

Article

When Judges Lie (and When They Should)

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What should a judge do when she must apply law that she believes is fundamentally unjust?¹ The problem is as old as slavery. It is as contemporary as the debates about capital punishment and abortion rights. In a seminal essay, Robert Cover described four choices that a judge has in such cases. She can (1) apply the law even though she thinks it is immoral; (2) openly reject the law; (3) resign; or (4) subvert the law by pretending that it supports the outcome that the judge desires, even though the judge does not actually believe that it does.²

This Article demonstrates that the fourth choice—judicial “subversion” or lying—is far more common than is openly acknowledged. This Article identifies some cases in which judges intentionally have framed the law to achieve a particular outcome. This Article also suggests that this kind of lie is occasionally justified. Sometimes it is the best of the imperfect choices that judges have when they are confronted with unjust

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1. “Morality” is a word with religious or natural law connotations that make some people uncomfortable. Partly in an effort to avoid this discomfort, I will use the terms “unjust,” “immoral,” and “unfair” interchangeably. I recognize that the words “unjust” and “unfair” contain an implicit moral (non-legal) judgment.

2. See Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003, 1005–08 (1968) [hereinafter Cover, Book Review] (reviewing RICHARD HILDRETH, ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION (1856)).

law. This Article recommends judicial lying only when it will thwart extreme injustice—a recommendation that, if followed, would reduce the subversion that is now endemic in our justice system.

Legal culture resists extreme responses, even to serious miscarriages of justice. In the legal canon, for example, a story is sometimes told about Robert Cover's journey as a scholar. His first essay called on American judges to "interfere with the [Vietnam] [W]ar effort," and if they could not, to resign.³ Cover wrote those words as an Assistant Professor-Designate in an essay published by the Columbia Law Review.

Several years later Cover wrote *Justice Accused*.⁴ Now a full Professor at Columbia Law School, Cover explained that his essay was a "short polemic" that had been criticized by several of his colleagues on the faculty of Columbia Law School.⁵ He thanked those colleagues for alerting him "to all the complexities of the process of complicity."⁶

Justice Accused is not nearly as polemical as the Columbia Law Review essay. Although his subject matter—slavery—is a more extreme example of immorality than the Vietnam War, Cover is less certain about what judges should have done. In the end, he is barely critical of judges who enforced the Fugitive Slave Law.⁷

The canonical story ends with a positive description of Cover's evolution. His growth from precocious student to mature scholar allowed him to appreciate the complexity of the judicial role. The moral of the story is that for members of the legal community, extremism in the defense of liberty is a vice. Moderation in the defense of justice is a virtue.⁸

3. *See id.* at 1008.

4. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) [hereinafter COVER, *JUSTICE ACCUSED*].

5. *Id.* at xi.

6. *Id.*

7. Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 *J.L. & RELIGION* 33, 45 (1989) ("Cover stops short of drawing any explicit, normative conclusions about the proper judicial response to the moral-formal dilemma.").

8. I corrupt Barry Goldwater's famous lines in his speech accepting the Republican nomination for President in 1964: "Extremism in the defense of liberty is no vice. And . . . moderation in the pursuit of justice is no virtue." JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* 355 n.1 (Justin Kaplan ed., 17th ed. 2002).

I agree with the descriptive part of the story but not its moral.⁹ Cover's demurrals evidence more a crisis of confidence than a sophisticated understanding of the judicial role. When a person is confronted with injustice and she has the power to prevent it, hand-wringing is an ineffectual response; it begets the "judicial complicity in tyranny" that Cover condemned in his essay about judges during the Vietnam War.¹⁰ One objective of this Article is to illustrate why and when extreme injustice in the law warrants more than a moderate response.

Part I of this Article puts the issue in historical context, and in its most sympathetic light, by considering the dilemma of abolitionist judges forced to interpret the law of slavery. Often the decision the judge made determined whether a human being was free or enslaved. Part II describes contemporary examples of subversion by judges. Part III begins to make the case that subversion is sometimes justified by describing the insufficiencies of the alternatives. Part IV explains that a principled theory that allows judges to depart from rules is not as radical as it initially seems. It describes influential theories of adjudication, and the laws of other countries, that grant judges this power. Part V sets forth a moral theory of subversion. It recommends a way for judges ethically to mediate conflicts between law and morality. It also anticipates and responds to objections to the theory. Recognizing that subversion is a controversial strategy, this Article concludes with an argument against symbolic or moderate responses to serious injustice.

I. SUBVERSION AND THE LAW OF SLAVERY

During the antebellum period of U.S. history, disputes sometimes arose about the legal status of a person. Northern judges, for example, had to determine whether someone was, in the eyes of the law, a slave. These cases frequently involved enforcement of the Fugitive Slave Acts of 1793 and 1850, which

9. I am not the first scholar to dissent from this moral or to criticize Cover's "evolution." See Derrick A. Bell, Jr., Book Review, 76 COLUM. L. REV. 350, 356 (1976) (characterizing the conclusion of *Justice Accused* as "strangely tame . . . for someone whose decision to write the book was born of a 1968 polemic in which he characterized judicial complicity in the Vietnam crimes as the equivalent of judicial acquiescence in the injustices of Negro slavery"); E. Nathaniel Gates, *Justice Stillborn: Lies, Lacunae, Incommensurability, and the Judicial Role*, 19 CARDOZO L. REV. 971, 976 (1997) (book review) (describing *Justice Accused* as "singularly unhelpful in clarifying the role that morality *should* play in judging").

10. Cover, Book Review, *supra* note 2, at 1004.

required federal officers to assist in the return of escaped slaves.¹¹ Judges usually applied the law in a way that supported the maintenance of slavery, e.g., by forcing blacks who had escaped to the North to return to the South. Abolitionist judges who ruled this way sometimes explained that they believed that this was the result the law required—even if they also believed the result was immoral.

U.S. Supreme Court Justice Joseph Story, for example, faced a conflict between law and justice and chose the law.¹² Story was an abolitionist, but in *Prigg v. Pennsylvania* he wrote an opinion invalidating a Pennsylvania law that established procedural protections for people who had been kidnapped by slave-catchers.¹³ Justice Story's opinion had two consequences, neither of them humane. The first was to condemn Margaret Morgan and her children to a life of slavery. The other was to empower slave-catchers across the United States by invalidating the anti-kidnapping laws that many northern states had established.¹⁴ After *Prigg*, Story wrote to a friend, "You know full well that I have ever been opposed to slavery. But I take my standard of duty as a judge from the Constitution."¹⁵

Lemuel Shaw, the Chief Justice of the Supreme Judicial Court of Massachusetts, also chose the law. Shaw's anti-slavery views were so well-known that the New Jersey Supreme Court had actually questioned his ability to judge such cases impartially.¹⁶ This concern was bolstered by Shaw's decision in *Commonwealth v. Aves*, in which he held that a slave brought by his master to Massachusetts gained his freedom.¹⁷

In *Thomas Sims's Case*, Shaw addressed the issue of whether the Fugitive Slave Act of 1850 was constitutional.¹⁸

11. See Act of September 18, 1850, 9 Stat. 462 (1850) (repealed 1864); Act of February 12, 1793, 1 Stat. 302 (1793), amended by Act of September 18, 1850, 9 Stat. 462 (1850).

12. This version of Story's dilemma is based on a comprehensive account by Nathaniel Gates. See Gates, *supra* note 9, at 985–1000.

13. 41 U.S. 539, 673 (1842); see U.S. CONST. art. IV, § 2. The Pennsylvania law established procedural protections for people who had been kidnapped by slave-catchers. *Prigg*, 41 U.S. at 543–46.

14. See Gates, *supra* note 9, at 1000.

15. COVER, JUSTICE ACCUSED, *supra* note 4, at 119 (quoting Letter from Joseph Story to Ezekiel Bacon (Nov. 19, 1842), reprinted in LIFE AND LETTERS OF JOSEPH STORY 431 (William W. Story ed., Boston, Charles C. Little and James Brown 1851)).

16. *Id.* at 250 (citing *State v. Post*, 20 N.J.L. 368, 376–77 (1845)).

17. 35 Mass. (18 Pick.) 193, 193 (1836).

18. 61 Mass. (7 Cush.) 285, 285, 302–08 (1851).

Many awaited Shaw's analysis of this issue with particular interest. As historian Leonard Levy notes, "[i]t was notorious that no fugitive slave had ever been returned from Boston It had become a matter of pride, not alone in the South, that a fugitive should be seized in Boston and taken back to slavery."¹⁹

Shaw wrote a careful opinion holding that the Fugitive Slave Act of 1850 was constitutional.²⁰ His was one of the first pronouncements on the issue.

Story and Shaw both believed that slavery was immoral.²¹ Their "private" morality did not, apparently, inform their judging.²² There are two different ways of evaluating a judge who chooses law when she faces what Cover described as the "moral-formal dilemma."²³ One is that she acts heroically when

19. LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 91–92 (1957). In an earlier case a slave named Shadrach was subject to a proceeding at the Boston courthouse to determine whether he was a fugitive. Abolitionist Boston citizens went to the courthouse, seized him, and sent him to freedom in Canada. This case received national attention, including from the President, who condemned the actions of Shadrach's emancipators. *See id.* at 87–90.

20. *See Thomas Sims's Case*, 61 Mass (7 Cush.) at 302–08. Shaw wrote:

The principle of adhering to judicial precedent, especially that of the Supreme Court of the United States, in a case depending upon the Constitution and laws of the United States, and thus placed within their special and final jurisdiction, is absolutely necessary to the peace, union and harmonious action of the state and general governments. The preservation of both, with their full and entire powers, each in its proper sphere, was regarded by the framers of the Constitution, and has ever since been regarded, as essential to the peace, order and prosperity of all the United States.

Id. at 310.

He also offered a long explanation for the existence of slavery law, writing that "[t]he principle is, that although slavery and the slave trade are contrary to justice and natural right, yet each nation, in this respect, may establish its own law, within its own territory." *Id.* at 313. Despite his personal feelings about slavery, Shaw wrote, "it seems to be the duty of all judges and magistrates to expound and apply these provisions in the Constitution and laws of the United States; and in this spirit it behooves all persons, bound to obey the laws of the United States, to consider and regard them." *Id.* at 319.

21. *But see generally* Mark Tushnet, Book Review, 20 AM. J. LEGAL HIST. 168 (1976) (reviewing COVER, *JUSTICE ACCUSED*, *supra* note 4).

22. I say "apparently" because some scholars think that Story's decision in *Prigg* was ordained not so much by blind application of the "rule of law" but rather by his belief in "unionism," a jurisprudence that emphasized the importance of maintaining harmony between the states. *See* Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 248–52; Gates, *supra* note 9, at 993.

23. COVER, *JUSTICE ACCUSED*, *supra* note 4, at 197–98.

she faithfully interprets a law with which she profoundly disagrees. Recognizing that her role is different from that of a lawmaker, she exhibits respect for the democratic process that creates the law, even when she has no respect for the particular law. The judge's steadfast adherence to her limited role upholds the rule of law.

An alternative view is that judges who enforce immoral laws are derelict in their responsibilities as moral actors. They are the judicial equivalents of Hitler's willing executioners.²⁴ Confronting slavery—the most important human rights issue of their time—abolitionist judges had power to ameliorate some of its effect, but instead, most caved. Their formal adherence to their legal role not only blinded them to justice but also eroded their humanity.

Which evaluation is correct, or is there a middle ground which situates the judge who applies unjust law somewhere between heroic and detestable? To say that the answer depends on one's personal views about morality diminishes the importance of the question. The moral-formal dilemma did not disappear with slavery. Judges still register strong moral objections to some laws. Their choices about how to respond to such laws have important consequences for justice, democracy, and the legitimacy of courts.

Faced with the same conflict between law and morality as Story and Shaw, anti-slavery jurors sometimes refused to convict people for helping slaves escape.²⁵ These jurors' moral analysis might have been instructive to judges, but legally they had a different, and greater, ability to subvert the law. Juror verdicts of acquittal are not subject to appellate review.²⁶ Judges who flagrantly violate the law are, on the other hand, likely to be reversed. The judge who wishes to subvert law must proceed more covertly. In the next Parts, I explain how modern day judges do this and when judicial subversion is the ethically correct choice.

24. See generally DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 388 (1996) (“[Some Germans] who inwardly shrank from being cruel felt compelled to disassemble brutality in order to conform to the prevailing ethos.”).

25. JEFFREY ABRAMSON, *WE, THE JURY* 64 (1994).

26. U.S. CONST. amend. V.

II. SUBVERSIVES AT WORK

Subversion is not simply a historical artifact. There are subversive judges today, as well as scholars who advise judges to engage in subversion. In this Part, I expose some of them. I identify some examples of judges who, an objective review of their cases reveals, likely misrepresented their views of the law in order to achieve a particular result. These judges almost certainly would dispute the claim that they have acted subversively. Reasonable inferences based on the public records in these cases may persuade the reader otherwise.

A. CREATIVES VERSUS SUBVERSIVES

There is a difference between creative judging and subversion. The difference depends on the mind-state of the judge. When a judge engages in creative judging, she believes that she is right on the merits, even if her position is not supported by precedent or other traditional authority. The creative judge may acknowledge that an issue is uncertain or in a state of flux. She may even welcome review by a higher court, because she believes in the legal correctness of her position.²⁷

One example of “creative judging” may have occurred in *United States v. Leviner*.²⁸ U.S. District Court Judge Nancy Gertner believed that a sentence mandated by the Federal Sentencing Guidelines was too high.²⁹ The guidelines required a greater sentence if the defendant had prior convictions.³⁰ In *Leviner*, Gertner refused to credit some of the defendant’s prior convictions because she found that they were the result of racial profiling.³¹ She wrote a long opinion in which she explained

27. Alternatively, a creative judge may hope her opinion will not be appealed because she fears the higher court would not agree with her interpretation of the law. U.S. Ninth Circuit Court of Appeals Judge Stephen Reinhardt, for example, often writes opinions that seem different from where a majority of the Supreme Court would come out on the same issue. See Matthew Rees, *The Judge the Supreme Court Loves to Overturn*, WKLY. STANDARD, May 5, 1997, at 27, 27–29. Noting that the Supreme Court grants certiorari in only a small number of cases, Reinhardt reportedly has said, “They can’t catch ’em all.” *Id.* at 29.

28. 31 F. Supp. 2d 23 (D. Mass. 1998).

29. *Id.* at 25.

30. *Id.*

31. *Id.* at 33; see also Patricia Nealon, *US Judge Acts to Counter Bias in “Stops,”* BOSTON GLOBE, Dec. 16, 1998, at B1 (“[Gertner] found that Leviner’s long rap sheet . . . reflected the fact that he, as a black man, was more likely to be stopped by police and prosecuted for motor vehicle violations.”).

why she believed her analysis was supported by the guidelines.³²

The subversive judge, as opposed to the creative one, believes that the outcome she desires is unsupported by law. She pretends otherwise, however. In this sense her opinion is a lie. If she is a trial judge, she makes findings of fact to insulate her decision, to the extent that she can, from appellate review.³³ If she is an appellate judge she cloaks her analysis in the language of precedent and statutory interpretation. She tries to proceed under the radar, hoping that attention will not be paid by higher courts. Subversive judges are double agents. Everyone thinks they work for law, but their true boss is justice.

It is impossible to know with certainty when a judge is being creative rather than subversive. The difficulty of proving an actor's mind-state is a common problem in U.S. law, where a criminal or tort case can turn on a fact finder's determination of the level of intent.³⁴ In such cases there is rarely direct evidence—the fact finder must rely on circumstantial evidence and her common sense. The same tools can help us try to distinguish between creatives and subversives, although I will concede that, at the end, no one but the judge knows for sure.

B. HARD CASES VERSUS EASY CASES

Subversion is a liberal, not radical, tool because it is based on faith in the rule of law.³⁵ It posits that there are “correct” and “incorrect” answers to legal controversies, and that these answers can be determined in a scientific fashion by applying jurisprudence. Subversion is required when the correct legal response conflicts with the correct moral response.³⁶ When

32. *Leviner*, 31 F. Supp. 2d at 25–39.

33. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 368 (1987); see also M.B.E. Smith, *May Judges Ever Nullify the Law?*, 74 NOTRE DAME L. REV. 1657, 1660 (1999) (“Judges most easily exercise this power [to nullify the law] when they make findings of fact, which rarely are disturbed or even closely examined by appellate courts.”).

34. MODEL PENAL CODE § 2.02 (1962).

35. See Paul Butler, *Should Radicals Be Judges?*, 32 HOFSTRA L. REV. 1203, 1204 (2004) (“Generally speaking, legal radicals do not believe in the rule of law.”).

36. See M.B.E. Smith, *Do Appellate Courts Regularly Cheat?*, CRIM. JUST. ETHICS, Summer/Fall 1997, at 11, 11 (“Somewhat surprisingly, the first question—do courts often cheat?—is the least tractable. It assumes a controversial jurisprudential hypothesis, namely, that at least some propositions of law have a determinate truth value. (If none do, then there is nothing for courts to follow, no way that they could cheat. . . . So one might, quite reasonably, block

judges decide law in “hard” cases, they do not act subversively.³⁷ Those cases are hard because the law is uncertain, and thus a judge’s moral intuition can be synthesized with the law.³⁸ The “easy” cases are the ones that will require cheating. In those cases, the judge’s interpretation of the law leads her to a morally unsettling result, but one that she believes is legally correct.

If there are any “radical judges,” their jurisprudence relieves them of the burden of subversion.³⁹ They do not believe that the rule of law is possible or that there are right or wrong answers to legal questions.⁴⁰ When I would describe a judge as acting subversively, the radical judge would say that she is simply aware of the political nature of her work in a way that other judges pretend not to be aware.⁴¹

“Radical judge” must, however, be an oxymoron.⁴² It is interesting, then, that some non-radical judges believe that they must occasionally lie or twist or cheat in order to achieve the legal outcomes that they desire. In the next Subpart, I provide examples of judges who I believe have intentionally subverted

my first question (Do courts often cheat?) by saying, ‘Courts can’t cheat because they are not bound by anything at all.’”)

37. H.L.A. Hart wrote, “Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.” H.L.A. HART, *THE CONCEPT OF LAW* 124 (1961).

38. Dan Solove has observed, “When judges have discretion, they have the freedom to decide the case according to their own will, intuitions, and values. Thus, according to the positivists, the rule of law does not extend to hard cases.” Daniel J. Solove, *Postures of Judging: An Exploration of Judicial Decisionmaking*, 9 *CARDOZO STUD. L. & LITERATURE* 173, 176 (1997); *see also* Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 *HOFSTRA L. REV.* 1095, 1100 (2004) (“Let me now turn to the issue that has been alluded to several times already by Professors Fried, Freedman and Butler, among others. I’m talking about the cases where a dispassionate application of the law to the facts leads to a result that the judge doesn’t like. I want to put aside the close case where the law is murky enough so the judge might find a principled way to reach a result he considers just.”).

39. *See* Butler, *supra* note 35, at 1212 (noting the absence of radical judges).

40. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518, 519–20 (1986) (discussing how, in a hypothetical case, a judge might start with an outcome that he wants to reach and then find a “legal” way to reach that outcome); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561, 665–73 (1983).

41. *See* Butler, *supra* note 35, at 1204.

42. *See id.* at 1213.

the law and scholars who have encouraged these judges. I do not approve of every example of subversion that I describe, nor do I intend these to be examples of judges who are subverting for moral reasons.⁴³ Later this Article suggests methods to distinguish between “good” and “bad” subversion. My purpose is simply to demonstrate that judges subvert more frequently than they or scholars commonly acknowledge. I have purposely included examples of both liberal and conservative judges, to demonstrate that subversives are not limited to any political party or cause.

C. SUBVERSIVE STORIES⁴⁴

1. Magistrate Judge Kathleen Kennedy-Powell

The most common judicial subversion occurs in criminal courtrooms. Judges often pretend to believe police officer testimony about how evidence was obtained if the cost of not believing the police is exclusion of important evidence.

An example of this kind of subversion occurred in the O.J. Simpson case.⁴⁵ Simpson was accused of murdering his ex-wife and another person outside of his ex-wife’s home.⁴⁶ Simpson moved to suppress a blood-stained glove and other evidence that Detective Mark Fuhrman claimed to have found on Simpson’s property.⁴⁷ The glove was especially probative evidence

43. Subversion can be used in the service of morality, or it can be used to achieve political ends. Recognizing that the line between the two is not bright, I praise only the first use. As I discuss below, disagreement with the law on public policy grounds—as opposed to moral grounds—does not justify subversion.

44. Several of these cases involved contested facts. Further, judge selection procedures often make it difficult for the public to be aware of a judge’s moral or political position on various issues unless the judge chooses to discuss these issues. In these case studies, I have tried to make reasonable inferences about the judge’s moral or political views based on public records. I concede that it is difficult, especially in contemporary cases, to know judges’ motives. For example, *Bush v. Gore*, 531 U.S. 98 (2000), would be an example of creative judging if the Justices who wrote opinions in favor of Bush actually believed in the interpretation of the Equal Protection Clause they asserted. It would be an example of subversion if those Justices did not believe in the legal merits of Bush’s case but so pretended in order to resolve the case.

45. People’s Response to Defendant’s Motion To Exclude Evidence of Domestic Violence at 2, *People v. Simpson*, No. BA097211 (Cal. Super. Ct. Dec. 15, 1994), 1994 WL 737964.

46. *See id.*

47. *Simpson Preliminary Hearing, Day 5, Part 1* (CNN television broadcast July 7, 1994) [hereinafter *Simpson Hearing*].

because a matching glove had been found at the murder scene.⁴⁸

Simpson's motion to suppress was based on the fact that the police had not obtained a warrant for the search.⁴⁹ The prosecution defended the search on the ground that there was an "exigent" circumstance which, under Fourth Amendment jurisprudence, creates an exception to the warrant requirement.⁵⁰ Detectives Mark Fuhrman and Philip Vannatter testified that, after responding to the murder scene, they went to Simpson's home because they wanted to make arrangements for someone to take care of the couple's children, who were in Mrs. Simpson's apartment.⁵¹ When they arrived at Simpson's property, no one appeared to be home.⁵² They became concerned, they testified, when they saw blood on Simpson's car.⁵³ They said that they thought that he might have been the victim of foul play as well, and they entered his property out of concern for safety.⁵⁴ They claimed that Simpson was not a suspect at the time of search, even though they were aware that Simpson had assaulted his ex-wife on previous occasions, and even though a spouse or former spouse is a usual suspect in a murder case.⁵⁵

Judge Kennedy-Powell credited the officers' testimony and denied the motion to suppress. She said her ruling was based on "the officers' . . . state of mind," their "specific actions," and "the experience of those officers in drawing their conclusions."⁵⁶ She found that the police officers were "acting for a benevolent purpose in light of the brutal attack and that they reasonably believed that a further delay could have resulted in the unnecessary loss of life."⁵⁷

A number of commentators were suspicious of Judge Kennedy-Powell's good faith. Criminal procedure scholar Wayne LaFave noted that "most people have responded [to the notion

48. *See id.*

49. *See id.*

50. *See id.*; *see also* *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978) ("[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." (citation omitted)).

51. *Simpson Hearing*, *supra* note 47.

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *Transcript of Ruling Denying Motion to Suppress Evidence*, L.A. TIMES, July 8, 1994, at A25.

57. *Id.*

that the police officers did not suspect Simpson] with a fair degree of incredulity.”⁵⁸ Stanford Law Professor George Fisher stated that “no one can believe” that Simpson was not a suspect at the time of search.⁵⁹ Defense attorney Harvey Silverglate wrote that, “[f]or the detectives to have denied that Mr. Simpson was a suspect at the time of the entry, and for Judge Kennedy-Powell to have pretended to believe them . . . showed how the fact-finding process gets skewed in order to preserve the admissibility of probative evidence.”⁶⁰

Commentators have used the Simpson suppression hearing as an example of the willingness of judges to subvert the law in criminal cases in order to thwart application of the exclusionary rule. Author Scott Turow wrote that the fact that Judge Kathleen Kennedy-Powell credited the officers’ testimony “is scandalous. It is also routine.”⁶¹ Professor Morgan Cloud remarked that the Simpson case “dragged the issue of police perjury out of the secluded corners of the justice system and into the realm of public debate. Although this public attention is unique[,] . . . the problem is old and certain to survive the current media frenzy.”⁶² Professor Alan Dershowitz wrote (thirteen years before the Simpson trial, in which he was one of Mr. Simpson’s attorneys) that, “[m]ost trial judges pretend to believe police officers who they know are lying” and that “all” appellate judges know this and “yet many pretend to believe the trial judges who pretend to believe the lying police officers.”⁶³

In a study of Chicago criminal courts, Myron Orfield found that:

The Courts [Study] respondents, including judges, also believe that judges may purposefully ignore the law to prevent evidence from being suppressed, and even more often, knowingly accept police perjury as truthful. When the crime is serious, this judicial “cheating” is more likely to occur due to three primary reasons; first, the judge’s sense that it is unjust to suppress the evidence under the circumstances of a particular case, second, the judge’s fear of adverse publicity, and

58. Wayne R. LaFave, Commentary, *Over the Wall: A New Theory Regarding Entry of the Simpson Compound*, Oct. 15, 1994, 1994 WL 562135, at *1.

59. George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 981–82 (1997).

60. Harvey A. Silverglate, *Courts Whittle Away the Fourth Amendment*, NAT’L L.J., July 25, 1994, at A19.

61. Scott Turow, Op-Ed., *Simpson Prosecutors Pay for Their Blunders*, N.Y. TIMES, Oct. 4, 1995, at A21.

62. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1314 (1994).

63. ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, at xxii (1982).

third, the fear that the suppression will hurt their chances in judicial elections.⁶⁴

2. Chief Judge Rose Bird, California Supreme Court

During Chief Judge Rose Bird's tenure as chief judge of the California Supreme Court, sixty-one death penalty cases reached the court.⁶⁵ Bird reportedly was personally opposed to the death penalty.⁶⁶ She voted to overturn the death sentence in all sixty-one cases.⁶⁷

During Bird's tenure, the California Supreme Court reversed more than ninety percent of the death sentences before it.⁶⁸ In those cases in which the court affirmed death sentences, Bird always dissented, although she was never the lone dissenter.⁶⁹ She was the only judge on the California Supreme Court, however, never to vote to affirm a single death penalty case.⁷⁰ Professor Michael Moore wrote:

It is clear that Bird strongly feels that the death penalty is everywhere and always an immoral and disproportional punishment. . . . What I do not respect, however, is the degree to which procedural errors are invented in order to effectuate a moral judgment that can no longer find direct expression in a holding that would invalidate the death penalty.⁷¹

Professor Moore believes that Chief Judge Bird had "taken the law into her own hands—and thereby stepped outside the judicial role."⁷²

Similarly, Professor Gerald Uelmen contended that:

The approach of the Bird court in reviewing death penalty judgments reflected a norm of reversal, in which the court paid little heed to principles such as abstention, the substantial evidence rule, and the

64. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992).

65. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at A1 [hereinafter Clifford, *Liberal Justices*].

66. Mike Weiss, *Goodbye to a Rose That Thrived in Every Climate*, S.F. CHRON., Dec. 6, 1999, at A2 (describing Bird's involvement with Death Penalty Focus, an organization opposed to the death penalty).

67. Clifford, *Liberal Justices*, *supra* note 65, at A1.

68. See Gerald F. Uelmen, *Review of Death Penalty Judgments by the Supreme Court of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 237 (1989).

69. See Michael Moore, Op-Ed., *Rose Bird Should Go: On Death Penalty She Has Taken Law into Her Own Hands*, L.A. TIMES, July 31, 1985, at B5.

70. *Id.*

71. *Id.*

72. *Id.*

principle of harmless error. Doubts, particularly those involving choice of sentence, were resolved in favor of reversal because of the severity and finality of the judgments being reviewed.⁷³

Some observers have defended Bird's jurisprudence. Professor Erwin Chemerinsky stated that "in the vast majority of these death penalty cases there were egregious errors committed by the trial courts—as reflected in the fact that forty of sixty-one death penalty cases were unanimous and another sixteen were either six-to-one or five-to-two decisions to reverse the death sentence."⁷⁴ Judge Bird herself stated that she had always "voted to reverse death sentences because defendants were denied essential constitutional protections during the course of trials or criminal investigations."⁷⁵ She claimed that her votes were based "on what the Constitution intends, what the history of a particular amendment is and what the case law has been over the years."⁷⁶

In November 1986, Bird was subject to a retention election, and she was voted out of office, along with two other liberal members of the court.⁷⁷ The campaign against Bird focused on what came to be known as Bird's "box score," which referred to her voting to overturn death sentences in sixty-one out of sixty-one cases.⁷⁸

73. Uelmen, *supra* note 68, at 239.

74. Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1985–86 (1988).

75. Frank Clifford, *Lone Justice: She's Been Described as Compassionate and Vindictive, Warm and Intimidating, Highly Respected and Unqualified for the Job: In Search of the Real Rose Bird*, L.A. TIMES, Oct. 5, 1986, at 12.

76. *Id.*

77. See Clifford, *Liberal Justices*, *supra* note 65.

78. *Id.* Judge Edith Jones, of the U.S. Court of Appeals for the Fifth Circuit, may be the pro-death penalty equivalent of Judge Bird. Although Judge Jones's "box score" has not been tabulated, her support for capital punishment is well-known. See Steve Lash, *High Court to Be Given New Course?: Next President May Have Great Impact*, HOUSTON CHRON., May 26, 2000, at A1 ("Jones . . . is a well-respected jurist known for her support of the death penalty."). Jones gave a speech to government lawyers on how to expedite capital cases. David Kaplan, *The Fryers Club Convention*, NEWSWEEK, Aug. 27, 1990, at 54. In *Burdine v. Johnson*, 231 F.3d 950, 964–65 (5th Cir. 2000), *vacated en banc*, 262 F.3d 336 (5th Cir. 2001), she voted to affirm a death sentence for a defendant whose attorney slept through parts of the trial. This case was eventually overturned in *Burdine v. Johnson*, 262 F.3d 336, 357 (5th Cir. 2001), in which Jones dissented.

3. Chief Judge Boyce F. Martin, Jr., U.S. Court of Appeals for the Sixth Circuit

Chief Judge Boyce F. Martin, Jr., of the U.S. Court of Appeals for the Sixth Circuit, reportedly used his administrative power to prevent an en banc review of the University of Michigan affirmative action case until two judges opposed to the policy became ineligible to vote on it.⁷⁹ On May 14, 2001, Martin received the petition for en banc review.⁸⁰ At that point eleven judges were eligible to vote on it.⁸¹ Martin delayed circulating the petition until October of that year, allegedly to prevent two anti-affirmative action judges from voting on the petition.⁸² In July, Judge Alan Norris, a Reagan appointee, took senior status.⁸³ The Sixth Circuit subsequently voted five to four to uphold the policy.⁸⁴ In a “Procedural Appendix,” dissenting Judge Danny Boggs wrote that the

panel that considered this case . . . was not constituted in conformity with [the local Sixth Circuit rule regarding en banc review] or any other rule. . . . Under these circumstances, it is impossible to say what the result would have been had this case been handled in accordance with our long-established rules. The case might have been heard before a different panel, or before a different *en banc* court.⁸⁵

Two other judges castigated Judge Boggs’s dissent on the merits, and also because it might “undermine public confidence” in the court.⁸⁶ Judge Alice Batchelder answered those judges by stating, “[p]ublic confidence in this court or any other is premised on the certainty that the court follows the rules in

79. Charles Lane, *Court Dispute in Affirmative Action Case Ruled Moot*, WASH. POST, Aug. 1, 2003, at A2.

80. See *Grutter v. Bollinger*, 288 F.3d 732, 811 (6th Cir. 2002), *aff’d* 539 U.S. 306 (2003). Martin had been a member of the panel whose decision was the subject of the en banc review.

81. See *id.*

82. See *id.* at 813.

83. See *id.* at 812.

84. Lane, *supra* note 79.

85. *Grutter*, 288 F.3d at 810–14 (Boggs, J., dissenting).

86. Judges Moore and Clay wrote separate concurring opinions. *Id.* at 734. Moore stated,

The baseless argument of the “Procedural Appendix” is that the *decisions* of this court are not grounded in principle and reasoned argument, but in power, and that the judges of this court manipulate and ignore the rules in order to advance political agendas. I am saddened that Judge Boggs and those joining his opinion believe these things. But, more importantly, I am concerned that my dissenting colleagues’ actions will severely undermine public confidence in this court.

Id. at 752–53 (Moore, J., concurring).

every case, regardless of the question that a particular case presents. Unless we expose to public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate."⁸⁷

4. Judicial Recognition of Subversion

A few judges have discussed cases in which they would be tempted to disregard the law in favor of their views. Two examples follow in which judges spoke hypothetically. Neither judge advocated lying nor admitted to having framed the law to achieve a particular result. What is striking, however, is the sympathetic light in which two currently sitting federal judges portray subversion.

a. Judge Harry Pregerson, U.S. Court of Appeals for the Ninth Circuit, Confirmation Testimony

Sen. Simpson: If a decision in a particular case was required by case law or statute, as interpreted according to the intent that you would perceive as legislative intent, and yet that offended your own conscience, what might you do in that situation?

Mr. Pregerson: Well, of course it's a hypothetical question and life does not present situations that are that clear cut, but I think all of us, judges and lawyers, would be very pleased if the congressional intent was clearly discernible. I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would follow my conscience.

Sen. Simpson: I didn't hear, sir.

Mr. Pregerson: I said, if I were faced with a situation like that, that ran against my conscience, disturbed my conscience, I would try to find a way to follow my conscience and what I perceived to be right and just. Not that, I would not, it would mean I would act arbitrarily. I was born and raised in this country, and I am steeped in its traditions, its mores, its beliefs, and its philosophies; and if I felt strongly in a situation like that, I feel it would be the product of my very being and upbringing. I would follow my conscience.

Sen. Simpson: So that would be a tough one for you in that situation?

Mr. Pregerson: Yes, sir.

Sen. Simpson: Let's say a decision in a particular case seemed to require, by case law or statute, and yet was inconsistent with what you believed might be the values of contemporary society; what might you do?

Mr. Pregerson: I would seek to distinguish that case.⁸⁸

87. *Id.* at 815 (Batchelder, J., dissenting).

88. *Selection and Confirmation of Federal Judges: Hearing Before Comm.*

b. Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit

At a symposium on judicial ethics at Hofstra Law School, Judge Kozinski discussed some cases that he described as having “easy” legal answers but where knowing whether a judge should follow the law was difficult. Judge Kozinski said, “In theory, it’s easy enough to say that a judge may never bend the rules to avoid a particular result, no matter how bad. But consider [these examples].”⁸⁹ One example involved the release of a child molester, when there was reason to believe that he would assault another child, but when he had a legal right to be free.⁹⁰ The other hypothetical case involved a convicted killer for whom there was legally sufficient evidence of guilt, but whom a judge believed had been wrongly convicted.⁹¹ Kozinski said:

I used to think that questions like these had an easy answer—you apply the law conscientiously and don’t worry about the consequences. But I’m no longer sure. I now wonder whether this isn’t false modesty, a kind of hubris: I will accept whatever result the law calls for, no matter how much it hurts somebody else. A troubled conscience is certainly not pleasant, but the real-life, brutal consequences of an unjust judicial decision are suffered by others—the innocent kid who wastes his life in a prison cell, or the future victims of the slasher released on a technicality.

I am reminded that among the most reviled participants in the Third Reich’s persecution of Jews and other minorities were the German judges who enforced the Nuremberg laws. These judges claimed as justification that they were simply applying the law. Our collective assessment seems to be that the judges shirked their responsibility—that they should have used their power and authority to undermine unjust laws. Do American judges have a similar ethical obligation? I’m not going to suggest an answer here because it’s a tough question.⁹²

5. Subversive Scholars

Two prominent scholars have written about serious ethical problems posed for judges by the Federal Sentencing Guidelines. Under the guidelines, a judge must make factual deter-

on the Judiciary, 96th Cong. 450 (1980) (statements of Sen. Alan Simpson, Member, S. Comm. on the Judiciary, and J. Henry Pregonson, U.S. Circuit J., Ninth Circuit).

89. Kozinski, *supra* note 38, at 1101.

90. *Id.* at 1102.

91. *Id.* at 1101.

92. *Id.* at 1102.

minations that can have the effect of adding or subtracting years of punishment in a particular case.⁹³ These scholars have described how a judge might subvert in cases in which the guidelines required punishment that seemed, to the judge, excessive.⁹⁴

a. Professor Albert W. Alschuler, University of Chicago Law Review

In the following passage, Professor Albert W. Alschuler describes the practice of some judges, and other participants in the sentencing process, of misrepresenting facts in order to make the sentence shorter.

Federal judges, prosecutors, defense attorneys, and probation officers sometimes have found an easier way to avoid the imposition of unconscionable sentences. They have discovered that “creative interpretation” of the guidelines can outflank reform rhetoric and afford them substantial discretion. The guidelines’ provisions concerning the degree of an offender’s involvement in the offense and the extent of his or her cooperation with the government have proven particularly pliable. The style of Henry David Thoreau and Martin Luther King, Jr. is not the style of most criminal justice officials; their civil disobedience usually is less public. They are unlikely to recognize it as civil disobedience at all and may call it “being realistic.”⁹⁵

The actual judicial equivalent of civil disobedience, as discussed extensively in the next Part,⁹⁶ is judicial “nullification,” which was the second of the four choices that Robert Cover described when judges face a conflict between law and morality. Civil disobedience requires a degree of transparency and willingness to accept sanctions that are not present in the practice that Alschuler identifies. One understands why a judge who believed the law required “unconscionable” punishment would look for an effective way around the law; open defiance in the form of traditional civil disobedience would be ineffective because it would probably be reversed.⁹⁷ Alschuler, however, seems to underestimate judges when he says that they would not “recognize” their disobedience to the law. “Being realistic,” which is how he believes judges would term their subversion,

93. See 18 U.S.C.S. app. § 1B1.3 (2006).

94. These articles were written before recent Supreme Court decisions that give judges more discretion to depart from the guidelines. See *United States v. Booker*, 543 U.S. 220, 226 (2005).

95. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 924–25 (1991).

96. See *infra* Part III.

97. See, e.g., *United States v. Webb*, 134 F.3d 404, 407 (D.C. Cir. 1998).

seems a bizarre way to describe an action specifically designed to thwart the will of the legislature.

b. *Professor Daniel Freed, Yale Law Journal*

Professor Daniel Freed, in an article in the *Yale Law Journal*, describes three choices that a federal judge has when she believes that a mandatory sentence is unjust. The judge can (1) comply with the guideline; (2) decide to challenge the system openly; or (3) “decide to *avoid* the formal system.”⁹⁸ The third option is accomplished by accepting plea bargains even when the judge believes that the result is different from what is required by the guidelines. Freed observes that:

When the gap between a guideline sentence and a just sentence is small, most judges are likely to choose the first option and follow the guideline, for the norm of courts is to follow the rules. As the gap between the Commission’s guidelines and a judge’s concept of just punishment widens, the degree of disrespect, noncompliance, and disparity is bound to increase, and the judge may more often choose the second option, formal challenge, or the third option, informal avoidance. When the gap becomes very wide, more and more decisionmakers—prosecutors, probation officers, and judges—will opt for the just sentence because they are all sworn to do justice.⁹⁹

Like Alschuler’s phrase “being realistic,” Freed’s “informal avoidance” is a euphemism for subversion. Freed suggests that judges recognize that the law may present varying degrees of injustice and that when they perceive that the injustice is slight, they are likely to follow the law. Judges, in his view, are more likely to proceed covertly when injustice is greater.¹⁰⁰ This seems an implicit recognition of the futility of “formal challenge,” which for judges would be open defiance of the law. If Freed is correct, the perception of judges seems to be that in cases of “mid-level” injustice a symbolic (transparent) protest might be appropriate, but when the injustice of the law is manifest, a non-symbolic and effective power play is a better response.

6. Weak Subversion

Occasionally appellate judges cast their vote for instrumentalist reasons. I describe this form of subversion as “weak”

98. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1726 (1992).

99. *Id.* at 1726–27 (footnote omitted).

100. *See id.*

when it has no impact on the result in a case. The outcome has already been determined (by the votes of other judges), so the judge's act is symbolic. It is subversive, however, because the judge does not actually endorse the view that her vote connotes.

One example of weak subversion occurred in *Brown v. Board of Education*.¹⁰¹ Chief Justice Earl Warren had intensely lobbied his fellow Justices for a unanimous opinion.¹⁰² The most recalcitrant was Stanley Reed, who planned to dissent.¹⁰³ According to a recent book on the case, Warren

approached Reed, displayed a concern with the sensitivities of the south, and wondered aloud whether the country's interests were better served by unanimity in the face of predictable opposition, rather than an individual opinion that might encourage southern recalcitrance. Reed conceded, agreeing to join the majority. Later on [Justice] Frankfurter would thank Reed for making the decision unanimous: "As a citizen of the Republic, even more than as a colleague, I feel deep gratitude for your share in what I believe to be a great good for our nation."¹⁰⁴

Another weak form of subversion occurs in cases in which the line between creative judging and subversion is thin indeed. Below I describe two scholars who encourage interpretations of law that, in practice, seem only marginally different from subversion. These cases involve the death penalty and abortion, two issues that, for some judges, carry the same moral imperatives as the slave cases of two centuries ago.

In "*Death's Casuistry*" Professor Robert Tuttle addresses the moral conflict faced by Catholic judges in death penalty cases.¹⁰⁵ Some judges believe that observant Catholics have a legal duty to recuse themselves in those cases. Tuttle states that abolitionist judges need not recuse themselves from deciding death cases because, very technically, the result is not a foregone conclusion. The Catholic Church allows death as punishment in some cases, even though they are "very rare, if not practically non-existent."¹⁰⁶ Since the law grants the judge discretion about whether to impose death, "the judge's bias toward

101. 347 U.S. 483 (1954).

102. See, e.g., ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 151-82 (2003).

103. See *id.* at 163, 173-76.

104. See *id.* at 176.

105. See Robert W. Tuttle, *Death's Casuistry*, 81 MARQ. L. REV. 371 (1998).

106. *Id.* at 376-77 (quoting JOHN PAUL II, *THE GOSPEL OF LIFE: EVANGELIUM VITAE* ¶ 56 (1995)).

life does not threaten the legal order; the law has given the judge the discretionary power that she exercises.”¹⁰⁷

The second example concerns Professor Michael Stokes Paulsen, who has described *Roe v. Wade*¹⁰⁸ as a “lawless and immoral decision” that creates “the most atrocious injustice in American law since slavery.”¹⁰⁹ Paulsen explicitly disavows “subversion of the rule of law,” but states that judges have a “moral imperative to resist *Roe* through every legitimate means.”¹¹⁰ In hard cases, he advises judges to use natural law principles to defeat abortion rights. He states, “the frequent lack of clarity in the law makes possible ‘ameliorist’ incremental, temporary solutions at the margins of the moral-formal conflict: The judge may introduce his own sense of what ‘ought to be’ interstitially, where no ‘hard’ law yet exists.”¹¹¹

III. THE INFERIOR ALTERNATIVES TO SUBVERSION

Having identified several examples of judicial subversion, I will now recommend it in some cases. There is a way that judges can responsibly use their power to prevent extreme injustices, through the theory of ethical subversion I propose later in this Article. First, I explain why the alternatives to subversion, as described by Robert Cover, fail to satisfy these criteria.

A. CHOICE I: APPLY THE LAW AGAINST CONSCIENCE

This choice is sometimes characterized as admirable, because the judge sets aside her views in favor of the law.¹¹² It was the choice made by Justice Story in *Prigg v. Pennsylvania*¹¹³ and Judge Shaw in *Thomas Sims’s Case*.¹¹⁴ The result, it is worth repeating, was the enforced bondage of Margaret Morgan and Thomas Sims. A more recent example occurred in federal court in Manhattan. Judge Gerald Lynch was required to sentence an eighteen-year-old defendant to a ten-year mandatory minimum sentence that Judge Lynch characterized as

107. *Id.* at 382.

108. 410 U.S. 113 (1973).

109. Paulsen, *supra* note 7, at 35.

110. *Id.* at 37.

111. *Id.* at 50 (quoting COVER, JUSTICE ACCUSED, *supra* note 4, at 6).

112. Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227 (2004).

113. 41 U.S. 539 (1842).

114. 61 Mass. (7 Cush.) 285 (1851).

“abhorrent,” “bitter,” and “unfortunate.”¹¹⁵ Judge Lynch expressed doubt that the “enormous penalty” would benefit either the defendant or society.¹¹⁶ During trial, Judge Lynch took the unusual step of granting the defense’s request to instruct the jury on the mandatory sentence that a guilty verdict would require.¹¹⁷ After the prosecution’s interlocutory appeal, the court of appeals reversed this ruling and ordered Judge Lynch not to reveal the sentence.¹¹⁸ The jury returned a guilty verdict, and Judge Lynch imposed the mandatory sentence, which he declared to be “unjust and harmful.”¹¹⁹ The judge concluded his sentencing by telling the defendant “I wish I could do more for you.”¹²⁰

U.S. District Judge Nancy Gertner has discussed applying the law against conscience and then writing what she describes as an “oy” footnote, in which she registers her disagreement with the law.¹²¹ Other commentators also have recommended that judges apply unjust law but protest it at the same time.¹²²

The problem with this alternative is that it is virtually meaningless. The unjust law retains its coercive force upon a human being. It also seems, when the law is profoundly unfair, an unconscionable act. How could any responsible moral actor impose, as Judge Lynch did, punishment that he believes is “unjust and harmful”?

When judges, after applying law they think is unjust, register some kind of protest, there is little evidence that legislators care.¹²³ U.S. District Judge Robert Sweet noted that when he has followed the law while objecting to its fairness, “the

115. Benjamin Weiser, *A Judge’s Struggle to Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, at A1.

116. *See id.*

117. *See id.*

118. *See id.*

119. *Id.* Judge Lynch “angrily denounced his own decision” and declared that this was “without question the worst case of [his] judicial career.” *Id.*

120. *Id.*

121. *See, e.g.*, Nancy Gertner, *To Speak or Not to Speak: Musing on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1147–61 (2004).

122. *See, e.g.*, Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483, 1501 (2004) (commending Judge Gerard A. Lynch for speaking out against an unjust application of mandatory minimum sentencing).

123. *See* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 169 (1980) (arguing that courts have a limited quantitative ability to challenge the legislature).

earth has not shaken as a consequence. Nor has it improved my feelings, or those of the defendant, on the issue.”¹²⁴

The strongest defense of this choice is based on separation of powers doctrine. Ideally, elected legislators—not judges—should make the law. Preserving this power for the most democratically responsive body is an important value. The value is not, however, absolute.¹²⁵ It must be balanced against other important values, especially those that implicate human rights, including the rights to be free from slavery, genocide, and racial discrimination.¹²⁶

One might distinguish between cases in which judges confront law that they believe is immoral and those cases in which the law is only unwise. In a democracy, the people should have the luxury of establishing unwise laws, within limits. Supreme Court Justices Anthony Kennedy and Clarence Thomas both have criticized laws for being poor public policy, but have voted to enforce them anyway, on constitutional grounds.¹²⁷ If that is the extent of their discontent with the laws, I think the Justices acted properly.

B. CHOICE II: APPLY CONSCIENCE AND BE FAITHFUL TO THE LAW

The Wisconsin Supreme Court refused to apply the Fugitive Slave Law,¹²⁸ as did an Ohio probate judge.¹²⁹ U.S. District Judge Robert Sweet has said that his moral opposition to the

124. Robert W. Sweet, *The Judge's Dilemma: Duty or Conscience?*, 19 CARDOZO L. REV. 1041, 1045 (1997).

125. *Id.* at 1045 (explaining that a judge's moral beliefs may require her to declare that performance of her oath is no longer possible because of the state of the law).

126. In Part V, this Article addresses concerns about separation of powers more fully.

127. See *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (stating that Texas's sodomy law, though constitutional, was “silly”); Supreme Court Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (criticizing the federal mandatory minimum sentence regime).

128. See Dennis McCann, *Slave Launched Battle Between State, Federal Governments: Wisconsin's Refusal to Obey Fugitive Slave Law Landed Newspaper Editor in Jail*, MILWAUKEE J. SENTINEL, Mar. 22, 1998, at 1, available at <http://www2.jsonline.com/news/state/wis150/stories/0322sesqui.stm>.

129. Cover, Book Review, *supra* note 2, at 1007 (citing 5 HELEN T. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 21–22 (1937)).

death penalty would lead him to openly defy the law, if he ever got such a case.¹³⁰ This is “judicial nullification” in the purest sense. (Cover called it “judicial civil disobedience.”)¹³¹ It is an act of conscience. It is also a dereliction of responsibility.

Judges lack the power to nullify that jurors have—at least when judges make rulings of law. When judges act as fact-finders in criminal cases they, like jurors, can nullify. When judges openly defy the law, they are likely to be reversed, and if they do so on a routine basis, they may be removed from the bench.

Judge Sweet is a modern day abolitionist. He believes that the death penalty is immoral. When a judge’s morality conflicts with his interpretation of the law, Sweet recommends that the judge

frankly state that the performance of his or her oath is no longer possible . . . as a matter of personal responsibility the judge should not enforce what is perceived to be an unjust result. . . . The judge must state that the enforcement is immoral and provide the basis of the perceived injustice along with the moral imperative—whether it be the Ten Commandments, John Rawls, the teachings of Buddha, or the United Nations Declaration of Human Rights.¹³²

Judge Sweet acknowledged that reversal might well be an anticipated result of his act, and that impeachment or censure is not entirely impossible.¹³³ Thus, in the end, the act is sound and fury, signifying nothing.

In *United States v. Webb*, for example, U.S. District Judge Stanley Sporkin refused to apply a sentence required by the Federal Sentencing Guidelines because he thought the sentence was unjust.¹³⁴ Sporkin’s main objection was that the defendant’s criminal conduct was solely explained by his addiction to drugs, but this factor was excluded from his consideration under the guidelines.¹³⁵ The court of appeals reversed, noting that the guidelines specifically rejected consideration of addiction.¹³⁶ The appellate court held that “Judge Sporkin not only abused his discretion in sentencing the defendant[;] he did so knowingly . . . [and] he wreaked havoc in the

130. See Sweet, *supra* note 124, at 1044–45.

131. Cover, Book Review, *supra* note 2, at 1007.

132. Sweet, *supra* note 124, at 1045.

133. *Id.*

134. 966 F. Supp. 16, 17 (D.D.C. 1997).

135. *Id.*

136. *United States v. Webb*, 134 F.3d 403, 404–07 (D.C. Cir. 1998).

administration of justice in this case.”¹³⁷ In an opinion recusing himself from the case, Judge Sporkin remarked, “the panel stated that the Court intentionally abused its discretion. To the contrary, this Court did what it was supposed to do—that is, render justice.”¹³⁸

Some judges engage in milder forms of nullification, in which they seem to openly defy the law, but calculate that their action will not be subject to judicial review. One example is U.S. District Court Judge Mary Johnson Lowe.¹³⁹ A former defense attorney, Judge Lowe thought that jurors should be told of their power to nullify. Under federal rules, however, jurors may not be so informed.¹⁴⁰ Judge Lowe, instructing jurors on the burden of proof in criminal cases, would tell them that if they found the defendant guilty beyond a reasonable doubt, they “may” convict him.¹⁴¹ The U.S. Attorney’s Office sometimes objected, asking the judge to say “must,” not “may.” Judge Lowe always refused. Because verdicts of acquittal are not subject to judicial review, however, she effectively insulated her own “nullification.”

The courage of judges who are willing to put their careers on the line for their principles is admirable. Nonetheless, fundamental defects in the law warrant more than a symbolic response. The more responsible practice is to prevent grave injustice, for example, by writing a decision that will survive appellate review.

137. *Id.* at 408–09.

138. *United States v. Webb*, No. Crim. A. 94-0245, 1998 WL 93052, at *3 (D.D.C. Feb. 20, 1998).

139. The Author served as a law clerk to Judge Lowe.

140. See Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 322 n.250 (1996) (comparing *United States v. Bejar-Matrecios*, 618 F.2d 81, 85 (9th Cir. 1980), where the court did not overturn based on a jury instruction which stated the jury had the “duty to convict” if it found guilt beyond a reasonable doubt, with *United States v. Hayward*, 420 F.2d 142, 143–44 (D.C. Cir. 1969), where the court reversed based on a “must convict” instruction).

141. For an analysis of this issue in state law, see John Brunetti, *Criminal Procedure*, 48 SYRACUSE L. REV. 517, 557 (1998), describing an attempt in New York to prevent nullification by changing form jury instructions from “may” convict to “must” convict. See also GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE* 159 (1988) (describing a behind-the-scenes battle about whether a judge should give an instruction describing the duty to convict to prevent jury nullification).

C. CHOICE III: RESIGNATION

The Nuremberg laws demonstrate the extent to which injustice—even genocide—can be legal.¹⁴² Given the opportunity, should a judge have used his power to prevent the application of those laws? Supreme Court Justice Antonin Scalia believes that the answer is no. He wrote:

Maybe my very stingy view, my very parsimonious view, of the role of natural law and Christianity in the governance of the state comes from the fact that I am a judge, and it is my duty to apply the law. And I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign.

But the alternative is not to do what is good or apply the law. The alternatives are to apply the law or resign because the law is what the people have decided. And if it is bad, the whole theory of a democratic system is that you must persuade the people that it is bad. I cannot go around—with respect to the Nuremberg laws, I would have resigned. But I would certainly not have the power to invalidate them because they are contrary to the natural law. I have been appointed to apply the Constitution and positive law. God applies the natural law.¹⁴³

Resignation is a response that various jurists have employed. Remember Judge John S. Martin?¹⁴⁴ Judge Robert Utter?¹⁴⁵ Judge Lawrence Irving?¹⁴⁶ These judges all resigned to

142. The Nuremberg laws were passed in 1935 and were “designed to isolate Jews from participation in the civic life of the Reich, and to end sexual contact between Germans and German Jews.” Paul H. Haagen, *A Hamburg Childhood: The Early Life of Herbert Bernstein*, 13 DUKE J. COMP. & INT’L L. 7, 21 (2003). These laws created two classes of German citizenship based on “German and generically related blood.” *Id.* The members of the second class, who included Jews, could not hold public office or vote. *Id.* at 22. The laws also forbade intermarriages between Jews and non-Jews. *Id.*

143. Antonin Scalia, *Of Democracy, Morality and the Majority*, Address at Gregorian University (May 2, 1996), in 26 ORIGINS 82, 89 (1996).

144. Judge Martin resigned from the U.S. District Court for the Southern District of New York. His reasons for resignation included an assault on the independence of judges through the use of the Federal Sentencing Guidelines and the Department of Justice’s intimidation of judges through the Feeney Amendment. See Arthur Price & Brian Kowalski, Note, *Ethical Obligations Under the New Approach to Sentencing Guidelines*, 17 GEO. J. LEGAL ETHICS 929, 934 (2004); John S. Martin, Jr., Op-Ed., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

145. Judge Robert Utter resigned from the Washington Supreme Court because of his stance on the death penalty. Utter has been quoted as saying, “We continue to demonstrate that no human is wise enough to decide who should die.” Dale Turner, *The Death Penalty Only Serves to Further Dehumanize Society*, SEATTLE TIMES, Mar. 18, 2000, at D8.

146. Judge J. Lawrence Irving resigned from the U.S. District Court of the

protest laws that they thought were immoral. If you do not remember them, you see the problem with resignation. It is spitting in the wind.

The problem with resignation “is that [it] abandons the moral arena to judges who have no qualms about enforcing unjust law.”¹⁴⁷ Judge Robert Sweet noted, “For me, resignation or recusal abandons the field to those who lack the same conviction and, of course, burdens one’s judicial brothers and sisters with the most troublesome of issues.”¹⁴⁸ When judges resign to avoid grappling with unjust law, they surrender their power to remedy extreme injustice. This is complicity disguised as morality.¹⁴⁹

Subversion seems the best—if not the only—option for judges who are interested in using their power responsibly and effectively. At the same time, however, subversion entails substantial costs; those costs are considered later in this Article. The next Part makes the point that providing judges with limited authority to depart from rules is contemplated by several legal constructs and is not as radical as it may initially seem.

Southern District of California. Judge Irving resigned because of his displeasure over the Federal Sentencing Guidelines. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 925 (1991); *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at A22.

147. Paulsen, *supra* note 7, at 73 (describing Robert Cover’s view). In his book review, Cover noted that resignation was also the response urged by Gandhi and Thoreau. In both writings, Cover seems agnostic about the potential of resignation. Cover, Book Review, *supra* note 2, at 1006. On the one hand, he notes that “resignation enables the judge to abstain from becoming a cog in the machinery of state oppression while refraining from a willful violation of his oath to support and enforce the law as he believes the law to be.” *Id.* On the other hand, he observes that for many “resignation will appear to be an empty gesture.” *Id.*

148. Sweet, *supra* note 124, at 1045.

149. Lawyers also sometimes face the dilemma of resigning or participating in a system that they believe is corrupt. The National Association of Criminal Defense Lawyers has advised its members not to participate in the military tribunal “trials” of persons suspected of terrorism, because it believes that the tribunals lack fundamental safeguards for accused persons. Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263, 333 n.308 (2004); see Nat’l Ass’n Criminal Def. Lawyers, Ethics Advisory Comm., Op. 03-04 (2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000d aa79/ethicsopinions/\\$FILE/Ethics_Op_03-04.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000d aa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf) (advising members that it is unethical to participate in military tribunals because the limitations placed on counsel make it impossible to render effective counsel).

IV. RULES-DEPARTURE IN JURISPRUDENCE, COMPARATIVE LAW, AND LEGAL DOCTRINE

In a democracy even limited judicial subversion seems, upon first impression, frightening. Why should one person's—even a learned judge's—perceptions of justice be credited over those of a legislative body?¹⁵⁰ It turns out, however, that some schools of jurisprudence already allow this kind of rules-departure. It is also contemplated by the laws of some other nations. Even the U.S. legal doctrine of “absurdity,” while not formally a rules-departure, allows judges to disregard the plain meaning of a law or statute. In this Part, I provide a short survey of this kind of judicial authority. My purpose here is to demonstrate that giving judges the power to occasionally depart from rules does not, in a democracy, lead to anarchy or totalitarianism.

A. JURISPRUDENCE

Robert Cover wrote that anti-slavery judges responded to “dissonance” between their morality and their legal interpretations by “retreat[ing] to a mechanistic formalism.”¹⁵¹ Formalism is the idea that rules contain the answer to every legal dispute, and that judges should decide cases based solely on the facts and the rules.¹⁵² In Cover's view, however, formalism allowed the abolitionist judges more flexibility than they realized. He believed that “the sorts of principles articulated as ‘fidelity to law,’ adherence to ‘authority,’ to ‘precedent,’ or to legislative or constitutional ‘intent’ seldom mechanistically compel a particular result in a given case.”¹⁵³

In Cover's view, judges could have both followed the law and refused to enforce the fugitive slave acts. Rather than ignoring the law of slavery, judges simply should have “interpreted” it in a very progressive fashion. As I will explain later,

150. The moral theory of subversion proposed later in this Article relies on norms of justice from international human rights law. To that extent, ethical subversion requires a judge to consult more than her own precepts about morality.

151. COVER, JUSTICE ACCUSED, *supra* note 4, at 232–36.

152. See Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 155–60 (1981) (“[L]egal disputes can be, should be, and are resolved by recourse to legal rules and principles. . . . Thus a formalist judge has an extremely limited set of materials to consider as relevant to his decision in a particular case—the rules and the facts. His decision is to be logically deduced from these two items alone.”).

153. COVER, JUSTICE ACCUSED, *supra* note 4, at 232–33.

Cover's recommendation seems tantamount to subversion, only the judge is supposed to be careful not to acknowledge what she is actually doing—not even to acknowledge to herself. It would have been difficult for a formalist judge, applying the law in good faith, to find major legal deficiencies with fugitive slave acts, especially when the U.S. Constitution itself provided for the return of runaway slaves. Under a “formal formalist” view, the pro-slavery interpretations of these judges were almost certainly correct.

Not every adjudicative theory requires as strict adherence to rules as does formalism. Some theories of jurisprudence actually allow judges to choose justice when it conflicts with law.¹⁵⁴ Natural law and pragmatism, especially, posit that moral considerations should be an important component of a judge's decision making.

Natural law views law as valid only when it is consistent with morality. Cover noted that “in the natural law tradition of slavery, the judge inherited a device for expressing the gap between the law as it is and the law as it ought to be.”¹⁵⁵ Cover concluded, however, that the anti-slavery judges were so committed to formalism they were unwilling to invoke natural law.¹⁵⁶ Ironically, some modern day jurists, notably Justice Clarence Thomas, seem more inclined to cite natural law than did most ante-bellum abolitionist judges.

The jurisprudence of pragmatism also would have provided abolitionist judges with a way to undermine the law of slavery. The legal philosopher Ronald Dworkin describes pragmatism as the view that “judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.”¹⁵⁷ Applying this principle to the fugitive

154. MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 90 (1973) (“[T]he judge is indeed bound by the rules of law, and he is bound to administer justice through those rules. But sometimes the ends of justice may be disserved by following those rules. In those cases the judge's role . . . extends him a liberty to make this judgment and to depart from the rules to achieve results consistent with the ends for which his role is set up.”).

155. COVER, *JUSTICE ACCUSED*, *supra* note 4, at 29. *But see* Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 288 (1988) (arguing that anti-slavery judges actually employed natural law in interpreting the law of slavery).

156. *See* COVER, *JUSTICE ACCUSED*, *supra* note 4, at 34–35.

157. RONALD DWORKIN, *LAW'S EMPIRE* 161 (1986).

slave cases, Dworkin believes that judges were not legally bound to find in favor of the slave masters. In a 1975 review of *Justice Accused*, Dworkin noted the judges “thought that the legislative policies in question violated the most fundamental of human rights. Why should they reject the competing idea that their formal responsibility as judges required that they protect individual right against misguided public policy?”¹⁵⁸

In Dworkin’s view, “law” is more expansive than written rules.¹⁵⁹ He writes that “the law of a community consists not simply in the discrete statutes and rules that its officials enact but in the general principles of justice and fairness.”¹⁶⁰ In the fugitive slave cases, Dworkin sees a conflict between this larger notion of law and the fugitive slave acts. He would have encouraged judges to disregard the law of slavery. Such an act would be based on “not simply the personal morality of a few judges, which they set aside in the interests of objectivity. They were rather, on this theory of what law is, more central to the law than were the particular and transitory policies of the slavery compromise.”¹⁶¹ In effect, like naturalism, Dworkin’s pragmatism would council antebellum judges to follow a higher law than slavery.

Natural law and pragmatism would relieve the judge who faces fundamentally unjust law of the burden of subversion; rather, the judge should interpret the law in a way that makes it just.¹⁶² The practical result, however, of application of either of these theories and subversion is the same—the will of the legislature is thwarted and the force of the unjust law is

158. Ronald Dworkin, *The Law of the Slave-Catchers*, TIMES LITERARY SUPPLEMENT (London), Dec. 5, 1975, at 1437, 1437 (reviewing COVER, JUSTICE ACCUSED, *supra* note 4).

159. *Id.*

160. *Id.* Professor Roy Brooks elucidates Dworkin’s views as follows:

Judges are permitted to make decisions outside established rules on the basis of principles but not policies, Dworkin argues. The judiciary should not simply be used as an instrument of society in the achievement of particular policy goals or in providing an efficient means to the achievements of those goals. Instead, the judge’s role in our liberal, democratic state is to ensure that a community treats its members in a principled, ethical manner.

ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 13–14 (2002).

161. Dworkin, *supra* note 158, at 1437.

162. *But see* Anthony J. Sebok, Note, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835, 1836 (1991) (arguing that Dworkin is mistaken in his belief that by applying his theory the judges that Cover considered would have reached a different result).

blunted. Perhaps endorsement of this kind of powerful judicial authority from a preeminent philosopher like Dworkin provides a measure of comfort to people who would fear subversive judges. Subversive judges are, in effect, no scarier than natural law or pragmatist judges.¹⁶³ All three kinds of judges perform moral analysis and pursue the same objective of harmonizing law and justice. The difference is that natural law and pragmatist judges regard the setting aside of rules as a legitimate part of their interpretative powers. Subversive judges, who tend to be more formalist, would regard their act as apart from their normal process of adjudication.

Most judges claim to follow more rules-bound theories of interpretation than either natural law or pragmatism.¹⁶⁴ In *Justice Accused*, Cover admonished modern day judges for adhering to the same rigid view of formalism as the antebellum judges. Yet Cover's extremely elastic views on judicial interpretation also raise serious issues. He wrote that "law," "authority," "precedent," and "legislative or constitutional 'intent' seldom mechanistically compel a particular result in a given case."¹⁶⁵ The practical result of Cover's proposal would be that the formalist judge responds to "cognitive dissonance" between law and morality by unconscious subversion. Rather than openly acknowledging that she is writing an opinion that is different from what the law requires, she tells herself that the outcome she seeks is supported by some legitimate interpretation.

Some judges probably do subconsciously subvert. Judge Jack Weinstein, for example, claimed that judges who have strong moral objections to law need neither nullify nor subvert it, because of "the great flexibility of the American common law and its historical forms of interpretation."¹⁶⁶ In this view, there can never be a real conflict between law and morality because the rules can always be "interpreted" to be consistent with mo-

163. I acknowledge that many judges and scholars register profound disagreement with natural law. Critics of pragmatist judges are more muted. *See, e.g.*, BROOKS, *supra* note 160, at 172 (noting that "most of our great judges have been judicial pragmatists"); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240 (1999) (describing as judicial pragmatists Supreme Court Justices Holmes, Brandeis, Cardozo, Frankfurter, Jackson, Douglas, Brennan, Powell, Stevens, White, and Breyer).

164. *See, e.g.*, BROOKS, *supra* note 160, at 172.

165. COVER, *JUSTICE ACCUSED*, *supra* note 4, at 232-33.

166. Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 *FORDHAM URB. L.J.* 131, 145 (2004).

rality. This kind of ends-justified view of formalism ultimately seems more deceptive than subversion. The subversive judge, at least, is true to herself.

B. COMPARATIVE LAW

Some countries allow judges more flexibility in law-morality conflicts than does the United States. It is interesting that the two most prominent examples are from nations that have experienced totalitarian regimes. In Germany, “administrative orders and regulations of a government agency may be nullified if they amount to a ‘gross violation of the laws of morality.’”¹⁶⁷ In South Africa the “apartheid judiciary did not have the option to review and reverse unjust laws; rather, the court and all the other institutions had to implement and administer such laws.”¹⁶⁸ In post-apartheid South Africa, however, “judges now have the duty to guard against the violation of human rights.”¹⁶⁹ The new constitution discourages judges from “too readily accepting the legitimacy of a law.”¹⁷⁰

Both Germany during the Nazi era and apartheid South Africa had laws that now are widely understood to have been unjust. Those nations’ post-facto analyses seem to conclude that judges should have had more authority to prevent application of those laws. In granting such extraordinary power to judges, it is likely that the risk that a judge might abuse this power was considered. In countries where memories of great injustice are fresh, however, it may be more obvious that the greater risk is not allowing a strong check on immoral law.

C. THE DOCTRINE OF ABSURDITY

The absurdity exception is a judicially created doctrine that exempts judges from following the plain meaning of a law if following it would lead to an absurd result.¹⁷¹ In *Crooks v. Harrelson*, the Court stated, “to justify a departure from the letter of the law . . . the absurdity must be so gross as to shock

167. Edgar Bodenheimer, *Significant Developments in German Legal Philosophy Since 1945*, 3 AM. J. COMP. L. 379, 388 (1954).

168. Tholakele H. Madala, *Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary*, 26 N.C. J. INT’L L. & COM. REG. 743, 748 (2001).

169. *Id.* at 757.

170. *See id.* at 758.

171. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

the general moral or common sense.”¹⁷² It must be clear that it was not the intent of Congress to have courts apply the statute in this way.¹⁷³

The doctrine of absurdity addresses a different problem than the moral-formal dilemma. It requires respect for the intent of the legislature, even if not for the legislature’s draftsmanship.

A judge applying the absurdity doctrine does not subvert the law so much as try to make it more consistent with the lawmaker’s purpose. For this reason the doctrine does not present the separation of powers issue that subversion does. I include it in this discussion of rules-departures only to make the minor point that even traditional legal doctrine allows judges to correct legislative bodies when they have made a procedural mistake that leads to an untoward result. The calculus of “absurd” results requires some reliance on a judge’s moral intuition. There is scant evidence that this power has been abused or that judges have used idiosyncratic, non-mainstream constructs of absurdity. This fact may provide some comfort as, in the next Part, I propose a moral theory of subversion that grants judges the authority to set aside some laws in the name of justice.

V. A MORAL THEORY OF SUBVERSION

In cases in which application of law would result in extreme injustice, judges should subvert the law. In other cases, they should refrain from subversion. This proposal obviously raises many questions, which I will try to address in this Part. At the onset, however, the reader should keep two things in mind. First, this theory, which reserves subversion for extreme cases, would limit rather than expand subversion’s present day practice. It would, for example, halt the most common kind of subversion—evasion of the Fourth Amendment exclusionary rule. Second, no judicial intervention against the will of a legislature is likely to be cost-free. Most Americans probably would agree that the Supreme Court was correct to invalidate school segregation laws in *Brown v. Board of Education*.¹⁷⁴ Still, they would have to concede that the Court’s actions created prob-

172. 282 U.S. 55, 60 (1930).

173. *Treat v. White*, 181 U.S. 264, 268 (1901).

174. 347 U.S. 483 (1954).

lematic legal and political consequences¹⁷⁵—consequences that have not yet been entirely resolved. My claim is not that subversion is a panacea; it is rather that judges should not be complicit when the law goes horribly astray, as it did when it allowed slavery.

If my proposal for ethical subversion is followed, I do not think our system of law would be radically disrupted (in part because, as I have described, unregulated and unacknowledged subversion now occurs frequently). My argument is cautious and moderate. Thus I am assuming that the rule of law exists and that it is preferable that legislative bodies, as opposed to judges, “make” law. I intend to preserve those ideals but create some limited exceptions that would allow judges to (1) relieve the violent effect of unjust laws¹⁷⁶ and (2) survive to judge another day.

A. PROCESS

The mechanics of subversion are relatively simple. The subversive judge needs to be both outcome-determinative and crafty. This is easiest at the trial level, where judges often act as fact finders. In the manner of the subversive trial judges described in Part II, the judge would make the kind of factual determinations that lead to a just outcome. Appellate judges would have to interpret the law in a way that is both plausible (even though the judge does not think it is correct) and that supports the desired result.

Duncan Kennedy, of Harvard Law School, has described how a judge might engage in this process.¹⁷⁷ He writes, in the

175. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 2–3 (1955); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428–30 (1960); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 564 (1965); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959).

176. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986). Cover’s theory was that all laws, not just unjust ones, are violent. He wrote, “a judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.” *Id.* at 1601.

177. See Kennedy, *supra* note 40, at 527–28 (describing through his persona as a judge, the six constraints on activist judges who want to do justice while facing a conflict between law and justice: “First, I see myself as having promised some diffuse public that I will ‘decide according to law,’ and it is clear to me that a minimum meaning of this pledge is that I won’t do things

persona of a judge,

the issue is how should I direct my *work* to bring about an outcome that accords with my sense of justice. My situation as a judge (initial perceived conflict between “the law” and how-I-want-to-come-out) is thus quite like that of a lawyer who is brought a case by a client and on first run-through is afraid the client will lose. The question is, Will this first impression hold up as I set to work to develop the best possible case on the other side?

....

So it is an important part of the role of judges and lawyers to test whatever conclusions they have reached about the “correct legal outcome” by trying to develop the best possible argument on the other side.¹⁷⁸

The subversive judge, then, simply adopts the best (plausible) legal arguments on the “justice” side of the law/justice conflict. She presents them as her own views, even though she does not actually agree with the interpretation of law. This is dishonest (later in this Part I situate the act in the tradition of “justified lies”) but nonetheless preferable to the alternative of following law that, in Kennedy’s view, makes the judge “an instrument of injustice.”¹⁷⁹

A judge willing to engage in ethical subversion should have some principled basis for choosing cases. There are two possible approaches to this issue: one, to leave it up to individual judges

for which I don’t have a good legal argument. . . . [S]econd, various people in my community will sanction me severely if I do not offer a good legal argument for my action. . . . [T]hird, I want my position to stick. . . . [F]ourth, by engaging in legal argument I can shape the outcomes of future cases and influence popular consciousness about what kinds of action are legitimate. . . . [F]ifth, every case is part of my life-project of being a liberal activist judge. . . . [S]ixth, since I see legal argument as a branch of ethical argument, I would like to know for my own purposes how my position looks translated into this particular ethical medium.”).

178. *Id.* at 522–23.

179. *Id.* at 558. In the conclusion to his article “Judge” Kennedy does not endorse a particular response by judges to conflicts between law and justice. Kennedy suggests that one alternative is, “[a]s the trial judge, I decide to pretend to believe an account of the facts . . . that I know to be false This is obviously an extreme measure.” *Id.* at 559. Kennedy summarizes his analysis thus:

[I]t is often argued that . . . the only permissible course of action for a judge confronting a conflict between law and how he wants to come out is *always* to follow the law I find this argument unconvincing [W]hether she should *always* follow the law in cases of conflict is a question that we answer as best we can through reflection and argument about our political system, about the actual laws in force within that system, and about particular cases.

Id. at 559.

to decide (which is the approach that has been tacitly adopted now), or two, to develop a method of determining when a legal result is unjust enough to warrant the extreme response of subversion. The second approach is preferable because it would help prevent subversion by judges with idiosyncratic moral views.

I propose that subversion be limited to laws that violate bedrock principles of international law. There are certain norms, known as *jus cogens*, which are so fundamental there can be no derogation. They apply to all states regardless of whether the state has signed a treaty. The principle of *jus cogens* is codified in the Restatement of the Foreign Relations Law of the United States as follows:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.¹⁸⁰

These norms represent a broad consensus among nations as to the most fundamental rights. I have no illusion that interpreting U.S. law under these principles is easy, but I think that it is possible for judges to do so in good faith. It is, after all, faith in their ability to interpret law that creates subversive judges in the first place.

Under *jus cogens*, the law of slavery and the Nuremberg laws would have been grounds for subversion. Subversion of the exclusionary rule, on the other hand, would not be justified.

Judges should subvert in a way that preserves their judicial capital.¹⁸¹ This means that they should carefully choose their cases, based on the plausibility of their “lie” (i.e., their analysis of the case) and on the degree of injustice. To limit subversion they should only engage in it when applying the law results in an extreme injustice. The “macro” concern here is

180. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

181. CHOPER, *supra* note 123, at 161–64.

that the court's legitimacy may be eroded if the public perceives too much subversion. The "micro" concern is that if an individual judge subverts too much, she might begin to lose her power as other courts look at her opinions with more scrutiny and view her decisions with less respect.¹⁸²

B. COSTS

Subversion is a choice with some potentially troubling consequences. I recommend subversion only because its consequences are not as bad as the other options a judge has when she confronts unjust law. None of the risks of the ethical subversion I propose are perilous enough to justify judicial complicity in the face of extreme injustice. Therefore, as the reader weighs the costs, she should keep in mind Margaret Morgan and Thomas Sims.¹⁸³ She should ask herself, "[a]re these costs worth it, if their benefit is the emancipation of a human being from slavery?" If the answer is no, then the reader finds herself aligned with Justices Shaw, Story, and Scalia.¹⁸⁴ She believes that judges should not use their power to prevent even the most extreme examples of injustice—slavery and genocide. She disagrees with Judge Alex Kozinski who says that "[o]ur collective assessment seems to be that the [judges who enforced the anti-semitic Nuremberg laws] shirked their responsibility—that they should have used their power and authority to undermine unjust laws."¹⁸⁵

To keep from overestimating the costs of subversion, the reader should remember that this project is descriptive as well as normative. As explained in Part II of this Article, subversive judges are all around us.¹⁸⁶ Thus, the analysis need not be contingent on hypotheticals about what would happen "if" judges started subverting the law. When the analysis is grounded in the real world we see that subversion is not a costless practice, but that it has not caused anarchy or fomented substantial backlash.

182. Rees, *supra* note 27, at 27. Matthew Rees describes Judge Stephen Reinhardt of the Ninth Circuit as one of the most overturned judges in history: "A former Supreme Court clerk confirms that justices have privately referred to Reinhardt as a 'renegade judge' and have given his opinions extra scrutiny." *Id.*

183. *See supra* Part I.

184. *See supra* Parts I, III.

185. Kozinski, *supra* note 38, at 1102.

186. *See supra* Part II.

1. Moral Costs

Subversion is a form of lying. Lying is wrong—usually.¹⁸⁷ Some philosophers, including Augustine and Aquinas, forbid any lie.¹⁸⁸ For Immanuel Kant, likewise, telling the truth is a categorical imperative.¹⁸⁹ Many people, however, find an absolute prohibition against lying unduly harsh. It would have required, for example, Anne Frank's protectors to tell the truth if Nazi authorities asked if they knew of her whereabouts. Even the Bible seems to excuse some lies. Exodus, for example, contains an account of Hebrew women who lied to Egyptian authorities so that they would not have to obey an order to kill male babies.¹⁹⁰ The women lied because they "feared God."¹⁹¹

The philosopher Anita Allen notes, "[m]ost contemporary philosophers who have taken up the subject of lying . . . have argued that the wrongness of lying is to some extent contingent upon the circumstances."¹⁹² In some moral and religious traditions certain kinds of lies are justified.¹⁹³ According to Allen,

[t]he standard example of when this doctrine may apply is the situation in which a murderer comes to your door looking for someone you

187. It is also worth noting that lying is quite common. This does not morally justify lying but makes the discussion of it more realistic. In the words of Anita Allen:

People lie all the time. Liars lie, but they are not alone. Ordinary people who value and practice a high degree of honesty also lie. Some highly regarded professionals lie as a seeming requirement of their work. Physicians and nurses lie to patients to ease their distress. Social psychologists lie to research subjects in studies of human behavior. Law enforcement officials lie to criminal suspects to encourage cooperation and collect evidence. Diplomats and government bureaucrats lie to gain advantage over foreign governments in international affairs. Lawyers lawfully conceal truths unfavorable to their clients, for indeed, in the adversary system, "the very institutional framework of a legal system may be used to hide the truth."

Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 165–66 (1999).

188. See ST. THOMAS AQUINAS, ST. THOMAS AQUINAS SUMMA THEOLOGICA, pt. II, question 110, art. 3 (Fathers of the English Dominican Province trans. 1911) ("[I]t is unnatural and undue for anyone to signify by words something that is not in his mind Therefore every lie is a sin, as also Augustine declares (*Contra Mend.* i).").

189. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 15 (James W. Ellington trans., Hackett Publishing Company, Inc. 3d ed. 1993) (arguing that lying cannot be a universal maxim because from "[s]uch a law there would really be no promises at all," which would consequently inconvenience the original author who personally willed a lie).

190. *Exodus* 1:15–22.

191. *Id.*

192. Allen, *supra* note 187, at 168–69.

193. *Id.* at 162.

know to be at home. When asked if the intended victim is at home, it is permissible to say that the intended victim is not The Catholic teaching is that you may lie or equivocate in this situation because the truth is sought by someone whose unjust intentions deny him or her the right to it.¹⁹⁴

Both the moral arguments against lying and the arguments supporting justified lies implicate subversive judges. Lies are bad for society, according to philosophers, because they break down the trust required for civic life.¹⁹⁵ In addition, the liar disrespects the dignity of the person to whom she lies; she does not allow that person to act rationally, based on the truth.¹⁹⁶

Subversive judges are subject to both these critiques. The specter of widespread lying by judges could erode the legitimacy of the courts and ultimately threaten the rule of law. For this reason, any moral theory of subversion should be restricted to narrow circumstances. It is also true that the judge who subverts does not trust others to correct the immorality; this is why she takes it upon herself. She might argue that her lack of trust is justified. Nonetheless, one motivation for judges who apply law that they believe is unfair probably is the hope that their application will call attention to the injustice, and lawmakers will respond by changing the law. The subversive judge circumvents the potential of this outcome.

A lie by a judge that has the result of freeing a human being from slavery might fit into the tradition of justified lies. The judge's act is evil, because it is a lie, but it is less than the evil of slavery. In this view, judicial candor is a hallmark of a civil society, but it is not a categorical imperative. In limited circumstances, in the service of a higher good, a moral theory of subversion would permit judges to make "mental notes" against applying unjust law.

2. Political and Legal Costs

a. Democracy and Separation of Powers

Judicial subversion is anti-democratic. It creates a short-term benefit with a long-term cost. The subversive judge

194. *Id.* at 168. Catholic doctrine requires one who lies in a permissible circumstance to make a "mental note" where she silently notes the truth to herself. *Id.*

195. *See id.* at 169.

196. *See id.*

makes, rather than interprets, law after the democratically elected body has passed unjust legislation.

My response to concern about the anti-democratic nature of subversion consists of four observations. First, some constitutional values are more important than others. If there is a conflict between fundamental civil rights and the separation of powers, then the former should be accorded more respect.¹⁹⁷ Second, the existence of constitutional anti-majoritarian practices reveals that democracy is not an absolute value. The Equal Protection Clause, for example, also restricts what “the people” can do—even through democratic means.¹⁹⁸ In interpreting this amendment, judges frequently confront tension between the ideals of majority rule and equal justice.¹⁹⁹

Third, the practice of democracy is not all or nothing. There are degrees of democracy. It is true that there is less democracy in a world with subversive judges, but there may still be “enough” democracy. Put another way, when the average citizen considers threats to popular governance, she probably is more concerned about loosely regulated campaign financing or election fraud than with subversive judges.²⁰⁰ With all its impurities, including subversive judges (both lawyers and lay persons probably are more willing to acknowledge judicial subversion than would be many judges or legal scholars), the United States’ practice of democracy is still sufficient for the citizen to believe that she lives in a free society, governed by “we, the people.”

197. Jesse Choper, making a similar calculus, also came out in favor of individual rights over separation of powers. *See generally* CHOPER, *supra* note 123.

198. U.S. CONST. amend. XIV, § 1.

199. *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107–09 (1976) (discussing the structure and limitations of the antidiscrimination principle that controls the interpretation of the Equal Protection Clause).

200. One reason might be that subversive judges, unlike campaign financing, are not high-profile campaign issues. Indeed, Republicans and Democrats seem to have little success when they attempt to make a campaign issue of the appointment of “activist” judges (charged against Democrats by Republicans) or “right-wing, reactionary” judges (charged against Republicans by Democrats). These issues have more currency in judicial elections (as opposed to elections for representatives in legislative bodies), but when subversive judges are defeated in these cases it may be because their subversion is too open, or because it is practiced indiscriminately—for example, to make “political” statements as opposed to “moral” statements.

Finally, the view of a rigid line between legislators who “make” the law and judges who “interpret” it is more a relic of high school civics than an accurate description of how the branches actually operate. As Judge Richard Posner writes: “Everyone professionally involved with law knows that, as Holmes put it, judges legislate ‘interstitially,’ which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.”²⁰¹

b. *Line Drawing*

Judicial subversion should be limited, but limited to what, exactly? This Article suggests two broad limitations: first, that judges rely on *jus cogens* principles of international law and second, that they preserve their judicial capital. These limitations still leave judges with considerable discretion.²⁰² For example, a judge might have to decide whether sentencing laws that punish crack cocaine offenses more severely than powder cocaine offenses constitute “systematic racial discrimination,” in violation of *jus cogens*.²⁰³ If she believes that such laws do represent an extreme injustice, she still must decide what to do in a particular case. She can try to prevent the defendant from

201. RICHARD A. POSNER, *OVERCOMING LAW* 231, 235 (1995) (“When a constitutional convention, legislature, or a court promulgates a rule of law, it necessarily does so without full knowledge of the circumstances in which the rule might be invoked in the future. When the unforeseen circumstance arises . . . a court asked to apply the rule must decide . . . what the rule should mean in its new setting. Realistically, it is being asked to make a new rule, in short to legislate.”).

202. Much depends on judges’ good faith in making the distinction between moral concerns and political concerns. To the extent that there is concern about a judge using subversion to enforce a non-mainstream construct of morality, the judicial selection and retention processes should help allay that concern. Judges typically seem not to hold political or moral views far outside of the mainstream. See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1982–90 (1990).

203. See Lynette Clemetson, *Judges Look to New Congress for Changes in Mandatory Sentencing Laws*, N.Y. TIMES, Jan. 9, 2007, at A12 (“Currently, possessing five grams of crack brings an automatic five-year sentence. It takes 500 grams of powder cocaine to warrant the same sentence. Similarly disparate higher amounts of the drugs results in a ten-year sentence. The 100-to-1 disparity, opponents of the law say, unfairly singles out poor, largely black offenders, who are more likely than whites to be convicted of dealing crack cocaine. At a sentencing commission hearing in November, Judge Walton, associate director of the White House Office of National Drug Control Policy under the first President George Bush and a onetime supporter of tough crack cocaine sentences, said it would be ‘unconscionable to maintain the current sentencing structure’ on crack cocaine.”).

being punished at all, or she can attempt to reduce the crack offender's punishment to what it would be if the offense involved powder cocaine. The "judicial capital" limitation means that she acts only if her subversion is likely to be both undetected and successful.

The practical result of these limitations is that like cases will be treated differently. One crack defendant's sentence might be subverted, and another's not. This discrepancy might seem to occasion another kind of judicial unfairness, but the goal of the subversive judge is to remedy the effect of unjust laws when she can do so in a responsible way. This goal presupposes that she will not be able to remedy all injustice, even in those cases that come before her.

These are only examples of how subversion might proceed in some principled fashion if there were an open discussion about it. That discussion will not happen as long as judges and scholars largely pretend that subversion does not occur. Lawyers, especially, acknowledge that subversion is commonplace, but because it is seen as shameful, there is no public debate about when it might be justified.²⁰⁴

In sum, the line-drawing critique identifies some of the most difficult issues subversive judges face. It is, however, the least persuasive critique. It criticizes subversion on procedural or methodological grounds, as opposed to on its merit. It tells Margaret Morgan and Thomas Sims that they should remain slaves because judges will have to make hard choices in other cases that have nothing to do with them, or slavery. It is one thing to acknowledge the difficulty of drawing lines between degrees of morality. It is another—bad—thing to suggest that this difficulty should prevent moral judgments from being

204. Smith, *supra* note 33, at 1658. Smith continues:

Kent Greenawalt has also discussed judicial nullification, albeit not in great detail. In *Conflicts of Law and Morality*, in the course of discussing the many techniques available to various legal actors for ameliorating the law's usual rigor, he points out (what every practicing lawyer viscerally knows) that judges at every level have a *de facto* power to nullify the law, in both criminal and civil matters. Judges most easily exercise this power when they make findings of fact, which rarely are disturbed or even closely examined by appellate courts. But if a fact-finder has unfettered discretion, she may tailor her findings as she pleases. Hence, the law may effectively be nullified by a judge who knowingly plugs fictive facts into correct doctrine in order to obtain a particular result.

Id. at 1659–60; see GREENAWALT, *supra* note 33, at 348–73.

made, when failing to make such judgments has horrific consequences.

c. Backlash

Theoretically there is the potential of a backlash reaction to subversive judges, but only if judges are poor subversives. If the judge is clever, people should not realize that she is acting subversively—she will seem like a creative interpreter of the law, and perhaps she will be reversed more than some other judges, but her real agenda will not be suspected.

What if word gets out? Some people fear a breakdown in the rule of law—every judge would do her own thing to spite the subversive judges. This seems unlikely, at least on a widespread basis. Historically, principled subversion in other contexts does not seem to have inspired unprincipled subversion. Thus activist jurors in fugitive slave cases did not cause other jurors to subvert just laws. There are famous examples of “bad” jury nullification, including white supremacist jurors who acquitted people guilty of crimes against civil rights workers, but those jurors were not motivated by “good” jury nullification.²⁰⁵ They may not have even been aware of the good nullification. They would have nullified regardless.

Likewise, there are judges whose legal decisions are motivated by politics or even more sinister motivations.²⁰⁶ They exist in a separate moral universe from judges who subvert for principled reasons. The judge who subverts for principled reasons risks outrage or sanctions, but probably does not cause unprincipled subversion.

CONCLUSION

Judicial subversion is justified only when it thwarts profoundly unjust law. In the previous Part I have demonstrated that principled subversion is not different in effect from other theories of adjudication that tolerate rules-departure. I acknowledge, however, that encouraging judges to subvert the law in any case is startling, even if one concedes that judges

205. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700–14 (1995) (discussing various rationales for jury nullification).

206. See generally Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432–33 (2004).

now frequently subvert without encouragement, guidelines, or any coherent theory.

Ironically, subversion—an extreme tool—now is employed by many moderate judges. As an extreme tactic, it should be reserved for extreme cases of injustice.

When a judge considers how she should respond to unjust law, she must make difficult choices. Our system of government relies on trust in the good faith of participants in the justice system, especially judges. Honesty and transparency are important components of that good faith. These truths must be reconciled with another reality: the violent, dehumanizing force of injustice, especially injustice accomplished through the law.

The law of slavery, for example, was evil. No judge ever should have applied law that had the result of enslaving a human being. If a judge had the power to free a slave, as a moral actor he should have done so, including—if necessary—by subverting the law. Judges who failed to do so were complicit in one of the worst human rights abuses in American history.

In his Letter from Birmingham Jail, Dr. Martin Luther King, Jr. wrote, “[t]he question is not whether we will be extremists, but what kind of extremists we will be . . . Will we be extremists for the preservation of injustice or for the extension of justice?”²⁰⁷ Conceding the complexity of the issues, and that no alternative is cost-free, this Article recommends that judges be extremists for justice.

207. Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), reprinted in 26 U.C. DAVIS L. REV. 835, 845 (1993).