

Andrés Reséndez,  
*The Other Slavery:*  
*The Uncovered Story of Indian Enslavement in America*

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America is often thought of as a place under the rule of law. The inscription on the architrave of the Supreme Court building in Washington, DC, “Equal Justice Under Law,” was not added until the early 1930s, but long before that the American ideal had been the rule of systems and procedures rather than the arbitrary whims of a single person or unelected body. One of the main putative reasons that the American Founding Fathers proffered for their desired split from England was that the American colonists, in their view, were not being treated fairly within the English legal system. This mid-eighteenth-century quarrel reveals a much older tradition in England, and in the English colonies in North America, of adjudicating cases equitably, in accordance with the ancient constitution. Indeed, among the formative documents of this ancient constitution is the Magna Carta (1215), whereby even an English king was made to acknowledge that he was subject to the rule of law. It was this spirit of English law that informed the American Revolution and continues to serve as the benchmark for the United States today.

England was not the only European power to move into the New World, of course. If anything, the Spanish Empire which preceded the English in the Americas had an even stronger legal tradition than did England. The Spanish Empire was a highly legalistic entity, and the kings and queens of Iberia ruled their holdings, east and west, through the gauze of laws, a panoply of edicts, decretals, and proclamations which were rigorously debated by ministers and subjected to intense scrutiny by legal philosophers and other learned counselors both prior to and after promulgation. Long before the first English settlers set foot along the eastern seaboard of North America, the Spanish had been conquering—and marauding in—South and Central America,

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1) See, for example, the Spanish Requirement of 1513 (the “Requirimiento”), which was the legal nicety overlaying the Spanish conquest of Native territories outside of Spain. Cf., e.g., Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

all under the pretext of codified law.<sup>1)</sup> The rule of law has been the ideal of the European overshadowing of the Americas since Columbus (who thought he was in India) first arrived in 1492.

But wherever there is an ideal, there is always a neglected reality. Much bruted in the Americas, this rule of law is, but how do things play out on the ground? Do people act as though the law brings equal justice, or merely say that it does so they can keep doing the unjust things that bring them more tangible rewards than fairness: money, power, and the trappings of office? A new book by Andrés Reséndez, who is a professor at the University of California-Davis and a specialist in the history of Mexico, challenges us to think, not just about the English and American shortcomings of the ideal of justice under the law, but about similar shortcomings throughout the entire western hemisphere. Even more important, *The Other Slavery* prompts a revisiting of the jurisprudential array as it is currently deployed worldwide. What is law, exactly, and how have the uses to which the law has been put unsettle some of the received ideals of countries and societies overall? What can the ongoing defiance of law teach us about justice and the limits of jurisprudence and legislation?

Everyone knows that Africans were enslaved in the Americas. Growing out of much older slaving practices and networks in Africa, which were run by Africans and Muslims and later appropriated by Portuguese traders and raiders, the slave system was brought by Europeans to points west of the Treaty of Tordesillas line, with Africans working plantations and generally forced into unrecompensed servitude in the Caribbean, as well as in North, South, and Central America. The “middle passage,” the route across which black Africans were transshipped from Africa to the New World, is well known as a cavalcade of nightmares. Many died along the way and were thrown overboard. Those who survived took their physical and psychological scars with them to wherever their master, who had purchased them as one would a wagon or an ox, wished them to go. The entire practice, from kidnapping to sale to forced labor, was morally indefensible, and yet legally permissible. The rule of law was tasked with setting in good order a practice ultimately rooted in lawlessness: human trafficking, not to mention the countless by-crimes attendant thereupon.

While the history of African slavery is familiar to many, less well known is that Africans were not the only people enslaved in the Americas. For example, many whites—Europeans, Slavs, and other Caucasians—worked under conditions of permanent or semi-permanent unfree servitude, not only in the Americas but also throughout Europe and Africa and beyond. But as the slave system hardened in the Americas, the racial division between black Africans and Caucasians led to a convenient index of labor status, with skin color coming to stand as a marker for self-ownership or the lack thereof. Eventually, white slavery as a practice grew less common, but whites were not the only non-Africans to work as slaves. From the

moment of Spanish arrival in the New World, Indians were captured and enslaved. Indian slavery in the Americas predates black slavery there, and, by all accounts, exceeded it in scope and also outlasted it in duration.

The premise of Reséndez' book is that this "other slavery"—that is, the enslavement of Indians—was somewhat different from black slavery in that Indian slavery was almost always technically illegal. Columbus took natives with him back to Spain on the return leg of his first voyage to the New World, and after that a wave of European (mainly Spanish) colonizers and adventurers began trading heavily in slaves, most of them Indians. The Spanish crown reluctantly tolerated this at first, but soon Queen Isabella forbade the practice as an affront to the dignity of her subjects (among whom she included the Indians) and an encroachment on her royal prerogatives. Subsequent Spanish monarchs took an equally, or even more forceful, line against slavery. Perhaps most notably, the Dominican friar Bartolomé de las Casas is famous for arguing in favor of the humanity of Indian slaves. In 1542, and at the urging of de las Casas, Holy Roman Emperor Charles V duly outlawed the practice of Indian slavery in a landmark legal decree premised upon de las Casas' arguments that Indians were children of God. The name of this decree was, fittingly enough, "The New Laws" (*Leyes Nuevas*). Only very briefly was Indian slavery ever legal, and even then it was an aberration of Church teachings and a distortion of the law.

And yet, Indian slavery was everywhere. In many ways, it was even more fundamental to American history than was the enslavement of Africans. Indians were being reported as effectively enslaved as late as the 1960s, and even today it can be argued that Native American reservations are home to people of attenuated degrees of autonomy. American judges and the United States Congress legalized this Indian enslavement (cf., e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Dawes Severalty Act (1887), and so forth), but Spanish and, later, Mexican and other New World judges were almost always against it. Even so, slavery as an institution was almost as common as marriage. Domestic slaves, almost always Indian, were a staple of Mexican towns (and even of Spanish towns, as many Spaniards took their Indian slaves back with them if they chose to return to the Iberian Peninsula). Courts and magistrates and bishops and kings repeatedly denounced this practice, and there were many instances of Indians securing their freedom through legal channels once it had been established that they were enslaved, but many attempts to outlaw a thing are tacit acknowledgements of the existence of many outlaws, and slavery, in some form or another, remained in de facto effect for centuries. The labor in Mexican and Peruvian silver mines, the domestic helpers for priests and lawyers in New Mexican frontier towns, the sexual captives of *encomienda* owners throughout Latin America—these were slaves, or something very much like slaves, and all of this went on as though invisible to the rule of law, indeed in direct defiance of it.

To be sure, North American slavery in native populations grew out of a much older and indigenous practice. Indians had been enslaving Indians for centuries, at least, before the arrival of Europeans, and Europeans quickly entered into a symbiosis with Indian slavers whereby, say, Apache or Comanche or Navajo raiders supplied labor by kidnapping Pueblo or Pawnee or Utes and selling them off, under brutal conditions, at European trading posts. At first glance this may seem to lend credence to the Spanish claim of civilizing the natives by way of superior cultural practices, such as the rule of law. However, the Indian enslavement of other Indians actually undermines the argument that Europeans civilized North America by imposing law on anarchy. The Europeans may have put an end to human sacrifice among the Aztecs, for example, but the sacrificial victims were prisoners of war, and the Spanish simply found them to be more useful alive than dead. The altars to Tezcatlipoca may have stopped running with blood, but human trafficking went on apace. The rule of law did not civilize the Americas so much as repurpose the practice of slavery and provide it with a convenient cover, ironically, of denied legal sanction.

The law, then, and those who practice, make, and enforce it, waged a half-millennium-long battle to uproot slavery by legal means. The failures outweighed the successes until the very end. (Human trafficking, tragically, continues to this day, and not only in the Americas, but in other countries also ostensibly under the rule of law.) This would seem to cast in dubious light the entire legal system. I suggest here turning to Hiroike Chikuro's conception of law for a different perspective on law and justice, and as a possible hint toward an alternative to pure, or mere, rule of law.

As Hiroike lays out in Chapter Fourteen, "The Principle, Substance and Content of Supreme Morality," of his collected works, the Chinese ideograph which expresses the concept of "law" (*fa*; J. *hō* 法) is a simplification of a much older ideograph which more accurately expresses the complex etymology of the character. As Hiroike explicates the origin of the term, *fa* was "used in the sense of the golden mean and average or equilibrium".<sup>2)</sup> In other words, while in the European and Euro-American context law and practice could be conceptually and practically dis severed, so that the law could remain unadulterated, but impotent, while outrageous violations of the law continued unabated, in the Chinese conception of the law justice as a mean was literally embedded in the ideographical etymology of the term for "law" itself. To have law, in other words, was to *do* law, that is, to act justly case by case. One could not Platonize the law; one had to see the case in its own light and render judgment accordingly.

*The Other Slavery* presents a multi-century history of an abject failure of law to

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2) Chikuro Hiroike, LL.D., *Towards Supreme Morality: An Attempt to Establish the New Science of Moralogy*, vol. 3 (Kashiwa, Japan: The Institute of Moralogy, 2002), 28–29.

effect justice. I suggest that a Hiroikean approach to law—taking into account not only the practice of slavery under cover of law but the many other violations of justice, such as abortion, which have found and continue to find justification in the black letter of legislation and regulation—is a way forward beyond the easy dichotomy of law and practice under the current Western legal framework. *The Other Slavery*, in other words, points toward another kind of law, a moral law rooted not in proclamations, not in words at all, but in justice intuited and acted upon.

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