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Paul Finkelman

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# ARTICLE

## INTERNATIONAL EXTRADITION AND FUGITIVE SLAVES: THE JOHN ANDERSON CASE

*Paul Finkelman\**

The John Anderson extradition case of 1860-61 was the last attempt to remove a fugitive slave from Canada.<sup>1</sup> It was briefly a major *cause célèbre* in the United States and threatened to lead to a confrontation between Great Britain and her former colony in North America. However, coming at the end of the antebellum period, it was quickly overshadowed and then made moot by Lincoln's election, the South's secession, and the Civil War. In Canada and Great Britain, its significance was longer lasting, since, at least according to one scholar, it "caused a rethinking of the rights of Canadians within the British empire."<sup>2</sup>

The Anderson case illustrates the ambiguities of the Webster-Ashburton Treaty and the way in which slavery led to peculiar international diplomacy in the mid-nineteenth century.<sup>3</sup> The failure of the United States government to secure Anderson sug-

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\* Associate Professor of History, Virginia Polytechnic Institute and State University. I thank my research assistant James Weishaupt for his work on this article, Dr. Kenneth Winn for helping me obtain some Missouri sources, and Professors Seymour Drescher, Louis Knafla, and John Swainger, for their superb comments on a draft of this Article. I presented earlier versions of this Article at a meeting of the American Society for Legal History and at a conference of the Law Society of Upper Canada. I thank the participants and audiences at both sessions for their helpful comments. © 1992 Paul Finkelman. All rights reserved. Not to be copied or quoted without permission of the author.

1. *In re John Anderson*, 20 U.C.Q.B.R. 124 (1860).

2. PATRICK BRODE, *THE ODYSSEY OF JOHN ANDERSON* xi (1989).

3. A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America for the Final Suppression of the African Slave-Trade, and for the Giving Up of Criminals, Fugitive from Justice, in Certain Cases, Aug. 9, 1842, U.S.-U.K., art. X, 8 Stat. 572, 12 Bevans 82 [hereinafter Webster-Ashburton Treaty].

gests that southern critics of the 1842 Treaty were correct in believing that it would do little to help them recover their bondsmen who had escaped to Canada.<sup>4</sup> The Anderson case also underscores the uncertain protection the Union Jack offered fugitive slaves and the extent to which Canadians were not immune to Negrophobia and racism. Finally, the case offers an example of the tensions between law, justice, and international politics in the antebellum era.

# I. JOHN ANDERSON IN MISSOURI AND CANADA: FROM SLAVERY TO FREEDOM TO JAIL TO FREEDOM

In September 1853, a Missouri slave named Jack, determined to find freedom, absconded from his master.<sup>5</sup> Three days into his escape, Jack encountered a white man named Seneca T.P. Diggs, who challenged Jack on his absence from his master's residence.<sup>6</sup> He then ran from Diggs, who sent his slaves to catch him. Jack escaped from the slaves, only to come upon Diggs carrying a large but light stick.<sup>7</sup> After a short scuffle, Jack stabbed Diggs two or three times and escaped. Diggs subsequently died, although Jack did not find this out until his arrest in 1860.<sup>8</sup>

Resourceful and strong, Jack travelled by foot to Chicago.<sup>9</sup> Abolitionists there helped him get to Detroit and then to Canada, where he arrived in November 1853.<sup>10</sup> The following year, the Governor of Missouri sought Jack's extradition but he "was nowhere to be found."<sup>11</sup> Changing his name to John Anderson, Jack remained in safe obscurity for the next six years, studying briefly at the William Bibb Institute in Windsor. He became a

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4. Ironically, British abolitionists thought the Treaty did not offer enough protection to fugitive slaves. They believed that without a treaty extradition would rest on rules of natural law, which would favor fugitive slaves, but that with a treaty a fugitive slave charged with certain offenses could be extradited. David M. Turley, *'Free Air' and Fugitive Slaves: British Abolitionists Versus Government Over American Fugitives, 1834-61*, in *ANTI-SLAVERY, RELIGION, AND REFORM: ESSAYS IN MEMORY OF ROGER ANSTEY* 163, 171-72 (Christine Bolt & Seymour Drescher eds., 1980).

5. *THE STORY OF THE LIFE OF JOHN ANDERSON, THE FUGITIVE SLAVE* 13 (Harper Twelvetees ed., 1971) (1863) [hereinafter *STORY OF JOHN ANDERSON*].

6. *Id.* at 15.

7. *Id.* at 16.

8. BRODE, *supra* note 2, at 8-11; WILLIAM TEATERO, *JOHN ANDERSON: FUGITIVE SLAVE* 11-14 (1986).

9. *STORY OF JOHN ANDERSON*, *supra* note 5, at 20.

10. BRODE, *supra* note 2, at 13.

11. BRODE, *supra* note 2, at 14.

mason and plasterer, and eventually bought a house about twelve miles south of Hamilton, Canada West [present day Ontario], in the small town of Caledonia.<sup>12</sup>

In March 1860, his fortune changed dramatically when a former friend named Wynne, "in retaliation for some offence given him by Anderson," told a magistrate that Anderson was wanted for stabbing a man in Missouri.<sup>13</sup> William Mathews, a Justice of the Peace in nearby Brantford, Canada West, then issued a warrant for his arrest and brought Samuel Port, a Windsor policeman, to identify Anderson. Officer Port told Mathews that Anderson was wanted for murder in Missouri. Hoping to share in a thousand dollar reward offered by Missouri, Port informed James H. Gunning, a Detroit slave catcher, about Anderson. Gunning then notified the family of Seneca Diggs in Missouri.<sup>14</sup> The Diggs family slowly took steps to have Anderson returned for trial.<sup>15</sup>

While in custody, Anderson admitted to Mathews that he had stabbed a white man while escaping from Missouri.<sup>16</sup> However, Anderson did not know the white man's name, and until Mathews told him, Anderson did not know he was wanted for allegedly murdering the man. For a month, Mathews waited for someone from the United States to proceed against Anderson. Meanwhile, Samuel B. Freeman, an experienced attorney and a founding member of the Anti-Slavery Society of Canada, intervened on Anderson's behalf.<sup>17</sup> By April no one had claimed Anderson. On April 28, 1860, the last day of the court session, Mathews released Anderson on the advice of Justice Archibald McLean of the Court of Queen's Bench.<sup>18</sup>

Once released, Anderson went to Simcoe, a town with a large black population, located about twenty miles south of Brantford.<sup>19</sup> Two days after Anderson's release, Gunning returned to Canada with evidence from Missouri and secured a

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12. STORY OF JOHN ANDERSON, *supra* note 5, at 23.

13. STORY OF JOHN ANDERSON, *supra* note 5, at 24.

14. BRODE, *supra* note 2, at 22-23.

15. Brode, citing a newspaper article of December 1860, said that the Diggs family contacted officials in Washington to help with the extradition, but there is no indication that the State Department became involved in the case until much later. BRODE, *supra* note 2, at 23.

16. BRODE, *supra* note 2, at 23.

17. TEATERO, *supra* note 8, at 24.

18. TEATERO, *supra* note 8, at 24.

19. BRODE, *supra* note 2, at 24.

warrant for Anderson's arrest.<sup>20</sup> In September, Anderson was recaptured in Simcoe and again jailed in Brantford.<sup>21</sup> This time Gunning was prepared to act on the arrest. A witness from Missouri was present to identify Anderson, although he could only identify him as one "Jack Burton" belonging to a Howard County, Missouri slaveowner named Moses Burton.<sup>22</sup> Gunning also submitted the deposition of a Missouri slave, who stated that he had seen a slave named Jack stab Diggs. This person was the only witness who could identify the slave Jack and place him at the scene of the stabbing.<sup>23</sup> On September 28, after a one day hearing, Magistrate Mathews concluded that there was enough evidence to sustain the charge that Anderson did "wilfully, maliciously and feloniously stab and kill one Seneca T.P. Diggs" in Missouri.<sup>24</sup> Apparently, Mathews had no doubt that John Anderson was the same person identified as Jack, who was wanted for murder in Missouri. Thus, Mathews ordered Anderson jailed "until he shall be delivered by due course of law."<sup>25</sup> This delivery could only commence when a formal warrant for his extradition arrived from the United States. The entire matter would then be forwarded to the Governor General, who would have the final say on the extradition request.<sup>26</sup>

A few days after this decision, Anderson petitioned the Governor General of Canada, asking that he not be returned to Missouri. Anderson did not deny he had stabbed Diggs; he only ar-

20. TEATERO, *supra* note 8, at 24.

21. BRODE, *supra* note 2, at 25.

22. *An Act to Pay the Expenses Incurred in the Prosecution of the Slave 'Jack,' Alias Anderson, for Murder, Committed in Howard County*, in 21 LAWS OF THE STATE OF MISSOURI, LAWS PASSED AT THE REGULAR SESSION OF THE 21ST GENERAL ASSEMBLY (1860-1861) 534 (1861) (Act of Mar. 27, 1861). In March 1861 the Missouri legislature authorized the expenditure of \$1,500 to reimburse citizens of Howard County for money spent "in the prosecution of said slave." *Id.*

23. Diggs' son, Benjamin, had seen the killing, but his testimony was virtually useless. He came to Brantford to testify against Anderson, but could not positively identify him as his father's killer. He was only eight at the time and had not been close enough to the stabbing to have actually seen what had happened. Moreover, because he did not know the slave Jack before the event, he could not be certain that Anderson was Jack. Benjamin Diggs could only say that Anderson was "about the colour and size of the man, but [Diggs] would not swear he [was] the man." *In re John Anderson*, 20 U.C.Q.B.R. 124, 130 (1860). This report of the case before the Queen's Bench contains a transcript of the proceedings before Justice of the Peace Mathews.

24. *Id.* at 133.

25. *Id.*

26. *Id.*

gued that it was necessary to "obtain his liberty."<sup>27</sup> Anderson pointed out that when he encountered Diggs, "his pursuers being at his heels with clubs," he acted on his "first impulse" and "dashed against said Diggs with an open knife."<sup>28</sup> Trapped between the pursuing slaves and their master, Anderson did what he had to in order to gain his freedom. He urged that the Governor General not return him to Missouri because in the encounter with Diggs he had "only used such force as was necessary to maintain that freedom" to which he thought he was entitled as a human being.<sup>29</sup>

In November Anderson applied to the Court of Queen's Bench in Toronto for a writ of habeas corpus.<sup>30</sup> The court listened to arguments from the 24th to the 26th of November, but deferred and then delayed judgment. On December 15 the court finally ruled that Anderson committed a crime that was recognized by Canadian law, and therefore, could be extradited under the Webster-Ashburton Treaty of 1842.<sup>31</sup> The court, by a vote of two to one, remanded Anderson back to "the custody of the keeper of gaol . . . until a warrant shall issue upon the requisition of the proper authorities of the United States of America, or of the state of Missouri . . ."<sup>32</sup> At this point it seemed Anderson's fate was sealed and only awaited the arrival of papers from the United States and final action by the Governor General of Canada. Curiously, although Anderson initially had been seized nine months earlier, neither the state of Missouri nor the United States government had yet issued a warrant for his arrest or a requisition for his extradition. Without these, especially the latter, the Governor General of Canada could not act on the case.

While John Anderson remained in the Brantford jail, abolitionists in Canada and England began agitating for intervention by the British government. The night that the Canadian court issued its opinion, William H. Harris, a black leader in Toronto, chaired a meeting that resolved to continue the fight for Ander-

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27. Letter from John Anderson to Edmund Walker Head, His Excellency the Governor-General of Canada (Oct. 1, 1860), in 2 *THE BLACK ABOLITIONIST PAPERS: CANADA, 1830-1865*, at 432 (C. Peter Ripley ed., 1986) [hereinafter 2 *THE BLACK ABOLITIONIST PAPERS*].

28. *Id.*

29. *Id.* at 433.

30. *In re John Anderson*, 20 U.C.Q.B.R. at 150 (1860).

31. *Id.* at 173-74.

32. *Id.* at 192-93.

son's release.<sup>33</sup> In early January 1861, news of the decision of the Canadian Court of Queen's Bench reached London.<sup>34</sup> The case electrified English abolitionists and rejuvenated the movement. For example, William Farmer, who had more or less dropped out of the anti-slavery struggle after 1854, reemerged to raise funds for Anderson, apparently appalled that a British court — even one in Canada — might consider sending a slave back to America.<sup>35</sup> Similarly, the English Ladies Association in Aid of the Colored Refugees, which had aided hundreds of fugitives in Canada between 1851 and 1857, came to life to raise money for Anderson and other blacks in Canada.<sup>36</sup>

News of the case led to a flurry of official activity as well. In conformity with pre-existing policies, on January 9, 1861, the Colonial Secretary, the Duke of Newcastle, ordered the acting Governor General, Sir William Fenwick Williams, not to issue a warrant for extradition until the government in London had reviewed the case.<sup>37</sup> Lord Palmerston<sup>38</sup> told Parliament that Newcastle had ordered Fenwick Williams "not to surrender Anderson to the American Government until he had received positive instructions from Her Majesty's Government to do so."<sup>39</sup> Palmerston could thus assure Parliament that there was "no chance of Anderson being surrendered until the question shall have been fully and completely considered."<sup>40</sup> Newcastle told the Canadian authorities that this was a case "of the gravest possible importance, and Her Majesty's Government . . . [is] not satisfied that the decision of the Court at Toronto is in conformity with the view of the Treaty which has hitherto guided the authorities in this country."<sup>41</sup>

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33. 2 THE BLACK ABOLITIONIST PAPERS, *supra* note 27, at 160 n.9.

34. See 2 THE BLACK ABOLITIONIST PAPERS, *supra* note 27, at 430, 435 n.3.

35. 1 THE BLACK ABOLITIONIST PAPERS, THE BRITISH ISLES, 1830-1865, at 360 n.8 (C. Peter Ripley ed., 1985) [hereinafter BLACK ABOLITIONIST PAPERS].

36. *Id.* at 365 n.1.

37. 161 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 222 (1861) (debate of Feb. 8, 1861).

38. Henry John Temple, Third Viscount Palmerston, 1784-1865, was foreign secretary from 1830-1834 and 1835-1841; he then held a seat in the House of Commons and took part in the debates over the Webster-Ashburton Treaty. In 1859 he began his second tenure as Prime Minister, making Lord John Russell foreign minister. 19 DICTIONARY OF NATIONAL BIOGRAPHY 496 (1967-1968), (1917-1921). See also 2 THE BLACK ABOLITIONIST PAPERS, *supra* note 27, at 435 n.3.

39. 161 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 222 (1861) (debate of Feb. 8, 1861).

40. *Id.*

41. Letter from Sir Frederic Rogers to Edmund Hammond (Jan. 16, 1861), in Cor-

Meanwhile, on January 15, 1861, the British and Foreign Anti-Slavery Society (BFASS) applied for a writ of habeas corpus from the Court of Queen's Bench at Westminster.<sup>42</sup> The BFASS hoped this writ would compel authorities in Toronto to send Anderson to London, where his case would be heard. After deliberating for less than half an hour, the court issued the writ, despite Chief Justice Sir Alexander Cockburn's recognition that this action might be "inconsistent with that higher degree of colonial independence, both legislative and judicial, which has happily been carried into effect in modern times."<sup>43</sup>

This writ had the potential to cause great damage within the British Empire. It was the first time an English court had ever issued such a writ to Canadian authorities.<sup>44</sup> Edwin James, the attorney for the BFASS, told the English judges that "the Crown has power to issue the writ of *habeas corpus* to any part of her possessions, that Canada is a possession of the British Crown, and that the Queen, according to the authorities . . . has the right to have an account of the imprisonment of her subjects in her own dominions."<sup>45</sup> While no English court had ever issued a writ of habeas corpus directed at Canadian authorities, English courts had issued writs of habeas corpus to other parts of the Empire, such as the Isle of Man, Jersey, Guernsey, and Ireland.<sup>46</sup> James argued that Canada, "as a possession of the British Crown," was no different than these places.<sup>47</sup>

Whether this was a fair characterization of Canada and its courts was unclear. By 1860, Canada "had wrested from Britain the grant of a wide autonomy" and was moving "toward full in-

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RESPONSE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON 3 (Harrison & Son eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 119 (1971).

42. Robert C. Reinders, *Anglo-Canadian Abolitionism: The John Anderson Case, 1860-1861*, 19 RENAISSANCE & MOD. STUD. 72, 86 (1975).

43. *Message from the President of the United States, Communicating, In Compliance with a Resolution of the Senate, Information Relative to the Extradition of One Anderson, a Man of Color*, S. EXEC. DOC. NO. 11, 36th Cong., 2d Sess. 44, 15 (1861) (transcript of the arguments in Westminster Hall, Jan. 15, 1861, in the Queen's Bench, *In Re Anderson*, from the short-hand notes of Messrs. Reed, Robinson, and Woodward) [hereinafter Westminster Transcript].

44. *Id.* at 19. See also *The English Writ of Habeas Corpus, in THE UPPER CANADA LAW JOURNAL* 53, 57 (Mar. 1861) [hereinafter *Habeas Corpus*].

45. Westminster Transcript, *supra* note 43, at 19.

46. Westminster Transcript, *supra* note 43, at 25.

47. Westminster Transcript, *supra* note 43, at 19.

dependence in domestic matters. . . ."<sup>48</sup> Canada was certainly far more independent than Man, Jersey, or Guernsey had been when the English writs had been served in those places. Since 1849, Canada had had virtual self-government on local questions under what Canadian scholars call the period of "responsible government."<sup>49</sup> Especially important were the facts that Canada had a fully developed court system and that Canadian courts had ruled that some English laws were not enforceable in Canada.<sup>50</sup> Since the Canada Act of 1791, the Canadian courts were not established by the acts of the King or Queen, but by the Canadian legislature.<sup>51</sup> Similarly, Canadian law had been enacted by Canadians in their own legislatures.

The Canada Act and the subsequent history of Canada implied that Canadian courts were parallel institutions to the English courts, and not inferior or subordinate to them. This issue, however, was clearly a complicated one. Despite the "responsible government" for domestic affairs, "foreign affairs were still wholly under British control."<sup>52</sup> Thus, the final interpretation of the Webster-Ashburton Treaty lay with the Governor General or with Whitehall, and the Canadians understood this. It was also true that the Governor General could still reject bills, the home government could disallow Canadian legislation, and Parliament could still pass legislation that was binding in Canada.<sup>53</sup> But, whether an English court could issue a writ that was enforceable in Canada was another matter. During the arguments before the English Court, Lord Justice Crompton asked if "the courts in Westminster have now a concurrent jurisdiction with the local [Canadian] courts in granting this writ."<sup>54</sup> Edwin James answered, "[T]he fact that Canada has both a separate legislature and judicature makes no difference. The Superior Courts in England have concurrent jurisdiction with the courts in Canada

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48. EDGAR MCINNIS, *CANADA: A POLITICAL AND SOCIAL HISTORY* 299 (4th ed. 1982).

49. This process is succinctly described in *id.* at 275-79.

50. BRODE, *supra* note 2, at 72, 74. Brode cites a Canadian decision in *Leith v. Wilis*, 5 U.C.Q.B. (O.S.) 101 (1836), declaring that the English Gin Acts were of no effect in Canada. BRODE, *supra* note 2, at 72.

51. 31 Geo. III, ch. 31, reprinted in R.S.C. 1985, app. II, No. 3, and in 1 DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA 163 (A. Shortt & A. Doughty eds., 1907).

52. MCINNIS, *supra* note 48, at 299.

53. MCINNIS, *supra* note 48, at 299.

54. BRODE, *supra* note 2, at 73.

as to issuing writs of *habeas corpus*.”<sup>55</sup>

The English court was uncertain if its writ would be obeyed in Canada. The Chief Justice feared that Canadian officials would treat the writ “with disobedience and contempt,” but Attorney James responded, “[Y]our lordship will not assume that.”<sup>56</sup> The court, however, was not so sanguine. The Chief Justice feared that people would “think that this is an interference with the independence of the colonial judicature,” and the court would embarrass itself with the “attempt to exercise a jurisdiction which we have no means of enforcing.”<sup>57</sup> James responded that “the sheriff of Toronto is a British subject,” implying that he would obey a writ from an English court.<sup>58</sup> James reiterated his point, arguing, “[I]f it is a British possession, and he is a British subject, there cannot be a question on earth.”<sup>59</sup>

Although still uncertain about its jurisdiction, the court at Westminster nevertheless issued the writ. The English judges accepted the argument that a writ of *habeas corpus* was the right of all people within the jurisdiction of the British crown, and they could issue such a writ to anyplace the Union Jack flew, unless expressly prohibited by Parliament.<sup>60</sup>

Most Canadians were certain that an English court had no power to issue a writ of *habeas corpus* in Canada. While most of the British press applauded the decision, many British legal scholars agreed with their Canadian counterparts that the Court at Westminster had no jurisdiction over the matter.<sup>61</sup>

Although angry over the English writ, Canadians had few options open to them if the writ was served. To reject the writ out of hand might force a crisis that no one in Canada or Great Britain was anxious to see develop. However much the writ led to “Canadian restiveness — the congenital tic of outraged colonials,” as one English historian has characterized the response to the writ,<sup>62</sup> Canadians were not about to follow South

55. BRODE, *supra* note 2, at 73.

56. Westminster Transcript, *supra* note 43, at 41.

57. Westminster Transcript, *supra* note 43, at 41.

58. Westminster Transcript, *supra* note 43, at 41.

59. Westminster Transcript, *supra* note 43, at 41.

60. Westminster Transcript, *supra* note 43, at 43-44.

61. BRODE, *supra* note 2, at 75-77; Reinders, *supra* note 42, at 87. A good example of an English critic of the English court's action is Thomas Tapping, *The Case of Anderson, the Fugitive Slave*, 11 L. MAG. & L. REV. 42 (1861).

62. Robert C. Reinders, *The John Anderson Case, 1860-61: A Study in Anglo-Canadian Imperial Relations*, 66 CAN. HIST. REV. 393, 410 (1975).

Carolina's recent example of secession. As the *Upper Canada Law Journal (Journal)* explained, Canadians were "united in the opinion that the English Court, in sending a writ of *habeas corpus ad subjiciendum* to Canada, had done wrong."<sup>63</sup> This led to a "feeling of resistance" among Canadians who were annoyed by the action of the English court.<sup>64</sup> Nevertheless, when they spoke "of a feeling of resistance" Canadians did "not desire to depict overt acts of treason."<sup>65</sup> The *Journal* declared:

[W]e do not intend to indorse [sic] the absurd stories circulated in the neighbouring States, about "the rising of 1775." Such stories were a libel on our loyalty. While determined to resist encroachments on our rights as an independent colony by all constitutional means, there never was, nor is there the slightest intention to kindle the flame of rebellion.<sup>66</sup>

The Canadians were indignant that a British court had the audacity to overrule a Canadian court but the Canadians had no interest in challenging British sovereignty. As the *Journal* noted, Anderson had the right to an appeal to "Her Majesty in Privy Council," a right with which "Canada is at present satisfied."<sup>67</sup>

What neither of the Court of Queen's Benches — the one in Toronto or the one in Westminster — would acknowledge was that in the end the fate of Anderson was not for a court to determine. This was a political question, ultimately to be settled by the government in London. In the end, it would be the Palmerston ministry, not a court of law, that would decide whether what Anderson did constituted murder under the Webster-Ashburton Treaty. As Lord Palmerston told the House of Commons, "[T]here is a general impression that the decision of the Court of Queen's Bench in Canada would have the effect of rendering it necessary that Anderson should be given up. But it has no bearing on that point."<sup>68</sup> All the Canadian decision affected was whether Anderson "was not to be taken out of the custody in

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63. *Habeas Corpus*, *supra* note 44, at 53. For a detailed discussion of the reactions in Canada and Great Britain, see Reinders, *supra* note 42, at 72-98.

64. *Habeas Corpus*, *supra* note 44, at 53.

65. *Habeas Corpus*, *supra* note 44, at 53.

66. *Habeas Corpus*, *supra* note 44, at 53.

67. *Habeas Corpus*, *supra* note 44, at 58.

68. 161 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 222-23 (1861) (debate of Feb. 8, 1861).

which he then was.”<sup>69</sup> The final decision rested with the Governor General of Canada, who took orders from the ministry. The Undersecretary for the Colonies, Chichester Fortescue, made the same point two weeks later, noting that it was “not within the competency of any Court of justice” to “deliver him up to any foreign Power.”<sup>70</sup> The Undersecretary reminded Parliament that “[t]he fugitive, Anderson, can only be delivered up under the hand and seal of the Governor General.”<sup>71</sup>

Had activists on both sides of the issue acknowledged the fact that the final decision in this case would rest with the Governor General or with the Palmerston administration, the tensions caused by the English writ might have been averted. Instead, pressure would have been focused on the Palmerston administration, which was probably unlikely to have allowed the extradition of a fugitive slave. Although Palmerston had never been much of a reformer, he had always been associated with the anti-slavery movement.<sup>72</sup> In 1853, he had been “one of the most prominent of the social figures to meet Mrs. Harriet Beecher Stowe.”<sup>73</sup> Moreover, “his deep-seated hostility to the United States” made him less than anxious to return a fugitive slave to the land of the free.<sup>74</sup> Palmerston’s Foreign Secretary, Lord John Russell, was even more committed to anti-slavery.<sup>75</sup>

The anti-slavery sentiments of the Administration, however, might have been counterbalanced by other considerations. Throughout his career, Palmerston feared an American invasion of Canada, which he was determined to resist.<sup>76</sup> Had the United States pressed the issue, it is at least remotely possible that Palmerston would have sacrificed John Anderson for peace on the St. Lawrence frontier. Equally important, both Palmerston and Lord Russell “were averse to interference in the judicial and legislative procedures of the colonies.”<sup>77</sup> They were reluctant to overrule local decision-makers on local matters.<sup>78</sup>

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69. *Id.* at 223.

70. 161 HANSARD’S PARLIAMENTARY DEBATES (3d Ser.) 826-27 (1861) (debate of Feb. 22, 1861).

71. *Id.* at 827.

72. JASPER RIDLEY, LORD PALMERSTON 276 (1970).

73. *Id.* at 549.

74. *Id.* at 548.

75. *Id.* at 549.

76. *Id.* at 540.

77. Reinders, *supra* note 42, at 83.

78. Reinders, *supra* note 42, at 83.

For reasons of both foreign and internal, imperial policy, a court decision freeing Anderson would have solved some delicate problems for the Palmerston ministry. If pressed by the United States, Palmerston might have found it easier to blame the release of Anderson on the courts, rather than on his own actions. Similarly, if this case was to lead to a conflict between the metropolis and the colony, Palmerston might have preferred for the Justices of the Queen's Bench to be the point men.

Despite the anti-slavery sentiments of the British leaders, foreign policy is not always guided by the principles of the leading *dramatis personae*. Competing sentiments might be balanced and given all these considerations, the actions of the BFASS may have been shrewdly correct. Palmerston's foreign policy "was intimately entwined with, and to a very large degree formed by, domestic politics."<sup>79</sup> Thus, the persistence of the abolitionists in litigating for Anderson's freedom had four values. First, it could, and ultimately did, lead to Anderson's release. Second, it kept the case in the public mind, and thus prevented a quiet or even secret extradition of Anderson. Third, it gave the abolitionists something to do, a focus for their cause, and a new visibility. Finally, it helped put pressure on Palmerston to do the right thing and release Anderson.

The application for an English writ of habeas corpus was ideal for these tactics. The English press carried news of the case to Westminster, generally applauding the result.<sup>80</sup> The writ placed the Anderson case in the forefront of the Anglo-Canadian legal world and threatened to cause a major crisis in imperial legal and political relations. From the abolitionist perspective, the English writ was a perfect way of forcing Palmerston and Lord John Russell to intervene on behalf of freedom.

Ultimately, the potential crisis between the English and Canadian courts over the English writ never materialized. While Canadians fumed about this symbolic loss of judicial autonomy, friends of Anderson found a way to further his cause and also avoid a confrontation between Canada and Britain: they simply appealed to another Canadian court which did issue a writ of habeas corpus.<sup>81</sup>

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79. DAVID F. KREIN, *THE LAST PALMERSTON GOVERNMENT: FOREIGN POLICY, DOMESTIC POLITICS AND THE GENESIS OF "SPLENDID ISOLATION"* 9 (1978).

80. Reinders, *supra* note 62, at 406.

81. *In re John Anderson*, 11 REPORTS OF CASES IN THE COURT OF COMMON PLEAS 2 (1861).

On February 1, 1861, Anderson's attorneys applied to the Court of Common Pleas in Toronto for a writ of habeas corpus.<sup>82</sup> That Anderson could gain another hearing at an inferior court was due to the jurisdictional anomalies of the early Canadian courts as well as the complexities of the common law. As a justice of Ontario's High Court of Justice explained six decades later: "In those days the decision of any court or of any judge in habeas corpus proceedings was not final. An applicant might go from judge to judge, [common law] court to [common law] court and the last applied to might grant the relief refused by all those previously applied to."<sup>83</sup>

Even without these anomalies of the Canadian court system, there was a strong legal reason for the Court of Common Pleas to hear Anderson's case, despite the fact that the higher Court of Queen's Bench had rejected his plea for freedom. In turning to Common Pleas, Anderson's attorneys were able to raise arguments and issues that had not been brought before the Queen's Bench. In other words, the case before Common Pleas was not *res judicata* because the points of law were new. Before the Canadian Court of Queen's Bench, Anderson's attorney, Samuel B. Freeman, had argued that Anderson should be set free because the evidence presented to Justice of the Peace Mathews was insufficient to warrant his extradition. Freeman argued that "according to our [Canadian] law the homicide was justifiable, and in any view of the matter it would not amount to murder" because Diggs was attempting to reduce Anderson to slavery.<sup>84</sup> Freeman's argument was excellent abolitionist theory. It was also a theory that the English Court of Queen's Bench later accepted. Moreover, it seemed to be the theory to which the Palmerston government had subscribed, as had, in fact, all English governments since the adoption of the Webster-Ashburton Treaty.<sup>85</sup> It was not, however, a theory that could persuade a majority of the justices of Canada's Court of Queen's Bench. They ruled that Anderson's act did constitute murder, and therefore, he could be extradited under the Treaty.<sup>86</sup>

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82. BRODE, *supra* note 2, at 90.

83. Justice William Renwick Riddell, *The Slave in Upper Canada*, 4 J. NEGRO HIST. 372, 394 (1919).

84. *In re John Anderson*, 20 U.C.Q.B.R. 124, 135 (1860).

85. After the Webster-Ashburton Treaty, the British Government never extradited a fugitive slave.

86. *In re John Anderson*, 20 U.C.Q.B.R. at 135. Webster-Ashburton Treaty, *supra*

Before the Court of Common Pleas, Freeman and his two new co-counsel offered an argument that was far narrower and far less political or philosophical. Anderson's attorneys argued that their client was in jail on a warrant of commitment that was technically insufficient. The technicality was a simple one. The warrant for Anderson's commitment charged that he did "wilfully, maliciously and feloniously stab and kill" Diggs. This charge was insufficient for a murder indictment in Canada. However, the Webster-Ashburton Treaty specified that extradition was possible for murder but did not allow extradition for lesser homicides.<sup>87</sup> Anderson's attorneys argued that since to "feloniously stab and kill" might include a lesser crime than murder, Anderson could not be extradited for the crime that Mathews had charged him with and for which he was committed.<sup>88</sup> The attorney for the Canadian government did little to resist this argument, presenting a weak case and admitting he had "no desire unduly to press the case against the prisoner."<sup>89</sup> While attorneys and judges had alluded to this question when the case was before the Queen's Bench, this claim had not been formally raised or answered.

The Court of Common Pleas happily accepted this line of argument. Chief Justice Draper noted that the charge that Anderson did "feloniously stab and kill" Diggs, "would be an insufficient statement in an indictment for murder in any of our Courts."<sup>90</sup> The court had little trouble finding that Anderson must be released on the technical insufficiency of the warrant. Upon his release, Anderson, who had been in and out of custody for nearly one year, commented "that he never thought there was so much law in Canada as he had experienced."<sup>91</sup> Although Anderson was once again out of jail, he could have been re-arrested under a better warrant, but that was unlikely.

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note 3, art. X.

87. Webster-Ashburton Treaty, *supra* note 3, art. X.

88. *In re John Anderson*, 20 U.C.Q.B.R. at 142.

89. *In re John Anderson*, in 11 REPORTS OF CASES IN THE COURT OF COMMON PLEAS 41-51 (1861), *quoted in* Reinders, *supra* note 62, at 411. The government might, of course, have rewritten the charge to specify murder, but at this point it was clear the government was happy to be rid of the case on a technicality.

90. *Judgment of Chief Justice Draper*, in CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON (Harrison & Sons eds., 1861), *reprinted in* 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 153 (1971).

91. *Habeas Corpus*, *supra* note 44, at 53.

As soon as the weather permitted, Anderson left Canada for England, where he was lionized, feted, educated,<sup>92</sup> and eventually shipped off to Liberia.<sup>93</sup> Among those speaking out for Anderson when he arrived in England was the eighty-year-old Charles Stuart, who had warned about the dangers of the Webster-Ashburton Treaty nearly two decades earlier. Although, as his biographer has pointed out, Stuart did not play a central role in securing Anderson's freedom,<sup>94</sup> it is not implausible to argue that the strong abolitionist opposition to the extradition clause during 1842 and 1843, which Stuart spearheaded, was critical to establishing the British policy that led to Anderson's freedom.

## II. THE INTERNATIONAL LAW CONTEXT: FUGITIVE SLAVES AND THE WEBSTER-ASHBURTON TREATY

Anderson gained his liberty because Justice of the Peace Mathews had failed to comply with the exact terminology of the Webster-Ashburton Treaty of 1842.<sup>95</sup> But even if Mathews had been more skilled at the law and had committed Anderson under a technically correct writ, it seems doubtful that in the end Anderson would have been turned over to the United States. In whatever fashion the charge against Anderson was framed, it is not clear that Anderson committed an act which the British government recognized as an extraditable offense under the Treaty. This conclusion is based on a combination of the exact language of the Treaty, how British policy towards fugitive slaves led to an understanding of that language, and the legal theory involving international law, or conflicts-of-laws, which the British would most likely have used to justify not returning Anderson.

### A. *The 1842 Treaty, Fugitive Slaves and British Policy*

The Webster-Ashburton Treaty "reduce[d] the threat of a third Anglo-American war" by resolving long standing disagreements over boundaries, access to waterways, and the suppression

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92. BRODE, *supra* note 2, at 119.

93. See, e.g., REPORT OF A GREAT MEETING HELD IN EXETER HALL, LONDON, ON TUESDAY EVENING, JULY 2ND, 1861, FOR THE PURPOSE OF WELCOMING JOHN ANDERSON, THE FUGITIVE SLAVE, TO ENGLAND 2-3 (1861).

94. ANTHONY J. BARKER, CAPTAIN CHARLES STUART: ANGLO-AMERICAN ABOLITIONIST 298 (1986).

95. Webster-Ashburton Treaty, *supra* note 3, art. X.

of the African slave trade.<sup>96</sup> Article X, the last substantive provision of the Treaty, provided a mechanism for the extradition of fugitives from justice found in the two nations.<sup>97</sup>

While the Treaty was between Great Britain and the United States, most of the provisions affected the United States and Canada. The unresolved boundaries were all along this border. So too were the rivers and lakes where access was in dispute. While fugitives from justice, as well as fugitive slaves, sometimes escaped to Great Britain or the British Caribbean, they were more likely to cross the border into Canada.

Compounding the difficulties of negotiations over the provision for the extradition of fugitives from justice was the fact that thousands of American slaves had escaped to Canada. Most slave states could easily charge these slaves with some sort of crime. Theft was the most likely charge, since the clothes they wore belonged to their masters. Additionally, they sometimes took horses to facilitate their escape, and in a literal sense, they had stolen themselves from their masters. Some slaves also committed more serious crimes, including battery and homicide, while making their escape.<sup>98</sup>

From the beginning of the negotiations over the Treaty, British officials made clear their determination not to allow the return of fugitive slaves. Henry Stephen Fox, the British ambassador to the United States, "warned against making any provision for giving up runaway slaves."<sup>99</sup> Lord Palmerston, the British Foreign Secretary, was equally opposed to the extradition of slaves, as was his successor, Lord Aberdeen.<sup>100</sup> As early as 1840

96. HOWARD JONES, *TO THE WEBSTER-ASHBURTON TREATY: A STUDY IN ANGLO-AMERICAN RELATIONS, 1783-1843*, at xi (1977).

97. Webster-Ashburton Treaty, *supra* note 3, art. X.

98. American abolitionists were divided about whether slaves ought to be prosecuted for stealing from their masters when escaping. Occupying an extreme position was Gerrit Smith, who "argued that a slave was justified in taking anything he needed to facilitate his escape." BETTY FLADELAND, *MEN AND BROTHERS: ANGLO-AMERICAN ANTI-SLAVERY COOPERATION* 315 (1972), *citing* New York State Anti-Slavery Society, Address of the Peterboro State Convention to the Slaves and Its Vindication (1842).

99. ALBERT R. COREY, *THE CRISIS OF 1830-1842 IN CANADIAN-AMERICAN RELATIONS* 174 (1941).

100. BERTRAM WYATT-BROWN, *LEWIS TAPPAN AND THE EVANGELICAL WAR AGAINST SLAVERY* 253 (1969). George Hamilton Gordon, the Fourth Earl of Aberdeen, was an evangelical, whose manner of dress, the American abolitionist Lewis Tappan thought, was "suggestive . . . of a nonconformist minister." *Id.* This background and life-style suggests that his opposition to the extradition of fugitive slaves was motivated by his personal moral and religious views, as well as what he deemed to be the best policy for England.

the British had drafted the basic elements of an extradition treaty. But, the British did not take any steps to negotiate for an agreement based on this draft until 1842. This was because of one of the key "demands of the United States which Great Britain was unwilling to recognize, namely, the extradition of runaway slaves and of 'all persons' regardless of their nationality or citizenship."<sup>101</sup> The British simply saw no point in attempting to negotiate with the Democratic Van Buren administration, or with Secretary of State John Forsyth, a slaveholding Georgian. Negotiations over extradition became possible only when the Whigs took power in 1841,<sup>102</sup> and New Englander Daniel Webster became Secretary of State.<sup>103</sup>

Lord Ashburton, the special British envoy appointed to negotiate the Treaty, also opposed the return of fugitive slaves.<sup>104</sup> He refused to include theft and burglary in the list of extraditable offenses because he believed they would be used as excuses to demand runaway slaves who took the clothes on their backs.<sup>105</sup> The Governor General of Canada had been interested in securing the right to extradite deserters and Ashburton had been "very desirous to secure the delivery of mutineers; but did not press it, lest it should involve, on the part of his Government, the delivery of slaves . . . ."<sup>106</sup>

When the Treaty was finally signed, abolitionists in the United States, Canada, and Great Britain expressed concern that the extradition provision would adversely affect fugitive slaves. Although Ashburton had kept theft and burglary out of the Treaty, opponents of slavery feared that the Treaty would be used to extradite fugitive slaves charged with robbery, mur-

101. COREY, *supra* note 99, at 175.

102. Although the Whig Harrison was elected president in 1840, by the time the Treaty was signed Harrison was dead and John Tyler, a former Democrat and a slave-owner from Virginia, was president.

103. COREY, *supra* note 99, at 175-77. Even after these negotiations were concluded, the British were so worried that their position on extradition might doom the entire agreement that they wanted to propose the Treaty to the Senate as a series of separate agreements. Thus, the boundary dispute might be settled, even if extradition was not. JONES, *supra* note 96, at 161-62.

104. Alexander Baring, First Baron Ashburton, was a retired banker by this time. Married to the eldest daughter of Senator William Bingham of Pennsylvania, Ashburton had a keen understanding of American politics and some sympathy for the United States, while at the same time being totally opposed to slavery.

105. COREY, *supra* note 99, at 177.

106. CONG. GLOBE, 27th Cong., 3d Sess., Appendix, at 12, quoting the American and Foreign Anti-Slavery Society (speech of Mr. Benton, Aug. 18, 1842).

der, attempted murder, or arson. Less than a year before the Treaty was signed, the Governor General of Canada extradited a slave named Nelson Hackett, who had escaped from Arkansas with a stolen horse, saddle, gold watch, and beaver coat.<sup>107</sup> Canadian authorities determined that the watch and coat were unnecessary for his escape and were therefore stolen goods.<sup>108</sup> Also undermining Hackett's claim to Canadian sympathy was the fact that the coat and watch were not taken from his master, but from a third party.<sup>109</sup> This reduced Hackett, in the eyes of Canadian officials, from a fugitive slave to a common thief. After an Arkansas grand jury indicted Hackett for larceny, the Governor General's Executive Council endorsed the extradition request from the Governor of Arkansas.<sup>110</sup> When Hackett arrived in Arkansas he was not tried for his crime, however, but instead was returned to his master.<sup>111</sup>

The Hackett case naturally made British abolitionists fearful of the extradition clause in the proposed treaty. They were concerned that local officials might act unilaterally under the treaty and send fugitive slaves back to the United States. Hackett's case underscored this fear, since British abolitionists believed that "local Canadian authorities had conspired with Hackett's American pursuers to mislead the new governor, [Sir Charles] Bagot, and secure the slave's return to Arkansas."<sup>112</sup> Thus, the British abolitionists wanted the final authority to return fugitives to rest with Whitehall. "Only if decisions on fugitives were ultimately taken in London could the reformers themselves hope to have any influence."<sup>113</sup>

During the treaty negotiation, British abolitionists reminded Ashburton about the extradition of Hackett. Shortly af-

107. Roman J. Zorn, *Criminal Extradition Menaces the Canadian Haven for Fugitive Slaves, 1841-1861*, 38 CAN. HIST. REV. 284 (1957); 64 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 640-41 (1842) (debate of June 27, 1842) ("Fugitives from the United States"). Hackett, it turns out, was the last fugitive slave extradited from Canada to the United States.

108. BRODE, *supra* note 2, at 19; ROBIN W. WINKS, *THE BLACKS IN CANADA: A HISTORY* 172 (1971).

109. 64 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 640-41 (1842) (debate of June 27, 1842) ("Fugitives from the United States"); BRODE, *supra* note 2, at 19; WINKS, *supra* note 108, at 172.

110. 64 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 640-41 (1842) (debate of June 27, 1842) ("Fugitives from the United States"); Zorn, *supra* note 107, at 286.

111. Zorn, *supra* note 107, at 286.

112. Turley, *supra* note 4, at 173.

113. JONES, *supra* note 96, at 150. See also Turley, *supra* note 4, at 177.

ter the United States Senate voted on the Treaty, a group of American abolitionists met with Ashburton in Boston to express their fears about Article X.<sup>114</sup> Ashburton told them that Britain opposed the return of fugitive slaves and would not allow the extradition of fugitive slaves on false charges of murder or larceny. The American "delegation left, wholly satisfied."<sup>115</sup> After a private meeting with Lord Ashburton, Lewis Tappan wrote to a friend in England that "our fears respecting any action in Canada adverse to the safety of fugitive slaves subsided. If he [Ashburton] was sincere — which we could not doubt — it seems to us impossible that your Government will allow any practice contrary to the intentions of the framers of the Treaty in Canada."<sup>116</sup>

Ashburton's position reflected the position of most British officials throughout these negotiations. But British abolitionists remained concerned, even if their American counterparts had been mollified. The abolitionist Captain Charles Stuart said the treaty was "a horrible pledge from us, to make ourselves runaway slave-catchers for the United States."<sup>117</sup> In November, a group of English abolitionists met with Lord Ashburton to discuss the problem. In private correspondence, Ashburton assured British abolitionists of his determination to protect fugitive slaves. He told the British abolitionists, John Scoble and Thomas Clarkson, that "real criminals" would be surrendered without "respect to colour and condition and therefore the Slave committing crime will be treated like any other person."<sup>118</sup> However, in the next sentence he continued: "It being always understood that acts necessarily connected with the fact of emancipation cannot be dealt with as crimes."<sup>119</sup> Dr. Stephen Lushington,

114. JONES, *supra* note 96, at 150.

115. JONES, *supra* note 96, at 150.

116. JONES, *supra* note 96, at 150. Letter from Lewis Tappan to John Beaumont (Nov. 17, 1842) in *A SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-1858*, at 105 (Annie Heloise Abel & Frank J. Klingberg eds., 1970). An account of this meeting is found in *CONG. GLOBE*, 27th Cong., 3d Sess., Appendix, at 12. *CONG. GLOBE*, 3d Sess., Appendix, at 59 (speech of Mr. Conrad, Aug. 18, 1842).

117. BARKER, *supra* note 94, at 245; Zorn, *supra* note 107, at 288.

118. Letter from Ashburton to Thomas Clarkson (Mar. 17, 1843) in *SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-1858*, at 32 (Annie Heloise Abel & Frank J. Klingberg eds., 1970). Ironically, by 1860 Scoble had taken up residence in Canada, where he was a leader in the movement to prevent the extradition of Anderson. 2 *THE BLACK ABOLITIONIST PAPERS*, *supra* note 27, at 162, n.13; BRODE, *supra* note 2, at 24.

119. Letter from Ashburton to Thomas Clarkson (Mar. 17, 1843) in *SIDE LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-1858*, at 32 n.28 (Annie Heloise Abel & Frank J.

an anti-slavery member of Parliament who was vigilant in fighting for the cause, assured his friends in the BFASS "that by nothing short of the most forced and 'treasonable construction,' could the clause be made to bear on fugitive slaves finding refuge in Upper Canada."<sup>120</sup> Lord Aberdeen promised that if "an evil use be made" of Article X he would urge its abandonment.<sup>121</sup>

Clearly, from the British perspective the Treaty did not include fugitive slaves. Nevertheless, as Ashburton told Scoble and Clarkson, the British government could not guarantee that a slave who had committed a crime in the United States might not be extraditable under the Treaty.<sup>122</sup> The abolitionists certainly took no comfort from the failure of the House of Commons, by a vote of 59 to 25, to exempt all runaway slaves from the operation of Article X.<sup>123</sup>

In response to abolitionist pressure, after signing the Treaty the British government ordered all colonial governors to send extradition records to England before acting on them. The government in London followed up this directive by sending all colonial governors "detailed instructions about extradition procedures . . . . These measures indicated that Britain would follow the narrowest view of her obligations under Article X, and that slaveholders would face difficulty in recovering their chattels from the British colonies."<sup>124</sup> As late as June 1843, Charles Stuart still complained about the dangers of the Treaty. But by the end of the year, British and American abolitionists became more optimistic, when the Governor of the Bahamas refused to extradite slaves who had escaped by boat from Florida, even though they were charged with murder in the United States.<sup>125</sup> Indeed,

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Klingberg eds., 1970).

120. *Minute Books of the British and Foreign Anti-Slavery Society* (Nov. 28, 1842) in *SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-1858*, at 105-07 n.77 (Annie Heloise Abel & Frank J. Klingberg eds., 1970).

121. FLADELAND, *supra* note 98, at 316.

122. Letter from Ashburton to Thomas Clarkson (Mar. 17, 1843) in *SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-1858*, at 32 n.28 (Annie Heloise Abel & Frank J. Klingberg eds., 1970).

123. Zorn, *supra* note 107, at 290; 71 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 564-86 (debate of Aug. 11, 1843).

124. Zorn, *supra* note 107, at 290-91.

125. BARKER, *supra* note 94, at 255-56; Letter from Joshua Leavitt to "My dear Friend" (Feb. 2, 1844), in *SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-1858*, at 175-76 (Annie Heloise Abel & Frank J. Klingberg eds., 1970); Letter from Lewis Tappan to John Beaumont (Jan. 30, 1844), in *SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-*

the combined work of American and British abolitionists led to one of their few victories in the evolution of the British interpretation of Article X, and the apparent acceptance of that interpretation by American officials.<sup>126</sup>

While American anti-slavery activists gradually became sanguine about British intentions for the extradition of fugitive slaves, Southerners were immediately fearful. John C. Calhoun fumed over the apparent British "treachery" in the negotiations over this Article.<sup>127</sup> In the United States Senate, Thomas Hart Benton of Missouri opposed the treaty "on many grounds."<sup>128</sup> Among them was the failure of the negotiators to spell out "how far" the extradition clause "applies to the largest class of fugitive offenders from the United States — the slaves who escape with their masters' property, or after taking his life — into Canada and the British West Indies."<sup>129</sup> Benton considered the extradition provision "the merest hoax" because the treaty stipulated that extradition was possible only if "the offence is . . . one for which the fugitive could be arrested and tried, if committed at the place of apprehension."<sup>130</sup> But, Benton asked: "[W]ho supposes that, in the abolition dominions of Great Britain, the murder or robbery of a master by his slave will be admitted to be a crime for which the perpetrator should be delivered up to justice? . . . Who expects a warrant, a decision, or a certificate against a slave, under such circumstances?"<sup>131</sup> Senator Charles M. Conrad of Louisiana echoed Benton's opposition, arguing that if a slave killed his master while escaping "would not an English judge . . . decide that *according to the laws of England*, there was no criminality?"<sup>132</sup>

President John Tyler also believed that "British authorities

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1858, at 169-75 (Annie Heloise Abel & Frank J. Klingberg eds., 1970); Letter from Joshua Leavitt to Joseph Soule (Jan. 12, 1844), in *SIDE-LIGHT ON ANGLO-AMERICAN RELATIONS, 1839-1858*, at 167-69 (Annie Heloise Abel & Frank J. Klingberg eds., 1970); Zorn, *supra* note 107, at 291.

126. FLADELAND, *supra* note 98, at 318-19.

127. FLADELAND, *supra* note 98, at 318. The term is Fladeland's, not Calhoun's.

128. CONG. GLOBE, *supra* note 106, at 1 (speech of Mr. Benton, Aug. 18, 1842).

129. CONG. GLOBE, *supra* note 106, at 12.

130. CONG. GLOBE, *supra* note 106, at 22.

131. CONG. GLOBE, *supra* note 106, at 22.

132. CONG. GLOBE, *supra* note 106, at 58 (speech of Mr. Conrad, Aug. 18, 1842). To support his position, Conrad included as a note to his speech an "account, given by the notorious Tappan, of a conference which took place between Lord Ashburton and a committee of the American and Foreign Anti-Slavery Society" which was published in the *New York Courier and Enquirer*. CONG. GLOBE, *supra* note 106, at 59.

might not surrender a slave" wanted for crimes in the United States.<sup>133</sup> He wrote Webster that "the extradition articles had better be omitted altogether. If a slave kills his master and flees, a Nassau jury or court would declare the act to have been committed in self defence [sic] and without malice."<sup>134</sup> He thought that the "main point" of an extradition treaty was "unprovided for."<sup>135</sup> Despite the opposition of Benton and Conrad, and the reservations of President Tyler, most of the Senate, including a majority of Southerners, voted to ratify the treaty.<sup>136</sup> Their desire to avoid a war with England may have outweighed their reservations about the extradition clause and other aspects of the Treaty. As Senator Conrad noted, many who did "not entirely approve this treaty" were "willing to vote for it as the price of peace."<sup>137</sup>

Given this British interpretation of the Treaty, which was understood by men like Benton and Tyler, and which was of course well known in Canada, it seems odd that two Canadian courts would authorize Anderson's extradition, and that a third would release him on a minor technicality. This suggests a huge gap between Canadian jurists and politicians, and their British counterparts. That gap was partially caused by the ambiguities of mid-nineteenth century theories of international law and the commitment to legal formalism on the part of Canadian jurists. It was also exacerbated by a growing hostility towards blacks among some groups in Canada.

### III. CONFLICT-OF-LAWS AND ANDERSON'S CASE

The case for Anderson hinged on the interpretation of the Webster-Ashburton Treaty. Article X of the Treaty provided for the extradition of persons "charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or

133. JONES, *supra* note 96, at 149; Letter from John Tyler to Daniel Webster (Aug. 7, 1842) in 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, SERIES 3 1841-1843 671-72 (Kenneth E. Shewmaker et al. eds., 1983) [hereinafter PAPERS OF DANIEL WEBSTER].

134. JONES, *supra* note 96, at 149; PAPERS OF DANIEL WEBSTER, *supra* note 133, at 672.

135. PAPERS OF DANIEL WEBSTER, *supra* note 133, at 672.

136. CONG. GLOBE, *supra* note 106, at 58 (speech of Mr. Conrad, Aug. 18, 1842). See also JONES, *supra* note 96, at 161-65.

137. CONG. GLOBE, *supra* note 106, at 59 (speech of Mr. Conrad, Aug. 18, 1842). One other cause of southern hostility to the treaty were provisions that required more vigorous American action to end the African slave trade.

robbery, or forgery. . . ."<sup>138</sup> Extradition was only possible under the Treaty if "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed."<sup>139</sup> Anderson's attorneys argued that as a slave seeking his freedom, Anderson did not commit a crime recognized by Canadian law. The stabbing of Diggs, they argued, was simply an incident in his assertion of his natural right to freedom.

The question for the Canadian Court of Queen's Bench was threefold: 1) Whether Anderson was charged with a crime that allowed for his extradition under the Webster-Ashburton Treaty; 2) Whether the crime Anderson allegedly committed was a crime cognizable under Canadian law; and 3) Whether there appeared to be sufficient evidence, under Canadian law, to convict him.<sup>140</sup> If the court answered yes to these questions, then the court would hold Anderson for final disposition of his case and his extradition to the United States. If, on the other hand, the Court concluded that any of these questions could not be answered in the affirmative, the Court had to release Anderson. In the typical fashion of a nineteenth century legal positivist,<sup>141</sup> Chief Justice John Beverley Robinson noted that the justices to the court had to "conform to what the law requires, and are not at liberty to act upon considerations of policy, or even of compassion, where a duty is prescribed."<sup>142</sup>

In a case involving treaty obligations, however, what the "law required" was a question of policy as well as law. The meaning of the "prescribed" duty turned on how the Canadian court approached what was a conflicts-of-law question. Put simply, the Canadian court had to decide between enforcing Anglo-Canadian concepts of law and justice, or those of the United States. In his dissent Justice Archibald McLean noted that "[t]he law of England, or rather of the British Empire" did "not recognise [sic] slavery within the dominions of the Crown. . . ."<sup>143</sup> Starting with this proposition, McLean analyzed slavery

138. Webster-Ashburton Treaty, *supra* note 3, art. X.

139. Webster-Ashburton Treaty, *supra* note 3, art. X.

140. *In re John Anderson*, 20 U.C.Q.B.R. 124, 145-50 (1860).

141. On this problem in the United States, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

142. *In re John Anderson*, 20 U.C.Q.B.R. at 174.

143. *Id.* at 186.

and then recapitulated the events leading to the death of Diggs. The Canadian justice continued:

Could it be expected from any man indulging in the desire to be free, which nature has implanted in his breast, that he should quietly submit to be returned to bondage and to stripes, if by any effort of his strength, or any means within his reach, he could emancipate himself? Such an expectation, it appears to me, would be most unreasonable, and I must say that, in my judgment, the prisoner was justified in using any necessary degree of force to prevent what to him must inevitably have proved a most fearful evil.<sup>144</sup>

This analysis led McLean to the critical question: "Can, then, or must, the law of slavery in Missouri be recognised [sic] by us to such an extent as to make it murder in Missouri, while it is justifiable in this province to do precisely the same act?"<sup>145</sup> McLean thought not.

Unlike many northern judges in the same circumstances, McLean was not governed by the United States Constitution, with its many compromises over slavery.<sup>146</sup> He was not obliged to enforce the laws of bondage to protect a federal union. With an ironic twist, McLean instead paraphrased the American Declaration of Independence, noting that all men are born equal and possessed of certain inalienable rights, amongst which are life, liberty, and the pursuit of happiness.<sup>147</sup> While in the United States only "the first of these" was "accorded to the unfortunate slaves," in Canada McLean would protect all these rights and "in administering the laws of a British province," he could "never feel bound to recognise [sic] as law any enactment which can convert into chattels a very large number of the human

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144. *Id.* at 187-88.

145. *Id.* at 188.

146. On the moral dilemma of slavery and jurisprudence, see COVER, *supra* note 141, but for examples of judges who found a way out of their dilemma see Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-slavery Use of a Pro-slavery Decision*, 25 CIVIL WAR HIST. 5-35 (Mar. 1979). On the proslavery aspects of the Constitution see Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant With Death*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188-225 (Richard Beeman et al. eds., 1987); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

147. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE (U.S. 1776); *In re John Anderson*, 20 U.C.Q.B.R. at 188.

race."<sup>148</sup>

A majority of the Justices on the Court of Queen's Bench in Toronto rejected this position, which was based on both natural rights and English common law. Chief Justice Robinson, speaking for a two to one majority, had no trouble accepting the evidence presented before Magistrate Mathews.<sup>149</sup> The various depositions, including that of the slave, convinced the court that if the crime had taken place in Canada, there was enough evidence to try, and probably convict, Anderson.

Assuming that Anderson had done what the evidence purported to prove, however, had he in fact committed a murder? After a careful review of the case, the court concluded that when he stopped Anderson, Diggs "was acting under legal authority as much as if he had been armed with process."<sup>150</sup> This was because Missouri law authorized all whites to stop any slave who was away from his master's residence without a pass.<sup>151</sup> The court thus construed Anderson's act to be the same as if a Canadian in legal custody had killed a policeman. Therefore, the court found that Anderson had committed a crime — murder — that was recognized by Canadian law and specified in the 1842 Treaty as an extraditable offense. The court remanded Anderson back to "the custody of the keeper of the gaol . . . until a warrant shall issue upon the requisition of the proper authorities of the United States of America, or of the state of Missouri . . . ."<sup>152</sup>

For Chief Justice Robinson, Anderson's status as a slave had nothing to do with the case. The case was not about a slave gaining his freedom at all costs, but rather about someone using deadly force to resist lawful authority. Where McLean saw a slave fighting for his freedom, Robinson saw a criminal resisting the police. Robinson, a conservative, was no friend of the oppressed when he read the law.<sup>153</sup>

There are two levels at which the Queen's Bench decision may have been incorrect. On both public policy grounds and

148. *In re John Anderson*, 20 U.C.Q.B.R. at 188.

149. *Id.* at 150-74.

150. *Id.* at 172.

151. *Id.* at 143.

152. *Id.* at 192-93.

153. Lord John Russell wrote of Chief Justice Robinson's opinion: "I believe the law is against Chief Justice Robinson but he cannot bear liberty in any form," Russell to Newcastle, January 9, 1861, quoted in *BRODE*, *supra* note 2, at 70.

choice-of-law theory and doctrine, the court might have reached a different decision. As already noted, the general public policy of Great Britain was to refuse to extradite fugitive slaves. None had been returned since the signing of the 1842 Treaty. Because a treaty was at issue, Justice Robinson may have been flat out wrong in thinking that he should approach this case as if it were an ordinary murder trial. A number of people in England and Canada took this position. The English *Law Magazine and Law Review* argued that Anderson could not be given up because whatever he had done, it was in self-defense.<sup>154</sup> This article argued that the whole question turned on whether Anderson could be "charged upon such evidence of criminality as, according to the law of Canada, would justify his apprehension and commitment for trial" on a murder charge.<sup>155</sup> Since Diggs could not have arrested Anderson in Canada without "committing an unlawful act," Anderson had a right to defend himself, even if it meant killing Diggs.<sup>156</sup> Had the Canadian judges viewed the case in this light, they would have released Anderson.<sup>157</sup> An anonymous Canadian, writing as "Junius Junior," argued much the same point in a pamphlet with the subtitle "Seven Ways of Proving that Anderson Should not be Remanded."<sup>158</sup> Many members of the English Parliament agreed. As Lord Palmerston noted, it was "clear as day" that the Webster-Ashburton Treaty required that "the American Government must establish that Anderson committed an offence which by the law of England is murder, and that they must give proof which would be sufficient to satisfy an English justice of the peace that he ought to be committed to be tried on that accusation."<sup>159</sup> Palmerston refused to "go into the question . . . whether a free man who kills in self defence another who attempts to reduce him to a state of slavery is guilty of manslaughter, or justifiable homicide, or murder" but he thought "it probable that no English lawyer would

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154. *The Case of Anderson, the Fugitive Slave*, 10 L. MAG. & L. REV. 368, 370 (1861).

155. *Id.* at 369.

156. *Id.* at 370.

157. *Id.*

158. Junius Junior, *A Review of the Judgments of the Bench, in the Anderson Extradition Case; or, Seven Ways of Proving that Anderson Should not be Remanded: with the Judgments of the Court Appended*, reprinted in 4 SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM 1700-1872: FUGITIVE SLAVES AND AMERICAN COURTS Ser. II, 445-92 (Paul Finkelman ed., 1988).

159. 161 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 223 (debate of Feb. 8, 1861).

place the act under the [heading of murder]."<sup>160</sup> Under the Treaty, if Anderson could not be tried for murder in Canada on the facts presented by Missouri authorities, then he could not be returned to Missouri for trial.<sup>161</sup>

#### IV. THE ANDERSON CASE, CANADIAN RACISM, AND THE LAW

For Canadians, the Anderson case was a major event which, according to one turn-of-the-century Ontario lawyer, "caused more excitement in [Canada West and] other British provinces than any other one had ever made before or since, and from start to finish the proceedings were watched over with the greatest interest by the legal profession and by governments and politicians of the British provinces."<sup>162</sup> Subsequent scholars have accepted this view. In a recent book-length study of the case, Patrick Brode, concentrating on the case as an aspect of Canadian history and Anglo-American relations, noted that when the British court at Westminster issued the writ of habeas corpus on behalf of Anderson, it "caused a rethinking of the rights of Canadians within the British empire."<sup>163</sup> "This intervention represented the last attempt by a British court to issue a writ in Canada. The nationalistic resentment aroused by this imperial interference — and the insistence by Canadians that it be repudiated — was a measure of the sense of nationhood Canada had achieved by 1860."<sup>164</sup> In Great Britain, too, the case was a major event. The English "law journals were full of the case," and it "provided more interest to law journals than any other case of the period."<sup>165</sup>

The Anderson case also helps illuminate the social history of Canadian race relations. While always proud of themselves for living in a beacon of real liberty just north of the "land of the free," Canadians were not immune from the virus of racism.<sup>166</sup> In the 1840's, the English abolitionist Charles Stuart "conceded that there was 'horrible prejudice' in some parts of Canada, par-

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160. *Id.* at 223-24.

161. *Id.*

162. J.E. Farwell, speaking in 1912 to the Ontario Bar Association, *quoted in* Reinders, *supra* note 62, at 393.

163. BRODE, *supra* note 2, at xi.

164. BRODE, *supra* note 2, at xii.

165. Reinders, *supra* note 62, at 400.

166. WINKS, *supra* note 108, at 142.

ticularly in the Western District."<sup>167</sup> At the same time, a black Canadian "cited numerous examples of color prejudice in Canada in an endeavor to sustain his argument that fugitive blacks would be better off emigrating to Jamaica."<sup>168</sup> Historian Robin Winks also undermines the myth of Canada as an unprejudiced haven for runaway slaves, noting that by the "1840s and 1850s the Negro found himself distinctly unwelcome in many areas of the provinces."<sup>169</sup> In Canada, "[p]rejudice rose as the number of Negroes rose."<sup>170</sup> Jason Silverman offers the most extreme analysis, arguing that by 1860 many Canadians were "frustrated and angry at the sudden influx of black refugees" following the adoption of the 1850 fugitive slave law.<sup>171</sup> Canadian newspapers often reflected popular "ambivalence" towards fugitive slaves; some papers published "vicious racist propaganda."<sup>172</sup> During the Civil War, one fugitive slave told an American investigator that there was "as much prejudice against the black man in Canada as there is in the States," while another complained that Canadians were more prejudiced than southern slaveholders.<sup>173</sup> Thus, Silverman concludes that American blacks "did not find in Canada what they had been promised."<sup>174</sup> On the contrary, they often found antagonism and resentment.<sup>175</sup>

Silverman's position, as well as that of Winks, seems over-argued. The fugitives Silverman quotes may have been unusually unhappy in Canada. Moreover, these statements were made during the Civil War, when these fugitive slaves may have already been laying the psychological groundwork for a return to the United States in anticipation of a total end to slavery. Canadian race relations, like those in the northern United States,

167. BARKER, *supra* note 94, at 244.

168. BARKER, *supra* note 94, at 244.

169. WINKS, *supra* note 108, at 142.

170. WINKS, *supra* note 108, at 143.

171. Jason H. Silverman, 'We Shall be Heard!': *The Development of the Fugitive Slave Press in Canada*, 65 CAN. HIST. REV. 54, 54 (1984), reprinted in 6 ARTICLES ON AMERICAN SLAVERY: FUGITIVE SLAVES 386, 386 (Paul Finkelman ed., 1989).

172. *Id.*

173. Fugitive slave Thomas Likers, speaking during the Civil War in Jason Silverman, *The American Fugitive Slave in Canada: Myths and Realities*, 19 S. STUD. 215, 218 (1980).

174. JASON H. SILVERMAN, UNWELCOME GUESTS: CANADA WEST'S RESPONSE TO AMERICAN FUGITIVE SLAVES, 1800-1865, at viii (1985). DANIEL G. HILL, THE FREEDOM-SEEKERS: BLACKS IN EARLY CANADA 100-04 (1981), describes the discrimination in education that blacks in Canada faced.

175. HILL, *supra* note 174, at 100-04.

were complex. In the North, for example, it was possible to find communities that offered blacks full equality and integrated facilities while another city in the same state barely tolerated blacks. The contrast between antebellum Cleveland and Cincinnati, Chicago and Cairo, or Syracuse and Albany illustrates the diversity within the North.<sup>176</sup> Canada, it seems, was equally diverse. The black utopias of Canada provided safe haven and more for numerous fugitive slaves and native-born Canadian blacks.<sup>177</sup> Racism in some parts of Canada clearly must be balanced with the success of blacks in other parts of the country.<sup>178</sup>

Anderson's case illustrates this diversity. Before his arrest Anderson had worked his way up the economic ladder from a penniless fugitive to a homeowner with a viable trade. Anderson's troubles in Brantford with a local politician who had no love for blacks must be contrasted with his ability to hide-out in Simcoe for an entire summer. The legal and political aspects of this case are equally illustrative of the complexity of race relations in Canada at this time. The Canadian judiciary certainly was almost too anxious to rush Anderson to judgment. Anderson's case was heard in three different courts, and with the exception of Justice McLean's dissent on the Court of Queen's Bench, no Canadian judge showed any sympathy for Anderson and his plight.<sup>179</sup> Even the court which released Anderson did so on a technicality, while rejecting the main thrust of his attorneys' argument. Some Canadian politicians, including Attorney General John A. Macdonald, were equally unsympathetic to Anderson and the problem of fugitive slaves.<sup>180</sup>

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176. See Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 *RUTGERS L.J.* 415 (1986).

177. WINKS, *supra* note 108, at 142-271; WILLIAM H. PEASE & JANE H. PEASE, *BLACK UTOPIA: NEGRO COMMUNAL EXPERIMENTS IN AMERICA* (1963).

178. WINKS, *supra* note 108, at 142-271; PEASE & PEASE, *supra* note 177, at 46.

179. *In re John Anderson*, 20 *U.C.Q.B.R.* 124, 174-92 (1860).

180. See *infra* text in Section V. Macdonald's hostility to blacks is revealed in a letter to Chief Justice J.W. Ritchie of New Brunswick some years later. In 1868, Ritchie asked Macdonald why Canada still retained a death penalty for the crime of rape when no one in fact had been hanged for rape in Canada since the early 1840s. Macdonald replied:

We found it necessary, or rather judged it expedient to return the life penalty principally on account of the influx of blackguards of all kinds from the United States, who can cross and recross our border at will and occasionally commit all kinds of outrages. We have thought it well also to continue it on account of the frequency of rapes committed by negroes, of whom we have too many in Upper Canada. They are very prone to felonious assaults on white women: If the sentences and punishment were not very severe there would be a great

At the same time, large segments of the Canadian public were truly outraged at the likelihood of Anderson's extradition. The leading white advocate of Anderson's release was George Brown, the "unrivaled" leader of the reformers in Upper Canada.<sup>181</sup> "Reactions in Canada to the court decision [of the Canadian Queen's Bench] were almost entirely critical."<sup>182</sup> Thomas Henning, the Secretary of the Anti-Slavery Society of Canada told his English counterpart that "[t]he cry here is throughout the land, Anderson is not a *murderer* but a *Hero* and he *must* not be given up."<sup>183</sup>

Henning seems to have accurately understood the sentiments of his countrypersons. A mob threatened the Court of Queen's Bench when that forum denied Anderson relief. Only the intervention of Anderson's attorney prevented a riot. In Montreal more than 2,500 people signed a petition on behalf of Anderson.<sup>184</sup> White and black residents throughout British North America objected to returning Anderson. "The Canadian press reported daily on the clamor, comparing Anderson to Garibaldi, to a ravished Negro maid seeking to escape from her abductor, and to the manly symbol of all Africa."<sup>185</sup> Black Canadians and white abolitionists in the country organized rallies in support of Anderson.<sup>186</sup> When Anderson was finally released, the *Toronto Globe*, a mainstream paper with anti-slavery leanings, declared: "We heartily congratulate the people of Canada on the narrow escape we have thus made from what would have been a deep and indelible stain on the fair fame of our country."<sup>187</sup>

Relying on a technicality, the Canadian judges on Toronto's Court of Common Pleas may have ultimately saved Canada's "fair fame" but they, and other Canadian judges, also put that "fair fame" into jeopardy. Had the Canadian judges been more

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dread of the people taking the law into their own hands.

Letter from John A. MacDonald to Chief Justice J.R. Ritchie (June 8, 1868) in NATIONAL ARCHIVES OF CANADA, MANUSCRIPT GROUP 26A, 854-55 (June 8, 1868). I am indebted to Professor Jon Swainger for sharing this information with me.

181. McINNIS, *supra* note 48, at 343.

182. Reinders, *supra* note 62, at 398.

183. Reinders, *supra* note 62, at 399.

184. Fred Landon, *The Anderson Fugitive Case*, 7 J. OF NEGRO HIST. 242 (1922).

185. WINKS, *supra* note 108, at 175-76; STORY OF JOHN ANDERSON, *supra* note 5, at 43-52.

186. 2 THE BLACK ABOLITIONIST PAPERS, *supra* note 27, at 430.

187. TORONTO GLOBE, Feb. 16, 1861, *quoted in* STORY OF JOHN ANDERSON, *supra* note 5, at 81. George Brown, the leading advocate of Anderson's release, was the owner of the Globe. It is likely that he, or his brother Gordon, wrote this editorial.

sensitive to the problem of slavery itself, Anderson might have been released for substantive reasons at either of his two earlier hearings.

Racial bias seems to have played an important part in the decision to hold Anderson for extradition. Patrick Brode, presenting a Canadian nationalist view, argues that "[i]n view of the accusations against Anderson, William Mathews would have been delinquent in his duty if he had not had him arrested."<sup>188</sup> Mathews was arrogant, authoritarian, and quick to judge blacks. Moreover, Mathews was a politician in a notably racist town. In 1846, fourteen years before Anderson's arrest, "white residents of Brantford asked that the Negroes there — fifteen families — be sent away" to a more remote and unsettled area of Canada West.<sup>189</sup> By 1860 race relations had, if anything, worsened. Magistrate Mathews, a politician with no legal training, embodied this hostility toward blacks and American fugitive slaves. He was, in Brode's language, a "bumbling racist."<sup>190</sup> His approach to the case reflected his prejudices.

Similarly, it is not clear under the law and the rules for extradition whether Mathews should have been so quick to incarcerate Anderson the first time he did so, or the second. The initial incarceration followed an accusation by an angry acquaintance, and, while not technically hearsay,<sup>191</sup> this was certainly flimsy evidence on which to arrest and to hold someone for a month.<sup>192</sup> Officer Port, who identified Anderson at that time, had never actually seen him, so the reliability of his identification was questionable.<sup>193</sup> The second incarceration was based on Gunning's affidavit, which recounted that Anderson had committed a murder in Missouri in 1853, and ended with the phrase, "this deponent doth verily believe."<sup>194</sup> Gunning, however, had

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188. BRODE, *supra* note 2, at 23.

189. WINKS, *supra* note 108, at 146.

190. BRODE, *supra* note 2, at 97.

191. Normally the statement of a third party commenting on what someone else said had happened would be hearsay. However, one of the exceptions to the hearsay rule is an admission made against the interests of speaker — in this case Anderson's admission that he stabbed someone.

192. One historian has argued that Mathews admitted he was holding Anderson "pending the receipt of necessary evidence" and that Mathews "subjected his prisoner to most rigorous prison life, . . . keeping him ironed, permitting no Negro friends to see him, not even admitting Rev. Walter Hawkins, the Negro preacher who afterwards became a bishop." Landon, *supra* note 184, at 237.

193. Landon, *supra* note 184, at 237.

194. *In re John Anderson*, 20 U.C.Q.B.R. 124, 125 (1860).

never been to Missouri and had never seen Anderson. In his dissenting opinion, Justice McLean of the Canadian Court of Queen's Bench suggested that Gunning's "doth verily believe" was not precise enough to issue an arrest warrant. McLean noted that Missouri had not yet issued any warrant at that time. Thus, he thought Mathews, "in the absence of any more positive information than mere belief of such a crime having been committed, might well have hesitated before issuing a warrant to apprehend the prisoner and, without being chargeable with any dereliction of duty, might have called for some proof of a murder having been committed, and of the identity of the party accused as the murderer."<sup>195</sup>

Similarly, the evidence presented to Mathews at the extradition hearing was suspect. No one present at the hearing could place Anderson at the scene where Diggs died. The only evidence of his being there was an affidavit sworn by a slave in Missouri.<sup>196</sup> Although Anderson's own attorney inexplicably failed to challenge this affidavit, a trained judge might have found it unacceptable. The judge might easily have demanded that the slave himself be brought to Canada to testify at the hearing. Since whites from Missouri were able to make the trip, there was obviously no technological reason to prevent the slave from coming. However, had the slave come, he would have been immediately free.<sup>197</sup> It is not clear if the affidavit of a slave could have been legally presented in a Missouri court. Slaves in Missouri could testify in criminal cases against other slaves but the Missouri law was silent on their giving affidavits.<sup>198</sup> Certainly, if a slave's affidavit was inadmissible in a Missouri court, there would be good reasons for a Canadian court not to have accepted the same affidavit. Anderson's attorney should have challenged the affidavit on these grounds but even when he failed to do so, there was no reason Mathews had to accept it at face value. The potential for coercion of a slave was enormous. A master could easily get a slave to agree to the contents of an

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195. *Id.* at 175 (McLean, J., dissenting).

196. *Id.* at 130.

197. Slaves were free, or at least had a claim to freedom, the moment they entered a free jurisdiction under *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772). See PAUL FINKELMAN, AN IMPERFECT UNION 162 (1981); William Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 CHICAGO L. REV. 86, 129 (1974).

198. MO. REV. STAT. §1090 (1845).

affidavit. Where slave testimony was involved, the only certain way of securing honest and fair testimony would have been to bring the slave to the court.

Anderson had of course admitted that he did stab a white man while escaping from Missouri. Anderson did not recant this admission, but neither did he view it as a confession of guilt. Anderson did not confess to stabbing Diggs. He did not know whom he had stabbed. Nor did he confess to killing anyone. He had no personal knowledge that he had killed anyone. Furthermore, even Anderson's admission that he had stabbed someone, assuming it was Diggs, did not necessarily provide probable cause for holding Anderson. This was because of the strict grounds for extradition under the Webster-Ashburton Treaty of 1842, which governed Canadian-American extradition at this time.<sup>199</sup>

As already noted, Article X of the Webster-Ashburton Treaty provided for the extradition of persons "charged with the crime of murder, or assault with intent to commit murder . . . upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed."<sup>200</sup>

Anderson was clearly charged with murder in Missouri, and murder was a crime that Canada recognized. The problem, however, was whether what Anderson had done in Missouri would have amounted to a murder in Canada. It is not at all clear that Anderson could have been charged for murder in Canada for the same offense. Diggs had initiated the violent contact by stopping Anderson, by ordering his slaves to chase Anderson, and finally, by assaulting Anderson with a stick. Under these circumstances, it would not have been unreasonable for a Canadian court to conclude that Anderson had committed the lesser offense of manslaughter or even justifiable homicide on the grounds of self-defense. In the Court of Common Pleas in Toronto, Chief Justice William H. Draper rejected this argument, declaring that "[h]omicide in all cases *prima facie* and unexplained is murder."<sup>201</sup> However, a different judge, with a different perspective, might have concluded that this was not "unexplained," but, on

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199. Webster-Ashburton Treaty, *supra* note 3, art. X.

200. Webster-Ashburton Treaty, *supra* note 3, art. X.

201. BRODE, *supra* note 2, at 92.

the contrary, was reasonable. In the Court of Queen's Bench Justice McLean, in dissent, had argued this position.<sup>202</sup>

#### V. MAKING SENSE OF THE CANADIAN RESULT

Beyond complicated issues of international law, the two Canadian courts which heard Anderson's habeas corpus petitions faced three identical questions: 1) Whether there was sufficient evidence to hold Anderson for subsequent extradition as a murderer; 2) Whether a fugitive slave accused of murder could be extradited under the 1842 treaty; and 3) Whether the warrant of commitment was technically correct.<sup>203</sup> The Canadian Court of Queen's Bench ruled against Anderson on all three grounds. Chief Justice Robinson believed that the evidence in support of the allegations against Anderson was strong enough to return him for trial in Missouri. Robinson rejected any notion that Anderson's slave status might mitigate his offense. The court noted that there were problems with the warrant for commitment, especially because it did not allege Anderson had committed a murder. However, Robinson believed "[d]efects of that nature . . . [were] not fatal, for there is not the same necessity for an adherence to technical terms in a warrant as in an indictment."<sup>204</sup> Robinson felt that "[w]hen a legal cause for the imprisonment appears upon the evidence, the ends of justice are not allowed to be defeated by a want of proper form in the warrant, but the court will rather see that the error is corrected."<sup>205</sup>

The Court of Common Pleas showed some, but not complete, sympathy for Robinson's position on the first two issues. Chief Justice Draper refused to rule out an extradition of a fugitive slave simply because as a slave he might be denied a fair trial or enslaved even if acquitted of the crime. He also offered one example of a situation where a fugitive slave might be returned for a murder trial — where the slave had killed a police officer in a free state in order to prevent his return to a slave state. But, at the same time, Draper was sensitive to the fact that slaves ought to have a right to fight for their freedom, and that the Queen's dominions had become the land of the free and the home of the brave slave. Thus, Draper faced a dilemma

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202. *In re John Anderson*, 20 U.C.Q.B.R. 124, 174-92 (1860).

203. *Id.* at 124.

204. *Id.* at 162.

205. *Id.*

which he described as follows:

I am reluctant, on the one hand[,] . . . to declare that each individual of the assumed number of 4,000,000 slaves in the Southern States may commit assassination in aid of escape on any part of his route to this province and find impunity and shelter on his arrival here. I am reluctant, on the other hand, to admit that Great Britain has entered into Treaty obligations to surrender a fugitive slave who, as his sole means of obtaining liberty, has shed the blood of the merciless task-master who held him in bondage.<sup>206</sup>

Fortunately for Draper, he did not have to reach any answers to this problem. Unlike Chief Justice Robinson, Draper believed that the warrant was defective and the court had no choice but to discharge Anderson. An English — or Canadian — court could not remand a prisoner to the custody of a jailor on a defective warrant.

There are four possible reasons for the different results in these two cases. Taken together, they explain why Anderson was set free by one court after another had refused to do so.

First, the arguments of counsel on behalf of Anderson seem to have improved in the second case. Practice might not have made Anderson's principal lawyer perfect, but Samuel Freeman did a better job in the last case. There he was also joined by two new counsel, one of whom "was a noted conservative."<sup>207</sup> This political bi-partisanship might have helped Anderson before the Court, while the addition of new attorneys might have helped shape the arguments on his side. In particular, before the Court of Common Pleas, Anderson's lawyers stressed the defects of the warrant of commitment, while before the Court of Queen's Bench they noted it was defective, but foolishly conceded that this was not the key issue of the case. In other words, in the latter case, the attorneys chose to argue law and were content to win on the technicalities of the law, while in the first case they were far more concerned with asserting anti-slavery theory. This argument also made sense politically. While the members of this court might have been more inclined to issue the writ than those

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206. *Judgment of Chief Justice Draper, in CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON* 40 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 156 (1971).

207. BRODE, *supra* note 2, at 91.

on the Queen's Bench, Anderson's attorneys also made it easier for them to do so by providing them with a suitable legal argument. With this new argument, the Common Pleas judges did not have to make a political ruling; rather, they could easily make a legal ruling that happened to suit their politics. On the other hand, had Anderson's attorney vigorously argued the insufficiency of the warrant in November, the Court of Queen's Bench might have released Anderson.

Second, the analysis of the case by the two courts differed. The Court of Queen's Bench focused on the facts of the case. Anderson had killed Diggs. That was enough for Chief Justice Robinson to believe that he should stand trial in the place where the crime was committed. For the Court of Common Pleas, however, the issue was the requirements of the Webster-Ashburton Treaty. Anderson had not been charged with a "murder" as required by the Treaty and no evidence had been introduced into a Canadian forum that Anderson had actually committed a murder. Thus he could not be extradited under the Treaty.<sup>208</sup> In a concurring opinion, Justice William B. Richards pointed out that Anderson could be held by the Canadian authorities only if his offense came under the Treaty because he had committed no offense at all under Canadian law. Richards noted that "if it were not for the Treaty, and the Act of Parliament carrying it out, we should be obliged to discharge the prisoner from custody, though it was clearly shown that he had committed murder in the State of Missouri. If it does not appear that he has committed some offence against the Queen's peace, we have no right to detain him in custody, except under the authority of the Act of Parliament."<sup>209</sup> Such an analysis led the Common Pleas judges to demand strict adherence to the Treaty in ways the Court of Queen's Bench did not.

Third, personalities and personal prejudices may have affected the way the two courts approached the case and the judgments they reached. Chief Justice Robinson, a descendant of

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208. *Judgment of Chief Justice Draper*, in CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON 40 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 156 (1971).

209. *Judgment of Mr. Justice Richards*, in CORRESPONDENCE RESPECTING THE CASE OF ANDERSON 41 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 157 (1971).

Virginia loyalists and slave-owners, had a "low opinion of blacks" and little tolerance for their presence in Canada.<sup>210</sup> An extremely conservative man, he was far more concerned with order than law or justice. The English Foreign Secretary, Lord John Russell, who had worked with Robinson in Canada, wrote of Robinson and his opinion in the Anderson case: "I believe the law is against Chief Justice Robinson but he cannot bear liberty in any form."<sup>211</sup> Draper, although a Tory in politics, was far more liberal than Robinson.<sup>212</sup> Moreover, the other judges on that court, John H. Hagarty and William B. Richards, "had been pronounced liberals in their day."<sup>213</sup> The different outcomes of the two Anderson cases underscore how personalities and personnel can affect the scales of justice.

Finally, the outcome was doubtlessly affected by the political problems the case had caused. For Canada West's Attorney General, John A. Macdonald, the Anderson case was an embarrassment. Macdonald felt some obligation to support his political allies, Justice of the Peace Mathews and later Chief Justice Robinson. At the same time, Macdonald realized that as Attorney General he would be held responsible if somehow Anderson was actually returned to the United States. Macdonald tried to straddle the issue. As Attorney General, he might have been instrumental in getting Anderson out of jail. An opinion by the Attorney General that Anderson's actions were not such that he could be extradited under the Webster-Ashburton Treaty probably would have ended the case before it reached the Canadian Court of Queen's Bench. Indeed, when he first got wind of the case, while it was in the hands of Justice of the Peace Mathews, he might have intervened on behalf of freedom. That Macdonald did not do so suggests that he was unsympathetic to Anderson's plight.

Macdonald did not take any interest in the case while it was before his political ally Mathews.<sup>214</sup> Once the case was headed for the Court of Queen's Bench, Macdonald apparently worked behind the scenes to secure a result favorable for Anderson. In

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210. BRODE, *supra* note 2, at 16.

211. Letter from Russell to Newcastle (Jan. 9, 1861), in BRODE, *supra* note 2, at 70.

212. BRODE, *supra* note 2, at 91.

213. BRODE, *supra* note 2, at 91.

214. Reinders argues that Macdonald "had early shown an interest in the case," but this early interest was *after* Mathews ordered Anderson held for extradition, not before. Reinders, *supra* note 42, at 74.

this way, he allowed the courts solve his dilemma. Thus, he privately agreed to provide public funds for Anderson's defense and interposed no objections to any of the procedural motions of Anderson's attorney, Samuel B. Freeman.<sup>215</sup>

Since the "[r]eactions in Canada to the court [of Queen's Bench] decision were almost entirely critical,"<sup>216</sup> Macdonald had to distance himself from the decision in order to prevent a political backlash. Macdonald personally tried to stay clear of the case, while in the end defending Canadian nationalism against both the Court at Westminster and the government at Whitehall. In an appeal to popular emotions, which probably had little impact, Macdonald went so far as to assert that "Anderson was better off being tried 'by the *Magna Charta*, by the law of the land' than by 'any Cabinet whatever.'" <sup>217</sup> This was nonsense, of course, since in the end Anderson's greatest chance for freedom lay with the Governor General or the English cabinet.

Probably more important to Macdonald than the reaction of the Canadian electorate was the impact of the case on Macdonald's aspirations for Canadian autonomy within the British Empire. Macdonald hoped to lead Canada to a new level of independence within the British Empire.<sup>218</sup> He could hardly accomplish this if Canada persisted in following a policy towards fugitive slaves that was diametrically opposed to that of Great Britain, in conflict with the spirit and possibly the letter of the Webster-Ashburton Treaty, and at odds with nearly eight decades of anti-slavery British jurisprudence.

Macdonald, an extremely ambitious politician, was still recovering from the extreme embarrassment of the "Orange Affair," which had forced him to abandon the Crown Prince and the Duke of Newcastle when they visited his hometown of Kingston.<sup>219</sup> The confederation that Macdonald looked forward to —

215. Reinders, *supra* note 42, at 74-75.

216. Reinders, *supra* note 62, at 398. See also Fred Landon, *Canadian Opinion of Southern Secession, 1860-61*, 1 CAN. HIST. REV. 255 (1920).

217. BRODE, *supra* note 2, at 107-08.

218. At this point in his career, Macdonald may not have been fully committed to the nationalism he came to embody after 1864. An alternative analysis of Macdonald is that, as an Anglophile and a Burkean conservative, he simply believed it was best to avoid controversies and eventually they would go away. I am indebted to John Swainger for his insight.

219. In September 1860, members of the anti-Catholic "Orange Order" demonstrated in Kingston in front of a boat carrying the Prince of Wales, the Duke of Newcastle, and Macdonald. This was an extreme affront to the visiting dignitaries because, although legal in Canada, the "Orange Order" was banned in Great Britain. Macdonald

and that he would ultimately bring to fruition — “would have been impossible . . . unless the Imperial Government had given its blessing.”<sup>220</sup> Despite the Orange fiasco, the trip to Canada helped convince Newcastle that confederation was a good idea.<sup>221</sup> But, Macdonald could not have known this in the winter of 1860-61. He only knew that the Anderson case was potentially a greater embarrassment than the Orange fiasco.

If Canadians had tried to force the extradition of Anderson, the British would have intervened and been more reluctant than ever to give Canada political autonomy. No one could predict the fallout if the Canadians ignored a writ from the highest common law court in England. Macdonald, anxious to avoid another embarrassment, doubtlessly wanted the Anderson case to just go away. This may explain why counsel for the Crown offered little resistance to the suggestion that the warrant was defective. Here was an easy way out of the problem which would cause the least political damage.

The Court of Common Pleas must have wanted to limit the political damage too, even though a majority of the judges were not political allies of Macdonald. Canada's jurists had their own reasons for wanting the case to end and Anderson to go free. Looming in the background was the writ of habeas corpus issued by the English Court of Queen's Bench at Westminster. If a Canadian court did not release Anderson, then an English court would demand he be brought to Westminster on a writ of habeas corpus. If this writ was served, it would have created a huge constitutional crisis in Canada. By discharging Anderson, the court avoided this crisis.

Even without the English writ on the horizon, there was yet one other important political issue which the Court of Common Pleas explicitly recognized. This was the likelihood that no matter what the Canadian courts did, the Governor General of Ca-

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was forced to leave the boat, and abandon these powerful emissaries from England, in order to placate his own constituents. Under the circumstances, Macdonald simply could not afford another embarrassing confrontation with England over a highly visible and emotional issue — such as the return of a fugitive slave. See DONALD CREIGHTON, *JOHN A. MACDONALD: THE YOUNG POLITICIAN* 299-303 (1952). Creighton does not tie this event to the Anderson case, but the two issues were merged in a brief but bitter debate in Parliament between Nova Scotia-born Thomas C. Haliburton and Samuel Chichester-Forcescue, the undersecretary for foreign affairs. 161 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 821-28 (1861) (debate of Feb. 22, 1861).

220. ARTHUR R. M. COWER, *COLONY TO NATION: A HISTORY OF CANADA* 318 (1961).

221. *Id.*

nada, at the direction of the Palmerston ministry in London, would refuse to sign a warrant of extradition. As Chief Justice Draper noted in his opinion, in an extradition case, the judge's "decision is not binding on the Government to whom he must certify the same, and the evidence, and on whom rests the ultimate responsibility of surrendering or refusing to surrender the prisoner."<sup>222</sup>

In releasing Anderson from custody, the Court of Common Pleas made life easier for the Cartier-Macdonald ministry in Canada, prevented a crisis with the mother country, and avoided a situation in which the Governor General would have to overrule the recommendation of a Canadian court. In addition, of course, the justices on this court, who were reformist in their personal and political views, had the satisfaction of knowing that they helped strike a blow against slavery and at the same time pleased the vast majority of the Canadian public. The only parties to the case who might have been offended were Magistrate Mathews and the United States government. Mathews, a small-minded man in a small office in a small town, was of no consequence to them. Canadians were rarely concerned with what might offend the United States, and in late February 1861, everyone in Canada knew that the United States had far greater things on its collective mind than the decisions of a court in Toronto.

## VI. MAKING SENSE OF THE AMERICAN RESPONSE

While all this was happening, the Buchanan administration did little to regain Anderson. Politicians in Washington and in Missouri also showed relatively little concern over the case. On October 2, 1860, Secretary of State Lewis Cass wrote to R. Douglas Irvine, the British Charge d'Affaires in Washington, asking that "Her Britannic Majesty's Government . . . issue the necessary warrant to deliver up the person" of Anderson.<sup>223</sup> Irvine immediately forwarded this letter to Lord John Russell, the Foreign Secretary. On October 27, 1860, this message was transmitted to Sir Edmund Head, the acting Governor General of Ca-

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222. *Judgment of Chief Justice Draper, in* CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON 40 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 156 (1971).

223. *Id.*

nada, as well as to the Prime Minister's office.<sup>224</sup>

Given the pace of transatlantic mail and intragovernmental communication, this seems like relatively expeditious action on the part of English authorities. But, it was not fast enough for the Americans. On November 2, 1860, Secretary of State Cass sent a letter directly to the British Ambassador, Lord Lyons, asking why "the requisition in question has never been forwarded to Canada."<sup>225</sup> Cass feared that Anderson was about to be released from custody. A day later Lyons explained to Cass that he had forwarded the material to London, rather than directly to Canada.<sup>226</sup> Lyons immediately telegraphed officials in Canada, requesting that Anderson not be released from custody.<sup>227</sup> The officials informed him that Anderson was being held "waiting requisition."<sup>228</sup>

The problem, of course, was that no "requisition" had actually been sent. Cass's initial communication of October 2, 1860 was not a requisition.<sup>229</sup> It was vague and general. It was little more than a note — hardly a document which would allow for an international extradition. In mid-December, Lord Lyons explained to the Acting Governor General of Canada, Sir William Fenwick Williams, "I knew nothing of [the facts of the case] . . .

224. *Id.* at 2.

225. Letter from Mr. Cass to Lord Lyons (Nov. 2, 1860) in *Westminster Transcript*, *supra* note 43, at 43-44. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 47-50 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 163-66 (1971).

226. Letter from Lord Lyons to Mr. Cass (Nov. 3, 1860), in *Westminster Transcript*, *supra* note 43, at 3. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 48 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 164 (1971).

227. Telegram from N.F. Williams to Lord Lyons (Nov. 6, 1860), in *Westminster Transcript*, *supra* note 43, at 3. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 48 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 164 (1971).

228. Telegram from N.F. Williams to Lord Lyons (Nov. 6, 1860) in *Westminster Transcript*, *supra* note 43, at 3. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 48 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 164 (1971).

229. Letter from Mr. Cass to Mr. Irvine (Oct. 2, 1860), in *Westminster Transcript*, *supra* note 43, at 2. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 47 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 163 (1971).

except what I have since read in the newspapers."<sup>230</sup> The American government had failed to supply even the most basic information on the case against Anderson. As late as February 12, 1861, Lord John Russell, the Foreign Secretary, told Parliament that "[n]o communication has taken place between Her Majesty's Government and that of the United States" on the Anderson case "beyond the original demand,"<sup>231</sup> which of course had been insufficient to justify an extradition. Lord John Russell later explained to Parliament: "Now what the American Government did was of the very simplest character. They stated that a man of colour had been guilty of murder, without saying what his name was or anything else."<sup>232</sup>

The fact that "something of a *rapprochement* between Great Britain and the United States took place in 1860"<sup>233</sup> may have influenced the lackadaisical pace of the federal government in sending the proper requisition for the extradition. At the same time, the Buchanan administration fully understood that this *rapprochement* did not apply to slavery. In January 1861, the American ambassador in London, George M. Dallas, reported to Secretary of State Jeremiah Black that the Anderson case had "awakened . . . much interest in this country," and it had "invoked . . . much professional astuteness to defeat the operation of the Xth Article of the Treaty of 1842 . . ."<sup>234</sup> Dallas reminded Black of "the pungent and uncompromising hostility to social bondage which prevails throughout this country [England]."<sup>235</sup> Dallas thought that it would be "expedient" if the

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230. Lord Lyons to Sir W. Williams (Dec. 14, 1860) in CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 50-51 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 166-67 (1971).

231. 161 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 342 (1861) (debate of Feb. 12, 1861).

232. 162 HANSARD'S PARLIAMENTARY DEBATES (3d Ser.) 258 (1861) (debate of Mar. 22, 1861).

233. ROBIN W. WINKS, CANADA AND THE UNITED STATES: THE CIVIL WAR YEARS 5 (1960).

234. Letter from Mr. Dallas to Mr. Black (Jan. 16, 1861) in Westminster Transcript, *supra* note 43, at 4. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 48 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 164 (1971).

235. Letter from Mr. Dallas to Mr. Black (Jan. 16, 1861) in Westminster Transcript, *supra* note 43, at 4. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 48 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMEN-

United States took part in the legal proceedings in London, if Anderson was sent there under the writ of habeas corpus issued by the Court at Westminster.<sup>236</sup> But this was more a showing of the flag than anything else. The fact was that British were not about give up Anderson, and American officials in London understood this. Short of a military confrontation, the United States could not expect any movement on the British side on this issue.<sup>237</sup>

Even in the unlikely event that some American administration would have been willing to confront Great Britain over the fate of a fugitive slave, in 1861 the nation was certainly in no position to do so. When the case began, Buchanan's was about to become a lame duck administration, facing the nation's greatest crisis: the threatened secession of the deep South if Lincoln won the forthcoming election. By the time Dallas wrote Black, the Union itself had started to fall apart.

At another time Anderson's case might have been a major issue for American domestic politics and American-British relations. It is likely that American abolitionists would have been outraged when it seemed that Canadian authorities might actually extradite the fugitive. Similarly, Southerners should have expressed deep concern when the Toronto Court of Common Pleas released Anderson allowing him to go to England, where his freedom would be secure. But, because of other more important events in the United States, there was little outrage by either abolitionists or Southerners.

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TARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 164 (1971).

236. Letter from Mr. Dallas to Mr. Black (Jan. 16, 1861) in Westminster Transcript, *supra* note 43, at 4. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 49 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 165 (1971).

237. Letter from Mr. Dallas to Mr. Black (Jan. 16, 1861), in Westminster Transcript, *supra* note 43, at 4. See also CORRESPONDENCE RESPECTING THE CASE OF THE FUGITIVE SLAVE, ANDERSON, 48 (Harrison & Sons eds., 1861), reprinted in 46 BRITISH PARLIAMENTARY PAPERS, UNITED STATES OF AMERICA: CORRESPONDENCE AND OTHER PAPERS RELATING TO FUGITIVE CRIMINALS AND THE SLAVE TRADE, 1842-90, at 164 (1971). Just before the Civil War began, Secretary of State William H. Seward suggested that the United States provoke a war with Spain or France as a way of bringing the Confederate states back into the Union as a united force against a foreign enemy. Lincoln summarily dismissed the idea. See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 270-71 (1988). Presumably the Anderson case would have provided a pretext for a similar struggle against Britain, except of course, it is inconceivable that anyone in the Lincoln administration would have considered such drastic action over a fugitive slave.

The timing of the case explains the silence of Americans. When Anderson was first tried, the United States was in the throes of the most important presidential election in the nation's history. Most of the anti-slavery movement was focused on Lincoln's campaign and where it might lead. In the early stage of this case, only the abolitionist Gerrit Smith, who lived in central New York State, seemed concerned with Anderson's fate.<sup>238</sup> It is also likely that the American anti-slavery movement was relatively unconcerned by the decision of Mathews. After all, what an unknown justice of the peace in a small village said did not, in the long run, matter very much. Abolitionists knew that the important decisions were made at much higher levels. They certainly must have expected the higher Canadian courts, and certainly the Governor General, to be on the side of freedom and anti-slavery.

The Canadian Court of Queen's Bench must have severely disappointed American abolitionists. Some newspapers in Detroit, Buffalo, and other northern cities commented on the dangers the case posed to fugitive slaves.<sup>239</sup> Gerrit Smith, who had been active in the case all along, went to Toronto to speak on Anderson's behalf.<sup>240</sup> The decision of the Queen's Bench, however, was not the focus of attention of abolitionists. The decision came down on December 15, 1860,<sup>241</sup> and news of it reached the United States slowly. The *Liberator*, the nation's most important anti-slavery paper, did not give the Anderson case any coverage until December 31, when it carried a story written before the Queen's Bench decision that only discussed the potential dangers of the case and did not indicate what the outcome had been. The *Liberator* subsequently ignored the case.<sup>242</sup>

By the time Americans knew about the decision by the Canadian Court of Queen's Bench, Lincoln's election, the secession of South Carolina, and the beginning of the dissolution of the Union made Anderson's case seem remote and unimportant. Many American abolitionists may have anticipated that the English anti-slavery movement would fight for Anderson's freedom.

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238. BRODE, *supra* note 2, at 52-53.

239. BRODE, *supra* note 2, at 52.

240. BRODE, *supra* note 2, at 85-86.

241. *In re John Anderson*, 20 U.C.Q.B.R. 124, 124 (1860).

242. Patrick Brode suggests that this was because William Lloyd Garrison, the editor of THE LIBERATOR, and Gerrit Smith were feuding, and as long as Smith was involved in the case, Garrison's paper would ignore it. BRODE, *supra* note 2, at 52-53.

The case was not as much an American issue as an Anglo-Canadian one. Moreover, only five days after the Canadian Court of Queen's Bench had ruled against Anderson, South Carolina had left the Union. American abolitionists had more on their minds, and in their newspapers, than the fate of Anderson.

The timing of the case was also awkward for Southerners. If the Canadian courts had immediately freed Anderson, or if the British courts had intervened early-on, and the Buchanan administration had been unwilling or unable to gain custody of Anderson, then the case could have become one more immediate cause of secession. Southerners, who in 1860-61 were looking for any and all excuses to leave the Union, could have pointed out that the Webster-Ashburton Treaty was useless. It would be another example of how the federal government did not protect southern interests.

But, in fact, the initial hearings in the case more than satisfied Southerners. Thus, they had no reason to complain or to make the case into a national or international issue. Not until February 11, 1861 — after Americans found out about the writ of habeas corpus issued by the Court of Queen's Bench in Westminster — did anyone in Congress raise the question of the Anderson case and the enforcement of the extradition clause of the Webster-Ashburton Treaty. On that day, Senator James S. Green of Missouri offered a resolution asking the President for information and diplomatic correspondence "relative to the extradition of one Anderson, a man of color, charged with the commission of the crime of murder in the State of Missouri."<sup>243</sup> Because this resolution was not on the agenda, Green needed the unanimous consent of the Senate to offer it. Charles Sumner of Massachusetts initially objected to the resolution, but then allowed it to be brought to the floor.<sup>244</sup> However, even this concession by Sumner could not accelerate movement. It took the Senate two more weeks, until February 25, to finally send the President a resolution asking for information on the Anderson case.<sup>245</sup> Although he had not yet left for England, by the time the court in Toronto had released Anderson, the chances of rear-

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243. CONG. GLOBE, 36th Cong., 2d Sess., 841 (1861); Westminster Transcript, *supra* note 43.

244. CONG. GLOBE, 36th Cong., 2d Sess., 841 (1861); Westminster Transcript, *supra* note 43.

245. CONG. GLOBE, 36th Cong., 2d Sess., 841 (1861); Westminster Transcript, *supra* note 43.

resting him were slim.<sup>246</sup>

By this time it was also too late for the Buchanan administration to do anything about the Anderson case. Buchanan would leave office in less than a fortnight. Seven deep-South states had already left the Union. By March the new administration of Abraham Lincoln and Secretary of State William F. Seward was far more concerned with the Civil War and maintaining good relations with England than it was with the fate of a former slave whose freedom was won at the expense of a meddling slaveholder in Missouri nearly a decade before.

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246. Anderson's departure was partially delayed by weather. He could not leave until a thaw in the St. Lawrence River made it possible to go to England without first entering the United States.