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The Fugitive Slave Acts, Judicial Independence, and the Jury

ONE OF THE most prominent causes of the American Revolution, at least if one believes the rhetoric of the revolutionaries, was the system of enforcing colonial taxes in vice-admiralty courts without juries.

As the name suggests, these were naval courts whose original function in the colonies was the regulation of nautical matters such as salvage rights, the disposal of prizes captured in wartime, and disputes among sailors and merchants.¹ During the course of the controversies that led to the Revolution, however, the vice-admiralty courts (which I shall rename ‘admiralty courts’ for brevity) became important as a symbol of judicial lawlessness on behalf of the crown, as they were used first to enforce customs laws, and, later, to enforce general (‘internal’) taxation, most importantly the Stamp Act.

One can have some sympathy for the perspective of Parliament: overseas colonies naturally tend to have rather a lot of their economic activity within the jurisdiction of the naval courts, and it must have seemed quite natural to have them adjudicate tax evasion of all kinds when primary methods of revenue raising were monopolies and duties on sea-borne trade. Moreover, those seeking to regulate the colonies picked up on the idea that the admiralty courts were convenient tools to implement their policies not least because colonial juries had an inconvenient habit of refusing to convict their fellows for matters like smuggling and tax evasion, and moreover would sometimes go so far as to turn around and convict customs officials and admiralty judges themselves for illegally (by colonial lights) imposing taxes.² But Parliament’s reaction clearly made the problem much worse: it began to expand the jurisdiction of the admiralty courts in the colonies beyond that which would have been permitted in the metropole, and stripped the common law courts of the power to interfere with their actions – in effect systematically depriving the colonists of the benefit of a

¹ C Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (University of North Carolina Press, 1960) 12.

² *ibid* 21, 31–36, 64; MP Harrington, ‘The Legacy of the Colonial Vice-Admiralty Courts (Part I)’ (1995) 26 *Journal of Maritime Law and Commerce* 581, 594; AW Alschuler and AG Deiss, ‘A Brief History of the Criminal Jury in the United States’ (1994) 61 *The University of Chicago Law Review* 867, 874–75.

jury of their peers with respect to some of the most infamous taxes that led to the revolution.

Rubbing it in, at one point Parliament created a centralised court in distant Halifax to handle some of these cases with more direct supervision from an officer sent over from England rather than hired from the colonies. The Sugar Act not only handed jurisdiction over to this new court, but also shifted the burden of proof so that the owners of goods which were seized for customs violations were obliged to prove their innocence.³ While the centralised court in Halifax failed to catch on (largely because customs agents were too afraid of the citizens of the colonies to use it), the other admiralty courts may have been even worse, from a rule of law standpoint: the judge of the Halifax court at least earned a fixed salary, whereas the judges of the other admiralty courts earned a commission on the goods they ordered seized, rather obviously giving them a bias against defendants.⁴

To illustrate the degree of colonial offence taken at these courts and the rule of law valence of their objections, we need look no further than a particularly striking paragraph in the 'Braintree Instructions', a document, drafted by no less than John Adams, which the Braintree town meeting sent to the Massachusetts General Assembly in 1765:

But the most grievous innovation of all, is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge, whose commission is only during pleasure, and with whom, as we are told, the most mischievous of all customs has become established, that of taking commissions on all condemnations; so that he is under a pecuniary temptation always against the subject. Now, if the wisdom of the mother country has thought the independency of the judges so essential to an impartial administration of justice, as to render them independent of every power on earth, – independent of the King, the Lords, the Commons, the people, nay, independent in hope and expectation of the heir-apparent, by continuing their commissions after a demise of the crown, what justice and impartiality are we, at three thousand miles distance from the fountain, to expect from such a judge of admiralty? We have all along thought the acts of trade in this respect a grievance; but the Stamp Act has opened a vast number of sources of new crimes, which may be committed by any man, and cannot but be committed by multitudes, and prodigious penalties are annexed, and all these are to be tried by such a judge of such a court! What can be wanting, after this, but a weak or wicked man for a judge, to render us the most sordid and forlorn of slaves? – we mean the slaves of a slave of the servants of a minister of state. We cannot help asserting, therefore, that this part of the act will make an essential change in the constitution of juries, and it

³Ubbelohde (n 1) 50–51.

⁴See Ubbelohde, *ibid* 6–7, 16, on the commissions, and *ibid* 69, 94, on the failure of the Halifax court. I'm eliding a little bit of complexity here – eventually the Halifax court was turned into four better-located courts, also with salaried judges, which at least partly superseded the old admiralty courts. *ibid* 133, 152.

is directly repugnant to the Great Charter itself; for, by that charter, ‘no amerciamment shall be assessed, but by the oath of honest and lawful men of the vicinage;’ and, ‘no freeman shall be taken, or imprisoned, or disseized of his freehold, or liberties of free customs, nor passed upon, nor condemned, but by lawful judgment of his peers, or by the law of the land.’ So that this act will ‘make such a distinction, and create such a difference between’ the subjects in Great Britain and those in America, as we could not have expected from the guardians of liberty in ‘both’.⁵

Observe the countless rule of law charges raised in this complaint – the absence of juries, the absence of judicial independence, the corrupting power of the dependence of the judge’s payment on the result, as well as the special legal disabilities imposed on the colonists relative to the metropole – and the antityrannicism, along with the claim that Magna Carta itself had been violated by these measures.

It’s worth unpacking precisely how judicial independence and the jury were supposed to support the rule of law, for these are key rule of law institutions that have been replicated in many other countries but also have been the subject of some controversy in them.

JUDICIAL INDEPENDENCE AND THE JURY

Contemporary rule of law scholars and advocates widely believe that there’s a close relationship between the rule of law and judicial independence. This concern runs at least as far back as 17th century England: consider the *Case of Prohibitions*, in which no less a jurist than Edward Coke insisted that ‘the King cannot take any cause out of any of his Courts, and give judgment upon it himself’, in an effort to establish what in contemporary terms would be called the autonomy of law from politics.⁶

The most prominent feature of the American judiciary is, of course, its exercise of remarkably strong powers of constitutional judicial review. Historically speaking, a case can be made for the claim that judicial review itself arises from the protection of rule of law interests. Its first great appearance in Anglo-American jurisprudence was in Coke’s opinion in *Bonham’s Case*, in which he declared that the common law had the power to control acts of Parliament – a proposition that made sense largely because the specific control that Coke imposed on Parliament was the foundational rule of law principle that no person may be a judge in their own case – *Bonham’s Case* was about the enforcement of

⁵ J Adams in CF Adams (ed), *The Works of John Adams, Second President of the United States*, vol 3 (Little, Brown and Company, 1865) 466–67. Adams had direct experience in these courts, for that same year he was called upon to defend John Hancock (he of the gigantic signature) against a smuggling charge in them. Ubbelohde (n 1) 124–25.

⁶ 12 Co Rep 64, 77 ER 1342, [1607] EWHC KB J23.

a ruling of the Royal College of Physicians in its own favour, under the authority of a statute that permitted it to serve as party and judge in a licensure dispute.⁷

More abstractly, the idea of judicial review represents the notion that a court, when it makes a legal ruling, must rule on *all* the law, that is, to reconcile the constitution, qua law, with the statute – which, in cases of unconstitutionality, simply means failing to enforce the statute – although this assumes a view about the nature of the constitution as fundamentally ordinary law which may be controversial, now or at the time of the framing.⁸

Juries as Popular Legalism

One important way to achieve both the constraint of officials by law and general law itself rather than factional legislation is to require the actual application of law to go through the agency of people who share key interests with those against whom the law would be applied. In this context, we must recall that for America's constitutional framers a key aspect of judicial independence was *jury* independence, and that juries were local and democratic.

Colonial and early American juries were substantially more active than contemporary juries and served as a check against arbitrary and oppressive government action.⁹ Consider the notion of 'jury nullification' – the decision of a jury to free a guilty defendant of a crime due to its conviction that the law is unjust – or, for a less aggressive conception, to make its own decisions about what the law is. Nullification is today almost universally among the bench and the bar considered inappropriate, but in the framing generation this was seen as

⁷ *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 114. See JV Orth, *Due Process of Law: A Brief History* (University Press of Kansas, 2003) 18–27.

⁸ Today, this debate has focused around S Snowiss, *Judicial Review and the Law of the Constitution* (Yale University Press, 1990), according to which judicial review was first seen as an extraordinary political as opposed to a basically legal act. For an example of more recent scepticism see G Leonard, 'Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review' (2006) 81 *Chicago-Kent Law Review* 867. Regardless of what one thinks about Snowiss's theory, there are surely some unconstitutional acts which the courts would have had to police. For example, the Treason Clause of Article III, section III specifically defines what acts constitute treason and what evidence is required to procure a conviction. It would be somewhat bizarre if Congress could rewrite that crime, or the President could bring a prosecution for it, without a court applying the strictures of the Constitution when carrying out the core judicial function of interpreting and applying the criminal law. The same goes for the Suspension Clause, regulating when the writ of *habeas corpus* may be suspended.

⁹ JN Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Vintage, 1997) 300–01. In comparative context, there has been some scepticism in other countries in the contemporary world even of the *compatibility* of juries – who traditionally do not give reasons for their verdicts – with the rule of law. In 2010, the European Court of Human Rights ruled that Belgium had violated Article 6 of the European Convention on Human Rights (right to a fair trial) by convicting a defendant without making its reasons clear in the (incredibly controversial) case of *Taxquet v Belgium*. See P Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) 11 *Human Rights Law Review* 213. The American framers would have seen this ruling as entirely backwards.

a vital function of the jury.¹⁰ We can also think of jury nullification as a different kind of way in which the people could operate ‘out of doors’, ie, by collective action to directly control political outcomes, as a kind of alternative to the mobbing endorsed by some in the revolutionary period.¹¹

From the standpoint of at least some in the Framing generation the jury and its power of nullification doubtless was seen as an important check on domineering government power. Importantly, this was not just about separation of powers and checks on executive power, but also as a direct popular check on judicial power. The colonial experience illustrated that judges themselves could be captured, and that judicial independence from the people posed its own risks of tyranny.¹² More broadly, the idea of jury nullification appears to have represented a kind of connection between participatory and representative institutions and the ideas that today come under the rubric of the rule of law.¹³

Jury nullification, or at least serious jury consideration about the legality of the charges having been brought, was also an important feature of the dispute over slavery: prosecutors and judges attempted to get juries to return treason convictions against those who violently resisted the Fugitive Slave Act of 1850, but, of course, such resistance happened in the North, and hence before Northern juries, and those juries weren’t about to go along with it.¹⁴ Contemporary scholars have suggested reviving the practice in the same tradition; most prominently, criminal law scholar and former prosecutor Paul Butler has called for Black jurors to engage in nullification in order to combat racial inequality in the criminal justice system.¹⁵

FUGITIVE SLAVE ACT OF 1850: THE RETURN OF THE VICE-ADMIRALTY COURT

The two Fugitive Slave Acts lent federal power to the enforcement by Southern slaveholders of their alleged property rights in the North. From the standpoint of Southern enslavers these could be seen as protections for the rule of law: the people and courts of the North were acting lawlessly in refusing to return fugitive ‘property’ to the South, and so federal intervention was required. Of course,

¹⁰ See A Schefflin and J Van Dyke, ‘Jury Nullification: The Contours of a Controversy’ (1980) 43 *Law and Contemporary Problems* 51, for an extended overview of the historical shift in the United States from a celebration of jury nullification to its rejection.

¹¹ GS Wood, *The Creation of the American Republic, 1776–1787*, 2nd edn (University of North Carolina Press, 1998) 321.

¹² *ibid* 298–301.

¹³ *cf* JE Carroll, ‘Nullification as Law’ (2014) 102 *Georgetown Law Journal* 579.

¹⁴ HR Baker, ‘The Fugitive Slave Clause and the Antebellum Constitution’ (2012) 30 *Law and History Review* 1133, 1166–67.

¹⁵ P Butler, ‘Racially Based Jury Nullification: Black Power in the Criminal Justice System’ (1995) 105 *Yale Law Journal* 677.

such an argument presupposes the possibility of slavery under law, a possibility that abolitionists (rightly, in my view) denied. But even assuming the Southern standpoint, the Fugitive Slave Acts illustrate the way that regimes of legal caste can ultimately undermine the protections of law for everyone.

The first – the Fugitive Slave Act of 1793 – permitted a person who claimed that another human was their slave to travel into free territory, arrest the alleged fugitive, and then appear before a judge or magistrate to prove that the person whom they captured was in fact their slave. It contained serious deviations from ordinary legal justice – for example, it purported to permit proof to be made of the slave status of a person seized as a fugitive by a mere affidavit from their purported owner.¹⁶

Free states tried to protect their people from this process, but, in *Prigg v Pennsylvania*, the Supreme Court held that federal legislation preempted state law attempting to protect fugitives – or alleged fugitives – and that Congress had exclusive authority over the law governing fugitive slave recapture.¹⁷ The facts of *Prigg* illustrate the way in which even those who were free could be enslaved under the federal regime. In that case, the Supreme Court overturned the conviction of a kidnapper who seized a Black family in Pennsylvania and brought them to Maryland under the colour of a claim that they were fugitive slaves.

The victims were a woman named Margaret Morgan and her children.¹⁸ Morgan's parents had been owned by a man named Ashmore, who claimed that he had freed them at least as of 1812. In 1832, Morgan married a free Black man and moved from Maryland to Pennsylvania; her children were born thereafter. Yet the kidnapper carried off Morgan's children along with her to slavery.

Even if Ashmore's freeing of Morgan's parents wasn't legally effective in Maryland (for whatever reason), and whatever we might think about Morgan's own status, it is highly dubious at best even under the law of the period to suppose that her children, born in a free state, to a woman who was herself born of people whose putative master had tried to free 30 years beforehand, would somehow still manage to inherit the status of slavery. But even if they had managed to inherit enslavement, it is patently absurd to suppose that they met the legal criteria to be subject to kidnapping under the text of either the 1793 Fugitive Slave Act ('a person held to labor in any of the United States, or in either of the Territories on the Northwest or South of the river Ohio, under the laws thereof, [who] shall escape into any other part of the said States or Territory') or the Constitution's Fugitive Slave Clause ('person held to service or labour in one state, under the laws thereof, escaping into another') – if for no other reason than they had never been held to labour anywhere to escape *from* and, as far as

¹⁶ An Act respecting fugitives from justice, and persons escaping from the service of their masters, ch VII, 1 Stat 302 (1793).

¹⁷ *Prigg v Pennsylvania* 41 US 539 (1842). *Prigg* is notoriously confusing, but P Finkleman, 'Sorting Out *Prigg v Pennsylvania*' (1993) 24 *Rutgers Law Journal* 605, has helpfully parsed out the various opinions.

¹⁸ I take the facts in this paragraph from Finkelman, *ibid* 610–11.

we know, may never have set foot in a slave state until they were dragged there by a kidnapper.¹⁹ They couldn't have escaped somewhere they never were in the first place. Nonetheless, these Black Northerners could be reduced to slavery. It should be unsurprising, in view of this kind of legal thumb on the scale in favour of the enslavement of the free, that kidnapping of free Black Northerners was a familiar occurrence.²⁰

But *Prigg* provided one small comfort to the North: it permitted free states to decline to offer the aid of their own law enforcement in the recapture of 'fugitives'.²¹ That tiny concession, however, was one of the drivers of the second act. Slaveholders complained of the costs associated with enforcing their claims against the hostility of Northern officials.²² Hence, the second Fugitive Slave Act directly undermined *Prigg*, for while the states couldn't be commandeered, private citizens of the North could be, and were – and at least one Northern citizen was charged with treason for (in part) refusing to go along with the command to join a federal marshal's posse comitatus.²³

The 1850 Act was much worse.²⁴ While the 1793 Act certainly undermined the basic right of a person to defend themselves, at least it required the recruitment of a real judicial officer as a precondition to deploying federal power on behalf of a putative slaveowner.

By contrast, the Fugitive Slave Act of 1850 made use of 'commissioners' – non-Article-III judges who sat in kangaroo courts to adjudicate the claims of slave-catchers with a number of very heavy thumbs on the scale in favour of slavery.²⁵ The slave-catchers could seize their victim 'without process' and bring

¹⁹ There is at least one case where a slave-catcher was successfully convicted in Pennsylvania for kidnapping due to his seizure of the free-state-born children of an admitted fugitive slave. Carol Wilson, *Freedom at Risk: The Kidnapping of Free Blacks in America, 1780–1865* (University Press of Kentucky, 1994) 51.

²⁰ Wilson (n 19); Finkelman (n 17) 623.

²¹ This was an early judicial recognition of the idea that today we call the 'anti-commandeering' doctrine. See *Printz v United States* 521 US 898 (1997). Similar commandeering issues exist today; in particular, 'sanctuary jurisdictions' prohibit their law enforcement officials from cooperating with the federal government in the holding of allegedly deportable immigrants, for example, by acceding to 'ICE Detainers' purporting to oblige or request state and local officials to hold prisoners beyond the term of their custodial sentence or trial in order to permit them to be turned over for deportation.

²² SW Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860* (University of North Carolina Press, 1970) 14–15.

²³ G Rao, 'The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America' (2008) 26 *Law and History Review* 1, 3. The defendant Rao mentions, Caster Hanaway, was also accused of being directly involved in the violent defence of the victim, Campbell (n 22) 153, so it's not completely clear to me that a treason charge would have worked for nonassistance alone.

²⁴ To amend, and supplementary to, the Act entitled An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters, approved February twelfth, one thousand seven hundred and ninety-three, 9 Stat. 462 (18 September 1850).

²⁵ Abolitionist lawyers challenged the Act on the basis that commissioners were carrying out a judicial function without the protections of Article III independence. RM Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1975) 177; Campbell (n 22) 35–44.

them before one of these commissioners. Thereafter, the commissioner was obliged 'to hear and determine the case of such claimant in a summary manner'. Commissioners upon receiving basically anything they viewed as evidence of the enslaved status of the victim would issue a certificate which counted as 'conclusive' proof sufficient to authorise the carrying of the victim back to the South and to 'prevent all molestation of such person or persons [ie, slave-catchers] by any process issued by any court, judge, magistrate, or other person whomsoever'. Moreover, much of this proof could be conducted entirely in the South and in advance (and hence thoroughly *ex parte*): the Act provided that a judge or magistrate in the state from which the person allegedly escaped could take testimony and that such a court's seal 'would be sufficient to establish the competency of the proof' of the escape.

Any interference with such a seizure was punishable by a 1,000 dollar fine, another 1,000 dollars in civil damages to the slave-catcher per victim rescued, and six months in jail.²⁶ Federal marshals were commanded to help out in any orders issued under the Act, and, as noted, were permitted to name deputies and to commandeer the service of local citizens to add to their force.

In principle, a kidnap victim who was legally free could then sue for their freedom in the courts of the slave state to which they were carried off.²⁷ But this probably would not have been an effective remedy, in view of the fact that such a person would be enslaved at the time, and likely under the heavy guard to which a kidnapper (for that they would be even under slave law if their victim was legally free) would naturally subject their victims – how is a person locked up in some plantation to even make it to a courthouse, let alone to find evidence to prove their freedom? If they would have any realistic shot at the protections of the law, it would have to be in some court in the North, and that's precisely what the Fugitive Slave Act of 1850 denied them.

I must be careful not to overstate the point there. The enslaved were not wholly defenceless; there were some successful freedom suits in the South. It's likely that the people who managed to achieve such feats were fairly extraordinary, but we cannot know precisely how extraordinary, as what we mostly have are historians' efforts to discover individual freedom suits rather than anything like quantitative data. Intuitively, such suits would have been difficult, but the degree of difficulty would depend on a victim's access to things like a social and informational network of other slaves, free people of colour, abolitionists, and the like. Physical access to the courts and to lawyers would have been a particular burden, except where slaves were taken to cities or the west, or after running away; and even for urban slaves, being sold down the river and away from the

²⁶ Based on consumer price index figures from the Minneapolis Federal Reserve Bank, *Consumer Price Index, 1800*, www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800-, the total fines and damages would be about \$60,000 in 2019 dollars.

²⁷ Campbell (n 22) 35–36.

courts was a real danger, as was use of violence to deter litigation.²⁸ On the whole, in view of the fact that a kidnapper in particular would have very strong incentives to use force to keep their victims away from the courts, the notion that a person kidnapped in Pennsylvania and sold away to, say, some plantation in Georgia or South Carolina would have meaningful access to Southern courts to free them seems particularly implausible.

But we haven't even discussed the most egregious part of the act from the rule of law standpoint: commissioners were paid twice as much to rule in favour of the slave-catcher as to rule against them. That flagrant assault on the notion of judicial neutrality was written directly in the text of the statute:

in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, upon the delivery of the said certificate to the claimant, his agent or attorney; or a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery.²⁹

Such blatant built-in judge-bribing would have been particularly shocking if any of the revolutionary generation had been alive in 1850, for it is a vivid reprise of the 'pecuniary temptation always against the subject' for which Adams so vociferously condemned the admiralty courts. The commissioner system shared other features with the admiralty court too, most obviously the complete absence of a jury.³⁰ Apparently the American masters were not above using the same techniques of oppression against their enslaved – and against free Black Americans who were falsely alleged to be enslaved – as Prime Minister Grenville used on them.

In addition to the additional incentive and opportunity the 1850 law offered to kidnapping, even its process effectively enslaved free Black Northerners. If they were to be treated as free persons in the North, then the Bill of Rights would apply to them in proceedings conducted by the federal government. Those rights included the prohibition on unreasonable seizures of the person, and the right to due process of law, which, if nothing else, manifestly must include a minimally fair trial in front of a judge who isn't paid to rule against one. By denying those rights to any person brought before such a commission, the law effectively assumed that they were slaves not entitled to the protections of the Constitution from the get-go. Indeed, Martin Delany argued that the condition

²⁸ For discussion, see KM Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (The University of Georgia Press, 2017) 44–47, 50, 53, 148, 192; L VanderVelde, *Redemption Songs: Suing for Freedom Before Dred Scott* (Oxford University Press, 2014) 4, 16–17, 29–30.

²⁹ It took 77 years for the Supreme Court to make clear that such a system was unconstitutional, at least in a criminal case. *Tumey v Ohio* 273 US 510 (1927). My colleague Steve Lubet informs me that there was at least a putative (albeit obviously pretextual) rationale for the difference in the Fugitive Slave Act: ruling in favour of enslavement supposedly required more paperwork.

³⁰ *cf* Campbell (n 22) 43–44.

of free Black Northerners was even worse than those of free Black Southerners, for at least the latter would have papers proving their status; because there was no slavery in the North, there was no bureaucratic mechanism by which a free Black Northerner could prove his non-slave status.³¹

Thus, the inevitable result of the 1850 Act was the expansion in the scope of slavery and the undermining of the capacity of the free states to keep it out of their territory. Unsurprisingly, those who were vulnerable to kidnapping recognised this fact: the Act sparked a vast migration of Black Americans in the North to Canada, illustrating with their feet the exclusion from the legal community that the statute inflicted on them; others took up arms for the protection the law would not give them.³²

THE RULE OF LAW DEBATE ABOUT NORTHERN RESISTANCE TO SLAVERY

The claims of the Fugitive Slave Act to the status of 'law' – and the status of slavery as a form of property – drove the rhetoric of secession and Civil War. The statements issued by Southern states explaining their positions are replete with appeals to an alleged Northern lawlessness. Thus, South Carolina accused the North of having 'denied the rights of property' in slaves and of permitting 'open establishment ... of societies, whose avowed object is to disturb the peace and to elohn the property' of slaveholders.³³

Georgia's statement includes a particularly revealing passage on the Fugitive Slave Act:

A similar provision of the Constitution requires them to surrender fugitives from labor. [...] In the fourth year of the Republic Congress passed a law to give full vigor and efficiency to this important provision. This act depended to a considerable degree upon the local magistrates in the several States for its efficiency. The non-slave-holding States generally repealed all laws intended to aid the execution of that act, and imposed penalties upon those citizens whose loyalty to the Constitution and their oaths might induce them to discharge their duty. Congress then passed the act of 1850, providing for the complete execution of this duty by Federal officers. This law, which their own bad faith rendered absolutely indispensable for the protection of constitutional rights, was instantly met with ferocious revilings and all conceivable modes of hostility. The Supreme Court unanimously, and their own local courts with equal unanimity (with the single and temporary exception of the supreme court of Wisconsin), sustained its constitutionality in all of its provisions. Yet it stands to-day a dead letter for all practicable purposes in every non-slave-holding State in

³¹ M Robison Delany, *The Condition, Elevation, Emigration, and Destiny of the Colored People of the United States Politically Considered* (Published by the Author, 1852) 155–56.

³² Campbell (n 22) 62–63.

³³ From the *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, 24 December 1860, via Avalon Project, avalon.law.yale.edu/19th_century/csa_scarsec.asp.

the Union. We have their covenants, we have their oaths to keep and observe it, but the unfortunate claimant, even accompanied by a Federal officer with the mandate of the highest judicial authority in his hands, is everywhere met with fraud, with force, and with legislative enactments to elude, to resist, and defeat him. Claimants are murdered with impunity; officers of the law are beaten by frantic mobs instigated by inflammatory appeals from persons holding the highest public employment in these States, and supported by legislation in conflict with the clearest provisions of the Constitution, and even the ordinary principles of humanity. In several of our confederate States a citizen cannot travel the highway with his servant who may voluntarily accompany him, without being declared by law a felon and being subjected to infamous punishments.³⁴

It was, it must be said, doubtless true that abolitionists used extra-legal means to resist the execution of the Fugitive Slave Act. Slave-catchers were met with violence on a number of occasions.³⁵ Northern officials who sympathised with abolition engaged in less dire and more amusing abuses of the legal system too – Lubet describes the legal harassment that was inflicted on two slave-catchers as including being ‘subjected to daily arrests on trivial and trumped-up charges including smoking in the streets, slander, swearing and cursing, carrying concealed weapons, reckless driving, and failure to pay bridge tolls’.³⁶ In Boston, it could be impossible to bring to trial even someone who killed a federal officer in the course of a failed rescue; that city maintained its status as the cradle of liberty by carrying out a charmingly comprehensive course of retaliation against a commissioner who had sent an escaped slave down South – firing him from a post at Harvard Law School (oh no! cancel culture!) and then, by legislative action, from a post as probate judge.³⁷ A Republican sheriff in Ohio skipped town in order to avoid being served with a writ of *habeas corpus* and made to free some slave-catchers who were being held his jail for kidnapping.³⁸

More official resistance came in the form of the use of the idea of federalism in defence of the freedom under law of Black Northerners. Thus, Northern states enacted ‘personal liberty laws’ to rein in the depredations of slave-catchers who crossed their territory, and the first cry of state’s rights in the conflict over slavery came not from the South but the North.

Perhaps the ultimate antislavery deployment of states’ rights was the case of *Ableman v Booth*.³⁹ The Wisconsin courts had granted a writ of *habeas corpus* against a federal marshal who was holding Sherman Booth, an abolitionist who

³⁴ Georgia Secession, 29 January 1861, via Avalon Project, avalon.law.yale.edu/19th_century/csa_geosec.asp.

³⁵ Baker (n 14) 1166–67.

³⁶ S Lubet, *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial* (Belknap Press of Harvard University Press, 2010) 134.

³⁷ *ibid* 216–25.

³⁸ *ibid* 312.

³⁹ *Ableman v Booth* 62 US 506 (1859).

had participated in a jailbreak to free a fugitive slave. The Wisconsin Supreme Court, in the course of commanding the release of Mr Booth, not only declared the Fugitive Slave Act unconstitutional, but refused to even acknowledge the authority of the US Supreme Court – on the theory that it had the independent capacity to strike down a federal law without review. Unsurprisingly, the Supreme Court was having nothing of this idea, and reversed Wisconsin's decision in no uncertain terms on the basis of the Supremacy Clause.

What are we to make of all of this? I think it reveals a paradox at the heart of institutional defences of the rule of law. Any tool that can be used to resist the abuse of state power can also be used to resist the use of that power to protect individuals. Thus, although jury nullification has been used against government lawlessness, it can also be a danger to the rule of law. In the Jim Crow South, such efforts to prosecute lynchers as were undertaken could be thwarted by defendants appealing to white supremacist juries and calling for nullification, thus permitting the lawless reign of terror of whites to continue.⁴⁰ Likewise with direct action itself: Black Americans were forcibly taken out of law enforcement custody both by abolitionists in the fight against the Fugitive Slave Act⁴¹ and by lynch mobs during Jim Crow.⁴²

We can juxtapose *Ableman v Booth* to the transposition of the legal invocation of states' rights to the other foot a century later in *Cooper v Aaron*.⁴³ There, once again, the Supreme Court was called upon to insist on its own authority in the face of a recalcitrant state, although this time it was the Arkansas governor and legislature, who had declared that they were not obliged to obey the ruling in *Brown v Board of Education* – governor Orval Faubus went so far as to call out the National Guard – and refused to desegregate their schools. Once again, the Supreme Court thundered about obedience to the Constitution and insisted that a state recognise the supremacy of federal judicial authority.

We probably ought to evaluate the Wisconsin Supreme Court's decision, but not Orval Faubus's, as praiseworthy. After all, the slave whom Mr Booth had freed was held pursuant to a statute that made a mockery of the basic principles of legal order, and under the colour of a claim that he was subject to a status, slavery, that itself was wholly incompatible with the rule of law. There could at most be the power of brute force holding Booth, not law, and hence he was entitled to be freed. While the Wisconsin court's refusal to acknowledge that

⁴⁰ Waldrep, 'National Policing, Lynching, and Constitutional Change' (2008) 74 *The Journal of Southern History* 589, 620, gives examples. Moreover, there is some suggestion that jury nullification was used (and, from the perspective of the federalist framers, abused) in the states during the Articles of Confederation period to avoid lawful debts. R Lettow Lerner, 'The Troublesome Inheritance of Americans in Magna Carta and Trial by Jury' in R Hazell and J Melton (eds), *Magna Carta and its Modern Legacy* (Cambridge University Press, 2015) 89.

⁴¹ eg, Campbell (n 22) 148 et. seq.

⁴² eg, W White, *Rope & Faggot: A Biography of Judge Lynch* (Alfred A Knopf, 1929) 23, 31, 33, 36.

⁴³ *Cooper v Aaron* 358 US 1 (1958).

the US Supreme Court had a right to review its decisions might seem a bit spiteful, since the decision would be reviewed at any rate, one can interpret it as a form of justifiable civil disobedience. That interpretation, however, depends on the underlying substantive character of the case: the Wisconsin Supreme Court was right, and Orval Faubus wrong, because the one was deploying the writ of *habeas corpus* on behalf of a person who had rightly used force to protect a person from enslavement by a kangaroo court, while the other was insisting on the right to operate separate and unequal schools.

Similarly, with respect to jury nullification and even violence, I think that we ought to evaluate seizing Black people from jails when they were about to be returned to enslavers as different from seizing Black people from jails in order to lynch them. Those who are enslaved are thrust into a Hobbesian state of war with their enslavers, and are for that reason entitled to defend themselves by any means necessary. But, again, this is a judgment that ineluctably depends on the underling evaluation of slavery as itself lawless.⁴⁴

I think the same is true more broadly of the kinds of structural constitutional protections that would occupy a more prominent place in a less critical book about the American rule of law. Are federalism and separation of powers protections against arbitrary government? Well, sure, I guess, for essentially the same reasons as the jury: because such organisational techniques give the people an opportunity to participate in governance by counterpoising the power of one group of political institutions against another.⁴⁵ But the institutional capacity for resistance is only pro-rule-of-law to the extent the status quo, toward which institutional resistance establishes a bias, is itself lawful. The capacity of ‘sanctuary cities’ to refuse to turn over undocumented immigrants to the federal government promotes the lawful treatment of those immigrants just because (as described at length at the end of this book), the United States treats those immigrants in a lawless fashion; it would not be a defence of the rule of law for cities to refuse to prosecute those who committed hate crimes to facilitate the oppression of subordinated minorities. Whether activity or stasis is more likely to promote lawful governance is not discoverable *a priori*.

⁴⁴ As noted in the previous chapter, one of the dominant theories of slavery’s justification in the intellectual background of America’s founding was as an outgrowth of war, according to which one might be enslaved as an alternative to being killed in combat, see discussions in W Uzgalis and N Zack, ‘John Locke, Racism, Slavery, and Indian Lands’, *The Oxford Handbook of Philosophy and Race* (Oxford University Press, 2017); DJ Schaub, ‘Montesquieu on Slavery’ (2005) 34 *Perspectives on Political Science* 70; B Hinshelwood, ‘The Carolinian Context of John Locke’s Theory of Slavery’ (2013) 41 *Political Theory* 562. The Supreme Court endorsed this justification for slavery in *The Antelope* 23 US 66, 120 (1825) On that logic, it seems to me that slavery’s constitution implicitly conceded the existence of a state of war.

⁴⁵ cf EA Young, ‘Welcome to the Dark Side – Liberals Rediscover Federalism in the Wake of the War on Terror’ (2004) 69 *Brooklyn Law Review* 1277; SF Kreimer, ‘Federalism and Freedom’ (2001) 574 *The ANNALS of the American Academy of Political and Social Science* 66; A Reed Amar, ‘Of Sovereignty and Federalism’ (1987) 96 *Yale Law Journal* 1425.

The Inevitability of the State of War

Charles Langston, standing in the dock to be sentenced for violating the Fugitive Slave Act by rescuing a kidnap victim in Ohio, explained that by abandoning even the pretence of permitting those who were alleged to be slaves any legal process even in the North, the Fugitive Slave Acts thrust all Black Americans into a state of nature and compelled them to resort to arms for their own defence:

[I]f any man whatever were to claim me as his slave and seize me, and my brother, being a lawyer, should seek to get out a writ of *habeas corpus* to expose the falsity of the claim, he would be thrust into prison under one provision of the Fugitive Slave Law, for interfering with the man claiming to be in pursuit of a fugitive, and I, by the perjury of a solitary wretch, would, by another of its provisions, be helplessly doomed to life-long bondage [...] [I]f ever again a man is seized near me, and is about to be carried Southward as a slave, before any legal investigation has been had, I shall hold it to be my duty, as I held it that day, to secure for him, if possible, a legal inquiry into the character of the claim by which he is held. And I go farther; I say that if it is adjudged illegal to procure even such an investigation, then we are thrown back upon those last defenses of our rights, which cannot be taken from us, and which God gave us that we need not be slaves.⁴⁶

And yet the Acts were themselves necessitated by the enforcement of the slave system in the first place. If we take the Southern claims to be simply trying to enforce their property rights against Northern resistance seriously, then the unwillingness of some Northern courts to enforce the law, and of Northern citizens to comply with it, necessitated substituting an arbitrary federal system for the courts of the free states. But this is only to be expected: a system of law which classifies some people as bearing no rights will inevitably provoke resistance, and that resistance will inevitably include at least *some* resistance from within the legal system, for – as EP Thompson famously argued in the abstract, and Ariela Gross illustrated with respect to real slave cases, respectively, the forms of the law and its claims to represent neutral justice impose an internal pressure on the participants to actually deliver such a thing; the efforts of the legal system to justify the difference in treatment between enslaved and free by representing the former as less than persons was belied by the fact that it needed to take their personhood into account in order to adjudicate cases in which they were involved.⁴⁷ In other words, the lawless nature of slavery generated the legal resistance of which the South complained, and which motivated the Fugitive Slave Act of 1850.

⁴⁶JR Shipherd, *History of the Oberlin-Wellington Rescue* (John P Jewett and Company, 1859) 177.

⁴⁷EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975) 262; AJ Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton University Press, 2000); cf J Cohen, 'The Arc of the Moral Universe' (1997) 26 *Philosophy & Public Affairs* 91.

Having substituted arbitrary adjudication for law – having done to the resisters of slavery what Parliament had first done to the resisters of taxes – it followed that the arbitrary system would sweep up some whom it (nominally) had not been intended to reach. As Martin Delany explained – writing about an 1848 ruling that a person need not know that an alleged fugitive was, in fact, a escaped slave before being subject to penalty under the 1793 Act for interfering with their kidnapping – the law effectively made slaves of every Black person, since it deprived them of assistance against kidnappers, and thus effectively presumed that any person subjected to a kidnapping was a slave.⁴⁸

Delany, like David Walker, drew on the ideology of antityrannicism to capture the entwining of slave status and lawlessness and of Blackness and enslavement: ‘I declare that every colored man in the nominally free states, under [the act], is reduced to abject slavery; because all slavery is but the arbitrary will of one person over another. This law is nothing more nor less.’⁴⁹ And like Langston, he recognised that in the absence of law all that was left to him was force.

⁴⁸ Letter from Martin Delany to Frederick Douglass, in *The North Star*, 28 July 1848, pp 2–3.

⁴⁹ *ibid*, p 2.