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Review, Justice Accused: Antislavery and the Judicial Process

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BOOK REVIEW

Justice Accused: Antislavery and the Judicial Process By Robert M. Cover. New Haven: Yale University Press. 1975. Pp. xxi, 322. $15.00

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Justice Accused by Robert Cover is a richly detailed illustration of a problem central to the idea of government by law, the interaction and possible incompatibility of conscience and rule. Cover explores this theme by examining the response of American judges of the antebellum era to the statutes which protected and fostered slavery, raising more general issues of the judiciary's proper role. His particular focus is on judges who demonstrated a personal moral antipathy to slavery, to whom the question always implicit in the judicial role was posed with special acuteness: what is the moral duty of a judge called upon to administer and enforce law that his conscience tells him is unjust? The question raises many of the same concerns which have received attention under the caption "civil disobedience." But for the judge tempted to disobey, the stakes are necessarily higher. By virtue of his official role, the judge not only feels additional pressure to conform his behavior to law but must also confront the fact that, whichever course he takes, his choice will have an immediate significance for good or for ill.

Justice Accused probes this dilemma with a peculiar meld of history, psychology and jurisprudence. The early chapters portray the leeway available to antislavery judges to act on the part of freedom. According to Cover this leeway was in large measure a result of the substantial but undefined role of natural law in eighteenth and nineteenth century jurisprudence and the strikingly uniform conclusion of contemporary jurists that slavery was inconsistent with nature's law. The same jurists agreed, however, that where positive law established and protected slavery, it was controlling. Cover chronicles the opportunities for natural law to assert itself interstitially where positive law was unclear, but also demonstrates how the space within which such doctrine could operate diminished steadily throughout the period as a result of a series of Supreme Court decisions upholding the pro-slavery position on a number of unresolved issues of constitutional interpretation.[1]

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[1] Ableman v. Booth, 62 U.S. (21 How.) 506 (1858); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

It was this narrowing of the options permitted by positive law which created the jurisprudentially interesting problem which is the author's principle concern. To be sure, Cover makes clear that there continued to exist slavery cases in which judges could reach antislavery results by conventional methods of statutory and constitutional interpretation.[2] But where a judge had the power, opportunity, and the sanction of positive law to restrict slavery and failed to do so, it is not difficult to agree that this failure was a breach of moral duty. The critical dilemma arose only when such action was clearly forbidden by positive law, for it is the "easy cases" brought under unjust law which present the most perplexing moral situations.[3] *Justice Accused* concentrates on a number of such "easy cases" decided under the Fugitive Slave Laws of 1793 and 1850 after the Supreme Court had foreclosed all reasonable possibilities that those laws honestly could be found unconstitutional or be interpreted to favor the liberty of escaped slaves. And, in the cases studied, the judges almost invariably chose to apply the settled law despite their libertarian consciences.[4]

The development in our time of a clear and universally shared moral perspective on the evil of human slavery is what allows us to see these cases as poignant examples of that persistent problem of judicial choice. It is remarkable, therefore, that the commentary on *Justice Accused* has thus far largely focused on the particular historical circumstances which surrounded these decisions.[5]

Perhaps it is the ease with which we now condemn slavery that obscures the painfulness of the choices the antebellum judges had to make. The recent decisions of the Supreme Court upholding the constitutionality of certain kinds of death penalty statutes present a modern day analogy which makes the timeless nature of the problem clear. While these decisions may not present a foolproof test for distinguishing between valid and invalid schemes of capital punishment, it is relatively clear that certain legislation should, as a matter of ordinary judicial in-

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[2] *See, e.g.*, Maria v. Surbaugh, 23 Va. (2 Rand.) 228 (1824) *discussed in* R. COVER, JUSTICE ACCUSED 68-69 (1975); Sims Case, 61 Mass. (7 Cush.) 285 (1851). Of course the Supreme Court cases cited in note 1 *supra* are themselves subject to this kind of criticism.

[3] It should be noted that there is a considerable body of opinion which would deny the possibility of any "easy" cases. *See, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS, 88-103 (1975).

[4] *Compare In re* Booth, 3 Wis. 1, (1854) (declaring the Fugitive Slave Act of 1850 unconstitutional) *with* Ex Parte Bushnell, 9 Ohio St. 77 (1859) (contra).

[5] *See* Bell, Book Review, 76 COLUM. L. REV. 350 (1976); Ely, Book Review, 1975 WASH. U.L.Q. 265; Genovese, Book Review, 85 YALE L.J. 582 (1976); Smith, Book Review, 24 AM. J. COMP. L. 138 (1976).

terpretation, now be held constitutional,[6] but it is equally clear that such legislation will be challenged. What is the proper response of a state court judge who is personally opposed to capital punishment as a matter of moral principle and on whose action may depend the life or death of a defendant? It is hardly surprising that, on a similar occasion, Justice Blackmun spoke in terms strikingly close to those used by the antislavery judges in Cover's study:

> Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence for the death penalty with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. . . . We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible.[7]

For those who find the solution to this example too simple, another contemporary controversy in constitutional law may further illustrate the problem. Consider a judge who has a personal moral antipathy to abortion of human pregnancies, considering abortion equivalent to murder. The judge is asked to enjoin the operation of a statutory restriction on abortion, a ban clearly unconstitutional under the most recent Supreme Court holdings.[8] But by upholding the statute even temporarily the judge may deter a number of abortions. Does the judge have a moral duty to disregard the controlling precedent? If he does not, why is he not similarly constrained with regard to the capital punishment statute? And why then would the antislavery judges of *Justice Accused* not be equally justified in failing to strike down the fugitive slave laws? While few today would sanction the antislavery judges' collaboration with laws upholding slavery, many people would object to a judge's ignoring positive law in at least one of the modern situations noted.[9] All of us, therefore, have some

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[6] *Compare* Gregg v. Georgia, 96 S. Ct. 2909 (1976) *with* Woodson v. North Carolina, 96 S. Ct. 2978 (1976) and Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

[7] Furman v. Georgia, 408 U.S. 238, 405, 411 (1972) (Blackmun, J., dissenting).

[8] Planned Parenthood of Cent. Mo. v. Danforth, 96 S. Ct. 2831, 2844-45 (1976).

[9] There is a certain artificiality in these examples. In each case a judge might properly reason that his decisions were not all that important since they were subject to reversal on appeal. Thus a conscience-dictated result would be short-lived and a rule-bound one would

stake in the suppression of judicial conscience at least some of the time. And it will probably be in the most sensitive and controversial areas that we will find the injection of subjective convictions most offensive. Needless to say, it will also be in these cases that the pull of the judge's conscience (not to mention the urging on the part of the moral community) is likely to be strongest.[10]

Cover does not deny the legitimacy of the demand made on a judge to subordinate his moral beliefs to the clear commands of law. Indeed he makes clear at one point that what he unhappily calls a "moral-formal" dilemma is, in fact, a "moral-moral" dilemma. What is really at issue, he says, is "a decision between the substantive moral propositions relating to slavery and liberty and the moral ends served by the formal structure as a whole. . . ."[11] Despite this admission, however, Cover's usual designation of only one set of interests as moral obscures the very real costs of the alternative decisions. Furthermore, Cover does not sufficiently emphasize the most critical values implicit in judicial fidelity to a law outside the judge. Instead, he ticks off these interests as mere abstractions: "ordered federalism," "consistent limits on the judicial function," "public trust," "the public corporate undertakings of nationhood," and the tension, "as some of the judges would have it, between liberty and the viability of the social compact."[12] But behind these factors and the equally important interest in democratic decisionmaking lies a more fundamental value. This is the very notion of government limited by law. In our system, those limits are realized through judicial review. Of course, judicial review itself raises the classic moral paradox implicit in a limited government based on checks and balances, for in the process of interpreting positive constitutional law the courts must in effect assume the unlimited power to declare their own limits.[13] The greatest value of a general suppression of judicial conscience is that it respects the clear constitutional limits that predefine government and the judiciary's role within it. In the cases coming before Cover's judges no reasonable person

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cause no independent damage. This is also true, of course, of the antislavery judges. *See* Ableman v. Booth, 62 U.S. (21 How.) 506 (1858) (overruling *In re* Booth, 3 Wis. 1 (1854). But as in the abortion case mentioned at least some behavior may be deterred. There is also the chance that there will be no appeal or that the Supreme Court would decline to review the case.

[10] Cover states in the Acknowledgements that the impetus for the book was his concern with the complicity of judges in the maintenance of the war in Vietnam. R. COVER, *supra* note 2, at xi.

[11] *Id.* at 197.

[12] *Id.* at 198.

[13] *See* THE FEDERALIST No. 78 (A. Hamilton).

could argue that the Constitution did not by clear language and implication create a government powerless to eliminate slavery and the duty of returning fugitive slaves. To conclude, as one commentator has, that the Constitution, in these cases, allowed judges to administer "general principles of justice and fairness," and "a concept of individual freedom antagonistic to slavery"[14] is not only to misread blatantly the Constitution and laws of the United States as they stood at that time, but is also simply to wish away the very moral problem which makes *Justice Accused* the very valuable book which it is.

The problem was and is a problem of choice, forcing a judge in such a situation to face the costs associated with each alternative. Yet Cover demonstrates that the antislavery judges denied that they were making any choice at all when they upheld the rights of slaveowners. Their actions, they claimed, were not volitional but automatic. By virtue of the very definition of the judicial function, they said, they were unable to reach the decision in conflict with positive law, even if it presented the lesser evil. Cover takes issue with this claim, asserting that no matter what they said, the judges could as a matter of hard reality simply decide the other way. In one of the most interesting sections of the book, he investigates with particular sensitivity and subtlety the meaning of "can't" when applied to the power of the judiciary to ignore positive law. The asserted limits on judicial discretion are analogized by Cover to the rule limiting a bishop in a chess game: one might plausibly argue that a player should move his bishop straight along a row or file, but one cannot do so and still be talking about chess. So the judicial function is defined, at least in the cases he is concerned with, by the rule of positive law the judge is to apply. The moral argument with the judges is, then, not how to be a judge but whether to be a judge.[15]

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[14] Dworkin, *The Law of the Slave-Catchers*, 1975 Times Lit. Supp. 1437.

[15] R. COVER, *supra* note 2, at 119-26. Cover makes a further analogy to rules of language. One can violate these rules and still be speaking the language; indeed, continued "violation" changes the rule. *Id.* at 126-30. The comparison to rules of a game and rules of language are analogous to Rawls' two kinds of rules. Rules of language are similar to rules seen from the "summary" view. Here actions are prior to the rule, which merely summarizes what has come to be acceptable conduct. As such the rules are subject to constant revision as judgments of propriety of the individual actions change. The game rules are analogous to the "practice conception" of rules. In this view the rules precede and define the practice under them, as illustrated by Cover's case of the rules governing the bishop in a chess game. While common law decisions might comfortably be seen as being made under rules of the "summary" type, the idea of a government deriving its limited power solely from the Constitution seems to demand a "practice" conception of constitutional rules. *See* Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 18-29 (1955).

The question of the judge's moral duty then suggests a much debated issue within the utilitarian tradition: the distinction between the justifications for practices and for individual actions, or between rule-utilitarianism and act-utilitarianism. In making this distinction one asserts that the morality of general rules of conduct is to be determined by a utilitarian calculus while the morality of an individual action is determined not by an evaluation of its consequences but by its conformity with the previously established rules. Applied to our cases, judicial decisions are to be evaluated not with respect to their particular consequences but only by their conformity with positive law. One's disagreement with a decision is thus not with the individual result but rather with the rule of decision from which it derives.

Unfortunately, the problem is not so simple, for this model carries with it as a central assumption the idea that individual actors are forbidden to calculate the consequences of an action at odds with the rule. Rawls puts the point quite clearly in discussing a possible decision to break a particular promise notwithstanding a general injunction to keep promises:

> [I]f one considers what the practice of promising is one will see, I think, that it is such as not to allow this sort of general discretion to the promisor. Indeed the point of the practice is to abdicate one's title to act in accordance with utilitarian and prudential considerations in order that the future may be tied down and plans co-ordinated in advance. There are obvious utilitarian advantages in having a practice which denies to the promisor, as a defense, any general appeal to the utilitarian principle in accordance with which the practice itself may be justified. . . . The promisor is bound because he promised: weighing the case on its merits is not open to him.[16]

Despite Rawl's assertion, however, it has been argued that rule-utilitarianism and its attendant "abdication" of the title to consider utilitarian consequences cannot itself be justified on utilitarian grounds.[17] To be sure, human frailty being what it is, the better result might ordinarily follow from adherence to a well designed rule. Yet as an empirical

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[16] *Id.* at 16.

[17] *See* Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A. L. REV. 780, 793-97 (1963). A variant of this argument and a good summary of the matter on rule utilitarianism is found at R. WASSERSTROM, THE JUDICIAL DECISION, 118-37 (1969).

matter this will not always be so; even a rule which normally produces the proper result may, in an individual case, cause undesirable consequences. On balance, a judge might find it preferable to disregard the rule in some individual case even after he considers the injury caused by subverting the ordinarily salutary system of adherence to positive law. It will be much more reasonable to come to this conclusion when the judge is certain that the very rule of positive law which is applicable is likely to produce undesirable consequences in the ordinary course of events.

It should be noted that, even put this way, the decisions of Cover's judges in the slavery cases were not obviously immoral. The main objection to violation of a rule of conduct by an appeal to its particular consequences is the bad example it sets, encouraging other, presumably less careful violations. While this objection is insubstantial in many contexts,[18] it appears more plausible in the charged social atmosphere Cover vividly depicts, in which a judge might have had good reason to wonder whether his decision would trigger a general wave of antislavery results. And while this may now seem, on balance, desirable, judges in that era might well have trembled to contemplate the consequences of a generalized antislavery jurisprudence in the free states of the nation, an eventuality which could well have upset the delicate political compromises worked out to stave off civil war.[19]

Furthermore, it should not be surprising that, as men of that era, even antislavery judges saw the competing moral values less clearly than we do today.[20] While it may be true that any one decision might have created only a small risk of such a reaction, our own recognition of the Civil War's costs and imminence should make us more sympathetic to judges who sought to avoid or forestall it. Judge McLean's fear that application of natural law "would undermine and overturn the social compact" is not unreal, and his conviction that "the enforcement of the

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[18] *See* Wasserstrom, *The Obligation to Obey*, 10 U.C.L.A. L. REV. 780, 792-97 (1963). The problem of the bad example is only the most obvious form of a broader objection to deviation from rules of conduct based on a hypothetical universalization of the transgression. Simply put, the objection is "What if everyone did that?" It does not appear that, at least from a strictly utilitarian viewpoint, this objection is not met by the response, "Not everyone will do it." *See id.* This does not mean the universalization objection might not have force in some deontological sense. *See* Harrison, *Utilitarianism, Universalization and Our Duty to Be Just*, 53 ARISTOTELIAN SOCIETY 105, 127-28 (1953).

[19] *See* Dworkin, *supra* note 14; Ely, *supra* note 5, at 273; Genovese, *supra* note 5, at 589; Smith, *supra* note 5, at 142.

[20] Professor Bell has suggested that the decisions in question must, in part, be attributed to a "societally-imposed inability to see blacks as the equals of whites." Bell, *supra* note 5, at 356.

'higher law' has caused more wars and bloodshed in the world, than all other causes united" is not even bad history.[21]

Cover's description of such language as an attempt to reduce the "cognitive dissonance" created by the difficult value choice presented to the judge, and his assertion that the judge made his choice psychologically easier by "elevation of the formal stakes," while undoubtedly true, do not adequately deal with the political complexities involved in the antebellum judges' ethical quandry. While there is no denying the relevance of the judges' psychological discomfort, such a characterization unfortunately diverts attention from the real costs associated with the decision which the judges rather accurately described in terms of the precarious basis of the social compact. That a tormented antislavery judge, honestly convinced that he lacked the legal power to free a fugitive slave, should mention by way of partial self-justification that overstepping his legal bounds would invite a major social cataclysm is hardly surprising, especially when he was probably right on both points. There was no need to "elevate" the formal stakes; those stakes were plainly high enough. It does not advance our understanding of the problem of choice to suggest that somehow the difficulty was all in the judge's head.

Ironically, while the idea of an utilitarian appeal to the consequences of the particular act of decision gives some support to adherence to rules in the antislavery cases, it is considerably less persuasive in justifying rule-bound decision in the hypothetical cases of the death penalty and abortion. Here the risks of a great cataclysm following a decision by conscience are small and the life-saving benefits will certainly be deemed substantial. In such cases, therefore, the judge might well consider himself duty bound to ignore the commands of positive law. However, a license for utilitarian inquiry can justify conscience-dictated decisions in both cases. Therefore, in designing a system of government we may prefer one in which judges generally do not act by their own lights, even though we recognize that by so doing we forgo the possibility of certain desirable results. In the end the conclusion is an entirely empirical one. Because of our mistrust of the capacities and predilections of judges we prefer to strip them in a sense of their critical capacity for moral evaluation by substituting the prescribed rules of positive law.

This model of the judicial role is, of course, a critical component of our notion of government limited by law, for that larger notion is premised on a directly analogous assumption. By limiting our government generally we give up the idea of establishing any particular vision of the

[21] R. COVER, *supra* note 2, at 261-62.

good society. We justify this sacrifice by our profound skepticism about the ability of our governors to identify the good society or to take measures to implement it. History has given us good reason to fear unlimited state power more than the consequences of hobbling the power of the state to do good.[22] We thus limit the area in which the government is to be permitted to make certain moral judgments, making those judgments instead through a political process of constitution making and amending. It is relevant for the advocates of conscience-bound decisions to recall, as Justice Holmes did in another context, that "time has upset many fighting faiths" and that we may believe in a system of positive legal limits on government "even more than [we] believe the very foundation of [our] own conduct."[23]

The effectiveness of such legal limits depends on the institution of judicial review. To have a truly limited government, the judiciary itself must be limited. Thus we come back to the need for judges who, in Rawls' phrase, "abdicate" conscientious decision and submit to positive law. It is true that, as a consequence, we may have developed a judicial "personality committed to fearful symmetries."[24] To such judges the idea that the judiciary "can't" reach a result clearly contrary to positive law may indeed represent a psychological reality and not a rhetorical explanation of an actual choice. But for us to conceive of judges as active moral agents would be to cede the right to alter and enforce our society's moral code without knowing how or when such power will be used.

Of course, a system with the kind of judge who defers moral judgment to positive law is only as justifiable as the rules of positive law which govern it. The antebellum constitutionalization of slavery and the memory of the Nuremburg trials provide all the reminders we need on this point.[25] But the mere fact that certain rule-bound judicial decisions

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[22] The idea is older than the idea of government by written constitution. This is evident in Plato's STATESMAN 292-301. For an interesting discussion of this contention and its inconsistency with any claim of knowledge of "[S]ome ultimate, logical, exclusively valid social order" see the introduction to J. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY, 1-13 (1960).

[23] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[24] R. COVER, *supra* note 2, at 3.

[25] Thus it would be entirely consistent for a judge called on to apply positive law which is morally offensive to decide that the entire system is not worth the candle. Consider those abolitionists associated with William Lloyd Garrison and Wendell Phillips, who recognized, according to Cover's account, a general obligation of the judge to respect the limits imposed by positive law. That in that time and place the positive law was immoral is indicated by the title of Phillips' tract, THE CONSTITUTION: A PRO-SLAVERY COMPACT. The correct course on that view was to avoid the moral dilemma by refusing to participate in

appear morally unjustified to the individual judge or to some other observer is not sufficient reason to condemn either the entire system of law or the action of the judge in a particular case. Indeed, it is the fidelity to law in such difficult cases as abortion and capital punishment which justifies rule-bound decision and is the best proof that the rule of law is more than a phrase.

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the legal system at all; Phillips' model of judicial conduct was Francis Jackson, "an obscure Massachusetts Justice of the Peace" who resigned his position, announcing, "I withdraw all profession of allegiance to it [the constitution] and all my voluntary efforts to sustain it." R. COVER, *supra* note 2, at 153-54.