



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

11-5-2007

Utility, History, and the Rule of Law: The Fugitive Slave Act of 1850 in Antebellum Jurisprudence

Alfred L. Brophy
University of Alabama - School of Law, abrophy@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Alfred L. Brophy, *Utility, History, and the Rule of Law: The Fugitive Slave Act of 1850 in Antebellum Jurisprudence*, (2007).

Available at: https://scholarship.law.ua.edu/fac_working_papers/365

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

THE UNIVERSITY OF
ALABAMA

SCHOOL OF LAW

**Utility, History, and the Rule of Law:
The Fugitive Slave Act of 1850 in
Antebellum Jurisprudence**

Alfred L. Brophy

*The Transformation of American Legal History:
Essays in Honor of Morton J. Horwitz
(forthcoming 2008)*

This paper can be downloaded without charge from the Social
Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=1024033>

Utility, History, and the Rule of Law: The Fugitive Slave Act of 1850 in Antebellum Jurisprudence

Alfred L. Brophy¹

In the years before the Civil War, the Fugitive Slave Act of 1850 focused public discussion of the duty to abide by law, as well as the obligations of individual (and religiously inspired) conscience. This paper addresses the debate over the act in Congress, where the Senators could already foresee conflict between law and conscience, as well as subsequent commentary by southern jurists, lawyers, religious leaders, novelists, and professors. They explored the competing considerations of individual morality, abstract duty to abide the law, and expediency in passage and enforcement of the Act. A final section explores the implications for the rich public debate for the judiciary and for politics in the years leading into Civil War. This paper exhumes the Act and places it at the center of American jurisprudence in the antebellum period.

This paper is the first chapter to a monograph I am writing, tentatively entitled, University, Court, and Slave: Moral Philosophy in the Old South. It is about moral philosophy in the antebellum South, which locates the common language of moral philosophy used by Southern educators and jurists. This language provides a way of understanding how Southern intellectuals thought about slavery and law. The project seeks to map the language used to talk about proslavery legal thought and get at how Southern intellectuals justify the institution of slavery. It seeks to understand the grammar of their moral thought, from their utilitarian calculus, to their belief in the importance of stability and the natural law of hierarchy.

The first chapter sets up the key points of conflict: the relationship between a people's values and their laws, the importance of the rule of law, and the utilitarian calculations that suggested slavery should be maintained, even if people were treated inhumanely within it. Subsequent chapters look to Southern moral philosophy texts of William Smith, Jasper Adams, Albert Taylor Bledsoe, and R.H. Rivers, as well as works on slave law by T.R.R. Cobb and also to the periodical literature on law and slavery; then it turns to Southern proslavery fiction and its abolitionist counterparts; as well as the debate between anti-slavery advocates, like Brown University President Francis Wayland and proslavery minister Richard Fuller. The second part looks to proslavery judicial opinions, which employ the same language of moral philosophy to categorize and justify their decisions. The result, I hope, will be a richer understanding of the centrality of moral philosophical thought in the old South and of the main ideas of proslavery

¹ I would like to thank Morton J. Horwitz, whose work has guided my thinking in law and legal history since I read *The Transformation of American Law, 1780-1860* in my first semester of law school. In more recent years, it has been my enormous good fortune to be his student in a more conventional sense. His humanity and concern for law's relationship to power guide my work.

I would also like to thank Mary Sarah Bilder, Adrienne Davis, David Holland, Daniel J. Hulsebosch, Daniel W. Hamilton, David Millon, and David Tanenhaus for reading this paper.

thought. The epilogue addresses the connections between antebellum colleges and courts, to help understand the connections between the well-educated and the powerful. It uses those connections to help understand something of the debate over what response, if any, colleges should have today towards their past. And it serves as an important reminder of the ways that education, which we generally believe is our liberation as a people, can also constrain our moral vision.

In Harriet Beecher Stowe's 1852 novel *Uncle Tom's Cabin* the slave Eliza hears that her child, Harry, will be sold away from her. She then takes Harry and flees across the Ohio river, where, she ends up seeking refuge at the home of Senator and Mrs. Byrd. The Senator and his wife were debating whether fugitive slaves should be returned to their owners. The Senator had just voted for a bill in the Ohio legislature to return them. Despite his pleas to listen to "reason," Mrs. Byrd said "I hate reasoning." For reasoning was only "a way you political folks have of coming round and round a plain right thing; and you don't believe in it yourselves, when it comes to practice."² Indeed, Mrs. Byrd was correct. For the Senator took in Eliza and little Harry. The Byrds gave Harry some clothes and toys that belonged to their own son, who had recently died. And then the Senator himself drove a wagon carrying Eliza and Harry to a Quaker settlement—a stop on the underground railroad. So that, when confronted with the inhumanity of the Fugitive Slave Act, the Senator broke it. He realized that he was breaking his own counsel. Yet, as Mrs. Byrd concluded, "Your heart is better than your head, in this case." And she asked, "Could I ever have loved you, had I not known you better than you know yourself?"³ This vignette at the center of *Uncle Tom's Cabin* shows Stowe's optimism that if she could just make people *feel* the injustice of the Fugitive Slave Act—and of slavery more generally—they would oppose the Act and the institution.

Much of *Uncle Tom's Cabin* is about the sentiment-based critique of slave law.⁴ Stowe

² HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* 145 (Boston, 1852).

³ *Id.* at 153.

⁴ See Alfred L. Brophy, "Over and above there broods a portentous Shadow,—the shadow of law": *The Critique of Law in Uncle Tom's Cabin*, 12 J.L. & RELIGION 457 (1995-96).

sought to overturn respect for slave law by pointing out how inconsistent it is with considerations of humanity. The Fugitive Slave Act of 1850, Stowe tells us, is what inspired her. For, it was in the wake of the Act that she heard “Christian and humane people” urging support for the Act. They recommended that fugitives be returned to slavery. Stowe was surprised, and she thought they could not understand slavery; if they did, such a question could never be open for discussion. And from this arose a desire to exhibit it in a living dramatic reality.”⁵

The Fugitive Slave Act of 1850 inspired, then, one of the most important novels ever written by an American. For the Act led to a conflict between sentiments of humanity towards the individual slaves and the cold logic of the rule of law and utilitarian considerations that underlay proslavery advocacy. Though Stowe touched the emotions of her readers, North and South, she was at the time on the losing end of the political and legal struggle over slavery. As Ralph Waldo Emerson told the citizens of Concord in 1851, many forces were aligned in favor of the Act and in favor of slavery. “The learning of the Universities, the culture of the eloquent society, the acumen of lawyers, the majesty of the Bench, the eloquence of the Christian pulpit, the stoutness of Democracy, the respectability of the Whig party are all combined” in the pro-slavery mission of kidnaping a fugitive slave, Emerson said.⁶

* * *

The Act had several key provisions. It established Federal Commissioners who had the authority to require private citizens to pursue fugitives. They also had jurisdiction to issue certificates of removal for fugitive slaves. The Commissioners took testimony from the

⁵ S TOWE, *supra* note 2, at 621-22.

⁶ Ralph Waldo Emerson, *The Fugitive Slave Law: Address to the Citizens of Concord*, 3 May, 1851, in 11 THE COMPLETE WORKS OF RALPH WALDO EMERSON 177 (1904).

slaveowner in person and from affidavits; the alleged slaves were not permitted to testify. Then, the Commissioners were to issue the certificates of removal once they established the identity of the slave as the person claimed to be a fugitive. There was no jury trial and no defenses were permitted. Thus, the Commissioners' function was limited to determining the identity of the person being returned, not whether the person actually *was* a fugitive. Commissioners received more compensation (\$10) if they ordered the slave returned than if they found the alleged fugitive was not the person claimed by the slaveowner (\$5). The Act preempted the Personal Liberty Laws of several Northern states, which prohibited state officers from cooperating in the return of fugitive slaves. Those who interfered with the return of fugitives were subject to a \$1000 fine and six months imprisonment.⁷ Such provisions led Henry David Thoreau to say on July 4, 1854 that "there are perhaps a million slaves in Massachusetts."⁸ It was, thus, a limitation of the rights of accused fugitives and the impressment of private citizens.

The Fugitive Slave Act of 1850 occupies an important place in thinking about the coming of the Civil War and antebellum jurisprudence.⁹ The majority of jurisprudential writing about

⁷ 9 STAT. AT LARGE 462 (September 18, 1850).

⁸ Henry David Thoreau, *Slavery in Massachusetts*, in 4 WRITINGS OF HENRY DAVID THOREAU 388, 388 (1906).

⁹ On the Act's place in history, see David Potter, *The Impending Crisis*, 112-14, 130-40 (1976); 1 William Freehling, *The Road to Disunion: Secessionists at Bay*, 497-505 (1990); Stanley L. Campbell, *The Slave Catchers* (1973); Mark Graber, *Dred Scott and The Problem of Constitutional Evil* (2006); Merrill D. Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* 457-66 (1987); Thomas J. Brown, "The Fugitive Slave Act in Emerson's Boston," 2000 *L. & Soc. Inq.* 669 (reviewing Albert J. Von Frank, *The Trials of Anthony Burns* (1998)); Laura R. Mitchell, "'Matters of Justice Between Man and Man': Northern Divines, The Bible, and The Fugitive Slave Act of 1850," in *Religion And The Antebellum Debate Over Slavery* 134-65 (John R. McGivigan and Mitchell Snay, eds., 1998). On the Southern reaction to the Act, see John Hope Franklin, *The Militant South, 1800-1861* 223-26 (1961); William J. Cooper, *The South and*

the Act has focused, however, on those opposed to it and why people comply with unjust laws. For example, Robert Cover focuses on the variety of antislavery responses to the Act in his 1975 book *Justice Accused*.¹⁰ Cover seeks to understand not the anti-slavery forces who were motivated by conscience to violate the law, like Stowe's fictional Senator Byrd, but the judges who followed the law, no matter the dictates of their internal moral compass. He emphasizes the importance of studying those people, for they were among the leaders at the time. And while they may have been antislavery in private, many worked within the proslavery legal system. Henry David Thoreau recognized as much the year before the Act was passed, as Americans debated the return of fugitive slaves. Thoreau criticized those who refused to take action against slavery:

There are thousands who are in opinion opposed to slavery and war, who yet in effect do nothing to put an end to them; who, esteeming themselves children of Washington and Franklin, sit down with their hands in their pockets, and say that they know not what to do, and do nothing; . . . What is the price-current of an honest man and patriot today? They hesitate, and they regret, and sometimes they petition; but they do nothing in earnest and with effect.¹¹

Cover addressed the problem of complicity in evil, so prevalent in the era of slavery. There are important issues about how the law constrained and channeled those who were antislavery in private. Stowe addressed such issues in her second novel, *Dred: A Tale of the Great Dismal Swamp*, in which she set up a judge, who was antislavery in private but issued a proslavery

the Politics of Slavery 301-21 (1978).

¹⁰R OBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975).

¹¹ Henry David Thoreau, *Civil Disobedience*, 4 *WRITINGS OF HENRY DAVID THOREAU* 306 (1906).

decision.¹² But left out of Cover's discussions are the ways that Americans discussed law outside of the judiciary, as well as the ideas of those who *supported* slavery.

The debates over the Act fit with the picture that Morton J. Horwitz's *Transformation of American Law 1780-1860* created. Horwitz examined the ideas at the heart of American law. Before historians began to revisit the conservative and dominant ideas in the antebellum South,¹³ *Transformation* depicted the architecture of a particular variety of conservative thought: legal thought. Across the common law, from torts and contracts to property, judges remade the law to bring it into line with the dominant philosophy of the era, which sought to promote economic growth. Their opinions subordinated concerns for individuals to considerations of precedent and to an increasing respect for considerations of utility. Judges rarely employed the sentiment urged by Stowe and Thoreau, for law was a stable field of thought concerned with preservation of vested rights, with expansion of the economy, and with the rule of law. The ideology of utility and cold legal reasoning that Stowe criticized in her antislavery trilogy—*Uncle Tom's Cabin*, *A Key to Uncle Tom's Cabin*, and *Dred*—was central to Horwitz' story as well.¹⁴

¹²HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* (Boston, 1856); ALFRED L. BROPHY, *Humanity, Utility, and Logic: Harriet Beecher Stowe's Vision of Southern Legal Thought in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113 (1998).

¹³ Among the many examples of this are Drew Gilpin Faust, *A Sacred Circle: The Dilemma of the Intellectual in the Old South* (1977); Eugene Genovese and Elizabeth Fox-Genovese, *The Mind of the Master Class* (2005); Michael O'Brien, *Conjectures of Order: The Intellectual and the Old South* (2004); Timothy Huebner, *The Southern Judicial Tradition, 1790-1870* (1998).

¹⁴ Decades of subsequent research has revealed the basic validity of Horwitz's picture. See generally GREGORY ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997); William W. Fisher, *Ideology*,

Even before the Act, debate about the rendition of fugitive slaves centered around the admiration for utility that Horwitz identified among judges. Henry David Thoreau's "Resistance to Civil Government" (popularly known, though not in Thoreau's time, as "Civil Disobedience"), delivered in 1849, illustrates the considerations of utility at the base of the rendition of fugitive slaves Act. Drawing upon a passage in William Paley's *Moral Philosophy*, which was a guiding text in moral philosophy for antebellum Americans, Thoreau spoke of Americans' respect for utility:

Paley resolves all civil obligation into expediency; and he proceeds to say that "so long as the interest of the whole society requires it, that is, so long as the established government cannot be resisted or changed without public inconvenience, it is the will of God . . . that the established government be obeyed—and no longer...."¹⁵

Thoreau, however, thought there were places where "the rule of expediency" is not the guide, "in which a people, as well and an individual, must do justice, cost what it may." He concluded that,

Religion, and the Constitutional Protection of Private Property; 1760-1860, 39 EMORY L.J. 65 (1990). Susanna Blumenthal has recently extended the story of moral philosophy into wills. See *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959 (2006). See also Lawrence Friedman, *Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History*, 24 LAW & SOC. INQ. 253 (1999) (reviewing Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth Century America* (1997)); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1151 (1999).

¹⁵T HOREAU, *Civil Disobedience*, *supra* note 11, at 361. Thoreau credits Paley as "a common authority with many on moral questions." He went through a number of American editions. See DONALD H. MEYER, *THE INSTRUCTED CONSCIENCE* 8-9 (1972); WILSON SMITH, *PROFESSORS AND PUBLIC ETHICS* (1956). On antebellum moral philosophy, see Louis Gertsis, *Morality and Utility in American Antislavery Reform* (1987); Rush Welter, *The Mind of America, 1820-1860* (1975) Louis Perry, *Boats Against the Current: American Culture Between Revolution and Modernity, 1820-1860* (2003); Theodore Dwight Bozeman, *Inductive and Deductive Politics: Science and Society in Antebellum Presbyterian Thought*, 64 J. AM. HIST. 704 (1977); John M. McFaul, *Expedience vs. Morality: Jacksonian Politics and Slavery*, 65 J. AM. HIST. 25 (1975).

“this people must cease to hold slaves, and to make war on Mexico, though it cost them their existence as a people.” Thus, Thoreau reached the central point of the debate: should we do justice to individual slaves or do what maximized the utility of the actor (in this case the nation). Many abolitionists, obviously, thought that justice to the individual *also* maximized the utility of the nation, but that was not what most Americans thought. Thoreau’s Transcendental project was to replace the collective law with an individual conscience. He asks,

Is it not possible to take a step further towards recognizing and organizing the rights of man? There will never be a really free and enlightened State until the State comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly.¹⁶

We see the centrality of utility, from judicial opinions, to legislative debates, to literary addresses. Everywhere one looked in the antebellum period, they saw Americans in love with the idea of utility. As William Goddard told the Brown University Phi Beta Kappa Society in 1836, “we, as a people . . . seem to make a regard to utility almost a part of our religion.”¹⁷

This essay returns to the debates in Congress and the early responses in the public with the goal of reading them for insight into the nature of legal thought. Where Horwitz and Cover’s

¹⁶THOREAU, *Civil Disobedience*, *supra* note 11, at 387. Emphasis of slaves’ suffering was the center of abolitionists’ thought. See Elizabeth Clark, “*The Sacred Rights of the Weak*”: *Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*, 84 J. AM. HIST. 463 (1995).

¹⁷WILLIAM G. GODDARD, AN ADDRESS TO THE PHI BETA KAPPA SOCIETY OF RHODE ISLAND, DELIVERED SEPTEMBER 7, 1836 22 (John H. Eastburn, Boston 1837). We can learn much about antebellum ideas from such lectures. See, e.g., JAMES PERRIN WARREN, *CULTURE OF ELOQUENCE: ORATORY AND REFORM IN ANTEBELLUM AMERICA* (1995); Donald M. Scott, *The Popular Lecture and the Creation of the Public in Mid-Nineteenth-Century America*, 66 J. AM. HIST. 791 (1980); Alfred L. Brophy, “The Intersection of Slavery and Property in Southern Legal Thought, From Missouri Compromise Through Civil War,” chapter 1 (Ph.D. dissertation, Harvard University, 2001) (discussing antebellum literary addresses conceptions of economic, moral, and legal progress).

subjects were judges, this paper looks to legislators, lawyers, and ministers, with the goal of understanding the ideas supporting the Act and the rule of law more generally. We see support for the rule of law, not just because it supported slavery (though of course that is important), but because it supported the idea of a republic, as a place where property rights are of primary importance. So even many who were not proslavery supported the Act. Exploration of the reasons that people urged for support of the Act tells us about the power of the idea of law. Many legislators, moreover, employed considerations of utility to support slavery (because in their minds slaves were better off in slavery and certainly everyone else was, too).

The debates illuminate a rich understanding of the intersection of constitutionalism, law, and slavery in American thought.¹⁸ Together, the debates and the response to the act illustrate key points of contention in antebellum thought: the roles of practical, utilitarian considerations, based on a reading of history and a society's current mores and the opposition: a religiously inspired search for moral perfection and individual humanity. Several key points of conflict emerge. First, a conflict between the considerations of utility to society and humanity to individuals. This is part of a calculation of the entire effects—a cost benefit analysis. Second and closely related to that is the centrality of utilitarian calculations in legislation, particularly in legislation supporting slavery and considerations in the abstract of rights. Finally, in determining the values to plug into the utility calculus and evidence of the organization of contemporary society, historical evidence was central to the believed necessity of slavery in opposition to bible

¹⁸ The Act appears as part of the rich debate in the public about the meaning of the Constitution, which was mediated by legislators and judges. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Daniel W. Hamilton, ed., *A Symposium on The People Themselves*, 81 *CHICAGO. KENT L. REV.* 809-1186 (2006).

and morality based critiques of slavery.



Let us begin with the most famous speech related to the Fugitive Slave Act, Daniel Webster's March 7 speech, which is concerned with supporting a moderate position, stepping back from the brink of disunion by recognizing that Southern states had a legitimate complaint about the loss of their slaves and noting that well-intentioned abolitionists were, nevertheless, harming the slaves.¹⁹ We might also recall that Thoreau referred to the Act as "Webster's Fugitive-Slave Bill."²⁰

So Webster first exculpates the proslavery ministers of the south: thousands believed slaveholding not sinful and thousands more—maybe even more numerous—find "slavery to be an established relation of the society in which they live, can see no way in which, let their opinions on the abstract question be what they may, it is in the power of the present generation to relieve themselves from this relation."²¹ Thus, a central element is the practical in politics and law: take the world as it is, rather than as it ought to be. That focus on the "practical reason" is, as Stowe pointed out, a central tenet of antebellum jurisprudence. And it is, as Ralph Waldo Emerson pointed out in his 1841 lecture, "The Conservative," the difference between conservatism and reform:

Reform is affirmative; conservatism is negative; conservatism goes for comfort, reform for truth. Conservatism is more candid to behold another's worth; reform more disposed to maintain and increase its own. Conservatism makes no poetry, breathes no payer, has

¹⁹ *Speech of Mr. Webster*, CONG. GLOBE, 31st Cong., 1st Sess. 269 (March 7, 1850).

²⁰ Thoreau, *Walden*, in 2 WRITINGS OF HENRY DAVID THOREAU, *supra* note 8, at 257.

²¹ *Speech of Mr. Webster*, CONG. GLOBE, 31st Cong., 1st Sess. at 270.

no invention; it is all memory. Reform has no gratitude, no prudence, no husbandry. . . .²²

Webster juxtaposed that practical reason with abolitionist extremism. For abolitionists saw the right clearly; they thought others ought so to see it also, and they were disposed to establish a broad line of distinction between what is right and what is wrong. Webster said starkly: “I think their operations for the last twenty years have produced nothing good or valuable. I cannot but see what mischiefs their interference with the South has produced.” Webster surveyed Virginia legislature’s 1832 debate in the wake of Nat Turner’s rebellion as evidence that the South was moving towards the termination of slavery. He urged his audience

to recur to the debates in the Virginia House of Delegates in 1832, and ... see with what freedom a proposition made by Mr. [Thomas] Jefferson Randolph for the gradual abolition of slavery was discussed in that body. Every one spoke of slavery as he thought; very ignominious and disparaging names and epithets were applied to it. The debates in the House of Delegates on that occasion, I believe, were all published. They were read by every colored man who could read, and to those who could not read, those debates were read by others. At that time Virginia was not unwilling or unafraid to discuss this question, and to let that part of her

²² Ralph Waldo Emerson, *The Conservative*, in RALPH WALDO EMERSON: ESSAYS AND-LECTURES 174-75 (Joel Porte, ed., 1983). Emerson continued:

The conservative assumes sickness as a necessity, and his social frame is a hospital, his total legislation is for the present distress, a universe in slippers and flannels, with bib and pap spoon, swallowing pills and herb-tea. Sickness gets organized as well as health, the vice as well as the virtue. Now that a vicious system of trade has existed so long, it has stereotyped itself in the human generation, and misers are born. And now that sickness has got such a foot-hold, leprosy has grown cunning, has got into the ballot-box; the lepers outvote the clean; society has resolved itself into a Hospital Committee, and all its laws are quarantine. . . . Its social and political action has no better aim; to keep out wind and weather, to bring the day and year about, and make the world last our day; not to sit on the world and steer it; not to sink the memory of the past in the glory of a new and more excellent creation; a timid cobbler and patcher, it degrades whatever it touches.

population know as much of discussion as they could learn. That was in 1832.²³

Then the abolition societies began in 1835 to send literature to Southern states. And the South retreated from discussion of termination in response to abolition societies.

[T]hey attempted to arouse, and did arouse, a very strong feeling; in other words, they created great agitation in the North against Southern slavery. Well, what was the result? The bonds of the slave were bound more firmly than before, their rivets were more strongly fastened. Public opinion, which in Virginia had begun to be exhibited against slavery, and was opening out for the discussion of the question, drew back and shut itself up in its castle. . . . [E]very thing that these agitating people have done has been, not to enlarge, but to restrain, not to set free, but to bind faster the slave population of the South....²⁴

Webster found that their fanaticism led them to see moral absolutes in stark and distinct terms: “They are not seldom willing to establish that line upon their own convictions of truth or justice; and are ready to mark and guard it by placing along it a series of dogmas, as lines of boundary on the earth's surface are marked by posts and stones.” The reference to boundaries—to bright lines—and to monuments is itself a central part of antebellum thinking. There are intellectual monuments, like judicial decisions and even great orations (Webster’s 1830 reply to Hayne became one) that coincide with physical monuments, like the Bunker Hill monument, the Washington Monument then under construction, and the city of Washington itself. And we hear of judges speaking of precedents as monuments that guide through a labyrinth.²⁵

²³ *Speech of Webster*, CONG. GLOBE, 31st Cong., 1st Sess. at 275.

²⁴ *Id.* Senator Underwood responded to the illusion that abolitionists might create a “moral railroad” in the South. But he did “not see that the first speck of dirt has been moved to make the grade and foundation of the great moral railroad.” *Speech of Mr. Underwood, id.* at 531 (April 3-4, 1850).

²⁵ *Green v Biddle*, 21 U.S. (8 Wheaton) 1, 101 (1823). Those who critiqued the common law thought it provided much less in the way of guides. William Sampson demystified the common law by insulting it. For the common law, he wrote, was the one

Yet, those lines—boundaries—between right and wrong are central to abolitionist thinking and to the evangelical mind more generally. In fact, perfectionism was a central trope of the religious excitement of the 1840s and 1850s. We hear much mocking of that perfectionism in Webster, as well as others. Abolitionists were fanatics²⁶—monomaniacs, to use the phrase that science developed at the time to label and stigmatize their behavior—and that single-minded

pagan idol to which [the English] daily offered up much smokey incense. They called it by the mystical and cabalistic name of Common Law. A mysterious essences. Like the Dalai Lama, not to be seen or visited in open day: of most indefinite antiquity; sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still the same that was, and was to be, and evermore to sit cross-legged and motionless upon its antique alter, for no use or purpose but to be praised and worshiped by ignorant and superstitious votaries.

WILLIAM SAMPSON, SAMPSON’S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS, UPON THE HISTORY OF THE LAW : WITH THE ADDITION OF SEVERAL ESSAYS, TRACTS ... 11-12 (Washington City, Gales & Seaton 1826). Or, as Sampson speculated in argument in *People v. Martin*, Yates Sel.Cas. 112, 153 (N.Y. Sup. Ct. 1810), “Cicero wondered how two soothsayers could look each other in the face. I wonder how the two learned expounders of the common law opposed to us can do so without laughing.”

²⁶ See, e.g., *Speech of James L. Orr*, CONG. GLOBE, 31st Cong., 1st Sess. 544 (May 8, 1850) (“their course can have no other effect than to fan the flames of fanaticism until they shall burn out the vitals of the Constitution and Union.”). Indeed, fanaticism was a favorite adjective to describe those who urged a restriction on private property. See, e.g., *In re New Orleans Draining Co.*, 11 La. Ann. 338 (La. 1856) (“So, too, fanaticism under the plea of philanthropy and the public good, is ready to purge and renovate society—revolutionize governments, and reconstruct the world according to its new ideas, provided that the cost and the consequent pain and sufferings, shall be borne by its beneficiaries.”); *People v. Gallagher*, 4 Mich. 244 (1856) (lamenting inability of penal laws to take away property used to manufacture alcohol) (“In 1831 there were over 4,000 organized temperance societies, and more than 600,000 members. In the mean time over 1,000 distilleries had been entirely stopped by their owners; about 5,000 drunkards had been entirely reclaimed, and over 1,000,000 of people in the United States were entirely abstaining from the use of all kinds of intoxicating drinks But the fate of these societies was sealed when they were induced by political demagogues, in conjunction with fanatical clergymen, to enter the political field, and take political action as a party.”).

pursuit of a goal led to larger harm.²⁷ For they “do not see how too eager a pursuit of one duty may involve them in the violation of others, or how too warm an embracement of one truth may lead to a disregard of other truths equally important.” That is a crucial distinction between antebellum Americans: do justice in individual cases or look at the picture as a whole. Many politicians spoke about this calculus: their vision of morals is such that they should do justice on the whole. That utilitarian calculus appeared in moral philosophy texts.²⁸ Thus, the debate related in perhaps its key part to the individual versus the collective. Abolitionists thought that

²⁷ One New York Supreme Court Judge explained the presence of “monomanism”: Some maniacs ... are rational on all subjects except one, and, until affected by that, exhibit the ordinary deportment and sagacity. These latter are monomaniacs. This partial insanity is prevalent to a very great extent; ... I see no other way of accounting for the wide prevalence of whimsical and fantastical opinions, the transcendental speculations, the wild vagaries of faith, the intolerant fanaticism, the rash obtrusion upon regions of knowledge, palpably beyond the limits of the human faculties, the profane contempt manifested by some men, and, alas! by some women, for all that experience has rendered sure and steadfast, rushing with wild avidity into the espousal of any thing new, because it is new, and substituting the phantoms of a diseased imagination for all that the Christian and philosophic world has heretofore regarded as most dear and sacred.

Thompson v. Thompson, 21 Barb. 107 (N.Y.Sup.Ct. 1855).

The Georgia Supreme Court attributed the “growing policy of Northern states to free slaves who set foot in their state while passing through them, to fanaticism This fungus,” the court said, “has been engrafted upon Northern States Codes by the foul and fell spirit of modern fanaticism.” Cleland v. Waters, 19 Ga. 35 (Ga. 1855).

²⁸ *See, e.g.*, ALBERT TAYLOR BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY 69-70 (J.B. Lippincott, Philadelphia, 1856); JASPER ADAMS, ELEMENTS OF MORAL PHILOSOPHY 15 (Cambridge, Folsom, Wells, and Thurston, 1837) (“By this theory [of utility], the jurisdiction of conscience is abolished, her decisions are classed with those of the superannuated judge, and determination of moral causes is adjourned from the interior tribunal of the breast to the noisy forum of speculative debate. Nothing is yielded to the suggestions of conscience, nothing to the movements of the heart; every thing is dealt out with a sparing hand, under the stint and measure of calculation.”); LAURENS P. HICKOK, A SYSTEM OF MORAL SCIENCE (1853); JOSEPH C. STILES, MODERN REFORM EXAMINED: OR, THE UNION OF NORTH AND SOUTH ON THE SUBJECT OF SLAVERY (J.B. Lippincott, Philadelphia, 1857) (pointing out ways that abolitionists want change).

such questions could be answered with a mathematical certainty:

these persons are disposed to mount upon some particular duty, as upon a war-horse, and to drive furiously on and upon and over all other duties that may stand in the way. There are men who, in reference to disputes of that sort, are of the opinion that human duties may be ascertained with the exactness of mathematics. They deal with morals as with mathematics; and they think what is right may be distinguished from what is wrong with the precision of an algebraic equation.²⁹

And that narrow, mathematical reasoning admitted of few opportunities for compromise.

They are apt, too, to think that nothing is good but what is perfect, and that there are no compromises or modifications to be made in consideration of difference of opinion or in deference to other men's judgment. If their perspicacious vision enables them to detect a spot on the face of the sun, they think that a good reason why the sun should be struck down from heaven. They prefer the chance of running into utter darkness to living in heavenly light, if that heavenly light be not absolutely without any imperfection. There are impatient men; too impatient always to give heed to the admonition of St. Paul, that we are not to "do evil that good may come"; too impatient to wait for the slow progress of moral causes in the improvement of mankind . . .³⁰

So there is a practicality, a consideration of the complete picture rather than issues by themselves, and then there is one other key legal element in the speech: a sense of the duty that the Constitution imposes on Congress and on individual citizens.

That world of law included an analysis of history, in considering the effects of legislation. Their practical world³¹ took a bold look at the world as it is, for which history was an important teacher. The lessons were conservative – that slavery was ubiquitous and could not be ended.

²⁹C ONG. GLOBE, 31st Cong., 1st Sess., at 271. Stowe describes the antislavery lawyer Edward Clayton in *Dred: A Tale of the Great Dismal Swamp* with similar language. 1 Stowe, *supra* note 12, at 374.

³⁰ Cong. Globe, 31st Cong., 1st Sess., at 271.

³¹ Speech of Hon. T. G. Pratt, *id.* at 1238 (August 20-21, 1850) ("The American people are essentially a practical people, I never shall believe that they are willing to risk the destruction of this Government upon a mere abstraction.").

That practicality, looking to overall considerations of utility, is a piece of what Horwitz described for common law judges. Where they altered the law to provide for economic progress, politicians took their institutions from considerations of utility. The Fugitive Slave Act debates appear, then, as part of a larger world of thought about law.³² Or, as Senator R.M.T. Hunter said, “Some suffering ... belongs to our condition; it is a part of the lot of humanity.”³³ Tennessee Senator John Bell reasoned from his understanding of history to argue that slavery was both morally just and practically necessary:

contributing in a hundred various forms and modes, through a period of thousands of years, to the amelioration of the condition of mankind generally, though sometimes abused and perverted, as all human institutions, even those of religion, are, still contributing to the advance the cause of civilization though, if you please, having its origins in individual cupidity, still mysteriously working out a general good.³⁴

The conclusion that slavery was immoral, Bell thought, could not be proven. For, the moral condemnation of slavery

is not arrived at in accordance with the Baconian method of reasoning, by which we are taught, that from a great many particular and well-established facts in the physical economy, we may safely deduce a general law of physical nature; and so of morality and government.³⁵

And like Webster, Bell also focused on the fanaticism among the abolitionists: “There is a fanaticism of liberty as well as a fanaticism of religion and philanthropy—a fanaticism exhibiting

³² *Id.* at 1616 (August 22, 1850) (“The legislator who shuts his eyes to all consequences, who does not look at all into the probabilities of *efficiency* or *inefficiency*, in connection with the measure to which he is about to impart his sanction, is unfit for the law-making functions.”).

³³ Speech of R.M.T. Hunter, *id.* at 1632 (Sept. 3, 1850). *See also id.* at 1633.

³⁴ CONG. GLOBE, 31st Cong., 1st Sess., 1105 (July 6, 1850).

³⁵ *Id.* at ____.

itself in theories which admit no distinction of races and claims for all a perfect equality, social and political; theories which reject all practical or useful schemes of government which have ever existed, or can be devised.”³⁶

Instead of abolitionists’ moral absolutes, supporters of the Fugitive Slave Act saw slavery as conferring more benefits than harms. Representative Miller of New Jersey emphasized the benefits of the rule of law’s protection of property rights. His focus was on the rights of slaveholders.

Twenty millions of freeman are living under the best system of laws ever devised by man; their daily avocations un-oppressed by any tyrannical laws, undistributed by any high-handed aggression upon their rights, and sending up no complaints against arbitrary government. From the extreme North, where the Yankee whaler strikes the monster of the deep, to the South, where the slave labors contentedly in the cotton-fields for his master—everywhere throughout this mighty empire, the rights of property and the rights of the citizens are protected and defended by the Constitution and the laws of slavery.³⁷

There might come a time when social and moral progress might allow the termination of slavery, but the time had not yet arrived. Or, as Senator Underwood argued, “Where I disposed to concede that to hold slaves was a sin on the part of the master, I am not sure that he would not aggravate his guilt, and deserve a hotter punishment by taking the prescription of *immediate abolition*.”³⁸

The attack on abolitionist fanatics was in part an attack on sentimental novelists. Even

³⁶ *Id.* at 1102.

³⁷C ONG. GLOBE, 31st Cong., 1st Sess., App. 311 (Feb. 21, 1850). Representative Miller spoke using language of landscape, of the fear of some of the “gathering clouds that darken these bright skies.”

³⁸ *Id.* at 531.

before Harriet Beecher Stowe wrote her sentimental novel, *Uncle Tom's Cabin*, Senator Bell linked sentimental writers, readers of sentimental literature, and abolitionists. He criticized sentimental literature for contributing to the agitation against slavery, indeed, against life as it was more generally:

But there is another class of enthusiasts which cannot be justly called fanatical, yet exercises a far more extensive and mischievous influences. Those are the subjects of a morbid sensibility, recluses—readers and authors of sentimental literature, who cannot bear the contemplation of the ordinary ills and hardships of real life, without a shock of their nervous system. They sigh for a state of society where wrong and injustice can never enter. Slavery at the south becomes the natural and favorite theme of the tongues and pens of these sentimentalists.³⁹

While the proslavery sentimental novels were ineffective, there was mocking literature—which in imitation of the sensationalist literature of the 1850s—attacks the virtue of the reformers.⁴⁰

Indeed, abolitionists had developed a sophisticated and powerful critique of slavery—and of proslavery law in particular. One of Stowe's first published stories entitled "Love versus Law," was a comparison of warm sentiments of the heart with the cold logic of property law. *One Thousand Lashes for Freedom* relied on cases to illustrate the brutality at the base of slavery. William Goodell's *American Slave Code in Theory and Practice* developed an important critique of the slave law. He focused on the "legal relation" of slavery—based on an understanding of the statute law and how the statutes are applied.⁴¹ He looked to statutes rather than the norms of behavior (so often characterized as benign by proslavery writers). Thus, it is

³⁹C ONG. GLOBE, 31st Cong., 1st Sess., 1102 (July 6, 1850).

⁴⁰ See, e.g., D. W. BARTLETT, *MODERN AGITATORS: OR, PEN PORTRAITS OF LIVING AMERICAN REFORMERS* (Miller, Orton, and Mulligan, New York, 1855).

⁴¹W ILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (New York: American and Foreign Anti-Slavery Society, 1853).

law, not norms, that are critiqued. And then, after showing the harshness of the law, he argues that the legal relations structure the actual practice of master-slave relations. His vision of slave law was that it influenced treatment of slaves and that then harsh treatment of slaves in turn influenced statutes. So harsh treatment went from norms to law. As Goodell said, the slave code is a vigilant guardian of the legal relation of master and slave—even as the role of law ought to be to restrain power.⁴² The role of law was to protect the weak, though it failed to do so.⁴³ *The American Slave Code in Theory and Practice*, like other important works on law in the antebellum era, discloses a sophisticated understanding of the relationship between law, history, and culture. One might construct a sophisticated picture of the relationship between history, precedent, and social norms by looking at Goodell and such proslavery works as Thomas Roderick Dew's *Digest of the Laws, Customs, Manners, and Institutions of Ancient and Modern Nations*, T.R.R. Cobb's *Historical Sketch of Slavery*, George Sawyer's *Southern Institutes* and John Fletcher's *Studies in Slavery*.⁴⁴ Together those works give us a picture of the rich

⁴² *Id.* at 400, 337. See also WILLIAM GOODELL, HISTORY OF SLAVERY AND ANTISLAVERY: A HISTORY OF THE STRUGGLE ... (New York, 1852). Goodell's *Views of American Constitutional Law: In its Bearing upon American Slavery* (2nd ed., Utica, 1845) argued that the spirit of the Constitution did not support slavery. Moreover, it urges a more humane common law. See, e.g., *id.* at 150-51.

⁴³ GOODELL, *supra* note 41, at 157. See also RICHARD HILDRETH, ATROCIOUS JUDGES. LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION ... (New York, Miller, Orton & Milligan, 1856).

⁴⁴ Dew and Sawyer have received less attention they deserve given the sophisticated picture of legal development they exhibit. See, e.g., GEORGE SAWYER, SOUTHERN INSTITUTES; OR, AN INQUIRY INTO THE ORIGINAL EARLY PREVALENCE OF SLAVERY AND THE SLAVE-TRADE 16-29 (J.B. Lippincott, Philadelphia, 1858); THOMAS R. DEW, DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF ANCIENT AND MODERN NATIONS (Appleton, New York, 1853); FOX-GENOVESE & GENOVESE, *supra* note 13, at 201 (discussing Sawyer) and *id.* at 201-03, 265-71 (discussing Dew).

understanding of jurisprudence that existed in the antebellum era.⁴⁵

While Senator Bell phrased his speech as an attack on sentimentalism, its larger point was that concern for the suffering of individuals was not the appropriate consideration. Instead, we should have cold considerations of utility. Bell's reasoning was that everyone suffers and we cannot alleviate the suffering.

These are the break-points, the places where the clashing view matters. While utilitarianism is the dominant value, there are other possible paths, which might have led to a "jurisprudence of sentiment." That jurisprudence based on sentiment, which was advanced by abolitionists black and white, received few adherents within the judiciary, however.

There also needed to be an understanding of what was possible, what was practical, and an understanding of the history of slavery and its current practice, which put it into a context for understanding how moral or immoral it was in reality. They looked to examples of history and what had happened and was happening. Senator John Bell of Kentucky read "the law of nature" by the "lights" and necessity of history. He analogized the dispossession of Natives from their land and found that acceptable with the law of nature.

As to the lawfulness or sinfulness of the institution of slavery—whatever . . . the disciples of a transcendental creed of any kind may hold or teach . . . I must claim the privilege of interpreting the law of nature by what I see revealed in the history of mankind from the earlier period of recorded time, uncontradicted by Divine authority. But above all I have seen here, on this continent, and in these United States, the original lords of the soil subdued...and the remnant still held in subordination; and all this under an interpretation of the law of nature which holds good at this day among our northern brethren . . .

Senator Bell then looked to the institution of slavery and found it necessary.

⁴⁵ Antebellum jurisprudence has not yet received all the attention it deserves. *See, e.g.,* Michael Hoeflich, *Legal Science from Leibnitz to Langedell*, 30 AM. J. LEGAL HIST. 95 (1986).

There are three millions of the African race, whose labor is subject to the will of masters, under such circumstances that their condition cannot be changed, though their masters should will it, without destruction alike to the interests and welfare of both master and slave. These are the lights by which I read and understand the law of nature.⁴⁶

This vision of utility was intertwined with a theological strand of belief in divine benevolence. Huntsville, Alabama Presbyterian minister Frederick A. Ross' *Slavery Ordained of God* told of the good that slavery brought to masters and slaves and he predicted it would continue until it passed away in the "fulness of Providence."⁴⁷ Senator Bell concluded with a plea to put slavery into context and understand the practicalities:

These examples show that there are certain abstract truths and principles which, however incontrovertible in themselves, like every other good thing, may be and often are misconceived and abused in their application. It is the business of statesmen to apply them with safety and to give them the utmost practical influence of effect consistent with the existing state of society.⁴⁸

So the debates on the Act contain much about the connections of morality and legislation. They also contain the grammar of Constitutional interpretation. The Constitution enjoins a duty upon states and state legislators, also. Bell thought there was no right of Northerners to interfere with Southern constitutional and property rights. I put it to all the sober and sound minds at the North as a question of morals and a question of conscience. What right have they, in their legislative capacity or any other capacity, to endeavor to get round this Constitution, or to

⁴⁶ C ONG. GLOBE, 31st Cong., 1st Sess., at 1105.

⁴⁷ F RED A. ROSS, *SLAVERY ORDAINED OF GOD* 7 (Lippincott, Philadelphia, 1857). Ross wrote that "*slavery is of God*, and to continue for the good of the slave, the good of the master, the good of the whole American family, until another and better destiny be unfolded." I am indebted to David Holland for reminding me of the importance of Providence in this debate.

⁴⁸ C ONG. GLOBE, 31st Cong., 1st Sess., at 1106.

embarrass the free exercise of the rights secured by the Constitution to the persons whose slaves escape from them? None at all; none at all. Neither in the forum of conscience, nor before the face of the Constitution, are they, in my opinion, justified in such an attempt. Of course it is a matter for their consideration. They probably, in the excitement of the times, have not stopped to consider of this. They have followed what seemed to be the current of thought and of motives, as the occasion arose, and they have neglected to investigate fully the real question, and to consider their constitutional obligations; which, I am sure, if they did consider, they would fulfill with alacrity.⁴⁹ The proponents of that Act thought that the Constitution enjoined on the legislature the duty of protecting slave property.

In the debates we also learn about the rule of law: why should people abide by a law, if they disagree with it. Some of the reasons for abiding are religious: it is the duty, as many interpreted Paul's second letter to the Corinthians, to abide by the commands of human governments. For, as Senator Underwood of Kentucky said, "it is generally combined arrogance and folly for a minority to denounce the legislation of the majority, and to threaten resistance and defiance in consequence of an alleged conflict with the law of God."⁵⁰ He concluded, "government is ordained of God; ... it is a duty to submit to the powers that be, and to render unto Caesar the things which are Caesar's."⁵¹ There is a proper and constitutional mode by which bad laws "may be assailed and repealed; but until repealed, they must be obeyed, or it is the end of

⁴⁹ CONG. GLOBE, 31st Cong., 1st Sess., at 1105.

⁵⁰ 31st Cong. 1st Sess. 530 (April 4, 1850).

⁵¹ *Id.* at 533.

government.”⁵² Moreover, following the law is a duty that will hold the government together. Many recognized the close connection between morals and legislation and worried that because the Act would not have the support of the community, it would be ineffective. As Senator Robert C. Winthrop of Massachusetts concluded, “it is the daily experience of this and of every other Government, that where laws are repugnant to the moral sense of the community, it is almost impossible to execute them.”⁵³ Or, as Senator Rhett said, “A law to have its practical effect must move in harmony with the opinions and feelings of the community where it is to operate.”⁵⁴

Then, after enactment, the Fugitive Slave Act of 1850 became a centerpiece of discussion about the rule of law. The debate focused under what, if any, circumstances can someone violate the rule of law. A vibrant antislavery jurisprudence emerged around the Act, which emphasized the right to violate the law and demonstrated both the truth of legislators’ predictions that the law would be a nullity and the limits of the power of law. For antislavery ministers discussed the ways that human created laws were limited and subordinate to conscience.⁵⁵ Some, like Samuel

⁵² *Id.*

⁵³ Cong. Globe, 31st Cong., 1st Sess. 1593 (Aug. 20, 1850).

⁵⁴ Cong. Globe, 31st Cong., 2nd Sess. 317 (1851).

⁵⁵ *See, e.g.*, NATHANIEL COLVER, THE FUGITIVE SLAVE BILL: OR, GOD'S LAWS PARAMOUNT TO THE LAWS OF MEN. A SERMON, PREACHED ON SUNDAY, OCTOBER 20, 1850 (Boston, J.M. Hewes, 1850); GEORGE BARRELL CHEEVER, GOD AGAINST SLAVERY: AND THE FREEDOM AND DUTY OF THE PULPIT TO REBUKE IT . . . (Crosby & Nichols, Boston, 1850); THEODORE PARKER, THE FUNCTION AND PLACE OF CONSCIENCE IN RELATION TO THE LAWS OF MEN: A SERMON FOR THE TIMES; . . . SUNDAY, SEPTEMBER 22, 1850 (Crosby & Nichols, Boston, 1850); JOHN KREBBS, A DISCOURSE ON THE NATURE AND EXTENT OF OUR RELIGIOUS SUBJECTION TO THE GOVERNMENT UNDER WHICH WE LIVE . . . DELIVERED IN THE RUTGERS STREET PRESBYTERIAN CHURCH . . . DECEMBER 12, 1850. . . (New York, Charles Scribner,

Spear, saw a middle path between abiding all law and violating it: he suggested that judges who opposed the Act should resign.⁵⁶

Much of the debate appeared in pulpits. John Lord of Buffalo's First Presbyterian Church delivered a widely distributed sermon, "The Higher Law, in Its Application to the Fugitive Slave Bill," in 1851.⁵⁷ Lord's sermon proceeded from the fear that following a "higher law" would result in an "open and forcible resistance by arms."⁵⁸ He believe, based on his reading of Matthew, that "obedience to governments, in the exercise of their legitimate powers, is a religious duty, positive enjoined by God himself."⁵⁹ Much of Lord's reasoning was based on his interpretation of the bible, which held that government is divinely constituted, that government has jurisdiction over contemporary affairs, and the decisions of governments within their jurisdiction are absolute. But Lord also reasoned that the higher law doctrine was unworkable, for it would abrogate all law. "Freedom of opinion by no means involves the right *to refuse*

1851) (responding to JOHN C. LORD, "THE HIGHER LAW," IN ITS APPLICATION TO THE FUGITIVE SLAVE BILL ... (Union Safety Committee, New York, 1851)); WILLIAM HOSMER, THE HIGHER LAW, IN ITS RELATIONS TO CIVIL GOVERNMENT . . . (Derby & Miller, Auburn [N.Y.], 1852).

⁵⁶AMUEL T. SPEAR, THE LAW-ABIDING CONSCIENCE, AND THE HIGHER LAW CONSCIENCE: WITH REMARKS ON THE FUGITIVE SLAVE QUESTION. A SERMON, PREACHED IN THE SOUTH PRESBYTERIAN CHURCH, BROOKLYN, DEC. 12, 1850 32 (Lambert & Lane, New York, 1850). *See also* EDWARD PRINGLE, THE PROCEEDINGS OF THE UNION MEETING, HELD AT BREWSTER'S HALL, DECEMBER 24, 1850 ... (W.H. Stanley, New Haven, 1851).

⁵⁷LORD, *supra* note 56. *See also* WILLIAM ADAMS, CHRISTIANITY AND CIVIL GOVERNMENT (C. Scribner, New York, 1851); ALBERT BARNES, THE CHURCH AND SLAVERY (Parry & McMillan, Philadelphia, 1857); MOSES STUART, CONSCIENCE AND THE CONSTITUTION: WITH REMARKS ON THE RECENT SPEECH OF THE HON. DANIEL WEBSTER IN THE SENATE OF THE UNITED STATES ON THE SUBJECT OF SLAVERY (Crocker & Brewster, Boston, 1851).

⁵⁸L ORD, *supra* note 56, at 4.

⁵⁹*Id.* at 6.

obedience to law; for, if this were so, the power to declare war and make peace; to regulate and levy taxes; in short, to perform the most essential acts of government, would be a mere nullity.”⁶⁰

The state may enact laws for slavery and one had to abide those laws. Anything else would “contradict the decision of the Apostle -- [and] subject every established principle, whether human or divine, on which rests the authority of civil government.” Lord looked to United States’ history, such as the ubiquity of slavery during the colonial period, to conclude that slavery did not violate any “higher law.” He also looked to other countries, such as China, to conclude that slavery, at least in some circumstances, was permissible.⁶¹

Ichabod Spencer explained in even more detail the purposes and functions of law (and why it must be obeyed) in his November 1850 sermon in the second Presbyterian Church in Brooklyn.⁶² Laws are necessary to restrain those who do evil. Therefore, “Law is a friend of the human race. It is the protector of the good man; and it punishes the bad man, only for the purposes of securing rights,—property, liberty, life. And even the bad would be worse off thousand fold than they are, if there were no efficient Law to restrain them by its authority and sanctions.”⁶³ Spencer embraced law as what facilitates and creates happiness and property. Though he acknowledged that in some instances one might violate an unjust law, those situations were few and far between. “Law is too important and delicate a thing to have its majesty trifled

⁶⁰ *Id.* at 7.

⁶¹ *Id.* at 10-11.

⁶² ICHABOD S. SPENCER, *THE RELIGIOUS DUTY OF OBEDIENCE TO LAW: A SERMON, PREACHED . . . NOV. 24, 1850* (M.W. Dodd, New York, 1850).

⁶³ *Id.* at 13.

with by the wicked nonsense of a half-obedience.”⁶⁴ He urged against rebellion, for that would lead to even worse harm. Revolutions “bring horrid evils along with them.” Spencer engaged in the balance of harm and benefit at the center of utilitarian reasoning. “It would be better to bear the injury for a while, than to involve the nation in confusion and blood.”⁶⁵ And when he looked around, he thought the law, on balance, brought substantially more benefit than harm.

“[G]overnment with all its unavoidable imperfection and errors, on the whole is beneficial—indispensable—we could not do without it. And rarely, very rarely indeed, is there a single instance of an individual man . . . whom Law has injured *more* than it has benefitted.”⁶⁶

Nevertheless, law was losing some of its majesty.⁶⁷ The public’s increasing condemnation of the Fugitive Slave Act was leading to further contempt of law. Emerson dismissed appeals to law books in his 1851 address at Concord. “A few months ago, in my dismay at hearing that the Higher Law was reckoned a good joke in the courts, I took pains to look into a few law books.” Indeed, he reported that he looked for signs that “immoral laws are void” and found that “the great jurists, Cicero, Grotius, Coke, Blackstone, Burlamaqui, Montesquieu, Vattel, Burke, Mackintosh, Jefferson, do all affirm this.” Yet, Emerson did not cite those passages in defense of his argument. For “no reasonable person needs a quotation

⁶⁴ *Id.* at 15.

⁶⁵ *Id.* at 16.

⁶⁶ *Id.* at 20.

⁶⁷ *See, e.g.,* CALVIN COLTON, A VOICE FROM ENGLAND TO AMERICA BY AN AMERICAN GENTLEMAN 38-60 (1839) (discussing increasing public concern with statutory law); Timothy Walker, *Advice to Law Students*, 1 WEST. L.J. 481, 482 (1844).

from Blackstone to convince him that white cannot be legislated to be black.”⁶⁸

As cases of fugitive slaves began to appear in courts the debates increasingly took on the question about whether individuals should actively stop rendition of fugitive slaves. The most famous case arose in Boston in 1854 when Anthony Burns was arrested as a fugitive slave and, after Judge Edward Loring ordered him returned, abolitionists set about plans to free him.⁶⁹ President Franklin Pierce employed federal troops to make sure that Burns was put on a ship to return to Virginia.⁷⁰ Burns brought into relief the obligations that law imposed. While some courts found creative ways to avoid the law, most commonly and most importantly, they followed it.⁷¹ Thoreau was led to ask in the wake of Anthony Burns’ trial, “does anyone think that justice or God wait on Mr. Loring’s decision?”⁷² As those courts upheld law, its credibility declined.

Yet, while some like Thoreau and Emerson questioned the Fugitive Slave Act’s proslavery jurisprudence, others supported it. Timothy Walker, founder of the Cincinnati Law School and author of the important *Introduction to American Law*, lectured on the need to abide the law in the wake of the Act in his 1851 Phi Beta Kappa lecture at Harvard. His lecture, “The

⁶⁸ Emerson, *supra* note 6.

⁶⁹ See, e.g., JAMES FREEMAN CLARKE, *THE RENDITION OF ANTHONY BURNS: ... A DISCOURSE ON CHRISTIAN POLITICS* (Crosby & Nichols, Boston, 1854).

⁷⁰ See, VON FRANK, *supra* note 9, at 203-19 (describing Burns’ case from Loring’s decision to Burns’ departure from Boston).

⁷¹ Robert Cover and, more recently, Mark Tushnet detail such conflicts between law and sentiment. See COVER, *supra* note 10; MARK TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2004).

⁷² Henry David Thoreau, *Slavery in Massachusetts*, *supra* note 8, at 389.

Reform Spirit of the Age,” mocked the reformers’ ideas:

We have been priest-ridden, and king-ridden, and judge-ridden, and school-ridden, and wealth-ridden, long enough. And now the time is come to declare our independence in all these respects. We cannot, indeed, change the past, — that is for ever immutably fixed; but we can repudiate it, and we do. We can shape our own future, and it shall be a glorious one. Now shall commence a new age, — not of gold, or of silver, or of iron, but an age of emancipation. We will upheave society from its deepest foundations, and have all but a new creation. In religion and politics, medicine and law, morals and manners, our mission is to revolutionize the world. And therefore we wage indiscriminate war against all establishments. Our ancestors shall no longer be our masters. We renounce all fealty to their antiquated notions. Henceforth to be old is to be questionable. We will hold nothing sacred which has long been worshiped, and nothing venerable which has long been venerated. These are the glad tidings which we the reformers of the age, are commissioned to announce.⁷³

Walker wanted no such reform. The rest of his talk was about the need to return to steady following of precedent and law. And without the rule of law, William Greene warned a Brown University literary society at the same time, the United States would descend from democracy into revolution.⁷⁴

Subsequent events vindicated the moral perspective of abolitionists, but for people looking from the perspective of the early 1850s, the crisis over fugitive slaves touched central issues of moral philosophy. Abolitionists were pessimistic. The language of moral philosophy and those modes of thinking were employed from the University lecture hall, to the pulpit, to the halls of Congress and the courtrooms throughout the nation. For a time those proslavery ideas triumphed. They emphasized a version of history that taught the ubiquity and, therefore, inevitability, indeed necessity, of slavery. They then tied that proslavery vision of history

⁷³TIMOTHY WALKER, *THE REFORM SPIRIT OF THE AGE* (J. Munroe, Cambridge, 1851).

⁷⁴WILLIAM GREENE, *SOME OF THE DIFFICULTIES IN THE ADMINISTRATION OF A FREE GOVERNMENT: A DISCOURSE, PRONOUNCED BEFORE THE RHODE ISLAND ALPHA OF THE PHI BETA KAPPA SOCIETY, JULY 8, 1851* (Providence, John F. Moore 1851).

together with a moral philosophy that emphasized considerations of utility and rested on a belief in the need to abide the rule of law. A sobering assessment was left by Louisa McCord, writing in the *Southern Quarterly Review* about the problems with abolitionists' attempts to end slave law: "a revolution that seeks to abolish law will end necessarily in despotism."⁷⁵

Though, despite the efforts made to justify slavery and make it look acceptable, commonplace, and legal, others saw through this. Massachusetts Senator Charles Sumner spoke about the violence inherent in the institution. "Slavery is a institution of force and not of right, as our law books teach – the private force of the master being made efficient and sufficient by the public force of the state."⁷⁶ It was the triumph of the antislavery position that it was able to make people see the considerations of force and brutality that proslavery politicians, judges, and intellectuals tried to justify. And so they undid, through the process of Civil War and Constitutional amendment, a part of antebellum American law, even if only for a short while.

⁷⁵ Louisa McCord, *British Philanthropy and American Slavery*, 14 DEBOW'S REV. 258 (1853).

⁷⁶CONG. GLOBE, 31st Cong., 1st Sess., at 1621.