Articles

Pandora's Box: Slave Character on Trial in the Antebellum Deep South

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INTRODUCTION

Jurists in the antebellum American South considered slaves to have the "double character of person and property" under the law, which generally meant that slaves were persons when accused of a crime, and property the rest of the time.[1] Indeed, when slave buyers felt their newly acquired human property to be "defective" physically or morally, they sued the sellers for breach of warranty—just as they

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1. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 83 (1858). Cobb's treatise on slavery was a polemical defense of the institution.

would over a defective horse or piece of machinery.[2] Similarly, slave owners sued hirers, overseers, and other white men who beat or neglected their slaves for damage to their property.[3] Yet in these mundane civil disputes, the parties in the courtroom brought into question, and gave legal meaning to, the "character" as well as the resistant behavior of enslaved people who persisted in acting as people.

Of course, horses could run away or be recalcitrant without being human, leading one historian to suggest that slaves influenced the law merely in the way that horses influenced the law.[4] Indeed, some legal historians have denied the existence of any "person/property" tension in the law of slavery at all, arguing that slaves were simply property with human qualities.[5] From this perspective, any contradictions in slavery law can be explained by slaveholders' efforts to shape the law instrumentally to serve their own economic interests. Yet to argue that there were tensions in the law is not to suggest that the law did not bolster the slave economy, nor is it to suggest that the typical Southern slaveholder or jurist suffered great angst over treating people as things. Rather, I will argue that slaves themselves influenced the law far more than things or horses ever could. In civil

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2. Most sales contracts for slaves included a declaration that the slave was "sound in body and mind and a slave for life," so these suits were for breach of an express contract. When no express contract existed, the states varied in their approaches. South Carolina followed the old rule, "a sound price implies a sound article," while most other states moved toward a rule of "caveat emptor" ("buyer beware"). Timrod v. Shoolbred, 1 S.C.L. (1 Bay) 324 (1793). Louisiana's Civil Code included strict consumer protections providing for rescission (or "redhibition") of slave sales in the event of "redhibitory" defects such as illness, madness, addiction to theft, or the habit of running away. LA. CIV. CODE, Bk. III, Tit. 7, Chap. 6, § 3, "Of the Vices of Things Sold," arts. 2496-505 (1824) (codified as amended in LA. CIV. CODE ANN. arts. 2520-527 (West 1992) (relating only to animals)). *See also* Andrew Fede, *Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor*, 31 AM. J. LEGAL HIST. 322 (1987); Judith K. Schafer, *"Guaranteed Against the Vices and Maladies Prescribed by Law": Consumer Protection, the Law of Slave Sales, and the Supreme Court in Antebellum Louisiana*, 31 AM. J. LEGAL HIST. 306 (1987).

3. *See* Judith K. Schafer, *"Details Are of a Most Revolting Character": Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, 68 CHI.-KENT L. REV. 1283 (1993).

4. Fede, *supra* note 2, at 323.

5. *See, e.g.*, ANDREW FEDE, PEOPLE WITHOUT RIGHTS (1992); Leon Higginbotham & Barbara Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511 (1989). As William W. Fisher III has noted, many historians have wrestled with the doctrinal contradictions of treating the slave as person and property. William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1056-57 (1993). Some historians argue that "the contradictions are only apparent; careful analysis will show that all aspects of slave law were shrewdly designed to serve the interests of slave owners," and that the slave was always and only property; others "acknowledge that the law of slavery was riddled with genuine inconsistencies but contend that they were all the fruits of a single, fundamental contradiction—the incompatibility of slave socioeconomic relations . . . and bourgeois socioeconomic relations"; finally, still others explain the inconsistencies as a relic of the genealogical origins of slavery law in Roman law, English common law, villenage, and the slave code of Barbados. *Id.* As Fisher contends, "[w]e can understand better the law of slavery by examining its relationships to Southern ideology." *Id.*

disputes such as warranty suits, slaves forced the law to consider their character, challenging slaveholders' self-conception as masters and statesmen.[6] In other words, these cases mattered to white Southerners because their self-understandings as white masters depended on their relationships to black slaves; putting black character on trial called white character into question as well.[7]

The issue of slave character arose most directly in suits for breach of warranty of "moral qualities." While sellers rarely warranted a slave's good character in writing, and courts were reluctant to imply such a warranty in the purchase contract, these cases often reached court in actions for fraud or deceit, when buyers charged that sellers had orally vouched for the slave's good character. Moral qualities included not only the general character of the slave, but also his or her "habits" of drinking, stealing, and running away.[8] Slave character also went on trial whenever a slave's runaway habit or other "vice" became an excuse for a white person to take some action against a slave, such as shooting the slave; an owner or hirer sometimes also gave a slave's character as an excuse for why the slave died or got sick.

Disputes over the sales and hire of slaves have received little scholarly attention until the last decade, when legal historians began examining the "private" law of slavery. Their studies have illuminated the effects of regionalism in American law, and the relationship between legal developments and economic development in the nineteenth-century South.[9] In particular, historians have called attention to the dilemmas antebellum Southern judges faced in applying legal rules first developed by Northern and English courts to cases involving slaves. In the most cited example, the majority of Southern courts refused to apply the fellow-servant rule, crucial to in-

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6. Kenneth Greenberg has shown the symbiosis of ideals of mastery and statesmanship in antebellum Southern culture. KENNETH S. GREENBERG, MASTERS AND STATESMEN (1985).

7. *See* Walter Johnson, Masters and Slaves in the Market: Slavery and the New Orleans Trade, 1804-1864 (1995) (unpublished Ph.D. dissertation, Princeton University) for a discussion of masters' dependence on slaves for their self-conceptions, in the marketplace as well as the courtroom.

8. The term "character" was sometimes used in the antebellum period to mean "reputation," as in, "he gave his good character," or "he had the character in the neighborhood as a . . . ." This usage does not necessarily mean, however, that "character" referred to something less important because it was exterior. While New Englanders recognized a strong division between external appearances and one's inner, "true" self, so that reputation could serve only as *evidence* of character, Kenneth Greenberg has recently shown the extent to which, for nineteenth-century Southerners, appearances *were* what mattered. Kenneth S. Greenberg, *The Nose, the Lie, and the Duel in the Antebellum South*, 97 AM. HIST. REV. 57, 63 (1992).

9. *See, e.g.*, AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (David S. Bodenhamer & James W. Ely Jr. eds., 1984).

dustrialization in the North, to slaves.[10] The only study of breach of warranty suits took this approach as well, pointing out that while South Carolina allowed implied warranties for slaves ("a sound price implies a sound commodity"), other states followed the newer rule of "caveat emptor," which is seen by some historians as a hallmark of capitalist development.[11]

Yet looking beyond appellate opinions to trial records suggests that these cases can tell us about more than just the economics of slave law; they can bring the courtroom to life as a cultural arena as well. Viewing law from an anthropological perspective as "one of the great cultural formations of human life," we can see the courtroom as an arena in which people created meaning.[12] Disputes over the nature of an individual slave's character brought forth many of the racial theories that characterized Southern culture, and helped to define which images of black men and women would prevail in the legal arena. Parties came into the courtroom telling various stories about slaves' character, but the courtroom process favored certain stories over others. When the slave at issue was a woman, the range of acceptable stories narrowed dramatically. By privileging particular slave personae, the law established racial meanings, not only through specific stereotypes of black people, but by painting a picture of black moral character development that differed from Southern white accounts of white moral character development. Thus, even the "private law" of slaves as property contributed to the construction of race and gender in Southern culture.[13] As William W. Fisher III has

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10. *See, e.g.*, MARK TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 45-49 (1981); Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law and Industrialization*, 31 AM. J. LEGAL HIST. 269 (1987); Frederick Wertheim, Note, *Slavery and The Fellow-Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112 (1986).

11. Fede, *supra* note 2, at 329-50; for a discussion of *caveat emptor*, see MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 180 (1977).

12. CLIFFORD GEERTZ, LOCAL KNOWLEDGE 219 (1983).

13. Critical race and gender theorists have explored some of the ways in which American legal structures and vocabulary shape the meaning of race and gender. For discussions by historians of the historical "construction" of race and gender, see generally MELTON MCLAURIN, CELIA: A SLAVE (1992); Barbara Jeanne Fields, *Race and Ideology in American History*, *in* REGION, RACE AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 143-77 (J. Morgan Kousser & James M. McPherson eds., 1982); Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 SIGNS 251 (Winter 1992). For discussions of the role of law in that process, see, e.g., PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor and the Racial Self*, 82 GEO. L.J. 437 (1993); *see also* BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION (1992); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 57-135 (1986).

argued, noting the links between Southern law and Southern ideology may explain doctrinal inconsistencies in slavery law far better than simply equating legal rules with parties' interests.[14]

This Article will examine the legal constructions of black character at precisely the moment when slaves were most "property"-like—as the objects of sale and rental. Andrew Fede, who has done the only published study of slave warranty cases outside of Louisiana, dismisses cases directly involving slave character as doctrinally unimportant, because appellate courts limited buyers' recourse to implied warranties when "moral qualities" of a slave were at issue.[15] Certainly, appellate judges strove to keep these cases out of the courtroom. Yet, not only did this effort fail, but in making it, judges revealed the importance of these cases in Southern culture. In 1821, South Carolina Judge Abraham Nott warned that extending an implied warranty of soundness to a slave's moral qualities would be "worse than opening Pandora's box upon the community."[16] By this, he acknowledged the dangers that litigating slave character posed for a system based on denying the personhood of human property.

Mark Tushnet, in his comprehensive study of the appellate law of slavery, suggests that the logic of the slave system demanded such a separation between contract law and slavery law, with the law of commerce being in the world of "interest" and the law of slavery being in the realm of "humanity."[17] Yet, the interwoven nature of "humanity" and "interest," both at the level of individual master-slave relationships and at the level of complex market transactions, undermines any such separation.

In commercial trials, slaves were viewed simultaneously as capital, as labor, and as people. Although most white Southerners perceived no contradiction in commodifying slaves, their moral systems suffered some strain in the effort. Christian apologists for slavery went to great lengths to justify slavery as a moral institution. But the difficulty of reconciling slave identities in the courtroom arose not from the planter's moral dilemma, but from the inherent relationship of slavery to liberal legal institutions. As James Oakes argues, there was an "intrinsically ambiguous relationship between slavery and the polity [in the South] . . . . The slaveholders had helped create the liberal institutions within which they exercised their power. . . . And yet liberalism, in the end, provided the slaves with the crack into

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14. Fisher, *supra* note 5, at 1057.

15. Fede, *supra* note 2, at 333-34. For Louisiana, see JUDITH KELLEHER SCHAFER, SLAVERY, CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 127-48 (1994); Johnson, *supra* note 7.

16. Smith v. McCall, 12 S.C.L. (1 McCord) 220, 224 (1821).

17. TUSHNET, *supra* note 10.

which their acts of resistance drove the decisive wedge."[18] Runaway and disobedient slaves forced their relationships with their masters into the courts, an arena in which liberal legal institutions formed a buffer against the masters' absolute power. Oakes concludes that, because "the laws and decisions regulating slavery were formulated within a liberal state that was not the historical creature of the slaveholding class," a "tone of desperation hovered . . . over the case law of slavery in the Old South."[19] Judge Nott's warning about Pandora's box, echoes this "tone of desperation."

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This Article is based on a review of published state supreme court reports of civil disputes involving slaves in South Carolina, Georgia, Alabama, Mississippi, and Louisiana from 1800 to 1870 (about 600 cases); all of the available trial records of those cases in South Carolina, Georgia, Alabama, Mississippi (about 200 cases); all the available trial records for those cases directly involving slave character in Louisiana (about 70 cases); as well as a survey of the unappealed cases in Adams County, Mississippi (roughly 8,000 of 30,000 cases from 1798 to 1861 were surveyed; 300 cases involved slaves).[20]

The five states surveyed comprise the region known today as the "Deep South," or the "Black Belt" in the antebellum era. These states were united by the culture and the economy of the cotton plantation. By the second quarter of the nineteenth century, they encompassed the largest slave populations in the United States because the Deep Southern states were the greatest slave importers in the domestic trade. These states, with large numbers of slaves and slave buyers, as well as large plantations, generated vigorous litigation over slave sales and fostered a relatively coherent planter culture and ideology. At the same time, the states are geographically distinct enough to illustrate the contrast between the "Old South" of South Carolina and the newer areas of the Southwest, such as Mississippi, and between the common law regimes and the civil law system of Louisiana.

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18. JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 139 (1990).

19. *Id.* at 159-60.

20. For the 1850s, I looked at each case before the circuit court. For the earlier years, I sampled one drawer out of every three; the records are handwritten, rolled, tied with a ribbon, and housed in metal drawers, of which there are 300 in all. Due to the unique and handwritten nature of most of these records, and the vagaries of their storage, certain citation information is not consistently available. Pinpoint cites to these sources would be unhelpful, as there are generally no page numbers. Additionally, other information such as the month of decision is occasionally missing from the opinion itself.

Of the five states, Louisiana had by far the most state supreme court litigation on these subjects. Because of Louisiana's codified consumer protections for slave buyers, warranty litigation was extremely common. Thus, my examples are often drawn from Louisiana court records. Despite an unusual Roman law heritage, there is no indication that Louisiana courts addressed the issue of slave character differently than did the courts of other Deep Southern states. The conflicting strands of racial ideology of antebellum Southern planters were far more important to legal developments than the genealogical origins of a state's laws. Furthermore, the presence and status of free people of color in New Orleans does not seem to have altered white attitudes toward black slaves.

Nor did I find a significant difference between the appealed cases and those that ended in a county court. To test whether or not appealed cases provide a representative sampling, I reviewed more than one third of all cases argued at the trial level in Adams County, Mississippi, which included the slave market at Natchez. I focused on this area for several reasons. First, the Adams County court records are complete, at least for the years 1817 to 1861, with some records remaining from 1798 to 1817. This is quite rare among Deep Southern counties, where many of the courthouses that survived the Civil War burned down in the following century, and many court officials simply lost or threw away their old records. Natchez is also a worthwhile subject for in-depth study because it was the home of the "nabobs," a center of wealth and large slaveholding in the cotton South. In the Southwest, Natchez's active slave market was second only to that of New Orleans. Lastly, this local study also allowed me to examine more closely the question of change over time. While I found that litigation increased over the antebellum period, particularly after the economic ups and downs of the 1830s, and there was a slight trend towards more favorable outcomes for slave buyers, I did not find noticeable changes in the imagery and ideology of black character. Although I hesitate to present a static picture of antebellum legal culture, I was impressed more by the consistencies among cases over time than by the contrasts among them.

Part I of this Article examines images of the "good" slave and the "bad" slave which emerged from civil trials. It considers how commodification of slaves' character and labor shaped the way witnesses spoke about slaves, and the profound impact gender narratives had on racial imagery, not only because white Southern stereotypes of black women and men were evident in the courtroom, but also because those stereotypes shaped the interpretation of slaves' perceived shortcomings as laborers. Part II explores the stories that witnesses, lawyers, and judges told about why slaves had the character they had

and behaved the way they did. In particular, stories about why slaves ran away, or had the character of runaways, determined the outcome of many warranty and hire cases. The answers that courtroom participants gave to these questions depended in part on whether the slave at issue was a woman or a man. This Part examines the "medicalization" of slave "vice" that colored accounts of slave character in many cases, but especially those involving women. Finally, Part III of the Article discusses the ways in which these cases challenged the Southern legal and cultural order. These cases frequently forced lawyers and judges to acknowledge slave agency, such as when witnesses noted a slave's own reasons for behaving in a certain way, when a slave's action resulted in a tort, or when a slave deceived a white man. This Part will also analyze how courts dealt with the impossibility of excluding slaves' own words from testimony in these cases.

I. WHAT IS A GOOD SLAVE?

Parties in the antebellum courtroom painted a picture of good and bad slaves which sometimes contradicted the stereotypes popularized by polemicists on both sides of the slavery debate. The stereotypes noted by historians John Blassingame and Deborah Gray White—the childlike "Sambo," the rebellious "Nat," the average "Jack," the sexual "Jezebel," and the motherly "Mammy"—may have shaped white Southerners' understanding of their relationships with enslaved African-Americans, but not all of these stereotypes emerged in the courtroom.[21] For example, while black women were rarely vilified as harshly as black men who were identified as "Nats," nor were they portrayed in sexual terms as "Jezebels." Furthermore, witnesses' characterizations of good slaves as honest, intelligent, and industrious call into question the sincerity of their belief in "Sambo" and highlight the fact that the qualities slaveholders prized in slaves were those useful in a market economy. Most descriptions of slaves included an estimate of dollar value, and most disputes hinged in one way or another on slaves' skills as workers. Suits involving the skills of a slave, in particular, brought the intersection of black status as capital and as labor into relief.

21. *See* JOHN BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE OLD SOUTH 133-34 (1972); DEBORAH GRAY WHITE, AR'N'T I A WOMAN: FEMALE SLAVES IN THE PLANTATION SOUTH 27-61 (1985). The actual existence of "Sambo" as a personality type in the antebellum South has been hotly debated; I refer here to "Sambo" only as a figment of white ideology.

As George Fredrickson has pointed out, Southerners needed a spectrum of images to deal with individual slaves in their daily lives.[22] Witnesses at trial testified about slaves in ways that did not fit into the simple stereotypes propagated by appellate judges and legal treatise writers, particularly in recognizing the personalities, human motivations, and skills of individual slaves.[23] For example, the good slave, at the trial level, often had qualities "Sambo" did not have, such as honesty and industry, and attributes beyond those of which "Sambo" was capable. Slave sellers generally advertised their slaves to be "a No. 1 boy," "honest, industrious and free from vice," or "honest, sober, humble and not given to be a runaway."[24] In one Louisiana case, the seller's witnesses proved William's honesty by testifying that he, "a boy of good character perfectly honest and sober . . . used to be sent to the house of the most respectable men in [town] to shave them when they did not like to come to the shop." William "was well informed and well acquainted with amounts and generally managed [his owner's] affairs."[25] Likewise, an overseer testified that Aglae was "very industrious very clean,"[26] and Lucinda's owner advertised her as "an honest trusty servant" who "always brought her wages in."[27] Honesty and industry were qualities that both male and female slaves might exhibit.

Occasionally, witnesses referred to slaves' intelligence or morality, implicitly or explicitly raising them to the level of whites.[28] At times, parties spoke of slaves as "men" and "women" or "persons" rather than "boys," "girls," or "wenches." For example, in one slave inventory, all adult slaves (over the age of eighteen) were designated "men" or "women," while all children were designated "boys" or "girls."[29] In *Pilie v. Lalande*, one witness reported that a female slave was "quick and intelligent," another that she was "of good

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22. GEORGE M. FREDRICKSON, THE ARROGANCE OF RACE 211 (1988) [hereinafter FREDRICKSON, ARROGANCE].

23. Self-conscious legal writers of treatises, as well as appellate judges, drew heavily on such stereotypes of the black slave as a happy, docile "Sambo;" a rebellious "Nat;" or a sensuous "Jezebel." *See* Fisher, *supra* note 5.

24. White v. Cumming, Docket #357 (Alexandria ser., 1826) (available in Supreme Court Archives, Earl K. Long Library, University of New Orleans [hereinafter *SCA-UNO*]). Appeal reported in 5 Mart. (n.s.) 199 (La. 1826).

25. Testimony of William Rudder, Castellano v. Peillon, Docket #944 (New Orleans ser., May 1824) (available in *SCA-UNO*). Appeal reported in 2 Mart. (n.s.) 466 (La. 1824).

26. Testimony of Etienne Girard, Petit v. Laville, Docket #4660 (New Orleans ser., June 1843) (available in *SCA-UNO*). Appeal reported in 5 Rob. 117 (La. 1843).

27. Pahnvitz v. Fassman, Docket #512 (New Orleans ser., June 1847) (available in *SCA-UNO*). Appeal reported in 2 La. Ann. 625 (1847).

28. *See, e.g.*, Chretien v. Theard, Docket #612 (New Orleans ser., Feb. 1822) (available in *SCA-UNO*). Appeal reported in 11 Mart. (n.s.) 11 (La. 1822).

29. Lewis v. Casenave, Docket #2559 (New Orleans ser., Dec. 1833) (available in *SCA-UNO*). Appeal reported in 6 La. 437 (1833).

disposition intelligent and a good servant."[30] In tort cases in which the court had to decide whether or not to hold a white person responsible for injury to a black slave, judicial comments about the volition of the slave were sometimes accompanied by the recognition that the slave was "a moral agent."[31] On the other hand, black intelligence, particularly in a woman, could be a negative attribute from a white point of view. In one case, Farmer tried to return Kitty because "she knew too much . . . the essence of Farmer's objection was that the slave was too smart."[32]

A bad slave had the opposite characteristics: faithlessness, dishonesty, indolence, and insubordination. The same slaves whom sellers portrayed as honest and trustworthy were accused, by slave buyers suing for character defects, of being "vicious and worthless, habitual and dangerous runaway," "ill disposed, faithless, inconstant, unsteady, disobedient, and bad in all respects," or "dishonest, lazy and vicious."[33] An especially bad slave, Lawson, "was violent and headstrong and abused the smaller negroes."[34] Another witness in Adams County Court described his former slave Jesse as one whom he had "bought . . . in chains . . . and sold . . . in the stock, as a notorious scoundrel."[35] Such vehement denunciations of slaves' whole character as degraded and vicious almost always referred to male slaves. Witnesses might characterize enslaved women as lazy, but the same stereotype of savagery did not apply to rebellious women.[36] For example, in one case about a runaway female slave, the buyer's most detailed complaint about her character was that she was "as smart a negro as any, if she would stay."[37] In other cases, the buyer merely argued that the female runaway was crazy or idiotic.[38]

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30. Docket #1724 (New Orleans ser., Mar. 1829) (available in *SCA-UNO*). Appeal reported in 7 Mart. (n.s.) 558 (1829). *See also* Plaintiff's Brief, Walker v. Hays, Docket #6606 (New Orleans ser., Feb. 1860) (available in *SCA-UNO*). Appeal reported in 15 La. Ann. 640 (1860) ("The plaintiff . . . established by Mr. Hair that [Agnes] was a very intelligent servant.").

31. *See, e.g.*, Horlbeck v. Erickson, 39 S.C.L. (6 Rich.) 154 (1852).

32. Farmer v. Fiske, Docket #5248 (New Orleans ser., Dec. 1844) (available in *SCA-UNO*). Appeal reported in 9 Rob. 351 (La. 1844).

33. Complaint, Taylor v. Cochran, Drawer 7, #1441 (Adams County Ct. [Miss. Terr.], June Term 1802) (available in Historic Natchez Foundation records [hereinafter *HNF*]).

34. Penciled memo [probably by judge], Perkins v. Hundley, Drawer 91, #25 (Adams County Cir. Ct., May Term 1819) (available in *HNF*).

35. Deposition of William Shaffer, Tull v. Walker, Drawer 70, (n. no.) (Adams County Cir. Ct., May Term 1830) (available in *HNF*).

36. *See, e.g.*, Laurence v. McFarlane, Docket #1722 (New Orleans ser., Mar. 1829) (available in *SCA-UNO*). Appeal reported in 7 Mart. (n.s.) 558 (La. 1829) ("sold [Fanny] because she was lazy").

37. Romer v. Woods, f.w.c. [free woman of color], Docket #1911 (New Orleans ser., Jan. 1851) (available in *SCA-UNO*). Appeal reported in 6 La. Ann. 29 (1851).

38. *See, e.g.*, Icar v. Suares, Docket #2649 (New Orleans ser., Jan. 1835) (available in *SCA-UNO*). Appeal reported in 7 La. 517 (1835); Briant v. Marsh, 19 La. 391 (1841).

It is striking how frequently vice in enslaved men was connected with dishonesty and faithlessness, suggesting that masters normally could have expected honesty and loyalty from slaves. If all slaves were mendacious "Sambos," this expectation would have made no sense. Sometimes one party, usually the seller, invoked the "Sambo" stereotype, arguing that one could not expect too much even from good slaves; "it [is] very common amongst Negroes to steal a little and run away."[39] This bore out the stereotype of slaves as mendacious and mischievous, though generally harmless. Yet a strong counterstory insisted that, in fact, well-treated, good slaves were both honest and trustworthy. Indeed, in the same case, the witness being deposed made plain that he "don't believed most negroes would steal and run away."[40] Thus, while Southerners in court spoke of bad slaves as dishonest and vicious, they usually meant to distinguish the character of these individuals from the general character of all black slaves.

The emphasis in trials on honesty and industry also suggests that whites highly prized these characteristics in slaves. As we saw in the earlier example of William, an honest, industrious slave was one who could be trusted to go out, do a job, and come home again. In a market economy, these were particularly important attributes. Legal disputes over slave character took place in a market context in which the slave's value as a worker was foremost in the parties' minds.

Because slaves were, along with land, the most important form of capital in the antebellum South, positive descriptions of a slave's character often were accompanied by an estimate of value, such as "being a fine fellow honest industrious free from vice and such an one as would command a good price" or "a Negro woman slave whose character was exceptionable and was considered not so valuable on account of her bad qualities but was worth as he considered $400."[41] The constant numerical valuation of slaves' characters meant that whenever slaves were viewed as people, their property aspect also intruded. Commodification meant always thinking about slave character in dollar terms.

Witnesses and sellers also described good or bad slaves in terms of their work skills or the jobs they performed. Women were disproportionately represented in both warranty and hire disputes over skilled slaves. Indeed, if a buyer sued a seller for a breach of warranty in the

39. Cozzins v. Whitacker, Bk. 34, Docket #1261 (Ala. Sup. Ct. Records, Jan. 1833) (available in Alabama Supreme Court Records, Alabama Department of Archives & History [hereinafter *ADAH*]).
40. *Id.*
41. *Id.*

sale of a female slave, and the case did not involve physical illness or death, the complaint most likely claimed that she did not perform sufficiently as a house servant. Thus, it appears that behavior that might have been interpreted as a deficiency in the "character" of a man was more often portrayed as deficiency in the "skill" of a woman.

In valuing slaves, skills could balance qualities considered to be defects, such as old age or high temper. Philander, for example, "was an old man about 50 years old; he was represented as a very good carpenter; though he was old, yet he might be more valuable on account of being a mechanic."[42] In another warranty case, Sally "was a pretty good looking old woman—was a House servant, and capable, but very high-tempered—she was an *excellent Cook*—she was put into the work house for her impudence."[43] The defendant told one witness that he could not manage her, and a former owner testified "that Sally was a very capable servant and objectionable only as respected her temper—which was intolerable."[44]

In order to recover the price of a slave, it was usually legally insufficient to prove that a slave did not have the skills the seller represented her to have. However, a skills claim could supplement another claim of unsoundness to the benefit of the buyer. Evidence that a seller had lied about a slave's skills tended to prove to the trier of fact that the seller had also lied about other things. For example, in *Brocklebank v. Johnson*,[45] the buyer's primary claim was that Romeo was a drunkard and suffered illness from his drinking. In addition, though, he wanted to prove that Johnson had misrepresented Romeo to be a good bricklayer. The trial judge instructed the jury to consider both claims—but for the skills claim, "the Plaintiff could only recover the difference in value between a Bricklayer and a common negro."[46] Brocklebank won both a jury verdict and an appellate judgment that he could recover for deceit even if Johnson had given no written warranty of Romeo's character or his skills as a bricklayer.[47]

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42. Testimony of Thomas N. Gadsden, Gantt v. Venning, Box 34 (City Ct. of Charleston, Jan. 1840) (available in South Carolina Supreme Court Records, South Carolina Department of Archives & History) [hereinafter *SCDAH*]. Appeal reported in Cheves 87 (S.C. 1840) [no S.C.L. volume available].

43. Campbell v. Atchison, Box 21 (S.C. Sup. Ct. Records, Mar. 1827) (available in *SCDAH*). The word "old" in the quotation was added to the transcript in a different ink.

44. *Id.*

45. Box 28 (S.C. Sup. Ct. Records, Apr. 1834) (available in *SCDAH*). Appeal reported in Johnson v. Brockelbank, 2 Hill 353 (S.C. 1834) [no S.C.L. volume available].

46. *Id.*

47. *Id.*; *see also* Athey v. Olive, 34 Ala. 711, 712-13 (1859) (stating that defendant refused to pay note because Matilda was crazy and because "Matilda . . . was represented by the plaintiff to be a good cook, washer and ironer, and seamstress, that she came up to neither of these

The Louisiana Supreme Court heard several of these mixed-claim cases involving women sold to do housework. The facts of these cases, as described in the trial testimony, highlight the different characterizations of women and men who refused to work. For example, Grenier Petit sued Jean Laville because Aglae "was neither a washer nor a good subject."[48] The plaintiff brought forth witnesses who testified that they had tried the slave Aglae as a washer and that "she did not appear to understand any thing about washing."[49] One witness, Mme. Felix, "gave her two shirts to wash and after keeping them during four hours she returned them without having finished them." She testified on cross-examination that "she can say in an hour if a person is a washer or not."[50] A woman who worked for Mme. Felix testified that she had been obliged to rewash the two shirts Aglae washed, and that although she "is not a washer by trade," she "is a good judge of washing."[51]

It is impossible to determine whether Aglae did not know how to wash shirts, or if she simply decided not to wash them as a form of resistance, but it is significant that all the witnesses labelled Aglae's defect as a lack of washing skills rather than rebelliousness or even laziness—in stark contrast to cases in which male slaves who failed to complete work were branded rebels with bad character and habits. Why white Southerners found it easier to imagine black women as incompetent rather than vicious is open to conjecture. Perhaps it was too far a stretch to conceive of a female house slave, a "Mammy," as a rebel; perhaps gendered notions of competency made it easier to attribute incompetence to black women. Certainly, the absence of whites' fear of "Nat" when the slave at issue was a woman made masters less likely to conjure up a vicious rebel at the first failure to obey orders.

The debates over slaves' skills often revealed how low judicial standards were for the level of skill, or for the amount of work,

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representations"); Nowell v. Gadsden, Box 42 (City Ct. of Charleston, May 1848) (available in *SCDAH*) (describing breach of warranty for Lander because of illness and lack of skill as blacksmith); Chretien v. Theard, Docket #612 (New Orleans ser., Feb. 1822) (available in *SCA-UNO*), appeal reported in 11 Mart. 11 (La. 1822) (reporting that buyer instantly discovered that [Lafortune] was neither a carpenter nor joiner . . . a drunkard and a thief and also an insubordinate slave").

48. Petit v. Laville, Docket #4660 (New Orleans ser., June 1841) (available in *SCA-UNO*). Appeal reported in 5 Rob. 117 (La. 1841). *See also* Buhler v. McHatton, Docket #3448 (New Orleans ser., Feb. 1854) (available in *SCA-UNO*). Appeal reported in 9 La. Ann. 192 (1854) ("Jane has proved entirely useless as a cook, and 2d, because she is addicted to madness, insanity, or habitual craziness . . . .").

49. *Id.*

50. *Id.*

51. *Id.*

reasonably expected of slaves. In *Chretien v. Theard*,[52] William Rogers, a carpenter, testified that the slave Lafortune was "expert in neither trade of Carpenter or Joiner, that he said Lafortune is not more expert in them than an intelligent man who has never learnt said trade."[53] Despite the fact that several other witnesses corroborated this testimony, the judge gave great weight to the testimony of two witnesses who had known Lafortune many years earlier, and who said "that he was capable of executing work when market [sic] out to him."[54] The judge wrote that "[t]his I think is as much as could be expected of an unlettered slave. It could not be supposed that he could calculate the dimensions and proportions of a building. It was not to be expected that a slave should be a master workman."[55]

Clearly, William Rogers believed that Lafortune, sold as a "carpenter and joiner," should have the skills of a carpenter and a joiner, able to perform his work better than even an "intelligent man" without training. In contrast, the judge implied that a slave carpenter could meet a lower standard than a "carpenter" or a "joiner"; the judge did not consider an "intelligent man" to be the appropriate reference point for "an unlettered slave." While ordinary Southern whites expected slaves to meet the industry's level of skill, judges in these cases avoided inscribing in the law too high a standard for slaves, one that might undermine the "Sambo" stereotype.

Finally, slaves' status as capital and as labor intersected. Litigants argued vehemently over a slave's skills in determining the slave's dollar value. For example, in *Stone & Best v. Watson*,[56] the buyer succeeded in proving a slave unsound because of illness. He also contended that if she was sound, her false reputation as "a No. 1 seamstress" ought to be taken into acount in the determination of her value.[57] In *Campbell ads. Atchison*,[58] one witness testified that "he would not have given a Dollar for" Salley, for whom the buyer had paid $350, "but that she ought to have brought $250."[59] His reason for considering her worthless was her temper, but he recognized that her skills would bring money on the market. Another witness testified that Salley "would *at the present time be worth $350*, but for her temper."[60] In *Porcher ads. Caldwell*,[61] a witness testified "that

52. Docket #612 (New Orleans ser., Feb. 1822) (available in *SCA-UNO*).
53. *Id.*
54. *Id.*
55. *Id.*
56. 37 Ala. 279 (1861).
57. *Id.*
58. Box 21 (S.C. Sup. Ct. Records, Mar. 1827) (available in *SCDAH*).
59. *Id.*
60. *Id.* (emphasis in original).

a first rate cook would be worth $500," but that because the slave had poor cooking skills, he "dont think the negro worth $350 if she had been sound."[62]

The cases involving slaves' skills show several sometimes contradictory impulses by all parties involved: witnesses' attribution of intelligence, ability, and efficiency to enslaved people; judges' unwillingness to set high standards for slaves' labor; the constant juxtaposition of paternalist rhetoric with discussions of slaves in terms of dollar value; and a focus on women's inability as opposed to insubordination. Yet, for the most part, disputes over skilled slaves avoided the starkest contrasts between the good slave and the bad slave for the very reason that they presupposed a competency on the slaves' part that defied the stereotype.

II. ORIGIN AND DEVELOPMENT OF SLAVE CHARACTER

Disputes involving runaway slaves, unlike those regarding slaves' skills, highlight the schizophrenic racial iconography of white Southerners: the hope that slaves were happy "Sambos" and "Mammys" was always balanced by the fear that if the bonds of slavery were loosened, the childlike slaves would revert to savage beasts. What the trials help to illuminate in this child-savage duality is the multiplicity of stories about what made a slave into a child or a savage. Slave buyers and sellers, hirers and owners, told different stories about the dependence of slaves' characters on their masters' influence, and the immutability of slave "vice."

As George Fredrickson has argued, "Sambo" and "Nat" were two sides of the same coin: according to Southern white racial theory, "the Negro was by nature a savage brute. Under slavery, however, he was 'domesticated' or, to a limited degree, 'civilized.' Hence docility was not so much his natural character as an artificial creation of slavery."[63] As Dr. Samuel Cartwright put it, "the negro must, from necessity, be the slave of man or the slave of Satan."[64] White Southerners believed that black character was plastic; one Virginia planter wrote that "[t]he character of the negro . . . is like the plastic clay, which may be moulded into agreeable or disagreeable figures

61. Box 37 (S.C. Sup. Ct. Records, Mar. 1842) (available in *SCDAH*). Appeal reported in 2 McMullan 329 (S.C. 1842) [no S.C.L. volume available].

62. *Id.*

63. GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914, at 53-54 (1917) [hereinafter FREDRICKSON, IMAGE].

64. Samuel Cartwright, *Negro Freedom an Impossibility Under Nature's Laws*, 30 DEBOW'S REV. 648, 651 (1860).

according to the skill of the moulder."[65] But they did not think it was "infinitely plastic": "innate racial traits limited his potential development to a more or less tenuous state of 'semi-civilization.'"[66]

This picture of black character as malleable to a certain point should be contrasted with Southern whites' conceptions of their own character development. Southern ideals of white character largely depended on slavery and a contrast between black and white. As James Oakes and other historians of Southern culture have explained, Southern society was based on both honor and slavery; slaves were those who could have no honor, whereas all white men could potentially take part in the code of honor.[67] From Scottish moral philosophy, white Southerners inherited the view that the "moral sense" was an innate faculty of all white men.[68] This moral sense could be developed through education, or it could be left in the rough, but all white men possessed it.

By the early nineteenth century, most white Southerners believed that blacks were bereft of the moral capacity to be educated. While proslavery writers did not put their conviction of black moral inferiority in terms of "the moral sense," they asserted frequently enough that blacks could not benefit from moral education because they lacked the necessary prerequisites.[69] Therefore, the plasticity of slaves' "character" did not necessarily equate with moral development as understood by educated whites. Rather, Southern ideologues emphasized the *imitative* abilities of the black slave. As Cartwright

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65. H. [only authorial information given in source], *Remarks on Overseers; and the Proper Treatment of Slaves*, 5 FARMERS' REG. 302 (1837).

66. *See* FREDRICKSON, IMAGE, *supra* note 63, at 52.

67. *See* James Oakes, *Slavery and Freedom*, *in* SLAVERY AND SOCIAL DEATH 3-39 (Orlando Patterson ed., 1982); *see also* FREDRICKSON, IMAGE, *supra* note 63, at 159; GREENBERG, *supra* note 6, at 65. The dishonor of slaves played itself out in the law. For example, slave testimony was barred because slaves could not be trusted to tell the truth like honorable men. Fisher, *supra* note 5, at 1077.

68. *See* E. BROOKS HOLIFIELD, THE GENTLEMAN THEOLOGIANS: AMERICAN THEOLOGY IN SOUTHERN CULTURE, 1795-1860, at 110-26 (1978). Many Southern theologians adopted the "faculty psychology" of the Scottish philosophers, which posited an innate "'moral sense' antecedent to self-regarding motives and independent of revelation." *Id.* at 130, 138.

69. *See, e.g.*, 2 THE INDUSTRIAL RESOURCES, STATISTICS, ETC., OF THE UNITED STATES, AND MORE PARTICULARLY OF THE SOUTHERN AND WESTERN STATES (J.D.B. DeBow ed., 1854) [hereinafter INDUSTRIAL RESOURCES]. More specifically, see John Campbell, *Negro-Mania: being an examination of the falsely-assumed equality of the various races of men*, *in* 2 INDUSTRIAL RESOURCES, *supra*, at 196 ("Lawrence remarks, that the difference of color 'between the white and the black races is not more striking than the preeminence of the former in moral feelings and in mental endowments.'"); Chancellor Harper, Negro Slavery, Address at the Society for the Advancement of Learning, of South Carolina 205 ("Objection answered—'The slave is cut off from the means of intellectual, moral, and religious improvement, and in consequence his moral character becomes depraved, and he addicted to degrading vices'"; arguing that slave cannot improve himself because he has no capacity for moral character development). *See also* COBB, *supra* note 1, at 37-38 (considering "[t]he development of his moral character, when in contact with civilization," and finding that blacks "exhibit the same characteristics" of moral degradation, whatever the circumstances).

wrote, "When made contented and happy, as [slaves] always should be, they reflect their master in their thoughts, morals, and religion, or at least they are desirous of being like him. They imitate him in everything, as far as their imitative faculties, which are very strong, will carry them."[70] Thus, a well-governed slave might *mimic* moral development without actually having her own moral faculty to develop.

A. "Like master, like man"

In warranty cases, the malleability of slave character was essentially a seller's story. Only a seller would suggest that a slave's character depended on good government by a master. In contrast, the buyer unhappy with a runaway or "vicious" slave preferred to portray the slave's character as immutable. This particular slave, according to the typical buyer, was an incorrigible savage under any circumstances. Buyers painted a world in which slaves were born with particular characteristics, just as whites were. Alternatively, while malleable character made slaves seem childlike but human, immutable viciousness could render an enslaved person subhuman.

Buyers rejected any evidence of mutable character. Because a slave could have no reason to want her freedom, she must simply have a runaway vice or habit. As John Staples, a witness for the buyer in *Hagan v. Rist*,[71] explained, "I do not know why he runaway [sic] he certainly had no reason I think it is a natural vice with him."[72] John Staples believed John (the slave) to be immutably vicious. William J. Ethridge, the overseer, corroborated this testimony by saying that John "ranaway without any cause whatever,"[73] in contrast to a slave who was whipped or had other reasons. Therefore, John must *be* a runaway. Likewise, Abram Taylor complained, Pompey was "ill disposed, faithless, inconstant, unsteady, disobedient, and bad on all respects," and "John Cochran and Peter Watts well knew him to embrace the earliest opportunity to return to his old masters . . . . Pompey never would remain or live with any other person or master than [Cochran and Watts]."[74]

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70. *Dr. Cartwright on the Caucasians and the Africans*, 32 DEBOW'S REV. 53, 53-54 (1861). *See also* COBB, *supra* note 1, at 35 ("[T]he negro . . . is imitative, sometimes eminently so, but his mind is never inventive or suggestive. Improvement never enters into his imagination.").

71. Docket #4503 (New Orleans ser., June 1844) (available in *SCA-UNO*). Appeal reported in 8 Rob. 106 (La. 1844).

72. *Id.*

73. *Id.*

74. Taylor v. Cochran, Drawer 7, #1441 (Adams County Ct. [Miss. Terr.], June 1802) (available in *HNF*).

Slave buyers, hirers from whom slaves ran away, or persons accused of shooting runaway slaves emphasized slaves' immutable viciousness, and their proper exercise of control over the slaves. In *Moran v. Davis*,[75] the slave Stephen ran away from Davis, who had hired him from Moran. Moran then sued Davis for the price of Stephen; in answer, Davis replied that Stephen "was of bad and insubordinate character and difficult to manage and keep in proper subjection .... Defendant says he used only so much and such means as were necessary to keep said negro under control .... [He] was unruly and insubordinate and would not submit to the control of the defendant."[76] The jury agreed that Davis should not have to reimburse Moran for the loss.[77]

The seller's story of malleability played into the paternalist defense of slavery by shifting the focus from the slave's character to the master's treatment of the slave. One case decided on appeal by Chief Justice John Belton O'Neall of the South Carolina Supreme Court illustrates this shift. In *Johnson v. Wideman*,[78] the buyer (Wideman) portrayed Charles as an insubordinate and vicious drunkard and runaway, while the seller (Johnson) claimed that Charles behaved badly only under bad government.[79] Wideman's witnesses testified that Johnson had represented Charles to be sober, honest, and humble, that Johnson had said "he would trust him with money," and that "a boy of ten years old could control him."[80] Instead, according to Alexander Cummins, "Charles would get drunk; he would not work; he let his coal kiln burn up; was insolent; he was very often drunk; he saw him once lying behind the shop, and at another time in the woods. He (Charles) stayed with the defendant about two months and then ran away."[81]

According to the buyer-defendant, not only was Charles lazy and insolent, but he also cursed his overseer and attacked or threatened other white men. One witness testified, "He was saucy: [one witness] saw him shove a white man, named Cramer, down. He did not bring

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75. Docket #1561 (Ga. Sup. Ct. Records, Apr. 1855) (available in Georgia Supreme Court Records, Georgia Department of Archives & History [hereinafter *GDAH*]). Appeal reported in 18 Ga. 722 (1855).

76. *Id.*

77. *Id.* In *Thornton v. Towns*, Jesse Thornton charged that Andrew Towns had violated a hire contract by his cruel treatment of several slaves: Towns argued that Golding's bad character fully justified his harsh treatment. Docket #3869 (Ga. Sup. Ct. Records, Jan. 1865) (available in *GDAH*). Appeal reported in 34 Ga. 1225 (1865).

78. 1 Rice 325 (S.C. 1839) [no S.C.L. volume available].

79. In this case, the seller sued the buyer because he did not pay his note. Although the trial records of this case are unavailable, the South Carolina Supreme Court, in an unusual opinion, reprinted the report of the trial judge, including the testimony and briefs.

80. *Id.* at 328.

81. *Id.* at 327.

much custom to the shop: he threatened to beat another white man named Wells."[82] The same witness revealed that Charles told Wells that "no one man ever had or ever should master him."[83] Another witness reported that "Charles and Norris (a white man) were gambling—he struck Norris. At a race, Berry [Charles's former owner, before Johnson] and another white man were quarrelling. Charles came up behind his master, shut up his fist and swore that he wished he was a white man."[84] Several witnesses testified to Charles's drinking, swearing, laziness, and general insolence. One witness even recounted a story of Charles pulling a knife to prevent the witness from pulling Charles's two big dogs off his own little dog.[85]

The defense maintained that Charles had been a runaway and a drunk when Johnson, the seller, had owned him. John Wideman, a relative of the defendant, testified that

> [h]is brother (who as well as he, was a boy) was once about whipping Charles's wife: she broke and run, crying and calling for her husband. Charles came to her and asked what was the matter: she said William, the witness' brother, was whipping her: he swore he would mash him to the earth. At another time, he and his brother chased Charles from the kitchen; he turned and offered to fight them.[86]

Other witnesses who lived near Johnson told stories of Charles swearing that he would not live with Johnson, hiding in a willow thicket when there was work to be done, and asking a storekeeper for a ticket (a pass). Major William Eddings estimated Charles's value over $1,000 when Johnson bought him from Berry, "taking him *as he was*," because of his skill as a blacksmith.[87] On the day of the sale, according to James Spikes, "Charles quarrelled with Berry: charged him with keeping his wife, shut up his fist and was walking towards Berry, when Johnson prevented him."[88] When the plaintiff-seller tried to argue that a firmer master could have reined in Charles's misbehavior, defense witness Sherwood Corley testified that "he had often helped to tie and whip [Charles]" when Berry owned him; "it had no effect on him; he would curse his master as soon as taken down."[89]

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82. *Id.* at 330.
83. *Id.* at 331.
84. *Id.* at 333.
85. *Id.* at 335.
86. *Id.* at 332-33.
87. *Id.* at 333.
88. *Id.* at 334.
89. *Id.* at 340.

In short, according to the buyer-defendant in this case, Charles was everything that struck terror into slaveholders' hearts about slaves: he owned a dog (against the law); he was married (unrecognized by law); worse, he tried to defend his wife's honor against white men; he not only acted as though he were equal to a white man, he *said he wished he was a white man*; he threatened white men with violence; he refused to work unless he wished to; he did not respond to whipping; and he ran away at will. He had two particularly dangerous traits: first, insolence, which meant that he threatened white men; second, the runaway habit, which meant that he threatened the institution of slavery. In all of these offenses, according to the buyer-defendant, Charles was impervious to varying treatment; he was immutably vicious.

The plaintiff-seller's witnesses, however, told a different story. According to them, Charles was a drunkard and an insolent negro only when he lived with Wiley Berry, "himself a drinking, horse-racing man"[90] (from whom Johnson bought Charles). As Lewis Busby explained, "He had heard of [Charles's] drinking. He had borne the character of an insolent negro: but not in the time he belonged to the Johnsons."[91] Others testified that Charles was humble and worked well; that when Johnson owned him, "he was not so indolent as when he belonged to Berry."[92] Berry had exposed him frequently to spirits, and had whipped him frequently. Alexander Presley testified that Wideman had known Charles's reputation and had told Presley that Charles "was under a bad character . . . as he could out-general old Wiley Berry, he must be bad."[93] Thus, Johnson's case rested on the contentions that Charles was a good slave when managed well and that the only evidence of his insolence came from his behavior under Berry and under Wideman himself. In the alternative, Johnson argued that Wideman knew of Charles's bad character before he bought him.[94]

The circuit judge, instructing the jury, asked, "[W]hat moral qualities would be so material, as that a misrepresentation of them would have the effect to rescind the contract?" He answered "that any quality represented to exist, which, if it did not, would have the effect of diminishing in a considerable degree, the usefulness and

90. *Id.* at 334.
91. *Id.* at 338.
92. *Id.* at 340.
93. *Id.* at 337.
94. *Id.* at 337-39.

value of the slave, would have that effect."[95] He went on to enumerate which of Charles's vices might qualify:

> Habitual drunkenness was I told them, such a vicious habit as would justify them in rescinding the contract, if they should believe that it existed, that the plaintiff knew it, and so knowing, deceived the defendant by informing him that the negro was sober. I told them that occasional intoxication, not amounting to a habit, would not justify them in rescinding a contract. An habitual runaway was, I thought, a material defect, which might justify them in finding, for the defendant, if there was on the part of the plaintiff a wilful misrepresentation. *Occasional flights of a slave from his master's service for special causes would not constitute any material moral defect.*
>
> Honesty, I said to them, was a material moral quality in a slave: but nothing short of general dishonesty would show a defect in this behalf. For occasional thefts among the tolerably good slaves may be expected . . . .[96]

The judge added a strong caveat, however. While all of these qualities in a slave might justify nonpayment of a note, he stated that

> the policy of allowing such a defense might be very well questioned. For, most commonly such habits were easy of correction by prudent masters, and it was only with the imprudent that they were allowed to injure the slave. Like master, like man was, I told them, too often the case, in drunkenness, impudence, and idleness.[97]

The stories of buyer and seller in *Johnson v. Wideman* highlight the way that mutability of a slave's character could dominate litigation over a slave's "vice." Charles, in the courtroom, appeared to be both child and savage, but Wideman claimed that he was a savage *no matter what*, whereas Johnson made the claim that Fredrickson documents: Charles was "a child *in his place*, and a savage *out of it*."[98]

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95. The judge began by instructing the jury that the defendant could not recover tort damages for the plaintiff's deceit; the only question would be whether the defendant was obligated to pay the $100 note. *Id.* at 342. This was a legal issue that cropped up frequently: the distinction between breach of warranty—a contract action, which could only result in a return of the slave and/or refund of the price—and deceit, a tort action, for which the injured party could recover damages. Having settled the legal issue, the judge made it clear that the moral issues would decide the case. *Id.* He also instructed the jury that they must find evidence of fraud in order for the buyer-defendant to win. *Id.*

96. *Id.* at 342 (emphasis added).

97. *Id.* at 342-43. The jury found for the seller-plaintiff, Johnson; Wideman appealed on the grounds that the judge's instructions had biased the jury for the plaintiff by ruling out damages for the defendant. Though it was labeled "per curiam," Judge John B. O'Neall nevertheless signed the opinion which affirmed the lower court judgment. *Id.* at 344-45.

98. FREDRICKSON, ARROGANCE, *supra* note 22, at 215.

The judge's instructions contained, in microcosm, several of the stories about slaves' character development. He drew a number of dichotomies: "occasional intoxication" vs. "habitual drunkenness"; "occasional flights . . . for special causes" vs. "habitual runaway"; "occasional thefts" vs. "general dishonesty." Like "Sambo," the typical slave could be expected to drink, run away, and steal a little—only when these acts came to define his character would he be considered defective. On the other hand, black character, like white character, was formed through habit, and masters were responsible for slaves' habits.[99] The trial judge, as well as Chief Justice O'Neall, largely accepted Johnson's argument that Charles's misbehavior could be attributed to the freedom Berry gave him and the bad example Berry set. This theory of slave "vice"—"like master, like man"—removed agency from the slave and portrayed the slave as an extension of his master.

B. Run Away or Runaway?

"Some months after the said Negroe man had run away he learned . . . that the same Negro was a runaway," explained one witness in a Louisiana case.[100] The distinction between the act and the character, drawn at length by the trial judge in *Johnson v. Wideman*, had several implications. On the one hand, it was a simple recognition of masters' lack of absolute control over their slaves; to define runaway character or dishonesty by a single act would have opened the floodgates, because acts of resistance simply happened too often. But it was more than that: the exercise of proving a runaway character or habit defined the slave by his vice and transformed the vice into an immutable essence. An Alabama case may illustrate: In 1849, Walker Reynolds sued William Ward for payment of an $800 note, given for the purchase of a slave named Bill.[101] In defense, Ward claimed that Bill was a runaway and that Reynolds had deceitfully represented Bill as "a negro of excellent character and recommended him in every particular extolling him both as to character and

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99. *See also* Cozzins v. Whitacker, Bk. 34, Docket #1261 (Ala. Sup. Ct. Records, Jan. 1833) (available in *ADAH*) (stating that "[plaintiff's w]itness Mr. Henry Fort proved . . . that he Anthony would steal chickens &c and run away and that, that was his character" but defendant's witness, Mr. Madden, testified "that it was very common amongst Negroes to steal a little and run away, it was greatly owing to the kind of master or owner they had"); Perkins v. Hundley, Drawer 91, #25 (Adams County Cir. Ct., May 1819) (available in *HNF*) (noting that Lawton was good slave under his master, but "after his master died [Lawton] became a little unruly which was the reason of his being sold").

100. Castellano v. Peillon, Docket #944 (New Orleans ser., May 1824) (available in *SCA-UNO*). Appeal reported in 2 Mart. (n.s.) 466 (La. 1824).

101. Ward v. Reynolds, Bk. 221, Docket #4181 (Perry County Cir. Ct., Jan. 1858) (available in *ADAH*). Appeal reported in 32 Ala. 384 (1858).

value."[102] Indeed, according to Ward, Reynolds had explained that the only reason he was selling Bill was "that there had been a disturbance between the negro and another about a negro woman the wife of the other."[103]

Reynolds, the seller, called witnesses to prove that Bill was a good slave under his ownership. William Wilson testified, "I never knew or heard of said negro Bill to resist or rebel against his owner or any other person who had authority to control him."[104] On cross-examination, Wilson reiterated that Bill was "active, able, and willing," yet amended "with this exception that he would occasionally run away."[105] Wilson probably lost his value as a plaintiff's witness when asked, "Had the said Bill the reputation of the Red fox and was not that reputation acquired by his running away and the difficulty in his being caught?"[106] Wilson answered, "He had the name of the Red fox and was hard to catch when out."[107] On re-examination, the plaintiff-seller's attorney asked Wilson, "Do you not believe the habit of running away by which Bill acquired the reputation of Red fox arose from imprudence of the plaintiff by his making unnecessary threats . . . ?"[108] Wilson explained, "If Bill had belonged to some persons he would not have run away, and it was well understood that if he expected to get a whipping beforehand he would leave."[109] In this case, the plaintiff's counsel found himself in the odd position of arguing that his own client's slave management had been so deficient—in "making unnecessary threats"—that the slave had run away from his seller, but that this did not prove he would run away from his buyer.

Several witnesses testified both that they knew Bill as "Red fox" because of his skill at evading the slave patrol *and* that he was an excellent worker. William Mecham, who described Bill as a "stout, active and good-looking negro," claimed that he only knew Bill to have run away once; "one time he came to me one morning and said his master had got mad with him, he wished me to go home with him which I did."[110] Micajah Lisle, who thought Bill a "*pert* active negro," also knew of only one runaway episode, when "I came across the boy Bill once in the woods."[111] Cunningham Wilson stated that

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

Bill was "in mind and body as far as I know as sound as any man—black or white."[112] On cross-examination, Wilson admitted: "I did know him to run away, I cannot state how often, several times, one time he went out a horse hunting and staid some time, how long am unable to say."[113] He also said that the name "Red fox" "was acquired from a race one night with dogs having run well but was caught."[114] However, Wilson concluded that Bill's value was "set with full knowledge of his character he having worked for me at harvest . . . and a better hand I would never desire."[115] The plaintiff-seller sought to prove that Bill's selling price had already been discounted for his runaway habit. All of the witnesses were asked to estimate Bill's value and to explain whether their estimate included a discount for his "Red fox" reputation.

In this case, the seller argued that Bill ran away only when he was afraid of being whipped, or when his master acted unreasonably, but that Bill had a good character. The buyer argued that being a runaway *was* Bill's character; Bill was a "Red fox." Many warranty and hire disputes over runaway slaves hinged on this distinction between the act of running away and the *character* or *habit* of being a runaway. To some extent, this distinction, particularly as codified in Louisiana law, amounted to tacit recognition of the area of rights which slaves had carved out for themselves, and of masters' lack of absolute control over their slaves. Despite increasingly strict statutory restrictions on slaves' movements, many slaves continued throughout the antebellum period to "go abroad" at night, to visit wives on other plantations, to hire themselves out, and even to live in town apart from their masters.

Yet the run away/runaway distinction was more than just accommodation by whites; it was an effort to define slave character in terms of habits. If a slave ran away once, it was acceptable to attribute that action to a rational motive, but if this dangerous habit became routine, then the slaveholder treated that habit as a vicious character trait or a disease. Without such a distinction, the comment that "some months after the said Negroe man had run away he learned . . . that the same Negro was a runaway" would make no sense.[116]

Again, issues of commodification always arose at moments of character determination. In one Natchez case, Jonathon Guice sued John Holmes for possession of a slave whom he claimed Holmes had

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. Castellano v. Peillon, Docket #944 (New Orleans ser., May 1824) (available in *SCA-UNO*). Appeal reported in 2 Mart. (n.s.) 466 (La. 1824).

illegally detained from him.[117] Guice's lawyer questioned several witnesses about the slave, John, asking, "What is his character, was he in the habit of running away?"[118] Holmes's lawyer then cross-interrogated: "What was the value of such boy when addicted to running away? What is the difference between the value of slaves who are confirmed runaways and those not having this vice, all other things being Equal?"[119] The witnesses all agreed that John had a good character, that he was not a runaway, and that a runaway was worth less than half "as he otherwise would be if not a runaway."[120]

At trials, witnesses frequently mentioned that a slave had run away once but called her a good slave at the same time. In *Cotton v. Rogolio*, Henry Doyle testified that Captain Samuel Cotton had told him that Mary "was dissatisfied at living in the county and that she had run away from Mr. Rogillio . . . . He also stated that she was among the best servants he had ever owned."[121] James Wallace, a witness for John Morton in a suit to retrieve damages for a runaway slave who had been shot in flight, testified that Spencer was "a likely boy worth twelve or fourteen hundred—never heard anything against his character except that he had run away."[122]

C. The Medicalization of Slave Vice: "Habit" and "Disease"

Buyers realized that if a slave's vice was a "habit" akin to a disease, her status became more like an animal's than it would if her vice was a purposeful one. Sellers knew that if she was merely the product of her owner's management, her status was more akin to a child's status. Both of these conceptions contrast with a conception of immanent human "character." Belief in either absolute malleability or immutable "addiction" to vice negated the idea that a slave acted out of the conscious choice of a rational mind or out of the yearnings of a human soul.[123]

The legal tendency to medicalize slave vice by portraying character defects as "habits" or "addictions" drew its inspiration from mid-

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117. Guice v. Holmes, Drawer 347, (n. no.) (Adams County Cir. Ct., 1854) (available in *HNF*).
118. *Id.*
119. *Id.*
120. *Id.*
121. Cotton v. Rogolio, Drawer 202, #143 (Adams County Cir. Ct., Apr. 1837) (available in *HNF*).
122. Morton v. Bradley, Bk. 215, Docket #4175 (Ala. Sup. Ct. Records, June 1857) (available in *ADAH*). Appeal reported in 30 Ala. 683 (1857).
123. White supremacists often gave immutable viciousness, or at least underlying savagery, as proof of the subhumanity of the entire Negro race. *See generally* FREDRICKSON, IMAGE, *supra* note 63.

nineteenth-century versions of biological racism.[124] Perhaps the most active expositor of these pseudoscientific theories was Dr. Samuel Cartwright, who was a physician-witness in slave cases in Natchez, Mississippi before moving to New Orleans to begin his better-known career as a medical propagandist for slavery. Cartwright championed the notion that Negroes were not only inferior, but were in fact a different, subhuman species. He propounded what historians have called "states'-rights medicine," giving "medical" justification for the Southern way of life.[125] In a series of articles in *DeBow's Review*, Cartwright propounded theories that interwined polygenesis, the physiological bases of black inferiority, and "negro diseases," with physiological causes, behavioral symptoms, and behavioral and physical cures.

Cartwright located the central difference between blacks and whites in a complicated feedback system between the nervous system, blood, and lungs. He postulated, "The great development of the nervous system . . . would make the Ethiopian race entirely unmanageable . . . . Defective hematosis . . . is the true cause of that debasement of mind which has rendered the people of Africa unable to take care of themselves."[126] Black people, Cartwright contended, rebreathed their own air, unlike whites:

> In bed, when disposing themselves for sleep, the young and old, male and female, instinctively cover their heads and faces, as if to insure the inhalation of warm, impure air . . . . The natural effect of the practice is imperfect atmospherization of the blood—one of the heaviest chains that binds the negro to slavery.[127]

Blacks needed slavery, Cartwright explained, because they needed white men's authority to "vitalize and decarbonize their blood by the process of full and free respiration, that active exercise of some kind alone can effect."[128]

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124. *See, e.g.*, Dean v. Traylor, Docket #549 (Ga. Sup. Ct. Records, Aug. 1849) (available in *GDAH*) ("negro consumption"), appeal reported in 8 Ga. 169 (1850); Abbey v. Osborne, Drawer 275, #52 (Adams County Cir. Ct., Apr. 1839) (available in *HNF*) ("*Struma Africana* or *Cachexia* or what is sometimes known on the Virginia and Maryland planations as *negro Poison*"); Hill v. Winston, Drawer 336, #25 (Adams County Cir. Ct., May 1849) ("negro syphilis"); Buckner v. Blackwell, Drawer 353, #23 (Adams County Cir. Ct., May 1857) ("cakescia affrina [sic] or negro consumption").

125. ADVICE AMONG MASTERS: THE IDEAL IN SLAVE MANAGEMENT IN THE OLD SOUTH 139 (James O. Breeden ed., 1980).

126. 11 DEBOW'S REV. 64, 184, 209, 331, 504 (1851), *reprinted in* 2 INDUSTRIAL RESOURCES, *supra* note 69, at 318-19, 325.

127. *Id.* at 325.

128. *Id.*

Cartwright argued that slaves were medically like children in their susceptibility to scrofulous diseases; in their anatomy (livers, veins, sensitive skin); in their fear of the rod; and in the fact that they were "easily governed by love combined with fear" and "required government in every thing."[129] Cartwright also enumerated the "negro" diseases, including "negro consumption" (what is now known as "miliary tuberculosis," a deadly form of the disease), and drew a connection between the physician's diagnostic role with respect to "negro diseases" and his role in litigation:

> It is of importance to know the pathognomonic signs in its early stages, not only in regard to its treatment, but to detect impositions, as negroes afflicted with the complaint are often for sale; the acceleration of the pulse on exercise incapacitates them for labor, as they quickly give out and have to leave their work . . . . The seat of negro consumption is . . . in the mind, and its cause is generally mismanagement or bad government . . . .[130]

Two other diseases were of paramount importance to these medical articles for slaveowners: "drapetomania" (the disease of running away) and "Dysthesia Ethiopica, or Hebetude of Mind" ("what overseers call Rascality"). Cartwright explained that drapetomania was caused by masters who did not recognize that negroes are by nature "knee-benders" from whom "awe and reverence must be exacted . . . or they will despise their masters, become rude and ungovernable, and run away."[131] Curing drapetomania required keeping slaves in "that submissive state which it was intended for them to occupy . . . and treat[ing them] like children, with care, kindness, attention, and humanity."[132]

According to Cartwright, rascality could also be attributed to lax management or excess freedom: "Dysthesia Ethiopica . . . attacks only such slaves as live like free negroes in regard to diet, drinks, exercise, etc."[133] The proper treatment, in order to stimulate the liver, skin, and kidneys, was to wash and oil the slave, then to slap his skin with a broad leather strap and put him to hard work, which would increase his circulation. Keeping the slave hard at work posed no danger, because, conveniently, according to nature's laws, it was impossible to overwork a slave. Cartwright wrote, "A white man, like a blooded horse, can be worked to death. Not so the negro . . . . The white

129. *Id.*
130. *Id.* at 320, 323.
131. *Id.* at 323.
132. *Id.*
133. *Id.*

men of America have performed many prodigies, but they have never yet been able to make a negro overwork himself."[134]

Some historians view Samuel Cartwright as a marginal thinker in the American South, whose ideas were accepted only on the fringe. William Stanton dismisses Cartwright as "that brutal Louisiana physician and publicist . . . with his banana-skin humor, who appeared only on the periphery of the controversy to comment, cheer, or make impolite noises of disapproval."[135] This viewpoint is valid only with respect to Cartwright's theories on polygenesis. Few Southerners accepted Cartwright's attempt to reconcile the separate origins of blacks with the Bible by arguing that Eve was tempted in the Garden of Eden not by a serpent but by a "negro gardener," and few believed that blacks outside slavery were slaves to a serpent/Satan.[136] The idea that "distinctive peculiarities and diseases of the Negro race" existed was far more widespread. Articles by other authors appeared not only in *DeBow's*, but also in several other Southern periodicals.[137] The existence of the links between body and behavior was widely accepted by antebellum Southerners. While few Southerners may have used the technical term of "drapetomania," they did refer to "cachexia africana" (dirt eating) and "other negro diseases" in court and discussed running away and other slave behaviors in terms of "addiction" and "habit."

For example, the Louisiana Civil Code labeled theft as an "addiction" and running away as a "habit."[138] Thus, to prove a slave a runaway or a thief, it was necessary to prove that this "condition" was long standing and had manifested itself a certain number of times for a given duration.[139] The fact that Louisiana was the only state to codify slave vices of character might explain its impulse to reduce moral qualities to medical bases. Certainly, this tendency had the

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134. Samuel Cartwright, *Negro Freedom an Impossibility*, 30 DEBOW'S REV. 648, 651 (1861).

135. WILLIAM STANTON, THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815-1859, at vii (1960).

136. *See* Cartwright, *Negro Freedom an Impossibility*, *supra* note 134; Samuel Cartwright, *Unity of Human Race Disproved*, 29 DEBOW'S REV. 129 (1860); and the responses to it: *Dr. Cartwright on the Serpent, the Ape and the Negro*, 31 DEBOW'S REV. 507 (1861); *Dr. Cartwright Reviewed—The Negro, Ape and Serpent*, 32 DEBOW'S REV. 238 (1861); *Dr. Cartwright on the Negro, Reviewed*, 32 DEBOW'S REV. 54 (1861); *Dr. Cartwright on the Negro—Reviewed*, 33 DEBOW'S REV. 62 (1861).

137. *See, e.g.*, A.P. Merrill, *Plantation Hygiene*, 1 S. AGRICULTURIST 267 (1851); J.S. Wilson, *Peculiarities and Diseases of Negroes*, 28 DEBOW'S REV. 597 (1860); *see generally* TODD L. SAVITT, MEDICINE AND SLAVERY: THE DISEASES AND HEALTH CARE OF BLACKS IN ANTEBELLUM VIRGINIA 1-184 (1978) (citing numerous articles by Southerners on black medical distinctiveness).

138. LA. CIV. CODE, Bk. III, Tit. 7, Chap. 6, § 3, art. 2505 (1824) (repealed).

139. "The slave shall be considered as being in the habit of running away, when he shall have absented himself from his master's house twice for several days, or once for more than a month." *Id.* The statutory rule was varied by case law when a slave was new to the state. *See generally* Schafer, *supra* note 2.

effect of reducing slaves to something more animal than human. Yet the description of running away or other vices (such as theft or disobedience) as "characters," "habits" or "addictions" was also widespread in other states.[140] It was common to characterize slaves with the phrase, "his habits were very bad."[141]

D. The Medicalization of Slave Vice: Madwomen and Idiots

The tendency to treat moral questions as medical ones seems to have been even stronger when the slave at issue was a woman. There was no female "Nat" in the Southern lexicon. A woman's resistance or refusal to work did not conjure the same fears in the white mind as did a black man's rebellion. In court, buyers or hirers of runaway women were more likely to question their sanity or mental capacity than their character.

Historians have long noted the nineteenth-century tendency to associate women with madness, but this has been considered a largely middle-class Victorian phenomenon—neurasthenic ladies at New England spas. Yet, in the slave trials, the same assumptions about mental instability suggest that gender narratives of insanity may have been even more widespread than previously realized, although their implications for black women were very different. The fact that most runaway women who became the object of warranty suits were house servants is also noteworthy. One explanation for this may be that white Southerners were trying to maintain their image of "Mammy," and rebellious behavior lay too far outside of that image to be reconciled with it. Ultimately, though, placing black women's behavior in a medical framework reinforced their *dis*honor in white Southern ideology.

* * *

On January 3, 1834, Rose Icar, a New Orleans "free woman of color," bought Kate, a twenty-year-old slave, from Anthony Abraham Suares.[142] Icar paid $500 in cash for her slave and, by all accounts, bought Kate for her labor, not to grant her freedom. Less than one

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140. *See, e.g.*, Mizell v. Sims, 39 Miss. 331, 333 (1860) (comparing "not a runaway nor in the habit of running away" and "a habitual runaway"); Ward v. Reynolds, Bk. 221, Docket #4181 (Perry County Cir. Ct., Jan. 1858) (available in *ADAH*) (noting "addictedness to running away"); James v. Kirk, Drawer 348, #55 (Adams County Ct., May 1853) (available in *HNF*), appeal reported in 29 Miss. 206 (1855) (discussing "the character of a runaway" and "the habit of running away").

141. *See, e.g.*, Tull v. Walker, Drawer 70, #2744 (Adams County Ct., 1830) (available in *HNF*); Campbell v. Kinloch (City Ct. of Charleston, Fall 1857) (available in *SCDAH*).

142. Suares v. Icar, Docket #2649 (New Orleans ser., Jan. 1835) (available in *SCA-UNO*). Appeal reported in 7 La. 517 (1835).

month later, Icar was in District Court, suing Suares for selling her a runaway. Her petition to the Court complained that "three or four days after the said slave had been taken possession of . . . it was discovered that said Slave was crazy, and she also ran away from her new mistress."[143] The witnesses for the plaintiff all described Kate's "craziness" in terms that raise the possibility that she was as sane as a slave could be, rationally resisting her position. Jean Dinot testified:

> [S]aid Slave is not worth much. When she is asked to fetch one thing she fetches another . . . . She is capable of setting fire to [a house], as she does not know what she is about . . . . Witness has seen said Slave when sent by her mistress go away in quite a different direction talking to herself and gesticulating. Witness on one occcasion met her going toward the Lake and asked her where she was going when she answered she did not know.[144]

On cross-examination, Dinot admitted that he had seen Kate only three times before appearing in court, and revealed another important fact: Kate spoke only English. Dinot did not know whether Rose Icar, a French speaker, spoke or understood English.

Kate ran away but did not get far before being caught and brought to the police jail of Jefferson, a neighboring parish. She managed to frustrate her jailor as well; she told him that she belonged to a Doctor Sealden. He asked where this doctor lived, and she told him, "Down there, down that Street."[145] He was unable to extract any more information from her and concluded that "said slave is not of sound mind."[146] The Sheriff testified that he had seen Kate "act as a crazy person—she holloed danced all night and could hardly answer when spoken to."[147] Although he threatened her often to be quiet, "the threats availed nothing," which led him to "the opinion that said Kate was crazy."[148]

Two other witnesses reached the same conclusion. One based his diagnosis on the fact that "[s]he is of no use in a house—when her mistress told her to do one thing she did another."[149] However, he also noted that Rose Icar spoke only a few words of English. On cross-examination, the witness testified that "when the Plaintiff told the slave Kate to do any work she spoke to her in English in the best manner she could."[150] He never saw Kate do any work; in fact,

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143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

"[w]itness was present when Plaintiff told said slave to go and wash her clothes. She took her clothes and went out of the House and ran away."[151]

By contrast, the only defense witness told the court that when Rose Icar had "informed [him] that Kate had absconded . . . [he] observed to her that inasmuch as the Slave was a stranger and unacquainted with the city, it was probable that she had lost her way, and that no doubt she had been taken up and put in jail."[152] When he suggested that Kate might be found at the Jefferson Parish jail, Icar told him that it was up to Mr. Suares to hunt for her. However, the witness noted that

> in none of the conversations which Witness had with the Plaintiff in relation to this Slave, did she allege the slave to be crazy; that during the whole time the Slave was under the superintendence of the Witness, he observed nothing in her behaviour to induce him to believe that she laboured under any . . . derangement.[153]

The trial court judge granted Icar a rescission of the sale, finding Kate to be a habitual runaway. The judge applied the January 1834 Act of the Louisiana Legislature which created the presumption that a newly imported slave who ran away within two months after sale had the redhibitory vice of running away at the time of the sale. Furthermore, the judge ruled that "the evidence of a personal inspection of the Slave satisfy the Court that the Slave is . . . destitute of mental capacity."[154] Suares appealed on the ground that neither Kate's running away nor her craziness was sufficiently established; "the utmost that can be inferred from the testimony is that she was rather stupid: this is an apparent defect, if a redhibitory defect at all . . . ."[155] Suares also complained that the judge had erred in basing his judgment on his own impression of the slave. The state Supreme Court was "satisfied from the evidence in the record, independently of the impression made on the mind of the judge, by personal inspection, that the slave in question was wholly, and perhaps worse than useless."[156]

Kate acted as though she did not understand her French mistress of color when the mistress spoke English. She disobeyed orders, avoided work, tried to escape, and lied to her jailers. This behavior convinced her mistress and the witnesses for the plaintiff, as well as

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. 7 La. at 518.

the judge, that Kate was crazy. If we compare her behavior to that of the runaway male slaves who stood trial in similar cases, their "vicious-ness" and her "craziness" are difficult to distinguish. If Kate had been a man, her refusal to take orders and her efforts to escape might have been seen as rebellion, and her drinking might have been emphasized more as evidence of intractable vice. But, as a woman, vices of "moral qualities" were not applied to her; her actions did not instill a fear of violent rebellion in whites. Lacking another explanation for Kate's actions, the court found that her insubordination was lunacy.

Other cases involving female slaves' "craziness" or "idiocy" bear striking similarities to cases in which male slaves were accused of vice. For example, witnesses for the buyer of the slave Melly testified that she whistled after answering any question put to her by a white person; that she was "much whipmarked and . . . did not seem to enjoy senses enough for common purposes"; and that she seemed to be an "imbecile."[157] However, defense witnesses found Melly to have "common sense enough for a field hand"; "she did like any other person she did her work well and obeyed well orders"; and they commented that, although Melly talked to herself, "white persons are more apt to speak to themselves than negroes," so that could hardly be a sign of idiocy![158] In deciding a similar case, the Louisiana Supreme Court, in ruling that idiocy was an apparent vice, vented frustration with deciding questions of slaves' minds and morals: "It is very difficult, if not nearly impossible, to fix a standard of intellect by which slaves are to be judged."[159]

In another Louisiana case, *Buhler v. McHatton*,[160] the buyer, Buhler, tried to have the sale set aside on two counts: first, "because said Jane has proved entirely useless as a cook"; and second, "because

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157. Chapuis v. Schmelger, Docket #2328 (New Orleans ser., Dec. 1851) (available in *SCA-UNO*).

158. *Id.*

159. Briant v. Marsh, 19 La. 391, 392 (1841). *See also* Nelson v. Biggers, Docket #428 (Ga. Sup. Ct., n.d.) (available in *GDAH*) (describing breach of warranty for "Betty, from imbecility of mind . . . a slave incapable of performing ordinary work and labor"). Witnesses for the buyer in *Nelson* testified that the seller had said that Betty "had not sense to raise her child and they took it from her and raised it in the house for she had overlaid her first one"; Osborn Unchurch, the buyer's overseer, "put her Betty to dropping corn and she could not do it for she had to be shown the place to drop and I put her to cover corn with manure and she did not have sense to do that." However, the seller's witness, James Heagans, testified that, while Betty was not "as bright as some negroes," she was capable of the ordinary work of field hands. *Id.* The lower court judge excluded this testimony; the buyer won. On appeal, the Georgia Supreme Court found error in the interpretation of the word "healthy" in the warranty as applying to "mind" as well as "body," and reversed. *Id.*

160. Docket #3448 (New Orleans ser., Mar. 1854) (available in *SCA-UNO*). Appeal reported in 9 La. Ann. 192 (1854).

she is *addicted to madness*."[161] Buhler tried to show Jane's insanity with evidence of her burning up her clothes, an "act utterly irreconcilable with the idea of deception," refusing to eat meat on Friday or Saturday, and "frequent paroxysms of weeping, superstition, and violence."[162] Witnesses ascribed Jane's odd behavior to "religious enthusiasm and grief at being separated from her children."[163] Buhler characterized her "weeping and lamenting a separation of children" as "superstitious monomania."[164] The jury, unimpressed, found for the seller, McHatton. Justice Campbell, in affirming the lower court judgment, noted that Jane's behavior "did not attract particular attention, and was not noticed for a month or more," and attributed it to her "religious scruples."[165]

In one of his briefs, an attorney gave a particularly revealing treatment of the impossibility of an enslaved woman taking moral action or having moral dilemmas. In *Walker v. Hayes*,[166] the slave had drowned herself and her child soon after being sold. The seller's witness, J. D. Hair, called Agnes "a girl of unusual good sense," and the jury gave a judgment for the seller.[167] On appeal, the buyer's attorney argued that the very fact that Agnes had committed suicide proved that she was "addicted to madness."[168] He went on to consider all the rational reasons why a person might commit suicide and concluded that none of them could apply to an enslaved woman:

> When [suicide] is done to avoid disgrace by the man sensitive about his honor, or in accordance with the prevailing custom of a people, whose minds are darkened by superstition or when it is done from motives of patriotism to retrieve a nation's honor, or rescue it from ruin, or in despair of the liberties of one's country, or to avoid a more cruel fate, in a death of torture, as illustrated by the heroes of antiquity, rendered immortal by their wisdom and their valor; it is not for a moment contended that it proceeds from insanity.
>
> But how different all these classes of suicide from the one for our consideration: here is a poor slave [with] no patriotic designs or interests to subserve, no national custom to conform to, no

161. *Id.*
162. *Id. Cf.* Council of Charleston v. Solomon Cohen Jr. (City Ct. of Charleston, Oct. 1843) (available in *SCDAH*) (recovering cost of housing slave Bella at Poor House "as a maniac dangerous to the neighborhood by a habit she had of throwing pieces of fire about the room").
163. *Id.*
164. *Id.*
165. 9 La. Ann. 192 (1854).
166. Docket #6606 (New Orleans ser., n.d.) (available in *SCA-UNO*). Appeal reported in 15 La. Ann. 640 (1860).
167. *Id.*
168. *Id.*

> disgrace to avoid, no terrible punishment to escape, buries herself and helpless child in a common grave . . . .[169]

In other words, an enslaved woman could have no *honor*: no nation, no tradition, no courage. The only possible reason that she could take her life was insanity.

III. Opening Pandora's Box

A. *Slave Agency*

All of the explanations of slave character and behavior outlined in Part II—as functions of slave management, as immutable vice, as habit or disease—operated in some way to remove agency from enslaved people. Reports of slaves who took action such as running away on their own impetus and for their own rational reasons fit uneasily into these accounts. Yet because slaves did behave as moral agents, reports of their resistant acts persistently cropped up in court. At times, witnesses provided evidence of slaves acting as moral agents; at times, the nature of the case required explicit recognition of slaves' moral agency; at times, it was necessary to rely on slaves' own words. Occasionally the courts explicitly recognized slaves' human motivations as the cause of "vices." More often, these stories appeared in the trial transcripts but were weeded out of the appellate opinions. Just as judges were reluctant to recognize slaves' skills and abilities, they feared giving legal recognition to slaves as moral agents with volition, except when doing so suited very specific arguments or liability rules. Recognizing slave agency threatened the property regime both because it undermined an ideology based on white masters' control and because it violated the tenets of racism which undergirded Southern plantation slavery in its last decades.

For example, in one Louisiana case, a witness for the plaintiff-seller, while testifying that the slave Caleb was "punctiliously honest and trustworthy," explained that he had never heard of "Caleb absenting himself from the plantation but once, there being no white persons on the plantation he and his wife had a quarrel and he (Caleb) was out, I believe all night."[170] Another witness testified to a conversation in which the slave seller explained that although the slave had run away four or five times, "it was generally for the fear of being whipped."[171] The appellate court referred to the latter comment,

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169. *Id.*
170. Thomas v. Selser, Docket #4774 (New Orleans ser., Mar. 1842) (available in *SCA-UNO*). Appeal reported in 1 Rob. 425 (La. 1842).
171. *Id.*

but not to the former. If a slave ran away for fear of being whipped, it suggested a mechanical reaction to stimuli within a master's control; fear of whipping could easily be integrated into a theory of vice as a function of slave management. However, running away because of a quarrel with one's spouse connoted a slave's control over his own family life and his own decision making, interpretations which fit poorly into accepted theories of slave behavior.

In *Reynolds v. White*,[172] the buyer-plaintiff complained that Sam was a runaway and a thief; his witness, George Malcolm, testified that Sam "stay[ed] away sometimes one day, sometimes more" and that "plaintiff was obliged to tie up said boy and nail up his gates to keep him at home."[173] On the other hand, White's witness, C. J. Cook, knew Sam to be "absent" only once when White owned him:

> To wit; the boy's mother was sick and the physician left a prescription for her; the boy was sent out with other prescription to the Druggists after candlelight that boy did not return for 24 or 48 hours . . . and Mr. White and family thought the boy was lost and witness was of the same opinion. The boy was in the constant habit of getting out to play whenever he could and would return.[174]

Cook did not consider this "play" to be running away.[175]

Similarly, in *Anderson v. Dacosta*, a witness for Mathilda's seller described her as one who "liked to play and amuse herself" but nevertheless "bore a good name and character and was of a mild disposition."[176] Another witness who spoke well of Mathilda denied that she was a runaway, explaining that she was only "in the habit of going back to the places where she was hired before," and that "all she wanted was a master to look to her and not to allow her privileges to run about."[177] In both of these cases, several witnesses for the sellers, rather than arguing that new masters bore responsibility for slaves' character, suggested that they ran away for their own reasons—to return to former owners, possibly to see family members, or even out of playfulness. Of course, this evidence of slave agency could shade into an argument that stronger discipline could prevent its exercise.

At the level of witness testimony, hire cases often brought forth evidence of enslaved persons acting of their own volition. For

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172. Docket #3982 (New Orleans ser., Jan. 1849) (available in *SCA-UNO*).
173. *Id.*
174. *Id.*
175. *Id.*
176. Anderson v. Dacosta, Docket #996 (New Orleans ser., Feb. 1849) (available in *SCA-UNO*). Appeal reported in 4 La. Ann. 136 (1849).
177. *Id.*

example, one owner sued a railroad for taking his hired slave to Brunswick, when he had been hired to work closer to home.[178] The railroad's lawyer posed cross-interogatories to a witness so as to suggest that the change in work assignment came of the slave's own volition, not of the railroad's needs:

> Do you know defendant carried said negro to Brunswick? Did not the negro run away and go towards Brunswick? Did defendant ask leave to carry said negro to Brunswick, or did he not say to you that the negro wanted to go there. And did he not tell you that he ran away?[179]

The witness replied, "I do not recollect that he said the negro wanted to go. After the negroes death Deft said something in regard to the negroes having become attached to some of the negro women that went to Brunswick and this being a reason why the negro went off with them . . . ."[180]

Witnesses often presented evidence of slaves trying to go back to former masters or, when hired out, to their present owners, making it difficult for the court to deny some semblance of slave agency.[181] Judge Hackleman sold a slave

> because he said he wanted another master—said he thought he ought to be allowed to go to preaching when he wanted to. He ran away from witness once. Got dogs and caught him. Told him I would whip him if he did not finish his task the day before—He did quite finish it and went off.[182]

Another slave ran away because, one witness reported, "he did not wish to go to Texas."[183] Mary, a Natchez slave, ran away because she "was dissatisfied at living in the country," although she had been purchased "to satisfy a negro boy . . . named Henry who wanted her for a wife."[184] Mary reported to a witness that she had "taken *some*

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178. Collins v. Lester, Docket #1349 (Ga. Sup. Ct. Records, May 1854) (available in *GDAH*). Appeal reported in 16 Ga. 410 (1854).

179. *Id.*

180. *Id.*

181. *See, e.g.*, Maury v. Coleman, Bk. 174, Docket #3063, #4 (Ala. Sup. Ct. Records, Jan. Term 1854) (available in *ADAH*); Farmer v. Fiske, Docket #5248 (New Orleans ser., Dec. 1844) (available in *SCA-UNO*).

182. Morton v. Bradley, Bk. 215, Docket #4175, #2 (Ala. Sup. Ct. Records, June Term 1857) (available in *ADAH*).

183. Mangham v. Cox, Bk. 1856, Docket #2952, #32 (Ala. Sup. Ct. Records, 1st Div., June Term 1856) (available in *ADAH*); *see also* Sessions v. Cartwright, Drawer 340, #142 (Adams County Cir. Ct., Nov. 1851) (available in *HNF*).

184. Cotton v. Rogolio, Drawer 202, #143 (Adams County Cir. Ct., Apr. 1837) (available in *HNF*).

medicine to clear herself," which he took to mean "thereby to produce abortion."[185]

Abram Martin sued Charles Bosley when they could not agree on how to divide a lot of slaves they had bought together.[186] According to a witness present at the "divition," two slaves asserted their own, contradictory preferences for the transaction:

> The fellow said if he was parted from [a certain woman slave] he would destroy himself he further observed that if he did not get her for a wife he would destroy the girl or himself and the girl would not live with him or have him for a husband and they were then parted and had been parted for the [voyage].[187]

Slaves who influenced their own sale, hire, or other disposition compromised their own commodification. Any risky venture might introduce unreliability into a transaction. But slaves were different from other risky investments because slaves *themselves* could increase or decrease their own value. Testimony about the role of slaves' volition in slave transactions extended their influence into the legal arena.

* * *

The Louisiana Supreme Court was the only Deep South court that occasionally accepted evidence openly of slaves' own motivations to explain their running away. This was probably because Louisiana had such strict codified parameters for the "habit of running away"—up to a certain point, a slave's behavior might be only "*petit marronage*" ("little running away"); after that point, the slave was a runaway. Because the definition of the runaway habit was strictly defined in the Louisiana Civil Code, judges were more able to recognize a slave's personhood when his or her behavior fell outside the strict definition.[188] For example, the New Orleans parish court did not consider that a slave's running away to visit his wife made him a "runaway."[189] Ludger Fortier sued for the rescission of a slave sale because the slave left three days after the sale for several hours.

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185. *Id.*

186. Martin v. Bosley, Drawer 49, Folder 3E (Adams County Ct. [Miss. Terr.], 1805) (available in *HNF*).

187. *Id.*

188. This seems to be an unusual twist on the perennial "rules vs. standards" debate—an instance where a rule gives more leeway than a standard. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

189. Fortier v. LaBranche, Docket #3289 (New Orleans ser., June 1839) (available in *SCA-UNO*). Appeal reported in 13 La. 355 (1839). Similarly, a slave buyer was denied rescission of the sale when the court found that the slave had only been returning (twice) to his former owner's plantation to see his wife. Smith v. McDowell, Docket #4431 (New Orleans ser., n.d.) (available in *SCA-UNO*). Appeal reported in 3 Rob. 430 (La. 1843).

According to defense witnesses, the slave had a good character and had run away only to visit a slave woman on a neighboring plantation. The court denied Fortier's claim, finding that "Negroes sometimes absent themselves from their masters in the night without being runaway." Similarly, in *Bocod v. Jacobs*, the Supreme Court noted that a slave's running away "may be the consequence of the displeasure of being sold—of his dislike of the new owner."[190] In *Nott v. Botts*, the trial judge found "nothing extraordinary in the fact of a negro coming from Kentucky, where they are treated almost on an equality with their master, running away in Louisiana," implying a slave's desire for greater autonomy.[191] All of these characterizations of slave motivation aver reasons that are rational, not products of mismanagement, "disease," or immutable viciousness.

The fact that Louisiana's definition of a "runaway" led to greater recognition of slaves' human agency had ramifications for litigants of nearby states. One Mississippi case became a referendum on the applicability of Louisiana law to local conditions. In 1848, John D. James, a Natchez and New Orleans slave trader, sold nine slaves to Joseph J. B. Kirk, a horse trader.[192] It is unclear whether the sale took place in Louisiana or Mississippi; the complaint refers to a sale "at the Parish of Point Coupee and state of Louisiana, to wit, at the County of Adams."[193] In any event, in 1849, Kirk filed suit against James on the basis of James's warranty executed under Louisiana law, stating that "said Slaves were free from the redhibitory vices and diseases."[194] Kirk complained that one of the slaves, Simon, had run away repeatedly and had finally drowned in an escape attempt.[195]

Both James and Kirk asked for jury instructions based on Louisiana law. Judge Posey refused to give several of James's instructions but did explain the Louisiana Code regarding redhibition to the jury.

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190. Bocod v. Jacobs, 2 La. 408, 410 (1831).

191. Nott v. Botts, Docket #3123, (New Orleans ser., Mar. 1839) (available in *SCA-UNO*). Appeal reported in 13 La. 202 (1839).

192. Kirk v. James, Docket #7049, Drawer 348 (Adams County Cir. Ct., Apr. 1855) (available in *HNF*). Appeal reported in James v. Kirk, 29 Miss. 206 (1855). James's trading business had him in the courts often; he defended three suits for breach of warranty in the Adams County Circuit Court in 1851-52 alone. Ayres v. James, Drawer 338, #171 (Adams County Cir. Ct., May 1851) (available in *HNF*); Kirkland v. James, Drawer 322, # 191 (Adams County Cir. Ct., May 1852) (available in *HNF*); McCrain v. Hames, Drawer 336, #136 (Adams County Cir. Ct., May 1852) (available in *HNF*).

193. *Id.*

194. Kirk v. James, Docket #7049, Drawer 348 (Adams County Cir. Ct., Apr. 1855) (available in *HNF*).

195. *Four* juries heard Kirk's suit. The first jury found for James, and Kirk was granted a new trial; two successive trials ended in mistrial. In 1853, the fourth jury found for Kirk, and Judge Stanhope Posey overruled James's motion for a new trial. James then lost his appeal to the Mississippi High Court of Errors and Appeals. Kirk v. James, Docket #7049, Drawer 348 (Adams County Cir. Ct., Apr. 1855) (available in *HNF*).

James appealed the lower court's decision on the ground that the jury had applied an "arbitrary rule of evidence of another state."[196] He argued that Louisiana was traveling down a slippery slope towards recognition of slaves' personhood and protection of slave buyers that Mississippi should not follow. He stated, "For illustration, suppose that by the laws of Louisiana negro slaves are competent witnesses to prove the vice in a companion . . . . "[197] Admitting slave testimony, argued James, was equally as outrageous as warranting that a slave would not run away.[198]

James's argument about the dangers of accepting Louisiana's protections for slave buyers in Mississippi reveals general fears about the slippery slope of implied warranty. While a buyer's rule that strictly codified vices as "habits" made it possible to treat slaves as subhuman, buyers' further claims about slaves' human agency threatened a law of sales in which slaves were property only.

Judges resisted extending protections to buyers because they did not want to open the "Pandora's box" of putting slave character on trial. Going to trial risked long, involved proceedings (and possible hung juries) on the question of masters' treatment of slaves. In *James v. Kirk*,[199] the testimony dwelt on whether a master was "as good a disciplinarian . . . as any of his neighbours."[200] Other cases put masters' character on trial in other ways—for example, by judging slaveholders' savviness in the marketplace. Because these market transactions were risky, and slaveholders became personally invested in the outcome, slaves had the most potential to influence the deals by their behavior.

Judges outside of Louisiana conceded slave agency most directly in tort cases, where a slaveholder sued another for damage to a slave when under the defendant's control. Most commonly, the defendant in these cases was an industrial hirer, or a common carrier, usually a ferryboat operator. Common carriers were generally held responsible for damages to property on board, so they usually insured themselves against such damage. In *Trapier v. Avant*,[201] a judge tackled the question of "whether negroes, being the property damaged, they

196. Kirk v. James, 29 Miss. 206, 208 (1855).

197. *Id.*

198. Justice Handy was unmoved, affirming the lower court judgment. In this case, he ruled, the Louisiana rules were not mere evidentiary regulations unenforceable in Mississippi; they were express stipulations of the contract itself. *Id.* at 211.

199. Docket #7049, Drawer 348 (Adams County Cir. Ct., Apr. 1855) (available in *HNF*).

200. *Id.*

201. Box 21 (S.C. Sup. Ct. Records, 1827) (available in *SCDAH*). Trapier's slaves drowned crossing in Avant's ferry; disputed facts included whether or not crossing in a paddle-boat rather than a "flat" was contrary to custom, and whether or not Avant's ferryman had been negligent, or even present, at the time of the drowning.

should form an exception to the general rule of liability in the carrier."[202] The court determined that slaves were not an exception. "Negroes have volition, and may do wrong; they also have reason and instinct to take care of themselves. As a general rule, human beings are the safest cargo, because they do take care of themselves."[203] According to the judge, however, the humanity of the slaves did not present enough of a problem to alter the general property rule. "Did this quality, humanity, cause their death? Certainly not—what was the cause? The upsetting of the boat. Who is liable fore the upsetting of the boat? The ferriman; there is an end of the question."[204]

The dissenting judge, however, pointed out the problem created by slaves' human agency: if the slaves had run away or thrown themselves overboard before the ferryman had a chance to reach them, then holding Avant responsible would amount to converting his contract into a guarantee of the slaves' "good morals and good sense."[205] To Judge Johnson, the dissenter, slaves' humanity—their desire to escape and even to commit suicide—prevented the application of the usual liability rule. He explained:

> These people like ourselves possess volition and physical powers which nothing short of the [illegible] can contain. Fetters may restrain their physical powers and the [illegible] may suppress the visible emotions of the will. But these restraints once removed, nothing short of omnipotence can infallibly circumscribe or put bounds to their powers . . . .[206]

Thus, both the majority and the dissent based their opinions about the applicability of a general liability rule to slaves on considerations of slaves' moral agency. In the tort case, unlike a breach of warranty case, judges found it impossible to deny that slaves were intervening actors in the causal chain. However, unlike the criminal law, which explicitly treated slaves as people so that they could be punished for crimes against whites, tort law resisted altering its rules for slave property. Torts pushed the logic of the black slave's dependent character to its outer limit: the position that won out in this case accepted that logic—but the dissent suggests the strains it caused.[207]

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202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* (Johnson, J., dissenting).
206. *Id.* (Johnson, J., dissenting).
207. For a useful discussion of the application of another tort liability rule to slaves, the fellow-servant rule, see Paul Finkelman, *Northern Labor Law and Southern Slave Law: The Application of the Fellow Servant Rule to Slaves*, 11 NAT'L BLACK L.J. 212 (1989). Finkelman argues that it was precisely because of the limits on slaves' agency—in this case, their inability to avoid dangerous work conditions—that Southern courts refused to apply this rule to slaves.

Another boat case illustrates the *Avant* dissent's position that whites could not be held responsible for actions taken by enslaved blacks of their own "free will." In *Gorman v. Campbell*,[208] where a slave drowned while working as a hired boathand, the ferry owner claimed that it was the slave's own fault that he died. Gorman, the slave owner, claimed that the boat owner must be held liable because he was responsible for the slave and had improperly employed him in clearing the river of logs. Richard Bishop, testifying for Gorman, stated:

> It is not the custom of the . . . rivers to employ negroes hired for Boat Hands in clearing obstructions from the river or opening new passages for the Boats [added later] unless it is unavoidable at the time or necessary . . . . The boy Sam of his own accord, in presence of the captain went into the river and commenced cutting a log. That he was about half an hour cutting the log in two—and the captain present during the time—that the water was very swift at the place he was cutting, and when he had cut the log—to save himself from being carried down stream he jumped upon another log which projected into the water, but which gave way and was carried down stream by the current with the boy on it—that in floating down his hat fell off, and in endeavoring to recover it, he sank suddenly, and was soon found, a short distance below . . . .[209]

The captain and engineer of the boat testified that "the boy . . . was not drowned from the improper management of the owners of the Boat-Express orders being given by the witnesses for the negroes to engage in the work of choosing the river."[210] The court charged the jury that if they believed the negro was engaged in the work of his own free will, the boat owner was not liable. The jury found for the boat owner. The plaintiff appealed on the ground that the court's instructions amounted to a statement "[t]hat it was not necessary to use coercion with this kind of property."[211] The plaintiff clearly understood that recognizing a slave's agency threatened the bonds of slavery.[212]

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208. Docket #1175 (Ga. Sup. Ct. Records, June 1853) (availabe in *GDAH*). Appeal reported in 14 Ga. 137 (1853).

209. *Id.* In the trial records, the slave's name appears as both "Sam" and "Landon"; in the supreme court report, it is reprinted as "London."

210. *Id.*

211. *Id.*

212. The Georgia Supreme Court, in an opinion by Judge Lumpkin, overturned the lower court verdict, finding for the slave owner. Gorman v. Campbell, 14 Ga. 137 (1853). *See* Finkelman, *supra* note 130, at 230; *see also* Horlbeck v. Erickson, 39 S.C.L. (6 Rich.) 154, 158 (S.C. 1852) ("The slave being a moral agent, and having volition, adventured from the impulses of his nature . . . "); Wilder v. Richardson, 23 S.C.L. (Dudley) 323, 324 (1838) ("To run away is an act arising from the volition of the slave."). Both of these cases from the South Carolina

In effect, not recognizing slaves as agents with free will meant holding all supervisors of slaves strictly liable for their character and behavior; recognizing slaves as agents, conversely, meant that supervisors were not required to "use coercion" to compel slaves' behavior. The first option created the equivalent of a warranty of moral qualities in the tort context, with all of its attendant difficulties—the second option threatened anarchy.

On the other hand, judges in hire disputes frequently used legal analogies to horses or real estate, which minimized the person/thing distinction and de-emphasized slaves as moral agents.[213] This may be because suits over hiring fell under the law of bailment, or rental property, which meant that these cases aligned slaves more closely with real property, especially real estate. Courts compared a slave falling ill or running away during the hire term to "the loss of the house by fire";[214] they compared the injunction not to treat a hired slave cruelly to the requirement that "after [a hired horse] is exhausted, and has refused its feed, the hirer is bound not to use it."[215] By abstracting claims about slaves to general property claims, judges made it possible to think of slaves less as human agents and more as things.

B. Trickery

To whites, the worst part about slaves' acting for themselves was the possibility that they might deceive their masters through such actions. Slaveholders were constantly on the lookout for slaves' trickery, and their fear lent greater urgency to the project of proper slave "management." A master who could not read slaves well ran the risk of being duped by them, and nothing was less honorable than being fooled by a slave.

The most common mention of a slave's deceit was to characterize a slave as feigning illness, "lazy . . . and affected to be sick,"[216] when in fact "little was there and then the matter with him, the said slave,

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Supreme Court revolved around the hiring of slaves.

213. I found no instances of parties in the courtroom explicitly comparing slaves to animals, although very occasionally a party cited cases involving unsound pigs or horses to bolster his legal argument. *See, e.g.*, Barnes v. Blair, 16 Ala. 71, 72 (1849) (citing horse cases); Scarborough v. Reynolds, 46 S.C.L. (13 Rich.) 98 (S.C. 1860) (plaintiff arguing that slave with crooked arm was unsound, citing cases in which lame horses were ruled unsound).

214. Outlaw v. Cook, Minor 257, 257-58 (Ala. 1824).

215. Hogan v. Carr, 6 Ala. 471, 472 (1844). *See also* Mayor of Columbus v. Howard, 6 Ga. 213, 219 (1849) ("If a man hires a horse, he is bound to ride it moderately."); John E. Stealey, *The Responsibilities and Liabilities of the Bailee of Slave Labor in Virginia*, 12 AM. J. LEGAL HIST. 336 (1968).

216. Cozzins v. Whitacker, Bk. 34, Docket #1261 (Ala. Sup. Ct. Records, Jan. Term 1833) (available in *ADAH*).

and only needed whipping to make him work well."[217] Hardy Stevenson complained that he had only bought the slave Esther because "the defendant represented said slave to be sound and to be deceitful in pretending to be sick frequently and . . . said all that she needed was a master who would drive her."[218] Doctors sometimes told a slave's master that a slave was "practicing a deception on the family . . . and treated her accordingly."[219] One doctor, who sold an old woman slave as sound, told the buyer that "she complained of being sick but that she was able to do the house work."[220] Her former owner also testified at the trial that although Fanny complained of rheumatism, "it was more from an unwillingness to work than from want of ability."[221] Slaveholders constantly feared that slaves were feigning illness or otherwise trying to manipulate their masters; a good master was one who could see through this deceit and make a slave work.

Slaves could feign insanity by putting on fake fits or acting as though they could not understand what was said to them. The stories of deceitful pretense of insanity mirror the same fears as those of feigning physical illness. Even when the parties generally agreed that a slave was insane, they felt it necessary to point out that her symptoms were "utterly irreconcilable with the idea of deception."[222] In a breach of warranty case for an allegedly insane slave, the seller often suggested that the insanity was feigned, as did this seller's lawyer on cross-examination of the buyer's overseer:

> What were the symptoms of insanity, if any, which you discovered about the negro Lawson? Were they constantly on him, or did they return only occasionally? Was not the said Lawson an artful designing fellow and do you not believe he *affected* to be deranged? Do you not remember that he pretended to be in love, and did he not state *that* as the cause of his derangement, and did not the [plaintiff] order him to be whipped saying he pretended only to be deranged, and that he would whip him out of his love fit, or words to that effect?[223]

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217. Walton v. Jordan, Docket #2099 (Ga. Sup. Ct. Records, Mar. 1857) (available in *GDAH*). Appeal reported in 23 Ga. 420 (1857).

218. Stevenson v. Reaves, Bk. 171, Docket #4043 (Barbour County Cir. Ct., Jan. 1854) (available in *ADAH*). Appeal reported in 24 Ala. 425 (1854).

219. Hopkins v. Tilman, Docket #2268 (Ga. Sup. Ct. Records, Sept. 1857) (available in *GDAH*). Appeal reported in 25 Ga. 212, 213 (1858).

220. Laurence v. McFarlane, Docket #1722 (New Orleans ser., Mar. 1829) (available in *SCA-UNO*).

221. *Id.*

222. Buhler v. McHatton, Docket #4660 (New Orleans ser., Feb. 1854) (available in *SCA-UNO*).

223. *Id.*

The most terrifying deceit by a slave was not to pretend illness or even insanity, however, but to pretend to be a white man. This issue arose in lawsuits by owners against railroads or ferryboats for transporting runaway slaves. The common carrier's defense was often that a reasonable person would have taken the slave for a white man. In one Georgia case, the owner introduced a witness who had seen Sam in Chicago, "passing as a white-man . . . . Saw him take drinks at the bar with white men."[224] Although "to a casual observer," this witness said, Sam "did not show any negro blood, he shewed [sic] the negro from the nose down."[225] The railroad put on witnesses who

> swore that they had *seen* Sam about [plaintiff's] store for a year or more and considered him a *white man*—that they had dealt with him in the store as a clerk of the [plaintiffs] bought goods of him and paid him money—that his complexion was light his hair straight and his general appearance to ordinary observation that of a white man one offered had been in the habit of calling him Mr Wallace and regarded him as a member of the firm.[226]

Thus, witnesses presented evidence of slaves' attempts to subvert the institution of slavery by avoiding work or escaping through the use of their own cunning. These subversions may even have been imagined by slaveholders anxious about their own ability to control their bondspeople. But the fact that the possibility of deception lurked behind every case of a "defective" slave thwarted whites' efforts to turn these cases into exercises of mastery and control. In particular, that a slave could "pass" as white meant that whites could imbue "property" with honor and character, albeit by mistake.

C. Slave Testimony

The one area where judges did travel down the slippery slope of recognizing slaves' personhood was in the acceptance of slaves' own statements as evidence in the courtroom. It was a cardinal rule of slave law in every state that slaves could under no circumstances testify against a white man; this rule applied to out-of-court nonhearsay as well as live testimony. The rationale for the rule was simple: slaves were mendacious and unworthy of taking the oath to testify; their words could not be the basis of liability or culpability of a white person. Yet, time and again, in warranty cases, a slave's statements regarding his or her own condition were allowed, almost always

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224. Wallace v. Spullock, Docket #3608 (Ga. Sup. Ct. Records, Dec. 1860) (available in *GDAH*). Appeal reported in 32 Ga. 488 (1861).
225. *Id.*
226. *Id.*

against a white man, the slave seller. Thomas Cobb notes in his treatise that this anomaly represented the primary exception to the rule, due to "the necessity of the case."[227] This mostly happened at the witness level and passed without judicial comment.

First, it was common for witnesses to refer to slaves' statements in their testimony without either party objecting. If no party objected, evidence of the use of slave testimony did not appear in the appellate opinion. For example, in *George v. Bean*,[228] several witnesses referred to slave testimony, that "the [slave] girl complained of a pain in her head and side" and "complained . . . of debility . . . of being overcome by hurt."[229] The Mississippi High Court of Errors and Appeals granted the plaintiff-seller a new trial on other grounds, never mentioning the admission of slave statements in its opinion.[230]

In one South Carolina case, one witness testified that "the Negro said he had eaten dirt,"[231] and another that Romeo "after a drunking frolic would complain of a stoppage in his water," to which no one objected.[232] In another case that involved competing medical testimony, one doctor testified that a slave "said she was unable to attend to her duties about the house" because of an "enlargement of the tendons of her ankle."[233] The other doctor, who argued that the swelling was only mild rheumatism, testified that "she said she had runaway, and took a cold, and that the swelling arose from that."[234]

The reported statements sometimes went beyond mere medical symptoms. One Natchez witness reported that an enslaved woman "had a short time before [she was sold] taken *some medicine to clear herself* (meaning thereby to produce abortion as this affiant

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227. COBB, *supra* note 1, at 231. Walter Johnson discusses this phenomenon in Louisiana courts. Johnson, *supra* note 7, at 233-34.

228. Record Grp. 32, Drawer 105, Docket #7418 (Chickasaw County Cir. Ct., Dec. 1855) (available in Mississippi Department of Archives & History). Appeal reported in 30 Miss. 147 (1855).

229. *Id.*

230. 30 Miss. 147 (1855).

231. Brocklebank v. Johnson, Box 28 (S.C. Sup. Ct. Records, Apr. 1834). Appeal reported in Johnson v. Brocklebank, 2 Hill 353 (S.C. 1834) [no S.C.L. volume available].

232. *Id.*

233. Dinkins ads. Parkerson, Box 34 (S.C. Sup. Ct. Records, 1839) (available in *SCDAH*).

234. *Id. See also* Mangham v. Cox, Bk. 1856, Docket #2952, #32 (Ala. Sup. Ct. Records, 1st Div., 1856) (available in *ADAH*); Feagin v. Beasley, Docket #2126 (Ga. Sup. Ct. Records, 1857) (available in *GDAH*); Dean v. Traylor, Docket #549 (Ga. Sup. Ct. Records, 1849) (available in *GDAH*); Buckner v. Blackwell, Drawer 353, #23 (Adams County Cir. Ct., May Term 1857) (available in *HNF*); James v. McCoy, Drawer 344, #69 (Adams County Cir. Ct., May Term 1854) (available in *HNF*); Herring v. James, Drawer 329, #169 (Adams County Cir. Ct., May 1847) (available in *HNF*); Smith v. Meek, Drawer 232, #76 (Adams County Cir. Ct., Apr. 1838) (available in *HNF*); Hillier v. Hume, (no box) (City Ct. of Charleston, 1854) (available in *SCDAH*); Gantt v. Venning, (no box) (City Ct. of Charleston, Jan. 1840) (available in *SCDAH*).

understood)."[235] Another testified to a slave's statements about his ownership: "[T]he overseer went with him to the negroe's cabbin [sic], where he was sick, saw and spoke to [the slave], asked him who he belonged to, and answered, to Mr Sauve and that said Barnaby sold him to him . . . ."[236]

Even if the opposing party objected to the admission of slaves' words at trial, often the judge overruled the objection. In *Bush v. Jackson*,[237] William Murrah's attorney asked Dr. Jesse Peebles about Phoebe's illness, including the following interrogatories:

> 11. State what account the negro woman Phoebe gave to you of the causes and length of her diseased state? How long she had been laboring under a cough and difficulty of respiration? Wether she had been cupped blistered or scarrified and what for? Who had been the physician. . . . Whether she had ever afterwards felt well? State what she described her feelings to be and to have been since said former sickness?
> 12. State how the symptoms [she] described accorded with your own opinion . . . .[238]

Despite the fact that the defendant objected to the eleventh and twelfth interrogatories "because predicated on the sayings of a slave," Dr. Peebles answered the questions.[239] In one Mississippi case, *Hill v. Winston*,[240] the defendant based his motion for a new trial on the judge's ruling which allowed "so much of the deposition of said Collins as relates to and is founded upon hearsay and the statements of the negro Caroline."[241] The judge allowed the jury to hear the deposition that "the girl Caroline stated that she was sickly and had been in bad health for several years, and had been sold several times and taken back," and the jury found for Caroline's buyer.[242]

When these cases reached appellate courts, judges invented creative excuses for what seemed like a giant step out of bounds: first, they took care of hearsay objections on the grounds that the statements

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235. Cotton v. Rogillio, Drawer 202, #143 (Adams County Cir. Ct., Apr. 1837) (available in *HNF*).

236. Barnaby v. Tomlinson, Drawer 31 (Adams County Ct. [Miss. Terr.], 1805) (available in *HNF*).

237. Bk. 174, No. 14, Docket #4012 (Ala. Sup. Ct. Records, Jan. 1854) (available in *ADAH*).

238. *Id.*

239. *Id. See also* Tilman v. Stringer, Docket #2486 (Ga. Sup. Ct. Records, 1858) (available in *GDAH*) ("[C]ounsel for defendant objected to the witness' stating any thing as to what the negro said in regard to her situation and that she complained—in the ground that it was hearsay—the Court overruled the objection and allowed the testimony . . . stated that the negro complained of head ache and said she had pains in her back and side and shoulders . . . .").

240. Drawer 336, # 25 (Adams County Cir. Ct., May 1849) (available in *HNF*).

241. *Id.*

242. *Id.*

were verbal acts or *res gestae*. Second, they ruled that since doctors routinely used slaves' statements about their own condition as criteria on which to base their medical opinions, such statements could be admitted in the context of doctors' opinions. Yet, eventually, even sick slaves' declarations to laymen were allowed. It was impossible to hear suits about the condition of human beings without hearing from the human beings themselves.[243]

The Mississippi High Court of Errors and Appeals, in *Fondren v. Durfee*,[244] decreed that a sick slave's declarations to his master about his present illness were admissible as "verbal acts, indicating the nature and character of the disease under which the slave is laboring," and then arrived at the dubious conclusion that "being made to the master, who is interested in the welfare of the slave, [the slave's declarations] are presumed to be honest."[245] This holding was a far cry from the expectation that a slave will dissemble illness to get out of work. The court also rationalized the presumption of slaves' honesty concerning their own health by the fact that slaves' declarations were "constantly acted upon by medical men as true statements."[246]

In *Bates v. Eckles & Brown*, Dr. Peterson testified, "In conversation with the negro, I learned from him, although he made the statement with extreme reluctance, that he had been subject to similar attacks before . . . ."[247] Mary Treadwell also explained that Toney

> made frequent suggestions as to the treatment to be used, which led to inquiries on my part, as to whether he had been before afflicted in the same way. He replied that he had been subject to similar attacks and had generally been relieved by drinking soap suds . . . [and] by being put in a barrel of warm water.[248]

Sarah Stephens added that she heard Toney "suggest the use of red pepper, which he generally carried in his pocket . . . . [H]e often asked for syrup and said meat would hurt him."[249]

Despite the defendant-seller's objections to this testimony, the Alabama Supreme Court, like the Mississippi High Court of Errors and Appeals, ruled that slaves' declarations "are admissible evidence upon the principle of *res gestae* as well as from the necessity of the

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243. *See* Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209 (1993).
244. 39 Miss. 324 (1860).
245. *Id.*
246. *Id.*
247. Bates v. Eckles, Record Bk. 153 (Ala. Sup. Ct. Records, Jan. 1855) (available in *ADAH*). Appeal reported in Eckles & Brown v. Bates, 26 Ala. 655 (1855).
248. *Id.*
249. *Id.*

case."[250] However, slave statements regarding previous illness would only be admissible if they had been made to a physician. The court cautioned that if it went too far in allowing statements as reported to other witnesses, such as "the female witnesses who disposed in this case," "it would be an easy matter to prove slaves unsound by their declarations of their unsoundness, oftentimes feigned as an excuse to avoid labor, or to procure a change of masters."[251] The possibility of a false "warranty" coming directly from a slave increased the risk of a master's investment, and increased the risk of the master losing his honor and character as a master if he honored the deceit of the slave.

IV. CONCLUSION

The introduction of slave testimony threatened slavery because it introduced into the courtroom the specter of the deceitful slave manipulating whites. The possibility that a slave might deceive one into believing in his illness, idiocy, or whiteness impugned a white man's honor in the deepest way. More than any other kind of dispute, those invoking whites' fear of being tricked by blacks demonstrate why it cannot be true that "the slaves' influence on sales law . . . was akin to that of horses, rather than to that of persons."[252] Slaves *were* people, whether or not "the law," as constituted by legislatures and appellate judges, recognized them as such. As people, they behaved in ways, consciously and unconsciously, that wreaked havoc with judges' efforts to treat them as things or horses. If a horse turned out to be lame or vicious, it did not create a trial scene in which a man's neighbors came out to accuse him of being unable to control his plantation.[253] A horse could not provide a challenge to a white man's honor.

Furthermore, a horse could not provide a challenge to the system of slavery the way that a resistant slave could. Runaway slaves forced conflict to the surface in a variety of ways, from escapes to the North to mundane disputes. Slave resistance assumed political significance in Southern courts because this was an arena in which Southerners

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250. 26 Ala. at 659.

251. *Id.* at 660. The Alabama Supreme Court later limited the *Bates* holding, ruling in *Blackman v. Johnson* that a witness could not testify that a slave prayed or called on others to pray for him as evidence of sickness. Blackman v. Johnson, 35 Ala. 252 (1859); *see also* Barker v. Coleman, 35 Ala. 221 (1859); Stringfellow v. Mariott, 11 Ala. 573 (1836) (admitting slave's declarations to prove *scienter* on part of vendor).

252. Fede, *supra* note 2, at 323.

253. *See, e.g.*, Ferguson v. Nelson, Drawer 356, #25 (Adams County Cir. Ct., May 1859) (available in *HNF*) (white horse warranted as "sound and gentle" turned out to be "unsound and scary"); Brown v. Jones, SG 2803 [archive marking], *in* Misc. Ct. Cases, Briefs, Etc., 1820-1873 (Ala. Sup. Ct. Records, n.d.) (available in *ADAH*) (horse warranted sound).

faced the most difficulty in reconciling slavery with their liberal institutions. The "tone of desperation" James Oakes found "hover[ing] over the case law of slavery in the Old South"[254] is apparent in the appellate decisions of moral qualities warranty cases, as judges tried to shut Pandora's box.

Parties in court opened Pandora's box when they based their claims on slaves' moral qualities or volition as moral agents; when their witnesses testified that slaves took action for their own reasons; or when those witnesses repeated slaves' own words. Judges, however, tried to shut Pandora's box by privileging accounts that emphasized slave behavior as a function of masters' character or management, or medicalized slave vice into insanity or idiocy. Lawyers and judges confronted slave resistance by promoting stories about the origins and development of slave character and behavior that removed rational agency from slaves. In this way, the law created an image of blackness as an absence of will, what Patricia Williams has called "antiwill."[255]

Yet reading trial records shows how incomplete a picture of "the law" appellate opinions provide. If what happened in courtrooms, in the common experience and consciousness of ordinary people, was "law"—if "law" is one of the "great cultural formations of human life"—then it is impossible to pin down one integrated version of "the good slave" under "the law."[256] Buyers, sellers, hirers, owners, and overseers all told different stories about why slaves behaved as they did and had the "character" they had. They drew on images at large in Southern plantation culture, shaped by shared narratives of race, gender, and commodification of slaves' character and labor—but they also refashioned those images for the legal arena, and for their own advantage at trial. The portrayal of slave character as malleable, dependent on a master's management, benefited slave sellers and owners; "medicalizing" slave vices as "habits" or "addictions" benefited buyers and nonowners who "damaged" slaves.

Because the conflict devolved so often into a debate over mutability or immutability of character, the focus inevitably shifted from slaves to masters. Mastery and the character of masters came into question directly under the dictum of "like master, like man," but indirectly as well in every decision about a slave's character that reflected in some way on her master's control, will, or honor. These cases mattered in

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254. OAKES, *supra* note 18, at 160.
255. WILLIAMS, *supra* note 13, at 219.
256. GEERTZ, *supra* note 12, at 219. I accept Geertz's "two propositions, that law is local knowledge not placeless principle and that it is constructive of social life not reflective, or anyway not just reflective, of it." *Id.* at 218.

Southern culture precisely because putting black character on trial also put white character on trial.