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SHOULD JUDGES COVERTLY DISOBEY THE LAW TO PREVENT INJUSTICE?

Jeffrey Goldsworthy*

JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY, THE ETHICS OF LAWLESS JUDGING* (Oxford Univ. Press 2010). Pp. 368. Hardback. \$65.00.

In *Limits of Legality, The Ethics of Lawless Judging*, philosopher and lawyer Jeffrey Brand-Ballard advocates that judges knowingly resort to furtive deviations from the law in order to achieve morally desirable outcomes more often than most people think they currently do or should.¹ He challenges what he acknowledges to be conventional wisdom by arguing that judges are morally justified in doing this to avoid not only extreme, but even moderate injustice.² But judges must act strategically (some might say cunningly). They must not create undesirable systemic effects that exceed a certain threshold. In particular, they must not influence other judges to deviate in ways that would undermine justice or good governance overall, either by reaching unjust results they mistakenly believe are just or by endangering the stability of the legal system and the rule of law.³

As Brand-Ballard points out, his thesis could be used to provide an unorthodox defense of judicial activism, whether liberal or conservative.⁴ Most defenders insist that decisions attacked as “activist” are legally sound, or at least respectable, and they dismiss the opposite view as politically motivated. But Brand-Ballard’s thesis could be deployed to defend even decisions conceded to be, as he puts it, “lawless.” Indeed, late in his book he says:

I must make a confession: I believe that legalizing contraception was morally correct and that Justice Douglas acted permissibly in *Griswold*, even if there was no sound legal argument for his ruling, as many lawyers believe.⁵

Legal philosophers agree that in some circumstances judges might be morally justified in disobeying the law and concealing their disobedience with a “noble lie.” For example, when natural lawyers accuse legal positivists of requiring judges to apply evil laws, the positivists reply that a judge’s legal obligation to apply the law might be

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1. JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* 5, 10, 14 (2010).
2. *Id.* at 9-10, 13, 308.
3. *See id.* at 185-88, 209-11.
4. *Id.* at 16-18, 50-52, 80-82, 272-76.
5. *Id.* at 306; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

outweighed by a moral obligation not to do so.⁶ Discussion of the issue has focused on the predicament of judges in regimes such as Nazi Germany, apartheid South Africa, and American states affected by slavery before the civil war. Even the leading non-positivist, Ronald Dworkin, has agreed that in such circumstances judges might be morally justified in furtive disobedience concealed by a spurious and insincere legal rationalization.⁷

But what about judges in modern liberal democracies, which we tend to believe are generally both just and efficacious? Philip Soper once observed that while the question of obligation to obey the law has been widely discussed, there is ‘virtually no literature on the question of the judge’s obligation to apply the law.’⁸ Brand-Ballard, who seems to have read everything on the subject, adds that almost every author assumes that judges in modern liberal democracies are always morally obligated to obey the law except, possibly, when this would result in extreme injustice.⁹

There is a growing body of literature in American law journals concerned with “judicial candor,” discussing whether or not judges should always be completely frank in setting out the reasons that actually persuaded them to reach their decisions.¹⁰ The authors usually recommend candor except in extreme cases.¹¹ Of course, a lack of candor does not necessarily conceal judicial deviation from the law: it may be used to conceal reasoning that is perfectly legal. For example, a judge might want to disguise creative law-making, even if it was justified or even required by legal indeterminacy. Martin Shapiro once argued that judges routinely conceal their creativity because they suppose that losing parties are more likely to accept adverse decisions if persuaded that they were mandated by law.¹² Jerome Frank, on the other hand, attributed the judges’ chronic failure to acknowledge their law-making role to self-deception.¹³

If judges are loathe to admit their creative role, it is hardly surprising that they almost never admit to deviating from the law.¹⁴ They pretend not to, even when they do deviate.¹⁵ This is no doubt because judges share the assumption that they are morally obligated to obey the law in all or almost all cases, or because they know that most of the community shares that assumption and would condemn them for flouting it.

There may be a divergence between this assumption and the “facts on the ground.” There is evidence that judges indulge in covert deviation more often than is generally acknowledged. Some observers of the American judiciary have claimed that judges often

6. Brand-Ballard adopts a neutral stance on the nature of law, declining to take sides in the debate between positivists and natural lawyers. BRAND-BALLARD, *supra* note 1, at 85, 98.

7. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 36-38 (1977); RONALD DWORIN, *LAW’S EMPIRE* 219 (1986); RONALD DWORIN, *JUSTICE IN ROBES* 18-19 (2006).

8. BRAND-BALLARD, *supra* note 1, at 126 (quoting PHILIP SOPER, *A THEORY OF LAW* 41 (1984)).

9. *Id.* at 4, 9, 15, 18, 116-17, 127-30, 177, 179, 183, 276, 279, 311.

10. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297 (1990); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); John J. Kircher, *Judicial Candor: Do As We Say, Not As We Do*, 73 MARQ. L. REV. 42 (1990); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

11. *E.g.*, Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1817-18 (2007).

12. Martin Shapiro, *Judges as Liars*, 17 HARV. J. L. & PUB. POL’Y 155, 155-56 (1994).

13. JEROME FRANK, *LAW AND THE MODERN MIND* 10, 40-41 (1930).

14. For the interesting story of a judge (J. Anthony Kline, Cal. Ct. App.) who openly declared his refusal to obey the law, see BRAND-BALLARD, *supra* note 1, at 53, 64-65.

15. *Id.* at 5, 213.

do so.¹⁶ I recently described the pragmatic strand in British jurisprudence, which includes a long history of occasional covert deviation.¹⁷ Whether covert deviation may sometimes be morally justified might therefore be of more practical significance than is commonly realized.

Brand-Ballard's investigation of that question is impressive. His coverage of the relevant issues, and of the legal and philosophical literature bearing on them, seemed to me to be comprehensive and thorough. At many points, when his argument arrives at a fork requiring a choice between alternative resolutions of some philosophical conundrum, he chooses the path that poses the most difficulty for his thesis, to show that it can surmount even the toughest hurdles.

But lawyers should be warned: this is a work of analytical philosophy, written in a methodical, tight, and technical style that some will find unfamiliar and occasionally difficult. He deploys many distinctions and tools developed by moral and legal philosophers. For purposes of concision and clarity, he also coins and stipulatively defines many of his own technical terms, which accumulate as his argument proceeds. Keeping track of them can be an effort. Here is a typical sentence:

For any given harm-comparison principle, there is a level of deviation density that produces a rate of deviation in optimal-result cases that the principle classifies as "too high," given the associated rate of deviation in suboptimal-result cases. This is the *deviation density threshold*, or *threshold*. An optimal decision-pattern is one that approaches threshold without exceeding it.¹⁸

Sometimes I wondered whether his aspiration for concise precision impeded rather than facilitated my understanding. Advance reading or regular consultation of his final chapter, which provides a clear summary of his overall argument, might help readers navigate the details more easily.

The book begins with careful stage-setting, including a clarification of preliminary issues and defense of basic premises.¹⁹ Brand-Ballard is not concerned with judges filling in gaps left open by indeterminate law or exercising lawful authority to change the law, such as by overruling non-binding precedent.²⁰ He is concerned with judges allowing extra-legal considerations to override determinate law. He dismisses the radical indeterminacy thesis often attributed to some figures in the CLS movement. Unjust results could always be lawfully avoided if that thesis were true by judges making appropriate choices necessitated by indeterminacies in the law. He also rejects what he "affectionately" labels the "Panglossian" view that the law, properly understood, never

16. BRAND-BALLARD, *supra* note 1, at 5; Butler, *supra* note 11, at 1786, 1821; M.B.E. Smith, *Do Appellate Courts Regularly Cheat?*, 16 CRIM. JUST. ETHICS 11 (1997) (arguing the answer is yes).

17. Jeffrey Goldsworthy, *The Limits of Judicial Fidelity to Law: The Coxford Lecture*, 24 CAN. J.L. & JURIS. 305, 306, 310-16 (2011).

18. BRAND-BALLARD, *supra* note 1, at 212-13 (footnote omitted).

19. *Id.* at 3-91.

20. *Id.* at 11-12, 16, 40-41, 45-47, 83-85.

requires judicial decisions that are unjust.²¹ He therefore maintains that the law often has determinate results that are occasionally unjust.²²

Brand-Ballard carefully scrutinizes a proposition that most of us take for granted: that judges have a legal duty to apply the law. Surprisingly, he can find little explicit support for this proposition in legal sources such as statutes, common law principles, or even judicial codes of ethics.²³ He is therefore unable to “conclude with complete confidence that judges have a legal obligation to apply the law,” but for the sake of his argument he assumes that they do.²⁴ It seems likely that the existence of such an obligation is a pervasive but unwritten presupposition of most, if not all legal systems.²⁵

Brand-Ballard distinguishes “conduct rules,” which lawmakers impose on rule subjects including judges, from both the “guidance rules” that the subjects actually follow, and the “appraisal rules” that are applied in evaluating and criticizing their conduct.²⁶ He argues that lawmakers might have good moral reasons to promulgate an absolute conduct rule that judges should always apply the law,²⁷ but that judges do not always have good moral reasons to follow such a rule.²⁸ This difference seems to invite, if not require, subterfuge on the judges’ part. When the conduct rules imposed by lawmakers on subjects differ from the guidance rules they actually follow, they should presumably keep the latter secret. Otherwise, they become vulnerable to criticism and possibly punishment by the lawmakers or their agents.

Most of us probably assume that judges have stronger reasons to obey the law than ordinary citizens do for various reasons including that people volunteer to become judges, swear a judicial oath, and make decisions that are much more publicly visible and likely to be imitated. However, one of Brand-Ballard’s arguments cuts the other way. Unlike judges, the law rarely requires ordinary citizens to perform acts that are positively unjust. While citizens may suffer injustice at the hands of the law, judges are more often forced to choose between complying with the law and inflicting injustice on others.²⁹ This can place judges in an awkward moral predicament.

He argues that judges have *pro tanto* (*prima facie*, or defeasible) moral reasons to deviate from any law that requires them to reach results they would, in the absence of the law, be morally bound to avoid.³⁰ He calls such results “suboptimal.”³¹ Those reasons are not necessarily undermined by the judges being legally required to apply a suboptimal law.³² Indeed, he denies that in every case judges have even a *pro tanto* moral reason either to apply the law or to recuse themselves.³³ He examines various

21. *Id.* at 86-88.

22. *Id.* at 48, 84-85, 313.

23. *Id.* at 56-73.

24. *Id.* at 70.

25. *Id.* at 183.

26. *Id.* at 123 (emphasis omitted).

27. *Id.* at 111-22.

28. *Id.* at 123-41.

29. *Id.* at 169-70.

30. *Id.* at 96-108, 308-09.

31. *Id.* at 74-75.

32. *Id.* at 92-110.

33. *Id.* at 123-41.

candidates for such a reason, including the predictability of law; the efficiency of judicial decision-making; doubts about the judges' ability to identify sub-optimal results; reasons for respecting and deferring to the lawmaker;³⁴ the judicial oath;³⁵ and familiar arguments for a general duty to obey the law, including consent, fair play, gratitude, natural duty, and samaritanism.³⁶

Brand-Ballard distinguishes what I will call "reliable judges," who are equipped with sound moral and practical judgment that enables them reliably to identify sub-optimal results, from "unreliable judges," who are not.³⁷ If the reliable judges were to deviate from the law too often, they might cause undesirable systemic consequences. One such consequence is "mimetic failure:" imitation of their willingness to deviate by unreliable judges, whose faulty moral or practical judgment causes them mistakenly to deviate in optimal-result cases.³⁸ Deviations by reliable judges that would otherwise be morally justified are unjustified insofar as they contribute to an overall increase in suboptimal results.³⁹

It follows that reliable judges should practice "selective optimization." They should take into account the likely systemic effects of their deviating, especially on the behavior of other judges, and not deviate so often or so openly that they help contribute to an overall increase in suboptimal results.⁴⁰ However, reliable judges should pursue this strategy surreptitiously.⁴¹ The usual reasons for judicial candor are outweighed by the danger that candor on this score might (a) jeopardize the reliable judges continuing in office, leading to their replacement by less reliable or more law-abiding judges, and (b) increase mimetic failure.⁴² One way of disguising deviation is to adopt the techniques of judicial minimalism and avoid deeper analysis or commitment to broader principles (which might be more easily exposed as specious) than is strictly required to achieve the desired outcome.⁴³

Brand-Ballard does not have much difficulty refuting arguments to the effect that judges in liberal democracies are never morally permitted to deviate, but my own strong intuition remains conventional in that they are permitted to deviate only in extreme cases. I also wonder whether, when applied in practice, his recommended strategy of selective optimization would lead to the same result. The guidance rules that he recommends to judges are abstract and schematic. When filled with empirical content, it is not clear where they might lead.

To simplify matters for the sake of argument, assume that most judges in some imaginary legal system can be classified as either liberal or conservative, a dichotomy that also reflects the general division of opinion throughout the community. Both groups

34. *Id.*

35. *Id.* at 142-56.

36. *Id.* at 157-78.

37. *Id.* at 187-88 (identifying "optimal judges" v. "judges [who] are less accurate identifiers of suboptimal results").

38. *Id.* at 187-88.

39. *Id.* at 181-232.

40. *Id.* at 233-69.

41. *Id.* at 271.

42. *Id.* at 271, 280.

43. *Id.* at 284-85.

of judges regard themselves as more reliable than the other group in terms of the accuracy of their moral and practical judgments. Both also believe that, at least on some occasions, their judgments are more reliable than those reflected in the laws enacted by elected legislators. It does not matter for our purposes which of the two groups' self-assessment (if either) is correct. The question is whether and how often they should surreptitiously deviate from enacted laws in an attempt to minimize suboptimal results.

One question is how confident they must be that applying the law would lead to a suboptimal result. It seems plausible that, in general, they are more likely to have the required confidence when applying the law would lead to extreme injustice. Extreme injustice is usually less debatable than moderate injustice, but it must be conceded that there is no direct correspondence between the severity and the obviousness of an injustice.

Another question is how confident judges can be that their deviation will go undetected. *Ex hypothesi*, they are dealing with a situation in which the law has a determinate result, even if establishing it requires complex reasoning. That complexity might make it easy to deceive the general public, but their fellow judges are much less likely to be deceived. Judges' published reasons are often very carefully scrutinized by lawyers, other judges, and academics. Moreover, their reasoning and processes of decision-making would often be known to their associates, who might write best-selling exposés about what goes on inside the judges' chambers. It follows that if the members of one group increase the number of occasions on which they covertly deviate, this is likely to be detected by members of the other group.⁴⁴

Then there is the difficulty of calculating the consequences of detection. Members of the other group, not wanting to be taken advantage of, might retaliate in one or both of two ways. First, they might publicly expose the covert deviations, and loudly complain about the dishonest legal activism of the deviators. This might disturb the general public and their elected representatives in the legislature and undermine their trust in the judiciary's willingness to impartially administer their laws. Secondly, members of the other group might ramp up the number of occasions on which they covertly deviate, although their deviations are also likely to be detected by members of the first group, who might then further escalate their rate of deviation. Neither group might be prepared to allow the other one to get the upper hand in using the judicial office to play politics.

This scenario could involve any number of possible consequences. One is doctrinal incoherence. A second is the psychological distress or damage that judges, who are honest people, might suffer from lying.⁴⁵ A third is escalating tit-for-tat judicial deviations, together with mutual accusations of dishonest judicial activism and usurpation of the authority of democratic institutions. The community might become extremely disturbed to think that, behind the closed doors of their chambers, judges are attempting to calculate exactly how much covert law breaking they can get away with. Lying violates the trust that is essential to harmonious social intercourse, and its exposure might breed cynicism and loss of faith in the judiciary. It might set a dangerous example for the rest of the community, including the other branches of government. If

44. *See id.*

45. *Id.* at 286-87.

judges are not prepared to obey collective decisions they disagree with, other officials such as the police and the armed forces might follow suit. If judges feel free to disobey laws they regard as wrong, why should they not feel the same? As Brand-Ballard acknowledges, if too many people lose faith in the rule of law, the whole system might collapse.⁴⁶

It would be extremely difficult to predict with any accuracy systemic consequences such as mimetic failure, diminishing trust in the judiciary, and erosion of the rule of law. No-one could gather the information needed to reliably calculate when and how frequently judges should covertly deviate. Indeed, I wonder how far Brand-Ballard's painstaking analytical approach can take us; whether, in the end, it leaves the most important practical questions having to be decided very roughly and intuitively. If those intuitive decisions are risk averse – and arguably, they should be – then they might settle on a guidance rule such as “never deviate except to avoid truly extreme injustice.”

Both groups of judges would no doubt want to avoid systemic collapse and might decide that it is in all of their interests to tacitly agree that no judge should deviate except to avoid extreme injustice. They might reach a *modus vivendi* whereby they pursue their moral and political disagreements through political and legislative, rather than legal and judicial, processes. They might also agree that democratic political procedures provide the fairest way of making the collective decisions that must be reached and generally obeyed. Covert deviations would thenceforth be regarded as a kind of cheating, whose escalation would risk undermining the *modus vivendi* and destabilizing the whole system.

Perhaps this is why, as Brand-Ballard often acknowledges, it is now generally assumed that judges are morally bound to apply the law in either all or almost all cases. The consensus is otherwise difficult to explain. It is generally acknowledged that promises may be broken if sufficiently weighty reasons exist, and not only in extreme cases. Why is it not similarly acknowledged that judges may break the law in equivalent circumstances? Is it possible that attitudes might change? Brand-Ballard advocates subterfuge partly because currently, judicial law-breaking is so widely regarded as wrong.⁴⁷ But if that attitude were to be eroded, perhaps as a result of Brand-Ballard's own arguments, would judicial deviation become so acceptable that it could be openly practiced and condoned?⁴⁸ This seems unlikely, for all the reasons just given. They are presumably the same reasons why, as Brand-Ballard concedes, lawmakers may have good reasons to promulgate an absolute rule that judges should always obey the law.⁴⁹ If so, then judicial deviation is fated always to be practiced in the shadows.

On the other hand, there are situations in which judicial subterfuge is less likely to lead to undesirable systemic consequences. First, there is sometimes bipartisan support within the judiciary and broader legal profession for judicial resistance to certain kinds of laws.⁵⁰ In the British Commonwealth, for example, there has long been bipartisan

46. *Id.* at 273.

47. *Id.* at 279-80.

48. *See generally id.* at 287-88 (considering the possibility that judicial deviation could become acceptable to the point of being condoned).

49. *Id.* at 116-22.

50. For a discussion on this topic, see Goldsworthy, *supra* note 17.

support among lawyers for a strategy of resistance to “privative” or “ouster” clauses, which remove or limit the authority of the judiciary to review the legality of executive and administrative decisions. Lawyers regard such clauses as violating the rule of law, even when they are constitutionally valid.⁵¹ More generally, cases from around the world show that liberal and conservative judges tend to unite in supporting activist decisions that strengthen their own independence or authority.⁵² When the legal profession as a whole heartily approves and turns a blind eye to any subterfuge involved, expert legal criticism is isolated or muted and damage to public confidence in the judiciary is unlikely.

Secondly, when judicial subterfuge is used to remedy clear and extreme cases of injustice or violations of the rule of law, “its exposure might not damage [the community’s] trust in the judiciary or breed cynicism.”⁵³ To the contrary, knowledge that judges occasionally act in this way might strengthen public confidence in them, just as occasional nullifications by juries of prosecutions widely deemed to be oppressive can strengthen faith in the jury system.⁵⁴ Lord Devlin of the British Court of Appeal once observed that “[t]he judicial qualities which the public singles out for praise are common sense and humanity; devotion to the law is less admired than a willingness to strain it.”⁵⁵ We do not need to speculate about this in the abstract because there is historical experience from which we can learn.⁵⁶ It shows that there have always been occasions when judges have used subterfuge to advance their conception of justice and good governance.⁵⁷ Yet the judiciary has not succumbed to rampant lawlessness, nor has the rule of law collapsed.⁵⁸ It might, indeed, have sometimes been strengthened.

Whatever one’s ultimate conclusions, Brand-Ballard has made an original, provocative, and illuminating contribution to a more hard-headed understanding of the judicial function.

51. *Id.* at 306.

52. INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 345 (Jeffrey Goldsworthy ed., 2006); Goldsworthy, *supra* note 17, *passim*.

53. *See* Goldsworthy, *supra* note 17, at 321-322.

54. *Id.* at 322.

55. PATRICK DEVLIN, THE JUDGE 90 (1979).

56. Goldsworthy, *supra* note 17, at 322.

57. *Id.*

58. BRAND-BALLARD, *supra* note 1, at 287.