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Law 421:01. Winter term, 2021. 1 credit.

Law and Slavery: Reopening a Nineteenth-Century Cold Case

Tuesdays, 4:40 - 6:40 [Remote, synchronous], February 9 through March 23

<https://umich.zoom.us/j/94172566028?pwd=V0FwZFUxcjBjNldDb05ucFd6Rjljdz09>

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The nineteenth-century legal record contains thousands of “cold cases” that illuminate the fraught relationship of law and slavery. Many formally criminal acts remained un-punished, including the kidnapping of free persons for sale into slavery and the outfitting of ships for the prohibited international trade in African captives. At the same time, enslavement itself rested on acts of force clothed in the robes of law, allowing peremptory processes such as the seizure of Black families as alleged fugitives from slavery. Formal legal proceedings against those who assisted fugitives could yield harsh penalties, which were sometimes met with popular resistance. In this seven-session, one-credit-hour seminar we will explore the methods of legal history as we read carefully in the surviving records of selected cases, and analyze their dynamics.

The seminar sessions will be organized around shared discussion and individual and collaborative research projects. We will begin by reading and discussing a vivid narrative of a dramatic case--the Oberlin-Wellington Rescue--to get a sense of the interplay of social movements and legal process in the fight over slavery. In our second week, we will take on the collective analysis of the 1853 Louisiana freedom suit styled *Eulalie vs. Long & Mabry*, building on a set of typescript transcripts. These provide an introduction to research in primary materials, and to the complexity of the legal fiction of “property in persons.”

Following a virtual visit to the Clements Library on February 23, we will move toward developing an individual project for each student (or pair of students). Students have various options for **the final written assignment**:

Option one is to select, transcribe, annotate, and prepare headnotes for selected excerpts drawn from records related to a case of your choosing, presenting those excerpts so that they convey your interpretation of the heart of the case. In other words, you will use the primary materials themselves as a scaffold on which to build a preliminary argument about the dynamics of the case.

Option two is to review an existing case file and craft a hypothetical legal intervention, such as a petition for a writ of habeas corpus for a specific child sold into slavery, a memo to the judge on the issues raised by an individual case, a brief on behalf of a local resident who is charged with assisting a fugitive from slavery, or instructions to the jury for a criminal or civil case.

As you assemble materials for your projects, we will explore several legal doctrines that are key to many such cases: habeas corpus in the context of slavery; state “personal liberty” laws; the 1793 and 1850 Fugitive Slave Acts; and actions under prescriptive claims to freedom. We will also talk about the logistics of projects like this --particularly the locating of manuscript case files and the task of transcription.

The first class will meet on February 9, and the last class will be on March 23. Feel free to contact Prof. Scott (rjscott@umich.edu) if you would like to discuss a potential project in advance of the beginning of the course.

Virtual Office hours (via Zoom): 2PM-5PM on Mondays. <https://umich.zoom.us/j/96784754186>

Course goals and grading: This course is designed with three goals in mind: (1) To enable students to engage primary materials to develop their own understanding of the dynamics of legal processes during the period of U.S. history when slavery -- encompassing the legal fiction of property in persons -- was recognized by both state and federal law. (2) To introduce law students to some of the mechanics of legal-historical research, including deciphering and analyzing nineteenth-century records. (3) To provide opportunities for teamwork and discussion in preparing individual or collaborative final projects.

Grades in the course will be based on informed participation in class discussion, both during Zoom sessions and on class discussion boards, and on the final written document exercise. Collaborative final projects are welcomed.

Examples of potential student projects. Note: An expanded and intermittently updated list of possible projects can be consulted in the following Google Doc, to which all enrolled students will have access:

<https://docs.google.com/document/d/1uNkjlRvGGdagvIr1dndPf8Pdamrov0BjE2HUVaUReb0/e/dit>

Here are some examples of projects based on the available typescript transcript of *Eulalie v. Long & Mabry*:

1. In 1856 Daniel Long and Zachariah Mabry were ordered by the Louisiana Supreme Court to release Eulalie Oliveau, six of her children, and eleven of her grandchildren, whom they had purchased from the men who had kidnapped the family. Six of the children and grandchildren, however, had by the time of the trial already been sold into the hands of an unknown buyer. The court took no steps to locate them. A document has now been uncovered that reveals their location. A possible project would be for a student (or pair of students) to craft a hypothetical form of legal action under Louisiana law that might have compelled the buyer to release the members of the family who were continuing to be held as slaves.
2. Louisiana criminal law prohibited the sale of free persons into slavery. Even after the issuance of the rulings in favor of the Oliveau family, however, no steps were taken to prosecute Long and Mabry, who had held them unlawfully. One possible exercise would be to envision an (unusual) Louisiana prosecutor who might have drawn up an indictment against Long and Mabry. You could craft that indictment, and produce a brief record of the likely outcome.

Here are some examples of unstudied cases for which documentation is available:

1. The Clements Library at the University of Michigan has recently purchased a batch of manuscripts that include attorneys' records dealing with a set of cases from Indiana. In 1848, Luther Donnell -- who had helped a family of fugitives from slavery reach freedom in Canada -- was indicted, tried, and convicted under Indiana law. The putative owner of the family, George Ray of Kentucky, then sued Donnell in federal court, seeking to recover the monetary value of those whom Ray had once held as property. A potential project would be to transcribe a selection of these manuscript records (which have been digitized) and present them in a way that highlights the legal dimensions of this story -- including the use of *habeas corpus*, and the successive uses made of the U.S. Supreme Court precedent set in *Prigg v. Pennsylvania*.

2. Some slavery cases were litigated here in Michigan. For example, the 1875 obituary of a Black abolitionist from Detroit, George DeBaptiste, recounted the following story: A family of five fugitives from slavery had settled in the town of Marshall, Michigan: "Their former owner, with others, had come on to capture them, and after they had done so the Crosssthwaites [Crosswhites] were rescued by citizens, including the Hon. Charles T. Gorham, then a resident and attorney of Marshall, now United States Minister at the Hague. They were sent on to this city [Detroit], and Mr. De Baptiste having been informed of their expected arrival met them at the depot, and soon after had them safe in Canada. The owner of the slaves sued Mr. Gorham in the United States Court in this city, and recovered a judgment against him of over \$5,000, for the value of the runaway slaves." I have posted the record of the decision in *Giltner v. Gorham* on the course Canvas site. Testimony from the case was printed in the local press; some clippings have also been posted on Canvas.

3. Another Michigan-related episode yielded what was referred to as the "South Bend case." A putative owner, John Norris from Boone County, Kentucky, tracked the family of David Powell to the town of Cassopolis, Michigan, where they had settled. Norris seized the family to take them back to Kentucky. A group of their Michigan neighbors gave chase, however, and caught up with Norris in South Bend, Indiana. They sought a writ of habeas corpus in an attempt to free the Powells from Norris's custody; he counter-sued. Anti-slavery activists published a detailed description of the case, which also received extensive coverage in the local press. I have posted a set of digitized clippings concerning the South Bend case on the course Canvas site; there is likely more to uncover. [Edith Lerner 3L wrote an essay on this case in a course last year; she has generously shared pdfs of the newspaper sources that she located.]

Many additional legal cases concerning slavery have never been formally studied in detail.

The Library of Congress offers a digitized selection of relevant materials:

<https://www.loc.gov/collections/slaves-and-the-courts-from-1740-to-1860/>

You can locate references to many cases in the footnotes to the magisterial work by Richard Blackett, *The Captive's Quest for Freedom*, and in other volumes listed in the research bibliography below.

Cases can also be uncovered in local nineteenth-century newspapers by using keywords, place names, or case names in the Advanced Search function of the database America's Local Newspapers.

<https://infoweb-newsbank-com.proxy.lib.umich.edu/apps/readex/welcome?p=EANX>

Newspapers.com and the website of the Library of Congress contain relevant word-searchable images from the nineteenth-century press. Such digitized material can include direct testimony from ongoing cases, and may provide details about the prosecutor, plaintiff, defendant, or judge that will enable you to use legal research techniques to locate the decision and other records.

(Students who may be fluent in French, Spanish, or Portuguese are invited, if they wish, to choose documents from the French Caribbean and Louisiana, Latin America, or Brazil. Please let me know in advance if you would like to try this, and we can consult about sources.)

Note: Special thanks to Keith Lacy of the UM Law Library research staff, and the staff of the Clements Library, for their assistance in locating decisions and original case files.

Reference Bibliography

The secondary sources listed here can help you identify specific cases, and review precedents and doctrine on legal questions related to slavery and freedom. Most are available for partial or full download, or online reading, through the main UM library portal at <https://www.lib.umich.edu/>. I have posted sample chapters of several on Canvas.

Bell, Richard. *Stolen. Five Free Boys Kidnapped into Slavery and Their Astonishing Odyssey Home*

Blackett, Richard. *The Captive's Quest for Freedom: Fugitive Slaves, the 1850 Fugitive Slave Law, and the Politics of Slavery*

Finkelman, Paul, editor. *Slavery and the Law*

Haliday, Paul D. *Habeas Corpus: From England to Empire* [discusses several early habeas cases related to slavery, including *Somerset v. Stewart*.]

Harris, John. *The Last Slave Ships. New York and the End of the Middle Passage*. [on the complicity of U.S. merchants with the unlawful international trade in African captives]

Jones, Martha S. *Birthright Citizens: A History of Race and Rights in Antebellum America* [includes discussion of efforts to expel free citizens of African descent from the U.S.]

Kennington, Kelly. *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* [examines case files of individuals who sued for freedom in Missouri. Most of these original files are now available in digital form.]

McDaniel, W. Caleb. *Sweet Taste of Liberty: A True Story of Slavery and Restitution in America*

Miles, Tiya. *The Dawn of Detroit: A Chronicle of Slavery and Freedom in the City of the Straits* [her chap. 4 includes discussion of *Denison v. Tucker*, a habeas case whose decision “constituted the rationale that regulated slavery until Michigan statehood in 1837.”]

Quarles, Benjamin. *Black Abolitionists* [includes discussions of aid to alleged fugitives from slavery]

Sharfstein, Daniel. *The Invisible Line: A Secret History of Race in America* [contains a discussion of the Oberlin defendants, convicted of aiding an alleged fugitive]

Sinha, Manisha. *The Slave's Cause* [on abolitionism]

Kimberly Welch, *Black Litigants in the Antebellum South*

Wells, John. *The Kidnapping Club: Wall Street, Slavery, and Resistance on the Eve of the Civil War* [on the seizure in New York of alleged fugitives from slavery]

Wong, Edlie. *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel*

List of sessions. (Readings will be posted in the Files section on Canvas.)

Week 1. February 9. Introductions. Discussion of the “Oberlin Rescuers,” Orindatus Simon Bolivar Wall, and the trial of Samuel Bushnell.

Reading: Daniel Sharfstein, *The Invisible Line*, pp. 85-105, and two accompanying primary documents posted in Files.

We will begin talking about the kind of cases you wish to work on, either individually or as part of a team. You can consult the ongoing Google Doc for ideas

<https://docs.google.com/document/d/1uNkjIRvGGdagvIr1dndPf8Pdamrov0BjE2HUVaUReb0/>

Week 2. February 16. The freedom suit of Eulalie Oliveau and the principle of “freedom by prescription.” Making sense of 19th century legal records.

Reading: Review the case file of *Eulalie v. Long & Mabry*, as filed in the records of the Louisiana Supreme Court. Both a typescript transcript and a digital scan of the manuscript are in Files on Canvas.

Assignment: Over several days, we will collectively create a set of entries (and some excerpts) from the case file to disentangle and convey the key developments in the case-- both the events in question, and the legal proceedings. Please make a contribution to that guide to the case (see the Google Doc link below) by Monday, February 15 at noon, so that everyone will be able to review the full document. Be sure to specify the date of each relevant development, citing to the page that is given in boldface and square brackets on the transcript, and add your initials at the end of your entry/entries. (For an overview of the case, you may find it helpful to take a look at pages 24 through 28 of the essay “Social Facts and Legal Fictions,” which I have posted in Files under Week 2.)

<https://docs.google.com/document/d/1PFDoukE64quuXRj4I7vltVNIBwDqZFWXtRVkbNXDgYY/>

Week 3. February 23. Virtual visit to the William L. Clements Library to view and discuss selected primary sources.

Reading: Habeas corpus and slavery, in Paul Halliday, *Habeas Corpus: From England to Empire*, in chap. 5, “Making Jurisdiction,” pp. 174-176; 208-212.

Please have this Google Drive open in a tab on your computer; it will enable you to Zoom in on images of items being discussed by the curators from the Clements Library.

<https://drive.google.com/drive/folders/1HO72VyBwO1hbmsUTfIB5x7wy2FDKRc4Y>

Week 4. March 2. Deadline for choosing your case. Class discussion of research procedures and challenges.

Reading: Robert Cover, *Justice Accused*, Prelude, ch. 10, ch. 11, & corresponding notes.

Oral presentation several student cases, with an emphasis on both the vantage point of the parties, including their perception of the law, and the vantage point of the judges.

Assignment for March 2: please return to the transcript of *Eulalie v. Long & Mabry*, or to the final (1856) decision in the case, and add another item to the Timeline. Notice the different understandings of the relevant law on the part of various parties, and the judges -- both the final ruling, and the odd concurrence.

<https://docs.google.com/document/d/1PFDoukE64quuXRj4I7vltVNIBwDqZFWXtRVkbNXDgYY/>

Week 5. March 9. From the 1793 Fugitive Slave Act through 1849. Case discussions.

Reading: “An Act respecting fugitives from justice, and persons escaping from the service of their masters.”(1793)

H. Robert Baker, *Prigg v. Pennsylvania: Slavery, The Supreme Court, and the Ambivalent Constitution*, ch. 4: “The Rights of Slaveholders and those of Free Blacks in Pennsylvania's Personal Liberty Law of 1826,” pages 65-81.

Oral presentations of several student cases.

Week 6. March 16. The 1850 Fugitive Slave Act and its Aftermath.

Reading: The 1850 Fugitive Slave Law.

Blackett, *The Captive's Quest for Freedom*, chap. 2, “The Law Does its Work.”

Oral presentation of several student cases.

Week 7. March 23. Concluding case discussions. Insights, puzzles, ideas for future study.

Final assignment: Each student will have an opportunity to present an overview of their case orally in March. The final written assignment, as described above, will be due on **March 30**. The recommended length for the final written assignment is 10 to 12 pages, double-spaced.

Note on Covid-19 and other stresses:

As you are already entirely aware, this is an unusually difficult year. Students and faculty face challenges with everything from internet connectivity to the physical and mental well-being of their families, their friends, and themselves. This seminar has been designed to be as collaborative and flexible as possible. Class discussions will be recorded, following Law School guidelines, so that any students who are ill or otherwise unable to attend can view the content. If you are experiencing particular difficulties with attendance or participation, please contact me via email (rjscott@umich.edu) so that we can seek adaptations that may reduce these difficulties.

Note on Covid-19 safety [a modified version of the University’s recommended statement]:

For the safety of UM students, faculty, and staff, as well as others in Washtenaw County, it is important to be mindful of measures that have been put in place for our collective protection. By returning to campus, you have acknowledged your responsibility for protecting the collective health of our community, and adhering to all safety measures mandated by the State of Michigan and the University, including maintaining physical distancing of at least six feet from others, and properly wearing a face covering when on campus and in other circumstances as required. Other applicable safety measures are described in the [University’s Face Covering Policy for COVID-19](#). Individuals seeking to request an accommodation related to the face covering requirement under the Americans with Disabilities Act should contact the [Office for Institutional Equity](#).

Presentations on March 2:

Daniel Guttenberg (dgutten@umich.edu) The case of Luther Donnell, for which the Clements Library has various lawyers’ papers in manuscript.

Derek Kang (kangdw@umich.edu) The case against Luther Donnell, for which the Clements Library has various lawyers’ papers in manuscript. The putative owner of the fugitive whom Donnell allegedly assisted subsequent brought a civil suit, which was dismissed.

Presentations on March 9:

Tamar Alexanian (taalex@umich.edu) *Commonwealth v. Aves*, an 1836 case about a 6-year-old girl named Med who was brought to Boston by a woman from New Orleans who claimed her as property.

Meredith Lindsey Joseph (mljos@umich.edu) The two cases (1838 and 1843) of a woman named Rebecca, who twice sued for freedom against James Black, Thomas Horine, and George Melody.

Arjun Parikh (arjunp@umich.edu) The rescue of the Crosswhite family and the subsequent suit, *Giltner v. Gorham*,

Zoe E. Seaman-Grant (zseamang@umich.edu) The 1858 case (tried in federal court) of the brig *Echo*, engaged in unlawful trading in African captives.

Presentations on March 16:

Rachel Carpman (rcarpman@umich.edu) The “South Bend Case,” on a family seized in Michigan to be taken to Kentucky

Jonathan B. Kagan-Kans (kagankaj@umich.edu) The 1851 “South Bend Case,” on a family seized in Michigan to be taken to Kentucky.

Kailyn E. LaPorte (laportek@umich.edu) Harrisson, a free man of color, indicted for “enticement,” that is, encouraging the flight from slavery of a woman named Caty. Maury County, TN, 1845. Acquitted.

Presentations on March 23.

Rob Lothman (rlothman@umich.edu) *Dorinda, a free woman of Colour v. John Simonds, Jr.* (St. Louis Circuit Court, 1826

Derrick A. Vallejos (davo@umich.edu) *In re Kirk*, the case of a fugitive from slavery in Georgia who reached New York.