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Judicial Disobedience, Justice Lemuel Shaw and *Commonwealth v. Aves*[2]

1. Judicial disobedience

Louise Weinberg, an American expert in the field of comparative and international private law aptly notes that, sooner or later, there always exists a possibility of a blatant conflict between law and morality, and, *ergo*, of the application of a law that is extremely immoral (or, even further, extremely unjust). Her view is that this problem is for jurisprudence the same as theodicy is for religion.[3]

Although, in principle, theodicy does not assume disobedience in respect of a divine decision if it seems unjust, in the field of law this appears to be considerably more complicated. In legal literature, the most frequent reference in this context is to the institution of civil disobedience, as a symbol of an individual's protest against the necessity of observing a law that leads to blatantly wrong results. Civil disobedience applies to every citizen as the addressee of legal norms, however, here I would like to focus on the still more complex dilemma of a judge who stands face to face with the possibility (the necessity?) of opposing a blatantly unjust law (judicial disobedience). Although, from the philosophical-legal point of view, the latter problem is fundamentally irresolvable – especially within the scope of legal positivism – it still constitutes an object of interest within contemporary literature, on the part of ethicists, philosophers, or lawyers.[4]

There is, surely, no surprise here as fundamental moral-legal problems do not only concern judges functioning in the extreme conditions of criminal and totalitarian regimes, but can also arise under democratic regimes, or even within systems that, *prima facie*, fulfil all the demands of a democratic state governed by the rule of law. Even more, in relation to such systems, the evaluation of the potential behaviour of judges

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[2] This article is based on the Polish article of J. Zajadło, *Problem nieposłuszeństwa sędziowskiego: Lemuel Shaw i sprawa Commonwealth v. Aves* [Eng. *Problem of Judges' Disobedience: Lemuel Shaw and the Case of Commonwealth v. Aves*], "Gdańskie Studia Prawnicze" 2017/38, pp. 627–642.

[3] L. Weinberg, *Of Theory and Theodicy: The Problem of Immoral Law*, in: J.A.R. Nafziger, S.C. Symeonides (eds.), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. Von Mehren*, Ardsley (NY) 2002, pp. 473–502.

[4] Among the most recent work on this subject, see: J. Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging*, Oxford–New York 2010; D.E. Edlin, *Judges and Unjust Laws: Common Law and the Foundations of Judicial Review*, Ann Arbor 2008; B.W. Wendel, *Lawyers and Fidelity to Law*, Princeton–Oxford 2010.

who face applying a blatantly unjust law, seems more rational, since it is not burdened with the odium of potential martyrdom. The best example of this is the unanticipated renaissance of Gustav Radbruch formula in recent years.[5] The expectation that judges in Nazi Germany would engage in acts of disobedience against an extremely immoral law is at the same time an imperative that they be ready to become martyrs and to give up their own lives in the defence of a universal ethic. As is well-known, Radbruch has, to some degree, justified German judges and laid the blame for the state of affairs on legal positivism. Without developing this topic further, I would like to merely conclude that the thesis that Nazi judges were bound by legal positivism is, indeed, morally attractive, nonetheless utterly false from a historical point of view. Although there have been rare cases of judicial opposition, at the same time one must recognize that it was not the legal positivism that was the main cause of their rather incidental nature.[6]

Prima facie, the concept of judicial disobedience might seem an oxymoron. If, in the field of legal studies and the associated political philosophy, one speaks of resistance to the authorities, it is almost exclusively in the context of the institution of civil disobedience. For all intents and purposes it does appear logical; after all, how can one speak of disobedience where judges themselves are the authorities, and as such they are obliged to obey the law and, to put it more precisely, to exercise fidelity to the law that has almost entirely, at least in the Continental European system, been passed without their participation. This formulation is a logical consequence of the established paradigm of the relationship between the creation and the application of law, even if certain amendments to this model might arise in the process of interpretation. Despite its superficially absurd character, the concept of judicial disobedience appears in legal literature, especially Anglo-Saxon, in the context of the dilemmas of the conscience of the judge.[7] Furthermore, it is an object of intense debate in modern doctrinal discussions at the juncture of political philosophy, legal philosophy, and constitutional law.[8]

The majority of authors agree that the problem of judicial disobedience is of an absolutely extraordinary nature,[9] but that does not mean that it should be seen as trivial. Quite the contrary, the more complex it is, the more attention it deserves. For the purposes of this study, I accept that the discussed issue has two aspects that differ from each other. The first, long ago identified, refers to the individual dimension and is based on a specific case resolved by a judge (or, sometimes, a specific group of cases of the same character). However, the second aspect, which is in fact less known, though significantly more important, is of an institutional nature and applies to judges as a personification

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[5] For more on this topic, see: J. Zajadło, *Formuła Radbrucha. Filozofia prawa na granicy pozytywizmu prawniczego i prawa natury* [Eng. *Radbruch's Formula: Legal Philosophy Between Legal Positivism and Natural Law*], Gdańsk 2001.

[6] Examples are given in I. Müller, *Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz*, München 1989, pp. 197–202.

[7] In American jurisprudence, the concept has become widely known thanks to article by L. Ross, J.P. Foley, *Judicial Disobedience of the Mandate to Imprison Drunk Drivers*, "Law and Society Review" 1987/2, pp. 315–324.

[8] Cf. e.g. J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, Cambridge 2010; T.R.S. Allen, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, Oxford 2013. It is interesting to note that both the authors disagree with each other not so much with regard to the legitimacy of the existence of the phenomenon of judicial disobedience, as rather with regard to its substance and scope of application. This is scarcely surprising as one writes of the sovereignty of the parliament, while the other writes of the sovereignty of the law.

[9] In this article, I have adopted this narrow understanding of judicial disobedience. Sometimes one does, indeed, encounter texts in the literature that link judicial disobedience in general with independent juridical practice and judicial independence. See, for example: S.B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, "Columbia Law Review" 1997/7, pp. 1971–2009, and S.B. Burbank, *The Architecture of Judicial Independence*, "Southern California Law Review" 1999/72, pp. 315–371.

of the third branch of government in a state. To some degree, both these aspects have appeared in the decisions of American courts in slavery cases, which will be discussed below although it of course applied by far more to the first rather than the second dimension. Indeed, considerably less attention is given to the institutional aspect of the matter, but this does not mean that it goes completely unnoticed. In the most recent literature, for example, Hans Petter Graver analyses the subject of the behaviour of judges and courts when the legislative body infringes the rules of a state governed by the rule of law, and especially when it proceeds contrary to the specific order of values expressed in the constitution, including the principle of tri-partite separation of powers.[10] Here we are dealing not with conflicts on an individual level in relation to the judge considering a specific case or type of cases, but with a certain kind of dilemma which judges face as a collective, that is as the third power which is under attack from the two others.[11] This is not a conflict of the state governed by the rule of law with democracy *in genere*, but rather a conflict of that state with the worst aspects of an ill-understood democracy *in specie*. In legal literature on constitutional law, and especially in Anglo-Saxon writings on the subject, this situation is seen as rare, but quite possible to imagine.[12]

It would appear that decisions of American courts in slavery cases constitute a much more appropriate example of the conflict between judicial conscience and the legal duty to obey the laws in force (on an individual and institutional level) than does the Radbruch formula discussed above.[13]

In contrast to judges in Nazi Germany, representatives of the American justice system, especially in the Northern states, were essentially in no danger should they resist the legislation protecting the institution of slavery. On the contrary, in cities such as, for example, Boston, judges who ordered that escaped slaves be sent back to their owners in the South met with protests by the abolitionist public opinion. Sometimes, it took the form of only a very strong pressure from a crowd of citizens, to which a judge, despite his personal abolitionist beliefs, did not succumb.

A typical example is the case of Thomas Sims, an escaped slave from Georgia, in 1851. Even such well-known and radical opponent of slavery as Justice Lemuel Shaw, the Chief Justice of the Massachusetts Supreme Judicial Court, felt obliged to comply with the Fugitive Slave Act of 1850 (which radically altered earlier regulations from 1793) and upheld the decision of Commissioner Edward G. Loring

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[10] H.P. Gravert, *Judges Against Justice: On Judges When the Rule of Law is under Attack*, Heidelberg–New York –Dordrecht 2015.

[11] However, one must add that, in this sense, a certain right to resist is vested, in specific circumstances, in each of the three powers – T. Campbell, *Separation of Powers in Practice*, Stanford 2004, p. IX: "The arrogation of power by a branch in a manner crossing over those divisions exposes the comparative disadvantages of the arrogating branch and calls for *vigorous resistance* by the branch upon which the encroachment has occurred" [emphasis – J.Z.]. Thus, as Thomas Jefferson wrote in a letter to Abigail Adams on 22 February 1787, it is necessary to be in constant readiness to resist the powers, especially if one of them arrogates too many rights to itself – see: C. Müllers, *The Three Branches: A Comparative Model of Separation of Powers*, Oxford 2013, p. 27.

[12] "It is a possibility that requires a theory of when *judicial disobedience* and lying are warranted in a generally *well-functioning democracy*" [emphases – J.A.]. See: J. Allan, *The Activist Judge – Vanity of Vanities*, in: L.P. Coutinho, M. La Torre, S.D. Smith (eds.), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences*, Heidelberg–New York–Dordrecht 2015, p. 85 ff.

[13] In the literature, however, despite everything, these two examples are often placed side by side: that is, on one side the Radbruch formula, and the Hart-Fuller controversy, and, on the other, the conflict of the conscience and the legal duty of American judges adjudicating in slavery cases. See, for example: J. Feinberg, *Natural Law. The Dilemmas of Judges Who Must Interpret Immoral Laws*, in: J. Feinberg, *Problems at the Roots of Law: Essays in Legal and Political Theory*, Oxford–New York 2003, pp. 3–36; J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, "Cardozo Law Review" 2007/2, pp. 669–702.

who ordered the returning back of Sims to his owner. The enforcement of the order was accompanied by such violent protests from a crowd of indignant citizens that the slave had to be escorted under naval escort to a ship that would take him to Georgia. The case had a very interesting sequel: Sims was later sold to the state of Mississippi, and then he escaped again in 1863 during the Civil War and returned to Boston. What's more, when Charles Devens, the federal sheriff who arrested Sims back in 1851, became a prosecutor in 1877, the former escaped slave was employed by the Department of Justice.[14]

Sometimes, however, the consequences incurred by a judge instructing that a runaway slave be handed over contrary to public opinion went much further. The standard example here is the case of Anthony Burns in 1854. In this case, too, the decision of Commissioner Loring ordering the return of an escaped slave to Virginia was accompanied by protests on the streets of Boston by several scores of citizens and, once again. the assistance of the U.S. Navy was needed. A year later, Burns returned to Boston since he had been bought for the sum of 1,300 dollars. The case did not end there for Commissioner Loring; in 1857, he was dismissed by Governor Nathaniel P. Banks, although, for accuracy's sake, we should add that a year later the President James Buchanan appointed him to another post.[15] This serves to show that, in the period immediately preceding the Civil War, the issue of slavery aroused serious conflicts not only between the North and South, but also within the structures of the federal authorities.

The best example are the two cases which I discuss in the following chapters: on the one hand, *Prigg v. Pennsylvania* of 1842, and, on the other, *Dred Scott v. Sandford* of 1857. Especially the verdict in the latter case which, according to some, has been the worst and most shocking judgment in the history of the U.S. Supreme Court[16] did not only radically divide judges, but is generally seen as an event that catalysed an inevitable armed conflict within the Union. Each in its own way, the verdicts in the cases of Edward Prigg, Sims, Burns, and Scott indicate the gradual escalation of a process that, as we have seen, began much earlier and had its roots in the 1770s and 1780s, during the period of the War of Independence and the process of adopting the U.S. Constitution. The matter of slavery divided the Founding Fathers[17] and the subsequent American political elites because it caused a dissonance between the ideals of the Declaration of Independence of 1776 and several pro-slavery provisions of the Constitution of 1787.[18]

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[14] For more on this topic, see: L.W. Levy, Sim's Case: *The Fugitive Slave Law in Boston in 1851*, "The Journal of Negro History" 1950/1, pp. 39–74; cf. also: S.W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law 1850–1860*, Chapel Hill 1970, p. 117 ff.

[15] From the extensive literature, see, especially: S.W. Campbell, *The Slave Catchers*…, p. 124 ff; A.J. von Frank, *The Trial of Anthony Burns. Freedom and Slavery in Emerson's Boston*, Cambridge (Mass.)–London 1999; also among recent studies, see: E.M. Maltz, *Fugitive Slave on Trial: The Anthony Burns Case and Abolitionist Outrage*, Lawrence 2010.

[16] B. Schwartz, *A Book of Legal Lists: The Best and Worst in American Law*, New York–Oxford 1997, p. 69 ff. The decision in *Dred Scott v. Sandford* still provokes huge emotional responses among American legal scholars and jurists. Among recent studies, see, for example: D.T. Konig, P. Finkelman, Ch.A. Bracey (eds.), *The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law* (eds.), D.T. Konig, P. Finkelman, Ch.A. Bracey, Athens 2010.

[17] For more on this topic, see: P. Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, Armonk (New York)–London 2001.

[18] The exceptionally rich literature on this topic includes: D. Waldstreicher, *Slavery's Constitution. From Revolution to Ratification*, New York 2009; G.W. Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic*, Chicago 2010.

2. *Commonwealth v. Aves*

In modern philosophical-legal literature, it is stressed that, with regard to the topic of judges' moral dilemmas, slavery cases before American courts can be divided into two basic groups: first, the so-called slaves in transit cases, which relate to a voluntary introduction of a slave into the territory of a free state; and second, the so-called fugitive slave cases, which relate to slaves captured on the territory of a free state with the aim of returning them back to their owner in a slave state.[19] The famous Lord Mansfield's decision in the case of *Somerset v. Stewart* of 1772, despite differences, in a sense combined these elements as it concerned an escaped slave who was voluntarily brought to England.[20]

The basic difference between slaves in transit cases[21] and fugitive slaves cases[22] consisted in their completely different legal basis and, as a result, also in a different philosophy underlying of their resolution. In the case of slaves in transit, the issue involved applying rules of comity in relations between particular states and mutual recognition of separate legal regulations on this basis. In the case of escaped slaves, the matter was more complicated and concerned the essence of American federalism, especially the division of competences between the states and the Union. The question arose which of the authorities, state or federal, were responsible for the implementation of the provisions of the Fugitive Slaves Acts of 1793 and 1850, passed on the basis of article IV, section 2, clause 3, of the U.S. Constitution (the so-called Fugitive Slave Clause). Both the non-binding character of the rules of comity and the unclear division between state and federal competences opened up some possibilities of dispute resolution in favour of slaves in the Northern states. However, the number of judgments in both types of cases is so vast and so diverse that it is difficult to discuss them in detail, if only because of the limited scope of this study. By way of example, let us focus only on a few judgments passed by one judge, Justice Lemuel Shaw, as they seem to be the most representative from the point of view of the issue of the conflict of conscience and the possibilities of interpretation under the positive law.

The Commonwealth v. Aves case of 1836 concerned the fate of a six-year-old girl named Med, a slave who was voluntarily brought to Boston by her owner Mary Slater. The person sued by the abolitionist community was Thomas Aves, the father of Mary Slater, because the young slave was in his home. Referring extensively to the above-mentioned verdict in *Somerset v. Stewart* (*sic!*), Justice Lemuel Shaw applied an interesting legal construction: admitting the free-person status of the girl, Justice Shaw said that he could not, on the basis of the rules of comity, recognize the laws of property of the state of Louisiana, because that law was contrary to the criminal law and tort law of the Commonwealth of Massachusetts.[23] In other words, Shaw repeated Lord Mansfield's argument that slavery may be legally acceptable, but it must be based on positive law. In Massachusetts there is a presumption of individual freedom. Undoubtedly, this

[19] A.J. Sebok, *Legal Positivism and American Slave Law: The Case of Chief Justice Shaw*, in: D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford–Portland–Oregon 1999, p. 114.

[20] For more on this topic, see: J. Zajadło, *Lord Mansfield. To Be A Judge*, Gdańsk 2021.

[21] This type of case is extensively discussed in P. Finkelman, *Imperfect Union. Slavery*, *Federalism*, *and Comity*, Chapel Hill 1981, *passim*.

[22] This type of case is extensively discussed in S.W. Campbell, *The Slave Catchers*…, *passim*; most recently: S. Lubet, *Fugitive Justice: Runaways*, *Rescuers*, *and Slavery on Trial*, Cambridge (Mass.)–London 2010, *passim*.

[23] A.J. Sebok, *Legal Positivism*…, p. 117 ff.

ruling, based on very closely argued legal thinking, was to some extent rooted in the deep anti-slavery beliefs of Justice Shaw. The leading abolitionist of the day, William Lloyd Garrison, called it a "rational, just and noble decision of [an] eminent judge".[24] In *Commonwealth v. Aves*, Shaw ruled as he did because he considered slavery "contrary to natural right, to the principles of justice, humanity and sound policy".[25] There is a widespread agreement in the literature that, by the arguments applied in this verdict, "Chief Justice Shaw had established a monumental precedent in law",[26] and, further, that "in the antebellum period, *Aves* stood along with Lord Mansfield's opinion in *Somerset* as one of cornerstones of antislavery thought and theory".[27]

Shaw's subsequent *Commonwealth v. Porterfield* and *Commonwealth v. Fitzgerald* judgments in 1844 confirm the reasoning and argumentation adopted in the *Commonwealth v. Aves* case. What is more, this case-law also affected judgments and even legislation in other free states.[28] An ambiguous element arose in *Commonwealth v. Aves*: Shaw did, indeed, acknowledge the freedom of the six-year-old Med, but at the same time separated her from her mother who remained a slave in far-off Louisiana. Considering the legal status of slaves, there is of course no guarantee that the child would not have been sold and separated from her mother at some point, but the problem remains.

There is also another earlier ruling in the case of *Commonwealth v. Howard* of 1832, which shows that Shaw exhibited an exceptional sensitivity and sense of justice in this type of cases. This time it concerned a teenage boy named Francisco who had been brought from Havana. In the light of the law of the Commonwealth of Massachusetts, the matter was simple: the boy was a free person. Shaw, however, went further; privately outside the courtroom, he questioned Francisco in detail, and it turned out that he was not treated as a slave by Mrs. Howard and that he did not feel a slave. Even more, the boy expressed a clear wish to stay with his guardian.[29] It was quite remarkable for the great Lemuel Shaw to hold a sincere and empathic conversation with a ten-year-old black boy from Havana in America of 1832!

The decisions of Justice Shaw in the cases of escaped slaves were somewhat different. Here, the opportunities for pro-liberal rulings were much more limited. In 1836, employing a clever procedural trick, Justice Shaw managed to bring about an actual release of two slave girls, Eliza Small and Polly Ann Bates, detained in Boston on the vessel *Chickasaw*. However, in the case of George Latimer in 1842, Justice Shaw held to the letter of the law and refused to release from detention a run-away slave from Virginia.[30] Shaw argued that he could not free Latimer because he was detained under the federal law with constitutional backing and, thus, he would have to follow the law. Thus, indirectly, Shaw provided a solution to the state authorities: if it was a federal case, there was no reason to use a state prison for this purpose and, thus, involve the state authorities. This was used later and state cooperation was repeatedly refused to federal sheriffs.

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[24] A.J. Sebok, *Legal Positivism*…, p. 119.

[25] *Lemuel Shaw*, in: J.R. Vile (ed.), *Great American Judges: An Encyclopedia*, Vol. 1–2, Santa Barbara–Denver –Oxford 2003, Vol. 2, p. 706.

[26] L.L. Levy, *The Law of Commonwealth and Chief Justice Shaw*, New York 1957, p. 68.

[27] P. Finkelman, *Lemuel Shaw*, in: N. Gross (ed.), *Noble Purposes: Nine Champions of the Rule of Law*, Athens 2007, p. 42.

[28] A.J. Sebok, *Legal Positivism*…, p. 120.

[29] L.L. Levy, *The Law of Commonwealth*…, p. 61 ff.

[30] A.J. Sebok, *Legal Positivism*…, p. 121 ff.

The problem of slavery, as described above, and court rulings in slavery cases remain, if only to a certain extent, a closed episode in time and space, and thus, they are of purely historical significance. On the other hand, however, they provide a fascinating material for a philosophical-legal analysis of the issue of possible judicial disobedience, which I raised earlier. In this respect, they carry a universal value. Understood thus, they are set out in contemporary jurisprudence, offering a typology of various possible paths of conduct for a judge facing the application of a law that is grossly contrary to their moral convictions.[31] These two perspectives, historical and universal, are difficult to disconnect, because they interpenetrate each other. When one considers the example of American judges' adjudicating on slavery, the question always arises as to why in certain historical circumstances, under the law then in force, and on the basis of a specific state of facts, judges behaved as they did and not differently. We have already seen this in the example of Justice Shaw on the one hand, in the *Aves* case, and, on the other, in that of *Sims*. These two decisions were made at different times (1836, and 1851), on the basis of various laws (the common law and the Fugitive Slave Act of 1850), and in relation to various factual states (a slave in transit and a run-away).

At the same time, the historical and universal perspectives differ significantly as they invoke different questions and dissimilar answers to be given to those questions. From a historical perspective, these are questions about what a judge did in a particular case and what hypothetical reasons influenced their decision. In turn, from a universal perspective, these are problems related to assigning a specific decision to one of the elements of an adopted model, and, as a result, with reconstructing the philosophical and legal foundations of that decision, while, at the same time, taking into account the historical context. Therefore, this is not only an answer to the question of what the judge actually did and why, but also, and perhaps most importantly, to the question of what they could have done, had he adopted certain philosophical and legal assumptions.

In this respect, Robert M. Cover's *Justice Accused* of 1975 (which I have frequently cited above) is seen as a ground-breaking study in the American jurisprudence.[32] Up to that point, research on the legal aspects of slavery was primarily of interest to historians, but Cover's book moved discussion onto new theoretical and philosophical grounds. Nowadays, we are even a step further on, because the problem of slavery arouses interest not only from the point of view of the problem of judicial disobedience discussed here, but it is also of interest to representatives of the latest philosophical trends, such as the Law and Literature school, or that of Law and Economy. This is hardly surprising: the issue of slavery was, on the one hand, the theme of many literary works (for example, by Harriet Beecher Stowe and Herman Melville); and, on the other hand, aside from its moral aspects, slavery had a quite tangible economic dimension. From a philosophical perspective, these two aspects are analysed by, for example, Mark V. Tushnet via the example of the judgment in the case of *State v. Mann* from 1829.[33] In this case, the problem was a criminal liability for an attempt to deprive a female slave (who had run away from a flogging) of her life. John Mann, fined five dollars by the lower court, was subsequently released from culpability by the Supreme Court of North Carolina. In the statement of reasons for the latter ruling, Justice Thomas Ruffin stressed that although his sympathy as a human lay on the side of the wounded

[31] Cf. e.g. P. Butler, *When Judges Lie (and When They Should)*, "Minnesota Law Review" 2007/6, pp. 1785–1828.
[32] R.M. Cover, *Justice Accused: Antislavery and the Judicial Process*, New Haven–London 1975.
[33] M.V. Tushnet, *Slave Law in the America South: State v. Mann in History and Literature*, Lawrence 2003.

slave named Lydia, as a lawyer he must recognize the absolute character of a master's authority over a slave. In the moral sense, the case was so widely celebrated and interesting that Stowe, the author of the famous *Uncle Tom's Cabin*, made it the background for less well-known novel titled *Dred: A Tale of the Great Dismal Swamp*.

It is interesting to note that Coover begins his book from a literary aspect. His starting point is to invoke Captain Vere from the *Billy Budd* novella by Melville.[34] For Coover, Vere is a classic example of a state official who sacrifices his material sense of justice to a formal obedience to the positive law in force at the time. There is a very interesting relationship between the figure of Melville and the case law of the American courts on slavery discussed in this article. It is a widespread opinion that the most spectacular example of a judge torn between his own anti-slavery conscience and the binding positive law was certainly the Chief Justice of the Supreme Court of Massachusetts, Lemuel Shaw. In this connection, it is worth recalling that in private life he was Melville's father-in-law, and that for literary historians he was no doubt the prototype of the figure of Captain Vere from the *Billy Budd* novella.

3. Justice Lemuel Shaw[35]

The necessity of passing judgment in slavery cases placed many outstanding American lawyers in an ambiguous position. This ambiguity is also apparent in the judgment of history, and Justice Shaw is the best example of this phenomenon. Justice Shaw ranked first in the list of top ten American judges outside the Supreme Court (*sic!*). His verdict in *Commonwealth v. Alger* of 1851 relating to the law of property is also highly recognized and rated the third best judgment of courts other than the Supreme Court. A shadow is cast on this evaluation by the verdict in the case of the slave Thomas Sims of 1851 (as mentioned above), which is regarded one of the worst judgments (ranking tenth on the list).[36] Roger B. Taney, Chief Justice of the Supreme Court between 1835 and 1864, enjoys a similar reputation: on one hand, ranked one of the top justices of the Supreme Court (ranked tenth); on the other, Taney is the author of the worst Supreme Court ruling, in the *Dred Scott v. Sandford* case of 1857 (ranked first – *sic!*).[37]

In the context of the main theme of this article, Shaw is an exceptional figure and his biography certainly deserves a mention. In contemporary legal scholars' writings, he has become a symbol of an internal fissure, experienced by a capable and integral lawyer, between fidelity to the law, ideals of abolitionist humanitarianism, and a desire to preserve the integrity of the Union. This is evident, in particular, in the Thomas Sims ruling; it was, in a sense, an expression of the compromise reached in 1850, because the new law on escaped slaves was at the heart of this agreement. On the basis of the previous regulations of 1793, it was still possible somehow to finesse the matter (*vide* the case of *Prigg v. Pennsylvania*), but now the possibilities became much more limited. Shaw did not seek refuge in formalism; the *contra legem* argument was also foreign to him. Here we witness an intelligent exploitation of creative and dynamic interpretation, although

[34] R.M. Cover, *Justice Accused*…, pp. 1–6. It is interesting that Cover compares the case of Captain Vere with another classical literary example, the dispute of Antigone and Creon in Sophocles's play.

[35] Biographical information about Lemuel Shaw, and material on his judgments come from: E. Adlow, *The Genius of Lemuel Shaw*, Boston 1962; F.H. Chase, *Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts*, Boston 1918; L.L. Levy, *The Law of Commonwealth*…, pp. 704–711.

[36] B. Schwartz, *Book of Legal Lists: The Best and Worst in American Law*, New York–Oxford 1997, pp. 130, 154 and 170.

[37] B. Schwartz, *Book of Legal Lists*…, pp. 20 and 69.

one can see elements of subversion in several judgments. Of course, it is difficult to talk about judicial disobedience in his case.

Although the problem of slavery was extremely important, difficult, and conflict--generating, it was not the only such matter in court rulings at the federal and state level. Justice Shaw's list of judgments contains more than 2,200 opinions in various cases, and it is difficult to establish any agenda. The expert on the history of American justice, G. Edward White, estimates that just after the death of the great John Marshall, there were three eminent judges who continued, yet at the same time modified his legacy: Chief Justice of the New York Supreme Court James Kent, Supreme Court Justice Joseph Story, and Shaw as Chief Justice of the Massachusetts Supreme Court. About the latter White writes that he had such a huge authority and such a dominant position in his court that in his thirty-year career he only once wrote a separate opinion, while for fifty opinions in the field of constitutional law issued in the most complex cases, only in three cases did his colleagues not share his position unanimously.[38] Given American conditions in those days, that is, indeed, a remarkable phenomenon.

Shaw was born on January 1781, in Barnstable in Massachusetts, into the family of the Episcopalian minister Oakes Shaw. From 1796 to 1799, he studied at Harvard, later studying law under David Everatt. In 1804, he began practicing law in Boston. In this brief biographical sketch, I will omit the details of Shaw's private life, and I will concentrate, above all, on his political activities, especially on his outstanding career as a judge. However, one personal fact is worth recalling and emphasizing: as I have mentioned, the famous American writer Herman Melville married Shaw's daughter Elizabeth. Literary historians emphasize that Melville was often inspired by the figure of his father-in-law, lawyer and judge – not just in relation to the *Billy Budd* novella, but also in *White Jacket* and *Bartleby, the Scrivener: A Story of Wall Street*. In a sense, Shaw contributed to the writing of these three texts, not just as the personal prototype of several literary figures, but also as a patron, since for a considerable time, he gave his financial support to his daughter's family.

In the early decades of the nineteenth century, Shaw's political career was really limited to the local level of the state of Massachusetts, but, at the same time, one can certainly say that he engaged in several important activities. It is not just that he formally belonged to the state assembly and to the state constitutional convention, but also that he was an involved and aware citizen, and issues important for his local community lay close to his heart.

From the existing sources we know that, both in his public activities and in his private life, being a member of Boston's intellectual elite, Shaw frequently expressed his negative attitude toward slavery. He was, however, too good a lawyer to simply and injudiciously transfer his attitude to the courtroom. He did that only when he was genuinely able to, but when he did, he used his exceptional legal intelligence, wisdom, and knowledge to its fullest. It is in this way that he has become a symbol of an American judge caught up in a constitutional axiological conflict, out of which there was no single acceptable way out.

Shaw's main activities involved his work as a judge; from August 1830 to August 1860, he was the Supreme Justice of the Massachusetts Supreme Judicial Court. During

[38] G.E. White, *The American Judicial Tradition. Profiles of Leading American Judges*, 3rd edition, Oxford–New York 2007, p. 44.

this time, he passed judgments in many cases relating to, in fact, almost every area of law, both as an appellate judge and a judge of the first instance. It is said that Daniel Webster himself had to convince Shaw to accept the post of Chief Justice and to resign from lucrative private practice. For Shaw, this entailed a considerable worsening of his material standing, since his annual income fell from 20,000 dollars to 3,500 dollars.

One of his most celebrated judgments is, of course, his verdict in the criminal case of *Commonwealth v. Webster* of 1850. The case was, indeed, exceptionally dramatic, and at that time the whole Boston was focused on it. It involved the murder of Dr. George Parkman by Harvard Professor John White Webster. The notoriety of this case quickly spread beyond the confines of the United States; as a curiosity, one may note that it was recounted in Poland in 1850 by the *Gazeta Warszawska*. The trial was a circumstantial one, and has become known in a special way in the history of forensics and criminology. For interest's sake, let us cite here a specialist medical and criminological text on the subject:

> One of the first confirmed dental analyses used in a court case was the identification of the remains of George Parkman. The incident took place in Boston, in the state of Massachusetts, in 1849 at the University of Harvard. The analysis, which was conducted and presented to the court by Dr. Nathan Keep, was crucial in the identification of the murder victim. This was a precursor of later cases in which dental identification played an important, and even central, role in illuminating the circumstances of a crime. In this case, the accused was Dr. John White Webster, who was an academic in the Faculty of Medicine at Harvard, where he taught anatomy. Webster had earlier borrowed money from Parkman. Both men arranged to meet in Webster's office in order to try to settle the matter of the loan. Dr. Parkman was never seen again after the day of the meeting. A week later, dismembered human remains were discovered by the porter in an outbuilding not far from Webster's office. Further, parts of a porcelain prosthesis and skull fragments came to light in the laboratory oven that was in Webster's laboratory. All circumstances connected with Parkman's disappearance and the spot where human remains were recovered cast suspicion on Webster. The dental prosthesis recovered in the laboratory oven, which had survived in a state that permitted identification, was used to identify the remains. Dr. Nathan Keep, dentist for many years, had made the prosthesis a year before the victim's death. He was in possession of a cast of teeth. In court, Keep – who was the deciding participant in the trial concerning murder – demonstrated common features of the cast and the surviving prosthesis. In the face of this evidence, Webster admitted to the murder of his creditor. Webster was condemned to death and executed in 1850.[39]

In legal literature, this case aroused a huge controversy. Shaw was accused of *de facto* shifting the burden of proof, and creating a situation in which it was not the prosecutor who had to prove guilt, but Wester who had to prove his innocence. He was also criticized for his instructions to the jury which lasted for more than three hours. Shaw's decision to allow the general public into the courtroom was also criticized. Apparently, there was a change-over every ten minutes, which meant that all in all more than sixty thousand people passed through the court.[40]

Other Shaw's rulings worth mentioning in this brief recount include, of course, the verdict (highly esteemed today and mentioned earlier) in *Commonwealth v. Alger*

[39] D. Lorkiewicz-Muszyńska, M. Łabęcka, C. Żaba, M. Kis-Wojciechowska, J. Kołowski, J. Sobol, *Trudności identyfikacji zwłok i szczątków ludzkich w oparciu o dokumentację i badania stomatologiczne* [Eng. *Difficulties with Identification of Corpses and Human Remains Based on Documentation and Dental Tests*], "Archiwum Medycyny Sądowej i Kryminologii" 2009/59, p. 218.

[40] J.R. Vile (ed.), *Great American Judges*…, Vol. 2, p. 706.

in 1851, and also, *inter alia*, in *Commonwealth v. Buzzel* (1834), *Farwell v. Boston and Worcester Railroad* (1842), *Commonwealth v. Hunt* (1842), *Roberts v. City of Boston* (1849), and *Brown v. Kendall* (1850).

The list of Shaw's judgments is, indeed, long and important. Nowadays, we recall Shaw above all, on the one hand, as the author of the opinion that freed six-year-old Med in *Commonwealth v. Aves*, and, on the other, as the man who condemned Thomas Sims to renewed slavery in *Commonwealth v. Sims* in 1851. Today, it is often hard for us to understand and rationalize the confused circumstances of the judgments of American courts in slavery cases. The only infallible way would be to travel in time and argue in the categories of the time, in order to grasp all the motives that lay behind a given judgement. In the meantime, all we have before our eyes is a historical perspective that is flattened by the present. However, could Lord Mansfield and, later, Justice Shaw suspect that slavery would be prohibited sometime in the future, not just by natural law and common law, but also by positive law? We do not know the answer to this question with any certainty; we can only hope that in their legal humanism they deeply believed so.

Judicial Disobedience, Justice Lemuel Shaw and *Commonwealth v. Aves*

Abstract: The main purpose of this paper is to analyse the notion of "judicial disobedience". The author describes two aspects (individual and institutional) and compares them with civil disobedience. The problem is presented in a paradigmatic manner, based on the example of American courts' case law on slavery in the period of half a century before the outbreak of the Civil War. Based on this, the author constructs a typology involving four possible opinions of an adjudicating judge based on provisions of law, which are contrary to the judge's conscience and morality.

In this paper the problem is described based on the example of Justice Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court from 1830 to 1860. Special attention is, however, paid to his judgment in case *Commonwealth v. Aves*, but his other verdicts have been mentioned as well.

Keywords: judicial disobedience, slavery, American courts, Lemuel Shaw, *Commonwealth v. Aves*

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