BOOKS


The review of a book long out of print, over 110 years old and almost certainly not soon to be reissued in paperback, needs some occasion as a justification. The occasion for this review is the present struggle in Vietnam—the only conflict in our memory which has shamed us in our nationality, making patriotism a disgrace.

I. A POLEMIC AGAINST THE AMERICAN JUDICIARY

The decade preceding the civil war marked the nadir of the American judiciary. With very few notable exceptions the judges in both state and federal courts enforced with gusto the provisions of the barbaric fugitive slave law of 1850.1 In Massachusetts the constitutionality of that naked act of oppression was solemnly upheld2 as those who rightly called the judicial officers kidnappers were mulcted in damages for libel and slander.3 Leading the shame of the judiciary, however, was the Supreme Court of the United States and Chief Justice Taney. Not only did this Court put the imprimatur of legitimacy upon the retrieving of fugitive slaves,4 but it also took from Congress and the states

* Richard Hildreth was a prominent Whig attorney and legal scholar. He was known as a leading American disciple of Jeremy Bentham. Hardly a Jacksonian Democrat in most political matters, he has been said to have agreed with the Jacksonians in the need to curb the powers of the judges. Ironically, the present volume, directed as it is to the abuses of the judiciary in supporting slavery, indicts, by implication, the Jacksonian bench more than the followers of Marshall.

2. Thomas Sims's Case, 61 Mass. (7 Cush.) 285 (1851). Earlier Massachusetts judicial history, it should be noted, was not so infamous. Chief Justice Shaw ruled in Commonwealth v. Ayes, 35 Mass. (18 Pick.) 193 (1836), that once a slaveowner voluntarily brought a slave into a non-slave state he could not compel him to return. After the Supreme Court's decision in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), Massachusetts passed one of the more stringent of the Liberty Laws restricting the power of state officials, including judges, to enforce the Fugitive Slave Act of 1793. Despite this Act the Massachusetts court gave in to Congress upon the passage of the Act of 1850.
4. See, e.g., Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1843). In Prigg a badly split Court in effect upheld the Act of 1793. Yet, the opinion of Justice Story was intended to lay the groundwork for state obstruction of the Act. Moreover, Story went so far as to state that the state officials had no obligation to enforce federal penal law in this area. Id. at 615. He held that Congress has exclusive jurisdiction in this area, thus laying the basis for a possible legislative attack upon slavery in the future. Id. at 617. However, Story did not speak for a majority of the Court. Taney, at least, simply wished to validate the Act of 1793 and to invalidate the conviction of Prigg. For differing assessments of Prigg, compare Dowd, Justice Story and the Slavery Conflict, 52 Mass. L.Q. 239 (1967), with Leslie, The Influence of Joseph Story's Theory of the Conflict of Laws on Constitutional Nationalism, 35 Miss. Valley Historical Rev. 203, 212-20 (1948).
any power to limit the spread of slavery or to inhibit the slaveholder. Indeed, when the Supreme Court of Wisconsin declared the Fugitive Slave Act unconstitutional in a rare and noteworthy act of courage and sound reasoning, Taney and his gang were quick to reverse. It is against this background of judicial complicity in tyranny that the volume under consideration was born.

In 1855 Passmore Williamson, a Philadelphia abolitionist, helped secure the escape of a family of slaves on board a ship docked in the Philadelphia harbor. Williamson was subsequently served with a writ of habeas corpus directing him to bring the slaves before the federal judge. Upon his failure to respond to the writ, he was jailed. Federal Judge Kane cited Williamson for contempt despite his protest that he had never had custody of the escaped slaves and did not know their whereabouts. Williamson’s case became a minor cause celebre among abolitionists.

Richard Hildreth wrote the present volume as a direct response to the Williamson case and to the role of the judiciary in maintaining the system of slavery. The body of the book consists entirely of chapters selected from Lord Campbell’s Lives of the Judges. Biographies of the very worst of England’s judges, and only the worst, are selected for inclusion. Hildreth’s carefully biased selection and Campbell’s acerbic wit and bitterly honest appraisals make this little volume a delightful change from the saccharine testimonials to men of the judiciary found in almost all collected writings of jurists. It is refreshing to read that a judge’s reputation was saved only because of the singular loathsomeness of two of his contemporaries, that were it not for those contemporaries, his name “might have passed into a by-word, denoting all that is odious . . . in a judge.” Yet, this book is more than an eccentric road into legal history. The editor’s purpose is explicitly stated:

The object of the present work, prepared as it is in the interest of justice and freedom, and designed to hold up a mirror to magistrates now sitting on the American bench, in which “to show virtue her own feature, scorn her own image, and the very life and body of the time his form and pressure,” will, I hope, induce Lord Campbell to pardon the liberty I have ventured to take with his writing.

6. In re Booth, 3 Wis. 1 (1854); In re Booth and Rycraft, 3 Wis. 157 (1854).
7. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858). Ultimately, the Supreme Court of Wisconsin yielded to the authority of the United States and accepted the Supreme Court’s mandate. See Ableman v. Booth, 11 Wis. 498 (1859). However, the Wisconsin court never accepted the reasoning of the Taney Court. Thus, in a collateral matter the unconstitutionality of the Act was assumed. See Arnold v. Booth, 14 Wis. 180 (1861).
8. See ATROCIOUS JUDGES 389-94.
9. The case aroused sufficient interest to cause the release of Williamson to be described in some detail by the Philadelphia press, See ATROCIOUS JUDGES 432.
10. A total of sixteen judges are chosen for inclusion: Roger Le Brabançon, Robert Tresilian, Thomas Billing, John Fitzjames, Thomas Fleming, Nicholas Hyde, John Brampton, Robert Heath, Robert Foster, Robert Hyde, John Kelynge, William Scroggs, Francis North, Edmund Saunders, George Jeffreys and Robert Wright.
11. ATROCIOUS JUDGES 387.
12. ATROCIOUS JUDGES 4.
The appendix to the volume contains the petitions and decisions in the case of Passmore Williamson. The implication is clear. A mirror held up to Judge Kane will reveal a judge akin to the worst in the Anglo-American tradition.

II. THE JUDGE AND IMMORAL LAW

We do not generally seek moral guidance from our judges. Their role is "legal" and our age is singularly unreceptive to natural law theories which could have any real weight in decision making. Yet, any man of the mid-twentieth century who is not wary of making secular law to the only standard for human conduct cannot have learned the brutal lessons of Hitler and Stalin. A century ago the abolitionists knew well the danger of obedience to, let alone enforcement of, law which violates all that is worthwhile in human community. Today the lesson ought to be clearer still. Therefore, if we can not expect moral guidance from our judges we must seek to attune them to the grave dangers of oppressive laws unthinkingly executed.

Now, young men of this nation face agonizing choice between willful law-breaking and complicity in the war in Vietnam. Among much of the academic community, even among many professionals, including lawyers, the Vietnam war has come to be seen as a genocidal horror. Confronted with the immorality of Vietnam many young men have turned to resistance. Resistance, at least in its form as refusal to serve in the armed forces, has been more widely tolerated than might have been expected. Some of the leading universities in the country have guaranteed to the felon returning from a sentence imposed for refusal to serve the same rights of readmission that are guaranteed to the returning soldier. The federal judiciary, however, has remained faithful to its long tradition as executors of immoral law. Draft resisters are imprisoned with increasingly harsh sentences. Novel, often potentially instructive, defenses are struck down as irrelevant. No judge has resigned in protest. No judge has availed himself of the opportunity presented by a draft case to instruct the public on

14. The graduate faculties at Columbia and Princeton have made such guarantees to students. Many other schools are presently considering such action.
15. This statement is extreme but not unsupported by evidence. The role of the federal judiciary in slavery is suggested by this review. For other instances, see, e.g., W. Preston, Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933 (1963). The federal judiciary crushed the I.W.W. and has helped to crush the Communist Party. See P. Renshaw, The Wobblies 215-42 (1967).
17. Many new defenses are being offered. The Nuremberg defense was explicitly offered by David Mitchell. The courts throughout the system have refused to listen to the defense, holding it irrelevant. See, e.g., United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), cert. denied, 386 U.S. 972 (1967). Black draftees have raised the issue of whether or not the country can legitimately ask black citizens to fight for the system that is attacking them in the ghetto. This defense has been dismissed as frivolous. See, e.g., United States v. Richmond, 274 F. Supp. 43 (C.D. Cal. 1967); United States v. Lewis, 275 F. Supp. 1013 (E.D. Wis. 1967).
the moral issues of the war. No judge has publicly engaged in creative judicial obstruction of the war effort. With Nazi Germany fresh in our minds, with the screaming silence of the German people barely passed into history, the silence and, more, the cooperation of the federal bench demands comment.

What can the judge do? What ought the judge to do without succumbing to the temptation to exceed his legitimate authority? The traditional answer to the dilemma is resignation—public and accompanied by a full justification for the act. Gandhi, accused of sedition, spoke to his judge's moral problem. He concluded that the judge must either "obey the law" and sentence him to the maximum sentence, or he must resign. Thoreau, in a similar vein, thought that a judge confronted with the "legal" question of whether one man is the slave of another ought to resign. Resignation enables the judge to abstain from becoming a cog in the machinery of state oppression while refraining from a willful violation of his oath to support and enforce the law as he believes the law to be.

For many, however, resignation will appear to be an empty gesture. After all, other judges will be found to convict the resisters. For the judicial activist there are other alternatives. The judge may insist upon the strictest procedural safeguards within the military and selective service systems. Indeed, such insistence should be carried to the extent that it becomes a plausible obstruction to the smooth functioning of the war machine. Obvious (and not too extreme) suggestions come to mind. There should be a right to counsel at draft board hearings; a right of access to selective service files; a right to unprejudiced tribunal for all selective service determinations; and a right to confront and cross-examine any person who would bring adverse testimony or material. Failure on the part of a draft board to abide by these standards should be remedied at least by a full de novo review in the courts.

Of course, litigation involving selective service laws has provided little precedent for such holdings. Nevertheless, the judge who strayed from the precedents in this area would not need to invent any radical constitutional doctrine. There was certainly no greater precedent for the Wisconsin Supreme Court to determine that a draft classification is invalid on the ground that it is based on a test of loyalty and ability to protect the United States that is not applied uniformly. The question is whether the Constitution requires either safeguards at the administrative level or broader review in court.

18. A thorough airing of the realities of American atrocities could be had by simply allowing the presentation of evidence to the effect that the United States is committing war crimes, reserving a ruling on the relevance until a later time. It is remarkable that of all the war related trials only the court martial of Howard Levy allowed the introduction of evidence concerning American war crimes. The ruling of Law Officer Brown on the relevance of that testimony is to be commended.

19. The word "publicly" may be of some significance. It is certainly true that some judges are more apt to find procedural defects in a draft case than are others. But an isolated acquittal or new trial is not enough.


22. Since the scope of review of selective service classifications has traditionally been very narrow, the courts could easily hold that the Constitution requires either safeguards at the administrative level or broader review in court.
Court's insistence upon a trial by jury and an Article III court for the trial of an alleged fugitive slave.\(^23\) A judge who chooses this second alternative decides that he will interpret the law to conform to his conscience even if such a course requires the disregard or stretching of authority. There will, however, be limits to this course of action. Presumably, the legal arguments must be at least plausible even if unsupported by precedent.

Finally, the judge can engage in judicial civil disobedience. He can simply refuse to follow law or authority and set resisters free. Such judicial actions may be either naked acts of power without an opinion, or they may be accompanied by "opinions" citing only the moral reasons for the decision. This course, too, was tried by a few hardy souls during the infamous decade of 1850-1860. Thus, a simple probate judge in Ohio not only saw to it that a fugitive was able to escape, but also imprisoned nine deputy federal marshalls for kidnapping.\(^24\) Of course, whether pursuant to judicial process or not, such acts are quite clearly civil disobedience and, if widespread, incipient insurrection. The question today, however, if the Vietnam war is not stopped quickly, is precisely when and how such resistance is to be carried out.

III. What Can We Expect From Our Judges?

The men of the American judiciary have not grown from soil which breeds radicalism. It is probably a bit much to expect overt judicial resistance to the law. Yet, the history of judicial responses to slavery provides at least a hint of what we ought to expect from the few judges of good will.

Lord Mansfield, in \textit{Somersett's Case}, said:

\textit{It [the state of slavery] is so odious that nothing can be suffered to support it but positive law.}\(^25\)

And, in the United States, Joseph Story tried to develop a broad enough concept of the Admiralty jurisdiction to enable the growth of a concept that slave-trading constituted "piracy" under international law.\(^26\) Neither Mansfield nor Story was a radical. Both were strong judges believing in the role of a creative judiciary.\(^27\) Both recognized a duty to the "law" even when the law proved contrary to their own morality. Yet, both judges refused to contribute to the strengthening of what they considered to be an immoral institution when there remained any legal argument to provide limits to slavery. Mansfield was able to take a far-reaching step, effectively abolishing slavery within the British

\(^{23}\) \textit{In re} Booth, \textit{3 Wis.} 1 (1854).

\(^{24}\) See account in \textit{5 Catterall, Judicial Cases Concerning American Slavery} 21-22 (1937).

\(^{25}\) \textit{20 T. Howell, State Trials 82} (1771-72).

\(^{26}\) See the account of this chapter in Story's judicial career in Dowd, \textit{supra}, note 4.

\(^{27}\) Indeed, Story was bitterly criticized by the Jacksonians, including Taney, for his complicity in the Marshall approach to the Constitution.
Isles; Story confined himself to laying, within the narrow confines of slavery, a theoretical basis for state nullification of the federal law.\textsuperscript{28}

We should ask as much from our own judges. Develop new notions of conscientious objection;\textsuperscript{29} explore the implications of Nuremberg if not for the positive law of America, at least for the notion of the \textit{mens rea} of the accused who has a good faith belief in the criminality of the war;\textsuperscript{30} re-examine the power of Congress and Executive to draft and kill for undeclared wars. If, finally, plausible law-making can find no way to interfere with the war effort, we should ask a bit more: the resignation of the judge of good conscience.

Hildreth wrote his little book in order to hold a mirror to the American judiciary. The mirror is again necessary. If resisters are to be sent to jail pursuant to legal process, the judges and prosecutors must be shown that they, with Lyndon Johnson and his regime,\textsuperscript{31} are responsible for this war and for its destruction. For it is certainly true that many young men would neither have fought nor died if the few heroic resisters were not so summarily tried and convicted.

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\textsuperscript{28} \textit{Prigg v. Pennsylvania} brought about a rash of state liberty laws to take advantage of the dictum that state officials need not help retrieve slaves.

\textsuperscript{29} The \textit{Seeger} case, United States v. Seeger, 380 U.S. 163 (1965), is sufficiently vague to enable any conscientious objection argument to be made with a straight face. The Selective Conscientious Objection argument is now being tested; almost certainly it will fail.

\textsuperscript{30} The \textit{Mitchell} case squarely raised the Nuremberg issue, albeit not in the context of \textit{mens rea}. The argument, while unusual, is not wholly foreign to the law. See United States v. Powell, 156 F. Supp. 526 (N.D. Cal. 1957).

\textsuperscript{31} No attempt is made here to assess Johnson's role in the war. The point is simply that the judiciary as enforcers of this law cannot help but be accomplices in that which the Executive perpetrates.