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### Resistance Lawyering

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# Resistance Lawyering

Daniel Farbman\*

*This is the story of a group of abolitionist lawyers who devoted themselves to working within a legal system that they considered to be fundamentally unjust and illegitimate. These “resistance lawyers” used the limited and unfriendly procedural tools of the hated Fugitive Slave Law of 1850 to frustrate, oppose, and, if possible, dismantle the operation of that law. Abolitionist resistance lawyers were forthrightly committed both to ensuring that their clients remained free and to using the cases that arose under the Fugitive Slave Law to wage a proxy war against the institution of slavery. Their daily direct service practices were inextricably linked to their movement politics and aspirations for systemic reform. Using new archival research that upends the existing historical consensus, I show that this linked practice was dramatically more effective than previously thought, both in protecting individual clients and as a means of building political opposition to slavery in local and national politics. This history should serve as a provocation for contemporary resistance lawyering. Many lawyers today practice within a legal system that they oppose in the hope of frustrating or dismantling that system. I suggest that today’s resistance lawyers can learn from the abolitionists’ integration of politics and daily practice as they fight to increase the political power and salience of their own work.*

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## INTRODUCTION

Like most abolitionist lawyers, John Joliffe thought that the Fugitive Slave Law of 1850 was a moral atrocity. That infamous law had been explicitly designed to create a summary process that would help Southern slave owners repossess human beings that they claimed as their slaves. Both the substance and the procedure of the Law were so anathema to abolitionists that antislavery activists like Joliffe did not consider it worthy of respect or obedience. Living in Cincinnati, Ohio, just across the Ohio river from Kentucky, Joliffe was stationed at one of the most active border crossings for the human beings who risked their lives to flee slavery.<sup>1</sup> The Fugitive Slave Law of 1850 was written

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1. The terminology around slavery is complex and highly debated. See Lucy Ferriss, *The Language of Enslavement*, LINGUA FRANCA (Oct. 12, 2017), <https://www.chronicle.com/blogs/linguafranca/2017/10/12/the-language-of-enslavement> [https://perma.cc/6L5S-F43F]. In this Article I have chosen to refer to the system and institution as “slavery” and to refer to a general class of people who were enslaved as “slaves.” When speaking about

expressly to ensure that those people who had risked their lives to come north would be arrested and sent back south to slavery with as little process and public outcry as possible.

So when Jolliffe took the case of a man named Lewis in the fall of 1853, he was lawyering not to legitimize the law, but to kill it. From his first moment on the job, Jolliffe sought to throw sand into the works of the procedures set out under the law. Jolliffe had the federal officials holding Lewis arrested; sought every continuance and delay in the courtroom that he could get; and tried to get the state courts to step in and interrupt the federal process.<sup>2</sup> He made the most of the limited tools available to him under the Fugitive Slave Law of 1850 to dismantle that law from within.

On the day that the commissioner was supposed to decide his fate, Lewis slipped out of the packed courtroom unnoticed and escaped into a friendly crowd of antislavery onlookers. From there, dressed as a woman and hiding in a series of safe houses, he eluded the grasp of his former master and made his way to freedom in Canada. Lewis' escape was an act of bravery largely made possible by the support of a strong and organized local abolitionist movement. It was also made possible by the work of his lawyer.

Lewis was among a surprisingly large number of alleged fugitive slaves who, despite having been caught in the grasp of one of the most infamously draconian laws in American history, escaped that grasp into freedom. Scholars have long told the story of the Fugitive Slave Law of 1850 as a total tragedy where nearly every alleged fugitive caught in the web of the Law was doomed to be returned to slavery. My research reveals that we have this story at least partially wrong. Nearly four out of every ten people who were caught in the Law's process ended up free. No one simple summary is adequate to explain this surprising outcome.

The stories of these alleged fugitive slaves are complex, and the people most responsible for the successes were undoubtedly the alleged fugitives themselves, followed closely in importance by the (usually black) movement

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these people in any more particularized way, I will refer to them not as slaves but as people who were enslaved. In addition, when referring to those people who were caught up in the process of the 1850 Law, I will refer to them as "alleged fugitive slaves." These choices are far from perfect, but seek to balance two conflicting truths about doing history in this period. First, slavery existed and was a fundamental part of American life for more than two centuries. Human beings were bought and sold as property and understood in private and public discourse as slaves. In our commitment to recover the agency of those human beings, we should not elide the depth and width of the social, political, and legal force of the label "slave." Still, as totalizing as slavery was in the past, historians also have an obligation to translate past into present. The human beings at the heart of this story (and of all stories about slavery) cannot and should not be reduced to a label that bears the stigma of oppression. Claims to ownership were contested in ways small and large, and the agency of enslaved people was a powerful force in the politics of the nation. Whether these terminological choices adequately balance the competing concerns laid out in this note, I am not sure. Those of us writing about these lives bear the responsibility, at a minimum, to grapple with these questions.

2. See *infra*, Part II.B.1.b.

activists who fought tirelessly for their freedom.<sup>3</sup> What is more surprising is a third leading explanation: lawyers. Close attention to the stories of the daily legal struggle within the procedural framework of the 1850 Law reveals case after case where the work of lawyers was instrumental to the effort for freedom.

The lawyers' work that I discuss was not, for the most part, traditional lawyering. While they nearly always agreed on the merits that their client should be freed, what stands out in case after case is the extent to which these lawyers employed every means at their disposal to frustrate, delay, and dismantle the system within which they were practicing. This is what makes Jolliffe and other abolitionist lawyers fighting the 1850 Law models for what I am defining in this Article as "resistance lawyers."

A resistance lawyer engages in a regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.<sup>4</sup> The abolitionist lawyers of the 1850s are perfect archetypes of resistance lawyering because every alleged fugitive slave that they represented was caught up in the processes of the 1850 Law. Lawyers who argued that the system was an abomination had little choice but to use the tools of that system as part of their struggle against it.

Resistance lawyering is rooted in direct service within the hostile system rather than collateral attack against it through other systems. Although abolitionist lawyers were not shy about challenging the constitutionality of the Law through processes external to the Law,<sup>5</sup> it was their work against the Law from within its own procedural framework that was most legally and politically effective. Although they were happy to use the strategies of impact litigation and collateral attack when they were useful, the work of these lawyers looked more

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3. Manisha Sinha's magisterial recent work on the abolition movement proves this assertion with unanswerable force. MANISHA SINHA, *THE SLAVE'S CAUSE: A HISTORY OF ABOLITION* (2016).

4. As I discuss more fully below, I understand resistance lawyering to be a relative definition rather than an absolute one. Resistance lawyering describes an attitude toward a set of procedures rather than any fixed political commitment. Any time a lawyer practices within a procedural and/or substantive legal system (or sub-system) she opposes in order to defeat the operation of that system, that is resistance lawyering. The word "system" as I use it here does not mean "the law" broadly. Rather, it means a discrete legal system like the Fugitive Slave Law, capital punishment, bankruptcy, etc. Lawyers within a single movement may disagree about which systems are or are not legitimate and thus about which systems should be resisted and which should be fixed and protected.

5. Because of the procedural framework of the Fugitive Slave Law of 1850, there were relatively few vehicles for attacking the constitutionality of the Law separate from the direct adjudication of whether or not an alleged fugitive should be freed. There was no explicit appellate procedure under the Law and thus no obvious forum for carefully teed up legal challenges. That said, in case after case, lawyers made constitutional arguments against the Law as part of their direct defense of their clients. *See, e.g., Miller v. McQuerry*, 17 F. Cas. 335, 337 (D. Ohio 1853) (No. 9,583).

often like direct service engaged in the urgent triage work of protecting human beings from being sent back into slavery.<sup>6</sup>

This observation is important because today, providing triage and direct service is generally not seen as the most direct way to achieve broad systemic reforms. By definition, triage practices concern symptoms of deep and intractable social problems, and a triage lawyer's job is usually to treat the symptoms rather than the central malaise. Both in law schools and in practice, there is a common anxiety that one must choose between "systemic" work and hands-on direct service work. The model of abolitionist resistance lawyers suggests that this need not be an either/or choice. The success of their strategies both for their clients and for the movement as a whole can serve as a spur and a lesson for present-day resistance lawyers who are confronting the question of how to make connections between their own movement politics and their daily practice.

Although I follow resistance lawyering into the present, this Article is primarily a legal history of the lawyering strategies brought to bear against the Fugitive Slave Law of 1850 by a set of abolitionist lawyers committed to undermining that law. In order to understand those strategies, it is necessary to put their practice into context. In Part I, I argue that these lawyers were not, and did not think they were, dismantling the institution of slavery in the courtroom. They knew slavery was a dominant social and cultural force that structured the underlying logics and mechanics of American law and politics. Although slavery was visible and manifest in legal rules and legal institutions, few held out hope that the institution of slavery itself could be directly assailed in a courtroom.<sup>7</sup>

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6. I use the word triage here in a somewhat different sense than some authors discussing public interest lawyering and legal services. The term is often adapted from its medical usage to refer to the difficult choices that lawyers and advocates must make between which cases to take and which not to take. Paul Tremblay, for example, defines triage as "a practice of distinguishing among several clients in determining which should receive what level of service, acknowledging that each cannot receive an unlimited delivery of service." Paul Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 *UCLA L. REV.* 1101, 1104 (1990). Anthony Alfieri expands this idea of triage to the level of community needs, arguing that those running nonprofits and clinics must also engage in a kind of decisional triage when deciding where and how to allocate time and resources. Anthony Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 *UCLA L. REV.* 1374, 1383 (2017). My own usage of the term in this article goes still one level of generality higher. Triage for me refers to the direct service lawyer's position in relation to her clients. She takes in those with the symptoms created by the broader political and social problems as an emergency room takes in all comers. Of course, within that process, there is a need to distinguish between those who need attention urgently and those who do not. Independent of that hard call, however, is the fact that the purpose of direct representation is to address the symptoms that walk in the door rather than the diseases that may be causing them within the political culture.

7. This statement risks flattening the complex strategic debates that raged between abolitionist lawyers in the United States between the founding and the Civil War. Some more moderate lawyers (exemplified by the Pennsylvania Abolition Society in the 1820s and '30s) espoused an incrementalist strategy that proposed to challenge slavery in court wherever possible, limiting the practice as much as feasible through "legitimate" legal means in order to constrain and, they hoped, choke off the air to the institution of slavery. See RICHARD S. NEWMAN, *TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC 60-85* (2002). Others, like William Lloyd Garrison and the New England Anti-Slavery Society, advocated a more radical immediatist position that relied less

These lawyers understood that the fight against slavery was a broad political effort to be waged across the culture. This did not mean that lawyers abandoned the courts as a site of resistance or that they shied away from direct representation. Rather, abolitionist lawyers saw what slavery cases did arise as opportunities, using every case arising under the 1850 Law as a venue for a vigorous rhetorical proxy battle against slavery.

In Part II, I draw on my own novel archival research to show that the lawyers and activists behind these cases were more effective than historians have previously understood. One might assume that lawyers preoccupied with a rhetorical fight against an intractable social ill might be less effective in the defense of the human clients before them. In fact, until now, historians have generally concluded that, with or without lawyers, people unfortunate enough to be caught up in the process of the 1850 Law were overwhelmingly likely to be sent back to slavery. In fact, the research that I lay out in Part II challenges this conclusion by taking a fresh look at original archival information. After compiling a list of every known case arising under the 1850 Law, I sought to determine the outcome of each case and examine the role that a lawyer (if any was involved) played in reaching that outcome.

Building on my surprising quantitative conclusions (nearly four out of ten alleged fugitives ending up free), Part II.B delves deeply into the narrative stories of a few select cases to explore what made abolitionist resistance lawyering so successful. Abolitionist resistance lawyers fought the 1850 Law from within, seeking delay at every turn, taking every opportunity to create procedural confusion and jurisdictional conflict, and remaining alert to any intervening event (legal or non-legal) that they could opportunistically seize to help their cause.

Resistance lawyering often helped clients end up free, sometimes through exoneration, sometimes through purchased freedom, and sometimes through escape. Moreover, resistance lawyering effectively raised the political salience of a trial and thus served the abolitionist lawyers' goal of making the proceeding into a proxy battle against slavery. Critically, the core strategies of resistance fused direct service and triage with broader political motives. Lawyers who saw the framework of the Fugitive Slave Law of 1850 as unjust used the procedural tools within that system both to achieve the best possible outcomes for their clients, *and* to obstruct and dismantle the system itself.<sup>8</sup>

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on legal interventions and more on mass political action. *See id.* at 108–30. Importantly, although these positions were more or less legalistic and more or less radical, both understood that the purpose of legal action was to advance a position in a fundamentally political struggle and *not* to dismantle slavery itself through the legal system.

8. As I discuss further, *infra*, the success that lawyers achieved should not obscure the fact that most alleged fugitives (even those with lawyers) did not wind up free. Every time a human being was returned to bondage under color of federal law was a human and moral tragedy. In noting surprising successes, I do not intend to minimize the brutality and cruelty of either the system of slavery or the 1850 Law.

Having observed the surprising success of resistance lawyering against the 1850 law, Part III turns to the present to make two modest claims. First (and most modest) is that there are many examples of resistance lawyering in the present. Especially among cause lawyers, there are many examples of lawyers practicing within systems that they abhor and of using that practice to resist, obstruct, and destroy the systems themselves from within. I focus on three concrete examples: opposition to the death penalty, criminal defense, and deportation defense. In these and other cases, there are strong resonances between present practice and the historical story in Parts I and II.

A second, and less modest, claim is that although there are many examples of what looks like resistance lawyering in the present, it is rare to find direct service and movement politics integrated as explicitly and as effectively as they were in the case of abolitionist lawyers in the 1850s. While acknowledging the many good reasons why this may be and recognizing fundamental differences between present and past, I propose that there is latent political opportunity to be tapped. Where resistance lawyering is happening, but where its politics are not explicit, there is an opportunity for today's lawyers to learn from the past and leverage their daily practice within and against systems they oppose by integrating that practice more explicitly with a movement politics.

Nothing in this second claim is intended to *prescribe* any specific politics for lawyers today. As was true in the 1850s, lawyers can and do come to their work with very different sets of political commitments and projects. Rather than suggesting any one political project, I suggest that lawyers today work to make the political commitments that bring them to the work clear.<sup>9</sup> This clarity, in turn, creates the potential for linking a daily direct service practice to a broader political project (whatever that may be). Integrating practice with politics following the model of the abolitionist resistance lawyers creates both outward- and inward-facing benefits. Outwardly, integration promises to create space for daily practice to become more politically salient. Inwardly, integration works as a buffer against burnout and disenchantment, making it more likely that lawyers will be able to sustain their work over the long haul.

It is not lost on me that many American lawyers committed to social change are living through a bleak moment. As national and global politics trend away from progress on racial justice, environmental protection, and economic equality, among other issues, courts have not emerged as stalwarts or saviors of individual rights.<sup>10</sup> Slavery is at the root of some of the social problems that we

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9. In this sense my modest prescription is procedural and pragmatic rather than substantive and normative. Without prejudging the outcome, I ask only that lawyers give an account of what they are doing and why. I propose that this clarity itself, regardless of the substance, is powerful.

10. Although legal institutions are unlikely to save us from rising right-wing ethnic nationalism, there is some evidence of hope that lawyers can play a role in "resisting" these political trends. Since the election of President Trump, law schools have seen a marked rise in applications—a rise that many attribute to a desire to engage in public service as a counterbalance to the politics that Trump represents. See Derek Hawkins, *Did Law School Applications Get a 'Trump Bump'? Maybe*, WASH. POST (Feb.

face today, but it is also an archetype for those problems. Like slavery, mass incarceration, climate change, and economic inequality are not monsters that can be slain in court alone. Nevertheless, their tentacles frequently manifest in the daily practice of direct service lawyers. For those of us who feel inspired (or bound) to resist, there are real questions we can ask about the role legal practice can and should play in that resistance. One lesson to draw from a close examination of the resistance lawyers of the 1850s is that there may be untapped political potential in the struggle against the symptoms of the monstrous problems before us.

In a political struggle, optimism is a precious commodity. Strange as it may be to say, this history of slavery offers a glimmer of precious optimism to lawyers engaged in social change movements today.

## I.

### THE LAW OF SLAVERY AND THE FUGITIVE SLAVE LAW

The Fugitive Slave Law of 1850 is one of the most appalling moral atrocities in American political and legal history. The Law facilitated the rendition of alleged fugitive slaves back to slavery, severing them from their families, children, jobs, and freedom. From the moment that President Fillmore signed the Law, many understood it to be monumentally unjust. Seeing the Law in action only made it worse. As they watched their black neighbors forced at gunpoint through Northern streets bound for the South and slavery, even the most conservative Yankee Brahmins “went to bed one night old-fashioned, conservative, compromise Union Whigs & waked up stark mad Abolitionists.”<sup>11</sup>

The Fugitive Slave Law of 1850 became a proxy for the broader sectional crisis simmering between North and South in the 1850s.<sup>12</sup> It stood in for the whole catalog of evils of plantation slavery, as well as for the North’s supine compromise with the South.<sup>13</sup> Many of the most searing depictions we retain of

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23, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/02/23/did-law-school-applications-get-a-trump-bump-maybe/?utm\\_term=.2604eae35c9](https://www.washingtonpost.com/news/morning-mix/wp/2018/02/23/did-law-school-applications-get-a-trump-bump-maybe/?utm_term=.2604eae35c9) [https://perma.cc/4ZQH-SCSW].

11. These are the words of Amos Adams Lawrence, a wealthy mill owner in Massachusetts (his family gave their name to Lawrence, Massachusetts as well as to Lawrence, Kansas). Lawrence said this in 1854 in response to the Anthony Burns trial in Boston (see *infra*). SIDNEY BLUMENTHAL, *WRESTLING WITH HIS ANGEL: THE POLITICAL LIFE OF ABRAHAM LINCOLN*, VOL. II, 1849–56, at 320 (2017). Lawrence was so radicalized that he became a leading figure in the pre-secession political and military struggle in Kansas. Named “Bleeding Kansas,” settlers and sectionalists flooded Kansas and fought, killed, and died over the question of whether Kansas would allow or outlaw slavery. The most famous of these combatants was John Brown, who would become an abolitionist martyr after his failed raid on Harper’s Ferry in 1859. See ROBERT K. SUTTON, *STARK MAD ABOLITIONISTS: LAWRENCE, KANSAS, AND THE BATTLE OVER SLAVERY IN THE CIVIL WAR ERA* (2017).

12. “Sectional crisis” is a broad term that refers to the increasing tension between North and South in the years leading up to secession and the outbreak of the Civil War in 1861.

13. The radical abolitionist Wendell Phillips expressed a widespread Northern opinion succinctly in 1854: “the *Government* has fallen into the hands of the Slave Power *completely*. So far as *national* politics are concerned, we are beaten—there’s no hope.” Letter from Wendell Phillips to

the sectional crisis leading up to the Civil War were aimed at the 1850 Law and its operation. In “A Boston Ballad,” Walt Whitman bitterly mocked the passive citizens of Boston for watching helplessly as Anthony Burns was marched through the streets back to slavery.<sup>14</sup> It was in response to this same scene that Henry David Thoreau famously declared independence from the state of Massachusetts, writing: “[m]y thoughts are murder to the State, and involuntarily go plotting against her.”<sup>15</sup>

If the Fugitive Slave Law was unpopular in 1850, it has not aged well. It has become an archetypal unjust American law.<sup>16</sup> In the halls of legal theory, it stands beside the Nuremberg laws of Nazi Germany, the Apartheid laws of South Africa, and the Jim Crow laws of the American South as a classic example of how we think about morally repugnant laws within a legal system.<sup>17</sup>

Bad as it was, the Fugitive Slave Law of 1850 was central to neither the administration nor the perpetuation of slavery in the United States. As a matter of substance, the Law was only a peripheral regulation serving the massive economic, political, and cultural force that was the practice of chattel slavery. Thus, any investigation of the struggles over the Law must begin with a clear-eyed analysis of the Law’s place within the broader socio-legal framework of slavery. My intention here is not to offer a fully articulated theory of the law of slavery. However, in order to understand how the legal resistance to slavery worked, it is essential to place slavery within its own legal context.

Slavery was, and had always been, woven tightly into the fabric of the American legal system. From the first decades of European arrival and conquest, slavery and slave labor formed an essential part of the political and economic

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Elizabeth Pease Nichol (Aug. 7, 1854) in 3 WILLIAM LLOYD GARRISON, 1805–1879: THE STORY OF HIS LIFE TOLD BY HIS CHILDREN 410, 411 (1894) (emphasis in original).

14. The poem imagines a corps of phantom revolutionary war veterans appalled at the specter of federal despotism: “What troubles you, Yankee phantoms? [W]hat is all this chattering of bare gums? . . . If you blind your eyes with tears, you will not see the President’s marshal; [i]f you groan such groans, you might balk the government cannon.” WALT WHITMAN, LEAVES OF GRASS 217 (1854). “A Boston Ballad” was originally published without a separate name as part of Whitman’s first edition of *Leaves of Grass*.

15. Henry David Thoreau, *Slavery in Massachusetts* 58 (1854).

16. A brief survey of lists of the worst laws in US history informally confirms this view. See, e.g., *10 Worst Laws in American History*, LISTVERSE (Sept. 15, 2017), <http://listverse.com/2017/09/15/10-worst-laws-in-american-history> [<https://perma.cc/C2E6-YCMJ>] (listing the 1850 Law as the fifth worst law in American history).

17. For example, Robert Cover’s *Justice Accused* used the examples of antislavery judges who upheld the constitutionality of the 1850 Law to show how the formalist underpinnings of legal thought could uphold deeply immoral outcomes (the “moral/formal dilemma”). ROBERT COVER, *JUSTICE ACCUSED* (1975). Reviewing the book, Ronald Dworkin responded that there was a solution to this moral dilemma in his own theory of adjudication which, if applied, would have allowed antislavery judges to successfully rule that the Law was in fact unconstitutional. See Ronald Dworkin, *The Law of Slave Catchers (Book Review)*, TIMES LITERARY SUPPLEMENT (Dec. 5, 1975). This interchange has become canonical—which for my present purposes only goes to show just how settled our present impression is that the 1850 Law was a very, very, very bad law.

geography of the colonies.<sup>18</sup> Coupled with the troubling presence of the preexisting brown-skinned population that white settlers sought to displace, the existence of black human beings bought and sold in the slave trade helped to structure the public understanding of the polity in the new colonies. White colonists began the work of creating racial difference and recognizing it at law almost as soon as the first black slaves arrived in Virginia.<sup>19</sup> Moreover, as the colonies grew over time, the practice of slavery became further entrenched in the political, social, and legal culture. So too did the identification between blackness and slavery. By the first decades of the nineteenth century, the practice of slavery was entwined with a deeply held belief in white racial superiority. The cultural and social logic of racialized slavery had become central to the Southern “way of life” that was protected and rationalized by the American legal system.

Slavery was recognized and validated by colonial statute, imperial policy, the United States Constitution, state statute, state courts, federal statutes, and federal courts. Slavery was unquestionably legal—indeed it was at the very heart of the American legal order.<sup>20</sup> And yet, for much of the history of slavery in the United States, it was difficult to identify something that we might call a public “law of slavery.”<sup>21</sup> Slavery’s very existence was protected by law, and its limits were defined by law, but the legal boundaries on slavery were created to ensure

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18. Slavery was introduced in Virginia “as early as 1619, when the settlers traded for twenty blacks brought by a Dutch man-of-war.” THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1816*, at 3 (1996). Slaves were an integral part of settler life in the seventeenth century colonies, with households both North and South often owning one or a few slaves to help with the daily work of a somewhat spare frontier life. It was not until the development of plantation agriculture (tobacco, sugar, and rice—and only later cotton) in the first half of the eighteenth century that slavery transitioned from a more personal institution to the familiar model of the plantation system. It was then, as larger scale farming called for more laborers, that slave populations began to grow. *See id.* at 4–5.

19. *See id.* at 17–19.

20. Legal historians argue over precisely how central slavery was to the negotiations and compromises of the Constitutional Convention in 1787. Nevertheless, a consensus has developed over the last decades that slavery was an essential element of the legal settlement that emerged out of independence. In *A SLAVEHOLDER’S UNION*, George William Van Cleve laid out the structure of the argument in detail. He argued that the existence of slavery was at the heart of negotiations over the shape of the union, such that the issue cast its shadow over the entirety of the union forged by the Constitution. Van Cleve asserted that the Constitution was proslavery, arguing that a government that met all the goals that the founders had for their nation “could not have been formed and then have territorially expanded as America did unless it protected slavery and its expansion.” GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDER’S UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY REPUBLIC* 270 (2010). Van Cleve was building on a robust literature placing slavery at the center of early American legal culture. *See* Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1124–25 (2012) (reviewing Van Cleve’s book and collecting sources suggesting that most historians agree the Constitution was proslavery).

21. Let me not be misunderstood as saying that slavery was not articulated by a robust legal regime. Not only did slavery raise a host of legal questions, it also required an increasingly complex set of rules and doctrines as it grew and expanded. Men like Thomas Cobb wrote extensive treatises documenting the laws relating to slavery. *See* THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA: TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY* (1858).

that the daily operation of the system of chattel slavery was largely left to private control.

Slavery was more than a system of labor: it was a system of governance and a cultural foundation for social life. The public law of slavery outlined the boundaries of that logic by protecting ownership in slaves through the law of property and by setting minimal limits on the power of owners. Within this framework, slave owners wielded the combined despotic power of the patriarch, priest, and monarch over family, faith, and governance.<sup>22</sup> Day in and day out across the slave states of the Southern United States, the system of slavery was articulated not through systemic lawmaking, but rather through the ad hoc, day-to-day lived interactions between enslaved people and those who asserted ownership of them. Public law and the common law very rarely interfered with the details of that relationship. Rather, law policed the boundaries of the private relationships by protecting the property rights on which they rested.<sup>23</sup> This explains why, when Southern colonies began to articulate statutory “slave codes” in the eighteenth century, those statutes dealt largely with the legal problems specific to defining human beings as property.<sup>24</sup> Moreover, this explains why so much of what later came to be called the “law of slavery” was dedicated to defining the racial boundaries of who could and could not be considered property.<sup>25</sup> As statutory law around slavery grew through the middle of the nineteenth century, the same pattern persisted: the laws existed to keep the core legal relationship between master and slave intact and insulated from legal inquiry or threat.

Because slavery was a social, economic, and cultural practice enmeshed in and protected by law, it was *not* an easy target for legal reform. There was no law to repeal or case to overturn that would put an end to slavery.<sup>26</sup> Moreover, even in the South, where slavery was protected by both statutory and case law,

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22. I use these masculine images advisedly because most slave relationships were structured by a white patriarchal archetype where the white male planter owned and controlled his “property” just as he did his family—with very few restrictions on his power. That is not to say, of course, that all owner-slave relationships followed this mold. Many women owned slaves, and the relationships between female slave owners (and wives of male slave owners) and their slaves were complex. See ELIZABETH FOX GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* (1988).

23. See MORRIS, *supra* note 18, at 42.

24. See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 *CARDOZO L. REV.* 1711, 1778–79 (1996).

25. See MORRIS, *supra* note 18, at 21–36.

26. This is, of course, true about the legal attacks that might be brought in any fight against a deeply entrenched social problem. For example, pages and pages of scholarship have been devoted to showing how the mere overturning of *Plessy v. Ferguson* by the Supreme Court in *Brown v. Board of Education* did not, and could not have, ended segregation by mere force of judicial fiat. See, e.g., MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L. J.* 470 (1976).

the practice of slavery itself was insulated from challenge because the law protected (but did not directly regulate) the right of owners to govern the daily operation of slavery.<sup>27</sup>

Slavery as an institution was thus mostly beyond the reach of legal challenge, which necessarily meant that challenges were only possible through collateral attacks on the institution from the margins. Those legal challenges were, in other words, part of a broad political strategy deployed against the system that supported and protected slavery. This need not diminish the importance of the legal fight against slavery. The stories in this Article show just how important legal resistance can be as part of a broad-based strategy for social change. However, understanding that legal challenges to slavery were not attacks on the heart of the system helps to explain why so much of the action was litigated in the margins: manumission, fugitives, and Northern personal liberty laws, to name a few examples. Supporters and opponents of slavery understood these cases to be proxy battles in a larger political struggle.<sup>28</sup> But while the rhetorical and long-term stakes could be high, the immediate stakes were generally lower than the rhetoric would suggest.<sup>29</sup>

Slavery was an iceberg the legal mass of which rested well below the visible surface of daily legal practice. What this meant for antislavery lawyers was that the central target—overturning slavery directly—was out of reach. The only way to resist slavery through legal means was through attacking the visible tip of the iceberg.

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27. Perhaps the most infamous example of this general proposition came in *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829). In *Mann*, the defendant John Mann shot and wounded an enslaved woman named Lydia. Mann had hired Lydia out from her owner and therefore, under North Carolina law, had all the rights of an owner over Lydia. The North Carolina Supreme Court held that Mann could not be prosecuted for battery against Lydia because the master's rights against his slaves could not be questioned in court. In Justice Ruffin's words:

We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty.

*Id.* at 265.

28. In nearly every case discussed *infra* in Part II, activists and lawyers immediately treated the arrest and trial of an alleged fugitive as a focal point to organize—not only to free the captive, but also to condemn the system of slavery and slave power that the Fugitive Slave Law of 1850 served.

29. For the actual litigants, the stakes of each individual fugitive slave case were, of course, as high as they could possibly be. What I mean by lower stakes is that frequently lawyers on both sides would suggest that the future of slavery (or the future of the union) hinged on the outcome of an individual case when, in reality, the institution of slavery was almost never under immediate practical threat.

### A. *The Fugitive Slave Laws*

#### 1. *The Tip of the Iceberg*

Because it was very difficult to frame direct challenges to slavery, the legal battles over slavery were mostly fought by proxy. Lawyers used the visible parts of the iceberg to point beneath the surface and challenge the broader problem. The most salient examples of this kind of practice were the many challenges that antislavery lawyers posed to the Fugitive Slave Laws. I will discuss these challenges in more detail in Part II, but in order to understand their context, it is necessary to lay out the legal architecture of the fugitive slave laws, which arise out of the Fugitive Slave Clause of the US Constitution. The story is the same as that found in Justice Story's opinion in *Prigg v. Pennsylvania*: the legal logic of slavery rested on the recognition that slave owners had a right to property in their slaves that the law would respect and enforce.<sup>30</sup> In the daily practice of slavery on plantations across the South, this right was secured by owners' private force (violence or the threat of violence) with the backing of the public force of the state. The right only became insecure when a slave took it upon herself to run away. Owners could rely on Southern states to acknowledge and enforce their property claims, and so when a slave ran away from North Carolina to Virginia, there was generally no obstacle to the owner's claim. Problems arose when a fugitive was able to cross into a free state that did not recognize or protect the property rights of a slave owner—in those situations, owners could not rely on Northern (and often hostile) state mechanisms to enforce their property rights.

To be clear, actual incidences of escape were few, and most slave owners found it relatively easy to reclaim and return their alleged slaves to the South.<sup>31</sup>

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30. *Prigg* involved a challenge to Pennsylvania's personal liberty law. That law sought to protect free black residents of Pennsylvania from being seized and enslaved by "slave catchers" roaming across the border. 41 U.S. 539, 540–41 (1842). In *Prigg*, Justice Story held that the Pennsylvania law (and all the other similar laws in Northern states) was unconstitutional because in passing the Fugitive Slave Law of 1793, Congress had exercised its legitimate power under the Fugitive Slave Clause of the Constitution, thus preempting states from regulating in the area. *Id.* More concretely, Story held that there was no problem under the federal law with the owner of a slave using self-help to recapture and forcibly bring an alleged fugitive back South. *Id.* ("The court have not the slightest hesitation in holding, that under and in virtue of the constitution, the owner of the slave is clothed with the authority in every state of the Union, to seize and recapture his slave, wherever he can do it, without any breach of the peace or illegal violence."). Jamal Greene has called it "the worst Supreme Court decision ever issued," pointing out that Story's holding that slave owners could use self-help as long they did not cause "illegal violence" meant, by inference, that violence against black people, free or fugitive, was always legal. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 428 (2011).

31. Although estimates vary, even the most robust accountings suggest that escapes were not a rampant problem. Supporting their argument that there were more escapes than generally thought, John Hope Franklin and Loren Schweninger suggest that no more than one to two percent (fifty-thousand out of four-million) of slaves attempted to escape in any given year. JOHN HOPE FRANKLIN & LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* 282 (2000). Of those who escaped, the vast majority did not end up free. See ERIC FONER, *GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD* 4 (2015) (estimating on the high end that five thousand slaves per year (less than 0.2 percent) successfully escaped). Most slaves who escaped travelled only a short

Moreover, at least until well into the 1850s, Northern states did not seek to obstruct all slave owners from reclaiming fugitives.<sup>32</sup> In short, fugitive slaves never seriously threatened the institution of slavery in the South.<sup>33</sup> Still, as national politics became increasingly rancorous over the issue of slavery on either side of the Mason-Dixon Line, legal battles over the Fugitive Slave Law of 1850 occupied an increasingly central place in national politics. Proxy battles in court might not have threatened slavery directly, but the supercharged political rhetoric surrounding those cases surely did.

In saying this, I take nothing away from the importance of the cases that arose under the 1850 law. Indeed, in Part II I will argue that the work of antislavery lawyers litigating these cases was essential to the broader political movement resisting slavery. However, in order to understand the importance of these cases, it is essential to understand that they were peripheral *until* they were weaponized as existential threats to slavery through organizing and resistance lawyering. Lawyering against slavery by representing and seeking to protect fugitive slaves was a rhetorical and political proxy war against an otherwise unassailable system. This meant that, to the extent that an abolitionist lawyer saw himself as fighting the broader battle for the end of slavery, lawyering had to be a tool in a larger project.

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distance, and despite the remarkable stories of ingenuity and organization surrounding the Underground Railroad, most escapes were unplanned and short-lived. The majority of successful escapes originated in border states where the distance to the state line was shorter. Other slaves escaped into the wilderness and the swamps. But the fact remains that most slaves who sought to escape were likely recaptured relatively quickly and returned to slavery.

32. Personal liberty laws were intended to make it more difficult for slave owners to reclaim alleged fugitives. The laws required legal process, criminalized the kidnapping of free blacks, and mandated that state authorities not cooperate with federal or private efforts to reclaim fugitives. Even the most radical laws, such as Massachusetts' "Latimer Law" (which prohibited state officials from cooperating with the rendition of alleged fugitives), allowed for the possibility that a slave owner could successfully reclaim an alleged fugitive, providing the owner observed proper process and did not seek state assistance. See THOMAS MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861*, at 109-17 (2001).

33. There has been vigorous scholarly debate over a related question: did the 1850 Law have any practical value for the South beyond rhetoric? James McPherson argued that the Law mattered "less for practical advantage than as a matter of principle." JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 79 (1988). Others have responded that the Law *did* matter substantively to the South for reasons beyond rhetoric and honor. See WILLIAM FREEHLING, *THE ROAD TO DISUNION* 502-503 (1991) (arguing that the Fugitive Slave Law was of primary importance to border state slave owners who were most at risk of having a slave flee); Jeffrey Rogers Hummel and Barry R. Weingast, *The Fugitive Slave Law of 1850: Symbolic Gesture or Rational Guarantee?* (Jan. 2006) (unpublished manuscript), [https://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1153528](https://papers.ssm.com/sol3/papers.cfm?abstract_id=1153528) [<https://perma.cc/SZ82-WXCT>] (arguing that the Law sought to protect material financial interests as part of an ongoing effort to protect the viability of slavery in the South). Though they disagree over whether the Law had *some* material benefit to slave owners, none of these scholars suggest that fugitive slaves posed a substantial systemic risk to slavery.

## 2. *The Mechanics of the Fugitive Slave Laws*

### a. *The Fugitive Slave Law of 1793*

Since before the drafting and ratification of the Constitution, the rendition of fugitive slaves had been a critical part of the legal system protecting slavery in North America.<sup>34</sup> A provision for returning fugitive slaves to their owners was therefore understood to be an essential element of any constitutional compromise in 1787.<sup>35</sup> The Fugitive Slave Clause in the Constitution promised to protect the property of slave owners, but did not provide any administrative mechanism for that protection.<sup>36</sup> As a result, in 1793 Congress passed the first Fugitive Slave Law, outlining a system for processing the claims of masters and sending alleged fugitives back into slavery.<sup>37</sup>

The Fugitive Slave Law of 1793 contemplated that putative slave owners could find and then “seize or arrest” an alleged fugitive and bring her before either a federal or state court. In court, the slave owner would have to prove “to the satisfaction of such Judge or magistrate” that the alleged fugitive was, indeed, her slave. This proof could be made by “oral testimony” or by an affidavit from a court in the slave owner’s home state. Once that proof was established, the court would issue a certificate to the slave owner granting her permission to remove the alleged fugitive back to her home state.<sup>38</sup>

The Law of 1793 also contemplated punishment for those who sought to obstruct the operation of the Law through escape or other means. Anyone who “knowingly and willingly” obstructed the slave owner, rescued an alleged fugitive, or harbored a fugitive was subject to a \$500 fine that would be paid to the slave owner as compensation.<sup>39</sup>

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34. “The interstate rendition of fugitive slaves among the American states was a well-established constitutional tradition by 1787.” WILLIAM WIECEK, *THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 78 (1977). Wiecek goes on to summarize laws meant to keep servants (white and black) from escaping, dating back to the earliest days of European colonization in the seventeenth century.

35. Although some historians have debated the importance of the clause in the negotiations, I am persuaded by the dominant view that the clause was critical to the overall compromise. George William Van Cleve makes the case best, concluding that the fact that the clause was not the subject of vigorous debate at the convention was not an indication that it was not important; rather, it “was born without controversy because it was a consensus means of controlling fugitive slavery that served the congruent sociopolitical interests of various states.” VAN CLEVE, *supra* note 20, at 168.

36. The text of the clause is famously opaque, requiring that states deliver alleged fugitives up to their owners, but saying nothing more. “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” U.S. Const. art. IV, § 2, cl. 3, *repealed by* U.S. Const. amend. XIII.

37. In fact, the Fugitive Slave Law of 1793 was part of a larger bill that governed the rendition of criminal fugitives as well. Only Sections 3 and 4 of the Law addressed fugitive slaves. *See* Act of Feb. 12, 1793, ch. VII, 1 Stat. 302 (“An Act respecting fugitives from justice, and persons escaping from the service of their masters”, hereinafter: “the Fugitive Slave Act of 1793.”).

38. *See id.* at § 3.

39. *Id.* at § 4.

The Law of 1793 created a forum for adjudicating slave owners' claims, making it relatively easy for owners to make and successfully prosecute their claims and to enslave previously free black residents of Northern states.<sup>40</sup> Still, opposition to slavery was growing in many Northern states. With that opposition came a growing political movement seeking to protect alleged fugitive slaves from being sent South. And in response, Southern states were starting to wring their hands about the law's inadequate protections and the risk to their property rights posed by Northern antislavery sentiment.

Beginning in the early years of the nineteenth century, a few Northern states began to take steps to limit the right of slave owners to recapture alleged fugitives. The first wave of legislation attacked an unanswered question in the law: did slave owners have the right to recapture alleged fugitives through "self-help"?<sup>41</sup> Supporters of slavery adamantly argued that the law protected the right to recapture without resorting to any legal process and that the law's procedures existed to aid slave owners who needed help, not to place a bar before those who did not. Northerners responded with the concern that recapture through self-help was little more than kidnapping. Even stipulating (as many did) that slave owners had the right to recapture their slaves in general, self-help without legal process put free blacks living in the North at risk of being kidnapped, brought South, and enslaved.<sup>42</sup> In response to these concerns, in 1819 Northern states began to pass laws requiring that any person seeking to remove an alleged fugitive slave from the state must follow the procedures laid out in the 1793 Law.<sup>43</sup>

These laws would become known generally as "Personal Liberty Laws." Although every state approached the problem slightly differently, in general these laws had three aims. First, they increased the penalties for kidnapping while making it clear that taking anyone out of the state by force or pretense would be construed as kidnapping.<sup>44</sup> Second, they barred state and local officials from aiding in the enforcement of the Fugitive Slave Law, leaving enforcement, in effect, up to the federal government alone.<sup>45</sup> Third, personal liberty laws

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40. Whether these individuals were truly fugitives or not, they were all living as free people before they were captured. Thus, the distinction between kidnapping a person who had never been enslaved (like Solomon Northup in *Twelve Years a Slave*) and re-enslaving a person who had previously been enslaved is less morally salient than it might seem. Still, it is true that the permissive standards and lack of progress also made it easy (and lucrative) for putative owners to make false claims to alleged fugitives or even to openly kidnap free blacks without fear of legal repercussions. See CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780–1865* (2015).

41. See MORRIS, *supra* note 32, at 28–29. "Self-help" refers to a property owner taking possession of property on their own authority without seeking recourse to or authorization from the state.

42. See *id.*

43. Ohio was the first state to pass such a law in 1819, and other states followed with more robust versions. *Id.*

44. *Id.* at 45. This meant in practice that "self-help" measures taken by slave owners would be construed as kidnapping.

45. See *id.* The question of whether state and local officials could be forced to enforce the Fugitive Slave Law was hotly debated and the subject of much Southern resentment. It was tentatively

created more robust procedural protections for alleged fugitives who found their way into state courts. The Law of 1793 was not clear on precisely what due process rights would be afforded to alleged fugitives, but in practice the answer was: not much. In state after state, Northern personal liberty laws pushed back against this, construing alleged fugitives as residents and even citizens of the state where they were residing. As such, the laws sought to cloak these residents with full due process rights to ensure that those who were returned to slavery had, in fact, been slaves.<sup>46</sup>

The obstructions that Northern states placed in the way of recapturing fugitive slaves over time became a bugbear for Southern supporters of slavery. Bemoaning the loss of money and the threat to the stability of their “sacred” property rights, Southern politicians claimed that the 1793 Law had become dead letter and agitated for a new, more robust, and more draconian fugitive slave law.<sup>47</sup>

*b. The Fugitive Slave Law of 1850*

The 1850 Law was the result of this agitation—but it was also the result of a broad compromise drafted by the moderate “great men” of the nation with the intention of staving off an impending sectional crisis.<sup>48</sup> The 1850 Law was passed as part of a package of measures that included abolishing the slave trade in Washington, D.C., admitting California as a free state, and allowing the new territories seized in the Mexican-American War between Texas and California to choose whether or not to adopt slavery by popular vote.<sup>49</sup> Historians have debated whether or not the compromise was a “good deal” for the North or the South and whether it accelerated or delayed the arrival of the Civil War.<sup>50</sup> What is not subject to debate, however, is that the 1850 Law was adopted in almost precisely the form that its Southern supporters desired.

Intended to fix the weaknesses that had made the 1793 Law “dead letter,” the new law had two primary goals. First, it made it easier for slave owners to reclaim alleged fugitive slaves from free states. Second, it increased the penalties levied against those who provided aid and comfort to alleged fugitives.<sup>51</sup>

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resolved in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), but it remained a very sore spot throughout the sectional crisis that led up to the Civil War.

46. See MORRIS, *supra* note 32, at 71–93.

47. R.J.M. BLACKETT, *THE CAPTIVE’S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY* 5–6, 43 (2018).

48. See Paul Finkelman, *The Appeasement of 1850*, in *CONGRESS AND THE CRISIS OF THE 1850S*, at 36 (Paul Finkelman & Donald R. Kennon, eds. 2012). Finkelman is very harsh on Henry Clay and Daniel Webster, two of the statesmen behind the deal. Other scholars are more sympathetic to the moderates who brokered the deal, arguing that they were facing a looming civil war and so were doing whatever they could to avert disaster. See ROBERT V. REMINI, *HENRY CLAY: STATESMAN FOR THE UNION* 749 (1993).

49. See Finkelman, *supra* note 48, at 49–56.

50. See *id.* at 36–38, 79.

51. See BLACKETT, *supra* note 47, at 7.

In service of the first goal, the 1850 Law created a new federal infrastructure for the arrest and trial of alleged fugitive slaves. The Law empowered the formerly lowly office of federal commissioner with full judicial powers in cases arising under the 1850 Law.<sup>52</sup> Commissioners were judicial officers appointed by Article III federal judges. The new law gave the circuits power to hire more commissioners and then gave those commissioners the power to hear and decide cases under the 1850 Law from start to finish.<sup>53</sup> The commissioners also had a newly empowered force of federal marshals at their command, who in turn were empowered to call out a posse of local citizens to aid them in apprehending and guarding alleged fugitives.

Once arrested and before the commissioners, the proceedings in these cases were intended to be summary—there would be no juries.<sup>54</sup> A claiming owner needed only bring a certificate from her home state and offer “satisfactory” proof that the alleged fugitive was indeed her slave. The alleged fugitives were not allowed to testify on their own behalf, nor were they guaranteed counsel or any procedural protections at all.<sup>55</sup> Infamously, commissioners were paid \$10 per case if they remanded an alleged fugitive to slavery and only \$5 if they ruled that she was free.<sup>56</sup> Taken as a whole, the Law made it clear that the goal was to create a summary hearing that would quickly deliver an alleged fugitive slave back to her owner without fuss, delay, or political uproar. The scales were heavily weighted against anyone unfortunate enough to be caught up in the process of the law—by design.

The law’s second mechanism for helping Southern slaveowners was to crack down more harshly on anyone (North or South) who offered aid and comfort to alleged fugitives. The Law of 1793 imposed a \$500 fine on anyone who obstructed the operation of the Law through rescuing or harboring an alleged fugitive. The 1850 Law doubled the maximum fine to \$1000 and added a possible prison term of up to six months.<sup>57</sup> Northern opponents of slavery were enraged that the Law explicitly criminalized their humanitarian commitments. These moderate increases in punishment seemed like extreme impingements on

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52. See Fugitive Slave Act of Sept. 18, 1850, 9 Stat. 462, § 4; *repealed by* Act of June 28, 1864, 13 Stat. 200.

53. See *id.* at §§ 3–4. Despite the Law’s insistence that commissioners had concurrent jurisdiction with federal district courts, in practice it was not unheard of for duly appointed Article III judges to take jurisdiction away from the commissioner hearing the case—especially when the case promised to be controversial or high-profile. The questionable legitimacy of the commissioners was the source of one of the most powerful legal objections to the Law. Its opponents argued that nothing in the Constitution authorized Congress to create new judicial positions outside of the Article III appointment process. As a result, the abolitionists argued, no proceedings before the commissioners were constitutionally legitimate. See WILLIAM HARNED, *THE FUGITIVE SLAVE BILL: ITS HISTORY AND ITS UNCONSTITUTIONALITY* 19–20 (1850).

54. Fugitive Slave Act of Sept. 18, 1850, 9 Stat. 462, § 6 *repealed by* Act of June 28, 1864, 13 Stat. 200.

55. *Id.*

56. *Id.* at § 8.

57. See *id.* at § 5.

their freedoms, and Northerners perceived the Law as a usurpation of Northern power in service of Southern aristocrats and the “slave power.”<sup>58</sup>

Both mechanisms of the Law sparked immediate outrage in the North. Town meetings were called, vigilance committees were assembled, and fiery speeches were made promising that Northerners and abolitionists would resist the Law at all costs and protect all alleged fugitives and free blacks from Southern slave catchers.<sup>59</sup> Supporters of slavery and defenders of the Law rallied to its defense, decrying their opponents as agents of chaos and fomenters of civil unrest.<sup>60</sup> Although the new law was peripheral to the broader practice of slavery, the 1850 Law immediately took center stage in the bitter sectional dispute that gripped national politics. Conflicting views on slavery were at the heart of a growing political divide in the nation, and the 1850 Law was a perfect proxy for the larger battle. A strike against the Law came to be seen (by both sides) as a strike against slavery and for abolition, while on the flip side, faithful enforcement of the Law came to be seen as essential to the preservation of slavery and the union.

## II.

### LAWYERS RESISTING SLAVERY

Either as a cause or a consequence of modern negative opinions about the 1850 Law, there is a widely held view that it was a disaster for the fugitives who were caught under its terms. Historians have generally reported that nearly all the alleged fugitives who were swept up in the grasp of the Fugitive Slave Law were returned to slavery. While historians have debated whether the number of alleged fugitives returned to slavery was or should have been significant to the sectional politics of the moment,<sup>61</sup> almost no one has disputed the basic

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58. Perhaps the most famous example of Northern outrage at having their compassion criminalized comes from Harriet Beecher Stowe’s *Uncle Tom’s Cabin*, where the fictional Senator Bird and his wife debate whether or not a law can be just that criminalizes the duty to help another human being. Although Senator Bird was a supporter of the Law in the abstract, he winds up providing aid to the fugitives that pass through his home—demonstrating by his actions the injustice of the Law. Reflecting on this scene, Stowe turns to her Southern readers and puts a fine point on her moral: “Ah, good brother! Is it fair for you to expect of us services which your brave, honorable heart would not allow you to render, were you in our place?” HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* 134 (1852).

59. See BLACKETT, *supra* note 47, at 15–25 (describing the explosion of public opposition to the Law in the months following its passage).

60. See *id.* at 25. In many cases, it was the moderate voices like Daniel Webster and Stephen Douglas who were the most avid defenders of the Law and the most alarmist about the risks of opposing it. Douglas, for instance, delivered a nearly four-hour stemwinder of a speech condemning the Chicago City Council for pledging to defy the Law in October 1850, arguing that the Law was constitutional and that opposition to the Law was treasonous. See *id.* at 23.

61. Paul Finkelman delivers the standard line about the Law’s draconian effects on alleged fugitives, arguing that “[b]etween 1850 and 1861 about a thousand blacks would be returned to bondage under the law” with very few gaining their freedom. Finkelman, *supra* note 48, at 77. But Finkelman goes on to argue that this number was actually small in the Southern view because it represented only a tenth of the estimated ten thousand slaves who escaped during that period. *Id.* Thus, for Finkelman,

observation that the effects of the Law were catastrophic (and that slavery was a near-certain outcome) for those unlucky enough to be caught up in its summary process.<sup>62</sup>

Having closely examined a more complete set of the cases brought under the Law during the decade that it was in effect, I have concluded that the numbers that we have come to accept tell an incomplete story.<sup>63</sup> Out of 210 cases invoking

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despite being a disaster for those alleged fugitives who were caught, the Law was not as effective as its Southern proponents had hoped. *Id.* RJM Blackett's recent work agrees with the spirit of Finkelman's observation. Blackett demonstrates that many fugitives were able to avoid the Law's grasp and that local political opposition to the Law blunted its force. *See* BLACKETT, *supra* note 47, at 457–59.

62. Blackett's recent book comes closest to asking the questions of the received wisdom that I am asking here. Advancing his own claim that there were more paths to freedom around and through the Law than we have thought, he quibbles with Stanley Campbell's data (discussed *infra*) in a limited way, arguing that more total fugitives wound up free during the first fifteen months after the Law's passage than Campbell had reported. *See id.* at 69. Blackett's observation is consistent with the data that I have collected here. Unlike Blackett, I have sought to extend the comparison between my own research and the previous research across the full scope of the Law's duration. Moreover, unlike Blackett, I have focused expressly on cases where I could be confident that the machinery of the Law had been activated in some measurable way.

63. A note on my methodology: in order to assemble the set of cases that I analyze here, I went case-by-case through the sources that had previously compiled cases, looking for primary source accounts of the cases in contemporaneous books, newspaper reports, court reports, and any other available resources I could uncover (private journals, correspondence, other collected papers). These compiling sources include comprehensive nineteenth century accounts (Samuel May's *The Fugitive Slave Law and its Victims* and Levi Coffin's *Reminiscences of Levi Coffin*) as well as more modern accounts (primarily Campbell's *The Slavecatchers* and RJM Blackett's *The Captives' Quest for Freedom*). Using these as starting points, I was able to search the primary sources for additional cases that had not been previously compiled or considered.

Once I had done this primary research, I was able to ask a consistent set of questions of the cases: had process been initiated under the 1850 Law? Were there lawyers involved? Who was the commissioner? What was the outcome? I then coded each of the cases and generated the rough statistical analysis that follows.

To my knowledge, this dataset is the most complete and well-articulated list of cases arising under the Law of 1850. That being said, the nature of the inquiry and the sources indicates that it is a near certainty that my survey has missed some cases. For the most part, commissioners under the Law of 1850 did not keep formal written records and did not publish their decisions in any form of legal reporter. It is likely that there were some jurisdictions where the Law's summary process was employed as it was intended—meaning that alleged fugitives could have been processed and remanded to slavery without any notice in the press or any other written record. It is just as likely that there were instances that never made their way into the press where process was initiated but where the alleged fugitive escaped. Add to this the reality that digitization of the newspapers from the era continues to grow (and that the text recognition software necessary to search those newspapers is imperfect but continues to improve) and it seems a near certainty that there are cases which I have not yet found.

This is to say that the raw numbers in this study should not be taken to be a claim of conclusive truth, but rather a best (and better than previously known) estimate. With the addition of cases to the data set, of course the percentages that I cite below will be liable to change. Even so, I can say with some confidence that it is unlikely that this data set will grow in ways that undermine the underlying conclusions. My extensive research revealed just how comprehensive the work of the scholars before me had been. While I did unearth a handful of new cases, I also found that most of what I was finding had been recorded somewhere before me. In that context, my contribution here is less a trove of new cases and more a new and comprehensive coding of those cases focused on the specific questions that I am asking about the enforcement of the 1850 Law. This means that while I am not claiming that this data set is complete or comprehensive (what historian could possibly be so deluded!),

some form of process under the Law,<sup>64</sup> eighty-one (38.5 percent) of the fugitives ended their cases as free people. Behind this surprising number, my research reveals that twenty-two (10.5 percent) of those 210 cases ended in exoneration; in forty-two cases (20 percent), the alleged fugitives escaped federal custody after the law's processes had been initiated; and in seventeen cases (8.1 percent) the alleged fugitive was freed soon after being judged to be a slave through purchase by abolitionists and their allies in the cities where the trials took place.<sup>65</sup>

This is a rich data set and many conclusions might be drawn from it. One such conclusion, as I outline below, is that lawyers were among the many actors who made it possible for nearly forty percent of the alleged fugitives to end up free. In victory and defeat in the courtroom, antislavery lawyers used their practice under and against the law to build the infrastructure for political change and victory. Practicing within a system that they abhorred (while deriding the injustice and oppression of the system) achieved surprisingly good outcomes within that system and helped to build a political narrative that was necessary to challenge the system itself.

In case after case, lawyers used the very limited procedural protections and the somewhat more robust platform provided by summary process under the Law

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I can say with some confidence that the broader intervention questioning the conventional narrative of the Law's impact and lawyers' role in that new narrative will survive future additions to the data set.

That said, I have posted a collection of my research as a working paper on my website. See Daniel Farbman & Benjamin Grossman, *Resisting in Process: Human Beings Ensnared in the Fugitive Slave Law of 1850* (2019) (unpublished working collection, Boston College Law School) (available at <http://works.bepress.com/daniel-farbman/11> [<https://perma.cc/43MP-Y347>]). I am eager for this to be a dynamic research tool that scholars working on these cases can use to build a collective and open-access knowledge base. No one would be happier than I should that resource grow enough to change the narrative yet again!

64. Identifying what counts as process under the Law is an admittedly complex task. For some cases it is easy. In 159 of the 210 cases, there is evidence of a full hearing before a United States Commissioner who ruled or was prepared to rule on the merits of whether the alleged fugitive should be returned to slavery. In many other cases, however, the case is less clear. The Fugitive Slave Law of 1793 explicitly stated that it was permissible for a slave owner to use "self-help" to arrest an alleged fugitive and return her to slavery if approved by a Southern court's process. This provision was upheld by Justice Story in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), and there is no reason to think that the Law of 1850 modified the rule. Thus, it could be argued that every single alleged fugitive (and kidnapped free black person) who was re-enslaved between 1850 and 1863 was returned under the provisions of the Law. By the same token, however, it could also be argued that every fugitive who successfully avoided capture during that same period escaped the clutches of the Law. The realities of the archive are such that it is impossible to collect any kind of reliable information about precisely how many fugitives were returned without any legal process or how many fugitives escaped. For this reason, I have limited my own sample of cases to those where I could find evidence of *some* process being invoked under the Law of 1850. In practice that means that I have included cases where I found proof that a United States Commissioner granted a warrant under the terms of the Law and where a federal official was acting on that warrant. By the same token, I have excluded cases where an alleged fugitive was seized through self-help by the alleged owner or his agents as well as cases where the only process provided came in state court.

65. This is a somewhat shifty figure because in a few cases where an alleged fugitive's freedom was purchased, there was an interval between the end of the trial (and a temporary return to slavery) and the subsequent emancipation of the slave.

to pursue two projects at the same time. The first project was to create the circumstances under which their client might avoid being returned to slavery. This meant seeking delay wherever possible, either by requesting continuances before the commissioner or by clogging up the process in other ways. It also meant working hard to get the alleged fugitives out of federal custody and into state custody, where the chances for escape were greater and where there was one additional barrier between the fugitive and a summary return to slavery.<sup>66</sup> Both delay and custody disputes created time and space for political organizing to take place—organizing that sometimes manifested as plans for escape, and sometimes allowed for the collection of funds to purchase the alleged fugitive's freedom. The extra time also served another (though less central) aim: substantive legal victory in the proceedings themselves. These victories, while rare, were not impossible. But they were only possible where the summary process had slowed down and lawyers had a chance to turn the proceedings into something more like a trial and less like a kidnapping. Behind all three of these strategies to achieve the ultimate freedom of the alleged fugitive was political organizing. Delay, confusion, and legal argument not only made rescue more likely, but also transformed the proceedings from a summary rendition into a community referendum on slavery.

This transformation reflected a second purpose motivating the lawyers. With every fugitive slave case, Northern lawyers drew more attention to the broader cause of abolition. Every case became an opportunity to broadcast an antislavery message to the community and the nation. The summary process of the Fugitive Slave Law, which had been designed to facilitate the protection of Southern property, provided the venue for some of the loudest and most effective attacks on the system of slavery that the nation had ever seen. Ironically, these attacks often emphasized just how terrible and oppressive the Fugitive Slave Law was (despite the fact that lawyers were actually achieving better results than expected).<sup>67</sup> The political power built through these cases was, very occasionally, part of what pressed a commissioner to decide that an alleged fugitive was in fact

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66. State jail was a temporarily safe space for an alleged fugitive because federal authorities would have to extract an alleged fugitive from state custody before they could exercise their authority under the Fugitive Slave Law of 1850 to return an alleged fugitive to slavery. For a dramatic example of the push and pull over custody, see the case of Rosetta Armstead, *infra* Part II.b.3.b.

67. There is a striking parallel here (one of many) between practice under the Fugitive Slave Law and today's immigration practice. As I will develop in Part III, there is evidence that present-day immigration lawyers are actually remarkably successful in preventing their clients from being deported (again, without overstating the case or minimizing the human tragedies suffered by those who are deported). But advocates for undocumented immigrants are more likely to emphasize the ways in which the system oppresses than the ways in which lawyers resist that system. This makes perfect political sense—especially in the context of true resistance lawyering where the victories achieved in the courtroom are victories *in spite* of the system rather than vindications of the system itself. For a lawyer ambivalent about the legal system that she inhabits, the victories within that infrastructure do not, of their own force, legitimate that system.

free.<sup>68</sup> More often, however, the political organizing around a trial was as concerned with mobilization as it was with the individual result. Indeed, the most galvanizing moments for antislavery lawyers were likely their losses, where the injustice of the law was enacted for all to see, dramatically supporting the rhetoric developed at trial.<sup>69</sup>

In the Sections that follow, I offer two ways of seeing the lawyers' surprisingly powerful role in fighting back against the Fugitive Slave Law. Both of these views emerge from new research that unsettles and reframes a story that most historians have taken for granted. The first of these views looks at the cases brought under the Fugitive Slave Law in the aggregate. Crunching what numbers I have, I discover that lawyers were surprisingly successful in their efforts to protect alleged fugitives caught up in the law's processes. The second of these views is more detailed, taking a deep dive into a few individual stories to bring to light the tactics that lawyers used to get these surprising results.

A. *A New Account of Resistance Lawyering Under the Fugitive Slave Law*

There is a reason that historians have agreed that most alleged fugitives caught up by the Fugitive Slave Law were doomed to be sent back to slavery. In 1970, Stanley Campbell published *The Slavecatchers*, an authoritative and brilliant compendium of every fugitive slave case that he could find. The book is a remarkable accomplishment. In 1970, there were no digital archives, no online library catalogs, and no searchable databases. Campbell scoured a remarkable breadth of sources to compile a nearly complete list of cases. Moreover, he coded each case carefully, noting date, location, number of cases involved, and the outcome.<sup>70</sup>

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68. This sort of conclusion is necessarily speculative, since no commissioner ever admitted that the mob outside the door convinced him that it would be unwise to send a fugitive back to slavery. Still, there are a number of cases where commissioners likely granted continuances and allowed more evidence collection because of fear that *too* summary a process would lead to conflict. And there are a few instances where commissioners admitted after the fact that they felt strong political pressure from the antislavery movement. For examples of this, see the cases of Tamor Williams, Rosetta Armstead, and Lewis *infra* in Part II.B. For a broader discussion of commissioners' role in enforcing the Law and resisting the Law, see BLACKETT, *supra* note 47 at 58–61.

69. One example is the Margaret Garner trial of 1856. Garner was the source for Toni Morrison's *Beloved*. She had escaped from Kentucky and was caught with her family and children near Cincinnati. Rather than return to slavery, she murdered one of her children and tried to murder the others and herself before being arrested. The government's "victory" in sending the slaves back to bondage affected huge shifts in local public opinion and served as galvanizing moments for antislavery organizing. On the Garner story, see STEVEN WEISENBURGER, *MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD-MURDER FROM THE OLD SOUTH* (1998).

70. Campbell coded the cases he collected into a few categories: "remanded by federal tribunal" (he would also note whether the remand was at government expense or not), "returned without due process," "released," and "rescued from federal custody." STANLEY CAMPBELL, *THE SLAVECATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860*, at 202–03 (1970).

Since 1970, historians have mostly relied on Campbell's work to conclude that the overwhelming majority of alleged fugitives were returned to slavery.<sup>71</sup> In his seminal history of the Civil War, James McPherson wrote that "[i]n the first fifteen months after its passage, eighty-four fugitives were returned to slavery and only five released." More striking: "[d]uring the full decade of the 1850s, 332 were returned and only eleven declared free."<sup>72</sup> More recently, in 2010 Stephen Lubet offered a somewhat less drastic account. Lubet, also citing Campbell, suggested that there were 191 known proceedings under the Fugitive Slave Law between 1850 and 1861, and that slaveholders' claims were denied only thirty-four times.<sup>73</sup>

Brilliant as his compilation was, Campbell's numbers are imperfect for several reasons. First, based on the data itself, the numbers tell us less than we might think. One problem is that Campbell does not always distinguish clearly (or accurately) between incidents where fugitive slaves were reported recaptured with no federal process and incidents where the machinery of the Fugitive Slave Law was engaged.<sup>74</sup> While the Law of 1850 surely gave license to some kidnapers and vigilante slave owners, instances of kidnapping and self-help recapture were, by definition, not within the legal process created by the Law.<sup>75</sup>

A second problem with Campbell's data is that he is interested only in the first-order outcome of the cases that he collects, not in the ultimate resolution.

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71. Campbell identified 332 total cases, of which 298 resulted in the alleged fugitive being returned to slavery. *See id.* Campbell found eleven cases that resulted in the fugitive being released and twenty-three that resulted in either rescue or escape. Of these 332 cases, Campbell tallied 191 cases that "came before a federal tribunal." Though this number is only nineteen fewer than the 210 that I found, Campbell and I disagree about how to classify some of the individual cases that he collects, meaning that the discrepancies between our accounts are more pronounced than the numbers make obvious.

72. MCPHERSON, *supra* note 33, at 80.

73. STEPHEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 5 (2010). McPherson and Lubet are notable because they attempt to carefully parse Campbell's numbers, but the extent of the settled view is evident from other sources as well. William Freehling, in his influential history of the Antebellum period, relied on Campbell to conclude that "90% of the 332 alleged fugitives tried under [the Law of 1850] were despatched southwards." FREEHLING, *supra* note 33, at 536. This conclusion, in turn, shows up in the notes of one of the leading Constitutional Law casebooks. *See* Paul Brest, et al., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 265 (2015, 6th Ed.) (citing FREEHLING, *supra* note 33).

74. To be clear, Campbell does draw a distinction between cases where a federal tribunal was convened and those where no tribunal was convened. The trouble is that Campbell's account is not always accurate. Take, for example, the case of two alleged fugitive slaves captured in December of 1855 in Baltimore. The two women were caught and returned immediately to Virginia with no evidence of any federal intervention or process. Campbell lists the two as "remanded by fed. Tribunal," but the contemporary accounts of the incident that I have found suggest that there was no federal tribunal involved at all. *See* CAMPBELL, *supra* note 70, at app.

75. There are real causal questions to be asked about the degree to which the Law of 1850 gave license to Southerners to prosecute their claims of ownership and recapture more freely. Scholars have debated this point vigorously in the past decades. I see my own argument adjacent to, but not committed to, a side of the debate. Because I am interested in the work of lawyers and in the specific *legal process* prescribed by the Law, my own focus is on the cases where that process was engaged rather than on the broader (and ultimately unanswerable) causal questions about just how the Law influenced the actions of Southern slavecatchers.

For this reason, Campbell does not remark on the many cases where alleged fugitives were adjudged slaves but ended up free because their allies had organized to purchase their freedom. My research suggests that there were at least seventeen such cases, or eight percent of the total cases where federal process was involved.<sup>76</sup>

The broader issue with relying on Campbell's data, however, is simply that it was gathered forty years ago. Today, with the aid of digital archives (and the invaluable guidance of Campbell's own path-breaking research), we have the tools to ask a much more thorough set of questions, from which a different outline of the story emerges. More than any quibble with a particular case collected and coded by Campbell, my research suggests the need to revise the core conclusion that Campbell's findings have been used to support. Campbell has been cited in support of the now-accepted proposition that somewhere around ninety percent of alleged fugitives were sent back to slavery under the Fugitive Slave Law.<sup>77</sup> My research concludes that the number is actually sixty percent and that nearly forty percent of slaves caught up in the process of the Law actually ended up free.<sup>78</sup>

As a secondary effect, the understanding—created in part by Campbell's data—that nearly every alleged fugitive was sent back has contributed to the view that lawyers and judges were either complicit in, or powerless to oppose, the blanket enforcement of the Law.<sup>79</sup> My research reveals that, in fact, lawyers were surprisingly powerful opponents of the operation of the Fugitive Slave Law. By using the limited tools provided to them under the Law, lawyers were instrumental in creating markedly better outcomes for their allegedly fugitive clients. Alleged fugitives who were represented by a lawyer in their federal proceedings were nearly twice as likely to end up free as those who were unrepresented.<sup>80</sup>

To restate and summarize my findings, then: between the fall of 1850 and 1863 (when the Fugitive Slave Law was last enforced in Washington, D.C.) I found 210 cases where process was initiated under the fugitive slave law. Of

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76. See Farbman & Grossman, *supra* note 63. Most of these cases occurred during the first years of enforcement of the new law. One example is the story of James Hamlet. Hamlet was one of the first people arrested under the new law in the fall of 1850 in New York City. Hamlet was determined to be a fugitive by the commissioner at trial; after the trial, however, friends and allies gathered the funds to purchase his freedom. Although Hamlet was returned to Baltimore for a few days, the purchase happened quickly and he was soon back in New York City. See *The Difference*, N.H. PATRIOT & STATE GAZETTE, Oct. 10, 1850, A2. In Campbell's accounting, Hamlet counted as lost to slavery: "remanded by fed. tribunal at gov't. expense." See CAMPBELL, *supra* note 70 at 202–03.

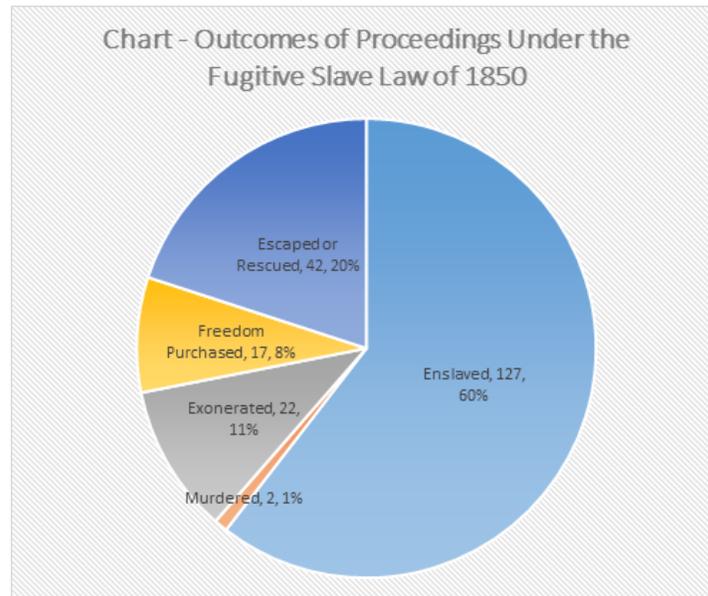
77. See FREEHLING, *supra* note 33, at 536.

78. See Farbman & Grossman, *supra* note 63.

79. This view draws fuel from Robert Cover's accusation in *Justice Accused* that judges and the legal profession more broadly were craven in the face of the Law, preferring to retreat to legal formalisms justifying adherence to the Law rather than to seek arguments and mechanisms to resist the operation of the Law from within the legal system. See COVER, *supra* note 17.

80. See Farbman & Grossman, *supra* note 63.

these 210 cases, nearly forty percent of them ended with the alleged fugitive as a free person. Of this number, eleven percent were exonerated, eight percent had their freedom purchased, and twenty percent escaped or were rescued.



Of course, it bears repeating that my research reveals that more than sixty percent of those caught in the process of the Fugitive Slave Law were returned to slavery or killed.<sup>81</sup> Still, this data reveals that eighty-one of the 210 alleged fugitives that I have found who were caught up in the adjudication process of the 1850 Law ended up free.

Having discovered that the outcomes for alleged fugitives caught up in the Fugitive Slave Law of 1850 were better than previously thought, the next question is why. One possible answer is that the Fugitive Slave Law was less draconian than we generally assume, but this idea is hard to defend. In the first place, the Law was designed with the primary purpose of facilitating the quick return of fugitive slaves to slavery. Process was summary, the evidentiary burden on claimants was low, it was nearly impossible for alleged slaves to establish their freedom, and the commissioners had strong incentives to find in favor of the claimant and against the alleged fugitive.<sup>82</sup> Moreover, the politics surrounding the Law were just as explicitly harsh and proslavery. Northern moderates like Daniel Webster saw the Law as a necessary concession to the

81. And, of course, a return to slavery was frequently akin to a death sentence, as with the famous story of Margaret Garner, who died of exposure on a cotton plantation after being sent back to slavery and sold down the river. See MARK REINHARDT, WHO SPEAKS FOR MARGARET GARNER: THE TRUE STORY THAT INSPIRED TONI MORRISON'S *BELoved* 43-45 (2010).

82. See *supra* Part I.

South to preserve the union.<sup>83</sup> They were committed to seeing that the Law was enforced predictably and summarily. For example, when the residents of Boston threatened to block the return of Anthony Burns to slavery in 1854, the federal government sent in the army to escort him through the streets and to his waiting ship South.<sup>84</sup> Even more convincing, however, is that there were only twenty-two out of 210 (10.5 percent) cases where a commissioner or a judge concluded that the alleged fugitive was free. When the system was operating as designed, it was as draconian as we have always thought it to be.

Another, better, explanation is that grassroots community opposition thwarted the Law more effectively than previously thought.<sup>85</sup> Fifty-nine (28.1 percent) alleged fugitives ended up free either by escape or by having their freedom purchased. For an escape to be successful, the support of the abolitionist community was essential, either through an actual mob or through assistance after the escape itself. Indeed, once the abolitionist community in a city or town was aware that a fugitive had been detained, one of the first orders of business for the vigilance committee was to draft a plan of escape. Purchases of freedom were even more reliant on community organization. In the typical case, activists would circulate through the community collecting donations until they had gathered enough to meet the purchase price.<sup>86</sup>

Linked at the hip to community power is the explanation at the heart of this Article: that lawyers acting in concert with grassroots opposition to slavery played an integral role in keeping alleged fugitives free. In cases where alleged fugitives were represented by counsel, nearly half ended up free (47.7 percent).<sup>87</sup> Compare this to cases with no lawyers involved, where fewer than one quarter of alleged fugitives ended up free (23.3 percent).<sup>88</sup> These statistics are consistent with the detailed narratives in the next section. Although the process provided by the Law was minimal and unfair, lawyers used every scrap of procedure that they could grasp to slow down and frustrate that process. They then used the bully pulpit of the courtroom to help build community support for the alleged fugitive. Sometimes this led to a movement to purchase her freedom, sometimes

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83. Webster articulated this view of the compromise most completely and most infamously in his “Seventh of March” speech on the Senate floor. See Daniel Webster, *The Compromises of the Constitution*, in DANIEL WEBSTER & BENJAMIN FRANKLIN TEFFT, *SPEECHES OF DANIEL WEBSTER* 489–536 (1854).

84. ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON’S BOSTON* 203–19 (1998).

85. This is one of the core theses of Blackett’s recent history. See BLACKETT, *supra* note 47, at xi.

86. Consider, again, the case of James Hamlet in New York. *The Difference supra* note 76.

87. See Farbman & Grossman, *supra* note 63.

88. The numbers are even more stark if you remove escapes from the equation. Alleged fugitives without lawyers were marginally more likely to escape than those with lawyers (23.3 percent vs 16.8 percent). But many escapes occurred early enough in the process that no lawyer could reasonably have gotten involved; therefore, removing escapes allows a fuller picture of the effect that lawyers had on case outcomes. Those alleged fugitives with lawyers were *much* more likely to be exonerated or have their freedom purchased than those without (30.8 percent vs. 5.8 percent).

it contributed to the escape plan, and sometimes it created enough public pressure to convince a judge or commissioner to conclude that an alleged fugitive was free.

It is no secret that resistance to the Fugitive Slave Law was widespread and passionate. Nor is there any doubt that abolitionists fought for the freedom of the individual alleged fugitives who were threatened with rendition to slavery. But a consequence of reliance on Campbell's data has been that those specific individualized campaigns for freedom have been thought to be largely futile. The stories of Thomas Sims, Anthony Burns, and Margaret Garner (all sent back to slavery despite powerful grassroots resistance) have become symbols for the enforcement of the Law rather than the stories of Shadrach Minkins (escaped), Stephen Bennett (freedom purchased), or Rosetta Armstead (exonerated).

The truth is that while those resisting the Law were fighting an uphill battle, they were not powerless. The most important support for alleged fugitives came from abolitionist activists at the grassroots level. In many Northern cities, an alliance of free black citizens and white abolitionists combined support for fugitives through the Underground Railroad with support for alleged fugitives threatened with being sent back to slavery. These abolitionist activists included a small but dedicated cohort of abolitionist lawyers who stood ready to protect alleged fugitives when the need arose. It was this collaboration between activists and lawyers and their work resisting the Law and its operation that accounted for most of the successes achieved by opponents of the Law.<sup>89</sup>

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89. There was one area where the story about lawyers emerged less clearly in the data. My research shows that alleged fugitives without lawyers were marginally more likely to escape from federal custody than those with lawyers. (Twenty-three percent of those without lawyers escaped or were rescued, while only seventeen percent of those with lawyers escaped or were rescued.) A closer look at the cases, however, reveals that escapes and rescues without lawyers look very different than those with lawyers. Almost all of the rescues and escapes that occurred without lawyers took place within the first brief instances of the federal process before a lawyer could reasonably get involved in the case. Typically, a Southern planter would come North and get a warrant from the commissioner for the arrest of an alleged fugitive. The commissioner would then pass this warrant on to a federal marshal who would set out to find and arrest the alleged fugitive. The alleged fugitive would then see the marshal coming (or hear that the marshal was coming) and escape either just before, during, or just after arrest. Indeed, these were the escapes that would seem to have been "easiest" because the alleged fugitive was escaping before she was put in jail or brought before the commissioner. It is thus not surprising that slightly more of these escapes occurred without lawyers—what is perhaps more surprising is that so many alleged fugitives *with* lawyers wound up escaping.

Just two of many examples of this scenario are the cases of John Jackson in Boston and Eliza in Chicago. A warrant for Jackson's arrest was issued by Commissioner Woodbury in Boston in January 1855. The marshal went to arrest Jackson, but he escaped before the marshal arrived. *See Fugitive Slave Case in Boston*, HERALD OF FREEDOM (WILMINGTON, OH), Jan. 5, 1855, A6. In Eliza's case in 1860, the commissioner in Chicago issued a warrant and she was arrested by the marshal and brought to the city jail. After an uproar, a mob of abolitionists (complicit with sympathetic police officers) broke her out of jail and helped her on her way to Canada. *See The Fugitive Slave Case at Chicago: Further Particulars*, BALTIMORE SUN, Nov. 16, 1860, at A1. To bring home the contrast between these escapes and those where a lawyer was involved, compare these stories with the stories of Shadrach and Lewis. *Infra* Part II.B.

All of this goes to making two relatively straightforward points. First, more alleged fugitives than we have previously thought ended their entanglement with the processes of the 1850 Law as free persons. Second, one powerful reason for this outcome is that lawyers were surprisingly effective in their efforts to protect their clients and resist the Fugitive Slave Law. The critical observation is not that lawyers were the primary heroes of the story, but that they were active and powerful partners in the political resistance to the Law and that without their resistance *within* the process of the Law, the good outcomes that this data reveal would not have been possible.

### B. *Resistance Lawyering in Practice*

Having recognized the effectiveness of lawyers as seen from a distance, the next step is to look more closely at the cases to understand precisely how lawyers worked to resist the operation of the Fugitive Slave Law of 1850 and how that work fits into the broader work of political resistance. This requires a turn away from the quantitative broad view toward a more qualitative and descriptive account of the stories behind these numbers.<sup>90</sup>

Although the cases had different outcomes, the work that the lawyers did in each was remarkably similar. Where detailed records of the lawyering and legal strategy exist, that strategy looks much the same whether the alleged fugitive was exonerated by the commissioner, escaped, or was sent back to slavery. Lawyers used delay, procedural entanglement, and building public attention as strategies in nearly every case. Usually, these strategies served the dual purpose of increasing their clients' chances of freedom and rallying public support against slavery and the 1850 Law. What emerges from each of these stories is a picture of abolitionist lawyers using every tool within reach to fight the Law of 1850 (and, by proxy, slavery more broadly).

#### 1. *Escape*

The lawyers who resisted the 1850 Law through delay, confusion, and obstruction created opportunity. Delay was valuable in and of itself because every day that an alleged fugitive remained in the North was a day that their families could visit them and a day that they were preserved from the consequences of returning to the plantation as an example for other slaves who

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90. I should acknowledge that I am not the first to consider these cases. Many scholars have done important and thorough work unearthing the details of these and other cases arising under the 1850 Law. *See, e.g.*, BARKER, *FUGITIVE SLAVES AND THE UNFINISHED AMERICAN REVOLUTION: EIGHT CASES, 1848–1856* (2013); BLACKETT, *THE CAPTIVE'S QUEST FOR FREEDOM*, *supra* note 47; LUBET, *FUGITIVE JUSTICE*, *supra* note 73; MARIE DELOMBARD, *SLAVERY ON TRIAL: LAW ABOLITIONISM, AND PRINT CULTURE* (2007); SINHA, *THE SLAVE'S CAUSE*, *supra* note 3. The reason to tell these stories in detail is not to uncover them as "new" narratives, but rather to place the focus where it has not previously been—namely, on a set of resistance strategies used by lawyers that spanned time, geography, and outcomes.

might think of escaping.<sup>91</sup> Delay could help build the political pressure that might result in exoneration and could certainly help allies organize to purchase an alleged fugitive's freedom. Delay could also facilitate escape.

In many instances where alleged fugitives escaped or were rescued, lawyers were instrumental in creating the opportunity for escape by resisting the Law through the now-familiar means of delay and confusion. Delay gave time for vigilance committees<sup>92</sup> of militant abolitionists to plot escape plans. Even in the absence of such organized scheming, delay simply created more chances for opportunistic escape. The following two examples from Boston and Cincinnati illustrate the extent to which lawyers and resistance lawyering could become instrumental in escape.

*a. Shadrach Minkins*

In 1850, Shadrach Minkins escaped from the service of John DeBree likely by stowing away on a boat bound North from Norfolk, Virginia.<sup>93</sup> Minkins made his way to Boston, where he found work as a waiter in the Cornhill Coffee House.<sup>94</sup> When the new law was passed in the fall of 1850, DeBree hired a slave catcher named John Caphart to come to Boston and bring Minkins back to Virginia. Caphart brought a certificate with him from Norfolk and presented it to Commissioner George Curtis, who issued a warrant for Shadrach's arrest in February of 1851.<sup>95</sup>

On the morning of Saturday, February 15, a federal marshal executed the warrant, pretending to be a customer and then arresting Minkins while he waited

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91. One gruesome example of this is Anthony Burns. Once returned to the South, Burns was placed in brutal solitary confinement, manacled hand and foot with very little to eat and only dirty water to drink. He was not allowed to speak to any other slaves in the prison where he was confined lest he pass along the "taint of freedom" to them. To make matters worse, he would be brought out for any curious Southern gentleman to observe his torture and to curse him. See CHARLES EMERY STEVENS, ANTHONY BURNS: A HISTORY 188–90 (1856). After that punishment, Burns was ultimately purchased by allies in Boston and even he, most famous of the condemned fugitive slaves, ended his story as a free man. See VON FRANK, *supra* note 84, at 290–91.

92. A vigilance committee was a gathering of private citizens for the purpose of protecting the community. In the North, antislavery vigilance committees were organized to protect alleged fugitive slaves. See Gary Collison, *The Boston Vigilance Committee: A Reconsideration*, 12 HIST. J. MASS. 104 (1984). Vigilance committees were also organized in the South to protect the citizenry from the dangerous influence of abolitionists and antislavery politics. See, e.g., MANISHA SINHA, THE COUNTERREVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA 211–212 (2003).

93. See BARKER, *supra* note 90 at 42–43.

94. "Coffee House" is actually a somewhat misleading name. A menu from the Cornhill Coffee House shows that it was, in fact, a fancy restaurant offering a selection of roast game including: Mongrel Goose, four varieties of duck, grouse, and woodcock. For dessert, you could order a floating island, Charlotte Rouse, or Calf's Foot Jelly. See Young's Cornhill Coffee House Menu- 1853, BOSTON ATHENÆUM (1835), <http://cdm.bostonathenaeum.org/cdm/ref/collection/p16057coll18/id/8> [<https://perma.cc/PK2R-QEC3>].

95. *Arrest of a Man in Boston as a Slave-Rescue of the Prisoner*, LIBERATOR, Feb. 21, 1851, at A2.

on him for breakfast.<sup>96</sup> The officers whisked Minkins to the courtroom in the hopes of a swift and quiet hearing before the commissioner. Fortunately for Minkins, the group was spotted crossing the street by some abolitionist activists who spread the alarm.<sup>97</sup> Boston's active antislavery community had already spotted Caphart in the city. Posters describing him by way of warning had been posted around the city,<sup>98</sup> and the Boston Vigilance Committee had assigned someone to follow the slave catcher through the streets.<sup>99</sup> By the time that Minkins arrived in the courtroom before Commissioner Curtis, a large crowd of abolitionist protestors, many of them black women, had gathered at the courthouse.<sup>100</sup> The activists had ensured that when Minkins walked into court, five of the leading abolitionist lawyers in Boston were there to meet him.<sup>101</sup>

DeBree's lawyer was Seth Thomas (a frequent defender of slave owners in Boston). Thomas argued that he was ready to try the case and that "as the proceedings were to be summary, he urged that the hearing should proceed at once."<sup>102</sup> Minkins's lawyers immediately sought delay, arguing that they had just met their client and had had no chance to prepare their case.<sup>103</sup> One look outside the courtroom would have been enough for Commissioner Curtis to know that the case was now in the public eye and that he risked serious political backlash if he rammed the hearing through without offering Minkins a chance to defend himself. Curtis was a stout moderate and defender of the Fugitive Slave Law, but he was also politically ambitious and sensitive to public perception,<sup>104</sup> so he agreed to continue the hearing until Tuesday, February 18.<sup>105</sup>

In this moment alone, the power of lawyers working together with an organized and vigilant community to oppose the Fugitive Slave Law of 1850 was evident. Remember that the Law was intended to create a summary process where owners could reclaim their "property" with federal assistance, requiring only minimal proof. One reason to create such a summary process was to avoid the political complications of public attention and resistance. There was no

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96. *Id.*

97. See BLACKETT, *supra* note 47, at 409.

98. *Id.*

99. See SINHA, *supra* note 3, at 507.

100. See BLACKETT, *supra* note 47, at 409.

101. *Arrest of a Man in Boston as a Slave*, *supra* note 95. These were Samuel Sewall, Ellis Gray Loring, Charles List, Richard Henry Dana, and Robert Morris.

102. *Id.*

103. *Id.*

104. Curtis was an ally of Daniel Webster and the "Cotton Whigs," who had been the primary brokers of the compromise that led to the passage of the Fugitive Slave Law of 1850. Although he was only a lowly commissioner, it was understood that he could raise his profile and advance his political career by navigating the crisis successfully. See GARY LEE COLLISON, SHADRACH MINKINS: FROM FUGITIVE SLAVE TO CITIZEN 119 (2009). Curtis' legal career would have a fascinating coda that reflected the changing politics of moderates in the North over the 1850s. In 1856 he was one of the lawyers who represented Dred Scott before the Supreme Court. See KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK 86 (1992).

105. *Arrest of a Man in Boston as a Slave*, *supra* note 95.

prohibition against alleged fugitives being represented by lawyers, but it was fairly clear that the Law did not anticipate a robust legal process. By claiming more process than was intended, the abolitionist lawyers were undermining the very purposes of the Law itself.

Having gotten this extra time, Minkins's lawyers sought more. They asked that DeBree's documentation be read aloud to them and Curtis agreed. This was a slow process.<sup>106</sup> All the while, directed by the vigilance committee and networks of black activists, antislavery advocates were gathering in an increasingly imposing mob inside and outside the courtroom.<sup>107</sup> In addition to this explicit show of public pressure, by the time the reading was done and the court adjourned, a new problem had emerged: there was no place to put Minkins for the three days until his hearing. The city of Boston and the state of Massachusetts refused to allow the federal government to use their jails, and there was no federal jail in the city. Stuck with no other conventional options, it appeared that Minkins would have to be housed in the courtroom itself for the night.<sup>108</sup>

The federal marshal now faced a logistical problem. He had only a few men to hold Minkins in the courtroom, and Minkins had five lawyers and some friendly members of the press with him, along with a growing mob of antislavery advocates in the hallways outside the courtroom and in the streets. Deputy Marshal Riley tried to clear the courtroom to no avail. Minkins's lawyers lingered with him discussing his case. Just as they were finally filing out of the courtroom, a group of activists from the hallway broke down the door and ushered Minkins out of the courtroom and out of federal custody. The commissioner and marshals were overwhelmed and were forced to watch helplessly as Minkins made his way into the street and eventual freedom.<sup>109</sup>

In the aftermath of Minkins's rescue, much was (and has continued to be) made of the question of whether his lawyers were active conspirators in the plan to help him escape. Robert Morris (one of the first black attorneys in the United States), one of Minkins's lawyers, was charged with conspiracy. Morris and all of his co-counsel disavowed any role in the rescue, but among historians the question of whether he did collaborate remains very much open.<sup>110</sup> Whether or not Morris or Minkins's other lawyers were explicitly complicit in his escape,

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106. *Id.*

107. *See Statement of Deputy Marshal Riley*, *LIBERATOR* (Boston, MA), Feb. 21, 1851, at A2. Riley testified that he was so concerned about the mob that he wrote to Boston's city marshal to request backup—a request that was not met.

108. *Arrest of a Man in Boston as a Slave*, *supra* note 95.

109. *Id.* After a few stops at safe houses, Minkins made his way to Fitchburg and then on to Montreal by train, where he opened his own restaurant. For more detail on the aftermath of the escape and the reverberations of the Minkins story in Boston, see COLLISON, *supra* note 104.

110. For a thorough discussion of Morris's involvement and trial and the ongoing debate around his role in the rescue, see Laurel Davis & Mary Sarah Bilder, *The Library of Robert Morris, Civil Rights Lawyer & Activist*, 57–61 (June 21, 2018) (Boston College Law School faculty paper), <https://lawdigitalcommons.bc.edu/lisfp/1154> [<https://perma.cc/26D4-NXH3>].

what is clear in retrospect is that their lawyering strategy worked hand in glove with the antislavery activists to facilitate Minkins's freedom. From the very beginning of the proceedings, Minkins's lawyers sought to buy time. They won their motion for a continuance and then managed to delay the court proceedings even further into the afternoon while the documentation was read. Having seen the power of public uproar to protect fugitive slaves since the passing of the Law, they must have known that the antislavery forces in the city would be gathering their strength and that every minute of delay in the proceedings would mean more political pressure and more opportunities for freedom.<sup>111</sup> As the lawyers slowed down the workings of the Law, Minkins's rescuers used the time and opportunities that the lawyers had helped to create to ultimately rescue him. As much as Minkins's lawyers might disavow their role in the rescue, none of them would have been displeased with the outcome.

*b. Lewis*

In 1850, a man named Lewis escaped from the service of Alexander Marshall in Fleming County, Kentucky. Lewis crossed the Ohio River into Cincinnati and continued onward to settle outside Columbus.<sup>112</sup> In the fall of 1853, Marshall tracked Lewis to where he was living and managed to get a warrant for his arrest. Federal Marshal Dryden of Cincinnati made the arrest and brought Lewis to Cincinnati by train to be tried before Commissioner Carpenter.<sup>113</sup> Even before Lewis arrived in Cincinnati, his lawyers were on the case. Activists in Columbus had spotted the arrest and telegraphed their allies in Cincinnati to warn them that Lewis was on his way. By the time that Lewis's train arrived, John Jolliffe, a lawyer, and Levi Coffin, the most prominent abolitionist in the city, had managed to convince the sheriff in Cincinnati to arrest Marshall for kidnapping.<sup>114</sup> The slaveholder was quickly freed, but the first salvo of resistance lawyering had been fired. Jolliffe surely never thought that he could succeed in keeping Marshall in prison on a state charge of kidnapping, but because he was able to convince a friendly local sheriff to arrest him, he managed to achieve a first measure of delay before the case even began.

At the hearing, Jolliffe partnered with young antislavery lawyer and future president Rutherford B. Hayes. They were lucky that Commissioner Carpenter

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111. For example, Morris and his co-counsel would certainly have been aware that the city had been in an uproar just months earlier over the escape of William and Ellen Craft. With the help of an engaged antislavery community, the Crafts had escaped the reach of a warrant under the Fugitive Slave Law of 1850. Their escape was considered a victory for the abolitionists and a stinging defeat to the allies of Daniel Webster, who had been a primary architect of the Compromise of 1850. *See* BLACKETT, *supra* note 47, at 396–408.

112. *See* BLACKETT, *supra* note 47, at 245. In the newspaper reports, Lewis's name is sometimes spelled "Louis."

113. *Id.*

114. *See* LEVI COFFIN, REMINISCENCES OF LEVI COFFIN, THE REPUTED PRESIDENT OF THE UNDERGROUND RAILROAD 549 (1898).

appeared less eager to execute the law quickly than some of his colleagues in other cities. Jolliffe and Hayes asked that the case be given a full hearing and Carpenter agreed to give Lewis substantially more than the summary process contemplated by the 1850 Law.<sup>115</sup> Jolliffe and Hayes made use of this extra time, making an elaborate argument that Lewis was free under Ohio law because his master had given him permission to enter the state before he escaped—and thus (because he had not technically escaped) that he was not a fugitive under the meaning of the 1850 Law. This had not proven to be a winning argument in past cases, but Carpenter allowed Lewis’s lawyers to make it fully over several days.<sup>116</sup>

Over the course of the hearing, the case gathered more and more public attention. When the day came for Carpenter to announce his decision, a large crowd had gathered both inside and outside the courtroom.<sup>117</sup> Even before Carpenter decided the case, Lewis’s lawyers tried one more gambit to delay the proceedings, announcing that they had just received word from Columbus that there was further exculpatory evidence in the case and asking for a continuance to consider that evidence.<sup>118</sup> While Carpenter was considering this request and beginning to deliver his conclusions on the case more broadly, the entire courtroom’s attention was focused on him.<sup>119</sup> He was “slow and tedious in reviewing the evidence, and [] he spoke in a low tone.” As a result, “the auditors were anxious to hear [and] they leaned forward much absorbed, trying to catch every word.”<sup>120</sup>

While the room (including the lawyers on both sides) was thus distracted, Lewis slipped his chair back a little bit to make space for himself. Noticing that

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115. See BLACKETT, *supra* note 47, at 245. Blackett suggests that the reason that Carpenter granted this request was that he was either partial to Lewis or intimidated by the mob of antislavery activists that had gathered. Levi Coffin suggests another possible reason: Carpenter was, in reality, an opponent of the law. When Coffin asked Carpenter what he would have done at the conclusion of Lewis’s case had he not escaped, he answered that he would have decided that he did not have the power to send Lewis back to slavery. Indeed, in June of 1854, Carpenter resigned his office as commissioner and wrote an editorial explaining why he felt like he could not serve in the post. See COFFIN, *supra* note 114, at 554.

116. See COFFIN, *supra* note 114, at 549.

117. The free black community of Cincinnati was one of the most vibrant and active hotbeds of antislavery politics in the nation. The antislavery activists in the community and the small but dedicated antislavery bar worked together in an integrated and consistent way. See NIKKI MARIE TAYLOR, *FRONTIERS OF FREEDOM: CINCINNATI’S BLACK COMMUNITY, 1802–1868*, at 160 (2005).

118. See *A Fugitive Settling His Own Case*, ANTI-SLAVERY BUGLE (Lisbon, Ohio), Nov. 5, 1853, at A1.

119. The *Anti-Slavery Bugle’s* story suggests that Carpenter announced *in court* that he did not think that he had authority to decide the case because the Fugitive Slave Law gave unconstitutional judicial powers to commissioners (this was a stock argument that antislavery advocates levied against the law). Carpenter reportedly was inclined to wait for Lewis’s lawyers to file a petition for habeas corpus to have the case heard by a federal judge. See *id.* Other accounts of the case report, along with Coffin, that Carpenter never actually announced his conclusions in the case at all. See COFFIN, *supra* note 114, at 550–51.

120. COFFIN, *supra* note 114, at 550.

nobody took note of him moving his chair, he did it again until he was behind the marshal and almost in among the crowd. Still no one noticed his movements, so he quietly stood up and stepped backwards. An ally in the crowd gave him a nudge of encouragement and someone put a hat on his head. Then, while Carpenter droned on, Lewis quietly walked right out of the courtroom and mingled among the crowd of free black activists who had gathered to observe the hearing.<sup>121</sup> From there, Lewis found his way to the street and then to a safe house, where he was effectively hidden by abolitionist allies for a few weeks before making his way to Canada and freedom.<sup>122</sup>

Jolliffe and Hayes were adamant that they had no part in planning Lewis's escape,<sup>123</sup> and there is no evidence to contradict their claims. Lewis's escape appeared to be opportunistic rather than premeditated. Even so, once again, it was the lawyers who were instrumental in creating the conditions under which escape was possible. Remember that Lewis was, like so many other fugitives, on a fast track to being sent back to slavery. From getting Lewis's captors arrested at the train station to extending the hearing before Commissioner Carpenter, Lewis's lawyers used strategies of delay and procedural confusion to buy Lewis time and raise the public salience of his trial. When the opportunity came for him to escape, it was amid the legal process that his lawyers had helped extend, and it was accomplished with the help of the engaged activists who had been on alert throughout the trial.

## 2. *Purchased Freedom*

If lawyering could be instrumental in facilitating escape, the role of resistance lawyering was even clearer in cases where an alleged fugitive was rescued from slavery by having her freedom purchased. In order to mobilize the funds necessary to pay for purchase, activists needed a combination of time and public awareness. The more prominent the case, and the longer it was in the public eye, the better the chances that friends of the alleged fugitive would have time and opportunity to pass the hat to collect the funds necessary to buy her freedom.

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121. *Id.* Coffin claims to have personally observed the entire scene in detail.

122. Coffin tells a potboiler of a story about Lewis's evasion of the marshal and his master. Apparently Coffin and some allies dressed Lewis in women's clothing and smuggled him into the house in the part of the city where most of the free black population lived. He stayed there for a week before being moved, again in women's clothing, to a sanctuary in a local church where he stayed for a few more weeks. Abolitionist allies went so far as to publish false reports in the local press reporting that Lewis had been seen making his way through Cleveland to Detroit. Only after the search had died down and the marshal believed that Lewis had already escaped did Lewis sneak out of the city for real, again disguised as a woman and smuggled in the back of a carriage. He made it to an Underground Railroad safe house and then on to Sandusky where he got a boat to Canada and freedom. *Id.* at 551–53.

123. *A Fugitive Settling His Own Case*, *supra* note 118.

That said, most instances of purchased freedom took place within the first fifteen months that the Law was on the books.<sup>124</sup> This is true for two primary reasons. First, slave owners became reluctant to accept offers to purchase an alleged fugitive's freedom as the sectional battle lines around the Law hardened. For instance, in the case of Margaret Garner, the man who claimed to own her and her family refused any purchase offers, preferring to bring his prize home and make an example of her for his other slaves and for the South more broadly.<sup>125</sup> Second, alongside the owners' reluctance, a subset of abolitionists also opposed efforts to purchase an alleged fugitive's freedom on the grounds that it amounted to an immoral acceptance of the legitimacy of the owner's claim and participation in the economy of slavery. For example, when Wash McQuarry was being tried in Cincinnati, a movement was initiated to purchase his freedom.<sup>126</sup> But prominent white abolitionists disagreed over whether it was appropriate to participate in the economy of slavery.<sup>127</sup> It is likely that this disagreement crippled the effort and McQuarry's allies were unable to raise enough money to meet his owner's asking price.<sup>128</sup>

While the attitude of the slave owners is entirely consistent with the hardening of proslavery politics over the course of the 1850s, the hardline position taken by men like Brisbane can be harder to understand. Men like Brisbane considered any participation in the market created by slavery to be an enabling endorsement of that system. Therefore, purchasing the freedom of an alleged slave not only enriched the slave owner, it also entrenched the very system they were trying to dismantle.<sup>129</sup> For the purposes of this Section, it is enough to acknowledge that the successful purchases of alleged slaves' freedom were most common in the early days of resisting the Fugitive Slave Law. However, this fact makes them no less interesting as an example of the strategies used by lawyers resisting the Law in service of freedom by any means.

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124. Seventy-one percent (twelve of seventeen) of the cases of purchased freedom that I found occurred between September 1850 and December 1851. See Farbman & Grossman, *supra* note 63.

125. See ENSLAVED WOMEN IN AMERICA: AN ENCYCLOPEDIA (Daina R. Berry & Deleso A. Alford, eds., 2012).

126. Levi Coffin reports that "[t]hose of us who were deeply interested in the fugitive's case made zealous efforts to raise the sum required by his master to buy his freedom." COFFIN, *supra* note, 114 at 547.

127. William Henry Brisbane, a former slave owner turned radical abolitionist, wrote in his journal that he did not approve of the effort being undertaken by activists to purchase McQuarry's freedom. Journal of William Henry Brisbane (Aug. 9, 1853).

128. See COFFIN, *supra* note 114, at 548.

129. For a thorough discussion of the issue in general, see BUYING FREEDOM: THE ETHICS AND ECONOMICS OF SLAVE REDEMPTION (Kwame Anthony Appiah & Martin Bunzl eds., 2018). As applied to the abolitionist movement, the chapters by Margaret Kellow and John Stauffer examine the debates within the abolitionist movement over whether and how purchasing freedom could be legitimate. See *id.* at 200–13. These debates suggest a divide between purists and pragmatists. While many of the lawyers in this study would be described as radicals, men like Jolliffe and Richard Hildreth were also pragmatists. Without any specific information indicating how Jolliffe would have felt about the purchase of McQuarry, this scholar's educated guess is that he would have supported anything that would have helped him end up free.

a. *Stephen Bennett*

Stephen Bennett was alleged to have escaped from Captain Edward B. Gallup of Baltimore in July of 1847. Bennett made his way to Philadelphia, where he lived with his wife and child.<sup>130</sup> In January of 1851, Gallup applied to Commissioner Ingraham in Philadelphia, seeking a warrant for the arrest of Bennett. Ingraham granted the warrant and deputized a local officer to make the arrest and deliver Bennett to the marshal in Philadelphia.<sup>131</sup> Bennett was arrested on Thursday, January 23, and brought to the city to await his hearing.<sup>132</sup>

The abolitionist community in Philadelphia took immediate action. When Bennett arrived before Commissioner Ingraham on Thursday at 10 a.m., William S. Pierce, the first lawyer on the scene, presented a writ of habeas corpus on behalf of the Supreme Court of Pennsylvania.<sup>133</sup> Ingraham granted the writ and continued the case until the next morning.<sup>134</sup> An extra day was more than enough for the activists in the free black community of Philadelphia to take action. They marched down to the jail and demanded (without success) that Bennett be released.<sup>135</sup>

By the next morning, the case had become widely known in the city.<sup>136</sup> At 10 a.m., Bennett's lawyers (Pierce and Elwood Evans) filed for another continuance to allow time for David Paul Brown, the dean of the Philadelphia antislavery bar, to come and serve as counsel for Bennett. Ingraham granted a brief delay.<sup>137</sup> At 11 a.m., Bennett's lawyers produced another form of delay by filing a habeas petition before Judge John K. Kane in the federal district court. Recognizing that this case had caught the public eye and wanting to ensure that the outcome would be seen as legitimate, Kane granted the writ and transferred the case to his courtroom.<sup>138</sup> It is very unlikely that Kane took the case to help Bennett; he was no abolitionist. Rather, he was an avid Jacksonian Democrat,

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130. *Another Fugitive Slave Case*, PUBLIC LEDGER (Phila., Pa.), Jan. 25, 1851, at A1 [hereinafter *Another Fugitive Slave Case*, PUBLIC LEDGER].

131. *A Fugitive Slave Case*, BUFFALO DAILY REPUBLIC, Jan. 28, 1851, at A2.

132. *Id.*

133. *Another Fugitive Slave Case*, PUBLIC LEDGER, *supra* note 130. I have been unable to learn more about why the Pennsylvania Supreme Court intervened in this way. The case did ostensibly involve a question of state law, since the central question was whether the fact that Bennett had been sent to Pennsylvania by his owner rendered him free under Pennsylvania law and thus not a fugitive. Still, that is mere speculation, and there is no indication of state court involvement in the subsequent accounts of the case.

134. *Id.*

135. BLACKETT, *supra* note 47, at 73. Blackett recounts Bennett's case as an instance of organized black resistance, which it surely was. But he neither notices that Bennett had his freedom purchased nor notes the work done by lawyers during his brief trial. Black resistance, coupled with time and public attention bought in part by legal action, tell a more complete story.

136. *Id.*

137. *Another Fugitive Slave Case*, PUBLIC LEDGER, *supra* note 130. David Paul Brown was one of the leaders of the Pennsylvania Abolitionist Society and the most famous abolitionist lawyer in Philadelphia. For most people in the city it likely went without saying that if there was a dispute about slavery in the courts, Brown should be there.

138. *Id.*

and just four years later would author one of the most notorious proslavery opinions of the 1850s in the case of Passmore Williamson.<sup>139</sup>

The counsel for Gallup was a man named McMurtrie, a lawyer notorious for representing slave owners in proceedings under the 1850 Law.<sup>140</sup> McMurtrie protested that the case had been begun before Commissioner Ingraham and should not be transferred. Kane demurred, holding that he had jurisdiction and that he should hear the evidence *de novo*.<sup>141</sup> It was now noon, and Pierce announced to Judge Kane that Brown would not, after all, be able to make an appearance in the case. Consequently, Pierce asked for *yet another* continuance to confer with his client. This too was granted.<sup>142</sup> It was now midafternoon on Friday and Bennett's lawyers had succeeded in delaying the hearing long enough for the antislavery organizers to bring a pro-Bennett crowd to gather outside the courtroom.

Once the case commenced, things did not look good for Bennett. Pierce and Evans argued that Bennett had been voluntarily sent to Pennsylvania while in Gallup's service and that these trips had rendered him free under state law. As a result, they argued, he could not be considered a fugitive. They did not dispute Bennett's identity. Kane ruled that there was no dispute that Bennett was indeed a fugitive and that his previous trips to the state had not made him free. At the end of the hearing on Friday, Kane ordered the marshal to return Bennett to Gallup and to Baltimore.<sup>143</sup>

Bennett had lost in the courtroom, but he would not return to slavery. The allies that had gathered around him had collected the funds to purchase his freedom for \$350.<sup>144</sup> Not only was the opportunity to purchase Bennett's freedom a victory for the activists and lawyers that rallied to support him, so too was the price. Slaves were among the most valuable commodities in the country in the 1850s, and other persons who had their freedom purchased were sold at a

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139. Judge Kane, as Robert Cover notes, was the primary subject of Richard Hildreth's radical abolitionist satire *Atrocious Judges*, in which Hildreth reprinted an annotated biography of terrible judges from pre-Revolutionary England. The book was targeted at judges like Kane who Hildreth argued were tools of tyranny, supporting slavery and upholding the Fugitive Slave Law. See RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* 159–61 (1856); see also COVER, *supra* note 17. Hildreth's book was likely an inspiration to Cover himself, who wrote *Justice Accused* after writing a (very belated) review of Hildreth's book which compared judges punishing Vietnam War protestors with judges who had been complicit with slavery in the 1850s.

140. *Another Fugitive Slave Case*, PUBLIC LEDGER, *supra* note 130. McMurtrie was also the lawyer for the slave owner in the Tamor Williams case, *infra*. Just as some lawyers made a steady practice of fighting for the freedom of alleged fugitives, so too did others like McMurtrie make a steady (and more lucrative) practice of representing slave owners in proceedings under the Fugitive Slave Law.

141. *Id.*

142. *Id.*

143. *Id.*

144. *A Fugitive Slave Case*, *supra* note 131. In today's dollars, that would be more than \$20,000—a huge sum for a grassroots organization. See Samuel H. Williamson & Louis P. Cain, *Measuring Slavery in 2016 Dollars*, MEASURINGWORTH.COM (2019), <https://www.measuringworth.com/slavery.php#text18> [https://perma.cc/D2AZ-U64W].

much higher price.<sup>145</sup> Although Bennett's lawyers had been able to buy him only a little bit more time, they had done everything they could in a case that they knew that they would surely lose. Without knowing whether William Pierce, Elwood Evans, or even David Paul Brown contributed to the fund to purchase Bennett's freedom, their lawyering within the law to slow down the machinery of returning Bennett to slavery was instrumental to his ending up free.

*b. Horace Preston*

A year later, in New York City, Horace Preston's case showed that proslavery forces were learning to push back against the tactics of abolitionist resistance lawyers. Preston lived in Williamsburg in Brooklyn with his wife and children. In April of 1852, a local police officer named Martin received a tip from a man claiming to be Preston's master that Preston was a fugitive slave from Baltimore.<sup>146</sup> Acting on this tip, Martin arrested Preston on a specious charge of petty theft and brought him to the city jail in New York ("the toms"). Martin then notified Busted, the lawyer for Preston's alleged owners, who contacted Reese, the alleged owner's son. Reese rushed to New York by train and, together with Busted, went to visit Preston in jail.<sup>147</sup> By the next morning, Busted and Reese had gone to Commissioner Morton and commenced process against Preston under the Fugitive Slave Law.

Busted and Commissioner Morton had learned from past cases and were clearly motivated to avoid the intervention and delay that lawyers created. Reese and Busted had gone to great lengths to hide Preston's location from his wife and the abolitionist attorneys that were trying to help him. By the time Preston's supporters and legal team finally found him, the case before Commissioner Morton had already begun.<sup>148</sup>

Preston's two lawyers were Erastus D. Culver and John Jay, both mainstays of the abolitionist bar in New York.<sup>149</sup> Once they found Preston and saw that Busted had already called his first witnesses, they proceeded to cross-examine those witnesses as best they could and extended cross-examination as long as possible, successfully lobbying a reluctant Commissioner Morton to recall Busted's witnesses so that they could question them further.<sup>150</sup> After dragging the process out as long as they could, Culver and Jay asked that the case be adjourned until the next day to give them time to confer with their client and

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145. James Hamlet, who was the first alleged fugitive to be tried in New York City, had his freedom purchased in 1850 for \$800 (about \$26,000 today). Giles Rose had his freedom purchased in the same year in Detroit for \$500 (about \$46,000 today).

146. *The Facts of the Outrage*, N.Y. TRIB., Apr. 5, 1852, at 4A.

147. *Id.*

148. *Id.* The details are somewhat hard to follow, but it appears Busted and Reese worked with Officer Martin to move Preston around so that he would be hard to find, hoping that they could thus dispense with the legal process without interference.

149. See FONER, *supra* note 31, at 112, 139.

150. *Court Proceedings: Alleged Fugitive Slave*, N.Y. TRIB., Apr. 2, 1852, at A7.

gather some semblance of a case. Morton was reluctant to extend the hearing, and Busted was indignant. Culver and Jay accused both Busted and Morton of attempting to hold the hearing in secret in order to send Preston off without any process. Jay acidly said that “it would be no doubt pleasant to Mr. Busted to ship the man off by the 5 o’clock train.”<sup>151</sup> Reluctantly, Morton relented and adjourned the hearing until the next morning.<sup>152</sup>

Short though the respite was, for Preston it meant the difference between being immediately returned to slavery and one more night with his family.<sup>153</sup> This alone made the delay a small victory, but it also bought time for Preston’s allies to raise the salience of the case and begin to organize an effort to free him.

When the hearing reconvened the next morning, Preston’s lawyers did everything they could to slow down the gears of the process—even provoking violence in the courtroom and then trying to take advantage of it.<sup>154</sup> Jay’s first move was to call Busted to the stand and question him about his role in planning and executing Preston’s arrest. Busted refused to answer these inquiries and Commissioner Morton refused to order him to answer. Jay then angrily accused Busted of being a “rank perjurer.”<sup>155</sup> Busted responded by jumping out of the witness stand and “[striking] Jay a violent slap on the left side of the head.”<sup>156</sup> Preston’s lawyers immediately sought to take advantage of this breach of decorum by demanding that the case be transferred to Judge Betts of the district court.<sup>157</sup> Betts refused to take the case,<sup>158</sup> and the opportunity passed, but the moment provides a nice illustration of Preston’s lawyers’ commitment to delay and procedural confusion. Literally reeling, Jay immediately sought to use Busted’s disruption to create more time and space for the case.

After the hubbub, Jay moved to dismiss the case for lack of evidence, arguing that no bill of sale had been produced. Morton adjourned, saying he would take the papers home with him and decide the next day.<sup>159</sup> Preston’s lawyers appeared to believe that Morton would decide the motion the next day, after which they would commence their own case. They had assembled a few witnesses who were at the courtroom the next morning (Saturday) in the

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151. *Id.*

152. *Id.* Upon adjournment some interesting jockeying occurred between the lawyers. Busted challenged Jay to match his own contribution to a fund for purchasing Preston’s freedom. Jay and Culver dismissed this challenge as hypocritical grandstanding. Culver remarked that he thought it was “wind myself, do the dirty work and then turn round and make a great offer.” *Id.* This building tension between the lawyers would come dramatically to the surface the next day.

153. *See id.* (The *Tribune* reporting that when Commissioner Morton adjourned the hearing, Preston’s wife “in much grief, approached to where he sat, kneeled down in front of him and gave way to her lamentation”).

154. *See United States Commissioner’s Office*, N.Y. TIMES, Apr. 3, 1852, at A1. While Jay was still representing Preston, it appears that Culver had been replaced by a lawyer named Emmett. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

expectation that they would have the opportunity to present their case.<sup>160</sup> Commissioner Morton had other ideas. He came into the courtroom on Saturday morning ready with his decision not only on the motion, but on the case as a whole. Before his lawyers knew it, Morton had signed the certificate and delivered Preston over to the marshal to be returned to Baltimore.<sup>161</sup> Preston's lawyers filed a last-ditch habeas petition to Judge Judson of the state court, but it came to nothing and Preston was brought back to Baltimore.<sup>162</sup>

It would seem, then, that Preston's case was lost and that all his lawyers' efforts were for naught.<sup>163</sup> But there was one more chapter. Because Preston's lawyers had stretched the case out over three days, it received extensive news coverage in the daily papers, raising public awareness. The case piqued interest and titillated readers: an alleged fugitive slave, lawyers insulting each other, even a fistfight. Thus, when Morton abruptly ended the hearing and sent Preston back to slavery, his lawyers, in concert with the abolitionist organizers in the city, had an audience for their outrage. Indeed, they continued their advocacy after the case ended, publishing a "card" detailing their involvement with the case and complaining that Morton had terminated the hearing without allowing Preston's case to be heard.<sup>164</sup> This card was the first volley in a broad effort to gather the \$1500 that Reese demanded to purchase Preston's freedom.<sup>165</sup> Newspapers across New York, both the city and the state, published notices advertising the collection of funds.<sup>166</sup> A little over a month later, the money had been gathered and Preston returned to New York and his family, a free man.<sup>167</sup>

Preston's return was more complicated than Bennett's. Although Preston's lawyers took every opportunity they could to slow down the system, Commissioner Morton was a more savvy and determined opponent than Ingraham had been. The result was that Preston had to endure the indignity of being marched out of the city in chains and returned to slavery for a horrific month. Still, the fact that Preston ended up free at all is likely due in part to his lawyers' efforts. Not only did they do everything they could to create time and space for delay and entanglement, they also continued their advocacy for him

160. *The Facts of the Outrage*, *supra* note 146.

161. *Id.*

162. *Id.*

163. In fact, Preston's case is listed as among those that were "remanded by fed. Tribunal at govt. expense"—and thus lost—by Campbell in *The Slavecatchers*. See CAMPBELL, *supra* note 70, at 202–03. Preston's subsequent purchase and return to freedom is one example of the importance of updating Campbell's account.

164. *A Card from the Legal Counsel of Horace Preston, Claimed as a Fugitive Slave by William Reese*, N.Y. TRIB., Apr. 5, 1852, at A4.

165. In today's dollars, this sum would amount to more than \$ 86,000.

166. See *Another Fugitive Slave Case*, POUGHKEEPSIE JOURNAL, Apr. 17, 1852, at A2 [hereinafter *Another Fugitive Slave Case*, POUGHKEEPSIE] (noting that two New York City papers were collecting funds); BUFFALO DAILY REPUBLIC, May 1, 1852, at A3 (noting that \$ 750 had been collected so far toward purchasing Preston's freedom).

167. *News Gatherings*, N.Y. TIMES, May 17, 1852, at A2.

after the case was over. They used the outrage over Morton's high-handedness both to build public opposition to the Law and to collect the funds to bring Preston home.

### 3. Exoneration

The most obvious way that lawyers helped alleged fugitives end up free was by exonerating them under the terms of the 1850 Law. Exonerations might seem to fit awkwardly into a picture of resistance lawyering because, in theory, an exoneration should be evidence of the law's process working properly. Justice is "working" when an alleged fugitive protests that she is not a slave and the commissioner, or judge, agrees and grants her freedom. In fact, however, exonerations were as much the product of strategies of resistance lawyering as were escape or purchased freedom. Abolitionist lawyers achieved exonerations not by pleading their cases to disinterested and just tribunals, but rather by putting political and moral pressure on commissioners and judges and by keeping that pressure applied through strategies of delay, procedural obfuscation, and public spectacle. These lawyers could not know in advance whether their arguments for exoneration would be persuasive, so they adopted the strategies of resistance to maximize the chances for a good outcome of any variety.

#### a. *Tamor Williams*

In February of 1851 William T. Purnell of Worcester County, Maryland came to Philadelphia looking for a woman named Mahala who he claimed had escaped from his service in 1828.<sup>168</sup> The woman who he claimed was Mahala went by the name Tamor Williams. She had been living in Philadelphia for years and was a longstanding member of a local Methodist church. She had six children, one of whom was still a nursing infant.<sup>169</sup>

Purnell's agent, Robert Bowen, claimed that he had learned of Williams's whereabouts by a letter signed by "Louisa Truitt."<sup>170</sup> Truitt was a mysterious figure who never appeared at trial. She apparently directed Bowen to meet a man on Market Street who would direct Bowen and Purnell to Williams.<sup>171</sup> Following the procedures set out in the Law of 1850, Purnell and his agents went to the offices of Commissioner Edward Ingraham. Ingraham issued a warrant for the arrest of Tamor Williams, which was executed on Thursday, February 6.<sup>172</sup>

Williams's arrest caused an uproar in the free black community of Philadelphia. As was true in so many of these cases, both the activists and the lawyers immediately sprang into action, so that when Williams was brought

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168. *Another Fugitive Slave Case*, PUBLIC LEDGER (Phila., Pa.), Feb. 7, 1851, at A2.

169. *Another Fugitive Slave Case*, N.Y. TRIB., Feb. 8, 1851, at A7 [hereinafter *Another Fugitive Slave Case*, N.Y. TRIB., (Feb. 1851)].

170. *The Fugitive Slave Arrest in Philadelphia*, EVENING POST (N.Y.C.), Feb. 8, 1851, at A3.

171. *Id.*

172. *Another Fugitive Slave Case*, POUGHKEEPSIE, *supra* note 166.

before the commissioner there were “some thirty or forty colored persons present” in the courtroom.<sup>173</sup> Not only was the room packed with black allies, but Williams was met there by prominent abolitionist lawyer William S. Pierce.<sup>174</sup> Pierce’s first move was to request delay. He convinced Commissioner Ingraham to continue the hearing on Williams’s case until the afternoon, when his more famous colleague David Paul Brown could join him.<sup>175</sup>

Despite the Law’s clear intention that she receive minimal and summary process, Williams found herself surrounded by a battalion of supporters and defended by experienced attorneys. Had no one been there to support her, in all likelihood Ingraham would have conducted the hearing quickly and, as the Law contemplated, sent Williams to Maryland (likely to be sold “down the river” to the deep South).<sup>176</sup> But, because the community and Pierce were in the courtroom, Ingraham granted a continuance until the afternoon.

The hearing was supposed to reconvene at 4 p.m. before Commissioner Ingraham.<sup>177</sup> David Paul Brown, in the meantime, wasted no time in filing a petition for habeas corpus before Judge Kane, the federal district judge sitting in Philadelphia. Faced with public attention and the delicate politics around the law, Kane chose to grant the petition for habeas and to hear Williams’s case himself in federal court.<sup>178</sup>

Kane’s decision caused more chaos favorable to Williams and her lawyers. Ingraham had adjourned the hearing until 4 p.m., but when Kane granted the habeas petition, he asked that the lawyers report to his courtroom at 1 p.m. to address the case.<sup>179</sup> Purnell’s lawyer (McMurtrie, the same lawyer who represented Bennett’s owner) was confused. He told Judge Kane that he’d sent his witnesses off with instructions to return in front of the commissioner at 4 p.m.. He did not know where they were now. Moreover, he was confused about what he was doing in front of a federal judge; he thought the whole proceeding was supposed to happen before the commissioner.<sup>180</sup> Kane responded that he was not quite sure either—“he was new in these matters.”<sup>181</sup> Then, because Purnell’s

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173. *Another Fugitive Slave Case*, N.Y. TRIB., (Feb. 1851), *supra* note 169. The *Tribune* was repeating the reporting of the *Philadelphia Inquirer* (not a proponent of abolition at this point). The reporting downplayed the excitement around the arrest, saying that “[t]here was no excitement manifested . . .” There may not have been any violence (this is frequently what was meant by “excitement” in the context of the fugitive slave disputes), but the fact that more than 30 free black citizens were at the courtroom on a Thursday morning immediately after Williams’s arrest shows that someone in the community was organized and vigilant.

174. Pierce was, of course, also the lawyer for Stephen Bennett. It should be clear by this point that the cast of characters in these cases was full of repeat players.

175. *Id.*

176. Ingraham proved to be no friend of abolitionists. One prominent abolitionist called him a “notorious . . . slave-catching commissioner.” See HILDRETH, *supra* note 139.

177. *Id.*

178. See *Another Fugitive Slave Case*, N.Y. TRIB., (Feb. 1851), *supra* note 169.

179. *Id.*

180. *Id.*

181. *Id.*

witnesses were not ready, Judge Kane continued the case until the next morning.<sup>182</sup>

Things went even better for Williams and her lawyers when the trial began before Judge Kane the next day. McMurtrie began the Friday morning proceedings by presenting his case. He called one witness: Robert Bowen. Bowen testified vaguely that he had hired Williams from Purnell for a few years before she ran away from his service in 1828.<sup>183</sup> On cross-examination, Bowen revealed that he and Purnell only knew of Williams's whereabouts because they had been notified by the mysterious Truitt letter. Bowen admitted that they could produce neither the letter, nor Truitt, nor the man that Bowen claimed to meet on Truitt's direction who led them to Williams. In the end, Bowen was forced to concede that the only proof that Williams had been Purnell's slave was his identification of her more than twenty years after he'd last seen her. Bowen then became ill and the hearing was adjourned until the next day (Saturday).<sup>184</sup>

On Saturday, McMurtrie continued to make his case, but although much was made of the mysterious Truitt letter, Brown and Pierce effectively reduced the case to Purnell's claim that he could identify Williams after more than twenty years' absence.<sup>185</sup> When it was Brown and Pierce's turn to make their case, they began by asking for more time. They argued that their evidence would take too long to produce and that the court should adjourn until Tuesday morning when Judge Kane was available next.<sup>186</sup> This request prompted a flurry of dispute from McMurtrie. He argued that the case should proceed quickly because his clients were "exposed to insult" in the city and had a right to conclude their case quickly. Brown responded incredulously, noting that his client faced a much more insulting fate should the case go against her.<sup>187</sup>

Kane took a short recess but insisted that the case proceed on Saturday afternoon. Brown and Pierce called four witnesses from the free black community who all testified that they knew Williams and had known her to be living in the area since before Purnell claimed that she had run away. One after another, they raised doubts about the already flimsy testimony offered by Purnell and his team. McMurtrie was on his heels. Backing away from his initial confidence, he argued to Kane that he did not have to prove that Williams was Purnell's slave, but rather that there was enough evidence to return her to

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182. *Id.*

183. *See The Fugitive Slave Arrest in Philadelphia, supra* note 170. It was a fairly common practice for planters to hire their slaves out to others who wanted to lease their services, especially in the North. Purnell's contract with Bowen is similar to the way that Frederick Douglass was hired out in Baltimore (where he learned to read) and the experience of countless other slaves in the border-state North.

184. *See The Fugitive Slave Case, PHILADELPHIA INQUIRER*, Feb. 10, 1851, at A1.

185. One further witness, J.T. Hammond, testified that Williams bore a resemblance to "the whole set of Dr. Purnell's negroes" but was unable to be any more concrete than that. *Id.* It is also important to acknowledge the racism in this!

186. *Id.*

187. *See id.*

Maryland, where a state court would decide the question of her freedom. Essentially impugning the credibility of the black witnesses examined by Brown and Pierce, McMurtrie suggested that the word of his white witnesses was sufficient to meet that standard. Kane rejected this argument out of hand, although McMurtrie may well have had a good legal case that this was the intent of the law.<sup>188</sup>

In the end, Judge Kane looked at the evidence and determined that Williams' witnesses were more persuasive. He held that "[t]here could be no question but that the weight of the evidence preponderated in favor of the prisoner."<sup>189</sup> Williams was set free and whisked away to an impromptu abolitionist rally to celebrate the victory.<sup>190</sup>

The resolution to Williams' case affirms the effective partnership that took place between abolitionist activists and lawyers. Brown and Pierce could only mount a defense because they had achieved a few precious days of delay. They used that delay to find witnesses to attack Purnell's case, but also to build political support for Williams and to put pressure on Kane so that he could not avoid seeing the salience of the case before him. As Brown concluded his arguments in the case, he hurled "burning invective" at Purnell and Bowen, describing them as kidnappers and servants of an evil slave regime.<sup>191</sup> As well as using delay and procedural entanglement, Brown intentionally made the case into a public spectacle, which then easily transitioned into a public political rally.

And so, much though Williams' case might appear to be a victory for traditional "lawyering," it was as much a product of resistance to the law as it was a victory within the law. From the beginning, Brown and Pierce acted to undercut the 1850 Law's primary purpose of summary process and a low evidentiary bar for alleged owners. They were happy to ask for as much delay and to create as much procedural confusion as possible. So too were they happy to politicize the case and turn it into a referendum on slavery.

#### *b. Rosetta Armstead*

The story of Rosetta Armstead demonstrates many of the same dynamics as that of Tamor Williams, superheated by five more years of sectional tension. Armstead was a slave claimed by Rev. Henry Denison of Louisville, Kentucky.<sup>192</sup> Armstead had been serving Denison in Louisville, but when his

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188. *See id.*

189. *Id.*

190. Despite characteristic understatement in the press, this celebration appears to have been quite raucous. At the rally itself, "the greatest excitement manifested," and thereafter "[t]he same wild feeling was shown by the colored population throughout the lower part of the county." *Id.*

191. *Id.*

192. *A Complicated Fugitive Slave Case*, NATIONAL INTELLIGENCER (D.C.), Apr. 7, 1855. Denison was the son-in-law of former President John Tyler.

wife died, he decided to send her to Virginia.<sup>193</sup> Denison charged a doctor named Miller with bringing Armstead from Louisville to Virginia in March of 1855. The easiest and most common route between Kentucky and Virginia was a riverboat up the Ohio River to Wheeling, Virginia.<sup>194</sup> During the 1850s, this trip had become somewhat fraught for slave owners traveling with slaves because antislavery activists kept an active watch on riverboats that docked in Ohio. The activists helped any slaves that they found into Ohio, where the slaves could claim that they had been freed by being brought voluntarily to free soil.<sup>195</sup> Courts had generally made exceptions for slave owners who were travelling directly on the river, but in general those traveling with slaves tried to use boats that docked on the Kentucky shore rather than in Ohio to avoid problems.

Traveling in March, Miller ran into problems in Cincinnati. Because of ice, he docked his boat in Cincinnati rather than across the river in Covington, Kentucky. Even worse for Miller, the river was not passable beyond Cincinnati, forcing him to take the train on to Wheeling, which required a stop in Columbus.<sup>196</sup> Miller was apparently ignorant of the law in Ohio that threatened to free any slave who was brought to the state voluntarily, and so he stopped off for the night in Columbus, where Armstead was noticed by the vigilant free black community. The activists in Columbus sprang into action and got a lawyer there to file a habeas petition for her. Armstead was brought before a friendly state probate judge and declared free because she had been brought voluntarily into the state and was, therefore, not a fugitive. Because she was still a minor, she was appointed a guardian, Van Slyke, and found herself suddenly a free person living in Columbus.<sup>197</sup>

Note already that the actions taken to protect Armstead were consistent with the broader strategies of resistance against the Fugitive Slave Law of 1850. The foundation for action was the vigilance and quick action of the free black

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193. Apparently, Denison's three-year-old child was living with relatives in Virginia while Denison and his wife were in Louisville. Rosetta was sent to Virginia to act as nurse for the child. *Id.*

194. Wheeling is now in West Virginia. Of course, before 1861, West Virginia was not a separate state, and what is now that state's border on the Ohio River was a major port for internal travel between Virginia and the Southwestern states. See OTIS RICE, *WEST VIRGINIA: A HISTORY* 87–88 (2010).

195. One famous case took place in 1845, when a man named Watson was nearly freed. Watson was enslaved and in transit on the river when his boat stopped at Cincinnati. Watson went to shore briefly, where some alert longshoremen found him and induced him to assert his freedom. Salmon Chase and a few others (including John Jolliffe) took his case and argued that Watson had been brought to Ohio voluntarily and was thus not a fugitive. Furthermore, Chase argued that because Ohio did not allow slavery, any slave brought to the state voluntarily by his master could not be sent back to slavery against his will. While Chase succeeded in getting the judge to agree that any slave brought to Ohio voluntarily would be free, Watson himself was not saved. The judge ruled that Watson had been "in transit" on the river and had then escaped to the shore, meaning that he had not actually been brought in to the state of his own free will. See JOHN NIVEN, *SALMON CHASE: A BIOGRAPHY* 84–85 (1995); see also *Decision of Judge Read, In the Matter of Samuel Watson, on Writ of Habeas Corpus*, CINCINNATI ENQUIRER, Feb. 24, 1845.

196. See COFFIN, *supra* note 114.

197. *Id.*

community in Columbus. Activists then called upon lawyers to support their efforts by seeking recourse to existing procedural means (here the state habeas process). This combination of activist vigilance and lawyering prevented Armstead from being whisked out of the state by train and created the possibility that she would end up free.

Upon learning that Armstead was in Columbus, Denison came to the city to plead with her to return to his service. When Armstead refused to return to slavery, Denison went to Commissioner Pendery in Cincinnati and got a warrant for her arrest as a fugitive slave. Armstead was arrested and brought to Cincinnati to be tried.<sup>198</sup> Here commenced a dizzying flurry of legal maneuvers that would end with Rosetta being declared free.

Even before Armstead arrived in Cincinnati, the wheels were turning there to protect her. Her guardian, Van Slyke, had telegraphed abolitionist allies in Cincinnati to warn them of what was coming, and a group of lawyers including Salmon Chase and Rutherford B. Hayes immediately sprang into action, seeking a writ of habeas corpus from Judge Parker, a state court judge on the Court of Common Pleas. Parker granted the writ and ordered that the federal marshal, H.H. Robinson, turn Armstead over to the sheriff, who would in turn return her to the care of Van Slyke.<sup>199</sup>

Chase and Hayes were eager to sow confusion by pitting state courts against federal courts. By getting Parker to order the marshal to turn Armstead over to the sheriff, they orchestrated a standoff between state and federal authorities that both slowed down the operation of the law and raised the profile of the case. Despite Parker's order, Marshal Robinson refused to turn Armstead over to the sheriff, prompting Parker to hold the marshal and Denison in contempt of court and to order Robinson to free Armstead.<sup>200</sup> Briefly defeated, Robinson turned Armstead over to the sheriff. No sooner had the sheriff brought Armstead to Van Slyke, however, than Marshal Robinson appeared at the hotel with a new federal warrant from Commissioner Pendery giving him authority to rearrest her. He executed the warrant and brought Armstead back into federal custody by force. This prompted a second contempt order from Parker.<sup>201</sup>

All of this back-and-forth took place before Armstead's hearing before Commissioner Pendery even began. Lawyers and activists had set the stage for the commissioner by painting both owner and marshal as criminals and enemies of Ohio law. Through delay and procedural obfuscation, the lawyers focused public attention on the case and forced Pendery to do more than rubber-stamp Denison's claim. In the end, this pressure worked. Pendery allowed a long and

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198. *See id.* "Arrest" may be too gentle of a description. One account has it that she was kidnapped by armed deputies and brought to the train at gunpoint while the kidnappers threatened to shoot anyone who interfered with them. *See* BLACKETT, *supra* note 47 at 247.

199. *See* BLACKETT, *supra* note 47 at 247.

200. *A Complicated Fugitive Slave Case*, *supra* note 192.

201. *Id.*

elaborate argument in the case, and while he chided Chase and Hayes for deliberately seeking to frustrate the operation of the Fugitive Slave Law, he ended up concluding that Armstead was, indeed, free under Ohio law.<sup>202</sup> Armstead was finally set free and returned triumphantly to Columbus to a huge crowd celebrating her return.<sup>203</sup>

The cases of Tamor Williams and Rosetta Armstead show the tactics of resistance lawyering at their most successful within the legal system. Taken alone, these cases might suggest that resistance lawyering is no more than savvy, zealous advocacy, as lawyers do whatever it takes within the system to achieve a positive result. But this misses just how radical their tactics were. Williams's and Armstead's lawyers were not acting as faithful stewards of a legitimate legal system. Instead, they were challenging the core assumptions of that system from within. The mere fact that they won does not change the conclusion that they were acting as resistance lawyers. It is not hard to imagine that these same tactics might have helped set the stage for escape or purchase had the circumstances been slightly different. Think, for example, of what might have happened had Penderly ordered Rosetta to be returned to Denison. The lawyering and organizing had energized a mob that might well have been motivated to free Armstead by purchase or by force. Indeed, it was likely that the pressure exerted by this mob contributed to Penderly's choice to depart from his normal summary process and avoid a riot by freeing Armstead.<sup>204</sup>

#### 4. *Returned to Slavery*

The strategies of resistance lawyering used in city after city and case after case were surprisingly successful, but they were not only employed in cases with happy endings. Lawyers could not know beforehand whether the time and space they were creating would be effective. Often, in fact, the strategies of delay and confusion became more extreme and overt in cases where the hope of a good outcome was smaller.

One example of this is the case of Thomas Sims, the first alleged fugitive to be returned to slavery from Boston. In February of 1851, Sims escaped from

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202. See BLACKETT, *supra* note 47 at 247–48.

203. See COFFIN, *supra* note 114, at 557. The case had an interesting afterlife beyond Penderly's verdict. Armstead's lawyers continued to press for the prosecution of Marshal Robinson under Judge Parker's contempt order. Parker fined Robinson \$50 and sentenced him to prison. Robinson then filed his own writ of habeas corpus before Justice John McLean of the United States Supreme Court (McLean was riding the Ohio circuit at the time). McLean heard argument on the case and then held that Robinson's imprisonment had been illegal because he was exercising his duties under the Fugitive Slave Law. See *A Complicated Fugitive Slave Case*, *supra* note 192.

204. Twenty-one alleged fugitive slaves had their fates in the hands of Commissioner Penderly over three years, and Armstead was the only one that he found to be free. In some instances, Penderly showed a desire to act quickly and with minimal process. See, for example, the summary process that he seemed to execute in the case of an alleged slave named Harvey who was brought before him in September of 1854. Harvey and his son were in court in the afternoon and back to slavery before nighttime. See *Fugitive Slave Arrested*, RICHMOND DISPATCH, Sept. 27, 1854, at A4.

James Potter's rice plantation near Savannah by stowing away on a boat bound for Boston.<sup>205</sup> In April, he was found in Boston and arrested. In the process of resisting arrest, Sims stabbed one of the deputies, Asa Butman.<sup>206</sup> Sims's Case came hot on the heels of the Shadrach Minkins rescue, and the federal and city authorities were keen to avoid a repeat. They secured the courthouse by literally surrounding it with "stout chains," and hundreds of armed men were engaged to prevent against escape.<sup>207</sup> The Boston vigilance committee faced a difficult challenge. Rescue was going to be difficult given the federal government's fortification of the proceedings, and it was not clear that it would be possible to purchase Sims's freedom.<sup>208</sup>

In this context, Sims's lawyers pulled out all the stops.<sup>209</sup> Their first move was to seek delay from Commissioner Curtis to allow them to file a motion for habeas corpus to the state courts. Curtis granted this delay, much to the dismay of Potter and his lawyer, old friend Seth Thomas (who had also represented the owner in Shadrach Minkins's case).<sup>210</sup> Sims's lawyers then filed two motions for habeas corpus with the Chief Justice of the State Supreme Court, Lemuel Shaw. Shaw denied both motions, infamously holding that states should not interfere with the operation of the Fugitive Slave Law and that the compromise over fugitive slaves was essential to the compromise at the heart of the Constitution.<sup>211</sup>

Undaunted, Sims's lawyers persevered and filed a flurry of motions in state court intended to slow the process in any way possible. They filed a motion for personal replevin against the federal marshal in the hopes of forcing a trial on the issue of whether he could legally hold Sims.<sup>212</sup> More creatively, they filed a criminal suit *against* Sims for the stabbing of Asa Butman and then argued that the state court needed to take jurisdiction because state criminal claims trumped

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205. BLACKETT, *supra* note 47, at 413.

206. *Id.*

207. *Id.*

208. This was true primarily because Potter seemed unwilling to entertain offers. After the Shadrach rescue, Southern slave owners were under pressure from proslavery politicians to ensure that the law be enforced to its full extent. *See id.*

209. Sims was represented, at some point or another, by most of the abolitionist lawyers in Boston. His primary attorney was Robert Rantoul, but he was assisted by Samuel Sewall, Charles G. Loring, Richard Henry Dana, Richard Hildreth, and many others.

210. Southern papers had picked up on the resistance lawyers' strategy of delay and griped that if commissioners allowed this kind of procedural delay there would be "little justice and no negro." BLACKETT, *supra* note 47, at 415.

211. *See id.* at 416. Shaw's opinion in Sims's Case was one of the central pieces of evidence for Robert Cover when he condemned antislavery judges for upholding the 1850 Law in *Justice Accused*. *See COVER, supra* note 16 at 176–78.

212. *Homine replegiando*, sometimes called the writ of personal replevin, was a lately revived mediaeval writ used to recover possession of an individual out of the hands of someone who detained him. Unlike habeas corpus, issues of fact raised by the writ of *homine replegiando* were triable by a jury, making it an increasingly valuable procedural device to northern abolitionists seeking to wrest blacks out of the hands of slave catchers and kidnapers. WIECEK, *supra* note 34, at 157 fn. 24.

the claims of the 1850 Law.<sup>213</sup> When these measures failed, Sims's lawyers tried filing a habeas petition in federal court before Judge Woodbury.<sup>214</sup> When this too failed, some of the more radical lawyers in the city resorted to attempts to arrest Sims's captors. Richard Hildreth issued an arrest warrant for Potter's agents John Bacon and M.S. D'Lyon, and convinced a friendly sheriff's deputy to execute the warrant. Bacon and D'Lyon were briefly detained.<sup>215</sup> All of these measures were to no avail, and Commissioner Curtis ruled against Sims, ordering that he be returned to Georgia.

Yet even this final order did not stop the legal process. As Sims was sitting on a boat on his way South, Richard Hildreth filed yet another warrant, this time a criminal warrant for Sims's arrest, in a last-ditch attempt to use his assault to get him into state custody. When the sheriff declined to act on the warrant, Hildreth and his allies put the warrant in the hand of a constable in Boston and a friendly deputy sheriff with jurisdiction over Nantucket. These lawmen chartered a steamer to chase down Sims's boat and board it to arrest him, but they got there too late; Sims's boat had beaten them out of the harbor and was well on its way back to Georgia.<sup>216</sup>

Sims's case and others like it demonstrated the lengths that radical antislavery lawyers were willing to go to stop the 1850 Law from functioning. Indeed, as the outcome of the case seemed more and more likely to go against Sims, the lawyering strategies became more and more explicitly hostile to the restrictions outlined in the 1850 Law. For the most committed resistance lawyers, legal process was just one tool among many to keep alleged fugitives from being returned to slavery. Even when resistance was at its most radical and extreme, as at the end of Sims's Case, the law was still being used in much the same way: to create delay and procedural confusion with the goals of opening up possibilities for freedom and building public opposition to slavery.

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213. See BLACKETT, *supra* note 47, at 416. This was not the only time that resistance lawyers sought to use a state criminal prosecution to keep an alleged fugitive out of federal custody. After Margaret Garner killed one of her children (and tried to kill the other two) rather than let them be taken back to slavery, John Jolliffe sought to interpose Ohio criminal law between her and the process of the 1850 Law. He argued that the state's interest in prosecuting murder trumped the federal interest in enforcing the law. See WEISENBERGER, *supra* note 69, at 79–81. Although this argument failed, it has parallels in the present. Local judges and police occasionally make creative use of local police and criminal procedure to protect undocumented immigrants from federal custody and exposure to ICE, such as when immigration attorneys argue for their clients' bail to be set *higher* in order to keep them in custody rather than be deported. See *infra*, Part III.D.

214. See *Another Scheme*, BOSTON COURIER, Apr. 14, 1851; *Decision of Commissioner Curtis: Sims Delivered Up to his Master!*, BOSTON HERALD, Apr. 11, 1851.

215. See *The Arrest of the Fugitive Slave Claimants*, THE BOSTON HERALD, Apr. 8, 1851.

216. See *Final Departure of Sims for Savannah—Attempt of the Abolitionists to Bring Him Back to Boston*, BALTIMORE SUN, Apr. 15, 1851, at A2.

### 5. *A Note on Ethics*

In and among these stories are a set of complex ethical problems that abolitionist lawyers faced in the 1850s and that resistance lawyers still face today. In addressing these questions, I do not propose to resolve them or to absolve the abolitionist lawyers of their ethical mistakes. Rather, I raise these issues to engage them as puzzles that structure the way that resistance lawyers thought and think about their practice.

One of the most obvious questions that arose in the case of Shadrach Minkins and Lewis was whether lawyers should help their clients escape in the face of a legal regime that they consider unjust and illegitimate. For many of us in the present day, looking back on slavery, this question seems easy.<sup>217</sup> Slavery was a great abomination and the moral choice—at least in hindsight—would surely be to help anyone facing a return to slavery to escape.<sup>218</sup> And yet while the lawyers in these stories were occasionally instrumental in creating the circumstances under which escape was possible, there is little evidence that any lawyer affirmatively facilitated an escape of one of their clients while representing them.<sup>219</sup> This fact reveals a fascinating dissonance in the practice of even the most radical resistance lawyers. For legal process to work as a tool of delay and confusion, lawyers could not entirely rupture their relationship to the legitimacy of the process. Even if delay and confusion were never intended in good faith with the legal system and only intended to obstruct, they were still accomplished within the boundaries of legitimate legal practice. For example, when Richard Hildreth made his last-ditch attempt to rescue Sims, he wrote out

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217. While there is no doubt that the American system of plantation slavery was an abomination and a human atrocity that spanned centuries, we oversimplify the moral clarity around the issue when we look back at the past from the present with unanimous condemnation. There were millions of people who saw the moral horror of the system at the time—first among them the enslaved people themselves, joined, of course, by the lawyers that are the focus of this Article. But for many white Americans, North and South, the morality of the issue was more complex. From Thomas Jefferson to Daniel Webster to Joseph Story to Abraham Lincoln, many of the “great statesmen” of the time balanced the human evils of slavery with what they saw as the pragmatism of governance and maintaining a unified nation. As such, the national discussions over the morality of slavery would likely have looked uncomfortably like the national discussions today over hotly contested moral issues in our politics. Rather than treat slavery as an exceptional moment of governmental atrocity, then, I would urge us to recognize that moral unanimity is a product of passing time and hindsight. We need not compare slavery to mass deportations to observe that many people in the present see deportations as a clear moral wrong and that their activism, as well as the course of history, will determine whether we reach a future unanimity on that point.

Of course, although this Article is not the right place to explore this point fully, the unanimous condemnation of slavery also masks an ongoing and unresolved fight in our politics about the extent to which racial injustice persists and how that persistence is or is not rooted in slavery and Jim Crow.

218. I recently asked one of my classes whether, if they were a lawyer in the 1850s, they would help one of their clients escape rather than be returned to slavery. The response in the room was nearly unanimously yes. When I posed a similar question with respect to a client facing deportation or imprisonment in the present, almost none of my students volunteered that they thought it was ethical to facilitate escape.

219. I hedge this somewhat because there were surely lawyers involved with vigilance committees across the North who were involved in plotting and sometimes executing escape schemes.

a warrant to have Sims retaken rather than just hiring a ship to retake Sims by force. Even at the extreme, Hildreth was acting just within the boundaries of the legal system.

This commitment to legal process even in service of undermining law is revealing. Powerful though lawyers were in resisting the law, the true revolutionaries looked beyond the courtroom. Levi Coffin and the abolitionists who helped Lewis escape felt no conflicts about putting a hat on his head and ushering him out the door. The members of the Boston Vigilance Committee felt no compunction about organizing a desperate (and perhaps violent) plan to rescue Thomas Sims.<sup>220</sup> This minimal commitment to the legal system meant that lawyers were not the rescuers (except in the case of exonerations), but rather operated at a close remove within the system as facilitators.

Antislavery lawyers also varied significantly in just how committed they were to the legal system. Some, like Richard Henry Dana in Boston and David Paul Brown in Philadelphia, fought for alleged fugitives to be free, but also argued that the Fugitive Slave Law of 1850 and its processes could be legitimate. Dana and Brown and lawyers like them opposed slavery personally and believed that it could be fought legitimately through the courts. However, when the courts ruled, they were inclined to respect those rulings.

But there were other, more radical lawyers for whom the entire legal apparatus of the Law was illegitimate. For these lawyers, no holding by a federal commissioner, and perhaps no holding by a federal judge or state judge, could be worthy of respect if it returned an alleged fugitive to slavery. It was these lawyers, men like John Jolliffe and Richard Hildreth, who pushed the limits of resistance lawyering right to the edge of rejecting law altogether. And yet they did not go over that edge—they used the tools of legal process to fight their battles. In asking for continuances, filing habeas petitions, and issuing specious arrest warrants, these lawyers worked within the legal system to fight against a discrete legal structure (slavery and the Fugitive Slave Law of 1850). They remained recognizably lawyers in their commitment to working within the law broadly while they fought to change legal systems that they abhorred.

This position is important to stake out both in the past and the present. It is tempting to see resistance lawyering as practiced by these lawyers as almost nihilistic—a pure stratagem to achieve a desired outcome. But a closer look reveals a deep faith in law and legal process behind even the most outrageous of the antislavery lawyers' attempts to delay and confuse. Resistance lawyering was defined by a rejection of a specific system of legal process, but ultimately (and necessarily) grounded in a fundamental commitment to legal order more broadly.

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220. See BLACKETT, *supra* note 47, at 416. Indeed, the vigilance committee's plan to rescue Anthony Burns in 1854 *did* turn violent when one of the deputies guarding Burns was killed in their failed attempt. See VON FRANK, *supra* note 84, at 62–70.

There is one further ethical problem that is worth noting before turning to the present. One of the reasons that antislavery lawyers sought delay was to raise the public salience of the case as it was happening. In part this was because increased public attention increased the chances that an alleged fugitive would end up free through acquittal, purchase, or escape. But increased public attention also meant a bully pulpit for antislavery lawyers' arguments condemning slavery. Remember that the fight against the Fugitive Slave Law of 1850 was an important proxy battle in a broader political struggle against slavery as a whole. Courtroom speeches were widely reported in the daily papers and legal arguments were essential weapons in the rhetorical struggle against slavery.<sup>221</sup>

Antislavery lawyers sought to portray their opponents as evil,<sup>222</sup> and in court they took every opportunity possible to rail against what Jolliffe called the "seething Hell of American Slavery."<sup>223</sup> This attack on slavery as an institution frequently lined up with their clients' interests. An alleged fugitive slave came to court abhorring slavery and hoping to end up free. Invective against slavery tended to build public support for purchase and escape and occasionally (as with Carpenter in the Lewis Case) made a commissioner or judge hesitant about allying themselves with the slavery and the South. But there were times when lawyers' focus on the broader political problem came into conflict with what we would think today might be their clients' best interests.

One example of this kind of conflict occurred in the Anthony Burns case. Burns was arrested in Boston in 1854. When Burns was first detained and brought into court, he did not yet have a lawyer. When he was first approached by Richard Henry Dana, Burns was reluctant to "lawyer up." Burns reportedly told Dana, "It is of no use, they have got me." He—rightfully—worried that if he fought the process, he would be punished for it when he got back to Virginia.<sup>224</sup> It was no secret that slave owners sometimes brutally punished returned fugitives, both out of anger and out of a desire to dissuade others from trying to escape.<sup>225</sup> Burns was prophetic; upon his eventual return to Virginia he was indeed subjected to humiliation and torture.<sup>226</sup> Dana and his colleagues convinced Burns to put up a defense, surely motivated in part by the desire to keep him from returning to Virginia (after all, as my research has shown, his chances were better than he might have thought). But the lawyers and activists

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221. For a discussion of the importance of the trial in the struggle for abolition, see DELOMBARD, *supra* note 90.

222. Remember John Jay's confrontation with Busted in the Horace Preston trial. That was one among many violent episodes centered around the courthouse. John Jolliffe was attacked in the street twice—once by a proslavery judge that he had spoken out harshly against and another time by Archibald Gaines, the man who claimed to own Margaret Garner and who Jolliffe had unrestrainedly vilified during the Garner trial. See WEISENBURGER, *supra* note 69, at 4–7, 95–99.

223. *Id.* at 124.

224. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1804–05 (1996).

225. See FRANKLIN & SCHWENINGER, *supra* note 31, at 241–48.

226. *Id.* at 188–90.

also knew that the Burns case presented a real political opportunity. Public opinion in Massachusetts was increasingly leaning towards a radical version of abolition, and the Burns case was a chance to focus attention on the Fugitive Slave Law and its horrors. There was more at stake in convincing Burns to put up a defense than saving him from slavery: his trial could be a windfall for antislavery politics more broadly.

In this the lawyers and activists were also right. After all, it was the Burns trial and the ultimate return of Burns under armed federal guard that converted many moderates and fence-sitters to the antislavery position.<sup>227</sup> And it was Burns's trial that inspired Thoreau to write "Slavery in Massachusetts" and Whitman to write "A Boston Ballad." These moments of conversion were essential to the ultimate political transformation that would give life to the Republican Party and result in Lincoln's election in 1860.<sup>228</sup>

But was it ethical for the lawyers to pressure Burns into becoming a political talisman when he knew better than any of them the stakes he was gambling? In a modern view of the lawyer as zealous advocate, the answer is probably not.<sup>229</sup> And yet there is a strong argument to be made that every effort should have been exhausted to keep Burns free *and* that the possible broad political gains were worth the risk to Burns—provided that Burns could be authentically convinced to buy into the strategy. Many present-day theorists would give their blessings to an abolitionist lawyer who encouraged his client to persist despite the risks to the client as a part of an iterative and collaborative strategy.<sup>230</sup> The picture is made much more complex, however, when a white lawyer exerts his power and privilege to manipulate a man facing exile and torture into contributing to his political project. This kind of paternalism and opportunism rightly raises questions that cut to the heart of the abolitionist movement and the role that lawyers play in today's social movements.<sup>231</sup>

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227. The Burns trial was the spark that made conservative Whigs like Amos Lawrence "waked up stark mad abolitionists." VON FRANK, *supra* note 84, at 207.

228. The language of conversion was frequently used to describe a person's transition from mainstream acceptance of slavery to abolitionism. Nearly every white abolitionist, from William Lloyd Garrison to Harriet Beecher Stowe to John Jolliffe and Richard Hildreth, had their own personal "conversion" story. Scholars have linked these conversion narratives to a parallel history of religious conversion that was sweeping parts of the United States in the 1830s and 1840s. See Michael P. Young, *A Revolution of the Soul: Transformative Experiences in Immediate Abolition*, in *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* 99–103 (Jeff Goodwin, James M. Jasper, & Francesca Polletta, eds. 2001)

229. This gestures towards, without diving into, a deep and broad literature discussing the inevitable ethical frictions that arise when lawyers balance commitments to their client on the one hand and broader political goals on the other hand. See Louis Fisher, *Civil Disobedience as Legal Ethics: The Cause Lawyer and the Tension Between Morality and 'Lawyering Law'*, 51 HARV. C.R.-C.L. REV. 481, 485–96 (2016) (summarizing the outlines of the dispute).

230. See *id.* at 486, describing David Luban's model of "'moral activism,' whereby lawyers would attempt to push the client toward a more just course of action." (citing DAVID LUBAN, *LAWYERS AND JUSTICE* 160 (1988)).

231. David Luban describes the problem of lawyers' paternalism as more than just interfering "with their clients' autonomous choices, but [sometimes riding] roughshod over the commitments that

A related ethical dissonance, also evident in the Burns trial, arises when lawyers strategically characterize their work as futile. Remember that the conventional wisdom for years was that very few alleged fugitives caught up in the process of the Fugitive Slave Law escaped its clutches. This was more than just a product of incomplete history. For lawyers and activists at the time, it was good politics for the 1850 Law to seem as monstrous as possible. The more vicious the Law, the more evil the national political compromise supporting it. It would thus be perfectly reasonable as a matter of strategy for a lawyer to help free a client and then turn around and argue that the Law was an abomination that damned every fugitive slave in its grasp.<sup>232</sup>

There is nothing inherently inconsistent about this position, of course. Rhetoric and results need not coincide neatly. Still, the dissonance between rhetoric and results could create subtle crosscurrents. A savvy advocate looking at the Burns case would see just how much political hay there was to be made from a losing case. Would this ever cause a lawyer to throw his case? Almost certainly not, but a good resistance lawyer would prepare to make the most of whatever outcome occurred. When each case is an opportunity to challenge slavery in public, and when the broader political project is paramount, then individual outcomes and individual *humans* matter incrementally less.

Opinions will differ on the “right” ethical position for Burns’s lawyers to take. Rather than attempt to resolve those issues, I propose that recognizing and considering this ethical problem is an important element of any manifestation of resistance lawyering. When a lawyer acts to undermine and challenge a legal regime that she fundamentally opposes, powerful questions arise. How much and which laws does that lawyer accept as legitimate? What is the lawyer’s relationship to her client? What is the lawyer’s relationship to the larger political movement that she is participating in? Lawyers resisting the Fugitive Slave Law of 1850 confronted these challenges day by day in a way that framed and contextualized their practice.

Resistance to the law in the courtroom meant bringing a clear politics to the practice of law. It meant confronting ethical challenges and possible cross-purposes and striving to resolve and make sense of them. It meant, in short, a self-aware and self-critical politics advanced through a daily legal practice coordinated with broader social and political movements. In this complexity, it becomes clearer why lawyers were more successful in resisting the 1850 Law

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make the client’s life meaningful and so impart dignity to it.” David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 826–27 (2005).

232. Present-day anti-deportation advocates do something similar when they decry the summary cruelty of the existing deportation apparatus while data shows that undocumented people facing deportation fare surprisingly well when represented by an attorney in the process. See INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 15 (2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) [<https://perma.cc/J4MU-DSPH>].

than previously thought: they were sophisticated participants in a powerful political movement, strategically using all the tools that they had.

### III.

#### RESISTANCE LAWYERING TODAY

Two clear threads emerge from these stories of resistance lawyering against slavery in the 1850s. First, lawyers were more effective than we remember at achieving positive outcomes within a system they abhorred. Their successes came from practicing *within* that system with the goal of resisting it. Abolitionist lawyers did not abandon the field to levy high-level attacks on slavery, but rather engaged in a detailed, strategic practice of direct representation that sought simultaneously to protect their clients and to dismantle the system that threatened them.

Second, these lawyers were not deluded into thinking that their practice alone would make the change that they sought. Rather, they understood their daily practice against slavery as situated within the broader context of a national (and international) social, political, and legal struggle for fundamental change. No thoughtful lawyer could imagine that by rescuing a single alleged fugitive they could undermine the system of slavery embedded in the fabric of American law. And yet every courtroom battle helped to build political power—and every alleged fugitive that was freed was one fewer human being consigned to bondage for life.

These two threads turn our attention to the present. In the part that follows I will argue that resistance lawyering remains a familiar and even common practice of cause lawyers in the American system. In other words, the first thread links present practice back to the past. Lawyers still frequently devote their practice to daily, detailed, direct representation within systems that they actively seek to resist through that practice.

#### A. *What is Resistance Lawyering Today?*

One might be tempted to suggest that in a robust adversarial system, *all* lawyering is resistance lawyering. For example, when a litigator for a large corporation seeks to bog her opponent down in endless discovery, is she not using the tools of the system to jockey for settlement position and perhaps avoid a trial? Indeed, I have no doubt that most lawyers can think of countless examples of “strategic” litigation where a given legal process is used not to reify or justify the underlying legal system, but rather to reach a result for a client by making that system more complex, opaque, or nonfunctional.

This kind of opportunistic litigation is different from the resistance lawyering that I am describing here. Using a legal process as a tool to seek a desired outcome from that process is different from using a legal process as a

tool to dismantle that *legal process itself*.<sup>233</sup> In other words, applying the hypothetical above, there is a difference between a zealous advocate manipulating discovery rules to reach a better outcome for her client and a lawyer who opposes the procedural regime underlying the cause of action.

Take, for example, a comparison between two lawyers asserting a claim that their client has not infringed a copyright. I will call the first lawyer the “zealous advocate.” When she seeks to gain a litigation advantage over her opponent in the discovery process, she does so *only* insofar as it is strategically useful to her goal of winning the case for her client. Now imagine a second lawyer: the “resistance lawyer.” The resistance lawyer argues that the system of copyright is itself unjust and illegitimate.<sup>234</sup> When she manipulates the discovery rules to frustrate the application of a copyright, she does so in part to win her case for her client, but she is also intentionally using the tools of a process she resists in order to undermine, confuse, or destroy that process altogether.

The zealous advocate accepts the rules of the game and seeks to play within them to win. The resistance lawyer sees the game as rigged and tries to destroy it from within. Two things make the difference difficult to perceive in practice. First, in many instances there may be no practical difference between the actions of the zealous advocate and the resistance lawyer. Returning to the example of copyright, both lawyers may seek delay and advantage to their client through discovery, and in ninety-nine out of one hundred cases they may reach the same strategic decision.<sup>235</sup> This does not mean that there will not be some tactical differences between the zealous advocate and the resistance lawyer. Nor, importantly, does it mean that the two will understand or speak publicly about their work in the same terms. Still, under the definition that I propose, it will usually be difficult to identify resistance lawyering simply by reference to tactics.

The second obfuscating complexity is that the act of resisting within the law requires some level of commitment to the validity of law more broadly. Even the most radical abolitionist lawyers retained a faith in some abstract idea of law, and many retained faith in specific legal processes (state habeas petitions, state

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233. The definition of a legal process is critical here. Legal processes do not exist hermetically sealed off from politics, policy, or culture. In some instances—as with the Fugitive Slave Law of 1850—it is easy to identify a specific legal regime as itself unjust and unconscionable. In other cases, the alignment may be less clear. Rather than try to impose formal clarity, I want to suggest that because resistance lawyering is, under my definition, perspectival, it matters most whether or not the lawyer has *herself* identified the process as unjust and unconscionable.

234. For an example of such an argument, see Eben Moglen, *The dotCommunist Manifesto* (2003), <http://emoglen.law.columbia.edu/publications/dcm.html> [<https://perma.cc/D88A-6NGW>].

235. Note that while a resistance lawyer may have a more complex attitude toward the simple ethical mandate to serve her client above all else, this does not mean that she will not also be committed to doing her best for her client. Just because this commitment shares space with a commitment to a broader systemic challenge does not mean that, where conflicts do not exist, she will somehow not choose to serve her client. Moreover, in most instances, anyone who understands themselves as a resistance lawyer will be practicing on the side of the law that minimizes these ethical quandaries.

supreme courts, and even federal appellate practice). Consequently, even the archetypal resistance lawyers did not want to “burn it all down.” It would be a mistake, then, to seek resistance lawyers in the present by just looking for the most radical lawyers with the most radical critique of “the system.” A public defender who is a committed prison abolitionist or an immigration attorney who believes in open borders will be comparatively easy to identify (though see the first problem above), but the definition that I am advancing requires a more nuanced analysis. Resistance lawyering is contextual and procedural. Any lawyer who practices within a legal process that she believes to be unjust may qualify. As such, to see resistance lawyering in any given case, one must first identify the “legal system” that is being resisted with some specificity.

Isolating the system with specificity is also valuable for surfacing the political commitments behind a given lawyer’s practice. Two anti-death penalty advocates may disagree on what they name the “system” that they oppose. The “moderate” may separate the criminal justice system from capital punishment. Thus, she may argue that the criminal justice system is structurally valid (it can be “worked clean”) while also believing that the capital punishment system is unsalvageable and must be dismantled. Her colleague the “radical” may disagree, arguing that the entire system of criminal procedure is a tool of racialized oppression and must be dismantled.<sup>236</sup> Both are “resistance lawyers” under my contextual definition, but in disagreeing about what it is they are resisting, they surface clarifying political and strategic differences. These differences can be corrosive to political movements if they go unacknowledged (and the fights go unfought). By the same token, surfacing and grappling with the differences among movement allies with common goals can build richer and more effective alliances.<sup>237</sup>

This doubles back to the second lesson to be drawn from studying the abolitionist resistance lawyers: although they occasionally differed in how they defined the systems they sought to undermine,<sup>238</sup> they were defined by their

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236. The moderate and the radical have been and remain unsteady allies in the struggle against the death penalty in the United States. Radical death penalty abolitionists complain that the “pragmatic and conservative” arguments against the death penalty “set aside moral qualms with state-sanctioned executions, and focus attention instead on practical problems with the punishment . . . . In other words, they appeal to the exiting moral values of those who support harsh retributivism.” BHARAT MALKANI, *SLAVERY AND THE DEATH PENALTY: A STUDY IN ABOLITION 2* (2018).

237. These inter-movement disagreements both complicate and catalyze present-day activism against the death penalty. See Andrew S. Baer, *Let Them Get Their Voices Out: The Death Row 10, Radical Abolitionists, and the Anti-Death Penalty Movement in Illinois (1996-2011)*, 11 J. STUDY OF RADICALISM 129, 129–31 (2017).

238. For example, a group of hard-liner abolitionists believed that the United States Constitution itself was a “covenant with death” and hopelessly entangled with slavery. See WIECEK, *supra* note 34, at 237–39. Lawyers from this camp sought to undermine the deep structures of American legal institutions. Others, no less radical on the issue of slavery, believed that the Constitution was not irrevocably entangled with slavery and thus focused their efforts on resisting the legal structures that were more specifically and explicitly tied to slavery. See, e.g., LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (1845).

political commitment to dismantling slavery. This meant that the connections between their political project and their legal practice were always on the surface. This, in turn, meant that abolitionist resistance lawyers were surprisingly self-aware about the specific systems they were practicing within and against and about how that practice connected to the antislavery movements they were engaged in.<sup>239</sup> This awareness inflected their courtroom strategy as well as the ways in which they leveraged the public attention drawn by their trials.

While many lawyers today could be defined as resistance lawyers with respect to some element of the systems that they practice within, the politics of that definition are less sharply defined in the present than they were for the abolitionist lawyers in this study. Lawyers in the present are, by and large, less eager to explicitly use their time in court to build political support or to broadcast their resistance as an explicit component of a broader political strategy. Resistance in the present is more likely to be covert and less likely to be strident. While there may be good reasons for this as a matter of ethics and strategy, there are also both public- and private-facing costs.

With respect to public-facing costs: a lack of political specificity gets in the way of possibly fruitful connections between legal practice and broader social and political movements. Part of what raises the political salience of a legal strategy is the political context that it operates within. Active and engaged allies not only help broadcast the actions in court, they also show up at hearings and rallies. The greater the clarity of the resistance lawyer, the more opportunities she will perceive to weave her practice in with the broader political movement.<sup>240</sup>

The private consequence is more amorphous but no less powerful. Lawyering can be lonely, dry work even when in service of causes that we feel passionately about. It is no secret that lawyers are not, as a group, the happiest

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239. An example of this emerges, once again, from the Anthony Burns case. In that case, Commissioner Edward Loring eventually issued the order condemning Burns back to slavery. Afterwards, Loring was pilloried in Boston politics. In addition to being a federal commissioner, Loring also sat on the state probate court as a judge. After the Burns trial, a number of activists (including a number of antislavery lawyers) lobbied in the state legislature to have Loring removed from the bench as punishment for his verdict in the Burns case. One of the leading opponents of this punitive movement was Burns's lead attorney, Richard Henry Dana. Loring's attackers saw the entire edifice of the laws supporting slavery as illegitimate and thus were unsympathetic to the argument that Loring was "just doing his job." Dana, on the other hand, argued that Loring should not be punished for his role in the system. Yes, he agreed, the 1850 Law was an abomination, but that was not justification for attacking the judiciary itself and for punishing judges for the bad politics of their decisions. See VON FRANK, *supra* note 84, at 241. The two sides of this argument represented clear differences between what systems were being resisted and what the politics of that resistance was.

240. Political clarity need not be public or proclaimed in court to serve this public-facing purpose. Indeed, many scholars have explored the many ways that lawyers can collaborate with social and political movements in and around their legal practice. See, e.g., Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J. L. & SOC. CHANGE 25, 26–28 (2011) (summarizing and evaluating five models of legal practice with and in support of community organizing). My work builds on that foundation, arguing that the stories of the abolitionist lawyers suggest that there may be more space in the courtroom itself to pursue this work.

profession.<sup>241</sup> Even if public interest lawyers are generally happier than their counterparts in private practice (an often proposed idea that may not be supported in fact), they are more susceptible to burnout and “compassion fatigue.”<sup>242</sup> One explanation that has been put forward for burnout is that the competitive, adversarial, and often isolated working environment of public interest lawyers, taken together with the enormity of the social problems that they face, create an unhealthy work life.<sup>243</sup>

Stated another way, lawyers who care about social change risk foundering in the isolated practice of law as a means of creating that change. If this is true, then one way to mitigate this risk is to construct a picture of one’s legal practice that goes beyond the case-by-case, hired-gun mentality.<sup>244</sup> A more clearly developed set of political commitments and goals could make a lawyer’s daily practice feel less futile by construing even drab procedural process as part of a broader political context. Moreover, a clearer political analysis also makes it more likely that lawyers interested in social change will find common cause with activists and broader social and political movements, creating the kind of community support that leads to more fulfilling and sustaining work.<sup>245</sup> This is more than self-help for lawyers, it is politically important: for those who care about making sustainable movements for social change, it matters that participants in those movements find sustainable ways to engage and persevere.<sup>246</sup>

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241. There is some reason to think that lawyers today are not quite as unhappy as they used to be, but it remains true that lawyers are statistically “a depressed, anxious, suicidal, alcoholic group . . . .” Daniel S. Bowling, III, *Lawyers and Their Elusive Pursuit of Happiness: Does it Matter*, 7 DUKE F. L. & SOC. CHANGE 37, 37 (2015).

242. Burnout refers to the disillusionment that can arise when an idealistic lawyer confronts the morass and intractability of practice against structural injustices. “Burnout results from a discrepancy between expectations and outcomes, or the perceived needs of a task exceeding the perceived resources.” Lee Norton et al., *Burnout and Compassion Fatigue: What Lawyers Need to Know*, 84 UMKC L. REV. 987, 987 (2016). Compassion fatigue refers to the exhaustion that comes from the “cumulative emotional, psychological and physical effects of exposure to the pain, distress or injustice suffered by clients.” *Id.* at 988. It is no surprise that these two problems have “plagued public interest lawyers for generations.” Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 S. CAL. INTERDISCIPLINARY L. J. 147, 157 (2014) (citing COMMISSION ON LAWYER ASSISTANCE PROGRAMS, *Compassion Fatigue*, ABA (July 9, 2014)).

243. Norton et al., *supra* note 242, at 987.

244. See also Nisha Agarwal & Jocelyn Simonson, *Thinking Like A Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L. & SOC. CHANGE 455, 467–70 (2010) (connecting theoretical engagement with social theory and political commitments to preventing burnout in everyday public interest lawyering).

245. The writing on burnout and compassion fatigue, as well as research on unhappiness in the legal profession more broadly, almost uniformly points towards more cooperative and collaborative work models, where lawyers are engaged in collective problem solving and are part of a community rather than an atomized group of individual professionals. See Norton et al., *supra* note 242, at 1001. Anodyne as these recommendations may seem, they are linked to a deeper politics that should not be dismissed.

246. For the purposes of the inward facing concerns, this engagement need not be public or overt. It is easy to imagine a lawyer who draws energy and inspiration from anonymous participation in a protest or a march without ever making an explicit connection between her practice and her protest.

These are not purely speculative musings. Abolitionist lawyers resisting the 1850 Law were surprisingly active and resilient in the face of dispiriting odds and a brutally unjust system. Though their tactics are not unfamiliar in the present, they modelled a clarity of political analysis and purpose that magnified the power of their work. One need not look too far to find examples of this kind of clarity in the present—and by no means do I intend to suggest that any of the modern-day resistance lawyers discussed below categorically lack this clarity. But where this political clarity is not fully realized, there is an opportunity. It is an opportunity to use the process of lawyering to serve and magnify a broader political project . . . and it is an opportunity to create a more sustaining and powerful model of legal practice.

In the sections that follow, I outline the ways in which lawyers fighting the death penalty, working in criminal defense, and defending immigrants against deportation are all practicing in strikingly parallel ways to the resistance lawyers who fought against slavery in the courtroom. I conclude with a gentle suggestion that, for all these parallels, in each of these cases there is potential political energy being squandered by the failure to connect detailed strategic practice and broader political movements.

Before turning to these examples, I feel bound to recognize that I have only chosen examples of resistance lawyering from the political left. As I have said before, I do not mean to elevate the phrase “resistance lawyer” to any celebratory pedestal. Because the definition is contextual, what makes someone a resistance lawyer is not her specific politics, but her relationship with the system that she practices within. While I do insist that resistance lawyering means a thoughtful engagement with one’s politics, I *do not* insist that it implies any specific political commitment apart from a critique of the procedural legal system that a lawyer practices within.<sup>247</sup> Given this, it might seem all the stranger that I have chosen to focus on examples of resistance situated solely (roughly speaking) on the political left. I have three reasons for doing this: from small to large, (1) a desire to inspire, (2) an aversion to knee-jerk equivalencies, and (3) a broader point about critique of the law.

The first of these reasons is rooted in the nature of the project more broadly. Whenever a historian leaves the safety of the past and the archive and seeks to bring the historical narrative to bear on the present, the costs can be high.<sup>248</sup> For me in this case, the reason to bear these costs is that I think there are lessons to be drawn from these past lawyers that will be of use to present lawyers—in particular to present lawyers who are laboring against systems of racial, social,

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247. Take, for example, the important political differences between moderate and radical opponents of the death penalty, or between moderate and radical abolitionists, discussed *supra*.

248. It would be safer and perhaps advisable for me to simply tell the history and leave it at that. Recklessly, I refuse. For a summary of the professional perils of presentism and a defense of my now serial practice of braving those perils, see Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 482–83 (2017).

and economic oppression. In short, I think that there is material here to spark optimism in those struggles and, dare I say it, to inspire. Thus, the present examples that I draw on are those closest to the group of lawyers who I believe are likely to be inspired.<sup>249</sup>

My second reason is that while I recognize that the unwritten rules of the legal academy require a search for equivalencies across the political spectrum, I resist that requirement. When one looks for examples of conservative resistance lawyers on the model that I have proposed, fewer examples pop to mind. Take, for example, lawyers who oppose abortion and who seek to overturn *Roe v. Wade*. There can be no doubt that these lawyers are deeply committed to the substantive cause of outlawing abortion and have linked their practice to the political movement to achieve that end.<sup>250</sup> By and large, however, these lawyers are not engaged in direct service, nor are they practicing within a procedural regime that they seek to dismantle. Rather, they are impact litigators arguing before a federal judiciary whose legitimacy they generally do not reject, in the hopes of changing a substantive doctrine (*Roe* and its progeny).<sup>251</sup> More broadly, a survey of the issues taken up by conservative cause lawyers suggests that a) most of the struggles that they engage in are against substantive outcomes rather than against procedural regimes, and b) most of their work does not fit the model of a daily direct service practice.<sup>252</sup>

So, without claiming broadly that conservative cause lawyers cannot be resistance lawyers, I do assert that most lawyers on the right do not fit into the category as neatly as those examples that I do put forward.<sup>253</sup> Having made this broad observation, it would be a kind of false equivalence to shoehorn in a conservative example where it does not fit neatly.

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249. I do not intend to convey that my only audience is these lawyers struggling against inequality or that I do not think that the history has anything to say to other readers. Rather, more narrowly, it is an explanation for why I have chosen the examples that I have.

250. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 49–50 (2009).

251. One could make the argument that the line of cases from *Roe* to *Casey* to *Hellerstedt* defines something like a “procedural” framework for addressing restrictions on abortions under the undue burden test. Assuming this reading, lawyers who would outlaw abortion but who defend state restrictions on abortion under the undue burden test could be construed as resisting the *Roe* framework. I am happy enough to acknowledge this reading as plausible while also noting that this kind of impact work is distinct from the direct service triage practice that the examples below share with the abolitionist lawyers.

252. John P. Heinz, Anthony Paik & Ann Southworth, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 27 *LAW & SOC’Y REV.* 5 (2003).

253. One interesting counterexample to this claim is the radical libertarian criminal defense lawyer. Many libertarians today are critics of the criminal justice system and some flirt with the idea of prison abolitionism. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 *MICH. L. REV.* 259, 295 (2018) (discussing libertarian critiques to the criminal justice system). When such a lawyer chooses to become a public defender, she might be indistinguishable from a leftist colleague who agrees with them that the whole system should be dismantled. The trouble is that even though a libertarian public defender might disagree on *other* political issues with her leftist colleague, on this issue they actually share a politics.

This brings me to my third and broadest reason for choosing the examples that I have: legal systems and procedural regimes are, by nature, conservative rather than revolutionary. It hardly needs saying that legal process and legal practice—precedent, professional training, rules of ethics, etc.—act in a general way to preserve stability and slow the process of social change. If legal processes are, in the aggregate, inherently conservative toward the status quo distributions of power, wealth and privilege, then it should hardly be surprising that when we look for lawyers committed to destroying those processes from within, we should find more who are critical of the status quo than who defend it.

Stated more briefly and without celebrating resistance lawyering as heroic: lawyers who seek to dismantle legal regimes from within are more likely to embrace a critical view of the society upheld by those regimes. Indeed, it is precisely this critical view which I propose supplies the latent political power to the project of resistance lawyering in the first place. The abolitionist lawyers in this study were critics not just of the Fugitive Slave Law, or even of slavery: they were critics of the socio-legal order established by and entangled with slavery. So too, I propose, are present-day resistance lawyers more likely to be critics of the socio-legal order that is supported by and entangled with the ongoing unjust distributions of power, wealth, and privilege that they struggle against in court day after day.

### B. *The Death Penalty*

Lawyers fighting against the death penalty in the United States today should find the strategies of abolitionist lawyers familiar. Opponents of the death penalty wield delay, procedural obfuscation, and opportunism as powerful weapons in their struggle to keep the state from killing those convicted of capital crimes.<sup>254</sup> Beyond strategy, most lawyers fighting the death penalty also share a

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254. Some may object that this characterization unfairly (or at least unwisely as a matter of strategy) depicts lawyers opposing the death penalty as agents of delay rather than justice. I am sympathetic to the strategic concern, but I propose two responses to it. First, as a matter of judicial opinion, the assumption that lawyers for clients condemned to death will do anything possible to delay that outcome is already commanding a majority of the Supreme Court. For proof of this, note the Supreme Court's recent decision to allow the execution of Domineque Ray to go forward in Alabama despite the fact that Ray had a very strong Establishment Clause argument that Alabama's practice of allowing a Christian chaplain into the execution chamber but not an imam violated the First Amendment. Over Justice Kagan's strong dissent, the Court justified its decision to ignore the Establishment Clause claim by implying that it was simply a delaying tactic. *See Dunn v. Ray*, 239 S. Ct. 661 (2019) ("Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh Circuit."); *see also* Ilya Somin, *The Supreme Court's Recent Religious Liberty/Death Penalty Decision is Bad—But Not Quite as Bad as Many Think*, VOLOKH CONSPIRACY (Feb. 9, 2019), <https://reason.com/volokh/2019/02/09/the-supreme-courts-recent-religious-libe> [<https://perma.cc/K8UE-GZXY>]. There are good reasons to dispute the Court's insistence that all late-stage litigation amounts to delay. Lawyers for Ray and others understand themselves to be struggling not only for delay but also to preserve the dignity of their clients as they face execution. *See ACLU AL Comment on Decision to Stay the Execution of Dominique Ray*, ACLU ALA. (Feb. 7, 2019), <https://www.aclu.org/news/aclu-al-comment-decision-stay-execution->

relatively clear political mandate: abolition of the death penalty.<sup>255</sup> In strategy and in politics, the struggle against the death penalty is one of the clearest manifestations of the abolitionist model of resistance lawyering in our present legal landscape.

For the most part, my intention here is to highlight these parallels to prove that the historical model does have a present analog. Consider a representative death penalty case: a client comes to court charged with murder—often of a particularly violent and gruesome nature. More often than not that client is poor, and frequently she is from a marginalized community. Her first attorney is likely to be a public defender or publicly appointed counsel. Sometimes she has an excellent lawyer and is clearly guilty. Sometimes she suffers because of the trial lawyer’s lack of time<sup>256</sup> or lack of skill,<sup>257</sup> or the system’s stacked deck.<sup>258</sup> Whatever the reason for the death sentence, most committed opponents of the death penalty would argue that the sentence itself is unjust and must be resisted. Stepping in after a client has been sentenced to death, the anti-death penalty lawyer immediately works to slow down the process and use every tool available to save her client’s life.<sup>259</sup> A responsible lawyer fighting to keep her client alive will exhaust every procedural mechanism in her arsenal, from state and federal habeas to actual innocence claims. She will seek clemency from governors and presidents, look for loopholes to justify a new trial, and happily throw procedural roadblocks in the path of the courts. When the end result of a proceeding is likely

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dominique-ray [<https://perma.cc/954E-ZQUF>] (“So long as the state of Alabama is going to continue to have and use the death penalty, it has a Constitutional responsibility to preserve the dignity and equality of the people it puts to death.”).

These objections notwithstanding, if a majority of the Supreme Court already wrongly believes that all death penalty lawyers do is seek delay, it would be silly (and hubristic) of me to worry that recognizing the obvious kernel of truth at the heart of the belief poses a real strategic threat. That horse, I fear, has left the barn.

My second justification for drawing the connection is that I think that there is a latent, unclaimed power in claiming the goal of frustrating a system that you despise. Death penalty abolitionism is becoming increasingly mainstream. If the tools of the system can be used to end a person’s life at the hands of the state, why can’t those tools forthrightly be turned against the state itself—not only to save lives, but also to build the political power to change the system itself.

255. Not all lawyers who represent clients faced with the death penalty oppose the death penalty categorically. For example, the Innocence Project cautiously supports a “a moratorium on capital punishment while the causes of wrongful convictions are fully identified and remedied.” *The Death Penalty*, INNOCENCE PROJECT (Feb. 10, 2009), <https://www.innocenceproject.org/the-death-penalty> [<https://perma.cc/5K4R-5MWH>]. It is possible, of course, to oppose the death penalty as *currently administered* without opposing the penalty more broadly.

256. See *Public Defenders Speak Up and Push Back*, INNOCENCE PROJECT (Nov. 27, 2017), <https://www.innocenceproject.org/public-defenders-speak-up-and-push-back> [<https://perma.cc/24F4-FPNX>].

257. For a summary of the alarmingly high odds that a person sentenced to death will have had inadequate legal representation, see *Representation*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-penalty-representation> [<https://perma.cc/438A-3QHZ>].

258. See *NAACP Death Penalty Fact Sheet*, NAACP fn. i–ii, [http://www.naacp.org/latest/naacp-death-penalty-fact-sheet/#\\_edn1](http://www.naacp.org/latest/naacp-death-penalty-fact-sheet/#_edn1) [<https://perma.cc/ZX5D-HBYL>].

259. See Anthony Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. 325, 326 (1996).

to be the death of her client, anything she can do to forestall that end is valuable. And then, after creating as much delay as possible, the lawyer will feel no shame in filing a claim under the Eighth Amendment that the delay itself has constituted cruel and unusual punishment.<sup>260</sup>

The purpose of all of this is not difficult to tease out: the duty of a lawyer fighting the death penalty is to keep her client alive for as long as possible. If the machinery of state-sponsored death cannot be outlawed, it must be stopped by grinding the wheels of the machine to an expensive and long-drawn-out halt. For most opponents of the death penalty, the ultimate penalty itself is illegitimate and therefore any legal tactic that would prevent it is fair game.

Without wading too deep into the grasses of a complicated field, it does not require much creativity to see parallels between the strategies employed by lawyers working for the abolition of slavery and the strategies employed by lawyers working for the abolition of the death penalty. In both cases, the stakes of the work are almost as high as they can be: life and liberty. In both cases, nearly every legal tactic is on the table because the threatened endpoint of the legal process (remanding the alleged fugitive or killing the accused) is the target of opposition.<sup>261</sup> As a result, for most lawyers who commit their careers to it, lawyering against the death penalty is a clear example of modern-day resistance lawyering.

But if the tactics in the courtroom are familiar, there are subtle differences in the present-day politics of those tactics. Like abolitionists in the 1850s, opponents of the death penalty disagree sharply in the extent to which they indict the legal system with illegitimacy. The most radical opponents see the death penalty as a proxy for a broadly broken criminal justice system that creates and perpetuates deep racial inequalities.<sup>262</sup> More moderate opponents are willing to draw lines between the death penalty (“death is different”) and the broader problems with the criminal justice system.<sup>263</sup> In themselves, these political

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260. In a string of death penalty cases, Justice Breyer has dissented from denials of certiorari that allowed the executions to go forward, arguing that “the death penalty, as currently administered, suffers from unconscionably long delays, arbitrary application, and serious unreliability.” See *Jordan v. Mississippi*, 138 S. Ct. 2567, 2568 (2018) (Breyer, J. dissenting from denial of cert.) (also citing previous dissents from denials of cert in *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017), *Boyer v. Davis*, 136 S. Ct. 1446, 1447 (2016), and *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995)).

261. Subject, of course, to the same caveats as were present in the context of lawyering against the 1850 Law. Different lawyers opposing the death penalty will define the legal process that they object to differently.

262. Bryan Stevenson is one of the most well-known and eloquent proponents of the view that the death penalty is a symptom of a much deeper disease. See, e.g., Bryan Stevenson, *A Presumption of Guilt*, 64 N.Y. REV. BOOKS 12 (July 13, 2017).

263. There are many death penalty abolitionists who are not prison abolitionists or even vociferous critics of the broader criminal justice system. For an account of the ways in which the two problems diverge, making death “different,” see Carol Steiker & Jordan Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. OF CRIM. LAW 189, 197–204 (2014). Another fissure runs between advocates who advocate for a focus on innocence claims and those who argue that such a focus does a disservice to the broader project of abolishing the death penalty. See Carol

differences are not unfamiliar. What has changed is that the work of the lawyers in the courts is more distant from these political differences than was the case in the struggle against slavery.

This is a more complex and nuanced point than I have the space to make adequately here, but the rough observation is this: lawyers fighting the death penalty fight their battles in court sometimes without developing or advancing a clear political analysis of the stakes of those battles. In the present, the idea of a lawyer as a zealous advocate is so regnant that a lawyer fighting the death penalty in court can easily slip into an instrumentalist pose wherein her task is simply to delay or avoid the penalty *for her client*.<sup>264</sup> In such a pose, the lawyer need not ask or answer the question of precisely how her work is advancing the broader cause of legal change. That question might, in fact, seem irrelevant. The problem is not that the lawyer has the wrong politics, but that she has not drawn the connection between her practice and the broader political struggle as sharply as she could. The problem is not that her advocacy seeks to resist the wrong legal system, but rather that she hasn't identified the system with sufficient clarity to leverage her practice within it as part of her broader critique of that system.

It would be unfair to impute this description of underbaked political analysis to all or even most lawyers resisting the death penalty. Indeed, the evidence suggests that many lawyers are as clear as their 1850s colleagues about what systems they are targeting and how their legal work within and against those systems serves their movement goals.<sup>265</sup> Rather, the point is that this political fuzziness is enabled by the structure of the practice in the present. If this is right, then the story of resistance lawyering against slavery has two lessons to teach today's lawyers. First, the work that lawyers do in the courtroom creating delay and confusion can be a powerful tool for drawing public attention and projecting political argument.<sup>266</sup> The clearer a lawyer is about the potential

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Steiker & Jordan Steiker, *The Seduction of Innocence: The Attractions and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY, 607–24 (2005).

264. Anthony Alfieri has charged present-day death penalty abolitionists with surrendering to the temptations of “instrumentalism” and thereby sacrificing the moral power of community narrative as a tool in both the courtroom and the broader political struggle. See Alfieri, *supra* note 259, at 330–45. Alfieri is primarily concerned with the ways that dominant legal strategies end up silencing the voices of the impacted defendants. That concern is cognate to a concern that litigation is inadequately attentive to a broader political campaign.

265. One example of this is the Equal Justice Initiative of Alabama, which combines anti-death penalty advocacy with a much broader political and cultural campaign to recognize and come to terms with the history of racialized violence in the American criminal justice system. The clearest example of this is The Legacy Museum and the National Memorial for Peace and Justice, both of which aim to create a context in which visitors can encounter and reckon with the history of racial oppression that expresses itself in the present criminal justice system. See *Museum and Memorial*, EQUAL JUST. INITIATIVE ALA., <https://museumandmemorial.eji.org> [<https://perma.cc/88TL-UP9M>].

266. There are, of course, essential differences between the present and the past in terms of the public's attention to what happens in court and thus the possibilities for lawyers who seek to speak to the public through their practice. In the absence of television, movies, Facebook, etc., the drama of “real life” in the courtroom was much more salient in the public mind in the nineteenth century. Newspapers from the 1850s were frequently dominated by reports of what had happened in the courts that day. In

connections between her courtroom practice and a broader political project, the likelier she will be to seize her practice as a tool when it comes to hand.

The second lesson from the past is that political clarity can help strengthen a thick web of political and social solidarity. Although solidarity can seem like a squishy term, authentic solidarity is the very foundation of transformative social movements. The lawyers fighting the 1850 Law were deeply personally enmeshed in activist communities that opposed slavery. When an alleged fugitive was arrested, lawyers were on the scene because they were part of powerful grassroots networks that were keeping vigilant. The lawyers' work emerged from and was continuous with the work of these networks. There is no question that some of the most interesting radical lawyering that is happening today follows this model.<sup>267</sup> In the case of lawyers fighting the death penalty, however, the work is frequently far removed from this immediate political context. It is procedural and legalistic, which is fine, but it is not always taking place within a context of collective activism. This remove is partly a product of the realities of anti-death penalty lawyering: it is a slow-moving appellate practice that usually operates in highly technical doctrinal areas. One consequence of a forthright articulation of resistance lawyering might be to push against this remove and affirmatively foster a thicker solidarity between lawyers and movement actors. The clearer a lawyer can be about her politics, the more able she will be to build political community around her work. The model from the past may be a tool to push back against atomized, individual, instrumental practice and to find ways to make that same work part of a robust system of collective political action.

### C. *Criminal Defense*

Criminal defense lawyers practicing in the contemporary context of mass incarceration frequently find themselves using the tools of a hostile system both to achieve results for their clients and to challenge the system itself. Although the politics of what resistance means in the context of criminal defense can be complex, there is value in considering what present-day defense lawyers might learn from the abolitionist lawyers in this study.

As with all the cases discussed to this point, what it means to be a resistance lawyer in the area of criminal defense is contextual. A threshold requirement for resistance lawyering is that the lawyer uses the tools of a system in order to oppose or dismantle that system. For many, perhaps most, criminal defense

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other words, a "normal" trial was much more of a public spectacle than it is today. That said, these differences can be overstated. Today, it takes very little for a piece of news to spiral out to a huge audience and be seen by millions of people. Although the daily procedures of courts may not always be front-page news anymore, one need only look to the life of the OJ Simpson trial in our popular culture to see how powerful what happens in court *could* be.

267. See generally Jim Freeman, *Supporting Social Movements: A Brief Guide for Lawyers and Law Students*, 12 HASTINGS RACE & POVERTY L.J. 191 (2015) (gathering and describing a wide array of present and historical examples of lawyers working in partnership with grassroots social movements).

lawyers, the criminal justice system itself is not the target institution. For these lawyers, the criminal justice system is not an entirely lost cause. Like the abolitionist lawyers who retained their faith in a broader conception of law and justice, this subset of lawyers retains a faith in the promise of a functional system of criminal justice. For some, that system is a vehicle for adjudication and justice that can be “worked clean” by vigorous, zealous advocacy on behalf of defendants.<sup>268</sup> For others, the critique is more radical and their faith in the system is linked to a more revolutionary possibility of a criminal justice system fundamentally reconfigured—though still with the structural roots of the system we have today.<sup>269</sup>

For criminal defense lawyers who retain faith that the criminal justice system can be legitimate, there are any number of ways that they might still be construed as (and construe themselves as) resistance lawyers. Within the confines of criminal procedure are hundreds of strands of procedural processes that one might oppose in a limited way. Opponents of life without parole, or three strikes rules, or mandatory minimums could condemn the sentencing regimes that lead to those results without rejecting the idea of sentencing altogether. The lawyers who work within those sentencing regimes while opposing them and hoping to frustrate them clearly fit the contextual model of resistance lawyers. Likewise, lawyers may oppose state procedural rules requiring that some juveniles be tried as adults and seek to undermine and frustrate those rules while practicing within their ambit.<sup>270</sup> To the extent that these lawyers resist what they

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268. One familiar logic behind this view is that the lack of funding for adequate public defense poses a threat to the legitimacy of the criminal justice system. Eve Primus argues that “[t]he lack of funding, excessive caseloads, minimal training, lack of independence, and failure of oversight make it impossible for defense attorneys to do their jobs. The result is a breakdown in the adversarial system that results in wrongful convictions and undermines the legitimacy and fairness of the system.” Eve Brensike Primus, *Defense Counsel and Public Defence*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESS 121, 128 (Erik Luna ed. 2017). Primus’ argument presupposes that legitimacy could flow from a robust and well-funded adversarial system.

269. For an example of a radical faith in the possibility of a criminal justice system, see Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017). Simonson is an unstinting critic of the current state of the criminal justice system, calling it undemocratic and “an unequal, racialized system of justice.” *Id.* at 1610. She is even a critic of proposals for more public participation in the system through deliberation and consensus. Instead, Simonson champions “bottom-up” forms of participation in the system, including resistance and contestation of the existing system. *Id.* at 1622. In other words, Simonson invites foundational challenges to the status quo operation of the criminal justice system from the grassroots. This invitation, however, is not to burn the whole thing down, but rather a suggestion for how to achieve a radical promise latent in the system itself. If, as she argues, collective resistance can help create “democratic criminal justice,” then the criminal justice system itself retains the promise of legitimacy. *Id.* at 1609. It is worth noting that Simonson may be moving away from this radical faith to something more destabilizing. *But see* Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 299 (2019) (arguing for the importance of keeping criminal legal institutions open to engagement with “a set of beliefs in the need for decarceration and even abolition held by subsets of the public that have for too long been excluded from public discourse”).

270. Perhaps the most famous example of this kind of resistance lawyering is Bryan Stevenson’s story of the time that he made a motion in court to try his juvenile client not just as any adult, but as a

see as unjust regimes both with the procedures of those regimes *and* by reference to a broader view of legal legitimacy rooted in the promise of a just criminal justice system, they are resistance lawyers under the definition that I put forward above. As such, many, if not most, public defenders will likely fit into the category in some context.

Stipulating that there are many forms of resistance that accept the legitimacy of the criminal justice system, there is another more thoroughgoing form of criminal defense resistance lawyer. Some defense lawyers question the foundational legitimacy of the entire criminal justice system.<sup>271</sup> These lawyers are the abolitionists in favor of “[a]bandoning carceral punishment and punitive policing” altogether.<sup>272</sup> Lawyers who hold these views question not only the legitimacy of specific procedural mechanisms within the criminal justice system, but the very purpose and structure of the system. Lawyers with this politics practicing as criminal defense lawyers will always be engaging strategies of resistance because they are using the tools of a system that they consider illegitimate to try to tear that system down.

The first important observation of the present in light of the past is that in the world of criminal defense there are resistance lawyers of many stripes. The array of tools that criminal defense lawyers use to keep their clients out of prison is broad. These sometimes include delay and often include engaging in procedural legerdemain and muddling. As was true in the context of slavery, these strategies can be understood both as the product of zealous advocacy and sometimes as the product of a more explicit political project aimed at an unjust procedural regime. While it may be difficult to distinguish between the zealous advocate and the resistance lawyer in individual cases, there can be little doubt that not all criminal defense lawyers are “simply” zealous advocates.

Stipulating that many criminal defense lawyers are to some extent resistance lawyers, the next question is what lessons there are to be learned from the abolitionist lawyers in this study. First, consider the confluence of hundreds or thousands<sup>273</sup> of resistance lawyers on the one hand and the growing salience

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seventy-five-year-old white corporate executive. See Pete Brook, *In Conversation with Bryan Stevenson*, MEDIUM (Nov. 12, 2014), <https://medium.com/@brookpete/in-conversation-with-bryan-stevenson-f366c00701d2> [<https://perma.cc/7XE6-M3V6>]. This is an archetypal instance of resistance lawyering where Stevenson uses the system’s own mechanisms to critique the system’s internal logic, both for the audience in the courtroom and the audience of public opinion beyond.

271. See *About*, ABOLITIONIST L. CTR., <https://abolitionistlawcenter.org/about> [<https://perma.cc/74B2-FNJ8>]. In a somewhat different context, Benjamin Levin draws a distinction between critics of the current state of “over” incarceration who argue that we are imprisoning *too many* people and critics of “mass” incarceration who argue that the very idea of prison may be the problem. See Levin, *supra* note 253 at 308–18.

272. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1160 (2015).

273. In 2007, the Bureau of Justice Statistics reported that there were 4321 full-time public defenders employed by states across the United States. See LYNN LANGTON & DONALD FAROLE, JR., SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES, 2007, BUREAU JUST. STAT. (Sept. 2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf> [<https://perma.cc/5ZUP-NWNZ>].

of the movement against mass incarceration on the other. The struggle against expanded and overwhelming incarceration in the United States has flowered into one of the most powerful political and social movements of our time. Everywhere you look, lawyers are playing important roles in that movement—some of them current or former criminal defense lawyers. Puzzlingly, however, the thousands of cases that lawyers fight within the criminal justice system every day are *not* front and center in the movement.<sup>274</sup> By and large, the daily defense of accused people is not a primary source of political energy or a focus of public attention.

This is a complex observation, and there are several possible reasons why it might be true.<sup>275</sup> But without overstating the case, one of these reasons may be that resistance lawyers in the defense bar have not maximized the potential political power of their daily practice. One reason for this is that many criminal defense lawyers are simply too busy to have articulated the kind of clear political analysis of their work that would facilitate connections between daily practice and politics. In my (admittedly informal) survey of a number of criminal defense lawyers, I asked a series of questions that have yielded revealing answers. First, I asked whether the system was functional or broken. Nearly everyone I spoke to answered “broken.” The next question is: can it be fixed by tinkering or do we need to tear it down? Most (but fewer) respondents say “tear it down.” From this beginning, you would think that most defense lawyers are abolitionists dedicated to undermining the criminal justice system as a whole. And yet, upon further questioning, I have not found that level of political unity. When asked whether “tear it down” meant abolishing police or abolishing prison, many I spoke with demurred. The system is deeply flawed, the argument goes, but tearing it down all the way goes too far. In conversation after conversation, I found myself pressing, trying to understand which systems these lawyers opposed and which they retained faith in. The answers were always slightly different<sup>276</sup> and always fascinating and thoughtful. What struck me most, however, was that most of

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274. In saying that the cases are not front and center I am saying neither that cases are never at the center nor that public defenders themselves are not front and center. In fact, taking New York City as an example, there are powerful recent examples of public defenders banding together to resist city and state policies. Defenders from organizations across the city led a movement to restore power to the Metropolitan Detention Center in Brooklyn during a period of extreme cold. They also banded together to challenge the Manhattan District Attorney’s restrictive policy on pre-indictment discovery. See Renate Lunn, *Electrifying Results of Defenders Uniting*, NAT’L ASS’N PUB. DEFENSE (Feb. 5, 2019), [https://www.publicdefenders.us/blog\\_home.asp?display=746](https://www.publicdefenders.us/blog_home.asp?display=746) [https://perma.cc/HPF5-H6S7].

275. A few examples: most cases end in plea bargains which are not, by their nature, ideal vehicles for oppositional political rhetoric; public defenders are repeat players with both prosecutors and criminal court judges and it would be bad for their clients in future cases if they insisted on too much public attention; we live in a world where the day in and day out matters of court are less captivating than they were in the nineteenth century; etc.

276. For example, some would abolish plea bargaining altogether; others thought it would be valuable if the power in the relationship were better distributed. Some would eliminate all misdemeanor charges for possession of marijuana; others advocated reforms in how drugs and drug offenses were policed and prosecuted.

these lawyers did not think of these questions as urgent or directly relevant to their daily practice. These kinds of reflections were a luxury.

Let me be clear that I do not mean this as a criticism or an indictment—criminal defense lawyers are already unconscionably overburdened.<sup>277</sup> Rather, these conversations highlighted the extent to which criminal defense lawyers either did not see their daily practice as directly engaged in a political struggle or did not see that struggle as immediately relevant to their work. For most of these lawyers, their primary and overriding commitment was to their client. The first priority in every case was to keep their client out of prison or at least to minimize their client's sentence. On its face, there is nothing wrong with this. Indeed, it is consistent with the orthodoxy of zealous advocacy that all lawyers are trained in, and it is unquestionably responsive to the needs of the individual facing punishment. Under this view of the lawyer's role, however, the politics that have brought the lawyer to that practice are not only unnecessary to explore but may pose ethical problems.

The trouble is that the lawyers I was speaking to were not mere zealous advocates; they were almost all resistance lawyers of some stripe. They did not come to their work with only a simple desire to win cases for their clients—they came with critiques of the system they were practicing in and with aspirations about what that practice might accomplish. The story of the abolitionist lawyers in this study shows how powerful a daily legal practice infused with this kind of political critique can be, both inside and outside court.

This is the source of my gentle proposal that more and deeper political analysis could be a tool for magnifying the impact of criminal defense lawyers' daily practice. The clearer that lawyers with political commitments are about their politics, the more potential there is for them to find ways to link their practice to those politics. Precisely how those links will work in practice is beyond the scope of this project. Let me instead propose three possible ways that this clarity *might* change the practice and power of these resistance lawyers.

First, and most concretely, are a set of courtroom strategies that might subtly change. One example could be as simple as the language that a lawyer uses to describe her client—e.g., person instead of felon. Another example might occur in the many forked choices of trial advocacy. Take, for example, a lawyer who believes that the practice of trying juveniles as adults is systemically unjust. When she attends an arraignment for a juvenile client, of course she will argue that her client should not be tried as an adult and of course she will employ whatever strategies she has at hand to avoid that result. These might include trying to avoid judges more inclined to try juveniles as adults, pleading to charges that do not invoke the procedure, etc. Beyond fighting these instances one by one, however, a lawyer with a clear and developed critique of the practice

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277. See Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DEN. L. REV. 389, 392 (2018).

of trying juveniles as adults is more likely to also work on systemic responses to the problem. These might include advocating to keep police out of schools, advocating for restorative justice programs for young people, or creating internal office protocols to ensure that clients at risk of these charges get whatever strategic interventions are required as early as possible. More broadly, she will use her bully pulpit in court, such as it is, to attack the practice in the aggregate as well as the specific.<sup>278</sup> The changes in tactics here may be small, but this kind of small shift can be and has been meaningful in the aggregate.<sup>279</sup>

Related to these changes *inside* the courtroom, there may be strategies outside the courtroom that would flow from a more forthright embrace of resistance lawyering. Once the political project within the courtroom is clear, lawyers can draw thicker connections to political movements outside the courtroom.<sup>280</sup> This means more than lawyers marching in protests or participating in social movements. It means drawing the kind of systemic linkages that construe the courtroom as a site of political struggle. One example of this kind of connection comes from the Bronx Defenders Organizing Project. Flowing out of the daily work of the public defenders working at the Bronx Defenders, the organizing project has treated that legal practice as a site of community organizing and power building. The members of the organization are both clients and members of the community, working on projects linked to the broader political goals of reforming the oppressive criminal justice infrastructure in New York City.<sup>281</sup>

This example recalls the intimate connections that existed between the organized antislavery movement and the abolitionist lawyers discussed above. In our present political context, resistance lawyers have been making more of these connections between movement and practice<sup>282</sup>—and there is room for more.

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278. Here, again, the example of Bryan Stevenson's motion to try his client as a rich white corporate executive is instructive. See Brook, *supra* note 270.

279. To take one further example: imagine a lawyer with a choice of two defense strategies. The first would be to implicate two other people in the crime and thus to exonerate her client while convicting two others. The second would be to present a strong alibi. Assuming that both strategies would be likely to succeed, a pure zealous advocate would likely pursue both aggressively without any qualms. A lawyer who was also a prison abolitionist, however, might think twice about a strategy that would send two other people to prison. While she might feel bound to employ the strategy if it had even a marginally higher probability of success for her client, she might seek to first raise the alibi if it was possible to win on that score without incriminating others.

280. Also, as already noted above, defense attorneys can draw connections to other offices through lines of political solidarity. See Renate Lunn, *Statement from the Attorneys of Color Caucus of the Association of New York Legal Aid Attorneys*, NAT'L ASS'N PUB. DEF. (May 2, 2016), [https://www.publicdefenders.us/blog\\_home.asp?display=131](https://www.publicdefenders.us/blog_home.asp?display=131) [<https://perma.cc/B5XR-456Q>].

281. The current goals of the project's campaign are to: "1. Stop the abuse of 'stop-and-frisk'; 2. End discriminatory policing; and 3. Increase NYPD accountability and transparency." *The Bronx Defenders Organizing Project*, BRONX DEFENDERS, <https://www.bronxdefenders.org/programs/the-bronx-defenders-organizing-project> [<https://perma.cc/65ZL-8P3Q>].

282. In 2016, a public defender in Las Vegas wore a "Black Lives Matter" pin into court and was asked by the judge to remove it. The incident generated press attention and was precisely the kind of

Finally, the kind of political clarity that I am proposing here might help criminal defense lawyers have longer and happier careers doing the work. As I noted above, the abolitionist lawyers modeled a resistance lawyering practice that connected daily work with solidarity, political movements, and power. With the danger of burnout hanging low over the heads of overworked and underpaid criminal defense lawyers, there is value in any strategy to make the work more sustainable over the long term. Considerable thought has been devoted to the problem of burnout in criminal defense work and how to avoid it.<sup>283</sup> Without questioning or supplanting any of that work, I propose here that to the extent that the solidarity and political clarity of reflective resistance lawyering can fight against burnout more broadly, it could certainly do the same in the context of criminal defense.

Of course, once a broader political project comes into view, new ethical and practical questions arise, mirroring the ones facing the lawyers fighting the 1850 Law. For instance, if a criminal defense lawyer sees her job both as defending her clients and as dismantling the criminal justice system, some instances may arise (as they did for the lawyers in the Anthony Burns case) where the interests of her client are at odds with the broader project she is committed to. A thoughtful resistance lawyer will struggle to resolve these conflicts and will likely resort to the conventional ethical commitment to serve her client first. But the story of the abolitionist lawyers highlights that these moments of conflict are also moments of potential political energy. The more clearly resistance lawyers see these moments of possibility, the more promise there is that they can make something of them.<sup>284</sup>

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connection between movement and practice that characterized the work of the abolitionist resistance lawyers. See David Ferrara, *Lawyers Pack Courtroom in Support of 'Black Lives Matter' Movement*, LAS VEGAS REV.-J. (Sept. 22, 2016), <https://www.reviewjournal.com/local/local-las-vegas/lawyers-pack-courtroom-in-support-of-black-lives-matter-movement> [<https://perma.cc/9PWF-2EPP>].

283. I am hardly the first to note that criminal defense lawyers risk burnout or to suggest ways of conceiving of the practice to militate against that burnout. Charles Ogletree famously argued that in order to sustain the work, defense lawyers must look beyond zealous advocacy and find motivation in empathy for the client and a sense of heroic combat with “the system.” See Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1242–43 (1993). Abbe Smith reframed Ogletree’s prescription, arguing that for defense lawyers to avoid burnout they should commit to a three-pronged approach: “respect for client, pride in craft, and a sense of outrage about inequality, injustice, and the routine abuse of power . . .” Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1208 (2004).

284. To see this clearly, imagine John Jolliffe arguing that his client was not the person that the owner alleged, with his proof being that he had the “real” slave here in the courtroom. It is nearly impossible, I think, to imagine that given his politics, Jolliffe would have been happy to send another human to the “seething hell of American slavery.” See WEISENBURGER, *supra* note 69, at 124. Rather, he would have done everything he could to make the argument while also protecting the other person. And all the while railing against an institution that would force such a monstrous choice.

*D. Immigration*

Lawyers working to protect undocumented residents from deportation represent a third category of possible present-day resistance lawyers. I will hardly be the first to compare our present immigration policy with the Fugitive Slave Law of 1850.<sup>285</sup> In both cases the federal government has created a machinery to litigate who may be a resident and citizen and who does not have sufficient status to claim state inclusion and protection. Both instances involve versions of sub-judicial summary process the scales of which are tipped against the vulnerable defendant. In both cases the stakes facing the defendants are dramatically high: exile, separation from family, the risk of bodily harm and death.

Given these similarities, it is no surprise that the strategies employed by lawyers fighting deportations can look strikingly similar to those employed by lawyers fighting the 1850 Law. As with slavery, the value of delay to an undocumented immigrant facing deportation is more than just an opportunity to put on a better case. It means more time with her family and more safety from whatever dangers she may face upon return. Given this, it is not surprising that delay is a key weapon in the arsenal of the immigration lawyer.<sup>286</sup> Relatedly, procedural complexity and involving multiple jurisdictions both serves the interest of delay and creates more chances for a good outcome. Immigration lawyers use habeas petitions to take cases out of the hands of immigration judges just as lawyers for alleged fugitives used habeas petitions to state and federal judges in the hopes of muddying the waters about who decides the outcome of a case.<sup>287</sup>

In fact, the parallels in strategy are sometimes eerily close. In a number of recent cases, lawyers representing undocumented clients have sought the help of state and municipal law enforcement to protect their clients from federal custody and deportation. In one striking recent case a public defender representing an undocumented client was in a New York City court for a routine hearing when

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285. For a small sampling of recent comparisons in the popular press and the academy, see Jeffrey M. Schmitt, *Immigration Enforcement Reform: Learning from the History of Fugitive Slave Rendition* 103 *GEO. L. J. ONLINE* 1 (2014); Sean Trainor, *What the Fugitive Slave Act Can Teach Us About Sanctuary Cities*, *TIME* (Feb. 7, 2017), <http://time.com/4659391/sanctuary-cities-fugitive-slave-act> [<https://perma.cc/69KL-DHUV>].

286. It is beyond question that immigration attorneys do what they can to keep their clients in the country (and out of detection) for as long as possible. Pointing this out raises some of the same strategic questions that I addressed when discussing the ways in which death penalty lawyers employ delay. Here it simply bears repeating that the concern that immigration lawyers are employing delay on purpose is already afoot. See Miriam Johnson, *Immigrants Use Asylum Applications to Delay Possible Deportation*, *WALL ST. J.* (Dec. 17, 2016), <https://www.wsj.com/articles/immigrants-use-asylum-applications-to-delay-possible-deportation-1481976003> [<https://perma.cc/J5WL-AF7H>]. Given this, it is not entirely clear that naming it and putting it in strategic conversation with the work of lawyers fighting slavery has any cost in the present.

287. See Zoey Jones & Andrea Saenz, *The Great Writ: Challenging Illegal Immigration Detention Through Habeas Corpus*, 42 *CHAMPION MAG. (NAT'L ASS'N CRIM. DEF. LAW.)* 38 (Apr. 2018).

she learned that ICE agents were waiting outside the courtroom to arrest her client. The lawyer convinced the judge to set her client's bail too high to be met so that the client would be taken to Rikers in the custody of the New York police and thus out of the reach of ICE.<sup>288</sup> This story, and others like it, recall the creative efforts of lawyers for Thomas Sims and Margaret Garner who sought to use state criminal processes to keep their clients out of the hands of federal authorities.

These striking strategic parallels suggest a robust mode of resistance lawyering wherein lawyers oppose the machinery of deportation by seeking to frustrate it.<sup>289</sup> Immigration lawyers differ as widely as criminal defense lawyers with respect to whether and which system of legal procedure they oppose. Some lawyers believe in the idea of a functional and just immigration system but oppose the particularities of the system that we have.<sup>290</sup> Others, like prison abolitionists, are more radical. They believe that all restrictions on immigration are unjust and advocate for open borders.<sup>291</sup> Lawyers from both camps can be understood as resistance lawyers in context.

Given these parallels, it is no surprise that many immigration lawyers fully embrace the position of resistance lawyering. There is a long tradition of lawyers working with immigrants against deportation who embrace what Sameer Ashar has called a “recessive strand” of lawyers who seek to “challenge the [legal] superstructure through the support of activist capacity building and the use of more critical discursive frames.”<sup>292</sup>

At the same time, the gap between movement politics and daily practice can still exist for immigration lawyers. Of course, as with the other examples here, not all immigration lawyers need be resistance lawyers in any sense. For those who do identify that way, there is an ongoing question as to how to connect a broader critique of the legal system they practice within to their daily practice of keeping their clients from being deported.

Another informal survey suggests that the reasons for this are familiar. Many immigration lawyers that I spoke with had complex feelings about the system of immigration courts. On the one hand, they were critical of the ways

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288. See Jonathan Blitzer, *The Trump Era Tests the True Power of Sanctuary Cities*, NEW YORKER (Apr. 18, 2017), <https://www.newyorker.com/news/news-desk/the-trump-era-tests-the-true-power-of-sanctuary-cities> [<https://perma.cc/R3NT-ESJK>].

289. Immigration lawyers, like abolitionist lawyers, are surprisingly successful in their efforts to oppose deportations. See AM. IMMIGRATION COUNCIL, *supra* note 232 at 15.

290. For a statement of a “left” position on immigration that does not embrace open borders, see Duane Campbell, *Toward a Left Position on Immigration*, DEMOCRATIC SOCIALISTS AM. (Dec. 17, 2018), <https://www.dsusa.org/weekly/toward-a-left-position-on-immigration> [<https://perma.cc/TMG3-RLF3>].

291. See, e.g., Steven Sacco, *The Practice of Immigration Law as Manumission*, OPEN BORDERS: THE CASE (Apr. 24, 2017), <https://openborders.info/blog/tag/immigration-law> [<https://perma.cc/BLP6-9PA3>].

292. Sameer Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 1464, 1496 (2017).

that immigration judges are not fair fora (no right to an attorney, summary process, direct executive control).<sup>293</sup> On the other hand, they all had stories about immigration judges who were willing to give their clients a fair hearing and were quick to note that they often got good outcomes in those courts. Lawyers in this complex position do not always understand themselves to be practicing within a system that they oppose, and the label of resistance lawyering can sit awkwardly. Even so, when pushed, most lawyers in this category *do* have structural critiques of the procedures they practice within. Moreover, most are deeply committed to the substantive position that the United States is deporting far too many people. This means that a search for political clarity modeled on the abolitionists might reveal nodes of political possibility between practice and movement that are worth uncovering.

The case is simpler for radical immigration lawyers who advocate for open borders and the abolition of the nation-state. For these lawyers, a forthright embrace of resistance lawyering means not only the possibility of a thicker connection between practice and politics, but also a richer intra-movement conversation. In struggles against injustice, everyone in the struggle can be tempted to claim the mantle of most heroic or most radical. Solidarity of political purpose is important, but it can also be an impediment to the kind of debates among allies that are required to propel mature political movements. Moderate “rule of law” abolitionists disagreed with immediatist abolitionists in the 1850s. Rule of law opponents of the death penalty disagree with radical abolitionists today. So too do rule of law criminal defense attorneys disagree with prison abolitionists today, and so too do believers in the possible value of immigration courts disagree with supporters of open borders today. These disagreements can be confusing and crippling if they go unstated. But if they are aired and explicit, then lawyers and movement actors can find strategic common ground upon which to build bridges between practice and movement politics.

### *E. Conclusions*

It would be easy to overstate the importance of the present lessons from the history of resistance lawyering against slavery. Stepping back, then, let me close with four points of emphasis. First, slavery was a problem too large to be attacked directly by lawyering. Like the enormous and intractable social problems that we face today (mass incarceration, racial and economic injustice, deportation), slavery could not be sued out of existence. To be effective, lawyering against slavery had to be part of a broader political strategy—and the legal cases arising out of the Fugitive Slave Law of 1850 were powerful opportunities to fight the institution by proxy in the press and in the hearts and minds of the public.

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293. See David Hausman, *How Jeff Sessions is Attacking Immigration Judges and Due Process Itself*, ACLU (Oct. 1, 2018), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges> [<https://perma.cc/5BNH-AVXZ>].

Second, resistance lawyering was the dominant tactic used by abolitionist lawyers to fight these proxy battles. Lawyers fighting the Fugitive Slave Law of 1850 saw that law as anathema and illegitimate. They resisted the law in coordinated partnership with powerful grassroots movements and sought to undermine it using the very tools and procedures provided by the law. Through delay, procedural obfuscation, and opportunism they both increased the chances that their clients would end up free and turned the courtrooms into powerful sites of political argument and contestation.

Third, resistance lawyering as a dynamic, daily set of practices got results in court. The lawyers who opposed the Fugitive Slave Law of 1850 were instrumental in helping many clients—more than had previously been thought—to end their entanglement with the law as free people. Despite the ethical conflicts that sometimes flickered at the edges of these cases, resistance lawyering was also effective politics, and even (perhaps especially) the losing cases became important political flashpoints for organizing and magnifying the power of antislavery politics.

Fourth and most speculatively, while the tactics of resistance lawyering are alive and well in many contexts today, and while those tactics are often successful in individual cases, the explicit political engagement of the abolitionist lawyers should be a lesson and an inspiration for present lawyers. The story of the antislavery lawyers shows the power of direct representation as a proxy battle in a broader political movement. It shows how a clear political analysis and a deep connection with movement activists can transform a triage legal practice into a tool in a broader project of social change.

Those of us committed to social change are not accustomed to telling optimistic stories about lawyers and social change, either historically or in the present. The law is too often dismal and practice within it can feel like swatting mosquitos in a swarm. So too are the courts often dismal, from *Dred Scott* to *McCleskey* to *Shelby County*, entrenching status quo inequalities and making heroic lawsuits seem like lost causes. But the story of these resistance lawyers is an optimistic one. It is a story of lawyers using the courts as a site of political contestation and winning—sometimes winning good results for their clients, sometimes winning the public argument, and sometimes both.<sup>294</sup> This history suggests that there is reason to be optimistic about both the power of resistance lawyering in the present and the potential of resistance lawyering in the future.

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294. For a full examination of the ways in which movement lawyers can win by losing, see Doug NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2010).

