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### Judicial Solidarity?

Daniel Farbman

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# Judicial Solidarity?

**Daniel Farbman\***

*We are living in a moment where open and principled resistance to law and legal order are a part of our daily lives. Whether in support of Black Lives Matter or in opposition to mask mandates, people are in the streets resisting. Over the last decade, the perception of the fixity of our legal order has eroded and so, too, has the stability of our consensus that legality and morality are aligned. In this moment, the visibility and viability of resistance to law and civil government through social movements have surged. With the increasing salience of civil resistance resurfaces an old question: can (and should) judges seek to stand in solidarity with movements engaging in civil resistance? The classic answers to this question take two forms. Judges should either enforce the law and punish the civil resister, or, if they cannot do so in good conscience, they should resign. These answers position the judge outside of and aloof from the political and social struggles that the resisters represent. It follows from this aloof position that judges cannot be in solidarity with civil resistance aimed at legal change in their official capacity. This Article questions the stability of the mainstream conclusion. By focusing my attention on judicial responses to civil resistance against the Fugitive Slave Law of 1850, I return to one of the most influential sources of our collective sense of judicial capacity for political resistance. Through my own original archival research, I revisit Robert Cover's conclusions about judicial timidity in Justice Accused. Against extensive evidence confirming Cover's bleak view, I expose and examine one judge's contrary argument. That judge, Ebenezer Rockwood Hoar, was a neighbor and friend of Henry David Thoreau, and he wrote in conversation with, not against, the strident views of the famous advocate of civil disobedience. Hoar proposed that a judge in sympathy with civil resistance should enforce the law in order to effectuate the power of the resistance. He argued that making Thoreau's theory of change work required sympathetic judges to enforce the law to expose its injustice. From*

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\* Assistant Professor, Boston College Law School. Nothing I write would be possible without Brook Hopkins. I am also in debt to Steven Mueller for his invaluable research assistance. I am grateful for the constructive help I received from the participants of Harvard Law School Public Law Workshop and the University of Chicago Public Law Workshop. I am also grateful for the comments and advice of Paulo Barrozo, Mary Bilder, Niko Bowie, Madison Condon, Dan Coquillette, Hiba Hafiz, Claudia Haupt, Dan Kanstroom, Steve Koh, Ben Levin, Judy McMorrow, Portia Pedro, John Rappaport, Daphna Renan, Blaine Saito, Joe Singer, and Susannah Barton Tobin.

*this colloquy between judge and activist, I draw the beginnings of a counter-narrative of how judges may strive towards (if not achieve) solidarity with resistance movements. Judges, like any other institutional actor, have the capacity and perhaps the obligation to be strategic about how they act within and against the social movements that find their ways into their courtrooms.*

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## INTRODUCTION

For the last half-decade, we in the United States have been living through moments of political and legal upheaval unlike any we've seen for a half-century. On a daily basis the edifice of what had seemed to be the consensus legal order is subjected to deep and existential attack. Whether in demands to defund the police or demands to overturn the results of a democratic election, human beings are taking to the streets in coordinated, mass movements posing foundational challenges to the way that we organize ourselves together under law. These movements and the human beings whose activism and energy fuel them are predictably coming into frictional contact with systemic actors in the legal system—the “civil government.” In this friction, the power of the movements' demands for change challenges those systemic actors to stake out their position vis-à-vis those demands. This Article looks to the past to help answer a pressing contemporary question: whether those systemic actors can be “in solidarity” with the movements in the streets while remaining within the challenged system. More specifically, the question is: can judges (the most embedded of all systemic actors within our legal system) be in solidarity with principled perpetrators of civil disobedience (who pose the most direct challenge to the legitimacy of that legal system)?

More than 150 years ago, amid the social, political, and legal upheaval over slavery leading up to the Civil War, an enraged and radicalized Henry David Thoreau said: “It is not an era of repose. We have used up all our inherited freedom. If we would save our lives, we must fight for them.”<sup>1</sup> If there have been “eras of repose” since, our present moment is not one. Thoreau argued then, and many argue today, that judges and other “inside” systemic actors (prosecutors,<sup>2</sup> bureaucrats,<sup>3</sup> etc.) cannot be agents of radical transformation. The argument is that to “fight for our lives” means rejecting the apparatus of the oppressive state and its civil government. It follows that there can be no solidarity between judges and the movement because the movement rejects the distribution of power that judges represent.<sup>4</sup>

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1. Henry David Thoreau, *Slavery in Massachusetts*, in HENRY DAVID THOREAU, WALDEN AND OTHER WRITINGS 712 (Modern Library, 1992).

2. For an emblematic example of this argument applied to the idea of a progressive prosecutor, see *Note: The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748 (2018).

3. There are some who argue, especially in the context of the four complicated years of the Trump administration, that principled bureaucrats doing their job against the tide of corruption is a radical act. See *Why “The Radical Bureaucrat”?*, THE RADICAL BUREAUCRAT, <http://radicalbureaucrat.com/index.php/why-the-radical-bureaucrat> (last visited Nov. 14, 2021). Others have argued, again in the context of the extreme circumstances of the Trump administration, that the only ethical thing that a federal official can do in the face of a corrupt regime is to resign. See David Luban, *The Case Against Serving*, JUST SECURITY (Nov. 14, 2016), <https://www.justsecurity.org/34404/case-serving-trump>.

4. Applying a version of this argument to the relationship between protestors challenging police violence (and the very existence of the police) and the police themselves, Derecka Purnell argued that solidarity was ultimately impossible because “[p]olice, ultimately, are the problem. Not merely the collection of their individual brutal acts.” Derecka Purnell, *Don't Let Cops Join Our Protests*, THE APPEAL (Jun. 2, 2020), <https://theappeal.org/cops-marching-in-police-violence-protests>.

My response to this argument is that it is mostly right. Robust solidarity demands that power imbalances be leveled at the structural and relational level. The performance of solidarity without the redistribution of power is, at best, a gesture and, at worst, threatens to mute and coopt the energy of demands that power be redistributed.<sup>5</sup> Judges, by definition, hold power within and by upholding the very systems that resistance movements are challenging. While they hold that power, they are prevented by their roles from walking hand-in-hand with movement activists. This is why, when Thoreau was asked what a judge or public official should do if they shared his radical critique of the legal order, he said, “my answer is, ‘If you really wish to do anything, resign your office.’”<sup>6</sup>

Thoreau’s answer is the purist’s elaboration upon the observation that solidarity across power difference is an impossible goal. It seems extreme, but within his sharp binary between collaboration and resignation lie the seeds of an attitude that continues to structure the way that movements *and* insiders think about solidarity and relationship. Both as they are described from without and as they describe themselves, judges are construed as either oppositional to or simply insulated from the pressures of demands for structural change. The judicial pose of impartiality reflects this binary. For those who celebrate and embrace impartiality, they do so precisely in celebration of the fact that judges are inside actors insulated from the violence, vehemence, and instability of demands for structural change.

This Article is about what we miss when we take the impossibility of judicial solidarity too much to heart. It is about whether and how systemic insiders and judges in particular can be participants, allies, and fellow-travelers in movements demanding fundamental changes to the legal order. The answer I reach looks away from the end point (“are judges in solidarity?”) and toward the work that judges do or could be doing to struggle with the question. Despite the ambient platitudes about judicial remove, we are all realists enough by now<sup>7</sup> to know that judges can never be removed from the politics that come through their chambers’ doors. Judges are humans, which means they are neighbors, friends, and advocates committed to moral beliefs. They are not agnostic about or removed from the systemic critiques abroad in the culture. Thus they, like every other systemic inside actor,<sup>8</sup> can and do participate in politically interested ways in the struggles that ride those critiques. So, when we focus on the struggle

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5. *See id.*

6. HENRY DAVID THOREAU, *Civil Disobedience*, in *WALDEN AND CIVIL DISOBEDIENCE* 399 (Penguin Classics 1986) (1854).

7. “We are all legal realists now. Or are we?” Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

8. This is not my first time making this observation. In a way, this article represents a third piece of an ongoing argument about whether and how institutional actors can be participants in movements for social and legal change. In *Resistance Lawyering*, I addressed the question to lawyers, and in *An Outrage on Our Feelings*, I addressed the question to local governments. Here, I address a similar question to judges.

toward solidarity rather than the impossibility of the endpoint, the question emerges as not *whether* judges can be in solidarity with movements that they believe in, but rather *how* their actions further or frustrate those movements when they intersect with the work of those judges. If judges are always situated in their own politics in some version of sympathy or antipathy to movement demands, it is also true that their actions are always situated strategically with respect to the struggle toward those demands. This leads to the basic realist observation at the core of this Article: judges' responses to movement critiques of law and the legal order are themselves incremental strategic interventions in support of or opposition to those critiques. Like all institutional insiders, judges cannot be "neutral" and so must choose whether to wield their power towards or away from solidarity with the movements swirling around them.

In pursuing this argument, the path I take runs not through the hills of jurisprudence, but rather through the dales of legal history. At the heart of this Article is a story of two neighbors living in the small but famously transcendental town of Concord, Massachusetts, in the middle years of the nineteenth century. One of those neighbors was the essayist, naturalist, and iconoclast Henry David Thoreau. The other was a lawyer, politician, and judge named Ebenezer Rockwood Hoar. Thoreau and Hoar's lives were deeply entangled around and through the households and stories of their other famous neighbors: Ralph Waldo Emerson, Bronson Alcott, Nathaniel Hawthorne, Charles Sumner. But the particular entanglement at the center of my story is between a lecture that Thoreau gave, at Hoar's invitation, to the Concord Lyceum in 1848 and an instruction that Hoar gave to a grand jury in Boston six years later in 1854.

The original title of Thoreau's lecture was "The Rights and Duties of the Individual in Relation to Government."<sup>9</sup> It is most famous today by the title "Civil Disobedience."<sup>10</sup> It was here that Thoreau famously advocated that, "Under a government which imprisons any unjustly, the true place for a just man is also a prison."<sup>11</sup> In the face of an unjust or oppressive law, Thoreau's advice to the moral citizen was clear: "I say break the law. Let your life be a counter friction to stop the machine."<sup>12</sup> Thoreau's view on disobedience was binary: there was a machine and there were principled opponents to

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9. See Letter from H.D. Thoreau to R.W. Emerson (Feb. 23, 1848), in *FAMILIAR LETTERS OF HENRY DAVID THOREAU* 185 (Houghton Mifflin 1894) ("I read [a lecture] last week to the Lyceum, on The Rights and Duties of the Individual in Relation to the Government—much to Mr. Alcott's satisfaction.")

10. The essay was originally published in 1848 under the title *Resistance to Civil Government* and was only given the title *Civil Disobedience* in 1866 in a posthumous collection of Thoreau's writings. See Michael Meyer, *Introduction*, in *WALDEN AND CIVIL DISOBEDIENCE* 1, 30 (Penguin Classics 1986).

11. The quote continues: "The proper place to-day, the only place which Massachusetts has provided for her freer and less desponding spirits, is in her prisons, to be put out and locked out of the State by her own act, as they have already put themselves out by their principles." THOREAU, *supra* note 6, at 398.

12. *Id.* at 396.

that machine. The radical change he imagined would come not from the refinements of the machine's workings from within, but from the destruction of the machine from without under the forces of moral and public pressure. Thus his advice for any judge, official, or operative of the machine of the state was simple: refuse "allegiance" to the regime and resign.<sup>13</sup>

Judge Hoar heard these words in 1848. Then, in 1854, he found himself sitting on the bench as a judge, faced with the task of instructing a grand jury what to do with a group of men and women who had intentionally flaunted the hated Fugitive Slave Law of 1850 and tried—unsuccessfully—to rescue an alleged fugitive slave named Anthony Burns. Judge Hoar seemed faced with Thoreau's two paths: resign or side with nearly every other judge in Hoar's situation and reject civil disobedience as a recipe for chaos, sedition, and civil war. He did neither. Instead, seeking to balance his allegiance to the antislavery movement and his judicial role, Hoar delivered a remarkable grand jury instruction that struggled seriously and forthrightly with the question of whether and how a judge can strive toward solidarity with a social movement.

Judge Hoar's instruction to the grand jury stands out against a dismal backdrop of other judicial actions related to the struggle against slavery. From the archives, I have gathered a collection of other grand jury instructions delivered by judges across the North. These instructions paint a familiar story of judicial remove and concern for the rule of law—coupled with a palpable horror of jury nullification and its political consequences. Despite broad political differences, these judges, to a man,<sup>14</sup> decried civil disobedience and the unruly and "dangerous" movement demands of radical antislavery activists. In doing so, they demanded that the grand juries that they were instructing keep faith with the Fugitive Slave Law and reject "treason" and disunion. Read against these other instructions, Judge Hoar's instruction stands out as charting a different path—a path shaped by the gravitational pull of his neighbor Thoreau.

Reading Judge Hoar's struggle between his role within a legal system that was upholding the system of slavery and his sympathy with those who opposed that system reveals an honest—if imperfect and incomplete—struggle towards judicial solidarity. Through his struggle, Judge Hoar concludes that he must enforce the law. He must enforce it not to preserve law and order, nor even because his hands were tied by his role, but because only through enforcing it could the law's true violence be visible. Only by sending the civil resisters to jail could they do what Thoreau proposed (and what Gandhi and Martin Luther King Jr. would elaborate): to go lovingly

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13. See *id.* at 399 ("If the tax-gatherer, or any other public officer, asks me, as one has done, 'But what shall I do?' my answer is, 'If you really wish to do anything, resign your office.' When the subject has refused allegiance, and the officer has resigned his office, then the revolution is accomplished.")

14. I used the gendered term advisedly. In the 1850s, there were no judges who were not men.

to jail as an illustration of law's injustice.

While Judge Hoar's conclusion is interesting (though not necessarily convincing) in its own right, it is his struggle to reach it that I am focused on. Judge Hoar answered the question of how a judge in his context and facing his facts should act, but he reached that answer through a process of strategic introspection. Different individual judges, with different embedded sympathies and antipathies, in different procedural and factual contexts, will reach radically different conclusions on how best to act. What Judge Hoar's struggle points to is not a model answer, but rather a model question: how to strive toward solidarity with a movement for systemic change from inside that system.

This Article pursues this question through four parts. In Part I, I lay out some of the theoretical backdrop necessary to understanding the history. I begin by defining solidarity and explaining why judicial solidarity must be understood as a process of striving rather than an endpoint. Here, I introduce the dominant views of judicial relationships to movements and I trace those roots through Robert Cover and his seminal 1975 book *Justice Accused*. There, writing about the failure of antislavery judges to confront slavery, Cover concluded that the gap between the bench and the movement was ultimately unbridgeable. In so doing, he painted the backdrop against which Judge Hoar's grand jury instruction stands out.

In Part II, I turn to my own original archival research examining a set of other judges' grand jury instructions regarding the question of abolitionist resistance to the Fugitive Slave Law of 1850. These instructions, taken together, largely confirm Cover's core argument: that judges chose fidelity to the formalities of the legal order and the rule of law over their own opposition to slavery. These instructions also lay out a clear rubric for what a grand jury instruction *should* look like under the dominant governing judicial norms.

Part III turns from this baseline to the conversation between Judge Hoar and his neighbor Thoreau. After locating Hoar amid the swirling voices of his peculiar neighbors, I read his jury instruction as a radical departure from the mainstream that is in direct conversation with Thoreau's ideas about civil disobedience and systemic change.

Finally, in Part IV, I bring into the present the story of Hoar's struggle towards something like solidarity with the antislavery movement. Returning to Cover, I argue that Judge Hoar's model provides a tool to push back against the status quo acceptance of judicial remove. If you look around carefully, it is easy to spot examples of judges who are struggling more or less openly with the questions that Judge Hoar's example surfaces. Especially today, with the increased salience not only of vocal social movements but of radical demands for change to the legal order, the comfortable resort to consensus ideas of the "rule of law" is unsatisfying. Without offering any substantive prescriptions, I close by advocating for a



more forthright and honest grappling with how judges and their actions are entangled with demands for systemic change.

## I. FOUNDATIONS – SOLIDARITY, JUDGES, AND ANTINOMIANS

### A. *Solidarity and Power*

Solidarity is a word that is susceptible to opportunistically slippery meanings. Merriam Webster defines it as “unity (as of a group or class) that produces or is based on community of interests, objectives, and standards.”<sup>15</sup> Critical to that definition, as the word has migrated into use in and about social movements, is that the unity hinges on a “community of interests.” For example, Lani Guinier and Gerald Torres argue that solidarity is built “through ‘a sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation,’ as well as through connective structures and shared identities that sustain collective action.”<sup>16</sup> The solidarity that they are interested in is not between the power holders and the community, but rather within the community itself, defined through and *against* the power holders. This is the same meaning of solidarity that the IWW (the Wobblies) uses when they describe “solidarity unionism” as an inclusive workers movement organized around common struggles and *against* the commonly felt oppressions of management and capital.<sup>17</sup>

This strong meaning of “solidarity” also helps define the broader contested term “social movement.” Guinier and Torres build their definition of social movements beginning with Sidney Tarrow, who argues that one constitutive element of a movement is that it “builds on networks of social solidarity.”<sup>18</sup> Elaborating on this foundation, they argue that “[s]ocial movements arise when ordinary people join forces in confrontation with elites, authorities, and opponents to change the exercise and distribution of power.”<sup>19</sup> While this definition is by no means the only one in the literature, it functions as a foundation for my own definition of movement here. Of

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15. *Solidarity*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/solidarity> (last visited Nov. 11, 2021).

16. Lani Guinier & Gerald Torres, *Changing the Wind: Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740, 2757 (2014).

17. Solidarity unionism, as defined by the IWW means bargaining outside of the legal frameworks established by the state and organizing not toward contracts, but rather building labor power independent of (and defined against) the power of management and capital. *See Solidarity Unionism*, IWW.ORG, <https://archive.iww.org/about/solidarityunionism> (last visited Nov. 11, 2021). Like the IWW, Veena Dubal draws on the work of Stoughton Lynd and defines solidarity unionism in the context of gig workers as “concerted activity which is informed, not necessarily by law, but by practices of democratically-informed mutual aid.” Veena Dubal, *Gig Worker Organizing for Solidarity Unions*, LPE BLOG (June 19, 2019), <https://lpeproject.org/blog/gig-worker-organizing-for-solidarity-unions>. *See also* STOUGHTON LYND, *SOLIDARITY UNIONISM: REBUILDING THE LABOR MOVEMENT FROM BELOW* (2015).

18. Guinier & Torres, *supra* note 16, at 2757 (citing SIDNEY TARROW, *POWER AND MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 1-9 (2d ed. 1998)).

19. *Id.*

particular importance is the focus on “chang[ing] . . . the distribution of power.” The movements that I am focused on are demanding fundamental institutional alterations in the legal order. They are movements that challenge the institutions themselves. Resistance to civil government—or civil disobedience—is a tactic that emerges from this understanding of movements. Naming a law unjust and then disobeying it poses a direct challenge to the legal system and its legitimacy. This is confrontation, and it is confrontation with the goal of stopping the “machine” of the unjust law. In these movements, solidarity is the adhesive power that brings “ordinary people” together and helps them build the power necessary to resist the “elites” and “authorities.”

Thus, while the word “solidarity” gets thrown around in many other weaker contexts with respect to contemporary social movements,<sup>20</sup> I do not use the word here in its performative, gestural sense.<sup>21</sup> Rather, the solidarity that I am interested in is the strong and difficult sense suggested by Guinier, Torres, and the Wobblies. It is easy for institutional actors to make solidarity statements without really relinquishing power or making generative space for the movements they are referring to. It is harder, and perhaps impossible, for those same actors to truly stand in solidarity with the people demanding that the institutions they represent be dismantled.

Under this definition of solidarity, it is hard to imagine any context in which a judge could be “in solidarity” with movement actors in the way that movement actors are in solidarity with each other. Indeed, most judges would insist that such solidarity was not only impossible but undesirable.

Judges are the most embedded systemic actors with our legal system. This is not because they are the most powerful actors; whether or not the judiciary truly is the “least dangerous branch,” it is easy to make arguments that legislators, executives, and even administrators wield more power to make and change law than judges do. What makes judges so systemically faithful is not so much their power as it is their deep sense of stewardship of the system itself. Judges are, to anticipate a term that I will return to, the priests and caretakers of our legal system. One need only look at any law school curriculum to see the central role that judicial opinions play in structuring the very substance of what law is and how lawyers are taught to understand it.

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20. As just one example among many, the Harvard College Office of Admissions and Financial Aid issued a “solidarity” statement, professing to stand “in solidarity” with any potential applicant who chose to protest and promising that “[s]tudents who exercise their rights by peacefully protesting will not have their chances of admission compromised.” *Black Lives Matter*, HARVARD COLLEGE, <https://college.harvard.edu/about/news-announcements/black-lives-matter> (last visited Nov. 11, 2021). While this is an admirable sentiment, the solidarity that the Harvard Admissions Office offers here does not level power differentials or create common cause. Instead, it simply approves a set of behaviors and promises not to punish them.

21. See Karen Attiah, *#BlackOutTuesday Was a Case Study in How Performative Solidarity Goes Awry*, WASH. POST (June 3, 2020), [https://www.washingtonpost.com/opinions/blackouttuesday-was-a-case-study-in-how-performative-solidarity-goes-awry/2020/06/03/0b9c42b8-a5e4-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/opinions/blackouttuesday-was-a-case-study-in-how-performative-solidarity-goes-awry/2020/06/03/0b9c42b8-a5e4-11ea-b473-04905b1af82b_story.html).

Because judges are the quintessential institutional insiders in the legal system, it is nearly impossible to imagine them retaining their institutional roles while remaining in strong solidarity with movements who seek to dismantle or transform that system. This is why Thoreau believed that the only responsible choice for a judge within an unjust system was to resign.

To see the texture of this problem, consider the example of the judge's relationship to civil disobedience. The orthodox judicial reflex in response to civil disobedience is encapsulated by the words of Justice Lewis Powell: "civil disobedience [is] fundamentally inconsistent with the rule of law."<sup>22</sup> For Powell, lawyers and especially judges "have a heavy responsibility for the preservation of the rule of law,"<sup>23</sup> which demands that they should reject the "heresy" of disobedience.<sup>24</sup>

The idea that judges are duty-bound to uphold the rule of law runs deep within the internal monologue of the profession. In its strongest and most prominent form, "rule of law moralism" argues that upholding the rule of law is, itself, a morally good and necessary act.<sup>25</sup> A slightly more nuanced version of the argument is "rule of law formalism." Formalists are less wedded to the normative value of the "rule of law," but they agree with Thoreau that, bound as they are by their roles within the legal system, judges have no place in resisting or changing the legal order.<sup>26</sup>

Neither normative nor formal fidelity to the rule of law act as absolute constraints on judicial behavior. All of us can conjure an example of a judge who, without renouncing their role or resigning, found a way to depart from

22. Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 205 (1966).

23. *Id.* at 205-06. Whether lawyers, themselves, should engage in civil disobedience or even represent those who engage in civil disobedience has been a much-discussed topic in the literature. My colleague Judith McMorrow has argued that lawyers, as officers of the court and as bound to their clients' interests, will rarely be ethically justified in engaging in civil disobedience. See Judith A. McMorrow, *Civil Disobedience and the Lawyer's Obligation to the Law*, 48 WASH. & LEE L. REV. 139, 142-44 (1991). On the other hand, some have argued that lawyers may permissibly engage in civil disobedience even *within* the boundaries of the ethical rules that constrain the profession. 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. L. REV. 481, 496-97 (2016).

24. *Id.* at 205.

25. If the legal profession is already skewed toward elite (and therefore moderate) views that track towards fidelity to the rule of law, the slice of that profession that finds its way onto the bench as judges is even more skewed. It is no secret that the federal judiciary in the present is far from representative and skewed towards white men and away from non-white, non-males. See Danielle Root, Jake Faleschini, & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CENTER FOR AMERICAN PROGRESS (2019), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary>. The same is true, by and large, at the state court level. See Alicia Bannon & Janna Adelstein, *State Supreme Court Diversity – February 2020 Update*, BRENNAN CENTER FOR JUSTICE (2020), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update>.

26. This is the category that Captain Vere from Herman Melville's *Billy Budd* falls into for Robert Cover in the introduction to *Justice Accused*. Cover quotes Vere: "For that law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it." ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 3 (1975).

the stringent demands of the rule of law in a specific case. “Judicial nullification” occurs when a judge finds a way to evade the effects of unjust laws in an individual case. We are familiar with these nullifying judges when it comes to individual acts of mercy: assisting an undocumented defendant to escape ICE custody,<sup>27</sup> departing downwards from sentencing guidelines,<sup>28</sup> or by otherwise nullifying or muting the effects of laws that they dislike in individual cases. Faced with defendants charged with civil disobedience, nullifying judges are prone to act in ways that mute the punishment that the civil resister might otherwise face.<sup>29</sup>

While forms of nullification are relatively familiar, they are rarely framed as explicit and public critiques of the legal regime. Rather, such critiques are more familiar when judges choose Thoreau’s path and resign rather than continue to participate in the system.<sup>30</sup> These Thoreauvians are no less committed to the idea of judge as the priest of the legal order than moralists or formalists. In choosing to resign, they affirm Thoreau’s argument that a judge cannot be both an institutional insider and a critic of the institution.

This brief canvas of judicial responses to civil disobedience reveals the extent to which the mainstream view (both from outside and within) of the judicial role is at odds with any thick conception of solidarity. As a descriptive matter, the Thoreauvian judges who resign may be right that there is no way to remain within the system and keep faith with movement critiques of that system. But this article suggests that the apparent binary between fidelity to the rule of law and resignation misses the power and potential of *striving toward* solidarity from within the judicial role. To put it differently, behind the seemingly rigid formalities of judicial fidelity to the rule of law, and within and around the mushy space of nullification, the human beings who serve as judges are always acting around the exigencies of morality and politics. They are always standing in some relationship to

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27. I’m referring here to the case of Judge Shelley Joseph in Newton, Massachusetts. While the facts of the case are somewhat contested, Judge Joseph was alleged to have cooperated with a court officer to help an undocumented person appearing before her escape ICE agents who had come into the court to arrest them. See Ellen Barry, *When the Judge Became the Defendant*, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html>

28. See Nancy Gertner, *Federal Sentencing Guidelines: A View from the Bench*, HUMAN RIGHTS MAGAZINE (Apr. 1, 2002), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol29\\_2002/spring2002/hr\\_spring02\\_gertner](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_gertner) (“When I looked closely, I noticed that all the scored offenses were nonviolent, traffic offenses—for instance, driving after his license was suspended. And then I wondered: Since no other traffic offense accompanied the license charges, how did the man get stopped? I strongly suspected ‘Driving While Black.’ I departed downward, refusing to give literal credit to the record.”)

29. Some observers suggest that lenience/nullification is really the most prevalent approach that judges take in individual cases of civil disobedience. See Matthew Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2103-04 (2007).

30. Some high-profile examples of this Thoreauvian choice are the immigration judges who resigned during the Trump administration rather than continue to participate in a procedural structure that they deemed unjust. See Ilyce Shugall, *Op-ed: Why I Resigned as an Immigration Judge*, L.A. TIMES (Aug. 4, 2019), <https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies>.

critiques of the system within which they operate. Sometimes, as Judge Hoar reminds us, they can make these fields of influence explicit and, perhaps, by striving towards a solidarity they can never reach, make space for the voices and critiques of those who might catalyze real change.

*B. Dismal Judges, Priests, and Antinomians*

One way of describing the position that I am pushing against in this article is judicial dismalism. By “dismalism” I mean the view that judges, although in possession of immense privilege and power, do not have the capacity to do anything with that power except uphold the status quo order within which they work. Perhaps the foremost theorist of dismalism is another key interlocutor for this essay: Robert Cover. In *Justice Accused*, Robert Cover sought to answer the question of why judges who opposed slavery in the 1840s and 1850s refused to act from the bench to resist the laws that upheld the regime. In particular, he asked why these judges failed to mitigate the horrors of the monstrous Fugitive Slave Law of 1850.

Cover’s answer, which has become the standard answer not only for this period but beyond, is that judges felt themselves to be formally bound by their roles and their oaths to the rule of law. Cover concluded that judges had uniformly chosen the obligations of the law as enacted over possible critiques of that law. Far from being moved by the increasingly radical arguments that the laws upholding slavery were illegitimate and that unjust laws had no legal force, Cover found “no instance of a judge referring to or citing the antinomian literature of abolitionism.”<sup>31</sup> To the contrary, Cover argued that these arguments served as foils for judges adhering to the law as written, who rejected them as “theories of abstract right” advanced by “extremists.”<sup>32</sup>

Cover’s dismal conclusion that the “antinomian literature of abolition” had not found its way into judicial discourse is central to his argument. In

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31. *Id.* at 215. “Antinomian” has a specific meaning in American intellectual history that Cover is almost certainly referring to here. To tell a very theologically complex story too simply, there is a tradition of “antinomian” opposition to the American Puritan church’s orthodox teachings. The most famous “Antinomian” controversy involved the famous 1637 trial of Anne Hutchinson, who claimed personal access to divine revelation independent from the bible or the church elders’ interpretation of the bible. Some have described the birth of transcendentalism in the 1820s and 30s as a second Antinomian crisis because Emerson and his fellow travelers built the intellectual structure of their new movement on a rejection of the rigid orthodoxies of the established Unitarian Church. In his famously controversial “Divinity School Address” and subsequently in many of his earliest and most explosive essays, Emerson argued against the church’s monopoly on spiritual meaning and instead for a much more deeply personal experience and interpretation of divine law. For Emerson, this began by rejecting the church’s dedication to the reality of miracles as an article of faith. He argued that “the word Miracle, as pronounced by Christian churches, gives a false impression; it is Monster. It is not one with the blowing clover and the falling rain.” Ralph Waldo Emerson, *An Address*, in *THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON* 63, 68 (Modern Library 2000). Given all of this, it seems clear that Cover was using the label “antinomian” to refer to the radical abolitionist view that unjust laws did not and could not command legitimacy and that law must submit instead to the personal moralities of those being asked to submit to the law. In abolitionist terms, this meant the view that slavery and the Fugitive Slave Law were illegitimate because they were oppressive and therefore, functionally, no law at all.

32. See COVER, *supra* note 26, at 215.

Cover's view, the failure of judges to intervene against slavery was a failure of imagination pre-determined by the judges' role. Like Thoreau, he came to see judges as irrevocably bound to the machinery of the rule of law. They defined themselves from within the machinery, rendering external critiques beyond the boundaries of their judicial imaginations. Once judges are so limited, there remains no room for imaginative striving in sympathy with "antinomian" abolitionists. Rather, we are left with a version of Thoreau's binary: to be complicit or to exit the system altogether.

This binary explains Cover's closing argument in the book where he submits that the judges he studied were best understood as priests and not prophets. As priests, they were bound by role and inclination to exalt, or at least uphold, the legal order that they were initiated into. These priests were being confronted with antinomian prophets who were challenging that legal order and forcing it to reveal its violence and immorality. Cover concluded with a stark encapsulation of judicial dismalism: "if a man makes a good priest, we may be quite sure that he will not be a great prophet."<sup>33</sup>

But Cover was wrong that no judges were sympathetically engaged with the antinomian arguments of abolitionism. Judge Hoar's engagement with Thoreau opens a small gap in his hermetic account of the dismal entrapment of the antislavery judiciary. This gap begins to let in a draft that threatens to muddle the orthodox account enough to point to new and provocative questions. If judicial dismalism is not inevitable, then the distinction between the functionary priest and the revolutionary prophet is not inevitable either. There is room, at the very least, for the priest to strive to make space for prophetic imagination.

## II. ORTHODOXY

If you were to read Judge Hoar's jury instruction without any context, it is very unlikely that you would find it remarkable enough to unsettle Cover's dismal thesis. Its significance is revealed by placing it in its historical and cultural context. In this Part, I will demonstrate that every other grand jury instruction delivered by Hoar's brethren on the bench in 1850 fits neatly into Cover's dismal thesis. Every other judge pledged fealty to his role upholding the rule of law and rejected any sympathy with the radical demands outside the courthouse door. I have canvassed all available grand jury instructions from cases involving abolitionists accused of resisting the Fugitive Slave Law of 1850. Only excepting Hoar's instruction, I have found precisely the priestly submission to the formality of law that Cover identified—seasoned with explicit anxieties about preserving social order, national unity, and the nation itself.

Having laid out the orthodox view, it becomes easier to see the ways in which Hoar's instruction departs from it. The question remains, why did he

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33. *Id.* at 259.

depart? The answer, which I turn to in the next Section, has everything to do with Thoreau and the ambient antinomian arguments that Hoar was surrounded by in his hometown of Concord, Massachusetts.

#### A. *Why Grand Jury Instructions?*

In September of 1850, President Millard Fillmore signed an updated Fugitive Slave Law as part of the Compromise of 1850 which, among other things, admitted California as a free state and abolished the slave trade in the District of Columbia.<sup>34</sup> As a major concession to the Southern states, the provisions of the Fugitive Slave Law were famously harsh against those who were alleged to be fugitive slaves. Among the most notorious provisions: alleged fugitives received only a summary proceeding before a Federal Commissioner with no opportunity to testify on their own behalf, no jury, and no recourse to the writ of habeas corpus. At the conclusion of the hearing, the Commissioner would be paid \$5 if he freed the slave and \$10 if he ruled in favor of the purported master.<sup>35</sup> Less frequently cited, but critical to the substance of this paper, was Section 7 of the law, which subjected any interference with the law to both criminal and civil penalties.<sup>36</sup>

As a consequence of Section 7, anyone who was alleged to have interfered with the law's mechanisms of reenslavement was subject to prosecution under federal law as well as any state laws against mass violence or rioting that might be implicated. In any such prosecution, a grand jury had to be convened to indict the resisters. These grand jury deliberations were marinated in a deeper level of anxiety about civil disobedience—namely, that the jurors were drawn from the same pool of increasingly antislavery northern citizens that the resisters represented. The prospect of grand juries nullifying the law by simply refusing to indict was extremely realistic and indeed happened frequently.

This partially explains the heightened rhetoric that shoots through these grand jury instructions. Despite the fact that the judges were instructing grand jurors about indictment rather than conviction, and despite the fact that these proceedings were ancillary to the morally urgent, central question of whether or not an alleged fugitive slave would be returned to slavery, these grand jury instructions were unique public leverage points amid a fraught process. Thus, when judge after judge delivered alarmist

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34. See generally Paul Finkelman, *The Appeasement of 1850*, in PAUL FINKELMAN & DONALD R. KENNON, *CONGRESS AND THE CRISIS OF THE 1850S*, at 36 (2012). This description cribbs from my own previous descriptions of the law. See Daniel Farbman, *Resistance Lawyering*, 107 CAL. L. REV. 1877, 1893-95 (2019); and Daniel Farbman, *An Outrage Upon Our Feelings*, 42 CARDOZO L. REV. 2097, 2120-22 (2021).

35. See *id.* at 71.

36. See *id.* at 70; Fugitive Slave Law of 1850, ch. 60, § 6, 9 Stat. 462, 464. While the Fugitive Slave Law of 1783 had imposed a \$500 fine on anyone who harbored or rescued an alleged fugitive, the 1850 law doubled the fine to \$1000 and added a possible prison sentence of up to six months. See Farbman, *Resistance Lawyering*, *supra* note 34, at 1894.

instructions suggesting that anyone who resisted the Fugitive Slave Law was criminally, recklessly, and possibly treasonously risking the permanence of the Union, they were seeking to intervene at a particularly weak link in the law's enforcement.

The public and political salience of these grand jury instructions is somewhat foreign to us in the present. Although we still use grand juries today to initiate prosecutions through indictment, and although judges still nominally preside over them, we have delegated most of the magisterial and managerial role over those proceedings to prosecutors. Today, grand juries are, by and large, out of the public eye, and what publicity they do create centers around prosecutors.<sup>37</sup> But in the 1850s, judges played a much larger public and procedural role in the grand jury process. Especially in such high-profile cases, where the very fabric of the compromise over slavery was being tested, a judge's grand jury instruction served as a statement on how law and the legal order should be understood in the public sphere.

This is why, despite the fact that these grand jury instructions were not formal judicial decisions, they were written and spoken with so much attention and rhetorical sophistication. Given this significance, it is surprising that this Article is the first to collect and analyze grand jury instructions in the 1850s in any systematic way. While the subject of civil disobedience against the Fugitive Slave Law has been widely discussed,<sup>38</sup> grand jury instructions as a class of judicial action and rhetoric have received little attention. What that attention reveals is Cover's familiar and dismal story. As judges spoke to juries and the broader public about the importance of upholding the rule of law, they condemned civil disobedience and abolitionism as dangerous seeds of anarchy. With the exception of Hoar, even judges who opposed slavery in principle were at pains to abjure the antinomian spark of radical resistance.

### *B. The Mainstream Instructions*

Beginning almost immediately after President Fillmore signed the Fugitive Slave Law in September of 1850, abolitionists across the North

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37. The highly publicized prosecutions (or lack thereof) of officers in the prominent cases of Michael Brown, George Floyd, and Breonna Taylor (among many others) have revealed the extent to which prosecutors control and manipulate the grand jury process as part of their broader control of the entire system. See Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1208 (2017) ("The complete prosecutorial control over the grand jury—particularly over the flow of information and grand jury procedure—solidifies the grand jury's dependence on the prosecutor."). As Irene Oritseyinmi Joe recently argued, to the extent that there is a performative element to the grand jury in the present, it rests with prosecutors like Kentucky Attorney General Daniel Cameron and Minnesota Attorney General Keith Ellison. See Irene Oritseyinmi Joe, *Probable Cause and "Performing for the People"* 70 DUKE L.J. ONLINE 138, 142-47 (2021).

38. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 104 (1985) (using the Fugitive Slave Law of 1850 as an archetypal example of an indefensible law); Steven Lubet, *Slavery on Trial: The Case of the Oberlin Rescue*, 54 ALA. L. REV. 785 (2003) (tracing the arguments based on the justification of civil disobedience made by defense lawyers in the Oberlin kidnapping trial in 1858).



exploded in outrage and pledged to resist it.<sup>39</sup> Almost as quickly, Northern judges from across the political spectrum responded by admonishing grand jurors to reject the abolitionist rhetoric and indict those dangerous dissidents who resisted the law.

From the very beginning, these judges established a four-part argument that would be adopted almost universally from bench to bench across the country. First, drawing on Justice Story's opinion in *Prigg v. Pennsylvania*, they insisted that the Fugitive Slave Law of 1850 was constitutional because safeguarding the compromise protecting property rights in enslaved humans was fundamental to the compromise at the Constitutional Convention of 1787.<sup>40</sup> Second, in addition to being constitutional, the law was justifiable as a protection of property. It followed that if the law was indeed justifiable, then it could be legitimately enforced. Third, because the law could be legitimately enforced, those who resisted the law must be punished to protect law and order. Fourth and finally, the cost of failing to punish resistance was high: civil war, the dissolution of the Union, and the end of the rule of law.

The first instruction came in federal court in November of 1850. Judge Andrew Judson instructed a Connecticut grand jury that "[n]o man's conscience . . . can justify [the constitution's] infraction, or excuse its rejection, in whole or in part."<sup>41</sup> That same month, Judge John Kane instructed a Philadelphia grand jury that, "[t]his law, I repeat it, will be enforced: and if broken, it will be vindicated. The constitutional compact

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39. Wendell Phillips addressed a raucous crowd at Faneuil Hall, proclaiming that all Massachusetts would resist the law and calling for jurors to protect those who resist the law: "The path to the jury box lies through defiance of the law. . . . The remedy, therefore, lies in defiance; and a jury is at last reached in a defiance of the law. . . . We must trample the law under our feet. . . . There is no treason in that. The law expects disobedience, provides for disobedience, and God forbid that it should be disappointed." *Rocking the Old Cradle of Liberty*, THE LIBERATOR, Oct. 18, 1850, at 167. Charles Sumner challenged his fellow Massachusetts citizens to cast out southern slave catchers: "Let our cities and towns vomit him forth. Never more to give him rest." *Judiciary True to Its Duty*, RICHMOND ENQUIRER, Nov. 12, 1850, at 2.

40. Historians have long argued over whether this compromise was indeed as necessary to the adoption of the Constitution as Story and others suggested. For my purposes in this paper, it isn't necessary to get into the weeds of the question of whether or not the framers indeed believed slavery to be fundamental to the constitutional compromise. It is sufficient to observe that there was widespread agreement among judges and legal elites in 1850 that Justice Story's compromise theory was not only correct, but was a (if not the) foundational principal of constitutional interpretation around slavery in the mid-nineteenth century.

41. Andrew Judson was no abolitionist. He was a vigorous Jacksonian Democrat and made himself an enemy to abolitionists by vigorously opposing Prudence Crandall's decision to admit a black student to her private boarding school in his home town of Canterbury, Connecticut, in 1833. Samuel May recalls Judson holding forth against allowing "a school for nigger girls" in strikingly modern terms: it would harm "the value of real estate there, and the general prosperity of the town." SAMUEL MAY, SOME RECOLLECTIONS OF OUR ANTISLAVERY CONFLICT 47 (1869). Judson didn't stop there. He lobbied successfully to pass a law in Connecticut that would ban the teaching of any black person in school there who was not a resident of the state. *See id.* at 52. Judson was a bigot, but not an entrenched supporter of slavery. Rather, he was a proponent of colonization which help explains why, when he presided over the famous *Amistad* case in 1840, he decided in favor of liberating the enslaved people aboard that ship and sending them back to Sierra Leone. *See* DONALD WILLIAMS, PRUDENCE CRANDALL'S LEGACY: THE FIGHT FOR EQUALITY IN THE 1830S, DRED SCOTT, AND BROWN V. BOARD OF EDUCATION 251-54 (2014).

which was made within these very walls, will never be repudiated here.”<sup>42</sup>

Neither Judson nor Kane were friends of the abolition movement or of the wing of the Whig party that was increasingly allied to it.<sup>43</sup> As such, their opening salvos were unsurprising. But the most thorough and strident early defense of the law against the “evil passions” that the abolitionists had “let loose” came from a judge who held much more nuanced views about slavery: Judge Elisha Huntington in Indiana. Huntington was a Whig who appeared to be sympathetic to antislavery causes.<sup>44</sup> Political sympathies notwithstanding, Huntington’s charge to the grand jury in December of 1850 was a thorough defense of the law and condemnation of those who would resist it.

He began by echoing Story’s foundational assertion from *Prigg v. Pennsylvania* that the Fugitive Slave Clause of the Constitution was a fundamental part of the compromise of 1787: “Without such a provision, the Constitution could not have been adopted.”<sup>45</sup> Judge Huntington then affirmatively justified the agreement to return fugitive slaves as necessary to protect property rights, blaming the radical abolitionists for the innovation in the last few decades of the idea that “there was any ‘higher law’ than the Constitution, which could defeat [those property] rights.”<sup>46</sup>

Having broadly justified the existence of a fugitive slave law in principle, Judge Huntington turned to the 1850 law specifically, arguing that the law represented practically no change from the original fugitive slave law: “the rights of the fugitive are substantially the same as they were under the old act of 1793.”<sup>47</sup> Judge Huntington thus found the 1850 law binding and enforceable and from that perspective sharply attacked those who would resist it. “Evil passions seem to have been let loose, and madness, in some sections of the country, seems to rule the hour.”<sup>48</sup> Comparing those who resisted the law to the perpetrators of the Whiskey Rebellion, Huntington threatened that “if necessary, force will be used to put down resistance to

42. *Judge Kane - Fugitive Slave Law*, ALEXANDRIA GAZETTE, Nov. 22, 1850, at 2. Kane was no abolitionist either. It was he who presided over the trial convicting Passmore Williamson of resisting the Fugitive Slave Law—the trial that inspired Hildreth to compile and publish *Atrocious Judges*. See COVER, *supra* note 26, at 215. For a fuller account of Kane’s ambivalence towards abolitionism (which was exacerbated by the fact that his son Thomas was an ardent abolitionist), see MATTHEW J. GROW, “LIBERTY TO THE DOWNTRODDEN”: THOMAS L. KANE, ROMANTIC REFORMER (2009).

43. The Whig Party had emerged from the ashes of the old Federalist Party and stood as the opposing party against the Democratic-Republican Party that was allied with Jefferson and Jackson. In the 1840s and 1850s, the Whig party disintegrated over internal disagreements over slavery and the antislavery wing of the party emerged as the base of the newly formed Republican party. For a more in-depth account of this story (in which Judge Hoar was deeply embedded), see *infra* notes 132-41.

44. Huntington’s views on slavery are not recorded outside of his judicial writings—though he was the judge who presided over a jury’s acquittal of an Indiana man who harbored fugitive slaves in *Vaughn v. Williams*, 28 F. Cas. 1115 (C.C. Ind. 1845).

45. See *The Union Feeling in the Country: Judge Huntington of Indiana on the Fugitive Slave Law*, N.Y. HERALD, Dec. 15, 1850, at 3.

46. *Id.*

47. *Id.*

48. *Id.*

the law” and that if those persuaded by the “insane counsels” of abolitionists “attempted to carry out what they proclaim to be their intentions [to resist the law], they will be guilty of treason toward the government, and possibly subjected to its penalties.”<sup>49</sup>

By threatening resisters with armed suppression and charges of treason (along with the threat of execution implied by those charges), Huntington sounded a note of panic that not all of his colleagues would match in pitch, but which was a shared undertone throughout the decade. His reasons for being alarmist were explicitly unionist: “Threatened resistance to the law of Congress, and inflammatory appeals to the misguided passions of a portion of the people of the North, have placed weapons in the hands of those in the South who seek to overturn the government.”<sup>50</sup>

By the beginning of 1851, the abstract anxiety that fueled Judge Huntington’s instruction<sup>51</sup> had turned into alarm at the (sometimes violent) resistance to the law that had started to flare up across the North. In the face of increasingly open opposition to the law and increasingly effective resistance in the form of rescues and escapes, concern about the breakdown of the rule of law ran high on the bench.

In February, a man named Shadrach Minkins who had escaped enslavement in Virginia was captured and arrested by federal marshals in Boston. The Boston Vigilance Committee<sup>52</sup> staged a dramatic escape where Minkins was whisked away from the federal courtroom and out of the clutches of the federal marshal.<sup>53</sup> Shadrach’s escape was an embarrassment for the Fillmore administration and the president and his Secretary of State Daniel Webster were determined to punish those who had helped make it happen. Such was the situation when the federal grand jury convened in Boston, and Judge Peleg Sprague delivered an instruction reminiscent of Judge Huntington’s in the shadow of a specific act of forcible resistance.<sup>54</sup>

Peleg Sprague was no apologist for slavery.<sup>55</sup> Rather, he was a

49. *Id.*

50. *Id.*

51. Although Judge Huntington references a meeting of abolitionists near the Ohio border, he did not signal that any actual resistance to the law had been undertaken, nor did the jury find any—they endorsed the judge’s sentiment but found no indictments. *See id.*

52. The Boston Vigilance Committee was a group of white and black abolitionist activists who had committed themselves to keeping watch to protect the black residents of Boston from kidnapping or capture by slave catchers. Its stated purposes were clear, though there has been some scholarly debate over how heroic its actions were and how much has been romanticized. *See* Gary L. Collison, *The Boston Vigilance Committee: A Reconsideration*, 12 *HIST. J. MASS.* 104 (1984).

53. For a fuller account of Minkins’s rescue (itself a synthesis of many other full accounts), see Farbman, *Resistance Lawyering*, *supra* note 34, at 1906-09.

54. Charge to Grand Jury - Fugitive Slave Law, 30 *F. Cas.* 1015 (D. Mass. 1851) (Sprague, J.).

55. Sprague was, in fact, much more aligned with the political sentiments driving abolition than he was with those supporting slavery. In 1839, he delivered a stem-winder of a speech in favor of temperance which, incidentally, condemned slavery in no uncertain terms. *See* PELEG SPRAGUE, *THE ARGUMENT OF PELEG SPRAGUE, ESQ., BEFORE THE COMMITTEE OF THE LEGISLATURE UPON THE MEMORIAL OF HARRISON G. OTIS AND OTHERS* 15 (1840). He had also been a stalwart Whig and a vocal opponent of Jackson’s genocidal “Indian Removal” policy. ROBERT VINCENT REMINI, *ANDREW JACKSON AND HIS INDIAN WARS* 235 (2001). Despite these political priors, Sprague was a moderate and

conventional (if conservative) New England Whig looking with horror on the spectacle of some of the “best men” of Boston in open rebellion against the law. Sprague began briefly and conventionally: the Fugitive Slave Law was constitutional and binding and must be enforced.<sup>56</sup> But he devoted the majority of his instruction to deploring the idea of civil disobedience.

For Sprague, it was one thing to attack the law with rhetoric, but it was a bridge too far to resist it in action. He believed that, in the end, law must be sovereign as a bulwark against anarchy.<sup>57</sup> Sitting at the center of a hotbed of antislavery, Sprague understood how strong the currents of opposition to the law were, but he rejected the idea that a higher law justified resistance, and attacked an abolitionist (and perhaps Emersonian) straw man as the real intolerant bigot: “Some have an impression that it is the divinity within them, an unerring and infallible guide. Hence they cannot believe, or conceive, that opposition to their views can be conscientious. This is the lurking fallacy, this tacit assumption of personal infallibility, that makes them intolerant toward others, and inaccessible to argument.”<sup>58</sup>

Having painted civil resisters as bigots and dangerous fanatics, Sprague turned his rhetoric heavenward and articulated a theological account of rule of law moralism: “Submission is a moral duty . . . . To submit to the law of the land is, then, to obey the will of god.” Rejecting the idea of divine disapproval of the Fugitive Slave Law, Sprague submitted that the real and only higher law is the Constitution and the Union, which it supports.

If religious duty was not enough to command fidelity to the rule of law, Sprague added the threat to social order and the Union itself. Of those who wished to destroy the present order to erect a better one in its stead, he said, “they must be inaccessible to reason or remonstrance, and of that unfortunate class in whose minds judgment is dethroned, and monomania hold usurped dominion.”<sup>59</sup>

With the North exploding with outrage, Sprague’s alarm was soon echoed by three justices of the Supreme Court riding circuit.<sup>60</sup> In April of 1851, Justice Samuel Nelson instructed a federal grand jury in the Southern

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a critic of Garrison and the idea of “immediate” abolition. Indeed, he was among the targets of a famous pamphlet attacking Boston moderates for their role in inciting an anti-abolitionist mob that nearly killed Garrison in 1836. See GAMALIEL BRADLEY, A LETTER TO THE HON. HARRISON GRAY OTIS, PELEG SPRAGUE, AND RICHARD FLETCHER, ESQ. (1836).

56. See *Charge to Grand Jury*, 30 F. Cas. at 1015.

57. “Men of all classes and every shade of opinion may, by argument or even declamation addressed to the reason or passions, endeavor to impress new views upon the public mind. But if, in their opposition to the expressed will of society, they pass from words to deeds, and embody the mischievous doctrines into criminal acts of resistance to law, whoever they may be, and whatever may be their position or their ultimate purposes, they must sooner or later find that the law is irresistible and overwhelming.” *Id.* at 1016.

58. *Id.* at 1017.

59. *Id.*

60. Until the practice was limited by the Judiciary Act of 1869 and eventually terminated in 1911, Supreme Court justices were obliged to spend time each year “riding circuit” around their designated region and sitting as district court judges. See Kermit L. Hall, *Circuit Riding*, in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 169 (Kermit L. Hall et al. eds., 1992).

District of New York.<sup>61</sup> He made all the now-familiar arguments. Nelson argued that the original fugitive slave clause was so essential to the interests of the Founders that “it was adopted without opposition, and by a unanimous vote.”<sup>62</sup> The new law was a constitutional enforcement of this provision. Because the law was constitutional, “it is a law, therefore, which every citizen is bound to obey, and the public authorities to enforce.”<sup>63</sup> Those who resisted it could have no good motive and they were placing the Union in peril: “If any one supposes that this Union can be preserved, after a material provision of the fundamental law upon which it rests is broken and thrown to the wind by one section of it . . . he is laboring under a delusion which the sooner he gets rid of the better.”<sup>64</sup>

Justice Nelson’s charge was national news: praised by the Democratic *New York Herald* and pilloried by the antislavery *New York Evening Post* and reprinted in papers around the country.<sup>65</sup> The press similarly covered Justice Levi Woodbury’s instruction to a federal grand jury in Augusta, Maine, during the same month. Justice Woodbury shared Justice Nelson’s Democratic politics and his disdain for abolitionism. Still, he was a New Englander, and his instruction exhibited more reserve and less apology for slavery while still hitting all of the major points of the standard argument: slavery was part of the constitutional compromise;<sup>66</sup> the fugitive slave law was binding law and must be enforced;<sup>67</sup> resisters to the law were dangerous and subject to punishment<sup>68</sup> because they were dangerous to the Union.<sup>69</sup>

If Nelson and Woodbury’s instructions were predictable based on their politics, Justice McLean’s were less so. McLean was one of two dissenting justices in *Dred Scott* and was notoriously the most antislavery justice on the Court.<sup>70</sup> While refusing to pass on the constitutionality of the law before

61. Justice Nelson was a reliable Jacksonian Democrat and no friend to abolitionists. In fact, he was originally assigned to write the majority opinion in *Dred Scott* until Justice Taney decided to take the opinion for himself.

62. Charge to Grand Jury - Fugitive Slave Law, 30 F. Cas. 1007, 1008 (S.D.N.Y. 1851) (Nelson, J).

63. *Id.* at 1012.

64. *Id.*

65. See *United States Circuit Court: On the Bench the Hon. Judges Nelson and Betts*, N.Y. HERALD, Apr. 8, 1851, at 1; *Notes on Judge Nelson’s Charge*, EVENING POST, Apr. 9, 1851, at 2; *Fugitive Slave Law*, DAILY NAT’L INTELLIGENCER, Apr. 15, 1851 at 1; *Judge Nelson on the Fugitive Slave Law*, VERMONT CHRONICLE, Apr. 22, 1851, at 62.

66. See *The Fugitive Slave Law: The Charge of Judge Woodbury to a New England Grand Jury*, N.Y. HERALD, Apr. 29, 1851, at 7.

67. See *id.* (arguing that the law is justified as a protection of the property rights of fellow citizens).

68. See *id.* (“But while tolerant, as we must be, to all differences of mere opinion, and to free discussion; yet if they end in bad conduct, all must reprobate, and courts of law must punish that conduct, or become themselves implicated.”)

69. See *id.* (If the law is forcibly resisted, it will become “difficult, if not impossible, to succeed in punishing the offense throughout, and then the Union will, probably, ere long, fall asunder, and the horrors of its dissolution must burst upon our astonished gaze.”)

70. This is not to say that McLean was what we might call an abolitionist. Robert Cover examines McLean’s views in some detail concluding that while he was an avowed opponent of slavery, he was also an avowed critic of radical or revolutionary abolitionist tactics. See COVER, *supra* note 26, at 244-

it was presented to the court,<sup>71</sup> McLean disparaged forcible resistance to the law as dangerous to the Union and social order: “it should be promptly discouraged and frowned down. Such a mode of redress has no sanction, and can have no sanction, from the institution or morals of the country. It tends alike to the subversion of all order and the destruction of all the securities of our social existence.”<sup>72</sup>

The justices were quickly joined by lower court judges from across the North—many of whom were public opponents of slavery. Judge Samuel Prentiss in Vermont was a vocal opponent of slavery who had supported the fight against the gag rule while serving in the U.S. Senate in 1838.<sup>73</sup> Yet Prentiss argued in his jury instruction that the law must be enforced and that the doctrines of civil disobedience “are new . . . [and t]hey inculcate insubordination and lawless disobedience; and those who teach them, whether they are conscious of it or not, are enemies to public order and the public peace and welfare.”<sup>74</sup> It was only by stifling resistance, “that we can hope to preserve this Union.”<sup>75</sup> In June, Judge Ross Wilkins in Michigan also weighed in.<sup>76</sup> Wilkins assured that the law “would be, and will be, executed in Michigan. . . . In this country, gentlemen, none are above the law.”<sup>77</sup>

In July, Judge Irwin—a Jacksonian and no friend to abolition—joined in from the Western District of Pennsylvania with a full-throated defense of the law, condemnation of resisters, and plea for enforcement to save the Union. So embedded in our social fabric was the law that “there can be not antagonist moral duty or obligation binding on the conscience in opposition to the laws. . . . The fallacy of the ‘higher law’ . . . has done much to peril the peace and safety of the community.”<sup>78</sup> In September, Judge Kane issued another instruction, this time making Judge Huntington’s suggestion explicit and telling the jury to charge resisters with treason:

If it has been thought safe, to counsel and instigate others to acts of forcible oppugnation to the provisions of a statute—to inflame the minds of the ignorant, by appeals to passion, and denunciations of the

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71. Nelson had explicitly assumed that the law was constitutional, while Woodbury declined to pass on the question but strongly suggested that he agreed with Nelson. In this context, McLean came in for praise from the antislavery press for exhibiting more reserve. See *Judge Mclean on the Fugitive Slave Law*, PA. FREEMAN, May 1, 1851, at 3.

72. *Id.*

73. See WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS 118 (1998).

74. *Obedience to Law*, DAILY NAT’L INTELLIGENCER, May 29, 1851, at 3.

75. *Id.*

76. Wilkins’s views on slavery are slightly harder to decipher, but there is evidence that he was at least somewhat aligned with antislavery movements because, in 1845, he wrote a letter attesting to the character and veracity of Henry Bibb, a fugitive slave who was publishing his memoir in explicit service of abolition. See HENRY BIBB & CHARLES J. HEGLAR, THE LIFE AND ADVENTURES OF HENRY BIBB: AN AMERICAN SLAVE 9 (1850).

77. *Another Judge on the Fugitive Law*, DAILY MO. REPUBLICAN, June 22, 1851, at 2.

78. *Judge Irwin and the Fugitive Slave Law*, DAILY UNION, June 28, 1851, at 2.

law as oppressive, unjust, revolting to the conscience, and not binding on the actions of men . . . the mistake has been a grievous one; and they who have fallen into it may rejoice, if their appeals and their counsels have been hitherto without effect. . . . He whose conscience, or whose theories of political or individual right forbid him to support and maintain [the Constitution] in its integrity, may relieve himself from the duties of citizenship, by divesting himself of its rights. But while he remains within our borders, he is to remember, that successfully to instigate treason, is to commit it.<sup>79</sup>

In October, Justice Nelson also issued another charge disparaging abolitionists as “disorderly and turbulent men” and restating an almost apocalyptic unionism:

Any one conversant with the history of the times, and with the great issue now agitating the country, and which the perpetuating of this Union is involved, cannot fail to have seen that the result is in the hands of the people of the Northern states. . . . If they abide by the constitution – the whole and every part of it – all will be well. If they expect the Union to be saved, and to enjoy the blessings flowing from it, short of this, they will find themselves mistaken when it is too late.<sup>80</sup>

Taken alone, each of these grand jury instructions is unremarkable. They represent mainstream judges espousing the mainstream position dictated by their professional commitments. Taken together, and after reading Cover, they are *still* unremarkable. Although some of these judges were opponents of slavery, all of them were faced with the same “moral formal dilemma” that Cover identified in *Justice Accused*. Each of these judges resolved that dilemma in favor of Cover’s dismal rule of law moralism. Even those who opposed slavery felt duty-bound to follow the law. Moreover, each of these judges demonstrated the same anxieties about preserving peace, law and order, and the status quo that also motivated Cover’s judges.<sup>81</sup>

More than anything, these jury instructions support the judicial dismorphism that Cover described. They suggest that Thoreau was right and that judges were positionally and professionally incapable of being in effective solidarity with the movement to overthrow slavery. Faced with case after case of civil resistance, judges from every part of the (admittedly narrow) political spectrum of the bench agreed that the law must be enforced, civil disobedience must be stamped out, and that the Union must be preserved.

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79. Charge to Grand Jury—Treason, 30 F. Cas. 1047, 1048 (E.D. Pa. 1851) (Kane, J.). Kane was an interesting character. A strong opponent of abolitionists, he charged his abolitionist son Thomas with contempt of court when he quit his job as court clerk in protest against enforcement of the Fugitive Slave Law. Thomas continued to live at home, however, and Kane looked the other way as he used the Kane house as a station on the Underground Railroad.

80. Charge to the Grand Jury—Fugitive Slave Law, 30 F. Cas. 1013, 1014 (W.D.N.Y. 1851) (Nelson, J.).

81. See Jeffrey Schmitt, *The Antislavery Judge Reconsidered*, 29 L. & HIST. REV. 797 (2011) (arguing that the real motivating factor that unified Cover’s judges was their anxiety about the imminent dissolution of the union).

These judges were priests and not prophets, and they were immune or hostile to the antinomian arguments that motivated the defendants who came before them

### *C. Antinomian Outliers?*

In the next Section, I will explain how Judge Hoar's jury instruction unsettles the dismal narrative that these mainstream grand jury instructions construct. While my focus is on Hoar and Thoreau, it is important to mention that, remarkable though the instruction was, it was not entirely unique in its time. Indeed, there were a number of judges and Federal Commissioners who subtly (and sometimes less subtly) opposed the Fugitive Slave Law of 1850.

These acts of judicial resistance can be divided into two primary categories. First came a small but notable group of Thoreauvians who chose to resign rather than enforce the law. While Cover found no judges who took this step, he overlooked a few Commissioners who publicly resigned rather than be pressed into duty enslaving alleged fugitives. One such Commissioner was none other than Judge Kane's son, Thomas. Thomas was serving as a Commissioner before the law was passed. Once it was signed, assigning Commissioners the task of ratifying slave owners' claims, Thomas resigned noisily and publicly in protest.<sup>82</sup>

Thomas Kane was not alone.<sup>83</sup> In some places, the antislavery politics among the bar were such that it was impossible for the federal judges to find anyone to serve as Commissioner.<sup>84</sup> In other cases, Commissioners found themselves radicalized by the burden of enslaving people to the point where they resigned their commission.<sup>85</sup> In places where antislavery feeling ran high, the pressures on Commissioners to resign were strong. Commissioner Loring, who presided over the infamous Anthony Burns proceeding, suffered public and professional calumny as a consequence of his refusal to step aside before he issued the order enslaving Burns.<sup>86</sup>

For the most part, the choices that Commissioners were making were between playing their managerial role in the law's process and resigning.

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82. See GROW, *supra* note 42, at 115-16 (2009).

83. Richard Blackett's masterful and encyclopedic book details other instances of Commissioners resigning rather than enforce the law. One other resigning Commissioner, Reade Washington, was rumored to be a descendant of George Washington. See R.J.M. BLACKETT, *THE CAPTIVE'S QUEST FOR FREEDOM* 58-59 (2018).

84. See *id.* at 53, 57.

85. One example of this was Commissioner Carpenter in Cincinnati, Ohio, who resigned his commission months after presiding over a controversial proceeding that ended with the alleged fugitive (a man named Lewis). Carpenter made his resignation a public act, describing and publishing his reasons in the local papers. See Farbman, *Resistance Lawyering*, *supra* note 34, at 1910. Blackett recounts the story of Commissioner Joseph Sabine in Syracuse who also resigned immediately following the famous escape/rescue of an alleged fugitive named Jerry in that city. See BLACKETT, *supra* note 83, at 57.

86. See BLACKETT, *supra* note 83, at 432-39. While Loring escaped formal professional censure, his reputation in Boston was forever tarnished and his plum teaching post at Harvard Law School was taken from him.



While nullification was theoretically a possibility (and while some Commissioners did provide more process than the law contemplated in response to public pressure), there is no evidence that any Commissioner chose to use his power to block the enslavement of one of the alleged fugitives before him.<sup>87</sup> In many places where it was hard to find lawyers to serve as Commissioners, resignation played a similar role to nullification. If there was no Commissioner on duty at all, there was no one authorized to issue warrants, deputize posses for the federal marshals, or preside over the summary process of adjudication. Whether acts of strategic nullification or personal moral resistance, these resignations were aligned with the Thoreau/Cover theory of judicial choice. In the face of enforcing a moral horror, the Commissioner chose to resign.

Alongside this small group of Commissioners was another, more amorphous group of state court judges who stood ready and willing to collaborate with abolitionist activists and lawyers who were pulling every procedural string in their arsenal to resist and delay the operation of the Fugitive Slave Law. In nearly every case, lawyers seeking to keep their clients from being enslaved resorted to any and every procedural and substantive legal lever within reach.<sup>88</sup> In places where state court judges were more friendly to abolitionists than federal court judges, antislavery lawyers frequently sought to use state court processes to interfere with and frustrate the federal process. A full catalogue of the ways in which state court judges happily allowed their courtrooms to be used strategically would fill more pages than I have here. Still, let me offer one representative example from the case of Margaret Garner—the source material for Toni Morrison’s *Beloved*.

Margaret Garner and her family had been enslaved in Kentucky by a man named Archibald Gaines. When Garner and her children escaped north across the Ohio River to Cincinnati, Gaines sent a party of slave catchers after them. When Garner saw the slave catchers coming, she killed one of her children (and attempted to kill the others) rather than send them back into enslavement.<sup>89</sup> Garner and her remaining family were captured and Gaines engaged the machinery of the Fugitive Slave Law to bring them back to Kentucky. While the proceedings were pending before the Federal Commissioner in Cincinnati, the Garners’ lawyer, John Jolliffe, sought every bit of leverage he could find to delay the proceedings and keep the

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87. There were a non-trivial number of proceedings before Commissioners that ended with the alleged fugitive being liberated. But having reviewed these cases thoroughly in my prior work, I conclude that these outcomes were much more likely to result from unavoidable substantive proof of liberty than they were to result from nullifying Commissioners. See Farbman, *Resistance Lawyering*, *supra* note 34, at 1968-27.

88. See *id.* 1885-94.

89. I am summarizing the arc of the story that has been told and analyzed many times. It has been fully told in many places, including STEVEN WEISENBURGER, *MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD MURDER FROM THE OLD SOUTH* (1999) and MARK REINHARDT, *WHO SPEAKS FOR MARGARET GARNER* (2010).

Garner free. One of his first and most successful tactics was to appeal to a friendly state judge in Cincinnati for a writ of habeas corpus transferring Garner from federal to state custody. Jolliffe argued that Ohio needed to try Garner for the murder of her child and that the state's claim took precedence over the federal claim. He found a sympathetic ear with Judge Burgoyne, who was an opponent of slavery, and who granted the writ, sparking a convoluted legal struggle between the state and federal authorities over who got custody over Garner.<sup>90</sup>

Jolliffe's gambit was ultimately unsuccessful and Garner was re-enslaved by the Commissioner and sent tragically "down the river" to death by hard labor. Still, Judge Burgoyne's willingness to strategically interpose state authority between the federal proceedings and human beings facing enslavement represents a picture of judicial engagement with the fight against slavery that Cover did not see.

These examples of righteous Commissioners and strategically nullifying state court judges point away from the seemingly unified position introduced by Cover and reinforced, time and time again, in the conventional grand jury instructions. In other words, they suggest a whiff of antinomian influence within the judicial establishment. These are gestures toward solidarity—and ones with their own corollaries in the present. But they were focused on the moral emergency of keeping a human being from being enslaved rather than the more complex case of criminally charging someone for being resisting a law. When a judge or Commissioner was faced with the question of whether an alleged fugitive should be enslaved or remain free, the political calculus was radically different than it was in cases of civil resistance. While there was political value in the outrage generated by the federal government's complicity in enslaving a human being, that outrage came at a price too high for any alleged fugitive to pay. People like Anthony Burns, Thomas Sims, and Margaret Garner were not submitting themselves to the Fugitive Slave Law to expose its injustice, they were struggling against it to *escape* the injustice upon which it was constructed.

Acting to help these alleged fugitives and struggling toward solidarity with the antislavery movement gathered around them meant interrupting the operation of the law against the bodies and lives of these human beings. The law's violence could not be exposed through its enforcement, because that very enforcement perpetrated nearly immediate erasure and an aggressive re-inscription of the core logics of the law itself. A human being enslaved under the processes of the law would be immediately bundled south, where there was little to no chance that they would be seen or heard from again. Moreover, the law and its power rested on a logic of property in human life. When an alleged fugitive was enslaved, that logic was reinforced and given

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90. See WEISENBURGER, *supra* note 89, at 79-81 (1999).

the stamp of approval by the state. Opponents of the law and slavery resisted the very idea of property in human life, which meant that they steadfastly insisted in rejecting the entire logic of property at every juncture. As a consequence, it was almost impossible to imagine even the most politically savvy alleged fugitive submitting to the processes of the law in order to reveal the law's flaws through its enforcement. In that context, resistance through resignation and nullification make good sense.

The difference between helping keep a human free and expressing sympathy for civil resisters matters because it is the difference between an urgent moral imperative and the more abstract idea of solidarity with the abolitionist movement. A judge might, when push came to shove, be unwilling to be complicit in the enslavement of a human (although Cover is right that these judges were fewer and farther between than they should have been). But that same judge might feel the need, alongside Sprague, Prentiss, and McLean, to condemn civil resistance aimed at frustrating the Fugitive Slave Law or ending the entire legal order of slavery.

Thus, while these glimmers of judicial resistance go some way to dispelling the dismal gloom, they don't bear directly on the central question of whether and how judges can strive towards solidarity with movements. For a more direct answer to this question, I turn, at long last, to Ebenezer Rockwood Hoar.

### III. THE JUDGE AND THE TRANSCENDENTALIST

#### *A. A Brief Biographical Sketch*

Comparing Hoar's instruction against the unanimity of the orthodox jury instructions reveals the extent to which it was a departure from that orthodoxy, but it does not fully explain *why* Hoar departed as he did. Therefore, before diving into that comparison, it is necessary to briefly situate Hoar within what Hawthorne called the "mountain atmosphere" of Emerson and Thoreau's Concord. Hoar's life was deeply entangled with that of Emerson and Thoreau on the one hand and with the growing antislavery political movement on the other.

#### *(1) Puritan Roots*

Ebenezer Rockwood Hoar was born in Concord on February 21, 1816.<sup>91</sup> His background was almost a caricature of Yankee aristocracy. His maternal grandfather signed the Declaration of Independence,<sup>92</sup> and his

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91. MOORFIELD STOREY & EDWARD WALDO EMERSON, EBENEZER ROCKWOOD HOAR: A MEMOIR 7 (1911).

92. *Id.* at 6. This was Roger Sherman who, among his various claims to fame, is the only person to sign all four of the arguably most important foundational documents of American law: the Continental Association, the Declaration of Independence, The Articles of Confederation, and the Constitution. See generally LEWIS HENRY BOUTELL, THE LIFE OF ROGER SHERMAN (McClurg 1896). Sherman has come

paternal grandfather fought at Concord Bridge in the first battle of the Revolutionary War in 1775.<sup>93</sup> His father was “Squire” Samuel Hoar, one of the grandest old men of nineteenth-century Concord and himself a lawyer, statesman, and a paragon of puritanical virtue.<sup>94</sup> His youngest son (and Rockwood’s brother) George Frisbie Hoar summed up the general tone of comments about his father: “in everything related to his own conduct, [he] was controlled by a more than Puritan austerity. He seemed to live for nothing but duty. Yet he was a man of strong affections, unlike what is generally deemed to be the character of a Puritan.”<sup>95</sup>

Rockwood’s mother Sarah was cut from a similarly rigid, if somewhat less rugged, cloth.<sup>96</sup> She, like her husband, seems to have combined an inherited puritan rigidity with a dutiful streak of altruism.<sup>97</sup> Once established as one of the leading ladies of Concord, Sarah evolved into “Madame Hoar,” who Frank Sanborn recalled as the “most talkative person in Concord in my time.”<sup>98</sup>

Hoar was one of five siblings. The oldest was Elizabeth, who would go on to become one of Ralph Waldo Emerson’s closest friends. Rockwood came next, followed by another sister (Sarah) and then Edward, who would become one of Thoreau’s closest friends. Finally, the baby, George Frisbie,

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in for abuse recently as the man behind the “Connecticut Compromise,” which created the Senate. He has also come under scrutiny because he was one of the northern delegates who allowed slavery into the new republic’s constitution. Whatever his contemporary tarnish, Thomas Jefferson saw him as a true Yankee and described him in words that echo those that would later be applied to his grandson: “That is Mr. Sherman of Connecticut, a man who never said a foolish thing in his life.” *Id.* at 292.

93. This was the first “Judge Hoar,” Samuel Hoar Sr. *See* GEORGE FRISBIE HOAR, *AUTOBIOGRAPHY OF SEVENTY YEARS* 20 (1905).

94. *See id.* at 38 (“Mr. Hoar was naturally conservative, as would be expected of an old Federalist who was educated at Harvard in the beginning of the nineteenth century. His rules of public and private conduct were strict and austere. He applied them more strictly to himself than to others.”). Despite being cut from rigid traditional cloth, Squire Hoar was, along with his son, one of the early architects of the mainstream antislavery movement in Massachusetts. *See* STOREY & EMERSON, *supra* note 91, at 4. There are glimpses of Squire Hoar’s politics in the records of the Concord Lyceum. In 1832, in response to the question “Is the Union threatened by the present aspect of affairs?” Squire Hoar argued that it was. KENNETH WALTER CAMERON, *THE MASSACHUSETTS LYCEUM DURING THE AMERICAN RENAISSANCE: MATERIALS FOR THE STUDY OF THE ORAL TRADITION IN AMERICAN LETTERS: EMERSON, THOREAU, HAWTHORNE AND OTHER NEW ENGLAND LECTURERS* 128 (1969).

95. *See* HOAR, *supra* note 93, at 36.

96. As Roger Sherman’s daughter, she had been raised among the most powerful families in the new republic. She played with John Jay’s children, told personal stories about George Washington, and was surrounded by men who had served in the Washington and Jefferson administrations. *See id.* at 15-16. Sarah, growing up in New Haven, was apparently particularly admired by John C. Calhoun—another kind of American aristocrat. *See id.* at 8.

97. While she was living in Connecticut, she and two of her friends (the daughters of Chief Justice Ellsworth and Senator Hillhouse) started a school to teach black children to read. At the time, it was illegal to teach any black person to read in New Haven, and yet the three young women were committed enough to the project that they persisted, ultimately winning public support for the school to continue. *See* PAULA IVASKA ROBBINS, *THE ROYAL FAMILY OF CONCORD* 31 (2003). Senator Hoar offers a somewhat more romantic view, to be taken with some filial grains of salt. He called his mother, “the most perfect democrat, in the best sense of the word, that I ever knew. It was a democracy which was the logical result of the doctrines of the Old Testament and the New. It recognized the dignity of the individual soul, without regard to the accident of birth or wealth or power or *color of the skin.*” HOAR, *supra* note 93, at 7 (emphasis added).

98. FRANK SANBORN, *THE LIFE OF HENRY DAVID THOREAU* 320 (1917).

would go on to become a long-serving senator from Massachusetts.

By all accounts, the atmosphere of the Hoar household matched the dutiful, puritan, and “just” descriptions of the parents. The Hoars were religious in the severe tradition; they were Unitarians of “the sternest type.”<sup>99</sup> It does not seem that it was the most gleeful environment for a child.<sup>100</sup>

Rockwood enrolled at Harvard at the age of 15 and graduated in 1835, at the tender age of 19. After spending a year running a school in Pittsburgh,<sup>101</sup> he returned home to Concord to study law with his father for two years.<sup>102</sup> In 1838, Rockwood entered the law school at Harvard. At the time, the law school had around seventy students and two full-time professors: Simon Greenleaf and Justice Joseph Story.<sup>103</sup> It was a small and elite world, and many of the Judge’s classmates went on to be famous. Notably, he was in class with Justice Story’s son, the lawyer and sculptor William Wetmore Story, Richard Henry Dana, James Russell Lowell,<sup>104</sup> and a number of future judges.<sup>105</sup>

After law school, Hoar apprenticed for a few months in Worcester with future Harvard law professor Emory Washburn, and then returned to Concord to set up his own practice.<sup>106</sup> He played politics and practiced law in Concord from 1840 to 1849, when the governor appointed him to the Court of Common Pleas, where he would serve until 1855.<sup>107</sup> It was during

99. STOREY & EMERSON, *supra* note 91, at 8.

100. HOAR, *supra* note 93, at 46. An almost comical picture of the family was drawn by a visiting German author who stayed with the family. She reported, “we went to sleep at the house of a stern old Puritan, where we had long prayers, kneeling with our faces to the wall.” FREDERIKA BREMER, *THE HOMES OF THE NEW WORLD: IMPRESSIONS OF AMERICA* 119 (Harper & Bros. 1853).

101. See HOAR, *supra* note 93, at 27. This was a relatively common post-graduate adventure for young Harvard graduates.

102. See *id.* at 28. Before heading home, the Judge went to go hear Henry Clay speak in Kentucky. While there, he was robbed on a river boat.

103. See CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 5 (1908). The life of a law student consisted of, every week, attending “six private lectures and usually more; at which the students are examined in their respective studies, and oral examinations and illustrations are given by the professors.” Harvard Law School, *Catalogue of the Law School of Harvard University for the Academical Year 1835-6*, at 6 (scanned images available from the Harvard Law School Library online at: <http://nrs.harvard.edu/urn-3:HLS.LIBR:1459156>). The course catalogue for 1835-1836 gives a flavor of the substance of the coursework. The two most important texts were Blackstone and Kent, supplemented by a host of subject specific treatises. See *id.* at 8-10.

104. While Rockwood was at law school, he began courting his future wife, Caroline Brooks (his neighbor in Concord), apparently partly at the instigation Lowell. See STOREY & EMERSON, *supra* note 91, at 31. Lowell appears to have been interested in Caroline himself—so much so that he was moved to write a poem about her about which he said, “By Jove! I like that better than anything I’ve written for two years. I wrote it *con amore* and *currant calamo*.” Judge Hoar and Lowell remained friends for the rest of their lives, so it doesn’t seem that there were hard feelings.

105. See WARREN, *supra* note 103, at 5, 7-8.

106. In 1845, just a few years after he began to practice, Rockwood was elected to the State Senate, where he must have served only briefly, because in 1847 he took a trip to Europe for his health. See Letter from Ralph Waldo Emerson to Harriet Martineau (Apr. 1847) (Hoar Family Papers, Concord Free Public Library) (“My friend Rockwood Hoar, Esq. of this town is sent to England & to Europe by his physician to force him to a rest from law & politics for a few months.”).

107. See STOREY & EMERSON, *supra* note 91, at 79, 107.

these years in Concord before taking the bench that he became increasingly entangled in state and national politics and the fight against slavery.<sup>108</sup> It was also during these years that he invited Thoreau to give the lecture that would come to be known as *Civil Disobedience* to the Concord Lyceum.

Although my concern here is with Judge Hoar in 1854 and what came before, his life and career afterward bear brief mention because they trace the complex ways in which public service and private influence continued to entangle his life. In 1859, the Judge was appointed to the Supreme Judicial Court of Massachusetts, where he served for ten years.<sup>109</sup> In 1860, while Judge Hoar was serving on the court, his neighbor and his children's school-teacher (and famous antislavery agitator) Frank Sanborn was arrested in his home for his role as co-conspirator in John Brown's infamous raid in Harper's Ferry.<sup>110</sup> The men who came to arrest Sanborn intended to bring him quickly out of the state to face trial in Washington, D.C. The neighbors raised the alarm, and Judge Hoar was called to dash off a writ of habeas corpus in his pajamas—this intervention helped Sanborn avoid punishment, despite his clear guilt.<sup>111</sup>

Once the war broke out, Judge Hoar's son Sam caused a family drama by running away from home to join the army.<sup>112</sup> In 1862, Sam and a classmate "disappeared" to Maine to enlist in a regiment there. While he was there, he ran into his old school-mate Julian Hawthorne, who was in Maine with his father—the famous author and the Hoar family's neighbor. Against his son's wishes, Nathaniel promptly wrote waspishly to Judge Hoar, ratting out Sam's plan.<sup>113</sup> Having discovered his son, Judge Hoar pulled some strings and managed to transfer Sam to the 48<sup>th</sup> Massachusetts Regiment.<sup>114</sup>

In March of 1869, President Grant appointed Judge Hoar to be his Attorney General.<sup>115</sup> Tasked with the delicate role of shepherding in a host of new judges under the Judiciary Act of 1869, Hoar's rigid moralism, combined with his seemingly ruthless directness, made him a lot of enemies in a short amount of time.<sup>116</sup> Southerners disliked Hoar because of his close

108. *See id.* at 107.

109. *See id.* at 119.

110. Sanborn had been instrumental in raising the funds that bankrolled Brown's raid. *See* DAVID S. REYNOLDS, JOHN BROWN, ABOLITIONIST 208 (2009).

111. *See* FRANK SANBORN, 1 RECOLLECTIONS OF SEVENTY YEARS 208-17 (1909).

112. Sam had been a student at Sanborn's school, along with Nathaniel Hawthorne's son Julian and Henry and William James' little brothers Bob and Wilkie.

113. Hawthorne's letter is tinted with some of his notorious waspishness. He adopts the role of informer without apology: "I write this without Julian's aspect; for he considers it a point of honor not to give any testimony that may tend to defeat the purpose of his schoolfellows; but as he had already spoken to me on the subject, I feel at liberty to use my own judgment about addressing you." Letter from Nathaniel Hawthorne to E.R. Hoar (Sept. 5, 1862) (Hoar Family Papers, Concord Free Public Library)

114. Despite this, Sam saw action and returned home very sick with fever. *See* STOREY & EMERSON, *supra* note 91, at 136. He survived, but Judge Hoar's hope that Sam avoid the war had been dashed.

115. *See id.* at 162-69.

116. Robbins reports that his cabinet-mate Nevins said, "When he dealt with dishonesty his sarcasm cut like a knife, and his contempt for stupidity was unconcealed." ROBBINS, *supra* note 97, at

connections to Charles Sumner and his dyed-in-the-wool New England heritage. But Hoar had also alienated Radical Republicans by his opposition to many of the most radical elements of Congressional Reconstruction.<sup>117</sup> Grant liked Hoar, but he felt politically compelled to get him out of his cabinet, and so he settled on the expedient of nominating Hoar for the Supreme Court in September of 1869.<sup>118</sup> Although Hoar reluctantly accepted,<sup>119</sup> the enemies that he had made in the Senate wound up dooming his nomination, which was rejected in February 1870.<sup>120</sup> By June of 1870, Hoar had submitted his resignation as Attorney General, and on July 7 he left his post to return to Concord.<sup>121</sup>

Back in Concord, the Judge resumed his legal practice and returned to politics. He was elected to Congress (grudgingly) in 1872, serving for only one term.<sup>122</sup> After he returned again from Washington, Hoar seems to have led a relatively quiet life close to Concord, practicing law and, like his father before him, playing the role of resident town statesman.<sup>123</sup> In April 1882, Judge Hoar was at Emerson's deathbed when he passed away.<sup>124</sup> Twelve years later, Hoar himself died.<sup>125</sup>

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312.

117. See RON CHERNOW, *GRANT* 684-85 (2017). Hoar's stubbornness regarding Reconstruction was not unique among devoted abolitionists. Once the Civil War ended and slavery was abolished, abolitionists were deeply split over questions regarding racial equality and the economic and political power that should be granted to the newly emancipated citizens. Hoar, it turned out, was no radical when it came to racial equality. This led to a public schism between him and his old ally (and devout egalitarian) Wendell Phillips. Phillips had been a critic of Hoar while he served in the Grant administration—and then, when Phillips died and Hoar was asked whether he would attend his funeral, Hoar responded that he would not, “but I entirely approve of the proceedings.” See Donald Yacovone, *Race, Radicalism and Remembering Wendell Phillips*, in WENDELL PHILLIPS, SOCIAL JUSTICE, AND THE POWER OF THE PAST 282 (A. J. Aiséirthe & Donald Yacovone eds., 2016).

118. See STOREY & EMERSON, *supra* note 91, at 184.

119. His reasons for reluctance were, it seems, related to money. In a letter to his wife, he reflects on whether or not he can support the family on the salary of a Supreme Court justice (then \$6,000) and whether he still had the energy to return to private practice after his term as Attorney General was over. Interestingly, the letter suggests that the position on the highest court had less of the cachet that it has for lawyers today. Judge Hoar suggests, to the contrary, that “I almost feel that it is ignominious to retire from active duty in the public service . . .” *Id.* at 186.

120. See *id.* at 187-97.

121. See *id.* at 210-13. Emerson celebrated his return to New England: “I notice that they who drink for some time the Potomac Water, lose their relish for the water of the Charles River, the Merrimac and the Connecticut. But I think the public health requires that the Potomac water should be corrected by copious infusions of these provincial streams. Rockwood Hoar retains his relish for the Musketaquid.”

122. See *id.* at 229. Storey and Emerson claim that Judge Hoar felt no sympathy for the “Liberal Republican” movement that would up in the strange nomination of Horace Greeley in that year. However, the Judge's views on race and reconstruction appear to have become more conservative. He voted against President Grant's “Force Bill” in 1873, which gave the President more power over Southern elections, and he also opposed an 1874 law to enforce the civil rights laws. See ROBBINS, *supra* note 97, at 338.

123. For example, he was co-chair of the Concord Centennial Committee planning the centennial celebration of the first shots of the revolutionary war. See STOREY & EMERSON, *supra* note 91, at 247.

124. See ROBBINS, *supra* note 97, at 352.

125. See *id.* at 358-59. A note of trivia: the Judge's last speech was on April 19, celebrating the fact that Massachusetts had finally adopted Patriot's Day as an official state holiday. Judge Hoar had long advocated that the day be celebrated by the state—making him, in a sense, the father of morning baseball at Fenway Park ball and the Boston Marathon.

*(2) The Conscience Whig*

Judge Hoar, as a young man, was a committed Whig and an avid admirer of Henry Clay and Daniel Webster.<sup>126</sup> Daniel Walker Howe has argued that being a Whig in the first half of the nineteenth century meant more than being part of a political party; it meant being part of a political and social culture.<sup>127</sup> As Howe describes it, that culture was defined by a strong conception of order: “the faculty of a statesman in this system was to maintain an orderly balance of society . . . and he did this largely through his rhetoric.”<sup>128</sup> Inherent in this effort to achieve social balance was a kind of Yankee reserve and abstention that would clearly have appealed to the Hoars.<sup>129</sup>

Until 1844, being a Whig in Massachusetts was a simple enough identity. With respect to economics, it meant being in favor of the broad plan of the national party,<sup>130</sup> and with respect to the growing sectional tension, it meant opposing the expansion of slavery.<sup>131</sup> In 1845, things got more complicated when the newly elected President Polk annexed Texas. As annexation led to the Mexican War and brought up questions about the expansion of slavery, the unity of the Massachusetts Whigs started to break down. Hoar and his father were both active opponents of annexation in January of 1845.<sup>132</sup> A turn to more direct abolitionist views followed. By the fall of 1845, Hoar was part of a group that drafted a resolution declaring, “in our private relations and in our political organizations, by our voices and our votes, in Congress or out, we will use all practicable means for the extinction of slavery on the American Continent.”<sup>133</sup> Things were moving quickly, and before long Hoar found himself keeping company with a new breed of Whig—more radical and less interested in balance. The leaders of this new political vanguard were unabashed abolitionists carving out a place in politics for their growing movement.

As the moderate Whigs sought compromise on the expansion of slavery (most infamously in the person of Hoar’s childhood hero Daniel Webster), Hoar broke with them. While serving briefly as a state senator, he spoke out on the Massachusetts statehouse floor saying, “It is as much the duty of

126. See HOAR, *supra* note 93, at 149.

127. See DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 3 (1979).

128. *Id.* at 31.

129. In Howe’s words, the Whig party sought to impose “standards of self-control and restraint, which dovetailed well with the economic program of the party for they emphasized thrift, sobriety, and public responsibility.” *Id.* at 33.

130. Writ very large, the program was an interventionist program of national development aimed at developing domestic industry. To quote Howe’s broad description of the disagreement between the Democrats and the Whigs on domestic economic policy: “The Democrats inclined toward free trade and laissez-faire; when government action was required, they preferred to leave it to the states and local communities. The Whigs were more concerned with providing centralized direction to social policy.” HOWE, *supra* note 127, at 16.

131. See STORY & EMERSON, *supra* note 91, at 38.

132. See *id.* at 39-40.

133. *Id.* at 40.



Massachusetts to pass resolutions in favor of the rights of men as in the interests of cotton.”<sup>134</sup> The party had fractured into two factions, and it was Hoar, rejecting moderation, who named the new factions: moderate “cotton Whigs” and increasingly radical “conscience Whigs.”<sup>135</sup>

Hoar had found himself at the leading edge of a tectonic partisan realignment. By 1848, he was a participant, along with his father, in the Free-Soil Party revolt instigated by the nomination of slave-owner Zachary Taylor as the Whig candidate for president.<sup>136</sup> Though he understood himself to be keeping the faith with his old Whig principles,<sup>137</sup> Hoar found himself at the front of the crowd rushing from the arms of the old Whig party and into the embrace of what would become the Republican party. Although his partisanship was dampened when he served on the bench, Hoar was and remained a staunch Republican for the rest of his life.<sup>138</sup>

This political transition is worth rehearsing because it was driven as much by national politics as it was by Hoar’s local milieu. At the time when Hoar was defining himself as a young lawyer and statesman, his neighbors were engaged in a debate over whether or not the radical abolitionist Wendell Phillips should be allowed to deliver an antislavery lecture at the Concord Lyceum. When the lecture was proposed in December of 1842, some opposed it as too controversial.<sup>139</sup> Though Phillips was ultimately invited to speak, the local debate over how and whether to consider abolitionist ideas did not subside. In 1845, Thoreau wrote a letter reporting on Phillips’s third speech before the Lyceum. Thoreau noted that:

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134. *Id.* at 43.

135. As Storey and Emerson tell it: “It is said that during the debate he was taunted with being a ‘Conscience Whig,’ to which he replied that he would rather be a Conscience Whig than a Cotton Whig. However this may be, it is certain that from what he said at this time came the names ‘Cotton Whigs’ and ‘Conscience Whigs’ thereafter used to designate the two factors into which the Whig party was divided by the annexation and admission of Texas.” *Id.* at 44.

136. Rockwood was one of the conveners of the Free-Soil convention in Worcester and he gave what was described as “a speech of great force and power.” *Id.* at 56. His father, Squire Hoar, was chosen as president of the convention.

137. In 1848, Rockwood “made a speech at some length, chiefly to prove that he and those who were acting with him were true to the Whig platform on the subject of slavery; that they presented to the country no new issue, but were endeavoring to redeem old Whig pledges by a consistent course of action. . . . Mr. Hoar spoke in measured terms and in a professional style, as though he were simply making an ordinary plea at the bar.” See *The New Political Movement*, LIBERATOR, July 14, 1848 at 2.

138. In 1849, when he was appointed to the bench, Judge Hoar wrote a letter to Charles Sumner that reveals the depth of his commitment to the political cause he was leaving. He wrote: “I desire to resign my office as a Member of the Free Soil [S.C.?] Committee. So withdrawing, as I must necessarily do, from an active participation in political contests, I cannot forbear to express to you and to our associates my high sense of the honor of having been connected with them in the arduous, but as we trust, not fruitless labors of the past year. To their disinterested steady, unwavering devotion to the great cause of Human Freedom, I can bear an appreciating testimony. And that through evil report and good report, in success or in defeat, they may preserve the same inflexible adherence to principle, until the good cause shall reach its surely destined triumph, is my heartfelt wish.” Letter from Ebenezer Rockwood Hoar to Charles Sumner (Aug. 3, 1849) (Unpublished Papers of Charles Sumner, Houghton Library, Harvard University).

139. Judge Keyes said, “this Lyceum is established for Social & Mutual improvement the introduction of the vexed and disorganizing question of Abolitionism or Slavery should be kept out of it.” CAMERON, *supra* note 94, at 156 (notes of meeting of Dec. 19, 1842).

[T]he admission of this gentleman has been strenuously opposed by a respectable portion of our fellow citizens, who themselves, we trust, whose descendants at least, we know, will be as faithful conservers of the true order, whenever that shall be the order of the day, and in each instance, the people have voted that they would hear him, by coming themselves and bringing their friends to the lecture room, and being very silent so that they might hear.<sup>140</sup>

We do not know from the records which side of this debate Hoar was on, but it is almost certain that he was part of the debate. Politics, abolitionism, sectional tension—these things were seeping inextricably into the intellectual life of Concord. Hoar could have followed his Yankee moderate neighbors and sought to cling to a conception of order that avoided “vexed” issues. Instead, when the crisis came, he was among the first to respond.<sup>141</sup>

### (3) *The “Mountain Atmosphere”*

If this feels like a hyperlocalized political snapshot, it is! But in Concord between 1840 and 1860, local politics was suffused with the antinomian spirit of the epicenter of the American Renaissance and Transcendentalism. Hoar’s political formation and education was shaped by his proximity to his famous neighbors, and especially Emerson and Thoreau. In Hawthorne’s evocative words, Emerson cast a powerful spell over the town: “it was impossible to dwell in his vicinity, without inhaling, more or less, the mountain atmosphere of his lofty thought.”<sup>142</sup> To put this influence more bluntly, Hoar’s politics and legal ideas were shaped amidst conversations with the transcendentalists, radicals, and utopians who were not only his neighbors but formed his closest family circle.

Hoar’s older sister, Elizabeth, had been engaged to be married to Ralph Waldo Emerson’s younger and beloved brother Charles.<sup>143</sup> Charles died in

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140. HENRY DAVID THOREAU, *Wendell Phillips Before the Concord Lyceum*, in CIVIL DISOBEDIENCE AND OTHER ESSAYS 185, 185 (Digireads, 2005). Although the lectures by Phillips were especially controversial, there were a number of other lectures during that time period at the Lyceum that touched on the roiling mixture of political and intellectual ferment. On January 4, 1843, Bronson Alcott’s starry-eyed English friend Charles Lane spoke; on November 23, 1843, Orestes Brownson spoke on “Demagogeism;” and on March 13, 1844, James Freeman Clark gave a lecture entitled “Annexation of Texas.” See CAMERON, *supra* note 94, at 156-58.

141. One reason for Rockwood’s political commitments might have come from his own family circle. In 1844, Squire Hoar was sent to South Carolina to challenge the newly passed laws there that made it legal to impress free black sailors from Massachusetts on ships in Charleston harbor into slavery. Squire Hoar traveled to Charleston with his oldest daughter Elizabeth, where he was met with considerable hostility and ultimately forced to leave the city on threat of mob violence. See HOAR, *supra* note 93, at 24-28. Squire Hoar’s trip south and his hostile reception were national news. A passage from *The Liberator* is illustrative: “The ‘chivalrous’ Carolinians are more savage than savages, for Indian barbarians hold sacred flags of truce, and treat with respect messengers sent to them on errands of redress. The Carolinians recklessly resort to personal violence, because they know they can do nothing by argument and reason.” *Hon. Samuel Hoar*, LIBERATOR, Dec. 20, 1844 at 2.

142. Nathaniel Hawthorne, *The Old Manse*, in MOSSES FROM AN OLD MANSE 27 (DeFau & Co. 1902) (1846).

143. See ROBBINS, *supra* note 97, at 79-105. Charles was himself a lawyer and in 1835, when Squire Hoar had been elected to Congress, he proposed that his future son-in-law take over his

1835, leaving both Elizabeth and Emerson bereft. From that point forward, Elizabeth was adopted as a sister by Emerson and effectively joined his household.<sup>144</sup> Elizabeth was not only close with Emerson but was an entrenched part of the transcendentalist circle, which had its epicenter in Emerson's household.<sup>145</sup> Among the closest members and most frequent visitors of that circle was Henry David Thoreau.<sup>146</sup>

Yet it was the Judge's younger brother who was most intimate with Thoreau. Edward Sherman Hoar trained to be a lawyer, but unlike his political and public-minded brothers, Edward was quiet, private, and drawn to nature.<sup>147</sup> He and Thoreau were close friends.<sup>148</sup> Edward was a frequent walking companion of Thoreau and he accompanied him later in life on his trips to the Maine woods and Mount Washington.<sup>149</sup> George Frisbie, the youngest Hoar brother, was also close with Thoreau. He reported that, "I have taken many a long walk with him. I used to go down to see him in the winter days in my vacations in his hut near Walden. He was capital company. . . . He was fond of discoursing. I do not think he was vain. But he liked to do his thinking out loud, and expected that you should be an

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practice—an offer that Charles accepted. *See id.* at 91.

144. *See id.* at 126-27. Emerson called her "Elizabeth the Wise" and said of her, "Elizabeth Hoar consecrates. I have no friend I more wish to be immortal than she, and influence I cannot spare, but must always have at hand for recourse." RALPH WALDO EMERSON, 4 JOURNALS OF RALPH WALDO EMERSON 85 (Houghton Mifflin 1911).

145. She saw much of Bronson Alcott and his English disciples who had come to Massachusetts to start a utopian community with him. She worked on *The Dial*, was close friends with Margaret Fuller and the Peabody sisters, and generally was in the midst of the corner of transcendentalist life that revolved around Emerson and his house. *See* ROBBINS, *supra* note 97, at 121.

146. Thoreau seems to have been somewhat intimidated by her. He wrote of her to Emerson, "Elizabeth Hoar still flits about these clearings, and I meet her here and there, and in all houses but her own, but as if I were not the less of her family for all that." Letter from H.D. Thoreau to R.W. Emerson (Jan. 24, 1843), in FAMILIAR LETTERS, *supra* note 9, at 58-59. For her part, Elizabeth liked Henry enough to give him an inkstand when he departed Concord for Long Island. *See* ROBBINS, *supra* note 97, at 143. But she felt ambivalent about him, as many others did, and it was in her voice that Emerson reflected on Thoreau after his death: "I love Henry, but I cannot like him; and as for taking his arm, I should as soon think of taking the arm of an elm-tree." *Id.* at 144.

147. After finishing law school in New York, Edward wandered to California where he "practiced law to some extent" and spent most of his time farming and exploring the country. *See* E.R. Hoar, *Letter to The Secretary of the Class of 1844*, in THE CLASS OF 1844, HARVARD COLLEGE, FIFTY YEARS AFTER GRADUATION 128, 129 (1896). Rockwood remembered his brother as "a scholar . . . an accomplished naturalist . . . an ornithologist of accurate and extensive observation, and something of a geologist." *Id.* at 131. The story of Edward's journey to California offers a glimpse of why he and Thoreau got along: "when admitted to the bar of [New York] . . . he found the confinement oppressive. The emigration to California was very attractive. He went by sea to Vera Cruz; there bought a mule on which he rode across Mexico to the Pacific Ocean, learning the Spanish language along the way, and then went by water to San Francisco." *Id.* at 128.

148. Edward was with Thoreau on the famous day in 1844 when, while the rest of the town was ensconced in a town meeting, they rowed up the river and accidentally set fire to 800 acres of farmland. *See* FRANK SANBORN, THE LIFE OF HENRY DAVID THOREAU: INCLUDING MANY ESSAY HITHERTO UNPUBLISHED AND SOME ACCOUNT OF HIS FAMILY AND FRIENDS 416 (1917).

149. Paula Robbins provocatively suggests, following on scholarly speculation regarding Thoreau's sexuality, that "both Edward and Henry shared more than their love of nature." ROBBINS, *supra* note 97, at 195. Whether she is intimating that the two had a sexual relationship with each other or merely shared a common feeling of alienation based on sexual orientation, it remains speculation in its purest form. Nevertheless, the mere speculation of biographers helps illustrate just how close Edward and Thoreau were.

auditor rather than a companion.”<sup>150</sup>

Close as his siblings were to Emerson and Thoreau, Hoar himself could not avoid being close to them and their conversations by association. He had good relationships with his sister Elizabeth and both of his brothers, although he seems to have had a special affection for quiet Edward.<sup>151</sup>

Although the Hoar siblings’ intimacy with Thoreau and Emerson raises provocative and murky questions about family influence, there are clearer connections to the transcendental circle in Hoar’s own relationships. Hoar and Emerson were among the most prominent public figures in Concord and were frequently in contact. The two men often “carriage-pooled” on their way back from Saturday Club meetings in Boston,<sup>152</sup> and the Judge was among the “philosophers” in the Adirondack Club that Emerson memorialized in his 1858 poem, “The Adirondacs.”<sup>153</sup>

While the direct connections between Hoar and Thoreau are less concrete, it is clear that the two men knew each other well. When they were children in school, Hoar debated Thoreau on the topic: “Does it require more talents to make a good writer than a good extemporaneous speaker?”<sup>154</sup> Hoar was often in attendance with Elizabeth, Edward, and Thoreau at Emerson’s informal Thursday family lectures and conversations in 1837-1838—at the height of Emerson’s first and most radical explosion of writing and thought.<sup>155</sup> Their paths would continue to cross in a myriad of small and deeply personal ways. Both men were pall-bearers at the funeral of Emerson’s mother Ruth in 1852.<sup>156</sup> When Thoreau was reaching the end of his life and had trouble walking, Hoar lent him his horse so that he could move around town, and when Thoreau was on his deathbed, Hoar sent him

150. HOAR, *supra* note 93, at 72.

151. Judge Hoar once said that his “dear brother” was “worth a dozen of me” although he was not famous or a prominent member of society. See STOREY & EMERSON, *supra* note 91, at 317. In his letter to the Class of 1844 at Harvard, Rockwood remembered his brother as “the flower of our family. He had refinement, taste, courtesy, with, gentleness, honor, learning, and intellectual force.” See Hoar, *supra* note 147, at 132.

152. The Saturday Club was, in the words of Louis Menand, “a literary dining and conversation society” which included a who’s who of Boston area intellectuals and leading men. See LOUIS MENAND, *THE METAPHYSICAL CLUB* 6 (2002). Amid men like Louis Agassiz, Oliver Wendell Holmes, Sr., James Russell Lowell and Charles Eliot Norton, Emerson and the Judge were both thinking society men, far from the more mystical conversations around the Emerson dinner table or at Fruitlands or Brook Farm. Rockwood, Emerson, and Hawthorne (whom Rockwood had invited to join the club in 1860) used to ride home together from the train in Waltham in the Judge’s carriage after late nights dining at the club. See STOREY & EMERSON, *supra* note 91, at 316. Although Hawthorne was a Democrat, and only tepid at best in his opposition to slavery, he seems to have especially enjoyed his moonlight drives with the transcendentalist and the republican—“Hawthorne may have enjoyed this as much as any portion of the entertainment.” FRANK PRESTON STEARNS, *THE LIFE AND GENIUS OF NATHANIEL HAWTHORNE* 381 (1906).

153. See STOREY & EMERSON, *supra* note 91, at 145. There is a famous painting of this party, which included Agassiz, Lowell, John Holmes, and others, hanging in the Concord Public Library.

154. Hoar won this debate, though he would lose to Thoreau later in that year in a debate on the topic: “Ought lotteries to be granted for any use?” See ROBBINS, *supra* note 97, at 69.

155. See ROBBINS, *supra* note 97, at 123. This was at the peak of Emerson’s emergence as a celebrity lecturer and essayist. He published *Nature* in 1836, delivered his *The American Scholar* address in 1837, and offended the Harvard Divinity School with his *Divinity School Address* in 1838.

156. See *id.* at 235.

“fragrant hyacinths,” which Thoreau enjoyed.<sup>157</sup> These connections, together with his siblings’ relationships, establish close personal ties, if not always an intellectual alignment.<sup>158</sup>

#### (4) *The Lyceum*

If Hoar was surrounded by transcendentalist voices in his private life, so, too, was he surrounded by those voices in the public forum of the Concord Lyceum, where so many of those same voices came to speak.<sup>159</sup> In 1834, around the time that Hoar returned to Concord from Harvard, Emerson gave his first of more than 100 lectures to the Lyceum.<sup>160</sup> Over the next four decades, the Lyceum hosted some of the most famous speakers from both the transcendentalist and abolitionist circles in the Boston area. Emerson seems to have delivered nearly all of his most famous essays as lectures at one point or another at the Lyceum.<sup>161</sup> Likewise, many of Thoreau’s most famous essays were delivered in some form at the Lyceum, including chapters from *Walden*<sup>162</sup> and the lecture that would later become *Civil Disobedience*.<sup>163</sup>

There is no way to say just how much effect these lectures had on their listeners or even whether Hoar was in attendance when all of them were given. We do know, however, that he was an active enough participant to be chosen as curator for the Lyceum between 1846 and 1848.<sup>164</sup> Curators were given complete control over choosing lecturers and “their decision [was] final without [any] further interference from the Lyceum.”<sup>165</sup> During the time that Hoar was curator, Emerson delivered many of the lectures that would make up his 1850 book *Representative Men*, Charles Sumner spoke

157. See Edward W. Emerson, *Ebenezer Rockwood Hoar*, in 4 MEMOIRS OF MEMBERS OF THE SOCIAL CIRCLE IN CONCORD 28 (1909).

158. Hoar was not always Thoreau’s biggest fan. The famous abolitionist and writer Thomas Wentworth Higginson reported that upon hearing that Thoreau’s journals would be published, Hoar responded, “Henry Thoreau’s journals? . . . Pray tell me who on earth would care to read Henry Thoreau’s journals?” HENRY GLEASON, *THROUGH THE YEAR WITH THOREAU*, at xvii (1917).

159. The Concord Lyceum was founded in 1828 for the purpose of “improvement of knowledge, the advancement of Popular Education, and the diffusion of useful information through out the community generally.” Both Squire Hoar and Rockwood (who would only have been twelve years old!) are listed as amongst the founding members. CAMERON, *supra* note 94, at 110 (Original Constitution of the Concord Lyceum).

160. See *id.* at 137 (minutes of Nov. 26, 1834).

161. On a number of occasions, Emerson presented lecture series over a period of weeks at the Lyceum. In 1838, in addition to reading *On Politics*, which he would later publish as the essay *Politics* in 1844, he delivered a series of six lectures *On Human Culture*. See *id.* at 148. Then in 1839, Emerson read another series of seven lectures, which he followed the next year with yet another series of eight lectures. See *id.* at 152, 154.

162. While he was living at Walden, Thoreau delivered a number of lectures, including *History of Himself* over two weeks in February of 1847. See *id.* at 162. And in 1849 he delivered a lecture entitled, *White Beans and Walden Pond*. *Id.* at 163.

163. See Letter from H.D. Thoreau to R.W. Emerson (Feb. 23, 1848), in FAMILIAR LETTERS, *supra* note 9, at 185 (“I read [a lecture] last week to the Lyceum, on The Rights and Duties of the Individual in Relation to the Government—much to Mr. Alcott’s satisfaction.”).

164. See CAMERON, *supra* note 94, at 160-62.

165. *Id.* at 160 (minutes of Nov. 12, 1845).

(twice), as did Theodore Parker and James Freeman Clark.<sup>166</sup> Perhaps most notably, Thoreau delivered four lectures, including the early version of *Civil Disobedience*.<sup>167</sup> We thus know that Hoar not only heard these lectures, but was part of the process of inviting them to be delivered.

Does this tell us that he agreed with all he heard? Hardly. But it tells us that he heard it, and likely heard it with some attention. The records of the Lyceum show that Judge Hoar was an active member in the public conversations of the town. His interlocutors, both private and public, were transcendentalists, mystics, and abolitionists in addition to old Federalists, Whigs, and Yankees. If he was not himself a full blown “antinomian,” he was proximate to and influenced by his antinomian neighbors.

### *B. The Instruction and the Lecture*

On May 24, 1854, Anthony Burns, an alleged fugitive slave, was arrested in Boston under the Fugitive Slave Law of 1850. The next day, Burns was in court, and the abolitionists of Boston were in an uproar. On May 26, a group of white and black abolitionist activists stormed the jail in an effort to free Burns from federal custody and help him escape enslavement. The attempt was violent, and while Burns was not saved, the rescuers did kill a U.S. Marshal.

Boston had been a flashpoint for the enforcement of the 1850 law since the Shadrach Minkins case. President Franklin Pierce felt compelled to send a strong message in support of the law. After Commissioner Loring concluded that Burns should be re-enslaved, the President called for federal troops to march Burns at gunpoint and under military guard through the streets of Boston and onto a boat bound for Virginia.<sup>168</sup>

By 1854, antislavery politics had moved into the mainstream across the North, and in Boston in particular. The spectacle of federal troops enslaving Burns in the streets of Boston set fire to the tinderbox of Massachusetts politics. Judge Hoar’s father, Squire Hoar, joined with Ralph Waldo Emerson to call a mass meeting in Concord that generated an angry resolution demanding that the Fugitive Slave Law be repealed.<sup>169</sup> Public speaking being the national pastime, speechmaking about the arrest, riot, and the outrage of the Fugitive Slave Law exploded across the state and beyond its borders.<sup>170</sup> Moderates and “cotton Whigs” found themselves converted by the spectacle into ardent abolitionists.<sup>171</sup>

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166. See *id.* at 160-62.

167. See *id.*

168. For a full account of the Burns trial, see ALBERT VON FRANK, *THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON’S BOSTON* (1998).

169. See *id.* at 231.

170. For a taste of the many, many speeches delivered directly after the incident, see *id.* at 29.

171. It was in response to the Burns trial that Amos Lawrence spoke his now famous quote, “we went to bed one night old fashioned, conservative, Compromise Union Whigs & waked up stark made abolitionists.” JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 120* (2003).

Although the uproar against the law had begun in 1850, it was the Burns trial and its aftermath that left the most indelible cultural mark. Walt Whitman bitterly depicted the scene in “A Boston Ballad,” itself a section of his sprawling *Leaves of Grass*.<sup>172</sup> Closer to home, the Burns trial and enslavement was the trigger to transform Thoreau’s abstract opposition to slavery into direct and urgent activist abolitionism. It was only after he’d witnessed his own state comply in the enslavement of Burns that he proclaimed: “my thoughts are murder to the state and involuntarily go plotting against her.”<sup>173</sup>

In the aftermath of Burns’s enslavement and the political furor around it, the members of the vigilance committee who had attempted to rescue Burns were brought before the grand jury in Boston to be indicted. The judge tasked with instructing and overseeing the grand jury’s proceedings was Rockwood Hoar. On July 3, in the midst of this boiling political cauldron, Hoar delivered his instruction to the grand jury. This charge, although spoken from the bench, was recorded and circulated in the newspapers the next day.<sup>174</sup>

*(1) Dismal?*

Having built up to this comparison, a first reading of the grand jury instruction will be somewhat deflating. Not only does Judge Hoar conclude that the Fugitive Slave Law is legally enforceable, he also concludes that any who oppose it must not look for any leniency from him or from the courts more broadly.<sup>175</sup> Nor is Judge Hoar’s sympathy with his neighbor Thoreau explicitly evident—with one notable passage as an exception, Hoar’s tone is that of a reasonable and dispassionate jurist, not a fire-eating abolitionist or theorist of social change.

But this is where the context becomes useful. When you look at Judge Hoar’s instruction against the backdrop of *every other* grand jury instruction dealing with resistance to the Fugitive Slave Law, what had seemed mild begins to look radical.

*(2) The Outlier among the Priests*

The other judges who delivered grand jury instructions across the North differed in politics and tone, but they all converged on a version of rule of law moralism. In case after case, judge after judge followed a four-part argument that began with affirming the constitutionality of the Fugitive

172. In Whitman’s telling, the “President’s marshal” stands in for King George and his tyranny reincarnated on the scene of his own defeat. WALT WHITMAN, *LEAVES OF GRASS* 89 (1855).

173. THOREAU, *supra* note 1, at 723.

174. EBENEZER ROCKWOOD HOAR, *CHARGE TO THE GRAND JURY AT THE JULY TERM OF THE MUNICIPAL COURT, IN BOSTON* 2 (Little Brown 1854).

175. He is clear that when a law has been deemed valid by the courts, “all citizens are in practice bound to regard it as a question settled.” *Id.* at 8.

Slave Law, insisted on the legitimacy of enforcing it, affirmed that punishing those who opposed it was also legitimate, and concluded by saying that this enforcement was necessary to the maintenance of order, social cohesion, peace, and the Union itself.

Judge Hoar's instruction began in the same place as the others did, with the constitutionality of the Fugitive Slave Law. Hoar acknowledged that the law was constitutional and binding: "it is my duty to say to you that the law under which [Burns] was detained, is a law binding upon the citizens of this Commonwealth. It has been enacted by the National Legislature, approved by the President of the United States, and held to be a constitutional enactment by [the Supreme Court]."<sup>176</sup> To this acknowledgement, he added his own pledge to adhere to the standard definitions of constitutionality: "it is the duty of every inferior tribunal to regard what [the Supreme Court] have decided henceforth as law, and it is the duty of all those concerned in the administration of justice, in any and every department, so to regard it. Gentlemen, any other rule, any other conclusion, could lead to nothing but anarchy."<sup>177</sup>

Though Judge Hoar's invocation of "anarchy" seems reminiscent of those judges who worried that resistance to the law would undermine the social order, his point is subtly but importantly different. Notice that it is not the threat of citizens resisting the law that promises anarchy, but rather a narrower institutional claim that if *lower courts* were to reject the holding of the Supreme Court, it would lead to anarchy in the judicial system. Hoar's focus is on the institutional responsibilities of the courts as opposed to the courts' role in preserving social order. He argues that he, himself, is bound to abide by the binding precedents of higher courts lest the entire edifice of the judicial system be thrown into anarchy. But, as will become clear, he neither imagines his fellow-citizens to be so bound nor shies away from acting within his role to support those citizens.

If the difference so far is subtle, Judge Hoar's next move makes his departure from the mainstream much more explicit. On the heels of acknowledging that the law was constitutional, he immediately pivots to showing just how thin a reed that constitutionality is. Judge Hoar begins by emphasizing that that the Supreme Court's holdings are not statements of law for all time, but ephemeral and subject to change depending on who sits on the Court and on the state of national opinion. "We find the Supreme Court of the United States overruling decisions which were made when that Court was differently constituted, holding that those decisions were erroneous and illegal, and it is competent for them to do so."<sup>178</sup> Justice McLean and others had admonished the jury to leave the project of law reform to electoral politics, but Judge Hoar goes further, suggesting that

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176. *Id.* at 6.

177. *Id.* at 7.

178. *Id.* at 7.



what will change those politics is coordinated social and political organizing to change public hearts and minds. He concluded that “the ultimate result upon any question of this nature, the ultimate decision of it, will be the result of the general conviction of the community. It will be the result of the mass of private opinion.”<sup>179</sup>

Though Judge Hoar claimed to accept the constitutionality of the Fugitive Slave Law, his subsequent language undermined that claim in two ways. First, by emphasizing that the Court may change its mind in the future, Judge Hoar frames its present position as provisional and temporary, subject to revision. This is, of course, always true, but in emphasizing this point, Judge Hoar highlights the promise of change over the fixity of current law.

Second, if the mechanism for changing the Court’s interpretation of the law is “mass . . . opinion,” then Judge Hoar’s instruction expressly encourages those who resist the law as agents of salutary change rather than traitorous anarchists. In Judge Hoar’s telling, the constitutional status quo is ugly and unfortunately binding, but it is also ephemeral and subject to pressure and change from those who were building a movement to resist and undermine it.

Judge Hoar makes his disdain for the law still more explicit. Taking a page from Marc Antony in Shakespeare’s *Julius Caesar*, he pivots from his faint acceptance of the law’s force to a full-throated denunciation:<sup>180</sup>

I might here, gentlemen, if it were proper for me to do so, and I were delivering an opinion in which that question arose, give you my private view on the matter. I might say to you that the reasoning on which the law has been held to be constitutional, so far as our Supreme Court is concerned, as I understand the decision, is placed on the ground of authority, and not of right. I might say that the authorities upon which that decision rests have failed to satisfy my understanding. I might say, gentlemen, that in my view, regarding it in the best light I have upon the matter, that statute seems to me to evince a more deliberate and settled disregard of all the principles of constitutional liberty than any

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179. *Id.* Hoar’s point here sounds a great deal like another of his transcendentalist neighbors. In his essay *Politics*, Ralph Waldo Emerson argued that written laws were ephemeral. “The law is only a memorandum . . . The statute stands there to say, yesterday we agreed so and so, but how feel ye this article today? Our statute is a currency, which we stamp with our own portrait: it soon becomes unrecognizable, and in process of time will return to the mint.” The legitimacy, and even the legality, of a law, Emerson argued, was rooted not in its having been written down, but rather in its connection to the will of the people. “But the wise know that foolish legislation is a rope of sand, which perishes in the twisting; that the State must follow, and not lead the character and progress of the citizen.” Ralph Waldo Emerson, *Politics*, in *THE ESSENTIAL WRITINGS*, *supra* note 31, at 378, 379 (Modern Library 2000).

180. Hoar had used this same rhetorical device in a more understated way earlier in his instruction. While ostensibly arguing that the men who would be charged by the jury were not justified in their actions, Hoar listed a number of cases when violence in defense of another citizen would be justified. He made it clear that men “may interfere to prevent a murder . . . [and to] prevent the commission of an irreparable injury.” Citizens may also intervene “if a pirate should appear in our waters, and attempt to carry off a man or woman . . . The law allows force to be used wherever, and to the extent that there is necessity for it, to prevent the commission of crime.” *Id.* at 6.

other enactment which has ever come under my notice.<sup>181</sup>

In three steps, Judge Hoar eviscerates any moral or legal foundation for the legitimacy of the Fugitive Slave Law. The Supreme Court has upheld it as a matter of “authority” not “of right,” meaning that the Court’s decision is rooted (charitably) in the formalities of legal precedent or (uncharitably) in the pure exercise of political power rather than in any kind of moral foundation. Worse still, the legal authorities that the Court has relied on are flawed—they have “failed to satisfy [Hoar’s] understanding.” Without “right” and without precedent, the law is left dangling as little more than a hideous mistake. Indeed, Judge Hoar suggests that it is the worst law that “has ever come under my notice.”

Every other judge who delivered a grand jury instruction was at pains to offer some justifying rationale for the law’s binding force. No other judge in the 1850s went so far as to criticize the law to the jury. Judge Hoar stands alone in telling the grand jury not only that the arguments for the law’s constitutionality are weak, but that in fact the law was severely at odds with constitutional liberty. Little matter that, in the next sentences, Judge Hoar appears to retreat and admonish the jury that private opinions such as his should have no purchase in the courtroom. By speaking his attack on the law from both a moral and a legal perspective from the bench, Hoar opened the door wide for jurors to see the law as illegitimate and to sympathize with those who sought to destroy it.

Read carefully, Judge Hoar’s opening was a radical departure from the first step of the standard four-part argument. While he conceded that the law was binding, he did so without offering any palliative justifications for it. Not grounded in morals or in good legal argument, the law was a monstrosity. Moreover, it was a monstrosity whose binding force was ephemeral. Should the people, united, choose to reject the law, its aura of constitutionality would fade and the Court would change course. Without explicitly calling for open resistance to the law, Judge Hoar was laying the groundwork for a nuanced engagement with Thoreau and the power, promise, and perils of civil resistance.

### (3) *Counter Friction and the “Higher Law”*

Thoreau gave the speech that would become *Civil Disobedience* in 1848, two years before the Fugitive Slave Law was passed and before “higher law” moved from philosophical abstraction to political slogan.<sup>182</sup> Hoar had

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181. *Id.* at 7.

182. While the phrase had been used here and there before the furor of 1850, its explosion onto the national political stage is generally attributed to then-Senator William Seward, who in the debate over the law said, “there is a higher law than the Constitution, which regulates our authority over the domain, and devotes it to the same noble purposes.” See William Seward, *An Appeal to the Higher Law*, in *AMERICAN HISTORY TOLD BY CONTEMPORARIES: WELDING OF THE NATION, 1845-1900*, at 58 (Albert Bushnell Hart ed., 1915).

encountered the arguments in *Civil Disobedience* when Thoreau had first expounded them in the Concord Lyceum in 1848. He was not yet a judge, and the Fugitive Slave Law had not yet set fire to Northern antislavery politics. And yet, Thoreau's theoretical account of how, why, and whether individuals should resist unjust laws was urgently germane to the question before Judge Hoar in 1854. The core of Thoreau's argument is that individuals can change the world by living honestly according to their consciences. The corollary to this is that individuals can only live honestly if they hold the government and its laws at arm's length.

Thoreau argues that: "we should be men first, and subjects afterward. It is not desirable to cultivate a respect for law, so much as for the right . . . Law never made men a whit more just; and by means of their respect for it, even the well-disposed are daily made the agents of injustice."<sup>183</sup> In other words, laws are not, by their own force, just or worthy of obedience and each citizen must think not of what is commanded by law, but what is commanded by conscience. In the face of unjust laws, Thoreau asks rhetorically, "shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?"<sup>184</sup>

Pause for a moment to note how Thoreau's framing seems to have been a scaffolding for Judge Hoar's presentation of the Fugitive Slave Law's constitutionality. Hoar says that the law was a product of "authority," not of "right"—the same framing that Thoreau uses to distinguish respect for law (authority) from respect for morality (right). He then asks the same question that Judge Hoar is faced with—in the face of a monstrous law, what should we do? Obey until we can change the law, or resist immediately?

Answering from the perspective of the citizen, Thoreau proclaims that the only honest choice is to break the law. When the machinery of government requires injustice in the face of an unjust law, "I say, break the law. Let your life be a counter-friction to stop the machine."<sup>185</sup> This is more than a choice of conscience; for Thoreau, it is the seed of political revolution. Thoreau suggests that this breaking of the law, done honestly, can change the world. "Under a government which imprisons any unjustly, the true place for a just man is also a prison."<sup>186</sup> By going to prison, one honestly reveals the injustice of the law, and the friction of that resistance has the power to stop the machine.<sup>187</sup> More than any other, this is the spark that flew and has long

183. THOREAU, *supra* note 6, at 387.

184. *Id.* at 395. Thoreau's argument here almost certainly owes a debt to Emerson's argument in *Politics* that "the law is only a memorandum." See EMERSON, *supra* note 31, at 378, 379-179. Emerson's essay was published in 1844 and first delivered at the Concord Lyceum in 1838. Perhaps more relevantly, Emerson mooted most of his lectures in vibrant household conversations that both Thoreau and Hoar were sometimes participants in.

185. *Id.* at 396.

186. *Id.* at 399.

187. It is difficult to excerpt the long famous passage where Thoreau makes this argument in full:

flown from the essay, igniting Gandhi, Martin Luther King, and countless others who have used the tactic of exposing the law's violence as a tool to change the law.

Of course, this is also the antinomian threat that the other judges, from Nelson and Kane to Prentiss and McLean feared. If those who opposed the law believed themselves justified in breaking it, and if jurors trying those resisters believed themselves to be justified in nullifying rather than convicting, and if courts countenanced both kinds of infractions by being lenient, then the legal order would crumble and the Union would disintegrate. For these judges, law and order required that everyone adhere to law—even (and especially) critics of the legal order. Everything else was anarchy and, perhaps, treason. This is why it was so important for these judges to stake their claim that the Fugitive Slave Law was constitutional and legitimate. Only from a thread of legitimacy could they then justify enforcing it.

Judge Hoar disagreed. While he concluded that the law must be enforced, he explicitly decoupled its enforcement from its legitimacy. Instead, he reduced the enforcement of the law to its raw mechanics—just as Thoreau had imagined. Nothing in Judge Hoar's account contradicted Thoreau's theory of the potential power of resisting unjust laws. Instead, Judge Hoar suggested that a judge might, by playing his role in keeping the machine running, actually facilitate the kind of transformational resistance that his neighbor imagined.

From the beginning, Judge Hoar was careful not to condemn his neighbor or the civil resister that he imagined. He acknowledged that “[i]t has been said sometimes, and in some places, that there are laws which it is the duty of citizens to disobey or resist.”<sup>188</sup> Of course, he knew precisely where this had been said! Judge Hoar recognized that “a law may be enacted by a Republican Government . . . which may be in itself wicked.”<sup>189</sup> While Justice McLean and a few others acknowledged the possibility of bad laws, they insisted that those laws must be obeyed until they were changed through the political system.<sup>190</sup> Judge Hoar disagreed:

[When a man] acting conscientiously and uprightly, believes [a law] to be wicked, and which acting under the law of God, he thinks he ought to disobey, *unquestionably he ought to disobey that statute*, because he ought to ‘obey God rather than man.’ I suppose that any man who would seriously deny that there is anything higher than human law,

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“I know this well, that if one thousand, if one hundred, if ten men whom I could name—if ten honest men only—ay, if one HONEST man, in this State of Massachusetts, ceasing to hold slaves, were actually to withdraw from this copartnership, and be locked up in the county jail therefor, it would be the abolition of slavery in America. For it matters not how small the beginning may seem to be: what is once well done is done forever.” *Id.*

188. HOAR, *supra* note 174, at 8.

189. *Id.*

190. This was the view that Thoreau explicitly rejected in his essay.

must ultimately deny even the existence of a Most High.<sup>191</sup>

Every other judge rejected “higher law” as antinomian heresy and condemned Thoreau’s civil resister as an anarchist or even a traitor. Judge Hoar, by contrast, took the validity of higher law as a given and celebrated the resister who acted upon that law as a moral hero. Hoar rejected Judge Sprague’s argument that incompatibility between terrestrial and divine law does not exist, and he unambiguously embraced the position that higher law can and does exist, and that those who feel bound by conscience to obey it where it conflicts with human law *unquestionably* ought to defer to higher law. Little matter that Hoar’s vision of higher law is linked affirmatively to divine law, while Thoreau’s (as befits his transcendentalism) is located within the citizen’s conscience. In the end, the neighbors agree: where a citizen believes a law to be unjust, it is that citizen’s duty to resist the law.<sup>192</sup>

#### (4) *The Judge and the Resister*

What remained for both Hoar and Thoreau was the question of what should happen to the citizen who disobeys the law. Thoreau’s answer was unambiguous: that person should go to jail. In the words of Martin Luther King, “I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.”<sup>193</sup> King drew this idea directly from Thoreau, who argued that “the only place . . . for freer and less desponding spirits is in . . . prison[.]”<sup>194</sup> Going to prison was a moral imperative for individuals, but it was also the only way to maintain faith in a just legal system. In King’s reading of Thoreau, disobeying unjust laws shows the “very highest respect” for law because it demands that law be more than simply raw authority. It exposes law and makes it possible to change hearts and minds.

Interestingly, on this view, every judge agreed on the right final result in the trial of a civil resister. The mainstream position was that resisters should go to jail because they were dangers to public order and traitors to the

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191. *Id.* (emphasis added)

192. Let me be clear here that neither Thoreau nor Hoar endorse violent resistance. Whether or not Thoreau was truly a believer in non-violence is a subject for another essay. While Hoar suggests with his discussion of rescuing men from harm and piracy that force in resistance to unjust laws may be justified, he later qualifies that when resistance involves “assailing others . . . it partakes of the nature of a revolution.” *Id.* at 9. Hoar does not reject the right to revolution, but he suggests that the state has a parallel right to suppress revolutions. It is worth noting in addition that Thoreau also speaks of revolution in his essay—albeit of a peaceable revolution. He suggests that, “[i]f a thousand men were not to pay their tax-bills this year, that would not be a violent and bloody measure, as it would be to pay them, and enable the State to commit violence and shed innocent blood. This is, in fact, the definition of a peaceable revolution, if any such is possible.” THOREAU, *supra* note 6, at 399.

193. Martin Luther King, *Letter from a Birmingham Jail* (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html).

194. THOREAU, *supra* note 6, at 398.

Union. But when Judge Hoar stated his agreement, he sounded more like his neighbor than like his colleagues on the bench.

A man whose private conscience leads him to disobey a law recognized by the community, must take the consequences of that disobedience. It is a matter solely between him and his Maker. . . . [I]f he believes it to be his duty to disobey, he must be prepared to abide by the result, and the laws, as they are enacted and settled by the constituted authorities to be constitutional and valid, must be enforced, although it may be to his grievous harm.<sup>195</sup>

When Judge Hoar states that, “it will not do for the public authorities to recognize [the civil resister’s] private opinion as a justification of his acts,” he limits his argument to the proper scope of institutional action.<sup>196</sup> Unlike the other judges, Hoar does not argue that the state must enforce the law against the resister to uphold the social order or to preserve the Union. In fact, he offers no moralizing salve to his bare positivist assertion that public authorities must enforce the public law. Instead, Hoar suggests something more abstract: that the law must be enforced because that is how the machine works. The solution to a broken machine is not to have one or two softhearted judges who seek to ease the violence of its operation. The solution, Judge Hoar suggests, is to allow the machine to do its work.

Having gutted the law of legitimacy or moral force, Judge Hoar commits to enforcing it only because to not do so would be to deny the systemic consistency of the machine of law. This leaves him working in parallel with Thoreau. Thoreau’s call to action—“I say break the law. Let your life be a counter friction to stop the machine”<sup>197</sup>—would be meaningless if there were no machine against which to exert friction. Indeed, this is the foundation upon which the political power of nonviolent resistance rests. The state must continue to act in order for the consequences of those actions to be revealed in the gears of the machine.

In insisting that the law must be enforced without offering any justification for its enforcement, Judge Hoar seems to invite precisely the kind of resistance that his neighbor imagined. Indeed, far more than refusing to condemn it (as the other judges had), he comes close to suggesting that resistance to a law as monstrous as this one is desirable and politically expedient for precisely the reasons that his neighbor suggests.

##### *(5) Judicial Solidarity?*

Judge Hoar’s instruction to the grand jury was a radical departure from those of even his most antislavery colleagues on the bench. Where they insisted that the Fugitive Slave Law was constitutional and legitimate,

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195. HOAR, *supra* note 174, at 8.

196. *Id.* at 8.

197. THOREAU, *supra* note 6, at 396.

Judge Hoar questioned both. Where they insisted that it must be enforced, he agreed, but suggested, in conversation with his neighbor, that perhaps enforcing the law was the best way to undermine it.

Where Thoreau imagines one man going to jail as a revolutionary act, Hoar responds by offering to be the judge who sends him there. Where Thoreau imagines being “counter friction to the machine,” Hoar responds by insisting that the machine keep running in order for that friction to make the heat necessary to change the machine.

And yet, in the end, Thoreau did not see himself as aligned with his neighbor. For Thoreau, there was no compromising with the brutal machine and remaining in solidarity with the movement to destroy it. In 1848, Thoreau demanded that any public official faced with a monstrous law should resign rather than maintain the workings of that machine.<sup>198</sup> In 1854, speaking one day after Judge Hoar’s instruction, Thoreau put the point more sharply: “I am sorry to say that I doubt if there is a judge in Massachusetts who is prepared to resign his office and get his living innocently.”<sup>199</sup>

Whether Thoreau’s 1854 stridency was a reflection on Hoar’s instruction or not, *Slavery in Massachusetts* offers a searing indictment of judicial remove. Judges who enforce the law based only on the thin standard that it is constitutional have abandoned their moral compasses and “persist on being the servants of the worst of men, and not the servants of humanity.”<sup>200</sup> Thoreau spits in disgust that “[s]uch judges as these are merely the inspectors of a pick-lock and murder’s tools, to tell them whether they are in working order or not.”<sup>201</sup>

Through the invective, Thoreau’s conclusion is clear: judges cannot remain part of the machine while also remaining in solidarity with those who would fix—or destroy—it. The choice is binary: be complicit or resist. With only the other judges’ grand jury instructions as models, or with only the evidence marshalled a century later by Robert Cover, Thoreau’s answer seems right. In a world in need of prophets, mere priests will not save us.

But Judge Hoar’s grand jury instruction makes the question more difficult. In Thoreau’s view, honest resistance to the machinery of unjust law is how that machine is fixed. “The law will never make men free; it is men who have got to make the law free.”<sup>202</sup> Yet is it true that those invested with power within the machinery of the law cannot aspire toward solidarity with those who are making the law free? Does Thoreau really want judges to nullify the law? Does he really want juries to let civil resisters go free?

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198. “If the tax-gatherer, or any other public officer, asks me, as one has done, ‘But what shall I do?’ my answer is, ‘if you really wish to do anything, resign your office.’ When the subject has refused allegiance, and the officer has resigned his office, then the revolution is accomplished.” THOREAU, *supra* note 6, at 399.

199. THOREAU, *supra* note 1, at 708.

200. *Id.*

201. *Id.* at 703.

202. *Id.*

One way of rebutting Thoreau is to observe that he was not, himself, a brilliant movement strategist. While Gandhi and King would use Thoreau's ideas to weaponize non-violence as a strategy for building power and challenging oppressive laws, Thoreau himself never did more than spend a desultory night in jail. Indeed, until he delivered *Slavery in Massachusetts* in 1854, Thoreau had not even been an active and vocal participant in the radical wing of the abolitionist movement. Famous though his words are to us, Thoreau's strategy was abstract and he was less organizer than iconoclast. I say this not to tarnish Thoreau's reputation, but to raise the concrete question of strategy inherent in any discussion of solidarity.

The question facing Judge Hoar was not how he should keep faith with Thoreau, but how he could strive toward keeping faith with the broader movement to abolish slavery. That question had two parts: abstract and pragmatic. As an abstract matter, every judge apart from Hoar who faced the question had abjured the very idea of striving for solidarity with the movement to abolish slavery. The fact that Hoar did not reject that idea, and instead chose to try to keep faith with the movement, is what makes his jury instruction so important. It is tempting to jump from this observation to asking the pragmatic question: what was the best strategy to employ against slavery? On this point, Thoreau was a much poorer guide because he was no strategist himself. By the same token, it would be a distraction to focus too much attention on whether Hoar's specific strategy in his instruction was "good" or "effective." What makes the instruction so remarkable is that he chose to *strive* toward strategic alignment and solidarity.

Returning with this lens to Hoar's response to Thoreau, we see that he suggests that judges, while acting within their roles and from within the legal order, can serve as conduits for and allies of resistance to that legal order. Judge Hoar never makes this argument explicit, but its outlines emerge from the shape of what he does say. Remember that Thoreau defines the government as a machine. When that machine is producing injustice, Thoreau proposes that individuals throw themselves into the gears to create friction. In other words, anticipating Gandhi and Martin Luther King's work, civil resisters can expose the violence of the machine by exposing its workings. To do this requires resisting openly, honestly, and with maximum impact. Since the point is to expose the machine's violence to public scrutiny, then you need the machine to be in full view. You need, in other words, for the law's injustice to be fully apparent and yet for the law to proceed anyway. This is where the productive dissonance of resistance is most powerful and where the law's legitimacy is weakest. Here at the nexus of weak legitimacy and powerful dissonance is a space where the leverage is greatest and minds can be changed.

Put aside, for the moment, the question of whether this power analysis is strategically convincing and imagine that you were a judge in sympathy with this view. How would you act? If you chose not to resign, might you



not want to attack the legitimacy of the law as Judge Hoar did—removing all moral and legal justifications and construing it simply as a monstrous exercise of power? Might you not want, then, to emphasize the law’s violence as Judge Hoar did?

Having constructed this nadir of legality and made space for the leverage of civil resistance, might you not insist on enforcing the law *in its hollowed-out monstrosity*? As a matter of strategy, Thoreau probably would not have wished his neighbor to nullify the law and thereby legitimize and mediate the violence of the law by making it humane in operation.<sup>203</sup> Thoreau claims to wish instead that the judge resign—making his own action public and performative. In some circumstances, and for some judges, this might be strategically appropriate. But Judge Hoar pursued a different strategy. Were Hoar to resign and be replaced by a mainstream jurist, that judge’s instruction to the grand jury would, as the others did, seek to emphasize the legitimacy of the law, deemphasize the violence of the law, and make arguments that civil resistance amounts to treason. In short, by resigning, Judge Hoar might have distracted attention from the grassroots movement actors upon whom the violence of the law bears most urgently, both by stealing the limelight and by muddying the political clarity of the resistance.

And so, when Judge Hoar chose not to resign but instead to decry the law and then enforce it, his actions were consistent with a strategy seeking solidarity with the goals of the abolitionist movement and civil resistance against the Fugitive Slave Law. He approved of a form of principled, non-violent<sup>204</sup> resistance and then made space for that resistance to have what he deemed would be its maximum political impact. Saying this does not advance a claim that Judge Hoar was himself a “hero” for his role. Nor am I claiming that the action he took was the only or even best strategic choice that a judge could have made in his position. Rather he was what he had always been, a moderate but principled public actor.

Judge Hoar was not himself prone to civil resistance.<sup>205</sup> But he was not

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203. Thoreau well remembered how his friend Bronson Alcott’s plan to go to jail as part of a tax protest had gone awry when Rockwood’s father, the Squire, paid his fine rather than letting him go to jail. Alcott was furious that his principled resistance had been foiled, and Thoreau sought to ensure that his own similar protest would not be foiled in the same way a few years later. See BARBARA L. PACKER, *THE TRANSCENDENTALISTS* 187-88 (2007).

204. Judge Hoar was explicit that there was an important line between non-violent resistance and violent resistance. “A case in which, from private conscience, a man can be bound openly to resist the law, by assailing others, is more difficult to imagine. When such does arise, it partakes of the nature of a revolution; and all the considerations which apply to the right of revolution, and the expediency of attempting a revolution, apply to cases of that nature.” HOAR, *supra* note 174, at 9. Even with this qualification, however, Hoar distinguishes himself from his fellow judges. First, he reiterates that it is not only permissible for some men to disobey the law nonviolently, but infers that they can be “bound” to resist. Second, he does not condemn even violent resistance in terms of sedition, treason, or anarchy. Rather, he moves such resistance into a different category of analysis—the right to revolution which he does not dispute, but which he places outside of the purview of the machinery of the law or of the courts.

205. Remember, however, that he was willing to save his neighbor Frank Sanborn from being prosecuted for his role in raising money for John Brown’s raid on Harper’s Ferry—in his pajamas. See SANBORN, *supra* note 111.

immune to the “antinomian” arguments of his more rambunctious friends, neighbors, and colleagues. He was an institutional actor willing to pledge fealty to, or at least accept, the constraints that his institutional role put on him. That did mean, however, that his institutional role precluded him from seeking to act in solidarity with those who were putting their bodies and freedom on the line to challenge the legal order.

Framed this way, Judge Hoar’s jury instruction was a model of honest striving towards judicial solidarity. He was neither the moral purist Thoreau demanded nor the prophet of reform Cover lamented. He was, instead, a priest doing his best to make room for the prophet to be heard.

### *C. Complications and Reflections*

Having shown how Hoar’s jury instruction was pushed by the forces of his antinomian neighbors’ arguments away from the orthodoxy of his fellow judges, I must warn you against simple takeaways.

In the first place, although the grand jury that Hoar instructed did indict eight of the participants in the uprising, the state prosecutors determined that they could not bring the cases to trial and dropped the charges in 1855.<sup>206</sup> There was no doubt in anyone’s mind as to whether the leaders of the uprising had done what they were alleged to have done. Indeed, Theodore Parker and Thomas Wentworth Higginson were stridently proud of their actions and perfectly willing to go to prison for them.<sup>207</sup> Rather, by 1855, there was simply no public will to enforce the law in Boston. This means that whatever striving towards strategic solidarity Hoar was engaged in with his jury instruction was ultimately mooted by the shift in public mood.<sup>208</sup>

This mootness, taken together with the specificity and particularity of the close reading here, demands even more caution with respect to what we take away from this story. While Hoar’s break with his fellow judges was significant upon close reflection, it was nuanced and rooted in small distinctions. Likewise, while Hoar’s entanglement with Thoreau and the antinomian voices of Concord is evident, it is far from self-evident. The comparisons at the root of this article are revealed through close readings. They are less stories of causation than sparks of possibility within a dismal orthodoxy.

I make no apology for the particularity, smallness, or specificity of the comparison here. It is from these small particularities that broader understandings about the past and present are constructed. More than a century and a half ago, Thoreau told us that judges should resign rather than

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206. See STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* 218 (2011).

207. See HENRY STEELE COMMAGER, *THEODORE PARKER* 243–46 (1982).

208. It also raises the specter of whether Hoar himself was encouraging the very jury nullification that he knew would likely meet these charges no matter what he said.

punish civil resisters and be complicit with the machine of unjust laws. A century later, Robert Cover concluded that judges in the 1850s had not been moved by the antinomian arguments of abolitionists and radicals like Thoreau. Cover's view that judges made good priests but poor prophets relied on seeing beyond small moments like this. But Cover and Thoreau and their dismal visions of judicial complicity have helped contribute to a smooth consensus that judges are simply institutionally incapable of strategic alignment with civil resistance.

The particularities of the story told here suggest that the surface is less smooth than it might seem. At the very least, the story of Hoar's conversation with his neighbor cracks a window on Cover's hermetically sealed set of judges who failed to live up to their own moral commitments. More than that, it also suggests the outlines of a more nuanced holistic ecosystem of solidarity and strategy between movement actors seeking systemic change and systemic actors in sympathy with those movements.

#### IV. JUDICIAL SOLIDARITY TODAY

And so what do we bring with us when we return to the present from the nineteenth century? We are living through moments when our legal order is stretched by social movements demanding fundamental changes to the way that law orders our lives. Civil resistance—both non-violent and violent—has once again become commonplace. That resistance poses challenges to institutions and institutional actors that would not have been entirely unfamiliar to Thoreau. Despite the best efforts of the legal realists and critical legal studies, judges today remain, as a collective, deeply role-bound (at least rhetorically) to rule of law moralism and/or formalism.

If Judge Hoar's story gently upends the story that antinomian thought was excluded from the bench in the 1850s, does that change anything about the way that we see the present? In what follows, I briefly propose two ways that it might. First, I return to Robert Cover, placing his argument in its own historical context—the struggle over how judges should respond to protests over the Vietnam War in 1968. Judge Hoar's story, and the aspiration toward solidarity that it represents, casts Cover's own narrative about the connection between past and present in a new light. Pivoting from 1968 to the present, I reflect on examples in our daily headlines that may reflect a similar aspiration. That aspiration is not new, nor am I advocating that more judges adopt an aspirational approach to their work. Rather, I suggest that there are judges who *do* aspire toward solidarity with transformational movements in the present. If this is true, then the story from the 1850s can help us as observers to understand and engage with that aspiration. Moreover, and perhaps more controversially, it can help those judges themselves to think beyond the vacuous “balls and strikes” neutrality of their professional self-talk and toward a more honest and generative self-awareness of the strategy, politics, and moral aspirations of their work.

### *A. Priests and Prophets*

In 1968, as a twenty-four-year-old third-year law student at Columbia Law School,<sup>209</sup> Robert Cover published a book review in the *Columbia Law Review*. Two things were notable about this publication. First was the year. 1968 is a year that was famously at the middle of one of the most dramatic episodes of social and legal unrest in the United States in the twentieth century.<sup>210</sup> Second, the book that Cover was reviewing was more than 100 years old and itself a reproduction of an even older book. The book was entitled *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression*,<sup>211</sup> and it was compiled by an obstreperous abolitionist lawyer, novelist, journalist, and historian named Richard Hildreth.<sup>212</sup>

Hildreth's book was a strange object. It was an edited collection of biographical sketches of British judges drawn from a larger history written by Lord John Campbell.<sup>213</sup> The occasion for compiling the book was the 1856 trial of Passmore Williamson, an abolitionist in Philadelphia who had refused to comply with a writ from a federal judge ordering him to produce alleged fugitive slaves that he supposedly had in his custody. Despite the fact that Williamson claimed never to have had such custody, the alleged fugitives evaded capture and enslavement and Williamson was cited with contempt of court and jailed. The trial became national news and a rallying point for abolitionists.<sup>214</sup> For Hildreth and others in the national abolitionist movement, it was further proof that the judges of the North were complicit in maintaining the unconscionable legal order that sustained slavery. He carefully selected examples from Campbell's biographies of the most venal, amoral, and power-hungry British judges and annotated these examples to

209. The next year, Cover was hired as a professor at Columbia and four years later he would move up the coast to Yale Law School. See *Obituary: Robert M. Cover Dies; Legal Scholar at Yale*, N.Y. TIMES, July 20, 1986, at A22. These were, it should be evident to anyone familiar with the market for law teaching today, very different times.

210. 1968 was the year that Martin Luther King and Robert F. Kennedy were murdered. It was also a year marked by dramatic protests against the Vietnam War, the trial of the Chicago Six, etc. Though focusing on any one year this way is reductive, it is a year that has come to have a shorthand cultural meaning. See, e.g., MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD (2005). I might add, parenthetically, that 2020 seems to be on a track to be remembered with much the same accretion of cultural and political meaning.

211. Robert Cover, *Book Review: Atrocious Judges: Lives of Judges Infamous as Tools of Oppression*, 68 COLUM. L. REV. 1003, 1003 (1968).

212. Hildreth was a fascinating character—deeply enmeshed in the Boston abolitionist community, a lawyer who disliked lawyers, an editorialist who delighted in suing other editorialists for libel, and a historian who disdained historians. In the words of his own friends, he was “very decided in the utterance of his opinions, vehement and caustic in controversy, quick and destructive as lightning in the judgment of antagonists.” Arthur M. Schlesinger, Jr., *The Problem of Richard Hildreth*, 13 NEW ENG. Q. 223, 225 (1940).

213. Campbell published ten volumes of *The Lives of the Chief Justices of England* and four further volumes of *The Lives of the Chancellors and the Keepers of the Great Seal of England*. These all seem to have been published between 1840 and 1855. Hildreth, ever the voracious reader and historian, seems to have gotten access to these texts and perused them at length.

214. See Cover, *Atrocious Judges*, *supra* note 21111, at 1004.

serve both as parables for and indictments of the present craven judiciary.

Throughout the book, Hildreth's commentary on the judges around him is brutally scathing. The tone of the book is well-summed-up in this quote: "If the people of Great Britain and America are not at this moment slaves, most certainly, as the following biographies will prove, it is not courts nor lawyers that they have to thank for it."<sup>215</sup>

For Cover, Hildreth's strategy of leveraging past outrages to cast light on present outrages was inspiring and worth emulating. The book review vibrates with Cover's own anger at the way that the federal courts of 1968 were repeating the mistakes of the federal courts of the 1850s. "Confronted with the immorality of Vietnam, many young men have turned to resistance. . . . The federal judiciary, however, has remained faithful to its long tradition as executors of immoral law."<sup>216</sup> Reviewing Hildreth's book gave him the opportunity to ask, for the first time, the question that he would ask again in *Justice Accused* and which animates this article: What should a judge do when they are in sympathy with a social movement rising in resistance to an unjust legal regime and when the demands of that movement come inside their courtroom?

Cover's answer in 1968 echoed Hildreth's disdain for judges of a century earlier. While acknowledging that "[t]he men of the American judiciary have not grown from soil which breeds radicalism," he argued that "the few judges of goodwill" should have been expected to refuse to act to support or strengthen "an immoral institution when there remained any legal argument to provide limits" to it.<sup>217</sup> This meant, in the context of draft resistance, that anti-war judges should use whatever leeway in the law they could find to push back against the war—and, channeling Thoreau, that "the judge of good conscience" must resign if no leeway can be found.<sup>218</sup>

Cover had unearthed Hildreth's book because Hildreth shared Cover's view that, despite the structural features which limit the radical imaginations of judges, "judges of goodwill" could do better. That those judges *weren't* doing better was proof that judges were priests and not prophets. Cover's 1968 book review harnessed the bitter polemic tone of Hildreth's book and reflected a dismal fatalism about the possibility of judicial solidarity onto the outrages of the late 60s.

Seven years later, Cover would return to this fatalism in much more depth

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215. RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* 34 (1856).

216. Cover, *Atrocious Judges*, *supra* note 211, at 1005. Incidentally, Cover recognized that his indictment of the federal judiciary was "extreme," but supported it by reference not only to slavery, but also to the suppression of labor and the communist part in the early part of the twentieth century. *See id.* at 1005 n.15.

217. *Id.* at 1007.

218. *See id.* at 1008. Cover suggests that judges might "[d]evelop new notions of conscientious objection, explore the implications of Nuremberg if not for the positive law of America, at least for the notion of the *mens rea* of the accused who has a good faith belief in the criminality of the war; re-examine the power of Congress and Executive to draft and kill for undeclared wars" (emphasis in original) (citations omitted).

in *Justice Accused*. *Justice Accused* is a hard book to summarize. It is a book about the legal profession and slavery, judicial psychology, the “moral formal dilemma,” and even about the foundations of classical legal thought.<sup>219</sup> It is a book of legal history, legal theory, and radical politics. The book’s many agendas are not always held in balance,<sup>220</sup> but the center that they all orbit around is the same question that animated his 1968 book review: what should the judge “caught between law and morality” do?<sup>221</sup> The answer to this question was the same as it had been in 1968 for the younger Cover and the same as it had been for Hildreth in 1856: judges *should* do more, but they either would or could not.

Cover’s antislavery judges were “earnest, well-meaning pillars of respectability” confronting, and ultimately collaborating with, a clear-cut “system of oppression.”<sup>222</sup> In Cover’s telling, every one of the judges he studied “squirmed” but ultimately sided with the law and its oppressive operation against freedom and antislavery.<sup>223</sup> They reached this conclusion, Cover argued, because they felt bound to do so. Bound by moral commitments to law and order, bound by role fidelity and professional identity, bound by a timidity, and bound by a formalist view that suggested that judges were servants, not makers, of law. It was the combination of formalism and timidity that Cover chose to critique most sharply. He argued—along with Emerson<sup>224</sup>—that “in a dynamic model, law is always becoming. And the judge has a legitimate role in determining what it is that the law will become.”<sup>225</sup>

Cover painted a picture of a legal establishment bound by a supine adherence to the formalities of law, unable to escape a rigid binary between obedience to hideous law or abdication through resignation. Cover saw in this dynamic a systematic and profession-wide commitment to the

219. This is the name that Duncan Kennedy gave the legal formalism that emerged in the aftermath of the American Civil War, which came to define (and still defines) so much of the architecture of the American legal profession, but which also came under transformational attack from Oliver Wendell Holmes Jr. and later the Legal Realists. See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1998).

220. Mark Tushnet, who might have been expected to be a sympathetic reviewer, wrote that, “I wish that I could be more enthusiastic about this book than I am.” The reason he gave for his tepid review was that there was too much going on such that “one is hard-pressed to find a coherent line of argument pursued from beginning to end.” See Mark Tushnet, *Book Review: Justice Accused: Antislavery and the Judicial Process*, 20 AM. J. LEGAL HISTORY 168, 168 (1976).

221. COVER, *supra* note 26, at 6.

222. *Id.*

223. “Make no mistake. The judges we shall examine really squirmed; they were intensely uncomfortable in hanging Billy Budd. But they did the job. Like Vere, they were Creon’s faithful minions. We must understand them—as much as Antigone—if we are to understand the processes of injustice.” *Id.* at 7.

224. As I have quoted above, in his essay *Politics*, Emerson argued: “The law is only a memorandum. We are superstitious, and esteem the statute somewhat: so much life as it has in the character of living men, is its force. The statute stands there to say, yesterday we agreed so and so, but how feel ye this article today? Our statute is a currency, which we stamp with our own portrait: it soon becomes unrecognizable, and in process of time will return to the mint.” Emerson, *Politics*, *supra* note 179, at 379.

225. COVER, *JUSTICE ACCUSED*, *supra* note 26, at 6.

formalities of law and order over the moral exigency of opposing slavery. It was a dynamic that he saw in the 1850s and one he continued to see in the present. In 1968, Cover found this collective choice appalling. In 1975, he seemed more resigned. These judges were not quite moral cowards as individuals, but rather role-bound cogs in a dismally suffocating formal legal establishment.

It is in this context that Cover's historical claim that no judge had taken the antinomian position seriously rose to the center of his polemic. The antinomian argument *matters* and it is urgent in our culture and our struggle—and yet somehow judges (priests) are insulated from or allergic to it. This is an argument that is familiar in the present. Judges still talk this way and we still hear them this way.<sup>226</sup>

There is a blunt power in the conclusion that this line of critique reaches. Judges are lost to us—and thus, the courts are not the right fora for transformational social change. Indeed, demanding that those who want systemic change turn their eyes away from courts and toward social movements is familiar in the legal academy,<sup>227</sup> on the intellectual left,<sup>228</sup> and in the activist world.<sup>229</sup>

But when we return to Judge Hoar and his struggle to engage with the arguments of his neighbor and his own aspirations toward systemic change, the cost of the blunt power comes into clearer focus. The truth then, and the truth today, is that antinomian ideas are always exerting pressure on judges and that judges are always responding to these pressures. Indeed, this is what Cover was really frustrated by. The antislavery and anti-war judges knew better! They knew the dynamics of power and they knew how those dynamics were flowing through their courtrooms. And yet they receded.

But Judge Hoar didn't recede, he struggled with the movement dynamics swirling around him and sought to situate himself productively within them. In this, his example checks the power of Cover's fatalism. It points toward the possibility of a productive struggle from the bench *alongside* struggles elsewhere. Without suggesting that judges will set us free, it posits, contra Cover, that judges need not always be atrocious.

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226. In one famous example, Justice Roberts proclaimed himself to be apart from political struggles, simply calling "balls and strikes." In another, less famous but archetypal example, a judge in Rochester, New York, wrote that, "[p]lacing a judicial seal of approval on the position of or tactics employed by proponents of one side of a societal issue being debated is antithetical to those qualities which this court believes our community rightly expects a judge to possess." *People v. Miller*, 2015 WL 521616, at \*4 (N.Y. City Ct. Feb. 6, 2015).

227. For a helpful summary of these critiques, see Douglas Nejaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 884-88 (2013).

228. See Samuel Moyn, *The Court Is Not Your Friend*, DISSENT (Winter 2020), <https://www.dissentmagazine.org/article/the-court-is-not-your-friend>.

229. See Stephen Millies, *Judges Will Not Save Us. It's the People Who Make History*, STRUGGLE-LA LUCHA.ORG (Sep. 23, 2020), <https://www.struggle-la-lucha.org/2020/09/23/judges-will-not-save-us-its-the-people-who-make-history>.

*B. Solidarity Tinted Glasses*

And so what changes when we start to believe that judges can struggle toward something like solidarity? Let me close by offering two potential answers.

The first change is a gentle shift in the way that those of us who are not on the bench observe and understand the actions of judges confronting movement demands. The binary between true solidarity (impossible) and complicity (inescapable, according to Thoreau) structures movement views of judges, but it also defines broader views about the political sensibilities and sympathies of judges. When we view judicial actions from within this binary, we see judicial struggles with movement demands in thin terms. We tend to view judges and their actions as individual agents, negotiating their own senses of personal morality and judicial role. Judicial politics is thus individualized into an inadequate caricature of legal realism.<sup>230</sup> In other words, judges and their behavior are reduced to *their* individual political views and *their* own positions with respect to broader political struggles.

The result of this individualization is that we tend to evaluate the decisions that judges make on their own terms. We rarely ask how and whether the work that judges are doing is situated within broader political struggles. But if we slip out of the binary for a moment and look not for ends but for aspirations, we might see things in the present differently.

To see this more clearly, consider the example of a recent opinion issued by Judge Carlton Reeves in Mississippi. In his seventy-two page opinion, Judge Reeves “appl[ie]d the law as stated by the Supreme Court,” and under the doctrine of qualified immunity, dismissed Clarence Jamison’s case alleging abuse and misconduct against police officer Nick McLendon.<sup>231</sup> In applying the law, however, Judge Reeves offered a blistering critique of the doctrine of qualified immunity, explicitly linking that critique to the rhetoric and demands of the Black Lives Matter movement.<sup>232</sup>

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230. I am on record distinguishing between strains in legal realist argument. I have argued that there were a set of “high realists” whose work was more theoretical and less gleefully polemical than some others who have been named realists. See Daniel Farbmán, *The Scalpel and the Salve: Rekindling Romantic Realism*, 1 CRIT. ANAL. LAW 212, 213 (2015). Here, however, the caricature of realism I’m responding to is not so much that posed by the more extreme realists themselves, but rather the thin and disparaging shorthand commonly used in law schools that legal realism means that “law is politics” or that law is determined by what the “judge had for breakfast.” See generally Dan Priel, *Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea*, 68 BUFF. L. REV. 899 (2020).

231. *Jamison v. McLendon*, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020).

232. While Judge Reeves is somewhat circumspect about fully stating his embrace of the movement, the very first page of the opinion reveals his rhetorical sympathy with the movement. Judge Reeves begins by listing the actions that Jamison was *not* doing: jaywalking, playing with a toy gun, selling loose cigarettes. Each of these actions, of course corresponds to a tragic where a black life was taken by law enforcement (Jaywalking—Michael Brown, toy gun—Tamir Rice, loose cigarettes—Eric Garner). *Jamison*, 476 F. Supp. 3d at 390. In making such a list and “saying the names” of those who have been killed by the police, Judge Reeves echoes the rhetoric of the movement in the streets and in the public media demanding that we remember those who have been killed by “saying their names.” See Andrea Castillo, *How Two Black Women in L.A. Helped Build Black Lives Matter from Hashtag to Global Movement*, L.A. TIMES (June 21, 2020), <https://www.latimes.com/california/story/2020-06-21/black-lives-matter-los-angeles-patrice-cullors-melina-abdullah> (quoting organizer Melina



Judge Reeves's opinion is remarkable in its thorough and searing attack on qualified immunity, equating the doctrine with segregation and calling for it to be overturned.<sup>233</sup> In many ways, it is an opinion reminiscent of Judge Hoar's own strategy: condemn the law and reduce its legitimacy to a mere assertion of power through the courts, and then enforce it to expose the law in its violence. While the case does not involve civil disobedience, it does involve the mechanics of exposing the violence of the machine through judicial action.

So what does the focus on striving toward solidarity reveal in *Jamison* that we might not already see? Observers of the case have tended to cast it as an individual act of protest from an individual judge. The focus has primarily been on Judge Reeves and his principled stand<sup>234</sup> (or on the merits of his arguments).<sup>235</sup> It has not gone unnoticed that Reeves's opinion echoes the demands of the Black Lives Matter movement,<sup>236</sup> but by and large the focus has remained on the individual act of judicial resistance rather than on the strategic place it plays within a broader movement discourse about abolition and qualified immunity.<sup>237</sup>

The focus on solidarity urges us to look more closely at the ways in which Reeves's judicial actions and words emerge from his own struggle to situate himself between his role and a movement with which he clearly feels allied. As it did for Judge Hoar, that struggle reveals ways in which judges remain limited by their roles, but also ways in which judicial action and rhetoric fit into and contribute to movement strategies. Whether effective or not, or even whether the holding is right or not, what is clear is that Judge Reeves was writing in sympathetic conversation with the antinomian movement forces around him.

From this one example, I'm sure anyone reading this can extrapolate tens

Abdullah: "When we say their name, we invoke their presence."). If this call-out is too abstract, note that Judge Reeves, later in the opinion, writes that "If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter too." *Jamison*, 476 F. Supp. 3d. at 397.

233. "[T]he status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of 'separate but equal,' so too should it eliminate the doctrine of qualified immunity." *Jamison*, 476 F. Supp. 3d at 423.

234. See Justin Jouvenal, *Judge's Blistering Opinion Says Courts Have Placed Police Beyond Accountability*, WASH. POST (Aug. 6, 2020), <https://www.washingtonpost.com/crime-law/2020/08/06/judges-blistering-opinion-says-courts-have-placed-police-beyond-accountability/>; Carrie Johnson, *Judge, Shielding Cop Via 'Qualified Immunity,' Asks Whether It Belongs In 'Dustbin'* NPR (Aug. 6, 2020), <https://www.npr.org/2020/08/06/899489809/judge-shielding-cop-via-qualified-immunity-asks-whether-it-belongs-in-dustbin>.

235. See Orin S. Kerr, *Did Judge Reeves Reach the Correct Result in Jamison v. McClendon?*, REASON (Aug. 6, 2020), <https://reason.com/volokh/2020/08/06/did-judge-reeves-reach-the-correct-result-in-jamison-v-mcclendon>.

236. See Mark Joseph Stern, *A Federal Judge Challenges the Supreme Court to Say Black Lives Matter*, SLATE (Aug. 5, 2020), <https://slate.com/news-and-politics/2020/08/supreme-court-qualified-immunity-reeves-opinion.html>.

237. Ending qualified immunity is an explicit demand of many organized arms of the broader movement. Indeed, it is articulated as a concrete demand within the Movement For Black Lives "End The War on Black Communities" campaign. See *End the War on Black Communities*, M4BL, <https://m4bl.org/policy-platforms/end-the-war-on-black-communities> (last visited Nov. 11, 2021).

or hundreds more. It is beyond the scope of this Article to assemble all instances for analysis or categorization. Instead, my narrow purpose is to show how a focus on the ways in which judges are enmeshed in (or hostile to) movements around them changes the angle from which we see judicial action and rhetoric. Judge Reeves may not be a police abolitionist—indeed, it may be impossible to be both judge and police abolitionist—but his words speak to broader movement demands. That reach towards solidarity pushes us away from a purist binary and reminds us of the complex and sometimes productive roles that institutional insiders can play in the incremental and daily struggle of movements for systemic change.

This brings me to my second and more speculative way in which this past story engages our present. As Cover argued, one reason that we have come to see judges as removed from movement struggles is that judges see themselves as so removed. Not only were they not raised from “soil which breeds radicalism,” but judges have been raised in and are priests of the very legal culture which values the self-talk of neutrality, remove, and depoliticization. This circularity is neither surprising nor novel. Still, it calcifies perceptions about whether and how judges can be anything more than aloof from or hostile to resistance movements.

What Judge Hoar’s example reminds us (through the example of Judge Reeves) is that everything that a judge does is situated within a context of political contestation. It follows, then, that everything that a judge does when intersecting with movement demands is in conversation with those demands and has a strategic inflection on how those demands are prosecuted and framed. If this is obvious, then we should all act accordingly. Yet above all, judges, themselves, should act that way, too.

To be clear, I am not advocating that all judges should embrace the radical demands of social movements.<sup>238</sup> Nor am I advocating for judges who truly adhere to rule of law moralism or formalism to abandon those role-determined commitments. By proposing that the struggle toward (or away from) solidarity is part of judicial practice, I am instead advocating for judges to engage with that struggle more directly. What makes Hoar’s jury instruction remarkable, in the end, is not his legal conclusion, his condemnation of the Fugitive Slave Law, or his strategic enforcement of that law. What makes it remarkable is the extent to which he struggled to engage with the antinomian voices that were moving him. This struggle, made public, created space within the system itself to consider and contest the system.

These antinomian voices are abroad today and none of us are unmoved by them. How aware we are of these voices and how we are moved by them

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238. I am personally supportive of demands that we change the composition of the state and federal benches to include judges who are more likely to be in sympathy with these demands. See, for example, the People’s Parity Project’s “Unrig the Courts” campaign advocating for a rethinking of the pipelines that lead to the federal bench. See *Unrig the Courts*, PEOPLE’S PARITY PROJECT, <https://www.peoplesparity.org/unrigthecourts> (last visited Nov. 11, 2021).

determines what space we make for them to be amplified or tamped down. For those of us who are moved by these voices, there may be barriers—personal, professional, institutional—that prevent us from reaching a thick solidarity with the movements demanding change. But those barriers need not keep us from taking the aspiration toward solidarity seriously.

As Thoreau said, “it is not an era of repose.” In these times, more than ever, the fiction of repose to which institutional actors in general, and judges in particular, resort is no stable home base. Rather, we are all better off when those institutional actors are willing to struggle with the forces that are unsettling our repose. That struggle makes room for contestation—and it can make room for power to build toward change.