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PROFESSIONALISM AND THE CHAINS OF SLAVERY

Redmond J. Barnett*

JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS. By Robert M. Cover. New Haven and London: Yale University Press. 1975. Pp. xii, 322. \$16.50.

THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS. By Don E. Fehrenbacher. New York: Oxford University Press. 1978. Pp. xii, 741. \$25.00.

Obedience to law often seems incompatible with loyalty to conscience, and professionalism may sometimes obstruct justice. Critics have long been suspicious of the legal profession on exactly these points, and some have lately accused the professions in general of supporting self-interest and class-interest, defensiveness and oppression.¹ In *The Culture of Professionalism*, for example, Burton Bledstein remarks that: "[T]he culture of professionalism in America has been enormously satisfying to the human ego, while it has taken an inestimable toll on the integrity of individuals."² If charges like this are true, at least a quarter of all employed Americans—the professionals—stand in considerable moral danger.³

Such claims cry for analysis, and a good place to begin is the intersection of professional institutions and behavior with a social situation that raises profound moral questions. The legal history of slavery in the nineteenth-century United States is such an intersection. Although neither of the books under review scrutinizes professionalism, both use it as a foundation for argument. The works exemplify the value of seeing concepts in relation to a

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1. See, e.g., Barzun, *The Professions Under Siege*, HARPER's, Oct. 1978, at 61-68; Glazer, *The Attack on the Professions*, COMMENTARY, Nov. 1978, at 34-41, and the works cited therein. See also I. ILLICH, DESCHOOLING SOCIETY (1971), and, for a sampling of relevant issues, see T. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY chs. 1-2 (1977); THE PROFESSIONS IN AMERICA (K. Lynn ed. 1965).

2. B. BLESTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA xi (1976).

3. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1977, at 406 (April 1977) (including 13.7 million "professional and technical" and 9.3 million "managers and administrators" in a labor force of 89.3 million).

particular set of concrete events, instead of tracing their amorphous intellectual history. But partly because neither book examines its own conceptual underpinnings, the two are utterly incompatible. To oversimplify only slightly, Robert Cover maintains that slavery reveals the moral dilemma and ultimate moral bankruptcy of professionalism; Don Fehrenbacher, professionalism's moral excellence. Cover's story is the anguished collaboration of the most professional American judges with slavery; Fehrenbacher's, the demonstration that greater professionalism could have prevented judicial complicity with slavery. For one, professionalism is a poison; for the other, a cure. As is so often true of the study of history, a closer look raises profound questions with exciting and perplexing implications.

I

Cover poses the problem with an example that few can ignore: Herman Melville's short novel, *Billy Budd*. In that unsettling work, the innocent sailor Budd's action of killing the evil petty officer Claggart, who had falsely accused him of mutiny, posed a cruel dilemma for Captain Vere and his officers: Would they free a sailor who had violated the Mutiny Act by striking his superior officer, or kill a man innocent of mutinous intent? How could they square law and conscience? More poignant yet, Melville's father-in-law was Lemuel Shaw, Chief Justice of the highest court in Massachusetts from 1830 to 1860, author of strong antislavery decisions, who nevertheless returned fugitive slaves to the South.⁴ Cover describes *Billy Budd* as posing the dilemma of antebellum Northern judges, personally opposed to slavery but committed by their professional roles to rivet new chains on escaped slaves.

In Cover's view, judges' roles as professionals significantly determined their actions, and their roles made them inhumane. Though Cover does not mention it, the prototype of such inhumane professionalism could be the United States Sanitary Commission in the Civil War: In the interest of disciplining troops, the Commission withheld medicine from wounded soldiers if it had not been requested through the correct formal procedures.⁵ The picture that emerges from Cover's pages is that Northern judges were tragic, noble, but irrational figures reluctantly sacrificing

4. R. COVER, *JUSTICE ACCUSED* 4-5 (1975).

5. G. FREDRICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* 104-05 (1965).

their morals to the idols of professional expertise. They valued both freedom and law, liberty and union, and the conflict of those values drove them nearly mad. As Cover says, "Make no mistake. The judges we shall examine really squirmed; were intensely uncomfortable in hanging Billy Budd. But they did the job."⁶ Implications for our time are not accidental: Cover reports that he began writing when colleagues objected to his seeing similarities between judges in the 1960s who approved the Vietnam War and judges of the 1850s who returned fugitive slaves.⁷ The charges he makes against legal professionals are grave, bolstered with thoughtful and respectful argument, and deserve reflective consideration.

II

In its conclusions and its method, Don Fehrenbacher's magisterial book intimates that professionalism promotes integrity and sustains humane values, while unfaithfulness to forms promotes irrationality and oppression. The work towers above the author's modest prefatory claims that "I have no sense of being immune from this plague of inaccuracy that seems to afflict students of the Dred Scott decision. My best hope is that I may have corrected some tiresome old errors and made some interesting new ones."⁸ It exhaustively examines the *Dred Scott* case, frequently but tactfully corrects predecessors' errors, and speaks with unrivalled authority. Fehrenbacher makes a convincing argument that the case was not a collusive lawsuit, that the two dissenting Justices of the Supreme Court did not force the majority to render a broad decision, and that the decision did not undermine respect for the Court.⁹ Nor did it break up the Democratic party, or propel Abraham Lincoln to the Presidency.¹⁰ Dred Scott himself was not shiftless and unreliable; Roger Taney was not a closet abolitionist.¹¹ The Chief Justice's opinion was not dictum, nor was he normally an apostle of judicial self-restraint.¹² Like the restorer of a house damaged as much by incompetent repair as by neglect, Fehrenbacher patiently removes the "new layers of confusion" added by "efforts at clarification by several

6. R. COVER, *supra* note 4, at 7.

7. *Id.* at xi.

8. D. FEHRENBACHER, *THE DRED SCOTT CASE* ix (1978).

9. *Id.* at 251-52, 270-76, 572; 308-12; 573-80.

10. *Id.* at 455-58, 561-67.

11. *Id.* at 571-72, 653 n.3, 714 n.7; 560.

12. *Id.* at 331-34, 231-35.

generations of scholars."¹³ Many of his questions are deceptively simple: What exactly were the legal issues? What did the Court decide? What consequences followed? Supplementing a careful text with helpful diagrams, he patiently corrects errors, weighs suggested explanations, and reaches considered judgments likely to be persuasive.

In Fehrenbacher's hands, traditional professional methods of political history support antislavery moral judgments. A careful account of the Fugitive Slave Law of 1793 demonstrates that the Constitution did not require active federal involvement in recapturing fugitives: relying on state action, as in the extradition of criminals, would have sufficed.¹⁴ A meticulous study of black citizenship sharply notes the inconsistency of forbidding free blacks to bring lawsuits on the ground that they lacked some rights of citizens (like voting), while permitting suits by corporations and white women and children, who also lacked some rights of citizens.¹⁵ Convincing documentation underlines the pervasive assumptions by Northern as well as Southern whites that blacks were inferior.¹⁶

The book's organization mirrors the author's description of the case as one of those "sharply defined historical events through which, like the neck of an hourglass, great causal forces appear to flow, emerging converted into significant consequences."¹⁷ The first third of the volume describes the history and politics of slavery and characterizes the judicial style of the Taney Court; the second describes the case itself from Dred Scott's early wanderings to the opinions of the Court; the final third describes the consequences, both immediate and remote. Fehrenbacher thus places the decision in both a synchronic context, where it becomes a window onto American attitudes and actions of the 1850s, and a diachronic one, looking back to the colonial years and forward to the twentieth century.

Viewed in larger terms, the case speaks to issues of law and morals across our entire history as an independent nation. Fehrenbacher ends his text in the present with an eye to the future by citing a poll conducted by the *American Bar Association Journal* in 1974 that chose the fourteen most important Supreme

13. *Id.* at 323.

14. *Id.* at 40-47.

15. *Id.* at 64-73.

16. *Id.* at 190-91, 428-39, 489.

17. *Id.* at 3-4.

Court cases. Only one came from the years between 1819 and 1935: *Dred Scott*. Why was there such "great importance thus attached to the Dred Scott decision by members of the American legal profession in the later twentieth century . . ."? Presumably because this first decision declaring a significant general act of Congress unconstitutional was, "in the long run . . . most significant as an epoch in the growth of American judicial power"—of which "we have yet to comprehend the full meaning. . . ." ¹⁸ If its present and future are important to professionals, its origins reveal something of the struggles to reconcile morals with interests. The Founding Fathers, Fehrenbacher admits, never gave slavery systematic consideration, and the Constitution backhandedly acknowledged the institution while anticipating its possible abolition: "It is as though the framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally—that is, plainly visible at their feet, but disappearing when they lifted their eyes." ¹⁹ Indeed, many grains flow through the neck of the *Dred Scott* case, and find their place before the reader's eyes.

The heart of Fehrenbacher's method is simple, unrevolutionary, and anything but flashy: the precise analysis of texts and situations, noting their ambiguities while finding their main thread. He seeks underlying patterns without losing sight of complexities and inconsistencies. What he says of the slavery clauses in the Constitution is typical of his entire approach: "Yet if the text and historical context of the three clauses fail to reveal a clear intent, their want of coherence does not entirely obscure a certain elemental drift or tendency." ²⁰ His is professional conservatism that keeps thrusting basic questions of values to the fore. The historian's method invites comparison with the methods of antebellum judges in general, and of Roger Taney in particular.

III

Taney's opinion in *Dred Scott v. Sanford* ²¹ frequently departed from neutral professional canons of construction. The departure was not quite total: Fehrenbacher credits the Chief Justice with making sound technical rulings on certain jurisdic-

18. *Id.* at 594-95.

19. *Id.* at 19-27, quotation at 27.

20. *Id.* at 26.

21. 60 U.S. (19 How.) 393 (1857).

tional and procedural questions.²² But Taney's choice of subjects and his manner of treating them reveal his unprofessional concerns. He gave a disproportionate amount of space—forty-four percent of his total opinion, twenty-four times the space he gave to discussing the effects of Scott's residence in Illinois—to arguing that blacks were not citizens and presumably possessed no rights of citizens, even those not at issue in the litigation.²³ Peculiar on professional grounds, this disproportion makes sense in light of the rising Southern white concern about the challenge to slavery implied by free blacks, of the Southern attack on the antislavery movement, and of Taney's own formal opinion as Attorney-General in 1832, which concluded that "The African race in the United States even when free" had privileges but no rights whatsoever.²⁴

More important than this imbalance in space, Taney's treatment played fast and loose with the Constitution's language. The Chief Justice repeatedly slipped from one logical category to another, implying that emancipation did not change the status of blacks, reading the term "regulation" as weaker than "law," and changing "Congress" into "independent sovereignties."²⁵ He used words without regard for their normal meanings, claiming that eight out of thirteen states was "all," that the statement, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" meant that a person "may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State," and that "the words 'free inhabitants' . . . did not include the African race, whether free or not."²⁶ He simply failed to discuss one constitutional clause that told against his argument.²⁷ He blithely asserted that free blacks in the 1770s and 1780s had "no rights which the white man was bound to respect," ignoring the rights they undoubtedly enjoyed to hold property, marry, make contracts, and sue.²⁸ Though Fehrenbacher scrupulously notes that Taney's contemporary and later critics misjudged his words—he ascribed that opinion to the public in the 1770s, not himself—the historian demonstrates that Taney's

22. D. FEHRENBACHER, *supra* note 8, at 331-33, 338-39.

23. *Id.* at 337, 340-64, 385-86.

24. *Id.* at 340-41, 70.

25. *Id.* at 343, 346-54, 368-69, 371.

26. *Id.* at 371, 344 (quoting Taney), 358 (quoting Taney).

27. *Id.* at 352-53.

28. *Id.* at 347-49.

opinion described no difference between the 1770s and the 1850s. A year and a half after the *Dred Scott* decision, Taney wrote an unpublished "supplement" to his opinion affirming more precisely that whites' belief in their own superiority was "as plain now as it was in the days of the *assiento* [early eighteenth century]." ²⁹ As in 1832, his white supremacist beliefs infected his decision.

Taney did not even behave with complete propriety towards his fellow Justices: After delivering his opinion orally, he rewrote it to outflank some of the dissenting Justices' objections, lengthening it by about fifty percent.³⁰ He discussed the case with President James Buchanan, and worked with Buchanan to convince one Northern Justice to concur with him.³¹ Further, he quarrelled so strongly with one dissenter—who, to be sure, had released the text of his own dissent to the newspapers—that the latter resigned from the Court.³² Fehrenbacher's description of Taney's additions, visible in the page proofs in the National Archives, is a fine bit of detective work.³³ All in all, the Chief Justice's performance is not what one expects from a professional jurist.

What, then, accounts for Taney's behavior? While Fehrenbacher does not attempt to play the psychohistorian, he does note that in 1855, less than five months before the arguments in the *Dred Scott* case, Taney's wife and daughter died in circumstances that surely made him feel guilty and involved his beliefs about the South. He had effectively forbidden his daughter's going North for the summer, proclaiming that her wish was "nothing more than that unfortunate feeling of inferiority in the South, which believes everything in the North to be superior to what we have."³⁴ While the family was staying at Old Point Comfort, near Baltimore, a yellow fever epidemic killed his daughter and a stroke killed his wife. A relative described Taney as being "in tears like an infant, and he has given way to the most bitter self reproaches, for keeping his family at the Point in reliance on his own judgment."³⁵ Although noting the suggestion of Taney's biographer that these deaths "deprived him of the emotional reserves necessary to preserve . . . judicial balance," Fehrenbacher pre-

29. *Id.* at 347-48, 445-48, quotation at 447.

30. *Id.* at 315-16, 320-21 (detailed list of additions).

31. *Id.* at 311-14.

32. *Id.* at 314-18, 670 n.30.

33. *Id.* at 320-21.

34. *Id.* at 558.

35. *Id.* at 559.

fers to interpret the decision as an example of Southern nonslaveholding whites' attitudes:³⁶

Like the Chief Justice, a majority of southerners had no significant economic stake in the institution of slavery, but they did have a vital stake in preservation of the southern social order and of southern self-respect. In the end, it may have been the assault on their self-respect—the very language of the antislavery crusade—that drove many southerners over the edge. . . . With increasing frequency and bitterness . . . , southerners protested that they were being degraded by northern sanctimony. Taney's Dred Scott decision . . . is a document of great revelatory value. In the very unreasonableness of its argument one finds a measure of southern desperation.³⁷

Here, perhaps, Fehrenbacher's caution about novel methods of interpretation may unduly impoverish his account. John Mack's recent biography of T. E. Lawrence shows that reasonable concern for a subject's psychological development is compatible with treating larger, public issues, as Erik Erikson has long maintained.³⁸ On Fehrenbacher's own showing, Taney's opinion contained a more "extraordinary cumulation of error, inconsistency, and misrepresentation, dispensed with such pontifical self-assurance" than those of his concurring Southern Justices.³⁹ James M. Wayne (Georgia) did not bother to file most of his opinion at all.⁴⁰ John A. Campbell (Alabama) ignored part of Taney's opinion, seemed to be sticking close to precedent, and used strict, if slightly bizarre and confusing, construction.⁴¹ John Catron (Tennessee) "flatly disagreed" with parts of Taney's opinion, privately described the whole account of Negro citizenship as dictum, briefly concurred with Samuel Nelson's opinion that had omitted several issues raised by Taney, and seems to have written with little rancor.⁴² Only Peter V. Daniel (Virginia) resembled Taney, "with a mind completely closed on the slavery issue," and even he "reached the same conclusion as Taney but by a shorter and straighter path," and made fewer misreadings and omissions.⁴³ Moreover, Daniel was "prostrated for months" by the

36. *Id.* at 559-61 (quoting C. SWISHER, *THE TANEY PERIOD* 722 (1974)).

37. *Id.* at 561.

38. J. MACK, *A PRINCE OF OUR DISORDER: THE LIFE OF T.E. LAWRENCE* (1976); E. ERIKSON, *INSIGHT AND RESPONSIBILITY* 201-08 (1964).

39. D. FEHRENBACHER, *supra* note 8, at 559.

40. *Id.* at 389-90.

41. *Id.* at 395, 396-98, 400-01.

42. *Id.* at 395, 401, 390, 396, 401-03.

43. *Id.* at 398, 395-96.

"horrible death" of his young wife, who one month before the decision burned to death when her clothing caught fire.⁴⁴ Compared with his Southern colleagues, Taney was less rational.

The Chief Justice's greater bitterness does seem in need of an explanation, and his psychological state seems relevant. Fehrenbacher gives us some tantalizing suggestions that add up to a portrait of Taney as the odd man out, who overcame his isolation by forcefully reiterating his own convictions and, if possible, riding roughshod over all opposition. Contemporaries complained of his "infernal apostolic manner," and one likened him to the Pope, "speaking 'ex cathedra, infallibly.'" ⁴⁵ His Roman Catholic and Federalist affiliations were unpopular with the majority of his countrymen. He was ugly and ill. What gave him the power to hold his audience was "the force of his reasoning and conviction." His great triumph had been as an executioner, killing the Bank of the United States for Andrew Jackson by removing government deposits from it. In 1856, he privately warned that the South was doomed unless it could completely suppress its internal dissent.⁴⁶ On the Supreme Court, unlike John Marshall, he failed to effect the compromises necessary for the Justices to agree on a single opinion: Multiple concurring opinions, as well as dissents, became common.⁴⁷

The events of 1855 could well have encouraged this well-developed tendency to inflexibility and insensitivity, especially in a case involving Southern honor. Since his love for the South had destroyed his daughter and wife, Taney needed some way of putting the family behind him or reaffirming the South's value. His selling the family home in Baltimore and never again visiting the site of his family's deaths was one way;⁴⁸ defending Southern claims and slavery more forcefully than before, another. As we shall see, this suggestion that inconsistencies between two strongly held beliefs impelled an intense response closely resembles Robert Cover's explanation for the tortured intensity of Northern judges and the proposal by Charles Sellers, Jr., that inconsistencies between slavery and American values promoted emotional upheaval among Southerners generally.⁴⁹

44. *Id.* at 679 n.2; 668 n.2; 305.

45. *Id.* at 649 n.40 (no date), 227 (1861).

46. *Id.* at 227, 557-58.

47. *Id.* at 228.

48. *Id.* at 559.

49. Sellers, *The Travail of Slavery*, in *THE SOUTHERNER AS AMERICAN* 40 (C. Sellers ed. 1960).

Perhaps because Fehrenbacher does not explicitly scrutinize professionalism, he does not ask, "Was there something about this judge's professional style that made him act so unprofessionally?" Hence his explanation is consistent with two different views. One assumes that professionals had the task of controlling an irrational or unjust public: It directs attention to conditions under which the public escapes from its leash, to Southern society rather than judicial character. In the case at hand, it absolves professionals from blame, seeing them as swept away by a rising emotional commitment to the Southern way of life, and finds the close study of professional values and personal character irrelevant. Though seeming to favor that view, Fehrenbacher does not completely deny the alternative: that professionals can be irrational and hold inconsistent values. From this perspective, the shifting balance within a judge's mind seems more important than external conditions. This internal approach is closer to Cover's analysis of Northern judges and Thomas Kuhn's approach to scientists.⁵⁰ Applied to the case at hand, it directs attention inwards, to the ways that judges internalize the values of their profession, not outwards to the society. A more rounded portrait of Taney, one with greater attention to the interaction between his psychic and public lives, might better suggest how a professional jurist could come to behave so unprofessionally, and therefore how strong professional commitments were. A great work of scholarship raises new questions and makes them ripe for further inquiry: Fehrenbacher's book fulfills these functions admirably.

What Fehrenbacher has done, in effect, is to write a professional's brief, reminiscent of the work of nineteenth-century antislavery lawyers like Montgomery Blair (Scott's counsel) or William Jay.⁵¹ Fehrenbacher makes a strong argument that adherence to neutral principles of construction and precedent would have freed Scott, while their violation by impassioned judges fastened the slaves' manacles more firmly. This view frees profes-

50. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* chs. 5-10 (2d ed. 1970).

51. On Blair, see D. FEHRENBACHER, *supra* note 8, at 281-82, 286-88, 295-301. Several passages in *The Dred Scott Case* make the same arguments as W. JAY, *INQUIRY INTO THE CHARACTER AND TENDENCY OF THE AMERICAN COLONIZATION, AND AMERICAN ANTI-SLAVERY SOCIETIES* (6th ed. N.Y. 1838) (1st ed. N.Y. & Boston 1835). Compare D. FEHRENBACHER, *supra*, at 360, on the three-fifths clause with W. JAY, *supra*, at 39-40; D. FEHRENBACHER, *supra*, at 343, on black citizenship with W. JAY, *supra*, at 41-42; D. FEHRENBACHER, *supra*, at 65, on the insertion of "white" in the Articles of Confederation with W. JAY, *supra*, at 42.

sionalism from its alleged service as a handmaid of the ruling class; instead, behaving according to the forms of a profession becomes a means of insuring integrity. Fehrenbacher's own manner of writing mirrors the book's content, and both argue the virtues of conservative judicial statesmanship. In more than one sense, *The Dred Scott Case* is a judicious book.

IV

Justice Accused denies that professionalism supported integrity. Cover's key concept is "the moral-formal dilemma": "the choice between the demands of role and the voice of conscience."⁵² Faced with a fugitive slave, he says, Northern judges needed to choose whether the moral rules served by antislavery were consistent with what Cover calls the formal considerations of judges; if not, and they generally were not, the formal considerations took precedence. Northern judges thus acted as had Captain Vere.

Cover gives the term "formalism" more sociological content than did Morton White in his classic study of Oliver Wendell Holmes and others, *Social Thought in America: The Revolt against Formalism*. White used the term to mean "abstractionism," or "logic, abstraction, deduction, mathematics, and mechanics" as opposed to "the rich, moving, living current of social life": an intellectual or attitudinal pattern.⁵³ In contrast, Cover's "formal principles" are less intellectual than sociological or anthropological: "the role of the judge," "the hierarchical character of the judicial system," "the standards of professional responsibility," and "the sense of the judicial craft."⁵⁴ For those, the term "professional" would seem as appropriate as the term "formal."

Northern judges, says Cover, invoked these formal, professional concerns more and more after the 1830s, when antislavery lawyers and their opponents increasingly forced them to consider the moral-formal dilemma. Judges tried to escape the dilemma by "elevation of the formal stakes" ("the tendency to choose the highest of possible justifications for the principle of formalism relied upon"—for example, that failing to return the slave would

52. R. COVER, *supra* note 4, at 6, 197-99.

53. M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 12, 11, 3 (2d ed. 1957).

54. R. COVER, *supra* note 4, at 197.

disrupt ordered American society).⁵⁵ They tried to escape by a "retreat to a mechanistic formalism" (interpreting ambiguous principles as "crystal clear demands from Constitution, Congress, and Supreme Court").⁵⁶ They tried to escape by "ascription of responsibility elsewhere" (proclaiming judicial helplessness and suggesting that other branches of government, or the people, bore the responsibility).⁵⁷ Each of these strategies relied on professedly neutral professional principles.

To explain why judges adopted formalism, Cover invokes a psychological model of cognitive dissonance, which I have implicitly adopted above in discussing Taney: the strain of believing in inconsistent propositions, such as fidelity to morality and to the legal system, or respect for the South and love for family.⁵⁸ This strain supposedly led judges to remove the contradiction by glorifying formalism, making it more mechanical, and blaming others. One of the most exciting parts of Cover's book is his close reading of appellate opinions for evidence of psychological stress of the sorts predicted by dissonance theory. True, the portraits of Joseph Story, John McLean, and others remain too flat to carry much conviction: looking at their lives outside their slave cases would put their characters into sharper perspective.⁵⁹ True, other psychological models would usefully supplement the dissonance one. Still, Cover's readings point the way to using legal opinions as psychological documents and deserve a more extended discussion than this review can give them.

In short, Cover and Fehrenbacher disagree. For the latter, professional formalism was yoked to morality: the moral-formal dilemma did not exist. For Cover, professional formalism allowed immorality: the moral-formal dilemma was crucial. Faced with incompatible views, we would do well to look more closely. Let us examine Cover's analogy to *Billy Budd*, the importance of natural law, and Southern judges' decisions in change-of-residence cases.

The Billy Budd Analogy

Although Cover's invocation of the *Billy Budd* analogy is

55. *Id.* at 199 & n., 229-32.

56. *Id.* at 199, 232-36, quotation at 233.

57. *Id.* at 199, 236-38.

58. *Id.* at 226-29 (relying heavily but not exclusively on L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957)).

59. R. COVER, *supra* note 4, ch. 13, (especially 238-58); app. at 260-67.

civilized, literate, stimulating, interdisciplinary, and hence admirable, is it on point? True, Melville himself raises the dilemma between conscience and law. He has Vere recognize "a troubled hesitancy, proceeding, I doubt not, from the clash of military duty with moral scruple," has the captain demand of his officers: "But do these buttons that we wear attest that our allegiance is to Nature? No, to the King," and makes him clinch his argument: "War looks but to the frontage, the appearance. And the Mutiny Act, War's child, takes after the father. Budd's intent or non-intent is nothing to the purpose."⁶⁰

But was Budd's intent "nothing to the purpose"? Someone like Fehrenbacher might argue that the court should promote the policy behind the Mutiny Act, not necessarily the literal words of that document. He might reject Vere's unsupported assertion that "War looks but to . . . the appearance." Vere and Melville agree that Budd was in fact innocent of intent to violate the policy of the Act, whose framers sought to punish mutineers. Since Budd was not a mutineer, respect for the legislature's policy would seem to require releasing him. In contrast, the authors of the Fugitive Slave Law intended to return escaped slaves. Since an escaped slave brought before Lemuel Shaw was in fact guilty of the act that legislators sought to punish, respect for the legislature's policy required Shaw to return him to his master. Of course there were important procedural questions about whether a particular defendant was in fact a fugitive and whether a state judge should help in the rendition process, and in a cosmic sense both Budd and the fugitives were innocent. But of the specific crime proscribed by the legislature, Budd was innocent and the fugitives guilty. Because of this difference, Vere's (and Cover's) naive dichotomy between nature and buttons, conscience and role, does not fully illuminate the dilemma of the antislavery judges. Those judges had more complex choices than Vere or Cover recognize.

Moreover, Vere justifies disregarding Budd's intent on grounds other than legal formalism. His sailors—"the people" as he calls them, using the same word that slaveholders often used for their slaves—"long molded by arbitrary discipline, have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate." Sailors in other warships in 1797 had mutinied; his sailors "would think that we flinch, that we are

60. H. MELVILLE, *BILLY BUDD: SAILOR (AN INSIDE NARRATIVE)* 110-12 (H. Hayford & M. Sealts eds. 1962).

afraid of them—afraid of practicing a lawful rigor . . . lest it should provoke new troubles.”⁶¹ In effect, Vere is arguing that the preservation of a ruling class, one that has made its subjects incapable of reasonable discourse and logical thinking, justifies undermining the legislature’s stated aims. Thus Vere’s ultimate justification is not in terms of legal formalism, but of protection for a privileged group. This orientation towards relationships of power in the society at large transcends the categories “formal” and “moral” and directs one away from professional values towards social relationships. In the hands of a historian like Eugene Genovese, this orientation towards external social relationships challenges psychological explanations. Slaveowners believed as they did, Genovese suggests, not because they were paralyzed by conflict among values, but because they accurately perceived external threats to their power.⁶²

Although Cover does not explicitly deny the importance of social power, neither does he think it important enough to discuss. His summation of Part III, “The Moral-Formal Dilemma,” maintains “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 antislavery bench to the call for liberty.”⁶³ “Troubled men in troubled times” is hardly specific, so the principal explanation comes down to “the juristic competence of the age.” By this term, Cover means the “jurisprudential tools of an epoch,” what Thomas Kuhn has identified and popularized as a paradigm: the assumptions underlying a profession that tell its practitioners what questions, answers, and procedures are legitimate.⁶⁴ In Cover’s words, tools “do not determine or generate specific answers to particular problems, but they do determine the universe of viable responses.”⁶⁵ Neither Kuhn nor Cover holds irrelevant the pressure on practitioners from the larger society, but both give much greater weight to assumptions within the professional group. A bit more willingness to look beyond the profession at the larger social context in which Captain Vere and Billy Budd lived would, I think, enrich Cover’s reading of Melville’s story. For Vere does not ultimately commit injustice for the sake of the law, as the moral-formal

61. *Id.* at 112-13.

62. E. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH* chs. 1, 10 (1965).

63. R. COVER, *supra* note 4, at 258-59.

64. *Id.* at 258; T. KUHN, *supra* note 50, at 10-22, 174-91.

65. R. COVER, *supra* note 4, at 258.

dilemma would have us believe: Vere takes an innocent life to preserve his own social group's power and privilege. Vere's dilemma is not exactly "the choice between the demands of role and the voice of conscience": his personal stake in an unjust social order informs his judicial actions. For Cover to have placed the moral-formal dilemma squarely in that context, instead of making ambiguous comments like "the King is but a symbol for a social order," would have made his analysis more penetrating and might have suggested a more complex model for antebellum judges.⁶⁶

Natural Law and Positive Law

In terms of Northern jurisprudence, the moral-formal dilemma appears most vividly in Cover's pages as a conflict between natural law and judicial positivism. Observing that explicit legislative enactments and judicial decisions supported slavery, and that natural law potentially challenged these positive laws in the name of universal principles of justice, Cover suggests that Americans' growing understanding of law as command instead of declaration of eternal principles shaped decisions into a proslavery configuration. Rulings enslaving blacks thus followed from the basic formal principles of the antebellum legal profession.

In the nineteenth century, as in the 1780s, Cover maintains, "the language of natural law came easily," and natural law was fundamentally antislavery.⁶⁷ Reflecting a tradition older than Justinian, English and American jurists commonly said that slavery was contrary to natural law; the American Revolution's libertarian rhetoric further encouraged American judges to invoke natural law in concrete cases.⁶⁸ As Cover points out, lawyers cited natural law when Massachusetts abolished slavery in the early 1780s.⁶⁹ In 1822, Joseph Story invoked natural law to uphold the American seizure of a French slave ship.⁷⁰ In a proslavery treatise on the law of slavery three decades later, T. R. R. Cobb admitted that most courts agreed that slavery was contrary to natural law.⁷¹ Even though the tradition of natural law had often accommodated slavery, as David Brion Davis has shown, there is little

66. *Id.* at 4.

67. *Id.* at 9.

68. *Id.* at 9-22.

69. *Id.* at 8, 44-50.

70. *Id.* at 101-02.

71. *Id.* at 98.

room to doubt that when nineteenth-century judges invoked natural law, they usually recognized that it told against bondage.⁷² Thus, any criticism of natural law at least undermined a basis for opposing slavery, and thereby strengthened the institution.

Along with respect for natural law, antebellum Americans accepted a sometimes antithetical principle: that law was the explicit, positive expression of lawmakers' will. Americans assumed that law emanated from the sovereign people, in constitutional conventions and legislatures; written constitutions and laws limited judicial discretion.⁷³ Cover lucidly suggests the generally accepted antebellum relationship between natural and positive law: although natural law existed independently of human action and declared what was just, it took on legal authority only as positive lawmaking action adopted it. Useful as natural law might be as a standard for judging legal rules, it remained subordinate to positive expressions of lawmakers' wills, such as constitutions, statutes, and precedents.⁷⁴ With some reason, Cover argues that this respect for positive legislation, the philosophical attacks on natural law by David Hume, Edmund Burke, and Jeremy Bentham, and the political attacks on judicial discretion, weakened respect for natural law.⁷⁵ "Gradually, from 1780 to the eve of the Civil War, the natural law condemnation of slavery came to mean not a common cultural tradition but a personal (or at least, party) preference."⁷⁶

Since positive legislation quite frequently supported slavery, Cover's dichotomous formulation suggests looking at efforts to challenge positive law with natural law. Cover discusses only two groups which made that challenge. Followers of the abolitionist William Lloyd Garrison argued that judges had to be faithful to professional roles, but should resign if those roles required immoral decisions. This advice was the special case of the Garrisonian prescription that the moral man should withdraw from immoral government.⁷⁷ Cover's second group is one that he felicitously names "constitutional utopians"—Lysander Spooner, Alvan Stewart, and others—who maintained that "the Constitution

72. D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823*, at 262 (1975); D. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 69-72, 94-97, 109 (1966).

73. R. COVER, *supra* note 4, at 25-28, 33-35.

74. *Id.* at 34-35.

75. *Id.* at 22-25, 140-47.

76. *Id.* at 30.

77. *Id.* at 150-54.

outlaws slavery, even in Alabama."⁷⁸ They defended this conclusion by bizarre readings of law: Stewart, for example, argued that the Constitution legalized only slavery that resulted from presentment by a grand jury and conviction by a petit jury. As Cover rightly observes, positions like this were eccentric, their arguments depending on "the haphazard ingenuity of rule and phrase manipulation." The antislavery alternatives that Cover recognizes, thus, were bleak: Judges could resign, or they could enforce "natural law, preferably through a forced reading of positive law instruments, but if need be, as an act of naked power." Not surprisingly, "neither of these solutions promised widespread acceptance by the men who sat on the bench."⁷⁹

Cover offers paired alternatives: positive law or natural law, methodological normality or eccentricity, the formal horn of the moral-formal dilemma or the moral horn. Since judges preferred to be normal rather than eccentric, they embraced positive law and formalism, rejecting natural law and morality. But of course they still felt the power of what they had rejected. Faced with the mutual incompatibility of natural law and legal professionalism, Cover affirms, they felt guilty, enslaved the fugitives, and justified their actions in shrill tones.

Like most dichotomies, this is plausible but not fully convincing. It seems too ready to identify natural law and the constitutional utopians as the only alternatives to judicial enslavement. In fact, as Cover too briefly notes, there was another alternative, one close to Fehrenbacher's position: that the Constitution prescribed only a limited federal support of slavery. Sticking close to texts and neutral principles of construction, judges could have read the fugitive-slave clause as forbidding state interference with slave extradition, rather than as requiring state or federal aid to slave catchers; the commerce clause could have authorized regulation of the interstate slave trade; slavery need not have been allowed in the District of Columbia. The group that William Wiecek identifies as "moderate constitutionalists" criticized the federal government's policy of defending slavery beyond minimal constitutional requirements, policies for which Cover provides an elegant phrase, "gratuitous complicity with slavery."⁸⁰ The

78. *Id.* at 154-58, quotation at 156.

79. *Id.* at 157-58, quotations at 157, 158, 158.

80. W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848*, at 15-16 (1977); R. COVER, *supra* note 4, at 155; see D. FEHRENBACHER, *supra* note 8, at 40-43, 37.

"moderate constitutionalists" sought to free the government from that relationship.

Cover dismisses this argument after a half-paragraph discussion of one of its prominent exponents, William Jay (1789-1858), by showing that Jay's policies would not directly have abolished slavery in any state, since they admitted the right of a state to control its own institutions. While the criticism of this "federal consensus," as Wiecek calls it, is accurate, Cover does not apply its criterion of effectiveness to the Garrisonians or the constitutional utopians. A parallel treatment of Jay and his colleagues would explicate and criticize their ideas. This course of action would have allowed Cover to consider whether a position "well within the mainstream of legal thought of the day" could criticize slavery without invoking natural law, or at least without invoking it in the manner of the constitutional utopians, and what contribution such criticism had on judges.⁸¹ Cover's account of other positions is so stimulating that the absence of a full-scale treatment of this one is a regrettable loss, especially since Fehrenbacher's book is in effect an argument along Jay's lines. Failure to consider the moderate constitutionalist position makes the moral-formal dilemma more plausible, but raises doubts about that dilemma's adequacy as an explanation of judicial behavior.

What we might call the Jay-Fehrenbacher position is a commonplace in areas of antebellum law outside slavery. Creative judicial interpretation of public policy, without reference to natural law, seems to have been the norm in cases involving economic development. In that area, acceptance of law as legislative command did not prevent judges from creatively reshaping legislative mandates. For over thirty years, legal historians of the antebellum years have been uncovering efforts to use law to promote socially desired changes in economic development, criminal law, and elsewhere. As Morton Horwitz says, "Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law."⁸² Rather, judges saw their actions as parallel with the legislature's in attaining such ends as economic development. Roger Taney's decision favoring new entrepreneurs in the *Charles River Bridge* case was typical in its explicit use of

81. R. COVER, *supra* note 4, at 155.

82. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 30 (1977). See, e.g., O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (rev. ed. 1969); J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

policy considerations.⁸³ Policy arguments bulked large in numerous decisions of Lemuel Shaw and other antebellum judges freeing railroads from liability to their injured employees, minimizing damage awards against new spheres of transport, and promoting ideas of contract, the market, and what Willard Hurst calls "the release of energy."⁸⁴ Antebellum courts, especially before the 1850s, seem to have followed the legislature's definitions of public policy: Although judges sometimes reached their conclusions before legislators acted, and often adjusted competing policy claims, they rarely ruled state laws unconstitutional.⁸⁵ As Cover says in another context, courts were sensitive, "not only [to] what the legislature has said on a subject, but also what it has intimated by nonaction or by action in related areas."⁸⁶ In economic areas, antebellum judges seem to have been willing to scrap natural law with barely a second glance; since there seemed few conflicts within the judges' own minds between formal principles and natural law, they did not feel guilty. Judges could ignore natural law and embrace blatantly positivist principles without succumbing to judicial formalism. If positivist principles did not lead to formalism and guilt in economic areas, can they be blamed for creating formalism and guilt in another area?

In slave cases, the direct evidence that judges felt guilty, let alone that they felt guilty because they accepted both formalism and morality, is slim. While Cover presents some evidence of this guilt and internal tension, he rightly admits that "[t]he evidence for a sense of guilt is admittedly indirect and uncertain . . . [and] somewhat ambiguous."⁸⁷ Evidence that cognitive dissonance escalated the formal stakes "must rest upon a tentative position consistent with all our evidence, but by no means proven by it."⁸⁸ Of the four judges that Cover examines, he says that "Joseph Story and his work may or may not exemplify the model constructed in this chapter";⁸⁹ Lemuel "Shaw's opinions, though troubled, do not give as clearly evidenced recog-

83. 36 U.S. (11 Pet.) 419 (1837). A convenient compilation is S. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971); a brief narrative treatment is R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 65-67 (1948).

84. J. HURST, *supra* note 82, at 3-32; see M. HORWITZ, *supra* note 82, chs. 1-7; L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* chs. 9, 10, 13, 14, 16 (1957).

85. M. HORWITZ, *supra* note 82, at 259.

86. R. COVER, *supra* note 4, at 105; see also M. HORWITZ, *supra* note 82, at 93.

87. R. COVER, *supra* note 4, at 208 n.

88. *Id.* at 231-32.

89. *Id.* at 243.

dition of an either-or dichotomy as do those of McLean";⁹⁰ Joseph Swan decided one of his two slave cases in the slave's favor without apparent anguish, while the other was so atypical—with a background of rallies promoting civil war and gubernatorial threats of using troops, plus a Supreme Court decision very recent and "squarely on point" against freedom—that Swan had more to be anguished about than other Northern judges.⁹¹ The model does seem to fit John McLean, who was related by marriage to some abolitionists and politically supported by others.⁹² It is easy to see how a man in such a position could feel pulled in two directions, not so much by his inner commitment to two incompatible principles as by his loyalties to his profession and to his family and political supporters. Even here, though, the judge's most strenuous arguments were addressed to juries, where Cover says "there is much greater reason to discount them as reflective of a personal problem and more reflective of a purpose of persuading others who have moral doubts," or in response to abolitionist lawyers, where similar qualifications would obtain.⁹³ Where psychological nuances are concerned, the impression a passage leaves on a trained reader may be more accurate than an assemblage of exact quotations, and one must respect Cover's careful readings of appellate opinions. Still, there is room for a deeper exploration of judicial opinions to test Cover's conclusions about the tension between positive and natural law.

Two cases decided by Lemuel Shaw in Massachusetts suggest very preliminary lines of inquiry: *Commonwealth v. Aves* (1836) and *Latimer's Case* (1842). The cases are not devoid of support for Cover's position. In *Aves*, Shaw freed a slave brought into Massachusetts on a temporary visit; in *Latimer*, he refused to release an accused fugitive slave from custody.⁹⁴ Both cases seem to juxtapose natural right and state policy: in *Aves*, both urge freeing the slave; in *Latimer*, natural right urges freedom, while congressional policy urges enslavement. In *Aves*, according to Cover, Shaw relied on both natural right and the positive law of Massachusetts; *Latimer* required him to "ignore natural law."⁹⁵ At the *Latimer* hearing, Shaw said "in substance," ac-

90. *Id.* at 251-52.

91. *Id.* at 253-54.

92. *Id.* at 246-49.

93. *Id.* at 260, 247.

94. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836), discussed in L. LEVY, *supra* note 84, at 62-68; *Latimer's Case*, 5 L. Rep. 483 (Mass. 1843), discussed in L. LEVY, *supra* note 84, at 78-85.

95. R. COVER, *supra* note 4, at 94, 170.

cording to William Lloyd Garrison, that

an appeal to natural rights and the paramount law of liberty was not pertinent! It was decided by the Constitution of the United States, and by the law of Congress, under that instrument, relating to fugitive slaves. These were to be obeyed, however disagreeable to our own natural sympathies and views of duty! . . . By the Constitution, the duty of returning runaway slaves was made imperative on the free states, and the act of Congress . . . was in accordance with the spirit of that instrument.⁹⁶

Such opposition between duty and nature seems to confirm Cover's reading.

Yet the two cases could be read to minimize the opposition of natural and positive law, and hence to minimize the conflict among the values internalized by a particular judge. In *Aves*, Shaw did not ground freedom just on natural law, but on article I of the Massachusetts Constitution's Declaration of Rights, which he said was "precisely adapted to the abolition of negro slavery."⁹⁷ He construed the fugitive slave clause of the Federal Constitution strictly, in the manner of Jay or Fehrenbacher, saying that it was intended "to fix as precisely as language could do it, the limit to which the rights of one party should be exercised within the territory of the other."⁹⁸ Indeed, Shaw held that all nonfugitive slaves entering Massachusetts "become free, not so much because any alteration is made in their *status*, or condition, as because there is no law which will warrant, but there are laws . . . which prohibit, their forcible detention or forcible removal."⁹⁹ Although Shaw referred to natural law, his holding rested on positive law. The same approach, six years later, found positive law—there, the United States Constitution and the Fugitive Slave Law—opposing the fugitive's claim. Unlike Cover's account, which fails to note that Shaw referred to specific Massachusetts constitutional and legal provisions, this interpretation makes Shaw a consistent champion of positive law: he need not have balanced natural and positive law in his own mind as legitimate grounds of decision. Why, then, in the *Latimer* hearing did he speak so passionately of natural rights? Not necessarily because he felt guilty, but because Garrison, who was present, interrogated him about natural rights. The passage quoted above from

96. L. LEVY, *supra* note 84, at 81 (quoting *The Liberator*, Nov. 4, 1842).

97. 35 Mass. (18 Pick.) at 210, 217; see L. LEVY, *supra* note 84, at 65.

98. 35 Mass. (18 Pick.) at 221; see L. LEVY, *supra* note 84, at 66.

99. 35 Mass. (18 Pick.) at 217; compare the headnote at 193 stating that a slaveowner bringing a slave into Massachusetts "cannot restrain the slave of his liberty during his continuance here, and carry him out of this State against his consent."

the *Liberator* sounds like an answer to a question, and the hearing was in such informal surroundings (the jailor's parlor) as to encourage conversation.¹⁰⁰ We need more evidence than Cover provides before we can reject the hypothesis that judges' comments about natural law were arguments addressed to the public and did not reflect judges' interior doubts. As noted above, even Cover admits that the evidence for guilt is indirect and ambiguous; he notes that judges' appeals to citizens to obey the laws might not reflect guilt, but "may be at least equally attributable to the need to convince hostile antagonists."¹⁰¹

Cover's provocative questions require answers. On those answers may depend our interpretation of the last century-and-a-quarter of American jurisprudence, not to mention at least some of the jurisprudence to come. If the moral-formal dilemma, the tension between the moral commitment to natural law and the formal commitment to the profession, largely determined judges' actions, these actions would become less problematic as judges' respect for the profession grew and as the power of natural law waned. In effect, increasing professionalization would desensitize lawyers and judges to the moral claims of natural law. But if antebellum judges' actions flowed from their respect for legislative policy, not their own guilt, increasing professionalism might not directly impair moral judgment. Indeed, such professionalism might help undermine the legitimacy of legislatures, leaving professions as the apparent best protectors of morality.

Extending Cover's analysis would help clarify these points. Although most of the time he favors the cognitive-dissonance/guilt explanation, he does occasionally suggest that judicial deference to legislative positivism was a formal principle, hence opposed to natural law. That position, though, seems to make guilt unnecessary and cognitive dissonance superfluous. The ambiguities are tolerable for Cover's purposes, but if we are to put antebellum law into the context of professionalism, we will need to weigh more carefully the contribution of the internal—judges' own world views, their own mental loyalties, and especially their values and commitments to methods of decision-making¹⁰²—with the external—the relation between judges and

100. L. LEVY, *supra* note 84, at 81.

101. R. COVER, *supra* note 4, at 208 n.; *cf. id.* at 260 (reasonable to discount statements made to jury as being "reflective of a purpose of persuading others who have moral doubts").

102. *Cf.* T. KUHN, *supra* note 50, at 182-87 (shared commitments, values, symbolic generalization, and exemplars create unanimous judgment among a community of specialists).

the larger society. We cannot be sure yet that the conflict within the legal profession between natural law and positivism made quite the difference that Cover has suggested. Yet the moral-formal dilemma and cognitive dissonance may well constitute part of a more complex account of antebellum judicial behavior and the morality of professionals.

Change-of-Residence

Although most of Cover's book deals with Northern judges, he finds the moral-formal dilemma south of the Mason-Dixon line as well. In both North and South, he says, judges had "a tendency . . . to speak of eternal principles of right" and "a concomitant tendency to reinforce their decisions by speaking of state policy." In the free states, natural right and public policy "led to the same conclusions, while in the South they required a delicate process of adjustment."¹⁰³ He describes that adjustment for the important class of cases, like *Dred Scott's*, in which a slave, with the master's permission, went to a free state, returned to a slave state, and later sued for freedom. Cover detects a change: Until the late 1840s or the 1850s, Southern courts relied on natural law and freed such slaves; later, a combination of exasperation at abolitionists and the practice of judicial professionalism made judges reverse themselves and consign slaves to bondage.

In the earlier period, Cover maintains, Southern courts held that slavery was so repugnant to natural law that it could exist only by explicit, positive law; so slaves were freed when they, or their masters, established residence in a free state. Once free, they remained free even if they returned to their former home, for no slave state's law allowed the enslavement of free Northerners. Accepting the premise that slavery was contrary to natural right was basic: "In the Kentucky court's view [in *Rankin v. Lydia*], we find again the idea of a preexisting natural law in favor of freedom that is always subject to the superior authority of the sovereign, but that governs for want of the exercise of such authority."¹⁰⁴ This natural law approach "was generally reversed in the last ten or fifteen years before the Civil War."¹⁰⁵

What overthrew natural law? Cover accepts as "the best description of the changeover and its rationale" a Note in the *Columbia Law Review* in 1971, "American Slavery and the Con-

103. R. COVER, *supra* note 4, at 93-94.

104. *Id.* at 96.

105. *Id.* at 97.

flict of Laws."¹⁰⁶ That Note credits "the growth of sectional antagonism" with some responsibility for the attack on natural law, and certainly the Missouri Supreme Court's statement in *Dred Scott* bears out this political and emotional dimension:

Times now are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstance, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.¹⁰⁷

But at the opposite pole, the Note credits judicial professionalism in the works of Joseph Story with dealing powerful blows at supraplural obligation. Story's *Commentaries on the Conflict of Laws* (1834) was one of many treatises he produced whose very existence helped build the legal profession and whose contents influenced judicial decisions. Story emphatically affirmed the unconstrained sovereign power of each state to decide what laws of other jurisdictions, if any, it would recognize: "[W]hatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter. . . ."¹⁰⁸ No overriding moral power, Story said, could command a state to recognize free or slave status achieved in another jurisdiction. While this doctrine liberated some slaves brought to the North, it seemingly permitted Southern courts to refuse to recognize the emancipatory effect of residence in free territory.¹⁰⁹ Thus the concept of a sophisticated professionalism combined with irrationality to strengthen the bonds of slavery.

This interpretation gains strength from the occasions on which Southern judges quoted Story. The highest court in Kentucky, for example, cited Story in support of the proposition that "it pertains to the sovereignty of every independent State, to determine for itself, and according to its own interests and policy, in what cases and to what extent the foreign law shall be adopted as a part of its own. . . ."¹¹⁰ Cover and the *Columbia Law Review*

106. *Id.* at 285 n.34 (citing Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 92-98 (1971)).

107. *Scott v. Emerson*, 15 Mo. 576, 586 (1852), quoted in D. FEHRENBACHER, *supra* note 8, at 264, and Note, *supra* note 106, at 97. The text as printed corrects minor errors of transcription in the Note and D. FEHRENBACHER, *supra* note 8.

108. J. STORY, COMMENTARIES ON THE CONFLICTS OF LAWS § 23, at 24 (1st ed. Boston 1834), quoted in R. COVER, *supra* note 4, at 84.

109. Note, *supra* note 106, at 93-96.

110. *Collins v. America*, 48 Ky. 565, 571 (1849).

Note certainly leave one with the impression that, about the time of the Mexican War, Southern courts changed their interpretations away from supraprimate natural law to state sovereignty. For this shift, legal professionalism bore considerable responsibility.

What overthrows this interpretation is Fehrenbacher's demonstration that most Southern courts did not change their position. One need not postulate an abandonment of natural law in order to explain continuity. What happened, Fehrenbacher maintains and independent reading of the cases cited in the *Columbia Law Review* confirms, is that the cases of the 1850s were factually distinguishable from those of the 1820s and 1830s. The same doctrines that freed earlier slaves enslaved later ones. The early cases involved slaves who established, with their owners' consent, permanent residence in the North; the latter dealt with slaves whose masters took them north for sojourns only, always intending to return to the slave state. In both periods, slaves were freed where change of permanent residence occurred, and not freed where domicile remained in the slave state. As Fehrenbacher adds, by the 1850s most masters knew enough about Northern law not to try taking their slaves north for permanent residence; the *Dred Scott* case, though decided in the 1850s, was based on events from the 1830s, and thus was something of an anachronism.¹¹¹

To support the claim of "abrupt reversal,"¹¹² the author of *American Slavery and the Conflict of Laws* cites the *Dred Scott* case and three other cases; only *Scott* supports that reading. The other three cases were from Kentucky:

In 1848, the [Kentucky appeals] court . . . had held that a former slave who had lived in Ohio for two years was free and his return to Kentucky would not cause his former status to reattach. A year later, however, in *Collins v. America*, the court refused to declare free a slave who had spent an indeterminate period of time in a free state. . . . Later, the same court refused to recognize the validity of a declaration of freedom made on a habeas corpus proceeding in Pennsylvania. . . .¹¹³

But a close reading of the cases shows that they differed as residence differs from sojourn. In the 1848 case, *Davis v. Tingle*, the plaintiff resided two years in Ohio, and the court held, "By his residence in Ohio, the plaintiff became free, and being once free, his return to this State did not make him again a slave."¹¹⁴ In the

111. D. FEHRENBACHER, *supra* note 8, at 55-61.

112. Note, *supra* note 106, at 97.

113. *Id.*

114. *Davis v. Tingle*, 47 Ky. 539, 545 (1848).

1849 case, the slave remained in Ohio "a short time, (about two weeks or less,)" on one occasion, and "a few days" on another. Although the court cited Story in maintaining that only Kentucky law governed whether to free the alleged slaves, it retained the holding of *Davis*: a sojourning slave remained a slave, a change of permanent residence produced freedom.¹¹⁵

If America [the slave] was sent to Ohio as her home . . . or for the purpose of being free, or under any circumstances which should, in reason and justice, identify her with the institutions of Ohio, she became free by operation of the fundamental law of that State, as soon as she entered its territory. And we perceive no principle of policy, or of public interest, or of justice, which would require the maintenance of the owner's right in this State, upon her subsequent return, under the impulse of her own free volition.¹¹⁶

The last case, *Maria v. Kirby*, involved a slave staying three or four days on a "trip of pleasure," and even those days may have been due to an unexpected delay.¹¹⁷ Only the Missouri Supreme Court in the *Dred Scott* case reached a conclusion different from its own prior case law, which had upheld the distinction between residence and sojourn. Fehrenbacher's analysis of that case suggests that special political pressures surrounding the defeat of Senator Thomas Hart Benton contributed to the unique Missouri result.¹¹⁸

Thus the alleged overthrow of natural law, the abrupt change to ignoring out-of-state emancipation, is not proved and, in fact, seems not to have generally happened. Fehrenbacher's conclusion is unambiguous: "Except in Missouri, as a result of the *Dred Scott* case, there appears to have been no decision of a Southern appellate court that denied a suit for freedom in a clear-cut case of permanent residence on free soil."¹¹⁹ But as the careful qualifications in that conclusion suggest, Fehrenbacher's account is not quite definitive. He is technically correct, for example, in discounting a Mississippi case, *Mitchell v. Wells*, on the ground that it was not a suit for freedom: The court refused to let a slave who had moved to Ohio for permanent residence sue in Mississippi to recover a legacy. But the court declared that it would not recognize the change of a slave's status outside Mississippi, and the

115. *Collins v. America*, 48 Ky. 565, 565-66, 571-72, 572-73 (1849).

116. *Collins v. America*, 48 Ky. 565, 575 (1849).

117. *Maria v. Kirby*, 51 Ky. 542 (1851).

118. D. FEHRENBACHER, *supra* note 8, at 258-60, 262-65.

119. *Id.* at 60.

natural inference from that statement is that the court would not have recognized out-of-state emancipation in a suit for freedom.¹²⁰

A more searching question would not be whether or not Southern courts changed, but whether legal professionalism contributed to whatever happened. Even though the Missouri and Mississippi courts quoted Story on sovereignty,¹²¹ the dissenting opinions were the more professional. In Missouri, Judge Hamilton Gamble reviewed the state precedents and showed that they compelled a decision that residence, but not sojourn, in free territory brought freedom; the Missouri court's majority responded with political arguments about "the dark and fell spirit in relation to slavery."¹²² In *Mitchell v. Wells*, the Mississippi dissenter drew careful distinctions between emancipation with and without a will and affirmed the validity of several previous state court decisions.¹²³ His opponents constituting the court's majority challenged those decisions, blurred his distinctions, and proclaimed that public policy was not to be found solely from legislatures and constitutions, but also from "the manners, customs, and habits of our people; our climate, soil, and productions."¹²⁴ Here at least, professionalism promoted emancipation. There is some possibility that a deeper investigation would show that Joseph Story's professionalism contributed to enslavement, but the easily accessible evidence suggests that it did not. Both analyses would be refined by inquiring about the effects of professionalism, but the clear import of Fehrenbacher's discussion is that professionalism supported the morally preferable position.

V

Neither Cover nor Fehrenbacher claims to have solved the problem of professionalism: each author tends to assume his vision of the concept, rather than articulating and examining it directly. But students of American law, historians and practitioners alike, may take these two works as a point of departure for study more closely focussed on the relations between professions and morality.

One assumption that the two authors share is that irrational-

120. *Mitchell v. Wells*, 37 Miss. 235, 249 (1859).

121. *Scott v. Emerson*, 15 Mo. 576, 583 (1852); *Mitchell v. Wells*, 37 Miss. 235, 251 (1859).

122. *Scott v. Emerson*, 15 Mo. 576, 586 (1852), *quoted in text at note 107 supra*; see D. FEHRENBACHER, *supra* note 8, at 264.

123. 37 Miss. 235, 269-71, 266-69 (Handy, J., dissenting).

124. 37 Miss. at 257, 251 (majority opinion).

ity promoted aggression. Cover adopts essentially the same psychological model as did Charles Sellers, Jr., in his influential article, *The Travail of Slavery*: Conflict among values produces confusion that is resolved through aggression.¹²⁵ Cover's "moral-formal dilemma" draws on more recent social psychologists than Seller's "fundamental moral anarchy," and they describe different groups of antebellum Americans, but Cover would share Sellers's comment: "[I]t was the very conflict of values, rendered intolerable by constant criticism premised on values [they] . . . shared" that produced the changes each author describes.¹²⁶ Cover's Northern judges resemble Sellers's Southerners, and the combination recalls David Donald's description of antebellum Americans:

increasingly unable to arrive at reasoned, independent judgments. . . . Huddling together in their loneliness, they sought only to escape their freedom. Fads, fashions, and crazes swept the country. . . . Hysterical fears and paranoid suspicions marked this shift of Americans to "other-directedness." Never was there a field so fertile before the propagandist, the agitator, the extremist.¹²⁷

Fehrenbacher, too, finds emotionalism and irrationality. "Anger, wounded pride, and a half-suppressed panic" were pushing Southerners in the 1850s "to the edge of hysteria." Later, "the Southern mood" becomes "fearful, angry, and defiant."¹²⁸ The presence of an antislavery minority "heightened the feeling of insecurity" among Missouri slaveowners. The sectional conflict became "an independent emotional force."¹²⁹ Thus the two books implicitly carry on the task set by A.E. Keir Nash nearly a decade ago: using appellate opinions to test the interpretation of Sellers (and, inferentially, Donald) that conflicts of values produced emotion and aggression. If judges insulated by long terms and high prestige evinced value-conflict and aggression, ordinary Americans a fortiori might be presumed to have done so; if not, either ordinary Americans were more humane than legend claimed, or judges' professional roles promoted humanity.¹³⁰ Neither book directly addresses Nash's problem; both presume its relevance. The two authors come close to recapitulating divergent

125. Sellers, *supra* note 49, at 67-69, 67 n.

126. *Id.* at 67; R. COVER, *supra* note 4, at 226-29.

127. D. DONALD, *LINCOLN RECONSIDERED* 229-30 (enlarged ed. 1961).

128. D. FEHRENBACHER, *supra* note 8, at 165, 337.

129. *Id.* at 258, 508.

130. Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197, 237-40 (1970).

accounts of McCarthyism in the early 1950s. Just as Michael P. Rogin blamed the phenomenon on fear, and some calculation, among political elites, Cover locates the relevant irrationality among judges, especially antislavery judges. Somewhat as Richard Hofstadter blamed McCarthyism, in large part, on rootless status-strivers and "the less-educated members of the middle classes," Fehrenbacher locates the relevant irrationality among Southerners in general, and especially voters in Missouri (although he makes Southern congressmen, senators, and newspaper editors emotionally involved as well).¹³¹

It would be reassuring to conclude that professionalism withstood irrationality, from whatever source derived, and Fehrenbacher does make a strong case that the dissenting Justices did resist the emotionalism of Missourians and of Taney. There is independent evidence, as in *Mitchell v. Wells*, to the same effect. As we move into the 1980s, we will often find ourselves in discussions about the moral effects of professionalism. Anyone who doubts the relevance of an academic monograph of over seven hundred pages to such immediate concerns should ponder Fehrenbacher's book. By making a strong case that fearless professional independence was the best support of antislavery conscience, it offers a powerful defense of professionalism in the contemporary world. The deeper one probes *Justice Accused*, the less persuasive it appears. The deeper one probes *The Dred Scott Case*, the more persuasive it appears. Since the acids of relativism have eaten away so many moral conventions, it may be that sophisticated professional standards are the best insurance that justice be done and conscience honored.¹³²

None of this denies that the interdisciplinary breadth and excitement of Cover's approach may yield valuable results. At the moment, his major formulations strike this reviewer as brilliantly suggestive rather than persuasive, but more detailed work might make them convincing. Developing the social interpretation of *Billy Budd* would illuminate both books, for Fehrenbacher emphasizes emotion so much as a foil for professionalism that he masks the elements of economic and social rationality behind Southern whites' defense of slavery. Eugene Genovese may be

131. M. ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* 31, 215-17, 248-56 (1967); R. HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 51, 44 (1965); see also *id.* at 83.

132. For a concise statement of the problem, see E. GOLDMAN, *RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM* 345-46 (rev. ed., abridged, 1956); for an application to historians, see J. HEXTER, *DOING HISTORY* 77-106 (1971).

right in seeing the masters as extremely rational defenders of an economic and social system that "was the foundation of a special civilization imprinted with their own character,"¹³³ rather than mere irrational, emotionally crippled victims. Perhaps neutral professional standards of construction and craft could withstand irrationality, but not rationality; could withstand the storms of psychology but not the cold wind of economics and social relations. To the extent that these economic and social concerns imply that poorly educated judges from lower socioeconomic backgrounds should have been less emancipatory than educated aristocrats, they are not entirely consistent with Nash's preliminary findings that deny that "red-neck authoritarianism" followed Jacksonian democracy.¹³⁴ Still, invoking these harsher realities might illuminate some areas now left obscure. Granting that antebellum judges favored legislative command over natural law, for example, why did they interpret public policy so imaginatively in economic cases and so narrowly in slave cases? Did they act because they, like Vere, benefitted from existing social arrangements, or because those arrangements, including whites' domination of blacks in all parts of the country, warped their vision?

Here as elsewhere, subtler and more extensive readings of the evidence are required. More studies of the caliber of Fehrenbacher's and Cover's, posing questions sharply and digging further into the mass of relevant materials, should improve our knowledge of the problems they raise. *The Dred Scott Case* and *Justice Accused* remind us that the relations between professionalism and integrity remain incompletely charted.

133. E. GENOVESE, *supra* note 62, at 270.

134. Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64, 94-96, quotation at 96 (1970).