

Fugitive Justice: Runaways, Rescuers, and Slavery on Trial

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Review

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Lubet, Steven *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial*.
Belknap Press of Harvard University Press, \$29.95 ISBN 978-0-674-04704-4

Looking at the Challenges of Enforcing Slavery

Law professor Steven Lubet focuses on three trials arising from the enforcement of the Fugitive Slave Act of 1850. After setting the scene by describing the Constitution's treatment of fugitive slaves and the Compromise of 1850, Lubet turns to Caster Hanway's treason trial for participating in violent resistance to a slave rendition in Christiana, Pennsylvania. Lubet brings a trial lawyer's sense to his detailed description of this as well as the other trials he describes, detailing the strategic decisions the prosecutors and defense lawyers made in light of the legal and evidentiary issues that they faced. Emphasizing divisions within the prosecution camp and the overreaching of a treason charge, which posed particular evidentiary problems in light of the Constitution's requirement that treason be proved by two witnesses to the defendant's own acts, Lubet shows how the defense attorneys exploited the usual disarray attending large-scale disorder to secure their client's acquittal.

Lubet then turns to the Anthony Burns rendition case in Boston. Under the Fugitive Slave Act, the only real issue open to Burns and his supporters was to challenge the claim that Burns was in fact the person described in the fugitive warrant. Yet, there was little doubt that Burns was indeed the person sought. Lubet shows how Burns's attorneys sought unsuccessfully to impose extremely high requirements of proof of identity to ensure that a free person was not enslaved.

Finally, Lubet describes the rescue of John Price in Oberlin, Ohio, and the ensuing trials of his rescuers – and the charges brought against his captors. Lubet's account of the rescue and the trials is quite lucid. He shows how the abolitionist sentiment pervading the Western Reserve shaped the lawyers'

strategic opportunities and limitations on all sides of the controversy.

Lubet suggests that the three trials show an evolution of anti-slavery legal argument, from grudging acceptance of the Fugitive Slave Act's constitutionality to its rejection as inconsistent with the "higher law." In Lubet's words, they show "the eventual transformation of higher law from an abstract inspiration to an unapologetic legal defense" (8). The Hanway treason trial dealt almost exclusively with whether Hanway had in fact committed acts that counted as treasonous. In the Burns rendition trial, the higher law made its appearance as a reason for a strict burden of proof. In the Oberlin trials, the defense tried to persuade judges and jurors to set aside the Fugitive Slave Act in the service of the higher law.

There is certainly something to this suggestion, but Lubet may be pressing a bit too hard. The issues in the trials differed. Hanway's lawyers understood that they could make a decent case on the facts, and so had little need to appeal openly to the higher law. Rendition cases like Burns's presented quite limited opportunities for legal and factual arguments, and his lawyers did what they could. The Oberlin trials were pretty much open and shut on the facts, with the possible exception of the trial of Charles Langston (older brother of the more famous John Mercer Langston), who had attempted to negotiate a peaceful resolution of a stand-off between Price's captors and his rescuers. With nothing to say about the facts and with legal arguments foreclosed in practice, the lawyers in these cases were almost forced to appeal to the higher law.

The three cases are familiar to specialists, but because Lubet trains his lens on the trials themselves rather than the rescues and renditions, readers will get a good sense of how lawyers went about enforcing and resisting the Fugitive Slave Act. As a trial lawyer, Lubet knows where the lawyers made real decisions and where they were playing to the galleries, although occasionally he seems to import twenty-first century ethical standards into his descriptions. The trial narratives move forward briskly, with good summaries of extended testimony and long speeches by the lawyers in support of their legal and factual arguments. Lubet has given us both a good read and a thoughtful analysis.

Mark Tushnet teaches constitutional law at Harvard Law School. He has written on the legal aspects of slavery, and on the twentieth-century civil rights movement.