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## JOHN BROWN'S TRIAL

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If asked to name the most important legal decisions in United States history, most Americans would quickly identify several fairly recent high visibility Supreme Court cases such as *Brown v. Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade*. Lawyers would contribute a few more, probably including *Marbury v. Madison*, *Dred Scott v. Sandford*, and *Gideon v. Wainright* (or perhaps *Robinson v. California*). Constitutional specialists might add *Lochner v. New York* or *Erie v. Tompkins*. Whatever the list, it is fairly certain that virtually all of the cases would be chosen because of the content of the rulings.

For that very reason, it would be harder to reach consensus regarding the most important trial in United States history. Most so-called trials of the century—from the Lindbergh kidnapping to O.J. Simpson—gain notoriety primarily because of media attention or inherent drama. Their actual impact rarely extends beyond the parties involved.

Sometimes, however, the very process of trying a case can focus attention on potentially transformative issues. Therefore, an argument could be made for the significance of trials such as the Scottsboro case, the Scopes “Monkey” Trial, the Conspiracy Seven, or the first Rodney

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King case, each of which had repercussions outside the courtroom.

It may well be that the most significant, or perhaps we should say consequential, trial in United States history was the prosecution of John Brown following his raid on the federal arsenal at Harpers Ferry, Virginia. By one measure that choice appears unconventional, because it was a trial in name only—the outcome never having been in doubt. But the trial of John Brown, in some ways more than the Harpers Ferry raid itself, did much to hasten, and perhaps even make inevitable, the onset of the Civil War.

In the immediate aftermath of the Harpers Ferry attack, John Brown was roundly reviled across the United States. Southerners, of course, had every reason to despise the man who had threatened to incite “servile insurrection,” their deepest fear. But Northern reaction was not dissimilar.<sup>1</sup> Brown was criticized as insane; the raid was characterized as a calamity and a wild scheme.<sup>2</sup> One free state newspaper remarked that the “insane effort to accomplish what none but a madman would attempt, has resulted as any one but a madman would have foreseen, in death, to all who were engaged in it,”<sup>3</sup> and another put it more bluntly—“the quicker they hang him and get him out of the way the better.”<sup>4</sup> Even the abolitionist *Liberator* referred to Brown’s efforts as “misguided, wild, and apparently insane.”<sup>5</sup>

Brown’s trial, however, caused a dramatic shift in Northern public opinion, summoning far more sympathy for his cause than he had been able to generate through force of arms. His unfair treatment (or at least the perception of it) by the Virginia court, coupled with his stirring oratory in his own defense, transformed the madman into a hero.

As the trial proceeded, Brown came to be seen in the North as a noble champion of abolition, forced to take desperate action by the wicked slaveholders. And the change in Northern opinion had a corresponding impact in the South. If Brown—murderer and fiend—was a hero in the North, then what chance could there be of national reconciliation? For many in the South, the conclusion followed inexorably. The only alternative to reconciliation was secession. To be sure, John Brown’s trial did not create that fault line. But, as we shall see, it made the fracture unmistakably clear.

How interesting, then, that the trial itself was characterized by jurisdictional blunders, professional misconduct, conflicts of interest,

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1. OSWALD GARRISON VILLARD, JOHN BROWN 473 (1911) (quoting *Freedom's Champion*, Atchison City, Kansas).

2. *Id.*

3. *Id.*

4. STEPHEN B. OATES, TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN 310 (1970).

5. VILLARD, *supra* note 1, at 473.

and outright lying.



In order to understand and appreciate the trial, it will be necessary to look fairly closely at the events leading up to the attack on Harpers Ferry. Unsurprisingly, the conventional view—that John Brown was a wild-eyed fanatic pursuing a suicidal mission—is highly misleading. In fact, Brown had a long history of activism and had already become something of a national figure because of his uncompromising and increasingly violent opposition to slavery. Indeed, the relationship between Brown and the “abolition establishment” was a constant subtext at his trial.

Here is a typical description of John Brown's raid, taken from a leading high school history textbook:

Unlike Lincoln, John Brown was prepared to act decisively against slavery. On October 16, 1859, he and a band of 22 men attacked a federal arsenal at Harpers Ferry, Virginia (now West Virginia). He hoped that the action might provoke a general uprising of slaves throughout the Upper South or at least provide the arms by which slaves could make their way to freedom. Although he seized the arsenal, federal troops soon overcame him. Nearly half his men were killed, including two sons. Brown himself was captured, tried, and hanged for treason. So ended a lifetime of failures.<sup>6</sup>

This account tracks the generally accepted narrative, but it is only moderately accurate and it is certainly incomplete. The actual story of John Brown's invasion of Virginia is far more complex, far more radical, and far more necessary to an understanding of his trial and the events that followed.



We can begin with the statement that Brown's life, before Harpers Ferry, had been characterized by failure. This claim is frequently used to marginalize Brown, portraying him as a ne'er-do-well or crank who was driven by frustration to an act of supreme folly. Following this

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6. GARY NASH & JULIE ROY JEFFREY, *THE AMERICAN PEOPLE: CREATING A NATION AND A SOCIETY* 496 (1998). The textbook goes on to say, “In death, however, Brown was not a failure. His daring if foolhardy raid, and his impressively dignified behavior during his trial and speedy execution, unleashed powerful passions, further widening the gap between North and South.” *Id.*

characterization, the Harpers Ferry raid becomes the act of a madman, occurring outside of any larger context or social movement. When we turn to the trial, however, we shall see that it was all about context—the only true dispute was over the relationship between the raid on Harpers Ferry and the forces that were tearing the nation apart. John Brown was hardly an unknown player in these events, nor had he failed in his efforts to intensify the consequences of the struggle against slavery.

While it is true that Brown's business affairs had been marked by lawsuits and bankruptcy, his career as a militant abolitionist had been considerably more successful. As a participant in the underground railroad, he had gained the attention, and in many cases the respect, of most of the most prominent abolitionists of the day, including Frederick Douglass, Harriet Tubman, Wendell Phillips, William Lloyd Garrison, and Gerrit Smith.<sup>7</sup>

He rose to national prominence in "Bleeding Kansas," where he had been one of the most visible commanders of the Free Soil militias.<sup>8</sup> Captain Brown won the battle of "Black Jack" against overwhelming odds, in what has since been called the first pitched confrontation in the Civil War.<sup>9</sup> Later, he led the successful defense of Osawatimie against the pro-slavery border ruffians from Missouri.<sup>10</sup> Brown also demonstrated a cruel and heartless side which he sought to justify through claims of necessity, as when he ordered the retaliatory murder of five pro-slavery settlers near Pottawatomie Creek.<sup>11</sup>

It was also from Kansas that John Brown embarked upon his first invasion of slave territory. On December 20, 1858, Brown organized a force of about seventeen armed men for a raid into Missouri.<sup>12</sup> Divided into two bands, Brown's company attacked the homes of three slave-owners, killing one man who resisted, and liberating eleven slaves.<sup>13</sup> The freed slaves were brought back to Kansas, where they were hidden while plans were made to carry them to freedom in Canada.<sup>14</sup>

For many, especially in the South, Brown's first raid was viewed

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7. W.E.B. DUBOIS, JOHN BROWN 249 (Harriet Tubman), 241 (Frederick Douglass), 131 (Gerrit Smith) (1973); JULES ABELS, MAN ON FIRE: JOHN BROWN AND THE CAUSE OF LIBERTY 130 (1971) (Wendell Phillips and William Lloyd Garrison).

8. OATES, *supra* note 4, at 144-46.

9. ABELS, *supra* note 7, at 84. Brown's band of 15 men defeated a force of about 80 under the command of Captain Henry Clay Pate, who would later visit the condemned Brown in his prison cell—they did not reconcile. *Id.* at 144.

10. OATES, *supra* note 4, at 169-71.

11. ABELS, *supra* note 7, at 62-80; DUBOIS, *supra* note 7, at 157-62.

12. ABELS, *supra* note 7, at 216-19. The slaveholders did not distinguish between slaves and other sorts of property, and neither did Brown's raiders who proceeded to steal livestock, jewelry, provisions, clothing, and wagons. *Id.*

13. *Id.*

14. *Id.*

as a murderous outrage. The governor of Missouri offered a reward of \$3000 for his capture, to which President Buchanan (a pro-slavery Pennsylvanian) added \$250.<sup>15</sup> Sentiment ran against Brown even among Free State settlers in Kansas, who feared that they would all soon suffer retaliation by Missouri forces.<sup>16</sup> Nor was their fear ill-founded. In the words of one ruffian, armed and outspoken, "When a snake bites me, I don't go hunting for that particular snake, I kill the first snake I meet."<sup>17</sup>

To be sure, none of the condemnation discouraged Brown, or even much bothered him. His goal was to incite open warfare over slavery and armed provocation was to him an indispensable tactic.<sup>18</sup> He published a detailed account of the Missouri raid in a letter to the *New York Tribune* explaining and defending his actions to "forcibly restor[e]" the slaves "to their natural & inalienable rights."<sup>19</sup> For John Brown, there was no room for compromise.

Notwithstanding the price on his head, Brown's next move was one of brilliantly calculated provocation. With a few companions and twelve newly liberated slaves,<sup>20</sup> Brown began a very public wagon journey headed for Windsor, Ontario. Rather than move secretly at night, in the fashion of the Underground Railroad, Brown traveled boldly during the day, daring the authorities to attempt to stop him.<sup>21</sup> Facing down a pro-slavery posse at the Battle of the Spurs, Brown's party crossed into Nebraska, eluded another posse, and eventually made its way to Iowa.<sup>22</sup> Slowly, the freedom caravan proceeded north and east.<sup>23</sup> Making no attempt to conceal his identity or his plans, Brown stopped frequently to preach, address crowds, and meet with newspaper reporters and editors.<sup>24</sup> Switching to the railroad, they traveled on to Chicago where they received funds that had been raised by the Cook County Bar Association.<sup>25</sup> Then on to Detroit, again by rail, and finally by ferry into Canada, where the slaves became legally free on March 12, 1859.<sup>26</sup>

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15. *Id.* at 219. Buchanan, a Democrat, favored the admission of Kansas to the Union as a slave state. He defeated John Fremont, a free-soiler and the first Republican to run for president, in the 1856 election. ABELS, *supra* note 7, at 94-95.

16. *Id.* at 219-20.

17. *Id.* at 220.

18. OATES, *supra* note 4, at 260-63.

19. *Id.* at 263.

20. Brown had freed 11 slaves; one of the women soon thereafter gave birth to a daughter. ABELS, *supra* note 7, at 223.

21. *Id.* at 223-30.

22. *Id.* at 220.

23. *Id.* at 223-30.

24. *Id.* at 228-30.

25. ABELS, *supra* note 7, at 230.

26. OATES, *supra* note 4, at 266.

All across Iowa, Illinois, and Michigan, Brown's procession drew cheers and support, rallying abolitionists and opponents of the Fugitive Slave Law.<sup>27</sup> Not once was there an effort to interfere with his mission—the detective Allan Pinkerton even helped arrange the railroad car that took them from Chicago to Detroit.<sup>28</sup>

Far from a failure, Brown's liberation train was a stunning success, galvanizing Northern public opinion in opposition to slavery (or at least to the Fugitive Slave Act) and demonstrating that slaves could be freed by force. In an entirely different sense, he was a success in the South as well, where he was personally vilified as a murderous fiend. It must have heartened Brown to learn that his incursion into Missouri was perceived as a threat to the entire Southern way of life, sparking demands that slave-state governments "do something to protect our people."<sup>29</sup> That reaction—panic and outrage—was precisely the one he had hoped for.



Equally inaccurate is the received description of the Harpers Ferry raid itself, which again makes it seem as though Brown's actions were an isolated outrage: "[John Brown] and a band of 22 men attacked a federal arsenal at Harpers Ferry . . . . He hoped that the action might provoke a general uprising of slaves throughout the Upper South or at least provide the arms by which slaves could make their way to freedom."<sup>30</sup>

While it is true that Brown's military force consisted only of twenty-two men (including two of his sons who were killed in the battle), he was actually supported, financed, and armed by a much larger group—or conspiracy, if you prefer—of abolitionists.<sup>31</sup> Following his triumphant exodus from Missouri, Brown had launched a recruiting and fund-raising tour through the abolitionist centers in the Northeast, where he succeeded in drawing much support to his violent cause.<sup>32</sup>

Though he did not reveal the specifics of his plan, Brown made it clear to his backers that he intended to liberate slaves through force of arms.<sup>33</sup> Of course, that necessitated an invasion of the South. Brown's

27. *Id.* at 265.

28. *Id.*

29. *Id.* at 262.

30. NASH & JEFFREY, *supra* note 6, at 496.

31. W.E.B. DuBois estimated that the number who took some part in the raid was actually closer to 50, including "[s]eventeen Negroes, reported as probably killed, [who] are wholly unknown, and those slaves who helped and escaped [who] are also unknown." DUBOIS, *supra* note 7, at 279-80.

32. OATES, *supra* note 4, at 268-69.

33. *Id.* at 268-69; Paul Finkelman, *Preface: John Brown and His Raid*, in *HIS SOUL GOES*

most important benefactors became known as the Secret Six—Rev. Thomas Wentworth Higginson, Dr. Samuel Gridley Howe, Rev. Theodore Parker, Franklin D. Sanborn, Gerrit Smith, and George Luther Sterns—pillars of mainstream abolitionism who provided him with encouragement and money.<sup>34</sup>

Brown used the funding from the Secret Six to arm and provision his men and to rent a farmhouse in nearby Maryland—about seven miles from Harpers Ferry—that he used as a staging ground.<sup>35</sup> He also commissioned the production of 1000 steel-tipped pikes that he intended to distribute among freed slaves.<sup>36</sup> In the process, he conducted an indiscreet and incriminating correspondence with members of the Secret Six, much of which he unforgivably brought with him (and made no effort to destroy or conceal) when he descended upon the South.<sup>37</sup>

Hero or villain, John Brown was certainly tied closely to leaders of the abolitionist movement, many of whom had at least implicit knowledge of his plans.<sup>38</sup> No one who encouraged or contributed money to John Brown—following his bloody career in Bleeding Kansas—could have expected that anything other than violence would follow.<sup>39</sup> As we shall see, it was Brown's trial that made it possible for his covert supporters to begin a more public call for the forcible eradication of slavery. In turn, the evident shift of sentiment in the North went a long way toward confirming Southern opinion that reconciliation within the Union would be impossible.

Nor was Brown's goal so straightforward as an attempt to "provoke a general uprising of slaves throughout the Upper South or at least provide the arms by which slaves could make their way to free-

MARCHING ON: RESPONSES TO JOHN BROWN AND THE HARPERS FERRY RAID 6 (Paul Finkelman, ed. 1995).

34. OTTO J. SCOTT, *THE SECRET SIX: JOHN BROWN AND THE ABOLITIONIST MOVEMENT* 290-305 (1979).

35. DUBOIS, *supra* note 7, at 277; OATES, *supra* note 4, at 275-76.

36. OATES, *supra* note 4, at 272. Brown's weaponry also included 15 boxes of rifles and revolvers, financed by backers from Massachusetts. *Id.* at 275-76.

37. SCOTT, *supra* note 34, at 290-305. In fact, Brown actually alerted his captors to the existence of a cache of papers, some of which implicated his northern associates, including Frederick Douglass. THOMAS FLEMING, *THE TRIAL OF JOHN BROWN* (1967) (unpaginated); OATES, *supra* note 4, at 286.

38. OATES, *supra* note 4, at 273. "It has been estimated that at least 80 people knew about Brown's projected invasion and that many others—Senators Seward and Wilson, for example—had reason to expect that Brown was planning some incendiary move against the South, although they did not know what for certain." *Id.* at 284.

39. According to W.E.B. DuBois, "Brown revealed his whole plan to no one," but did make his general intentions clear. DuBois quotes one supporter saying "[o]f course, we had almost precise knowledge of his methods, but all of us perhaps did not know just the locality selected by him, or, if knowing, did not comprehend the resources and surroundings." DUBOIS, *supra* note 7, at 262.

dom."<sup>40</sup> Rather, his "well-matured plan"<sup>41</sup> was considerably more ambitious and entirely more subversive.

John Brown's design was nothing less than the establishment of a free and separate "provisional government" within the borders of Virginia, eventually to be expanded throughout the South. To that end, he had drafted a constitution, naming himself as president and commander-in-chief.<sup>42</sup>

The development of Brown's constitution had actually begun in the spring of 1858 when Brown drafted the document at the home of Frederick Douglass.<sup>43</sup> Next, he convened a conference in Chatham, Ontario, where he first revealed his proposal to establish an enclave of freedom within the Southern states.<sup>44</sup> Described by W.E.B. DuBois as "a frame of government . . . simplified and adapted to a moving band of guerrillas,"<sup>45</sup> Brown's constitution was to be the framework for a series of "permanent fortified refuges for organized bands of determined armed men."<sup>46</sup>

The Harpers Ferry raid was meant to be the first step toward establishing armed enclaves from which militant abolitionists and freed slaves could wage guerrilla warfare against the Southern states. As W.E.B. DuBois put it, they would establish their bases in the mountains "thence to descend at intervals to release slaves."<sup>47</sup> Then,

[h]e would continue sending armed parties to liberate more slaves, confiscate arms and provisions, take hostages, and spread terror throughout Virginia. Those slaves who did not want to fight would be funneled up the Alleghenies . . . and across the North into Canada . . . . Meanwhile, driving down Virginia into Tennessee and Alabama, Brown's guerrilla army would raid more federal arsenals and strike at plantations on the plains to the east and west; from then on the revolution would spread spontaneously all through the Deep South.<sup>48</sup>

It was a bold and outrageous strategy, which John Brown virtually repudiated when he came to trial.

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40. NASH & JEFFREY, *supra* note 6, at 496.

41. OATES, *supra* note 4, at 312; FLEMING, *supra* note 37, (unpaginated).

42. FLEMING, *supra* note 37, (unpaginated).

43. RICHARD B. MORRIS, FAIR TRIAL 263 (1953).

44. *Id.*

45. DUBOIS, *supra* note 7, at 259.

46. *Id.* at 274. It was later discovered that Brown brought with him a number of "small, elaborate maps of seven Southern states with crosses drawn on those counties where slaves overwhelmingly outnumbered white people." OATES, *supra* note 4, at 321.

47. DUBOIS, *supra* note 7 at 276.

48. OATES, *supra* note 4, at 278.



For all of Brown's preparation, the raid itself lasted little more than a day. The small band had spent the summer at a rented farmhouse on the Maryland side of the Potomac River, about seven miles from Harpers Ferry, gathering weapons and hoping for reinforcements.<sup>49</sup> Finally, on Sunday evening, October 16, 1859, Captain Brown gave the order and the company began its march toward destiny.<sup>50</sup>

Crossing the Shenandoah bridge into Virginia, they quickly subdued a night watchman and almost effortlessly took control of the federal arsenal and armory buildings.<sup>51</sup> Taking prisoner a few unfortunate citizens who happened to be on the street that night, they also seized the nearby rifle works, where weapons and ammunition were manufactured for the federal government.<sup>52</sup> Brown's next step was to send a raiding party into the countryside, with directions to take hostages and liberate slaves.<sup>53</sup> Their primary target was Colonel Lewis W. Washington, a great-grandnephew of the first president.<sup>54</sup> Colonel Washington was reputed to own a ceremonial sword that had been presented to his forebearer by Frederick the Great of Prussia.<sup>55</sup> Along with the slaves, Brown wanted that sword as an emblem for his own new republic.<sup>56</sup>

Washington was captured without incident, as were two other slaveowners who were brought back to Brown's headquarters along with ten temporarily emancipated slaves. Eventually, Brown assembled about thirty hostages and succeeded in cutting the telegraph lines out of Harpers Ferry.<sup>57</sup> For a while, all went according to plan.

Brown's commandos had constructed a barricade across a railroad bridge into Harpers Ferry. Shortly after 1:00 a.m. on October 17, a Baltimore & Ohio train arrived at the blockade. In cruel irony, the railroad employee on duty at the time was a freedman named Shephard Hayward. When he went out to investigate the situation, he was shot by one of Brown's sentinels. He died fourteen hours later, becoming the first fatality of that battle of John Brown's war against slavery.<sup>58</sup>

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49. *Id.* at 275-76.

50. *Id.* at 288.

51. *Id.* at 290.

52. *Id.*

53. OATES, *supra* note 4, at 291.

54. *Id.*

55. *Id.*

56. *Id.* at 292.

57. ABELS, *supra* note 7, at 278.

58. *Id.* at 279-80. In yet a further irony, the Sons and Daughters of the Confederacy later erected a plaque to Hayward, claiming that he "exemplif[ied] the character and faithfulness of thousands of Negroes, who under many temptations throughout subsequent years of war so

The rifle shots, of course, alerted the town that something was afoot, thus dooming the revolt within hours of its inception.

Soon the alarm was spread. A slave uprising at the arsenal! An abolitionist invasion! Church bells tolled, calling men to arms. A rider hastened to nearby Charlestown, from whence telegraph messages were quickly sent to Richmond and Baltimore.<sup>59</sup> By Monday morning the raiders were surrounded by local citizens and militiamen, who poured fire down on their positions. Dangerfield Newby, a freedman who had joined the raid in hopes of liberating his wife and children, was the first of Brown's men to fall.<sup>60</sup> It was clear that the insurrection had miscarried and even flight was rapidly becoming an impossibility.

Brown twice attempted to negotiate a cease fire that would trade his hostages for the escape of his followers.<sup>61</sup> But despite their display of a white flag, his emissaries were all either gunned down or taken prisoner.<sup>62</sup> Nonetheless, Brown remained fairly solicitous of his own prisoners' welfare, at one point ordering breakfast for them from a local tavern.<sup>63</sup> As the day wore on, more of Brown's men were shot, including his sons Watson and Oliver.<sup>64</sup> Brown consolidated his forces in an engine house, the most defensible building in the armory complex, and released all but nine of his hostages.<sup>65</sup> At nightfall Brown made a last-ditch attempt at negotiation, sending out a note that offered to release his prisoners if he and his men were allowed to "cross the Potomac bridge" without pursuit.<sup>66</sup>

Only darkness and rain prevented the assembled militias from storming the engine-house and completing the rout.<sup>67</sup> At about 11 p.m., Colonel Robert E. Lee arrived in Harpers Ferry, commanding a company of United States Marines.<sup>68</sup> Plans were quickly made for an as-

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conducted themselves that no stain was left upon a record which is the peculiar heritage of the American people." *Id.*

59. *Id.* at 280.

60. The enraged townspeople proceeded to mutilate Newby's corpse, as they later did with several of the other slain raiders. *Id.* at 288, OATES, *supra* note 4, at 294.

61. ABELS, *supra* note 7, at 292.

62. *Id.* at 289-90.

63. *Id.* at 284.

64. *Id.* at 291, 298.

65. *Id.* at 283.

66. Brown's precise terms were strikingly unrealistic, given his desperate position:

In consideration of all my men, whether living or dead, or wounded, being soon safely in and delivered up to me at this point with all their arms and ammunition, we will then take our prisoners and cross the Potomac bridge a little beyond which we will set them at liberty; after which we can negotiate about the Government property as may be best. Also we require the delivery of our horse and harness at the hotel.

ABELS, *supra* note 7, at 292.

67. *Id.* at 293.

68. *Id.*

sault the next morning, when daylight would make it possible for Lee's men to distinguish between the Virginia hostages and the abolitionist invaders.<sup>69</sup>

By Tuesday morning only five of Brown's raiders remained standing.<sup>70</sup> Seven had fled, five of whom would escape completely, and the others were either dead or gravely wounded.<sup>71</sup> No doubt expecting a frontal assault, it must have heartened Brown to see a detachment of Marines approach under a flag of truce.<sup>72</sup> The massive doors to the engine house had been secured with stout ropes, but Brown pushed them open slightly in order to be able to speak with the leader of the troop, J.E.B. Stuart.<sup>73</sup>

Stuart presented the only terms that had been authorized by Colonel Lee.<sup>74</sup> Brown was to surrender immediately and unconditionally to the federal authorities, in which case he and his men would be "kept in safety to await the orders of the President."<sup>75</sup> Brown countered with a futile demand for safe passage out of Virginia, at which point Stuart jumped aside and signaled his men to storm the engine house.<sup>76</sup> As the troops rushed in, Brown's party fired their rifles, but they were soon overcome.<sup>77</sup> Brown himself was slashed with a saber and beaten to the ground; the extent of his injuries would become a contentious issue during his trial.<sup>78</sup>

Lee's Marines killed two of the raiders, capturing John Brown and four others, including Watson Brown who had been mortally wounded the previous day.<sup>79</sup> Watson was briefly interrogated by one of his captors:

"What brought you here?" he was asked.

"Duty, sir."

"Is it then your idea of duty to shoot men down upon their own hearth-stones for defending their rights?" asked the Virginian.

"I am dying," said Watson Brown. "I cannot discuss the question. I did my duty as I saw it."<sup>80</sup>

69. *Id.* at 294.

70. OATES, *supra* note 4, at 302.

71. *Id.*

72. *Id.* at 300.

73. ABELS, *supra* note 7, at 296.

74. *Id.* at 294.

75. *Id.* at 295.

76. *Id.*

77. *Id.* at 296.

78. ABELS, *supra* note 7, at 296.

79. OATES, *supra* note 4, at 302.

80. *Id.* at 302.



What would be done with the defeated John Brown? Though he had been captured on federal property and seized by federal troops, it soon became evident that his fate would be determined by the Commonwealth of Virginia. Governor Henry Wise rushed to Harpers Ferry in order to lead the interrogation of Brown and personally take control of the prisoner.<sup>81</sup>

Wise soon confronted the most critical decision of his career. How were the invaders to be punished? There were three possibilities. The governor could declare martial law and bring Brown and his men to trial before a drumhead military court, no doubt resulting in an immediate execution.<sup>82</sup> Alternatively, he could turn his captives over to federal authorities—the crimes had occurred on federal property and they had been taken into custody by federal troops—insisting that the national government fulfill its responsibilities to the citizens of Virginia. Wise, however, embraced the third option—indictment and trial in a Virginia court.<sup>83</sup> This decision ultimately proved disastrous, though at the time it must have seemed like a political masterstroke.

By rejecting the path of summary execution, Wise was able to stake a claim for Southern justice.<sup>84</sup> Even in the face of a monstrous invasion, the governor could demonstrate that Virginia was determined to observe “judicial decencies” while protecting Brown from very real threats of lynching.<sup>85</sup> At the same time, his rejection of federal jurisdiction struck a blow for state sovereignty by establishing the primacy of Virginia’s courts.<sup>86</sup> At a time when the authority, indeed the cohesion, of the federal government was very much in doubt, Wise was obviously determined “to enhance the prestige of Virginia at the expense of Washington.”<sup>87</sup> Finally, a state trial gave Wise control over the framing of the indictment, which clearly reflected a political agenda:

The Jurors of the Commonwealth of Virginia . . . do present that John Brown, Aaron C. Stevens . . . and Edwin Coppoc, white men, and Shields Green and John Copland, free negroes,

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81. *Id.* at 302-03.

82. FLEMING, *supra* note 37, (unpaginated).

83. OATES, *supra* note 4, at 307.

84. *Id.* at 308.

85. *Id.* at 307-08.

86. ROBERT PENN WARREN, JOHN BROWN: THE MAKING OF A MARTYR 393 (1929).

87. OATES, *supra* note 4, at 308. As Oswald Garrison Villard put it, “Wise had no desire to have it said that the State of Virginia was forced to hide behind the skirts of the Federal Government, and to obtain its help to punish those who violated her soil and killed her citizens.” VILLARD, *supra* note 1, at 477.

together with divers other evil-minded and traitorous persons to the Jurors unknown, not having the fear of God before their eyes, but being moved and seduced by the false and malignant counsel of other evil and traitorous persons and the instigations of the devil, did, severally . . . within the jurisdiction of this Court, with other confederates to the Jurors unknown, feloniously and traitorously make rebellion and levy war against the said Commonwealth of Virginia . . . .<sup>88</sup>

Brown was to be tried not only for murder, but more importantly for committing treason and waging war against Virginia on behalf of other "evil minded and traitorous" Northern abolitionists.<sup>89</sup> If Brown's raid was intended as a blow against the South, the prosecution would be a counterstrike against the anti-slavery movement in the North. As Stephen A. Douglas would later rephrase the strategy, the attack on Harpers Ferry was the "natural, logical, inevitable result of the doctrines and teachings of the Republican party."<sup>90</sup>

In brief, Governor Wise's decision to charge treason in a Commonwealth court transformed John Brown's trial into something very much like a referendum on the unity of the nation. In the North, every misstep in the trial, every dereliction by the prosecution, would be seen as a reflection on the poor quality of Southern justice.<sup>91</sup> Prosecution in federal court would have carried with it at least a veneer of regional neutrality,<sup>92</sup> but the Virginia proceeding made it clear that the case against John Brown was also intended as a defense of slavery itself. While Northerners might well have supported swift trial and speedy execution of a brutal fanatic, they were not ready to condemn the abolitionist cause—especially once John Brown began to take advantage of his bloody pulpit.<sup>93</sup>

88. FLEMING, *supra* note 37, (unpaginated).

89. The indictment contained two other counts charging premeditated murder and inciting servile rebellion. Similar indictments were presented against the other captured raiders. VILLARD, *supra* note 1, at 488.

90. OATES, *supra* note 4, at 310.

91. Paul Finkelman, *Manufacturing Martyrdom: The Antislavery Response to John Brown's Raid*, in *HIS SOUL GOES MARCHING ON: RESPONSES TO JOHN BROWN AND THE HARPERS FERRY RAID* 43 (Paul Finkelman ed., 1995).

92. Following Brown's conviction, Wise decided to turn another of the raiders, Aaron Stevens, over to the federal authorities. Wise hoped that a federal trial would allow the indictment and arrest of northern co-conspirators who were beyond the reach of Virginia courts. That decision was later rescinded, however, and Stevens also was tried and condemned in Charleston. VILLARD, *supra* note 1, at 477-78; OATES, *supra* note 4, at 328-29.

93. Governor Wise himself later expressed regret that he had not ordered Brown's summary execution, as would have been possible under a declaration of martial law. VILLARD, *supra* note 1, at 503.



The trial was convened in nearby Charlestown, the county seat, Judge Richard Parker presiding.<sup>94</sup> The prosecution was led by Andrew Hunter,<sup>95</sup> specially appointed by Governor Wise, assisted by Charles Harding of Jefferson County.<sup>96</sup> Two local attorneys were appointed to defend John Brown, Lawson Botts and Thomas C. Green, the mayor of Charlestown.<sup>97</sup> Consistent with the governor's instructions, the prosecutors were determined to follow the proper forms of adjudication, albeit as rapidly as possible. Brown was ready both to exploit and disdain them:

Virginians, I did not ask for any quarter at the time I was taken. I did not ask to have my life spared. The Governor of the State of Virginia tendered me his assurance that I should have a fair trial; but, under no circumstances whatever will I be able to have a fair trial. If you seek my blood, you can have it at any moment, without this mockery of a trial . . . . There are mitigating circumstances that I would urge in our favor, if a fair trial is to be allowed us: but if we are to be forced with a mere form—a trial for execution—you might spare yourselves that trouble.<sup>98</sup>

Of course, John Brown had no interest in hastening his own execution. Indeed, his primary trial strategy was to delay it at every turn. It was not that he feared death—he wrote to his supporters that “to seal my testimony for God and humanity with my blood will do vastly more toward advancing the cause I have earnestly endeavored to promote, than all I have done in my life before”<sup>99</sup>—but rather that he intended to fight for every possible moment in which he could proclaim his cause to the watching public.

Moreover, Brown's persistent efforts to stall the case played neatly against the prosecution's insistence on proceeding at “double quick time.”<sup>100</sup> The trial commenced less than a week following the raid, beginning on the very day that the indictment was returned,<sup>101</sup> and the prosecution was adamant that it reach its conclusion without interrup-

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94. *Id.* at 479.

95. *Id.* at 442.

96. *Id.* at 485.

97. The court had initially appointed a different lawyer, Charles J. Faulker. Mr. Faulker, however, had been one of the militiamen who “end[ed] the raid by force” and was therefore allowed to withdraw following the preliminary examination. *Id.* at 483.

98. VILLARD, *supra* note 1, at 487.

99. OATES, *supra* note 4, at 336.

100. *Id.* at 308.

101. MORRIS, *supra* note 43, at 257.

tion. Relying upon Virginia's speedy trial statute,<sup>102</sup> Judge Parker denied every request for a continuance, no matter what the stated reason.

Brown's first claim was that he was too badly injured to face immediate trial.<sup>103</sup> He had been stabbed and beaten when Stuart's brigade stormed the engine house.<sup>104</sup> Declaring that he was too weak from his wounds, Brown initially refused to leave his jail bed.<sup>105</sup> Judge Parker ordered that the prisoner be carried into court on a cot, from which Brown made his first request for a continuance:<sup>106</sup>

I do not intend to detain the court, but barely wish to say, as I have been promised a fair trial, that I am not now in circumstances that enable me to attend a trial, owing to the state of my health. I have a severe wound in the back, or rather in one kidney, which enfeebles me very much. But I am doing well, and I only ask for a very short delay of my trial, and I think I may be able to listen to it; and I merely ask this that, as the saying is 'the devil may have his dues,' no more. I wish to say further that my hearing is impaired and rendered indistinct in consequence of wounds I have about my head . . . I could not hear what the Court has said this morning . . . I do not presume to ask more than a very short delay, so that I may in some degree recover, and be able at least to listen to my trial, and hear what questions are asked of the citizens, and what their answers are. If that could be allowed me, I should be very much obliged.<sup>107</sup>

A court appointed doctor, however, advised the judge that Brown's injuries were not so serious as to impair his memory or his hearing, and the continuance was denied.<sup>108</sup>

Other continuances were sought throughout the trial, some based on Brown's repeated claims of ill health,<sup>109</sup> others on the ground that new counsel was about to arrive from the north.<sup>110</sup> The judge would

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102. "When an indictment is found against a person for felony, in a court wherein he may be tried, the accused, if in custody, shall, unless good cause be shown for a continuance, be arraigned and tried in the same term." FLEMING, *supra* note 37, (unpaginated) (quoting the Virginia statute). Such statutes are usually thought to be for the benefit of the accused, insuring that a defendant not be held indefinitely in custody awaiting trial, but that did not deter Judge Parker.

103. VILLARD, *supra* note 1, at 488.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 488-89.

108. VILLARD, *supra* note 1, at 489; OATES, *supra* note 4, at 309.

109. VILLARD, *supra* note 1, at 495. Hunter, the prosecutor, believed that Brown—the "crafty old fiend"—was feigning throughout. *Id.*

110. *Id.* at 492.

have none of it. “[T]he expectation of further counsel,” he ruled, “does not constitute a sufficient cause for delay since there is no certainty about their coming.”<sup>111</sup> And when two new attorneys actually did arrive, one from Washington and the other from Cleveland, the “inexorable judge” would not even allow them a few hours in which to study the indictment and prepare the defense,<sup>112</sup> insisting bluntly that “[t]he trial must go on.”<sup>113</sup>

The court succeeded in bringing the trial to a speedy conclusion, but only at the cost of engendering tremendous sympathy for John Brown. In the words of the Lawrence, Kansas *Republican*:

We defy an instance to be shown in a civilized community where a prisoner has been forced to trial for his life, when so disabled by sickness or ghastly wounds as to be unable even to sit up during the proceedings, and compelled to be carried to the judgment hall upon a litter . . . . Such a proceeding shames the name of justice, and only finds a congenial place amid the records of the bloody Inquisition.<sup>114</sup>

The Boston *Transcript* made the same observation:

Whatever may be his guilt or folly, a man convicted under such circumstances, and, especially, a man *executed* after such a trial, will be the most terrible fruit that slavery has ever borne, and will excite the execration of the whole civilized world.<sup>115</sup>

Since the outcome of the case was never in doubt—Virginia had the power and resolve to see Brown hang—sympathy is all that was truly at stake. Thus, every denied continuance brought John Brown closer to his ultimate goal, a consequence that he seems well to have understood, as the requests for delay persisted throughout the trial.



Brown’s appointed attorneys, Botts and Green, were capable members of the Charlestown bar. While no doubt appalled and angered by Brown’s acts, their defense of him was not perfunctory—an impressive accomplishment in an extraordinarily difficult situation.

For example, Botts and Green exercised all of their peremptory

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111. ABELS, *supra* note 7, at 323.

112. VILLARD, *supra* note 1, at 493.

113. MORRIS, *supra* note 43, at 286.

114. VILLARD, *supra* note 1, at 480.

115. *Id.* at 481 (emphasis in original).

challenges, excusing eight of the twenty-four proffered veniremen,<sup>116</sup> although the effort at finding dispassionate jurors in Jefferson County was surely an exercise in futility. Each of the twelve who were eventually seated swore that he could "try this case impartially from the evidence alone without reference to anything [he had] heard or seen of this transaction."<sup>117</sup> Of course, the promises of objectivity must have been transparent to everyone in the courtroom. Still, Botts and Green evidently did the best they could under the circumstances.

More debatable was counsel's decision not to seek a change of venue. The trial began scarcely a week after the outrage at Harpers Ferry, with both panic and fury still thick in the air. A biased jury was the least of Brown's fears, a lynch mob being an ever present possibility.<sup>118</sup> Of course, moving Brown to another county in Virginia would have had at best a minimal effect on the predisposition of the jury pool, while perhaps exposing him en route to an even greater risk of lynching. The Jefferson County jail, situated directly across the street from the courthouse, was probably the safest place for Brown in the entire Commonwealth.<sup>119</sup>

Botts and Green rightly concluded that an insanity plea was the only conceivable hope of saving Brown's life.<sup>120</sup> Apparently without consulting their client, they obtained a telegram from A.H. Lewis of Akron, Ohio, attesting to a history of insanity in Brown's family. Immediately after the jury was impaneled, Botts read the telegram aloud in open court.<sup>121</sup> According to Lewis,

Insanity is hereditary in [Brown's] family: His mother's sister died with it, and a daughter of that sister has been two years in a lunatic asylum. A son and daughter of his mother's brother have also been confined in the lunatic asylum, and another son of that brother is now insane and under close restraint. These facts can be conclusively proven by witnesses residing here, who will doubtless attend the trial if desired.<sup>122</sup>

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116. VILLARD, *supra* note 1, at 489; MORRIS, *supra* note 43, at 274.

117. ABELS, *supra* note 7, at 323.

118. VILLARD, *supra* note 1, at 488; DUBOIS, *supra* note 7, at 358.

119. Judge Parker made it clear that he intended to protect the prisoner, announcing in open court that a lynching would be "nothing else than murder, for which its perpetrators might themselves incur the extreme penalty of the law." VILLARD, *supra* note 1, at 488. Governor Wise later observed of the captured raiders that his troops had "escorted them to prison and placed around them such a force as to overawe Lynch-law." *Id.* at 503.

120. The Southern historian and writer Robert Penn Warren, perhaps the least sympathetic of all Brown's biographers, referred to insanity as the "one powerful defense." WARREN, *supra* note 86, at 401.

121. MORRIS, *supra* note 43, at 274.

122. OATES, *supra* note 4, at 324. Interestingly, neither DuBois nor Villard include the text of the telegram in their biographies of Brown, both referring to it only in passing. Villard devotes but a single sentence to the telegram, VILLARD, *supra* note 1, at 359, and DuBois disposes

There would be no opportunity to assess the effectiveness of the strategy. Brown was far more interested in making his point than in avoiding the noose, and he quickly recognized that a claim of insanity would undermine everything he stood for.<sup>123</sup> He repudiated the defense at once, rising from his cot for the first time during the trial:

I look upon [the insanity defense] as a miserable artifice and pretext of those who ought to take a different course [in regard] to me[,] if they took any at all, and I look at it with contempt more than otherwise. . . . [I]nsane persons, as far as my experience goes, have but little ability to judge of their own insanity; and, if I am insane, of course, I should think that I know more than all the rest of the world. But I do not think so. I am perfectly unconscious of insanity and I reject, so far as I am capable, any attempt to interfere with me on that score.<sup>124</sup>

Botts and Green acted well beyond their authority in raising the question of Brown's sanity, but there can be little doubt that their intentions were honorable (or at least sincere). It would have been far easier for them to have mounted a superficial defense, or none at all, while watching or even hastening the inevitable conviction. Instead, they employed what must have seemed to them the only viable strategy on Brown's behalf. True, they were more or less heedless of Brown's larger, political design for the trial, but it surely would have been well nigh impossible for two Virginia lawyers—both men would later serve in the Confederate army, Botts dying in the second Battle of Bull Run<sup>125</sup>—to have assisted him enthusiastically.<sup>126</sup> Even so, Botts, in his opening statement, while careful to avoid vouching for his client, was able to bring himself to argue that "it was due to the prisoner to state that he believed himself to be actuated by the highest and noblest feelings that ever coursed through a human breast."<sup>127</sup>

The conflict of interest was palpable, as the advocate was plainly torn between duty to his client and loyalty to his community. Perhaps

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of it in a dependent clause. DUBOIS, *supra* note 7, at 359. Perhaps the details recounted by Lewis give a bit too much credence to assertions of Brown's madness, which both Villard and DuBois otherwise reject.

123. Outside the courtroom, Frederick Douglass recognized that the use of violence against slavery could not be branded insane, even in suicidal circumstances. He insisted upon the rejection of "the charge of insanity against a man who has imitated the heroes of Lexington, Concord, and Bunker Hill." Finkelman, *supra* note 91, at 60.

124. ABELS, *supra* note 7, at 324.

125. VILLARD, *supra* note 1, at 485.

126. Green remarked, "I had not a disposition to undertake the defense, but accepted the duty imposed on me." MORRIS, *supra* note 43, at 285.

127. *Id.* at 276-77.

the best evaluation of the professionalism of Botts and Green came from one of the northern lawyers who eventually replaced them: "must say [that] their management of the case was as good for Brown as the circumstances of their position permitted."<sup>128</sup>



Notwithstanding the evident integrity of Botts and Green, John Brown repeatedly requested access to attorneys of his own choosing.<sup>129</sup> When the question of a lawyer first arose, Brown attempted to reject the appointment of local counsel.

I have sent for counsel. I did apply, through the advice of some persons here, to some persons whose names I do not now recollect, to act as counsel for me, and I have sent for other counsel, who have had no possible opportunity to see me. I wish for counsel if I am to have a trial; but if I am to have nothing but the mockery of a trial, as I have said, I do not care anything about counsel.<sup>130</sup>

Brown clearly understood that sympathetic lawyers would make it easier for him to manage his own defense, both as it was proffered in the courtroom and as it was presented to the public. In 1859, every common law jurisdiction prohibited criminal defendants from testifying under oath in their own defense.<sup>131</sup> Strange as it might seem to modern sensibilities, it was thought at the time that sworn testimony would constitute either an invitation to perjury or a violation of the privilege against self-incrimination.<sup>132</sup> Consequently, defendants such as Brown were wholly dependent on their attorneys if they wanted to be heard.

Seeking legal assistance from Judge Daniel Tilden of Cleveland and Judge Thomas Russell of Boston, both of whom also practiced law in accordance with the standards of the time, Brown made his needs clear. Without a lawyer committed to the cause, "neither the facts in our case can come before the world; nor can we have the benefit of such facts (as might be considered mitigating in the view of others)

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128. ABELS, *supra* note 7, at 327. Another agreed, saying, "The gentlemen who have defended Brown acted in an honorable and dignified manner in all respects." MORRIS, *supra* note 43, at 284-85.

129. MORRIS, *supra* note 43, at 271.

130. *Id.*

131. *Ferguson v. Georgia*, 365 U.S. 570, 577 (1961).

132. Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 CARDOZO L. REV. 821 (1997). See generally R.H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION, ITS ORIGINS AND DEVELOPMENT* (1997); John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825 (1999).

upon our trial."<sup>133</sup> Exquisitely sensitive to the importance of his public image, Brown added, "Do not send an ultra Abolitionist."<sup>134</sup>

In fact, he devised his own outline for the trial:

We gave to numerous prisoners perfect liberty.

*Get all their names.*

We allowed numerous other prisoners to visit their families to quiet their fears.

*Get all their names.*

We allowed the conductor to pass his train over the bridge with all his passengers. I myself crossing the bridge with him and assuring all the passengers of their perfect safety.

*Get that conductor's name and the names of the passengers, so far as may be.*

We treated all our prisoners with the utmost kindness and humanity.

*Get all their names, so far as may be.*

Our orders, from the first and throughout, were that no unarmed person should be injured under any circumstances whatever.

*Prove that by ALL the prisoners.*

We committed no destruction or waste of property.

*Prove that.*<sup>135</sup>

Brown's aim was not only to defeat the charge of murder—which he hoped to do by demonstrating that he had shown compassion rather than malice toward his captives, and by extension that he had no intention to murder anyone.<sup>136</sup> But that goal was subordinate to his larger purpose, which was to enhance the image of his entire endeavor by emphasizing its humanitarian, rather than military, objectives.<sup>137</sup> It would have been nearly impossible to engender sympathy in the North for a bloody invasion of peaceful Harpers Ferry (hence the need for a lawyer who was not an ultra-Abolitionist). A much stronger case, however, could be made for a tempered mission to rescue slaves in which no property was to be damaged and "no unarmed person should be injured under any circumstances whatever."<sup>138</sup> And there began the reinvention of John Brown.

Of course, the claim was false. Brown had no respect for Southern property or for the lives of slaveowners. He had proven as much with

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133. VILLARD, *supra* note 1, at 493.

134. *Id.*

135. VILLARD, *supra* note 1, at 490-91 (italics in original).

136. MORRIS, *supra* note 43, at 290.

137. *Id.*

138. ABELS, *supra* note 7, at 325.

his series of murders in Kansas and Missouri. In fact, he believed that he was completely justified in taking lives, as he had explained early in the raid to his second hostage, the watchman Daniel Whelan, "I came here from Kansas, and this is a slave state; I want to free all the negroes in this State; I have possession now of the United States armory, and if the citizens interfere with me I must only burn the town and have blood."<sup>139</sup>

True or otherwise, Brown's case could best be presented to the world with the assistance of cooperative counsel. While the trial began with Botts and Green at the defense table, they were eventually dismissed.<sup>140</sup>



One Northern lawyer did arrive near the beginning of Brown's trial.<sup>141</sup> In strictly professional terms, his conduct was far more questionable than anything done by Botts and Green.

George H. Hoyt was a neophyte lawyer from Athol, Massachusetts.<sup>142</sup> Only twenty-one years old, he appeared even younger.<sup>143</sup> Within days of the Harpers Ferry raid, Hoyt was retained by John Le Barnes, a Boston abolitionist, and sent directly to Charlestown, ostensibly to assist in Brown's defense.<sup>144</sup>

In reality, however, Hoyt was sent not as a lawyer but as an advance scout with directions to begin planning an escape attempt. Hoyt was instructed to send Le Barnes

an accurate and detailed account of the military situation at Charlestown, the number and distribution of troops, the location and defences of the jail, and nature of the approaches to the town and jail, the opportunities for a sudden attack and the means of retreat, with the location and situation of the room in which Brown is confined, and all other particulars that might enable friends to consult as to some plan of attempt at rescue.<sup>145</sup>

Both Judge Parker and prosecutor Hunter were skeptical of Hoyt. It seemed unlikely that an inexperienced youngster was the only lawyer in Massachusetts available to assist so famous an abolitionist as John

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139. VILLARD, *supra* note 1, at 430.

140. MORRIS, *supra* note 43, at 286.

141. *Id.*

142. OATES, *supra* note 4, at 316.

143. MORRIS, *supra* note 43, at 281.

144. *Id.*

145. VILLARD, *supra* note 1, at 484.

Brown. Hunter communicated his misgivings to Governor Wise, reporting that "[a] beardless boy came in last night as Brown's counsel. I think he is a spy."<sup>146</sup> The prosecutor promised that the young man, as well as all other strangers, would be "watched closely."<sup>147</sup>

Hunter was right to be wary. Le Barnes was not the only abolitionist who was working on rescue efforts for John Brown.<sup>148</sup> Though none of the plans matured into action, Virginia had already experienced one invasion and the authorities could hardly discount the possibility of another.<sup>149</sup>

The prosecutor's suspicions notwithstanding, Judge Parker accepted Hoyt's credentials and allowed him to appear as additional counsel for Brown.<sup>150</sup> He was thereafter given free access to the prisoner, sharing with him the true purpose of his presence in Charlestown.<sup>151</sup> This raises the distinct likelihood that the constant attempts to prolong Brown's trial were, at least at some point, intended to facilitate escape. Certainly Hoyt continued in a dual role as both counsel and conspirator; even after the trial, he was involved in evaluating a plan to launch a rescue mission from Ohio.<sup>152</sup> There is no evidence that Brown's other northern attorneys were actively complicit in such efforts, but it is altogether possible that they were aware of what might follow from an extended trial. That conclusion is supported by an enigmatic note, received by Brown near the trial's conclusion: "My brave but unfortunate friend, Protract to the utmost your trial. Your delivery is at hand. [signed] W.L.G."<sup>153</sup>

Brown himself rejected the possibility of escape, reasoning with great clarity that he could better serve the cause as a martyr. "Let them hang me," he said, "I am worth inconceivably more to hang than for any other purpose."<sup>154</sup> Many of his supporters among the abolition-

146. MORRIS, *supra* note 43, at 281.

147. VILLARD, *supra* note 1, at 485.

148. The boldest—or perhaps the craziest—plan involved a plot to kidnap Governor Wise in order to ransom him for John Brown. VILLARD, *supra* note 1, at 515; MORRIS, *supra* note 44, at 282. Such intrigues continued right up until Brown's execution. VILLARD, *supra* note 1, at 517.

149. ABELS, *supra* note 7, at 354-56.

150. At one point Hunter protested that Hoyt was not truly an attorney, and indeed Hoyt was unable to document his membership in the Massachusetts Bar. Mayor Green, however, remembered a letter in which Hoyt had been referred to as a full-fledged lawyer. That was apparently good enough for Judge Parker. VILLARD, *supra* note 1, at 490.

151. WARREN, *supra* note 86, at 425; VILLARD, *supra* note 1, at 485.

152. WARREN, *supra* note 86, at 426.

153. MORRIS, *supra* note 43, at 282. The initials would appear to be those of William Lloyd Garrison.

154. OATES, *supra* note 4, at 335. Brown consistently repeated that sentiment right until the eve of his execution. An old colleague from the Kansas days visited him in his cell and asked, "You remember the rescue of John Doy. Do you want your friends to attempt it?" Brown replied, "I am worth now infinitely more to die than to live." WARREN, *supra* note 86, at 427.

ist elite eventually agreed. Rev. Theodore Parker predicted, "Brown will die . . . like a martyr and also like a saint."<sup>155</sup> Rev. Thomas Higgenson put it more bluntly: "I don't feel sure that his acquittal or rescue would do half as much good as being executed, so strong is the personal sympathy with him."<sup>156</sup>

Brown's dismissal of escape, however, does not exonerate George Hoyt, who was manifestly willing to use his law license to facilitate an armed raid on the courthouse itself.<sup>157</sup> To be sure, history has absolved his ardent abolitionism and there was genuine courage, indeed heroism, in his willingness to challenge hostile Virginia—either as counsel or spy—on behalf of the cause. As a lawyer, however, he knowingly violated both criminal statutes and professional conventions, and he no doubt would have done more had circumstances allowed. Hoyt's actions can best be understood as civil disobedience—illegal conduct in service of a higher law and pursuit of a greater ideal. If discovered, he would have borne the consequences.



John Brown was not the only one who wanted to use the courtroom to make a larger point, as became apparent from the very beginning of the trial. Governor Wise was determined to address the issue of the supposed northern threat to Southern autonomy, believing that Brown's invasion could only have been the result of a "powerful and well-organized conspiracy."<sup>158</sup> And while it is true that Brown was a confederate, shall we say, of the leading abolitionists, he was a very independent and unconstrained member of the movement. If not quite an abolitionist renegade, he was surely the quintessential loose cannon. In the days following the raid, it might well have been possible to separate Brown from the "passive abolitionists" of the North who, in Robert Penn Warren's words, listened to sermons, went home, and "were content to mind their own business."<sup>159</sup>

In the autumn of 1859, the threat of further abolitionist violence was very much a phantom menace, but Wise and his colleagues still chose to prosecute Brown as though he were the vanguard of an invasion. Informed that Judge Daniel Tilden was en route from Ohio to assist Brown's defense, Hunter "asked tartly if Tilden was a lawyer or

155. ABELS, *supra* note 7, at 341.

156. *Id.*

157. Hoyt reported back to Le Barnes that escape was not feasible, "The country all around is guarded by armed patrols & a large body of troops are constantly under arms." WARREN, *supra* note 86, at 425.

158. *Id.* at 390.

159. *Id.*

a leader of a band of desperadoes."<sup>160</sup>

The prosecutor's opening statement gave primacy to the indictment's treason count, with its pointed allusion to other "evil-minded and traitorous persons" to the jurors unknown.<sup>161</sup> He asserted that Brown's goal had been "to rob Virginia's citizens of their slaves and carry them off by violence,"<sup>162</sup> continuing proudly that the attempted manumissions had been "against the wills of the slaves, all of them having escaped, and rushed back to their masters at the first opportunity."<sup>163</sup>

No argument could have been more forceful in the South or more inflammatory in the North. By tying his case to the virtues of slavery, the prosecutor implicitly asserted that the execution of Brown would be a blow for the protection of slavery—a claim that even moderates in the North could not abide. Many who would never otherwise have condoned the tactics of Harpers Ferry found it necessary to defend Brown, since the alternative was defending slavery.

A more restrained prosecution theory could have been equally successful without sharpening regional tensions. Rather than focus on the political crime of treason, the prosecutor could have sought Brown's execution based on the simple crime of murder. Imagine an argument such as this:

This is not a case about slavery; it is a case about violence. No matter what anyone thinks about the question of slavery, you will have to agree that John Brown committed murder in the course of his invasion of Harpers Ferry. Shephard Hayward was a freed slave, not a slaveowner, yet he became Brown's first victim. More men died because of John Brown's decision that he is above the law, that he is empowered to destroy those with whom he disagrees. Perhaps slavery will endure and perhaps it will be abolished, but the decision is not to be made by John Brown's weapons. Justice demands that he be convicted of the murders that he caused.

That position would have found support in the North as well as the South, by invoking what was still perceived as a common interest in

160. FLEMING, *supra* note 37, (unpaginated).

161. VILLARD, *supra* note 1, at 488.

162. MORRIS, *supra* note 43, at 276.

163. *Id.* The myth of contented slaves was essential to Southern peace of mind. Of course, once Brown had been overwhelmed and captured, the "liberated" slaves did everything they could to distance themselves from any cooperation with his plan. It was worth their lives even to suggest otherwise. W.E.B. DuBois, however, believed that an unknown number of slaves had cooperated with Brown. DUBOIS, *supra* note 7, at 140. At least one slave, known only as Phil, was arrested and jailed for assisting Brown in defending the engine house. He is reported to have died in prison, either of fear or mistreatment. VILLARD, *supra* note 1, at 468.

preserving the Union through peaceful means.<sup>164</sup> It is too much to claim, of course, that even the most conciliatory prosecution theory would have had a healing effect on the growing divisions between north and south, but it could have avoided framing the trial as a simple battle between slavery and abolition. It was precisely that characterization—you are either for slavery or for Brown—that allowed John Brown to take the national stage as a spokesman for the cause of freedom.

Perhaps the prosecutor was playing to his audience, mindful of the need to reassure Virginians that they were secure in their lives and property, including their human property. Perhaps he was zealously determined to make the maximum case against John Brown. Perhaps he was taking directions from Governor Wise, whose broader political ambitions were no secret. Whatever the reason, he played directly into John Brown's hands. By maintaining an extreme theory of the case, he enabled Brown, against all previous odds, to reinvent himself as an heroic icon (at least according to northern lights).



The prosecution case began with Andrew Phelps, conductor of the railroad train that had been stopped by Brown's blockade, who described the shooting of Shephard Hayward. Phelps had also been present at the initial interrogation of Brown following his capture, during which Brown had been asked about his plans. Phelps testified about Brown's proposed constitution for a "provisional government" with himself as commander-in-chief. In addition, Phelps continued, there was to be a secretary of state, a secretary of war and a general government that would include "an intelligent colored man."<sup>165</sup>

On cross examination, Phelps conceded that Brown had stated "it was not his intention to harm anybody or anything. He was sorry men had been killed. It was not by his orders or with his approbation."<sup>166</sup>

The prosecution's most notable witness was Colonel Lewis Washington, who was said to bear a striking resemblance to the first president.<sup>167</sup> Washington described his kidnapping by Brown's men and his subsequent imprisonment at the armory. Brown, Washington testified, realized that his position was surrounded, and therefore took Washington and nine other men "whom he supposed to be the most prominent"

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164. Indeed, there were a number of large, anti-Brown demonstrations in the North, as pro-Unionists attempted to distance themselves from his brand of radical abolitionism. Finkelman, *supra* note 91, at 46.

165. FLEMING, *supra* note 37, (unpaginated).

166. *Id.*

167. *Id.*

of his hostages, and isolated them in the engine house.<sup>168</sup> Brown had advised Washington that "I shall be very attentive to you, sir," explaining that "I may get the worst of it in my first encounter, and if so, your life is worth as much as mine."<sup>169</sup> The colonel did not say whether he interpreted that particular statement as a reassurance or a threat. Washington added, however, that "[n]o negro from this neighborhood appeared to take arms voluntarily."<sup>170</sup>

Following Washington's testimony, the prosecution required Brown to identify a series of documents, recovered from the farmhouse in Maryland, linking him to his abolitionist backers in the North.<sup>171</sup>

Other prosecution witnesses included hostages Armsted Ball, a machinist from the armory, and John Allstadt, a plantation owner who had been abducted by the same expedition that seized Washington. Ball testified that the raiders had fired from their redoubt, killing Harpers Ferry Mayor Fontaine Beckham.<sup>172</sup> Allstadt observed that Brown had kept his rifle "cocked all the time."<sup>173</sup> He also noted that the released slaves "did nothing" and that "[s]ome of them were asleep nearly all the time."<sup>174</sup> The latter pronouncement drew laughter in the courtroom, though some of the observers must have recognized it as preposterous even at the time.<sup>175</sup> Still, the idea that slaves might sleep through their own liberation had powerful mythic force, undermining the claims of abolitionism and reinforcing the image of slavery as a benign (and even necessary) institution.

The first defense witness was another hostage, Joseph Brewer, who was asked to affirm Brown's directions that his men avoid unnecessary bloodshed.<sup>176</sup> This was to be the defense theme throughout. Brown had been moved by moral necessity to attempt the emancipation of slaves, but he had made every effort to refrain from violence, even in the face of extraordinary provocation. The prosecution objected, claiming that Brown's asserted restraint was no more relevant than the "dead languages," but Judge Parker allowed the testimony.<sup>177</sup>

To press the point, the defense called Harry Hunter, son of the special prosecutor, who had been present for one of the most demoral-

168. MORRIS, *supra* note 43, at 279.

169. WARREN, *supra* note 86, at 386.

170. FLEMING, *supra* note 37, (unpaginated).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. In fact, it was Allstadt's own slave, recorded only as Phil, who was arrested for cooperating with Brown, dying in the Jefferson County jail before he could be tried. VILLARD, *supra* note 1, at 468.

176. FLEMING, *supra* note 37, (unpaginated).

177. *Id.*

izing events of the entire raid. In the early afternoon on Monday, October 17, Brown had attempted to negotiate a cease-fire by sending William Thompson out of the armory under a white flag of truce. Thompson, whose brother was married to Brown's daughter, was immediately seized by the local militia, white flag notwithstanding. Despite the failure of this tactic, Brown tried it again a few hours later, with even more disastrous results. This time the messengers—Aaron Stevens and Brown's son Watson—were both shot. Watson was mortally wounded, although he did manage to make it back to the temporary refuge of the armory; Stevens was captured.<sup>178</sup>

Thompson was not so lucky. Following his capture he had been taken to the Wager House hotel, where a mob, led by Harry Hunter and George Chambers, tracked him down and killed him. Hunter described the events in his testimony:

We . . . caught hold of him, and dragged him out by the throat, he saying: 'Though you may take my life, 80,000,000 will arise up to avenge me, and carry out my purpose of giving liberty to the slaves.' We carried him out to the bridge, and two of us, leveling our guns in this moment of wild exasperation, fired, and before he fell, a dozen or more balls were buried in him; we then threw his body off the trestlework . . . I had just seen my loved uncle and best friend I ever had, shot down by those villainous Abolitionists, and felt justified in shooting any that I could find; I felt it my duty, and I have no regrets.<sup>179</sup>

Hunter's testimony caused Brown to show emotion for the only time during the entire trial. The prisoner groaned and "cried out" for details.<sup>180</sup> Brown's distress in hearing the story of Thompson's murder was no doubt genuine, but he must also have realized the value of the testimony in advancing his overall strategy. The evidence now showed that Brown had harmed no prisoners and had not even sought to use them as shields when Stuart's detachment stormed the engine house.<sup>181</sup> In contrast, the Virginians had repeatedly ignored his flags of truce, shooting down Aaron Stevens and Watson Brown and then cold-bloodedly murdering the captured William Thompson. Harry Hunter might have felt justified in killing as many "villainous Abolitionists" as he could find, but the expression of that sentiment was one more

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178. VILLARD, *supra* note 1, at 439.

179. *Id.* at 442 (quoting Hunter's testimony). Hunter's uncle, Fontaine Beckham, Mayor of Harpers Ferry, had been shot and killed by one of Brown's raiders. *Id.* at 441.

180. *Id.* at 491.

181. Lewis Washington had so testified, "In justice to Brown, I will say that he advised the prisoners to keep well under shelter during the firing, and at no time did he threaten to massacre us or place us in front in case of assault." MORRIS, *supra* note 43, at 280.

step in turning the Commonwealth's murder case against John Brown into a national contest between slavery and freedom.



Harry Hunter's testimony was received with complete and excruciating silence in the courtroom. The special prosecutor must surely have been shaken by his son's story of deliberate execution of a man who was "unarmed and pleading for his life."<sup>182</sup> Nor could Botts and Green have been unmoved, though it is impossible to know whether they sympathized more with their client or with the elder Hunter, a fellow Virginian and colleague at the bar.

The stage was set for drama, and Brown provided it soon after Hunter left the stand. Defense attorneys Botts and Green called out the names of several additional witnesses, but none came forward. Clearly unnerved by Hunter's testimony,<sup>183</sup> Brown rose from his cot and protested loudly:

I discover that notwithstanding all the assurances I have received of a fair trial, nothing like a fair trial is to be given me, as it would seem. I gave the names, as soon as I could get them, of the persons I wished to have called as witnesses, and was assured that they would be subpoenaed . . . but it appears that they have not been subpoenaed as far as I can learn; and now I ask, if I am to have anything at all deserving the name and shadow of a fair trial, that this proceeding be deferred until tomorrow morning; for I have no counsel, as I before stated, in whom I feel that I can rely, but I am in hopes counsel may arrive who will attend to seeing that I get the witnesses who are necessary for my defence.<sup>184</sup>

Whether offended or relieved, the appointed attorneys immediately petitioned the court for leave to withdraw as counsel. As Green put it,

Mr. Botts and myself will now withdraw from the case, as we can no longer act in behalf of the prisoner, he having declared here that he has no confidence in the counsel who have been assigned him. Feeling confident that I have done my whole duty, so far as I have been able, after this statement of his, I should feel myself an intruder upon this case were I to act for him from this time forward.<sup>185</sup>

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182. VILLARD, *supra* note 1, at 491.

183. See OATES, *supra* note 4, at 325; MORRIS, *supra* note 43, at 283.

184. VILLARD, *supra* note 1, at 491-92 (orthography original).

185. MORRIS, *supra* note 43, at 285.

He continued candidly, "I had not a disposition to undertake the defense, but accepted the duty imposed on me, and I do not think, under these circumstances, when I feel compelled to withdraw from the case, that the Court could insist that I should remain in such an unwelcome position."<sup>186</sup>

Green was of the same mind, "I have endeavored to do my duty in this matter, but I cannot see how, consistently with my own feelings, I can remain any longer in this case when the accused whom I have been laboring to defend declares in open court that he has no confidence in his counsel."<sup>187</sup>

Judge Parker quickly agreed, releasing both men from their obligations as counsel. This left the novice George Hoyt as the only available attorney for Brown, who petitioned for a delay based upon his own inadequacy as trial counsel (he did not mention his dual role as spy), "I cannot assume the responsibility of defending him myself for many reasons. First it would be ridiculous in me to do it, because I have not read the indictment through . . . and have no knowledge of the criminal code of Virginia, and no time to read it."<sup>188</sup>

Informing the court that experienced attorneys were expected to arrive shortly, Hoyt pleaded for a continuance until at least the next morning. The judge was impassive. Disinclined throughout to wait for Northern lawyers, he also disapproved of Hoyt's proposal because "the idea of waiting for counsel to study our code through could not be admitted."<sup>189</sup> Botts, however, did one last service for his erstwhile client, imploring Judge Parker to allow Hoyt at least one night of preparation and volunteering to "sit up with him all night to put him in possession of the law and facts in relation to this case."<sup>190</sup> The court relented, allowing Hoyt one night to become schooled in both criminal defense and Virginia law.<sup>191</sup>

We can only speculate as to Brown's reasons for discharging Botts and Green. Perhaps it was but another attempt at delay; perhaps he was truly aggrieved at their failure to obtain the desired witnesses (though it would hardly have seemed likely that northern lawyers could have been more effective in that endeavor); perhaps he simply saw an opportunity to assail the quality of Virginia justice. Another possibility is that the story of Thompson's murder impelled to him to take some ac-

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186. *Id.*

187. *Id.* at 286.

188. *Id.* at 285.

189. *Id.* (quoting Judge Parker in his response to the withdrawal of Brown's attorneys from the case).

190. See MORRIS, *supra* note 43, at 286.

191. *Id.*

tion, any action—the discharge of his Virginia lawyers being the only power that he had. Whatever his motive, the disavowal of Botts and Green brought him no sympathy in Charlestown. According to the *New York Herald*, “the indignation of the citizens scarcely knew bounds.”<sup>192</sup> Brown was denounced as “an ungrateful villain, and some declared he deserved hanging for that act alone.”<sup>193</sup>



Hoyt’s hastily acquired skills as an advocate, however, were not to be tested. Experienced reinforcements had arrived by morning—Samuel Chilton of Washington and Hiram Griswold of Cleveland.<sup>194</sup> The new attorneys requested several hours in which to read the indictment and study the record, but Judge Parker was willing to allow them only a few minutes to interview their client.<sup>195</sup> Brown had chosen to dismiss his very capable local attorneys; he would have to bear the consequences.<sup>196</sup> “The trial must go on.”<sup>197</sup>

And go on it did. The defense continued to call hostages who testified that their lives had never been threatened, even after Watson and Oliver Brown had been fatally shot. Most of the direct examinations were conducted by young Hoyt, but in a bizarre turn Brown himself took part in some of the questioning without rising from his cot.<sup>198</sup> Hunter protested the repetitive testimony, calling it a waste of time. Hoyt replied that it was relevant to “prove the absence of malicious intention,”<sup>199</sup> which seemed to satisfy the court. Hunter waived cross examination of these witnesses, surely hoping both to expedite the trial and to belittle the validity of that particular line of defense.<sup>200</sup>

Once the last witness had testified, Chilton argued for the first time that there was a defect in the indictment. It was unfair, he maintained, to require Brown to defend himself in one proceeding against three such disparate charges as murder, treason, and inciting servile insurrection. Thus, he requested that the prosecution be required to elect a single count and dismiss the other two.<sup>201</sup> The reasoning behind this strategy is not entirely clear, unless it was simply another effort at de-

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192. VILLARD, *supra* note 1, at 492 (quoting *New York Herald*, Nov. 1, 1859).

193. *Id.*

194. MORRIS, *supra* note 43, at 286.

195. *Id.*

196. WARREN, *supra* note 86, at 407; VILLARD, *supra* note 1, at 493.

197. MORRIS, *supra* note 43, at 286.

198. VILLARD, *supra* note 1, at 494. The prosecution did not object to this unprecedented procedure, perhaps out of a desire to speed the trial. *Id.*

199. FLEMING, *supra* note 37, (unpaginated).

200. *Id.*

201. VILLARD, *supra* note 1, at 494.

lay. All three charges were capital crimes and all three were supported by roughly the same evidence. And even if forced to choose, the prosecution would obviously select its strongest, best-supported count—which would be sufficient to send Brown to the gallows.

The prosecutors objected mightily, though their motivation is easier to understand. Having chosen to indict Brown as a threat to the Southern way of life—meaning, of course, the preservation of slavery—they were not about to temper their case at its very conclusion. All three counts were necessary to tell their story. In their eyes, John Brown was not merely a murderer, he was an abolitionist murderer. Indeed, he was a murderer because he was an abolitionist. If Brown's abolitionism itself was tantamount to a crime, then the charges of treason and servile insurrection were necessary to establish the connection.

Judge Parker promptly ruled for the prosecution, holding that "distinct offences may be charged in the same indictment,"<sup>202</sup> and directed the attorneys to proceed immediately to their final arguments. Again the defense protested at being pressed to go forward, but the prosecution claimed there was urgent need to bring the trial to a conclusion. Resuming his theme of the abolitionist threat, Mr. Hunter successfully argued that the very length of the trial endangered the welfare of society: "[T]here could not be a female in this county who, whether with good cause or not, was not trembling with anxiety and apprehension."<sup>203</sup>

By that point it was already late Saturday afternoon and Brown was again maintaining that he was too ill to proceed.<sup>204</sup> Though clearly mistrusting Brown's claims, Judge Parker struck a compromise intended "to avoid all further cavil at our proceedings."<sup>205</sup> The prosecution would begin its argument that evening, but the defense argument and the prosecution rebuttal would be held over until the following Monday. Having insisted that the jurors were being unfairly separated from their families, the prosecution was now constrained to argue only briefly before adjourning for the balance of the weekend. That task fell to Charles Harding, the second-string prosecutor known for his ineptitude,<sup>206</sup> who limited his remarks to about forty minutes.<sup>207</sup> Harding addressed none of the legal issues, but instead condemned Brown as the leader of a band of "murderers and thieves," declaring that he had "forfeited all rights to protection of any kind whatsoever."<sup>208</sup>

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202. *Id.*

203. ABELS, *supra* note 7, at 328.

204. VILLARD, *supra* note 1, at 495.

205. *Id.*

206. FLEMING, *supra* note 37, (unpaginated).

207. *Id.*

208. MORRIS, *supra* note 43, at 287.



Brown spent much of the next day meeting with his attorneys in order to outline his defense, no doubt conferring over precise tactics. Represented at last by trusted and supportive counsel, Brown declared that he was “perfectly satisfied” with their plans.<sup>209</sup> The prisoner clearly understood that his life was forfeit, and realized that the audience for his defense lay well beyond the courtroom. He “seems,” observed George Hoyt, “to be inspired with a truly noble Resignation.”<sup>210</sup>

The defense argument on Monday morning rested in equal parts on technicalities and misrepresentations. Doing his best under difficult circumstances, Hiram Griswold began by asserting that Brown could not be guilty of treason as charged because he was neither a citizen nor a resident of Virginia.<sup>211</sup> Moreover, Virginia had no jurisdiction over the murder charges since Brown had remained almost exclusively on federal property.<sup>212</sup>

But the heart of the argument, evidently presented with his client’s input and approval, consisted of an artful denial of Brown’s very principles. Far from a danger to slavery and the South, Brown was depicted as an idealistic dreamer, noble in his intentions but incapable of incitement. There could be no conviction for conspiracy to incite insurrection because the slaves simply failed to join.<sup>213</sup> The provisional constitution, Chilton claimed, was never a serious plan, but instead was an “imaginary government for a debating society . . . a wild and chimerical production.”<sup>214</sup> As to Brown’s influence upon the abolitionist movement,

Can it be supposed, gentlemen, for a moment, that there is fear to be apprehended from such a man, who, in the zenith of his power, when he had a name in history, and when something

209. VILLARD, *supra* note 1, at 495.

210. *Id.* (capitalization in original).

211. MORRIS, *supra* note 43, at 288.

212. ABELS, *supra* note 7, at 329. The only murder for which Brown had been physically present was that of Luke Quinn, a United States Marine who was shot when J.E.B. Stuart’s men stormed the arsenal, which was obviously federal property. *Id.*

213. *Id.* Omitted from the argument was the fact that nearly a quarter of the raiders—five of twenty-two—were themselves black, either freedmen or fugitive slaves. This fact was well noted among African American communities in the North, where Brown was lionized. One black newspaper, for example, complained that the role of the black raiders had been suppressed in mainstream accounts. Daniel Littlefield, *Blacks, John Brown, and a Theory of Manhood*, in *HIS SOUL GOES MARCHING ON: RESPONSES TO JOHN BROWN AND THE HARPERS FERRY RAID 75-76* (Paul Finkelman ed. 1995).

214. ABELS, *supra* note 7, at 329.

might be hoped for the cause in which he was engaged, could only, throughout the whole country, raise twenty-one men? Is it to be supposed for a moment, I ask, now, when he is struck down to the earth, his few followers scattered or destroyed—now, when the fact is known that the South is alarmed and armed in every direction ready to repel any enterprise of this kind, that anything is to be feared? No, gentlemen, there is not the remotest danger of your ever again witnessing in your State anything akin to that which lately occurred.<sup>215</sup>

Of course, even to his death, Brown intended just the opposite. Having failed to incite rebellion directly, it was his hope and aspiration to achieve it posthumously through martyrdom.

It cannot be known whether Griswold was fully aware of his own tacit deceptions. He had not met Brown before arriving in Virginia, though he must certainly have known of him, including Brown's pitched battles in Kansas, and probably the Pottawatomie murders as well. Attorney and client counseled together at some length as Griswold prepared his speech, but we do not know whether the prisoner was candid or cagey during their meeting. There is reason to suspect, however, that Griswold was knowingly complicit in the effort to reinvent John Brown as a mainstream abolitionist, as will become apparent when we consider Brown's own address to the court. But whatever the lawyer's actual knowledge, it is certain that Brown himself initiated the strategy.

Griswold's argument was not actually intended to assuage the fears of the Virginia jurors, but rather to magnify the enormity of their certain verdict. If Brown could be characterized as less than a menacing firebrand, then his execution could be characterized as an attack against the entire abolitionist movement—an attack that would in turn motivate a response. Ironically but effectively, it appeared that the denial of violence could be used to inspire violence.

Special prosecutor Hunter delivered the rebuttal. He addressed the alleged technical deficiencies in the indictment, dismissing those deficiencies as legally without merit, but he saved his real fire for Brown's "nefarious and hellish purpose of rallying forces into this Commonwealth . . . as the starting point for a new government."<sup>216</sup>

To Hunter, Brown was the vanguard of an abolitionist invasion.<sup>217</sup>

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215. MORRIS, *supra* note 43, at 288-89.

216. WARREN, *supra* note 86, at 407-08.

217. As Paul Finkelman put it, Brown's invasion was the Southerners' worst nightmare, posing a far graver threat than their own slaves to the survival of the peculiar institution. "Even though they feared slave rebellions, Southerners had convinced themselves that . . . blacks were incapable of anything worse than sporadic violence. But Brown raised the ominous possibility of armed black slaves, led by whites who would encourage them to destroy Southern white soci-

Brown's conduct showed "that it was not alone for the purpose of carrying off slaves" that he came to Virginia.<sup>218</sup> Rather, his intention was to overthrow the Commonwealth, establishing an abolitionist regime—or worse—in its place. "His 'Provisional Government' was a real thing and no debating society . . . and in holding office under it and exercising its functions, he was clearly guilty of treason."<sup>219</sup> Furthermore, "[h]e wanted the citizens of Virginia calmly to fold their arms and let him usurp the government, manumit our slaves, confiscate the property of slaveholders, and without drawing a trigger or shedding blood, permit him to take possession of the Commonwealth and make it another Haiti."<sup>220</sup>

There was no space for reconciliation in the prosecutor's scorching argument, which has been referred to as a "whiplashing"<sup>221</sup> of Brown, but was at least as much a scourging of the entire abolitionist cause. To Hunter, freeing the slaves was the equivalent of assassinating their masters, and he drove that point home in his allusion to Haiti.<sup>222</sup> But if that logic served to rally the frightened people of the South, it would have an entirely different impact in the North, where most abolitionists had previously supported emancipation without violence. But Hunter, in essence, denied the possibility of peaceful emancipation—manumission leads to Haiti—thereby pushing the abolitionist movement in exactly the direction that John Brown intended.

It took the jury only forty-five minutes to reach its determined verdict of guilty on all charges. John Brown, however, was yet to have the last word.



Allowed to address the court before sentencing, Brown delivered extemporaneous remarks that were directed "not [to] the men who surrounded him, but the whole body of his countrymen, North, South, East and West."<sup>223</sup> Speaking six years later at Abraham Lincoln's funeral service, Ralph Waldo Emerson would refer to Brown's speech as one of the two greatest of the century (the other being the Gettysburg Address).<sup>224</sup>

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ety." Finkelman, *supra* note 33, at 4.

218. ABELS, *supra* note 7, at 329.

219. WARREN, *supra* note 86, at 408.

220. MORRIS, *supra* note 43, at 289.

221. MORRIS, *supra* note 43, at 289, OATES, *supra* note 4, at 326.

222. *Supra* text accompanying note 220.

223. VILLARD, *supra* note 1, at 498.

224. ABELS, *supra* note 7, at 331.

Certainly, Brown's speech galvanized the North,<sup>225</sup> drawing praise from those who had previously denounced him. It was fashioned for that very purpose, and therefore devised with no deep regard for the truth.<sup>226</sup> As Robert Penn Warren would say, "It was so thin that it should not have deceived a child, but it deceived a generation."<sup>227</sup>

Brown did not hesitate to conceal the extent of his true plans:

In the first place, I deny everything but what I have all along admitted: of a design on my part to free slaves. I intended certainly to have made a clean thing of that matter, as I did last winter, when I went into Missouri and there took slaves without the snapping of a gun on either side, moving them through the country, and finally leaving them in Canada. I designed to have done the same thing again on a larger scale. That was all I intended. I never did intend murder, or treason, or the destruction of property, or to excite or incite slaves to rebellion, or to make insurrection.<sup>228</sup>

Brown's Missouri rescue had been popular in the North, so it is understandable that he would attempt to wrap himself in the mantle of that success.<sup>229</sup> But even so, he tampered with the truth. In fact, there had been gunfire in Missouri and a slaveowner had been killed.<sup>230</sup> Moreover, the Missouri liberation had been an almost incidental event during the Kansas battles, during which Brown had ordered the murder of five unarmed men for the crime of sympathy with slavery.<sup>231</sup>

It was flatly untrue that Brown intended no more at Harpers Ferry than to deliver slaves to Canada.<sup>232</sup> His "well matured plan" actually called for the establishment of a permanent military enclave to be used as a base for continuing raids on slaveholders. If successful, Brown would have spread his encampments further into the South to encourage and facilitate insurrection—though he continued to deny as much: "I never had any design against the liberty of any person, nor any disposition to commit treason or incite slaves to rebel or make any general insurrection. I never encouraged any man to do so, but always discouraged any idea of that kind."<sup>233</sup>

225. "What a text John Brown has given us," declared Rev. William Henry Furness, vowing to use it "next Sunday all day" in his sermons, and "a good deal this winter." Finkelman, *supra* note 91, at 43.

226. ABELS, *supra* note 7, at 331.

227. *Id.* at 331-32.

228. VILLARD, *supra* note 1, at 498.

229. SCOTT, *supra* note 34, at 278.

230. ABELS, *supra* note 7, at 332.

231. *Id.*

232. *Id.*

233. *Id.* at 331.

Lies again. Brown had specially ordered 1000 steel pikes for the express purpose of arming freed slaves for a general insurrection. He brought cases of handguns and rifles with him to Virginia, far more than could possibly have been needed to equip his force of twenty-two men.<sup>234</sup> "General insurrection" was so much his intention that he had printed forms for the "commissions" of the officers in his provisional army, which was to be organized into battalions, companies, bands, and sections.<sup>235</sup> And far from discouraging men from joining him, Brown had actively recruited others, castigating those who lost their resolve and failed to join the mission.<sup>236</sup>

But Brown was not lying to save his life. He knew full well that he would be sentenced to die and he was determined to make the most of his martyrdom. His protestations of nonviolence were intended to aid his greater cause by making him the victim, rather than the killer, of Harpers Ferry. And so, when he turned to the cause itself he was able to speak with sincere nobility:

I believe that to have interfered as I have done, as I have always freely admitted I have done, in behalf of His despised poor, I did no wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I say, let it be done.<sup>237</sup>

Thus, John Brown was able to turn attention from his own excesses and recklessness to the evils of slavery. The strategy could not have been more effective. All across the North, people rallied to Brown's cause, lionizing him as the hero of Harpers Ferry and denouncing the malevolence of southern justice that would enslave millions and then dare to execute their liberator. As though governed by physical laws, the reaction in the South was equal and opposite, condemning both Brown (literally) and his Northern supporters (figuratively) as a mortal

234. VILLARD, *supra* note 1, at 407.

235. ABELS, *supra* note 7, at 267.

236. VILLARD, *supra* note 1, at 409. Even in his final speech, Brown found it necessary to criticize the weakness of some of his fellow prisoners:

Let me say, also, in regard to the statements made by some of those who were connected with me, I hear it has been stated by some of them that I have induced them to join me. But the contrary is true. I do not say this to injure them, but as regretting their weakness. Not one but joined me of his own accord, and the greater part at their own expense. A number of them I never saw and never had a word of conversation with, till the day they came to me . . .

*Id.* at 499.

237. *Id.* at 498-99.

threat to their lives and homes.



At a distance now of 140 years, it is impossible to chastise John Brown for lying about his tactics in order to advance the cause of abolition. The struggle for human freedom was the greatest movement of the nineteenth century and John Brown, for all of his extremism, understood more clearly than most that it would take a civil war to emancipate the slaves. Measured against that goal, a few flashes of oratorical deception seem well justified, perhaps imperative. And in any event, Brown certainly felt no moral obligations to the slaveholders' court. In a sense, he was speaking the whole truth when he told his captors that his acts were "worthy of reward rather than punishment."<sup>238</sup> Bound by God to "remember them that are in bonds," he had done nothing more than to "act up to that instruction."<sup>239</sup>

It is fair to ask, however, whether his lawyers were aware of the deceit. Under no conception of legal ethics have attorneys ever been entitled to "counsel or assist a witness to testify falsely."<sup>240</sup> It may be that professional misconduct is morally vindicated under extreme circumstances, but that question cannot be answered unless we know whether the standard was violated in the first place.

As it turns out, there is good reason to believe that Chilton and Griswold were willing participants in John Brown's plan to suppress the truth about his intentions at Harpers Ferry. First, we know that Brown was adamant about his need for northern lawyers who were not known as ultra-abolitionists. Notwithstanding the determined efforts of Botts and Green, and the possibility that highly regarded local lawyers might actually have been more effective before the Charlestown jury, Brown dismissed them at the first opportunity—even if that meant placing his fate in the hands of novice (though politically dependable) George Hoyt. Hoyt, of course, was completely trustworthy and deserving of Brown's confidence, having traveled to Virginia for the purpose of facilitating an escape.

Chilton and Griswold, the senior lawyers who eventually took over the defense, were not part of any rescue scheme. They did, however, spend hours closeted with Brown in preparation for the trial's final arguments, following which Hoyt himself pronounced the client "well

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238. *Id.* at 498.

239. *Id.*

240. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999). The contemporary iteration is found in Rule 3.4(b), but the concept itself is as old as the legal profession.

pleased with what has transpired."<sup>241</sup>

A further implication arises from the manner in which the defense was conducted. John Brown was not called to make a statement on his own behalf until after the verdict had been returned, and then the invitation came from the court. Although Virginia law at the time prohibited a criminal defendant from testifying under oath,<sup>242</sup> common law precedent did allow defendants to address the jury directly, either in narrative or through direct examination.<sup>243</sup> Judge Parker had earlier shown an inclination to indulge Brown's unconventional participation in the trial, allowing him to address the court on a number of occasions and also to question several of the witnesses. There is reason to believe, therefore, that he would have permitted Brown to make a statement to the jury prior to the verdict.<sup>244</sup> Moreover, a denial of such a request would have provided even more ammunition for Northern newspapers, ever eager to condemn Virginia justice.

Since the goal of the defense was to give Brown an opportunity to speak to the nation, why did they forego an opening to put him on the witness stand, even if unsworn? Why wait until after the conviction to ask him to speak? And indeed, why not at least attempt to provide two such occasions rather than one?<sup>245</sup>

241. VILLARD, *supra* note 1, at 495.

242. Every United States jurisdiction followed some version of "interested party" incompetence well into the nineteenth century. Virginia did not abolish the rule until 1886. Under common law precedent, however, judges had discretion to allow criminal defendants to make unsworn statements on their own behalf, either in narrative form or with the assistance of counsel's direct examination. See Levy, *supra* note 132, at 844 ("[T]he defendant always retained the right to address the court unsworn at the close of his trial.").

243. This was particularly the case for defendants in capital cases. 16 C.J. *Criminal Law* § 2142, at 848 (1918) (an "accused, when represented by counsel, has no right, save in capital crimes, to make a statement of facts to the jury"); *State v. Townley*, 182 N.W. 773, 780 (Minn. 1921) ("it was the common law rule, at least in capital cases, that the accused was entitled to make an unsworn statement to the jury at the close of the case"); FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES 427 (8th ed. 1880) ("At common law, a defendant, at least in capital cases, is entitled to address the jury, at the conclusion of the case, giving his own story as to any relevant facts. In making this statement he is not subject to cross-examination."). Cf. *State v. McCall*, 4 Ala. 643, 646-47 (1843) (holding that it was within court's discretion, in non-capital case, to refuse to allow defendant to make unsworn statement where statements were not "authorized by the evidence adduced.")

244. Eight years earlier, in a widely publicized murder trial, a New York judge allowed the defendant to make an unsworn statement to the jury prior to the verdict. *The Case of Margaret Garrity*, N.Y. TIMES, Oct. 21, 1851, at 2:3. Margaret Garrity was seduced by a man who falsely promised marriage, only to abandon her for another woman after he compromised her virginity. On trial for his murder, Garrity pled temporary insanity, and the court allowed her to explain to the jury the "many and enormous wrongs" she had suffered. She was acquitted, even though her unsworn statement was "not admitted as legal testimony." *Id.* Nonetheless, it "had its effect and furnished a fine field for the counsel for the prisoner; and being so often repeated and reviewed, it had vast weight with the jury in spite of their conscientious resistance of it." *Id.*

245. Following the jury's verdict on November 2, Judge Parker set Brown's execution for December 16. In the intervening six weeks, Brown was allowed to write hundreds of letters

For a trial strategist, one answer seems evident. A mid-trial statement by Brown, unlike his speech at sentencing, could have been followed immediately by rebuttal evidence. For some reason, Brown's lawyers apparently did not want to expose him to contradiction by the prosecution, or perhaps even cross-examination if the court had allowed it. It is unlikely that they seriously feared the possibility of implicating his backers in Massachusetts or elsewhere. Brown could readily have dealt with that problem simply by refusing to answer questions about his supporters, as he had done when interrogated by Governor Wise shortly following his capture. Facing a certain conviction and death sentence, he hardly needed to be concerned about a contempt citation; nor would his reputation have suffered as a result of shielding his associates from indictment.

We are left, then, with the distinct possibility that Brown's statement was withheld from the trial itself for fear of the uncomfortable questions that would have followed about the true nature of his intentions. Confronted with his papers, maps, commissions, and letters, would he have been credibly able to deny the plan for a general insurrection? Would he have been able to maintain his crucial calm composure for the balance of the proceeding, as well as his artfully devised story? Knowing that he would later have the option of an unchallenged speech at sentencing, a capable lawyer would have chosen to avoid that risk—especially if he was aware of Brown's intention to lie.

That is as far as we can go based upon the available evidence. We know that Brown dissembled, the better to make his point. We know that his attorneys facilitated that stratagem, knowingly or otherwise, thus enabling Brown to play his crucial role in "heightening the contradictions" between North and South.



Here is an example of the Northern reaction to John Brown's exploits immediately after the raid on Harpers Ferry: "We are damnably exercised here about the effect of Brown's wretched fiasco in Virginia about the moral health of the Republican Party. The old idiot—the quicker they hang him and get him out of the way the better."<sup>246</sup>

Salmon Chase, a Republican candidate for president and eventually Lincoln's secretary of the treasury, put it this way: "How sadly misled by his own imaginations! How rash—how mad—how criminal then to

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expressing his views and goals. When Griswold and Chilton opted to forego direct examination, however, it could not have been known that there would be such a lengthy delay between conviction and execution, or that Brown would be allowed such free access to public opinion.

246. OATES, *supra* note 4, at 310.

stir up insurrection which if successful would deluge the land with blood and make void the fairest hopes of mankind!"<sup>247</sup>

Virtually all of the Northern newspapers had the same initial response to the raid, calling Brown a "lawless brigand," a "madman," and worse.<sup>248</sup> The *New York Times*, then a moderate Republican paper, was typical in saying "The great mass of our people look on this with horror and execration."<sup>249</sup>

With the progress of the trial, however, Northern reaction changed dramatically in a direction that could only be viewed with alarm, if not outright panic, in the South. Many editors took the position that the raid was an inevitable response to the evils of slavery, in essence saying that the slaveowners got what they deserved: "If a man builds his house on a volcano, it is not those who warn him of the danger who are to blame for its eruptions."<sup>250</sup>

The *New York Independent* was among the most outspoken, expressing the conviction that Brown's raid demonstrated that "God has in view the overthrow of slavery."<sup>251</sup> Decrying the "indecent haste of the court to obtain a verdict of Guilty, the rude treatment of counsel from abroad, the disregard for the forms and proprieties of law,"<sup>252</sup> the editorial went on to make an ominous prediction:

Not John Brown but slavery will be gibbeted when he hangs upon the gallows. Slavery itself will receive the scorn and execration it has invoked for him. . . . When John Brown is executed, it will be seen he has done his work more effectively than if he had succeeded in running off a few hundred slaves. The terror by night that rules in every household on her soil, drawing sleep from mothers and children, the anxieties and fears that for months to come will burden her population, the spirit of revenge—all these will make the cost of slavery to Virginia greater than she can bear.<sup>253</sup>

Leading Northern abolitionists drove home the same point. Ralph Waldo Emerson called Brown a "new saint awaiting his martyrdom" who "will make the gallows glorious like the cross."<sup>254</sup> Henry Wadsworth Longfellow said that Brown's raid would mark the "date of

247. *Id.* at 313.

248. ABELS, *supra* note 7, at 314-15.

249. *Id.* at 317.

250. *Id.*

251. *Id.* at 313.

252. *Id.* at 314.

253. ABELS, *supra* note 7, at 313-14.

254. OATES, *supra* note 4, at 318.

a new Revolution—quite as needed as the old one.”<sup>255</sup> Wendell Phillips proclaimed that Brown “has twice as much right to hang Governor Wise, as Governor Wise has to hang him.”<sup>256</sup> For Virginia, the execution of Brown was “sowing the wind to reap the whirlwind, which will come soon.”<sup>257</sup>

The reaction in the South, of course, was fiery from the first news of the raid, and it continued in that vein without surcease. The *Richmond Whig* presciently declared: “Immediate shooting or hanging without trial is the punishment they merit. In regard to these offenders, the just and safe principle is hang them first and try them afterward.”<sup>258</sup> The *Fredericksburg Herald* was, if anything, even more enraged: “Hang these villainous wretches, offenders against the public peace, without the benefit of clergy . . . . The wheel and the rack are not a whit too hard for them. Shooting is a mercy they should be denied.”<sup>259</sup>

As it became clear that Northern opinion had become sympathetic to Brown, indeed openly supportive of him, the anger in the Southern press turned in a new direction. If Brown was a hero in the North, then what chance could there be for security within the Union? “The day of compromise is passed,” declared one editor, “there is no peace for the South in the Union. The South must control her own destinies or perish.”<sup>260</sup> The *Charleston Mercury* made the point explicitly:

The great source of the evil is that we are under one government with these people, that by the Constitution they deem themselves responsible for the institution of slavery and therefore they seek to overthrow it . . . . If we had a separate government of our own, the post office, all the avenues of intercourse, the police and military of the country, would be under our exclusive control. Abolitionism would die out in the North or its adherents would have to operate in the South as foreign emissaries.<sup>261</sup>

It was too late to turn back. John Brown's trial had rubbed raw the wound of slavery, exposing the impossibility of reconciliation. Perhaps the South could have endured the raid, but there was no tolerating the transformation of John Brown into a Northern hero: “Though it convert the whole Northern people without an exception into furious,

255. *Id.* at 319.

256. *Id.* at 318.

257. *Id.* at 319.

258. *Id.*

259. ABELS, *supra* note 7, at 319.

260. OATES, *supra* note 4, at 320.

261. ABELS, *supra* note 7, at 316.

armed abolition invaders, *yet Old Brown will be hung!* That is the stern and irreversible decree, not only of the authorities of Virginia but of the PEOPLE of Virginia without a dissenting voice."<sup>262</sup>



Counterfactual history is always questionable, and surely it is too much to claim that the Civil War could have been forestalled if only the trial of John Brown had been handled differently. On the other hand, the argument is compelling that the Harpers Ferry prosecution inflamed regional antagonisms, thus hastening the war and perhaps even making it unavoidable.<sup>263</sup> Which straw broke the camel's back? Was it Bleeding Kansas that made the war inevitable? Was it only the election of Lincoln that assured secession? Whatever the answer, it seems certain that the trial of John Brown, and the subsequent public reactions, placed a heavy burden on the fragile, splintering Union.

In that sense, Brown was successful beyond any expectation. Reconciliation between North and South would assuredly have meant compromise on the question of slavery, preserving the institution at least where it already existed and thus condemning to continued bondage another generation or more of black Americans. By using his trial to push the abolitionist movement toward open approval of violence, thus enraging even "moderates" in the South, Brown achieved one of his dearest goals. It is therefore possible to say that the defense strategies prevailed. In contrast, the prosecution ultimately resulted in disaster for the men who directed it, assuming that they wanted to protect their lives and property.

As he left jail for the gallows on his execution day, John Brown handed a note to one of his guards, speaking prophetically to his allies in the North: "I John Brown am now quite *certain* that the crimes of this *guilty land*: will never be purged away; but with Blood. I had *as I now think vainly* flattered myself that without *very much* bloodshed; it might be done."<sup>264</sup>

As though to underscore Brown's role in inspiring the looming war between the states, the officer in charge of his execution spoke these last words on the scaffold as the trapdoor was released: "So perish all such enemies of Virginia! All such enemies of the Union!"<sup>265</sup>

262. *Id.* at 346 (emphasis in original).

263. Horace Greeley predicted that John Brown's raid would make the "irrepressible conflict . . . ten years nearer." Finkelman, *supra* note 91, at 42.

264. VILLARD, *supra* note 1, at 554 (orthography and emphasis in original). The handwritten note is reproduced therein at page 554 overleaf.

265. *Id.* at 557.