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THE MANY FACES OF AMERICAN CAPTIVITY AND ITS LEGAL MATRIX: A REVIEW ESSAY

Christian Pinnen*

ALFRED L. BROPHY, *UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF THE CIVIL WAR* (OXFORD UNIVERSITY PRESS 2016). Pp. 408. HARDCOVER \$45.95. PAPERBACK \$29.95.

PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT* (HARVARD UNIVERSITY PRESS 2018). Pp. 304. HARDCOVER \$35.00.

WILLIAM KISER, *BORDERLANDS OF SLAVERY: THE STRUGGLE OVER CAPTIVITY AND PEONAGE IN THE AMERICAN SOUTHWEST* (UNIVERSITY OF PENNSYLVANIA PRESS 2017). Pp. 280. HARDCOVER \$47.50.

The history of slavery—including Native American captivity and other forms of perpetual servitude—is now synonymous with the rise of the American economy and inextricably linked to the history of the American Republic for historians. While this is not a popular subject with some people, the more research that is done on the topic, the more connections between slavery and American society at large are brought to light. Consequently, legal histories are especially important to show the close connections between America's legal culture and its foundation, rooted in many ways in arguments surrounding the enslavement of humans. The three books in this essay are welcome additions to the literature addressing potent issues in the history of slavery from a legal perspective in the nineteenth century and aiding our understanding of the complex, tumultuous, and torturous relationship of American history and slavery.

The three authors choose very different ways to engage with the topic of slavery and the law. Both Alfred Brophy in *University, Court, and Slave* and Paul Finkelman in *Supreme Injustice* write more traditional legal histories which focus on legal actors. They investigate lawyers, judges, and the institutions that educated them to explain a legal culture that either did nothing to end slavery, or actively supported the interpretation of the Constitution that anchored the peculiar institution in the fabric of America's founding and society under the umbrella of protection of private property. The third author, William

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Kiser, adds a more ambitious point of view to the literature by investigating the clash of several different systems of servitude and its national ramifications in the southwestern borderlands. By focusing on the territory of New Mexico and its system of debt peonage and Native American captivity, Kiser uses the prism of these various systems of servitude to investigate the legal development of slavery and the challenges Southerners encountered in defending their labor system as the sectional strife in the country built its momentum toward civil war.

All three books connect on issues of legal thinking as Americans sought to reckon with, and reconcile, the enslavement of African Americans with the founding ideals of the American Republic. The three authors chosen for this essay do so on three significant levels. Paul Finkelman picked three justices of the Supreme Court, two of them chief justices, to show how and why each of them dealt with questions of slavery when cases reached the highest court. Each justice believed slavery was a legal issue that had the potential to tear apart the American Republic, but Finkelman forcefully suggests that while they chose to act or remain silent at various stages, they could have corrected the path of slavery's legal road at multiple junctures.¹ They did not. Instead, they "encouraged southerners to attempt to create their own nation, based on the proposition that all men are *not . . .* entitled to life, liberty, and the pursuit of happiness."²

Alfred Brophy investigates the stratum below the Supreme Court and focuses on Southern lawyers, judges, and the law schools that educated them, to which they often returned to teach. What Brophy concludes, and elegantly argues, is the simple fact that Southern legal culture was entirely built on the premise that slavery was constitutional.³ That is what law professors taught, lawyers argued, and judges ruled. This, then, had a powerful intellectual influence on Southern leaders in the way that they engaged constitutional questions and the way they argued with, and against, their Northern counterparts.

William Kiser's book, *Borderlands of Slavery*, operates on yet another level, investigating the laws of slavery and their meaning in the United States' push west. But rather than engaging in the constitutional issues that frequently whipped the Senate and the House into a frenzy after the Mexican-American War when issues connected to slavery and westward expansion arose, Kiser focuses on the inherent problems caused by three very different systems of servitude that concomitantly existed in the territory of New Mexico. He asserts that the centuries-old system of Native American captivity and the trade of these captives, as well as the system of debt peonage, existed long before white American settlers and army officers began to bring enslaved black people to the region.⁴ While this, at first glance, appears to be a regional problem, Kiser deftly shows how national debates influenced legal proceedings in the New Mexico territory and how local New Mexican ideas of debt peonage in turn forced Congress to wrestle with larger

1. PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT* 1–3 (2018).

2. *Id.* at 224.

3. ALFRED L. BROPHY, *UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF CIVIL WAR* xvi–xx (2016).

4. WILLIAM KISER, *BORDERLANDS OF SLAVERY: THE STRUGGLE OVER CAPTIVITY AND PEONAGE IN THE AMERICAN SOUTHWEST* 17–18 (2017).

questions of perpetual servitude outside of African slavery, and even beyond the Civil War and the Thirteenth Amendment.

When it comes to slavery and the United States Constitution, few scholars have published as widely on the topic as Paul Finkelman, and he brings his extensive expertise to bear in *Supreme Injustice*. To him, the three justices of the highest court he investigates in this book, John Marshall, Joseph Story, and Roger Taney, were all complacent to the spread of slavery west, if not blatantly in support of the idea. He illustrates his point by probing the cases and opinions of the three justices, the resulting consequences for constitutional law, and, by extension, the fate of the Union and its enslaved people. While Finkelman concedes that the Constitution was pro-slavery, he powerfully argues that the Supreme Court justices could still have hemmed in slavery to prevent its expansion, to suppress the slave trade, and to protect free African Americans more substantially.⁵ His construction of the justices' jurisprudence bears out his argument, but there may be more left to be said on each justice. Finkelman ascertains that "[w]ith very few exceptions, the United States Supreme Court from 1801 to 1861 was a constant friend of slavery and almost never a friend of liberty."⁶ He essentially invokes the idea that the justices' morals should have overruled the realpolitik and zeitgeist of the time, which would have made these three justices truly independent from, and ideologically untainted by, the national debates raging on during the Antebellum period.⁷ However, Finkelman absolutely succeeds in showing how central, how foundational, slavery was to the United States and how it dominated most facets of life.

Essentially, the book consists of three short biographies. In the first, the author takes on John Marshall.⁸ He establishes that Marshall was a slave owner, and while he was "bold, brilliant, forceful, and often fearless," in most of his jurisprudence and decisions, he frequently denied freedom suits.⁹ Finkelman's skill shines when he analyzes the key cases of John Marshall, particularly in his opinion in *The Antelope*,¹⁰ where he lays out clearly how Marshall constructs his argument while rejecting natural law. He shows how Marshall had frequently relied on natural law in other cases before and after *Antelope*, but not in the case of enslaved Africans and their freedom in this case.¹¹

The second biography illuminates Joseph Story's career on the highest court. Maybe Finkelman's greatest weakness lies in his choice of Story himself, because Finkelman never explains adequately why he picked him as a subject. While Marshall and Taney are self-explanatory, Story is, at first glance, an odd choice. Whereas the other two are some of the United States' most (in)famous chief justices, Story served on the court under Marshall. In the author's eyes, Story may be the perfect embodiment of the forces at play

5. FINKELMAN, *supra* note 1, at 10.

6. *Id.* at 24–25.

7. *Id.* at 1–2.

8. The two most recent biographies on John Marshall contradict Finkelman at times. See generally RICHARD BROOKHISER, JOHN MARSHALL: THE MAN WHO MADE THE SUPREME COURT (2018); JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES (2018).

9. FINKELMAN, *supra* note 1, at 28–31.

10. *Id.* at 96–102.

11. See *id.* at 90–100 (reviewing *The Antelope* case in its entirety); *id.* at 97–100 (addressing Marshall's rejection of natural law).

in the United States at that time. While Story appears to disapprove of the slave trade in his opinion in *Alligator*,¹² he then writes a much narrower opinion in the more famous *Amistad* case.¹³ In Finkelman's estimation, the real condemning evidence for Story's pro-slavery stance comes in *Prigg v. Pennsylvania*, where he "did more than ignore countervailing precedents; he rewrote them to support his own opinion."¹⁴ Finkelman argues that Story's ruling severely threatened the freedom of many Northern African Americans by significantly strengthening the Fugitive Slave Act of 1793.¹⁵

As one would expect, Finkelman reserved his harshest—and most convincing—prosecution of "supreme injustice" for Roger B. Taney. Here, Finkelman really excels. He is able to show that Taney, indeed, used his position on the Court to further a pro-Southern, pro-slavery stance in the interpretation of constitutional law, culminating in the *Dred Scott* decision. To Finkelman, the question that had to be answered was whether the *Dred Scott* decision was a mistake, or "the culmination of a career focused on supporting slavery and persecuting free blacks."¹⁶ His answer is the latter. In a slew of deft analysis, the author dissects Taney's major jurisprudence and proves that the judge was consistently pro-slavery. To highlight one string of analysis, Finkelman reasons that Taney's decisions were not always based in strict constitutional interpretation.¹⁷ Rather, Taney, for example, did not always support states' rights; he only did so when that decision led to a pro-slavery opinion.¹⁸ In cases where that did not appear imminent, he sided with the federal government.¹⁹

Altogether, Finkelman builds a strong case that highlights the pervasive presence of slavery, enslaved people, and their enslavers in America's legal history. He aggressively reasons that judges could have had the power to stop the institution, or at least limit its expansion. Yet they did not, a reality he labels "supreme injustice."²⁰ This top down approach to understand the importance of slavery to the legal history of the United States has merits, but also some problems. At times, there is a lack of context to the cases and the way they were argued in front of the court. Alfred Brophy's *University, Court, and Slave* seeks to remedy that problem.

Brophy approaches the issue of slavery from a more grassroots angle. To him, the Southern legal profession as a whole had developed an interpretation of the Constitution that permeated all levels of the profession: all practitioners and teachers of law in the South fell in line. Per the author, "the judges and lawyers had legitimized a world view that said threats to slaves as property was unconstitutional and justified war."²¹ Brophy makes perfectly clear how the Southern symbiosis of law and culture functioned: As universities through their teaching supported slavery, so slave labor supported schools. In a nutshell,

12. *Id.* at 126–29.

13. *Id.* at 133–39.

14. FINKELMAN, *supra* note 1, at 157.

15. *Id.* at 150–52.

16. *Id.* at 173.

17. *Id.* at 177.

18. *Id.* at 189–91.

19. FINKELMAN, *supra* note 1, at 210–12.

20. *Id.* at 10.

21. BROPHY, *supra* note 3, at xx.

to Southerners slavery was justified by the past, it was economically necessary, and it was perfectly moral.²² This is not necessarily a new assessment of the Southern point of view, and the theories of, for example, Beverly Tucker, Thomas Roderick Dew, or Thomas R. Cobb are well traveled ground. The first chapters very much read like an intellectual legal history of the South but add not much new to the discussion. However, they make meaningful connections—in particular to works such as *Supreme Injustice*—by situating it in the school of “new constitutional history that places Supreme Court doctrine in its intellectual context and demonstrates how constitutional law in the Supreme Court and in the minds of politicians and voters is supported by—and sometimes in turn legitimates—ideas in the larger culture” and by focusing on landmark cases in connection with this new direction of inquiry.²³

Brophy writes what he preaches. Key, at least in this reviewer’s mind, is the author’s consistent ability to show how strongly institutions of higher learning in the South are actually intertwined with the way that Southern politicians and intellectuals at large explained the constitutionality of slavery in the Republic. Chapter three in particular highlights the rise of a new generation of scholars and teachers in the 1830s that were washed in the blood of the pro-slavery argument. These scholars, in turn, taught their charges essentially how to defend slavery, and by 1857, those teachings included a turn away from the union as a viable, constitutional option.²⁴ One example from an insightful selection by the author is the publication of *Uncle Tom’s Cabin*. In Brophy’s analysis, the book morphed into a critique of slave laws for Southerners, and an attack on slave laws equaled an attack on Southern institutions, which in turn created a destabilization of Southern society.²⁵ The intellectual part of Brophy’s history is well established, but he is able to show how wide these ideas permeated education, in particular legal education, in the South and how that tainted Southern conceptions of the Constitution and the Republic.

The third book, *Borderlands of Slavery: The Struggle over Captivity and Peonage in the American Southwest* by William Kiser, adds a third dimension to the legal history of slavery. Kiser probes the New Mexico territory and its variation of servitude in conjunction with American westward expansion of chattel slavery. Kiser’s book shines a light on the various permutations of human bondage in the southwest and how the United States struggled with each. The author explains the various definitions of servitude that by the 1860s existed concomitantly in New Mexico. Two of these were based on Hispanic legal traditions in the area conquered after the Mexican-American War. Debt peonage forced a large group of people into essentially hereditary servitude, even though settlers in New Mexico did not acknowledge that fact until after the Civil War. In addition, many a servant originated in the Native American captive trade that flourished in the region and over the centuries had become a vital part of diplomacy in the region.²⁶

22. *Id.* at 9–11.

23. *Id.* at 15–16.

24. *Id.* at 101–21.

25. *Id.* at 172–73, 176.

26. On captivity, slavery, and diplomacy, see JULIANA BARR, *PEACE CAME IN THE FORM OF A WOMAN: INDIANS AND SPANIARDS IN THE TEXAS BORDERLANDS* (2007); JAMES BROOKS, *CAPTIVES AND COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS* (2002); PEKKA HÄMÄLÄINEN, *THE COMANCHE EMPIRE* (2008).

New Mexico, according to Kiser, remained a problematic territory because of the constant cultural, legal, and human exchange between powerful Native nations like the Apache or Comanche and Mexico across the border to the south. In addition, the slaveholders and abolitionists serving as territorial officials very much participated in the rising sectional conflict in the United States.²⁷ Even though two systems of servitude existed, racial slavery did not exist in the region until enslaved Atlantic Africans traveled with their enslavers from the eastern United States, according to Kiser. Debt peonage was so successful, and the circumstances of indebtedness so easily manipulated, that the need never arose to develop a system of racial slavery.²⁸ This claim needs more exploring, since the Spanish legal tradition certainly recognized the racial inferiority of non-white people. However, this does not hurt the overall argument of the book.

Kiser's work drives at the heart of the issue that links slavery to the law of the land in the United States. Even the systems of debt peonage and Indian captivity already in existence were quickly sucked into a larger market economy, and, hence, "[w]hatever their sobriquets, such systems introduced a more profit-centered form of slavery into the Southwest."²⁹ This required the local enslavers to legally protect their human laborers from outside interference. While US politicians may have not recognized debt peonage or Indian slavery as equal to African American slavery and expressed a "general ambivalence," people in New Mexico did and, therefore, participated in national debates very much on the side of the South.³⁰ Only then did politicians pay some attention to New Mexico's captives, and only in a cursory way. Lawmakers, judges and lawyers, based on US law, did not recognize enslavement if people of African descent were not involved. Legally, then, the discourse really was more concerned with African American slavery in the context of the North-South dichotomy, rather than a true idea of liberty for all.

The three perspectives presented by the authors in this essay, taken together, offer a fascinating view on antebellum legal culture. In particular, its connection to the institution of slavery. All three authors build their cases on very solid ground, but their source base varies appreciatively. From the legal elite to the legal majority and on to the legal borderlands, we get a much clearer picture of the ways in which Southerners and Northerners argued about the meaning of law in conjunction with the language of slavery in the Constitution. Most importantly, all three authors impress on us the notion that the zeitgeist of the constitutional discussion mattered, as did the historically specific moment when discussions occurred. The best example is the problems that New Mexico faced in joining the union. Even though politicians did not believe debt peonage and Indian captivity could actually be classified as slavery—as they defined it clearly as not part of the capitalist system that was African American slavery—they would not allow New Mexico to join the union right away because of expansionist issues related to slavery. So, while they did not acknowledge the servitude of a large population in the area as slavery, they nevertheless agreed that New Mexico would upset the balance of non-slaveholding and slaveholding states. Slavery dominated much of the national political—and by

27. KISER, *supra* note 4, at 68–72.

28. *Id.* at 96.

29. *Id.* at 2.

30. *Id.* at 55–56.

extension legal—conversation of the antebellum period and remains a defining tenant of the development of constitutional law, American society, and the shaping of the nation in general.