

## A COMMONS IN THE MASTER’S HOUSE

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*Almost everyone who reads these words is an institutional insider in some form. Those of us who aspire toward transformation, liberation, and resistance from our institutional settings are forced to confront Audre Lorde’s striking admonition that “the master’s tools will never dismantle the master’s house.” For some, finding themselves in the master’s house is a spur towards purism—a rejection of institutional power in search of a “pure” remove from which to critique it. For others, it is a dispiriting check on their aspirations and an invitation to sullen fatalism. This Essay questions whether we are bound to the hard consequences of purism or whether there are avenues within our institutional infrastructure that allow us to pursue change with radical pragmatism.*

*Canvassing my own historical work on the struggle against slavery in the 1850s, I advance the beginning of an answer: it may be that it is impossible to revolutionize the institutions we work in as insiders, but it is possible for institutional actors to hold deliberative space within their institutions for transformational and radical imagination. By deliberative space, I mean space held open for conversation, democracy, and participatory deliberation. None of us, alone, can imagine our way out of the master’s house. But together, by stepping back and making space, we may be able to open a commons in the master’s house where we listen, dream, and challenge each other.*

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## I. IMAGINING THE COMMONS

### A. *Compromise and Complicity*

In the late summer of 1853, white abolitionists in Cincinnati had a tragic fight about how far to take political purity. In August 1853, a federal marshal arrested George “Wash” McQuerry in Ohio.<sup>1</sup> A Kentuckian named Henry Miller claimed that McQuerry was his property and sought to use the mechanics of the Fugitive Slave Act of 1850<sup>2</sup> to re-enslave McQuerry and bring him back to Kentucky.<sup>3</sup> As soon as McQuerry was arrested, the antislavery activist network in Cincinnati went into high alert.<sup>4</sup> They knew that if Miller could hurry McQuerry into a courtroom without anyone being the wiser, the quick and egregious legal processes afforded to putative owners would allow Miller to be across the river to enslave McQuerry before anyone had even known he had been captured.<sup>5</sup> So as soon as the arrest took place, one of the most prominent Black abolitionists in the city, Peter Clark, ran through the streets to share the news with the city’s leading abolitionist lawyer, John Jolliffe.<sup>6</sup> Clark and Jolliffe huddled in Jolliffe’s office drafting a writ of habeas corpus.<sup>7</sup> Then, at two o’clock in the morning, Clark drove

1. See *Miller v. McQuerry*, 17 F. Cas. 335, 335–36 (C.C.D. Ohio 1853) (No. 9,583).

2. Ch. 60, 9 Stat. 462 (repealed 1864).

3. *McQuerry*, 17 F. Cas. at 336. Undisputedly, McQuerry had indeed been enslaved in Kentucky before he escaped to Ohio in the 1840s. See *Arrest of a Fugitive—Much Excitement*, DAILY HERALD (Cleveland), Aug. 19, 1853. Once McQuerry had settled on a farm in southern Ohio, he got married and had three children. See *id.* He was respected in the community and known as a “sober, hard working man.” *Id.*

4. See *Arrest of a Fugitive—Much Excitement*, *supra* note 3 (noting that McQuerry had to be guarded by a “posse of police” against “a crowd of 200 negroes”).

5. See Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1894 (2019) (describing the legal system’s re-enslavement processes).

6. See NIKKI M. TAYLOR, AMERICA’S FIRST BLACK SOCIALIST: THE RADICAL LIFE OF PETER H. CLARK 92 (2013).

7. See *id.*

to the town of Clifton where he delivered the writ to U.S. Supreme Court Justice John McLean at his home there.<sup>8</sup>

The mad dash had its intended effect: instead of McQuery being silently re-enslaved, his trial became a public spectacle that drew national attention.<sup>9</sup> Jolliffe used the trial to spotlight the evils of slavery and to build public support for McQuery (and antipathy toward Miller).<sup>10</sup> During the trial, Cincinnati's antislavery forces were united in support of McQuery. Hundreds of people took to the streets in support of his freedom, and the antislavery activists used the press and the public square to condemn the institution and men like Miller (and then McLean) who upheld it.<sup>11</sup>

But when the trial ended with the tragic conclusion that McQuery was to be re-enslaved, a fight broke out among the abolitionists over what measures they should take to free him. Under public pressure, Miller had promised to sell McQuery into freedom if his supporters could raise \$1,200.<sup>12</sup> Some abolitionist leaders in the city organized an effort to capitalize on public outrage and raise the money to free McQuery.<sup>13</sup> Others opposed this effort on the grounds that participating in the monstrous economy of slavery was a

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8. *See id.*

9. The trial reached the attention of William Lloyd Garrison, the editor of the leading abolitionist newspaper in the nation, *The Liberator*. *The Liberator* reported that the trial was a spectacle: "The jury box was filled by ladies, so crowded was the court room." *Accursed Be the Union!*, *LIBERATOR*, Aug. 26, 1853, at 135.

10. *See generally* LEVI COFFIN, *REMINISCENCES OF LEVI COFFIN, THE REPUTED PRESIDENT OF THE UNDERGROUND RAILROAD* 545–46 (Cincinnati, Robert Clarke & Co. 2d ed., 1880). Jolliffe pilloried Miller and Kentucky for

demanding a process by which this defendant—this intelligent and upright human being—may be dragged from his home, from the wife of his bosom, from the graves of his children, and, bound hand and foot, hurried forever away from them and from all he holds dear, . . . [so that] the last drop of his blood may be scourged out on far Southern plantations.

*Id.*

11. *See generally* *Accursed Be the Union!*, *supra* note 9.

12. Miller "generously" offered to contribute \$50, making the actual price \$1,150. COFFIN, *supra* note 10, at 547.

13. *See id.* at 547–48.

ratification of the institution.<sup>14</sup> The disagreement was such that, despite their best efforts, the collection fell short.<sup>15</sup>

The proximate result of this intramovement disagreement was a human tragedy. Wash McQuerry was enslaved, torn from his family and life, and relegated to the status of property.<sup>16</sup> From our perspective today, this looks like an avoidable tragedy—a catastrophic consequence of short-sighted purity politics in the face of a moral cataclysm. It seems that a group of white abolitionists cared more about their own moral consistency than they did about McQuerry's life. But this tidy presentist moral calculus makes matters too easy. In the brutal reality of slavery, McQuerry's tragedy was just one among thousands of moral horrors occurring every day. To radical purists, any compromise or complicity with slavery was an endorsement and perpetuation of the system itself, and such an endorsement was too steep a price to pay to save McQuerry. The radical pragmatists who sought to purchase McQuerry's freedom had to make peace with the fact that they were willing to participate within a system of property and capitalism that was murderous, oppressive, and fundamentally horrific.<sup>17</sup>

Anyone familiar with the internal strategic conflicts in contemporary social movements<sup>18</sup> should be cautious about judging too harshly the

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14. Levi Coffin was a Quaker who ran a store that sold goods untainted by the slave economy. See NIKKI M. TAYLOR, *FRONTIERS OF FREEDOM: CINCINNATI'S BLACK COMMUNITY, 1802–1868*, at 152 (2005). He was also one of the most active leaders of the Underground Railroad in Cincinnati. See *id.* Somewhat ironically, given Coffin's commitment to purity as a matter of commerce, it was he who "made zealous efforts to raise the sum" to purchase McQuerry's freedom. COFFIN, *supra* note 10, at 547. On the other side of the debate was Dr. William Henry Brisbane, a former slave owner who had moved north from South Carolina and converted to a rigid and radical abolitionist. See 1 MARY ELLEN SNODGRASS, *THE UNDERGROUND RAILROAD: AN ENCYCLOPEDIA OF PEOPLE, PLACES, AND OPERATIONS* 73 (2008). Brisbane was among a group of opponents of slavery who did not support paying slave owners because it suggested that their claims to "property" were legitimate. See *Journal of William Henry Brisbane* (Aug. 19, 1853) (on file with author) ("To night I attended a meeting at the Zion's Church held to raise money to purchase the freedom of McQuerry. Not approving the measure I took no part in the meeting."); see also Farbman, *supra* note 5, at 1912.

15. See COFFIN, *supra* note 10, at 547–48.

16. See generally *id.*

17. See Farbman, *supra* note 5, at 1912. In fact, disputes over whether and how to purchase a slave's freedom (or "redeem" it) were frequent and ethically complex. For a fuller accounting of the economics and morality of this problem, see *BUYING FREEDOM: THE ETHICS AND ECONOMICS OF SLAVE REDEMPTION* (Kwame Anthony Appiah & Martin Bunzl eds., 2007).

18. While I intend my use of "movement" and "social movement" to be capacious enough to admit multiple definitions, it may be useful to lay out how I understand the term in my own scholarship. My own definition follows that of Lani Guinier and Gerald Torres (who in turn built on the work of many others, including Stanley Tarrow). In their words, "[s]ocial movements arise when ordinary people join forces in confrontation with elites, authorities, and opponents to change the exercise and distribution of power." Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740, 2757 (2014). To this definition I would add my own gloss from prior work: "The movements that I am focused on are demanding fundamental institutional alterations in the legal order. They are movements that challenge the institutions themselves."

Cincinnati abolitionists who failed to free McQuerry. Questions of purity and pragmatism battle at the heart of most movement strategies.<sup>19</sup> In our fallen world, situated as we are within overlapping imperfect (and often overtly oppressive) systems, those of us who seek to change or overhaul those systems often face the question of how to situate our struggles within and against these systems. Should we reject the systems altogether? Should we participate in them in good faith? Should we participate in them with the goal of undermining them? How do we balance pragmatism and strategy against purism and moral clarity?

### B. *The Master's House*

Nobody can pass through any sort of self-reflective activist space without encountering Audre Lorde's arresting proclamation that "*the master's tools will never dismantle the master's house.*"<sup>20</sup> Lorde's words stand in for a broader set of arguments aimed at any number of problematic institutions. From debates over whether it is possible to be a "progressive prosecutor,"<sup>21</sup> to debates over whether it is possible to be a transformative member of Congress,<sup>22</sup> to debates over whether it is possible to be a radical corporation,<sup>23</sup> the question of whether it is possible to transform the world using existing systemic tools is one that haunts nearly every institution in our lives.

For lawyers—and especially those of us who work in and around legal education—the question has specific and familiar contours. We know that

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Daniel Farbman, *Judicial Solidarity?*, 33 YALE J.L. & HUMANS. (forthcoming 2022) (manuscript at 9) (on file with author).

19. To offer just one representative example, there has long been a similar conversation taking place among activists fighting against cash bail. Some movement actors have championed bail funds (which provide funding for detained people to post bail) as a means of acting pragmatically within the system to resist the system. See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 635–37 (2017). Others have argued that these bail funds legitimize the system by participating in the immoral structure of cash bail. See *id.*

20. AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 112 (1984).

21. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1415–19 (2021); see also Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748 (2018).

22. While it is true that the group of young, progressive congresspeople who have been labeled "The Squad," pose a challenge to the mainstream Democratic Party, there is no doubt that they are also committed and strategic institutional actors. See Aída Chávez, *Alexandria Ocasio-Cortez Looks Like a Radical. She's Really a Pragmatist.*, WASH. POST (Mar. 12, 2020), <https://www.washingtonpost.com/outlook/2020/03/12/alexandria-ocasio-cortez-pragmatist/> [https://perma.cc/9NHV-U876].

23. While a subset of for-profit corporations have become certified as "B-Corps" for their commitment to balancing profit with doing good in the world, some argue that these labels, however well-intentioned, do little to change the basic underlying structures of inequality and subordination that sustain them. See, e.g., ANAND GIRIHARADAS, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 212–14 (2019).

law schools are haunted by big problems: hierarchy,<sup>24</sup> cartelism,<sup>25</sup> debt,<sup>26</sup> and gender and race inequalities.<sup>27</sup> If we are employed by law schools, we know that we are party to these problems and inevitably complicit in uncomfortable ways.<sup>28</sup> These discomforts demand our own reckoning with Lorde's challenge. We who live and work in the master's house—should we be inside this house? And if so, what should we be doing here?<sup>29</sup>

### C. A Place for Radical Imagination

It should be clear that I do not have a detached or dispassionate view of this problem. I spent my years in practice before returning to the academy working with grassroots organizers on long-term projects aimed at radically transforming oppressive systems.<sup>30</sup> When I left practice and entered the legal

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24. For the last two years, I have taught Duncan Kennedy's polemic, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982), and despite its age, my students have uniformly identified with Kennedy's core observation that law schools create, reproduce, and organize themselves through hierarchical logics, *see id.* at 591–92.

25. The recent movement to abolish the bar exam has invigorated arguments that law schools are part of a “legal cartel” that limits entry into the profession through controlled chokepoints that do little to ensure qualifications and much to limit access. *See* Brian L. Frye, *It's Time for Universal Diploma Privilege*, JURIST (Apr. 6, 2020, 10:03 AM), <https://www.jurist.org/commentary/2020/04/brian-frye-diploma-privilege/> [<https://perma.cc/T5MB-5RCQ>] (“While I teach professional responsibility, the real title of the class is ‘managing the legal cartel.’”); Jessica Williams, *Abolish the Bar Exam*, CALIF. L. REV. BLOG (Oct. 2020), <https://www.californialawreview.org/abolish-the-bar-exam/> [<https://perma.cc/NN5H-PE2M>] (“The bar exam is [a] system of oppression, as it was designed to keep ‘undesirable’ (read: non-White, non-male) lawyers out of the profession.”).

26. A recent American Bar Association report found that recent law school graduates held an average of \$108,000 in debt. *See* Alexis Gravely, *Impact of Student Debt on Young Lawyers*, INSIDE HIGHER ED (Sept. 23, 2021), <https://www.insidehighered.com/news/2021/09/23/aba-report-shows-impact-law-school-debt-young-lawyers> [<https://perma.cc/H395-6P9E>]. For Black law students, the number was over \$200,000. *See id.* About 80 percent of these students reported that their debt burden had an impact on the choices that they made about their careers. *See id.*

27. *See generally* Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7 (2021).

28. Perhaps the most searing statement of the problems in legal education comes from a letter that Dean Spade wrote in 2010 addressed to “Those Considering Law School.” Letter from Dean Spade for Those Considering Law School (Oct. 2010), <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School.pdf> [<https://perma.cc/YQ4T-93W4>]. Spade's letter argues that legal work is inherently supportive of existing systems and that law school discourages radical imagination. *See id.* It is aimed at idealistic young people considering law school, but also serves as an indictment of the entire system of legal education and legal practice as unsuited to radical transformative work. *See id.*

29. In the essay where Lorde speaks these words, she is reflecting on the labor of women, and especially non-white women in academic spaces. *See generally* LORDE, *supra* note 20. More specifically, she is speaking these words at an academic conference to critique the conference's troubling complicity with academic hierarchy and erasure of marginalized voices. *See id.* at 110. From the conference itself, Lorde is challenging her listeners to do better, to seek other modes of solidarity and interaction, and to question their core institutional commitments. *See id.* at 112–13. In this sense, Lorde offers her own specific response to what academics should be doing with our power.

30. My work was primarily focused on equality in education and school discipline, particularly what is sometimes called the school-to-prison pipeline. The communities and organizers that I was working with imagined public school systems where funding was equal

academy, I found myself haunted by the question of whether I had left a job where I was “fighting the good fight” to join an institution where there was no room for transformational work. I wondered, in short, whether I had moved into the master’s house and picked up his tools.

On the other side of this anxiety was my realization (accepted after hard reflection) that the work I wanted to do was not located on the front lines of the “good fight,” but rather in libraries, in classrooms, and at the keyboard. I had to come to terms with the fact that the work that lit me up was situated (at least according to our current societal order) within the institution of the legal academy.

Having reached this conclusion, the next question was whether it was an impasse. Was compromise the same as concession? Was there room within my work for radical and transformative imagination—even if that imagination targeted the very institutions that I was working within?<sup>31</sup>

Most academics realize that our research and writing is motivated by autobiographical curiosity or anxiety. (At least, I know this to be true of myself.) This is why this story of my own institutional situation and anxiety helps to explain the historical research and writing that I have been doing since I joined the academy. In every project that I have undertaken, I have asked a version of the same question: is there space within settled and often oppressive institutions for utopian and radical imaginations that challenge those institutions?<sup>32</sup> Upon reflection, I realize that this question is a relative of the question that the Cincinnati abolitionists faced over whether they should purchase McQuerry’s freedom. All of us who operate within imperfect, unjust, and even horrific institutions<sup>33</sup> must grapple with the

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and plentiful, where police did not control discipline, and where Black and brown students could thrive. If this sounds modest, it was not. We were essentially operating on utopian imagination in all of our work.

31. While my own conception of how transformational imagination operates largely springs from my historical work and my practice, it is closely aligned with the way that Amna Akbar describes the radical imagination that flows from movement spaces and into law reform work. See generally Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U L. REV. 405 (2018).

32. It should be said that I know this question to be a basic one. Just like the teenager staring up into the stars contemplating their smallness knows themselves to be asking an age-old question and still simultaneously has their mind blown—so too I experience asking this question as both deeply unoriginal and yet personally vital. Indeed, it seems to me that this is the sort of question that responsible actors must *always* be asking. When we treat fundamental and existential questions as “asked and answered,” we lose track of the importance of making the asking and answering an iterative process rather than a linear one.

33. Let me be clear that I am not drawing a direct moral equivalency here between the horrific institutional structure of slavery and the legal academy! Obviously they are different, and some might argue that their differences are so extreme that any comparison is specious. My argument is simply that the struggle between purity and pragmatism is not only salient in the most extreme cases, but rather a constant question for all who work within institutions that they are critical of. Moreover, as I have argued elsewhere, it is a mistake to treat slavery and the struggle for abolition as *sui generis* or a moral outlier. See Daniel Farbman, “*An Outrage Upon Our Feelings*”: *The Role of Local Governments in Resistance Movements*, 42 CARDOZO L. REV. 2097, 2171–74 (2021). Slavery was an entrenched legal, political, cultural, and economic institution upheld through “normal” politics and struggled against with the tools of

fraught balance between purity and pragmatism. Are we bound to the hard consequences of purism? Or are there avenues within our institutional infrastructure that allow us to pursue change with radical pragmatism?

This Essay is about the unsettled answer that I keep converging on: it may be impossible to revolutionize the institutions we work in as insiders, but it is possible for institutional actors to hold deliberative space within their institutions for transformational and radical imagination. By deliberative, I mean that the space be held open for conversation, democracy, and participatory deliberation. None of us, alone, can imagine our way out of the master's house. But together, by stepping back and making space, we may be able to open a commons<sup>34</sup> in the master's house, where we listen, dream, and challenge each other. This commons could be a place where institutional insiders are invited (or forced) to be in contact and in conversation with voices and views not usually welcome or heard in the sealed spaces they move in. When we open this destabilizing and democratic commons, we may not be tearing down the master's house, but we could be gaining the means to transform it.

## II. THREE EXAMPLES OF THE COMMONS

I am well aware that “holding deliberative space for radical imagination” within institutions is an abstract idea in search of specific instances. In some sense, the abstraction is the point. I have been converging on this aspiration through my work for the last few years, but it is an aspiration more than a prescription. The least I can do, however, is map out the convergence in the hope that in doing so I can give some particularity to the idea.

The following three examples are drawn from my work on the history of the institution of slavery and the struggle to tear that institution down. Because slavery is such an archetype of an oppressive and unjust system, the work of institutional actors *within* the systemic logics of slavery casts clear shadows on our muddier institutional questions today. In these three histories, I observed actors within institutional hierarchies—lawyers, judges, local governments—wielding their power to open up a critical deliberative space within the institutional structure from which foundational questions about that structure could be asked. In doing so, each institutional actor struggled to balance their assigned roles with radical critiques of the structures on which those roles depended. Like the Cincinnati abolitionists,

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“normal” politics. *See id.* In this sense, it is archetypal rather than atypical when we are thinking about the institutions that we work within today. *See id.*

34. I recognize that “a commons” is an abstract term, and I invoke it in part because of this abstraction. I expect that the term will resonate differently with different readers and invoke different kinds of social and special imaginations. That's good! Still, if it is useful, I am drawn to the term in part because it invokes a space that is unowned and undominated but existing within and among (and sometimes even inside) claims of land ownership and mastery. The most explicit example of this was the “commons” system of open fields that existed in Britain before enclosure (when all land was defined as pertaining to specific owners). *See generally* Simon Fairlie, *A Short History of Enclosure in Britain*, LAND, Summer 2009, at 16, 19–20.

these institutional actors also struggled to balance the immediate triage demands of ending individual oppression with broader strategic movement goals. From their collective radical pragmatism emerged a common commitment to taking advantage of the space created by these struggles to open doors into political and legal imaginaries that were not welcome within the mainstream institutional framework.

In *Resistance Lawyering*, I focused on the work that lawyers did within the despised procedural framework of the Fugitive Slave Act of 1850.<sup>35</sup> The power that these lawyers successfully wielded for their clients and against the institution of slavery was rooted in the disruptive space they created in courtrooms and within the legal system.

In “*An Outrage Upon Our Feelings*”: *The Role of Local Governments in Resistance Movements*, my focus shifted to a group of cities and towns across the North that passed resolutions condemning the Fugitive Slave Act.<sup>36</sup> As acts of local governments, these city and town resolutions were, literally, institutional acts. I argued that these resolutions were most effective and promising where they cast the public space of local government as a site of resistance where deliberative democracy and radical imagination could flourish.<sup>37</sup>

Finally, in my most recent paper, *Judicial Solidarity?*, I turn to the most entrenched institutional actor in the legal system: the judge.<sup>38</sup> I tell the story of a judge named Ebenezer Rockwood Hoar and his 1854 grand jury instruction in the wake of an armed uprising against the Fugitive Slave Act.<sup>39</sup> In telling this story, I argue that even judges can seek to make space for movements and radical imagination within the otherwise sealed spaces of elite legal practice.<sup>40</sup>

While I draw the idea of a commons in the master's house from these examples, none of them offer a “model” or prescription in the sense that lawyers and policy makers often desire. Rather, what is common to these three examples is a shared outlook: humility, inclusion, and radical pragmatism. The commons cannot be planned or built; rather, it is the space that emerges when institutional insiders actively crack the windows and cede space to make room for the voices speaking outside (and often against) the institutional status quo.<sup>41</sup> This is radical pragmatism because it does not seek to manifest a utopian order on a broken world, but rather works in the cracks,

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35. See generally Farbman, *supra* note 5.

36. See generally Farbman, *supra* note 33.

37. See *id.* at 2180–81.

38. See generally Farbman, *supra* note 18.

39. See *id.* at 28–49.

40. See *id.* at 49–54, 58–62.

41. Inside and outside are necessarily (and inherently) relative terms here. I am skeptical that any of the outside voices that I am thinking about here could be considered truly *outside* any institutional framework. All of us operate within our own frameworks, whether they be nonprofit organizations or just the broader requirements of surviving in a capitalist society. When I speak of “inside” and “outside,” then, I am referring to the specific institutional spaces that legal insiders occupy (law schools, local governments, the courtroom) and the voices that are generally not heard or welcomed in those spaces.

lacunae, and corners of that broken world. Like every house, the master's house is drafty—there are gaps in the walls, leaks in the roof, unused dusty corners. Those of us who live and work in that house can feverishly spackle, seal, and vacuum—or we can make room for and nurture the disruptive energies where we see them, thus making space for transformational deliberation and radical imagination.

### A. Resistance Lawyering

#### 1. The History

By the fall of 1850, a rift had emerged in the socio-legal order of the United States. On one hand, with every passing month, slavery was hardening its grip in the South and in mainstream national law and politics. Across the South, the laws regulating slavery were getting harsher as a new generation of more radical hard-liners ascended to political power. Many states passed laws cracking down on manumission,<sup>42</sup> exiling (or enslaving) free Blacks,<sup>43</sup> and banning abolitionist speech.<sup>44</sup> These state hard-line policies were reflected in national politics as well. By 1850, it had become the orthodox view of legal and political elites that the compromise with slavery was a foundational element of the constitutional order—and that if that compromise was threatened, secession and Civil War would follow.<sup>45</sup> Fueled by anxiety about the growth of antislavery politics, and with secession and Civil War looming, the South and the allies of slavery extracted a series of further compromises intended to guarantee the perpetuation of slavery. From the Missouri Compromise of 1820 (which opened the Southwest up to slavery), to the annexation of Texas, and then to the “compromise” of 1850,

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42. See generally THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 371–99 (1996) (analyzing the legal history surrounding manumission).

43. See generally ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, *BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA 132–77* (2020) (reviewing the response to free people of color by those living in slave societies).

44. See generally Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 796–802 (1995) (reviewing abolitionist efforts and subsequent attempts to silence them).

45. The most famous exponent of this compromise was Justice Joseph Story, who argued in *Prigg v. Pennsylvania* that the original Fugitive Slave Act of 1793 was constitutional because it embodied the Fugitive Slave Clause in the U.S. Constitution—which was a compromise that was essential to the drafting and ratification of the Constitution. 41 U.S. 539, 540–42 (1842). He wrote,

The full recognition of [the right to property in slaves] was indispensable to the security of this species of property in all the slaveholding states; and indeed was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevailing in the non-slaveholding states, by preventing them from intermeddling with or obstructing or abolishing the rights of the owners of slaves.

*Id.* at 540.

a growing Southern brinksmanship sought to extract more assurances supporting the future and security of slavery.<sup>46</sup>

This was the context in which the Fugitive Slave Act of 1850 was passed. Southern legislators demanded new and stronger federal support for slave owners seeking to reclaim their “property” when the human beings that they had enslaved escaped to freedom.<sup>47</sup> While the absolute numbers of fugitives were low, Southerners saw the new law as a symbolically essential commitment to their “‘sacred’ property rights.”<sup>48</sup> Not only did “great compromisers” like Daniel Webster accede to this demand, but they also committed themselves to making good on the compromises’ guarantees and to ensuring that alleged fugitives be effectively enslaved to prove the good faith of the North.<sup>49</sup>

Behind legal institutionalists’ increasing adoption of (or capitulation to) a hard-line defense of slavery was the growing salience of antislavery politics. While abolition had been a part of mainstream political discourse since before 1776, it was not until the mid-1830s that it began to grow into anything more than a fringe movement.<sup>50</sup> After 1836, however, fueled by growing sectional tensions over westward expansion and effective antislavery activism in the press and popular culture, the arguments against slavery had become a force in national politics.<sup>51</sup> From states passing “personal liberty laws” to protect their Black citizens against kidnapping,<sup>52</sup> to the controversy over the annexation of Texas,<sup>53</sup> to the splintering of the Whig party and the birth of the Republican Party,<sup>54</sup> antislavery arguments were driving electoral and policy outcomes across the country.

And so, a dissonant gap opened between the growing antislavery movement challenging the institutional foundations of slavery and the increasingly reactionary mainstream legal and political defense of slavery. While institutions, from Congress to political parties to the courts, doubled down on their pledge of fealty to slavery, in clenching their fists they made the institutions more brittle.

When the new Fugitive Slave Act was enacted in September 1850, the law’s explicit goal was to strengthen federal support for slave owners seeking

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46. For a detailed examination of these assurances, see 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776–1854* (1990).

47. See Farbman, *supra* note 5, at 1893–94.

48. *Id.* at 1893. Slave owners and their political allies often talked about their right to own human beings as “sacred” or “natural.” Among many to invoke the phrase “sacred rights of property” was President James Buchanan in his final address to the U.S. Congress in 1860. See H.R. JOURNAL, 36th Cong., 2d Sess. 13 (1860).

49. See Farbman, *supra* note 5, at 1902–03.

50. See MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 228 (2016).

51. See *id.*

52. See THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861*, at ix (The Lawbook Exchange Ltd. 4th prtg. 2008) (1974).

53. See SINHA, *supra* note 50, at 478–80.

54. See HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* xiii–xv (2014).

to “reclaim” and enslave humans that they claimed as property.<sup>55</sup> The procedural framework of the law was intended to soothe Southern hard-liners in nearly every respect.<sup>56</sup> It was very easy for putative owners to engage the machinery of the law with federal marshals standing at the ready to apprehend any alleged fugitive on nothing more than the owner’s word.<sup>57</sup> Once apprehended, the process afforded by the law was explicitly biased against the alleged fugitive. Alleged fugitives were not guaranteed lawyers, had very little opportunity to present evidence, and could not have their cases heard by a jury.<sup>58</sup> The commissioners appointed to adjudicate the cases were paid \$10 if they found in favor of the putative owner, but only \$5 if they found in favor of the alleged fugitive.<sup>59</sup> Perhaps most inflammatory for Northerners, the new law increased criminal penalties for providing aid and comfort to a fugitive in any way.<sup>60</sup>

To borrow a phrase, the new law’s cruelty *was the point*.<sup>61</sup> Its procedural framework was meant to appease hard-liners through its cramped injustices and slanted summary process. As a result, the procedural legal framework that came into existence was both harsh and brittle. For antislavery lawyers contemplating practicing within this system, its cruelty made it apparent that resistance was necessary.<sup>62</sup> And yet, while some purists insisted that any participation in the system validated and reified it,<sup>63</sup> most rejected knee-jerk purism and adopted a radically pragmatic approach to fighting against slavery and against the Fugitive Slave Act.

In case after case, these lawyers used the new law’s paltry procedural tools and all other tools at their disposal to disrupt, delay, and co-opt the law’s process. This is the approach that I call “resistance lawyering” in my recent article.<sup>64</sup> There I described a resistance lawyer as someone who, by practicing within a system that they believe to be unjust, “seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.”<sup>65</sup> While I argue that this model of lawyering

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55. Farbman, *supra* note 5, at 1893.

56. *See generally id.* at 1893–95.

57. *See id.* at 1894.

58. *See id.*

59. *See id.*

60. *See id.* at 1894–95.

61. *See generally* ADAM SERWER, *THE CRUELTY IS THE POINT: THE PAST, PRESENT, AND FUTURE OF TRUMP’S AMERICA* (2021).

62. Lawyers were among the thousands of people who protested against the law as soon as it was signed. *See generally* Farbman, *supra* note 5, at 1895.

63. The most famous statement of this view came from Henry David Thoreau who, excoriating lawyers and the legal system, argued that the only decent position that a lawyer or a judge could take was to oppose the law and its operation entirely and exit the system. *See* HENRY DAVID THOREAU, *Slavery in Massachusetts, in WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU* 695, 708 (Brooks Atkinson ed.1992). He wrote, “I am sorry to say that I doubt there is a judge in Massachusetts who is prepared to resign his office and get his living innocently.” *Id.*

64. Farbman, *supra* note 5, at 1880.

65. *Id.*

transcends the 1850s, these abolitionist lawyers practicing within and against the Fugitive Slave Act were archetypal examples of resistance lawyering.

*Resistance Lawyering* was a long article! I won't rehash its arguments here or redescribe the remarkable tactics of the abolitionist lawyers who achieved amazing outcomes for their clients and for the movement more broadly.<sup>66</sup> Rather, I want to point out how these lawyers, acting as institutional insiders within a legal procedural system, opened a commons within the very most hostile institutional space. As noted earlier, the framework of the Fugitive Slave Act was both harsh *and brittle*. To return to the analogy of the master's house, the walls were reinforced, but the joints were not well sealed.

Through delay, procedural confusion, and strategic use of the press,<sup>67</sup> antislavery lawyers invited subversive and radical imaginaries into courtrooms designed to tamp down those voices. In a system designed to ensure that alleged fugitives could not speak on their own behalf, lawyers manipulated the rules so that they could speak.<sup>68</sup> In a system designed to minimize public outcry, lawyers magnified political salience and outrage in every case they could.<sup>69</sup> In a system designed to reinforce the compromise with slavery, resistance lawyers transformed each case into a space to contest and challenge that compromise.

## 2. Lawyers as Institutionalists

It is tempting to lionize abolitionist resistance lawyers and to figure them as subversives and revolutionaries. I think this both overstates the case and understates the power of the lessons they have to teach us today. There are many lawyers today who stand in a similar oppositional (and yet embedded) position with respect to the legal system that they practice within.<sup>70</sup> Especially for public interest and nonprofit lawyers (who are undercompensated financially), there is an understandable tendency to compensate themselves with the self-righteousness of heroism. Indeed, since the article was published, I have been struck by how many lawyers have sought to claim the label "resistance lawyer" for themselves as a badge of honor. As a former underpaid civil rights lawyer, I understand this impulse.

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66. For those who are interested, I tell these stories in some detail in Part II of the article. *See id.* at 1895–932.

67. *See id.* at 1905.

68. *See, e.g.,* MARK REINHARDT, WHO SPEAKS FOR MARGARET GARNER? 25–26 (2010) (describing how lawyer John Jolliffe, representing Margaret Garner—whose story inspired Toni Morrison's novel *Beloved*—managed to manipulate the trial process to allow Garner to testify before the commissioner).

69. In case after case, lawyers used the bully pulpit of the courtroom to speak indirectly to the press and build public support for the alleged fugitives they represented. *See generally* Farbman, *supra* note 5, at 1905–32.

70. Here again, I acknowledge the huge differences between the context of slavery and our present unjust frameworks, while insisting that the shadows of the past can be usefully observed in the present. In the paper, I offer capital defense lawyers, public defenders, and immigration lawyers as examples, though there are many others one could imagine as well. *See id.* at 1939–52.

Badges of radicalism, like proclamations of purity, are powerful rhetoric against the ever-pulling tide of institutional complicity. Whether or not a lawyer's work fits within the definition I laid out, given the choice between "resistance" and "status quo," it is easy enough to guess which one most cause lawyers would choose.

But while many lawyers are resistance lawyers in some sense, treating the term as a heroic and individualistic badge misunderstands the lessons of the 1850s. The reality is both more prosaic and more powerful. Lawyers working within institutions and struggling to make space to question and upend those institutions are working in incremental but essential ways to make a commons within the master's house—not alone, but together with each other and with the excluded voices whose imaginaries they invite into that commons. Making this commons is resistance by inclusion and invitation. It is resistance by making space for discourse and democracy. To the extent that this is heroic work, it is heroism on a modest scale. And modesty is a critical element: this model of resistance suggests that lawyers are *not* the heroes of the movement, but rather coparticipants with the activists, agitators, dreamers, and grassroots organizers who would be excluded from the master's house.

This modesty matters because no matter how radical a lawyer's work and critique, to be a lawyer is to be an institutionalist. Lawyers are, almost definitionally, embedded as practitioners within a legal system. Living in the real world, it hardly needs saying that all legal systems have a politics and that many legal systems launder a complicity with oppressive structures through the guise of neutrality. As I argue in *Resistance Lawyering*, there is no one great structure that we can name "the legal system," but rather multiple and overlapping substantive and procedural frameworks that lawyers practice within and around.<sup>71</sup> Even if lawyers practice within substructures and subsystems that they oppose, most lawyers retain a deeper commitment to the "rule of law" and the abstract idea of a good and functioning "legal system."<sup>72</sup>

Casting lawyers as institutionalists should not minimize or dispirit. Rather, it should highlight the extent to which lawyers cannot constructively cast themselves as purists, wash their hands of "the system," and propose to burn it all down. Rather, as institutional insiders, their radicalism must be pragmatic. Even for resistance lawyers with deep critiques of the systems that they are operating within, it is not *their work* alone that is doing the work of resistance.

The abolitionist lawyers that I wrote about were not dismantling slavery on their own, and those that hoped to do so were deluded and ineffective. Rather, they were vectors for bringing radical and transformative arguments fueled by a transformative abolitionist imagination into legal spaces. Through their obstructionist practices, grandstanding oratory, and procedural shenanigans, these lawyers found ways to bring the force of outside

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71. *See id.* at 1933–34.

72. *See id.*

movement arguments into courtrooms, and then back out again into the public view.

The radical and revolutionary energy that was driving antislavery politics and resistance was an energy growing in movement spaces: Black abolitionist vigilance committees, antislavery societies, churches, and women's sewing circles. The boundaries between those movement spaces and the conventional and conservative spaces of law and legal argument were policed by status quo legal elites. Paeans to "the rule of law" and demands that laws like the Fugitive Slave Act be upheld to preserve "legal order" were intended to do precisely what today's demands that law not be "politicized" are intended to do: erect a barrier between legal imaginaries and the unsettling and threatening radical imaginaries developing in movement spaces.

What resistance lawyers did and continue to do is to breach that barrier. By making space for movement actors to speak and by muddying the boundaries between legal and movement imaginaries, lawyers can open up a deliberative space within the very institutions that they operate within. Framed this way, resistance lawyers both past and present do not need to choose purity or complicity. They need not choose whether to take up or reject the "master's tools." Instead, through modesty, strategy, and radical pragmatism, they can make space within the master's house for critique, imagination, and transformation.

### B. *Outraged Towns*

Lawyers were not the only institutionalists outraged by the Fugitive Slave Act. When the law was signed by President Millard Fillmore in 1850, a wave of outrage manifested in spontaneous community gatherings and meetings across the increasingly antislavery North.<sup>73</sup> Most of the antislavery societies and vigilance committees that convened these meetings operated outside of government.<sup>74</sup> The mass movement against the law was burning from the grassroots against the brittle but rigid institutions that upheld slavery.

Apart from the small, but growing, cadre of antislavery politicians at the state and national levels, most public officials and government actors either stayed aloof from the abolitionist firestorm or, like Daniel Webster, pledged fealty to the new law and the "patriotic" project of compromise.<sup>75</sup> Nevertheless, a small number of towns and cities sought to get off the sidelines by passing resolutions that condemned the Fugitive Slave Act and promised to nullify it.

I wrote about these local resolutions in my recent article, "*An Outrage Upon Our Feelings*": *The Role of Local Governments in Resistance Movements*.<sup>76</sup> In that article, I collect examples of local resolutions from

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73. See Farbman, *supra* note 33, at 2125.

74. Today we would likely see them as nonprofits or nongovernment organizations, but those labels did not carry their present meaning in the 1850s.

75. See Farbman, *supra* note 33, at 2167–69.

76. See generally *id.* at 2122–63.

cities and towns across the North.<sup>77</sup> The language in these resolutions was strident. Acton, Massachusetts, called the law “an abomination without a parallel in the annals of our government.”<sup>78</sup> The citizens of Marshfield, Massachusetts—the hometown of hero-turned-villain Daniel Webster—called the law a “disgrace to the civilization of the age, and clearly at variance with the whole spirit of the Christian faith.”<sup>79</sup> Not only was the law a moral outrage, they argued, but it was unconstitutional.<sup>80</sup>

For the local governments that felt and spoke this way, it was clear that they sought to resist the Fugitive Slave Act. The central strategic question was then: what could be done to stop the law? The short answer common to every resisting town was, dispiritingly, almost nothing. In some places, like Acton or Marshfield, there were very few Black residents and very little chance that an alleged fugitive slave would ever be apprehended in town.<sup>81</sup> In small and predominantly white towns, the outrage of the new law was a political abstraction. It was easy to promise to resist or even nullify the law because there was almost no chance that anyone would be forced to keep that promise in any substantial way.

In other places, like Chicago, there were many more free Black residents and thus a much higher likelihood that a slave owner would leverage the law’s mechanisms to reclaim their “property” within the city.<sup>82</sup> For a city like Chicago, the question of local capacity for resistance was much more pragmatic. The city *could* choose to deploy its police or constabulary to intervene against the federal marshals and protect an alleged fugitive. Moreover, the city *could* choose to use its resources in other material ways to provide physical sanctuary and protection for alleged fugitives. For pragmatic reasons, however, no city ever proposed to take such steps. Interposing local police against federal marshals was a recipe for armed civil conflict, which the city would almost certainly lose. Perhaps more to the point, although there was value in expressing antislavery outrage, there was less reason for the city government to take the much more substantial risk of challenging the federal government on behalf of residents who were not full-fledged citizens.

Whatever the reasons, despite often high-flying rhetoric and saber-rattling about nullifying the law, no local government actually took any meaningful

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77. Although, truth be told, the vast majority of the examples wind up being from small towns in Massachusetts, with Chicago being an important outlier. See generally *id.*

78. *Id.* at 2157 (quoting *Resolutions at 1851 Acton Town Meeting in Response to Federal Fugitive Slave Act*, ACTON MEM’L LIBR. CIV. WAR ARCHIVES, [https://www.actonmemoriallibrary.org/civilwar/documents/acton\\_town\\_meeting/1851\\_resolutions.html](https://www.actonmemoriallibrary.org/civilwar/documents/acton_town_meeting/1851_resolutions.html) [https://perma.cc/VLD9-SR6X] (last visited Mar. 4, 2022)).

79. *Id.* at 2100 (quoting 1 LYSANDER SALMON RICHARDS, HISTORY OF MARSHFIELD 163 (1901)).

80. In Weymouth, Massachusetts, the resolutions proclaimed the law “‘highly obnoxious to the people of this Town’ because it was ‘unconstitutional’ as well as ‘arbitrary, unjust, and cruel.’” *Id.* at 2130 (quoting *Proceedings of the Weymouth Town Meeting of November 12, 1850*, in RECORDS OF THE TOWN OF WEYMOUTH).

81. See *id.* at 2127, 2142.

82. See *id.* at 2134–35.

substantive action to resist the law. While private citizens organized to patrol the streets and alert residents to the threat of slave catchers,<sup>83</sup> local governments did not help with these efforts.<sup>84</sup> While private citizens denounced anyone who would collaborate with the slave catchers, local governments were unwilling to back their rhetoric with real sanctions against their collaborating neighbors.<sup>85</sup>

Where the gap between rhetoric and action was so stark, it is tempting to conclude that local governments were simply not rich or effective sites for resistance. Put more sharply, a close examination of many of these resolutions points toward a shallow and ineffective performative alignment with the abolitionist movement. To speak against an outrage is better than nothing! But empty institutional promises feel more like bluster than support.

It is not hard to translate the bleak picture from the past into today's landscape. In my recent article, I note the many parallels between the 1850 resolutions and contemporary sanctuary resolutions.<sup>86</sup> The politics around proclaiming sanctuary are problematically familiar, and many cities and towns have performatively embraced the idea of sanctuary as "good politics" without doing as much as they could (or should) to actually protect their residents against being detained and deported.<sup>87</sup>

It is tempting, then, to drift toward purism—to the view that the only place where "true" resistance can happen is on the outside of the formal structures of governance. It is tempting to conclude that local governments can, at best, be sympathetic windbags and, at worst, make cynical promises that they will not live up to. In short, looking at the present through the past, there is reason to be concerned that governmental actors cannot be productive participants in resistance movements.

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83. In Chicago, a group of abolitionists gathered at Quinn Chapel A.M.E. Church (a predominantly Black church) to create a well-articulated plan for private patrols. *Id.* at 2135. The meeting was explicit about how much help they expected from the government: "[W]e must abandon the hope of any protection from [the] government." *Id.* (second alteration in original) (quoting 1 CHRISTOPHER ROBERT REED, *BLACK CHICAGO'S FIRST CENTURY: 1833–1900*, at 101 (2005)).

84. *See id.* at 2161.

85. In Weymouth, Massachusetts, for example, the resolutions labeled "any man who officially or unofficially shall aid or abet the execution of the Fugitive Slave Law" as "a deadly enemy to the virtue[,] peace[, and] security" of the town. *Proceedings of the Weymouth Town Meeting of November 12, 1850*, in *RECORDS OF THE TOWN OF WEYMOUTH*; *see also* Farbman, *supra* note 33, at 2129–30. Having said that, however, the town meeting failed to impose any available sanctions, such as revoking town licenses or expulsion from the town meeting. *See id.* at 2130.

86. *See generally* Farbman, *supra* note 33, at 2169–81.

87. The example of Chicago is relevant again here. In 2016 after the election of former President Donald Trump, Mayor Rahm Emmanuel promised undocumented residents of the city that they would be "safe in Chicago." Alex Kotlowitz, *The Limits of Sanctuary Cities*, *NEW YORKER* (Nov. 23, 2016), <https://www.newyorker.com/news/news-desk/the-limits-of-sanctuary-cities> [<https://perma.cc/4E9C-C3UF>]; *see also* Farbman, *supra* note 33, at 2175 n.242. In the first six months after the election, U.S. Immigration and Customs Enforcement deported nearly 3,000 Chicagoans. *Id.* at 2177.

For all the sympathy I have with this temptation, I want to push back against it. My argument in the article begins with the flickering promise of the resolutions passed by the town meeting in Acton, Massachusetts, in the spring of 1851.<sup>88</sup> Like many of its neighboring towns that spoke out, Acton's resolutions condemned the Fugitive Slave Act in no uncertain terms.<sup>89</sup> They called the law a capitulation to slavery and slave owners and called the law "manifestly iniquitous and unconstitutional."<sup>90</sup> But unlike its neighbors, Acton's resolutions neither promised to nullify the law nor to provide sanctuary.<sup>91</sup> Rather, Acton's resolutions made explicit that the purpose of speaking was not to pretend substantive protection, but rather to keep faith with the town's tradition of civic engagement and virtue.<sup>92</sup> In keeping faith with the town's moral traditions, Acton was doing more than virtue signaling. The resolutions make it clear that the town was pledging to hold civic space for resistance to the law. Without promising to resist the law by public means, the resolutions promised to value civil disobedience against the law and to support and foster a space for town residents to organize against the law.<sup>93</sup>

Acton's resolutions modeled the promise of radical pragmatism in local resistance. Acton did not cast itself as the hero or protector.<sup>94</sup> The town meeting seemed aware of the limits of its own capacity to resist the law.<sup>95</sup> But the resolutions also implicitly recognized that the institution of local government represents a civic space.<sup>96</sup> Acton's resolutions thus invited civil resisters, abolitionists, organizers, and radical imaginations into the civic space of the town.<sup>97</sup> In this sense, Acton transformed its town common into a commons within the master's house.<sup>98</sup>

Acton's example from 1851 points the way toward a model for today's local governments. Just as resistance lawyers decenter themselves to create space within the institutions of legal practice, so too can local governments decenter their own role to create civic space for movement energies to flow in and through. Once again, the model is radical pragmatism. Where institutionalists within local governments (including the political arms of

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88. See generally Farbman, *supra* note 33, at 2104, 2155–60.

89. See *id.* at 2155.

90. *Id.* at 2156 (quoting *Resolutions at 1851 Acton Town Meeting in Response to Federal Fugitive Slave Act*, *supra* note 78).

91. See *id.*

92. The resolutions declare that the town meeting "feel it to be a duty we owe to the memory of our Fathers that we owe ourselves, to our descendants, to our Country and to our God, to record our solemn protest against said law." *Id.* at 2157 (quoting *Resolutions at 1851 Acton Town Meeting in Response to Federal Fugitive Slave Act*, *supra* note 78).

93. See *id.* at 2158.

94. See *id.* at 2159.

95. See *id.*

96. See *id.*

97. See generally *id.*

98. The Acton Town Common is a painfully iconic representative of the New England stereotype. There is a green (with a war memorial at its center) laid out in front of the old congregational church. See *Acton*, FREEDOM'S WAY, <https://freedomsway.org/communities/acton/> [<https://perma.cc/6V58-WFBU>] (last visited Mar. 4, 2022).

those governments themselves) are drawn toward helping resistance movements, they can act strategically and incrementally. Broad public statements of sanctuary may be helpful, but so too may be small gestures like participatory budgeting, extending the franchise to noncitizens, and making room for radical imagination within and across the wide array of local public space.

If the argument here is somewhat dyspeptic about the value of public proclamations of sanctuary or high-flying local political rhetoric, it is ultimately optimistic on the question of whether and how local governments can participate in resistance movements. If movements require nourishment and democratic space to thrive, local governments can be powerful incubators of transformative ideas and energies. Not only is this a hopeful image, it is already happening to a greater and lesser extent all over the country and the world.<sup>99</sup> Recognizing these already flourishing commons within our existing institutions promises to shift focus away from antigovernment purism and toward growing, extending, and maximizing these spaces.

### C. Resisting Judges

The optimistic spark that I am trying to protect from the elements relies on the observation that, to varying degrees, institutional actors have made, and can make, space within otherwise hostile institutions to nourish and support resistance movements. But against that optimism blows a large objection. Even if the kind of radical pragmatism that I am identifying is possible, it is also rare. It is far more common for institutional insiders to act to exclude radical imaginaries and close down the space for resistance movements to flourish.

This was true in the 1850s, and it remains true today. Perhaps the most well-known study of this bleak story is Robert Cover's book *Justice Accused: Antislavery and the Judicial Process*.<sup>100</sup> In the book, Cover canvassed the way that the legal elite—especially judges—coalesced around the view that the survival of the union depended on maintaining the compromise with slavery.<sup>101</sup> In particular, Cover focused on antislavery judges.<sup>102</sup> As judges, these men (and they were all men) were the central pillars of the legal establishment, and in Cover's telling, every one of them chose complicity

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99. One prominent example of this idea is the municipalist movement. Municipalists have identified local government as a site for their work of “radicaliz[ing] democracy, feminiz[ing] politics and driv[ing] the transition to an economy that cares for people and our environment.” See *About*, FEARLESS CITIES, <https://www.fearlesscities.com/en/about> [https://perma.cc/TS4J-4JUT] (last visited Mar. 4, 2022). The most prominent working example of municipalism in action is Barcelona, but there are municipalist movements and governments all over the world. See *Map*, FEARLESS CITIES, <https://www.fearlesscities.com/en/map> [https://perma.cc/SA5L-SUFS] (last visited Mar. 4, 2022).

100. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

101. See generally *id.*

102. See generally *id.*

with slavery over their personal moral objections against it.<sup>103</sup> This was what Cover called “the moral-formal dilemma.”<sup>104</sup> While Cover began his analysis disgusted at these craven judges, he ultimately concluded that lawyers and judges, as deeply entangled as they were with the institutions that they operated within, were simply not well-suited to be the agents of change within those institutions.<sup>105</sup> In his evocative framing, judges were priests, not prophets.<sup>106</sup>

Robert Cover’s view of judges and the limited scope of their capacity to be useful in resistance movements stands not only as the definitive statement on the subject for the 1850s, but also for today. In my recent paper, *Judicial Solidarity?*, I call Cover’s view “judicial dismalism” and argue that it is aligned with a form of purism that comes straight from Henry David Thoreau.<sup>107</sup> Thoreau, in his seminal essay *Civil Disobedience*, argues that where a judge is faced with an unjust law, his only option is to refuse to enforce that law and resign.<sup>108</sup> Both Thoreau and Cover share the view that judges either cannot or will not do anything from within their institutional role to disrupt or challenge that institution.<sup>109</sup> To merge their views, prophets resign while priests labor on.

In *Judicial Solidarity?*, I confront the Cover/Thoreau purist view and, through the story of Thoreau’s neighbor, Judge Ebenezer Rockwood Hoar, unsettle the stability of their conclusion.<sup>110</sup> Judge Hoar, a native of Concord, Massachusetts, was deeply entwined personally and intellectually with his famous transcendentalist neighbors Emerson and Thoreau.<sup>111</sup> Hoar’s parents were Yankee royalty (his father was known as “Squire Hoar” and his mother was the daughter of Roger Sherman).<sup>112</sup> Like so many other Massachusetts elites, Hoar had been educated at Harvard and raised in staunchly orthodox traditional politics.<sup>113</sup> In short, he was no firebrand. But Hoar was also a leader of the increasingly mainstream antislavery political movement in Massachusetts.<sup>114</sup> As an elite antislavery institutionalist, Hoar fit Cover’s

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103. See generally *id.* See also Farbman, *supra* note 18, at 13–14, 57–58.

104. COVER, *supra* note 100, at 5; see also Farbman, *supra* note 18, at 57.

105. See generally COVER, *supra* note 100.

106. See *id.* at 259 (“If a man makes a good priest, we may be quite sure that he will not be a great prophet.”).

107. See Farbman, *supra* note 18, at 12.

108. See HENRY DAVID THOREAU, *Civil Disobedience*, in WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU 665, 680 (Brooks Atkinson ed., 1992).

109. See generally Farbman, *supra* note 18, at 57–58.

110. See generally *id.* at 5–8.

111. See *id.* at 28, 37–38. Hoar’s sister had been engaged to marry Emerson’s younger brother Charles before he tragically died, and Ralph Waldo Emerson had taken her into his household. See *id.* at 36. Hoar’s younger brother was Thoreau’s close friend and frequent walking companion. See *id.* at 37.

112. See *id.* at 28–29.

113. See *id.* at 29–30.

114. While Hoar was no fire-breather, he was a staunch opponent of slavery when he served in the state legislature. See generally *id.* at 34–36. He was among the first and founding members of the Massachusetts Republican Party that emerged as an antislavery party from the ashes of the Whig Party. See *id.*

profile perfectly. He was precisely the kind of judge who would oppose slavery in private but uphold its institutional compromises in public in the name of political and social stability.

Hoar was not the only antislavery judge to charge a grand jury on how the law should treat abolitionists who resisted the Fugitive Slave Act. In *Judicial Solidarity?*, I collect and digest all the other grand jury instructions delivered in cases prosecuting abolitionists who tried to rescue or otherwise help alleged fugitives.<sup>115</sup> Every other judge, no matter where they sat or what their attitude toward slavery was, had the same response to these cases: the Fugitive Slave Act must be enforced, and resistance to the law must be punished because otherwise the rule of law would disintegrate.<sup>116</sup> These jury instructions, as a collection, strongly confirm Cover's dismal view of antislavery judges. To a man, the priests of the legal institution doubled down on institutionalism and sought to choke off any challenges to the status quo and the legal order.

Judge Hoar's jury instruction was different. Where every other judge took pains to establish the legitimacy and enforceability of the Fugitive Slave Act, Judge Hoar proclaimed that the law "seems to me to evince a more deliberate and settled disregard of all the principles of constitutional liberty than any other enactment which has ever come under my notice."<sup>117</sup> Where every other judge argued that the law's legitimacy must be stable, Hoar (while acknowledging that the law was *currently* constitutional) argued that the law's legitimacy is dynamic and could be changed through mass politics.<sup>118</sup> And where every other judge feared that any resistance to the law in the name of "higher law" would be the gateway to secession and anarchy,<sup>119</sup> Hoar explicitly allowed for the moral possibility of civil resistance. He allowed that when a man "acting conscientiously and uprightly, believes [a law] to be wicked, and which, acting under the law of God, he thinks he ought to disobey, *unquestionably he ought to disobey that statute.*"<sup>120</sup>

In the context of the other jury instructions, and in the shadow of Cover's dismal view, Judge Hoar's instruction stands out. Again and again, Hoar rejects the institutional orthodoxy that would clamp down on dissent and affirm the legal order. Again and again, Hoar makes space for the radical abolitionist ideas swirling outside his courtroom door. One could dispute (and I discuss this dispute at length in the article) whether Hoar's instruction does enough to truly stand in solidarity with the movement to abolish slavery. One could argue (as Thoreau did)<sup>121</sup> that it would have been better for him to resign than to continue to operate within a corrupted system.

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115. *See id.* at 16–24.

116. *See id.*

117. EBENEZER ROCKWOOD HOAR, CHARGE TO THE GRAND JURY, AT THE JULY TERM OF THE MUNICIPAL COURT, IN BOSTON, 1854, at 7 (Boston, Little, Brown & Co. 1854); *see also* Farbman, *supra* note 18, at 44.

118. *See* Farbman, *supra* note 18, at 43.

119. *See generally id.* at 16–24.

120. HOAR, *supra* note 117, at 8 (emphasis added); *see also* Farbman, *supra* note 18, at 47.

121. *See supra* note 63 and accompanying text.

Ultimately, these strategic arguments are beside the point. The question is not whether or not Judge Hoar was a “hero of the resistance.”<sup>TM</sup> As I previously argued, this very idea is itself a distraction. Instead, what interests me is the attempt. In Judge Hoar’s deviant grand jury instruction, I see another effort by someone who holds institutional power to make space for deliberation, resistance, and radical imagination within a hostile system. It may be that, in Cover’s terms, Hoar is a priest and not a prophet. But he is a priest who wants to make room for prophecy rather than one who wants to stamp it out. Or, to bring the metaphor back around, Hoar is yet another master who is working to open up a destabilizing and democratizing commons within the master’s house.

Transposing Hoar’s story to the present, we face the modern application of Cover’s challenge. Can judges be allies in struggles for liberation and in movements resisting unjust institutions? One could argue that the question itself is destabilizing. The concepts of judicial remove and neutrality are baked so deeply into our legal system that the ideas (and self-evident facts) of judicial politics and moral motivation are taboo.<sup>122</sup> To suggest that judges can or should make room for the challenges of movement politics within their courtrooms is a fundamental breach of this decorum. The trouble, however, is that the breach is inevitable. It does not take an expert to see how deeply the political environment outside the courtroom walls inflects the decision-making of the judges within. As was true in the 1850s, judges can either work actively to *exclude* the deliberative and radical clamor of movement politics from legal spaces or, like Judge Hoar, they can make space for that clamor within the system.

Neither of these two options is “neutral” or “impartial.” Both are taken with the clamor within earshot. The question today, as in the past, is what judges and other institutionalists do in the context of that clamor. Modest as

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122. It would be almost silly to generate a string-cite here to encapsulate the broad struggle being waged in academia, in the courts, and in our politics. Instead, let me offer just two prominent examples, both from the highest priests of the judiciary: Justice Breyer and Chief Justice Roberts. Justice Breyer has argued repeatedly against the view that judicial decisions are driven by politics instead of legal principles, which he believes is inaccurate and erodes the public’s trust in the U.S. Supreme Court. See Harvard Law School, *Scalia Lecture: Justice Stephen G. Breyer, “The Authority of the Court and the Peril of Politics,”* YOUTUBE (Apr. 7, 2021), <https://www.youtube.com/watch?v=bHxTQxDVTdU> [<https://perma.cc/J4LX-DHZR>]. His view, apparently sincerely held, is rooted in a deep orthodoxy within the legal profession, which insists that judicial impartiality is a necessary virtue for the ongoing health of the legal order. Chief Justice Roberts agrees. In his (in)famous testimony during his nomination hearings, he insisted that the role of a judge was simply to “call balls and strikes.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56* (2005) (statement of John G. Roberts, Jr.) (“I come before the Committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

it is, Hoar's model shows how a judge might make a less dismal choice than simply stopping up their ears and screaming for peace.

### III. MAKING THE COMMONS

#### A. *Against Prescription*

One of the risks of rooting historical examples in the movement to abolish slavery is that it feeds the temptation to lionize the resisters in these stories. There are few moments in history where "right" and "wrong" seem so starkly defined from our modern vantage point than the 1850s in the United States. Along with the temptation toward lionizing resisters comes a temptation to draw prescriptive lessons from them. It is tempting, in short, to argue that *these* heroes strove to make a commons in the master's house and that we should follow their blueprint.

As tempting as this takeaway is, I want to reject it. I reject it for two reasons that are worth rehearsing here as I close. First, the very idea that there are heroes, or that institutional actors can be heroes, is counterproductive. To the extent that there is a utopian promise of making a commons within our unjust institutions, it is a collective project that requires stepping back and ceding space rather than stepping up and taking credit.

Second, the search for a prescriptive blueprint is a distraction. Even if it were not true that the 1850s was a fundamentally different political, cultural, and legal context than today, what is common to each of these stories is not substantive strategy, but rather a radical pragmatism that rejects grand plans and adopts contingency and specificity. What it meant for institutionalists to make space and cede power was entirely contingent on their relationships to organizers, movements, and radical imagination. What the examples in these stories have in common is an aspiration toward, rather than a plan for, opening space.

The difference between aspiration and planning may seem abstract, but it is critical. One of the things that makes lawyers so prone toward institutionalism is the way that legal training emphasizes planning. Law students and young lawyers are taught to brief cases, outline classes, map out pleadings, and script out depositions. They are professionalized into the logic of law school and the legal profession in its hierarchy<sup>123</sup> (and in its maleness<sup>124</sup> and whiteness<sup>125</sup>). All these strategies are about creating and preserving order. For example, the very act of outlining a class in preparation for a final exam is predicated on the hope that there is rationalized order that the student can impose on the class. That order, properly imposed, creates the possibility of planning for (and succeeding on) a final exam that tests synthetic comprehension. Students become the heroes of their own quest to

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123. See generally Kennedy, *supra* note 24.

124. See generally LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997).

125. See generally Capers, *supra* note 27.

impose effective order on the universe and then have their heroism crowned with the laurels of the professor's evaluation.<sup>126</sup>

Where the goal is success within the guidelines of an established institutional framework (grades in law school), this makes perfect sense. But it should also be clear that it reifies the institution itself. Where the institution rewards the heroes who vanquish their exams, those who get those rewards walk away with more power within the institutions as their spoils. Thus, the ideas of heroism and institutionalism are intertwined and self-reinforcing. Heroism exists only in the context of the institutions—the sword that the law student uses to vanquish exams cannot be used to vanquish the idea of exams altogether. In other words, to deploy the central metaphor of this Essay in a different context, no matter how carefully sharpened or expertly wielded, the master's tools will never dismantle the master's house.

Opening a commons within the master's house, then, must mean something other than planning and heroic striving. What all of the stories that I summarize here share are people with institutional power aspiring toward destabilizing the very institutions that gave them power. What the abolitionist judges, the town meeting of Acton, and Judge Hoar all understood was that the real power to destabilize came from outside (or at least beyond) the relatively narrow confines of their specific institutional context. The goal was not to *tame* and *translate* those forces into a litigation strategy or a closing argument. Rather, the goal was to *let the forces in*, in all of their chaos, complexity, and radical potential.

All these stories show that the acts of letting in, making space, and stepping back are opportunistic rather than premeditated. I have called the process “radical pragmatism.” It requires the institutional actors to be in active and integrated relationships with movement actors and to seize the opportunities to open a commons when they appear at the cracks and joints of their institutional practice. This means humility. But it also means more than that. It means a thoughtful and self-reflective practice of space making.

And since this Essay is partly written in the key of autobiography, let me say that what I describe here is a practice that I aspire to in my own work both on the page (here) and in the classroom. Although I am identifying this strain of thought and practice in my own work, I am far from the only lawyer or academic working on these ideas.<sup>127</sup> I am, myself, no “hero of the

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126. Though, of course, grades are not strictly speaking evaluations so much as they are an exercise in ranking to fill the insatiable appetite of the curve. The fact that the laurels come from comparison and competition only emphasizes the extent to which students are the heroes of their own saga.

127. Generating anything like a full list of citations here would almost certainly exclude by omission more than it would include. Suffice it to say that the work I am identifying myself with here is work claimed by lawyers who call themselves movement lawyers, community lawyers, organizers, radicals, cause lawyers, and more. It is work that is undertaken every day in law school clinics and law school classrooms. To cite just a few personal lodestars: GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *STAN. L. REV.* 821 (2021); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals*

resistance,” but I do believe that law schools and the legal academy are institutional contexts where space making is both essential and able to make change.

I say this because I have seen it. I am writing these words just weeks after one of my most influential mentors, Lani Guinier, passed away. I took Professor Guinier’s class “The Responsibilities of Public Lawyers” when I was a first-year student at law school. Two years later, I was lucky to be a teaching fellow for the class when she taught it again. Like many students who came to law school hoping to change the world, I had found the reality of legal education to be dispiriting and obfuscating. I had found my own capacity for imagination to be dulled by complexity and confusion. But when I stepped into Professor Guinier’s class in the spring of my first year, it was like I felt the breeze on my cheeks for the first time in months. There, in the heart of the master’s house of Harvard Law School, Professor Guinier was modeling the practice of stepping back and challenging us, as students, not only to step up, but to make space for voices and imaginations beyond ourselves and beyond our law school context to be present in our conversations.

Professor Guinier was not perfect, and neither was the class. We did not escape the hierarchy of our surroundings or bring about radical transformations on the spot. But I will never forget the optimism that I felt in the first week of class as I started to see the promise of the practice of radical pragmatism in my legal education. This is the promise that I realize animates my writing and my teaching. It is an optimism that lives not in a prescription for how we should teach, but rather in a reminder that when we step back, cede space, crack the windows and relinquish control, we let in the breezes and voices that can change the spaces we inhabit from within.

### *B. In Defense of Where We Are*

I can trace how my own path of inquiry has traveled from Professor Guinier’s classroom, to my time in practice, to research that I have committed my last five years to. But I can also see how my nonprescriptive prescription to “make space” and practice radical pragmatism might be frustrating. At the nub of each story that I have told is a kernel of optimism—that struggle against oppressive institutions may not be in vain. But if I refuse to tell you how to struggle (you’ll know it when you see it) or that the struggle is heroic (you win when you recede), it all can feel more like an aphorism or a koan than a law review article. Fair enough. So let me close with something more like concrete optimism.

I presume that almost everyone reading this Essay is an institutionalist of some stripe. If you are a law student, you already hold a great deal of privilege and power and are being trained to wield and reify the power of the legal order as part of your professional identity. If you are a law professor,

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*and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

despite your grumbling, your power and institutional complicity are all the more deeply inscribed. If you are a lawyer, politician, teacher, etc., I can tell similar stories. Few of us (and perhaps none of us), as individuals, are truly outsiders.

Given this reality, the great danger that purism poses is a corresponding fatalism. If we believe that the master's tools will never dismantle the master's house, but all we have are the master's tools, then we are forced to conclude that we will never dismantle the house. This fatalism itself need not be crippling for the existentialists among us,<sup>128</sup> but it will be dispiriting to many. As a general matter, it leaves institutionalists with three choices: The first is to follow Thoreau and reject the institutions altogether and become a purist agitator for external change. The second is to follow Cover's judges and reject the hope of change altogether and become an avowed defender of the institution. The third is to reject fatalism.

The most common way that lawyers tend to reject fatalism is to reject Lorde's warning altogether. The argument goes: lawyers *have been* heroes in the story of making fundamental change. With the right litigation strategy or the right degree of leverage, this view suggests, lawyers can change the world. This view is a version of the hero's journey that I am skeptical of. Doubtless, lawyers do a great deal of good for their clients within the existing institutions that they inhabit. Much of that good might rightly be called heroic—from keeping clients alive in the face of the death penalty to keeping clients in homes in the face of eviction. But the conventional heroism here is within the framework of the “system” not struggling to transform it. Thus, this pathway is less a rejection of fatalism than an avoidance.

But I think it is possible for insiders to reject fatalism in a more effective way without renouncing the institutions themselves. In the stories I have told in my articles and that I summarize here, radical pragmatists balance the individual heroism of their practice within the system with a broader opportunistic struggle against the oppressions of those institutions. They decenter their own heroic narratives within the logics of the system and make space for other voices, other stories, and other imaginations to mingle in the commons.

What radical pragmatism and the commons look like will be different in different institutional contexts. I have said a good deal about what this may mean for lawyers, judges, and public officials, but it is worth locating the practice specifically in the space that may be closest to home for many who read it: law school and legal education. Those of us who teach in law schools hold the keys to the discursive spaces in our classrooms. While there is much about the institutional realities of legal education that we cannot change,

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128. The particular existentialist that I am thinking of here is Derrick Bell. While Bell famously came to the conclusion that racism is permanent, he refused to let its permanence be a cause to stop striving. His conclusion, he argued, was not “cause for either despair or surrender. Rather, these dire prognostications pose a challenge and a basis for lifetime commitment to fight against the racism that diminishes the lives of its supporters as well as its victims.” Derrick Bell, *The Racism is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 *CAP. U. L. REV.* 571, 572 (1993).

there are a thousand ways that we have the power to open classroom spaces and disrupt their hierarchies and rigidities. Those of us who write scholarship similarly have a great deal of agency in what we write and who we write for<sup>129</sup> (even if we write within a framework of scholarly pressures that we don't control). And those of you who are law students do so much work to hold the institutional space of legal education. There are countless opportunities to make space and open windows from within the classroom, in making editorial decisions on journals,<sup>130</sup> and in student organizing.

It is critically important to say that not all of us who are situated within institutions believe those institutions need to be changed. But for those of us who do, we are not faced with the stark choice between complicity and purism. Rather, we—lawyers, law students, law professors, institutionalists of all stripes—have the power to invest in radical imaginaries and movement pressures and to opportunistically make space within our institutional practices for those imaginaries and pressures to operate from the inside. Through the specific transformative work of self-awareness and engagement, we can, together, open a commons in the master's house.

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129. Amna Akbar, Sameer Ashar, and Jocelyn Simonson have recently argued “that legal scholars should take seriously the epistemological universe of today’s left social movements, their imaginations, experiments, tactics, and strategies for legal and social change.” Akbar, Ashar, & Simonson, *supra* note 127, at 825.

130. Here, again, I speak from autobiography. One of the moments in my own life within the institutional framework of law school that I found most optimistic was my experience as part of a team of editors that worked on an article published in the *Harvard Civil Rights–Civil Liberties Law Review* (CRCL) by a man named Thomas O’Bryant. See Thomas C. O’Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299 (2006). O’Bryant was (and remains) imprisoned in Florida on a sentence of life imprisonment without parole. When I was a student editor at CRCL, we received a submission from O’Bryant telling his story and critiquing the byzantine rules of habeas under the Antiterrorism and Effective Death Penalty Act of 1996. Over the course of a year, I worked as part of a team of editors to bring O’Bryant’s handwritten article into the formal pages of a law review—and thus into the view of a set of readers who would not have otherwise encountered it. On one level, it was small work—one law review article (maybe 100,000 law review articles) will not change the world. On the other hand, it was transformational work for me, my coeditors, and O’Bryant. We were occupying a formal and well-understood institutional space publishing scholarship in a well-respected journal. By opening space for a different and otherwise excluded voice, we let a new breeze blow through the still air of our journal office. For more about the publication of the article and the journal’s process, see Jocelyn Simonson, *Breaking the Silence: Legal Scholarship as Social Change*, 41 HARV. C.R.-C.L. L. REV. 289 (2006). It is the author’s great risk that telling personal stories tends toward a heroic account from the first person. That is not what I intend! Rather, I mean this story as an illustration of what kind of work I am talking about, tuned, inevitably, in the key of my own experience.