SLAVERY ON TRIAL: THE CASE OF THE OBERLIN RESCUE

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I. INTRODUCTION

We are accustomed to thinking of civil rights attorneys and civil disobedience as phenomena that originated with the freedom marches and sit-ins of the 1960s. But in fact, those tactics and practices have much longer histories, dating back at least to the Abolitionist Movement of the pre-Civil War era.

Much of our knowledge of the struggle for human freedom has been refracted by the Civil War itself, which understandably is viewed as the crucible of emancipation. In contrast, the earlier Abolitionist Movement is often portrayed as either piously self-righteous and therefore ineffective, or as recklessly millenarian and therefore ineffective. It was the pragmatic Abraham Lincoln, not the demagogic William Lloyd Garrison, who succeeded in saving the Union and freeing the slaves.

Because of the inevitable contemporary association of the Union with emancipation ("Lincoln and liberty"), it is often assumed that the two principles were always connected. In fact, the opposite is true. Right up until the Republican electoral victory in 1860, preservation of the Union also meant the preservation—and frequently the extension—of slavery, as Federal power was regularly exerted to protect slaveholders' "property rights."[1]

Abolitionists, in fact, could be characterized as anti-Union in any of several senses. By definition, every abolitionist opposed extending slavery to territories and new states, even in order to preserve the Union.[2] Thus, the various national compromises were all anathema to abolitionists because they all involved the admission of new slave states. While most Northern politicians—even those who opposed slavery in principle—believed that the controlled extension of slavery was the necessary price for national cohe-

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1. NAT BRANDT, THE TOWN THAT STARTED THE CIVIL WAR 14-15 (1990).

2. *See* HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 326 (1998) (discussing the American Anti-Slavery Society's adoption of the slogan "No Union With Slaveholders").

sion,[3] the Abolitionist Movement stood for just the opposite. If forced to choose between unity and freedom, unity had scant value.

In a stronger sense, the Abolitionist Movement opposed the national government itself, especially during the 1850s, because they regarded it as under the perpetual control of slave-holding Democrats.[4] Even Northern presidents, such as Millard Fillmore (of New York), Franklin Pierce (of New Hampshire), and James Buchanan (of Pennsylvania), were considered little more than tools of the South.[5] The *Dred Scott* decision,[6] and the Fugitive Slave Act[7] even more so, sharpened this resentment into outright resistance. Throughout the 1830s and 1840s, it had been argued that free soil was a "state's right."[8] In other words, each state had the sovereign power to declare men free within its borders (save perhaps for slaves "in transit," or under other limited circumstances).[9] The Fugitive Slave Act, however, abrogated this right, requiring free state officials, and even ordinary citizens, to assist in the apprehension of runaway slaves.[10] The Act also set up new federal tribunals, staffed by commissioners whose sole function was to speed the return of fugitive slaves.[11] By the end of 1850, there were nineteen successful renditions under the Act, returning nineteen fugitives to bondage, with only two dismissals.[12]

Thus, in a political alignment that today seems oddly contradictory, the Union itself became the guarantor of slavery while abolitionists often rallied for the cause of "States' Rights." Ohio's Republican Governor Salmon P.

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3. For example, Daniel Webster was a pivotal supporter of the compromise of 1850, notwithstanding his general anti-slavery credentials. *Id.* at 398. So committed was he to compromise, that Webster later condemned as "treason" the rescue of a runaway slave in violation of the Fugitive Slave Act. *Id.* at 408-09.

4. *See* BRANDT, *supra* note 1, at 125, 134.

5. For example, Fillmore readily signed the Fugitive Slave Act when it reached his desk, even though the Act had failed to attract an absolute majority vote in either house of Congress—it passed by virtue of numerous abstentions by Northern members. *Id.* at 403. "God knows that I detest slavery," he explained to Daniel Webster, "but it is an existing evil, for which we are not responsible, and we must endure it, and give it such protection as is guaranteed by the Constitution, till we can get rid of it without destroying the last best hope of free government in the world." *Id.*

6. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

7. Act of Sept. 18, 1850, 9 U.S. Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

8. *See* BRANDT, *supra* note 1, at 14-16.

9. A number of Northern states passed "personal liberty laws" intended to overcome the inequities of the Fugitive Slave Act, which provided alleged fugitives with rights to trial by jury and habeas corpus, both of which were denied under federal law. *Id.* at 19. By enacting such a law, the state legislature was issuing a direct challenge to federal supremacy, similar in form to the Southern doctrine of nullification.

10. *Id.* at 14-17.

11. An arrested fugitive was not entitled to testify before the tribunal, was not entitled to a jury, was not allowed an appeal, and was prohibited from seeking habeas corpus. Act of Sept. 18, 1850, 9 U.S. Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200. Moreover, the commissioner was to be paid ten dollars upon issuing a "certificate of removal," but only five dollars if the certificate was denied. MAYER, *supra* note 2, at 407. It appears that the first successful rendition under the Act was initiated just eight days after the law was passed, when James Hamlet was seized in New York. PAUL FINKELMAN, SLAVERY IN THE COURTROOM 85 (1985). Hamlet claimed to be free by virtue of his birth to a free woman, but the federal commissioner would not allow him to testify, summarily ordering his return to Baltimore. *Id.*

12. MAYER, *supra* note 2, at 406. That pattern held true, or got worse, throughout the 1850s, with as many as ninety-eight percent of prosecutions resulting in rendition of the fugitive. *Id.* at 412.

Chase (later Lincoln's secretary of the treasury, and then Chief Justice of the United States) denounced the Fugitive Slave Act as "a symbol of the supremacy of the Slave States and the subjugation of the Free,"[13] declaring also that the Ohio Supreme Court had the authority to free those wrongfully imprisoned under the Act.[14]

Indeed, abolitionist leader William Lloyd Garrison regularly spoke of secession by the *Northern states*, arguing that the Constitution's acceptance of slavery rendered it "a covenant with death and an agreement with hell."[15] His influential newspaper, *The Liberator*, carried the slogan "No Union with Slaveholders" on its masthead.[16]

As the greatest moral crusade of the nineteenth century, the battle against chattel slavery brought forth a movement that found itself challenging the very legitimacy and cohesion of the United States government. It is no wonder, therefore, that these contemporaries of Thoreau (himself an abolitionist, if an apolitical one) readily engaged in civil disobedience,[17] especially in aid of runaway slaves. Given the constitutional legitimacy of slavery, and the determination of the federal government to protect it, conscientious abolitionists were left with little choice. Shortly after the introduction of the Fugitive Slave Act, anti-slavery activists began referring to "the higher law" and "a higher law than the Constitution" as justification for outright resistance.[18]

The thwarting of slave-catchers was most often covert—the Underground Railroad traveled at night and in secret—and therefore seldom engaged lawyers in their professional capacities.[19] Lawyers were, of course, called upon to defend captured fugitives, but the rigged nature of the proceedings made representation nearly futile. In case after case, the federal commissioners ruled in favor of alleged slave owners,[20] notwithstanding the efforts of the abolitionist bar.

Once such case was the capture in Boston of Thomas Sims, an escaped bricklayer from Savannah.[21] Crowds of abolitionists assembled to protest the proceeding against Sims, but were greeted by the entire Boston police force, ringing the courthouse to prevent any attempt at rescue. The defense of Sims therefore fell exclusively to lawyers, who engaged in repeated legal maneuvers to block his return to Georgia.[22] In addition to defending him before the federal commissioner, they filed multiple writs of habeas corpus in the Supreme Judicial Court of Massachusetts, all of which were denied

13. BRANDT, *supra* note 1, at 208.
14. *Id.* at 209.
15. MAYER, *supra* note 2, at 531.
16. *Id.*
17. Thoreau's classic essay, *Civil Disobedience*, originally delivered as a lecture in 1848, was heavily influenced by his opposition to slavery and his exposure to leading abolitionists. *Id.* at 414.
18. *Id.* at 13.
19. *Id.* at 411-12.
20. *See* MAYER, *supra* note 2, at 410-12.
21. *Id.* at 410.
22. *Id.* at 411-12.

by Chief Justice Lemuel Shaw.[23] The lawyers' efforts were to no avail. The certificate of removal was duly issued and the weeping Sims was shipped off to Savannah where, it was reported, he was given thirty-nine lashes for his escape.[24]

The utter failure of protest and litigation, as in the Sims case, led inevitably to more and more open civil disobedience, with crowds intervening, either peacefully or otherwise, to obstruct the legal kidnapping of escaped slaves.[25] The federal government, in the administrations of Fillmore, Pierce, and Buchanan, responded with a series of prosecutions that, in turn, prompted the development of a legal theory of civil disobedience.[26]

Among the most important of these was the case that came to be called the Oberlin Rescue.[27] In September of 1858, a band of slave-catchers from Kentucky apprehended a runaway slave in Oberlin, Ohio. Hundreds of local abolitionists came to the slave's rescue, freeing him from his captors and spiriting him to freedom in Canada. The pro-slavery Buchanan administration decided to use this as a test case, indicting thirty-seven of the rescuers under the Fugitive Slave Act, and bringing them to trial in Cleveland.[28]

The group mounted a vigorous defense, represented *pro bono* by prominent members of the Cleveland bar.[29] The trial itself provides an extraordinary example of the relationship between lawyers and civil disobedience. While it is clear that the defendants were proud of their defiance of the hated Fugitive Slave law, the actual trial strategy wavered back and forth—sometimes asserting strained technicalities, sometimes seeming to rely on denial or misidentification, and only occasionally justifying civil disobedience (or adherence to "Higher Law") in the course of the proceeding.[30] Of course, in 1859 lawyers had little or no experience with courtroom maneuvers for defending civil disobedience. They were working in unexplored territory. It is obvious from the record that the lawyers were feeling their way along, improvising as the trial progressed. Thus, the Oberlin Rescuers' trial is particularly instructive, as it provides us with an early example of the dynamic development of civil disobedience as a legal defense.[31]

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23. *Id.* at 411.
24. *Id.* at 410-12; *see also* FINKELMAN, *supra* note 11, at 88-94.
25. *See* MAYER, *supra* note 2, at 407-08.
26. *Id.* at 42.
27. *See generally* JACOB R. SHIPHERD, HISTORY OF THE OBERLIN-WELLINGTON RESCUE (1859).
28. BRANDT, *supra* note 1, at 117.
29. *Id.* at 127.
30. *See generally id.* at 143-82.
31. *See generally* SHIPHERD, *supra* note 27. A note on sources: Two separate trials were held in the rescuers' case. The first, that of Simeon Bushnell, was not transcribed. A court reporter was present for the second trial, that of Charles Langston, but the transcript has been lost. The best surviving record of the trial is the account compiled by indicted rescuer, and Oberlin student, Jacob R. Shipherd, published in book form within weeks of the trial. *Id.* Shipherd relied heavily on newspaper accounts, as well as his own notes, to reconstruct the testimony at both trials, though often in summary rather than verbatim. Shipherd was hardly an objective observer, nor were his other sources, which included John Kagi—then a reporter for the *New York Tribune*, but later one of John Brown's lieutenants at Harpers Ferry. (The prosecutors evidently refused to assist. *See* FINKELMAN, *supra* note 11, at 126.) Nonetheless, Shipherd's book remains the best and most complete account of the trials. For additional information regarding

II. THE KIDNAPPING OF JOHN PRICE

In early September 1858, John Price, a runaway slave from Kentucky, was living quietly in Oberlin, Ohio.[32] The presence of runaways was hardly unusual in Oberlin or in the surrounding Lorain County. Oberlin College had been established in the 1830s on the principles of both coeducation and racial integration, which led to an astonishingly (for the time) integrated student body.[33] The town of Oberlin itself shared the attributes of the school, with black and white citizens mixing freely in every walk of life. When John Mercer Langston, an attorney and Oberlin College graduate, was elected town clerk, he became the first black public official in the United States.[34] So well-known was the community for its commitment to racial equality that detractors often scornfully referred to the residents as "Ober-litionists," though the recipients of the intended jeer actually accepted it with a good measure of pride.[35]

The black population of Oberlin included many "free negroes" who were attracted by the town's egalitarian philosophy.[36] The presence of so many free African-Americans also provided camouflage, so to speak, for fugitives from nearby Kentucky, many of whom stopped in Oberlin as they prepared to cross Lake Erie into Canada, and some who more or less settled there.[37] John Price was one of the latter. Having escaped in 1856 from his owner, John Bacon of Mason County, Kentucky, Price made his way to Oberlin where he worked as a farm hand and laborer.[38]

The active presence of so many black people also had the unfortunate effect of attracting the slave hunters, who ranged across Ohio in search of escapees who had crossed the river from Kentucky.[39] Motivated by the offer of substantial bounties, the man-stealers were not known for making careful distinctions between freedmen and runaways, sometimes kidnapping any available black person.[40] In the days before routine photography, much more reliable means of identification, it was a simple enough matter to seize a man or woman on the basis of a general description. Consequently, even the free black community lived in a state of perpetual fear. After all, the Supreme Court's *Dred Scott* decision made it abundantly clear that a black person had "no rights which the white man was bound to respect."[41]

Shipherd and other sources, see BRANDT, *supra* note 1, at 267-69.

32. *See* BRANDT, *supra* note 1, at 50.

33. *Id.* at 27-28.

34. Langston went on to become dean of the Howard University Law Department, United States Ambassador to Haiti, and a member of the United States House of Representatives. WILLIAM CHEEK & AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM 1829-65 (1996).

35. BRANDT, *supra* note 1, at 41-42.

36. CHEEK & CHEEK, *supra* note 34, at 284.

37. BRANDT, *supra* note 1, at 41-42.

38. *See id.* at 50-51.

39. *See id.* at 52-53.

40. *See id.*

41. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

The Fugitive Slave Act of 1850 made matters even worse, because it authorized the capture of any black person, by either bounty hunters or federal marshals, on the basis of an affidavit sworn out by the alleged owner.[42] The captive would be taken before a federal commissioner for a hearing that was little more than a sham.[43] The prisoner had no right to a jury trial, or even to testify.[44] Instead, the commissioner would decide the captive's fate exclusively on the basis of the slave-catcher's evidence, which was almost always hearsay at best.[45] Moreover, there was no right to an appeal. In these circumstances, there was a very real possibility that free men and women, either by mistake or deliberately, would be "legally" bound into slavery.[46] To the abolitionists of Oberlin, of course, it made no difference whether an African-American was free or a runaway. They were determined to protect every black fellow resident, and often boasted that no person had ever been returned to slavery from Lorain County.[47]

If the price of freedom is eternal vigilance, that was never more true than in the late summer of 1858. Slave-catchers had recently made three failed attempts in the Oberlin community, each time thwarted by the resistance of the families themselves.[48] On September 13, however, they would be more successful—at least for a short while. On that day, a Kentucky slave-catcher named Anderson Jennings arrived in Oberlin, where he joined Richard Mitchell, another Kentuckian.[49] Jennings was in search of John Price, whom he believed he recognized from an earlier trip north.[50] Jennings understood how difficult it would be to capture a black man in predominantly abolitionist Oberlin. A few weeks earlier, slave hunters had made two attempts to seize a black woman and her family, but were chased off each time by students and faculty from the college.[51]

Recognizing that he would need local assistance if he were to have any chance at success, Jennings sought the aid of Anson P. Dayton, a deputy United States marshal and a pro-slavery Democrat.[52] As an official of the Buchanan administration, Dayton was sworn to uphold the Fugitive Slave Act, but he seemed to be motivated by personal reasons as well as official duty. Dayton had previously been the town clerk of Oberlin, but he was replaced in that position by John Mercer Langston, which made Dayton the first white man in the history of the United States to be ousted from office in favor of an African-American.[53]

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42. BRANDT, *supra* note 1, at 14-17.
43. *Id.* at 16-17.
44. FINKELMAN, *supra* note 11, at 60.
45. *See* BRANDT, *supra* note 1, at 16.
46. *See id.* at 52-53.
47. *Id.* at 50.
48. *Id.*
49. *Id.* at 54.
50. BRANDT, *supra* note 1, at 54.
51. *Id.* at 51-52.
52. *Id.*
53. CHEEK & CHEEK, *supra* note 34, at 316.

Dayton had no qualms about capturing John Price, but he was unwilling to participate himself. Twice within the previous few weeks he had been thwarted, at gunpoint, in similar efforts—once in Oberlin and once in nearby Painesville—and he had no interest in risking his safety again.[54] He therefore advised Jennings to seek reinforcements in Columbus, figuring that out-of-towners would attract less immediate suspicion.[55]

With Dayton's help, Jennings eventually enlisted the aid of two law enforcement officials from Columbus: Jacob Lowe, a deputy United States marshal, and Samuel Davis, a part-time jailer and deputy county sheriff.[56] The four men—Kentuckians Jennings and Mitchell, Ohioans Lowe and Davis—rendezvoused at Chauncy Wack's tavern in Oberlin, there to plan the capture of John Price.[57] They had plenty of muscle, but still lacked a local agent who could help them locate their quarry without attracting undue attention. Conferring with the other patrons—Wack's was a hangout for pro-slavery Democrats—it was suggested that they might get the necessary help from Lewis Boynton, a prosperous local farmer.[58]

Jennings and Lowe proceeded to the Boynton farm where they successfully recruited not Lewis but rather his fourteen-year-old son Shakespeare. For a promise of twenty dollars, with his father's approval, the boy agreed to join the plot.[59]

On the morning of Monday, September 13, 1858, the slave-catchers made their move. Driving his father's horse and buggy, Shakespeare Boynton approached John Price at his home.[60] At first, Shakespeare offered John temporary work digging potatoes, but John declined because he had promised to care for an injured friend. Thinking quickly, Shakespeare suggested that John would enjoy a ride in the country. "Well, John," he said, "the fresh air must feel good to you; and you may as well have a good ride while you're about it. I'll bring you back again."[61] Trusting the boy, Price agreed to the ride, not suspecting that he was being led into an ambush.[62]

They had traveled only about a mile, to the outskirts of town, when a buggy carrying Lowe, Mitchell, and Davis overtook them.[63] The three men quickly surrounded Price, seizing him and forcing him into their wagon.[64] Price resisted momentarily, but soon realized that he had no choice when Mitchell displayed his pistol. "I'll go with you," he said, seemingly resigned to his capture.[65]

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54. BRANDT, *supra* note 1, at 57.
55. *Id.*
56. *Id.* at 59.
57. *Id.*
58. *Id.*
59. BRANDT, *supra* note 1, at 59.
60. *Id.* at 61, 63.
61. *Id.* at 63.
62. *Id.*
63. *Id.*
64. BRANDT, *supra* note 1, at 63.
65. *Id.*

The three slave-catchers turned their wagon toward the nearby town of Wellington, where they planned to catch a train that would take them to Columbus.[66] Showing Price their warrant, Lowe informed Price that he was being taken "back to his master," not bothering to mention the necessity of a hearing under the Fugitive Slave Act.[67] Of course, there was little reason at that point to talk of legalities. John Price had no rights that the white men were bound to respect, and the hearing—presumably to be held in Columbus—was a mere formality on the way back to Kentucky.

III. THE RESCUE IN WELLINGTON

The slave-catchers had no reason to doubt the success of their mission, and were probably already counting their reward money, as they proceeded toward Wellington. Shortly after they reached the halfway point, however, they encountered another carriage headed in the opposite direction, back toward Oberlin.[68] Reckoning this to be his last chance at freedom, Price called out for help as the two wagons passed each other.[69] It was a tense moment that might have led to a confrontation, but the men in the Oberlin-bound wagon apparently ignored Price's cries.[70]

It turned out, however, that one of those men was Ansel Lyman, a militant abolitionist who had served with John Brown in "Bloody Kansas."[71] He had not ignored Price at all, but rather assessed his chances and determined that he needed reinforcements. Immediately upon arriving in Oberlin he raised the alarm—John Price had been kidnapped by slavers—drawing dozens into the street.[72] John Watson, a freed slave, was the first man to set off to Wellington, but many others, black and white, followed immediately on horseback and in wagons.[73] Among them was Simeon Bushnell, a bookstore clerk, who shouted "They have carried off one of our men in *broad daylight*, and are an hour on their way already."[74] A number of men brought firearms, including Charles Langston, John Mercer Langston's brother, who tucked a pistol into his waistband.[75]

Literally hundreds of Oberliners set off to rescue John Price, even if they had to walk. The crowd included freedmen and runaway slaves, heedless of the potential risk to their own liberty.[76] It included students and faculty from the college, ministers, merchants, artisans, lawyers, and farmers.[77]

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66. *Id.* at 64.
67. *Id.*
68. *Id.* at 65.
69. BRANDT, *supra* note 1, at 65.
70. *Id.*
71. *Id.* at 67.
72. *Id.* at 69.
73. *Id.* at 69-70.
74. BRANDT, *supra* note 1, at 73.
75. *Id.* at 75.
76. *Id.* at 75-85.
77. 2 CHARLES GALBREATH, HISTORY OF OHIO 224 (1925).

Their number included John Copeland, a radical who would later ride with John Brown, but it also included pacifists and missionaries.[78] As historian Nat Brandt put it, "It seemed as though every male in Oberlin, white and black, was racing to Wellington."[79]

Meanwhile, Lowe, Mitchell, and Davis had arrived in Wellington with their captive, meeting up with Anderson Jennings at Wadsworth's Hotel.[80] Located on Wellington's Public Square, the hotel gave the four men a clear view of the gathering crowd, which may eventually have included as many as five hundred people—though not all of them were would-be rescuers.[81] It was the kidnappers' plan to take Price to Columbus on a late afternoon train, but it quickly became apparent that they would have to make their way through an angry mob in order to succeed.[82]

Wadsworth's Hotel was hardly a fortress, but its owner was a slavery sympathizer who ordered his employees to guard the entrances and stairways.[83] Price was moved to an attic room, accessible only by a ladder, better to sequester him.[84] But at best it was a standoff. Even if the mob could be kept out of the hotel, there was no way the slave-catchers could safely reach the railroad station without help.

Relying on the Kentucky power of attorney and the federal warrant, which they believed gave them full legal authority to remove Price to Kentucky by way of Columbus, the slave-catchers attempted to negotiate their way out of their dilemma—meeting with various representatives of the rescuers in an attempt to persuade them to disperse the crowd.[85] They displayed their legal documents to everyone they encountered, including lawyers and the town constable.[86]

Eventually, Anderson Jennings addressed the crowd from a hotel balcony. "I want no controversy with the people of Ohio," he said, while insisting "[t]his boy is mine by the laws of Kentucky and of the United States."[87] The crowd shouted him down, however, and demanded that Price be brought to the balcony.[88]

Surprisingly, Jennings brought Price out to speak, claiming that the slave wanted to return to his master. Price was equivocal—he was in the custody of four armed men, after all—saying only that he "supposed" he would have to go because Jennings "had got the papers for him."[89] Mem-

78. BRANDT, *supra* note 1, at 75-85.
79. *Id.* at 85.
80. *See id.* at 66, 87-88.
81. Wellington was especially crowed that afternoon, as many had gathered to watch a fire earlier in the day. GALBREATH, *supra* note 77, at 224.
82. BRANDT, *supra* note 1, at 89.
83. *Id.* at 90.
84. *Id.*
85. *Id.* at 92.
86. *Id.*
87. BRANDT, *supra* note 1, at 92.
88. *Id.*
89. *Id.*

bers of the crowd encouraged Price to speak more freely, or even jump from the balcony.[90] But before anything more could happen, Oberliner John Copeland raised his gun, frightening Jennings who dragged Price back into the hotel.

Charles Langston was one of many Oberliners involved in efforts to obtain a local court order barring Price's removal from Ohio.[91] The basis for such an order would have been questionable at best, resting on one of three tenuous grounds: Perhaps Jennings's papers—power of attorney and warrant—were inadequate; perhaps their captive was in reality a free man, not a runaway, who was being illegally detained; perhaps Ohio's sovereign rights as a free state were being violated by the Kentuckians' actions. By law, however, the first two claims would have to be resolved by a federal commissioner in Columbus, pursuant to the Fugitive Slave Act, not by a local magistrate in Wellington or nearby Elyria.[92] And the third question would seem to have been firmly put to rest by the United States Supreme Court in the *Dred Scott* case.[93] Nonetheless, a court order could buy time, and might even gain Price's temporary freedom, ending the standoff nonviolently.

The legal efforts failed, however, due to a combination of uncertainty about the law and the slave-catchers' firm resolve. Crucially, Charles Langston was one of the last Oberliners to be involved in the negotiations.[94] Meeting with the slave-catchers in the hotel, Langston attempted to persuade Jacob Lowe, whom he knew from Columbus, to set Price free.[95] The crowd was "bent upon a rescue at all hazards," Langston cautioned.[96] Lowe countered with an offer to have a committee of Oberliners accompany him to Columbus in order to assure a fair hearing for Price.[97] Langston agreed to present Lowe's proposal, but assured the deputy marshal that the crowd would have none of it.[98] To emphasize his point, Langston spoke one last time to Lowe, saying either "*We* will have him any how," or "*They* will have him any how."[99] The specific pronoun would assume great significance later, at Langston's trial.[100]

When Langston emerged empty handed, members of the crowd decided that the time for talk had ended.[101] Separate groups, both white and black, stormed the hotel from all sides, entering both the front and back doors.[102] They besieged the slave-catchers in their attic room, eventually breaking

90. *Id.* at 94.
91. CHEEK & CHEEK, *supra* note 34, at 318.
92. BRANDT, *supra* note 1, at 15-17.
93. *See* Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
94. BRANDT, *supra* note 1, at 97.
95. *Id.* at 98.
96. CHEEK & CHEEK, *supra* note 34, at 319.
97. BRANDT, *supra* note 1, at 98.
98. *Id.*
99. *Id.*
100. *Id.*
101. *See id.* at 101-04.
102. BRANDT, *supra* note 1, at 101-04.

through the barred door.[103] The rescuers literally carried John Price out of the hotel, bearing him on their shoulders into the Public Square.[104] The crowd let out a cheer of victory and men threw their hats into the air as Price was virtually thrown into the back of Simeon Bushnell's wagon, which the clerk then furiously drove back to the safety of Oberlin.[105]

The rescue was all but complete. John Price would shortly be spirited across Lake Erie to Canada where, presumably, he was able to live out his life in freedom. Although no word appears to have come back from him to Oberlin,[106] John Mercer Langston would remark confidently that, "John Price walks abroad in his freedom, or reposes under his own vine and fig tree with no one to molest him or make him afraid."[107]

For Price's rescuers, however, there would be another, extended chapter in the story.

IV. THE INDICTMENT OF THE OBERLIN RESCUERS

While Oberlin responded with profound celebration to the liberation of John Price, the reaction elsewhere was the exact opposite.[108] The rescuers had openly flouted the law of the United States, controversial as it was. They had physically intimidated a federal marshal, who was acting under the authority of a federal warrant, by making threats and brandishing firearms. It was a challenge that the Buchanan administration could not abide.[109]

By late September it was rumored that there would be many indictments, and by mid-October a federal grand jury was being empanelled in Cleveland.[110] Ominously, every member of the grand jury was a Democrat, and therefore presumably hostile to Oberlin, even though northern Ohio was overwhelmingly Republican and anti-slavery at the time.[111] At a time when grand juries were hand-chosen by the clerk of the court, it may not have been entirely surprising that a Democratic administration would select fellow Democrats in a highly politicized case. Even so, it must have been shocking when it was revealed that one of the grand jurors was Lewis Boynton, who had colluded with the kidnappers and offered his son, Shakespeare, to assist in the asportation.[112]

The grand jury began hearing testimony in early November, Judge Hiram Willson presiding, and returned its true bill on December 6, 1858.[113]

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103. *Id.* at 106.
104. *Id.*
105. CHEEK & CHEEK, *supra* note 34, at 319.
106. GALBREATH, *supra* note 77, at 224.
107. CHEEK & CHEEK, *supra* note 34, at 319.
108. BRANDT, *supra* note 1, at 112.
109. *Id.* at 113.
110. *Id.* at 115.
111. *Id.*
112. *Id.*
113. BRANDT, *supra* note 1, at 116.

Of course, there was never any doubt about the outcome. Judge Willson's charge to the grand jury told the whole story. Deriding the rescuer's motives for violating the Fugitive Slave Act, he belittled their "declared sense of conscientious duty."[114] Rather, he informed the jurors,

> There is, in fact, a sentiment prevalent in the community that arrogates to human conduct a standard of right above, and independent of, human laws; and it makes the conscience of each individual in society the test of his own accountability to the laws of the land.
>
> While those who cherish this dogma claim and enjoy the protection of the law for their own lives and property, they are unwilling that the law should be operative for the protection of the constitutional rights of others.[115]

This "dogma," the court continued, leaving no doubt as to his biases,

> [I]s a sentiment semi-religious in its development, and is almost invariably characterized by intolerance and bigotry. The leaders of those who acknowledge its obligations and advocate its sanctity are like the subtle prelates of the dark ages. They are versed in all they consider useful and sanctified learning—trained in certain schools in New England to manage words, they are equally successful in the social circle to manage hearts; seldom superstitious themselves, yet skilled in practising [*sic*] upon the superstition and credulity of others.[116]

This was an advance warning to the defendants, of course, virtually daring them to assert "higher law" as a justification for violating the Fugitive Slave Act.

In all, the grand jury indicted thirty-seven men, twenty-five of whom were closely associated with Oberlin, and another twelve from Wellington.[117] There were twelve black men among the defendants, including three fugitive slaves.[118] Most interesting was the fact that three of the inductees had never been present in Wellington. James Fitch, Henry Peck, and Ralph Plumb, all leaders of the Oberlin community, were charged only with aiding and abetting the rescue, meaning that they had encouraged others to resist the fugitive slave law but had not themselves participated in the events at Wellington.[119] The Buchanan administration was palpably taking aim at the

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114. *Id.* at 115 (emphasis omitted).
115. *Id.* (emphasis omitted).
116. *Id.* at 115-16.
117. *Id.* at 116-17.
118. BRANDT, *supra* note 1, at 117.
119. *Id.* at 125.

Abolitionist Movement, hoping to use the prosecution to suppress resistance in the North and curry favor in the South.[120]

In the event, however, the rescuers were anything but intimidated. They virtually rejoiced in their indictment, recognizing that it provided them with an unprecedented opportunity to publicize their struggle against slavery.[121] One of their first activities, on January 7, 1859, was to hold a "Felons' Feast," a banquet at which they gathered to plan their strategy and declare the righteousness of their cause.[122] As reported in the anti-slavery press, the numerous speakers, in addresses and toasts, proclaimed their dedication to human freedom and their resistance to the Fugitive Slave Act.[123] One speaker announced that the "detested law never could be enforced" in Lorain County, concluding that,

> Making war as it does upon all that is manly in man, we will hate it while we live, and bequeathe our hatred to those who come after us when we die. No fines it can impose or chains it can bind upon us, will ever command our obedience to its unrighteous behests.[124]

Many supportive letters were read aloud, including one from John Brown, Jr., who had ridden with his father in Kansas and who would later die with him at Harpers Ferry.[125] The younger Brown clearly articulated the "higher law" justification that would soon be presented in Judge Willson's court and that would, soon enough, become the rallying cry for the violent overthrow of slavery.[126]

> Step by step the Slave power is driving us on to take one or the other horn of the dilemma, either to be *false* to *Humanity* or *traitors* to the *Government*. If we "would ordain and establish Justice," and maintain our Constitution not only in its essential spirit but its letter, strange to say we are *forced* into the *attitude of resistance to the Government*.[127]

As the trial date approached, supporters of the defendants held numerous public meetings for the purpose of raising both funds and sympathy.[128] These events were well covered in the press, as the rescuers realized that publicity was their only counterweight to government power. Henry Peck wrote in William Lloyd Garrison's *Liberator* that "the fire which this out-

120. *Id.* at 112.
121. *Id.* at 131-32.
122. *Id.* at 132.
123. BRANDT, *supra* note 1, at 132-33.
124. SHIPHERD, *supra* note 27, at 7.
125. BRANDT, *supra* note 1, at 135.
126. SHIPHERD, *supra* note 27, at 10-11.
127. *Id.*
128. BRANDT, *supra* note 1, at 138.

rage has kindled in Lorain will not go out till an effort has been made to teach these arbitrary and insolent officials that freemen know what their rights are."[129]

The trial was set for April 5, 1859.[130] On March 8, the prosecutor and defense counsel met to resolve pretrial matters and begin selecting a jury.[131] By this time, the defendants had retained three of Ohio's leading attorneys, all serving pro bono, although only their lead counsel, Rufus Spalding, participated in the pretrial meeting.[132] Spalding was a former speaker of the Ohio House of Representatives and had also served on the state supreme court.[133] The other defense lawyers were Albert Gallatin Riddle, a former county prosecutor and a rising star of the Cleveland bar, and Seneca O. Griswold, youngest and least experienced of the three, who was an Oberlin graduate.[134] The prosecutor was United States Attorney George Belden, a firm supporter of the Fugitive Slave Act who was determined strictly to enforce the law.[135] At trial, George Bliss, a former judge and congressman, would join Belden.[136] Belden was determined to try the rescuers individually rather than as a group, a decision that would later become significant and which the prosecution would probably regret.[137] The lawyers agreed that Simeon Bushnell would be tried first, followed by Charles Langston, with the others then proceeding in the order of their names on the indictment.[138] They next turned to jury selection for the first trial. The venire consisted of forty men—again hand-chosen by the court clerk—none of whom were from Lorain County.[139] Although ten of the panel were apparently Republicans, each side was allowed twelve strikes, which the prosecution promptly used to reduce the venire to 28 pro-slavery Democrats.[140] Whatever use they made of their own strikes, the defendants would have no sympathizers on this jury.

V. THE TRIAL OF SIMEON BUSHNELL

Simeon Bushnell's trial began on April 5, 1859, with opening statements by the prosecution and defense.[141] Speaking for the government, George Bliss scorned the defendants and their motives, taking particular care to belittle any obligations of the higher law:

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129. *Id.*
130. *Id.* at 140.
131. *Id.*
132. *Id.* at 127.
133. BRANDT, *supra* note 1, at 127.
134. *Id.*
135. *Id.* at 127-28.
136. *Id.* at 146.
137. *Id.* at 140.
138. BRANDT, *supra* note 1, at 140; GALBREATH, *supra* note 77, at 220.
139. BRANDT, *supra* note 1, at 127-28.
140. *Id.*
141. *Id.* at 140.

> People around Oberlin think so little of their government and the statutes of the Federal Government, when they interfere with their sympathies with Negro women and men, that they consider their violation a good joke. Is it right [that] any people should impugn the laws of the land, knowing no law but their own consciences? This is a serious question. Any jury of un-debauched minds will execute the statutes in the same faith as in any civil or criminal case under statute law.[142]

In response, defense counsel Riddle moved from abstraction to specifics, leaving no doubt that the higher law was in play:

> [I]f a fugitive comes to me in his flight from slavery and is in need of food and clothing and shelter and rest and comfort and protection and *means of further flight*—if he needs any or all the gentle charities which a Christian man may render to any human being under the circumstances, so help me the great God in my extremist need, he shall have them all.[143]

By far the boldest argument was made when Rufus Spalding called upon Judge Willson to declare the Fugitive Slave Act unconstitutional, notwithstanding solid precedent to the contrary.[144] This was nothing short of a demand for civil disobedience from the bench. "[H]ad I the distinguished honor to occupy the seat which is so eminently filled by your honor" said the former justice of the Ohio Supreme Court,

> I should feel bound to pronounce the fugitive law of 1850 utterly unconstitutional, without force and void; though in thus doing I should risk impeachment before the Senate of my country; and, Sir, should such an impeachment work my removal from office, I should proudly embrace it as a greater honor than has yet fallen to the lot of any judicial officer of these United States.[145]

In a sense, however, the most significant moment of the day came during Spalding's brief opening statement, which revealed a dilemma inherent in the defense case. Raising a theme that would be repeated in several contexts, Spalding asserted,

> [B]y no law, human or divine, did the negro rescued owe service to any man living; that his arrest was kidnapping, procured by the use of the most scandalous and fraudulent deceit, and that *whether, the*

142. GALBREATH, *supra* note 77, at 225.
143. *Id.* at 226 (emphasis added).
144. *Id.*
145. *Id.*

> *defendant aided to rescue him or not*, he was amenable to no criminal statute whatever.[146]

In other words, the defense planned to argue in the alternative: The defendant didn't do it; but if he did, he was impelled by the higher law.[147] Then as now, such tactics were permissible, but only at the cost of clarity and force. The nature of the dilemma became apparent as soon as the government began calling witnesses. The prosecution case was straightforward, but the defense case, as we shall see, would tend to fold in upon itself, with technical evidentiary claims more or less attenuating appeals to the higher law.

A. The Prosecution Case

From the first prosecution witness, Kentuckian John Bacon, the government narrative stuck closely to the elements of the crime.[148] Bacon owned John, "bone and flesh," but the boy had run off without consent.[149] To retrieve his property, Bacon executed and delivered to Anderson Jennings a power of attorney describing John as "about twenty years old, about five feet six or eight inches high, heavy set, copper colored, and [weighing] about 140 or 150 pounds."[150] John—whose "mother was a slave and is still"—had never been returned to Bacon, his lawful owner.[151]

Next, the clerk of Mason County, Kentucky, testified to the official seal on the power of attorney, which empowered Jennings to seize the runaway.[152] The document was admitted into evidence.[153] Then Anderson Jennings testified to his apprehension of John and the subsequent rescue, stressing that he had shown his legal papers to members of the crowd, and adding that he had been knocked down when the hotel room door was pushed open.[154]

Having established the basic outline of the story, the prosecutors called numerous additional witnesses to emphasize the most important details. For example, Richard Mitchell testified that he told the crowd about the power of attorney,[155] and John Wheeler was called to corroborate that Lowe had done the same.[156] Norris Wood testified to John's statement, "they had the papers, and *he s'posed he'd have to go.*"[157] Most importantly at this point in the trial, six witnesses—including bystanders David Wadsworth, Charles

146. SHIPHERD, *supra* note 27, at 16 (emphasis added).
147. *See id.*
148. *Id.*
149. *Id.* (emphasis omitted).
150. *Id.*
151. SHIPHERD, *supra* note 27, at 17.
152. *Id.*
153. *Id.*
154. *Id.* at 18-19.
155. *Id.* at 28.
156. SHIPHERD, *supra* note 27, at 25.
157. *Id.* at 24.

Marks, and E.S. Kinney—all testified that they saw Bushnell driving off with John in his wagon.[158]

In contrast to the linear development of the direct testimony, the cross-examinations raised a welter of technicalities, many of which no doubt appeared petty or even trivial. The power of attorney had not been properly witnessed (it was signed by a deputy, rather than the clerk himself); Bacon was not John's exclusive owner (full title may have been held by the estate of Bacon's deceased father); there had been an extraordinary financial deal between Bacon and Jennings (the suggestion being that Jennings's testimony was influenced by self-interest).[159]

One recurrent line of cross-examination was about the complexion of the escaped slave. In the power of attorney, John was described as "copper colored,"[160] but the man captured by Anderson Jennings was sometimes described as black, raising the possibility that the slave-catchers had apprehended the wrong man.[161] Whatever the potential value of this argument, however, it was in fact rather pointless given Jennings's testimony that he knew John personally from Kentucky,[162] and the testimony of other witnesses that John acknowledged Bacon as his master.[163] Moreover, a federal commissioner in Columbus where Jennings proposed to take his captive, at least in theory, should have resolved all such arguments, but that lawful resolution was deliberately thwarted by the rescue itself.[164]

Lawyers have always been trained—even in the mid-nineteenth century—to search out weak points in the opposition case, so it is impossible to fault Spalding and company for raising every conceivable claim of defense. Perhaps a single juror might have been persuaded to vote for acquittal on the basis of a missing signature. The greater impact of that strategy, however, was to mute the appeal to higher law, which surfaced only slightly during the cross-examinations.[165]

Intermittently, however, a more compelling theme emerged. Twice during the prosecution case, defense counsel objected to testimony about statements attributed to John Price, using heavy sarcasm to make a point about the moral contradiction underlying the entire prosecution.[166] The first instance came early in Belden's direct examination of Anderson Jennings.[167] After establishing that Jennings took custody of Price in Wellington on September 13, 1858, the district attorney asked the next logical question, seeking to prove that Price was indeed the runaway named in the power of attor-

158. BRANDT, *supra* note 1, at 149; SHIPHERD, *supra* note 27, at 30-32.
159. SHIPHERD, *supra* note 27, at 17-34.
160. *Id.* at 16.
161. *Id.* at 21.
162. *Id.* at 19.
163. *Id.* at 24.
164. BRANDT, *supra* note 1, at 58.
165. SHIPHERD, *supra* note 27, at 16-43.
166. *Id.*
167. *Id.* at 18.

ney: "Did he recognize you?"[168] This drew a politically pointed objection from the defense, on the ground that,

> [T]he acts of this piece of property, this chattel, this *thing*, were nothing to charge the defendant by unless he, the defendant, were a party to them. The recognition of his master's agent by this chattel was no more than the recognition a dog might make by the wagging of his tail.[169]

The point, of course, was to emphasize the moral incongruity inherent in slavery. The government had to recognize Price's humanity in offering its evidence, even as it denied his humanity in making him a slave. The expectation was clearly that the court would nonetheless allow the evidence, which could be interpreted as an admission that John Price was a human being, and therefore entitled to human rights.

The court, however, did not rise to the bait, sustaining the objection without comment.[170] Later, however, a bystander witness testified to statements by Price, admitting that he "belonged" in Kentucky to a man named Bacon.[171] The defense again objected to a statement from "this piece of property."[172] This time, the court overruled the objection and permitted the testimony.[173]

The prosecution called a total of nineteen witnesses.[174] The last major witness was Oberlin tavern owner Chauncy Wack.[175] A slavery sympathizer, Wack had traveled from Oberlin to Wellington out of curiosity, not as part of the rescue. He testified that the crowd had been assured that the papers for Price were lawful.[176] In response, someone in the crowd shouted that they "didn't care for papers" and that "they'd have [Price] anyhow."[177] Others said, "they'd tear the house down" because "they were Higher Law men."[178] According to Wack, "It was generally understood through the crowd that the men had papers. Some of the crowd advised peace, and some a rush."[179] There were more than a few armed men in the crowd.[180] Most importantly, Wack did not directly implicate Bushnell. Although he saw Price carried out of the hotel, he did not see the buggy that took him back to Oberlin, and he did not see Simeon Bushnell at all that day.[181]

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168. *Id.*
169. *Id.*
170. SHIPHERD, *supra* note 27, at 18.
171. *Id.* at 25-27.
172. *Id.* at 26.
173. *Id.*
174. *Id.* at 16-35.
175. SHIPHERD, *supra* note 27, at 33.
176. *Id.* at 33-34.
177. *Id.* at 33.
178. *Id.*
179. *Id.*
180. SHIPHERD, *supra* note 27, at 33.
181. *Id.*

The cross-examination of Wack was desultory; touching upon the irrelevant possibility that Jennings had paid his bar tab with a counterfeit $10 bill.[182] Of course, the witness had done no real harm to Bushnell, reiterating on cross that he had never seen the defendant in Wellington.[183] Most interestingly, the defense did not pick up on Wack's observation that the rescuing crowd was filled with "Higher Law men,"[184] although this might have provided an opportunity to drive home a moral point.

As the prosecution rested, the overall defense strategy was far from evident. Was this a technical case, resting on defects in Jennings's warrant and power of attorney? Was it a case of misidentification (regarding Price) or non-identification (regarding Bushnell)? Or was it a moral defense of the rescue itself? At least some of those questions would have to be answered when the defense began its case in chief.

B. The Defense Case

The first defense witness was Lewis Boynton, followed by his son, Shakespeare.[185] The apparent purpose of calling the Boyntons was to underscore the contemptible tactics used in Price's capture.[186] As expected the Boyntons displayed a vulgar callousness, treating the proceeding as an occasion for some low humor.[187] Abolitionists, of course, were shocked and outraged at the very idea of employing an adolescent in a scheme of deception and betrayal, but the manner of Price's capture had no actual bearing on Bushnell's guilt or innocence. Finding the testimony harmless to their case, the prosecutors did not bother to cross-examine either witness.[188]

The defense next returned to the theme of misidentification, calling Henry Peck to testify that John Price, whom he knew well, "was a decidedly black man" who was no taller than "[f]ive feet five inches" and who weighed at least 160 pounds "when healthy."[189] The purpose of this testimony was to challenge the legitimacy of Price's seizure, since the operative power of attorney described a copper colored man who was both taller and thinner.[190] In strictly legal terms, however, the identity of the captive—whether or not he was in fact the runaway named in the papers—was a matter for the federal commissioner to decide. Neither Simeon Bushnell nor any other rescuer was entitled to take the law into his own hands, depriving the appropriate authority of jurisdiction.

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182. *Id.* at 33.
183. *Id.* at 34.
184. *Id.* at 33-34.
185. SHIPHERD, *supra* note 27, at 35.
186. *See id.*
187. *Id.* at 35. For example, Shakespeare testified that he was thirteen years old, "*Expect* I am a son of last witness, but it's hard telling now-a-day[s]!" *Id.*
188. *Id.*
189. SHIPHERD, *supra* note 27, at 35-36.
190. BRANDT, *supra* note 1, at 16; SHIPHERD, *supra* note 27, at 35-36.

Misidentification, therefore, was no defense, unless, of course, it could be made into a defense. Ordinary legal processes resolve questions of identification fairly and in accordance with due process. But what if the defendants could establish that the Fugitive Slave Act provided no such opportunity? What if the chance of misidentification was so great, and so irremediable, that free men were certain to be dragged arbitrarily into slavery? Even the Buchanan administration—even the Supreme Court in the *Dred Scott* case—could not support the willful enslavement of free men. That would constitute kidnapping under the laws of Ohio and every other state, implying, perhaps, an attendant moral right for citizens to intervene.

Fully developed and expanded upon, the possible misidentification of John Price might be used to undergird a full-scale defense of civil disobedience. It is notable, therefore, that the defense case included four more witnesses who controverted Price's appearance.[191] John Cox, for example, testified that Price was "very black, so black he shone."[192]

This effort was undermined, however, by the repeated attention given to hypertechnical questions concerning the warrant and power of attorney, with several witnesses testifying, for example, to the absence of an official seal.[193] Moreover the defense case included no evidence of attempts to seize freedmen in Ohio, though such events had occurred recently in Lorain County.[194] It seems clear enough, in retrospect, that defense counsel was playing all possible angles, unsure or unready to make civil disobedience the cornerstone of the case.

Nonetheless, the final defense witness drove the point home in a uniquely convincing fashion. Orindatus S.B. Wall, an emancipated slave, was called to the stand, creating an exquisite dilemma for the prosecution and the court.[195] As a black man, he had no rights that the court was bound to respect.[196] Would he be allowed to testify? A prosecution objection, if sustained, would emphasize the inadequacy of the courts to hear the claims of black men, perhaps justifying the rescuers' mistrust of the federal commissioners.[197] Allowing Wall to testify, however, implied that black men indeed had rights, again bolstering the defense.[198]

The available record states only that Judge Willson "decided him to be a perfectly competent witness."[199] It is likely, therefore, that the prosecution in fact objected, or perhaps the need for a ruling was simply obvious to the court. In either event, Wall was the only witness who was not sworn, but

191. SHIPHERD, *supra* note 27, at 35-43.
192. *Id.* at 41.
193. *Id.* at 36-41.
194. *Id.* at 16-43.
195. *Id.* at 42.
196. SHIPHERD, *supra* note 27, at 42.
197. *Id.*
198. *See id.*
199. *Id.*

rather affirmed his testimony.[200] The record does not disclose whether this departure was related to his race.

Wall served almost as an expert witness on questions of complexion, explaining that he "[k]new the colors by which people of color were classified. There were black, blacker, blackest. Then copper color, which is about the color of hemlock tanned sole leather. Then there are dark, lighter, and light mulatto."[201] He knew John Price well, and described him as "a decidedly black negro."[202]

With that, the defense rested.

C. The Final Arguments

1. The Prosecution Opens

George Bliss argued first for the government, making his case as simply as possible.[203] John Price was "the slave of Bacon in Kentucky, at the time he escaped in 1856."[204] The defense efforts to confuse this issue were unavailing, because the evidence showed that Price's mother was a slave and "maternity establishes the status as a slave or free man."[205]

With regard to identity, the description in Bacon's power of attorney was sufficiently accurate, and the testimony of Kentuckians, regarding color, was more reliable than that of Oberliners.[206] In any event, Price freely admitted that he "was Bacon's slave, and must go back to Kentucky,"[207] which should resolve any remaining questions. Finally, the "Oberlin people who came to the rescue of John, knew he was a fugitive, their language showed it; they assembled on receipt of information that a *fugitive* had been taken by *slave* catchers."[208]

Indeed, argued Bliss, "When these Oberlin men went down to Wellington, they proclaimed that they did so under the Higher Law, for they knew they were outraging the law of the land."[209]

> [A]s to the actual defendant, there was no doubt concerning his participation:Bushnell is proved to be in the crowd, and there is no contradiction of the fact that Bushnell was in the buggy, being the same buggy in which the negro was placed. It was not Bushnell's horse and buggy, and he therefore must have been selected for the

200. *Id.*
201. SHIPHERD, *supra* note 27, at 42.
202. *Id.*
203. *Id.* at 43.
204. *Id.*
205. *Id.*
206. SHIPHERD, *supra* note 27, at 43-44.
207. *Id* at 44.
208. *Id.*
209. *Id.*

> purpose of carrying the negro off. Bushnell was in waiting . . . when John was put in the buggy, cracked the whip and away he went.[210]

The prosecutor concluded by reminding the jury of their duty to "execute this statute" and to reject the proposition that "any people should impugn the laws of the land, knowing no law but their own consciences."[211]

2. The Defense Argues

While the prosecution's argument had taken only two-and-a-half hours (a relatively short summation in that era), the defense would argue for several days.[212] Albert Riddle, spoke first, beginning an oration that would take longer than a day.[213] He did not hesitate to come to the point:

> And now, as to the matter referred to, the so-called dogma of the Higher Law . . . I am perfectly frank to declare, *that I am a votary of that Higher Law*! . . .
>
> *Right*, and its everlasting opposite, *Wrong*, existed anterior to the feeble enactments of men, and will survive their final repeal—and must ever remain Right and Wrong, because they are such, unchanged and unqualified by your acts of Congress, and statutes of your Legislatures . . . .
>
> . . . .
>
> You may erase, expunge, exile and outlaw this thing, Right, from your Statutes, and denounce it as wrong, and still it is Right.[214]

From the very outset, Riddle based the defense on morality, condemning slavery and denouncing the Fugitive Slave Act.[215] He did not seem concerned that the argument was discontinuous with the previous defense strategy; he conceded that John Price was an escaped slave, thus trivializing the question of the description in the power of attorney. It was a bold argument, obviously intended more for the press—and the nation—than it was for the court and jury. Recognizing that Bushnell faced nearly certain conviction, Riddle tauntingly asserted that "[w]hen the convict stands up for sentence, he occupies a moral level above the tribunal that pronounces judgment, and the judge who dooms is abashed in the presence of the criminal he condemns."[216]

Notwithstanding his invocation of the higher law, however, Riddle went on to raise the same technical arguments that had surfaced throughout the

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210. *Id.* at 45.
211. SHIPHERD, *supra* note 27, at 45.
212. *Id.* at 45, 63.
213. *Id.* at 45.
214. *Id.* at 45-46.
215. *Id.* at 48.
216. SHIPHERD, *supra* note 27, at 47.

trial. The indictment was insufficient because its language did not follow the precise wording of the statute; "good title" to John Price was not stated in the indictment; it was possible that Price belonged to Bacon's mother or any of his five siblings; Jennings's Kentucky power of attorney conflicted with Lowe's Ohio warrant;[217] and the warrant lacked an official seal.[218]

At one point—perhaps for the first time in an American courtroom—Riddle attempted to reconcile his technical defense with the loftier ideals of civil disobedience. He argued that the Fugitive Slave Act had to be narrowly interpreted, "warring as it does upon every element of the common law and all primitive notions of right."[219] Because the Act "attempts to clear the whole moral decalogue and scatter its divided fragments," the defense was justified in demanding the strictest proof of every element.[220] Thus, Riddle invited the jury to indulge "a liberal construction of all the conduct of the prisoner, so that his acts may fall outside of [the Fugitive Slave Act's] penalty."[221]

This was potentially a powerful theme—connecting the evils of slavery to the jury's duty and providing them with a way to acquit the defendant without repudiating the law itself. Perhaps it might have worked with a more sympathetic jury. In any event, Riddle himself did not seem to hold out much hope. He devoted only a few minutes to this point in a jury address that began one afternoon and did not conclude until the end of the next day. For the better part of three sessions of court, Riddle hammered away at the technicalities, punctuated with condemnations of slavery and the Fugitive Slave Act.[222] It was only at the very end of his speech that he again connected the two arguments, denouncing the "unutterably loathsome, unconstitutional, and wicked Act of 1850," and then proclaiming that "the Government has failed to meet the wicked exactions of its wicked statute."[223]

Today it may seem that a full day of closing argument would be sufficient—indeed, far more than sufficient—in a relatively simple case, but in the mid-nineteenth century public oratory was one of the only forms of mass communication. Audiences were accustomed to listening to lectures at great length, for enlightenment, education, and even entertainment. Consequently, it was only natural that senior counsel Rufus Spalding would also argue on behalf of the defendant, continuing for yet another full day.

Spalding inveighed against slavery and the Fugitive Slave Act, but he was not above rhetorical tricks and flourishes.[224] Referring to Shakespeare Boynton, for example, Spalding emphasized the cruel betrayal of Price,

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217. *Id.* at 47-49.
218. *Id.* at 60-61.
219. *Id.* at 47.
220. *Id.*
221. SHIPHERD, *supra* note 27, at 47.
222. *Id.* at 45-63.
223. *Id.* at 62.
224. *Id.* at 63-82.

though that had little or nothing to do with the charge against Bushnell. Nonetheless, Spalding condemned,

> The most minute, disgusting details of this blood-betraying bargain. How readily he consented to play the Judas, and how well satisfied he was with the reward of his treason,—the twenty—it should have been *thirty*—pieces of silver . . . .
>
> . . . .
>
> . . . It is too sickening to go through again with the details of this loathsome transaction.[225]

Even more dramatically, Spalding delivered a dire warning—seemingly to the jurors but, in truth, intended for the spectators and the press—that even free white citizens might someday be apprehended under the Fugitive Slave Act:

> Is it not important that we ask whether the time will not soon be upon us when *our* own children shall have the manacles now brought from Kentucky for African slaves, encircling their fair limbs? But we are told that there is no danger of mistaking Saxon children for African slaves.[226]

Then, pointing to a child in the gallery, he continued,

> Gentlemen of the Jury, is there one of you who would not be proud to reckon that "flaxen haired" little boy yonder among your children? His skin is whiter than the District Attorney's, and his hair not half so curly! And yet, less than six months ago that child was set free in the Probate Court in this city, having been brought a *slave* from North Carolina![227]

In keeping with the overall defense strategy, Spalding also attacked the technicalities, arguing that Bacon was not Price's exclusive owner, but only held a one-sixth share of the slave's title.[228] He emphasized that the power of attorney was not signed, and that the warrant was defective in form, and had been issued in the wrong district.[229] He did not, however, make any great effort to repeat Riddle's attempt to link the technical arguments to the "wicked exactions" of the Fugitive Slave Act.[230]

More significantly, Spalding defended Oberlin's commitment to abolition, "freely admit[ting] that Oberlin is an asylum for the oppressed of all

225. *Id.* at 78.
226. SHIPHERD, *supra* note 27, at 68.
227. *Id.*
228. *Id.* at 75.
229. *Id.* at 76-81.
230. *See id.* at 62.

God's creation, without distinction of color," and countercharging that the "village of Oberlin was invaded by slave catchers."[231] In essence, he took up William Lloyd Garrison's challenge to the very legitimacy of the government, demanding a choice between the "defenders of Freedom" and the forces of slavery:

> God forbid that we should not speedily decide which shall have the supremacy here. For Slavery and Freedom cannot exist together; one must die that the other may live. And I say, with the patriots of '76, "Better that we do without the Union, than without our liberties."[232]

The call to disunion and civil disobedience was no defense to the charge against Bushnell, and in closing Spalding made his defiance explicit:

> I have said that slavery is like a canker, eating out the vitals of our liberties, and that the Supreme Court of the United States has become the impregnable fortress and bulwark of slavery: I now say that unless the knife or the cautery be applied to the speedy and entire removal of the diseased part, we shall soon lose the name of freedom, as we have already lost the substance, and be unable longer to avoid confessing that TYRANTS ARE OUR MASTERS.[233]

The Fugitive Slave Act was, he concluded, "this odious act" to which even the United States Supreme Court "*can bind no one.*"[234]

We see in these two closing arguments the early development of the legal strategy—as opposed to the political strategy—of civil disobedience. With little tradition of comparable advocacy to build upon, the defense lawyers moved back and forth between dissonant, if not entirely inconsistent, positions. They posited at one moment that there had been no violation of the Fugitive Slave Act, and at another that the defendant was morally compelled to resist the Act and defy the courts. Only at the beginning of Riddle's argument was there an attempt to relate the two positions, but the relationship was hardly pursued.

This is no criticism of Riddle and Spalding. They were working from scratch, developing a new line of defense under difficult circumstances before a hostile court. It is to their great credit that they even began the development of the defense and, surely, no fault that they did not perfect it. In any event, they would soon have another opportunity in the trial of Charles Langston.

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231. SHIPHERD, *supra* note 27, at 77.
232. *Id.*
233. *Id.* at 81.
234. *Id.*

3. The Prosecution's Rebuttal

District Attorney Belden, realizing that the defense was speaking to an audience far beyond the courtroom, began by observing that he did not know whether to address the jury or the audience. "Are we in a dream?" he asked rhetorically.[235] "[A]re we in a court of justice? or are we in a political hustings?"[236]

Following some words of ridicule for the "Saints of Oberlin," including "*sub-saint* Bushnell,"[237] he determined to be brief and direct. "[T]ake no account of the quibbles and technicalities,"[238] he told the jury, because the case had been fully proved. John Price was an escaped slave, who was known to be an escaped slave. He was adequately described in the power of attorney and warrant, both of which were valid under the law. Thus, it was "perfectly lawful and right for the gentleman from Kentucky" to take him into custody.[239] And it was perfectly unlawful for Bushnell and his colleagues from Oberlin to interfere.

D. The Verdict

Following instructions from the court, predictably favorable to the prosecution, the jury retired to deliberate. They returned in less than three hours, announcing that they had reached a verdict, which they pronounced in a single word: Guilty.[240] The defense team hardly had an opportunity to recover from the defeat. Without even pausing to sentence Bushnell, the court immediately called to trial the case against Charles Langston.

VI. THE TRIAL OF CHARLES LANGSTON

Following the conviction of Bushnell, abolitionist opinion rallied behind the rescuers. The *Ohio State Journal*, for example, opined that the trial represented far more than the prosecution of Bushnell, Langston, and their colleagues:

> It is not so much a violation of the fugitive slave law which is to be punished by the United States as the anti-slavery sentiment . . . . That is the thing. It is Oberlin, which must be put down. It is freedom of thought which must be crushed out.[241]

235. *Id.* at 82.
236. SHIPHERD, *supra* note 27, at 82.
237. *Id.*
238. *Id.* at 83.
239. *Id.*
240. *Id.* at 88.
241. BRANDT, *supra* note 1, at 166.

William Lloyd Garrison saw the trial as an opportunity for "moral regeneration," vowing that the prosecution "will give a fresh impetus to our noble cause."[242] Abolitionist Congressman Joshua Giddings recognized that the defense of the rescuers could serve as a call to greater resistance to slavery and slave hunting, declaring that "Cleveland . . . is now the Boston of 1775," the cradle of revolution.[243]

Well aware that the trial was attracting national attention, both the prosecution and defense determined to do their best. Once again, District Attorney Belden presented a tight, professional case, fortified this time by the production of a surprise witness. And once again, the defense took a scattershot approach, raising every possible argument without much evident concern for interconnection.

A. The Prosecution's Case

Charles Langston's trial commenced on Monday, April 18, 1859.[244] It was an appropriate date—the anniversary of Paul Revere's ride—in view of Giddings's comparison of Cleveland to Lexington and Concord. The symbolism, however, appears to have been missed, or at least not remarked upon, by the court.

The venire presented by the federal marshal was again heavily weighted in favor of the prosecution, having been vetted to ensure that they "had no objection to the enforcement of the Fugitive Slave Law."[245] One prospective juror admitted to having already formed the opinion that "the boy was a slave," but Judge Willson denied a motion to remove him for cause.[246] The eventual jury consisted of "nine Administration men, two Fillmore Whigs, and one Republican, who had no objections to the Fugitive Slave Law."[247]

The indictment against Langston was broader than the one against Bushnell because Langston was charged with interfering with the execution of a federal warrant.[248] Nonetheless, much of the prosecution's case simply repeated the evidence against Bushnell. The first witness was John Bacon, who testified to his ownership of the escaped slave.[249] The next witness was the clerk of Mason County, Kentucky, who testified to the validity of Jennings's power of attorney and supported Bacon's claim of undivided ownership.[250]

Anderson Jennings was the first witness to identify Langston as a direct participant in the rescue, stating that the defendant came in with the crowd

242. *Id.* at 169.
243. *Id.*
244. *Id.* at 167.
245. SHIPHERD, *supra* note 27, at 96.
246. *Id.*
247. *Id.* at 97.
248. *Id.* at 98.
249. *Id.* at 99.
250. SHIPHERD, *supra* note 27, at 99.

that freed John Price.[251] Jennings also testified several times to Price's alleged desire, or at least willingness to return to Kentucky.[252] This claim, repeated insistently by the prosecution, clearly demonstrated the political nature of the prosecution. The fiction of the happy slave was essential to the maintenance of the slave power, which rested on the twin myths of white beneficence and black contentedness. The prosecution, even in the case of a runaway, could not bring itself to concede that a former slave showed the least reluctance to return to bondage. The defense continued to object to the admission of statements from "property."[253] This time the court made a compromise ruling; Price's "*acts* but not the words were evidence."[254]

Jennings's most damaging testimony, however, involved an exchange with Langston that occurred thirty minutes before the rescue. Jennings stated that Langston came into the hotel room to participate in a round of negotiation, during which Lowe identified himself as a deputy United States marshal and displayed the federal warrant.[255] Langston was asked to help persuade the crowd to disperse, but "[h]e refused to do it, and said we might just as well give him up, as *they* were determined to have him."[256] Then, apparently realizing that he had attributed a less incriminating pronoun to the defendant, Jennings quickly corrected himself: "He said, *we* are determined to have him."[257] The point of this, of course, was to establish that Langston was an instigator, responsible for subsequent events. The prosecution contended that Langston did not merely describe the crowd's intentions ("they" were determined) but rather delivered a first person threat ("we" are determined).

Richard Mitchell was the fourth Kentuckian to testify.[258] He stated that he knew John Price—"a full-blooded Negro"—and recognized him as the captured runaway in Ohio.[259] Once more there was an objection to the admission of Price's statements. This time the court specifically ruled, without apparent irony, "for the purposes of testimony, all persons whether black or white must be regarded as persons."[260] Mitchell then described the events of the rescue but was compelled to admit on cross-examination that he could not identify Langston as a participant.[261] The next witness, Chauncy Wack, had less trouble placing Langston in the center of events. The Oberlin inn-

251. *Id.* at 100.
252. *See id.* at 99-102.
253. *Id.* at 99.
254. *Id.*
255. SHIPHERD, *supra* note 27, at 102.
256. *Id.* at 100.
257. *Id.* at 100-01. Jennings later supplied a third version of Langston's statement: "[He] said we might as well give him up, as they were bound to have him." *Id.* at 102.
258. *Id.* at 102.
259. SHIPHERD, *supra* note 27, at 102.
260. *Id.* at 103.
261. *Id.*

keeper put the defendant on the hotel balcony less than five minutes before the "rush" of the crowd escorted Price down the stairs.[262]

More ominously, a series of witnesses testified to Langston's threatening statements that seemed to set him up as a leader of the rescue. Norris Wood testified that Langston said, "*we* will have him any way," displaying a gun as he spoke.[263] Charles Wadsworth testified that he discussed with Langston the validity of Price's capture, noting that Langston had been shown the legal documents supporting the Kentuckians' claim: "I asked him if the papers which the slaveholders had were all right. He said it made no difference whether they were right or not, they were bound to have John any way."[264] N.H. Reynolds saw Langston in the hotel hallway, and heard him say "something about the train coming from Cleveland, that they had got to have him before the train came in, or they would not succeed in getting him."[265]

Deputy Marshal Jacob Lowe, who had known and respected Langston for some time, testified to his negotiation with the defendant, about an hour-and-a-half before the crowd took action.[266] At first, Lowe's testimony seemed to exonerate Langston, characterizing him as a peacemaker:

> I told him that the negro was a fugitive—the one named—that Jennings had a power of attorney, and I had a warrant, and that I had arrested him . . . . I told him that I would like to have him go down and explain to the crowd how things were. He expressed himself satisfied that the negro was legally held, and said he would go down and tell the people so.[267]

Langston departed, returning in twenty minutes to inform Lowe "they were determined . . . on having the boy."[268] The two men, sitting together on the bed, discussed Lowe's proposal to set up a committee to accompany them to Columbus, "and see that John had a fair trial, and that if he was not held legally, he of course would be delivered up."[269] Langston said that he wanted to avoid trouble and was therefore "very anxious to have [the proposal] carried out. But the people below would not agree to, or to hear of it."[270]

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262. *Id.* at 104.

263. *Id.* at 105. Wood also testified that John Copeland drew a gun and pointed it at Jennings when the Kentuckian briefly escorted Price to the hotel balcony. Though indicted for the rescue, Copeland was never apprehended in Ohio. Within a year, however, he was carrying a gun with John Brown in Virginia. Copeland was one of the few to survive the raid on Harpers Ferry; he was captured, tried and hanged in the weeks that followed.

264. SHIPHERD, *supra* note 27, at 107.

265. *Id.* at 116.

266. *Id.* at 116-19.

267. *Id.* at 116-17.

268. *Id.* at 117.

269. SHIPHERD, *supra* note 27, at 117.

270. *Id.*

At this point, it still seemed that Langston's role might have been non-culpable, attempting to broker a peaceful compromise. But then Lowe threw a bombshell, volunteering the prosecution line even though it was inconsistent with everything else he attributed to Langston. "He got up, and just as he was about to go down stairs he said, 'we will have him any how.'"[271]

The testimony against Langston was evidently well orchestrated. The identical statement, or nearly so, was ascribed to him at various times in different locations. It was as though he had walked around the entire afternoon telling all listeners "we will have him any how," with only the slightest variation. One witness even had Langston repeating those same words at a post-rescue rally in Oberlin. According to Philip Kelly, Langston bragged of warning Lowe "that it was no use for them to try to keep John, for they would have him any way."[272] One might think that a well-educated man such as Langston might have varied his verb choice—claiming at least once that they would free, rescue, liberate, take, or perhaps release him. But no, he seems to have stuck to the oddly passive, "we will have him" on every occasion.

However much the suspicious uniformity of the prosecution testimony might have diminished its credibility, one prosecution witness nonetheless delivered a surprising and devastating blow to the defense. William Sciples, himself one of the indicted rescuers, turned state's evidence and testified against Charles Langston.[273] Sciples claimed to have seen Langston in the hotel hallway, outside the room where Price was held captive. Making plans with a group of "*mixed* men; three or four were colored," Langston assured his colleagues that "we will have him at anyway . . . before he shall go south."[274]

Among the last witnesses for the prosecution was Sterne Chitteneden, the Fugitive Slave Act commissioner who had issued the warrant for Price. He authenticated the warrant and verified his authority to do so, adding that he had never issued a warrant before.[275] Shortly after Chittenden's testimony, the prosecution rested.

B. The Defense Case

The defense began with a series of witnesses who testified to supposed defects in the Jennings and Lowe papers. Joseph Dickson, a Wellington lawyer, said that he examined Lowe's warrant and observed that it had no seal and that Jennings had never mentioned holding a power of attorney.[276] Isaac Bennett and Barnabas Meacham, respectively Wellington's justice of

271. *Id.*

272. *Id.* at 106.

273. BRANDT, *supra* note 1, at 170. Sciples was given lenient treatment as a consequence of his cooperation. *Id.* at 195.

274. SHIPHERD, *supra* note 27, at 115.

275. *Id.* at 120.

276. *Id.* at 121.

the peace and constable, likewise testified that there was no seal on the warrant and that the power of attorney was not displayed to the crowd.[277]

The evident point of this was to show that John Price was being held illegally, thereby justifying the rescue or at least vitiating the charge of interfering with the execution of a federal warrant. But the technical argument was both complex and abstruse—requiring first the assumption that the power of attorney was not displayed, then the inference that Price was being held solely by virtue of the warrant, and finally the conclusion that the absence of a seal rendered the warrant invalid, thus making Price an unlawful prisoner—and, in any event, it failed to explain why these questions should not have been presented to the federal commissioner in Columbus, as proposed by Lowe.[278]

A more promising line of defense was raised by witnesses who testified to Charles Langston's efforts to resolve the situation peacefully, either through negotiation with the slave-catchers or by invoking Ohio law against the Kentuckians. Langston had been instrumental in securing a state warrant for kidnapping on the dubious theory that Ohio law trumped the Fugitive Slave Act. Although the service of the state warrant might have been sufficient to set Price free without a struggle, the Wellington constable ultimately declined to enforce it, for fear that he would be sued. Nonetheless, Langston's attempts to use legal means—described by several witnesses, including Constable Meacham, James Patton, and William Howk[279]—severely undercut the prosecution claim that he was the instigator of the forcible rescue. Other witnesses testified that Langston did not participate in the actual rescue, thereby contradicting the prosecution case.

The defense did not present any testimony regarding Langston's alleged statement(s) that "we will have him any way." It would have been virtually impossible to prove the negative—that he never said any such thing—and only the slave-catchers themselves were present when the purported threats were made.[280]

Langston himself, of course, could have denied making the damning statements, but under the law at the time he was disqualified as a witness and could not testify in his own behalf. The so-called "interested party rule," which provided that no criminal defendant could testify at his own trial, was then in effect in every common law jurisdiction.[281] Maine was the first state to abolish the rule, in 1864, and Ohio did not follow suit until 1867.[282] Thus, Langston was not allowed to take the stand—not because he was a black man, but because he was the defendant—and the jury was not

277. *Id.* at 120-23. Several other defense witnesses gave comparable testimony.

278. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (ruling seventeen years earlier that federal procedures trumped state laws regarding the rendition of fugitive slaves).

279. SHIPHERD, *supra* note 27, at 122-25.

280. The defense did call several witnesses in surrebuttal who testified to Sciples's poor reputation for veracity, presumably to undermine his testimony regarding Langston's threats. *Id.* at 127.

281. *See* Ferguson v. Georgia, 365 U.S. 570 (1961).

282. *Ferguson*, 365 U.S. at 577.

allowed to hear what might have been the most probative evidence regarding his alleged threats to Jennings, Lowe, and company.[283] Langston would eventually address the court, speaking eloquently in opposition to slavery, but not until after the jury's verdict had been returned.

In any event, the defense position was again muddled, at turns raising highly technical claims, denying the defendant's active involvement, while justifying the forcible response to the "kidnapping." Though not flatly contradictory, the use of multiple defenses did seem to detract from the force of the pure claim of civil disobedience, which did not emerge clearly from the defense testimony.

C. The Final Arguments

1. The Prosecution Opens

This time, District Attorney Belden argued first, presenting a terse summary of the prosecution case.[284] It was plain that John Price was a slave of Bacon's who had escaped to Ohio. It was surely within the power of the master to retake his slave, either personally or through an agent. Jennings had therefore acted legally in seizing Price in Oberlin, pursuant to a valid power of attorney, notwithstanding the "impotent and miserable" attempts to discredit that claim.[285]

Belden next turned to the "agency Langston had in the rescue," describing the defendant as "very cunning and very hypocritical, very shrewd, but very deceiving."[286] Langston knew about the power of attorney and understood its validity, as well as the warrant. The proof showed that the crowd acted with "common intent," and Langston's own acts were intended not to keep the peace, or even punish kidnappers, "but to rescue the negro."[287]

Moreover, Belden argued, Langston would be guilty even if he had only attempted to have a state court warrant served against Lowe.[288] Because federal law is supreme, interference with the deputy marshal "under legal process" would have been "as unlawful as the interposition of violence."[289] Indeed, a fugitive slave warrant would have to be honored even if it was issued in the wrong district or otherwise defective.[290]

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283. Strange as it seems today, it was thought at the time that sworn testimony by a defendant would contravene the privilege against self-incrimination. Leonard Levy, *Origins of the Fifth Amendment and Its Critics*, 19 CARDOZO L. REV. 821 (1997); John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine*, 77 TEX. L. REV. 825 (1999).

284. SHIPHERD, *supra* note 27, at 125-26.

285. *Id.* at 128.

286. *Id.*

287. *Id.*

288. *Id.* at 128-29.

289. SHIPHERD, *supra* note 27, at 128.

290. *Id.* at 128-29.

2. The Defense Argues

Arguing first for the defense, young Seneca Griswold began by reminding the jurors that they had been selected purposely "from the ranks of one political party."[291] Nonetheless, he expressed confidence that they would "lay aside all political bias or prejudice."[292]

This brought Griswold directly to the point. "The right of the jury trial," he explained, "is one of the earliest institutions of the Anglo-Saxon race."[293] For centuries, the right "to be tried by a jury of his peers was the right of the humblest man."[294] For Charles Langston, however, this right existed only in theory, because he could "have no jury of his race or color, or of those who are his peers."[295] Because of this, Griswold urged the jury to take special care in judging Langston's case, in essence to compensate for the wrongs of slavery and race prejudice:

> In view, therefore, of this misfortune of his birth,—of his color and condition,—that he is one of this outcast race,—that he has no other right but that of being punished, I ask you the more carefully to consider his case, and give him a fair and impartial hearing. I ask you to forget his race and color, and try his case as though he were one of your equals; as though he were, as he is, a man, and had rights; to try him in accordance with your oaths, and the well-established maxims of the law,—that he must be held innocent until his guilt is proven, and that guilt established beyond a reasonable doubt.[296]

This argument varied slightly, but importantly, from the one raised by Albert Riddle on behalf of Simeon Bushnell. Riddle argued that the Fugitive Slave Act should be strictly interpreted, in view of its "wicked exactions."[297] Spalding's argument was broader still, that the jury should take extraordinary care to overcome "the race card" in determining Langston's fate.[298]

As we might have come to expect, however, Spalding's eloquent plea for racial justice quickly gave way to an argument of overwhelmingly complex technicality. The power of attorney was invalid, he said, because only the deputy county clerk acknowledged it, though issued in the name of the principal.[299] It might have been legal had the deputy used his own name, or

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291. *Id.* at 129.
292. *Id.*
293. *Id.*
294. SHIPHERD, *supra* note 27, at 129.
295. *Id.*
296. *Id.*
297. *Id.* at 62.
298. *See id.* at 129, 140.
299. SHIPHERD, *supra* note 27, at 130-31.

if the clerk had executed a "re-acknowledgment," but it was a nullity as presented.[300]

This discussion alone appears to have lasted nearly as long as the entire prosecution argument, but Spalding was only beginning. His next point was equally intricate, as he attempted to parse the nature of Price's custody at the time of the rescue. The indictment charged that Price was rescued from Jennings, but the evidence demonstrated that he was rescued from Lowe.[301] Because the "agent" and the "marshal" had differential authority under the Fugitive Slave Act, this discrepancy was fatal: "How then can you find this defendant guilty? How can you avoid acquitting him, if you must find the custody in the agent Jennings?"[302] This argument could only succeed if the jury—already strongly disposed to enforce the Fugitive Slave Act—was willing to set aside the common sense conclusion that Jennings and Lowe jointly held Price, because they were all together in the same room.

Spalding turned next to the facts. There was no proof, he said that Langston was "identified with the crowd,"[303] and therefore the presumption of innocence demanded that he not be accountable for the crowd's actions. It was not unlawful to "mingle" in a crowd, many of whose members did not even sympathize with the rescue![304] The evidence showed that Langston was not "inciting others to perform acts of violence," but instead "was counseling peace and a resort to legal measures."[305]

Recognizing the importance of the pronoun in Langston's alleged statements—the we/they distinction—Spalding argued that Jennings's testimony was not persuasive.[306] In any event, the rough Kentuckian's southern grammar (which had repeatedly drawn laughter from the gallery) made it impossible to fasten "any tolerable degree of accuracy in his statements."[307]

Spalding gave the jury four reasons to conclude that the prosecution case had failed, but he did not much defend the rescue itself.[308] That task would fall to Franklin Backus, who had joined the defense team only at the beginning of Bushnell's trial. Backus began with a ringing defense of civil disobedience:

> The offence here charged, then, is a political offence. The defendant is charged not with the breach of a moral, but with a legal rule. . . .

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300. *Id.* at 130.
301. *Id.* at 130-32.
302. *Id.* at 130.
303. *Id.* at 132.
304. SHIPHERD, *supra* note 27, at 134.
305. *Id.*
306. *Id.* at 132, 134.
307. *Id.* A comparable argument could not be made concerning Lowe's grammar or accent, because the deputy federal marshal hailed from Columbus, Ohio. Instead, Spalding argued that the witness was simply mistaken. "It all turns on a single word . . . . If, however, Mr. Lowe is mistaken as to a single word it changes the whole face of the matter." *Id.* at 138.
308. At one point he argued that the reaction in Oberlin was virtuous because the crowd believed Price to have been kidnapped, but he quickly pointed out that Charles Langston did not live in Oberlin, as though to differentiate the defendant from the Oberliners. SHIPHERD, *supra* note 27, at 133.

> He does not stand before you accused of the commission of any thing which is within itself a crime, but with an act which is only a crime because the law declares it is. There is not one of you, Gentlemen of the Jury, who would look upon him after conviction as you would look upon a *thief*, or one convicted of a *moral wrong*.[309]

Thus, Langston was at most a transgressor, but he could not be called a criminal, "for he is inspired by the noblest of motives, such as all good men approve."[310] This was a call for jury nullification, which Backus amplified with an emotional appeal. The defendant, he told the jury, "could count a long line of ancestry on one side *not* of African blood, but wealthy and respectable Anglo-Saxon sires."[311] In fact, Langston's father was a Revolutionary War veteran who married a former slave in Virginia, and then moved his children to the free state of Ohio.[312]

Thus, Backus admonished the jury that its "reluctance must be tenfold greater by your verdict to shut out this man—emphatically a MAN—from the few privileges yet allowed him in this 'land of the free.'"[313] This was a non sequitur, because the very premise of the Abolitionist Movement was that white ancestry should confer no greater rights, but it was obviously designed to appeal to the sympathies, or perhaps biases, of the jurors.

Then defense counsel presented a remarkable argument that appeared to play on both (strongly) philo-Semitic and (somewhat) anti-Catholic themes, no doubt reflecting the prophetic Protestantism then influential in northern Ohio. Backus invoked the case of Edgardo Mortara, a Jewish child from Bologna who had been seized from his family by the Papal police based on the claim that the boy had been secretly baptized by a domestic servant.[314] The kidnapping, which occurred in June of 1858, caused international outrage, as liberal governments protested the Papal State's cruelty toward Jewish families.[315] The Buchanan administration presented a formal protest to the Vatican, but the Pope was unyielding.[316] The seizure was completely legal under Canon Law, and Jewish parents could not raise a baptized child.[317] There was tremendous sympathy in the United States in favor of the Mortaras, and Backus attempted to turn it to his own client's advantage. Though the kidnapping shocked all Americans, he said, Jews would naturally "feel themselves more outraged by this occurrence."[318] He stated,

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309. *Id.* at 141.
310. *Id.*
311. *Id.* at 143.
312. CHEEK & CHEEK, *supra* note 34, at 7-22. The facts of Langston's background were not in evidence, but were presumably so well known that there was no objection from the prosecution.
313. SHIPHERD, *supra* note 27, at 143.
314. *Id.* at 144.
315. DAVID KERTZER, THE KIDNAPPING OF EDGARDO MORTARA 3, 118-28 (1997).
316. *Id.* at 127-28.
317. *Id.* at 128.
318. SHIPHERD, *supra* note 27, at 144.

> You and I condemn the act in the abstract as heartily as can any one belonging to the outraged race, yet at the same time we well know that it does not *take hold of us* as it does—and naturally does—of them . . . . Why? Because of this bond of kindred.[319]

If American Jews were specially affected by the kidnapping of Edgardo Mortara in Italy, it should certainly follow that Charles Langston would react with special outrage to the seizure in Oberlin of John Price. Backus argued:

> Well then, when one thus allied to this *defendant*, a man belonging to the same race with himself, has made *his* escape from this eternity of bondage to which he was doomed by the local law of Kentucky—has succeeded in escaping from his oppressors, and has come here into the State of Ohio, is pursued, decoyed, and seized, and is about to be hurried back to a deeper and more hopeless bondage than that from which he fled;—do you not know, do you not understand that the feelings of this defendant would naturally be affected to a degree to which you would not expect those of one of the dominant race here to be stirred? . . . And you will regard the conduct of a man thus situated, moved by such sympathies, with a greater degree of tolerance,—you will find far more excuses for his conduct, growing out of this sympathy of blood . . . than for one of another race. And there can be nothing wrong in your so doing.[320]

In other words, this was yet another reason to nullify the fugitive slave law, at least as it applied to this defendant. Of course Charles Langston rescued John Price, he could not be expected to react otherwise. Who would not take similar action in similar circumstances? The jury should understand and excuse his instinctive rescue of the runaway slave.

It was a powerful argument, though it contradicted nearly every other key aspect of the defense case—that the slave status of John Price was unproven and that Langston had neither encouraged the crowd nor himself participated in the rescue. But if that was irony, it was lost in the stream of technicalities to which the major portion of Backus's six-hour speech was devoted.[321]

Backus concluded with a final plea that the jury deal out to the defendant, "in this *one* instance, equal justice, as you would to a man whose complexion was of another hue."[322]

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319. *Id.*

320. *Id.*

321. Backus even introduced a new complication—that Marshal Lowe's custody of John Price was terminated at the moment when Jennings arrived at the hotel—intended to defeat the charge of interfering with a federal warrant. *Id.* at 153.

322. *Id.* at 165.

3. The Prosecution's Rebuttal

George Bliss delivered the prosecution's stinging rebuttal, shorter by orders of magnitude than the extended arguments of the defense.[323] Taking advantage of Backus's "blood sympathy" argument, Bliss referred the jury to the testimony that John Price was willing and ready to return to his master.[324] While this was surely a fiction, the powerful myth allowed the prosecutor to argue that no sympathy for John Price had motivated "Langston and his associates to rescue him from the hands of the party which was taking him back to the South."[325] Rather, the defendant's "purpose, fixed and determined, was to violate and set at defiance one of the laws of the land."[326]

The prosecution, in some ways, raised the issue of civil disobedience more clearly than the defense, urging the jury to reject the idea that citizens may choose to challenge the law. The Oberlin crowd, he proclaimed, "did not care for the law," but instead "made their own laws."[327] But while "[t]he right of a portion of our inhabitants to hold property in slaves may be an unpleasant one to contemplate," the rights of the "residents of Kentucky [cannot] be broken down by such men as Charles Langston."[328] Then he repeated the fateful attribution, Langston's alleged threat, notwithstanding the law, "we will have him any way."[329]

D. The Verdict

Again the court delivered a jury charge highly favorable to the prosecution, instructing the jurors "to divest . . . any and all prejudices" against the Fugitive Slave Act.[330] This was hardly necessary in the case of a jury that had been hand selected for their support of that law, but the court was evidently taking no chances. Even worse, the judge charged the jury that Langston's presence in the crowd, even if wholly nonviolent, was evidence of a "common design" that made him "a party to every act which had before been done by the others . . . and, also, a party to every act which may afterwards be done by any of the others, in furtherance of such common design."[331]

This time it took the jury only about half an hour to find the defendant guilty on all counts.[332]

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323. SHIPHERD, *supra* note 27, at 165.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. SHIPHERD, *supra* note 27, at 165.
329. *Id.* at 166.
330. *Id.*
331. *Id.* at 169.
332. BRANDT, *supra* note 1, at 182.

VII. THE SENTENCING OF LANGSTON AND BUSHNELL

Simeon Bushnell was the first of the convicted defendants to face sentencing. Judge Willson asked Bushnell if he had anything to say, or whether there was any reason that sentence should not be pronounced, but the defendant declined to speak.[333] The court then prodded the defendant, asking pointedly whether he had "*any regrets* to express for the offence of which he stood convicted."[334] "No," replied Bushnell, he had no regrets.[335]

It quickly became obvious that Judge Willson had intended to trap Bushnell into precisely that reply, as the court proceeded to read aloud from a prepared manuscript, castigating the defendant for "deem[ing] it a praiseworthy virtue to violate the law, and then seek its penalties with exultation and defiance."[336] The court continued excoriating both Bushnell and the higher law:

> A man of your intelligence . . . must know that when a man acts upon any system of morals or theology which teaches him to disregard and violate the laws of the Government that protects him in life and property, his conduct is as criminal as his example is dangerous.
>
> The good order and well-being of society demand an exemplary penalty in your case. You have broken the law,—you express no regret for the act done, but are exultant in the wrong.[337]

The sentence was exceptionally harsh—sixty days imprisonment and a fine of $600 plus costs, an impoverishing amount for a bookstore clerk.[338] Bushnell, perhaps expecting some lenience in view of the moral basis for his offense, was stunned into silence.[339] A pure heart and clear conscience was no ground for mitigation in Judge Willson's court.

Charles Langston was sentenced the next morning.[340] Unlike Bushnell, he did not decline the judge's invitation to speak in his own behalf, though recognizing that he could not expect "any thing which I may say will in any way change your predetermined line of action."[341] He then began a speech that his brother, John Mercer Langston, would later describe as "perhaps the most remarkable speech that has been delivered before a court by a prisoner since Paul pleaded his own cause before Agrippa."[342]

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333. SHIPHERD, *supra* note 27, at 170.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. SHIPHERD, *supra* note 27, at 170.
339. BRANDT, *supra* note 1, at 184.
340. SHIPHERD, *supra* note 27, at 175.
341. *Id.*
342. *Id.* at 186.

"I cannot . . . expect, judging from the past history of the country, any mercy from the laws, from the Constitution, or from the courts of the country," the defendant began.[343] He then recounted the many reports of slave hunters in Lorain County, "lying hidden and skulking about, waiting some opportunity to get their bloody hands on some helpless creature to drag him back—or for the first time—into helpless and life-long bondage."[344] This fear affected all of the black citizens in an around Oberlin, some of whom had earned their freedom "by long and patient toil," and some of whom had been freed through the "good-will of their masters."[345]

> And there were others who had become free—to their everlasting honor I say it—by the exercise of their own God-given powers;—by escaping from the plantations of their masters, eluding the blood-thirsty patrols and sentinels so thickly scattered all along their path, outrunning bloodhounds and horses, swimming rivers and fording swamps, and reaching at last, through incredible difficulties, what they, in their delusion, supposed to be free soil.[346]

It was for these "three classes" that Langston intervened against the man hunters, who had gotten their hands on John Price.[347] "I will not say a slave, for I do not know that," explained Langston, calling Price "a *man, a brother*, who had a right to his liberty under the laws of God, under the laws of Nature, and under the Declaration of American Independence."[348] Invoking his own father's service in the Revolutionary War, Langston continued that he believed the Kentuckians had not legal authority to seize Price, and therefore "I felt it my duty to go and do what I could toward liberating him."[349] Nonetheless, Langston had only acted to "procure . . . a lawful investigation" and to secure justice for "my brother whose liberty was in peril."[350]

As to the claimed threat—"we will have him"—Langston was so adamant that his words were recorded with double emphasis: "*This I* NEVER *said.*"[351]

Langston assailed the Fugitive Slave Act as a law made to "crush the colored man," both unconstitutional and unjust.[352] "But I have another reason to offer why I should not be sentenced," he added,

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343. *Id.* at 175.
344. *Id.*
345. SHIPHERD, *supra* note 27, at 175.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* at 176.
350. SHIPHERD, *supra* note 27, at 176 (emphasis omitted).
351. *Id.* (emphasis omitted). Langston added that he had only advised Lowe, "an old acquaintance and friend," that the crowd was "bent upon a rescue at all hazards," in the hope of "extricat[ing] him from the dangerous position he occupied." *Id.*
352. *Id.*

> I have not had a trial before a jury of my peers. . . . The Constitution of the United States guarantees—not merely to its citizens—but to *all persons* a trial before an *impartial* jury. I have had no such trial.
>
> The colored man is oppressed by certain universal and deeply fixed *prejudices*. Those jurors are well known to have shared largely in these prejudices, and I therefore consider that they were neither impartial, nor were they a jury of my peers.[353]

Again invoking his ancestry, Langston reminded the court "my father was a Revolutionary soldier; that he served under Lafayette, and fought through the whole war; and that he always told me that he fought for *my* freedom as much as for his own."[354] Yet the Fugitive Slave Act threatened to return even free men to slavery, because under its terms "BLACK MEN HAVE NO RIGHTS WHICH WHITE MEN ARE BOUND TO RESPECT."[355]

As Langston quoted the despised *Dred Scott* decision, the spectators applauded loudly, sensing what was sure to follow.[356]

> [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 defences [*sic*] our rights, which cannot be taken from us, and which God gave us that we need not be slaves.[357]

There was little doubt what "last defenses" Langston had in mind. He informed the court that he stood "unjustly condemned, by a tribunal before which he is declared to have no rights," and from which he expected no mitigation of his sentence.[358] And then he defiantly concluded:

> I must take upon myself the responsibility of self-protection; and when I come to be claimed by some perjured wretch as his slave, I shall never be taken into slavery. . . . I stand here to say that I will do all I can, for any man thus seized and held, though the inevitable penalty of six months imprisonment and one thousand dollars fine for each offence [*sic*] hangs over me![359]

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353. *Id.*
354. SHIPHERD, *supra* note 27, at 177.
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.* at 178.
359. SHIPHERD, *supra* note 27, at 178.

The gallery broke into "[g]reat and prolonged applause," which the marshal could not quell until the judge threatened to clear the courtroom.[360] Then Judge Willson spoke, this time extemporaneously; he had obviously been moved by Langston's forceful address:

> You have done injustice to the Court, Mr. Langston, in thinking that nothing you might say could effect a mitigation of your sentence. You have presented considerations to which I shall attach much weight.
>
> . . . I see mitigating circumstances in the transaction which should not require, in my opinion, the extreme penalty of the law. This court does not make laws . . . . We sit here under the obligations of an oath to execute them, and whether they be bad or whether they be good, it is not for us to say. We appreciate fully your condition, and while it excites the cordial sympathies of our better natures, still the law must be vindicated. On reflection, I am constrained to say that the penalty in your case should be comparatively light.[361]

Willson then sentenced the defendant to twenty days in prison and a fine of $100, plus costs—a far less drastic sentence than the one imposed on Simeon Bushnell, though Charles Langston had been far more defiant.[362]

VIII. THE APPEAL

The convictions of Bushnell and Langston were challenged in the Ohio Supreme Court, via writ of habeas corpus, raising profound questions of state and federal authority.[363] Christopher Wolcott, the Republican attorney general of Ohio, presented the case for the defense along with Albert Gallatin Riddle, arguing the unconstitutionality of the Fugitive Slave Act.[364] The state supreme court, they claimed, was the tribunal of "last resort" on questions of state sovereignty.[365] Slavery, being local in character, did not naturally fall within the sphere of the federal government, and was therefore subject only to state legislation.[366]

Amplifying this position, Wolcott stressed to the court that every state has the right to "inquire into the validity of any authority imposing restraint upon its citizens."[367] As a sovereign state, Ohio had never yielded this right to the federal government, "as she never could yield it, and still preserve her

360. *Id.*
361. *Id.*
362. *Id.*
363. BRANDT, *supra* note 1, at 209-11.
364. *Id.* at 210.
365. *Id.*
366. *Id.*
367. *Id.*

sovereignty."[368] As to the United States Supreme Court, which had upheld the Fugitive Slave Act, Wolcott asserted that five of its justices "are themselves slaveholders, and therefore, directly and personally interested in all these questions."[369]

Wolcott challenged the Ohio court to resist federal supremacy. "Has it come to this," he asked, that the federal authorities may compel the Ohio court either to renounce its own judgment or "remand these applicants to an unlawful imprisonment?"[370]

> If these be the only alternatives—if collision can be avoided only by striking down every safeguard with which the Constitution has hedged about the liberty of the citizen, LET COLLISION COME—come now. Let the question be settled while I live. I don't want to leave the alternative of collision or of the absolute despotism of the Federal Government as a legacy to my children.[371]

It was very nearly a call to Northern secession, a position popular with some, though not all, Ohio Republicans. At a rally in support of the rescuers, radical Congressman Joshua Giddings called on Ohio's citizens and courts to "resist the enforcement of this infamous Fugitive Slave Law."[372] As the crowd cheered, he added, "I would have this voice sound in the mouth of the cannon."[373] The next speaker, Republican Governor Salmon P. Chase, also described the Fugitive Slave Act as "a symbol of the supremacy of the Slave States and the subjugation of the Free," but he counseled the crowd against violent resistance.[374] Instead, the great remedy was at the ballot box.[375] Nonetheless, he promised to execute any writ issued by the state supreme court ordering release of the rescuers,[376] again raising the possibility of a confrontation with federal authority, and perhaps hastening the advent of the looming Civil War.[377]

Chief Justice Joseph Swan and the four other Justices of the Ohio Supreme Court were Republicans.[378] It was widely believed that they would grant the writ and order the release of Langston and Bushnell.[379] Following deliberation, however, the court rejected the petition by a vote of 3-2.[380] The Chief Justice, himself an ardent abolitionist, wrote the majority opinion,

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368. BRANDT, *supra* note 1, at 210.
369. *Id.* at 211.
370. *Id.*
371. *Id.*
372. *Id.* at 207.
373. BRANDT, *supra* note 1, at 207.
374. *Id.* at 208.
375. *Id.*
376. *Id.* at 208-09.
377. GALBREATH, *supra* note 77, at 229.
378. BRANDT, *supra* note 1, at 211.
379. *Id.*
380. *Id.* at 212.

reluctantly holding that he was "under my solemn oath as a judge, bound to sustain the supremacy of the Constitution and the law, [and therefore] *the prisoner must be remanded.*"[381]

IX. EPILOGUE

A dozen Oberlin rescuers remained to be tried, now facing little hope of either acquittal or reversal of the inevitable convictions.[382] Having been rebuffed by Ohio's highest court, however, they still had some recourse in the local courts of Lorain County.[383] Warrants were obtained for the arrest of the slave-catchers, charging them with kidnapping under Ohio law.[384] The four men—Jennings, Mitchell, Lowe, and Davis—were in fact arrested and held for eight days in the Lorain County jail until they were released on bond.[385] This tactic threatened yet another confrontation between the state and federal governments, as District Attorney Belden personally traveled to Washington, D.C., where he obtained a federal writ of habeas corpus signed by United States Supreme Court Justice John McLean.[386] It would not have escaped the rescuers' notice that the writ freeing the slave-catchers had come from McLean, who had been one of the two dissenting justices in the *Dred Scott* decision.[387]

The four kidnappers, however, were not anxious to be pawns in the power struggle, fearing that they would be convicted in the Ohio courts and unwilling to spend time in prison waiting for the jurisdictional dispute to be resolved.[388] Eventually a deal was reached.[389] The charges against the kidnappers would be dropped and Belden would move to *nolle prosequi* the remaining rescuers' cases.[390] Judge Willson grudgingly agreed, and the prosecutions ended.[391]

Although some of the rescuers were reluctant to accept freedom on these terms, the deal was generally seen as a victory for the abolitionists. The pro-slavery *Cleveland Plain Dealer* railed against the mutual dismissals as an injustice to the Kentuckians:

> Finding no law in Lorain but the higher law, and seeing the determination of the sheriff, judge and jury to send them to the penitentiary any way, for no crime under any human law, but on a

381. *Id.*
382. *Id.* at 221. Charges had been dismissed against the Wellington defendants, in an attempt by the government to isolate the Oberlin radicals. BRANDT, *supra* note 1, at 221.
383. *Id.* at 222.
384. *See id.*
385. *Id.*
386. *Id.* at 223.
387. BRANDT, *supra* note 1, at 223.
388. *Id.* at 223-24.
389. *Id.* at 224-29.
390. *Id.* at 229.
391. *Id.* at 228-36.

> charge trumped up on purpose to drive them out of the country . . . they proposed to exchange nolles, and the district attorney consented to it. So the Government has been beaten at last with law, justice and fact all on its side, and Oberlin with its rebellious higher law creed is triumphant.[392]

As compelling as it was at the time, the case of the Oberlin rescuers was soon overshadowed by events. Within the year, John Brown staged his attack on Harpers Ferry, only to be captured, tried, and hanged for treason.[393] That trial, with Brown's defiant final speech, captured the attention of the nation far more than did the brief imprisonment of Bushnell and Langston.[394] The martyred Brown, who went proudly to the gallows, became a rallying cry for abolitionism.[395]

In some ways, however, the rescuers' trials may have inspired aspects of the legal defense of Brown, who was represented by anti-slavery lawyers from Cleveland (and who was known to have followed closely the cases of Langston and Bushnell).[396] It may not have escaped notice that Bushnell, who stood mute, received the harsher sentence. Langston, who unhesitantly proclaimed his commitment to freedom, actually managed to sway the court.

Brown, of course, had no hope of avoiding the noose in Virginia, but we can still hear echoes of Charles Langston's eloquence in John Brown's final speech.

> I believe that to have interfered as I have done, as I have always freely admitted I have done, in behalf of His despised poor, I did no wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I say, let it be done.[397]

Charles Langston himself would have an enduring connection to Harpers Ferry. One of the men who accompanied Brown was Lewis Sheridan Leary, a freeborn black man from Oberlin.[398] Leary died in the raid, leaving behind his pregnant wife.[399] The widowed Mary Leary married Charles Langston, and soon gave birth to a daughter, Louise, who later enrolled at

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392. GALBREATH, *supra* note 77, at 231.
393. Steven Lubet, *John Brown's Trial*, 52 ALA. L. REV. 425-66 (2001).
394. *Id.*
395. *Id.*
396. *Id.* at 443-66.
397. OSWALD GARRISON VILLARD, JOHN BROWN 498-99 (1911).
398. *Id.* at 421.
399. CHEEK & CHEEK, *supra* note 34, at 361-62.

Oberlin.[400] Louise herself had a son, whom she named after her stepfather. That child, as by now may be obvious, was Langston Hughes—poet, playwright and central figure in the Harlem Renaissance of the 1920s.

X. CONCLUSION

Charles Langston spoke in his own behalf with clarity of purpose unencumbered by considerations of courtroom strategy or legal tactics. It turned out that he—more than any of his able and dedicated counsel—was the truest, most effective votary of the higher law, and an enduring model for the role of civil disobedience in American courts.

400. *Id.* at 362.