

Final draft. January 21, 2020.

Winter Term 2020

Law 877: 001. THE LAW IN SLAVERY AND FREEDOM

Prof. Rebecca J. Scott

January 22 - April 22, 2020

Room 236 Hutchins Hall

Wednesdays, 2:55 PM - 4:55 PM (2 credit hours)

Office Hours: 2 to 3:30 p.m., Thursdays, 969 Legal Research Bldg. (rjscott@umich.edu)

In this seminar we explore the ways in which slavery, often defined in the Americas as entailing state recognition of a property right in human beings, interacted with the structures and practices of law, both in the United States and in other parts of the Atlantic world. We will examine how law addressed the category of “slave” and codified the power of slaveholders, and how those held as slaves interacted with legal institutions and practices, both civil and criminal. We will also ask to what extent law or custom on occasion provided means by which to exit the status of slave and find formal freedom. In the latter part of the course, we will discuss the period of Reconstruction, with attention to enforcement of the post-Civil War Constitutional amendments. In a final unit, we will look briefly at the phenomenon of contemporary slavery and human trafficking, and at legal strategies that have been employed to combat such practices, including the use of longstanding labor law and criminal law, as well as international law and new domestic statutes aimed at human trafficking.

Course readings include works by legal scholars and historians, a key memoir (*Twelve Years a Slave*), and the case files and decisions in several suits that reached the U. S. Supreme Court. We will pay particular attention to two cases on the slave trade and slavery: *The Antelope*, 23 U.S. 66 [1825] and *Prigg v. Pennsylvania* 41 U.S. 539 [1842]), as well as a state criminal case (*Celia, A Slave*); and a case from the period of Reconstruction: *U. S. v. Cruikshank*. We will also discuss court records of a freedom suit from the period of British rule of the Gold Coast (in what is now Ghana), and labor inspection records from modern Brazil. On February 12, class will be held at the William L. Clements Library, across the street from the Law School, where we will see and handle original manuscript primary sources on slavery.

Each student’s final paper will be a close analysis of a specific body of primary

documents (witness testimony, depositions, inspection reports, correspondence, etc.), centered on an individual case or problem. The paper should be approximately 16 pages of descriptive and analytic text (ca 4,000 words, not including notes), with an appendix consisting of an annotated transcription of four pages of primary material, for a total of 20 pages.

Successful completion of this course meets the Upper-Level Writing Requirement for students, except for first-year students choosing it as an elective. It also meets the International or Comparative Law Distribution Requirement. Students who read Spanish, French, or Portuguese fluently will have an opportunity to draw on primary materials in those languages, if they wish to do so.

Due dates: Each student will submit one short paper on January 29 (4 pages), and a brief outline of his/her panel presentation (2 pages) on the Wednesday of the week of his/her panel. A research prospectus (4 pgs) introducing the sources and questions for the final paper is due on Friday, April 3. The final paper itself is due by 5 p.m. on Monday, April 27.

Panels

Four student panels will be formed in the seminar, each of which will focus on a case or episode that highlights relationships between law and slavery.

Panel 1. Kidnapping or commerce? *The Antelope* (1825) [present on Week 6]

Panel 2. Free woman or fugitive? *Prigg v. Pennsylvania* (1842) [present on Week 7]

Panel 3. Gender, violence, and self-defense: *Celia, a Slave* [present on Week 8]

Panel 4. Voting rights in the face of white supremacist violence: *U.S. v. Cruikshank* [present on Week 11]

By Wednesday of the week *before* their presentation, members of the panel should choose and submit for circulation a packet of approximately 25 pages of primary and secondary documents on the case for reading by the entire class. At the assigned session, the panel will distribute a prepared handout, each member will present a specific aspect of the case, and the panelists will engage the class in an exercise designed to illuminate the stakes in the case.

Laptop and Tablet Use

To make it easier for everyone to concentrate on discussion, no phones, laptops, tablets, or other electronic devices are to be used during the sessions of the seminar. Please bring all materials to class in paper form, marked up as necessary.

Course Goals and Grading

The goal for the course is for each student to acquire an understanding of the dimensions and variability of the different forms of law that governed slavery, and their consequences, with an

emphasis on change over time, framed by the role that slavery played in the economy and society of different polities. In the process, each student is expected to work on drawing from primary sources a complex analysis of the dynamics of law in action in a specific setting. Mastery of this skill is to be demonstrated in class discussion, the panel presentation, the prospectus, and the final paper. Grades for the course will be calculated based on the following guidelines:

- Informed participation in class discussion (including Canvas discussion board) [40%]
- 4-page short writing assignment, due on Week 2 [5%]
- 4-page prospectus for the final assignment [5%]
- Presentation in the panel discussion on selected cases (including 1-pg handout) [20%]
- Final paper/ document analysis [30%]

Readings

Copies of the following three books have been ordered through the new Barnes and Noble ordering system. They are also on reserve in the Law Library Reserve Room. Please be sure to read from the designated editions.

Solomon Northup, *Twelve Years a Slave* (paperback edition **from LSU Press**)

Trevor Getz and Liz Clarke, *Abina and the Important Men* (Oxford U. P.). **Second Edition.**

Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (W.W. Norton, 2019).

All other required readings are on electronic reserve and are posted on the Canvas site. Electronic reserves at the Law Library are accessed through <http://lexcalibur.lib.law.umich.edu>.

SCHEDULE OF SESSIONS

Week I. January 22.

Preliminary Discussion: Examining slavery and freedom in historical perspective. The many “legalities” of slavery: formal codes, judicial doctrine, local legislation, implied reciprocities, patterns of enforcement or impunity, customary rules, and vernacular understandings.

Required readings:

Ira Berlin, *Generations of Captivity*, prologue, pp. 2-19.

Selections from the Louisiana Civil Code of 1825 [excerpts posted on Canvas and on reserve]

Letter of Octave Johnson, February 1864, in Ira Berlin et al., eds., *The Destruction of Slavery*, p.

217.

Letter of Joseph J. Harris, 27 December 1864, in Ira Berlin et al., eds., *Freedom's Soldiers*, p. 140.

First day's discussion question: For a Black soldier in the Union army in 1864, what might "law" mean, in contrast to its meaning five years earlier? What kinds of implied concepts of rights, reciprocities, and obligations show through the texts from Joseph J. Harris and Octave Johnson? [Note: For help in identifying the context in which each of these testimonies was produced, please review the 2-page document titled "situating documents in a timeline," in the folder in Canvas.]

Week 2. January 29.

Slavery in the making of the Atlantic world. Laying the legal groundwork for enslavement.

Writing assignment #1 (4 pages, due in paper copy in class on January 29, backup copy to be submitted through the Assignments section of the Canvas site). Choose some particular sphere of slave life regulated by law (such as marriage, manumission, or the ownership of property by slaves), and reflect on the similarities and differences that you see in the codes or laws of any two different kingdoms, colonies, territories, or states (medieval Spain, the French Antilles, and colonial South Carolina).

Using the 'Reply' function to the Week 2 Discussion question, please post a brief description of your comparison on the Canvas Discussion board by 5 pm on Tuesday, January 28, to facilitate our conversation in class.

Readings:

Selections from the law code of Alfonso X El Sabio (1221–1284), king of Castile, as reproduced in Samuel Parsons Scott, translator, and Robert I. Burns, S.J., editor, *Las Siete Partidas* 5 volumes (Philadelphia: University of Pennsylvania Press, 2001). I have included the introduction, which you can skim, as well as the following laws for careful reading:

Volume Three. The Third Partida.

Title XVI. Concerning Witnesses. Law XII and Law XIII [pp. 670-671]

Title XXIX. Prescription. Law III, Law V, Law XXIII, Law XXIV, Law XXV [pp. 838-839, 847]

Volume Four. The Fourth Partida.

Title V. Concerning the Marriages of Slaves [pp. 901-903]

Title XXI. Slavery; Title XXII. Freedom; Title XXIII, Status [pp. 977-987]

South Carolina, 1740 "Bill for the better ordering and governing of Negroes and other Slaves in this Province."

The *Code Noir*. Translated excerpts in Dubois and Garrigus, *Slave Revolution in the Caribbean*,

1789-1804, pp. 49–54. [note correction to one typo in the printed text, concerning burial].

For discussion in class: What seem to have been the conceptual sources for the multiple legal regulations of the behavior of slaves and masters? What might we infer from the contrasts among these different regulatory regimes?

Week 3. February 5.

Slavery in plantation societies in the 17th and 18th centuries. Legal pluralism, challenge, and contradictions. Early forms of (cautious) anti-slavery.

Readings:

Richard Grey, “The Papacy and the Atlantic Slave Trade: Lourenço da Silva, The Capuchins, and the Decisions of the Holy Office,” *Past and Present* 115 (May 1987): 52–68.

Anti-slavery petition from the Germantown Quakers (1688). Transcript.

Malick Ghachem, “Prosecuting Torture: The Strategic Ethics of Slavery in Pre-Revolutionary Saint-Domingue (Haiti),” in *Law and History Review* 29 (November 2011): 985–1029.

Somerset v. Stewart (12 Geo. 3, King’s Bench, 1772).

For discussion in class: How does opposition build to an institution as well-entrenched as slavery in the 17th and 18th century Atlantic worlds? What interpretations of law supported or opposed the critique?

NOTE: At the end of this session, we will form the four panels, based on student preferences.

Please take a look at the cases discussed in each of the panels listed on p.2, and post your first and second choice to the Canvas discussion board by 5 p.m. on Tuesday, February 4.

Week 4. February 12.

Building a legal-historical analysis. Session I. We will convene in the William L. Clements Library (909 South University Avenue, diagonally across South University from the Law Quadrangle. Please enter through the back door, which faces Harlan Hatcher Graduate Library).

We will work with the curators of manuscripts, printed works, and graphical materials at the Clements Library to view and read selected items dealing with law, slavery, and Reconstruction. This visit provides an opportunity for students to explore different modes of engaging primary sources, in preparation for the final writing assignment, which itself requires careful

transcription, annotation, and analysis of primary material.

Readings:

Ada Ferrer, "Haiti, Free Soil, and Antislavery in the Revolutionary Atlantic," *The American Historical Review* Vol. 117, No. 1 (February 2012), pp. 40–66.

Review the handout prepared for the meeting at the Clements Library, and make a preliminary selection in advance of the table whose materials you would like to consult.

Week 5. February 19.

Building a legal/historical analysis: Session II: The first 30 minutes of our session will be devoted to a discussion on locating primary legal-historical materials for your final document analysis, which may (if you choose) be closely linked to your panel presentation.

Note: Examples of possible sources can be found in the folder on Canvas titled "Primary Sources for Research," but you may also explore sources in the Law Library, the Clements Library, and on academic websites that provide carefully documented archival material. (An example of the latter is the site titled Slavery, Memory, and Reconciliation, prepared at Georgetown University: <http://slavery.georgetown.edu/>).

Reading for discussion: Trevor Getz and Liz Clarke, *Abina and the Important Men*, [Second edition], Parts I, II, III, V. (For further details, see the website <https://abina.org/>.)

For class discussion. What does "law" mean for Abina Mansah, and for the colonial officials who heard her case? How do Getz and Clarke build a narrative from a fragment of surviving archival material? Some scholars have critiqued Getz's distinction between slavery and not-slavery, or between slavery and marriage. What do you see as the relevant lines of distinction?

Week 6. February 26.

The international trade in African captives, after it is outlawed in certain jurisdictions: The case of the *Antelope* and the U.S. federal courts.

Readings:

Packet of selections from the trial record and opinion in the case of the *Antelope* 23 U.S. 66 (1825), plus excerpts from secondary literature on the case, including Jonathan Bryant, *Dark Places of the Earth: The Voyage of the Slave Ship Antelope* (compiled by members of Panel 1.)

Presentation of the *Antelope* case by Panel #1.

Note: All students should plan to submit by Friday, February 28, a **one-page** description of the sources to be used for final paper, using the Assignment section of the Canvas site. You are strongly encouraged to visit the instructor's office hours in advance to discuss possible sources.

Week 7. March 11.

Personal liberty laws, fugitives from slavery, and the complexities of federalism.

Required readings:

H. Robert Baker, *Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution*, pp. 1–8.

Packet of primary and further secondary readings on Prigg, as assigned by Panel #2.

Presentation by Panel 2. *Prigg v. Pennsylvania*.

Week 8. March 18.

Slavery, violence, and self-defense in the era of Dred Scott. The case of *Celia, a slave*.

Readings: Selections of secondary and primary materials in the case of *Celia, A Slave*, as compiled by members of panel #3. [Note: the manuscript trial records can be downloaded from the website maintained by Prof. Douglas Linder, of the University of Missouri - Kansas City Law School: <https://www.famous-trials.com/celia>]

Presentation by Panel #3. *Celia, a Slave*

Week 9. March 25.

Solomon Northup, *Twelve Years a Slave*. The LSU Press edition has been ordered as a textbook. If you are unable to obtain a copy of that edition, you may read another scholarly edition, such as the one published by W. W. Norton and edited by Henry Louis Gates and Kevin Burke. Be sure to consult the introduction to the LSU Press edition, posted on Canvas in pdf, which explicitly addresses the question of corroboration for Northup's account.

Discussion: As you read Northup's account, make a note (perhaps using post-it tabs for later reference) of each point at which he engages law or some form of administrative process. Choose **one** such episode, and post your observations on it to the Canvas discussion board by 5pm on Tuesday, March 24.

[If we end up having more than 16 students in the class, hence more than needed for the 4 panels of 4 students each, we may also use this week for a supplementary presentation by two or three

students, focused on cases that are available in languages other than English.]

Week 10. April 1.

Formal freedom. The second founding?

The achievement of legal freedom in the United States, the recognition of new rights. The passage of the post-Civil War Amendments.

Reading: Eric Foner, *The Second Founding*, Preface, Introduction, and chapter 2 (“Toward Equality: The Fourteenth Amendment”).

The Civil Rights Act of 1866.

Topic of discussion: Giving meaning to legal freedom. Different modes of understanding the Reconstruction Amendments through legal-historical analysis and through subsequent judicial doctrine.

Second graded writing assignment, **due by 5 P.M. on Friday, April 3**, to the instructor’s mailbox in the lobby of the 9th floor, Legal Research Building (with digital file to the Assignment section in Canvas, as a backup only):

Prepare a 1,000-word (4 pages, double-spaced, full margins) prospectus for your document analysis, accompanied by 1 page of transcription from the document. The prospectus, which can incorporate material that will eventually become part of your paper, should lay out your key questions about the larger document that you will transcribe, and suggest the ways in which the materials you have selected will enable you to address those questions.

Week 11. April 8.

The Fifteenth Amendment and the realities of voting in the face of terror.

Readings:

Foner, *Second Founding*, chapter 3 (“The Right to Vote: The Fifteenth Amendment”)

Selections on Reconstruction-era violence + the events behind *Cruikshank*, prepared by Panel 4.

Presentation by Panel 4: *U. S. v. Cruikshank*.

Week 12. April 15.

Coda: “Contemporary slavery”: The challenges of definition and enforcement.

Evidence from the United States and from Brazil:

Selections from Bridgette Carr, Anne Milgram, Kathleen Kim, and Stephen Warnath, *Human Trafficking Law and Policy* (LexisNexis, 2014). [selections will be drawn from pages 21 to 93]

Rebecca Scott, Leonardo Barbosa, and Carlos Haddad, “How Does the Law Put a Historical Analogy to Work?: Defining the Imposition of a ‘Condition Analogous to that of a Slave’ in Modern Brazil,” *Duke Journal of Constitutional Law and Public Policy* 13 (2017):1-46.

[Possible small panel on contemporary slavery]

Week 13. April 22.

Completing your research and formulating your findings. Class discussion to be organized by research clusters. A retrospective on law in slavery and freedom.

Reading: Foner, *Second Founding*, chap. 4 (“Justice and Jurisprudence”).

Final Papers

Guidelines for the final papers, which are due by 5 p.m. on Monday, April 27.

Each paper will provide a short, annotated transcription from the primary source, accompanied by a legal-historical analysis of the selected body of primary materials, and a reflection on the analytic questions that it addresses. Your conclusion may also suggest specific questions and sources that might enable the analysis to go further. The paper should be approximately 16 pages in length (4,000 words), with 4 additional pages of transcribed primary materials, for a total of 5,000 words (not including notes).

Be sure to follow a consistent standard footnote citation form – either Blue Book or Chicago Manual of Style. (A link to the short version of the Chicago Manual format is on the Canvas site.)

Please use 12 point typeface throughout (*including* the footnotes or endnotes), leave 1 inch side margins to allow room for comments, and **double-space** your text. Please indicate word count at the end.

Edit and proofread carefully. Submit a copy to the Assignment section of Canvas, and a **paper copy** to Prof. Scott’s mailbox in the lobby of the 9th floor, Legal Research Building, both by 5 p.m. on April 27. Papers will be evaluated on the clarity of the argument, the precision of the document analysis, the use of evidence to support the writer’s assertions, and the linking of the analysis to the broad themes discussed in the course.