>7</sup> I was sufficiently impressed that together with a group of other Yale Law students, we organized a reading group on Robert Cover's work, which was student-led and (in a practice that is one of the reasons I have abiding affection for Yale Law School) approved for pass/fail credit by the School's curriculum committee. His masterwork,

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*and Literature*, 97 YALE L.J. 777, 777-93 (1988); Richard Posner, *Interpreting Law, Interpreting Literature*, 7 RARITAN 1, 1-31 (1988).

<sup>4</sup> For the exchange between Ronald Dworkin and Stanley Fish, see Ronald Dworkin, *Law as Interpretation*, in THE POLITICS OF INTERPRETATION 249, 249-70 (W.J.T. Mitchell ed., Chicago Univ. Press 1983); Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in THE POLITICS OF INTERPRETATION, *supra*, at 271, 271-86; Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, in THE POLITICS OF INTERPRETATION, *supra*, at 287, 287-313; Stanley Fish, *Wrong Again*, 62 TEXAS L. REV. 299, 299-316 (1983); RONALD DWORKIN, *LAW'S EMPIRE* (Harv. Univ. Press 1986); Stanley Fish, *Still Wrong After All These Years*, in LAW AND PHILOSOPHY 401, 401-18 (D. Reidel Publ'g Co. 1987).

<sup>5</sup> Brett G. Scharffs, *Interpretation and Adjudication: Some Philosophical Aspects of a Current Debate* (1989) (B.A. thesis, Oxford University) (on file with author).

<sup>6</sup> See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1860-1915 (1987).

<sup>7</sup> Others have noted a similar impact of Cover's Work. See, e.g., *id.* In this essay, written shortly after Cover's article was published, Minow states: "Cover raised a warning that should chill those of us who are taken with the interpretive turn in law." *Id.* at 1893. Minow adds: "Cover's challenge alters the terms of the debate and for someone, like me, who is drawn to the interpretive turn, his challenge forces reconsideration and reevaluation." *Id.* at 1894. Minow also states: "Cover's work changes the terms of discussion; we cannot go on the way we were going after we hear his words." *Id.* at 1863.

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*Justice Accused: Antislavery and the Judicial Process*,<sup>8</sup> his articles *Nomos and Narrative*<sup>9</sup> and *The Folktales of Justice*,<sup>10</sup> as well as some of his lesser-known work, had a tremendous impact on my way of thinking about the law. But nothing had a greater effect than *Violence and the Word*, which was published in 1986 shortly after Professor Cover's death and just a few years before I arrived at Yale.<sup>11</sup>

It is fair to say this article landed like a bombshell on my way of thinking about the law and about the interpretive enterprise. *Violence and the Word* begins with what, to my mind, is one of the most important and powerful sentences in legal scholarship. Cover declares, "Legal interpretation takes place in a field of pain and death."<sup>12</sup>

In a footnote, he explains that the term "legal interpretation" is "directed principally to the interpretive acts of judges."<sup>13</sup> But he uses the broader term "legal interpretation," he says, "for it is my position that the violence which judges deploy as instruments of a modern nation-state necessarily engages anyone who interprets the law in a course of conduct that entails either the perpetration or the suffering of this violence."<sup>14</sup>

The implications of this declaration are stunning, shocking, even staggering. Not only is interpretation by judges categorically different than other forms of interpretation (since legal interpretations call forth the coercive power of the state), the interpretation of legal texts by all of us (including law students and law professors) is categorically different because our interpretations (implicitly or explicitly) advocate for uses of state power that are coercive, or to use another term coined by Cover, "jurispathic."<sup>15</sup>

In the second sentence of the article, Cover begins to explain the meaning of his shocking claim. "Legal interpretive acts signal

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<sup>8</sup> ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (Yale Univ. Press 1975).

<sup>9</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>10</sup> Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179 (1984-1985).

<sup>11</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601-29 (1986).

<sup>12</sup> *Id.* at 1601.

<sup>13</sup> *Id.* n.1.

<sup>14</sup> *Id.*

<sup>15</sup> Cover, *supra* note 9, at 40.

and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”<sup>16</sup> In making stark and explicit the connections between the “interpretations” of judges and the “violence” that follows from those interpretations, the seriousness and stakes of legal interpretation are laid bare. This violence bears upon our most important interests—liberty, property, family, life itself.

Again, on a personal note, in a way that is true of very few sentences, I can remember precisely how reading this for the first time made me feel: suddenly, all the clever and angry debates about interpretation (debates in which I had been immersed as a student for several years) seemed *frivolous*. Legal interpretation is different because the stakes are different. For an English professor, a new and iconoclastic interpretation of an important text (immediately to my mind came Professor Fish’s brilliant and revolutionary reading of Milton, *Surprised by Sin: The Reader in “Paradise Lost”*), is valued and rewarded precisely because it is new, innovative, and disruptive.<sup>17</sup> Fish’s work was particularly influential because it placed the reader, rather than the author, at the center of the interpretive enterprise, themes he developed further in subsequent works, such as *Is There a Text in This Class?: The Authority of Interpretive Communities*,<sup>18</sup> and in his collected essays, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989).<sup>19</sup> But for a judge, or even a lawyer, interpretation is a game played for very different stakes. Indeed, the game is so serious that to call it a game (which, in a way it had become for me) was to do something that was deeply immoral.

Cover’s first paragraph continues: “Interpretations in law also constitute justifications for violence which has already occurred, or which is about to occur.”<sup>20</sup> This sentence brings to mind the severe

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<sup>16</sup> Cover, *supra* note 11, at 1601.

<sup>17</sup> STANLEY FISH, *SURPRISED BY SIN: THE READER IN PARADISE LOST* (Harv. Univ. Press 2d ed.1998).

<sup>18</sup> See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (Harv. Univ. Press 1982).

<sup>19</sup> See generally STANLEY FISH, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory, in LITERARY AND LEGAL STUDIES* (Duke Univ. Press 1990).

<sup>20</sup> *Id.*; Cover, *supra* note 11, at 1601.

consequences for fugitive slaves of judges who upheld the Fugitive Slave Act, returning human beings into slavery, which Cover had analyzed in *Justice Accused*.<sup>21</sup> Cover's point, however, has general import: the violence occasioned by legal interpretation is not limited to the immediate consequences of the Judge's declaration, it also implicates and perhaps validates violence that has already taken place or that will subsequently take place as a result of the judge's interpretation of the law.<sup>22</sup>

Then Cover says this: "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."<sup>23</sup> Cover's reference to "interpreters" rather than just judges again implicates all of us who are engaged in interpreting legal texts. Words can hurt, and in the law, this hurt is more than metaphorical, or even hurt feelings. The judge's words occasion violence and leave behind victims. Cover does not let us off the hook, with some generalized point about the coercive power of the law; he focuses our attention on the actual people, who he identifies as victims, of the law. This is important, for we might think of a criminal trial as involving an accused "perpetrator" and an alleged "victim." Cover forces us to see that anyone—all of us—who come within the purview of the law are potential victims of legal interpretation.

Cover continues: "Neither legal interpretation nor the violence it occasions may be properly understood apart from one another."<sup>24</sup> Here Cover reminds us that we simply cannot engage in legal interpretation without grappling with the real-world implications—the violence—that inherently and invariably attends legal interpretation.

Cover concludes his opening paragraph with what might appear as an aside, but which I read as an indictment of the law *and* literature, or what at the time was often casually referred to as the "law *as* literature" movement. Speaking of the necessary connection between "violence and the word" in legal interpretation, Cover says: "This much is obvious, though the growing literature that argues for

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<sup>21</sup> COVER, *supra* note 8, at 175.

<sup>22</sup> Cover, *supra* note 11, at 1601.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

the centrality of interpretive practices in law blithely ignores it.”<sup>25</sup> This sentence is accompanied by a lengthy footnote (another footnote 2) that cites several recent “Law and Literature” and “Interpretation” symposia that resulted in two issues of important law reviews, as well as other books, including Ronald Dworkin’s *Law’s Empire*,<sup>26</sup> and J.B. White’s, *When Words Lose Their Meaning*.<sup>27</sup> The common denominator of these projects, Cover says, is that they place the “meaning-giving, constructive dimension of interpretation at the heart of law,” and advocate for the primacy of law as a “culture of argument” that raises “rhetoric to the pinnacle of jurisprudence.”<sup>28</sup>

I describe this as an “indictment” of the “law as literature” movement, because Cover observes (correctly, I believe) that these approaches focus on the “meaning-giving” dimensions of interpretation, while underplaying or even ignoring the violence inherent in legal interpretation. Footnote 2 continues: “The violent side of law and its connection to interpretation and rhetoric is systematically ignored or underplayed in the work of both Dworkin and White.”<sup>29</sup> When Cover states that debates about interpretation in the law “blithely ignore” the violence and victims that follow legal interpretation,<sup>30</sup> he could well have been speaking of me (an unimportant novice in the game of legal interpretation), but one nonetheless who had thought of it mostly as a game. Thus, my recollection of feeling that most of the arguments that took place regarding “law as literature” were deeply frivolous.

## II.

So this much is clear (at least to me): Cover forever changed the way we should think about legal interpretation, because it is not just a *meaning generating* activity, it is also a *violence imposing*

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<sup>25</sup> *Id.*

<sup>26</sup> RONALD DWORIN, *LAW’S EMPIRE* (Belknap Press 1988).

<sup>27</sup> JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (Chicago Univ. Press 1984).

<sup>28</sup> Cover, *supra* note 11, at 1601-02 n.2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1601.

enterprise.<sup>31</sup> But what of my assertion, in my title, that the first paragraph of *Violence and the Word* “killed” the law as literature movement?

Alas, this is certainly an overstatement. Legal interpretation (of the sort I’ve been engaging in here) does not always occasion the type of violence that a “killing” would entail. And so, I am engaging in another type of literary move—metaphor—that Cover might also condemn as “blithe” or frivolous.

Nevertheless, I do think the metaphor apropos. I do believe Cover’s work has had a dramatic effect upon scholarly discussions of “interpretation” in the law, and I think it is accurate to say that the “law as literature” movement crested in the years immediately before and after the publication of *Violence and the Word* and seems to have lost momentum in the following years. An online search of the phrase “law as literature,” shows it peaking in the years immediately following the publication of *Violence and the Word* in 1986, and dropping precipitously in subsequent years.<sup>32</sup> Similarly, a more complex search of “legal interpretation” occurring in proximity to the phrases “literary interpretation” or “literary criticism” or “literary theory” also shows a spike in the years immediately after the publication of *Violence and the Word*, which then trails off significantly in the following years.<sup>33</sup> In contrast, more generic

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<sup>31</sup> Various writers have cited Cover for his significance as an early critic of the law as literature movement. See e.g., John Tasiouias, *The Paradox of Equity*, 55 CAMBRIDGE L.J. 456 (1996) (citing Cover for the proposition that the “analogy between literary and legal judgment appears to be subject to certain drastic limitations”).

<sup>32</sup> For example, a search in the Law Journal Library in HeinOnline with the following parameters: Advanced Search; Sections: Articles, Comments, Notes, Reviews, Legislation, Cases, Decisions, Miscellaneous, Index, Editorial and External Articles; Dates: Starting 1980; and Text search: “law as literature,” shows that the frequency of the phrase “law as literature” peaked in the years following the publication of *Violence and the Word* and has been in decline in the years since:

1980-1986 = 122  
 1987-1993 = 288  
 1994-2000 = 196  
 2001-2007 = 165  
 2008-2014 = 157  
 2015-2021 = 89

<sup>33</sup> The search parameters in, *id.* at Text Search: “legal interpretation” AND (“literary interpretation” OR “literary criticism” OR “literary theory”), revealed the frequency of the phrase’s use:



references to “law and literature” have continued to increase since the 1980s.<sup>34</sup> But it is difficult to conclude too much (least of all causation) from this kind of word frequency analysis.<sup>35</sup>

Perhaps it would be more accurate to say Cover’s argument abruptly changed the way I think about interpretation, and in particular about the value and applicability of the insights and techniques of literary interpretation for the interpretation of legal texts, and that it should have—and to a remarkable extent seems to have had—a similar effect on the way all of us think about legal interpretation.

### III.

It is noteworthy that in the years since the publication of *Violence and the Word*, the center of gravity of statutory and even constitutional interpretation moved away from an obsession with “intent” versus the role of readers and “interpretive communities” to debates that center mostly upon “text” and the ordinary and reasonable meaning of texts.<sup>36</sup> The emphasis on text, rather than the

1980-1986 = 83

1987-1993 = 272

1994-2000 = 204

2001-2007 = 119

2008-2014 = 135

2015-2021 = 91

<sup>34</sup> The search parameters in, *id.* at Text Search: “Law and Literature,” revealed a somewhat different pattern, with references to law and literature increasing over time, with an apparent dip in the last six years:

1980-1986 = 407

1987-1993 = 1429

1994-2000 = 1767

2001-2007 = 1730

2008-2014 = 1727

2015-2021 = 1428

<sup>35</sup> This type of search pulls all mentions of a phrase and does not tell us whether it is an important part of the analysis, so it will involve both over and under counting. Also, the number of articles over time has increased dramatically, so raw numbers likely do not tell the full story.

<sup>36</sup> The gravitational force of U.S. Supreme Court Justice Antonin Scalia is perhaps the key to this switch. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, THE UNIVERSITY CENTER FOR HUMAN VALUES (Princeton Univ. Press 1997); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (West Group 2012); ANTHONY

consensus of “interpretive communities” recognizes the force and authority of law in a way that other theories underplay. There is something far more sober about debates about debates regarding the “ordinary meaning” of texts, than the open-textured possibilities of interpretation inspired by literary theory. It is noteworthy that, in 2015, Justice Elena Kagan famously declared: “We’re all textualists now!” in a conversation at Harvard Law School honoring Justice Antonin Scalia.<sup>37</sup> As others have noted, Justice Kagan’s statement was more than a truism, but was rather a “testament to the sea change the law has undergone in recent decades.”<sup>38</sup> Justice Kagan explained that when she was in law school (she graduated in 1986, the year *Violence and the Word* was published), if someone had mentioned “statutory interpretation” to her, she was not sure she “would even quite have known what that meant,” since statutory interpretation “was not really taught as a discipline.”<sup>39</sup> The approach to statutory interpretation at that time, Justice Kagan explained, was “what should this statute be,” rather than what do “the words on the paper say?”<sup>40</sup> Focusing on what a statute should be drinks deeply from the well of literary approaches to interpretation, and as Justice Kagan notes, can turn judges into legislators.<sup>41</sup> Focusing on the words of a statutory text is a much more deferential and modest mindset for a judge to adopt, one that is consonant with the stakes—the violence and the victims—that attend legal interpretation.

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SCALIA, *THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW* (Jeffrey S. Sutton & Edward Whelan eds., 2020).

<sup>37</sup> Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 25, 2015).

<sup>38</sup> Diarmuid F. O’Scannlain, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 *ST. JOHN’S L. REV.* 303, 304 (2017).

<sup>39</sup> Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*