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CAN A LAWYER EVER DO RIGHT?

Owen M. Fiss*

Jacques Maury and Maurice Garçon were good people, but not good enough. They resisted the harshness of the racial laws of Vichy France but not as fully as they should have. Falling victim to the proclivity of all lawyers, they became ensnared within the technical trappings of the law. They helped individual clients who suffered under the Vichy laws, but are faulted by Richard Weisberg for failing to challenge those laws at a foundational level.¹ Professor Weisberg described the result as grotesque.

When viewed from such a perspective, one might be tempted to celebrate the work of another attorney—Richard Dana—as that of the sublime.² He was fully committed to the abolitionist cause and participated in many of its activities. He stood up for Anthony Burns in a proceeding brought against Burns under the Fugitive Slave Act of 1850. Dana was not paid for representing Burns, nor was he compelled by a court or anyone else to render such assistance: He volunteered. In the end, Dana lost. Anthony Burns was delivered by Commissioner Loring to his master and returned to servitude, but not without a good fight by Dana on both a technical and foundational level.

As an initial stratagem, Dana managed to obtain a short continuance, so that Burns could decide whether or not he desired Dana’s representation. Then Dana turned what might have been a summary rendition proceeding into a four-day public trial on the validity of the Fugitive Slave Act and Burns’s right to freedom. Dana’s aggressive lawyering constituted an important contribution to the abolitionist cause. As Paul Finkelman acknowledges, it “educated the North to the dangers of slavery and the South to the power of antislavery.”³

Yet Professor Finkelman is unprepared to let the matter rest on this note. His inclination is not to praise, but rather to criticize Dana. Thus, the acknowledgement of Dana’s contribution to the

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³ Id. at 1818.
abolitionist cause that I just quoted appears as but a grudging con­
cession. In a more critical vein, Finkelman remarks that “no one
listened to Burns,”⁴ and then adds that “[u]ltimately, [the aboli­
tionists'] help hurt him.”⁵ According to Finkelman, the gains of the
antislavery cause from the Burns case were secured at the expense
of an individual who never sought nor wanted the help of aboli­
tionists.⁶ Such a judgment seems too harsh, and juxtaposed with
Richard Weisberg’s critique of the French lawyers, I have begun to
wonder, in these days of lawyer bashing, whether a lawyer can ever
do right.

Embedded in Professor Finkelman’s critique of Dana are two
factual claims. The first—which seems false—is that Burns did not
want Dana’s help. When Dana first volunteered, Burns did not
reject his offer of help, but merely expressed unease and reluctance
stating, “I shall fare worse if I resist.”⁷ The decision confronting
Burns was a difficult one—it had to be made in a tense and highly
electric situation soon after the capture and with the master sitting
nearby. Commissioner Loring, true to the forms of the law, asked
Burns whether he wanted a delay so he could think about the mat­
ter, and ordered a two day continuance only after Burns agreed to
a delay. After the delay, Burns said he wanted to be represented
by Dana.

In the interim, Burns had been visited and advised by three
persons—two blacks (one Reverend Grimes, and the second, a Mr.
Pitt, for whom Burns had worked) and one white (Wendell Phillips,
the well-known abolitionist leader). Although Professor
Finkelman looks upon this visit with some concern, there is abso­
lutely no reason to assume that these persons had coerced or in any
other way unduly influenced Burns’s choice. The more plausible
assumption is that they had helped Burns make a free and in­
formed choice to fight for his freedom and accept Dana’s represen­
tation. Professor Finkelman criticizes Dana for ignoring Burns’s
desires, yet, oddly, he discounts the possibility that Burns was
bravely and genuinely speaking for himself when he said he wanted
to be represented by Dana.

A second factual claim advanced by Professor Finkelman is
that Dana hurt Burns by resisting the rendition. Here, too, Profes­
sor Finkelman seems to be on shaky ground. In levelling this

⁴ Id.
⁵ Id.
⁶ See id.
⁷ Id. at 1806-07.
charge against Dana, Finkelman hypothesizes that Burns was punished by his master for the resistance, and that this punishment "left Burns weak, ill, and permanently lame. It probably shortened his life." It is true that following the rendition proceeding Burns was kept in chains for several months. Yet such a measure may have been intended simply to prevent another escape. Moreover, even if it were retribution for the resistance, Professor Finkelman overlooks the possibility that Burns would have been punished for the original escape whether or not he had resisted the rendition. We have no way of knowing whether the punishment was increased due to the resistance or Dana's intervention, much less what toll an increased punishment may have taken on Burns's physical well-being or whether it shortened his life.

This second claim about Dana's representation, and Finkelman's insistence that it actually hurt Burns, can also be faulted for failing to take into account a fact—buried in footnote 150—that a group of Bostonians, led by Grimes, subsequently purchased Burns for $1300 and then had him manumitted. One wonders whether this would have happened without Dana's intercession, for it was his action that transformed Burns's rendition into a drama of its own, and linked it forever with the abolitionist cause.

Even assuming that Professor Finkelman's two factual claims—that Burns did not want Dana's help and that the resistance actually hurt Burns—are valid, I would still be reluctant to condemn Dana's role in the case in quite the way that Finkelman does. Even on Finkelman's facts, Dana was no officious intermeddler. Instead, he was an attorney struggling with a dilemma present in all reform litigation: How can lawyers fight institutional wrongs when they are limited to pursuing the narrow interests of individual clients?

At stake in any rendition proceeding was the interest in freedom of the individual slave, more specifically, Burns's interest in articulating and giving effect to his decisions, the right to speak for himself and to be heard. Professor Finkelman fully grasps this interest in freedom, but only this interest. For that reason, he is prepared to place Burns wholly in control of this proceeding—even to the point of allowing Burns to return to slavery quietly and without a fight. What Finkelman overlooks, however, is the multidimensional nature of freedom. The Burns rendition would have an im-

8 *Id.* at 1807 (footnote omitted).
pact not only on Burns, but also on the interests of the slave community as a whole and, for that matter, those of humanity. We may make Burns's desires paramount when only his individual freedom is at stake, but not once we understand the multidimensional nature of freedom and the fact that the continued existence of slavery and the enforcement of the Fugitive Slave Act were threats to everyone.

A broader understanding of the scope of interests at stake might well vindicate Dana's defense of Burns, even on Finkelman's account of the relationship between the two. Obviously, if Burns did not want Dana to represent him, Dana may not have been able to represent himself as Burns's lawyer. However, Dana could be understood as a lawyer for the unnamed members of the class of those subjected to slavery or the Fugitive Slave Act, or as the lawyer for Phillips, Grimes, and Pitt, or, for abolitionists in general, or, to use the progressive phrase, the lawyer for the situation. Dana might have even participated in the proceeding as a friend of the court.

In invoking humanity's interest in freedom, Dana stands in danger of substituting his own conception of the good—or that of the privileged group to which he belongs—for that of the collectivities he is purporting to represent. This is a danger present in any reform litigation or, to use Richard Weisberg's formula, whenever a wrong is attacked at a foundational level. This danger must be openly confronted, and should lead to a certain critical self-awareness or modesty on the part of lawyers and an attentiveness to the needs and interests of those on whose behalf they are fighting. Yet it is also important to recognize that a lawyer must attend to the interests of all the victims, and avoid the danger of privileging one victim to the detriment of the class as a whole.

Although Dana most certainly should have listened to Burns, there were others to which he should also have listened. Responding to those interests, may have put Dana in the position of sacrificing an individual's interest to that of the larger collectivity, but that, too, is sometimes unavoidable. Eradicating an evil as enormous as slavery will necessarily harm many individuals. While some of those harmed may be perpetrators of the wrong, many

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9 See e.g., Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 58-68 (1978) (describing Brandeis's coining of the phrase "lawyer for the situation" to defend his role as an attorney-mediator for various clients in a single transaction).

10 At the initial rendition hearing, Dana asked permission to address the Court as amicus curiae. See Finkelman, supra note 2, at 1809.
others may have no discernible relationship to the perpetration of the wrong. Indeed, they may properly be regarded as its victims. The sad truth is that sometimes we must take one step back in order to take two steps forward. Often, there is no other way. We recognize this in the field of battle, and it is no less true in the law.

Richard Weisberg rightly calls our attention to the horrors of the hermeneutic of acceptance. What is missing from both papers, and perhaps from our age in general, is a full appreciation of all that is entailed in the hermeneutic of resistance.