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CHAPTER 6

Habeas Corpus and the New Abolitionism

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Ever since G. W. F. Hegel focused theoretical attention on the membership rules of political societies and suggested they required a principle of birth and rejected the social contract theorists' fictional if not strategic consensualism, scholars have debated the legitimacy of birth as the paradigmatic rule for membership and penalties for presence in a sovereign territory without this or permission from those who have it. Disputants about these rules tend to find themselves in one of three camps: The first follows the Hegelian view arguing that membership should be based on birth, and at least seem given or natural, from the Latin root *nasci*, meaning birth.¹ Opposing this view in a second camp are individualist or anti-intergenerational arguments that individuals should not receive, and governments not provide, political or economic privileges based solely on birth.² In a moment of libertarian clarity, the *Wall Street Journal* in 1984 published an editorial advocating amending the US Constitution to add five words: "There shall be open borders."³

Finally, a third, mainstream, so-called liberal,⁴ position is that clear membership rules, including but not limited to those based on birth, must be in place to ensure the integrity of the democratic nation-state and that such communities should provide generously to foreigners, first by providing access to refugees and second by providing a path some may navigate to citizenship or at least residency.⁵ As in *States without Nations*, I use the phrase "so-called liberal" because a political community established through the phenomenology of birth and not consent is not liberal. When birth paradigmatically defines membership, nativist impulses follow. An example of this position is crystallized in a statement by New York City Queens borough councilwoman Ann Pfoser Darby in March 2017: "I've been around immigrants my whole life—I was on the front lines of helping immigrants—but I have to draw the line between those who are legal and those who are not."⁶ Scholars writing from this consensus perspective largely avoid discussion of three problems the birthright default poses, leaving aside those of fairness in distributing prizes from the "birthright lottery."⁷

First, the default to birth and not express consent for initiating membership, as explained by John Locke, removes the basis for insisting on government accountability to “the people.” Tacit consent, including residence or simply using roads and bridges, obligates obedience to a sovereign, but “makes not a Man a member of that Society. Nothing can make any Man so, but his actual entering into it by positive Engagement and Express Promise and Compact.”⁸ When a king lacks a community that has provided the monarchy express consent, he lacks political authority. If the king nonetheless asserts sovereignty, say, as Charles II or James I, then he rules as a despot and thus the society is in the state of nature.⁹

Second, the default of birth and not express consent for membership means the creation of intergenerational attachments that assuage anxieties about mortality along the lines described, and endorsed, by Hegel, but that also lead to the episodic virulent nativism and nationalism associated with the taxonomies of Schmittian existential friends and enemies, as well as exclusion and removal, that defy rational discourse much less solutions.¹⁰

The third problem, and the focus of this essay, is the failure of those who endorse birthright membership, and who flinch from open borders, to engage with the ugly side of enforcement mechanisms required by the exclusions they implicitly recognize, if not defend. Precisely because Seyla Benhabib’s work emblemizes commitments held by those who disdain strong endorsements of the nation favored by scholars such as David Miller and Greg Jusdanis, I focus on the political significance of her failure to endorse open borders and, reciprocally, the abolition of deportation.¹¹ Benhabib helpfully draws on Kant to highlight two political questions raised by sovereign borders. The first concerns the rights of hospitality: what are the human rights of visitors? The second address the rights of membership: “While the prerogative of states to stipulate some criteria of incorporation cannot be rejected, we have to ask: which are those incorporation practices that would be impermissible from a moral standpoint and which are those practices that are morally indifferent—that is to say, neutral from the moral point of view?”¹² Benhabib argues for a *porous* and not *open* border, and for allowing current governments to control membership: “I have pleaded for first-admittance rights for refugees and asylum seekers but have accepted the right of democracies to regulate the transition from first admission to full membership.”¹³ Her claims are about the moral or human rights that political institutions ought to recognize, but Benhabib has nothing to say to Queens councilwoman Darby, who, unpersuaded, would like to deport undocumented migrants and actually would defer to a majority of similarly positioned citizens who favor birthright as the paradigmatic rule of membership. The difference between Benhabib’s position and that of Hegel is that Benhabib only allows for birthright citizenship, while Hegel requires this. In the language of Benhabib, Darby has a right as a member of the US democratic majority

to require birthright citizenship and to refuse to recognize other membership criteria.

The problem with the third position is that the questions about the heuristics for defining membership are political, not moral, and demand a critical inquiry into the conventions on which they are uniformly established, that is, by birth, either to certain parents or in a particular territory, as opposed to abstract conjectures independent of the persistent commitments to fantasies of diachronic belonging over synchronic imaginations, identifications, and commitments.¹⁴ That is, whether membership is based on birthright or other criteria that produce the populations able to distinguish “us” and “them” and to produce the benign or harmful border and membership policies responsive to these comes from political and not moral decisions, as do all principles and judgments that implicate power, a point in keeping with a Nietzschean skepticism that “morality” ever obtains the universal perspective its claims imply. Presumably Benhabib would flinch from allowing a majority to decide on whom to bestow the status “slave” based on birthright; and yet no such “moral” line is drawn for deportations based on birthright citizenship or its approximations, including the tautology of “legal residents.” Discouraging the deportation of legal residents is analogous to disfavoring the enslavement of “free blacks.” The policies endorsed by the latter would help many blacks, but would not abolish slavery. Indeed, Benhabib explicitly states that she does not want open borders. If not, then she is responsible for those who enter without permission and become *de facto* long-term residents who lack rights and who thus may be deported. It is thus worth noting this mainstream camp is using their moral intuitions to recapitulate public attitudes. For decades, well over two-thirds of the US public, including 59 percent of Republicans in 2016, have supported a path to legalization for undocumented residents who meet certain criteria.¹⁵ At the same time, 63 percent of Republicans favor building a wall so that entrance will be controlled by a sovereign authority. By failing to question a society’s prerogative to rely on birthright membership as the paradigmatic membership rule for constituting the group that will regulate future membership, Benhabib and others disregard how the status distinctions on which they rely for their analyses are every bit as flawed as investigations into the possibilities for morally acceptable versions of patriarchy or slavery, whose conventions also rely on the authority of those creating a status to unilaterally and unaccountably define the conditions of those occupying these subject positions.

The Hegelian or nativist stance, on the one hand, and the libertarian position, on the other, both offer a logical consistency absent in the position held by so-called liberals, which seems best characterized as a confused and banal pragmatism.¹⁶ The muddled consensus of the so-called liberals appears to be embraced for reasons of the theorists’ own sentimental attachments to the nation-state and its intergenerational communities as well as the lack of will to attack such

irrational sentiments when they are so widely held by others. The disavowal of the libertarian position often conveys a fear that any radical change to such a scheme would appear impractical and utopian.

The irony is that in the name of ad hoc moral reasoning, so-called liberals actually lack any principled argument to defeat those of anti-immigrant activists such as Councilwoman Darby. Benhabib's position has principles that might persuade some citizens not to endorse Darby's harsh responses in all cases. But if borders are legitimately enforceable by sovereign governments, then nativists are right to challenge those on the left who, like Benhabib, prioritize some residents over others and are silent when those excluded cut the line and either entered when they would never have legal authority for this or in front of those who were going through the legal channels for their permission to enter. In light of the tremendous distance between the prevailing policies and the libertarian and anti-intergenerational rejection of birthright citizenship, this essay sketches out parallels with the tensions in the early nineteenth-century anti-slavery and abolitionist communities and provides some suggestions as to how this present moment may nudge the large group of so-called liberals committed to marginal improvements in the current toxic immigration and deportation policies to commit to the principled abolition of birthright citizenship and to further demand citizenship based on residence in the context of a world with open borders, along the lines of state residence acquired in the federated United States of America.¹⁷

The analysis here extends an argument begun elsewhere about the historical, legal, and political similarities between slavery and nativist exclusions to advance a specific claim about the political and legal similarities between the response to the 1850 Fugitive Act and the response to the post-1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). In the 1830s to 1840s, slave owners in the South were livid about the efficacy of the Underground Railroad.¹⁸ There had been a law that since 1793 provided a legal mechanism for the return of escaped slaves, but its enforcement in the North had become the exception.¹⁹ In an effort to discourage southern states from seceding, Congress in 1850 amended the 1793 Fugitive Act to allow privately hired slave catchers or US marshals to arrest, confine, and transport escaped slaves with no judicial oversight.²⁰

The 1850 law incensed abolitionists, including civil rights attorneys and journalists who highlighted the new law's infringements on due process rights. The legal-political story of how the abolitionists responded to the 1850 law offers some important lessons for US communities responding to increased enforcement of IIRIRA in 1996. As a matter of policy, immigration law enforcement, like the Fugitive Slave Act, has been the prerogative of the federal government. That is, the federal government had clear policies requiring any individual who was not born in the United States to seek permission before entering, residing, or

working in its sovereign territory and for enforcing this with deportation.²¹ The enforcement of these policies ebbed and flowed.²² During the Clinton administration, Congress passed three laws sharply increasing grounds for deportation and the infrastructure for enforcing these, as well as limiting the discretion of the immigration officers to allow individuals to remain and the ability to appeal administrative findings in the federal courts (1994 Crime Act, IIRIRA of 1996, and the Antiterrorism and Effective Death Penalty Act of 1996). As a result, deportations increased from fifty-five thousand in 1995 to nearly half a million in 2012.²³ At the same time, a number of cities and states proclaimed themselves a “sanctuary” from federal deportation law and offered at least a show of political resistance.²⁴ Does the reaction against the heightened enforcement of fugitive slave laws in the 1850s, including the Civil War and the post-Civil War amendments to the US Constitution responsive to this, offer lessons for the political and legal struggles unfolding under the Trump administration?

The question is motivated by apparent parallels between the increased organization of local resistance to the enforcement of slavery in the North, culminating in the election of Abraham Lincoln, and the increase in local resistance to federal immigration and deportation policy. The slave owners were aggrieved the Fugitive Slave Act was not being enforced. Likewise, contemporary nativists who made up the “white backlash” mobilized to more aggressively enforce the 1996 law threatened by business elites and the Obama administration.²⁵ Both time frames held a national referendum on these respective differences about law enforcement. In 1860, the abolitionists prevailed and Lincoln was elected. In 2016, the antinativists lost. This essay suggests that just as the increased enforcement of the existing federal fugitive slave law in the 1850s pushed those who disfavored slavery and defended escaped slaves into a more radical position of active resistance, including arresting US marshals and private agents capturing fugitive slaves in the northern states, the 1996 law and its increased proper as well as unlawful implementation during the Trump administration may also push people into seeing the inherent tension between the rule of law and deportation law in practice, which is largely irregular and illegal. Politically, the law also increased the political mobilization to abolish slavery altogether. A comparison of these laws, judicial rulings, and political reactions to the 1850 law with those in the wake of the 1996 IIRIRA and now Trump’s new enforcement efforts may highlight the costs and benefits of deference to birthright citizenship and help crystallize for those on the fence about free movement, but appalled by deportation practices, the urgency of supporting free movement and abolishing birthright citizenship.

To explore the parallels, the essay begins by discussing some of the jurisprudence around the mistreatment of slaves in the 1830s and 1840s. The next section establishes parallels between the efforts by local and state governments in the 1850s to not only resist but actually arrest federal agents enforcing the

Fugitive Act and the resistance efforts by state attorneys general and mayors today. Finally, expanding on these parallels, the last section draws on lessons from the 1850s to suggest ways that states and local law enforcement officers, including local prosecutors, might charge and arrest federal agents for violating laws against kidnapping and false imprisonment.

1820s to 1840s: The Rights of Slaves

Slaves under US federal and state law, like undocumented residents, occupied a world of legal paradoxes. The law gave life-and-death power over slaves to their owners. Insofar as individuals had property rights to their slaves, the government seemingly could no more intercede to prevent the annihilation of slaves as it could to prevent the destruction of one's chattel. At the same time, prosecutors did on occasion prosecute slave owners for abuse. In *State v. Hale* (1823), a white man appealed his conviction for "inhuman battery and assault of a slave": "The person assaulted is a slave, who is not protected by the criminal law of the State; but that, as the property of an individual, the owner, may be redressed by a civil action."²⁶ The majority of the North Carolina Supreme Court rejected this assertion: "Mitigated as slavery is by the humanity of our laws, the refinement of manners, and by public opinion, which revolts at every instance of cruelty toward them, it would be an anomaly in the system of police which affects them, if the offence stated in the verdict were not indictable." That said, the judges wanted it known that their finding of unlawful abuse was cognizant of abuse that the law required they tolerate: "At the same time it is undeniable that such offence, must be considered with a view to the actual condition of society, and the difference between a white man and a slave, securing the first from injury and insult, and the other from needless violence and outrage." Violence toward slaves may be allowed that would never be tolerated in relations among free citizens.

The majority rationalized the punishment of the white perpetrator by analogizing the protection of slaves to the common law's protection of animals against cruelty. This decision was among a series that produced the well-known *Mann* case a few years later, finding that slavery as a civil institution protected from criminal prosecution a man who had been convicted of shooting a rented slave, and noted that such legal protection was a symptom of the institution's depravity:

That there may be particular instances of cruelty and deliberate barbarity, where, in conscience the law might properly interfere, is most probable. The difficulty is to determine, where a Court may properly begin. . . . The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of

God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master, which the slave would be constantly stimulated by his own passions, or the instigation of others to give; or the consequent wrath of the master, prompting him to bloody vengeance, upon the turbulent traitor—a vengeance generally practised with impunity by reason of its privacy. The Court therefore disclaims the power of changing the relation, in which these parts of our people stand to each other.²⁷

Judge Ruffin's argument remained within the paradigm of slavery and stated its logical corollaries, that is, allowing murder. But this is not to say he was insensitive to the larger context.

Indeed Ruffin alluded to pragmatic constraints on slavery's abolition, along the lines of those today who might be concerned about the impracticality of legalizing free movement, and who thus countenance the deportation regime now in place until the numbers of people from poor countries have substantially decreased. "The same causes are operating, and will continue to operate with increased action, until the disparity in numbers between the whites and blacks, shall have rendered the latter in no degree dangerous to the former, when the policy now existing may be further relaxed." Just as contemporary jurists might voice despair over the individual consequences of their decisions for immigrants unprotected or harmed by US law, but who would feel the dearth of institutional authority to press for different outcomes, Judge Ruffin stuck to his understanding of the rule of law, while stressing the educational implications of its outcome: "The result, greatly to be desired, may be much more rationally expected from the events above alluded to, and now in progress, than from any rash expositions of abstract truths, by a Judiciary tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil, by means still more wicked and appalling than even that evil" (*Mann* at 263). Ruffin voiced a hope that slavery might be abolished, but placed more faith in the course of a history unfolding enlightened by his insights, but not his orders.

In another North Carolina case, *State v. Negro Will, Slave James S. Battle* (1835), a jury failed to convict Will of the murder of Richard Baxter.²⁸ Out of pique, Baxter had shot a twelve-inch hole in Will's back and was chasing him with murderous intent when Will managed to confront Baxter and shoot him instead. The opinion explained Baxter had no legal grounds for shooting Will. Will's status as a slave deprived him of a claim of self-defense, but the judge ruled nonetheless that Baxter's death was manslaughter and not a homicide. Note that in this rendition the barbarian is the white slave owner, Baxter: "The Courts of the country should foster the enlightened benevolence of the age, and interpret the powers which one class of the people claim over another, in conformity, not with the spirit which tolerates the barbarian who is guilty of savage cruelty, but

with that which heaps upon him the frowns and execrations of the community.” Nonetheless, the court affirms slavery’s legality and distinguishes the rights of an apprentice against physical abuse from the absence of such rights for a legal slave, which explains why the court convicted Will of manslaughter and did not release him on a claim of self-defense.

The Rule of Law on the Battlefield of Habeas Corpus

The compromises in slave-owning states over criminal indictments in the context of punishing slaves gave way to a much more radical response to the efforts to enforce slavery in the North, especially through the use of habeas corpus, whose mobilization dramatized legal showdowns between state and local authorities, from the Jacksonian era until the election of Abraham Lincoln. In *Prigg v. Pennsylvania* (1842) the Supreme Court upheld the constitutionality of the 1793 Fugitive Slave Act, including broad prerogatives for private agents, but it still allowed state governments to prosecute slave owners or their agents for kidnapping and to issue habeas orders on behalf of captured individuals who insisted they were not fugitive slaves.²⁹ Slave owners could seize people with no due process, but if evidence of error could be procured, those capturing the slaves could be criminally charged with kidnapping. Moreover, the decision imposed no positive obligation on states to assist in the return of slaves, and several northern states repealed laws to assist the return of escaped slaves.³⁰

Closer consideration of the fight between pro- and antislavery forces over the line between the civil action of seizing fugitives and the criminal prosecution of kidnapping is suggestive of how local communities today might prosecute errant federal immigration law enforcement agents, especially those who hold people with no probable cause or who detain and deport US citizens.³¹ Justin Wert notes, “National party coalitions . . . weighed in on habeas, arguing that the use of habeas to frustrate the recovery of fugitive slaves violated federal law and numerous constitutional provisions, and more generally risked the dissolution of the Union.”³² The 1833 Habeas Act was to protect federal tax collectors from arrest by the states. However, it was in fact mobilized “by slaveholders to recover their fugitive slaves . . . to remove from state to federal courts cases in which federal marshals were arrested by state authorities for enforcing the fugitive slave law provisions of the Compromise of 1850.”³³ This was in response to the fact that states were using their own, parallel, state habeas powers and courts “to thwart federal fugitive slave legislation and protect their free black populations from kidnapping.”³⁴

The case that has the most relevance for contemporary political struggles and especially state-federal disputes over undocumented residents and deportations is *Ableman v. Booth* (1859). The case came about after a slave named

Joshua Glover escaped in 1850 from the control of slave owner Benammi (in some documents spelled “Benjamin”) Garland, who came from Missouri to Wisconsin to reclaim his property.³⁵ In 1852, Garland located Glover working in Racine. Garland procured a warrant from the federal marshal for Glover’s arrest. The marshal and Garland then went to Glover’s cabin, seized him, and brought him to a Milwaukee jail.

The capture and jailing of local resident Glover under the Fugitive Slave Act upset the local, abolitionist newspaper editor Sherman Booth, who publicized Glover’s captivity as a kidnapping and enlisted local civil rights attorneys in filing a habeas claim in the county court to demand specific evidence be produced and a process followed by which Glover might be released to Garland’s custody. This is the same practice that had not been followed for the many free blacks effectively kidnapped on the word of a white slave catcher alone. The Milwaukee attorneys prevailed and the County Court of Milwaukee issued the writ of habeas corpus. Booth organized a commission to investigate the circumstances of the capture and the use of the local jail for holding Glover, with a focus on charging the US marshal with kidnapping. Meanwhile, a mob assembled and Glover was freed and fled to Canada.

Booth was held responsible for Glover’s escape and arrested by US marshal Ableman and charged with violating the Fugitive Slave Act. A few weeks later, the Wisconsin Supreme Court declared the Fugitive Act’s absence of due process protections unconstitutional and ordered Booth’s release. The fifty-nine-page decision reviewed a number of statutory and constitutional defects in Booth’s arrest. First, “the said act of congress under which said complaint was made, punishes the aiding, etc., in the escape of ‘persons held to service or labor under the laws,’ etc., and not aiding the escape of ‘property,’ for which reason said warrant is defective in substance and form.”³⁶ Second, the judge points out that the “warrant, by virtue of which the petitioner [Booth] was held, was not issued by a federal judge or court, but by a commissioner of the United States.”³⁷ The judge further points out that because the penalty is confinement, it is a “penal statute, and must be construed strictly. It is in restraint of freedom, and therefore every presumption arising under it must be in favor of liberty.”³⁸ Third, and most importantly, the state judge asserts authority to find unconstitutional on the basis of the Wisconsin state constitution an act imposed by the federal government: “[It] is equally his duty [of the state officer] to interpose a resistance, to the extent of his power, to every assumption of power on the part of the general government, which is not expressly granted or necessarily implied in the federal constitution.”³⁹ We clearly see state rights arguments invoked by the northern states in this time frame on behalf of abolishing slavery: “Increase of influence and patronage on the part of the federal government naturally leads to consolidation, consolidation to despotism and ultimate anarchy, dissolution and all its attendant evils.”⁴⁰

Having established his jurisdiction over the matter at hand, Judge Smith makes a substantive point that is extremely relevant to the enforcement of the country's deportation laws: the lack of a trial by a jury to establish the identity and status of the person in the custody of the slave agent, either the US marshal or a private contractor, violates the country's due process clause: "An essential requisite is due process to bring the party into court. It is in accordance with the first principles of natural law."⁴¹ But the Fugitive Act had no protections and no process, simply the affirmation of the statements by the alleged agent about the condition and identity of the person named as the fugitive from labor.

Judge Smith also notes the political context informing the passage of the 1850 Fugitive Act that undergirds his rejection of it. Several states had passed their own laws to facilitate the capture of escaped slaves. The fact that they later rescinded them was evidence that states had the prerogative to determine the custody procedures of those in their borders.⁴²

Judge Smith writes: "Can that be said to be by due process of law which is without process altogether? Here the status or condition of the person is instantly changed in his absence, without process, without notice, without opportunity, to meet or examine the witnesses against him, or rebut their testimony. A record is made, which is conclusive against him, 'in any state or territory in which he may be found.'⁴³ The capture was legally a civil matter—it was in service of executing a civil contract—and thus could not trigger the Sixth Amendment right to a trial by a jury, which is reserved for criminal accusations. On May 27, 1854, Judge Smith found in the Fifth Amendment's right to due process a right to a jury trial to review the claim that the person being captured was indeed an escaped slave.⁴⁴ Absent this due process, Smith found the 1850 act unconstitutional and granted the release of the editor Sherman Booth, who was held under it. On June 9, 1854, the federal marshal Stephen Ableman appealed the decision to the full Wisconsin Supreme Court, and on July 19 the court affirmed the findings of Judge Smith and imposed court costs on the federal marshal.⁴⁵

At that point, Ableman sought an indictment of Booth in federal court, and on January 4, 1855, a grand jury for the federal district court in Wisconsin indicted Booth.⁴⁶ A jury was impaneled and found him guilty on January 13. On January 23, Booth was sentenced to a month in prison and a thousand-dollar fine. On January 27, Booth challenged the sentence as unconstitutional and the district court judge issued two habeas orders to bring Booth to court, one to Ableman and another to the Milwaukee sheriff whose jail was holding Booth. On January 30, the marshal told the district court he did not have custody of Booth and the sheriff produced Booth before the state court. On February 5, 1855, the state court held that Booth's imprisonment was not legal and that he "was by that judgment, forever discharged from that imprisonment and restraint, and he was accordingly set at liberty."⁴⁷ On April 21, the US attorney general brought a writ of error to the attention of the chief justice of the US Supreme Court and

demanded that it find the Wisconsin state court lacked jurisdiction. On “the first Monday of December, 1855” the chief justice of the US Supreme Court issued the writ of error. Four years later, in its 1859 decision, the US Supreme Court noted that the Wisconsin State Supreme Court disregarded its order and “had directed the clerk to make no return to the writ of error, and to enter no order upon the journals or records of the court concerning the same.”⁴⁸ The US Supreme Court, in a unanimous decision authored by Chief Justice Taney, found that the federal district court and not the state court had jurisdiction and that the Fugitive Act was constitutional, and ordered the reversal of the Wisconsin State Supreme Court decisions and its assertion of habeas authority in these cases.⁴⁹

The matter did not end there. The Wisconsin State Supreme Court, in an act of judicial nullification, disregarded the US Supreme Court, thus inciting the outrage of the southern states, including South Carolina, which on hearing of the decision reissued a threat of its secession. This decision was but one of a number of flash points that culminated in both the election of Abraham Lincoln and the outbreak of the Civil War.

Relevance for Deportation Law and Politics

The echoes of the struggles in the mid-nineteenth century between state and federal authorities are present to some extent in judicial orders granting temporary restraining orders and injunctive relief against the Department of Homeland Security’s ban on immigrants from Muslim countries. These claims were filed by state attorneys general of California, Washington, and Hawai’i, and endorsed by amicus briefs from those of other states as well, including a notable overlap with the states that resisted the Fugitive Act.⁵⁰ However, the courts granting this relief were federal, not state, courts, and the main lessons from Sherman Booth’s experience bear further elucidation as to new forms of resistance that may unfold in keeping with the legal analyses in the Fugitive Act cases.

First, the concern about the prerogatives to execute an order without judicial review stated in a language of due process by Judge Smith should resonate among those disturbed by the brutality occasioned in the implementation of deportation laws. Earlier cases have stated that because deportation is a civil and criminal action, individuals in deportation proceedings do not have the Sixth Amendment right to a trial by jury, a right to a court-appointed attorney if they cannot afford one, or a right to avoid adverse inferences if they fail to answer questions during an immigration hearing, and they are held in facilities that have no regulations.⁵¹ Smith recognized this as well for Joshua Glover and other so-called fugitives from labor, but still found in the Fifth Amendment a requirement for some due process, much more than is presently provided for those accused of violating US immigration laws. Smith in fact is brilliant and prescient

for our own context when he asks, "What would be thought by the people of this country, should congress pass a law to carry into effect that clause of the fourth article in regard to citizenship and declare pains and penalties against any state functionary who should fail to comply?"⁵² Smith is pointing out the application to "persons" escaping forced labor (US Constitution, Article IV) could not be applied to "citizens" because the absence of due process would mean a number of people not evading labor contracts would be taken into custody as though they were, as was the memoirist Solomon Northrup, who in 1841 was kidnapped and forced into slavery for twelve years.⁵³ However, just as the lack of due process protections meant hundreds of free-born blacks in northern states were treated as Northrup, tens of thousands of US citizens in recent years have been detained and even deported.⁵⁴ Indeed, deportation regulations,⁵⁵ by defining the US citizen in Immigration and Customs Enforcement (ICE) custody as "an alien . . . claiming U.S. citizenship," have not just crossed but entirely destroyed the line on which those in ICE custody might rely for their legal rights.⁵⁶

Smith's reliance on a close reading of the laws and insistence on adhering to the separation of powers is also relevant for contemporary legal and political arguments to abolish deportation and speaks to the broader importance of laws for political causes opposing injustice. Although one might construe Smith as an especially clever jurist, and thus someone who might be able to find good arguments in any corpus of legal writings, there is a reason for those who oppose injustice to follow Smith's approach and pay special attention to the plain text of statutes. The laws of the United States seem to reflect some constitutional reluctance, so to speak, when it comes to putting especially egregious doctrines into writing. Not only does the US Constitution omit the word "slavery," but the oft-called Fugitive Slave Act is actually titled the Fugitive Act, and suggests a similar aversion to admit its purpose. Deportation laws and regulations are similarly vague or incoherent, and thus admit many possibilities for preventing their implementation as well.⁵⁷ For this reason, in recent years a large number of civil rights challenges to removal orders have procured constitutional victories on behalf of those in deportation proceedings and even criminal convictions of local police for civil rights violations in the enforcement of immigration laws.⁵⁸

As the exegesis above shows, in a number of places Smith is able to parse the law so that the enforcement measures before him can be construed as inconsistent with it. For instance, he points out the Fugitive Act refers to "persons" in forced labor, in contrast with the slave owner's warrant for his "property." And Smith draws on historical documents from the Constitutional Convention indicating that those drafting the document rejected the inclusion of language that would require states to enforce this section. Likewise, Smith points out that, in keeping with the act, the warrant is issued by a "commission" and not a judicial officer, which thereby offends due process. Similarly, deportation orders are issued by the agencies descendant from a "commission" on immigration, now by

ICE agents and sometimes reviewed by the Department of Justice's Executive Office of Immigration Review, another government office that used to be in the same commission. The purpose of the Constitution's separation of powers as well as habeas corpus is to ensure that a single officer cannot deprive an individual of liberty and the opportunity to prove her innocence or, in the cases of a free person or citizen, her legal identity and status under fugitive laws and deportation laws, respectively. Indeed "most southern states increasingly determined that jury trials, not habeas proceedings, were the most appropriate mechanisms for decisions involving fundamental rights of property."⁵⁹ If a jury trial is required to make findings about potentially escaped slaves, then it seems fair to wonder why this would not be demanded for due process in those defending themselves against being removed from their residence and even deprived of their US citizenship.

Finally, Smith's insistence on the legal authority of states independent of the federal government has implications for those in state and local jurisdictions who find these laws or their enforcement either unconstitutional or against state or other federal statutes. Not only can these state and local jurisdictions file motions for relief against their enforcement, but they may in the future use their authority to arrest federal agents who, acting under color of law, are so egregious in their violations that their actions overcome their qualified immunities and render them vulnerable to criminal charges of kidnapping and false imprisonment.

At present, sanctuary cities are simply refusing to honor ICE detainees for those released from local jails, as Peter Mancina discusses further in chapter 16.⁶⁰ But the precedents referenced above suggest a much broader scope of state authority. Just as the Fugitive Acts of 1793 and 1850 had so few due process requirements that they incentivized false arrests, the deportation laws are so poorly written and administered with so little oversight that the vast majority of cases reveal a number of violations, ranging from the failure to abide by the statutes themselves to egregious violations and outright abuse and even torture. For the most part these abuses have received either no affirmative legal attention or attention only in civil proceedings, including the recent case under Colorado law brought against the GEO Group in Aurora and heard in federal court, providing class certification to those in GEO's custody over the past decade and forced to work for no pay or for a dollar per day.⁶¹ However, many of the abuses are criminal in nature, including forced labor, and, as the slavery-era precedents cited above suggest, could be remedied by state or local prosecutors bringing criminal charges against federal agents. At present there have been federal charges against local law enforcement, such as the prosecution by the DOJ of Sheriff Joe Arpaio, but local authorities striving to uphold the rule of law could at any point respond to the burgeoning outrage against deportations and file criminal charges against ICE agents and the private prison firms and guards they use. Many of the places where these violations occur are in jurisdictions with Democratic governors or mayors. Because detention under immigration laws is civil and not criminal,

there is no similar legal latitude for treating those in custody in any way that is punitive. The prohibition against penal protocols for people in custody under immigration law is largely ignored. But just as prosecutors used the law to protect slaves from cruelty, they might also use the laws to protect those in ICE custody from assault. Nothing prevents California governor Jerry Brown from responding to complaints about abuse by GEO's private prison guards in Adelanto by using everything from state laws that rescind private security firm or guard authorization if a licensee "committed assault, battery, or kidnapping, or used force or violence on any person, without proper justification" to arresting the warden and assistant warden on criminal charges of violating state criminal laws prohibiting this.⁶² In fact, insofar as some states allow private citizens to assume the role of the state attorney general and file criminal indictments, courts in New Jersey, following the precedents that afforded them habeas authority in the 1850s, for instance, could hear criminal complaints brought by private citizens against CCA in Elizabeth, which is notorious for its abuse of those it holds. Instead of filing grievances for verbal and physical abuse or unlawful arrest, private citizens could bring criminal charges to the attention of local judges and, using the federal Freedom of Information Act and, with the consent of the individuals harmed, the Privacy Act to bring criminal charges against the perpetrators.⁶³ In fact, just as a New Jersey citizen prompted a judge to consider a criminal indictment against Governor Chris Christie, such measures could be pursued even against the New Jersey county jails that break the law and abuse those in wings of county jails rented out to ICE.⁶⁴

The movement to abolish slavery made use of the courts for legal, analytical, and physical support of the Underground Railroad. In these precedents, the movement to abolish birthright citizenship and deportation has not only useful tools at its disposal but also an institutional framework for further mobilizing the intuitions of those such as Benhabib, who, like those facing the long history of slavery, have a problem visualizing the demise of oppressive institutions whose longevity often becomes interpreted as inevitability and necessity. For most of the history of the world, slavery, along with patriarchy, seemed so inherent to social order that to question its persistence would be akin to questioning the necessity of gravity. Although laws have scripted practices in one time frame that later seem hideous and even preposterous, there is, as Martin Luther King Jr. proclaimed, an arc to history that bends to justice, and the public conversations that legal reasoning in this country demands suggest that over the long term these writings in motion, available to all, clarify the law's weaknesses and empower those attentive to its injustice.⁶⁵

NOTES

1. G. F. W. Hegel, *The Philosophy of Right*, trans. T. M. Knox (1821; Oxford: Oxford University Press, 1967); Gregory Jusdanis, *The Necessary Nation* (Princeton, N.J.:

Princeton University Press, 2001); David Miller, *On Nationality* (Oxford: Oxford University Press, 1995).

2. Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013); Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, Mass.: Harvard University Press, 2009); Hillel Steiner, "Libertarianism and the Transnational Migration of People," in *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, ed. Barry Brian and Robert E. Godin (University Park: Pennsylvania State University Press, 1992), 87–94; Jacqueline Stevens, *States without Nations: Citizenship for Mortals* (New York: Columbia University Press, 2009).

3. Editorial Board, "In Praise of Huddled Masses," *Wall Street Journal*, July 3, 1984.

4. For an elaboration on the difference between "so-called liberal" and "liberal" heuristics of membership, see Stevens, *States without Nations*, especially chap. 1, "The Persistence and Harms of Birthright Citizenship in So-Called Liberal Theory and Countries."

5. Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999); Peter Schuck and Rogers Smith, *Citizens without Consent: Illegal Aliens in the American Polity* (New Haven, Conn.: Yale University Press, 1985).

6. Corey Kilgannon, "Bike Lanes for Immigrants? A Queens Official's View Draws Fire," *New York Times*, March 31, 2017.

7. Shachar, *Birthright Lottery*.

8. John Locke, *Two Treatises of Government* (1690; Cambridge: Cambridge University Press, 1988), 2:122.

9. Jacqueline Stevens, "The Reasonableness of John Locke's Majority: Property Rights, Consent, and Resistance in the Second Treatise," *Political Theory* 24 (1996): 423–63, esp. 438–39.

10. Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 2008).

11. Miller, *On Nationality*. For a discussion of similar tensions in the work of other so-called liberals, including Rawls and Walzer, see Stevens, *States without Nations*, esp. 4–9 and 32–35. Carens, *Ethics of Immigration*, suggests birthright is a starting point for membership and allows for open borders for residence. However, a political community established through the phenomenology of birth and not consent is not liberal. When birth paradigmatically defines membership, nativist impulses follow; these may be opposed through rational discourse, but such interventions will not be effective.

12. Benhabib, *Rights of Others*, 43.

13. Benhabib, *Rights of Others*, 220.

14. Jacqueline Stevens, *Reproducing the State* (Princeton, N.J.: Princeton University Press, 1999).

15. Bradley Jones, "Americans' Views of Immigrants Marked by Widening Partisan, Generational Divides" (Pew Research Center, April 15, 2016).

16. I say a "banal pragmatism" because it is advanced in a language of liberalism and deontological fairness that is in effect simply smuggling in a rationale for the status quo and not a defense of a principled pragmatism.

17. Benhabib comes close this when she states that "the ideal of territorial autochthony must be abandoned" (*Rights of Others*, 216), but it is unclear why her moral magic wand,

which has vanquished the practice of denying refuge to asylum seekers and requiring a path to citizenship for residents, can eliminate birthright citizenship only as an “ideal” and not a practice of democracies, before which the wand falls limp.

18. Stevens, *States without Nations*.
19. “The law of 1793 was in fact but little, if any more than organizing the state authorities for the accomplishment of the constitutional duties devolved upon them. . . . It was practically nothing more than the states themselves carrying out the constitutional compact.” *In Re: Booth*, 3 Wisconsin 1, 49 (1854).
20. Lysander Spooner, *A Defence for Fugitive Slaves: Against the Acts of Congress of February 12, 1793 and September 18, 1850* (Boston: Bela Marsh, 1850).
21. Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, Mass.: Harvard University Press, 2007).
22. Joseph Nevins, *Operation Gatekeeper and Beyond: The War on “Illegals” and the Remaking of the U.S.-Mexico Boundary* (New York: Routledge, 2010).
23. John Simanski and Lesley Sapp, “Immigration Enforcement Actions: 2012” (annual report, Department of Homeland Security, 2013).
24. Corrie Bilke, “Divided We Stand, United We Fall,” *Indiana Law Review* 42 (2009): 165–94.
25. Marisa Abrajano and Zoltan Hajnal, *White Backlash: Immigration, Race, and American Politics* (Princeton, N.J.: Princeton University Press, 2016).
26. *State v. Hale*, 9 N.C. 523 (1823). These cases seem to have been brought to the attention of prosecutors by owners who had rented out their slaves to other white southerners.
27. *State v. John Mann*, 13 N.C. 263 (1830).
28. *State v. Negro Will, Slave James S. Battle*, 18 N.C. (1 Dev. & Bat.) 121 (1835).
29. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).
30. Justin Wert, *Habeas Corpus in America: The Politics of Individual Rights* (Lawrence: University Press of Kansas, 2011), 57.
31. Dallin Oaks, “Habeas Corpus in the States, 1776–1865,” *University of Chicago Law Review* 32 (1965): 243–88; Stevens, *States without Nations*.
32. Wert, *Habeas Corpus in America*, 28.
33. Wert, *Habeas Corpus in America*, 46.
34. Wert, *Habeas Corpus in America*, 46.
35. The narrative here relies on Wert, *In Re: Booth*, 3 Wis. 1 (1854), and *Ableman v. Booth*, 62 U.S. 506 (1859).
36. *In Re: Booth*, 9.
37. *In Re: Booth*, 11.
38. *In Re: Booth*, 27.
39. *In Re: Booth*, 31.
40. *In Re: Booth*, 34.
41. *In Re: Booth*, 59.
42. *In Re: Booth*, 62.
43. *In Re: Booth*, 59, quoting from the 1850 Fugitive Act.
44. For an insightful constitutional and political theoretical argument on why those in deportation proceedings should have a right to a jury trial, see Daniel Morales, “It’s Time for an Immigration Jury,” *Northwestern University Law Review* 108 (2013): 36–53.
45. *Ableman v. Booth*, 62 U.S. 506 (1859).

46. This narrative is drawn from the opening pages of *Booth*, 509.
47. *Booth*, 511.
48. *Booth*, 512, quoting from the affidavit of the federal district attorney charged with executing the writ.
49. *Booth*, 526.
50. Eric Schneiderman, “Coalition of 18 Attorneys General File Amicus Brief Supporting Washington State’s Lawsuit Against President Trump’s Executive Order” (press release, New York Attorney General’s Office, February 17, 2017).
51. Morales, “It’s Time for an Immigration Jury”; Daniel Kanstroom, “Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases,” *Harvard Law Review* 113 (1995): 1889–1935; Mark Dow, *American Gulag* (Berkeley: University of California Press, 2005); Daniel Kanstroom, *Aftermath: Deportation Law and the New American Diaspora* (Oxford: Oxford University Press, 2012).
52. *In Re: Booth*, 48–49.
53. Solomon Northrup, *Twelve Years a Slave* (New York: Darby & Miller, 1855).
54. Jacqueline Stevens, “U.S. Government Detaining and Deporting U.S. Citizens as Aliens,” *Virginia Journal of Social Policy and Law* 18 (2011): 606–720.
55. See 8 C.F.R. § 235.3(b)(5).
56. Benjamin Lawrance and Jacqueline Stevens, *Citizenship in Question: Evidentiary Birthright and Statelessness* (Durham, N.C.: Duke University Press, 2017).
57. Kanstroom, “Deportation, Social Control, and Punishment”; Nancy Morawetz, “Citizenship and the Courts,” *University of Chicago Legal Forum* 200 (2007): 447–70; Stevens, “U.S. Government Detaining”; Jacqueline Stevens, “One Dollar per Day: The Slaving Wages of Immigration Jail, 1943 to Present,” *Georgetown Immigration Law Journal* 32 (2015): 391–500.
58. Dave Altamari, “East Haven Officers Convicted of Civil Rights Violations,” *Hartford Courant*, October 21, 2013.
59. Wert, *Habeas Corpus in America*, 52.
60. At the same time, state and local governments asserting “sanctuary” or other immigrant-friendly policies are all cooperating with ICE and turning over the names of those in custody under criminal law. See Lawrance and Stevens, *Citizenship in Question*.
61. *Alejandro Menocal et al. v. GEO Group, Inc.*, case no. 1:14-cv-02887, US District Court, Colorado, <http://deportationresearchclinic.org/DRC-INS-ICE-FacilityContracts-Reports.html>.
62. California Penal Code, Chapter 11.5, Private Security Services (7580–7588.8).
63. American Civil Liberties Union (ACLU), “ACLU of New Jersey Provides UN Rapporteur with Report on Immigration Detention That Outlines Concerns of Abuse” (press release, May 15, 2015); American Friends Service Committee, “How For-Profit Prison Corporations Shape Detention & Deportation Policies” (press release, December 7, 2015).
64. Abott Koloff, “Groups Say Hudson County Immigration Detention Site not Giving Adequate Medical Care,” *Record*, May 11, 2016; Brian Thompson, “Judge Allows Official Misconduct Complaint Against Christie to Go Forward,” *NBC New York*, October 16, 2016.
65. For more on the new possibilities enabled by technology for using litigation to avoid injustice, see Jacqueline Stevens, “Forensic Intelligence and the Deportation Research Clinic: Toward a New Paradigm,” *Perspectives on Politics* 13 (2015): 722–38.