

Reviews

Accomplices to Failure

William S. McFeely†

Judicial Power and Reconstruction Politics. By Stanley I. Kutler. Chicago: University of Chicago Press, 1968. Pp. ix, 178. \$5.95.

The men on the Supreme Court during the Civil War and Reconstruction have been strangely neglected. Some who are almost forgotten do not deserve their obscurity. Noah Swayne, for example, born in Virginia in 1804, returned to claim his Quaker wife, free her slaves, and take her back with him to Ohio. Their son lost a leg fighting with Sherman in Georgia and, as Assistant Commissioner of the Freedmen's Bureau in Alabama after the war, was in the center of Reconstruction racial controversies. It is hard to believe that these bits of family history were absent from Justice Swayne's mind as he confronted the Court's business. His less obscure fellow Justice, Salmon P. Chase, is seldom remembered for his judicial career despite the fact that he was Chief Justice. This was partly Chase's fault; his vision of himself was in another role, President of the United States. He was the Radical Republican choice for President in 1864 but was bested by a shrewder politician when Lincoln "kicked Chase upstairs" into the Chief Justiceship.¹

These are only two of the colorful men who sat on the bench at a critical point in our nation's history. Their responsibility as members of the Supreme Court was second only to that which John Marshall had assumed. In the aftermath of the Civil War, the Constitution was significantly amended; it was the obligation of the Chase Court to interpret the changed document and to define the legal status of the new man in Reconstruction America, the black American who had been a slave but now was free.

A glance at any newspaper today suggests that the Chase Court failed to meet its obligation, but surely the effort deserves close and thorough

† Assistant Professor of History and American Studies, Yale University; B.A. 1952, Amherst College; M.A. 1962, Ph.D. 1966, Yale University.

1. S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 23 (1968) [hereinafter cited as KUTLER].

analysis. Therefore, most welcome is a work which begins, as does Stanley I. Kutler's, with a promise to overthrow the old view that the Supreme Court timidly avoided the controversies of the Civil War and Reconstruction. The traditional view is not flattering: Marshall forgotten and Taney disgraced, the Justices, remembered only for their obsolete *Dred Scott* decision,² hid behind the bench while wilder types in Congress and in carpetbagger legislatures of the South had their day. The Justices are considered to have regained their vigorous voice only later in the century when the nation got over the aberration of Reconstruction and began to learn that the business of America is business.

Kutler would overturn all of this; he endorses the judgment of an unnamed contemporary admirer of the Chase Court that it "was of only 'little less importance' than the Marshall Court."³ To persuade us of this appraisal, Kutler has three tasks. He must demonstrate that it was not crippled by the legacy of *Dred Scott*, that it was peopled by able men, and that it did important work and did it well, without avoiding the critical issues brought before it. In his assertion that the Court remained respected and could command attention to its decisions despite the "self inflicted wound" of *Dred Scott*, Kutler is persuasive.⁴ Abolitionists hated the decision for blocking the last door through which a satisfactory non-violent resolution of the slavery question might have moved, but, for the most part, they did not propose to remove the obstacle by removing the institution. Charles Sumner, while strongly attacking Roger Taney, was "at no time . . . critical of the Supreme Court" itself.⁵

Kutler could have been more convincing in explaining that a decision as discredited in hindsight as *Dred Scott* did not necessarily cripple the institution that made it by noting that a good many Americans at the time probably found it quite credible. After all, Chief Justice Taney thought that he was affirming what the electorate, in majority voice, had asked for when it chose James Buchanan to be its President. Taney was not the only white American who wanted to be done with the Negro question. For others who were outraged by *Dred Scott*, a corrective was soon underway. Although it was an odd and bloody device for overturning a poor judicial decision, the Civil War helped dispose of the ideological stigma of that decision.

Kutler's reminder that even during a war politicians had issues on

2. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

3. KUTLER 6.

4. Quoted in *id.* at 3.

5. *Id.* 25.

their minds other than military and racial ones is entirely in order. Remembering his own days riding circuit, Lincoln turned to the nation's federal court system and strove for efficiency. With Senator Lyman Trumbull he worked out a system which roughly equalized the number of people in each circuit and, in the process, restructured the circuits so that only three, rather than five, of the nine circuits were composed entirely of slave states. The opportunity for a truly national judicial system was enhanced. Rather than weakening the Court because its Chief Justice was the spokesman of an opposition political viewpoint and of a constitutional doctrine which was being abandoned, Lincoln strengthened its structure. Clearly he thought the Court worth saving.

In discussing the abilities and performances of the Justices, however, the slimness of Kutler's book tells. It is a collection of essays which somewhat overlap—"Yerger had been held for trial by a military commission in Mississippi for killing an army officer" (p. 85), "Yerger had been arrested and detained for trial by a military commission in Mississippi for killing an army officer" (p. 105)—, and adequate coverage is not given the men on the bench and those who argued before them. The rich irony of the *Slaughter-House Cases*⁶ is hardly invoked by merely describing plaintiff's counsel John A. Campbell as an "ex-Justice."⁷ Opposing counsel Thomas Jefferson Durant is not mentioned at all even though he argued more Reconstruction cases before the Supreme Court than perhaps any other lawyer, was widely supported for an appointment to that bench, and, what is more, was an ex-slaveholder turned radical whose close political association with Negro Republicans in New Orleans forced him to sneak out of that city in the dark of night on July 30, 1866 to keep from being killed in an anti-Negro riot. He was certainly immersed in Reconstruction politics in a way not irrelevant to an appraisal of the *Slaughter-House* doctrine. There were, in short, many politicians and a great mass of critical politics beneath the judicial iceberg that interests Professor Kutler. Much in the manner of the New Criticism that once flourished in English departments, Kutler belongs to the school of constitutional historians who would judge the Justices by their words, alone, without concern for their other acts, which gave them shape as men and which may have contributed to the substance of their judicial decisions. The

6. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

7. KUTLER 138.

neglect is not fatal, for the second essential for reappraisal is present. There were able and interesting men on the Court.

Having established that it was not hobbled by the irons of *Dred Scott* and assuming that the men on the bench were able, Kutler proceeds to document the strength of the Chase Court by considering the work it did. It is here that Mr. Kutler breaks new ground by drastically, if conservatively, revising the historical meaning of the Civil War and Reconstruction. He does *not* think that restating of the law of the land so that it satisfactorily encompassed black Americans as free men was the critical business before the Reconstruction Court. Like Justice Samuel Miller of the Chase Court, Professor Kutler is aware of "that race and that emergency,"⁸ but does not give the issue priority; there were, it seems, no special disruptive conflicts during the Civil War and Reconstruction which obliged this Court to disturb itself, or, at least, none which could not wait. Kutler is content that the Supreme Court did not spend itself, as his fellow historians sometimes do, with "an excessive concentration on the Negro problem,"⁹ but, instead, by "judicious and self-imposed restraint,"¹⁰ preserved its vital institutional juices so that "in our own day [it could] . . . express and redeem most faithfully the Republican Reconstruction program—in all its aspects."¹¹

It appears from Kutler's study that the Civil War did not make much difference and, when it was over, that little basic reconstructing of the society was needed. Gone are the days of W. E. B. DuBois and *Black Reconstruction*; continuity, not conflict, is the theme. Chase and his colleagues simply moved into John Marshall's sturdy house and found it a congenial setting in which the Court could continue a "steady upward pattern of institutional and power development."¹² For Kutler, as for James Ford Rhodes, this era represents the working out of a Marshallian nationalism. Reconstruction is not a comfortable word for the author who defines it only in connection with the ending of the overrepresentation of the South in the circuit courts. He hails this change as "one of the first substantive achievements of Republican Reconstruction—reconstruction, that is, to make national institutions more responsive to the needs of the dominant section."¹³

It is the institution which matters and it is critical to Kutler's thesis

8. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

9. KUTLER 167.

10. *Id.* 6.

11. *Id.* 168.

12. *Id.*

13. *Id.* 16.

that the Court be seen as independent and strong. It must not be guilty of beating a "timely retreat," as William R. Brock has suggested it did in the face of the threat of extinction by a powerful Congress attempting to build legislative dominance in the English manner at the expense of the executive and legislative branches.¹⁴ Kutler convincingly contends that the Court was not afraid of Congress and asserted its independence by invalidating as unconstitutional ten legislative acts; previous Courts had done so only twice.¹⁵

Having established that the Court could, without surrendering power, coexist with the other two branches of government, Kutler still has to demonstrate that the judicial branch could develop its institutional power without being affected, as the White House was, by Negro leaders who came to demand the vote or, as the Congress was, by black people who sat in the gallery day after day to see how things were going. Although he does not speak of them, Kutler must suspect that they were also watching the Court, for he acknowledges that the "*Milligan* decision is central to *contemporary* and historical interpretations of how the Supreme Court really felt about the Republican [reconstruction] program."¹⁶ It is critical to Kutler's thesis that he show that these interpretations were unfounded: he must demonstrate that *Milligan* did not draw the Court into the thicket of Reconstruction racial issues, that the Court allowed Congress to handle such matters, and that the Court went about its nonracial business without having defaulted on any obligation to interpret Congressional acts regarding the freedmen.

To exonerate Justice David Davis of any such default in his decision on *Milligan*, Kutler states that the Republicans in Congress "as yet had no clearly defined, cohesive southern policy. Therefore how could the decision inhibit a nonexistent program?"¹⁷ The reader is left with the impression that Justice Davis, with the war over and subversion no longer a danger, could inquire into English and American theories of liberty without any political distractions and declare that a man, seized as a traitor during the war in Indiana where civil courts were open, must be released for civilian trial. The great libertarian decision had a timeless quality; no burning issue of the postwar year of 1866 was present to defile it.

Or was there? Perhaps what Americans were looking for in the

14. *Id.* 64.

15. *Id.* 114.

16. *Id.* 67 (emphasis added).

17. *Id.*

Milligan decision was not the erasing of a past error as much as words of direction for a present problem. Their eyes went straight to a "totally unnecessary bit of dicta" which Davis added, stating that Congress had no power to create the kind of military tribunal which had tried Lambdin Milligan.¹⁸ While concurring in the belief that Milligan deserved a civil trial, Chief Justice Chase, speaking for himself and three other dissenters, claimed for Congress the power to create such military courts "within districts or localities where ordinary law no longer adequately secures public safety and private rights."¹⁹ Such was the case in 1866 with the failure of the Johnsonian governments in the Southern states to protect even the lives of black citizens, let alone their right to obtain justice in a civil court. Chase continued: "We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war . . ." ²⁰ Civil rights workers, if not those they sought to aid, should be protected under the Congressional war power.

Why did the Justices bother to argue the question of obtaining justice via the war power if, as Kutler states, there was in 1866, the year before the Reconstruction Acts of 1867, "certainly no general intention to institute military commissions and control in the South"?²¹ Kutler claims that Justice Davis could have had no idea that such was coming and was not engaged in a confrontation with Congressional Radicals, because Congress did not act on such matters until a year later. In fact, Congress already had acted and an application of the test of chronology (that Kutler allows to be crucial) suggests that David Davis had small claim to such innocence.

On March 3, 1865, Congress, drawing on its war power, created the Freedmen's Bureau, assigned it to the War Department, and "committed [to it] . . . the control of all subjects relating to . . . [the] freedmen" in the South.²² The head of the agency was composed of army officers. Although often with too little zeal for their clients' welfare, the Bureau agents continued the work of the wartime provost marshal courts which had been opened to freedmen with complaints wherever Union armies had penetrated the South. The Bureau's

18. *Id.* 93.

19. *Ex parte Milligan*, 71 U.S. (41 Wall.) 2, 142 (1866).

20. *Id.*

21. KUTLER 94.

22. Act of Mar. 3, 1865, ch. 90, § 1, 13 Stat. 507.

military tribunals were quickly involved in jurisdictional disputes with local civilian courts. For example, in the case of John Martin, General Thomas Conway of the Bureau went to the mayor of New Orleans in July 1865 and demanded the release of a self-employed Negro who had been sentenced on a charge of vagrancy by the city court to six months in the work house, commutable if Martin would agree to contract to work in the sugar cane fields where there was a labor shortage. As Conway put it, "the trouble was not that John was poorly dressed or that he carried chickens that he raised from the hour that they came from the shell, but that he was black."²³

As civilian courts resumed, President Johnson insisted that many Bureau courts close and Bureau officers such as Conway be replaced. But so well documented were the numerous reports of murderers unpunished and of non-federal court sentences like the one John Martin received that there was strong sentiment for reinvolving the federal government in judicial matters by employing the only agents thought to be available, army officers. In December 1865, Lyman Trumbull, probably the most powerful senator of the day, sponsored twin pieces of legislation, the Civil Rights Bill and the Freedmen's Bureau Bill. The excellently drawn (and still useful) Civil Rights Bill of 1866 sought to insure common law liberties for the freedmen.²⁴ The Freedmen's Bureau was specifically charged with the duty of enforcing the Civil Rights Bill. The Bureau officers were to go with their clients to the local civilian courts to see that justice was rendered. If it were not, the freedmen were to take their cases to the federal district courts via hearings before United States Commissioners. In April 1866, the month *Milligan* was announced, Trumbull became (somewhat to his embarrassment) the lion of the black community for his vigorous and successful efforts to override the President's veto of the Civil Rights Bill. The Freedmen's Bureau Bill was successfully vetoed by the President, but the Bureau remained in operation since the Act creating it provided an indefinite terminal date.

In this period of a "nonexistent program" prior to the Reconstruction Act of 1867 the Congress drafted the fourteenth amendment and sent it to the states for ratification. Also, on July 16, 1866, Congress passed, over the President's veto, an act to continue the Freedmen's Bureau.²⁵ Section 14 of that Act stated that where "judicial proceedings

23. Letter from T.W. Conway to Hugh Kennedy, July 13, 1865, on file in the Andrew Johnson Papers, Library of Congress.

24. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

25. Act of July 16, 1866, ch. 200, 14 Stat. 173.

[had] been interrupted by the rebellion . . . the President shall, through the commissioner and the officers of the bureau . . . extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of . . . rights" enumerated in the Civil Rights Bill.²⁶ The section provided that "no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than [that] . . . to which white persons may be liable . . . for the like offense."²⁷ To be sure, Congress made the Bureau's jurisdiction unclear by adding a clause which stated that military courts could not be conducted "where the ordinary course of judicial proceedings [had] not been interrupted by the rebellion . . ."²⁸ Bureau officers, as they listened (those few who did) to the freedmen tell of unpunished acts of great cruelty, were not persuaded that the existence of procedure meant that the rendering of justice had not been interrupted. Thus in Virginia in the fall of 1866, in defiance of state courts, a military court heard the case of a white doctor accused of murdering a white woman. The same December that Davis read his *Milligan* opinion, General Howard reported to Secretary of War Stanton that the actions of "District Judges in the State of Mississippi, that the Civil Rights Bill was unconstitutional has no doubt robbed the colored people of privileges intended to be secured to them by that law" and that the alternative set of rules for the freedmen, the strict vagrancy laws, "will occasion practical slavery."²⁹ Civil courts—even federal civil courts—were obviously sitting but just as obviously this did not mean that justice was available to the freedmen.³⁰

In January 1867, two months before enactment of the first of the Reconstruction Acts of 1867, which Professor Kutler considers as establishing the first military commissions, General Howard wrote to his Assistant Commissioners in charge of the freedmen in the southern states:

I understand the judges, or some of them [Justice Davis was hopefully looked on as a waverer who might be brought to join

26. *Id.* § 14, at 176-77.

27. *Id.* at 177.

28. *Id.*

29. Letter from O.O. Howard to E.M. Stanton, Dec. 21, 1866, on file in the records of the Bureau of Refugees, Freedmen and Abandoned Lands (BRFAL), National Archives.

30. Justices Swayne and Chase, on circuit, upheld the Civil Rights Bill's constitutionality, but, due largely to *Milligan*, the Bill's status was in doubt until the fourteenth amendment was ratified. The Bill, never held unconstitutional by the Court, was rediscovered in *Jones v. Mayer*, 392 U.S. 409 (1968).

the Chase minority in supporting the Bureau courts], who made the decision in the "Milligan Case," had no idea that it would apply to the States not yet represented in Congress. I should like to test Section 14 of the Bureau Law passed July 16, 1866.

Can you not get a judge of U.S. Court to take from a Military Commission appointed by you, a case, by "Habeas Corpus" and carry it up to the Supreme Court. . . . I wish a decision by that Body . . . if possible, this term.³¹

That no military commissions were even intended for the South when Davis wrote *Milligan* and that *Milligan* affected a "nonexistent program" would certainly have been a surprise to the recipients of this letter, who included General Wager Swayne, the Justice's son.

With *Milligan*, the Court was in the middle of the racial politics of Reconstruction. This was its important work and it did not do it well. Justice Davis's mistrust of the military as a judicial institution is understandable, but opposing an unsatisfactory means of achieving justice for the freedmen did not remove the need to achieve it. Why were the thirteenth amendment, the Civil Rights Bill of 1866, and the fourteenth amendment not expounded in such a way that national citizenship had a chance of becoming a reality? It was not enough for the Court in *Georgia v. Stanton*³² to fail to interfere with the Congress's reconstruction plans. The Court had the obligation (and it had the opportunity) to make clear what the law of the land was and how black Americans stood in relation to it. Where was this exercise of judicial power?

Davis's dicta in *Milligan* were understood at the time as raising the central issue of Reconstruction. The question was what the federal government, having sustained the Union in a fearful war, would do to protect its new black citizens and thus preserve order and the restored nation. There were two alternatives. First, the federal government could use federal institutions—the Freedmen's Bureau and the federal courts, to name two—to afford protection, out of either a sense of justice or fear of black insurrection. (A black uprising was feared should repression by Southern whites prove too great to bear.) This was the radical position and it was the position taken by Chase, Wayne (of Georgia, the only Southerner on the court), Swayne, and Miller in *Milligan*.

Second, the federal government could yield authority over black people to white Southerners, who had held it under slavery. This was

31. Letter from O.O. Howard to Generals Swayne, Brown, Moyer, Ord, Scott, and Sibley, Jan. 30, 1867, on file in the records of the BRFAL, National Archives.

32. 73 U.S. (6 Wall.) 50 (1868).

the position of the Democratic Party, of President Johnson, and of Justices Davis, Grier, Nelson, Clifford, and Field in *Milligan*. It was also, of course, what happened. Congress, rather than strengthening the coherent national policy which the President and the Supreme Court had undercut, passed the Reconstruction Acts of 1867 and turned a national responsibility over to state governments. True, these governments were for a short time and to a limited degree integrated, but soon the recapture of these governments by white supremacists was accomplished by killings and intimidations of exactly the sort which had made the friends of the freedmen so sure that Davis's opinion in *Milligan* was a mistake. With the political accommodation known as the Compromise of 1877, the "dominant region" handed to the rebels the job of maintaining the law and order thought necessary to preserve the Union.

The Supreme Court ratified the compromise; in 1883 in *United States v. Harris*³³ the Court declared that the federal government was unable to protect its citizens from even a lynching. This was not an abrupt about face by the Court; it was the sorry end of the long and complex Reconstruction chapter of Supreme Court history. The story has many facets: the abandonment of the freedmen by Salmon Chase as he defected to try to win the Democratic Presidential nomination in 1872 is one; the failure of Ulysses S. Grant to use his power of appointment to carry to the Court what some Americans had thought was a mandate given him to truly unite the nation is another.

The gloomy road from *Milligan* through *Slaughter-House* to *Harris* is fascinating. But it is not the route which Professor Kutler chose to follow. Instead he uncritically demonstrates that the Court went about more conventional business. Ample evidence is presented documenting the importance of the Chase Court in continuing the tradition, begun by Marshall, of the Supreme Court having a key voice in articulating the government's policy on economic growth. Kutler makes it clear that the Chase Court contributed to and continued this tradition.

Kutler is not entirely blind to the other demand on the attention of the Chase Court—the question the black people posed. He concedes that the *Slaughter-House* doctrine—leaving to the states the determination of the rights of American citizens—"had devastating effects for the freedmen [and] . . . became the Court's most potent weapon in its later support of racialism."³⁴ In this 1873 decision, Kutler sees the Court as simply voicing the end-of-Reconstruction sentiments of a

33. 106 U.S. 629 (1882).

34. KUTLER 166.

nation which had not so much abandoned its idealistic zeal as it had embraced a return to "normalcy." Kutler is perceptive in locating this change of attitude long before the formal end of Reconstruction in 1877, but he errs in seeing the disappointment of the freedmen by the Justices as something which came only in the twilight of the era.

"Racialism" was not something which the Court put off until later; its spirit infected the Court throughout Reconstruction. Insensitivity to black Americans was a Court tradition running back to Marshall in *Scott v. The Negro London*³⁵ in 1806. *Dred Scott* was only its most virulent expression; it was present in *Milligan* as well. Justice Davis knew what his dicta meant to the freedmen; if he was not reading the newspapers he had his brothers Wayne and Swayne to tell him how much the freedmen of the South needed the judicial power which, it seemed, only the army could provide. He helped take it away. The Supreme Court—not alone, to be sure—failed the freedmen.

As Professor Kutler's troubling book somewhat unintentionally makes clear, the quality and extent of the nation's commitment to the welfare, let alone the equality, of its black citizens during Reconstruction is in serious question. He would avoid the matter by claiming that it was not the true issue. (As the Second Reconstruction recedes there will be those who will attempt to mask some of its failures by asking if issues were also false in these days.) For those prone to assume that the existence of grave injustice ensures great attention to it, Professor Kutler's study is a stern corrective. Kutler's summation of the First Reconstruction can be quarreled with, but it cannot be lightly dismissed:

The concern for the Negro manifested itself politically as part of a wider constitutional and legal problem. That concern more properly might be viewed as a byproduct of the Republicans' conscious and well-articulated desires to reconstruct the nation—that is to reconstruct the nation in order to insure constitutional and political hegemony for the physically dominant section and, correspondingly, to expand the authority and policy functions of the federal government, which that section would control.³⁶

That may be what Reconstruction came to, but it is not where it started. When the Civil War ended, there was hope for something more. Salmon P. Chase and the men on his Court missed greatness because they passed up the chance to effect a much more important reconstruc-

35. 7 U.S. (3 Cranch) 324 (1806).

36. KUTLER 167 (emphasis in original).

tion, one which might have moved the nation toward racial equality rather than away from it.

Policemen's Lot

Albert J. Reiss, Jr.†

The People and the Police. By Algernon D. Black. New York: McGraw Hill Book Co., 1968. Pp. x, 246. \$6.95. *Police Power: Police Abuses in New York City.* By Paul Chevigny. New York: Pantheon Books, 1969. Pp. xxi, 298. \$6.95.

These books have several objectives in common: to analyze police abuses toward citizens by examining citizen complaints of the misuse of police authority; to assess the merits of civilian review boards and procedures in handling such complaints; and to seek some causes for police mistreatment of citizens. There are other similarities. Both Algernon Black and Paul Chevigny have had active careers in the area of civil liberties and civil rights. Both are writing about the New York City Police Department and their experiences in handling civilian complaints concerning police abuse in New York. Yet they are very different books.

Perhaps one reason for their differences lies in how the authors came to write them. Mr. Black is the former chairman of the 1966 Civilian Review Board of the New York City Police Department. Mr. Chevigny is a staff attorney for the New York Civil Liberties Union. The material for his book derives from his direction of the Police Practices Project of the Civil Liberties Defense and Education Fund, which he headed during 1966 and 1967. The purpose of the project was to study police abuses, particularly in New York City. Fortunately this project was undertaken during the period of the Civilian Review Board's existence in New York City, making separate assessment of its role feasible.

Black's book is a relatively superficial treatment of the police role and its use of force and authority, interwoven with brief descriptions of some complaints heard by the Board and the procedures it followed

† Director of the Center for Research on Sociology and Professor of Sociology, University of Michigan; Ph.B. 1944, Marquette University; M.A. 1948, Ph.D. 1949, University of Chicago.

in handling them. Chevigny's book has far more to say on these same topics, and in addition he presents a penetrating and often brilliant legal and sociological analysis of police misuse of authority, even when, in the reviewer's opinion, his evidence and inferences are questionable. Most readers are busy people. They may more profitably pursue their interest in this area by reading Chevigny's book than Black's. The further opinions in this review are addressed to his work.

There is a wealth of material in *Police Power* on different types of complaints about misuse of police authority, the problems that any investigator or attorney confronts in attempting to prepare such cases for departmental or judicial review, the difficulties encountered in just resolution of complaints, and the workings of review procedures. These materials alone could make a reading worthwhile.

There are two causal theses in *Police Power*. First:

The one truly iron and inflexible rule we can adduce from the cases is that any person who defies the police risks the imposition of legal sanctions, commencing with a summons, on up to the use of firearms. The sanction that is imposed depends on at least three factors: the character of the officer, the place where the encounter occurs, and the character of the person with whom the encounter is had. The police may arrest *anyone* who challenges them (as they define the challenge), but they are more likely to further abuse anyone who is poor, or who belongs to an outcast group.¹

Second:

The most basic point in this book is that the pattern of police abuses continues because . . . most people in our society do not wish to change the pattern. If they really wanted to change, they could exert enough pressure on the agencies of the legal processes to bring it about.²

Both theses are "demonstrated" more by the canons of legal reasoning than by those of behavioral science. Evidence in the book exists mainly for the first; argument for the second.

Important as is the evidence assembled on what is involved in misuse or abuse of police authority, any causal explanation is severely limited by the fact that Mr. Chevigny deals only with citizen complaints. Although he recognizes this limitation, he generally ignores it in reaching conclusions. Lacking a sample of cases where police authority is challenged, such as in observational studies of police practice, one cannot

1. CHEVIGNY 136.

2. *Id.* 249.

sort out the conditions under which abuse follows and those under which it does not. At most, challenge of police authority is a necessary but not sufficient condition for abuse. Lacking also a sample of cases where police abuses of citizens occur, it is not even possible to assess whether it is a necessary condition. Indeed, there is evidence to the contrary. In my own studies of undue use of force toward citizens, cases of abuse were observed where citizen complaints led to brutal acts without any challenge of police authority. That the police may have experienced moral indignation in such cases is possible, but the cases demonstrate that challenge of police authority is not always a necessary condition of police mistreatment of citizens. Then, Chevigny's emphasis upon the practice of covering misuse of authority with false charges may simply be a consequence of complaints originating when false charges are made. My own studies in Boston, Chicago, and Washington, D.C., show that abuse frequently is not covered by false charges. In a population of complainants such as those I studied, however, one probably loses most of those who are relieved to be free of police processing when there is no arrest. Such refusals to complain about police abuses may well outnumber the complaints of police abuse reported in Chevigny's book. In short, lacking samples of police and citizen encounters, causality is not demonstrable. Moreover, one would like to assess the probabilities of the occurrence of abusive acts as well as the fact that they occur.

In a trenchant discussion of the police role and the necessity to assert the authority now built into that role, Chevigny focuses on the problem of legitimating authority in the system of law enforcement and criminal justice. He regards the abuse of authority that occurs when the power of arrest is used to cover police assaults on citizens as far more serious than the assault itself, largely owing to its corruption of citizen trust in the rule of law and the organized legal system.

Worthwhile as is his discussion of the problem of the legitimation of authority by law enforcement officials, Chevigny directs his moral indignation only against the use and abuse of authority by the police. Only tangentially does he recognize that the authority of the prosecution and the court must be legitimated as well. In fact, legitimating that authority lies at the heart of a society that attempts to operate by the rule of law. Thus he carefully analyzes the manner in which the police attempt to assert authority, whether by manner, words, or the use of weapons, and he seems somewhat blinded to similar matters at the level of the prosecutor and the courts. Early in the book he takes care to report in detail judicial hearings and encounters with prosecutors in

bringing cases to a hearing. He seems to miss in these presentations his own anguish over a defendant failing to appear "properly dressed" before the judge and what that might mean in terms of conduct before judicial authority. He seems oblivious to judicial interruption of citizen "testimony" by commands such as "stick to the facts." Indeed, he seems almost oblivious to what John Hersey presents so well in *The Algiers Motel Incident*, that citizens may as deeply resent the behavior of prosecutors and judges in *their* exercise of authority as they do that of the police, and thereby deny their legitimacy by lying.

Admirable as is the treatment of police authority in this book, it does not appear to me to get to the heart of the matter of legitimation of authority in democratic societies at all levels of the system of justice. Weber's distinction between substantive rationality and formal rationality in legal systems is illuminating, but it says little about the legitimation of either form. Therein lies the problem.

The last chapters of *Police Power* grossly oversimplify the problems of changing any system; Chevigny rests his case on the notion that if people want things they can make them happen. From my point of view, his book, like most current treatments of the problems of police behavior and citizen concerns with such behavior, and of the legal system generally, still fails to come to grips with the central problem: how does one make a civil society? Is it possible to ensure a civil police without a civil citizenry? Can one obtain a civil police if one sanctions police for misconduct toward citizens but does not sanction citizen misconduct toward the police? Is it possible that so long as asymmetrical relations obtain between the police and citizens there will be misuse of authority? Those questions need more serious study.