USE OF THE COURTS IN THE MOVEMENT TO ABOLISH AMERICAN SLAVERY

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According to John Stuart Mill, "abolitionists, in America mean those who do not keep within the Constitution."[1] "On Independance Day in 1854, at Farringham, Massachusetts, Garrison, at an abolitionist gathering, publicly burned the Constitution of the United States, crying, 'So perish all compromise with tyranny.' "[2] In 1842 John Quincy Adams successfully defeated a Congressional attempt to censure him for moving to refer to committee a petition "asking Congress to adopt measures breaking up the Union of free and slave states."[3] In a letter written to his daughter in 1840, Joshua Giddings, leader of abolitionist forces in Congress, unwittingly revealed the degree to which abolition of slavery and destruction of the Union had become joined together in the public mind. He wrote that, in spite of all the abolition talk, "I don't see that the Union is yet dissolved."[4]

The widely held belief that abolitionists meant to destroy the union was not completely unjustified. Many abolitionists were uncompromising in their bitter attacks on the Constitution. Garrison called it "a covenant with death and an agreement with hell." Wendell Phillips said it was "a wall hastily built, in hard times, of round boulders . . . a 'hodge-podge' . . . a general mess, a bowl of punch, of all the instititutions of the nation." Frederick Douglass said, "Liberty and Slavery—opposite as Heaven and Hell—are both in the Constitution; and the oath to support the latter is an oath to perform that which God has made impossible . . . If we adopt the preamble, with Liberty and Justice, we must repudiate the enacting clauses, with Kidnapping and Slaveholding."[5]

Douglass set out the specific charge. Abolitionists, he said, saw the Constitution as "a compromise with slavery—a bargain between the North and South."[6] For evidence to support their charge, the opponents of slavery cited the Constitution itself. That document gave the South extra polit-

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1 J. S. MILL, *Dissertations and Discussions: Political, Philosophical, and Historical* 53 (1882) in S. LYND, CLASS CONFLICTS, SLAVERY & THE UNITED STATES CONSTITUTION 154 (1967).

2 7 DICTIONARY OF AMERICAN BIOGRAPHY 170 (1965).

3 R. B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860, 52 (1963).

4 Joshua R. Giddings, Letter Jan. 7, 1840, Giddings Colection, Ohio Historical Society Museum, Columbus, Ohio.

5 All of these quotations are taken from S. Lynd, *The Abolitionist Critique of the United States Constitution* in THE ANTISLAVERY VANGUARD: NEW ESSAYS ON THE ABOLITIONISTS 210-11 (M. Duberman, ed. 1965).

6 *Id.*

ical power in the House by counting each slave as three-fifths (3/5) of a person in apportioning congressional seats.[7] It allowed the slave trade to exist at least 20 years past the creation of the Union.[8] It required the return of fugitive slaves in accordance with rules of Congress.[9] This array of constitutional power gave the South substantial support in its efforts to keep slavery alive.

The mere existence of these powers in the Constitution was enough to condemn the document to many Abolitionists. But further proof was added to their case in 1840 when Madison's notes on the Constitutional Convention were published. In these papers, abolitionists found dramatic evidence of what they had claimed all along. "The great danger to our general government," wrote Madison, "is the great southern and northern interests of the continent, being opposed to each other . . . the states [are] divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from their having or not having slaves."[10]

The abolitionist charge that the Constitution was the transcript of a nefarious bargain with immorality, which was based on constitutional language and supported by Madison's comments, made it difficult for opponents of slavery to rely on courts of law in their effort to end it. This failure to rely on courts, the law and the Constitution as a primary tool in their reform efforts is merely one example of the general allegation, made by some modern historians, that abolitionists were unable to use institutions in their campaign for change. In his admirable book on slavery,[11] Stanley Elkins describes what he feels is the ineffectual quality of abolitionism by joining it to the politically impotent Transcendentalist movement.

> The thinkers of Concord (the Transcendentalists) . . . were men without connections. Almost without exception they had no ties with sources of wealth; there were no lawyers or jurists among them; none was a member of Congress; they took next to no part in politics at all; . . . [F]ar from 'revolting' against the age, Transcendentalism embodied in aggravated form certain of its most remarkable features—its anti-intellectualism, its individual perfectionism, its abstraction, and its guilt and reforming zeal. Moreover, the intellectual features of the reform movement most relevant to this inquiry—abolitionism—very strikingly duplicate those very features just enumerated . . . What does matter is that the thinking of those men whom we specifically remember as abolitionists—whose claim on history rests on their association with abolitionist movement as

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[7] U. S. CONST. art. I, § 2.

[8] *Id.* § 9.

[9] *Id.* art. IV, § 2.

[10] S. Lynd, *supra*, note 5.

[11] S. M. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL & INTELLECTUAL LIFE (1963).

such—should follow the very same pattern (as the thinking of Transcendalists.)[12]

The primary allegation is that "the anti-institutionalism so characteristic of the Transcendentalists reached heights of extravagance in radical abolitionist"[13] circles rendering them open to the charge of ineffectualness. To the extent that abolitionists were able to use courts and the legal process, and use them successfully, in combating slavery, the allegation is wide of the mark. And the abolitionists were successful in the courts to a surprising degree. Given the fact that the Constitution was a compromise between slave states and free states, giving several protections to slavery; given the fact that prior to 1860 it "is extremely probable that the judiciary commitee [of the Senate] was . . . influenced in its action regarding nominations to the Supreme Court by the views of the nominees as to slavery;"[14] and given the fact that a vocal group of abolitionists openly called for disunion, connecting abolition of slavery with destruction of the nation in the public mind; given all these facts, it is remarkable that abolitionists were able to use the courts as successfully as they did.

Specifically, the abolitionists were able, through court action, to: weaken the slave trade; destroy the Fugitive Slave Law of 1793; undermine the fugitive slave law of 1850; make significant gains for civil liberties and civil rights; and, finally, through the Dred Scott case, to lay bare the hypocrisy and intellectual shoddiness of a constitutional system designed to protect human rights, but based in part on the acceptance of human slavery.

I. Early Abolitionist Court Action

In 1700, Judge Samuel Sewell of Massachusetts was spurred to attack slavery publically by the consideration in the General Court of Massachusetts of "a petition for the emancipation of two unjustly enslaved Negroes."[15] It is not clear whether or not the judge sat on the case or what the outcome was. It is clear that he was inspired by it to write a stinging attack on slavery. It also seems apparent that the case was the beginning of legal agitation against slavery in Massachusetts. This is an important beginning, since "abolition in the Bay State is a particularly suitable subject

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[12] *Id.* at 147, 158, 175.

[13] *Id.* at 175.

[14] Westel W. Willoughby, quoted in 1 W. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 21 (1926). The quotation goes on to say, "however, the Justices acted in accordance with their conscientious interpretation of the Constitution," and is used by Warren to answer Von Holst's charge in his *Constitutional History of the United States* that their views on slavery controlled the appointment of Judges prior to 1860."

[15] A. ZILVERSMIT, THE FIRST EMANCIPATION; THE ABOLITION OF SLAVERY IN THE NORTH 58 (1967).

for investigation because a legend persists that other New England States were influenced by her example."[16]

The leading abolition case in Massachusetts was the "Quock Walker Case." It is a case confused by a complex fact pattern, obscure origins and uncertain effect. However, it is generally hailed as at least part of the successful attack on slavery in the courts of Massachusetts. Quock Walker was alleged to be a runaway slave. In trying to regain possession of his alleged property, the master and defendant in the suit, Nathaniel Jennison, assaulted the Negro. The Negro brought the action for assault and battery. There were a number of counter and concurrent suits (six in all) and various settlements reached. However, the case did reach the General Court twice, once in 1781, and once in 1783. There is historical controversy as to which case effected slavery the most, but it appears that one or the other or both together did have some effect on the future of slavery in Massachusetts.

"There is reason to suspect that the entire episode was planned . . . with the hope of bringing the matter to court."[17] The apparent planner of the case, both the fact and the law, was the "most prominent attorney in the county," Levi Lincoln. He was consulted very early in the case, prepared the pleadings, and arranged the various settlements in order to focus the issue on the constitutionality of slavery under the declaration of rights. He argued eloquently that slavery was a violation of human rights. The role of Levi Lincoln in the Walker trial was one which, at his death many years later, was remembered along with his position as Attorney General of the United States under Thomas Jefferson and his appointment (which he declined) to the Supreme Court by Madison in 1810.[18] (John Quincy Adams subsequently declined the same seat, and Joseph Story, at the age of 36, was finally appointed to fill the vacancy).[19]

A legend has grown around the second Quock Walker case saying that the charge to the jury [the highest Court's cases were heard before a jury] by one judge was responsible for ending slavery in Massachusetts. Unfortunately for the judge's place in history, it is a fact that slaves continued to be sold in Massachusetts for several years after the 1783 decision. "Far from being hailed as revolutionary decisions, affecting the property rights of thousands of owners, they [the Quock Walker cases] went unnoticed in contemporary newspapers. The reason for the ambiguous result of the Walker-Jennison cases is that they were, in all probability, only several of a series of cases testing the constitutionality of slavery. At the same time that Levi Lincoln was arguing that slavery was incompatible with the dec-

[16] Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker Case'* AM. J. LEGAL HIST. 118-44 (1961).

[17] *Id.*

[18] *Id.*

[19] *Id.*

laration of human rights for the benefit of Quok [sic] Walker in Worcester, Theodore Sedwick was making a similar plea for Elizabeth Freeman in Berkshire County—and with similar results. These freedom cases ultimately had the desired effect. Some Negroes were encouraged to sue for their freedom; others, convinced that the courts would not return them to slavery, simply left their masters. As a result, when the first federal census was taken in 1790, Massachusetts reported that it had no more slaves."[20] While it is unclear just how the judicial attack on slavery in Massachusetts affected the institution in other parts of the country, there is some indication that the action did not go unnoticed. According to Jeremy Belknap, writing in 1788, "the Negroes in Massachusetts and New Hampshire are all *free*, by the first article in the Declaration of Rights. This has been pleaded in law, and admitted."[21] And Judge Cushing, famous for his part in the second Quock Walker case, called this case and its effect to the attention of a justice of the state of Pennsylvania whom he was visiting.[22] When organized abolition activity began in earnest in 1831, then there was precedent for the successful use of courts in the anti-slavery cause.

II. The International Slave Trade

Lieutennant Robert F. Stockton was 26 years old when, in 1821, he was commissioned by the American Colonization Society to negotiate the cession of African land for their proposed colony. He was successful in carrying out his task and the land he obtained became Liberia. Thirty-five years later, in 1856, Stockton ran for President of the United States on the North American ticket (the abolitionist wing of the Know-Nothing Party.) His campaign biography of that year[23] speaks as highly of his Liberia accomplishments as it does of his term in the United States Senate, his service as first Governor of California, and his role in developing stem vessels, long guns, and the under water propeller for navel vessels. It also speaks of his legal efforts to end the slave trade based on his own aggressiveness on the high seas.

American slavers were in the habit of carrying several foreign flags to disguise their identity when approached by American naval vessels.[24] They also, on occasion carried several captains of different nationalities to go along with the different flags. Lieutenant Stockton's instructions in 1822 were to "capture all vessels, sailing under the American flag, found engaged in prosecuting the slave trade."[25] This direction, he felt, inhibited

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[20] Zilversmit, *supra* note 15, at 112-113.

[21] *Id.*

[22] J. Cushing, *supra* note 16.

[23] S. J. Bayard, A Sketch of the Life of Commodore Robert F. Stockton; with an Appendix of Documents (1856).

[24] W. S. Howard, American Slavers and the Federal Law 1837-1862 74 (1963).

[25] Bayard, *supra* note 23, at 51.

him in his efforts to supress the slave trade. He therefore captured a slaver sailing under the French flag (which was, in fact, French) on the grounds that its cargo made it a pirate.

The ship, the *Jeune Eugenie*, was returned to the United States for trial. Stockton retained his friend, and former counsel in the piracy case of the *Marrianna Flora*,[26] Daniel Webster, to argue the legality of the capture. Stockton, whose father was a leading member of the New Jersey Bar, and whose grandfather had signed the Declaration of Independance, supposedly drafted the arguments used by Webster in the case. Mr. Justice Story, sitting as a circuit judge, delivered the opinion of the court.

In the opinion Story held that,

> [a]fter listening to the very able, eloquent, and learned arguments delivered at the bar on this occasion,—after weighing the authorities which bear on the case with mature deliberation,—after reflecting anxiously and carefully upon the general principles which may be drawn from the law of nations to illustrate or confirm them, I have come to the conclusion that the slave-trade is a trade prohibited by universal law and by the law of France; and that, therefore, the claim of the asserted French owners must be rejected.[27]

According to Bayard, "Lieutenant Stockton was the first in the United States who ever asserted and acted upon these broad and fundamental principles of natural law."[28] Unfortunately, though the case supported the capture of several additional slavers by Stockton, it appears not to have had a decisive effect. Twenty years later the American slave trade began to reassert itself once again amid "Confusion on the Bench."[29]

However, in February of 1841, a similar case was argued and won before the Supreme Court. The counsel in that case was John Quincy Adams, "then the most vigorous of all the anti-slavery advocates in Congress, and consequently, of all statesmen, the most obnoxious to the South."[30] The case was *United States Schooner Amistad*.[31] The ship was a slaver which had been captured by its cargo, whose officers had been killed in the revolt, and which had been brought to the United States by an American naval vessel. The Spanish owners of the former slaves demanded their return. The issue as reported by the press, was whether or not the Court of the nation had the power to return to slavery men who arrived on American shore as free. Judge Story, writing for the court, held that the Negroes should be freed from custody and sent back to Africa.

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[26] 24 U.S. (11 Wheat.) 1 (1826).

[27] 2 Mason's C.C. Reports. This citation is given by BAYARD, *supra* note 23, at 52.

[28] BAYARD, *supra* note 23, at 53. The use of this case is one reason why this article is a preliminary note. All references to the *Jeune Eugenie* seem to arise from the campaign Biography of Bayard. Many are confused and unclear. Therefore, more research into the effect or lack of effect of the case is necessary.

[29] HOWARD, *supra* note 24, at 92-102.

[30] 2 WARREN, *supra* note 14, at 74.

[31] 40 U.S. (15 Pet.) 518 (1841).

Adams' description of his argument contrasts sharply with today's Supreme Court practice. "I spoke four hours and a half, with sufficient method and order to witness little flagging of attention by the judges . . . The structure of my argument, so far as I have yet proceeded, is perfectly simple and comprehensive, needing no artificial division into distinct points but admitting the steady and undeviating pursuit of one fundamental principle—the ministration of *justice*."[32] The next day Adams argued for an additional four hours, and the following day he "spoke about four hours and then closed somewhat abruptly."[33] Adams' successful appeal to justice pleased the abolitionists. Winning the case was important in their appeal to general principles of law. That they recognized this case as important is signified by the fact that Adams was retained by Mr. Lewis Tappan[34] who, with his brother Arthur, was a leading financial and organizational figure in all abolitionist circles between 1830 and 1860.

Through these two court cases, abolitionists were able to establish that slaves who managed to escape from the slave trade were free, and that Americans could capture slavers of foreign flags. Both cases were based on general principles of justice and the rights of man. Both cases judicially recognized the human degredation of slavery. These were important points for the abolitionists to get into the judicial record.

III. The Fugitive Slave Law of 1793

It is around the two fugitive slave statutes, one of 1793, the other of 1850, that the abolitionists made the most significant law. John Hurd published a classic treatise on the law of slavery in 1862. In the preface to that work, he said, "[i]n the greater part of the cases cited in this volume it has been necessary for the judiciary to determine the operation of the first and second sections of the fourth Article of the Constitution of the United States" (the sections pertaining to the fugitive slave laws).[35] The magnitude of the litigation effort is illustrated by the fact that the table of cases in Volume II of the Hurd treatise contains 480 separate listings.

The trying of so many cases, "the greater part of which" dealt with the fugitive slave laws and their relation to the Constitution, shows that a strong anti-slavery bar existed. In fact, a number of prominent abolitionist leaders were attorneys who began by trying fugitive slave cases. "Thaddeus Stevens . . . started out as an abolitionist lawyer defending fugitive slaves in Pennsylvania, and . . . climaxed his career by fathering that potentially great bulwark of individual liberty, the Fourteenth Amendment."[36] Salmon P. Chases' "Defense of James G. Birney in 1837 for

[32] 2 WARREN, *supra* note 14, at 74.

[33] *Id.*

[34] *Id.*

[35] J. C. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES iii (1862).

[36] F. M. Brodie, *Who Defends the Abolitionists?* in DUBERMAN, *supra* note 5 at 54.

harboring a fugitive slave brought him into prominence as an antislavery advocate."[37] It was from this start that Chase went on to become an anti-slavery Senator and Governor from Ohio, a member of Lincoln's cabinet and, finally, Chief Justice of the United States. James G. Birney, the defendant in the famous case defended by Chase, "abandoned a prosperous legal practice" for the anti-slavery cause.[38] The case that Birney and Chase combined on, *Birney v. State*,[39] is still cited for the proposition that "guilty knowledge [is] . . . a necessary ingredient of crime."[40] A number of other prominent attorneys served the cause in various capacities. Congressmen Rufus P. Spalding, former judge of the Ohio Supreme Court, Joshua Giddings from the outskirts of Cleveland, and Albert G. Riddle, and William B. Stantan as a private attorney, all contributed their legal talents to the battle against the fugitive slave law.

The effect of this massive outpouring of legal activity was described by Wilbur H. Siebert, the leading authority of the underground railroad. Commenting on the value of the Hurd volumes as an historical source, Siebert states: "[i]n the series of the record of these trials, one may trace the legal opposition to the enforcement of the Fugitive Slave Laws, . . . mark the clash of federal jurisdictions and see the growth of the spirit of nullification in the North." But the most significant occurance in the battle was the "decision in the Prigg case, by which efficacy of the law of 1793 was destroyed, and the Southern demand for a new law made imperative."[41]

Prigg v. Pennsylvania,[42] was decided by a divided court with Mr. Justice Story acting as Chief Justice in the place of the ailing Taney, writing the opinion. Prigg was the plaintiff in a suit against the state of Pennsylvania. His female slave had escaped and one year later he came into Pennsylvania to seize her and her offspring. The state of Pennsylvania sought to restrain him in accordance with its state law. The issue before the court was whether or not the law of Pennsylvania violated the Constitution. Prigg claimed it did; Pennsylvania claimed it did not. The Court held unanimously that the statute violated the Constitution, and that a master's right to regain his slave was protected by the Constitution.

At first abolitionists were furious against the opinion. The Court had unanimously upheld the constitutionality of slavery. However, the sec-

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[37] THE LINCOLN LIBRARY OF ESSENTIAL INFORMATION 1792 (1951).

[38] B. H. BARNES, THE ANTISLAVERY IMPULSE 1830-1844, 39 (1933).

[39] 8 Ohio Rep. 230 (18337).

[40] Kilbourne v. State, 84 Ohio St. 247, 95 N.E. 824 (1911).

[41] W. H. SIEBERT, THE UNDERGROUND RAILROAD FROM SLAVERY TO FREEDOM 384 (1898). This book is one of a number of old works to be republished by the Arno Press and The New York Times as part of their series on "The American Negro: His History and Literature." Professor Siebert was a long-time member of the faculty of the Ohio State University Department of History.

[42] 41 U.S. (16 Pet.) 539 (1842).

ond point of Story's opinion angered slavery men. He argued that any state law dealing with fugitive slaves was unconstitutional whether it *hindered* or aided their return. Judge Story himself believed that "a great point had been gained for liberty—so great a point, indeed, that on his return from Washington," wrote his son, "he repeatedly and earnestly spoke of it to his family and his intimate friends as being 'a triumph of freedom'."[43]

After an initial heated attack on the Court, the anti-slavery spokesman quited to an acceptance of the decision. "Undoubtedly, the chief reason for the equanimity with which the decision was finally accepted was the rapid realization by the Northern States of the effective weapon which had been placed in their hands."[44] Now the northern state refused to allow their government agencies to be used to enforce the fugitive slave law. For example, within a year of the decision Massachusetts "passed a statute which made it a penal offense for any state officer or constable to aid in any way in carrying the Federal law into effect."[45] The effect was a demand by southerners for a new fugitive slave law.

IV. The Fugitive Slave Act of 1850

"As a part of the famous compromise of 1850, the Congress of the United States passed the Fugitive Slave Act. This act [was] one more anvil upon which the abolitionists were able to forge their antislavery crusade."[46] Nothing illustrates better than the *Oberlin-Wellington Rescue Case* how sophisticated the abolitionists were in their use of the courts to build support against the fugitive slave law and slavery itself.

The case arose when a Kentucky slave hunter lured a runaway slave into his custody at Oberlin, Ohio. The slave was taken to Wellington, Ohio, to be transported out of the state. However, on the road the slave and his captor were spotted and a demonstration shortly developed. The slave was rescued and sent on to Canada. The rescuers, thirty-seven in all, were charged with violation of the Fugitive Slave Act, and two were brought to trial and convicted in the Federal District Court in Cleveland.

In an appeal to the Ohio Supreme Court on a writ of habeas corpus, that court denied the writ in a 3 to 2 decision. Chief Justice Swain lost his seat on the court as a result of the decision, but perhaps left "the odium of inaugurating civil war in this country . . . upon the South."[47]

The final step in the legal strategy was taken in July of 1859, just three

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[43] 1 WARREN, *supra* note 14, 87.

[44] *Id.*

[45] *Id.*

[46] Warren Guthrie, *The Oberlin-Wellington Rsecue Case, 1859*, in ANTISLAVERY AND DISUNION, 1858-1861; STUDIES IN THE RHETORIC OF COMPROMISE AND CONFLICT 85 (J. Auer, ed. (1963)).

[47] W. P. COCHRAN, THE WESTERN RESERVE AND THE FUGITIVE SLAVE LAW 214 (1920).

months after the conviction had been secured. The counsel for the rescuers prepared to bring a counter charge against the slave hunter for kidnapping. The United States attorney, tired of the constant harrassment of the public resulting from the unpopularity of the case, agreed to drop the charges against the "rescuers" if they would drop the charges against the "kidnappers." Agreement was reached and the rescuers were released.

The effect of the case and the public agitation accompanying it profoundly changed the course of Ohio politics. "The Fugitive Slave Law had previously escaped criticism in northern Ohio because little attempt had been made to enforce it there. The events of this case, however, opened the law and slavery to renewed denunciation in the press, in the church, and in public mass meetings. It resulted in a strong antislavery, anti-Fugitive Slave Law plank in the platform of the Ohio Republican Party. It also led to a great antislavery mass meeting in the Western Reserve on the slavery issue, and the following year the Western Reserve sent to Congress men firmly opposed to making further concessions to the slave power."[48] Two of the men subsequently elected to Congress had been attorneys for the rescuers.

During the entire period of the legal maneuvering, the attorneys were busy insuring public support for their cause. The first public meeting was the "feast of the felons" in which "thirty seven good citizens of Loraine County, indicated by the Grand Jury . . . sat down with their wives and a number of invited guests to a suptuous repast . . . Among them were venerable grey-headed men, some of the early settlers of Loraine County—men who had filled the forest and built the humble log-cabins, school houses and churches of the wilderness—nobel men, good men, and true men—men of Puritan and Covenanter stock, of Revolutionary Blood, of spotless reputation—indicated criminals."[49] This contemporary account of the situation gives an indication of the intense feeling generated by the case in the Western Reserve.

Upon conviction, the first two rescuers tried were sent to jail. The court then proposed to try the cases of the rest of the accused before the same jury. The defense refused and all defendants were ordered jailed. From jail the citizens ran a massive protest. They printed a newspaper called *The Rescuer* which appeared every second Monday; a column called "A voice from the Jug" was written for the Cleveland Plain Dealer by one prisoner; and Sunday school children as well as other visitors came to shake hands with the prisoners. On May 24, 1859, a mass rally was held near the jail which was addressed by the Governor, Salmon P. Chase, Congressman Joshua P. Goddings, and by the prisoners themselves from inside the jail.

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[48] *Guthrie, supra* note 46, at 94.

[49] J. R. SHIPHERD, HISTORY OF THE OBERLIN-WELLINGTON RESCUE 5, 6 (1859).

When the rescuers were finally released, a great celebration was held. The leader of the rescuers received a one-hundred-salvo gun salute by the Oberlin Hook and Ladder Company and the Wellington "Sax Horn Band." "To emancipationists everywhere the speeches of a politically ambitious lawyer defending, not his clients, but an idea gave 'a fresh impetus to our noble cause,' in Garrison's words."[50] While the activities in the Oberlin-Wellington case were particularly dramatic and widely known, abolitionists across the North were combining legal attacks against the fugitive slave law with popular support in an effort to build a massive opinion against slavery.

V. Civil Liberties

The protection of civil liberties is primarily a defensive battle. Each thrust against free speech, free press, academic freedom, or any other right, must be met or the right will be lost. The anti-slavery forces of 19th century America recognized the moral and political importance of this task of protection and joined it to the fight for abolition. "The insistence upon the moral and legal right of a minority to speak and be heard, with full protection from suppression or interference, became in time nearly as important to the [slavery] controversy as the abolition of the slave system."[51]

In 1833, Prudance Crandall announced that her school for girls in Canterbury, Connecticut, would be opened to Negro girls. An immediate out-cry was heard from the community, led by Andrew T. Judson, an attorney and official of the American Colonization Society. It was one thing to send Negroes to Africa, quite another to let them move into a North American, white community. Judson secured passage of a state law forbidding schools such as Miss Crandall's from operating. For defiance of that law, the school mistress was arrested. The thrust against educational freedom had been made.

Arthur Tappan, wealthy businessman, founder of the American Anti-Slavery Society, and brother of the man who later retained Adams to present abolition's argument in the *Amistad Case*, accepted the challenge and hired three attorneys to defend Prudance Crandall. Led by Sammuel J. May, "who was projected into national prominence by his part in the case,"[52] the abolitionists argued that Negroes possessed an inalienable and constitutional right to education. The prosecution, conducted by Judson, urged that Negroes were not citizens, and that the Declaration and the Constitution had never meant to make them citizens. He also argued that the only result of such a school as Miss Crandall's would be race amalgamation. Out of court, he commented that the real aim of the school "was to train

[50] Guthrie, *supra* note 46, at 97.

[51] Nye, *supra* note 3, at 317.

[52] *Id.* at 106.

Negro girls as brides for New England Bachelors."[53] The first trial ended in a hung jury. The second trial ended in a conviction. On appeal, the conviction was quashed and the abolitionists won thier point.

The next major legal victory won by the abolitionists was the defeat of an attempt to censure John Quincy Adams by the House of Representatives in 1842. Though not a court-room battle, this quasi-judicial proceeding does show an ability and willingness on the part of abolitionists to use legal reasoning and methods.[54] Russell Nye suggests that this use of the law by abolitionists represented a division in the movement. "By 1840 the movement was divided into two fairly well-defined groups, one based on the moralistic-religious position of Weld, Garrison, and the Lane 'rebels,' the other on the political-legal position of Birney and his circle. While the Liberty party and its supporters carried the battle against slavery into Congress and the courts, the other group seized on popular contemporary evangelistic techniques . . ."[55] The Adams censure case shows that Nye's allegation is not accurate.

Although Garrison considered the American Anti-Slavery Society his organization, Birney, Leavitt, Stanton and Weld were responsible for most of the society's work. It was this Society which effectively popularized and organized the evangilistic techniques used by abolitionists throughout the country.[56] In 1841, these four men, seeing that new techniques were needed to continue the fight, left the organization (to Garrison) nearly simultaneously. Birney continued his political work with the Free Soil party. Stanton started a law practice. Weld and Leavitt went to Washington where they organized the anti-slavery congressmen into an effective political force and prepared the defense of Adams. The division Nye refers to was not one between personalities, but rather one making a change of strategy by the same persons, save Garrison, who never changed.

For six days the trial of Adams raged in the House. The galleries were packed by the public and members of the Senate. Adams spoke brilliantly. "Day by day the trial went forward, and night after night Weld and the old warrior counseled together upon the program of defense for the morrow."[57] Finally the resolution to censure was laid on the table.

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[53] *Id.*

[54] The assertion that a trial of censure in the United States Congress is a proceeding demanding legal knowledge and skill comparable to that required in the courtroom is supproted by the fact that during the 20th century's famous censure trial, that of Senator Joseph McCarthy, the defendant Senator retained the famous trial lawyer, Edward Bennett Williams, to prepare his defense. Williams was not allowed to speak on the Senate floor, but he was allowed to be present and advise his client. During the 1842 proceedings against Adams, the embattled Congressman's chief advisor was Theodore Weld, the evangelistic abolitionist from Ohio. E. B. WILLIAMS, ONE MAN'S FREEDOM 667 (1962); G. H. BARNES, THE ANTISLAVERY IMPULSE 1830-1844 (1933).

[55] NYE, *supra* note 3, at 199.

[56] BARNES, *supra* note 46, at 107.

[57] *Id.* at 186.

The victory was won. Weld wrote: "This is the first victory over the slave-holders *in a body* ever yet achieved since the foundation of the government . . ."[58] Weld had successfully made the transition from evangilist to legal advisor.[59]

Interference with the use of the mails by slave-holders constituted a thrust at freedom of the press. If the mails could be stopped through state action, no abolitionist newspaper would ever reach the South. In 1849, John M. Barrett was arrested in Spartanburg, South Carolina, for bringing into the state a "paper with the intent to disturb the peace and security of the state, in relation to the slaves thereof."[60] The case was very complex. Barrett had tried to mail certain documents alleged to be incendiary. He had also refused to receive a letter allegedly sent to him under a false name. When the local postmaster refused to open the letter at a trial, he was jailed. Barrett was allowed to remain free only if he posted a $2000 bond. Once again abolitionists met the challenge. Money for the bond was raised through the North and preparations were made to defend Barrett. Before the final case came to trial, Barrett was released. The issue was becoming too embarrassing to the authorities.

In 1845, the abolitionists lost a case in the New Jersey Supreme Court which sought to outlaw slavery as a violation of the New Jersey Constitution. Although the case was lost, abolitionist counsel Alvan Steward, leader of the New York Anti-Slavery Society, made a strong argument which sounds familiar to modern ears. Referring to the famous *Quock Walker* case, he urged New Jersey to abolish its limited form of slavery as Massachusetts had done because of "inalienable rights" section of its Constitution. His argument was that "[s]laves are persons and hence to deprive them of these natural rights is to violate the 5th amendment [of the United States Constitution.] The due process clause is thus read in a mixed technical and substantive sense."[61] Though, as in this case, abolitionists frequently lost in court, they also often won. They saw and accepted the responsibility of defending civil liberties, and in doing so often established or suggested important principles of law.

VI. Dred Scott

Dred Scott vs. Sandford,[62] though lost by the abolitionists, was by far their most ambitious and far-reaching effort in the courts. The tenacity

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[58] *Id.* at 187.

[59] ten Broek, Equality Under Law: The Antislavery Origins of the Fourteenth Amendment (1947) develops a strong argument that the modern concepts of "due process" and "equal protection" in the fourteenth amendment can be traced to the legal writings of Weld, Stanton, and Birney.

[60] Nye, *supra* note 3, at 82.

[61] ten Broek, *supra* note 59, at 79.

[62] 60 U.S. (19 How.) 393 (1856).

of the organizers of the case is a monument to the creation of test cases. The inappropriateness of the decision and its damage to the court is a strong argument for judicial restraint and responsibility. Of all abolitionist efforts, both inside and outside the courts, this case provided the most convincing evidence to the northern moderates that slavery was a threat to the Union.

Dred Scott was a slave born in Southampton County, Virginia [home of Nat Turner], around 1795. He left there with his first master in 1827. When this master died in St. Louis in 1831, Scott passed to the master's daughter, who sold him two years later. The new owner was an Army surgeon named Emerson who was transferred to Illinois in 1834, taking Scott with him. One year later Emerson was again transferred, this time to the Wisconsin Territory. Scott married another slave of the doctor and had a child. In 1838, the surgeon, with Scott, returned to St. Louis where he died six years later. Scott was left to the surgeon's widow, Mrs. Irene Sanford Emerson. It was against her that the first Dred Scott case was brought.

Mrs. Emerson left her new slave with her brother, Henry Blow, anti-slavery lawyer and well-to-do businessman. It was at his decision and urging that the first case was brought to court. In that case, *Scott, a Man of Color v. Emerson*, Scott's lawyers argued that the time he had spent in Illinois and the Wisconsin Territory made the former slave a free man. Their argument was upheld and Scott could then and there have become a free man. However, lawyers on both sides of the case decided to appeal to get a higher court ruling on the same issue. In 1852, the Missouri Supreme Court, *Scott v. Emerson*[63] "reversing its previous practice by a two to one vote, refused to extend comity and honor the laws of other states."[64]

In November of 1853, a new strategy was worked out by the abolition lawyers in the case. "Until this time no startling novelty had distinguished the Dred Scott case; similar pleas in behalf of slaves had been heard in the state courts throughout the century."[65] However, now Mrs. Emerson was remarried to Dr. Calvin C. Chaffee, an abolitionist Congressman, and her affairs and property were administered by her brother, John F. A. Sanford of New York. Scott's attorneys filed a charge of assault against Sanford on behalf of Scott in federal court. The basis of the suit was the diversity of citizenship between Sanford, a citizen of New York, and Scott, allegedly a citizen of Missouri. Thus, two important questions were presented to the court: (1) could a negro be a citizen, and (2) was the enslavement of Scott a violation of his rights. The lower federal

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[63] 15 Mo. 576 (1852).

[64] S. I. KUTLER, THE DRED SCOTT DECISIONS: LAW OF POLITICS x (1967).

[65] *Id.*

court found that Scott was a citizen of Missouri and that Sanford had not violated his rights by holding him in slavery after he had been in free territory. The case was now ready for the Supreme Court.

The Court heard oral argument in the December term of 1855 and was about to side-step the entire question when Justice McClean of Ohio, the only abolitionist on the court and candidate for the first Presidential nomination of the Republican party, decided to write an opinion "reviewing at length the history of African Slavery in the United States from the Free Soil point of view."[66] The southerners demanded a re-hearing. One year later, in the December term of 1856, argument was heard once again. And once again, the court seemed ready to side-step the controversial issues. However, with the defeat of Fremont in the election, the southerners on the Court felt emboldened to "attempt to settle definitively all questions with an opinion of the court."[67] Chief Justice Taney agreed to write the opinion.

First, he held that the lower court had erred and that Scott could not be considered a citizen, and that therefore the court did not have jurisdiction. Second, he held that the Missouri Compromise was unconstitutional, and that therefore Scott could not have become free even if he could have sued. The Compromise was unconstitutional in that part which made the land in Wisconsin Territory forever free of slavery. This he declared was deprivation of property without due process of law.[68] His point was again jurisdictional. If Congress lacked the power to make Scott free, then Scott could not be a citizen and therefore the court could not have jurisdiction. Each of the other judges wrote statements on the case, and there was not a majority on the reasoning that led to the decision.

The case was a disaster. Even though some credible explanation can be given for Taney's reasoning[69] there is little that can be said in defense of the result or the method by which it was reached.

> When, as in this case, the student finds six judges arriving at precisely the same result by three distinct processes of reasoning, he is naturally disposed to surmise that the result may possibly have induced the processes rather than that the processes compelled the result; . . . when he discovers further that the processes themselves were most deficient in that regard for history and precedent in which judicial reasoning is supposed to abound,

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[66] Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, AM. HIST. REV. 52-69 (1911); KUTLER, *supra* note 64, at 123.

[67] *Kutler*, *supra* note 64, at xiii.

[68] Here, according to Corwin, the vested rights theory grafts onto the due process clause of the fifth amendment of the Constitution. This was a doctrine in use only in New York and North Carolina which held that while some due process was merely procedural, other due process consisted of rights which could not be eliminated "even by the forms which belong to due process of law." Wynehamer v. People, 18 N. Y. 378, 420 (1856). This doctrine bears a distinct similarity to the due process assertions of the Birney, Weld, Stanton theory of law basing their attack on slavery upon the same clause.

[69] *See* CORWIN, *supra* note 66, at 135.

> his surmise becomes suspicion; and finally when he finds that beyond reasoning defectively upon the matter before them the same judges deliberately gloss over material distinctions . . . and ignore precedents that they have themselves created . . . his suspicion becomes conviction.[70]

The effect on the court was disasterous. It was not until 1870 that it finally recovered from the distrust it had created. "The Dred Scott decision cannot be, with accuracy, written down as a usurpation, but it can and must be written down as a gross abuse of trust by the body which rendered it."[71] The major lesson of the case is that even the court is subject to the limitations of social and political realities. But also it shows a tenacity and ingenuity on the part of the abolitionists which sets them distinctly apart from the reflective and detached Transcendentalist thinkers of Concord to whom Stanley Elkins likes to compare them. There were a number of hard-headed, realistic and effective men working in the abolitionist cause.

VII. Conclusion

This short review of a few, well-known legal actions prepared, financed, and prosecuted by abolitionists, should raise serious questions about the charge that abolitionists were ineffective and isolated members of society. When Elkins compares abolitionists to transcendentalists, he implies that they had no "ties with sources of wealth." However, the Tappan brothers were wealthy silk importers who put the profit of their business, and of a number of friends whom they converted into the cause of abolition. Elkins suggests that there were few lawyers in abolitionist circles. However, most of the men whose names keep reappearing in connection with abolition were lawyers — Birney, Stanton, Adams, Phillips, Giddings — or were men willing to work with the law, as Weld did. In the ranks of abolition were other lawyers such as Chase, Stevens, and the men who tried the masses of fugitive slave cases.

To the extent that abolitionists were like Transcendentalists, they should have taken no part in Congress or politics; and yet all major leaders of abolition, save Garrison and his followers, who never did change, worked through either the courts, the Congress, where some of the greatest victories were won, or through political parties. Far from being anti-institutional and unwilling to revolt, the abolitionists raised questions and sought answers that struck at the nation's core; and it raised these questions at the seat of power and in the heart of institutions so insistently that the nation was finally driven to war by their goad.

Elkins' mistake lies in his identification of abolition with Garrison. "There is some danger that the builders [in abolitionist circles] may be

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[70] *Id.*, at 138.

[71] *Id.*

overlooked . . . This would occur as a result of . . . concentrating, as Stanley Elkins has done, on the New England branch of the movement with its close intellectual ties with the Transcendentalists."[72] This is a mistake that Elkins should not have made. He himself quotes part of the following passage:

> The Boston abolitions made the Garrison legend history; but this was their only great achievement. As advocates for a reputation, Garrison's followers were unique; but as factors in the antislavery impulse—at least throughout the decade of the forties—they and their leader were even less than negligible; they were 'dead weights to the abolition cause.'
>
> Garrison was equipped by taste and temperment for free-lance journalism and for nothing else. As a journalist he was brilliant and provocative; as a leader for the antislavery host he was a name, an embodied motto, a figurehead of fanaticism.[73]

It is more than a mere quibble to consider Elkins' charge. The abolitionists are now being looked to as a model for successful agitation. Those who are seeking to copy the model must be sure they understand it. To the extent that Elkins claims abolitionists worked outside of institutions, he clouds the picture and misleads the copiers. The way abolitionists used the courts is one example that undermines the charge.

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[72] Willie Lee Rose, *Abolitionists in South Carolina,* in THE ANTI-SLAVERY VANGARD: NEW ESSAYS ON THE ABOLITIONISTS 191 (M. Duberman, ed. 1965).

[73] BARNES, *supra* note 46, at 175.