ARTICLES

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

*Robert M. Cover**

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

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

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

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

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

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

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

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

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

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

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

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

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

argument" or as operating within a "community of interpretation." It is also consistent with an understanding of the constitutional law of judges, which is far less benign. For while one dimension of the agonistic element of law may be argument; another and more important dimension is violence. While argument may be said to take place within a community, violence frequently marks the failure of community and the metaphors that evoke it.

Since Burke made his point about constitutions we have watched the blossoming of an entire library of works about conventionalism and the deriving of "oughts" from "is's." Indeed, because Burke wrote before the publication of the first part of Wittgenstein's *Philosophical Investigations*[3] and long before the fashionable manipulation of continental "hermeneutic" traditions on the American academic scene, it may safely be said that his point is considerably easier to understand today than it was in 1945. Despite the emergence of a major emphasis in all the humanities on the social, the constitutive, and the conventional workings of language, however, there has been far too little attention paid to the role of violence in establishing and in destroying understandings.

Elaine Scarry's new work, *The Body in Pain*,[4] is an important and exciting start in the process of rectifying that omission, but it is only the beginning. Hers is a brilliant evocation of the world-destroying character of pain for those who suffer it. Here, by sharp contrast, I am concerned with the practical considerations of normative world building for those who perpetrate or seek to perpetrate violence successfully.

For legal interpretation occurs on a battlefield—it is part of a battle—which entails the instruments both of war and of poetry. Indeed, constitutional law is, I would argue, more fundamentally connected to the war than it is to the poetry. The connection begins at the beginning and never disappears.

I. THE CONSTITUTION AS VIOLENCE

The Declaration of Independence, our first constitutional document as a nation, ends with a mutual pledge of "our lives, our

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[3] L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 3d ed. 1973).

[4] E. SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD (1985).

fortunes, and our sacred honor." It is the pledge of people who know that war will be the test of the constitutional characterization to be given their acts—treason or foundation. The first *Federalist Paper* opens with a remark on the significance of the call "to deliberate on a new Constitution":[5] "The subject speaks its own importance; comprehending in its consequences, nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world."[6] A call to deliberate upon poetry may enlist an array of as noble or even nobler reasons for discourse. But the reasons here adumbrated for constitutional deliberation are, in fact, the stuff of war, while those behind poetry will as likely be the stuff of love or salvation.

The Constitution's connection to violence is not confined to our Revolutionary origins nor to our crises of continuity in 1787 or at the Civil War. The determination of some men to force a polity to emerge out of violence, the determination of others to insist on the permanence and continuity of constitutional union at the price of blood—these are certainly the polestars of commitments through which constitutional understandings come to be translated into pain and death. But the connection extends or intrudes into the routine constitutional orderings of our law as well.

For judges also deal pain and death.

That is not all that they do. Perhaps that is not what they usually do. But they *do* deal death, and pain. From John Winthrop through Warren Burger they sit atop a pyramid of violence, dealing . . . .

In this they are different from poets, from critics, from artists. For it will not do to get precious—to insist on the violence of strong poetry, and strong poets. Even the violence of weak judges is utterly real—in need of no interpretation, no critic to reveal it—a naive but immediate reality. Take a short trip to your local prison and see. The point here is not whether or not the violence of judges is justified, only that it exists and differs from the psychoanalytic violence of literature or the metaphorical characteriza-

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[5] THE FEDERALIST No. 1, at 89 (A. Hamilton) (B. Wright ed. 1961).
[6] *Id.*

tions of literary critics and philosophers. I have written elsewhere that judges of the state are jurispathic, that they kill the diverse legal traditions that compete with the state. I am speaking now, however, not of the jurispathic quality of the office but of the homicidal.

Not only does the violence of judges and officials, the violence of a posited constitutional order, exist. It is generally understood to be implicit in the practice of law and government. Violence is so intrinsic a characteristic of the structure of the activity that it need not be mentioned. Read the Constitution. Nowhere does it state the obvious: that the government thereby ordained and established has the power to practice violence over its people. That, as a general proposition, need not be stated, for it is understood in the very idea of government. It is, of course, also directly implicit in many of the specific powers granted to the general government or to some specified branch or official of it.

The fact that the subject matter of constitutional interpretation is violence—that the Constitution is violent in origin, purpose, and intent—shapes the practice in two fundamental ways. For constitutional interpretation, like all legal interpretation, is a practical discipline. It relates to action and determines action in a variety of ways. Yet there is a chasm between the thought or contemplation of violence and the violent deed. That chasm is in some measure the gulf between all thought and action, but it is unique in two respects.

First, there is the internal, psychological, and moral revulsion we feel at the infliction of pain on other people. Ethology and ethnography point to a near universal revulsion at violence within the social group of a species save in certain limited circumstances, such as competition for females or leadership. But there are obvious limitations upon the revulsion against violence. First, there are deviant individuals who do not experience it. Second, all or almost all people are fascinated and attracted by violence despite being repelled by it. Third, and most important for our purposes, the revulsion in almost all people may be overcome or suppressed under certain circumstances determined by social cues. These limitations do not deny the internal revulsion against violence. Indeed, one may say that they are the conditions for overcoming it without which law would either be unnecessary or impossible. Were

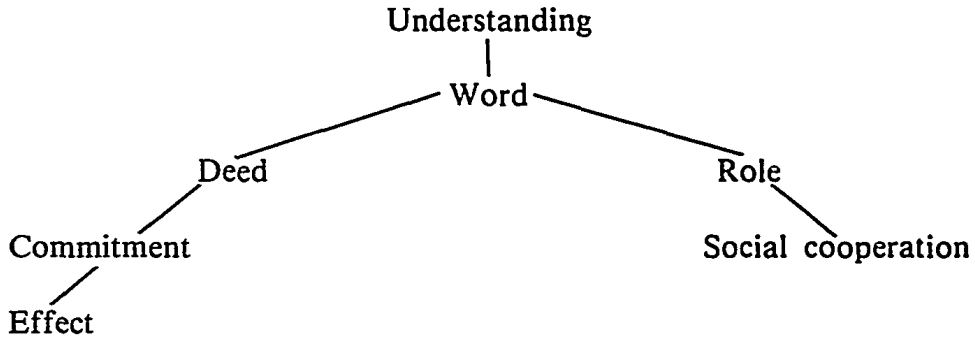
the inhibition perfect, law would be unnecessary; were it not capable of being overcome through social signals, law would not be possible.

Because constitutional interpretation entails the production of deeds of violence, it must be related in a strong way to the social codes which bypass or suppress the general inhibitory mechanisms of revulsion at the causing of pain and death. It must be part of the bridge over this gap between the thought of violence and the deed. An understanding of the texts, written and social, which authorize violence is separated from the translation of that understanding into deeds of violence. That change requires a kind of transformation in the domain of *action*. We can never understand violence apart from the deed because our resistance to violence is, in large part, a resistance to the deed—not simply the idea.

The second factor separating the thought of violence from the deed is at least as important as our uncertain inhibition against violence. It is the fact that deeds of violence are rarely simply suffered by the victims without conditions of domination, conditions that are themselves frequently, perhaps always, tied to a history of violence which conditions the expectations of the actors. The imposition of violence, then, depends upon the satisfaction of the social preconditions for its effectiveness. Few of us are courageous or foolhardy enough to *act* violently in an uncompromisingly principled fashion without attention to the likely responses from those on whom we would impose our wills. If constitutional interpretation entails action in a field of pain and death, we must expect, therefore, to find attention to the conditions of effective domination. To the extent that effective domination is not present, the word of constitutional meaning will either be adjusted to the actions that can reasonably be expected from people in conditions of reprisal, resistance, and revenge, or the constitutional word will come, over time, to bear an uncertain relation to the constitutional deed.

Constitutional interpretation, therefore, can never be "free." It can never stand as the function of an understanding of the text or word alone. Constitutional interpretation is a form of bonded interpretation, bound at once to practical application, to the deeds it implies, and to the ecology of jurisdictional roles, the conditions

of effective domination. If we designate the understanding of the Constitution as the "word," the practical application as "deed," and the jurisdictional considerations as "role," we find a bonded complex, a molecule of interpretation, that looks like this:



Constitutional interpretation may be the act of judges or citizens, legislators or presidents, draft resisters or right-to-life protesters. The forces operating between word, deed, and role change with the different actors and contexts. But all three elements will always be present in some degree. And the varying kinds of forces exerted constitute an important dimension of constitutional interpretation which is too often overlooked.

I have argued before that the identification of constitutional law with the interpretations of judges and/or state officials is a mistake. The role ecologies of these actors, however, are different from those of other makers of constitutional law. Indeed, as we shall see, of the variety of official actors within the state, each is identified with a somewhat different variant of the word/deed/role complex that we call interpretation. The differing interpretation "molecules" are designed to fit one against the other to form a crystal of interpretive acts that will present the smooth facade that can be called "constitutional law," rather than a multiplicity of laws.

I shall begin the exposition of constitutional interpretation with judicial discourse. It is the most familiar—the axis around which most debates on interpretation revolve. But it is important to understand that this is only one of the ways in which the triple-bonded character of constitutional interpretation manifests itself. I will deal later with the very different constitutional interpretations of protesters, citizens, and political officials.

II. Judicial Interpretation

The bonded character of constitutional interpretation can be seen in even relatively simple judicial acts. Consider the imposition of a sentence in a criminal case. Such an act has few of the problematic remedial and role complications that have occupied commentators for a generation with regard to affirmative relief in institutional reform litigation or complex "political question" cases. Judges imposing sentences in criminal cases are doing a familiar act, clearly within their province. There are disagreements, of course, about how the act should be carried out--whether with much or little discretion or whether attending more to objective and quantifiable criteria than to subjective and qualitative ones. But the act is and long has been a judicial one, and one which requires no strange or new modes of interaction with other officials or citizens.

Within this familiar judicial act there is a taken-for-granted structure of cooperation that ensures, we hope, the effective domination of the present and prospective victim of the state violence—the convicted defendant. The role of judge becomes dangerous, indeed, when the conditions for domination of the prisoner and his allies are not present. We see the products of ineffective domination in occasional trials in our country and in many instances throughout history in other nations: the attack on the Colombian Palace of Justice, the trial of the Argentinian generals.

The normal grammar logic of roles in the imposition of a sentence thus entails police, jailers, or other enforcers, who will restrain the prisoner (or set him free subject to effective conditions for future restraint) on the order of the judge, and guards, who will secure the prisoner from rescue and protect the judge, prosecutors, witnesses and jailers from revenge. The judge imposing a sentence normally takes for granted the role structure, which might be analogized to the "transmission" of the engine of justice. The judge's interpretive act of the "proper" sentence can be expected to become a deed because of the other actors involved. The word-deed bond obtains because a system of social cooperation obtains. That system guarantees the judge massive force—the conditions of effective domination—if necessary. It guarantees, or is supposed to guarantee, a relatively faithful adherence to the

word of the judge in the deeds carried out against the prisoner.

A. An Article II Court: The Tiede *Case*

In a nation like ours, in which the conditions of state domination are usually not seriously in doubt, it is easy to forget the role transmission system except where its character is disputed. But a significant level of insight results from keeping the structure, however silent, in mind. The significance of the structure can be appreciated in the remarkable decisions of Judge Herbert Stern in *United States v. Tiede*.[7] Those decisions are an unusually lucid elaboration of the grammar of roles in the simple case.

Judge Stern was (and is) a federal district judge in New Jersey. In 1979 he was appointed an article II judge for the United States Court for Berlin. The convening of the Court for Berlin in 1979 and Stern's appointment were a response to the reluctance of West Germany to prosecute two people who had used a toy gun to threaten the crew of a Polish airliner en route from Gdansk to East Berlin and had forced it to land in West Berlin. The formal status of Berlin as an "occupied" city enabled the Germans to place the responsibility for prosecution of the skyjacker-refugees on the Americans.[8]

Stern's moving account of the unusual trial which ensued includes his long struggle with the United States government over whether the Constitution of the United States governed the proceedings.[9] After a jury trial, which the prosecution opposed,[10] and a verdict of guilty on one of the charges, Stern was required to perform the "simple" interpretive act of determining the appropriate sentence. As a matter of interpretation of the governing materials on sentencing, it might indeed have been a "simple" act—one in which relatively unambiguous German law was relatively unambiguously to be applied by virtue of American law governing a court of occupation.

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[7] 86 F.R.D. 227 (U.S. Ct. for Berlin 1979). The reported opinion encompasses only certain procedural questions that arose in the trial, primarily the question of whether the defendants were entitled to a jury trial. A comprehensive account of the trial and the various rulings made during its course can be found in H. STERN, JUDGMENT IN BERLIN (1984).

[8] H. STERN, *supra* note 7, at 3-61.

[9] *Id.* at 62-352.

[10] *See Tiede*, 86 F.R.D. at 228.

Stern brilliantly illuminates the defects in such a chain of reasoning. The judicial interpretive act in sentencing is connected to the deed; it is the actual performance of the violence of punishment upon a defendant. But the deed is connected to the judicial word by the social cooperation of many others through their roles—as lawyers, police, jailers, wardens, magistrates. The conditions for appropriate and successful social cooperation may fail in a variety of ways.

This is Judge Stern's account of his sentencing of the Defendant Detlef Tiede:

> Gentlemen [addressing the State Department and Justice Department lawyers], I will not give you this defendant. . . . I have kept him in your custody now for nine months, nearly. . . . You have persuaded me. I believe, now, that you recognize no limitations of due process. . . .
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> I don't have to be a great prophet to understand that there is probably not a great future for the United States Court for Berlin here. [Stern had just been officially "ordered" not to proceed with a civil case brought against the United States in Stern's court. That case was a last ditch attempt in a complicated proceeding in which the West Berlin government had acquired park land—allegedly in violation of German law—for construction of a housing complex for the United States Army Command in Berlin. The American occupation officials had refused to permit the German courts to decide the case as it affected the interests of the occupation authority. American Ambassador Walter Stoessel had officially written Stern about the land dispute on the day before the sentencing: "your appointment as a Judge of the United States Court for Berlin does not extend to this matter."][11] . . .
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> . . . .
>
> Under those circumstances, who will be here to protect Tiede if I give him to you for four years? Viewing the Constitution as non-existent, considering yourselves not

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[11] H. STERN, *supra* note 7, at 353.

> restrained in any way, who will stand between you and him? What judge? What independent magistrate do you have here? What independent magistrate will you permit here?
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> When a judge sentences, he commits a defendant to the custody—in the United States he says, "I commit to the custody of the Attorney General of the United States"—et cetera. Here I suppose he says, I commit to the custody of the Commandant, or the Secretary of State, or whatever . . . . I will not do it. Not under these circumstances. . . .
>
> I sentence this defendant to time served. You . . . are a free man right now.[12]

Herbert Stern's remarkable sentence is not simply an effective and moving plea for judicial independence and against the subservience which the administration tried to impose. It is a dissection of the anatomy of criminal punishment in a constitutional system. As such, it displays the inward structure of the judicial word in sentencing, the tacit acceptance of a role structure which in this case could no longer be tacit because it was no longer there.

Because almost all judicial utterance becomes deed through the acts of others who are embedded in roles, the judge must see, as Stern did, that the meaning of his words changes with the changes in roles. The overriding assumption of constitutional violence is that it is always done within limits and subject to the role-bound action of others. Stern uncovered the falseness of that premise in the Berlin context and had to "reinterpret" his sentencing accordingly.

B. Capital Punishment

The sentence of death is the most profound act of sentencing that a judge may encounter. It is routine no longer. But the grammar of the judicial utterance is as simple as that of any other criminal sentence. The judge must achieve an understanding of the constitutional and other legal texts or materials that she believes speak to the question of the proper or permissible occasions for

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[12] *Id.* at 370.

imposing a capital sentence. She must understand the texts in the context of an application that entails the deed of killing another person. And she must act to set in motion the acts of others which will, in the normal course of events, end with someone else killing the convicted defendant. Our judges do not *ever* kill the defendants themselves. They do not witness the execution. Yet they are aware, intensely aware, of the deed.

The confused and emotional situation which now prevails with respect to capital punishment in the United States is a product in several ways of the bonded character of constitutional interpretation. First, to any person endowed with the normal inhibitions against the imposition of pain and death, the deed of capital punishment entails a measure of reluctance and abhorrence; the gulf between word and deed, interpretation and action, must be bridged. Because the *deed* in capital punishment is extreme and irrevocable, pressure is placed on the "word," on the interpretations that establish the legal justifications for the act.

Indeed, capital cases reveal the structure of judicial interpretation far more than other cases do. The reason lies in the agonistic character of law. For the defendant and his counsel search for and exploit the characteristics of the structure that may serve any advantage. And they do so to an extreme degree in a matter of life and death. The typical capital sentence in the United States reveals precisely the characteristics of a law-centered interdependence of roles that Judge Stern found to be potentially lacking in Berlin in the *Tiede* case.

Consider. Not only do jailers carry out the judicial decision, they await it! All state actors know that the judge will be called on, time and again, to consider exhaustively all interpretive avenues that might occur to defense counsel to avoid the sentence. For a time it came to be expected that no capital sentence would be carried out without several substantial delays while judges considered some defense not yet fully decided by that or other courts. The almost stylized action of the drama required that the jailers stand ready, visibly ready, to receive intelligence of the judicial act, even if it be only the action of deciding to take future action. The stay of execution—though it be nothing, literally nothing—nonetheless constituted, as an act of *textual* exegesis, an important form of constitutional interpretation. It was the visible proof of the thread

tying the violence of the warden and executioner to the deliberative act of understanding of the judge.

The stay of execution and the special open line permit, no, require that this inference be drawn from the failure of the stay of execution. That too is the visible tie between word and deed; these wardens, these guards, these "doctors," jump to the judge's tune. If the deed is done, it is the constitutional deed—one integrated into, and justifiable under, the proper understanding of the word. In short, it is the stay, the drama, even the possibility of the stay that render the execution constitutional violence, the deed an act of interpretation.

For, after all, executions can be found almost anywhere. If people disappear, if they die suddenly and informally in prison, quite apart from any articulated justification and authorization for their demise, then we do not have constitutional interpretation at the heart of the deed, nor do we have the deed, the death, at the heart of the Constitution.

Let us be explicit. It is a plain and nasty thought that death and pain are at the center of constitutional interpretation. Better it should be the community of argument, of reader and writer of texts, of interpreters. But not really. So long as death and pain are part of our political world, it is essential that they be at the center of the Constitution. The alternative—that they be there *without* constitutional interpretation—is truly unacceptable.

Our discussion thus far prepares the way for understanding the nature of the issues that have dominated the capital punishment constitutional debate over the past decades. It is by no means an atypical story with respect to the working of the interpretive process. In capital punishment, as with so many other issues, the judges did not come to the question of constitutional interpretation through a presentation of the broadest and most abstract form of the relevant questions. Capital cases arose predominantly through appeals of capital sentences. And each of those sentences was imposed pursuant to the complex interplay of text, judge, and officials that I have described above.

A long tradition dictates that the judge in such circumstances should engage the problem, not the text. When the judge comes to the text, he will have come to it because there is a person out there seeking action. The text is instrumental to the question of

decision—of action—and only instrumental. There are undoubtedly many circumstances in which such a view is naive, in which the judge seeks the occasion to pronounce upon the text, but even in such cases it is in fact some action in the world, albeit possibly the matter on the judge's agenda, that dictates the hot interest in the text. In fact, in capital cases, it is fair to say that the cases do and did produce the occasion for the text and not vice versa.

The fact that there is first the need for action shapes at least the original interpretive mode. The initial question is not, for example, whether capital punishment is cruel and unusual punishment within the meaning of the eighth amendment. Rather, the question is whether the sentence of death imposed on Furman[13] (or Gregg[14] or Woodson[15] or Barefoot[16] or . . .) can stand. In the first stage of capital litigation, the justices found many reasons that most of the death sentences coming to them could not stand quite apart from any supposed invalidity under the eighth amendment per se. Yet it is very common to find that our legal texts, like all others, present "the overdetermination of language and consequently an underdetermination of meaning."[17] Action is like language in this regard. The action may be overdetermined, but the meaning of it—the justificatory structure under which it signifies an instance of a generality—is consequently underdetermined.[18]

After *Furman v. Georgia*, intense interest arose in testing the general processes for imposing death sentences. The shift to process entails the *deed* perspective. Awesome responsibility means near-total certainty and complete fairness. We may call this post-*Furman* period the period of the due process truce. Not all the cases were being decided on due process grounds, by any means, but a variety

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[13] *See* Furman v. Georgia, 408 U.S. 238 (1972).

[14] *See* Gregg v. Georgia, 428 U.S. 153 (1976).

[15] *See* Woodson v. North Carolina, 428 U.S. 280 (1976).

[16] *See* Barefoot v. Estelle, 463 U.S. 880 (1983).

[17] Bloom, *The Breaking of Form*, in DECONSTRUCTION AND CRITICISM 1, 12 (1979).

[18] I think it may be said, incidentally, that the problem here is not one of disagreement among the justices, or at least not only that. Although by 1972 two justices had moved to an abolitionist perspective on the death penalty, I believe it fairly clear that even Brennan and Marshall moved to that position over time and through the experience of testing their actions against all plausible justificatory rules over a period of years.

of process-oriented attacks on the death penalty were working so that for a rather long time there were no executions anywhere in the United States. Gary Gilmore brought the ten-year moratorium to an end, and he did it by insisting on his personal responsibility for his own execution. Gilmore's insistence on personal action operated to tear through the fabric of role tissue connecting adjudication to action in capital punishment.

The period of the moratorium, after all, had in no way put an end to defendants' receiving death sentences. Indeed, the moratorium was characterized by the repeated upsetting of such sentences at the appellate level, often at the highest appellate level, the United States Supreme Court. The role structure of obedient officialdom, the officials without moral or constitutional voice or action in the executions they carried out, stood visibly waiting for the words of appellate courts to cut the action in mid-scene and return to the death row interlude.

Gilmore dramatically refused to avail himself of these by-then stereotypical processes. He immediately grasped the moral enormity of the moratorium: that it had evolved out of the highly stylized and self-conscious matching of words and deeds in capital cases, the words of judges and the deeds of wardens. Moreover, he saw that there was something particularly weak in the endless search for perfect process that doomed it to failure. Gilmore saw this as a failure of nerve;[19] it certainly encompassed a failure of decisive vision. In any event, Gilmore did not play. He refused to appeal and he refused to let his lawyers appeal his death sentence.[20]

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[19] *See* N. MAILER, THE EXECUTIONER'S SONG 521 (1979) (quoting Gilmore: "Don't the people of Utah have the courage of their convictions? . . . [W]hen I accept this most extreme punishment with grace and dignity, you . . . want to back down and argue."); *see also id.* at 675.

[20] *See id.* at 488-92 (recounting Gilmore's conversation with his attorneys). For those who thought the Utah statute unconstitutional, the Gilmore drama entailed the following. Gary Gilmore and the state of Utah's officials agreed that without an appellate decision on the constitutionality of the death statute, Gilmore would be killed by a firing squad. *See id.* at 676-77. Officials would in fact act. Gilmore dared them to. They would act in the very face of the United States Supreme Court without that court or any other having ruled directly on the relevant questions of constitutionality. The Supreme Court did rule that Gary Gilmore's mother did not have standing to bring a next-friend petition, and thus effectively upheld the individualistic premises of the adversarial structure and its roles. Gilmore v.

With respect to the great majority of death cases, however, Gary Gilmore did not change the uneasy terms of the due process truce. The Court continued to say that death was permissible if you get it right. And almost all the individual cases continued to confirm that the state could *not* get it right. Charles Black and many others made the point forcefully that death cases deserved super-due process.[21] And opponents countered both with arguments in certain cases that there was absolutely no doubt as to the heinous character of the defendants and their acts[22] and with occasional concessions that no human process is guaranteed error-free.[23]

Gary Gilmore's moral perception was that the law simply would not do the deed; that while the will was not present to abolish the death penalty (only Justices Brennan and Marshall continue their dissents), neither was there a body of justices prepared to do the dirty deed that was a concomitant, no, an intrinsic part of their understanding of the Constitution. Due process had let them have it both ways. Spenkelink[24] put an end to that. Once the dam was broken, once the due process truce was broken, it became a matter of serious principle that executions go forward without too unseemly a delay.

The extraordinary ruling in *Barefoot v. Estelle* permitting, nay, encouraging courts of appeals to give expedited and summary treatment to serious issues in pending death cases,[25] so as not to delay the execution, is actually quite understandable. It is simply the extension of the principle of constitutionally responsible action—

Utah, 429 U.S. 1012 (1976).

Gary Gilmore's case incidentally, is a strong reinforcement of the perspective on capital cases as the deed forcing the word. For here, where Gilmore did not force the issue, the Court did not stand before the deed.

[21] C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).

[22] *See, e.g.*, Berns, *The Morality of Anger*, in THE DEATH PENALTY IN AMERICA 333 (H. Bedau 3d ed. 1982).

[23] *See, e.g.*, van den Haag, *In Defense of the Death Penalty: A Legal-Practical-Moral Analysis*, 14 CRIM. L. BULL. 51, 56-57 (1978).

[24] The execution of John Arthur Spenkelink on May 26, 1979 was the first involuntary execution since 1967. *See* King, *Florida Executes Killer As Plea Fails*, N.Y. Times, May 26, 1979, at 1, col. 2. The Supreme Court had twice denied certiorari. Spenkelink v. Florida, 428 U.S. 911 (1976); Spenkelink v. Florida, 440 U.S. 976 (1979).

[25] 463 U.S. at 892-96.

the bond of word and deed through roles to which Judge Stern so eloquently appealed in Berlin. If the death penalty is constitutional, and it is, the majority holds, there must be deaths. Ours is not a Platonic Constitution. We do not adjudicate the nature of pure forms of the death penalty that can never be realized materially. If there is a constitutional death penalty, then there must be death. Due process is an important right, but it is also an instrumental one. Due process cannot mean subjecting the system of transmission from word to deed to strategic manipulation that makes realization impossible. The procedural structure, whatever it is, must be able to do the deed.

Now, having laid out what I take to be the premise of *Barefoot*, I hasten to add that though I am not an abolitionist, I believe *Barefoot* to be an abomination. It is an abomination because the Court has gotten so engaged in the need to do this deed that it has simply lost the perspective that a comparison to any set of large civil cases would give it. And it may well be that on a purely personal level, the most important aspect of the role structure, and the modification made in it by *Barefoot*, is that it shelters the nine justices from responsibility. If the lower courts kill the prisoners, the Supreme Court may be able to indulge the fantasy that the blood is not on their hands.

III. The Constitutional Interpretation of the Citizen

Just as the Supreme Court was making it virtually impossible to kill convicted criminals, it was enunciating the right of a woman (and her doctor) to kill a fetus within the first two trimesters of pregnancy.[26] The strange juxtaposition of these two most controversial areas of constitutional interpretation over the past decade and a half makes for particularly fascinating speculation. In capital punishment, death occurs by act of the state and requires the massive mobilization of force to effectuate it (even when, as is usually the case, the force is only in the background). In an abortion, death occurs through private acts because of the complete helplessness of the fetus and the impossibility of its organizing a defense. The Court has read the Constitution in a manner largely prohibiting the defense of the fetus through political action or

[26] *See* Roe v. Wade, 410 U.S. 113 (1983).

legislation. The right-to-life movement has thus been an exercise in what I have called elsewhere redemptive constitutionalism.[27] The movement requires not simply that it be left alone to realize its vision of the constitutional order. It requires that social life be transformed in keeping with its inclusive vision of life and of protection.

As an exercise in reading, the constitutional interpretive stance of the right-to-life movement is plausible and, for some, compelling. There is a very significant reading of *Roe v. Wade* as the *Dred Scott v. Sandford*[28] of our day. The analogy to *Dred Scott* is a reading of the movement into a tradition of opposition to the Court; problematicization of bonds of obligation; and minimalism in carrying out the roles that connect decision to action.

Perhaps the most important thing to note about the constitutional interpretation of movements and dissenters, however, is that they are required in important ways to prove that they are doing constitutional law, not just talking about it. The organized roles of society do this for the justices except when a new regime comes in and tells them they are no longer judges. But just as the ecology of roles and the social cooperation in domination that it fosters validate the interpretations of the judges by transforming them into deeds, so the romance of the deed transforms the interpretation of the dissenting community into a species of true constitutionalism.

The citizen or dissenter's constitutional interpretation cannot be *less* the deed than that of the state's officials. If the officials of the state realize their vision in blood, the dissenter must also either suffer or impose a parallel form of violence. Warren Burger and his group may or may not be ready to kill with their own hands. But they are ready to kill. *Barefoot* does this work for them, and they are insistent that death result. If a movement such as the right-to-life movement is to make law, it too must be ready, as it is, to suffer or impose violence for the constitutional vision it develops. In other words, the extension of constitutional politics from argument to action—from briefs to pickets or sit-ins or even

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[27] Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 33-35 (1983).
[28] 60 U.S. (19 How.) 393 (1857).

bombings—is in part compelled by the logic of constitutional interpretation.

In law to be an interpreter is to be a force, an actor who creates effects even through or in the face of violence. To stop short of suffering or imposing violence is to give law up to those who are willing to so act. The state is organized to overcome scruple and fear. Its officials *will* so act. All others are merely petitioners if they will not fight back.