2005

The Lawless Adjudicator

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Georgetown Public Law and Legal Theory Research Paper No. 11-57

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26 Cardozo L. Rev. 2253-2261 (2005)
February 2010

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THE LAWLESS ADJUDICATOR

Robin West*

I would like to thank the Cardozo School of Law for hosting this lovely event honoring the work of Richard Weisberg, and particularly his text, The Failure of the Word.¹ I am honored and quite touched and humbled by the invitation to address this distinguished group of scholars. To speak personally for a moment, The Failure of the Word opened many doors for me. It showed me a sort of writing and scholarship about law and justice and the great questions of jurisprudence that I did not know existed: the scholarly attempt, that is, to find in canonical works of literature philosophical insights about the meaning of law and the promise of justice.² It also suggested, obliquely at the time, a way of responding to deconstructive challenges to the coherence of law, to the justice of Codes, and to legalistic virtues, without resorting to a sort of soul-sucking authoritarianism.³ Finally, and most specifically, it built a literary and legal case for the homicidal criminality of an adjudicator, Captain Vere, who for the most personal and perverted reasons betrays rather than upholds a legal text, and does so toward the end of murdering—through a purportedly legal execution—an innocent man.⁴ All of these projects—the call to return to the literary text, the defense of legalism (or as Weisberg forthrightly puts it in his paper, his “reverence for law”⁵), and lastly the “Bill of Particulars” he brings against Vere, the lawless adjudicator—went deeply against the grain of two thousand plus years of Western thought, and certainly the modern and postmodern legal academy. I will comment in detail only on the last of these contributions: the characterization of Vere as a lawless adjudicator. Then I will say

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2 Failure of the Word does this by example. Weisberg later argued directly for a return to the literature in RICHARD H. WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE (1992).
3 Again, Failure of the Word does so by example; Weisberg later argues for this directly, in his important historical work on Vichy France. See RICHARD H. WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE (1996) [hereinafter VICHY LAW].
4 FAILURE OF THE WORD, supra note 1, at 147-70.
something very quickly about Weisberg’s reverence for legalism and justice, argued for indirectly in The Failure of the Word, and much more explicitly here.\(^6\)

First, on the “lawless adjudicator.” The question I want to pose is this: Why is it so hard for the legal academy—and the legal profession—to come to grips with the bare logic of the charge, much less the case, that Vere acted lawlessly, and therefore criminally, and indeed murderously, when he willfully distorted the governing law, so as to execute Billy? Why has this quite specific legal claim not received more of a hearing? Is it because Weisberg was not sufficiently considerate in his communication of this idea? On first blush that seems implausible: It is one thing, after all, to argue syllogistically that Claggart is Christ, that Claggart is a villain, and that therefore Christ is a villain—one can see why that claim may require considerate communication\(^7\)—but the indictment of the fictional Vere in a nineteenth century novella? Why has it proven so hard for the academy to hear Weisberg’s claim that Vere is a murderer? Here is the syllogism: Vere was charged with the duty to uphold the law, he betrayed the law and his duty to apply it in order to execute an innocent man, and he did it knowingly, intentionally, and with plenty of malice aforethought, and for the most profoundly personal, political reasons. Therefore, Vere is a lawless adjudicator, a dissembler, a criminal, a murderer. Does that straightforward legal argument—that an adjudicator is a man to whom the power to declare what the law is has been delegated; that an adjudicator might be a criminal, and might achieve criminal ends, through dissembling, misrepresenting, or perverting legal texts, and thereby through breaching a trust—itsel itself require considerate communication? Has our faith in adjudication reached such absurd heights that the lawless or criminal adjudicator has become an unthinkable oxymoron? Or, have our expectations dropped so low that the phrase “lawless adjudicator” has become redundant, so self evident, that the presentation, the claim, that an adjudicator is lawless, is just a trite, banal, and unnecessary restatement of a mode of being always and already present in courts of law?

Briefly, I think, the answer is “yes” to both these questions. The assertion that an adjudicative claim is both false and politically motivated is inevitably met these days, in the legal academy, first, with a two-fold shrug: the first shrug, “Oh, who’s to say what’s ‘false’ anyway,” and the second shrug, “Political? So what?—of course it is, are not they all, are not we all, how could it possibly be otherwise?” That double-shrug is then followed with a statement of alarm, or at least

\(^6\) Id.

\(^7\) Id. at 2225.
consternation, that betrays perhaps a too-fond identification with the bench: “Surely, an adjudicator can't be lawless simply for putting forward even a bad legal argument.” So, what happens against such background presuppositions in the legal academy—a background that combines the deepest imaginable faith in adjudicative wisdom with the broadest conceivable denial of the possibility of fidelity to law—to the Weisbergian claim that an adjudicator is lawless? What follows, I think, is that, except for in Richard Weisberg's scholarship, Captain Vere and all of his lawless co-conspirators on the bench get off scot-free.

But again, how did we get to this state of affairs? Why are lawyers and legal academics so oddly inattentive to the problem of the lawless adjudicator? Weisberg suggests an answer in this paper. Vere's defenders, he suggests in an aside, have always tended to be dogmatic authoritarians, citing as an example Richard Posner's near hysterical defense of Vere's honor against Weisberg's challenge. Well, that may be a fair characterization of Posner—I have certainly argued as much—but as influential as the good judge may be, he was, is, and will always be an exceptional case. He is not representative, at least of the legal academic trend I am trying to describe. It is just not true that the legions of legal academics and lawyers—largely left-leaning democratic contributors to John Kerry's campaign—who have a hard time even hearing, much less evaluating, Weisberg's depiction of Vere as a lawless adjudicator, are “dogmatic authoritarians.” Quite the contrary: many of these people consider themselves to be, and in most respects are, a thorn in the side of the status quo, critical thinkers in all respects, inquisitive, challenging, non-dogmatic, skeptical, anti-authoritarians. So, “dogmatic authoritarianism” does not cut it. Somehow these non-dogmatic, critical, anti-authoritarians are blinded by their faith in adjudication, or their skepticism regarding law, or, oddly, both to the criminality and villainy of the lawless adjudicator. How did we get to this point?

Let me broaden the question, quickly, and then suggest an answer. First, to broaden it: Richard Weisberg is not the only legal critic of the last three, four or five decades to suggest the criminality of lawless adjudicators. Two examples of recent vintage come to mind, and three if we go back further, as we ultimately must, back to 1954, to understand this piece of our current intellectual milieu. But let us start with the more recent. In an early 1990s capital murder case, the

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8 Id. at 2226-27.
Supreme Court upheld the constitutionality of a state’s decision to execute a defendant in spite of the production, post-verdict, of credible evidence strongly suggestive of the defendant’s innocence. Well, said the Court, whether or not too little, definitely too late: the evidence pointing to innocence is not timely, and to consider it would be too burdensome for the state; the execution must go forward. Justice Blackmun, in dissent, complained that the state’s action, and the Court’s affirmance of it, comes “perilously close” to simple murder.11

That extraordinary remark, I believe, suggests two questions of relevance here: First, why “perilously close”? We are putting an innocent man to death, with malice aforethought . . . . But second, is Blackmun suggesting that the Justices that did this are “perilously close” to being murderers? Does a Supreme Court Justice really think this of his brethren? If so, shouldn’t we all be upset? Or, was he speaking metaphorically, or maybe only speaking of the state executioners, and surely not of his brethren on the Court. “Considerate communication,” indeed.

My second example is of even more recent vintage, and comes from an article written by Vincent Bugliosi, an ex-California State’s Attorney, and published by The Nation12 in the wake of Bush v. Gore.13 Bugliosi, speaking directly to the scores of constitutional lawyers who had pronounced the Court’s decision in that case to be political and legally untenable, had this to say:

If, indeed, the Court, as the critics say, made a politically motivated ruling (which it unquestionably did), this is tantamount to saying, and can only mean, that the Court did not base its ruling on the law. And if this is so (which again, it unquestionably is), this means that these five Justices deliberately and knowingly decided to nullify the votes of the fifty million Americans who voted for Al Gore and to steal the election for Bush. Of course, nothing could possibly be more serious in its enormous ramifications. The stark reality, and I say this with every fiber of my being, is that the institution Americans trust the most to protect its freedoms and principles committed one of the biggest and most serious crimes this nation has ever seen—pure and simple, the theft of the presidency. And by definition, the perpetrators of this crime have to be denominated criminals.

Since the notion of five Supreme Court Justices being criminals is so alien to our sensibilities and previously held beliefs . . . most readers will find my characterization of these Justices to be intellectually incongruous. But make no mistake about it, I think my

11 Id. at 446.
12 Vincent T. Bugliosi, None Dare Call it Treason, THE NATION, Feb. 5, 2001, at 11.
background in the criminal law is sufficient to inform you that Scalia, Thomas et al. are criminals in the very truest sense of the word.¹⁴

Bugliosi’s article was titled None Dare Call It Treason. Indeed they do not—but why do they not? Paraphrasing Weisberg: Why the considerate communication? I will get to my third example in a moment, but first, let me answer the Bugliosi-Weisberg question. Why don’t they call it treason? Why do we not call them murderers, when they dissemble and pervert the law for personal and political reasons in order to legitimate and abet the execution of the innocent; why do we not call it treason, or at least theft, when they successfully conspire to steal an election? To get back to fiction: why can we not at least judge Vere, a fictional adjudicator, and find him guilty? And what good is law, anyway, or the Rule of Law, if we cannot?

Is it a failure of nerve, a proneness to dizziness? Well, yes, probably. I do not know anyone in law schools, or anyone period, other than Vincent Bugliosi (who was, perhaps, toughened up by prosecuting Charles Manson and his gang thirty years ago) who wants to bring down on their corporeal being or on their precious institutions the holy wrath of the organized legal political right.

But there are two more local, more cerebral, less character-based reasons as well. The first, although the most germane, perhaps, to these proceedings, I will only mention because I have written on it at length elsewhere,¹⁵ and that is the indeterminacy thesis and its grip on the modern and postmodern legal imagination. One simply cannot assert the lawlessness or the criminality of an adjudicator, of all people, if one simultaneously holds some version of the claim that statements purporting to say “what the law is” cannot possibly be true or false, because of the thorough-going radical indeterminacy of legal texts. There is no actus reus for the larceny, in other words, even if there is intent: there is no taking, no theft, no treason, in terms of the indictment Bugliosi wants to bring. There are only arguments, good or bad, congenial or not. There are no claims of law that could be faithful or duplicitous. There is no possibility of fidelity to law, if there is no law sufficiently determinate to command fidelity. If we cannot claim fidelity, we can hardly claim infidelity, duplicity, disingenuity, perversion, or distortion of law. Without that major premise, of course,

¹⁴ Bugliosi, supra note 12, at 11.
Bugliosi's indictment of the Rehnquist Court falls apart, as does Blackmun's charge, as does, of course, Weisberg's indictment of Vere.

But this is only half of the story. The broad based denial of the possibility of fidelity or infidelity to law, I think, is clearly but only partly attributable to the grip of the indeterminacy thesis on the contemporary legal imagination. The other variable in my equation, \( A + B = C \), where \( C \) equals the pass we give the lawless adjudicator and \( B \) is the indeterminacy thesis, is faith—and specifically, faith in legal, adjudicative wisdom, even when, particularly when, adjudication departs from fidelity. What accounts for this extraordinary faith—a faith held, clearly, by both those who do and do not hold some version of the indeterminacy thesis?

There may have been some version of this faith always with us, but its current form dates, I believe, to Brown v. Board of Education.\(^{16}\) Brown did two things that matter to Weisberg's eventual thesis. First, it did what justice required: it declared segregation unconstitutional. Second, it did so anti-legalistically, at least if we assume Weisberg's understanding of legalism as in some way a matter of interpreting binding legal texts in a way that holds true to authorial intent. Brown did not quite say that "history is bunk," but it came awfully close: the Court basically proclaimed itself not bound by its own history.\(^{17}\) The Brown Court rested its conclusion, not on the authority of the past, or on the authority of the text of the Constitution; but rather, on the pressing necessity of eradicating a present harm and a present injustice. The appeal in Brown was to principle and consequence—not the past, not the text, and not the law. Both prongs of Brown—the doing of justice and the Court's willful decision to limit its own attentiveness to the past, and hence, arguably, to law—were central to Brown's legacy: a legacy that unquestionably includes a revolution, a total transformation, in our understanding of what justice minimally requires in our social relations with each other, but also, a transformed generation of liberal, visionary legal scholars, all of whom were and are committed, to varying degrees of explicitness and inconsiderateness, to the proposition that justice can and must be done by courts, through legal institutions and forms, whether by using, or ignoring, the law itself. Courts, meaning judges,

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\(^{16}\) 347 U.S. 483 (1954).

\(^{17}\) See id. at 492-93.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id.
meaning adjudicators, morally must do justice, even in the face of Codes—legal Codes—that seemingly command the contrary. Given law’s indeterminacy, furthermore, the “must” in that sentence all the more readily implies the “can”: the Constitutional phrases guide, but never command, the wise adjudicator toward a justice, which is nevertheless unconstrained by law. Thus the aspiration of a liberal generation of lawyers: Justice can be achieved through wise adjudication, even in the face of hostile, but thankfully, given indeterminacy, not binding law.

Brown, then, prompted the third of my three examples of allegations of lawless adjudication: recall the “Impeach Earl Warren” signs that sprouted up along highways in southern states in the aftermath of Brown v. Board of Education. Earl Warren: the lawless adjudicator. So, in addition to the powerful intellectual and moral currents drowning out the allegation of a lawless adjudicator quickly described above, add this potent cultural determinant: liberal legalists of the past half century do not want to cast their lot with the southern segregationist movement’s attempt to impeach Earl Warren. To convince us, ultimately, of the criminality of Vere, I would infer from all of this that Richard Weisberg must not only demonstrate that law possesses some degree of determinacy, and must somehow cast some doubt on the liberal legalist’s faith in the unconstrained pursuit of justice through adjudicative institutions, but must also, somehow, rewrite Brown, so as to bring its self-evidently morally mandatory result in alignment with Weisberg’s own self-evident reverence for law. The assumption of the last fifty years has been that the justice upheld in Brown was at odds with the law Weisberg reveres. To rehabilitate law, then, one must re-write that decision.

Now, a word about the second promise of The Failure of the Word. In that book indirectly, but in his paper more explicitly, Weisberg puts forward not only the basis for his indictment of the lawless adjudicator, but also the basis for his moral embrace of the law Vere eschews. Weisberg’s essay is a moral, political, and intellectual brief for legalism: for the virtue of fidelity to law, for the goodness of legal Codes, and the need for individuals and societies to choose their governing texts wisely and on the basis of sound foundational values. I found the moral convictions expressed here—the reverence for legalism, the respect for Codes, and the focus on the Codifier, rather than the adjudicator, as the lawgiver—to be a welcome and stark contrast to the reverence for discursive, long-winded, principled adjudication, on the one hand, and the present and future-oriented consequentialism so central to the new legal pragmatism, on the other, that now surrounds me in the legal academy. But we need to tread
carefully. Much harm, spiritual and otherwise, much injustice, can be done, is done, and has been done, through undue, unwarranted, undeserved fidelity to legal texts that may themselves be cruel, riddled through with reossentiment, abortive of human freedoms, aspirations, and pleasures, and of course, horribly unjust for the manifest inequality they express and perpetuate. Then what for legalism?

To take a relatively limited example: even a judge’s stance, but certainly a citizen’s stance, toward a criminal code that still criminalizes crack cocaine at 100 times the degree of severity as powder cocaine, should perhaps be something less than reverential toward the legalisms—codified and otherwise—that present him with this dilemma; likewise, the Slave Codes, the Jim Crow Laws, the Fugitive Slave Acts, the Apartheid Laws, the Race Laws, and so on and so on and so on . . . Richard of course knows this: that is why he directs our attention to the values expressed in foundational law, as well as the badly neglected virtues of legalistic fidelity.\(^{18}\) But that identification of foundational values as that which in turn justifies legalist fidelity cries out for elaboration and elucidation. What are they? They must, presumably, be something other than the value of legalistic justice itself. In this day of empire, of nation-building, of transitional administrative law, of interim constitutions, and so on and so on and so on, such questions are not fanciful. Legal justice may be—I think it is—in part about fidelity to a deservedly well-regarded legal text by mature individuals who have chosen their texts wisely. But it is not only that. It is also a matter of legal creation in accord with values felt deeply. But lastly, it is also a matter of knowing when, and at what cost, to sever the ties to the past, to absorb the cost of being set adrift, when those foundational texts and the values that inform them prove lethal, or inhuman, or at odds with the blessed community, or the “human personality,” to borrow a phrase from Martin Luther King’s Letter from a Birmingham Jail;\(^ {19}\) when a legal Code proves itself to be not a law for free and productive individuals, but a recipe for disaster. I am quite sure, absurdly confident, that Richard Weisberg, who has so powerfully reminded us of the forgotten legalist virtues, will prove equally illuminating when he shines his light of reason on those codified legal perversions; perversions that evidence not only the reossentiment of the Captain Veres among us, but of the legal Codes themselves, and will help us see when our deepest commitments, legalist and humanist both,

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\(^{18}\) See Weisberg, supra note 5; VICHY LAW, supra note 3, at 486-529; FAILURE OF THE WORD, supra note 1, at 114-29.

\(^{19}\) Martin Luther King, Jr., Letter From a Birmingham Jail, reprinted in MARTIN LUTHER KING, JR., WHY WE CAN’T WAIT 76 (1964).
counsel not a robust lawfulness, but the need for either measured, or inconsiderate, civil disobedience.