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## Article

### De Facto Slavery and the “Syren Songs of Liberty and Equality”: Carol Weisbrod, Much Obligated

AVIAM SOIFER

*The law matters, yet not as much as judges like to say it does.*

*Also, it matters when and why judges claim that they are bound by the law.*

*Carol Weisbrod has written broadly and with great insight about the boundaries between what makes the law seem settled and when it is not.*

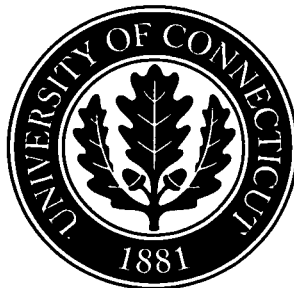
*In the spirit of her work, this Article briefly examines a Vermont case in the early 1800s about slavery and freedom. The case itself is paradoxical because Vermont earlier had been the first jurisdiction in North America formally to abolish slavery.*

*The late Robert Cover, who helped Carol and me to become friends more than 30 years ago, explored the moral-formal dilemma that judges sometimes face. In “Justice Accused,” Cover suggested provocatively that in addition to the rarely used judicial options of defiance or resignation in such situations, judges also have the choice to follow the law—frequently, and in revealing fashion, emphasizing how bound they might be, a phenomenon Cover identified as cognitive dissonance—or the choice to find a way around or through apparent legal obligations.*

*Selectman of Windsor v. Jacob focuses that dilemma within a context of rights, community, and federalism. These are realms in which Professor Weisbrod has led the way with her remarkable scholarship.*

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# De Facto Slavery and the “Syren Songs of Liberty and Equality”: Carol Weisbrod, Much Obligated

AVIAM SOIFER\*

*Without Contraries is no progression. Attraction and Repulsion, Reason and Energy, Love and Hate, are necessary to Human existence.*<sup>1</sup>

## I. INTRODUCTION

In law, the problem of the contingent meaning of language simply will not go away.<sup>2</sup> This enduring issue is particularly acute because lawyers are unusually committed to making it appear that the words we use have

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J.D., Yale Law School (1972); M. Urban Studies, Yale City Planning Department (1972); B.A., Yale College (1969). I received a great deal of help with a longer article, of which this essay is an updated part. That still-unpublished article was begun many years ago, and I put it aside in favor of what passed for more pressing matters. In particular, however, I would like to acknowledge the customary help of Kathryn Abrams, Donald Board, Steve Diamond, the late Willard Hurst, Lewis Kurlantzick, John Leubsdorf, Ray Madoff, Maeva Marcus, Hugh Macgill, Martha Minow, Bruce Mann, Joseph Singer, David Seipp, Carol Weisbrod, and Larry Yackle. I also benefited substantially from the research assistance provided by Leiv Blad, Joyce Kim, Daniel Offner, Christine Prepose, and Amy Van Galder. I am further indebted to my fellow participants in an NEH summer seminar at Stanford University in 1987, where I began the paper, and to faculty workshops at the Boston University and Cardozo Schools of Law, at which I first presented it—as well as to the staff of the University of Connecticut Law Review.

I hope that all those who helped me so much along the way can perceive at least signs of the many improvements they wrought.

<sup>1</sup> WILLIAM BLAKE, *The Marriage of Heaven and Hell*, in *THE POEMS OF WILLIAM BLAKE* 166, 166–67 (W.B. Yeats ed., Charles Scribner's Sons 1893).

<sup>2</sup> The point Michael Polanyi made years ago may now be fashionable in scholarly circles, but most lawyers still seem quite reluctant to accept the claim that language has “double indeterminacy due to our reliance both on its formalism and on our own continued reconsideration of this formalism in its bearing on experience.” MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 95 (1958). It is somewhat melancholy to note that Abraham Lincoln had anticipated Polanyi in reference to “liberty” in 1864. Lincoln said, “The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*.” Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864), in *7 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 301, 301 (Roy P. Basler ed., 1953). Even for Lincoln, who embraced the Declaration of Independence and who ultimately engaged in intensive lobbying for a constitutional amendment to free the slaves, “liberty” could hardly be put back together again. HANS L. TREFOUSSE, *THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE* 299–304 (1968). Douglass Adair has described words such as “democracy” as “sponges,” the kinds of words that “the more times they are squeezed through our mouths, the more connotations they absorb, the less precise and exact becomes the meaning, the more they become burdened with extra implications.” Douglass Adair, *Clio Bemused, in FAME AND THE FOUNDING FATHERS* 298 (Trevor Coulbourn ed., 1974) (describing “democracy” as “a sacred cow that has escaped from its original pasturage”).

meaning that is continuous with past usage. Craving certainty seems a widespread phenomenon throughout society, and lawyers in particular like to emphasize that words contain longstanding power. But “contain” entails its own complexity: it may mean the power of words to control the powerful and/or the use of words to enhance power.

To illuminate such legal issues in context, no one has been both more creative and more scholarly than Professor Carol Weisbrod. She is masterful in uncovering counter-stories, overlooked cases, and earlier and more nuanced examples that challenge core assumptions. Carol genuinely is a scholar’s scholar. She also believes in and serves the community of scholars much more than most of us do, and she seems to live the life of the mind more than virtually anyone else. Yet what probably makes Carol’s scholarship and her friendship so exceptionally fruitful is her strikingly original yet also learned curiosity. Her mind often is non-linear as well as ceaselessly probing, and she has exceptional tenacity to follow an idea or a citation across whatever meandering paths and obscure sources require traversing. Carol Weisbrod undoubtedly is “one of a kind,” but this very individuality is ironic because Carol tends to emphasize not the crucial role of individuals but rather the myriad problems and great promise of malleable associations.<sup>3</sup>

Throughout Carol’s prolific writing and research, she seems to delight particularly in the discovery of a contradictory doctrine or an outside group whose norms will illuminatingly challenge law and lore that was previously considered mainstream. Her sources are wide-ranging, and often off-center. Yet a central theme emerges throughout Carol Weisbrod’s work: it is that obligations do or ought to arise from the very nature of human relationships. Therefore the law, paradoxically, plays a key role as both a source and as a mask in the realm of sorting out our complicated obligatory links. Carol’s broad-ranging and sometimes seemingly almost eccentric insights actually revolve consistently around a core issue: how much and in what specific ways ought we to be obliged to one another?

Undoubtedly, among Carol’s greatest strengths is her ability to explore beyond the beaten path, to find significant new evidence that subtly but basically challenges usual assumptions. This is rare in law. Lawyers and judges may sometimes say that context matters, but legal thinking

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<sup>3</sup> She begins *Emblems of Pluralism*, for example, with Eugen Ehrlich’s assertion that our fate turns on what we can achieve inside the “numberless . . . organized associations” within which we live. CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002). Her first chapter starts with Ralph Waldo Emerson’s point that “every law and usage was man’s expedient to meet a particular case; that they all are imitable, all alterable; we may make as good, we may make better.” *Id.* at 17.

generally resists contextualization.<sup>4</sup> Indeed, we seem particularly vulnerable to being “worshippers at the shrines of Terminus, god of boundary stones.”<sup>5</sup> Among many possible examples that would suit the spirit of Carol’s work, I would like to touch on one that, I hope, will be illustrative of the kinds of concerns, surprises, and joys that are central to the Carol Weisbrod School of Significant Insights from Unexpected Sources.

## II. “THE AFRICAN DINAH”

In 1802, Vermont Supreme Court Judge Royall Tyler decided a narrow evidentiary point that nonetheless opened up basic issues of liberty, entitlement, and windfall. It also implicated complex matters of federalism, and the legal impact of both human and governmental obligation.

Tyler, the first successful playwright in the United States and a leading light in Vermont politics and law,<sup>6</sup> confronted the issue of whether another leading citizen and fellow Associate Judge, Stephen Jacob, could be forced to repay \$100 to the town of Windsor. The Windsor selectmen had spent that amount for medical care, and support of a blind, aged, sick, and indigent woman: “the *African Dinah*.”<sup>7</sup>

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<sup>4</sup> Based on her important work in the private law realm of contracts in *The Boundaries of Utopia*, for example, Professor Weisbrod probably could be placed within the camp of Arthur Corbin, Karl Llewellyn, and Grant Gilmore—scholars who are generally said to represent the tendency among legal realists to emphasize the need to consider every case and its “operative facts.” CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* (1980). But she also was delighted to find out that Samuel Williston of Harvard Law School—often taken to be emblematic of the opposing, formalist doctrinal perspective in contract law—also described himself as a realist. SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 214 (1940). Moreover, Williston wrote realist-sounding statements such as, “The extent to which freedom of contract should be limited inevitably becomes a question of degree to which not even an attempt at an answer can be made without reference to time, place, and circumstance.” Samuel Williston, *Freedom of Contract*, 6 CORN. L.Q. 365, 379 (1921).

<sup>5</sup> MARSHALL SAHLINS, *ISLANDS OF HISTORY* 27 (1985). Sahlins described a dominant tendency to think of history as one footprint following another, developing Elman Service’s characterization of “[h]eroic history” as an approach akin to “Fenimore Cooper Indians.” *Id.* at 36–37.

<sup>6</sup> For details of Tyler’s life and letters, see generally G. THOMAS TANSSELLE, *ROYALL TYLER* (1967); *THE PROSE OF ROYALL TYLER* (Marius B. Péladeau ed., 1972). An excellent short summary may be found in ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 97–100, 111–19 (1984).

<sup>7</sup> *Selectmen of Windsor v. Jacob*, 2 Tyl. 192, 194 (Vt. 1802) (argument by counsel for defendant, Jacob). There is no indication that Jacob recused himself from judgment in his own case when it came up for trial while he was serving as Chief Judge of the County Court, though the winning argument on his behalf does suggest some sensitivity to what we might term conflict of interest concerns and may indicate that Jacob did not sit. At the initial stage of the case, Jacob prevailed and was awarded \$4.75 costs on the ingenious formalistic theory that a summons could not have been legally served by the deputy sheriff, because the deputy sheriff, as a resident of the town of Windsor, was an interested party whose cause was being litigated by the selectmen. Windsor County Court Records, March Term, 1801 (Benjamin Swain, Clerk) (on file with author). The Vermont legislature then elected Jacob to the Supreme Court during the period between Jacob’s successful motion for a continuance before the Vermont Supreme Court in 1801 and the time when the Windsor selectman’s case was heard by that Court in August 1802. Tyler’s report of the Supreme Court case notes that “being a party,” Jacob did

Stephen Jacob had first obtained notoriety in Vermont as a young man in 1778 when he delivered a poem in honor of Ethan Allen and other Vermont heroes on the occasion of the first anniversary of the Battle of Bennington. In Jacob's paean to those who "for freedom fought and nobly bled," he forecast the glorious future:

No tyrant here shall dare erect his throne/  
 No griping landlord wake th' oppressed's groan/  
 No cringing minion be for flatt'ry fed/  
 No menial slave a haughty master dread . . . .<sup>8</sup>

At that point, Jacob was a recent Yale College graduate and he later apprenticed in law with the great Theophilus Parsons in Massachusetts. Jacob went on to serve in virtually every town office in Windsor, as well as becoming justice of the peace, State's Attorney, and the first United States Attorney in Vermont.<sup>9</sup> The selectmen of Windsor brought suit against Jacob, however, because they alleged—and he never denied—that in the summer of 1783—as the Revolutionary War finally ground to its end—Jacob traveled to New Hampshire, purchased Dinah White as a slave, and brought her home to Windsor. The town selectmen claimed that Dinah worked for Jacob as a slave until 1799.<sup>10</sup>

On February 19, 1800, freeholders and inhabitants of Windsor were notified that on the agenda for the March town meeting was an item:

To see what measures the Town will take respecting a certain negro woman by the name of Dinah who was purchased and brought into this State about Seventeen years past by Stephen Jacob, Esq. and has until about ten months past lived in his family—and lately applied to the Selectmen as overseers of the Poor of said Town for support and maintenance.<sup>11</sup>

The counsel for the town soon found himself arguing to the Vermont Supreme Court that "though no person can hold a slave *de jure* by our

not sit. *Selectmen of Windsor*, 2 Tyl. at 199. Vermont practice provided that a case on appeal could be heard *de novo* in the Supreme Court, and that a twelve member jury might be impaneled.

<sup>8</sup> Stephen Jacob, *Oration Delivered at Bennington 6-7 (1779)*. I am grateful to James Thomas Fayette, Boston University School of Law, 1988 for discovering this poem and other details concerning Stephen Jacob and his controversy with the selectmen of Windsor.

<sup>9</sup> A LIST OF THE PRINCIPAL CIVIL OFFICERS OF VERMONT FROM 1777 TO 1918, at 12, 16, 24, 258, 267, 275, 344, 355 (John M. Comstock ed., 1918); HENRY STEELE WARDNER, *THE BIRTHPLACE OF VERMONT: A HISTORY OF WINDSOR TO 1781*, at 461, 523 (1927). Jacob and Tyler probably met earlier when Jacob was still at Yale College. Tyler was chosen the Valedictorian at Harvard College in 1776, and Yale College then paid him "the unusual compliment of conferring upon him a like degree *in honorarium*." Russell W. Taft, *Royall Tyler*, 20 GREEN BAG 1 (1908).

<sup>10</sup> *Selectmen of Windsor*, 2 Tyl. at 194.

<sup>11</sup> Windsor Town Meeting Notice, Windsor Town Clerk's Office (Feb. 19, 1800) (on file with Connecticut Law Review).

constitution,” it was entirely clear that Dinah had been a “slave *de facto*.”<sup>12</sup> Therefore, he claimed, Jacob had a moral obligation to support Dinah. Additionally, the town claimed, “the law of common justice, upon which all equitable actions are founded” will “imply a promise” by Jacob for expenses incurred in Dinah’s support.<sup>13</sup> Finally, Vermont’s antislavery attitude had to be taken “*cum grano salis*” (with a grain of salt), because both the federal constitution and the federal fugitive slave statute of 1793 protected a master’s tenure in a slave.<sup>14</sup>

One might have expected such moral, legal, and factual arguments for liberty along with responsibility—and for saving taxpayers money—to prevail over the claims of a slaveholder. But Jacob responded effectively in both formal and factual terms. On the formal level, he invoked Article I of the Vermont Constitution of 1777, the famous provision that gave Vermont pride of place in the formal abolition of slavery in America. That Article provided that no person could be held as a slave in Vermont—unless, it is worth noting, that person consented to being a slave. Therefore Jacob claimed that the bill of sale for Dinah could not be admitted into evidence.<sup>15</sup> Without that evidence, he insisted that the selectmen could not prove that he was responsible for Dinah.

As to the facts, Jacob claimed that “several of the inhabitants of *Windsor* . . . inveigled [Dinah] from her master’s family and service by the syren songs of *liberty and equality*, which have too often turned wiser heads.”<sup>16</sup> Those townspeople thus were morally bound to support her.<sup>17</sup> On the other hand, Jacob claimed he was not so bound because “in obedience to the constitution,”<sup>18</sup> he knew he could not hold Dinah as a

<sup>12</sup> *Selectmen of Windsor*, 2 Tyl. at 194.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 194–95.

<sup>15</sup> The Vermont Constitution provided:

[N]o male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, *slave*, or apprentice, after he arrives to the age of twenty-one years, nor *female* in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.

*Id.* at 194 (quoting the Vermont Constitution). However, it was not contended that Dinah fell within any of the prohibition’s exceptions. *Id.*

The bill of sale is still on file in the Vermont Historical Society Archives in Barre, Vermont. It states that Jotham White of Charlestown, New Hampshire on July 26, 1783, in consideration of the sum of 40 pounds, did “hereby sell and deliver to . . . Stephen Jacob, my Negro Woman Slave, named Dinah, about thirty years of age.” Bill of Sale from Jotham White to Stephen Jacob for Dinah, Vermont Historical Society (on file with Connecticut Law Review).

<sup>16</sup> *Selectmen of Windsor*, 2 Tyl. at 196–97.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* Moreover, Jacob’s attorney argued, Jacob “must bear his proportion of the burthen” with his fellow citizens of Windsor when the suit failed. This burden, as well as the need to respond to an “illiberal charge,” convinced Jacob that “a moral obligation upon all to be charitable, and to conduct conformably to the principles of natural justice . . . do not operate for, but against” his opponents, the selectmen. *Id.* at 196–97.

slave. If the townspeople were not happy with the situation, they should have warned Dinah out of Windsor.<sup>19</sup>

The Vermont Supreme Court's response to this anomalous situation—a slaveholder gaining the significant advantage of unpaid years of service by a slave without any subsequent responsibility for her care through his sophisticated use of the state's early prohibition against slavery—provides a revealing glimpse of attitudes towards expectations, federalism, and the role of government. It also underscores troubling issues of voluntariness within the context of slave labor.

Tyler decided the case with apparent ease. His opinion for the Vermont Supreme Court held that the case turned on the validity of the bill of sale "within this State."<sup>20</sup> Though the bill of sale might be binding elsewhere, Tyler proclaimed, because Stephen Jacob was an inhabitant of Vermont, his bill of sale as a master ceased to operate.<sup>21</sup> Jacob therefore entirely escaped liability. Jacob's sophistication about Vermont law afforded him the benefit of nearly seventeen years of Dinah's labor, but he bore no responsibility for her needs in old age. A leading Vermont citizen and slaveholder could enjoy a huge windfall precisely because of Vermont's abolition of slavery.

Appearing on behalf of the Windsor selectmen, Jonathan Hatch Hubbard had argued that it was important to realize that there could be de facto slavery in Vermont, even though all agreed that there could be no de jure slavery.<sup>22</sup> In Dinah's case, Hubbard insisted that "there is a moral obligation upon the master to support her when incapable of labour; and the law of common justice, upon which all equitable actions are founded, will imply a promise in him to respond any necessary expenses incurred by others for her support."<sup>23</sup>

Tyler refused to find any implied promise, however, and seemed untroubled by the moral dilemma Hubbard sought to emphasize. Hubbard also failed in his attempt at a slippery slope argument,<sup>24</sup> as well as when he pointed to the protection of slavery within the federal Constitution that, he argued, ought to be relevant to Vermont law and the decisions of Vermont courts.

Stephen Jacob's attorney, Charles Marsh, offered a very different version of the facts. Marsh claimed that several citizens of Windsor, including some of the very selectmen who brought the case, were in effect

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<sup>19</sup> *Id.* at 197–98.

<sup>20</sup> *Id.* at 199 (emphasis removed).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 194.

<sup>23</sup> *Id.*

<sup>24</sup> He argued "that it would operate extremely hard upon corporations, who possessed no power to loose the shackles of slavery while the slave continued in health, to be made a common infirmary for them when sick and useless." *Id.*



interested parties. They were the ones who acted inequitably, “discovering that [Dinah] was an excellent servant, and wishing to profit themselves of her labours, inveigled her from her master’s family and service by the syren songs of *liberty and equality*, which have too often turned wiser heads.”<sup>25</sup> Marsh summarized by asking,

Is it equitable then, that when the sovereign power had dissolved the tenure by which [Jacob] held her services, and when he had been deprived of her labours by the enticement of others, that by the same power, and *virtually* at the suit of the same people who enticed her from his service, and who have profited by her labours when in vigour and health, he should now be compelled to maintain her in the decrepitaney of old age.<sup>26</sup>

In reaching his decision, Tyler reduced the case to a basic formal dichotomy:

If the bill of sale could by our constitution operate to bind the woman in slavery when brought by the defendant to inhabit within this State, then it ought to be admitted in evidence; and the law will raise a liability in the slave-holder to maintain her through all the vicissitudes of life; but if otherwise it is void.<sup>27</sup>

No bill of sale was admissible, so there had been no slavery. Therefore Jacob had no obligation to support Dinah. Tyler noted that the law of other states might differ.<sup>28</sup> He also indicated that the legal situation would have been very different under the federal Constitution had Dinah been a fugitive slave.<sup>29</sup>

Indeed, in foreshadowing many decades of bitter debates about the role of the federal Constitution in possible conflict with the views of a particular state about slavery, Tyler noted that Vermont had felt obliged to repeal its own antislavery statute upon its admission to the Union in order to be “[i]n compliance with the spirit of this [federal] constitution.”<sup>30</sup> Tyler

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<sup>25</sup> *Id.* at 197.

<sup>26</sup> He met Windsor’s slippery slope argument by claiming that the town could have “warned out” Dinah as a pauper, and he portrayed his client as such a law-abiding citizen that he did nothing to try to retain Dinah because “[a]s an inhabitant of the State, in obedience to the constitution, he considered that he could not hold her as a slave.” *Id.*

<sup>27</sup> *Id.* at 199.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 198.

<sup>30</sup> *Id.* at 199–200. In 1786, the October session of the Vermont Legislature, meeting in Rutland, had adopted “An Act to prevent the sale and transportation of Negroes and Molattoes out of this State,” stating that “the idea of slavery is expressly and totally exploded from our free government.” VERMONT STATE PAPERS: BEING A COLLECTION OF RECORDS AND DOCUMENTS, CONNECTED WITH

went on to instruct his fellow Vermonters, proclaiming that at times of future conflict,

I trust the good people of *Vermont* will on all such occasions submit with cheerfulness to the national constitution and laws, which, if we may in some particular wish more congenial to our modes of thinking, yet we must be sensible are productive of numerous and rich blessings to us as individuals, and to the State as an integral of the Union.<sup>31</sup>

Tyler's explication of the relationship between federal and state constitutions was perhaps even more interesting than his resolution of the knotty legal issues before the court. In a vigorous dictum, Tyler argued that in forming the United States Constitution, "it was necessary to make numerous provisions in favour of local prejudices . . . that the rights or the supposed rights of all should be secured throughout the whole national domain."<sup>32</sup> In addition, Tyler insisted that Vermonters should be aware that they would continue to have to "submit with cheerfulness to the national constitution and laws," even when wishing for federal law "more congenial to our modes of thinking."<sup>33</sup>

*Selectmen of Windsor v. Jacob* thus is an early and extraordinary example of what later became a familiar assertion among Northern judges that a compromise with slavery was essential to the very existence and ongoing success of the Constitution. Historians generally have assumed that this argument entered judicial opinions only after the Missouri Compromise and the overt conflict over slavery that surrounded it.<sup>34</sup> Yet both the dictum and decision in *Jacob* were produced by an unusually accomplished judge who repeatedly expressed strong antislavery and anti-Southern sentiments in his literary endeavors. Tyler, even though rejected by John Adams as a suitor for the hand of Adams's daughter "Nabby," was

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THE ASSUMPTION AND ESTABLISHMENT OF GOVERNMENT BY THE PEOPLE OF VERMONT 504-06 (1823).

<sup>31</sup> *Id.* Chief Justice Jonathan Robinson's concurring opinion adds little beyond emphasis to the points made by Tyler.

<sup>32</sup> *Selectmen of Windsor*, 2 Tyl. at 199; 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, 189-90, 194-97 (Richard Beeman et al. eds., 1987) (arguing that slavery was in fact the key issue on which compromise had to be reached at the Constitutional Convention).

<sup>33</sup> *Selectmen of Windsor*, 2 Tyl. at 200.

<sup>34</sup> See, e.g., ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 210 (1975) ("As most of the traditional signposts of the law pointed away from antislavery morality, it became harder to justify an antislavery result except through action that most of the profession would have viewed as violative of professional and constitutional role strictures."); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 74-151 (1978); see also PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 78-82 (1981) (detailing decisions upholding the rights of slave owners on the basis of the compromise underlying the formation of the Constitution).

certainly enough of a Federalist to have helped to squelch Shays's Rebellion in western Massachusetts, to hold office as a staunch Federalist State's Attorney, and to take firm public positions against threats to law and order.<sup>35</sup> That Stephen Jacob's legal victory was strikingly unpopular—as well as expensive for the town of Windsor at a time when localities were obliged to support indigent inhabitants—is hardly surprising. Jacob was not reelected in 1802 and never again held public office. Poignantly, however, Dinah remained a public charge to the end, though she also remained "Judge Jacob's Dinah."<sup>36</sup>

That Jacob won only a pyrrhic victory became still more obvious when his successor as associate justice, Theophilus Harrington, soon achieved widespread antislavery fame. Harrington, who liked to preside in court barefoot, acknowledged that he was bound by his judicial oath to uphold the federal Constitution. Thus, Harrington explained, he would meet his constitutional obligation as a judge to return a fugitive slave to a master so long as the master produced adequate evidence of title. After receiving bills of sale for a fugitive and for the fugitive's mother, however, Harrington went on to demand "a bill of sale from God Almighty."<sup>37</sup> Finding no evidence of God's signature, Judge Harrington freed the slave.

In striking contrast, the *Jacob* decision illustrates the limits of judicial imagination. It presented an early amalgam of judicial formalism and judicial enthusiasm for the vague demands of nationalism. Tyler's decision suggested the difficulty in separating strands of republicanism and

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<sup>35</sup> MARY PALMER TYLER, *GRANDMOTHER TYLER'S BOOK: THE RECOLLECTIONS OF MARY PALMER TYLER* 75–81 (Frederick Tupper & Helen Tyler Brown eds., 1925); TANSALLE, *supra* note 6, at 15–16, 19–22. Tyler was in the process of joining the Jeffersonians in the wake of dramatic events such as the imprisonment of Vermont's anti-federalist Congressman "Spitting" Matthew Lyon in 1802. C. PETER MCGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC* 172–73 (1966). However, he seems to have become the same kind of lukewarm Jeffersonian as was Joseph Story. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 9–12 (1985); TANSALLE, *supra* note 6, at 34. Tyler remained an outspoken law-and-order man as indicated, for example, in his charge to the Grand Jury condemning a local insurrection in the 1809 case of Cyrus B. Dean. *THE PROSE OF ROYALL TYLER*, *supra* note 6, at 362–65, 408. Yet frequently, and particularly in his play, "The Algerine Captive," Tyler excoriated the slave trade specifically and Southerners generally.

<sup>36</sup> In 1806 and 1807, the town of Windsor warned Dinah to depart. There were further charges for keeping Dinah, including for the Doctor who attended "Judge Jacob's Dinah in her last sickness." Windsor Town Records, Windsor Town Clerk's Office (on file with author). Finally, even poetically, it cost \$3.00 in March 1809 for "making coffin and tolling bell for Judge Jacob's Dinah" as well as \$1.50 for digging her grave. *Id.*; see generally Katherine E. Conlin, *Dinah, and the Slave Question in Vermont*, 21 VERMONT Q. 289 (1953).

<sup>37</sup> WILBUR H. SEIBERT, *VERMONT'S ANTI-SLAVERY AND UNDERGROUND RAILROAD RECORD* 5 (1937). A further irony of Jacob's limited victory is that in the years after Jacob's death in 1816, his mansion became the Town of Windsor's best-known stop on the Underground Railroad. KATHERINE E. CONLIN, *WINDSOR HERITAGE: BIRTHPLACE OF VERMONT'S CONSTITUTION AND INDUSTRY* 28 (1975). For details about Harrington's lively life and his bold decision in favor of liberty, see 5 State Papers of Vermont 77–78 (W. Crockett ed., 1923) (on file with author). For an argument that Vermonters were anything but firmly united in their antislavery beliefs, however, see generally J. Kevin Graffagnino, *Vermont Attitudes Toward Slavery*, 45 VERMONT HISTORY 31 (1977).

individualism. Simultaneously, the result in *Jacob* underscored how judges perceive of themselves as able to react only belatedly and narrowly, even as they confront clear injustice.

Stephen Jacob was able to invoke the "private" sphere boundary of liberty and thereby exploit Dinah over many years without becoming legally accountable. He succeeded legally primarily because of a formalistic and binding perception of Dinah's right to be free. Tyler's opinion emerged directly from a narrow approach to legal issues, an approach that fits awkwardly with Tyler's argument about the demands of federalism, which he couched in terms of the essential, but ever-changing, constitutional compromise over slavery. Finally, Dinah's plight underscores the practical difficulty in deciding how to free the slaves, made particularly problematic because the lines drawn between public and private responsibility in the early decades of the nineteenth century were murky and malleable.<sup>38</sup>

### III. CONCLUSION

With brilliance, Carol Weisbrod demonstrates throughout her prolific scholarship that legal materials afford an important source for revealing how people define myriad community values. Law in its many manifestations is indeed an appealing depository for society's moral residues.<sup>39</sup> Yet close scrutiny even of formal judicial opinions tends to be frustrating because attention must be paid not only to the context but also to the dynamics of who is not heard and what is not said within the adversarial process. Indeed, by regularly funneling issues into binary categories, the adversarial process in the United States obscures the extent to which law is indeed a "moving classification system."<sup>40</sup>

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<sup>38</sup> For a particularly revealing exchange about the pragmatic difficulties accompanying the end of slavery, see the response to an inquiry by St. George Tucker of Virginia, investigating how Massachusetts accomplished the abolition of slavery, written by John Adams, who warned that immediate abolition endangered old, infirm, and otherwise vulnerable slaves. Adams wrote: "[W]hat is justice? Justice to the Negroes would require that they should not be abandoned by their masters and turned loose upon a world in which they have no capacity to procure even a subsistence. What would become of the old? the young? the infirm?" COVER, *supra* note 34, at 39.

<sup>39</sup> As Justice Holmes, of all people, once stated: "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). In this famous speech, Holmes's repeated use of striking organic imagery, his optimism about what will happen to the dragon of history once forced out of the cave into the daylight, *id.* at 469, his urging to "catch an echo of the infinite," *id.* at 478, and even his specific hypothetical about the law of prescription, *id.* at 476; all suggest a major upbeat theme inconsistent with Holmes's hard-headed skeptical focus on "our friend the bad man." *Id.* at 460. This seems a measure of optimism stretching beyond the requisites of appearing to look forward with hope on the occasion of speaking at the dedication of a new hall for the Boston University School of Law.

<sup>40</sup> Edward Levi, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY: A SYMPOSIUM 266-67 (Sidney Hook ed., 1964); see also JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956) (tracing a history of nineteenth

Kent Newmyer has suggested that antebellum legal culture offered a particularly easy target for Justice Holmes and others who rebelled against formalism. Yet later reformers and debunkers who searched for order or who embarked on quests for community soon also found themselves entangled with the recalcitrance of the law.<sup>41</sup> Looking backward, it was and remains nearly impossible to avoid stumbling into the legalistic mode central to American thought.<sup>42</sup> In addition, the very role of being an American judge can never be severed entirely from being an officer of the state. Either through action or inaction, judges inevitably must perform some kind of triage among competing claims.<sup>43</sup>

In that process, like it or not, judges also make myths. The law that judges pronounce, particularly through their decisions in the realm of competing rights claims, is nowhere to be found until judges create it. But judges also make law in fits and starts. A talented judge chooses among competing vectors to suit a particular dispute and, at times, also to send a particular message. Paradoxically, however, even as judges exercise "the sovereign prerogative of choice,"<sup>44</sup> they feel themselves significantly constrained.

As Edmund S. Morgan wisely noted,

Although fictions enable the few to govern the many, it is not only the many who are constrained by them. In the strange commingling of political make-believe and reality the governing

century American legal issues); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987) (describing child rights and how legal scholarship and jurisprudence has shaped those rights).

<sup>41</sup> See, e.g., HURST, *supra* note 40 (describing inherent conservatism within nineteenth century legal thought); Morton Keller, *The Pluralist State: American Economic Regulation in Comparative Perspective, 1900-1930*, in REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS (Thomas K. McCraw ed., 1981) (outlining the relatively tumultuous history of economic regulation in early twentieth century America); R. JACKSON WILSON, IN QUEST OF COMMUNITY: SOCIAL PHILOSOPHY IN THE UNITED STATES, 1860-1920 (1968) (examining the intellectual careers of five prominent American thinkers and demonstrating the limits and failures of individualism vis-à-vis social philosophy); ROBERT WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967) (describing the breakdown of American society in the late nineteenth century and the emergence of a new American community in the early twentieth century).

<sup>42</sup> For a study of the place of this legalistic mode in the American mind, see, e.g., JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 3-17, 138-47 (1983); LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 97-101, 107-23 (1985); JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY 3-9, 13-18 (1981); BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 9-10, 162-169 (1987); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6-11, 61-69 (1983).

<sup>43</sup> Hendrik Hartog, *Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History*, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 236-37, 241-57 (Hendrik Hartog ed., 1981); Martha Minow, *We, The Family: Constitutional Rights And American Families*, in THE CONSTITUTION AND AMERICAN LIFE 299, 299-311, 316-23 (David Thelen ed., 1988); WEISBROD, *supra* note 4, at 165-85; Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 25-42, 53-67 (1983).

<sup>44</sup> Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899).

few no less than the governed many may find themselves limited—we may even say reformed—by the fictions on which their authority depends. Not only authority but liberty too may depend on fictions. Indeed liberty may depend, however deviously, on the very fictions that support authority. That, at least, has been the case in the Anglo-American world; and modern liberty, for better or for worse, was born, or perhaps we should say invented, in that world and continues to be nourished there.<sup>45</sup>

In large measure, the greatness of Carol Weisbrod's work revolves around the originality of her careful research. She somehow models how free we can be to find real insights and new and often surprising ideas through diligent research in little-known sources and the work of many other disciplines, as well as through consideration of the importance of multifarious systems of authority. Her work directly challenges us to make hard judgments—yet perhaps also to consider “moral obligation” and “the law of common justice” (as the losing attorney put the matter in the *Jacob* case) along the way.<sup>46</sup> Carol Weisbrod demonstrates repeatedly that liberty itself entails obligations to various others, including simultaneous and sometimes conflicting obligations to different individuals and groups. We live among implied contracts of varied sorts, as well as with multiple additional de facto and de jure constraints. Better understanding of the pluralistic nature of our various overlapping obligations might help us to be both free and meaningfully obliged.

Carol Weisbrod is a supremely disciplined scholar who also stands out for the freedom of her intellect and her probing sense of inquiry. Much more than most, she does the nitty-gritty work of deep archival research and she greatly (albeit quietly) delights in discoveries and confirmations within obscure sources. But it must be noted that her brilliant work—her research, writing, teaching, editing, questioning, listening, and talking—also helps lift our eyes to previously unimagined alternatives. Somehow new worlds of thought seem to emerge from within her deep understanding of both the core and the peripheral players and ideas of the past. The extraordinary breadth and depth of Carol's work illuminates many paths to being free enough to make new worlds together.

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<sup>45</sup> EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 14 (1988).

<sup>46</sup> *Selectmen of Windsor v. Jacob*, 2 Tyl. 192, 194 (Vt. 1802).