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The Jurisprudence of American Slave Sales

JENNY B. WAHL

An analysis of all appellate cases involving slave-sales reveals that southern courts helped minimize the costs of trading in slaves. Slave-sales law also surpassed other contemporaneous commercial law in sophistication. Why? Greater information gaps between slave buyers and sellers called for more complex institutional support. The enormous property value embodied by slaves also led to more litigation, greater need for settled law, and a more even match of power between plaintiff and defendant. Additionally, legal rules surrounding slave sales substituted for the employment law governing free-labor markets.

In the village of Sharpsburg, Maryland, scarcely a mile from the site of the 1862 Union victory that served as catalyst for the Emancipation Proclamation, rests a small stone. It is unremarkable save for its inscription:

> From 1800 to 1865 This Stone Was Used as a Slave Auction Block. It has been a famous landmark at this original location for over 150 years.

As these words testify, slave sales were commonplace in the antebellum—and even Civil War—South.[1] Like all commercial transactions, slave sales spawned litigation. Indeed, disputes surrounding the sales of slaves constituted one-sixth of the nearly 11,000 American appellate cases involving slaves.[2] Judges drew on general legal principles, including those concerning the sale of animals, to settle such disputes. Yet the humanness of the property sold—and its value to the southern economy—complicated

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[1] Because the United States banned the international slave trade in 1808, new U.S. slaveowners had to make domestic purchases or inherit their freshly acquired property after that time. In his monumental study of slave trading, Tadman estimated that, from 1820 to 1860, an average of 200,000 slaves per decade moved from the upper South to the lower South. Most of the movement took place through trades rather than migration. Tadman asserted, in fact, that slaves who lived in the upper South faced a very real chance of being sold by their owners for speculative profit. Tadman, *Speculators*, esp. pp. 5–8, 47, 113, 129. Also see Franklin, *From Slavery*, p. 104; Roark, *Masters*, p. 88; and Bancroft, *Slave Trading*.

[2] State and federal appellate court reporters record a total of 10,989 cases regarding controversies over slaves that were decided up to 1875 in the 15 slave states (in the years following statehood) and the District of Columbia. I compiled these cases by hand-searching the 1,026 volumes of reporters. Many slave cases are cited in one of two published indices—Catterall's *Judicial Cases* and the Century Edition of the *American Digest*. For a fuller description of the data and a discussion of their merits, see Wahl, "Bondsman's Burden," pp. 500–01, fn. 100.

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the determination of liability and the types of remedies used by judges, as well as the terms of the sale contracts themselves.

The following article applies economic analysis to the law of slave sales. I discuss two sets of cases: those in which specific covenants such as warranties gave rise to the dispute, and those in which judges determined liability based on parties' representations and knowledge rather than on express stipulations. The study suggests that slave law developed in a way that minimized the cost and uncertainty of trafficking in human flesh, thus strengthening the institution of slavery.

What is more, slave law was more sophisticated than the law governing other sorts of transactions, in particular livestock sales. Three factors are pertinent. First, the high market value of slaves enhanced the likelihood of litigation and the importance of well-defined rules to govern slave transactions. Second, compared to other antebellum commodity markets, slave markets involved larger information gaps between buyers and sellers. As a result, slave markets called for relatively more elaborate institutional support. Finally, plaintiff and defendant were more evenly matched in slave cases. In other areas of law, contemporaneous legal doctrines tended to favor powerful interests, primarily those associated with expanding industries and capital mobilization; losses fell mostly upon those who had little political or economic voice.

THE ECONOMICS OF SLAVE LAW: A HISTORICAL PERSPECTIVE

Economic Analysis of Slave Law: An Overview

Legal rules influence behavior. Because courts rely on precedent, the liability and damages determined in a given lawsuit essentially set prices for the actions of future litigants. They can also encourage similarly situated parties to make advance agreements and therefore stay out of court. Given the power of such precedents, it is important to inquire whether the rules themselves are efficient. As Robert Cooter and Daniel Rubinfeld have succinctly explained, legal disputes are resolved efficiently when legal entitlements go to those who value them most, legal liabilities go to parties who can bear them at the least cost, and transactions costs of dispute resolution are minimized.[3]

The law of slave sales concerned itself with the transfer and protection of property rights, not with the establishment of ownership. Accordingly, one can evaluate the efficiency of this body of law by considering how well

[3] Cooter and Rubinfeld, "Economic Analysis," p. 1070. This type of analysis stems from the work of Ronald Coase. Coase, "Problem." As Coase demonstrated, legal rules would not affect the allocation of resources if markets operated without cost. Because transactions costs are positive, legal rules affect resource allocation and hence behavior. Also see Posner, *Economic Analysis*, pp. 21–24, 229–33 and *Tort Law*, pp. 1–6; Posner and Rosenfield, "Impossibility;" Calabresi, *Cost*; Cooter, "Economic Theories;" Cooter and Ulen, *Law*; Gilles, "Negligence;" Wittman, "Price;" and Calabresi and Melamed, "Property Rules."

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it met the last two criteria posed by Cooter and Rubinfeld. Put simply, did the legal rules governing slave sales tend to allocate and measure losses as economically minded litigants would have, and to encourage the use of markets when doing so was cheap? I believe they did.

The southern judiciary respected contractual rights and responsibilities agreed to by slave buyers and sellers. Absent fraud, misrepresentation, and coercion, arrangements made ahead of time represented what contractual parties thought was best for them. Because judges supported these arrangements, they helped keep transactions private and cheap, even encouraging people to develop standardized forms of dealing.[4] Sellers typically paid damages (based on market prices) for unfulfilled promises, provided buyers lived up to their end of the bargain. By consistently placing the cost of a broken contract on the breaching party, courts encouraged people to breach contracts only if benefits exceeded costs. By using the market to determine damages, courts also gave incentives to contractual partners to avoid litigation costs by means of liquidated-damage clauses—clauses specifying a sum of money the breaching party would pay to his contractual partner in the event of a breach. Courts further discouraged litigation by deciding that sellers avoided liability when buyers took price discounts in exchange for explicitly acquiring the risk of defective property.

Some slave sales were informal, with little spelled out in a written contract. When disputes arose under these circumstances, courts had the ticklish task of assigning responsibility for losses to plaintiff or defendant. Here I find that judges allotted losses to the party who could most cheaply have borne the risk of such losses—just as economically minded parties would have done, had they made their preferences known in advance.[5] As a result, the common law reinforced natural market tendencies, gave incentives to potential buyers and sellers of slaves to vocalize and formalize their true preferences, and helped minimize the joint costs of moral-hazard and adverse selection. In the process, southern judges also encouraged people to settle differences beforehand and avoid the courtroom.

Slave Law Versus Other Antebellum Law

To call the law of slave sales efficient entails adopting the view that the costs of legal rules to those affected most—the slaves—simply did not

[4] A South Carolina judge eloquently explained in a slave case why courts deferred to private agreements: "When men make contracts, and have fair opportunities of consulting their own prudence and judgment, there is no reason why they should not abide by them." *Watson v. Boatwright*, 1 Rich. 402, 403 (S.C. 1845).

[5] Posner and Rosenfield, "Impossibility," pp. 122–25, noted that one can determine the least-cost risk bearer by answering three questions: Who can foresee the risk of loss most cheaply? Who can predict the size of the loss most cheaply? Who can insure against the risk of the loss most cheaply? Often, the answers to at least the first and third questions point to the same party. Their article discusses several useful examples.

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matter.[6] Even if one can swallow something so noxious, the economic analysis of law runs the risk of lacking historical perspective. The common law of slavery, whether it concerned the sale, hiring, or accidental injury of a slave, looks far more like modern-day commercial, employment, and tort law than it does nineteenth-century law. For instance, antebellum judges North and South respected express agreements no matter what the object of sale, but slave transactions generated greater scrutiny of sales contracts, bills of sale, and buyer behavior. In addition, nineteenth-century courts tended to apply the doctrine of *caveat emptor* to nonslave sales that lacked express agreements, whereas southern courts resolved disputes in slave sales by looking at prices, representations made by sellers, and knowledge that sellers and buyers had or should have had. In slave cases, judges also generally required disclosure of known flaws and considered various types of remedies carefully. The relatively more complex calculations undertaken in slave cases resemble those that arose decades later in other types of lawsuits.[7]

A brief overview of the evolution of American common law helps put these differences in context.[8] Although British common law during the eighteenth century emphasized the protection of property owners and consumers, the focus of American law changed soon after the Revolution. Early nineteenth-century judges began to move away from strict liability toward a negligence standard that considered the degree of carelessness

[6] Eggertsson, *Economic Behavior*, pp. 112–16, pointed out that calling law efficient also ignores the cost of changing the structure of property rights and the possibility that the state maximizes something other than the value variable of neoclassical economics. His criticisms are apt, and I pay them heed throughout the article. To place my work within the law-and-economics framework, however, I adopt this terminology.

[7] Fede, "Legal Protection," went so far as to argue that the law of slave sales foreshadowed elements of the modern Uniform Commercial Code. For example, slave states typically implied warranties of title and soundness (unless buyer and seller obviously knew a slave was not sound). The Code contains similar implied warranties in its implied warranty of merchantability (§2-314). The Uniform Commercial Code was drafted (primarily by Karl Llewellyn) by 1952 and has been adopted (at least in part) by all states of the union. Teeven, *History*, p. 222.

Fede also claimed that southern judges leaned away from the *caveat emptor* doctrine in disputes concerning sales of items other than slaves. Southern judges may well have desired consistency in state commercial law for different items of personal property more than they wanted consistency across states—northern and southern—in commercial law for nonslave items. That is, slavery itself likely influenced the path of southern law. Yet my research shows that the common law of slave sales differed from that of its closest relative, livestock sales. So while Fede may be right in contending that southern commercial law diverged from northern law, the common law of slave sales still stands alone.

[8] The following narrative offers a perspective similar to that of Douglass North, who argued that the legal system (like other institutions) reflects people's efforts to reduce transactions costs and to influence the governing authorities, as well as the desires of those in power. North's writings include "Institutions and Economic Performance," "Institutions," "Economic Performance," *Institutions, Structure*; and North et al., *Growth*. See also Hurst, *Law* and *Growth*; Horwitz, *Transformation*. For a brief lucid comparison of the neoclassical view and the neo-institutionalist approach, see Du Boff, "Toward a New Macroeconomic History." Eggertsson, *Economic Behavior*, provided an excellent text-length treatise on the neo-institutionalist approach, along with several useful references. Coase influenced the neo-institutionalists as well as economics-and-law researchers. See especially "Nature." Barzel, *Economic Analysis*, nicely combined elements of both sets of literature.

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associated with the defendant's actions. Fairly quickly, moreover, they moved even further to embrace economic expansion, mobilization of capital, and a "release of energy," to use J. Willard Hurst's terminology. In commercial transactions, for example, courts paid attention to manufacturers' and merchants' demands for standardized, foreseeable costs and tended to shy away from placing liability on sellers of consumer goods. The doctrine of *caveat emptor* for sales replaced the sound-price rule (which presumed that any item sold at full price was sound) by the early 1800s and remained strong through the early twentieth century.[9]

These shifts in legal liability correspond roughly to the surges of economic growth following the turn of the nineteenth century. In effect, the legal system created rules that benefited expanding industries and new technologies and that placed the burden of growth on those whose political voice was slight and whose losses were not fully measured.[10] The mass markets created by nineteenth-century commercial law, for example, made the ultimate consumer insignificant. Individuals injured or disappointed by commodities—even livestock—rarely found the cost of lawsuits worthwhile; transactions costs generally prohibited groups of aggrieved consumers from joining forces.

Slave law differed from other antebellum law because the plaintiffs were not small-time consumers, employees, or accident victims, whose losses might not figure into the grand sweep of nineteenth-century American economic growth. Instead, plaintiffs were slaveowners, whose concerns could not be dismissed lightly. Although economic progress mattered to southerners, so did slavery. Slaves contributed significantly to southern wealth and the southern way of life. The men who attended the Confederate Constitutional Convention even referred to slavery as the "cornerstone" of the Confederacy.[11] Moreover, because a slave might represent a substantial chunk of one's assets, litigation was worth the cost to many a slaveowner plaintiff when litigation over lesser-valued property or an

[9] For discussions of property law, see Hurst, *Law*; Horwitz, *Transformation*, esp. pp. 85–102; and Friedman, *History*. The history of contract law appears in Teeven, *History*, pp. 140, 187; Hamilton, "Ancient Maxim;" Friedman, *Contract Law*, p. 17; Zainaldin, *Law*, p. 58; and Hurst, *Law*, p. 98. While the *caveat emptor* doctrine reigned supreme through most of the nineteenth century, particularly in the North, northern courts created certain narrow exceptions. Horwitz, *Transformation*, p. 199; and Friedman, *Contract Law*, p. 103.

[10] According to Horwitz, northern courts and other northern institutions focused on growth and development, throwing their weight behind "new" property to the detriment of "old." *Transformation*, pp. 63–64. See also Hurst, *Law*. Horwitz also pointed out that assigning the burdens of economic development through the legal system hit the weakest and least active elements of the population. If economic growth had been subsidized through the property taxes then in place, the burdens would have fallen more on the wealthy. *Transformation*, pp. 101–02. In a related point, Mokyr, "Technological Inertia," noted that governments could affect the path of development by their championing—or discouraging—of technological change. One might characterize the bureaucrats of the antebellum period (particularly in the North) as exhibiting an excess of enthusiasm about technology. For estimates of nineteenth-century American growth, see Atack and Passell, *New Economic View*, pp. 8–12; and Engerman and Gallman, "U.S. Economic Growth."

[11] Finkelman, "Exploring," fn. 272.

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ill-defined value of life was not.[12] Compared with other antebellum disputes, then, arguments over slaves led to more litigation, more detailed legal rules, and more attention paid to disgruntled plaintiffs.

Placing more responsibility on slave merchants than on other sellers also reflected the greater divergence in knowledge between seller and buyer. Sellers of all stripes are typically more familiar with the merchandise than buyers.[13] As compared to the quality of relatively fungible agricultural and manufactured goods, however, the qualities of human beings were difficult to discern by would-be buyers. Obtaining information about their purchases cost slave buyers more than buyers of other commodities. At the same time, slave sellers could gain such information more cheaply than, say, livestock sellers. Because slaves could talk, their owners knew more about the slaves' well-being than owners of beasts knew about their property.[14] These information gaps caused the law of slave sales to differ from the contemporaneous law of livestock sales—its closest relative—in key respects.

The informational disadvantages of slave buyers suggest an additional reason for the relatively greater protection afforded them by the courts. The rules that shielded slave buyers from adverse selection at the point of sale took the place of protections enjoyed by employers of free persons. In the free labor market, antebellum employers and employees could bargain over pay and work conditions, and employers could typically fire unsatisfactory subordinates at will. Slaveowners dealt with a much different labor force. If a bought slave was not as skilled or productive as a buyer had good reason to believe, the buyer did not have the option of lowering wages or discharging the slave. A slave buyer with no legal recourse might have tried to foist off such a slave onto another unsuspecting purchaser, but the end result would have been lower overall prices and a faltering sale market.[15]

[12] Ransom and Sutch, *One Kind*, pp. 52–53, estimated that slaves constituted 60 percent of agricultural wealth in five southern cotton states and that the average slaveholder held two-thirds of his wealth in slaves. They conservatively estimated that the 1860 market value of the 2 million slaves in the five states was $1.6 billion. Ransom and Sutch later calculated that the total value of slaves on the eve of the Civil War was about $3 billion. "Capitalists," p. 151. See also Wright, *Political Economy*, who noted that even a few slaves would comprise the major part of most slaveholders' portfolios. Also see Soltow, *Men*, esp. pp. 65, 138–39; and Goldin, "Economics."

[13] Fede, "Legal Protection," p. 330, has also asserted that slaves were a high-risk investment and that slave buyers were at an informational disadvantage. This disadvantage persisted no matter if the seller had owned and employed the slave or the seller merely traded slaves as merchandise. Why? Long-time property owners had the advantage of close companionship with the property they sold. Although professional traders may not have had this advantage, they had others. Because traders were in the business of assessing quality, they should have known more about their wares than the typical individual who bought from them.

[14] That slaves could talk might lead one to believe that slave buyers could also cheaply assess the slaves' health. As I discuss later, however, slaves on the auction block had incentives to lie. Although they might lie to their owners as well, owners at least had the ability to observe the behavior and well-being of slaves over a longer period of time. And slaves who frequently lied also gave information to their owners, albeit indirectly.

[15] See Akerlof, "Market," for a general analysis of the lemon problem. Legal rules reflected market structures as well. The simple *caveat emptor* doctrine suited the face-to-face transactions that occurred

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As humans, slaves also posed knottier concerns than other chattel property: a slave could kill himself in anguish upon separation from his family or be freed without his owner's consent if the government summarily abolished slavery. Judges therefore pondered contractual interpretations more when slaves were on the auction block.

ECONOMIC ANALYSIS OF THE COMMON LAW OF SLAVE SALES

Cases in which People Made Express Agreements

Southern judges respected express agreements made by buyers and sellers of slaves. By leaving risks where parties had placed them and fixing damages by reference to market prices, legal rules helped settle expectations and contribute to orderliness in slave markets.

WARRANTIES

Sellers of slaves frequently offered warranties of a slave's title, soundness, or specific characteristic. Then as now, warranties cheaply communicated to buyers that sellers would take financial responsibility for defective products. As a result, buyers paid higher prices for warranted slaves.[16] In turn, a seller who expressly warranted his slave as sound typically paid damages if the slave was defective.

To recover in a warranty case, the plaintiff actually had to prove that the property purchased was unsound; he could not simply speculate that the slave was prone to unsoundness. In a Georgia case, for instance, the court refused to adjudge the children of tubercular Sofa as unsound, in part because they were apparently born before Sofa fell ill.[17]

What sellers knew about their wares did not matter in warranty cases. Even sellers unaware of their slaves' unsoundness had to pay up.[18] In one

in many antebellum commodity markets. By contrast, southerners conducted many slave sales through traders even in the early years of the republic, which made a rule of *caveat emptor* less workable. Stampp, *Peculiar Institution*, p. 240; Fede, "Legal Protection," p. 330; and Tadman, *Speculators*. Not until the latter half of the nineteenth century did middlemen spring up in other commodity transactions, along with new methods of financing and marketing. Teeven, *History*, p. 220; and Chandler, *Visible Hand*, pp. 209–15, 236–37.

[16] *Patton v. Porter*, 3 Jones 539 (N.C. 1856), noted that warranties shifted risk rather than necessarily indicating that slaves were sound. Of course, slave traders had market incentives to warrant only their sound slaves because a reputation for fraud or misrepresentation would have hurt their future ability to trade. Sellers typically had better information about their wares than buyers. Consequently, if sellers were risk-neutral and buyers risk-averse, sellers might have found it particularly profitable to offer warranties.

[17] *Dean v. Traylor*, 8 Ga. 169 (1850). *Chilton v. Jones*, 4 H. & J. 62 (Md. 1815), is a similar Maryland case involving scrofula.

[18] Rarely, courts rescinded slave sale contracts instead of awarding damages, at times with a setoff for use. For example, see *Scott v. Clarkson*, 1 Bibb 277 (Ky. 1808). Defendants who paid damages also sometimes requested an offset for the value of services rendered by the sold slave. In *Harvey v. Kendall*, 2 La. An. 748 (1847), the court refused such a request, saying that the defendant's use of the purchase money compensated for the slave's lost services.

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intriguing North Carolina case, a slave was warranted to have no defect in his eyes. When he turned out to be nearsighted, the court decided the warranty had been breached. Justice Thomas Ruffin dissented, saying, "It is known that there are more myopic persons, among the educated and refined classes . . . and many more among white[s]" but that nearsighted whites were not thought of as defective.[19] Yet a slave was different, as the majority opinion recognized, because the slaveowner bore the loss of the slave's circumscribed abilities to perform tasks or, alternatively, had to pay for spectacles.

Certainly sellers who knew their wares were defective had to deliver on warranties. In the illustrative case of *Ayres v. Parks*, buyer David Ayres insisted upon a warranty of soundness for slave Peggy that stated she was "sound, healthy and clear of disease, . . . and warranted and defended from all manner of claims whatsoever." Peggy had frequent nosebleeds. The seller initially refused to sign the bill of sale unless the bleeding was excepted, but Ayres would not buy Peggy unwarranted because he wanted to resell her farther south. The defendant eventually acceded to Ayres's wishes, saying that the price was "very large . . . greater than she could ever get again." When Peggy died from a severe nosebleed shortly after the sale, the court supported purchaser Ayres's action for breach of warranty.[20]

In a case that pairs nicely with *Ayres*, seller Slatter refused to warrant his slave's health unless he received an extra $200. Buyer White agreed to take the slave without a warranty and with a clause in the sale contract stating that "White . . . runs the risk of her health." The slave died soon after the sale; White sued for damages. The court decided in Slatter's favor. This case was not simply a no-warranty one: the buyer specifically agreed to shoulder financial responsibility for the slave's health, and the court respected the arrangement.[21]

Vendors who gave warranties of soundness did not have to pay damages for slaves that, after the sale, suffered at the hands of their buyers or lacked necessary medical attention. Buyers could more cheaply have foreseen and guarded against these circumstances, so judges' rulings circumvented moral-hazard problems and discouraged buyers from behaving perversely. In an 1842 Arkansas case, for example, Pyeatt warranted his slave Sophia as sound. Buyer Spencer claimed Sophia was insane because she talked to herself and ran away; the jury awarded damages. The appellate court reversed and awarded a new trial, however, because Spencer had whipped

[19] *Bell v. Jeffereys*, 13 Ired. 356, 360 (N.C. 1852).

[20] *Ayres v. Parks*, 3 Hawks 59, 60 (N.C. 1824). The court in *Aven v. Beckom*, 11 Ga. 1 (1852), came to a similar holding even though the purchaser—who owned the bought slave's wife—knew more about the slave than the seller's agent, who was the administrator of the seller's estate.

[21] *White v. Slatter*, 5 La. An. 29 (1850). For simple no-warranty cases, liability rules might not appear to matter because buyers and sellers could adjust prices. As I discuss later, however, liability rules indeed could affect resource allocation because buyers and sellers had different costs of acquiring information.

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Sophia severely shortly after buying her, salted her wounds, and staked her in the ground naked. This court attributed Sophia's actions to her grief at being separated from her children and to Spencer's monstrous behavior, not to madness.[22]

Buyers who subjected warranted slaves to an unhealthy environment, even without intentional cruelty, did not prevail in court when slaves died. A Kentucky slave died from tuberculosis after transferal from the country to a large, crowded hotel; a Louisiana slave succumbed after exposure to measles en route to his new master's house. Another newly purchased Louisiana slave died after working in a cholera-laden pork warehouse. In none of these cases did courts award damages for breach of warranty.[23]

Far more slave than livestock cases were heard in southern appellate courts in the first six decades of the nineteenth century, no doubt because slaves were more valuable. Courts also interpreted contractual language more broadly and more consistently when slaves were sold than when beasts were. The greater value of slaves, along with larger information gaps between slave buyers and sellers, explains the greater responsibility of slave sellers. The phrases "sound and healthy," "stout and healthy," and "young, likely, and healthy" all created warranties of soundness in slaves.[24] In contrast, affirming that a horse was sound did not typically generate a warranty for sellers—southern or northern—unless the word "warranty" was used.[25]

Other differences in slave and livestock law likewise show the greater responsibility of slave sellers. Agents who offered warranties on behalf of slaveowners bound the owners. But a seller's statement to the agent of a

[22] *Pyeatt v. Spencer*, 4 Ark. 563 (1842).

[23] *Fry v. Throckmorton*, 2 B. Mon. 450 (Ky. 1842); *Lyons v. Kenner*, 2 Rob. 50 (La. 1842); and *Stackhouse v. Kendall*, 7 La. An. 670 (1851). Tadman, *Speculators*, p. 107, reported that traders sometimes inoculated or insured their wares during times of epidemics.

Louisiana buyers who abused or neglected slaves were quite likely to bear the loss if the slaves died. See for example *Roca v. Slawson*, 5 La. An. 708 (1850); and *Williams v. Moore*, 3 Munf. 310 (Va. 1811) (in *dicta*). To sustain a statutory action, a Louisiana buyer had to care for newly bought slaves like a "prudent father." (See note 48 for reference to redhibition statutes.) *Sargent v. Slatter*, 6 La. An. 72 (1851); *Soubie v. Sougeron*, 5 Rob. 148 (La. 1843); and *Kiper v. Nuttall*, 1 Rob. 46 (La. 1841). (The *Sargent* court sustained the buyer's action.) Neglecting to summon a doctor threw the loss of a dead slave on buyers in *Williams v. Talbot*, 12 La. An. 407 (1857); *Stoppenhagen v. Verdelet*, 10 La. An. 263 (1855); and *Hooper v. Owens*, 7 La. An. 206 (1852).

[24] The phrases quoted are from slave cases *Ditto v. Helm*, 2 J.J. Marsh. 129 (Ky. 1829) (overturning *Smith v. Miller*, 2 Bibb 616 [Ky. 1812]); *Steel v. Brown*, 19 Mo. 312 (1854); and *Baum v. Stevens*, 2 Ired. 411 (N.C. 1842). Unlike warranties in land, a warranty did not run with the slave. *Offutt v. Twyman*, 9 Dana 43 (Ky. 1839).

[25] Southern cases include *Lindsay v. Davis*, 30 Mo. 406 (1860); and *Erwin v. Maxwell*, 3 Murph. 241 (N.C. 1819). The words "sound to the best of my knowledge," "considered sound," "he is sound and will make a good horse," and "safe and kind and gentle" did not necessarily create warranties of soundness in the North. *Myers v. Conway*, 62 In. 474 (1878); *Wason v. Rowe*, 16 Vt. 525 (1844); *Duffee v. Mason*, 8 Cow. 25 (N.Y. 1827); and *Jackson v. Wetherill*, 7 Serg. & R. 480 (Pa. 1822). By mid-century, some northern states were more likely to discover a warranty for livestock and hold sellers liable. See for example *Morgan v. Powers*, 66 Barb. 35 (N.Y. 1866); *Smith v. Justice*, 13 Wis. 600 (1861); *Tuttle v. Brown*, 4 Gray 457 (Mass. 1856); and *Cook v. Moseley*, 13 Wend. 277 (N.Y. 1835).

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buyer that he warranted a horse as sound was insufficient to sustain an action.[26] And temporary injuries or curable diseases did not violate general warranties of soundness for livestock, but they might for slaves.[27]

Slave warranty cases also posed more complicated questions than livestock cases, and the nature of the chattel sold influenced the degree of scrutiny judges devoted to particular disputes. Determining what constituted the soundness of a slave was considerably more difficult than doing the same for a cow or horse, for example. In slave cases, judges had to decide if warranties covered mental capabilities; not so in livestock cases. The North Carolina Supreme Court decided that a general warranty of soundness encompassed the quality of a slave's mind, where the inability "to comprehend the ordinary labors of a slave, and perform them" meant a slave was of unsound mind. An Alabama court included soundness of mind in a warranty of soundness of a person, saying that the word *person* was used to distinguish rational from irrational creatures and therefore referred especially to the mind. According to a Georgia court, "healthy slave" covered the slave's physical—but not mental—capacities.[28] Interestingly, a warranty of soundness did not include any guarantee of a slave's "moral qualities." *Dicta* in a South Carolina case explain why:

> The character of a slave depends so much upon the treatment he receives, the opportunities he has to commit crimes, and the temptation to which he is exposed. . . . A vice which would render him worthless in one situation, would scarcely impair his value in another. A habit that would render him useless to one man, would scarcely be considered a blot upon his character in the hands of another.[29]

Drunkenness in a slave, for instance, did not necessarily constitute a breach of a warranty of soundness.[30] Buyers and sellers could, of course, agree to a specific warranty for a slave's good character. And acknowledged moral qualities could increase a slave's value.[31]

Damage calculations also reveal the more sophisticated reasoning used

[26] *Dennis v. Ashley*, 15 Mo. 453 (1852); and *Sipple v. Breen*, 1 Har. 16 (Del. 1832).

[27] *Roberts v. Jenkins*, 1 Fost. 116 (N.H. 1850); *Smith v. Rice*, 1 Bail. 648 (S.C. 1830); and *Thompson v. Bertrand*, 23 Ark. 730 (1861).

[28] *Sloan v. Williford*, 3 Ired. 307, 309 (N.C. 1843) (also used in *Simpson v. McKay*, 12 Ired. 141, 143 [N.C. 1851]); *Caldwell v. Wallace*, 4 Stew. & P. 282 (Ala. 1833); and *Nelson v. Biggers*, 6 Ga. 205 (1849). The *Sloan* trial-court verdict for the plaintiff was reversed because a deposition taken on Sunday was erroneously admitted into evidence.

[29] *Smith v. McCall*, 1 McC. 220, 223 (S.C. 1821). Warranties of soundness naturally did not encompass casualties of parturition subsequent to the sale. *Hambright v. Stover*, 31 Ga. 300 (1860).

[30] See, for example, *Eaves v. Twitty*, 13 Ired. 468 (N.C. 1852). (In this case, the plaintiff lost partly because he had not proved that the slave was a drunkard before the sale.) Nor was drunkenness a redhibitory vice giving rise to the rescission of a sale under Louisiana statutes. *Behan v. Faures*, 12 La. 211 (1838); and *Xenes v. Taquino*, 7 Mart. N.S. 678 (La. 1829). For a discussion of redhibition, see the text at note 48. Drunkenness in slaves could knock down their prices by as much as 55 percent. Fogel, *Without Consent*, p. 70, fig. 12.

[31] *Wyatt v. Greer*, 4 S. & P. 318 (Ala. 1833), had a special warranty for character. *Creswell v. Walker*, 37 Ala. 229 (1861), addressed moral qualities and prices. Two livestock cases refer to character and resulted in verdicts similar to those in slave cases. A Missouri court held that a sale of a steer included no implied warranty of character. *McCurdy v. McFarland*, 10 Mo. 377 (1847). And a New York plaintiff

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by judges and litigants in slave cases. In both slave and livestock cases, a defective chattel that had been expressly warranted would yield damages equaling the difference between a sound and an unsound chattel.[32] Yet in slave cases, courts adopted much more complicated formulas, considering the foregone use of the purchase money, the value of the slave's services, the expected life span of the slave, the place of purchase, and so forth. In a Maryland case, the court even consulted life tables specific to the "African" race.[33]

Certain damage calculations demonstrate judges' special scrutiny of slave cases. Warranted Missouri slave Dinah died after purchaser Soper tortured her, for example. Unbeknownst to the parties, Dinah apparently suffered from some slight disease at the time of the sale. During a postmortem examination, a doctor discovered the disease. The court instructed that, if Dinah's death resulted from Soper's cruelty, seller Breckinridge should pay damages only for the impairment to Dinah's value caused by the disease. In a similar Alabama case, warranted slave Major was shot in the arm; in the course of amputating the arm, the surgeon discovered a defect in Major's lungs. Major's lung affliction, according to doctors, hastened his death. The court determined that the damages due to the warranty breach should pertain only to the lung ailment itself (about $50 worth), not the additional complications resulting from the wound.[34] In an Arkansas case, the court did not order money damages for defective warranted slaves but rather permitted traders to maintain a trade-in policy. The policy no doubt operated as a means of economizing on the traders' cash flow. By respecting this practice, the judiciary enabled the traders to operate more cheaply.[35]

The paucity of antebellum cases involving warranted livestock makes it

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could not recover damages by showing that the cattle he purchased were of "disorderly character." *Strevel v. Hempstead*, 44 Barb. 518 (N.Y. 1864).

[32] In *Ayres v. Parks*, 3 Hawks 59 (N.C. 1824); and *Broughton v. Badgett*, 1 Ga. 77 (1846), damages equaled the difference between the price paid and the value of an unsound slave. In other cases, courts specified damages as the difference between values of sound and unsound slaves. See *Graham v. Bardin*, 1 Patt. & H. 206 (Va. 1855); *Stearns v. McCullough*, 18 Mo. 411 (1853); *Williamson v. Canaday*, 3 Ired. 513 (N.C. 1843); and *Adkinson v. Stevens*, 7 J.J. Marsh. 237 (Ky. 1832) (reversed for insufficient evidence). *Thornton v. Thompson*, 4 Gratt. 121 (Va. 1847), provides a damage calculation involving a jackass. Other cases refer to horses. *Wallace v. Wren*, 32 Ill. 146 (1863); *Moulton v. Scruton*, 39 Me. 287 (1855); *Comstock v. Hutchinson*, 10 Barb. 211 (N.Y. 1850); and *Cary v. Gruman*, 4 Hill 625 (N.Y. 1843).

[33] *Williams' Case*, 3 Bland 186 (Md. 1831). For another useful calculation, see *Thompson v. Bertrand*, 23 Ark. 730 (1871).

[34] *Soper v. Breckinridge*, 4 Mo. 14 (1835); and *Marshall v. Gantt*, 15 Ala. 682 (1849). These verdicts bear some resemblance to the "second-injury" rules in workers' compensation. If a pre-existing injury or condition exacerbates an employee's injury on the job, the employer is responsible under such rules only for losses ascribable to the job-related injury. Such rules were designed to promote—or at least not discourage—the employment of the disabled. The Americans with Disabilities Act may alter the effect of these rules.

[35] *Sessions v. Hartsook*, 23 Ark. 519 (1861). The verdict may have worked to the interest of customers as well. If the traders were reasonably scrupulous and accepted trade-ins without much fuss, the policy benefited buyers provided that, on average, the costs of litigation exceeded the costs of exchanging slaves.

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difficult to evaluate exactly how southern appellate courts determined standards of proof, liability of ignorant sellers, and responsibilities of buyers in livestock sales. Civil War Northern and postbellum southern livestock cases suggest, however, that livestock law may have grown to resemble the slave law of earlier years.[36] In an 1861 Wisconsin case, a buyer could not simply speculate that warranted livestock was defective; like slave buyers, he had to offer convincing proof.[37] Postbellum sellers of livestock had to make good on their warranties even when unaware of defects, just as slave sellers had.[38] And the Wisconsin buyer of a horse, like the Arkansas buyer of slave Sophia, could not win damages for breach of warranty because he likely caused the aberrant behavior of his recently purchased chattel.[39]

PRICE DISCOUNTS AND LOCALITY RESTRICTIONS

In addition to warranties, other specific clauses appeared in sales contracts. Family or sentimental ties among slaves led some sellers to discount prices if buyers agreed to keep slaves in the neighborhood.[40] Sold slaves could then stay near friends, parents, children, or partners. If buyers violated such clauses, courts awarded damages, taking into account the profit-making opportunities of selling slaves further south. A Kentucky court upheld a restrictive covenant in one such case, saying: "It is true, that slaves are property, and must, under our present institutions, be treated as such. But they are human beings, with like passions, sympathies, and affections with ourselves. And while we must treat them as property, we should not entirely overlook the obligations due to them as human beings."[41] Despite its rhetoric, this court sided with seller Turner on economic grounds. Slave Edmond was sold for $300 to $500 below market price because buyer Johnson had agreed to keep Edmond in Warren County near his wife. This arrangement was intended in part to keep

[36] Preliminary research indicates that postbellum southern livestock law and slave law were in fact directly related. By tracing citations to several leading slave cases, I have found that southern judges frequently used slave cases as precedents for subsequent livestock cases—mostly hiring cases—even into the 1930s.

[37] *Miller v. McDonald*, 13 Wi. 673 (1861).

[38] *McKee v. Jones*, 67 Miss. 405 (1889); and *Brown v. Bigelow*, 10 Allen 242 (Mass. 1865). I found one antebellum example in which southern and northern courts came to different rules. An Arkansan who proclaimed that his horse had an eye "as good as any horse's" gave a warranty, but a Hoosier—saying the same words—did not. *Buckman v. Haney*, 6 Eng. 339 (Ark. 1850); and *House v. Fort*, 4 Blackf. 293 (In. 1837). The southern rule resembles that determined in the earlier mentioned slave case of *Bell v. Jeffereys*.

[39] *Smith v. Swarthout*, 15 Wis. 550 (1862).

[40] Calderhead, "How Extensive," p. 53, found that one-quarter of advertisements in the Maryland *Gazette* of sales for the period 1809 to 1839—other than judicial or estate sales—requested that the slaves remain in the state.

[41] *Turner v. Johnson*, 7 Dana 435, 440 (Ky. 1838). Also see *Oldham v. Bentley*, 6 B. Mon. 428 (Ky. 1846); *Fenwick v. Grimes*, 8 F.C. 1142 (D.C. 1838); *Price v. Read*, 2 H. & G. 291 (Md. 1828); *Young v. Palmer*, 30 F.C. 863 (D.C. 1825); and *Adams v. Anderson*, 4 H. & J. 558 (Md. 1819).

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Edmond's wife happy and relatively productive. Johnson broke his word and instead sold Edmond to a state farther south.

Why not simply require unscrupulous buyers to return slaves in these sorts of cases? Such a remedy might have offered a greater deterrent than damages—and have avoided costly litigation between future buyers and sellers of slaves. One explanation has to do with procedure: nineteenth-century courts of law did not have the ability to grant such "equitable" remedies. Yet buyers could have complained to courts of equity instead. They did not, for a simple reason: slaves sold south were often impossible to trace, particularly when sold by an itinerant trader. Any remedy other than money damages would have left unhappy sellers with no real remedy. One Kentucky inheritance case shows clearly how plaintiffs could lose without recourse to a damage remedy. Here, a master named a particular slave in his will, leaving the slave as a specific bequest. Just before the master died, the slave was beaten to death. The heir to the slave petitioned the court to award him the slave's monetary value; the court refused, on the grounds that money was not the same as the specific slave. The plaintiff ended up with nothing.[42]

The damage awards granted in no-resale cases in fact offered considerable deterrence, because they tended to focus on the gain to the seller rather than the loss to the buyer. Vendor Brent sold slave Nelson for $475 instead of Nelson's estimated local-market value of $700 when buyer Richards agreed not to sell Nelson without giving Brent first refusal at the same price (of $475). Instead, Richards sold Nelson to a trader for $1,000. The trial court awarded Brent $225; the appellate court increased the damage award to $525. In legal terms, the appellate court required Richards to disgorge his total profits. Arguably, the value of the first-refusal clause to Brent was the original damage award of $225. By upping the award to include the additional gains from the second sale, the court diminished the incentive of potential defendants to cheat.[43]

Cases in which People Lacked Express Agreements

In cases where slave buyers and sellers did not make their agreements clear, judges tended to assign liability to the party who could have most cheaply foreseen and protected himself against the risk of loss. These rules stand in marked contrast to the *caveat emptor* doctrine commonly applied

[42] *Ross v. Carpenter*, 9 B. Mon. 367 (Ky. 1849). Equitable remedies, particularly in contract cases, generally might offer greater deterrence and lower administrative costs than damage remedies. Cooter and Ulen, *Law and Economics*, pp. 320–24, pointed out that specific performance of contracts should perhaps be the routine remedy for breach, because contractual partners by nature face low transactions costs. But Cooter and Ulen also noted that, when contracts are impossible to perform (as in the restricted-locality cases) or when behavior is hard to monitor, damages are a more efficient remedy.

[43] *Brent v. Richards*, 2 Gratt. 539 (Va. 1846). Some slave cases did generate equitable remedies when quantifying damages was particularly difficult. In restricted-locality and no-resale cases, the discounted price at least reflected the value of the clause to the seller. But if a favorite slave were sold or seized unlawfully, without his owner's consent, the sale price might not accurately mirror the value of a slave to his master. In these sorts of disputes, plaintiffs could—and did—seek equitable relief.

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in commodity sales. The relative costs to seller and buyer of acquiring information about the condition of a particular slave (or of slaves generally) figured significantly in many dispute resolutions. Because verdicts paralleled what contractual parties would have chosen for themselves, the common law mimicked the market and gave incentives to potential buyers and sellers to formalize their arrangements.

BUYERS AND SELLERS UNAWARE OF DEFECTS IN SOLD SLAVES

Slave sellers knew (or should have known) relatively more than buyers about the property they purveyed. Judges tended to place liability on sellers in cases where buyer and seller claimed to know nothing about a slave's infirmity or vice; this rule reflects the seller's cheaper access to information about his slave. To illustrate: the court in *Hanks v. McKee* said the existence of a disease "must be a matter best known by the one who possesses and employs the subject of the disease.[44]

South Carolina was most pro-buyer, subscribing to the sound-price doctrine: any slave sold at full price was presumed sound. If the buyer could not observe (and was not told of) a defect, but had paid the price of a sound slave and could prove the defect had existed at the time of the sale, the buyer was entitled to damages.[45] In one case, the court awarded damages under the sound-price doctrine for slave Philander who died from lung disease. The buyer had been informed of Philander's recent fall from a house and his subsequent shortness of breath but paid full price for the slave.[46] But a plaintiff could not rescind a sale on the grounds that his newly bought slave had spread venereal disease because he did not prove the slave was diseased when he bought her. And if a South Carolina buyer paid a discounted price for a slave, he needed an express warranty to obtain relief for a defect unless he could prove deceit or fraud.[47]

[44] *Hanks v. McKee*, 2 Litt. 227, 229 (Ky. 1822). The burden of proof fell on the plaintiff, as in warranty cases. In the case of *Stewart v. Dugin*, 4 Mo. 245 (1835), for instance, the buyer had to prove that he did not know of the slave's disease but that the slave had the disease at the time of the sale and died from it.

[45] The South Carolina courts generally relied on the early case of *Timrod v. Shoolbred*, 1 Bay 324 (S.C. 1793). Fede, "Legal Protection," pp. 331–32, surmised that South Carolina subscribed to the sound-price doctrine to protect buyers because, of all the slave-holding states, South Carolina had the highest proportion of its population enslaved and had numerous slave buyers.

[46] *Venning v. Gantt*, Cheves 87 (S.C. 1840). Judge O'Neall dissented, saying the court should not use the doctrine because the seller expressly refused to warrant the slave. The majority opinion countered that, to cover himself, the seller also should not have accepted a full price.

[47] *Lightner v. Martin*, 2 McC. 214 (S.C. 1822); *Watson v. Boatwright*, 1 Rich. 402 (S.C. 1845). Rescission of a sale is essentially a court-ordered "undoing" of the transaction. If a court rescinded the sale of a slave, the seller took back the slave and the buyer took back the purchase money. If a slave died, this equitable remedy differed little from a damage remedy awarding the full value of a sound slave to the buyer (aside from the question of who paid burial costs). In cases of defective but not worthless slaves, rescission remedies presumably would have deterred sellers more from perverse behavior. They also ran the risk of leaving the buyer with no remedy, however, as the text at note 42 points out. For example, rescinding the sale of a slave who ran away might yield nothing for the buyer if he could not produce the slave. What remedy was used depended upon where the plaintiff brought

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Louisiana slave buyers enjoyed additional legal protection through statutes. A sold slave who later manifested an incurable disease or vice—such as an "addiction to running away"—could generate a "redhibitory" action. If successful, slave buyers who brought such actions obtained a rescission of the sale. (Redhibitia is a concept in Roman law referring to the process of canceling a sale because, at the time of the sale, the merchandise had hidden flaws.)[48] The Act of 2 January 1834 presumed against the seller if a defect showed up within three days for Louisiana slaves and within fifteen days for slaves who had been in the state for less than eight months.

Louisiana judges generally considered running away as evidence of a redhibitory vice.[49] Under the 1834 Act, slaves who fled within 60 days of sale were presumed flawed at the time of sale, unless the slave had received unusual punishment—or other circumstances mattered. In *Fazende v. Hagan*, for instance, ten-year-old Ben was sold by defendant Hagan, then ran back to Hagan's slave yard. Ben was not considered to be vice-ridden, only young and scared. (Fazende retrieved Ben; Ben then threw himself into the river to drown.) And a Louisiana court determined that the buyer of a Kentucky slave should have expected the slave to flee because Louisianans treated slaves much more harshly than Kentuckians.[50]

Certain states protected sellers somewhat more than South Carolina and Louisiana because many state residents not only bought slaves but also sold slaves to traders, often for export out of state.[51] Traders were in the business of buying and selling slaves, so they likely could have evaluated the attributes and worth of a slave more cheaply than the ordinary buyer—and perhaps more than the ordinary person selling to traders. As a result, buyers who were also traders enjoyed relatively less legal protection. For example, Virginia slave trader Wilson had to pay the agreed-upon price of $700 to Shackleford for a black woman and her three children even though the woman had dropsy, which became evident soon after the sale. Wilson resold the family in South Carolina for $475, paid this sum to Shackleford, and persuaded the trial court to prohibit

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the case—a law or equity court. What remedy was more efficient depended on several factors: rescission remedies might have led to less litigation, but they were less flexible in cases where buyers contributed to the injury or where equitable remedies were impossible to carry out.

[48] In the case of slaves, such flaws included illness, impairment, or the habit of running away. The buyer bore the burden of proof and had to offer to return the slave to be entitled to a rescission. *Bach v. Barrett*, 2 La. An. 955 (1847); and *Barrett v. Bullard*, 19 La. 281 (1841). Buyers could not recover transportation costs. *Coulter v. Cresswell*, 7 La. An. 367 (1852). The bulk of Louisiana slave cases involved redhibitory actions. For further discussion, see Schafer, "Guaranteed," and *Slavery*.

[49] See for example *Rist v. Hagan*, 8 Rob. 106 (La. 1844); *Icar v. Suares*, 7 La. 517 (1835); and *Macarty v. Bagnieres*, 1 Mart. 149 (La. 1810).

[50] *Fazande v. Hagan*, 9 Rob. 306 (La. 1844); and *Nott v. Botts*, 13 La. 202 (1839).

[51] The favorable rules toward South Carolina and Louisiana slave buyers resemble the legal rules that favored expanding industries like railroads. Slave sellers naturally had more sway in states where they figured more prominently. See Fede, "Legal Protection;" and Schafer, "Guaranteed."

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Shackleford from seizing an additional $225 worth of Wilson's property. The issue at appeal was whether Shackleford knew about the dropsy at the time of the sale. He did not and had offered no warranty, so Wilson ended up paying the full $700 for the slave family.[52]

Slave buyers in all states tended to have more protection than buyers of livestock. For instance, a fair price typically implied a general warranty of title to a slave. This was not true for livestock. And litigation costs relative to the value of property exchanged also mattered. An Arkansas court explained why the sound-price rule should not be used for animals, for example: "[T]he immorality of this rule is counterbalanced by the tendency to vexatious litigation, which would be encouraged by the opposite rule of civil law. The common law requires vigilance and prudence on the part of the purchaser."[53]

SELLERS' REPRESENTATIONS

Antebellum southern courts held slave sellers to their representations but tended to view statements about livestock quality as puffing; these legal rules reflect the greater asymmetry in information between buyers and sellers in slave markets. If a slave buyer reasonably relied on a vendor's representations about his wares, the seller paid damages or faced rescission of the sale if the sold slave did not measure up. These verdicts favoring defendants preserved the integrity, in a twisted sense of the word, of slave markets. Had judges ruled otherwise, people would have had perverse incentives to sell lemons—particularly slaves likely to decamp and slaves with concealed disabilities, diseases, or defects—but represent them as trustworthy and healthy. What is more, masters as a whole would have shopped in sales markets loaded with lemons.[54]

Touting the skills, health, or trustworthiness of slaves bound sellers. In one case, a slave described as a good "washer, ironer, and cook" did not, in fact, possess these qualities. Because female domestics fetched a 20 percent price premium, the plaintiff understandably won damages of $170. Likewise, sickly slaves represented as healthy yielded damages or rescission. Runaways represented as otherwise gave rise to similar remedies.

[52] *Wilson v. Shackleford*, 4 Rand. 5 (Va. 1826). Also see *Smith v. Miller*, 2 Bibb 616 (Ky. 1821); and *Brooks v. Cannon*, 2 A.K. Marsh 526 (Ky. 1820).

[53] *Turner v. Huggins*, 14 Ark. 21, 25 (1853).

[54] One might expect that liability rules holding sellers to their representations would stop sellers from claiming anything about their wares. Yet sellers commonly made some sort of representation about their stock-in-trade. Goodell, *American Slave Code*, p. 43, referred to advertisements attesting to slaves' piety, intelligence, honesty, and sobriety. But theory as well as empirical evidence suggests that sellers would describe slaves' attributes. Suppose sellers claimed nothing. Then "good" and "bad" slaves would sell for the same price if buyers could not ascertain the difference. Any seller with a "good" slave would therefore find it worthwhile to pass along that information to a potential buyer in exchange for a higher price, provided sellers could distinguish "good" from "bad" slaves. As long as the price differential exceeded the expected costs of litigation and damages, sellers would provide such information even when responsible for their representations.

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Prices clearly indicate why plaintiffs won damages in such cases: runaways and the physically impaired sold for discounts of up to 65 percent.[55]

Because the reproductive potential of female slaves affected their prices, buyers misled about slaves' fecundity brought their complaints to court. In the Georgia dispute of *Hardin v. Brown*, Hardin bought slave Eliza, who was said to be pregnant. The slave died and was buried; Hardin exhumed her seventeen days later so that he might avoid paying for Eliza if she in fact had not been pregnant. (Hardin ended up having to pay for Eliza because he dug up and inspected the corpse hastily during a stormy night. The court determined that Hardin did not give enough evidence of the slave's barrenness. If he had, the court likely would have awarded damages or rescinded the sale).[56]

The facts in *Hardin* recall those in an 1887 Michigan case famous to first-year law students—*Sherwood v. Walker*.[57] In *Sherwood*, the buyer bought a cow that was thought barren. The cow was in fact pregnant. The court let the seller rescind the sale on the grounds of mutual mistake. Interestingly, an antebellum Kentucky case involving a cow generated a result opposite to *dicta* in *Hardin* (and contrasting with *Sherwood* as well). Here, the seller represented a cow as a "good breeder." These words did not create a warranty, according to the court—which refused to rescind the sale when the cow was found barren.[58] Similarly, advertising one's stallion or jack as a "good foal-getter" was not typically considered a warranty. (Kentucky, a state noted for horse-breeding, made some exceptions to this rule).[59]

Sellers often included a slave's age as part of the terms of sale. A slave's productivity corresponded to his age; prices reflected this relationship.[60] Courts usually held sellers to these representations in slave cases—and less so in livestock cases—because judges thought slaves' true ages were hard to pinpoint. Louisiana plaintiffs and their witnesses said that slaves over the age of 30 tended to look 5 to 15 years younger. South Carolina blacks were said to wear their age better in slavery than in any other condition.[61]

[55] The domestic case is *Pilie v. Lalande*, 7 Mart. N.S. 648 (La. 1829). Sickly slave cases include *Hancock v. Tucker*, 8 Fl. 435 (1859); *Overstreet v. Phillips*, 1 Litt. 120 (Ky. 1822); *Smith v. Rowzee*, 3 A.K. Marsh. 527 (Ky. 1821); and *Burton v. Wellers*, Litt. Sel. Cas. 32 (Ky. 1808). Runaway cases include *Ward v. Reynolds*, 32 Ala. 384 (1858); and *Scott v. Perrin*, 4 Bibb 360 (Ky. 1816). Fogel, *Without Consent*, p. 70, fig. 12, delineated premiums and discounts for various characteristics.

[56] *Hardin v. Brown*, 27 Ga. 314 (1859). Fogel and Engerman, *Time*, pp. 81–82, measured the effect of reproductive capacity on the price of female slaves.

[57] *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

[58] *Scott v. Renick*, 1 B. Mon. 63 (Ky. 1840).

[59] The typical "foal-getter" case is *Roberts v. Applegate*, 48 Ill. App. 176, aff'd 153 Ill. 210 (1894). Kentucky cases include *Lamme v. Gregg*, 1 Metc. 444 (Ky. 1858); and *Dickens v. Williams*, 2 B. Mon. 274 (Ky. 1842).

[60] Fogel, *Without Consent*, p. 68, fig. 11, showed that slave prices were affected by age, gender, health, skills, and reliability, with age being most important. Also see Drago, *Broke*, on the importance of age, sex, weight, and height of slaves to one trader.

[61] *Walker v. Cuculla*, 18 La. An. 246 (1866); *Lobdell v. Burke*, 5 Rob. 93 (La. 1843); and *Roberts v. Yates*, 20 F.C. 937 (S.C. 1853).

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Slaves, of course, often did not know their ages—as one anonymous slave reported, "When I come here, colored people didn't have their ages. The boss man had it."[62]

Small inaccuracies did not yield liability for the seller. For example, courts found for the sellers in cases where the sold slaves were said to be aged 25 and 22, respectively, but were truly aged 29 and 26.[63] But Kentucky courts understandably ordered rescissions in two other cases. In one case, vendor McCann claimed that slave Hannah—who was 40 years old with nine or ten children—was age 29 with three children. In the other dispute, a seller represented his slave's age as 25 instead of her true age of 40.[64] In a similar Tennessee lawsuit, a trial court decided a slave's age was not warranted, even though the seller represented the slave as 35 years old instead of her true age, 45 years old. Both parties apparently knew the slave's correct age. But the appellate court reversed and remanded the case, saying the seller should be accountable for his representation.[65]

Courts held sellers to their representations about animals' ages in some cases. A seller who represented a horse as 14 years old was determined to have warranted that the horse was no older than age 14. But in a Tennessee case, the seller warranted a horse as sound and stated that the horse was age 9, when in fact the horse was age 20. The court decided the revelation did not sustain the charge that the horse's soundness was misrepresented. Similarly, in New Hampshire, a horse advertised as "six years old, . . . warrant[ed] sound and kind," was not warranted as to age.[66]

Reliance on a seller's representations about a slave's human character only protected the buyer to a certain extent. Deliberate misrepresentations by sellers certainly created liability. Slave Anthony was said to be honest and industrious but was actually a lazy liar. Although the trial court rejected evidence of the slave's character, the appellate court reversed and remanded the case for evaluation of the damages the buyer had sustained by relying on the seller's misstatements. But judges also expected buyers to exercise a good influence on slaves, refusing to award damages for bought slaves who later exhibited poor morals or character. In a South Carolina case, slave Charles was represented as honest, sober, honorable, and not given to running away. The purchaser complained he had been deceived, yet he had to pay full price for Charles because "Occasional flights of a

[62] Lester, *To Be a Slave*, p. 30. Tadman, *Speculators*, pp. 98–101; and Stampp, *Peculiar Institution*, p. 259, cited evidence that slaves being readied for market had gray whiskers shaved off and gray hairs plucked or blackened. Stampp also said that slaves were taught that their ages were some 10 to 15 years younger than their true ages.

[63] *Whitson v. Gray*, 3 Head 441 (Tn. 1859); and *Banfield v. Bruton*, 7 B. Mon. 108 (Ky. 1846).

[64] *Thomas v. McCann*, 4 B. Mon. 601 (Ky. 1844); and *Scott v. Clarkson*, 1 Bibb 277 (Ky. 1808). *Thomas* was reversed and remanded for an error in the proceedings, but *dicta* supported the outcome of the trial.

[65] *Hogan v. Carland*, 5 Yerg. 283 (Tn. 1833).

[66] *Burge v. Strogert*, 42 Ga. 89 (1871); *Martin v. Edwards*, 11 Humph. 374 (Tn. 1850); and *Willard v. Stevens*, 4 Fost. 271 (N.H. 1851). See also *Ferguson v. Oliver*, 8 S. & M. 332 (Miss. 1847).

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slave ... would not constitute any material moral defect ... occasional thefts among tolerably good slaves may be expected ... such habits were easy of correction by prudent masters, ... Like master, like man ... in drunkenness, impudence, and idleness.[67]

Although a seller's representations about a slave's physical attributes and skills bound him, his slave's statements typically did not. Courts considered admitting evidence of a slave's remarks only if a slave spoke to a doctor about his current condition, or if impartial other people made supporting comments.[68] Why? Slaves might wish to stay with their masters or, alternatively, to find new ones. A Kentucky court noted: "[T]here is a strong indisposition in such creatures to be sold, and ... to avoid a sale, they may frequently feign sickness, or magnify any particular complaint with which they are afflicted." An Alabama court countered: "[I]t would be an easy matter to prove slaves unsound by their declarations of unsoundness, oftentimes feigned as an excuse to avoid labor, or to procure a change in masters.[69]

SELLERS' DISCLOSURE OF FLAWS AND BUYERS' KNOWLEDGE OF DEFECTS

As well as being responsible for their own representations, slave sellers had a duty to disclose flaws. As Richard Posner has noted, disclosure of an item's attributes is most important, economically speaking, when the item sold is valuable and its characteristics costly for the consumer to discover.[70] Both prerequisites held true in slave sales. If a seller knew (or should have known) that a slave had a hidden defect, the seller was liable for damages if he deliberately concealed the flaw or did not inform the buyer about it.[71] Courts also protected the viability of long-distance sales, saying that sellers had to describe their slaves truthfully when buyers lived too far away to inspect the slaves.[72]

[67] *Cozzins v. Whitaker*, 4 S. & P. 282 (Ala. 1833); and *Johnson v. Wideman*, Rice 325, 342 (S.C. 1839). Rosengarten, *Tombee*, p. 162, describes a typical slaveowner who tolerated pilfering—especially of food—in the interest of tranquility and to avoid open discussions of human needs. *Eaves v. Twitty*, 13 Ired. 468 (N.C. 1852), exemplifies the verdicts in drunkenness cases. For two interesting cases from the Civil War era, see *Miller v. Gaither*, 3 Bush 152 (Ky. 1867); and *Brown v. Hawkins*, 3 Bush 558 (Ky. 1868).

[68] *Allen v. Vancleave*, 15 B. Mon. 236 (Ky. 1855); *Rowland v. Walker*, 18 Ala. 749 (1850); and *Tumey v. Knox*, 7 T.B. Mon. 88 (Ky. 1828).

[69] *Brownston v. Cropper*, 1 Litt. 173, 176 (Ky. 1822); and *Eckles v. Bates*, 26 Ala. 655, 660 (1855). Bauer and Bauer, "Day to Day Resistance," pp. 95–102, 108, discussed instances of slaves who pretended to be sick or disabled, particularly on the auction block.

[70] Posner, *Economic Analysis*, p. 99. The seller had an affirmative duty to inform the buyer about defects, according to Fede, "Legal Protection," fn. 150. Yet the seller only had to say what he believed was true, even if others said otherwise. *McIntire v. McIntire*, 8 Ired. Eq. 297 (N.C. 1852).

[71] Such defects included peritonitis and pleuritis (*Wade v. Dewitt*, 20 Tx. 398 [1857]); scrofula (*Thompson v. Botts*, 8 Mo. 710 [1845]); venereal disease (*Samuel v. Minter*, 3 A.K. Marsh. 480 [Ky. 1821]); and leg ailments (*Burton v. Willis*, Litt. Sel. Ca. 32 [Ky. 1808]). *Brugh v. Shanks*, 5 Leigh 598 (Va. 1833); *Reading v. Price*, 3 J.J. Marsh. 62 (Ky. 1830); and *Hardwick v. Hardwick*, 4 Bibb 569 (Ky. 1817), also discuss this rule.

[72] See, for example, *Hanks v. McKee*, 2 Litt. 227 (Ky. 1822). The northern states eventually adopted

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Yet judges did not let slave buyers use ignorance as an excuse. As the court declared in a case where the buyer knew of the slave's exposure to measles, "Both may be innocent parties, but let the loss fall on him who voluntarily encountered all the responsibility."[73] If a buyer knew or should have known about a slave's defect—including defects peculiar to human property—judges would not award damages. These rules encouraged slave buyers to incorporate their knowledge into the prices they paid, effectively insuring themselves against later calamities and thus staying out of court.

Warranties of soundness did not, for instance, cover obvious defects in slaves or animals, although they included defects not discernible by the unskilled eye. As an example, an Alabama buyer knew about a slave's tendency to have fits. The court therefore did not interpret the clause "sound at this time" to mean "always sound." Nor did an express warranty of soundness pertain to a slave's crooked arm in the case of *Scarborough v. Reynolds*. The rule was more complicated than first appears, however, and its interpretation is rich with economic overtones. The essence of *Scarborough* was this: the buyer could see the crookedness of the arm, which "did not affect [the slave] in labor; she could hoe and chop with an axe as well as women generally can." So South Carolina, easily the most buyer-protective state, refused to award damages to buyers who received no economic injury. But an Arkansas appellate court, subscribing to the same "obvious-defect" rule in *Jordan v. Foster*, awarded buyer Jordan damages under breach of warranty for eight-year-old slave Hannah, who also had a crooked arm. Why the different result? Although Hannah's crooked arm was obvious, her true defect—a creeping paralysis that medical experts testified would eventually incapacitate Hannah—was not.[74]

The law regarding defects in warranted animals resembled slave law.[75] Chief Justice Johnson colorfully explained this rule in *Jordan*. The justice said that a warranty of soundness was not breached when a horse lacked a tail or ear because the buyer knew a part was missing and could presumably calculate the effect on productivity. But a horse blind in one eye might trigger a breach of warranty, because this defect might not be obvious to the typical horse buyer.

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a similar rule for commodities—the doctrine of *caveat emptor* began to apply more for spot sales of present goods than for goods the buyer could not inspect before sale. Northern courts also cautiously began to infer warranties of quality and fitness for a particular purpose if the buyer had no opportunity to inspect the goods. Fede, "Legal Protection," pp. 326–27; and Teeven, *History*, p. 187.

[73] *Williams v. Vance*, Dud. 97, 100 (S.C. 1837). Plaintiff Williams purchased slave Robin, knowing of the exposure. When the slave died from measles, Williams recovered nothing.

[74] *Clopton v. Martin*, 11 Ala. 187 (1847); *Scarborough v. Reynolds*, 13 Rich. 98, 99 (S.C. 1860); and *Jordan v. Foster*, 11 Ark. 139 (1850). The *Ayres* case discussed earlier is much the same—Peggy's nosebleeds were obvious, but their eventual effect on Peggy's ability to function was not. See also *Williams v. Ingram*, 21 Tx. 300 (1858).

[75] See for instance *Vates v. Cornelius*, 59 Wis. 615 (1884); and *Burton v. Young*, 5 Har. 233 (Del. 1849).

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Courts did not grant relief to slave buyers told of defects. In one poignant case, a free man of color gave his note for $500 to buy his obviously sick wife, even though she would have been worth only $300 sound. He had to pay, although his wife died soon after the sale. In another case, the seller informed the buyer of a slave's venereal disease; the buyer had to pay even though the slave died from the affliction. A South Carolina buyer openly accepted the risks associated with a sickly looking slave at the time of sale and therefore could not recover damages when the slave died. In a Mississippi case, Dr. Otts had to pay for a scrofulous 12-year-old that he bought and nursed with great care. The doctor wanted to return the slave to seller Alderson in exchange for the purchase price plus nursing expenses. The court denied Ott's claim, saying that "the purchaser . . . must charge his loss to a presumptuous reliance on his own judgment, and his improvidence in failing to obtain a warranty against defects." And South Carolina plaintiff Gist knew that slave Linder frequently ate dirt but refused to allow mention of it in his receipt because Gist wanted to resell the slave without revealing this knowledge. When Linder died from complications arising from dirt-eating, Gist recovered nothing. The opinion stated: "The purchaser . . . bought with his eyes open, and with avowed willingness to run all the risks of his bargain."[76]

Buyers who should have known of a slave's illness or injury could not garner damages, either. In a North Carolina case, the seller refused to warrant slave Lewis in any way. Lewis was noticeably sick at the time of the sale, and a neighbor informed the buyer that Lewis suffered from spells in the head and religious mania. The buyer nevertheless paid full price of $850 for the slave, then brought suit. The trial court decided for the buyer, but the appellate court reversed and awarded a new trial, saying the plaintiff should have asked for an express warranty or refused to buy Lewis. A different slave Lewis was loudly proclaimed not to be warranted as "sound in any way" in an estate sale; Lewis died 18 days after the sale, and his purchaser had to pay. Although a South Carolina jury granted damages for a slave who died from lockjaw after injuring his foot, the appellate court granted the seller a new trial because the wound was clearly visible at the time of sale and had been examined by the plaintiff's physician. In a similar Tennessee case, infant slave Wesley bore the marks of spinal disease when sold. Although the jury awarded the buyer damages, the appellate court granted a new trial. A Louisiana slave's visibly swollen knee at auction prevented the buyer from rescinding the sale later.[77]

[76] *Lyles v. Bass*, 1 Cheves 85 (S.C. 1840); *Hart v. Edwards*, 2 Bail. 306 (S.C. 1831); *Limehouse v. Gray*, 3 Brev. 230 (S.C. 1812); *Otts v. Alderson*, 10 S. & M. 476, 481 (Miss. 1848); and *Farr v. Gist*, 1 Rich. 68, 74 (S.C. 1844). People who eat dirt are now thought to be trying to satisfy some nutritional deficiency.

[77] *Fulenwider v. Poston*, 3 Jones 528 (N.C. 1856); *Parker v. Partlow*, 12 Rich. 679 (S.C. 1860); *Miller v. Yarborough*, 1 Rich. 48 (S.C. 1844); *Long v. Hicks*, 2 Humph. 305 (Tn. 1841); and *White v. Hill*, 10

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SPECIAL HAZARDS: SUICIDE, INSANITY, AND EMANCIPATION

Buyers had to exercise caution in property transactions generally, but courts also expected slave buyers to account for the special hazards associated with human property. Cases in which sold slaves killed themselves vividly illustrate this expectation. If a slave committed suicide at or around the time of sale, who bore the loss? Generally, the buyer did—courts considered suicide a hazard of sale the buyer should have contemplated. Sometimes slaves even gave notice to potential new masters: when the cruelest slave master in the county bid at an auction for Delicia Patterson, she shouted: "Judge Miller! Don't you bid for me, . . . I will take a knife and cut my own throat from ear to ear before I would be owned by you."[78]

Buyers paid for dead slaves in *Bunch v. Smith* and *Walker v. Hays*, for example. In *Bunch*, slave Bob slashed his throat in front of the buyer, the seller, and a group of other people. The buyer retrieved his money from Bob's stunned seller minutes after the suicide, but Judge O'Neall reinstated the sale and ruled that the buyer should bear the loss of Bob's death. In *Walker*, slave Agnes drowned herself and her child Virginia after being sold. The buyer claimed that Agnes must have been insane, but the court determined she was not, only despondent over the sale.[79]

Insanity in a sold slave in fact gave rise to many disputes. The merits of the plaintiff's case usually rested on his ability to evaluate the slave's condition: if a buyer could easily have determined that a slave was insane, courts would not hold a seller liable. Louisiana buyer Chambliss had ample opportunity to inspect insane slave Riley, for instance. The court refused to award damages, deciding Chambliss should have seen that Riley had no sense.[80]

But sellers were liable in such cases if the slave's insanity was not obvious to the buyer. A buyer could not always inspect a slave cheaply. Seller Bontz forbade buyer Grant to talk to slave Celia because the slave "might run away" if she knew about the sale, for example. (In truth, Celia was an idiot. Grant put Celia in jail while trying to get his money back; she died. A District of Columbia court awarded Grant damages equal to Celia's price plus costs.) Nor could buyers always determine the slave's mental capabilities as easily as sellers could. A South Carolina court judge argued that the idiocy of a slave might elude the vigilance of a buyer, although it "can not escape the knowledge of the owner." In a note of caution on the matter, a Louisiana opinion stated: "It is very difficult . . . to fix a standard

[78] Lester, *To Be a Slave*, p. 52.

[79] *Bunch v. Smith*, 4 Rich. 581 (S.C. 1851); and *Walker v. Hays*, 15 La. An. 640 (1860). Also see *Merrick v. Bradley*, 19 Md. 50 (1862); and *Thomason v. Dill*, 30 Ala. 444 (1857). Franklin, *From Slavery*, p. 131, noted the incidence of slave suicides, and many scholars have examined the seeming prevalence of slave mothers who killed their own children. Savitt, "Smothering," conjectured that most apparent murders were actually cases of Sudden Infant Death Syndrome.

[80] *McCay v. Chambliss*, 12 La. An. 412 (1857).

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of intellect by which slaves are to be judged."[81] In 1851 Dr. Samuel Cartwright attempted to shed light on this issue in his "Report on the Diseases and Physical Peculiarities of the Negro Race." He described two mental illnesses unique to bondsmen: *drapetomania* (manifested by slaves who continually tried to escape), and *dysaesthesia Aethiopis* (exhibited by slaves who neglected or refused work). To the modern ear, both sound like perfectly reasonable responses to enslavement.

A slave could suffer mental illness and die by his own hand; he could also go free at the hands of others. Courts expected slave buyers to acknowledge that the government might someday free their human property. When property worth billions of dollars disappeared with emancipation, frantic slave buyers attempted to shift their losses to sellers. Yet nearly all courts recognized sales made before war's end, refusing to adopt plaintiffs' arguments that warranties of title or "slave for life" had been breached.[82] A Virginia slave buyer had to pay a bond dated October 1863 in the amount of $13,110, for example. Why? "[T]he purchaser acquired all he contracted for, but his enjoyment was not commensurate with his expectations.... The [plaintiff] ... assumed all the risks attending the acquisition of this species of property in the then existing condition of the country." Similarly, an Alabama court enforced a note given for slaves on February 1, 1864. The court recognized the uncertain value of slave property during the Civil War but observed that people could still lawfully buy and sell this contingent interest. In its opinion, the court said the Emancipation Proclamation (effective January 1, 1863) might have affected slaves' values but not their transferability. An Arkansas court recognized that defendant Dorris probably did not intend to pay $3,000 for a slave bought on August 29, 1863—rather, he may have been trying to evade a stamp tax by paying cash. Yet the court refused to relieve Dorris of his obligation when the slave was freed.[83]

[81] *Grant v. Bontz*, 10 F.C. 977 (D.C. 1819); *Stinson v. Piper*, 3 McC. 251, 253 (S.C. 1825); *Briant v. Marsh*, 19 La. 391, 392 (1840).

[82] Emancipation did not cause a breach of warranty for slaves warranted as "slaves for life." *Anderson v. Mills*, 28 Ark. 175 (1873); *Fitzpatrick v. Hearne*, 44 Ala. 171 (1870); *Porter v. Ralston*, 6 Bush 665 (Ky. 1869); *Thomas v. Porter*, 3 Bush 177 (Ky. 1868); *Bradford v. Jenkins*, 41 Ms. 328 (1867); *Walker v. Gatlin*, 12 Fla. 1 (1867); and *Haslett v. Harris*, 36 Ga. 632 (1867). Nor did emancipation destroy an action against a slave vendor or vendee. *McNealy v. Gregory*, 13 Fl. 417 (1869–70–71); *Matthews v. Dunbar*, 3 W. Va. 138 (1869); *Riley v. Martin*, 35 Ga. 136 (1866); and *Calhoun v. Burnett*, 40 Ms. 599 (1866). Generally, administrators of estates were not liable for refusing to sell slaves for Confederate currency or for failing to sell slaves before war's end. *Mickle v. Brown*, 4 Bax. 468 (Tn. 1874); *Womble v. George*, 64 N.C. 759 (1870); *State v. Hanner*, 64 N.C. 668 (1870); and *Finger v. Finger*, 64 N.C. 183 (1870).

[83] *Henderlite v. Thurman*, 22 Gratt. 466, 482 (Va. 1872); *McElvain v. Mudd*, 44 Ala. 48 (1870); and *Dorris v. Grace*, 24 Ark. 326 (1866). *Blease v. Pratt*, 4 S.C. 513 (1872); *Kaufman v. Barb*, 26 Ark. 24 (1870); and *Fitzpatrick v. Hearne*, 44 Ala. 17 (1870), are similar cases. Only the relatively more protected Louisiana purchasers routinely avoided paying for slaves subsequently emancipated. Louisiana cases include *Satterfield v. Spurlock*, 21 La. An. 771 (1869); and *Sandidge v. Sanderson*, 21 La. An. 757 (1869). In a single Missouri case, the court refused to enforce a note given for slaves taken into Confederate states, saying: "Many slaves were taken to the states in insurrection ... [to] enable the

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By making purchasers pay for slaves later emancipated, judges avoided double-compensating buyers who had (or should have) adjusted prices for the probability of emancipation. Judges also adhered to the standard practice of refusing to undo voluntary agreements. This practice is no different from one that requires buyers of a futures contract for grain, say, to pay the price agreed upon, even if the bottom drops out of the grain market. By settling expectations that agreements are enforceable, judges keep matters out of court when circumstances change. As one Arkansas judge wrote:

> We are not unmindful of the hardship and ruinous loss which have very often arisen out of circumstances connected with the late war, by which individuals, in consequence of acts not their own, have been made to suffer, but can not on account of such hardship, depart from well established principles of law; to do so would open a wide and disastrous field of litigation.[84]

CONCLUSION

Slavery darkens the history of a people that values life, liberty, and the pursuit of happiness. François-René de Chateaubriand's 1791 diary entry offers one traveler's poignant first impression of America: "I gave my silk handkerchief to the little African girl: it was a slave who welcomed me to the soil of liberty."[85] Many antebellum institutions helped strengthen the shackles of slavery; the southern judiciary numbered among the most important. My survey of all the appellate court cases involving slave sales shows that judges typically came to verdicts that facilitated the smooth operation of the domestic slave trade and, thus, the institution of slavery itself.

Antebellum cases open a window on the world of slaves as well. The sheer number of cases involving the sale of slaves tells how easily the average slave's life was disrupted; the dry recitation of facts reveals the uncertainty, meanness, and despair in many slaves' lives. Southern judges, like most antebellum southerners, rarely considered the incalculable costs to slaves of the region's legal and political regime. In part, this was a procedural matter—judges could decide cases based only on the merits of

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enemy to keep the field. To hold such intercourse as lawful, and enforce contracts made in prosecuting it, would suppose that government could sanction its own destruction, . . . The law tolerates no such absurdity." *Carson v. Hunter*, 46 Mo. 467, 472 (1870). Arkansas' 1868 constitution annulled slave sales retroactively, but an 1871 case made this provision unconstitutional. *Osborn v. Nicholas*, 13 Wall. 654 (U.S. 1871).

The Emancipation Proclamation stated that all slaves in the states rebelling against the Union were to be free as of January 1, 1863. It did not apply to areas controlled by the Union army, nor to the border states. The proclamation was unenforceable in areas not controlled by the Union and, in fact, did not free the slaves in those areas, according to southern courts. The end of the war or a clause in a revised state constitution typically conferred freedom in the Confederate States. Abolition in Texas did not occur officially until 1868. Catterall, *Judicial Cases*, various volumes. The Mississippi Senate finally ratified the Thirteenth Amendment in 1995.

[84] *Haskill v. Sevier*, 25 Ark. 152, 157 (1867).

[85] de Chateaubriand, *Memoirs*, p. 21.

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arguments made by parties with legal standing, and slaves did not have this standing.

Court cases also demonstrate that the law of slave sales outpaced other commercial law in sophistication. Although this body of law resembled the law for livestock in some respects, slave sale contracts exhibited more complexity, their interpretation required more subtlety, and the remedies for their breach were more comprehensive. The slave's double identity provides the key to understanding the difference in laws. Slaves possessed the complex nature of a human being, which led to relatively large information asymmetries between buyer and seller. The capabilities of slaves also made them substitutes for free employees; yet people who unwittingly bought inferior slaves could not easily dispose of them—unlike antebellum employers, who could fire unsatisfactory workers at will. The possibility of adverse selection thus shadowed slave-sale markets, resulting in relatively more complicated legal rules than those governing the sale markets for livestock or fungible commodities. At the same time, the large value of slave property increased the probability of litigation and the importance of settled law; it also generated a more even match of power between plaintiff and defendant than in other commercial cases. Effective legal protection of consumers other than slave buyers is, in fact, a tale of the twentieth century.[86]

[86] Hurst, *Law*, pp. 75–105; and Teeven, *History*, p. 222.

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