

THE LAW OF HUMAN BONDAGE

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Paul Finkelman. *The Law of Freedom and Bondage: A Casebook*. (New York: Oceana Publications, New York University School of Law: Ingram Documents in American Legal History, 1986). xv + 281 pp. Notes, index. \$30.00.

Between 1858 and 1862 John Codman Hurd published his massive two-volume work, *The Law of Freedom and Bondage* (Hurd, 1968). It was an effort to provide a comprehensive study of the jurisprudence that arose out of the existence of slavery and freedom in the federal union. Finkelman's casebook with the same title is more modest. It is, however, a valuable collection of excerpts of statutes, comments from nineteenth-century treatises, and passages from important state cases. These materials have been chosen to open enquiry into areas similar to those explored by Hurd.

Finkelman's selection of sources is apt. Federal cases are omitted because they are well-known and widely available. The documents included are grouped around four topics: the colonial origins of slavery, the abolition of slavery in England and the Northern states, Southern manumission cases, and finally the criminal law of slavery. All of these are of moment, and the selections used are quite good. Still, this is an incomplete collection. A number of legal categories and relationships are not represented, such as situations in which slaves might be the subjects of gifts, loans, sales, mortgages, or hires. Their exclusion is unexplained. Finkelman does suggest one likely reason: "Thousands of private legal actions in the South centered on slaves as property. Usually these cases had little to do with the 'law of slavery'" (p. xiv). This is an important remark, although the author does not indicate when such cases had something to do with the "law of slavery" and when they did not. But, the point is even more basic: What is the "law of slavery"? What are its boundaries, and what are the principles for including some legal notions and relationships and not others? Many scholars have defined slavery in terms of the treatment of human beings as property, and others have questioned this definition (Patterson, 1982: 21-27; Finley, 1968, 307-313). This central definitional problem is glossed over by Finkelman's approach, and this is unfortunate.

The structure of this casebook follows the traditional pattern

of a series of questions and comments, most of which are judicious and thoughtful. However, some are puzzling, on a rare occasion a misleading comment slips by, and the author seems unable to resist asking leading questions (e.g., is this decision “equitable or fair” [p. 55] or is it “reasonable”? [p. 141]).

An example of the happily rare misleading remark involves the discussion of the Roman law principle of *partus sequitur ventrem*, which provided that the status of a child would be derived from the mother as opposed to the common law rule that it was derived from the father. The author says that “except for a short period in colonial Maryland, all slaveholding colonies and states adopted this rule for the children of Negro women” (p. 16). If Greene (1966: 126) is correct, however, “none of the New England colonies effected the change legally,” although they did as a matter of “custom and tradition.” Another statement by Finkelman (p. 16), that “such a rule equated the status of Negroes with that of animals,” is even more curious. The difficulty is that this rule did not apply solely to blacks. If a white indentured servant woman gave birth to a child by a slave, which did occur in the colonial South, that child would be free and not a slave on the basis of the same legal principle.

Occasionally, moreover, the author asks questions that are more puzzling than provocative. For instance, among the questions he poses about *Respublica v. Richards* (2 Dallas 224 (1795)), a Pennsylvania case brought by the state abolition society, is, “In a democracy, should the prosecution of crimes be left to the discretion of the state, or should citizens become involved? Can analogies be drawn between this problem as it affected slavery and such contemporary issues as civil rights, women’s rights . . .?” (p. 66). His point here seems strained and not altogether clear. It also raises a question about the intended audience for this casebook.

Some of the questions appear to be aimed at law students and others at history students. Some could be handled reasonably well by the one but not the other, and the comments do not always prepare a reader to grapple with the questions at all. An illustration can be found in two of the criminal cases. On the grisly case of the murder of a slave by a master, *Souther v. Commonwealth* (7 Gratt. (Va.) 672 (1851)), Finkelman (p. 260) asks, “Was Souther’s behavior typical?” (p. 260). It is hard to imagine that law students or even many history students would be likely to have the information necessary to deal with this question. On the other side, regarding the case of *State v. Ben* (1 Hawks (N.C.) 434 (1821)), the author wonders, “What does the court mean by ‘pregnant circumstances’?” (p. 265). The problem is that this is an evidentiary rule that the case itself does not clarify, and it is certainly doubtful that most students trained in history but not law could handle it with any facility or accuracy.

Unfortunately, certain questions are also occasionally framed

in an odd way for an historian as good as Finkelman. He notes, for instance, that the Massachusetts declaration of rights declared all men equal, which the state court used to virtually end slavery. However, a similar declaration in Virginia was construed by that state's court to reach a different result. The set of questions that follows is, "Why should the same words have different meaning? Which judiciary was correct in its interpretation of the words? Is it possible that both courts were correct for their own states?" (p. 36). Regrettably, such slightly sophomoric questions at times creep into this volume, and when they do they detract from its quality.

Despite these criticisms this casebook does have considerable value. The cases selected are among the most important for anyone who wants to explore large areas of the law of slavery, and to a lesser extent the law of freedom, in the years before the Civil War. Because these sources are not readily available, this book fulfills a useful function. If it encourages students to plumb these cases, as it hopefully will, and whets their appetite for more, it will have been a success.

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