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Steven Lubet. *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial.* Cambridge: Belknap Press of Harvard University Press, 2010. 367 pp. $29.95 (cloth), ISBN 978-0-674-04704-4.

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Triumph of Law, Failure of Justice

The Fugitive Slave Act of 1850 affirmed the U.S. government's support of slavery, catalyzing conflict in the process. The law required federal officials to aid in the search for and seizure of alleged runaways anywhere in the United States. It also criminalized efforts to stall or block the law's enforcement. Therefore slave catchers and U.S. Marshals hunted fugitives with impunity, even in states and territories where positive laws had abolished slavery. Moreover black and white abolitionists who refused to help slave catchers, or who chose to rescue recaptured runaways, faced federal fines and imprisonment. The fugitive slave law thus protected southern slaveholders' rights to their human chattel, but as one historian has noted, "To secure these rights the law seemed to ride roughshod over the prerogatives of the northern states."[1]

Among the fugitive slave law's most vociferous critics were black abolitionists. Citing the United States' failure to protect the rights of African Americans, Frederick Douglass disclaimed his allegiance to the federal government and its laws: "We owe allegiance to the government that protects us, but to the government that destroys us, we owe no allegiance." Instead, he explained, blacks owed their loyalty to natural law, "the world's theory of right and wrong." According to this moral code, there was an "absolute justice," one denied by positive law, but realized in battles over freedom: "It was right in light of absolute justice, which says to the aggressor, he that leadeth into captivity shall go into captivity, and he that taketh the sword shall perish by the sword."[2] Thus he told African Americans to resist the fugitive slave law, violently if need be; the triumph of justice could only come at the expense of law.

Unfortunately for Douglass, slaveholders and their federal allies effectively enforced the Fugitive Slave Law of 1850. Indeed most runaways brought before a federal tribunal were returned to their slaveholders. And in fugitive slave cases where local disapprobation led to rescue attempts and/or legal disputes between state and federal courts, federal prosecutors rarely relinquished custody of the fugitive.[3] In short the federal government ensured the triumph of law–and, for blacks, the failure of justice.

That the fugitive slave law overcame social, political, and legal challenges is one of the lessons of *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial*, a well-researched and elegantly written monograph by Williams Memorial Professor of Law Steven Lubet. But the purpose of the study is not to measure the effectiveness of the law. Rather, *Fugitive Justice* explains how federal enforcement and prosecution of the law pushed abolitionist lawyers to advance radical legal theories in defense of the runaways and rescuers they represented. To do so, the monograph retells the stories of three high-profile fugitive slave trials in Pennsylvania, Massachusetts, and Ohio, respectively, focusing acutely on the legal arguments delivered for and against the fugitive slave law during each case. In this way readers experience both the palpable drama of antebellum trials in the United States as well as the ideological and rhetorical battles among prosecutors, defense attorneys, U.S. commissioners, and federal judges.

Fugitive Justice fills an important gap in the legal historiography of slavery. Several historians have discussed how the Fugitive Slave Law of 1850 contributed to the burgeoning political crisis between proslavery and antislavery forces in the United States.[4] Others have traced the impact of fugitive slave laws and trials on national politics.[5] Lubet's study addresses these issues as well, except it concentrates on courtroom dynamics and legal argumentation in ways heretofore unexplored. This should not be surprising, given that Professor Lubet is an expert in judicial ethics and trial advocacy as well as the director of Northwestern's Bartlit Center on Trial Strat-

egy. What he adds to the history of these three trials are insights into the lawyers' courtroom decisions. Lubet pushes the sources as far they can go in his effort to reveal why attorneys chose particular jury members and witnesses and why they crafted certain theories when presenting their cases.

As per sources, *Fugitive Justice* is a work of synthesis, relying largely on historical monographs and printed primary documents. Lubet consulted the published reports of each fugitive slave trial he examined and the book-length studies that historians have written about them. He also utilized the extant memoirs and diaries of the trials' lawyers as well as the available writings of litigants and rescuers. Additionally Lubet made use of contemporary newspaper accounts, county histories, legal treatises, and other printed ephemera like handbills.

Even in the absence of clearly distinguished parts, Lubet's monograph divides neatly into four sections with an introduction and epilogue as bookends. The introduction concisely outlines the study's research questions, historical significance, and various arguments. The first three chapters chronicle the emergence of the political crisis over slavery, highlighting the ways that the federal fugitive slave law and runaway slaves were linchpins of legal and extralegal conflict between slaveholding and non-slaveholding states. In chapters 4 through 7 Lubet examines the 1851 Christiana Riot in Pennsylvania and the subsequent trial of Castner Hanway, a Quaker charged with treason for his presence at the riot. The jury acquitted Hanway, since the evidence marshaled against him did not prove that he intended to nullify the fugitive slave law through his participation in the conflict. In chapters 8 through 11, Lubet investigates the rendition of runaways from Boston, Massachusetts, the so-called Athens of America. Here he focuses largely on the 1854 trial of Anthony Burns, an African American charged as a fugitive slave from Virginia. A U.S. commissioner ruled that Burns was in fact a fugitive slave and, despite local hostility, ordered that he be returned to his slaveholder in Virginia. In the final four chapters Lubet describes the recapture of a runaway, John Price, in Oberlin, Ohio, as well as the dramatic rescue of Price by local abolitionists. Lubet then details the 1859 trials of Simeon Bushnell and Charles Langston, both of whom were charged with and convicted of violating the fugitive slave law during the rescue. In the epilogue Lubet briefly discusses John Brown's attack on Harper's Ferry and the persistent tensions caused by the fugitive slave law until its repeal in 1864. More importantly he underscores the role played by the emergence of "higher law" during the 1850s–a phenomenon, Lubet explains, that "helped to create an unbridgeable gap between the free states and the slave power" (p. 327).

The strengths of *Fugitive Justice* are its cogent arguments and thorough analyses of legal theory. Lubet forwards two main claims. First he asserts that the enforcement and prosecution of the Fugitive Slave Act of 1850 deepened sectional divisions–a decisive factor in the outbreak of war. Here the title of the monograph is instructive. For the slaveholding states "fugitive justice" referred to their right to recapture runaways. In their eyes, justice was served whenever the federal government helped slaveholders reclaim their property. For non-slaveholding states, however, "fugitive justice" alluded to the law's shortcomings. To their minds, justice was elusive: The fugitive slave law sanctioned slavery on otherwise free soil, a decidedly unjust outcome of the law.

Second, Lubet argues that abolitionist lawyers' strategies changed over the course of the 1850s. In the earliest fugitive slave trials they often conceded the constitutionality of slavery and refrained from discussions of morality in defense of runaways and their rescuers. They preferred highly technical legal arguments to politically and religiously charged appeals to "higher law." However by the end of the decade abolitionist lawyers refuted the constitutionality of the fugitive slave law. Radicalized by the failure of political compromise and outbreaks of violence, they called upon courts to defy positive law in the name of "higher law," one that excoriated slavery as a crime against God and humanity.

Lubet traces the "emergence of higher law" by carefully analyzing attorneys' arguments during trial proceedings. The clear focuses of these analyses are the ideological affinities of antislavery attorneys and the choices they make concerning case theory. Abolitionist lawyers walked a fine line between adherence to positive law and appeals to "higher law." Given their commitment to abolishing slavery, they implicitly rejected statutes that legalized the institution and protected slaveholders' rights to human property. Despite these abolitionist leanings, antislavery lawyers also believed in the sanctity of law. They were neither vigilantes nor revolutionaries but, rather, pragmatic reformers, the professional allies of the more radical white and black abolitionists on the front lines of the battle over slavery.

In light of their equivocal relationship to radical abolitionism, antislavery lawyers took a decade to accept and utilize the "higher law" defense. In 1851 Hanway's attorney, Thaddeus Stevens, only addressed the facts of the case, abstaining from condemnations of slavery during

the trial. Stevens feared that any mention of "higher law" would irreparably damage his case. In 1854 Anthony Burns's lawyer, Richard Dana, also chose not to invoke the "higher law" in his client's defense. In his closing argument, however, Dana condemned slavery and the fugitive slave law as evil, and asked that the U.S. commissioner use his conscience when making his ruling. By 1859 moral, religious, and political opposition to the extension of slavery had coalesced; therefore, antislavery lawyers no longer feared politicizing the courtroom. In turn Simeon Bushnell's attorneys, Albert G. Riddle and Rufus Spalding, declared themselves "votaries of the higher law" and defended their client on the grounds that slavery was immoral and the fugitive slave law unjust. Riddle and Spalding took radical steps in a notoriously conservative branch of government: "As a theological ideal there was nothing novel about preferring the law of God to the law of man, but ... to assert the same principle as a legal defense ... was a new and untested strategy" (pp. 253-254). This risky choice did not pay off for Bushnell; he was convicted for violating the fugitive slave law. Still the case was a watershed moment in the abolitionist movement.

Unfortunately Lubet misses his opportunity to explain exactly how significant this turn to the "higher law" defense was. Absent from the main text as well as the notes at the end of the monograph are historiographical discussions that situate *Fugitive Justice* in relation to existing historical literatures. What exactly was the relationship between "higher law" legal theory and the ideals that abolitionists professed from pulpits or published in pamphlets? Lubet might have answered this question easily by integrating his analyses with that of other historians. More importantly, he would have specified how *Fugitive Justice* advances our understanding of slavery, the fugitive slave law, and the coming of the civil war.

Fugitive Justice raises other questions that remain unanswered. For example, readers will wonder how Professor Lubet chose the trials he analyzed. Between 1850 and 1860 there were 332 fugitive slave cases; 191 of them went before a federal tribunal.[6] In short Professor Lubet took his pick from hundreds of cases. It is clear that the rescue efforts in Christiana, Boston, and Oberlin were volatile, and the trials controversial. Therefore one might surmise that Lubet chose these three trials precisely because they were so dramatic. However, does the political and legal drama in these cases earn them the title of "three of the most important fugitive slave trials of the 1850s" (p. 3)?

A final question is that of African American legal and political consciousness. To Lubet's credit *Fugitive Justice* treats free and enslaved African Americans as agents in the story. Even as he details the legal decisions made by white lawyers and judicial officials, Lubet carefully accounts for the words and actions of black actors. They were a "third force," Lubet claims, since they operated outside of the North's and the South's political purviews, and, in the face of agreements made by the opposing sections, "would continue to upset the balance, undermine the compromise, break the armistice, and shatter the truce" (p. 49). These actors did not just "fade into the background." In fact Lubet intimates that they were the catalysts of sectional conflicts.

Still, Professor Lubet's tight focus on legal theory limits his ability to examine the ideological currents in African American social thought. It is interesting to consider the impact of "higher law" theology and legal theory on African American consciousness in non-slaveholding states. Were black abolitionists as equivocal about the higher law as white antislavery attorneys? Or were they advocates of higher law and absolute justice as was Frederick Douglass?

One interesting example is the speech that Charles Langston delivered before he was sentenced for aiding the rescue of John Price in Oberlin. First he condemned the U.S. Constitution, and positive law more generally, for both were "so constituted to oppress and outrage colored men." Then he championed the higher law, by which John Price, himself, and other African Americans "had a right to [their] liberty under the laws of God, under the laws of nature, and under the Declaration of Independence." And finally he advocated absolute justice, for in the absence of laws that protect freedoms African Americans "are thrown back upon those last defences of our rights" (pp. 295-297). In short Langston was unapologetic about helping Price. In fact he believed that breaking the law was the only way to get justice. How pervasive this legal consciousness was among African Americans in non-slaveholding states is a fascinating issue that Lubet's study raises but does not discuss in great detail.

Notwithstanding these unanswered questions, Professor Lubet's *Fugitive Justice* convincingly argues that fugitive slave trials were a contributing factor to the coming of the Civil War. It also explains clearly how notions of "higher law" evolved from mere rhetoric to antislavery legal theory. In the final analysis Lubet's study tells a compelling story about the fugitive slave law and its challengers from which both legal scholars and historians will benefit.

Notes

[1]. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 80.

[2]. "Freedom's Battle at Christiana," *Frederick Douglass Paper*, September 25, 1851.

[3]. Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (Chapel Hill: University of North Carolina Press, 1970), 114.

[4]. For a standard treatment of the subject, see McPherson, *Battle Cry of Freedom*, 78-91.

[5]. For a detailed discussion of the federal government's enforcement and prosecution of fugitive slave laws between 1787 and 1864, see Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2001), especially chapters 7 and 8. For discussions of fugitive slave trials and their impact on national politics, turn to the historical monographs which Lubet used in his synthesis, namely Thomas P. Slaughter, *Bloody Dawn: The Christiana Riot and Racial Violence in the Antebellum North* (New York: Oxford University Press, 1994); Albert J. Von Frank, *The Trials of Anthony Burns: Freedom and Slavery in Emerson's Boston* (Cambridge, Mass.: Harvard University Press, 1999); and Nat Brandt, *The Town That Started the Civil War* (Syracuse: Syracuse University Press, 1990).

[6]. Campbell, *The Slave Catchers*, 207.

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