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COLONEL UTLEY'S EMANCIPATION—*OR*, HOW LINCOLN OFFERED TO BUY A SLAVE

JERRICA A. GILES & ALLEN C. GUELZO*

The reputation of Abraham Lincoln has see-sawed over the last half-century on the fulcrum of race, and the results have not been happy for that reputation. As Gerald Prokopowicz has written, "the big question" about Lincoln and slavery runs today like this: "Was Lincoln really the Great Emancipator that we have traditionally been brought up to admire, or was he just a clever, lying, racist, white male politician who had no interest in the well-being of black America other than when it served his political interests?"[1] No longer is it necessary, as one historian has wryly remarked, for politicians to "get right with Lincoln."[2] Historians now yearn to "get right" with Frederick Douglass, and to judge by the recent freshet of literature on Lincoln and Douglass, it is now incumbent on Lincoln to be gotten right with Frederick Douglass, too. One of the most damaging accusations leveled against the possibility of justifying Lincoln on race appears in Lerone Bennett's infamous screed, *Forced into Glory: Abraham Lincoln's White Dream*, where, as the finale to a battery of accusations of racism, Bennett's Lincoln "personally ordered Union officers to return runaway slaves to slavemasters" and turned a blind eye to "Kentuckians, for example," who "were selling and reenslaving African-Americans freed by the war and congressional acts."[3]

Oddly, the accusation that Lincoln had held back from genuine emancipation in Kentucky could have had more teeth in it than Bennett

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1. GERALD J. PROKOPOWICZ, DID LINCOLN OWN SLAVES? AND OTHER FREQUENTLY ASKED QUESTIONS ABOUT ABRAHAM LINCOLN 160–61 (2008).

2. Richard N. Current, *The Master Politician*, in THE BEST AMERICAN HISTORY ESSAYS ON LINCOLN 135 (Sean Wilentz ed., 2009).

3. LERONE BENNETT, JR., FORCED INTO GLORY: ABRAHAM LINCOLN'S WHITE DREAM 124, 538 (2000); *cf.* Lerone Bennett, Jr., *Did Lincoln Really Free the Slaves?: New Book Says Most Famous Act in American History Never Happened*, EBONY, Feb. 2000, at 60.

realized. In November 1862, Lincoln wrote to one of those Kentuckians, George Robertson, with an offer that should have put the millstone of racism around Lincoln's neck forever: an offer to *buy* a slave. "I now understand," Lincoln wrote to Robertson little more than two months after issuing the Preliminary Emancipation Proclamation, that "Col. Utley . . . has five slaves in his camp, four of whom belong to rebels, and one belonging to you. If this be true," then for the slave belonging to Robertson, "I will pay you any sum not exceeding five hundred dollars."[4]

Even if this is not quite the same as finding Lincoln in the crowd at a slave auction, the Robertson letter does seem to reveal (just as Bennett complains) a Lincoln indifferent to emancipation, willing to barter in black flesh, and prepared to put up hard cash for the purchase price of a slave. Yet the circumstances surrounding this letter create the most bizarre and most ironic moments in the long see-saw of Lincoln and race, for there are some good reasons why the Robertson letter is actually prime evidence of Lincoln's anxiety to *protect* emancipation at all costs. What is more, the Robertson letter—as it will turn out—is not so much about Robertson as it is about emancipation in Kentucky; and not so much about Kentucky as it is about the most lethal threat to emancipation: the federal court system.

I. THE CONTEXT: KENTUCKY AND THE CIVIL WAR

Kentucky had long been slavery's greatest embarrassment. It had been formed from a slave state, had legalized slavery from its beginning as a state, and was Southern in its culture and politics. Yet it was a state whose politics were much more pro-Union than pro-slavery; a state that had sent to Congress Henry Clay, the bane of both Jeffersonian agrarians and pro-slavery filibusterers; and a state where the heaviest concentration of slaves in 1850 sat on a belt that ran only from Lexington to Bowling Green, only amounted there to twenty-five percent of the population, and decreased rapidly everywhere else, until only about fifteen percent of the population in Kentucky counties outside the Bluegrass were slaves.[5] In 1849, a state convention actually

4. Letter from Abraham Lincoln to George Robertson (Nov. 26, 1862), *in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 512 (Roy P. Basler et al. eds., 1953) [hereinafter COLLECTED WORKS].

5. HAROLD D. TALLANT, EVIL NECESSITY: SLAVERY AND POLITICAL CULTURE IN ANTEBELLUM KENTUCKY 8–9 (2003); 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854, at 463–64, 468 (1990).

had debated vigorously an emancipation plan which would make slavery "'gradually disappear from Kentucky in 70 years.'"[6]

To be sure, with the Ohio River as their only northwards barrier, many slaves did not bother to wait that long. The proximity of Kentucky all along its northern border to free states acted as an even more potent dissolvent of slavery, as freedom beckoned to anyone bold enough to try a crossing of the Ohio River. Kentucky lost so many slaves to French leave that John P. Kennedy was forced to conclude that "the tendency of nearly all . . . of the Border States must be . . . toward the increase of free labor by immigration and settlement, and to a correlative gradual diminution of slave labor."[7]

That did not mean, though, that Kentucky was ready to undergo some miraculous conversion to abolition. To the contrary, white Kentuckians might protest their weariness with propping up slavery so close to the lure of free territory, but they would never finally agree to emancipation until the level of the state's slave population had fallen so low as to be negligible or until the federal government had adopted a comprehensive colonization plan guaranteeing that all freed slaves would be promptly deported. "I feel as you do about the Union," Kentucky governor Charles S. Morehead wrote to John J. Crittenden, "as I know that Kentucky does, and it *must* be preserved."[8] But Kentucky slaveholders would never permit the "general government" to "assume an attitude of hostility to slavery" and thus "become hostile to the property of a large portion of its own citizens."[9]

As it was, with the outbreak of the Civil War, the Lincoln administration barely managed to hold onto Kentucky for the Union. Kentucky governor Beriah Magoffin briefly tried to declare Kentucky neutral in the conflict, and the state was only provoked into declaring for the Union by Confederate general Leonidas Polk's unilateral decision to cross into Kentucky and occupy the key Mississippi River town of Columbus.[10] Even then, Kentucky was almost blown back into

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6. 1 FREEHLING, *supra* note 5, at 469 (quoting George W. Johnson, FRANKFORT YEOMAN, Nov. 30, 1848).

7. JOHN PENDLETON KENNEDY, THE BORDER STATES: THEIR POWER AND DUTY IN THE PRESENT DISORDERED CONDITION OF THE COUNTRY (1861), *reprinted in* SOUTHERN PAMPHLETS ON SECESSION, NOVEMBER 1860–APRIL 1861, at 234–35 (Jon L. Wakelyn ed., 1996).

8. Letter from Charles S. Morehead to John J. Crittenden (Mar. 30, 1850), *in* 1 THE LIFE OF JOHN J. CRITTENDEN, WITH SELECTIONS FROM HIS CORRESPONDENCE AND SPEECHES 364 (Chapman Coleman ed., Da Capo Press 1970) (1873).

9. *Id.*

10. *See* Victor B. Howard, *Lincoln's Slave Policy in Kentucky: A Study of Pragmatic*

the arms of the Confederacy by Major General John C. Fremont's martial-law emancipation edict in neighboring Missouri in 1861. "The proclamation of Genl. Fremont reached here yesterday," wrote Kentucky senator Garrett Davis to Treasury Secretary Salmon Chase, "& is most inopportune for the Union party . . . . There is a very general, almost a universal feeling in this State against this war being or becoming a war against slavery."[11] Lincoln's old friend, Joshua Speed, wrote to the president anxiously: "Our Constitution & laws both prohibit the emancipation of slaves among us—even in small numbers—If a military commander can turn them loose by the thousand by mere proclamation—It will be a most dificult matter to get our people to submit to it."[12] Lincoln's proposal to the border-state congressional delegations in July 1862, that they encourage "initiatory" plans for federally funded state emancipation schemes, was firmly declined by the border staters until Congress "shall provide sufficient funds and place them at your disposal" for the "expense of deportation and colonization of the liberated slaves."[13] The refusal statement was signed by all but one member of the Kentucky delegation.[14]

Kentucky slaveholders were so touchy about even the whisper of emancipation because they were, after all, so vulnerable. If it had been easier than elsewhere in the South for Kentucky's fugitive slaves to slip away from their masters' grasp *before* the war, it was even easier now, with Union soldiers on hand, encamping and garrisoning key points throughout the state. It did not help the equanimity of Kentucky slaveholders, either, that military policy on how to handle runaway slaves was entirely at sixes and sevens. To begin, in May 1861, General George B. McClellan invaded western Virginia, promising that no "interference with your slaves" was contemplated.[15] Secretary of War

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Strategy, 80 REG. KY. HIST. SOC'Y 281, 283 (1982); Steven E. Woodworth, *"The Indeterminate Quantities": Jefferson Davis, Leonidas Polk, and the End of Kentucky Neutrality, September 1861*, 38 CIV. WAR HIST. 289, 291 (1992).

11. Letter from Garrett Davis to Salmon Chase (Sept. 3, 1861), *in* 3 THE SALMON P. CHASE PAPERS: CORRESPONDENCE, 1858–MARCH 1863, at 94 (John Niven et al. eds., 1996).

12. Letter from Joshua F. Speed to Abraham Lincoln (Sept. 1, 1861) (on file with the Library of Congress in the Abraham Lincoln Papers Collection). The papers in the Lincoln Collection are available online at http://memory.loc.gov/ammem/alhtml/malhome.html.

13. Letter from the majority of the United States Congressmen from the border slaveholding States to Abraham Lincoln, President of the United States of America (July 14, 1862), *in* THE POLITICAL HISTORY OF THE UNITED STATES DURING THE GREAT REBELLION FROM NOVEMBER 6, 1860, TO JULY 4, 1864, at 214–17 (Edward McPherson ed., 1864).

14. *Id.*

15. Proclamation by George McClellan, Major-Gen., U.S. Army, Commanding Dep't, to

Simon Cameron, even as he approved Benjamin F. Butler's sarcastic designation of the runaways of Confederate officers as "contraband," similarly would "neither authorize nor permit any interference, by the troops under your command, with the servants of peaceful citizens"—in other words, of Southerners not actively serving the Confederacy—"in house or field."[16]

At the same time, this non-interference policy did nothing, of course, to discourage runaways from showing up at Union picket lines and pleading to be taken in, as they had done with Butler. So, in November 1861, Henry Wager Halleck, now commanding the Department of Missouri, issued a general order that forbade even the entrance of fugitives into "the lines of any camp, or any forces on the march," and directed the expulsion of "any now within such lines."[17] What resulted, however, was a disgraceful string of incidents similar to that experienced by the 10th Indiana Volunteers in February 1862, when "three or four slave hunters" demanded access to the regiment's camp and, under the operation of the Fugitive Slave Law of 1850,[18] claimed the rendition of two runaways who "had mixed with the Negro cooks and waiters and were thus endeavoring to effect their escape to the North."[19] The two fugitives "had counted on being protected in the regiment," but the Indianans had no choice, under Halleck's orders, except to see them taken "without molestation on our part."[20]

Reports of this sort ignited an equal but opposite reaction in Congress, which passed an "additional article of war" in March 1862, forbidding "[a]ll officers or persons in the military or naval service of the United States" from "returning fugitives from service or labor who may have escaped from any persons to whom such service or labor is claimed

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the People of Western Virginia (May 26, 1861), *in* 2 U.S. WAR DEP'T, SERIES I, OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES IN THE WAR OF THE REBELLION 49 (Robert N. Scott ed., 1880).

16. Letter from Simon Cameron, Sec'y of War, to Benjamin F. Butler, Major-Gen., U.S. Army, Commanding Dep't (Aug. 8, 1861), *in* 1 U.S. WAR DEP'T, SERIES II, OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES IN THE WAR OF THE REBELLION 762 (Robert N. Scott ed., 1894).

17. General Orders, No. 3, issued by Henry Wager Halleck, Major-Gen., U.S. Army, Commanding Dep't (Nov. 20, 1861), *in* 8 U.S. WAR DEP'T, SERIES I, OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES IN THE WAR OF THE REBELLION 370 (Robert N. Scott ed., 1883).

18. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

19. BY THE DIM AND FLARING LAMPS: THE CIVIL WAR DIARY OF SAMUEL MCILVAINE 32 (Clayton E. Cramer ed., 1990).

20. *Id.*

to be due."[21] This at once gave fresh alarm to Kentucky's slaveholders: Robert Mallory, who represented Kentucky's seventh congressional district, demanded to know how Congress proposed to reconcile "a national law which stands on your statute-book"—namely, the Fugitive Slave Law—with a directive to the U.S. Army that prohibited the enforcement of it.[22] But Francis P. Blair, in the exchange with Mallory, merely sniffed that "the Army of the United States has a great deal better business than returning fugitive slaves," which was no consolation either to slaveholders *or* to army officers who had to wonder if the new "additional article" would shield them from prosecution if they refused to cooperate with slaveholders in hot pursuit of their runaways.[23] Both Kentucky senators voted against the "additional article" bill; so did seven out of Kentucky's nine representatives.[24]

What this did was to create an atmosphere of uncertainty and mistrust all along the border, and especially in Kentucky. And into that uncertainty forged the 22nd Wisconsin Volunteer Infantry and its commander, Colonel William Laurence Utley.

II. THE 22ND WISCONSIN AND ITS COL. UTLEY—AND ADAM

Lincoln's Preliminary Emancipation Proclamation was issued on the same day that the 22nd Wisconsin Volunteers crossed over the Ohio River into Kentucky, traveling from Cincinnati to Louisville. The Kentucky newspapers were at that moment foaming into fresh eruptions over Lincoln and his "nigger proclamation," which the *Louisville Daily Democrat* identified as the principal reason that "this rebellion is not put down," since the Union army had now obviously "abandoned the idea" of restoring the Union and "gives its sole attention to abolishing slavery."[25]

The 22nd Wisconsin could not have disagreed more: "Emancipation was a topic of freq[ue]nt, earnest debate" in the regiment, and it was the 22nd's conviction that it was the failure of the war thus far to deal with slavery that was the problem.[26] The regiment had been recruited in mid-August as a response to Lincoln's call, on July 1, 1862, for 300,000 new

21. HENRY WILSON, HISTORY OF THE ANTI-SLAVERY MEASURES OF THE THIRTY-SEVENTH AND THIRTY-EIGHTH UNITED-STATES CONGRESSES, 1861–64, at 28–33 (1864).

22. CONG. GLOBE, 37th Cong., 2d Sess. 956 (1862).

23. *Id.* at 955.

24. *Id.* at 958–59.

25. LOWELL H. HARRISON, LINCOLN OF KENTUCKY 233 (2000).

26. William H. McIntosh, Annals of the 22d Wisconsin 8 (1909) (manuscript on file with the Wisconsin Historical Society).

volunteer enlistments, and the Wisconsin counties contributing the 22nd Wisconsin's companies had a strongly New-Englandish and abolitionist flavor to them. The single largest group—three companies—were drawn from Racine County, which had held "a protracted war meeting . . . night and day" to promote enlistments, as though it had been a religious revival.[27]

Their colonel, the forty-eight-year-old William Utley, was an immigrant from Massachusetts, a teetotaling Methodist and abolitionist who had "lived a nomadic sort of life," finally settling in Racine as "a portrait painter and musician."[28] He found his true calling, however, in politics: he was elected county marshal in 1848, as a Free-Soiler; he was subsequently elected to the state legislature in 1850, served an appointed term as state adjutant-general, went into the state Senate in 1860, and was reappointed state adjutant-general at the outbreak of the war.[29] Lincoln's 1862 volunteer call prompted Wisconsin governor Louis Harvey to turn to Utley to command the new 22nd Regiment, and, after only two weeks of instruction, Utley and his new recruits were hurried off to defend Cincinnati from Confederate raiders under Edmund Kirby Smith.[30]

Utley was, as befit a Methodist, a perfectionist: listening to the regimental band slaughter its way through the accompaniment to battalion drill, Utley broke into the band, seized the bass drum away from the inept bass drummer, and proceeded to hammer out the proper cadence "with all his might."[31] Stopped on the train tracks through Indianapolis, Utley policed the passenger cars carrying his men to Cincinnati, and noticing one soldier stepping off the train and furtively returning with "a black bottle in his hand," Utley caught up with him and the bottle, "uncorked it, applied it to his nose, grasped it by the neck and dashed to pieces on a stone and then pointed his finger to the car into which Mr. Soldier sneaked like a whipped puppy."[32] Slavery

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27. EUGENE WALTER LEACH, RACINE COUNTY MILITANT: AN ILLUSTRATED NARRATIVE OF WAR TIMES, AND A SOLDIERS' ROSTER 82 (1915) [hereinafter RACINE COUNTY MILITANT].

28. WIS. HIS. SOC'Y, THE HISTORY OF RACINE AND KENOSHA COUNTIES 613–14 (1879).

29. *Id.*

30. *Id.*; WILLIAM DELOSS LOVE, WISCONSIN IN THE WAR OF THE REBELLION: A HISTORY OF ALL REGIMENTS AND BATTERIES THE STATE HAS SENT TO THE FIELD 993–94 (1866); RACINE COUNTY MILITANT, *supra* note 27.

31. UNCOMMON SOLDIERS: HARVEY REID AND THE 22ND WISCONSIN 7, 9 (Frank L. Byrne ed., 2001) (1965) [hereinafter UNCOMMON SOLDIERS].

32. *Id.*

was no more tolerable in Utley's righteous eyes than drunkenness or a weak downbeat, and he made it plain that before he would obey any order for the rendition of fugitive slaves, "You may strip the eagles from my shoulders . . . ."[33]

Once the 22nd Wisconsin had been dispatched across the Ohio, brigaded together with Col. John Coburn's brigade of the 85th Indiana, 19th Michigan, and 33rd Indiana, and organized as part of Major General Gordon Granger's "Army of Kentucky," fugitive slave incidents began almost on cue. The 85th Indiana picked up "a young Negro," who was then picked back up and jailed in Paris, Kentucky.[34] The regiment's colonel threatened to break open the jail, and when the owner of the "boy" showed up to claim him, the owner was accused of Confederate sympathy and the "boy" reclaimed for the 85th Indiana as contraband of war.[35] By mid-October, the 22nd Wisconsin had picked up its own contingent of fugitives, when three slaves from a farm near Williamstown "ran out and expressed a desire to go with us."[36]

So it was no great surprise, when the 22nd Wisconsin arrived outside Lexington, in the heart of the Bluegrass, on November 12, 1862, that yet another fugitive turned up at the picket line of the 22nd Wisconsin. He was short—a "dwar[f]," as he was described—and a "mulatto" who called himself Adam; he wore "a heavy collar of rough iron" and "through rents in his clothing could be seen the scars of brutal beating."[37] He explained that he had run away from "an Irishman" to whom his owner had hired him out and who had "beaten him, and threatened to kill him."[38] Adam had been hiding in the woods for two weeks, living off "nuts" and "acorns" and anything else he could scavenge and trying to find "protection in other regiments, but they told

33. McIntosh, *supra* note 26, at 8.

34. FRANK J. WELCHER & LARRY G. LIGGETT, COBURN'S BRIGADE: 85TH INDIANA, 33RD INDIANA, 19TH MICHIGAN, AND 22ND WISCONSIN IN THE WESTERN CIVIL WAR 37 (1999).

35. *Id.*

36. UNCOMMON SOLDIERS, *supra* note 31, at 9–10; *see also* WELCHER & LIGGETT, *supra* note 34, at 32; William M. Fliss, *Wisconsin's "Abolition Regiment": The Twenty-Second Volunteer Infantry in Kentucky, 1862–1863*, 86 WIS. MAG. HIS. 6–7 (2002); *Col. Wm. L. Utley: A Tribute to His Memory and Brief Sketch of His Life*, RACINE ADVOCATE, Mar. 12, 1887, at 4; McIntosh, *supra* note 26, at 8.

37. *Col. Utley and Judge Robertson*, WIS. ST. J., Jan. 30, 1863; Appleton Morgan, *Recollections of Early Racine*, 2 WIS. MAG. HIS. 431 , 433–34 (1919); McIntosh, *supra* note 26, at 11.

38. B.S.H., *The Twenty-Second Regiment; The Irrepressible African—Kentucky Loyalty—Col. Utley Indicted*, MILWAUKEE DAILY SENTINEL, Nov. 22, 1862 [hereinafter *The Twenty-Second Regiment*].

him that the generals had ordered them to return all negroes who came to them."[39] That, of course, meant nothing to William L. Utley, who ordered the collar "struck off and the negro given employment in the camp" with Company A's orderly sergeant, Frank Lawrence.[40]

III. COL. UTLEY MEETS THE HON. GEORGE ROBERTSON

What *was* a surprise, however, was the arrival at the 22nd's picket line near Nicholasville, Kentucky, on November 14, 1862, of Adam's owner, in a coach and four with a negro groom, a man of "Doctor Cary proportions"—five feet, ten inches, and 240 pounds—who asked at the picket line to speak with Col. Utley.[41] He was George Robertson, and just on those terms alone, he meant nothing but trouble for William Utley, the 22nd Wisconsin—and Abraham Lincoln.[42]

George Robertson was the former Chief Justice of the Kentucky Supreme Court, former member of both the Kentucky legislature (and speaker of the House in 1851–1852) and the U.S. Congress (for three terms), professor of law for twenty-three years at the rare law school west of the Appalachians (Transylvania University), author of three books on politics and law, a loyal Henry Clay Whig, and "generally regarded as the ablest jurist Kentucky has produced."[43] Born in 1790 in Kentucky and named for an uncle, he had lived and practiced law in the commonwealth all his life (in fact, he had been licensed to practice just shy of his nineteenth birthday).[44] Personally, he "never at the polls or in

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39. *Id.*

40. Morgan, *supra* note 37, at 433–34; *The Twenty-Second Regiment*, *supra* note 38.

41. UNCOMMON SOLDIERS, *supra* note 31, at 14.

42. There are four detailed accounts of the faceoff between Utley and Robertson, the earliest of which appeared in the *Milwaukee Daily Sentinel* on November 22, 1862. *See The Twenty-Second Regiment*, *supra* note 38. The other three appear in GEORGE S. BRADLEY, THE STAR CORPS; OR, NOTES OF AN ARMY CHAPLAIN DURING SHERMAN'S FAMOUS "MARCH TO THE SEA" (1865) (Bradley served as the 22nd Wisconsin's chaplain later in the war); in Frank Byrne's edition of the letters of Harvey Reid, a soldier of the 22nd Wisconsin, *see* UNCOMMON SOLDIERS, *supra* note 31; and in EUGENE WALTER LEACH, RACINE COUNTY MILITANT, *see supra* note 27. The most colorful is Bradley's, although it is evident at points that Bradley had access to the *Daily Sentinel* version. Leach claimed to have had the details of "the controversy of Colonel Utley with Justice Robertson" from "Mr. Park Wooster, a stepson of Colonel Utley." E.W. Leach, *More Light on Colonel Utley's Contest with Judge Robertson*, 3 WIS. MAG. HIS. 251, 251–53 (1920).

43. 1 JOHN WILSON TOWNSEND, KENTUCKY IN AMERICAN LETTERS, 1784–1912, at 78–79 (1913).

44. *Id.*; GEORGE ROBERTSON, AN OUTLINE OF THE LIFE OF GEORGE ROBERTSON 31 (Lexington, Ky., Transylvania Printing & Publ'g Co. 1876); CHARLES LANMAN, BIOGRAPHICAL ANNALS OF THE CIVIL GOVERNMENT OF THE UNITED STATES 423 (1887); WILLIAM B. ALLEN, A HISTORY OF KENTUCKY, EMBRACING GLEANINGS,

a deliberative assembly, gave a vote on any other ground than principle."[45]

But in Congress Robertson was, like Clay, a compromiser rather than a stand-patter on the issue of slavery. He considered slavery "a moral and political evil," but the individual states had a right to be "left free to regulate their domestic relations in their own way."[46] And in Kentucky, where "slavery is . . . intertwined with the social or personal habits of the free population," there was no "rational hope" of adopting "any system of emancipation" in the future before the "number of slaves" was "considerably diminished, and the people more and more assimilated to the non-slaveholding habits and conditions."[47] Which was as much as to say, *not in any future he could see*. In 1819, Robertson wrote the bill for the organization of the Arkansas Territory, cautioning Congress not to "awaken jealousies and excite alarm, *which will contribute to the unnatural prolongation of the legal existence of slavery in America*," lest it "even dissolve the Union."[48] It was his proposal for a permanent "latitudinal line, (say about 37 degrees north latitude)," below which "slavery may exist" but "north of which it shall not,"[49] that was taken up by Henry Clay a year later as the cornerstone of the Missouri Compromise.

It was some three decades later that Robertson and Abraham Lincoln came to their first intersection. Lincoln's father-in-law, Robert Smith Todd of Lexington, had been, like Robertson, a prominent Kentucky Whig and associate of Henry Clay. When Robert Todd died in 1849, his estate became ensnared in a series of lawsuits which pitted the children of Todd's first wife (including Mary Lincoln) against the children of his second. In *Todd v. Wickliffe* (1849–1850), *Todd v. Wickliffe* (1854–1855), and *Todd v. Edwards* (1857–1858), George

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REMINISCENCES, ANTIQUITIES, NATURAL CURIOSITIES, STATISTICS, AND BIOGRAPHICAL SKETCHES 261–62 (1872).

45. ROBERTSON, *supra* note 44, at 45; *see also* Samuel Mackay Wilson, *George Robertson*, *in* 4 GREAT AMERICAN LAWYERS: THE LIVES AND INFLUENCE OF JUDGES AND LAWYERS WHO HAVE ACQUIRED PERMANENT NATIONAL REPUTATION, AND HAVE DEVELOPED THE JURISPRUDENCE OF THE UNITED STATES 396 (William Draper Lewis ed., 1908).

46. ROBERTSON, *supra* note 44, at 206.

47. *Id.*

48. Speech of Mr. Robertson, of Kentucky, on the Bill to Establish the Territorial Government of Arkansas (Feb. 18, 1819), *in* GEORGE ROBERTSON, SCRAP-BOOK OF LAW AND POLITICS, MEN AND TIMES 26 (1855) [hereinafter Robertson Speech]; *see* ROBERTSON, *supra* note 44, at 52–53.

49. Robertson Speech, *supra* note 48, at 26–27.

Robertson had been employed by Mary and Abraham Lincoln and Mary's siblings as counsel in suits against the Todd step-siblings.

In the process, Robertson took note of Lincoln's politics (which in 1854 were now becoming heavily involved in protests against the extension of slavery into the western territories and demands for the restoration of the Missouri Compromise). During a visit to Springfield in July 1855, Robertson dropped off a copy of his newly published collected speeches, *Scrap-Book of Law and Politics, Men and Times*, which he thought Lincoln might like to see as historical grist for the call to restore the Missouri Compromise line.[50] Lincoln wrote back six weeks later, when he had had time to digest the book, and complimented Robertson's "able and patriotic speech" from 1819 on "the exact question which led to the Missouri compromise."[51] On a sadder note, however, Lincoln added that times had changed. In 1819, Robertson could still hope it would all lead to "the peaceful extinction of slavery."[52] By 1855, Americans had degenerated so far from wanting any extinction for slavery that they now spoke of the Declaration of Independence as "a self-evident lie."[53] But if American opinion had now become perfectly reconciled to the permanent existence of slavery alongside freedom, would it end there? "Our political problem," said Lincoln, is that if slavery is right in the South, and can flourish there without fearing extinction, why will it not seek to establish itself every place in the United States?[54] In words that would come back to him three years later, Lincoln asked: "Can we, as a nation, continue together permanently—forever—half slave and half free?"[55] Probably not. "May God, in his mercy, superintend the solution."[56]

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50. STEPHEN BERRY, HOUSE OF ABRAHAM: LINCOLN AND THE TODDS, A FAMILY DIVIDED BY WAR 41–42 (2007).

51. Letter from Abraham Lincoln to George Robertson (Aug. 15, 1855), *in* 2 COLLECTED WORKS, *supra* note 4, at 317–19.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* Once the Civil War broke out, Lincoln renewed his contacts with Robertson and used him as a listening post (as he did with other Kentucky friends) to measure the ups and downs of Kentucky's political climate. Predictably, Robertson warned him that "Kentucky is safe, and will, *if necessary*, fight at home or elsewhere under and for our national Flag"—provided, of course, that Lincoln gave "no excuse for apprehension that force is to be used, either defensively or aggressively, for any other purpose than a rightful, prudent, and successful enforcement of the Constitution" (such as, say, emancipation). Letter from George Robertson to Abraham Lincoln (May 15, 1861) (on file at the Library of Congress in the Abraham Lincoln Papers Collection).

Standing now before Colonel Utley, Judge Robertson did not hesitate to invoke all the authority that his connections to Abraham Lincoln could support. Robertson informed Utley that he had been informed that "his boy Adam . . . was in the regiment,"[57] and would Utley please "deliver him up."[58] Utley had not the faintest idea who George Robertson was, and no intention of allowing "nigger hunters to ransack my regiment."[59] He would, however, have Adam located and brought out for questioning if Robertson would care to "drive into town, and return at three o'clock," and "if he is your boy, and is willing to return to you, I will not oppose it."[60] Adam was found "secreted in one of the tents," and Utley proceeded to interrogate him there: Had he run away from Judge Robertson? No, but he had from the "Irishman" to whom Robertson had hired him out.[61] Why had he run? Because "the person to whom his master had hired him" was "in the habit of whipping him severely."[62] Adam had "repeatedly pleaded with Robertson that he could not endure the treatment he was receiving," but Robertson's "only reply was, 'go back, you dog.'"[63]

That froze Utley's blood. Trailing Adam behind him, Utley returned to meet Robertson and told the judge in no uncertain terms that he was dreaming "if he supposed he was going to deliver that little innocent boy, who had been dwarfed in body and mind, to an inhuman aristocratic bloat, who had grown fat on the labors and sweat he had robbed from him."[64] He had been told by Adam that

> he showed his master his neck, with the skin torn off, where the Irishman had tied a rope around it, and dragged him about. And yet his master would give him no protection—had commenced hiring him out when only five years of age, and had left him there ever since, taking all his wages. He says that he has been beaten, and worked and starved, till there was nothing left of him, and that he was then beaten for not being bigger. He also says that he endured it till he could no longer,

57. UNCOMMON SOLDIERS, *supra* note 31, at 14.

58. *The Twenty-Second Regiment*, *supra* note 38.

59. WILLIAM H. TOWNSEND, LINCOLN AND THE BLUEGRASS 300 (1955); BRADLEY, *supra* note 42, at 69.

60. *The Twenty-Second Regiment*, *supra* note 38.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

> and fled. Now, sir, is that your boy? Are you the fiend of a master of whom he speaks? . . . I say, sir, is that your boy? Are you that master?[65]

Robertson expostulated, "You can't believe him; niggers will lie."[66] But Utley only turned to Adam, "who manfully met the tyrant . . . and shook hands with him," repeating the same story he had told Utley and adding, "Massa, you know it is so."[67]

Patience gone, Robertson now "tried the bullying game," and informed Utley that not only was he a Unionist, whose property was not liable to federal confiscation, but

> he . . . was the only man living who had voted for the Missouri Compromise; that he had written able and eloquent articles on the subject of emancipation, which Abe Lincoln had sent for; that he didn't like slavery, but if this is the way the Union army and the administration are going to trample their rights, under their feet, there would not be a Union man left in Kentucky, and the Union could never be restored.[68]

Utley was fully prepared to give as good as he had gotten, and he volleyed back that he "had never had much confidence in the loyalty of Kentucky."[69] He had "not seen a half-dozen who did not damn the President" all through Kentucky: "You may put all the pure *Unionism* in Kentucky into one scale, and a ten pound nigger baby in the other, and the *Unionism* will kick the beam. . . . If the perpetuity or restoration of the Union depends upon my delivering to you with my own hands that poor little overworked creature, dwarfed by your own avarice, the Union may be cast into hell, with all the nations that forget God."[70] Now it was Utley's moment to taunt Robertson: "I don't think you can get that boy. If you think you can, there he is, try it."[71] It was evident to Robertson that if he tried to remove Adam forcibly, "it would not be safe for him to undertake it" in the camp of the 22nd Wisconsin.[72] There

65. BRADLEY, *supra* note 42, at 70.
66. *The Twenty-Second Regiment*, *supra* note 38.
67. *Id.*
68. *Id.*
69. *Id.*
70. BRADLEY, *supra* note 42, at 73.
71. *Id.* at 72.
72. *The Twenty-Second Regiment*, *supra* note 38.

arose "an uproarious cheering" from the soldiers, "in the midst of which the disputant passed out of the crowd."[73]

Robertson's next stop was Utley's brigade commander, Col. John Coburn, who summoned Utley to report to him "forthwith."[74] In Robertson's presence, Coburn urged Utley, "for the sake of peace and harmony," to let Robertson have his slave.[75] But Utley was no more cooperative with Coburn than he had been with Robertson alone: "Kentucky has resorted to the most powerful means to seduce the officers of the Union Army" and to "[a]ll that handsome women, fine carriages, sumptuous dinners, virgin wine, and great men" could do "to lay me under obligations to their policy."[76] But Utley wanted Coburn and Robertson both to know "that God Almighty has put heads on both ends of the bolts that hold me together, which slavery can never draw out so long as soul and body hang together."[77] In the end, Coburn declined to order Utley to surrender Adam, telling the fuming Robertson, "If you think you can get your nigger by force, go and try to take him."[78]

IV. LINCOLN IS DRAWN IN

Unlike the Williamstown farmer who had lost his slaves to the 22nd Wisconsin in October, George Robertson had a wide range of weapons with which to do battle for Adam, and he began to deploy them almost immediately. First, on November 15, Robertson filed both a criminal complaint (for a violation of the federal fugitive slave statutes) and a civil complaint (a replevin action, for the loss of chattel property) against William Utley, adding an affidavit stating that he "is entitled to the possession" of Adam and that "said Adam is worth $600, and the Plaintiff prays for [his] immediate restitution and $100 in damages."[79] The sheriff of Jessamine County was promptly issued a summons for Utley to appear in the local state court during the March 1863 term. By this time, however, the 22nd Wisconsin was again on the march; and there remained more than a little question as to how a civil process was going to be served on a member of a military organization which could,

73. UNCOMMON SOLDIERS, *supra* note 31, at 15.

74. *The Twenty-Second Regiment*, *supra* note 38.

75. *Id.*

76. *Id.*

77. *Id.*

78. UNCOMMON SOLDIERS, *supra* note 31, at 15.

79. George Robertson v. Wm. L. Utley, No. 3586, Archives Record, at 4 (Jessamine Circuit Ct., Ky.).

under military law in time of war, refuse the sheriff admittance. Utley had instructed the 22nd's pickets "to admit no citizen unless their business is known, and then only one at a time," just to be safe, "and it was arranged that if the sheriff came with a posse, he alone, should be passed by the guard to try his hand at serving the writ."[80] It took the unhappy sheriff until December 10 to catch up with Utley and serve the summons, and only after disguising himself in a Union army uniform to enter the 22nd Wisconsin's camp.[81]

Robertson's other strategy was to write, first to the governor of Kentucky (who convened "a consultation a whole day with the prominent men of the State") and then to Abraham Lincoln to demand that he override any military obstacles to the arrest of Utley.[82] "The conduct of a few of the Officers of the army in forcibly detaining the Slaves of union Kentuckians may provoke a conflict between Citizens & Soldiers," Robertson wired Lincoln on November 19.[83] "[T]o prevent such a Catastrophy we desire you to say as we believe you will that military force will not be permitted for the detention any more than for the restoration of such property & especially in resistance & contempt of the legal process of a civil tribunal."[84] Since this made no direct allusion to any particular incident, Lincoln treated Robertson's complaint as just one more venting by an irritated Kentuckian on Kentucky Unionism's favorite subject, and he drafted a reply to Robertson the next day which tartly informed the judge that the time for petting and cosseting slaveholders had long passed: "Do you not know that I may as well surrender this contest, directly, as to make any order, the obvious purpose of which would be to return fugitive slaves?"[85]

Lincoln, however, did not send the reply, because he was soon enough hearing the story of Col. Utley's emancipation from Utley himself. Utley wrote to Lincoln even more quickly than Robertson, appealing histrionically to Lincoln to sustain "me in an effort to support the Constitution, laws of Congress and the proclamation of the

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80. McIntosh, *supra* note 26, at 11.

81. *The Twenty-Second Regiment*, *supra* note 38; George Robertson v. Wm. L. Utley, No. 3586, Archives Record, at 7–9 (Jessamine Circuit Ct., Ky.); McIntosh, *supra* note 26, at 23.

82. B.S.H., *From Col. Utley's Regiment—The Negro Question*, MILWAUKEE DAILY SENTINEL, Nov. 25, 1862.

83. Letter from George Robertson to Abraham Lincoln (Nov. 19, 1862) (on file at the Library of Congress in the Abraham Lincoln Papers Collection).

84. *Id.*

85. Letter from Abraham Lincoln to George Robertson (Nov. 20, 1862), *in* 5 COLLECTED WORKS, *supra* note 4, at 502.

President, against the fierce and malignant opposition of the slave power of Kentucky."[86] After giving his side, Utley declared that "I am now indited for man-stealing and hunted as a felon . . . for simply standing by the Constitution, obeying the laws of Congress and honoring the Proclamation of the President of the United States issued on the 23d day of September last."[87]

Not content with grabbing Lincoln's ear, Utley also made a bid to get his dilemma before the cabinet, too, by writing to former Wisconsin governor Alexander Randall, who was now serving as assistant postmaster general to the hardnosed Montgomery Blair. "I am in a devil of a scrape," Utley complained. "All K[entuck]y is in a blaze."[88] In addition to the federal charge, "they have got me indicted at Lexington under the Laws of Kentucky."[89] He needed some form of intervention, since "my life is threatened if they ketch me out side the lines."[90]

The sitting governor of Wisconsin, Louis Harvey, sent an emissary of his own to Lincoln on November 21, who found out from Utley's friend Randall that "the subject has been up at two Cabinet meetings" already.[91] But Lincoln himself, despite his "manifest interest" in the case, hesitated to put his foot down on either Robertson's or Utley's side.[92] "This is a devilish vexed question at this time . . . . For the sake of harmony in this hour of our nation's greatest trial, I would like to slide along through this crisis without committing myself to either side."[93]

Vexed was hardly the word for it. Whatever Lincoln's personal inclinations toward emancipation, he was limited by the fact that, as president, he had no civil authority to emancipate anyone in the slave states, since the establishment of slavery was, legally speaking, a matter of state enactments and statutes, not federal ones. Only the federal

86. Letter from William L. Utley to Abraham Lincoln (Nov. 17, 1862) (on file at the Library of Congress in the Abraham Lincoln Papers Collection).

87. *Id.*

88. Letter from William L. Utley to Alexander Randall (Nov. 17, 1862) (on file at the Library of Congress in the Abraham Lincoln Papers Collection).

89. *Id.*

90. *Id.*

91. B.S.H., *The Col. Utley Matter Before the President and His Cabinet*, MILWAUKEE DAILY SENTINEL, Dec. 6, 1862.

92. *Id.*

93. *Id.*

Fugitive Slave Laws of 1793[94] and 1850[95] provided slavery with any federal standing, and those could not be unilaterally revoked merely by a president's civil proclamation.

The war, of course, had introduced an entirely new aspect to this jurisdictional problem, since it was presumed that, as commander-in-chief, Lincoln held certain "war powers" in time of war or rebellion that expanded his room for action in the civil sphere; and it was as commander-in-chief, exercising his "war powers," that he had issued the Emancipation Proclamation. But Lincoln was also painfully aware that these "war powers" existed in theory only.[96] They had never been defined legislatively or judicially, and there was nothing suggesting that, if some sort of court challenge could be mounted, the whole edifice on which emancipation had so far been erected might not come crashing down—particularly since the Chief Justice of the U.S. Supreme Court was, in 1862, still the same Roger Taney who had written *Dred Scott v. Sandford*,[97] who had tried to obstruct the Union war effort in *Ex parte Merryman*[98] (and would try again in *The Prize Cases*[99]), and who had already prepared in advance opinions that could be used to strike down as unconstitutional other aspects of Lincoln's wartime agenda.

So it was with a view toward cutting in advance the legal Gordian knot that might have choked emancipation that, on November 26, Lincoln made Robertson his astounding proposition: "I now understand the trouble is with Col. Utley; that he has five slaves in his camp, four of whom belong to rebels, and one belonging to you."[100] Assuming that this report was accurate—and hoping, more than supposing, that the burr under Robertson's saddle was monetary rather than legal—Lincoln made him a flat-out offer that would have moved the bomb of the Utley case a safe distance from the federal court system, where someday it could be defused without risk of casualties. "If this be true, convey yours [meaning, title to Adam] to Col. Utley, so that he can make him

94. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

95. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

96. JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 222 (2006); BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 140–41 (2007).

97. 60 U.S. (19 How.) 393 (1857).

98. 17 F. Cas. 144 (C.C.D. Md. 1861).

99. 67 U.S. (2 Black) 635 (1863).

100. Letter from Abraham Lincoln to George Robertson (Nov. 26, 1862), *in* 5 COLLECTED WORKS, *supra* note 4, at 512.

free, and I will pay you any sum not exceeding five hundred dollars."[101] This was not an offer Lincoln enjoyed making, "[b]ut," he added, "the life of the nation" was at stake.[102]

As Lincoln might have guessed, George Robertson was also after a principle, rather than money, and he refused Lincoln's offer flatly. "The citation in my civil suit against [Utley] having been served, I can certainly obtain a judgement for $1000, and perhaps more, and no Federal court can go behind such a judgement or refuse to enforce it," Robertson replied on December 1.[103] But "my object in that suit was far from mercenary—it was solely to try the question whether the civil or the military power is Constitutionally supreme in Kentucky."[104] To John J. Crittenden, Robertson wrote, "Our people are already ripe for popular uprising against military usurpation and defiance of our laws, our peace, and the cause of the Union," and only an object lesson in the form of William Utley's head would calm the storm.[105] Which was, in the end, just what Lincoln feared.

The circumstances of war, however, prevented Robertson from ever laying hands on Col. Utley or Adam. The 22nd Wisconsin moved into Tennessee in March 1863, only to find itself ambushed and a large number of its men captured, including Col. Utley—all of which put Utley beyond the reach of both Lincoln and George Robertson. Under the exchange cartel, Utley and the 22nd's prisoners were repatriated to St. Louis, which was also beyond Robertson's reach, and in July 1864 Utley resigned his commission and returned to Wisconsin, which was even farther from Robertson's call.[106] With an almost pathological determination, Robertson kept obtaining continuances, until the repeal of the Fugitive Slave Act in June 1864 and the passage of the Thirteenth Amendment in January 1865 made the federal criminal complaint a dead letter. Even then, however, Robertson kept pushing for the prosecution of his civil replevin action, and in 1871, he finally succeeded in having the case transferred to the U.S. Circuit Court for the Eastern District of Wisconsin. On October 6, 1871, "judgment was ordered for

101. *Id.*

102. *Id.*

103. Letter from George Robertson to Abraham Lincoln (Dec. 1, 1862) (on file at the Library of Congress in the Abraham Lincoln Papers Collection).

104. *Id.*

105. E. MERTON COULTER, THE CIVIL WAR AND READJUSTMENT IN KENTUCKY 155 (1926).

106. Fliss, *supra* note 36, at 13.

the plaintiff" in the sum of $908.06, with $26.40 for court costs.[107] George Robertson had finally gotten his pound of flesh. Not that it did much good to Robertson, who suffered a stroke in 1871 and died in 1874, or any lasting damage to William Utley. Lincoln's last attorney general, James Speed, had acted as Utley's counsel, and on February 14, 1873, at the prompting of Wisconsin's Radical Republican senator, Timothy Howe, an act of Congress ordered Utley to be indemnified, with interest, from the U.S. Treasury.[108] There was still enough fizz to the story more than a decade after the event that this was front-page news in the *New York Times*, and even found space in the San Francisco papers.[109]

* * *

A little knowledge is a dangerous thing, and this has fully as much application to Lincoln, race, and slavery as to any other topic. Superficially, Lincoln's letter to George Robertson, offering Robertson not more than five hundred dollars if he will reassign to William Utley title to Adam, at best sounds like a bribe to throw Robertson off an unpleasant scent, and, at worst, sounds like a callous indifference to the moral untouchability of slavery. But what was Lincoln actually doing in the Robertson letter? In fact, a close reading of the Utley v. Robertson imbroglio reveals instead a Lincoln determined to fend off even the hint of a challenge to emancipation, even if he has to ante up his own cash money to effect it. The same might be said about almost every other objection raised against Lincoln in this era of black estrangement from the "Great Emancipator." The detritus of the decades obscures to our eyes what was patently obvious to Lincoln's; only in the hard historical effort of power-washing away that build-up, and not in short-circuit judgments made with a sharp eye to the main chance, will we find a true and continuing understanding of Lincoln, for us and for all Americans.

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107. HARRISON, *supra* note 25, at 235; Leach, *supra* note 42, at 251–53.

108. CONG. GLOBE, 42d Cong., 2d Sess. 3247 (1872); CONG. GLOBE, 42d Cong., 3d Sess. 1349 (1873); An Act for the Relief of William L. Utley, Pub. L. No. 42-141, 17 Stat. 729 (1873).

109. *Paying For a Runaway Slave*, N.Y. TIMES, Feb. 10, 1873; *Claim for the Value of a Kentucky Slave*, S.F. DAILY EVE. BULL., Feb. 20, 1873.