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Law, Morality And The Judge: Robert M. Cover's *Justice Accused*

RAYMOND L. FAUST

When Billy struck and killed the master-at-arms, Claggart, in Herman Melville's classic *Billy Budd*, he became liable, under the terms of the English Mutiny Act, to a sentence of death which was to be summarily executed by the captain of the vessel on which the killing occurred. Captain Vere, on whose shoulders this responsibility rested, perceived the injustice of the act's command, and in the following soliloquy, delivered to the other members of the drumhead court convened to hear Billy Budd's case, he wrestles with the problem of what he should do:

> But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—Does that state it aright? You sign sad assent. Well I too feel that, the full force of that. It is Nature. (p. 110, Hayford & Sealts, ed.)

Captain Vere is here confronted with one of the judge's perennial ethical problems: what does one do when the demands of his conscience or sense of justice come into conflict with the commands of positive law? On the one hand, a conscientious judge is likely to feel the need to conduct himself in a way he considers to be 'right,' just and honorable. On the other, he is also likely to feel the demands of his office and the public trust reposed in him. He will thus find himself in a position wherein he is forced either to choose between two important and conflicting ethical values or abdicate his bench and leave the decision-making to someone else.

In his book, *Justice Accused: Antislavery and the Judicial Process*, Robert M. Cover does not seek to answer the ethical question which Captain Vere had to resolve. Perhaps no definitive answer is possible. What he does seek to do is to give us a case study of how a group of antislavery American judges reacted when confronted with the same problem in the context of slavery cases, and to suggest some reasons for these reactions.

Given the emotional nature of the issue involved, and the difficulty of the moral question, perhaps the most remarkable fact to emerge from Professor Cover's study is that all the judges surveyed acted in the same way. To a man they
followed Captain Vere (whom Cover suggests may have been patterned after Chief Justice Shaw, Melville's father-in-law):

But do these buttons we wear attest that our allegiance is to Nature? No, to the King.... Our vowed responsibility is in this: That however pitilessly [the] law may operate in any instances, we nevertheless adhere to it and administer it. (Ibid.)

Vere hanged Billy Budd; and all the judges included in Professor Cover's study duly entered pro-slavery rulings where the law demanded, refusing to permit conscience to interfere with 'duty'.

This result cannot be easily dismissed as the result of moral cowardice on the part of the judges involved, nor as proof that their antislavery opinions were mere posturings rather than deeply held convictions. This is so for at least three reasons: 1) the judges who made the rulings often suffered more for their adherence to the law than they would have for departing from it, 2) what we know about the men involved indicates that they were not unwilling to commit themselves to a strong antislavery position outside the courtroom, and 3) the very eminence of the judges studied—Justices Story and McLean of the U.S. Supreme Court and Chief Justice Shaw of the Massachusetts Supreme Judicial Court, to mention only the most famous—raises at least some inference that they were principled men acting in good faith.

What, then, explains Professor Cover's findings? His thesis is that the result obtained flowed from the impact of three forces upon a judge: 1) the intellectual framework within which he functioned, 2) what Cover calls the 'dialectical environment,' and 3) his own temperament and self-image. And all of these factors tended to point the judge in the direction of obedience to the dictates of positive law at the expense of conscience.

The intellectual world of the nineteenth century judge was one in which the two main concerns relevant to our topic here were what the judge's role ought to be in the evolution of law in a democratic society, and whether a recognition and application of 'natural law' was ever appropriate to a legal system. Professor Cover reviews exhaustively the eighteenth and nineteenth century sources from which American judges drew their ideas on these subjects, and studies practically all of the antebellum slavery litigation to discover how judges actually applied these doctrines in the context of slavery cases. What he comes up with is a sort of intellectual profile of the antislavery judge, and how he thought.

The archetypal judge which emerges is a man who believed in an ideal natural law which condemned slavery but acknowledged that the natural law did not apply in any given jurisdiction except to the extent that it had been incorporated into the positive law thereof, and one who believed that the national and state constitutions were in the nature of social compacts, giving legitimacy to the state and obligating its citizens, including judges, to obey its dictates. He was thus a legal positivist. He was also a man concerned with the limitations of his legitimate power, and much concerned to find rules of decision which would enable him to keep his personal inclinations and prejudices out of the decisional process.

A man like this, who is both convinced of the legitimacy of the sovereign he serves and of the desirability of finding and applying 'neutral' decisional rules,
is quite likely to respect the limitations of his role and refuse to go beyond these, on doctrinal grounds alone. But a judge never decides a case in a vacuum, without some reference to its practical impact. And the personality of the judge can never be entirely banished from adjudication. Non-rational and extralegal factors will enter the equation. Professor Cover discusses some of these under the rubric of the 'dialectical environment.'

Basically, what is subsumed under this heading are those factors which tend to challenge the demands of legal doctrine which we have been discussing. They are a mixed bag of intellectual and emotional appeals. Cover identifies three as most important in their impact on the judges studied: the ideological basis of advocacy, the presence of—or potential for—extralegal action (i.e., resistance), and the sympathetic qualities of the potential victims of injustice (i.e., the slaves themselves).

The first of these factors is a catchall meant to describe those non-legal arguments which antislavery advocates aimed at judges both in and out of the courtroom: impugning the morality of a legal system which could sanction slavery and the men who can serve such a system, and appeals to a morality higher than law which justifies disobedience to law.

By recognition of the second factor, Cover believes, judges became aware that the formal resolution of a given case was less ultimately outcome-determinative than it might otherwise have been (thus changing the stakes for disobedience to the law's commands) and were reminded once again that many did not regard obedience to the law as the transcendent moral value.

The impact of the third factor is obvious: the plight of the fugitive aroused the judge's humane impulses and made him desire to give his aid.

Collectively, these inputs provided a heavy counterweight to the demands of legal doctrine. And the scales became more finely balanced as it became yearly more apparent that there was to be no institutionally permissible way to reform the legal system to do away with slavery, barring a major political upheaval.

Professor Cover thus posits that the judges who were subject to these conflicting inputs experienced what he calls 'cognitive dissonance,' which they sought to reduce. He explains his theory thus:

The relevant elements of dissonance theory for this work may be briefly stated: First, "dissonance" (a term for a sort of loose inconsistency) among cognitions "gives rise to pressures to reduce or eliminate the dissonance"; second, the presence to reduce dissonance will be greater, the greater the personal involvement in the inconsistent "cognitions"; third, the greater the commitment to one "cognition," the less likely that the avenue of dissonance reduction will involve change in that cognitive framework; fourth, in choice situations, dissonance is always present because of knowledge that any choice made is dissonant with the positive attributes of the choice foregone; and, therefore, fifth, dissonance is "highest" in situations where one must choose among closely balanced, inconsistent alternatives. In such situations, according to the first premise, the tendency to pursue dissonance reducing behavior will be maximized. (p. 227, footnotes omitted)
Cover's reason for introducing this theory into his analysis is because he thinks that it will give him "a prism through which the judicial work of conflicted men may be refracted with suggestive, though not conclusive, results." (p. 227) Unfortunately, his prism refracts only white light. It generates a pretty pattern, but is not very useful analytically. The problem lies with the test itself. According to the formulation set out above, all the dissonance hypothesis can hope to predict is that given a highly conflicted situation, and given that a certain course of action has been chosen, certain behavior patterns will result which we can denominate 'dissonance reduction,' since they seek to rationalize and support the course chosen. It thus requires as givens the two important characteristics which any useful behavioral test would seek to be able to predict. All the dissonance hypothesis can do is predict that attempts at rationalization will occur. And this is a truism. The same thing is done every time any judge writes an opinion.

Up to this point, Cover's analysis is apparently correct, even though probative of very little. Where he goes wrong is when he begins an effort to use his dissonance hypothesis to do more than it can legitimately be asked to do. He seeks, by the discovery of methods of dissonance reduction used in common by all the judges surveyed, to make statements about the probable substantive future conduct, not only of the judges surveyed, but of judges of a certain 'jurist competence'. He suggests that all of the judges he surveyed in depth—Justices Story and McLean, Chief Justice Shaw, and Judge Charles R. Swan of Ohio—used the following three dissonance reduction devices: elevation of the formal stakes of decision-making, retreat to a mechanical formalism, and ascription of responsibility for the result elsewhere. From this he concludes

that from the many formulations that were within the juristic competence of the age, the antislavery judges consistently gravitated to the formulations most conducive to a denial of personal responsibility and most persuasive as to the importance of the formalism of the institutional structure for which they had opted. (p. 229)

This, in turn, leads to another conclusion:

The consistent recourse to the highest justifications for formalism, the most mechanical understanding of precedent, and the steadfast excision of self and appeal to separation of powers suggests that it was the performance of troubled men in troubled times as well as the juristic competence of their age that determined the almost uniform response of the anti-slavery bench to the call for liberty. Some performance characteristics are idiosyncratic or random. But the predictability of the performance characteristics outlined above suggests that given a particular juristic competence, there will be very specific consequences to and limits on the performance of judges caught in the moral-formal dilemma. If a man makes a good priest, we may be quite sure he will not be a great prophet. (pp. 258-9)

I take this statement to mean that it was partly the legal-intellectual milieu of the times and partly the personality of the judge which determined the choices he made. I would not doubt the truth of that statement. Indeed, it seems to me wholly plausible, and very likely true. The only problem is that it cannot even be suggested by the application of the cognitive dissonance theory. It is merely
the author's untested inference from his evidence. As such it has no predictive weight whatsoever. Indeed, if one takes the personality half of the formulation seriously, it may be positively misleading. I have been able to find nothing which might be called evidence that the judges studied shared a 'judicial temperament' which fitted them to be priests but not prophets. And I can find no justification for an inference that respected, experienced judges will on the basis of personality characteristics usually present in such persons opt for the demands of law over those of morality, more or less regardless of the 'juristic competence of the age.'

While Professor Cover's book thus fails as a case study exposing behavioral processes valid beyond the facts immediately involved, it is nonetheless a fascinating narrative. Cover is a lucid writer, and his handling of the legal doctrines and case law with which the judges he studied worked is expert. Aside from the conclusions of the author, this is a book from which one can learn a lot. And the ethical problem which was the substance of the ethical dilemma in which these judges found themselves remains an important one, and still is unresolved. Despite the criticisms, it is still a book worth reading.