Washington University Law Review

Volume 1975
Issue 1 *Symposium: Legal Services to the Poor in Developing Countries*

January 1975

Review of "Justice Accused: Antislavery and the Judicial Process," By Robert M. Cover

James W. Ely Jr.
Vanderbilt University

versely, at its readable best, although admittedly it does not paint a true picture of the bulk of the federal judiciary.

JAMES G. FRANCE*

JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS. By Robert M. Cover.[1] New Haven and London: Yale University Press, 1975, Pp. xii, 322. $15.00.

Slavery in America has long been a subject of intense scrutiny by historians.[2] Indeed, several major interpretations of slavery have appeared recently, enhancing our understanding of the complex workings of the peculiar institution.[3] Although the relationship between slavery and the legal system has not been explored as fully as other aspects of human bondage, contemporary scholarship has examined the colonial origins of slavery,[4] the enforcement of the Fugitive Slave Act of 1850,[5] and the personal liberty laws enacted by free states to hamper the return of fugitives.[6] Similarly, legal historians have probed the handling of slave crimes and private manumission proceedings before state supreme courts.[7] Much, however, is left to be done. The treat-

* Professor of Law, University of Akron, Formerly Judge, Court of Appeals, Seventh District, Ohio.

1. Associate Professor of Law, Yale University.

2. *E.g.*, U. PHILLIPS, AMERICAN NEGRO SLAVERY (1918).

3. *E.g.*, D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823 (1975); R. FOGEL & S. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974); E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974).

4. *E.g.*, Alpert, *The Origin of Slavery in the United States—The Maryland Precedent*, 14 AM. J. LEGAL HIST. 189 (1970).

5. *E.g.*, S. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860 (1970).

6. *E.g.*, T. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861 (1974).

7. *E.g.*, Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. So. HIST. 537 (1974); Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C.L. REV. 197 (1970); Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970).

ment of slaves at the trial court level remains largely untouched,[8] as does the consideration of slavery in property, estate, commercial, and tort law.[9]

Robert M. Cover's provocative study of the antislavery bench and bar is a significant contribution to the growing literature in this field. The author focuses primarily upon the intellectual dilemma of the antislaverly judge—one who would have accepted the "characterization of slavery as oppression"[10]—as he was forced to decide between his private conscience and the application of laws favoring the institution of slavery. Recognizing that those judges particularly troubled by slavery "represented but a small percentage of American judiciary," Cover nonetheless argues that "their position was strategically important" since they had a great impact on their fellow judges and the potential to influence abolitionist opinion.[11] The author maintains that "a known, committed antislavery judge was in the best position to set an example of role fidelity and to convincingly articulate the rationale for law-abiding behavior."[12]

Cover pays special attention to the views of Joseph Story[13] and Lemuel Shaw[14] of Massachusetts and John McLean[15] and Joseph Swan[16] of Ohio. Despite their personal antipathy to slavery, each of these judges felt compelled to render decisions upholding human bondage, and each came under increasingly hostile attack by antislavery forces. Judge Swan paid an especially heavy price for his conception of judicial duty. In 1859 he was denied renomination to the Ohio Supreme Court because of his decision denying the state's power to grant habeas corpus to the rescuers of a fugitive slave who were convicted under federal law.[17]

---

8. *But see* Edwards, *Slave Justice in Four Middle Georgia Counties*, 57 GA. HIST. Q. 265 (1973).

9. For a suggestive article, see Stealey, *The Responsibilities and Liabilities of the Bailee of Slave Labor in Virginia*, 12 AM. J. LEGAL HIST. 336 (1968).

10. R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 6 (1975) [hereinafter cited as JUSTICE ACCUSED].

11. *Id.* at 237.

12. *Id.* at 225.

13. Associate Justice of the United States Supreme Court, 1811-1845.

14. Chief Justice of the Supreme Judicial Court of Massachusetts, 1830-1860.

15. Associate Justice of the United States Supreme Court, 1829-1861.

16. Judge of the Supreme Court of Ohio, 1854-1858, Chief Justice, 1858-1859.

17. JUSTICE ACCUSED 256. The case was *Ex parte* Bushnell, 9 Ohio St. 77 (1859).

To establish the intellectual background for this judicial dilemma, Cover considers at length the interplay between natural law and legal positivism. Noting the persistent resort to natural law theories by antislavery advocates, he points out that the very ambiguities of the concept made it "a tool for expressing moral doubt and concern about slave law"[18] and "a device for expressing the gap between the law as it is and the law as it ought to be."[19] Under the influence of ideas expressed in the late 18th century by Montesquieu, Blackstone, and Lord Mansfield, any possible justification for slavery based on natural law had disappeared. On the other hand, these same authorities acknowledged that, if sanctioned by positive law, slavery could rightfully exist. As this deference to positive law suggests, natural law occupied a lesser place in the judicial scale of values than constitutions, statutes, and precedents. Moreover, the decades following the American Revolution saw many commentators reject natural law as a vehicle for the formulation of social policy.[20]

For all its practical limitations, the natural law tradition indicated that slavery was contrary to the inherent right to liberty. As Cover observes: "To speak of slavery as against natural law, even if the legal consequences of the statement were few and undramatic, was to admit the moral blemish on the system."[21] Yet the uses of natural law remained obscure. Was natural law simply a sort of residual body of authority, available only when other sources of law did not reach a given situation? To what extent could it be used in the interpretation of acts of positive law? Did natural law have any role when the positive law unmistakably established slavery?

---

18. JUSTICE ACCUSED 9.

19. *Id.* at 29.

20. Cover's emphasis on the antislavery character of natural law is perhaps overdrawn. Private property also was seen as a basic natural right, and this included the right of masters to their slaves. In addition, the declining influence of natural law in the post-Revolutionary period weakened its vitality as a force for emancipation. "As time went on," Winthrop D. Jordan has pointed out, "antislavery writers appealed to its principles less directly and less often." W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812, at 350 (1968). Still, the antislavery implications of natural law were unquestionably bothersome to defenders of the peculiar institution. *See, e.g.*, T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858) (arguing slavery was in full accord with natural law).

21. JUSTICE ACCUSED 35.

Surveying a variety of slave cases in the period 1780 to 1840, Cover concludes that judges adhered to judicial positivism and were disinclined to discuss the natural law rights of bondsmen. Litigation to define the meaning of the "free and equal" clauses of state constitutions, to determine the scope of state emancipation acts and private manumissions, and to apply conflict of laws principles and international law in a slavery context all pointed to the triumph of positivism. Even the celebrated *Amistad* case,[22] one of the infrequent antislavery legal victories, "reaffirmed the supremacy of positive law to natural right and extended" this reasoning to include foreign municipal law.[23] Justice Story's opinion freed the Africans who had seized control of a Spanish ship, but was predicated on the fact that the Africans were illegally enslaved under Spanish law, which had prohibited Spanish participation in the African slave trade. More important, Story seemingly limited the slave's right of revolution to situations of illegal confinement and denied this right when the law fostered slavery.

Aside from their commitment to positivism, antebellum judges were acutely aware of self-imposed limits on judicial law making. The Jeffersonian and Jacksonian movements raised questions about the function of an undemocratic and independent branch of a supposedly representative government. As a consequence of the bitter controversy over federal common law crimes and the codification drive, both of which challenged the discretionary character of common law adjudication, judges came to conceive of their roles as "one of will-less, self-abnegating application of law."[24] While judges realized that they made law, they were circumspect in the exercise of this power; the judicial ethic prohibited the substitution of their individual convictions of right in disregard of the law. This attitude served to contract the area in which antislavery judges felt free to move against slavery.

After 1840, the discomfort of the antislavery judge was heightened by the emergence of a small but active ideological bar dedicated to attacking the legal underpinnings of slavery. Largely concerned with fugitive slaves, the antislavery bar spurned compromise, pursued apparently hopeless cases, and used the courtroom as a forum for political and social criticism. As the arguments of the antislavery lawyers

22. United States v. The Amistad, 40 U.S. (15 Pet.) 518 (1841).

23. JUSTICE ACCUSED 109.

24. *Id.* at 147.

grew more tenuous, many judges viewed such advocates as publicity seekers anxious to delay proceedings, or even as threats to the rule of law. In one of his most interesting chapters, Cover describes the division of opinion among antislavery lawyers over the judicial function. New England attorneys, under the influence of the Garrisonians and Wendell Phillips, accepted the obligation of judges to apply positive law in preference to natural law. Since the Garrisonians admitted that the law did not permit a judge to apply his own version of justice to slavery, they contended that the conscientious antislavery judge ought to resign. Other antislavery counsel fashioned arguments that would permit judges to use their power to free slaves. Asserting that express law in conflict with natural law was invalid, such attorneys maintained "that the judge ought to create a new judicial role in which he has the power to resort to natural law."[25]

Neither theory, however, held much prospect for success. Resignation would underscore the moral purity of the jurist, but would do nothing in the short run to aid individuals or curtail slavery. On the other hand, efforts to formulate a new legal approach to slavery served to tangle the bondage question with other legal issues. In addition, antislavery counsel were glaringly inconsistent with respect to federalism. The states' rights argument against the summary return of fugitives ran directly counter to other abolitionist goals, such as federal control of slavery in the territories and District of Columbia and use of the mails for abolitionist propaganda, which necessitated a broad construction of the federal constitution. Lastly, neither approach enlisted any support among antebellum judges.

Confronted by this ideological advocacy and the sympathetic qualities of the fugitives, "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."[26] Specifically, the author outlines four justifications advanced by the judges for their fidelity to the positive law of slavery: (1) ordered society depended upon adherence to constitutional limits; (2) the separation of powers doctrine lodged control over slavery elsewhere in the government structure; (3) maintenance of the national union was at stake; and (4) their judicial

25. *Id.* at 125.
26. *Id.* at 229.

oath bound them to support the Constitution. Although the antislavery judges continued within their traditional roles, the author observes that "this participation was often accompanied by protests that responsibility lay elsewhere, by indications of distress, helplessness, and, indirectly, guilt."[27]

Despite its strengths, one cannot help feeling that the scope of this work is unduly narrow. We learn much about the place of natural law in antebellum adjudication and the thought processes of a small circle of antislavery judges. Even here, however, the work is marred by Cover's failure to treat the primary sources pertaining to these jurists. Further, Cover does not explain why, in the end, natural law exercised so little influence and the antislavery bar changed so few minds. Curiously, the author gives only passing attention to the impact of natural law upon southern judges who operated in a proslavery climate. Yet a judge in a slave state would have had far greater opportunity to pass upon the antislavery implications of natural law than a northern jurist.[28]

Even more serious is the apparently artificial character of the central problem—conscience versus the law. It is unclear on what basis Cover selected Story, Shaw, McLean, and Swan for examination, but excluded other judges opposed to slavery. Moreover, the degree of antislavery commitment by several of these judges is suspect. While Justice Story personally disliked slavery, biographers stress the ambiguity in his approach to the peculiar institution and his sense of restraint.[29] In 1842, Story wrote Senator John Berrien of Georgia to suggest the appointment of federal commissioners to assist in the administration of the fugitive slave laws.[30] This surely indicates that Story's antislavery

27. *Id.* at 208.

28. For example, in a contested testamentary manumission, the Tennessee Supreme Court declared that "the laws under which he is held as a slave have not and cannot extinguish his high-born nature nor deprive him of many rights which are inherent in man." Ford v. Ford, 26 Tenn. 92, 96 (1846), *discussed in* A. Howington, "Not in the condition of a horse or an ox": *Ford v. Ford*, the Law of Testamentary Manumission, and the Tennessee Court's Recognition of Slave Humanity, 1974 (unpublished manuscript in possession of this author at Vanderbilt School of Law). *See also* Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neall*, 21 S.C.L. REV. 141 (1969).

29. *See, e.g.*, G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 393-94 (1970); J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 297-99 (1971).

30. MCCLELLAN, *supra* note 29, at 262-63 n.94. This portion of Story's letter to Berrien was omitted from LIFE AND LETTERS OF JOSEPH STORY (W. Story ed. 1851), a work upon which Cover relies.

feelings were rather tepid. Similarly, Cover offers no evidence that Lemuel Shaw agonized deeply over his fugitive slave decisions. Leonard Levy observed that Shaw left "the cause of individual freedom in anxious regard for an even greater value, the nation itself."[31] How did Story or Shaw differ from Benjamin R. Curtis,[32] whom Cover classes as a conservative unionist? Arguably, then, neither Story nor Shaw really fit the author's preconceived model. To this extent the hypothesis upon which the entire volume is based begins to crumble.

The book ignores a whole range of other factors, such as educational background and political affiliation, that might influence the outcome of slavery cases to a greater extent than an abstract philosophical commitment to antislavery. Did John McLean's presidential ambitions dictate his position on fugitive cases? He was, after all, the conservative favorite at the Republican Convention of 1856, pledged to respect the rights of the slave states.[33]

Also bothersome is the author's treatment of the method of reasoning employed by the antislavery judges. Disagreeing with the prevailing interpretation of antebellum judicial style, Cover contends that in slavery cases judges adopted a mechanistic formalism in their opinions. "Thus, in slavery," he asserts, "the 1840's and 1850's were not a golden age of free-wheeling policy jurisprudence, but an age of the retreat to formalism."[34] For example, Cover claims that Justice Shaw used a different method of analysis in slavery litigation than in torts, labor, or criminal cases: a marked reluctance to become involved and a heavy reliance on precedent.[35] To the antislavery judges, the author concludes, "it was important that they hide the extent of their decisional power from themselves."[36]

In this conclusion, Cover takes partial issue with Karl Llewellyn[37] and Morton Horwitz,[38] who have suggested that antebellum judges de-

31. L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 108 (1957).

32. Associate Justice of the Supreme Court, 1851-1857.

33. *See* F. WEISENBURGER, THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT 146-51 (1937).

34. JUSTICE ACCUSED 200.

35. *Id.* at 251. Cover draws heavily upon LEVY, *supra* note 31.

36. JUSTICE ACCUSED 235.

37. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 36-38, 62-72 (1960).

38. *See* Horwitz, *The Emergence of an Instrumental Conception of American Law,*

veloped an instrumental conception of law as a conscious means to attain socially desirable ends. Although Llewellyn and Horwitz drew most of their examples from commercial law, Cover's assessment is also at variance with William E. Nelson's recent study of the conflict between instrumentalism and antislavery jurisprudence. Seeing the major slavery decisions as an outgrowth of the instrumentalist tradition, Nelson writes:

> The fact, however, is that the advocates of compromise with slavery rested their case upon instrumentalist arguments about what was politically wise and economically expedient, whereas opponents of slavery made essentially moralistic arguments about the law of God and the rights of man. At least in the courts, the conflict between slavery and antislavery was not a struggle for political power, but also a conflict between men possessing differing views about the proper role of law and government—between men who believed that courts should explicitly pursue socially expedient policy goals and men who believed that courts should decide cases consistently with standards of what, in some ultimate sense, was right and wrong.[39]

The difference between Cover and Nelson can be illustrated by their handling of *Prigg v. Pennsylvania*,[40] in which the Supreme Court upheld the constitutionality of the Fugitive Slave Act of 1793. To Cover, *Prigg* "appears to be a formidable example of a highly formalistic abdication of the responsibility to weigh and consider policy and moral implications of constitutional law . . . ."[41] Nelson, however, maintains that *Prigg* "rested on an instrumentalist concern for national unity . . . ."[42]

Part of the difficulty with Cover's analysis lies in his treatment of the reasons advanced by antislavery judges in support of their decisions. National unity, public order, and the integrity of the judicial process were surely important values that even antislavery jurists could well have prized more dearly than freedom for bondsmen. Although Cover admits the force of these competing values, he is clearly unimpressed and

---

1780-1820, in 5 PERSPECTIVES IN AMERICAN HISTORY 285 (D. Fleming & B. Bailyn eds. 1971).

39. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 543-44 (1974).

40. 41 U.S. (16 Pet.) 539 (1842).

41. JUSTICE ACCUSED 240.

42. Nelson, *supra* note 39, at 539.

treats such arguments as a formula for judicial evasion. Furthermore, the institution of slavery was never on trial before any of these judges. At most their decisions could have affected a handful of runaways. An antislavery judge steeped in instrumentalist thinking understandably might decide that such a minimal impact on slavery was not worth the price of the sectional animosity that was sure to follow a judicial blow against the fugitive slave law.[43]

The author's handling of the battle over federal common law crimes is imprecise. Cover first asserts:

> The common law character of the federal court was an issue, . . . not so much out of hostility to judicial lawmaking as out of hostility to aggrandizement of the national government at the expense of the states.[44]

But a few lines later we are told that the Jeffersonians attacked federal common law crimes "because they understood that common law jurisdiction is a form of legislative power . . . ."[45] It was this very recognition of the potential for judicial law-making that caused judges to deny personal preference as a legitimate basis for adjudication.

In addition to its consideration of the crucible of slavery and the law, Cover's work has broad implications for contemporary legal practice. The limitations of ideological antislavery advocacy become evident, and perhaps foreshadow similar problems with the self-styled radical lawyers of the 1960's.[46] The quandary of a judge called upon to implement laws that he disdains is, of course, still with us. Nevertheless, we derive no guidance from Cover about the resolution of this dilemma. Natural law and appeals to higher justice, with their vague boundaries and heavy subjectivity, are hardly meaningful alternatives to positive law. Even now, judicial law-making, especially in the constitutional area, remains a sensitive subject. In his sometimes wordy and repititious efforts to probe judicial "collaboration in a system of oppres-

---

43. The outcry which greeted the Supreme Court's decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), would seem to indicate the wisdom of a low judicial profile on slavery questions.

44. JUSTICE ACCUSED 140.

45. *Id.* at 141.

46. *See, e.g.*, J. BISHOP, *William Kunstler and the New Bar*, in OBITER DICTA 3 (1971).

sion,"[47] the author poses some difficult questions, but attempts no answers.

JAMES W. ELY, JR.*

47. JUSTICE ACCUSED 6.

* Associate Professor of Law, Vanderbilt University.