

The Oracle and the Curse: A Poetics of Justice From the Revolution to the Civil War

Alfred Brophy

Follow this and additional works at: <https://digitalcommons.lsu.edu/cwbr>

Recommended Citation

Brophy, Alfred (2013) "The Oracle and the Curse: A Poetics of Justice From the Revolution to the Civil War," *Civil War Book Review*: Vol. 15 : Iss. 2 , Article 7.

DOI: 10.31390/cwbr.15.2.09

Available at: <https://digitalcommons.lsu.edu/cwbr/vol15/iss2/7>

Review

Brophy, Alfred

Spring 2013

Smith, Caleb *The Oracle and the Curse: A Poetics of Justice from the Revolution to the Civil War*. Harvard University Press, \$35.00 ISBN 978-0-674-07308-1

An Exploration of the Influence of Legal Action on Culture

The “oracle” in the title of Caleb Smith’s ambitious reading of pre-Civil War literature regarding law refers to judges; the “curse” refers to the writings of those who opposed the system and were often tried and condemned by it. (20-21) This book, thus, puts judges and the majesty of the common law in opposition with the writings of non-lawyers, often people adjudged criminals like Nat Turner and John Brown. Smith seeks to understand how legal writers portrayed judges as oracles and thus defended the power of the law, and how those oracles were challenged. In the process Smith suggests the process by which curses de-legitimized the law and substituted new principles in their place.

Caleb Smith’s *The Oracle and The Law* speaks to huge issues, such how pre-Civil War American law gained and maintained legitimacy? How authority shifted from legal and religious elites to popular sovereignty from Revolution through Civil War? And how our country reconciled the higher law arguments of abolitionists with the principles of law and constitutionalism that so widely supported property rights in enslaved humans? It speaks to timeless questions of obedience to law, even as the law is unjust. And our nation continues to struggle with them, as our citizens turn sometimes to the streets and occasionally even to violence, as they challenge everything from environmental development to our wars abroad.

How did oracles fit together with curses (or maybe it should be cursers)? The oracle part is pretty straight-forward. Oracles (judges) could turn to the muscle of the local police and even the army if necessary to enforce their judgments and protect property. The steam printing press and other

technologies, such as the gun, likewise worked in conjunction with “the law” to bring order and promote economic growth. The power of the state was strong; it would take a lot to successfully challenge it. And oracles did what they could to justify the state through their opinions. While we often think of oratory as a destabilizing force, oracles effectively mobilized rhetoric to suppress challenges. For instance, Frederick Douglass and Emerson are celebrated for their use of oratory to push down irrational authority. But oratory often was mobilized to shore up authority. The college literary addresses supporting traditional modes of thought were more numerous than the ones – like Emerson’s *American Scholar* -- prompting students to take subversive action.

Smith interprets oracles of the law like Chancellor James Kent as making law about transcendent justice. (15) This is a more positive view of antebellum law than that held by many legal historians of the past several decades. For instance, Robert Cover’s *Justice Accused* (1975) and Morton Horwitz’ *Transformation of American Law* (1977) both depict law as distinct from morality. Treatise writers professed law’s debt to Christian values, as Ralph Waldo Emerson’s 1851 “Address to the Citizens of Concord on the Fugitive Slave Law,” pointed out; yet, the law was divorced from Christian morality. The jurists themselves often drew that distinction as well, as one sees in Chief Justice Marshall’s opinions in *The Antelope* (1825), a case that uphold some parts of the international slave trade, and *Johnson v. M’Intosh* (1823), a case that justified the deprivation of land from Native Americans. Both opinions distinguished between justice and law, then upheld the law.

The power of conservative thought – and the appeal of principles like property – was strong. And the oracles of law were supplemented in their work by other sources of authority, such as execution sermons, the subject of the second chapter. Those sermons reflected the authority of the judges and then later the judgment of the people – which Smith sees as reflecting the changing sources of authority from Revolution through the early nineteenth century. (86)

What of the curses? Where did their power come from? What effect did they have? Smith has several chapters on curses – blasphemous speech, “evil speaking” (that is, slanderous speech against a Christian), slavery (such as *The Confessions of Nat Turner*), and the controversy in the 1850s over proslavery law that gave rise to much discussion of the “higher law.” Smith focuses on the public statements of those outsiders who were subject to trial for subverting the system – people like Nat Turner, Henry David Thoreau, and then John Brown –

as well as more common law breakers. His is a story about how literature in the form of public addresses critiqued the legal system and, perhaps, helped to remake it. Often the “curse” sought to be accepted by its audience by appealing to another source of legitimacy. That is, cursers maintained that they acted legitimately, just as did the oracles. Thoreau phrased the issue more radically than most as “The only obligation which I have a right to assume is to do at any time what I think right.” (180)

The cursers were challenging the authority of law and in the case of slavery, they challenged it very successfully. But it was a long road to get to that point. The process by which poetics supported and indicted law deserves further attention. “For a poetics of justice,” Smith observes, “there is the question of how the court’s own way of addressing the people contributes to the mode of governance it describes.” (101) The final chapter, “Words of Fire,” is about how anti-slavery words motivated action. Here I would like to know more about how readers understood these texts. It is pretty clear how Harriet Beecher Stowe’s *A Key To Uncle Tom’s Cabin* tore down respect for Thomas Ruffin’s heartless 1830 opinion in *State v. Mann*, which denied protection to an enslaved woman abused by her possessor because to give her protection would have undermined slavery. She used Ruffin’s transparent self-interest in support of the brutality of slavery against him. Not for nothing was *State v. Mann* a famous and frequent part of the anti-slavery critique of southern slave law. But one wonders about how other antislavery texts were received by their audience.

The Oracle and the Curse contributes to and draws from a lot of recent writing. Habermas casts a shadow over this book, for Smith is interested in how people in public (the famous “public sphere”) challenged the law. Similarly, it builds upon Jeannie DeLombard’s *Slavery on Trial*, which details how anti-slavery advocates put slavery “on trial” through their literature. It also fits in a line of works using literature broadly construed to map ideas in America from Revolution through the Civil War, running from Perry Miller’s *Life of the Mind in America* through Robert Ferguson’s *Law and Letters in American Culture*, to Gregg Crane’s *Race, Citizenship, and Law in American Literature*. Each deal with aspects of the ideas of those at the center of power – judges and lawyers – and how those ideas were supported and sometimes challenged by those who thought the world should be ordered differently. This book is filled with insight across a really broad spectrum of ideas and helps us understand how property and power were challenged as the authority of judges went from a grounding in religious doctrine to one based on popular will. The popular will itself ultimately

challenged the idea of slavery.

Smith marks well the fracturing of the power of authority over that time. This is a book that will – like Robert Cover’s *Justice Accused* – repay many readings for its insight into the interaction of justice and law. No doubt political ideology and the struggles over politics in early America “defined the modes of persuasion through which legal authority might properly secure the assent, or respond to the dissent, of the sovereign people.” (40) Yet, one wonders how much the literature Smith discusses dethroned law. Was literature “merely” mapping larger changes? The world we live in likes causal arguments and we await some ambitious book to build on Smith’s powerful volume and make a fuller case that the cursers pulled down the authority of proslavery law through their literature.

Alfred L. Brophy is the Judge John J. Parker Distinguished Professor of Law at the University of North Carolina – Chapel Hill. He is the co-editor with Sally Hadden of A Companion to American Legal History (2013) and his next book, University, Court, and Slave: Proslavery Thought and Jurisprudence in the Old South, will be published by Oxford University Press. Contact the author at abrophy@email.unc.edu or 919.962.4128