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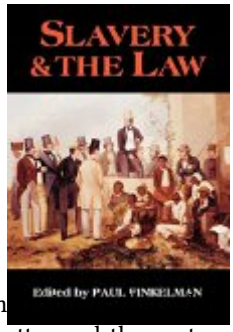
Paul Finkelman, **ed**. *Slavery and the Law.* Madison, Wis.: Madison House, 1997. 465 pp. $44.95 (cloth), ISBN 978-0-945612-36-0.



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This splendid work – the offspring of a *Chicago-Kent Law Review* symposium – is a collection of fourteen essays by talented historians and legal theorists. The book's editor, Paul Finkelman, is probably the reigning dean of legal studies concerning slavery. Not unexpectedly, the essays in this anthology are of uneven caliber. What is surprising, however, is the degree to which all the pieces cohere in the unified purpose of recounting the integral place of slavery in American law and, therefore, American civilization. Yet, at the same time the essays pursue no single theme and embrace a vast array of subject matter.

Finkelman introduces the collection with a lucid overview of "The Centrality of Slavery in American Legal Development." He identifies slavery as "simultaneously peculiar and prosaic," as "an oddity that ran counter to the professed ideals of the nation, and yet…was deeply embedded in the social, political, and legal structure of the nation" (pp. 3, 4). He devotes considerable attention to the ways in which southern slaveowners dodged and skirted the egalitarian preachments of the Declaration of Independence. In doing so, Finkelman is characteristically hostile toward Thomas Jefferson, whose reputation as an antislavery thinker Finkelman has long damned as grotesque and grossly undeserved. The introduction underscores how successfully the slaveholding interests of the Founding generation were able to interweave human property concerns into the legal and constitutional latticework of the Republic.

Finkelman divides the body of the text into four sections. The brace of essays in Part One concerns "Theories of Democracy and the Law of Slavery." Derrick Bell's lead essay, which is more of a "think piece" than a work of scholarly research, is at once provocative and problematic. Bell's overarching con
slavery has died, the racism that buttressed the system of oppression remains alive and well among us. In articulating the relevance of antebellum slave law to contemporary social issues, Bell offers a not-so-gentle reminder that America's liberal democratic tradition has thrived parasitically upon slavery and institutionalized racism. Beyond these general premises, however, Bell arrives at some questionable conclusions. The most incredible of these is his assertion that the facts about slavery "have been systematically consigned to an era of our history that has been deemed better forgotten," with the result that the "scope and significance of slavery in the nation's past remains repressed" (pp. 30, 31). This untenable allegation ignores the past thirty years of scholarship on the African-American experience while slighting those who have contributed to this historiography (not the least of whom is editor Finkelman, whose life's work has been devoted to illuminating the scope and significance of slavery in the nation's legal fabric).

Far more insightful is William W. Fisher III's article on "Ideology and Imagery in the Law of Slavery." In treating the nature of southern slave law, Fisher points out, legal historians have relied overwhelmingly upon explanatory models emphasizing the class interests of the planter patriciate, the idiosyncrasies of individual judges, or the sources of American law generally (English common law, Roman law, and so forth). While granting the viability of all these approaches, Fisher insists that ideological considerations must also be taken into account, specifically on three levels: white images of slaves, southern justifications for slavery, and white codes of conduct. Fisher notes the lack of ideological consensus on each of these points. Southern whites alternately viewed slaves as docile Sambos as well as unrestrained, brutish sav-

ages. Sometimes they conceived of slavery in paternalistic and humane terms, other times as a necessary means of race control. In some cases Southerners opted to define the conduct of white-black relations according to the Old South's ethic of honor, in other cases according to the tenets of evangelical Christianity. As Fisher demonstrates, southern judges and lawmakers resorted to each of these competing ideological strains on different occasions, thereby crafting a law of slavery marked by no small measure of inconsistency and incoherence. In brief, Fisher deftly relates the myriad ways in which ideology served to shape slave law and jurisprudence.

Part Two, on "Constitutional Law and Slavery," contains four essays. Sanford Levinson's "Slavery in the Canon of Constitutional Law" ranks among the best pieces of this collection. Using his own courses at the University of Texas Law School as a frame of reference, Levinson makes an insurmountable defense of the proposition that "slavery ought to be a major topic of an introductory course in constitutional law," that it should form a part of the "canon" of study of the nation's legal and constitutional foundations (p. 89). In substantiating this thesis, Levinson clearly illustrates how thoroughly slavery was enmeshed in the American constitutional structure. Indeed, slavery's role in American constitutional development extended far beyond overtly slave-related cases, such as *Dred Scott v. Sandford*. Various legal and political aspects of slavery colored constitutional construction on a wide range of matters from interstate commerce to immigration to the nature of the Union itself. Finkelman's essay on New Jersey courts and federal fugitive slave legislation supports Levinison's arguments. Finkelman looks at an 1836 suit in which New Jersey's chief justice, Joseph C. Hornblower, denied congressional jurisdiction over the rendition of fugitive slaves, claiming instead that this power belonged to the states (the U.S. Supreme Court reached the polar opposite conclusion in *Prigg v. Pennsylvania* in 1842). Furthermore, the judge decreed that all persons, including alleged runaways, had a right to trial by jury as a matter of due process. Though originally unreported, Hornblower's opinion was resurrected in the 1850s by northern opponents of the Fugitive Slave Law. Thus, Finkelman's article reveals the strong judicial component of antislavery politics in the free states, though the author tends to exaggerate the import of this particular case.

Finkelman's piece segues nicely into the work of James Oliver Horton and Lois E. Horton, who discuss black responses to the Fugitive Slave Act of 1850. To them, "the passage of the Fugitive Slave Act of 1850 was the opening assault of a brutal decade" for African Americans (p. 157). In exposing free blacks to the danger of kidnapping by slave-catchers, the notorious statute served to galvanize northern black communities in resistance to the baneful measure. This resistance was characterized by collective self-help and by an "important link between free blacks and [escaped] slaves" (p. 157). The Hortons are at their best in relating the cooperative efforts of these two groups, who forged strong bonds in the face of a common threat. On a broader level, this essay also serves as a stark reminder that the Constitution and its laws often touched the lives of antebellum African Americans in horrible and pernicious ways.

The section on constitutional law concludes with Michael Kent Curtis's not altogether successful attempt to link the composition of the Fourteenth Amendment to a late antebellum controversy regarding free speech. The focal point of the article is the sectionalized congressional debates of 1859-1860 concerning Hinton R. Helper's *The Impending Crisis*, an abolitionist tract written in 1857 by a native North Carolinian. Blasting Helper's book as the kind of incendiary agitation that sparked John Brown's raid on Harpers Ferry, southern states suppressed the work in their jurisdictions, while southern congressmen excoriated their many Republican counterparts who had endorsed it. Curtis maintains this episode convinced northern antislavery proponents that the slave states could not be trusted to safeguard basic liberties, such as free speech. He argues, therefore, that a prime motivation for Republican lawmakers in drafting the Fourteenth Amendment was a determination to make the free-speech and free-press guarantees in the Bill of Rights binding upon the states. This is an intriguing proposition but not wholly convincing. Curiously, Curtis pays little heed to the Reconstruction context in which the Fourteenth Amendment actually came into existence. It is hard to believe that the Amendment's creators set about their task in 1866 with their minds fixated retrospectively upon the debate over Helper's book in 1859.

The four essays in Part Three address the criminal and civil law of slavery. Thomas D. Morris begins this section by tracing the vicissitudes of evidentiary rules in criminal proceedings involving slaves. This essay, in effect, synopsizes an important segment of Morris's magisterial *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996). Morris finds that by the mid-nineteenth century, rules of evidence pertaining to slaves had evolved from a policy of absolute exclusion in all criminal cases to one favoring selective admissibility of slave testimony (though never

against whites). Likewise, by the time of the Civil War some southern states occasionally afforded slave defendants such legal securities as jury trials and the right of appeal. As Morris points out, however, all these procedural changes were calculated to fortify the slave system–as when courts accepted slave evidence that exposed insurrectionary plots–not to extend fair treatment to blacks. Judith Kelleher Schafer's article is largely a reprinted chapter of her brilliant study, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State University Press, 1994). Focusing upon litigation concerning cruelty to slaves, the essay seconds Morris's assessment of the bottom-line function of slave law. Although abused slaves occasionally found solace in the Louisiana justice system, more often courts excused even the most heinous and sadistic acts of slavemasters against their bondspeople. Of course, "the courts were quite willing to support the slave owners' financial interest" when other whites damaged the human property of slaveholders, but they did very little "to provide even the most basic protection for slaves" against the barbaric conduct of cruel masters, despite a civil code that prohibited such mistreatment (p. 263).

Ariela Gross makes an outstanding contribution to this volume with her examination of legal disputes in warranty cases: that is, suits in which aggrieved buyers of slaves sought to recover damages from the sellers, charging breach of warranty because the slaves in question subsequently displayed "defects" in their moral character – usually meaning tendencies to thievery, drinking, or flight. This piece dovetails nicely with Jenny Bourne Wahl's recent *The Bondsmen's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998), which also deals extensively with slave sales and the function of slave law in the marketplace. Yet, Gross carries her discussion far beyond the pale of economics. She adds credence to Fisher's arguments by demonstrating how warranty disputes became ideological battlegrounds on which southern courts struggled to define the nature of race and slavery. These cases posed grave questions that challenged slaveholders' conceptions of master-slave relations and the essence of their "peculiar institution." To what extent was faulty moral character on the part of slaves attributable to their innately inferior nature? Or did character defects ensue because inept masters failed to provide their "people" with proper moral guidance? Or was it possible that slaves' behavior was a product of their own volition? The first two questions revealed fundamental tensions between racialist and paternalist justifications for slavery, while the third, in acknowledging the moral agency of slaves, held frightening implications for "a system based on denying the personhood of human property" (p. 291). In sum, Gross shows that in litigating slave character, southern whites inevitably put the whole slave regime on trial.

Thomas D. Russell closes Part Three in fine fashion with his essay "Slave Auctions on the Courthouse Steps." Through extensive and exemplary research, Russell establishes that half of all slave sales in antebellum South Carolina were managed by agents of the courts. He postulates, therefore, that similar research in other areas of the South will unearth evidence of a massive and expanded role for the legal system in perpetuating and reinforcing the slave system. As Russell avers, "The stirring metaphor of the slave auction ought, then, to bring to mind an image of courts and law and a vision of these courthouse steps, on which each month one-half of all slave sales took place" (p. 355).

The final section of the volume presents a quartet of pieces dealing with comparative slave law. Alan Watson contributes two of these entries. Readers familiar with Watson's monographic opuses on slave law in Rome and in the Americas will likely find this pair of offerings less than satisfying. The crux of Watson's brief first essay seems to be the myopic point that seventeenth-century European jurists accepted slavery because they admired Roman law, including its slavery provisions. His second, more substantial, essay on "Thinking Property at Rome" highlights the legal tensions that arose from the dual status of slaves as both persons and things. While exploring this dichotomy has great merit, the essay is neither truly comparative nor especially relevant to the rest of the volume. The main purpose for its inclusion seems to be as an introduction to the essay that follows it: Jacob I. Corre's "Thinking Property at Memphis," which applies Watson's model to a jurisdiction in antebellum Tennessee (though the work could stand well on its own, rather than as a corollary to its antecedent). At any rate, Corre exposes the many ways in which southern jurists wrestled with the people-versus-property dilemma inherent in the institution of human bondage. Although the law of slavery was intended to govern slaves as chattel possessions, the fact that bondspeople were "thinking property" meant that southern courts were destined time and again to stumble over the slaves' humanity.

Jonathan A. Bush tenders an especially thoughtful descant upon the origins and evolution of the law of slavery in the American colonies. In compelling tones,

Bush manifests how English common law had precious little impact upon the colonial development of American slave law because the British constitution "allowed all the colonies a private space in which planters and merchants could deploy slave labor with little oversight from England" (p. 397). Much like Watson (in his other writings), Bush contends that early Americans invented rather than inherited slave law. Hence, this work stands as a valuable counterpoint to the position taken by Morris in *Southern Slavery and the Law*, which places great emphasis on the common-law derivation of southern slave law.

Eight of the features in this compendium are original contributions; the remaining six selections are versions of previously published material. By assembling these pieces into a wide-ranging, yet coherent, compilation, Finkelman has put together a marvelous and worthy tome. Uncluttered by legalistic legerdemain (no mean feat for a work of this type), the book is accessible to general readers and specialists alike. *Slavery and the Law* makes substantial contributions to legal history and the historiography of American slavery while enriching our understanding of the nature of American democracy.

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