



ARTICLE

Warranting Violence

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Abstract. This Article excavates unfamiliar stories about contracts doctrine and the violence of slavery. One such story begins with six-year-old Martha, whose bill of sale warranted her “to be sound.” When Martha’s purchaser found her unable to perform the “duties that might be reasonably assigned to a child,” however, he sued for breach of warranty, alleging that Martha was “absolutely an idiot, and of no value.” In response, Martha’s vendor claimed that she was in fact sound and that her “dullness” was merely the result of “having been badly treated.”

Cases like Martha’s—decided in Tennessee and published as *Belew v. Clark*—were common in the antebellum South, as purchasers of slaves routinely sued vendors for breach of warranty. These warranties drew courts into the very heart of slavery’s violence, where they were called upon to answer questions about how much violence was necessary and acceptable for the slave regime to work. Questions such as: How much violence did an enslaved child need to endure before her injuries constituted a breach of warranty?

Through an analysis of 152 appellate cases heard in five Southern states (Mississippi, South Carolina, Tennessee, Texas, and Virginia), this Article finds that warranties of soundness were one of the few sites where the law intervened in the violence of slavery. By changing the risks and incentives associated with slaveowners’ violence, warranties of soundness also shaped the very forms that said violence took.

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Introduction

The violence of the criminal law is relatively direct. . . . I would be prepared to argue that all law which concerns property, its use and its protection, has a similarly violent base.

—Robert Cover¹

On August 26, 1852, Robert Glenn purchased a fifteen-year-old girl named Lucinda from Samuel Moore for \$650. At the time of sale, Moore warranted that Lucinda was “sound, healthy, [and] sensible.”² This warranty, known as a warranty of soundness, guaranteed the physical and mental health of an enslaved man, woman, or child at the time of sale.³

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1. Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1607 n.16 (1986).
 2. Declaration at 1, Glenn v. Moore (Tenn. Cir. Ct. Marshall Cnty. Oct. 14, 1854) (on file with Tenn. State Libr. & Archives, Range 34, Section B, Shelf 1).

Under Rule 10.7.1(d), *The Bluebook* recommends using the parenthetical “(enslaved party)” or “(enslaved person at issue)” when a case involves an enslaved person as a party or as the subject of a property dispute or other legal dispute. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1(d)*, at 116 (Columbia L. Rev. Ass’n et al. eds., 22d ed. 2025). See generally Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 121 (2020) (explaining that such a parenthetical “would prevent litigators from intentionally or accidentally obscuring a case’s origin in slavery”). Given that many, if not all, of the cases cited in this Article discuss the violence of slavery, I have chosen not to follow the rule in the pages that follow.

3. See DEA H. BOSTER, *AFRICAN AMERICAN SLAVERY AND DISABILITY: BODIES, PROPERTY, AND POWER IN THE ANTEBELLUM SOUTH, 1800-1860*, at 34-51, 74-92 (2013) (explaining the many ways in which “the circumstances of slave life could be hazardous to the bodies and minds” of enslaved people such that slaveowners would deem them “unsound”); SHARLA M. FETT, *WORKING CURES: HEALING, HEALTH, AND POWER ON SOUTHERN SLAVE PLANTATIONS 20-34* (2002) (explaining how “the concept of soundness irrevocably bound the health of enslaved African Americans to the chattel principle” and emphasizing that enslaved people did not understand their own health through the rubric of soundness); ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 122-32* (Univ. of Ga. Press 2006) (2000) (demonstrating that warranty litigation became a locus of enslavers’ demonstrations of mastery over slaves’ bodies and characters, as well as a site of disruption due to slaves’ undeniable moral agency); WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 117-34, 176-88* (1999) (describing slave traders’ endeavors to present enslaved people as sound prior to sale and enslaved people’s efforts to be seen as (un)sound in order to shape their own sale); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, at 102-15, 119-23, 125, 130-31 (1996) (describing the contract doctrine that governed slave sales and the doctrine’s changes over time, including the use of warranties of soundness); DAINA RAMEY BERRY, *THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION 70-72* (2017) (explaining soundness’ role in commodifying the lives and bodies of the enslaved); 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, 306-11, 320-21 (1987) (explaining the laws of redhibition (implied warranties) in Louisiana slave sales and showing that slave sales were regulated much the same as other commodity transactions). For more

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As with warranties generally, slave warranties protected slave buyers against the risk of hidden “defects.”⁴ If an enslaved person became ill or died months or years after a purchase, it was common for the buyer to bring a breach of warranty suit against the seller.⁵ When Robert Glenn discovered that Lucinda was “incapable of procreation or gestation,” he did exactly that.⁶ Five months after purchasing Lucinda, Glenn sued Moore for breach of warranty, claiming that Lucinda’s infertility “destroy[ed] her usefulness and value.”⁷ He sought \$1,000 in damages—roughly \$42,000 in today’s dollars⁸—Lucinda’s purchase price plus the amount he had spent on physicians to diagnose and treat Lucinda’s condition.⁹ If the court found that Lucinda’s condition was a breach of warranty, Glenn would have been able to recover the money he had lost from investing in her. In this way, Lucinda’s warranty shifted some of the financial risk of buying her *from* the person buying *to* the person selling, thus providing valuable financial protection for a slave buyer like Glenn.

For enslaved people like Lucinda, however, being warranted as sound was no guarantee of protection. In her specific case, Glenn’s preparations for trial merged the violence of the slave trade with the violence of slave medicine. While it was not uncommon for slaveowners to provide for some slaves’ medical care,¹⁰ the nature and extent of treatment differed when a warranty of

information on the role of warranties of soundness in the commercial law of slavery, see generally GROSS, above, which contains the only book-length treatment of warranties of soundness. For more on Ariela Gross’s book and the arguments therein, see notes 5, 31, 144, 371, and accompanying text below.

4. Long v. Hicks, 21 Tenn. (2 Hum.) 305, 308 (1841).
5. In *Double Character*, legal historian Ariela Gross establishes the centrality of warranties of soundness to the law of slavery—uncovering that disputes over warranties of soundness were the “most common cases involving slaves” across the slaveholding South. GROSS, *supra* note 3, at 122. As Gross demonstrates, these cases implicated more than just the economy of slavery, however. They were also sites of contestation for white Southerners’ conflicting ideologies and beliefs about honor, Blackness, and the enslaved themselves. See *id.* at 57-61, 70-78, 109-11, 120-21. This Article both builds on and departs from Gross’s important work. *Double Character* powerfully broadened our conception of what “law” is and who shapes it in order to present a more complex and nuanced picture of the law of slavery. See *id.* at 5-7. By contrast, in the pages that follow, I narrow the aperture in order to ask: How did warranties and the contract doctrine that governed them intervene in slavery’s violence, and to what effect?
6. Declaration, *supra* note 2, at 2; see Writ of Summons at 1, *Glenn v. Moore* (describing the date as “the second Monday in February AD 1853”).
7. Declaration, *supra* note 2, at 2.
8. *\$1,000 in 1853 Is Worth \$42,093.77 Today*, OFF. INFLATION DATA, <https://perma.cc/9ZFC-PVSU> (archived Jan. 7, 2026).
9. Declaration, *supra* note 2, at 2.
10. See TODD L. SAVITT, *MEDICINE AND SLAVERY: THE DISEASES AND HEALTH CARE OF BLACKS IN ANTEBELLUM VIRGINIA 194-201* (1st paperback ed. 1981).

soundness was on the line. For one, Glenn had *three* different physicians conduct pelvic exams on the teenager.¹¹ Even those slaveowners who paid white doctors to provide medical care outside of the litigation context were unlikely to routinely hire multiple physicians to provide second, third, or fourth opinions.¹² By contrast, as Ariela Gross has shown, hiring multiple doctors to provide expert testimony *was* routine for warranty suits.¹³

That the practitioners in question were also white men would have heightened Lucinda's discomfort during the exams.¹⁴ We know from the work of Sharla Fett and others that enslaved people distrusted white medical practitioners.¹⁵ It is not hard to imagine that an enslaved teenage girl would have far preferred to be examined by a woman from her own community.¹⁶ Of course, Lucinda's preferences likely mattered little to Glenn.¹⁷ And even if they had, enslavers would not have been able to rely upon enslaved healers as expert witnesses in the courtroom due to bans on slave testimony.¹⁸

To make matters far worse, it is likely that Lucinda's pretrial examinations were also physically painful for her.¹⁹ Some months prior to the lawsuit, Moore had hired a physician "for the purpose of extending the entrance to the vagina," which the doctor attempted to do for several weeks.²⁰ That same doctor also testified about Lucinda at trial, as did one other physician who had

11. At trial, all three doctors testified as to the size and shape of Lucinda's "genital organs," concluding that "menstruation in copulation" was not possible for her. Bill of Exceptions at 5, *Glenn v. Moore* (writing that the plaintiff "introduced three witnesses practicing Physicians who deposed that they examined the slave Lucinda").

12. See SAVITT, *supra* note 10, at 165-66, 171, 194-99.

13. GROSS, *supra* note 3, at 122-24, 136-37.

14. See MARIE JENKINS SCHWARTZ, *BIRTHING A SLAVE: MOTHERHOOD AND MEDICINE IN THE ANTEBELLUM SOUTH* 145 (2006).

15. E.g., FETT, *supra* note 3, at 34, 143.

16. Cf. *id.* at 147, 151 (discussing enslaved patients' preference for Black doctoring and distrust of white male physicians in women's health). Many plantations had enslaved healers, upon whom owners would call in the case of illness or injury. *Id.* at 118-19; see CAITLIN ROSENTHAL, *ACCOUNTING FOR SLAVERY: MASTERS AND MANAGEMENT* 32-33 (2018).

17. See generally DEIRDRE COOPER OWENS, *MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY* 42-44 (2017) (describing enslaved women's "helplessness to resist the medical practices performed on their bodies"); see also FETT, *supra* note 3, at 145-47 (explaining that the status of enslavement meant that slaves could not legally consent to medical procedures).

18. See MORRIS, *supra* note 3, at 229-32 (discussing bans on slaves' testimony).

19. Cf. COOPER OWENS, *supra* note 17, at 11 (noting that enslaved women endured "the application of painful medical experimentations, without the use of anesthesia, even at a time when it was regularly used").

20. Bill of Exceptions, *supra* note 11, at 6. Moore likely hired this physician in an effort to show that Lucinda's condition was remediable, and thus not a breach of warranty. *Id.*

examined Lucinda on behalf of the seller, Moore.²¹ This means that after weeks of tortuous experimental procedures on some of the most intimate parts of her body, Lucinda was also subjected to at least five different physicians' examinations.²² The fact that the costs of such medical care and testimony were often included in damages awards likely further incentivized the practice.²³

In these ways, we see how Glenn's efforts to enforce Lucinda's warranty—by suing for breach—also changed the nature of Lucinda's suffering. To be clear, the warranty litigation was far from the only reason Lucinda suffered as an enslaved woman.²⁴ Most significantly, it is likely that she would have been subjected to tortuous gynecological procedures whether or not the warranty existed.²⁵ Nevertheless, without the warranty, Glenn and Moore would have had no need to arrange for Lucinda's five pelvic exams. Rather, those weeks of experimental "treatment" were contingent on the warranty litigation.²⁶

This contingent violence was just one part of a commercial context defined by brutality. And it is this violent commercial context that this Article takes as its starting point, asking whether and how contract doctrine was able to adapt to its demands. The doctrinal answer was twofold. By (1) limiting the

21. *Id.*

22. See *id.* at 5-6; see also Edward E. Baptist, *Toward a Political Economy of Slave Labor: Hands, Whipping-Machines, and Modern Power*, in *SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 31, 56-58 (Sven Beckert & Seth Rockman eds., 2016) [hereinafter *SLAVERY'S CAPITALISM*] (explaining the importance and significance of using the word "torture" to describe certain forms of violence inflicted against the enslaved); SCHWARTZ, *supra* note 14, at 67-70, 80-82, 105 (describing the ways in which many white doctors' treatments for enslaved women's infertility were "experimental, ineffective, painful, even dangerous").

23. See, e.g., *Shewalter v. Ford*, 34 Miss. 417, 421-22 (1857) (explaining that the warranty extended to expenses incurred by reason of unsoundness, including "medical bills in consequence of the disease"); see also GROSS, *supra* note 3, at 132-41 (explaining the importance of doctors to warranty suits and arguing that their centrality led to higher medical expenses on the part of the buyer).

24. As Harriet Jacobs famously wrote in *Incidents in the Life of a Slave Girl*, "[s]lavery is terrible for men; but it is far more terrible for women." HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 77 (L. Maria Child & Jean F. Yellin eds., Harvard Univ. Press enlarged ed. 2000) (1861). For more on the violence experienced by enslaved women, see SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 79-88 (1997); DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 63, 68-69, 72-73, 83-84 (rev. ed. 1999); THAVOLIA GLYMPH, *OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD* 18-31 (2003); and JENNIFER L. MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* 70-95, 128-32 (2004).

25. See SCHWARTZ, *supra* note 14, at 67-106.

26. See Bill of Exceptions, *supra* note 11, at 6.

scope of covered conditions and (2) adopting a narrow conception of causation, courts allowed warranties to cover some of the conditions caused by slavery's violence, while ignoring the fact that slaveowner violence was their cause in the first place. In so doing, contract doctrine accommodated and occluded the violence of slavery.

But contract law's adaptation to violence is only part of the story. The rest concerns the doctrine's place in slavery's broader legal terrain. As numerous historians have documented, slavery's violence was ubiquitous, and enslavers faced very few restrictions on the form, frequency, or severity of the violence they inflicted upon the enslaved.²⁷ Consequently, and as this Article argues, the near absence of legal regulations on enslaver violence would have lent warranties of soundness and their doctrine an outsized role in mediating that violence.

This Article proceeds in three Parts. Part I begins by explaining the unique challenges that slavery's violence posed for slaves' health—and by extension for the slave trade—before unpacking the ways in which warranties of soundness offered one of the few legal solutions to these challenges. By shifting the risks of unsoundness from slave buyers to slave sellers, warranties also changed the risks and incentives for the owners who were committing said violence. From there, Part II homes in on the doctrinal rules that governed the scope of warranties' coverage, illustrating how these rules made certain kinds of violence more (or less) costly to slaveowners. The doctrine balanced the needs of buyers and sellers, offering some amount of financial protection to both. This protection did not extend to the enslaved people who were warranted, however. Changing the costs and incentives of enslavers' violence was more likely to transform violence's form, rather than eliminate its occurrence. And as Lucinda's case demonstrates, a buyer's decision to sue for breach of warranty could lead to further suffering for the person whose soundness was in question. Part III examines how the rules governing remedies inflicted their own costs on the enslaved.

Taken together, these arguments suggest that warranties of soundness were more than just a commonly used contract. Their use and their doctrine were also ways for law to regulate slavery's violence. Other scholars have made a similar argument about contract's role in regulating the slave trade more broadly.²⁸ This Article adds to this body of scholarship both in its emphasis on

27. See, e.g., sources cited *infra* notes 63, 65-68; *infra* notes 79-83 and accompanying text.

28. See, e.g., STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE 162-64 (2005) (describing contract rules and implied warranties as "laws regulating slave sales"); JOHNSON, *supra* note 3, at 46-47 (describing slave traders' sales as "redistribution" that "depended on . . . recognizing and regulating the humanity of the people they bought and sold"); Adam Rothman, *The Domestication of the Slave Trade in the United States*, in THE CHATTEL PRINCIPLE: INTERNAL SLAVE TRADE IN THE AMERICAS
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contract *doctrine's* role in regulating slavery, and in its focus on the regulation of slavery's *violence*, rather than on contracts and contract doctrine's regulation of the slave trade.

Thinking of slave warranties in this manner has two primary implications. The first is that contract law's regulation of the violence of slavery likely extended well beyond warranties of soundness. There were many other types of contracts that impacted the financial risks and profitability of slavery.²⁹ And as the story of slave warranties shows, intervening in slavery's profitability meant intervening in its violence. Indeed, the historical scholarship bears this out.³⁰ Nevertheless, most scholarship on violence and the laws of slavery has emphasized the role played by property, constitutional, and criminal law.³¹ This Article builds on these insights by

32, 44-45 (Walter Johnson ed., 2004) [hereinafter THE CHATTEL PRINCIPLE] (“[T]he domestic slave trade . . . was regulated by means of the enforcement of legal conventions that protected slaveowners when they unwittingly purchased unhealthy or intractable slaves.”).

29. Slave hiring contracts, conditional sales, chattel mortgages, and other credit agreements were chief among them. See GROSS, *supra* note 3, at 30-35 (discussing slave hiring as well as the centrality of slaves to the Southern credit economy generally); JONATHAN D. MARTIN, *DIVIDED MASTERY: SLAVE HIRING IN THE AMERICAN SOUTH* 18-19, 42-43 (2004) (discussing slave hiring); MORRIS, *supra* note 3, at 102-06, 121-23 (discussing conditional sales); SHARON ANN MURPHY, *BANKING ON SLAVERY: FINANCING SOUTHERN EXPANSION IN THE ANTEBELLUM UNITED STATES* 39-43, 62-65, 70-73 (2023) (discussing various banks' use of enslaved people as collateral for loans and mortgages taken out on slaves); CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND LEGAL INSTITUTIONS IN EARLY AMERICA* 42, 55-56 (2021) (discussing the use of slaves as collateral in colonial credit agreements).
30. As historian Calvin Schermerhorn has written, “[s]lavers’ profit margins grew in proportion to the violence.” CALVIN SCHERMERHORN, *THE BUSINESS OF SLAVERY AND THE RISE OF AMERICAN CAPITALISM, 1815-1860*, at 169 (2015).
31. Notable exceptions to this general trend include Daina Berry’s *The Price for Their Pound of Flesh*, Ariela Gross’s *Double Character*, and Walter Johnson’s *Soul by Soul*. Their invaluable insights into enslavers’ methodical commodification of Black lives, pursuit of warranty litigation, and transactions in the slave market are the historiographical foundation upon which this Article rests. See BERRY, *supra* note 3, at 1-9 (uncovering the ways slaveowners put monetary values on enslaved lives from conception to death); GROSS, *supra* note 3, at 122-52 (explaining the ways in which the violence of white supremacy manifested itself during warranty trials); JOHNSON, *supra* note 3, at 162-88 (describing the harms and humiliations slaves experienced as a result of the sales process); see also Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 223 (1999) (explaining how wills and intestate succession “traced a delicate and often brutal dance” around questions of race, sex, and slavery in the antebellum period). But those exceptions largely prove the rule: The wider literature has tended to locate slavery’s violence elsewhere. See, e.g., ANDREW T. FEDE, *HOMICIDE JUSTIFIED: THE LEGALITY OF KILLING SLAVES IN THE UNITED STATES AND THE ATLANTIC WORLD* 192-222 (2017) (describing the statutory and criminal common law regimes governing the murder of enslaved people in the antebellum era); SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 106-20
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exploring how contract doctrine was integral not just to slavery's economy, but also to its practices of violence.

The second implication of slave warranties' regulation of slavery's violence concerns the way we think about racial violence and the law more broadly. Specifically, the history of slave warranties underscores the importance of interrogating contract doctrine's ability to accommodate, incentivize, and/or enact racial violence. This focus differs from much of the existing work on the subjects of law, racial violence, and contracts. In general, the literature on the relationship between legal doctrine and racial violence tends to focus primarily on tort and property law within private law, or the criminal legal system and constitutional law in public law.³² Relatedly, to the extent that contract law scholarship engages with questions of contract- and race-based harm, it often does so often within the rubric of consent, coercion,

(paperback ed. 2d prtg. 2003) (describing the "routine use of violence against slaves by community-sponsored groups such as white slave patrols"); ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 21-32 (1982) (addressing property law's role in slavery's "idiom of power"); HANNAH ROSEN, *TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH* 10-19 (2009) (describing the relationship between constitutional law, citizenship, and slavery and its connection to sexual violence against enslaved women); PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865*, at 6-34 (1988) (outlining the range of violent punishments that slaveowners inflicted on slaves in their efforts to control their bodies and behavior); MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 72-90, 158-69 (1981) (illustrating how criminal and property law frameworks legitimated and structured violence against enslaved people by defining their legal status as persons and as property).

32. See, e.g., Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 131 (2017) (describing how Fourth Amendment jurisprudence "exposes African Americans not only to the violence of frequent police contact but also to the violence of police killings and physical abuse"); Myisha S. Eatmon, *Wielding an Unlikely Weapon: Black Americans, White Violence, and Damage Suits During the Early Days of Jim Crow*, 111 J. AM. HIST. 267, 268 (2024) (uncovering Black Americans' use of tort law to combat white racial violence in the Jim Crow era); Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1548-50 (2022) (explaining the role of violence, particularly violence committed by groups of armed British North Americans, in U.S. constitutional culture); Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 640 (2012) (arguing that the personhood value that some people place in property can emerge from its violent acquisition). When it comes to the question of the relationship between the law and violence more generally, Robert Cover's *Violence and the Word*, see note 1 above, is perhaps the most well known in this tradition. See Austin Sarat, *Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 3, 4-5 (Austin Sarat ed., 2001) (describing the significance of Cover's work in "think[ing] about law in relation to the institutional reality of its intimate engagement with violence").

or discrimination.³³ The history of slave warranties indicates, however, that contract law ought to be considered alongside doctrines like tort and criminal law for its capacity to regulate violence.

These insights are rooted in an analysis of 152 appellate cases heard between 1735 and 1860 in five Southern states: Mississippi, South Carolina, Tennessee, Texas, and Virginia. These states were chosen for their variability—demographically, economically, and agriculturally.³⁴ In spite of these differences, however, the doctrine governing warranties of soundness varied little between states and across time periods.³⁵

This may owe in part to the fact that it was common for state courts to look across state lines when articulating the rules governing warranties of soundness.³⁶ Courts regularly cited holdings from other state courts of last resort as authority for the common-law rules they were observing.³⁷ In addition, some of this doctrinal consistency likely owed in part to courts' belief that legal rules would impact the interstate slave trade, both in terms of

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33. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 7-9 (1991) (discussing the role that race plays in contract law's understandings of consent, coercion, and objectivity); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) (demonstrating the significant impact racial and gender discrimination can have on contract terms); Aviam Soifer, *Essay, Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1916-30 (1987) (discussing *Betty's Case*, wherein an enslaved woman chose to remain enslaved—and the case's implications for contract, consent, and violence (citing 20 Monthly L. Rep. 455 (Mass. Nov. 9, 1857) (Shaw, C.J., in chambers))).
34. For more information on the differences between the states, see Table 3 in the online Appendix. Brittany Farr, *Warranting Violence: Appendix*, 78 STAN. L. REV. 533 app. 1, tbl.3 (2026) [hereinafter Appendix].
35. The contract and commercial doctrine of slavery was largely uniform across the slaveholding states. JENNY BOURNE WAHL, *THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY* 19-24 (1998).
36. In an 1856 case, for example, the Supreme Court of Texas explained that its measure of damages was the same measure used in North Carolina, South Carolina, and Mississippi. *Scranton v. Tilley*, 16 Tex. 183, 194 (1856). Texas had been a civil-law jurisdiction prior to joining the United States, but Texas courts soon decided to follow the common-law doctrine that existed in other states. See, e.g., *McKinney v. Fort*, 10 Tex. 220, 231 (1853) (explaining that though civil law was “in force in Texas previous to 1840,” the state had adopted common-law doctrine).
37. See, e.g., Jenny B. Wahl, *The Jurisprudence of American Slave Sales*, 56 J. ECON. HIST. 143, 153-54 (1996) (describing consistent doctrinal development across jurisdictions). Courts in jurisdictions older than Texas also looked beyond their borders when deciding warranty cases. For example, in *Kinley v. Fitzpatrick*, a Mississippi case listed in Table 2 of the Appendix, note 34 above, the court cited decisions on warranties of soundness from New York, North Carolina, and Kentucky. 5 Miss. (4 Howard) 59, 61-62 (1839). Mississippi became a state nearly thirty years before Texas joined the Union in 1845. See Appendix, *supra* note 34, tbl.1.

slaveowner behavior and market stability.³⁸ Courts understood that the scope of warranties' coverage could have significant impacts on the profitability of selling slaves. As historians of the time period have shown, legal actors believed that the rules of contract doctrine both responded to and shaped economic markets.³⁹ Legal actors understood this to be true about markets for people—as well as markets more generally.

Accordingly, the legal conception of unsoundness needed to inhabit a Goldilocks zone: broad enough to protect purchasers from the riskiest aspects of buying human property but narrow enough to insulate sellers from the possibility of far-reaching and long-lasting liability. Judges, many of whom were slaveowners themselves, would certainly have known that slavery's practices—namely, forced labor, torture, and mistreatment—would have been significant drivers of this far-reaching liability. In the words of one Texas court, “[i]t would be extremely dangerous” for courts to create broad liability for unsoundness.⁴⁰ For if they did, “[t]he vendor would indeed make the disposition at his imminent peril.”⁴¹

Consequently, appellate cases provide a unique window into how courts made contract doctrine suit slavery's “peculiar” commercial context.⁴² In general, they did so by (1) accommodating the fact that slavery was far more violent than other industries and (2) ignoring the reality that enslaved people were different from other chattel. This meant that a court would exclude “the want [absence] of a leg, or an arm, or a hand by a slave” from a warranty's coverage without requiring an inquiry into how an enslaved person lost a body part in the first place.⁴³ It also meant that there was no doctrine to deal with the fact that an enslaved person's representation of her own soundness could

38. See, e.g., Justin Simard, *Slavery's Legalism: Lawyers and the Commercial Routine of Slavery*, 37 LAW & HIST. REV. 571, 585 (2019).

39. One of the most well-known works in this vein is Morton Horwitz's *The Transformation of American Law*. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 160-210 (1977) (discussing changes to contract doctrine in the nineteenth century and the doctrine's relationship to the shift toward a liberal market economy); MORRIS, *supra* note 3, at 108 (describing one court's opinion in a warranty case and remarking that “[l]iberal capitalism, in its harsher form, could hardly have been expressed so unabashedly”).

40. *Murphy v. Crain*, 12 Tex. 297, 313 (1854).

41. *Id.*

42. My use of the term “peculiar” here is a reference to both antebellum Southerners' use of the phrase “peculiar institution” to describe slavery and historian Kenneth Stampp's influential book on the subject. See generally KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 3 (1956).

43. *Shewalter v. Ford*, 34 Miss. 417, 422 (1857). For more on *Shewalter*, see notes 242-43 and accompanying text below.

easily contradict the representations made by her seller.⁴⁴ In sum, courts' legal reasoning made warranties of soundness make "sense" in the context of slavery by occluding the two things that made slave sales different from all others: the violence of slaveowners and the agency of the enslaved.⁴⁵

In the pages that follow, I focus primarily on the former of these two features—slaveowners' violence—because my driving research question is about the law's relationship to violence. My aim in this and other projects is to better understand how the law accommodates, participates in, and transforms violence. Thus, I home in on those committing that violence. Indeed, in some ways, slavery's historical record can tell us a lot more about white violence than it can about Black agency. This does not mean that the agency of enslaved and free Black Americans is absent from the archive. It is not. And there is a rich historical literature unequivocally demonstrating so.⁴⁶ Nevertheless, I think the fact that our official legal records—meaning the very precedent upon which some current law still rests—are so replete with racial violence is a fact worth foregrounding.⁴⁷

44. As Ariela Gross has written, courts instead sought to explain away these moments of rupture wherein the moral agency of the enslaved became undeniable. GROSS, *supra* note 3, at 72-97.

45. The agency of enslaved people was much harder for courts to ignore at the trial court level, however, where "the repeated intrusion of slaves' moral agency" was a recurrent theme. *See id.* at 123.

46. *See generally, e.g.*, STEPHANIE M.H. CAMP, CLOSER TO FREEDOM: ENSLAVED WOMEN AND EVERYDAY RESISTANCE IN THE PLANTATION SOUTH 78-97 (2004) (describing the many ways in which enslaved women exercised their own agency daily); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974) (setting out an early intervention in the historical scholarship on the thoughts, feelings, and agency of enslaved people); WHITE, *supra* note 24 (describing the connections and relationships between enslaved women); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 10 (2018) (documenting Black activism and theorizing about citizenship, and demonstrating "how people without rights still exercised them"). Scholars have also troubled the so-called notion of "recovering" Black agency from the historical record. *See, e.g.*, Saidiya Hartman, *Venus in Two Acts*, 26 SMALL AXE, June 2008, at 1, 2-3, 6, 11-12 (describing a reconstructed story of an enslaved person as "a story predicated upon impossibility"); Walter Johnson, *On Agency*, 37 J. SOC. HIST. 113, 113-21 (2003) (critiquing the idea that a historian can "give the slaves back their agency"); Joan W. Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773, 777-80, 790-97 (1991) (explaining how histories that focus on agency thereby risk "reify[ing] agency as an inherent attribute of individuals, thus decontextualizing it").

47. K-Sue Park and Justin Simard advance a similar goal through their scholarship. *See* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1066-71 (2022) (explaining the foundational role that the violence of conquest and slavery played in the development of property law); Simard, *supra* note 2, at 81-85 (demonstrating the extent to which cases involving enslaved people continue to be cited today).

Lastly, this Article’s definition of violence refers to more than just the paradigmatic violence for which slavery is known, such as the brutal punishments and extractive violence of the cotton fields. While still tethered to the physical bodies of the enslaved people experiencing it, violence as I define it here entails any action, or *deliberate inaction*, that caused or worsened the bodily suffering, pain, or injury of the enslaved. I adopt that definition for two reasons: This definition captures not only the spectacles of violence for which slavery is known, but also “the other multilayered and routinized forms of domination” that enslaved people experienced.⁴⁸ For enslaved people, these forms of domination included things like starvation rations, denial of adequate clothing during winter months, and administration of medicine and medical treatments without consent.⁴⁹ As Patricia Hill Collins and others have argued, thinking about physical violence in this way—by making routinized domination visible *as violence*—helps us see “how violence is shaped by and helps structure intersecting power relations.”⁵⁰

My focus on physical violence also owes to the nature of the contracts under consideration here. As Part I will address, physical (as opposed to psychological) violence was the kind of violence most likely to have impacted sale prices and negotiations. Thus, I have deliberately chosen to exclude much of the immense psychological violence of enslavement from my definition—not because I think it did not constitute violence, but for the sake of analytical specificity and clarity. In this way, I follow Austin Sarat who argues that “critical theory and deconstruction have left violence with a confusion of meaning.”⁵¹ In addition, by focusing on the bodily aspects of slavery’s violence, I aim to foreground the material consequences of doctrinal abstraction in my analysis.

48. Cf. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991) (discussing forms of abuse experienced by minority women in shelters).

49. See *infra* Part I.A.

50. Patricia Hill Collins, *On Violence, Intersectionality and Transversal Politics*, 40 ETHNIC & RACIAL STUD. 1460, 1461 (2017).

51. Sarat, *supra* note 32, at 8-9.

I. Slave Sales in a Free Market

They sold slaves here and everywhere.

—Lorenzo Ivy⁵²

After the international slave trade was abolished in 1808, the domestic slave trade became the primary way that slaveowners were able to acquire new people held in bondage as property.⁵³ In the decades between 1820 and 1860, upwards of 500,000 slaves were traded in the interstate market.⁵⁴ Transactions within this market ranged from the “intimate” (such as when an owner sold a purported favorite slave to a neighbor⁵⁵) to the fully arms-length (such as when an owner’s legal agent purchased a group of slaves from a professional slave trader⁵⁶). During the nineteenth century, warranties of soundness were used in sales across this spectrum, from small sales between friends and family, to large commercial transactions.⁵⁷

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52. EDWARD BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM*, at xxiii (2014) (quoting a Virginia Work Projects Administration interview with a formerly enslaved man named Lorenzo Ivy).
53. As Walter Johnson has written, the end of the transatlantic slave trade “made it possible to identify for the first time and attempt to control something that had not previously been a subject of knowledge or regulation: the internal slave trade.” Walter Johnson, *Introduction: The Future Store*, in *THE CHATTEL PRINCIPLE*, *supra* note 28, at 1, 4; *see also* MICHAEL TADMAN, *SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH* 11 (1989) (identifying 1808 as “the time when importations from Africa finally became illegal”).
54. *See* TADMAN, *supra* note 53, at 12 tbl.2.1 (estimating a total of 874,092 interregional slave exportations between 1820 and 1860); *id.* at 44 (explaining that the slave trade likely accounted for “60-70 percent” of the interstate migration of slaves during that period); *see also* Michael Tadman, *The Interregional Slave Trade in the History and Myth-Making of the U.S. South*, in *THE CHATTEL PRINCIPLE*, *supra* note 28, at 117, 124 (“[T]he total number of slaves traded in the period from 1790 to 1860 would have been well over one million.”).
55. *See* *Scranton v. Tilley*, 16 Tex. 183, 185-86 (1856) (describing sixteen-year-old Friday as “evidently a favorite with his master”); *Smith v. Cozart*, 39 Tenn. (2 Head) 526, 529-30 (1859) (describing Mary Cozart’s sale of Maria, who Cozart “had raised”); *Sample v. Looney*, 1 Tenn. (1 Overt.) 85, 85 (1804) (statement of the case) (describing Milton’s sale of Milly, to whom the family felt “attached”).
56. *See* *Boinest v. Leigne*, 31 S.C.L. (2 Rich.) 464, 465 (1846) (describing the sale at auction of seven enslaved people by the administratrix of Boinest’s estate); JOHNSON, *supra* note 3, at 46; TADMAN, *supra* note 53, at 47.
57. *See* GROSS, *supra* note 3, at 33.

A. Unlike Other Sales

When Robert Glenn sued for breach of warranty, he did so on the grounds that Lucinda was suffering from a “latent defect[.]”⁵⁸ Such defects were a concern for purchasers, like Glenn, who were not always able to accurately assess the health of the humans they purchased.⁵⁹ Of course, buyers like Glenn would have had opportunities to evaluate slaves’ health before sale, but the state of antebellum medicine was such that medical assessments were often inaccurate, even when conducted by medical professionals.⁶⁰

Slave sales’ financial risks owed to more than just the limitations of antebellum medicine, however. The violence that was central to slavery’s profitability made it extraordinarily likely that enslaved people would be sold with injuries, illnesses, and disabilities. Moreover, enslaved people themselves could (mis)represent their health through their own words or actions.⁶¹ After all, and as Daina Berry has shown, there is a profound “intellectual history of enslaved people’s thoughts, expressions, feelings, and reactions to their own commodification.”⁶²

1. Violence and value

Slavery’s violence took many forms.⁶³ It included the spectacular scenes most often associated with slavery, where slaveowners brutally whipped, beat,

58. *See, e.g., McKinney v. Fort*, 10 Tex. 220, 231 (1853) (explaining that if there is no express warranty, then a buyer must “abide by all losses arising from latent defects”); *Ayres v. Parks*, 10 N.C. (3 Hawks) 59, 60 (1824) (noting the argument by a slave seller’s attorney that express warranties applied “only to latent, not obvious defects”); *see also* Bill of Exceptions, *supra* note 11, at 7-8 (quoting trial exhibits stating that Lucinda’s condition remained undiscovered until she married and that Moore “had no chance of knowing it” at the time of sale).

59. There are many reasons for this. First and foremost, it is worth noting that unhealthiness and/or disability are not necessarily visible, in spite of popular beliefs otherwise. *See BOSTER, supra* note 3, at 34-35; Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897, 917-24 (2019) (historicizing and complicating the expectation that disability be visible). Beyond that, sellers regularly dressed and presented the enslaved people they were selling in ways that emphasized healthiness and/or masked any injuries or illness. GROSS, *supra* note 3, at 123-25; JOHNSON, *supra* note 3, at 163-67. Lastly, and as will be discussed in more depth in Part I.A.2 below, enslaved people themselves also had reasons to misrepresent their own soundness.

60. As historian of medicine Sharla Fett has written, “antebellum medicine and health care was a veritable free-for-all, characterized by experimentalism, skepticism, and contesting claims to scientific legitimacy.” FETT, *supra* note 3, at 4.

61. Walter Johnson powerfully describes this decision as being able to “underwrite or undermine” sellers’ representations. JOHNSON, *supra* note 3, at 173.

62. BERRY, *supra* note 3, at 2.

63. In addition to the sources cited elsewhere in this Subpart, a significant amount of scholarship—far more than can be listed here—has been written about the violence of
footnote continued on next page

and branded enslaved people under the guise of punishment.⁶⁴ But it went far beyond punishment as well.⁶⁵ It was also sexual violence, as slaveowners sexually assaulted the enslaved women and girls that they owned.⁶⁶ Medical violence—which included nonconsensual medical procedures as well as medical experimentation—was not uncommon.⁶⁷ Superadded to all of the above were the host of mundane and subtle violences that enslaved people faced on a daily basis. This included starvation, exposure to the elements, medical neglect, and back-breaking labor.⁶⁸ It would also have included slaveowners’ demands that enslaved people perform happiness and merriment, whether during their own sale, in the fields where they worked, or in the

slavery. *See, e.g.*, STEPHANIE E. SMALLWOOD, *SALTWATER SLAVERY: A MIDDLE PASSAGE FROM AFRICA TO AMERICAN DIASPORA* 3-8 (1st paperback ed. 2008) (addressing violence in the context of the transatlantic slave trade); KIDADA E. WILLIAMS, *THEY LEFT GREAT MARKS ON ME: AFRICAN AMERICAN TESTIMONIES OF RACIAL VIOLENCE FROM EMANCIPATION TO WORLD WAR I*, at 3-13 (2012) (arguing for the importance of attending to Black Americans’ firsthand accounts of their experiences with racial violence); STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH 60-80* (2019) (describing the role of white women slaveowners in slavery’s violence); EMILY A. OWENS, *CONSENT IN THE PRESENCE OF FORCE: SEXUAL VIOLENCE AND BLACK WOMEN’S SURVIVAL IN ANTEBELLUM NEW ORLEANS* 14, 29-55 (2023) (detailing the role of transactions and contracts in the sexual violence that white men committed against enslaved women and girls).

64. An important and widespread belief among slaveowners was the notion that enslaving Black Americans required white slaveowners to have the right to punish slaves however they saw fit, no matter how cruel. MORRIS, *supra* note 3, 190-93. Or as North Carolina Supreme Court Justice Thomas Ruffin wrote in an influential case on precisely this question, “[t]he power of the master must be absolute, to render the submission of the slave perfect.” *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).
65. As Saidiya Hartman has argued, “the most invasive forms of slavery’s violence lie not in these exhibitions of ‘extreme’ suffering Shocking displays too easily obfuscate the more mundane and socially endurable forms of terror.” HARTMAN, *supra* note 24, at 42.
66. *See, e.g., id.* at 79-94 (describing how the law made the rape of enslaved women legally illegible); ROBYN WIEGMAN, *AMERICAN ANATOMIES: THEORIZING RACE AND GENDER* 56-62 (1995) (describing race scientists’ violent sexualization of Black women’s bodies); WHITE, *supra* note 24, at 62-78 (describing the unique harms experienced by enslaved women, including their sexual and reproductive exploitation). Of course, enslaved women were not the only ones subjected to sexual violence. *See, e.g.*, THOMAS A. FOSTER, *RETHINKING RUFUS: SEXUAL VIOLATIONS OF ENSLAVED MEN* 2-3 (2019) (focusing on “the sexual abuse and exploitation of enslaved men”).
67. *See, e.g.*, COOPER OWENS, *supra* note 17, at 11, 42-50 (highlighting the centrality of medical experimentation on enslaved women to the development of gynecological medicine); FETT, *supra* note 3, at 142, 151-57 (explaining that white doctors felt “encouraged” to experiment on enslaved men and women and regularly did so without their consent); SCHWARTZ, *supra* note 22, at 228-33, 240, 260-68 (describing surgical experiments conducted on enslaved women without their consent).
68. *See* SAVITT, *supra* note 12, at 83-110 (describing the “clothing, food, and working conditions” of the enslaved (capitalization altered)). Saidiya Hartman describes this as the “quotidian routine of violence.” HARTMAN, *supra* note 24, at 42.

enslavers' own home.⁶⁹ Saidiya Hartman has described these coerced performances as “the most invasive forms of slavery’s violence.”⁷⁰ Unlike the torture and neglect that were also endemic to slavery, these acts of domination used bodily control to force a different sort of subjection onto the enslaved, one that turned pleasure into punishment. In *Twelve Years a Slave*, Solomon Northrup described one such experience, writing “many a night in the house of Edwin Epps have his unhappy slaves been made to dance and laugh.”⁷¹ According to Northrup, being forced to participate felt “rather as if we would cast ourselves upon the earth and weep.”⁷²

Within slaveowner ideology, violence was a necessary part of the system. As one North Carolina Supreme Court Justice put it, violence was “inherent in the relation of master and slave.”⁷³ Enslavers believed violence to be a necessary technique of labor extraction and management.⁷⁴ Whippings, starvation rations, chronic sleep deprivation, and coerced performances of singing and dancing were all believed to aid in slaves’ ability to turn profits for their enslavers.⁷⁵ Moreover, the treatment of enslaved people as generally fungible commodities facilitated an indifference toward the wellbeing of any one enslaved person in particular, so long as wealth overall was maintained.⁷⁶ One formerly enslaved man, James W.C. Pennington, described these dynamics as “the chattel principle, the property principle, [and] the bill of sale

69. HARTMAN, *supra* note 24, at 36-48.

70. *Id.* at 42.

71. SOLOMON NORTHRUP, *TWELVE YEARS A SLAVE* 74 (1853).

72. *Id.*

73. *State v. Mann*, 13 N.C. (2 Dev.) 263, 266-67 (1829).

74. BAPTIST, *supra* note 52, at 140-42; WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 248 (2013) (“For slaves, violence was the metric of production.”); ROSENTHAL, *supra* note 16, at 70 (“[T]he process of production was far more complex and violent than the practice of calculation.”); Baptist, *supra* note 22, at 49-52.

75. HARTMAN, *supra* note 24, at 43-46 (explaining that coerced performances were considered to be “an important element of plantation management”); JOHNSON, *supra* note 74, at 171-75, 178-80 (describing slaveowners’ “torturous conversion of labor to capital” and their use of “food to control their hungry slaves”).

76. See JOHNSON, *supra* note 3, at 143. This violent objectification of the enslaved was especially acute prior to the end of the international slave trade, when enslavers sometimes considered it cheaper to work slaves to death and replace them than to care for the slaves they already owned. ROSENTHAL, *supra* note 16, at 140-42 (explaining the “existence of negative prices” and their consequences for the enslaved); SMALLWOOD, *supra* note 63, at 198 (explaining that during the time period when the transatlantic slave trade was still legal in the United States, it was “more efficient” to replace “lost workers with new ones” rather than rely on slaves’ reproduction, due to “the prodigious rate of population loss from high mortality among both African adults and American-born infants”).

principle,” writing that these principles were the very foundations of slavery.⁷⁷ Slavery’s violence was its “inevitable consequence[.]”⁷⁸

The law did little to protect the enslaved from these many violences. As Thomas Morris has written, there is “[l]ittle evidence” of the law protecting the enslaved from the ubiquitous “nonfatal abuse” by their owners.⁷⁹ Slave narratives are also replete with descriptions of owners’ violence and their often-debilitating consequences. As Frederick Douglass wrote in his autobiography, owners “could cripple or kill without fear of consequences.”⁸⁰ Indeed, there were few legal limitations to the kind of punishment an owner could mete out⁸¹ and virtually no minimum standards of care.⁸² Local legal practices did far more than any wide-ranging restrictions.⁸³ But even still they did very little.

That the ubiquitous and supposedly necessary violence of slavery also threatened slaves’ value as both labor and commodity should be self-evident.⁸⁴

77. JAMES W.C. PENNINGTON, *The Fugitive Blacksmith* (1849), in *THE FUGITIVE BLACKSMITH AND OTHER ESSENTIAL WRITINGS BY JAMES W.C. PENNINGTON* 17, 23 (Jan Stievermann, Caitlin B. Smith & Eddie S. Glaude, Jr. eds., 2025) [hereinafter PENNINGTON, *THE FUGITIVE BLACKSMITH*]. Walter Johnson takes up Pennington’s articulation of the chattel principle in *Soul by Soul*, using the phrase to describe the ideology that enabled white enslavers to treat Black people as property. JOHNSON, *supra* note 3, at 19–20.

78. PENNINGTON, *THE FUGITIVE BLACKSMITH*, *supra* note 77, at 23.

79. MORRIS, *supra* note 3, at 193; GROSS, *supra* note 3, at 111–14.

80. FREDERICK DOUGLASS, *Life and Times of Frederick Douglass: Written by Himself* (1893), in *FREDERICK DOUGLASS: AUTOBIOGRAPHIES* 453, 495 (Henry Louis Gates, Jr. ed., 1994). Dea Boster has collected several of these accounts in her manuscript on slavery and disability. See, e.g., BOSTER, *supra* note 3, at 39 (“[A]s one runaway slave remarked in 1838, ‘there was hardly a day that some of the slaves did not get crippled or killed.’” (quoting *Recollections of Slavery By a Runaway Slave*, *EMANCIPATOR* (N.Y.), Oct. 11, 1838, at 98)).

81. MORRIS, *supra* note 3, at 182–208 (outlining the few laws that limited owners’ ability to assault and abuse the enslaved people they owned).

82. *Id.* at 195–96 (writing that there were “a few statutes and cases” that dictated a minimum standard of care, but that until the last decade before the Civil War, South Carolina was the only state to have such laws).

83. See, e.g., LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 62, 102–11, 192–96 (2009) (explaining how local legal cultures’ protection of “the peace” sometimes resulted in white Southerners being prosecuted for violence against the enslaved).

84. Excessive violence against the enslaved also threatened whites’ assertions of their own superiority. As Ariela Gross has demonstrated, “slaveholders’ self-conception as honorable masters” was constructed in relationship to the Black people they enslaved. GROSS, *supra* note 3, at 4. An enslaver’s honor was vulnerable during warranty trials in particular, where judgments about an enslaved person’s character would have been understood as a reflection of the enslaver’s character. *Id.* at 107–11.

An enslaved person's injuries could easily impede their ability to labor.⁸⁵ Prospective buyers also believed that visible evidence of punishment indicated that an enslaved person was likely to disobey, resist, or run away.⁸⁶ This reasoning assumed that a severe punishment was most likely to be given for serious infractions.⁸⁷ In either case, evidence of either disability or disobedience tended to reduce how much an enslaver was willing to pay to purchase a slave.⁸⁸

Slave sellers, especially commercial traders, understood this. And unsurprisingly, vendors routinely endeavored to make the slaves they were selling appear to be as healthy and able-bodied as possible.⁸⁹ In addition, when sellers deemed punishment necessary prior to sale, they did so with an implement that “raised blisters but left no permanent scars.”⁹⁰ This particular weapon was known as the “paddle,” and one can find frequent reference to its use by slaveowners and professional slave traders alike in the narratives of formerly enslaved people.⁹¹

For example, in one accounting, a formerly enslaved man named Henry Watson described being sold in Natchez, Mississippi by a slave trader who made frequent use of the “instrument of torture . . . on parts which the purchaser would not be likely to examine.”⁹² According to Watson, the paddle

85. For more on the disabling violence and conditions of slavery, see also JENIFER L. BARCLAY, *THE MARK OF SLAVERY: DISABILITY, RACE, AND GENDER IN ANTEBELLUM AMERICA* 15-16 (2021).

86. JOHNSON, *supra* note 3, at 145; ROSENTHAL, *supra* note 16, at 140-41.

87. *See* JOHNSON, *supra* note 3, at 105-06.

88. BERRY, *supra* note 3, at 136-37; BOSTER, *supra* note 3, at 48; GROSS, *supra* note 3, at 124-25, 130-31; JOHNSON, *supra* note 3, at 130-33.

89. JOHNSON, *supra* note 3, at 118-24.

90. *Id.* at 129.

91. *See, e.g.*, HENRY BIBB, *NARRATIVE OF THE LIFE AND ADVENTURES OF HENRY BIBB, AN AMERICAN SLAVE* 103-05, 132-34 (Univ. of Wis. Press 2001) (1849) (writing “the paddle is applied to those parts of the body which would not be so likely to be seen by those who wanted to buy slaves”); JAMES WATKINS, *STRUGGLES FOR FREEDOM; OR THE LIFE OF JAMES WATKINS, FORMERLY A SLAVE IN MARYLAND, U.S.; IN WHICH IS DETAILED A GRAPHIC ACCOUNT OF HIS EXTRAORDINARY ESCAPE FROM SLAVERY, NOTICES OF THE FUGITIVE SLAVE LAW, THE SENTIMENTS OF AMERICAN DIVINES ON THE SUBJECT OF SLAVERY* 22 (Univ. of N.C. at Chapel Hill 2000) (1860) (“The flesh rose up into the holes of the paddle, leaving hard lumps which the next stroke burst. . . . [T]he torture was such as I never experienced either before or since.”); THEODORE DWIGHT WELD, *AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES* 71 (Arno Press 1968) (1839) (describing the paddle as “an instrument of prodigious torture” (quoting Letter from C. Stewart Renshaw, Reverend, to Exec. Comm., Am. Anti-Slavery Soc’y (Jan. 1, 1839))).

92. HENRY WATSON, *NARRATIVE OF HENRY WATSON, A FUGITIVE SLAVE* 12 (Boston, Bela Marsh 1848).

was “considered one of the most cruel [instruments] ever invented.”⁹³ The author of a different autobiography explained that some slaveowners preferred the paddle because it “peels the skin all up.”⁹⁴ Unlike whippings with a cowhide, with a paddle “[w]hen it gets well it will be right smooth, and not in knots.”⁹⁵

Against this backdrop, reading slaves’ bodies for signs of violence was a central goal (and challenge) for prospective slave buyers.

2. The perils of human agency

The fact that slaves were commodities who could speak created further challenges for enslavers involved in the slave trade.⁹⁶ Enslaved people could, and did, intervene in slaveowners’ assessment of their soundness.⁹⁷ They did so by describing, or *not* describing, the symptoms or conditions they were experiencing. Some enslaved people would have done this of their own volition.⁹⁸ Others would have been performing healthfulness under threat of violence.⁹⁹ In this way, enslaved people played a role in how the medicolegal practice of soundness developed.¹⁰⁰

93. *Id.*

94. *Recollections of Slavery by a Runaway Slave*, EMANCIPATOR (N.Y.), Sept. 20, 1838, in I BELONG TO SOUTH CAROLINA: SOUTH CAROLINA SLAVE NARRATIVES 49, 71 (Susanna Ashton ed., 2010).

95. *Id.*

96. See FRED MOTEN, IN THE BREAK: THE AESTHETICS OF THE BLACK RADICAL TRADITION 1 (2003) (“The history of blackness is testament to the fact that objects can and do resist.”).

97. Doctors’ and slaveowners’ anxieties about enslaved people’s ability to hide the “truths” of their bodies were not limited to sales and warranties of soundness. GROSS, *supra* note 3, at 75-76, 85-86, 95-96, 137-38 (describing similar concerns in disputes over slave hiring contracts). Women’s reproductive capacity was a site of particular anxiety. As Marie Jenkins Schwartz documents in *Birthing a Slave*, enslavers in the late antebellum period considered enslaved women’s efforts to control their own fertility to be abortion. SCHWARTZ, *supra* note 22, at 111. Enslavers’ suspicions about the bodies of enslaved people extended beyond reproduction as well. Epilepsy was of particular concern and being prone to epileptic fits was one of the most fraught conditions an enslaved person could have. BOSTER, *supra* note 3, at 43-44.

98. Historian Elise Mitchell has cautioned against overreading feigned illness as a resistance strategy, given that “slaveholders often wittingly and unwittingly falsely accused enslaved people of feigning illness.” Elise A. Mitchell, *Unbelievable Suffering: Rethinking Feigned Illness in Slavery and the Slave Trade*, in MEDICINE AND HEALING IN THE AGE OF SLAVERY 60, 60 (Sean Morey Smith & Christopher D.E. Willoughby eds., 2021).

99. JOHNSON, *supra* note 3, at 177.

100. As recently as 1987, however, it was claimed that enslaved people’s influence on this area of law “was akin to that of horses, rather than to that of other persons.” Andrew Fede, *Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor*, 31 AM. J. LEGAL HIST. 322, 323 (1987).

The autobiography of Bethany Veney, a formerly enslaved woman, offers a compelling example of how an enslaved person could manipulate slaveowners' perceptions of her unsoundness. Veney writes:

I had been told by an old negro woman certain tricks that I could resort to, when placed upon the stand, that would be likely to hinder my sale; and when the doctor, who was employed to examine the slaves on such occasions, told me to let him see my tongue, he found it coated and feverish, and, turning from me with a shiver of disgust, said he was obliged to admit that at that moment I was in a very bilious condition. One after another of the crowd felt of my limbs, asked me all manner of questions, to which I replied in the ugliest manner I dared; and when the auctioneer raised his hammer, and cried, "How much do I hear for this woman?" the bids were so low I was ordered down from the stand . . .¹⁰¹

Veney distorted her voice, coated her tongue, and answered questions about her health untruthfully. She performed unsoundness, and this performance lowered her market value. Thus, Veney demonstrated that even though she was formally an object of sale, her subjectivity could influence the market. Performances of health or illness like Veney's were a regular feature of the slave market.¹⁰²

The Tennessee case *Cobb v. O'Neal* illustrates one version of this push-pull dynamic between slave buyers, slave sellers, and the people being sold with respect to the supposed truth of slaves' bodies.¹⁰³ The case describes an enslaved woman named Priscilla who coughed during her sale and subsequently explained to her purchasers that she had been "sick for some time, and had a severe hemorrhage of the lungs."¹⁰⁴ In response to Priscilla's declaration, her seller Joshua Cobb explained that she was "merely putting on [because] she did not want to go to the country."¹⁰⁵ Cobb reassured the buyers that Priscilla was sound and that he would warrant her accordingly.¹⁰⁶ Cobb was wrong. According to doctors who examined Priscilla shortly after her sale, Priscilla was suffering from "consumption," or what is now known as tuberculosis.¹⁰⁷ Priscilla's buyer sued and won \$833.75 in damages.¹⁰⁸ The court made no mention of whether Priscilla died from her illness.

101. BETHANY VENEY, *THE NARRATIVE OF BETHANY VENEY: A SLAVE WOMAN* (1889), in *COLLECTED BLACK WOMEN'S NARRATIVES* 1, 30 (Anthony G. Barthelemy ed., 1988).

102. See JOHNSON, *supra* note 3, at 16-17; see also *Crouch v. Culbreath*, 45 S.C.L. (11 Rich.) 9, 10 (1857) (writing that the doctor who examined Vincent "might have been deceived by Vincent's complaints").

103. 34 Tenn. (2 Sneed) 438, 439 (1854).

104. *Id.* at 440.

105. *Id.*

106. *Id.*

107. *Id.* at 440-41.

108. *Id.* at 439, 443.

Of course, the agency of the enslaved challenged more than just enslavers' ability to identify slaves' health at the time of sale. As Ariela Gross has written, slaves' moral agency also threatened slaveowners' efforts to reproduce and profit from the chattel principle.¹⁰⁹ During warranty trials, slaveowners were often forced to confront the fact that enslaved people—as *people*—could not only act on their own behalf, but also act in ways that might challenge or outright contradict enslavers' own claims.¹¹⁰ Such behavior could “throw masters' honor into question,” as well as threaten the racist ideology that enslaved people were “racially inferior beings who benefited from bondage.”¹¹¹

B. Contracting amid Hidden Information

Taken together, the phenomena described above—namely, slavery's violence and the humanity and agency of the enslaved—could lead to significant information asymmetries between slave sellers and slave buyers. As I discuss below, the contract doctrine of caveat emptor—Latin for “buyer beware”—and the domestic slave trade's unregulated market would have allowed these information asymmetries to flourish. Consequently, it was warranties of soundness that intervened in the slave trade's hidden information problem, and in so doing, provided buyers with greater protection than contract and tort law alone otherwise could.

1. Slave sales and the “free market”

By the beginning of the nineteenth century, most states' appellate courts were unwilling to diverge from the doctrine of caveat emptor when it came to sales, even in the sale of slaves.¹¹² Under caveat emptor, sellers were not liable for any defects that buyers discovered after purchase.¹¹³ This was a shift from

109. GROSS, *supra* note 3, at 73, 89, 91-92.

110. *Id.*

111. *Id.* at 73.

112. MORRIS, *supra* note 3, at 104-19. Of the cases considered here, the earliest example of a court applying the doctrine of caveat emptor is *Westmoreland v. Dixon*, 5 Tenn. (2 Hayw.) 223, 224-27 (1817) (per curiam). For more on the adoption of caveat emptor in the United States, see MORRIS, note 3 above, at 104-09. This strict reliance on caveat emptor did not always extend to the trial courts, however. As Ariela Gross has noted, “juries largely decided cases on the basis of the stories, or ‘facts,’ presented to them in testimony.” GROSS, *supra* note 3, at 39. Because a breach of warranty would have been decided at law (rather than in a court of equity), jury trials were likely exceedingly common for cases brought on the warranty. See *id.* at 37.

113. *Law Maxims.—Caveat Emptor, &c.*, 30 LAW MAG. Q. REV. JURIS. 289, 290-92 (1843). Sellers avoided liability so long as they had not participated in fraud or concealment. *Law of Sales—Warranty and Fraud*, 2 AM. L. REV. 636, 638 (1868) (“[T]he vendee, on discovery of the fraud, is entitled to rescind the sale . . .”). Unlike breach of warranty, however,
footnote continued on next page

the earlier sound price doctrine, under which a sound price implied a warranty of soundness.¹¹⁴ Under caveat emptor, by contrast, the burden was on purchasers to either demand a warranty of soundness or accept the risk of going without. As one court put it, “the purchaser buys at his own peril.”¹¹⁵

For legal writers and jurists who supported caveat emptor, there was “no moral impropriety in suffering the loss to fall where chance has assigned it.”¹¹⁶ Under this framework, judges did not have either a moral or legal imperative to intervene in unfair contracts.

Nevertheless, the doctrine’s putative moral imperative likely mattered to antebellum judges, many of whom were aware that their decisions in slave warranty cases implicated questions of fairness.¹¹⁷ Who should bear the risk of loss?¹¹⁸ What degree of honesty do contracting parties owe to one another?¹¹⁹

fraud required that the complainant prove intent on the part of the seller. *See, e.g., Mizell v. Sims*, 39 Miss. 331, 331 (1860) (explaining the distinction between an action on the warranty and one for fraud with respect to the seller’s knowledge about the truth of his representations).

114. *See, e.g., Sample v. Looney*, 1 Tenn. (1 Overt.) 85, 88-89 (1804) (noting a buyer’s argument that because he paid “a full and sound price” for an enslaved woman, “the law would imply a warranty”). *Sample* also happens to be the earliest of Tennessee’s appellate cases on warranties of soundness. Tennessee’s earliest appellate case addressing soundness in the sale of other chattel took place in 1813. *See generally Glassock v. Wells*, 3 Tenn. (Cooke) 262, 263 (1813) (discussing soundness in the sale of horses).
115. *Otts v. Alderson*, 18 Miss. (10 S. & M.) 476, 480 (1848).
116. *The Doctrine of Implied Warranty on the Sale of Personal Chattels*, 12 AM. JURIST & L. MAG. 311, 315 (1834).
117. *See, e.g., Murphy v. Crain*, 12 Tex. 297, 310-11 (1854) (“This certainly is a comprehensive and clear exposition of the rule. And it will require but little attention to its import to determine with what justice it can be claimed to support the plaintiff’s case.”); *Harmon v. Fleming*, 25 Miss. 135, 136-37 (1852) (argument of Campbell & Niles for appellants) (“This case is a novel one in this court; and as a rule is now to be established, it is believed that this court will settle the doctrine in such a way as to advance justice, and work as little hardship as possible.”); *Edings v. Brown*, 30 S.C.L. (1 Rich.) 255, 257 (1845) (“The authority of the New York cases is sanctioned by judges Story and Kent, . . . and they seem most consistent with justice and the analogies of the law.”). *See generally* HORWITZ, *supra* note 39, at 161-67 (describing common law courts’ concerns with fairness and equity in this time period); SCHERMERHORN, *supra* note 30, at 26 (writing that “issues of money and finance were understood in moralistic terms” in nineteenth-century commercial markets, including the market for people).
118. *See, e.g., McKinney v. Fort*, 10 Tex. 220, 231 (1853) (explaining that a “purchaser must, at his own risk, attend to the quality of the article which he buys”).
119. *See, e.g., Mizell v. Sims*, 39 Miss. 331, 334-35 (1860) (explaining that even though a seller misrepresented an enslaved man under warranty as being of “good character,” the buyer could only have sued for that misrepresentation “on the ground of fraud and deceit . . . a distinct ground of liability from that of warranty”).

When does salesmanship veer into fraud?¹²⁰ These were common questions in the warranty cases considered here. In answering them, courts were being called to determine which principles of fairness would be guiding America's cruelest market.

Courts approached these challenges with an eye toward equity and the stability of the slave economy.¹²¹ After all, enslaved people were "a favorite and valuable species of property" for white Southerners.¹²² Moreover, and as historians such as Ariela Gross, Myisha Eatmon, and others have demonstrated, within Southern legal culture, lawsuits put questions of honor and reputation on the line.¹²³

South Carolina decisions offer several examples of what this judicial concern about market fairness could look like.¹²⁴ This is likely unsurprising when one considers that South Carolina and Louisiana were the only slave states to find implied warranties in the sale of chattel into the nineteenth century. In Louisiana, this was the case because the state followed the civil law, which held that warranties were implied in the sale of goods.¹²⁵ In South Carolina, the use of the sound price doctrine in the sale of slaves can be traced

120. *See, e.g.*, *Limehouse v. Gray*, 5 S.C.L. (3 Brev.) 231, 233 (1812) ("[I]t was contended, that although she [(an unnamed enslaved woman)] was advertised as 'prime,' that expression, by general consent, in this country, did not carry any warranty as to soundness.").

121. *See, e.g.*, *Comm'r in Equity v. Smith*, 43 S.C.L. (9 Rich.) 515, 522 (1855) ("[I]t seems to me the same result ought to follow from right reason, which is nothing else than justice."); *Glidewell v. Hite*, 6 Miss. (5 Howard) 110, 145 (1840) ("Fair dealing is essential to the existence of society, and to its happiness and prosperity. It is the implied compact which is the very foundation of all the social relations of man, and when its habitual violation shall be sanctioned, or tolerated with impunity, the complicated transactions of society must cease, and its purposes be totally defeated.").

122. *Harrington v. Comm'rs of Rds.*, 13 S.C.L. (2 McCord) 400, 407 (1823).

123. *See* Myisha Shuntez Eatmon, *Public Wrongs, Private Rights: African Americans, Private Law, and White Violence During Jim Crow* 63-65, 129-30 (Sept. 2020) (Ph.D. dissertation, Northwestern University) (on file with author); GROSS, *supra* note 3, at 54 ("In a culture in which being called a liar was the ultimate challenge to a man's honor, a breach of warranty suit itself was an insult."). *See generally* DYLAN PENNINGROTH, *BEFORE THE MOVEMENT: THE HIDDEN HISTORY OF BLACK CIVIL RIGHTS* 31, 156-64 (2023) (explaining the ways in which Blacks' reputation among whites could aid in litigation in the post-slavery South); KIMBERLY M. WELCH, *BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH* 60-81 (2018) (explaining how Black litigants made use of reputation in their cases).

124. *See, e.g.*, *M'Lean v. Ex'rs of Green*, 27 S.C.L. (2 McMul.) 17, 19 (1841) ("Sales at auction should be accompanied with the most perfect openness and fairness."); *Crawford v. Wilson*, 8 S.C.L. (1 Mill) 353, 354 (1818) ("I do not think, therefore, that the defendant acted with that fairness and candour in this transaction with which he ought to have done . . ."); *see also supra* notes 117, 120 and accompanying text; *infra* note 130 and accompanying text.

125. Schafer, *supra* note 3, at 308.

to the 1793 decision *Timrod v. Shoolbred*.¹²⁶ In that case, the court held that a sound price led to a warranty of soundness because “all imaginable fairness” ought to be observed in contracts.¹²⁷ For the court, this was especially true in the sale of enslaved people because of their economic value.¹²⁸ At the time of its decision, the *Timrod* court explained that it was simply applying existing law.¹²⁹ In later decades, its decision would be characterized as an adoption of the civil-law rule.¹³⁰ In both accounts, the reason for the rule’s use remained the same. As one of the *Timrod* attorneys put it, “the juries of the country were bound, in justice and common honesty, to support and maintain this doctrine.”¹³¹

Yet, judicial concerns about justice in contracting were not limited to South Carolina or Louisiana, nor were they restricted to the legal question of whether a warranty was present. Whether a warranty was express or implied, courts had to answer the same questions about “justice” after the breach occurred.¹³² To answer those questions, courts turned to the ordinary principles of contract doctrine. Chief among these were: (1) the rule of expectancy, which dictated that the remedy for breach ought to put the plaintiff in the position he would have been in had the contract been performed;¹³³ (2) the requirement that contracts have consideration in order to

126. 1 S.C.L. (1 Bay) 324 (1793); see, e.g., *Miller v. Yarbrough* 30 S.C.L. (1 Rich.) 48, 50 (1844) (citing *Timrod* as the origin of the doctrine); *Limehouse v. Gray*, 5 S.C.L. (3 Brev.) 231, 231 (1812) (characterizing *Timrod* as the principle case in the doctrine of implied warranties in slave sales).

127. *Timrod*, 1 S.C.L. (1 Bay) at 325.

128. *Id.*

129. *Id.* at 325–26.

130. See *Rodrigues v. Habersham*, 28 S.C.L. (1 Speers) 314, 318 (1843); *Smith v. Bank of State of S.C.*, 12 S.C. Eq. (Ril. Eq.) 113, 113 (1837) (stating that “it was thought to be sound policy to adopt the rule of the civil law broadly”); *Colcock v. Goode*, 14 S.C.L. (1 McCord) 513, 516 (1826) (noting that “the English judges do not recognize that principle of the civil law to the extent that we do”). But see *Smith v. McCall*, 12 S.C.L. (1 McCord) 220, 220 (1821) (writing that he “believe[d] that [the sound price doctrine] was then considered as a rule of the common law” when judges in South Carolina adopted it).

131. 1 S.C.L. (1 Bay) at 324.

132. See, e.g., *Graham v. Bardin*, 1 Pat. & H. 206, 214 (Va. Spec. Ct. App. 1855) (“To allow the vendor to defeat the vendee’s action on his warranty . . . would be contrary to justice, to common sense and to law . . .”).

133. *Compare Allen v. Anderson*, 22 Tenn. (1 Hum.) 581, 582 (1842) (indicating that the proper measure of damages was “the difference between the value of the negroes in their actual condition, and what would have been their value, if there had been no breach of the covenant . . . and, also, medical bills”), with RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (A.L.I. 1981) (providing a definition of expectation damages consistent with the *Allen* court’s opinion).

be valid;¹³⁴ and (3) the parol evidence rule, which governed how courts interpreted the contract itself.¹³⁵

Thus, from a formalistic perspective, contract rules were the same for sales of enslaved people as they were for any other contract. Parts II and III below will complicate this notion by showing how courts' interpretations of warranty rules were in fact specific to slavery, even if they did not appear to be at first blush. Nevertheless, appellate courts could *and did* pretend that there was no difference between a slave and a horse when it came to contract law.¹³⁶ Doing so allowed courts' doctrinal reasoning to operate separate and apart from the specificity of slavery's brutality. It also enabled contract law to both accommodate and occlude the violence of slavery. This is consistent with what critical race theorist Patricia Williams has described as contract law's ability to "render[] invisible the force of the state" and violent "judicial whimsy."¹³⁷

2. Insuring purchases

From a contemporary perspective, the interstate slave trade was lightly regulated.¹³⁸ Of particular note is the fact that unlike in other countries, the federal government did not regulate its domestic slave trade.¹³⁹ This means that to the extent that there were statutory limitations placed on slave sales, these statutes were passed at the state level. All Southern states passed such

134. *See, e.g.,* *Kearly v. Duncan*, 38 Tenn. (1 Head) 397, 401 (1858) ("It is said the agreement to warrant the soundness of the slaves was voluntary and unsupported by any consideration, and, therefore, not binding on the defendant. This is a mistaken assumption. The purchase by the plaintiff . . . was a sufficient consideration to support the agreement.").

135. *See, e.g.,* *Wood v. Ashe*, 32 S.C.L. (1 Strob.) 407, 412 (1847) (holding that "[t]he express contract alone is the evidence of what was intended by the parties").

136. *See, e.g.,* *Shewalter v. Ford*, 34 Miss. 417, 422 (1857) ("The rule . . . applies to such imperfections as are plain and palpable . . . such as the want of a leg, or an arm, or a hand by a slave, or a tail or an ear by a horse . . ."); *Tutt v. M'Leod*, 4 Miss. (3 Howard) 223, 225-26 (1839) ("A witness was called to prove the price of the unsound negro . . . and this was objected to also on the ground that the contract was entire, and being in writing must explain itself.").

137. *See* WILLIAMS, *supra* note 33, at 34.

138. As Thomas Morris meticulously documented in his work on the law of slavery, a "portion of the law involving slaves is found in statutes, but a great deal of it is not." MORRIS, *supra* note 3, at 2.

139. SCHERMERHORN, *supra* note 30, at 31; *see* *Groves v. Slaughter*, 40 U.S. 449, 503 (1841) (declining to decide a question of interstate slavery on federal constitutional grounds). Congress did, however, ban the *international* slave trade. The ban took effect in January 1808. W.E. BURGHARDT DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638-1870*, at 108 (1896).

laws at different points in their history.¹⁴⁰ After the ban on the *international* slave trade went into effect in 1808, however, Tennessee and Mississippi were the states that were the most active in their efforts to restrict America's internal slave trade.¹⁴¹ Nevertheless, these laws were largely ineffective.¹⁴²

Aside from poorly enforced bans on the interstate slave trade, there were almost no other legal restrictions on the nature of slave sales. And as will be discussed in greater depth below, life insurance on enslaved people was not a viable option for most slaveowners. Consequently, for slave buyers attempting to navigate the significant information asymmetries found in slave sales, warranties of soundness provided the best form of insurance for their financial investment.

Warranties responded to the information asymmetry inherent in slave sales by shifting the risk of enslaved people having hidden injuries and illnesses from buyers to sellers. As numerous legal scholars and economists have shown, warranties are a legal technology designed for shifting risk and altering parties' incentives.¹⁴³ The history of slave warranties reveals that this was true under slavery as well. Trial records, slave narratives, planters' journals, and other archival evidence make plain that the presence or absence of warranties at the time of sale mattered to slaveowners like Robert Glenn.¹⁴⁴ Or as one seller said

140. See, e.g., DEYLE, *supra* note 28, at 51-54 (describing various laws passed on slave imports across the slaveholding states); DU BOIS, *supra* note 139, at 236-74 (listing the state statutes that regulated the U.S. slave trade).

141. In Tennessee, the state legislature prohibited importing enslaved people for sale in 1812. See H.M. Henry, *The Slave Laws of Tennessee*, 2 TENN. HIST. MAG. 175, 189 (1916). Beginning in 1822, Mississippi required those importing slaves into the state for sale to register a certificate of character for each imported person. Lacy K. Ford, *Making the 'White Man's Country' White: Race, Slavery, and State-Building in the Jacksonian South*, 19 J. EARLY REPUBLIC 713, 728 n.37. In 1833, the state banned the importation of slaves for sale entirely. *Id.* at 729.

142. TADMAN, *supra* note 53, at 87-93.

143. There is an extensive literature that focuses on the relationship between information asymmetries and warranties. See generally, e.g., Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461 (1981) (analyzing a monopolist's ability to mislead the public about their product's quality); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981) (proposing an investment theory to explain consumer warranties and empirically comparing it to the signal theory); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983) (addressing the relevance of imperfect information and information asymmetries for contract law and regulations); Esther Gal-Or, *Warranties as a Signal of Quality*, 22 CAN. J. ECON. 50, 60 (1989) (arguing that "in oligopolistic markets, the informational content of warranties is limited").

144. See, e.g., Brief at 7, *Moores v. Ashley* (Tenn. Ch. Fayette Cnty. Nov. 14, 1866) (on file with Tenn. State Libr. & Archives, Box 307, Shelf 1) ("Purchases at judicial sales are generally made upon speculation and it would be unreasonable that purchasers at them should have the advantage of the low price at which property usually sells at these
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when assuaging a buyer's concerns: "Keep the negro, and if she dies you shan't lose."¹⁴⁵

Under a warranty of soundness, so long as there was a breach of warranty, a purchaser could recover.¹⁴⁶ Consequently, a warranty's protection was broader than any provided by the common law on its own.¹⁴⁷ Under the common law, disgruntled purchasers of unsound slaves would have been able to bring actions for fraud or deceit.¹⁴⁸ Succeeding on these claims, however, required that a purchaser prove that the seller in question either intended to commit fraud or knowingly misrepresented the enslaved person in question.¹⁴⁹ By contrast, breach of warranty actions had no such requirements.¹⁵⁰ So long as the buyer could prove he had a warranty and that the enslaved person had been unsound at the time of sale, recovery was possible.¹⁵¹

sales, and also be made secure against loss by remedy against the sheriff."); Bill at 2, Logan v. Burt (Tenn. 1853) (on file with Tenn. State Libr. & Archives, Box 244, Shelf 6) ("He not only fraudulently, concealed the diseased condition of said negro, from your orator, but said Burt, fraudulently represented, and warranted said negro . . .").

The archival material that Gross marshals in *Double Character* clearly demonstrates the importance of warranties to buyers. See GROSS, *supra* note 3, at 6 (explaining her use of trial court records as well as "[d]iaries, letters, travelers' accounts, newspapers, [and] ex-slave narratives" in order to reconstruct the role of warranties in the practice of slavery); see also BERRY, *supra* note 3, at 70-71, 84 (describing the use of warranties in slave sales).

145. Wood v. Ashe, 32 S.C.L. (1 Strob.) 407, 408 (1847).

146. See Part II below for what constituted a breach.

147. Of course, some buyers would attempt to bring multiple claims at once. See, e.g., Blythe v. Speake, 23 Tex. 429, 430 (1859) (discussing a plaintiff who brought an action "for the breach of warranty, and fraud of the defendants, in the sale of the slave"). Bringing multiple claims in this manner would only have been possible after states started softening pleading standards, which previously would have required plaintiffs to elect to either sue on the warranty (at law) or for fraud (in equity) prior to filing the suit. See, e.g., Shenault v. Eaton, 12 Tenn. (4 Yer.) 98, 103-04 (1833) (dismissing a suit for lack of equity jurisdiction where failure to prove fraud left the complainant with only "a plain, adequate, and unembarrassed remedy at law upon his covenant of warranty"); see also KELLEN R. FUNK, LAW'S MACHINERY: REFORMING THE CRAFT OF LAWYERING IN AMERICA'S INDUSTRIAL AGE 159-86 (2025) (charting the changes in pleading standards during this time period).

148. See *Law of Sales—Warranty and Fraud*, *supra* note 113, at 638-39 (describing the legal actions of fraud and deceit); Mizell v. Sims, 39 Miss. 331, 335 (1860) ("If liable at all, it could only have been on the ground of fraud and deceit in making the representations, which would have been a distinct ground of liability from that of warranty.").

149. See *Law of Sales—Warranty and Fraud*, *supra* note 113, at 638-39.

150. See Trice v. Cockran, 49 Va. (8 Gratt.) 442, 448 (1852) ("It has been decided long since that case may be maintained upon a warranty; and that it is not necessary to allege the scienter; or if it is alleged it need not be proved.").

151. See, e.g., Sypert v. Sawyer, 26 Tenn. (7 Hum.) 413, 414 (1846) (affirming the chancery court's dismissal of a bill where there was "no fraud in the warranty of soundness of the
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Throughout the antebellum period, warranties of soundness remained the best form of insurance against slaves' unexpected deaths. The next best option—life insurance—was less accessible as a form of protection against the economic risks attendant to owning people.¹⁵² Policies for enslaved people were not available until the 1830s, and even then were only readily available for owners in the upper South.¹⁵³ Most often, these policies were taken on enslaved people working in dangerous industries like mining.¹⁵⁴

Even then, for the relatively few slaveowners who took out life insurance policies, those policies only partially covered an enslaved person's appraised value. For example, according to the Baltimore Life Insurance Company's internal regulations, life insurance policies on slaves could not exceed two-thirds of the enslaved person's actual value.¹⁵⁵ Internal company regulations like these¹⁵⁶ were designed to both reduce the inherent risk of providing life insurance in the context of slavery, as well as mitigate the likelihood of slave insurance creating "moral hazard" problems.¹⁵⁷

The case of the slave ship, *Zong*, is an extreme example of what moral hazard could look like in the context of slave insurance.¹⁵⁸ *Zong*'s crew opted to "destroy[]" the captive Africans on board in order to claim the value of the "goods" under the charter company's maritime insurance policy.¹⁵⁹ Ostensibly,

slave; and that, therefore, the complainant must be left to his remedy at law upon his warranty"). The distinction between claims of fraud and breach of warranty would have been all the more important in the earlier part of the nineteenth century, when plaintiffs could not bring simultaneous claims of breach and fraud. FUNK, *supra* note 147, at 57, 81, 244-58 (explaining the differences between law and equity and describing the efforts over the nineteenth century to either fuse the two, or to minimize equitable jurisprudence).

152. See Sharon Ann Murphy, *Securing Human Property: Slavery, Life Insurance, and Industrialization in the Upper South*, 25 J. EARLY REPUBLIC 615, 620-21, 623 (2005); Todd L. Savitt, *Slave Insurance in Virginia and North Carolina*, 43 J.S. HIST. 583, 583-86 (1977).

153. As historian Sharon Murphy has documented, the Baltimore Life Insurance Company was the first company to insure an enslaved person on behalf of his owner, doing so in 1831. Murphy, *supra* note 152, at 620. The Baltimore Life Insurance Company was then the only company offering policies on the enslaved until the late 1840s. *Id.*

154. *Id.* at 619; see also Michael Ralph, *The Price of Life: From Slavery to Corporate Life Insurance*, 64 DISSENT MAG. 63, 65 (2017).

155. Murphy, *supra* note 152, at 624.

156. In addition to limiting the value of the insurance policy, the Baltimore Life Insurance Company also dictated that no other competing policy could be taken out on the insured slave and limited the duration of the policies to seven years. *Id.*

157. *Id.* at 621.

158. See *Gregson v. Gilbert* (1783) 99 Eng. Rep. 629, 629; 3 Dougl. 232, 232-33 (KB). For more on the case and maritime insurance used during the transatlantic slave trade, see James Oldham, *Insurance Litigation Involving the Zong and Other British Slave Ships, 1780-1807*, 28 J. LEGAL HIST. 299, 299-300 (2007).

159. *Gregson*, 99 Eng. Rep. at 630.

the captain was motivated to throw 150 people overboard because of the imminent threat of death by dehydration.¹⁶⁰ Yet, when it rained halfway through the mass drowning, the crew continued to carry out their murderous insurance fraud.¹⁶¹

The *Zong* case is also an example of a commercial contract of slavery incentivizing violence. Without the maritime insurance contract as a backstop, the captain's decision to murder the entirety of his "cargo" would not have made financial sense.¹⁶² To be sure, *Zong's* violence differs in scale and method from the violence that warranties occasioned. The biggest difference between the two is the extent to which loss caused by the insured's own violence would be insured by the contract. In *Zong*, the case turned on whether "perils of the sea" necessitated throwing the captives overboard.¹⁶³ If the ship's dire circumstances had been caused by "perils of the sea," and the only way to save the white crewmembers' lives was for them to murder their cargo—as alleged in the declaration—then the "loss" caused by the captives' murder would have been covered by insurance.¹⁶⁴ By contrast, a slave buyer's ex post murder of a purchased slave would have *prevented* a buyer's recovery under the warranty. As Parts II and III will show, the violence that slave warranties occasioned was more likely to be caused by efforts to prove or preserve an enslaved person's value, rather than "destroy" that value entirely.

Regardless of these differences, warranties of soundness in slave sales and maritime insurance policies for slave ships shared an important quality: Both contracts sought to redistribute the economic risks of the slave trade. Slavery's ubiquitous violence meant that slaveowners' financial risk and slaves' subjection to violence were ineluctably intertwined. Redistributing economic risk for enslavers necessarily created new opportunities for slaveowners to harm the enslaved.¹⁶⁵

For the enslaved people being bought and sold, statutory law, insurance policies, and warranties offered precious little protection from the harms such sales could cause. Questions such as how far slaves could be sold, whether families could be separated, the youngest age at which a child could be sold

160. *Id.* at 629.

161. *Id.*

162. *See* Oldham, *supra* note 158, at 307-08, 313.

163. *Gregson*, 99 Eng. Rep. at 629.

164. *See id.*; *see* Oldham, *supra* note 158, at 313.

165. As Calvin Schermerhorn has written, some slaveowners "were accustomed to using violence to manage business risk rather than to invest in infrastructure and formulate or implement rational supply-chain management." SCHERMERHORN, *supra* note 30, at 181.

apart from his mother, and to whom slaves were sold were all left to the discretion of owners and sellers.¹⁶⁶

C. Warranty Law, in Brief

By the early nineteenth century, the use of warranties of soundness for enslaved people was standard practice.¹⁶⁷ These warranties were typically written into the bill of sale and stated that the seller warranted the slave to be “sound in body and mind.”¹⁶⁸ Most warranties of soundness used this language.¹⁶⁹ Notably, this standardized language did not specify how soundness was defined, or which “defects” would be excluded from coverage. The answers to these questions were instead dictated by the doctrine itself and were largely the same regardless of who or what was being warranted.¹⁷⁰

With respect to the definition of soundness, so long as the “chattel” was not “unfit” for her intended use, she would be considered sound for the purposes of the warranty.¹⁷¹ In the case of both a horse and an enslaved person, “labor” was her intended use under the doctrine.¹⁷² As one South Carolina

166. Three states did, however, have laws requiring mothers and children to be sold together: Alabama, Georgia, and Louisiana. See MORRIS, *supra* note 3, at 128; WAHL, *supra* note 35, at 202 n.70. But the rules in these states had plenty of exceptions. Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1171-72 (“In these three states, statutes protected a limited type of relationship, that of mothers to very young children. The extent to which the statutes in these states actually prevented family separations is unclear . . . because two of the statutes explicitly allowed exceptions to the no-separation rule.”).

167. See GROSS, *supra* note 3, at 5-6, 33, 125.

168. See, e.g., *Mizell v. Sims*, 39 Miss. 331, 333 (1860) (discussing an unnamed enslaved man who was warranted “sound in body and mind”).

169. GROSS, *supra* note 3, at 33.

170. Indeed, courts would sometimes even directly analogize between the rules for people and the rules for horses, such as when one South Carolina court wrote that it “[d]id not understand, either in legal or common parlance, that a negro is unsound because he wants a leg, or an arm, or a horse because he wants a tail.” *Stucky v. Clyburn*, 25 S.C.L. (Chev.) 186, 189 (1840); see also THEOPHILUS PARSONS, *Warranty, in THE LAW OF CONTRACTS* 456, 459 n.i (1853) (including cases involving both the sale of horses and the sale of enslaved people in the section addressing the extent to which general warranties will cover “plain and obvious” defects).

171. See, e.g., *Stucky*, 25 S.C.L. (Chev.) at 189 (“It is said that unsoundness in a horse is any ‘organic defect, any infirmity which renders it unfit for use and convenience’” (citation omitted) (quoting JOSEPH CHITTY, JR., *A PRACTICAL TREATISE ON THE LAW OF CONTRACTS, NOT UNDER SEAL; AND UPON THE USUAL DEFENSES TO ACTIONS THEREON* 360 (Springfield, G. & C. Merriam 4th Am. Ed. 1839)); Bill of Exceptions, *supra* note 11, at 9 (“To create unsoundness it is necessary that the negro should not be useful for the purpose for which she was purchased . . .”).

172. *Scarborough v. Reynolds*, 47 S.C.L. (13 Rich.) 98, 101-02 (1860) (approving a lower court’s finding that a woman’s “crooked” arm did not render her unsound because it
footnote continued on next page

court explained, “the same definition, as to physical unsoundness, will apply as well to a negro as to a horse.”¹⁷³ As historians have documented, however, slaves’ value to their owners was more complex than their capacity to provide labor power. Enslaved people were also valuable as capital assets, which owners (and lenders) understood.¹⁷⁴ Nevertheless, when it came to the value that warranties of soundness protected, one was prioritized above others: the value that slaves provided as workers.

Not all “defects” that impeded an enslaved person’s ability to labor would constitute a breach of warranty, however. Importantly, and as Part II will examine more fully, warranties of soundness did not cover “defects that [were] plain and obvious.”¹⁷⁵ Defects were considered obvious if they “require[d] no skill to detect.”¹⁷⁶ As one court’s jury instructions explained, if a “defect was, at the time [of sale], so plain and perceptible as such, that [the buyer] did see it or could have seen it with *ordinary vigilance*, then [the seller] is not liable on the warranty.”¹⁷⁷ In other words, warranties of soundness did not insure buyers against their failure to do due diligence when purchasing people.

Thus, both caveat emptor and warranty law incentivized buyers’ due diligence. Yet, diligence on the part of enslavers meant suffering on the part of the enslaved. Due diligence in the context of slave sales looked like stripping people naked, kneading women’s stomachs to determine reproductive capacity, examining “the breast, arms, teeth, and general form and appearance,” manipulating fingers and joints, and conducting intrusive medical examinations.¹⁷⁸ Formerly enslaved people described these experiences as humiliating, invasive, and painful.¹⁷⁹

“did not affect her labor” and that “she could hoe and chop with an axe, as well as women generally can”).

173. *Stucky*, 25 S.C.L. (Chev.) at 189.

174. MURPHY, BANKING ON SLAVERY, *supra* note 29, at 9; PRIEST, *supra* note 29, at 7.

175. *Stucky*, 25 S.C.L. (Chev.) at 188 (quoting CHITTY, JR., *supra* note 171, at 360).

176. *Id.* (quoting CHITTY, JR., *supra* note 171, at 360).

177. Herndon v. Bryant, 39 Miss. 335, 337-38 (1860) (emphasis added).

178. WHITE, *supra* note 24, at 32; JOHNSON, *supra* note 3, at 138 (quoting one slave buyer’s description of his “standard slave inspection”); *id.* at 138-39, 141-45, 147-49.

179. See JOURDEN H. BANKS, A NARRATIVE OF EVENTS OF THE LIFE OF J. H. BANKS, AN ESCAPED SLAVE, FROM THE COTTON STATE, ALABAMA, IN AMERICA 47 (Univ. of N.C. at Chapel Hill 2000) (1861) (“During the time I was there, I saw things I never wish to see again The distresses I saw made a deep impression upon my mind.”); FED. WRITER’S PROJECT, WORKS PROGRESS ADMIN. FOR THE STATE OF N.C., Interview by T. Pat Matthews with Alex Woods in Raleigh, N.C., in 11 SLAVE NARRATIVES: A FOLK HISTORY OF SLAVERY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES pt.2, at 414, 417 (1941) (“De man who wus doin’ de buyin’ would inspect dem. Dey would look in dere mouthes, and look ‘em over just like buyin’ [horses].”); see also BERRY, *supra* note 3, at 42; GROSS, *supra* note 3, at 22, 43-44; HARTMAN, *supra* note 24, at 38; JOHNSON, *supra* note 3, at 163.

Thus, by requiring slave buyers' ordinary vigilance—both with and without a warranty—contract law incentivized a specific kind of harm to the enslaved. To put it differently, slave buyers had a legal duty to violate the people they were purchasing.

D. The “Neutrality” of Contract Law

We can only speculate as to why American courts did not better tailor slave warranty law to the fact that slaves were both people and property. Perhaps it is because, as Thomas Morris and others have suggested, the law treated slaves as property for the purposes of commercial law and as persons when it came to criminal law.¹⁸⁰ Warranties and sales would have fallen on the commercial law side of the divide, wherein slaves were property rather than people, making specialized rules for slave warranties unnecessary. Of course, this divide was not nearly so hard and fast, something that Thomas Morris himself pointed out.¹⁸¹ Commercial law was never able to entirely ignore the personhood of the enslaved. Indeed, and as Ariela Gross has argued, warranties were one of the contexts in which the enslaved were understood to *simultaneously* be persons and property.¹⁸²

Alternatively, the lack of innovation in warranty law may owe to slaveowners' commitment to a racist worldview that simultaneously dehumanized and commodified enslaved people. Keeping the legal rules the same for slaves as for other kinds of property would have helped to underscore and reinforce whites' belief in Black inferiority.¹⁸³ By contrast, changing the law in order to acknowledge the personhood and humanity of the enslaved (in however limited a manner) might have threatened the logic of this white

180. See MORRIS, *supra* note 3, at 2. Morris's book is organized around this distinction between legal rules that treated slaves as property and those that treated them as people.

181. See *id.* at 13 (writing that conceptualizing the law of slavery as a distinct body assumes “a too rigid reliance on the notion that lawmakers sought a formally rational and discrete body of law limited to slaves”).

182. See GROSS, *supra* note 3, at 3 (“By looking at the moment when slaves were *most* property-like to white Southerners—at the moment of sale or hire—this study will explore the paradoxes that arose from slaves' double identity as human subjects and the objects of property relations *at one and the same time.*”).

183. See Ford, *supra* note 141, at 719 (“Viewing slavery as at least essential, arguably beneficial, and, in all likelihood perpetual, subordinationists sought to render white dominance of blacks as complete and thorough as possible.”); see also KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA* 109-14 (1996) (offering a history of English white supremacist racial beliefs about Blackness during the colonial era); JOHNSON, *supra* note 74, at 186-91 (describing some of the ways enslavers reinforced white supremacy via their use of food); MORRIS, *supra* note 3, at 246-48 (describing how creating special rules for enslaved people could have a similarly subordinating effect).

supremacy. Many historians have documented, however, the ways in which white supremacist ideology was capacious enough to tolerate slavery's many contradictions.¹⁸⁴ Thus, even though racism undoubtedly played a part in the shape that warranty law took (or did not take), white supremacy is at best a partial explanation.

Another possible reason that warranty law went largely unchanged in the context of slavery is because contract doctrine worked well enough for slave sales, such that antebellum courts did not think doctrinal innovation was necessary.¹⁸⁵ This explanation has the benefit of resembling the reasoning that many courts used in the cases involving the "peculiar" challenges of slave sales. For example, when an enslaved man named Bob chose to kill himself rather than be sold, the court sought guidance from a treatise on the law of procedure, rather than referring to authorities on the law of slavery.¹⁸⁶

Within the framework of contracts, Bob's suicide became a straightforward legal question: Did Bob's "self-destruction" prevent his "delivery" from occurring?¹⁸⁷ The court's answer was no. As a result, Bob's seller received damages equivalent to Bob's \$450 purchase price plus three years' worth of interest.¹⁸⁸ Writing about Bob's case, historian Daina Berry points out that "[n]o other marketable product had the ability to destroy or botch a sale."¹⁸⁹ Nevertheless, the same contract rules that applied to other "marketable products" applied to slaves.¹⁹⁰

184. See, e.g., HARTMAN, *supra* note 24, at 5-6 (explaining that the "barbarism of slavery" was furthered by the treatment of enslaved people as property *as well as* through the recognition of the humanity of the enslaved).

185. See Simard, *supra* note 38, at 573-74, 581 ("As long as a simple act of the legislature could authorize slaveholding, slavery did not present interesting or important legal issues. From the perspective of a working lawyer, the law on this question was settled.")

186. *Bunch v. Smith*, 38 S.C.L. (4 Rich.) 581, 581-82, 585 (1851) ("Mr. Chitty tells us that, 'to maintain a count for goods sold and delivered, it is essential that the goods should have been delivered to the defendant . . . or that something equivalent to a delivery should have occurred.'" (citation omitted) (quoting 1 JOSEPH CHITTY, A TREATISE ON PLEADING, AND PARTIES TO ACTIONS *345-46 (J.C. Perkins et al. eds., Springfield, G. & C. Merriam 9th Am. ed. 1844))). I am grateful to Daina Berry's essay, "*Broad is de Road dat Leads ter Death*," in *SLAVERY'S CAPITALISM*, note 22 above, at 146, 150, for drawing my attention to this case.

187. *Bunch*, 38 S.C.L. (4 Rich.) at 585.

188. *Id.* at 584-86. For a similar case in the warranty context, see *Franklin v. Long*, 7 G. & J. 407, 408-09, 419 (Md. 1836).

189. Berry, *supra* note 186, at 153. Berry uses Bob's case as an example of the ways in which enslaved people's lives continued to be commodified even after death. As she writes, "Bob's deceased body continued to make money for Bunch at a rate of 0.5 percent per year." *Id.* at 150.

190. *Id.* at 153.

II. The Aperture of (Un)Soundness

Where a horse is warranted to be “sound,” the actual extent of the warranty is to be implied from custom and usage, and the intention and understanding of the parties.

—William W. Story, 1847¹⁹¹

There was no evidence given of the usage of trade, in regard to the sale of Africans.

—*Furman v. Miller*, 1807¹⁹²

Slave sales were just one type among many in nineteenth-century America’s emergent free market.¹⁹³ As Part I demonstrated, however, the industry of slavery was markedly more violent than its comparators. Yet in spite of this significant difference, the contract rules governing the sale of slaves and the sale of chattel like horses were largely the same.

This Part takes up this puzzle, interrogating how courts made contract doctrine make sense amid the violence of slavery. It begins in Subpart A by outlining the types of claims of unsoundness that made it to Southern appellate courts, showing how the legal rules defining soundness shaped the claims that enslavers were likely to bring and appeal. From there, Subparts B and C demonstrate how the legal rules governing the scope of warranties’ coverage threaded the needle between (1) providing slave *buyers* with some protection from the financial risks posed by slavery’s inherently dangerous and disabling conditions, while (2) still protecting slave *sellers* from the wide-reaching liability they would incur were warranties to insure buyers against all of the consequences of slavery’s violence.

In essence, warranty doctrine shifted *some, but not all*, of violence’s risks from slave buyer to slave seller. As the pages below will illustrate, however, this shifting of risk did not necessarily reduce the likelihood that an enslaved person would be subjected to an owner’s violence. Rather, by manipulating the financial risks and incentives associated with the violence, cruelty, and deprivation of slavery, warranties of soundness transformed the kinds of violence enslavers were likely to mete out.

A. The Claims

The Subparts below provide a snapshot of what enslavers’ claims of unsoundness looked like. Broadly speaking, claims of unsoundness each fell

191. WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL § 829 (2d ed. 1847) (capitalization altered).

192. 4 S.C.L. (2 Brev.) 127, 128 (1807).

193. See HORWITZ, *supra* note 39, at 263–64.

into one of three categories: (1) unsoundness of body, (2) unsoundness of mind, or (3) death.

The rules governing unsoundness shaped these claims in two important ways. First, because soundness was tethered to an enslaved person's capacity to labor, purchasers tended to frame their claims in terms of labor lost.¹⁹⁴ Second, many of the "defects" described below are those that would have been difficult for a slave buyer to identify at the time of sale.¹⁹⁵ This likely owes to the fact that "obvious defects" did not constitute a breach of warranty under the law.¹⁹⁶

In this way, the cases discussed below illustrate some of the ways in which the legal rules about soundness impacted the kinds of cases that did have their day in court. Of course, it is not possible to know from court records alone how many enslavers chose not to file suit because of these legal rules. The appellate record collected here remains instructive, however. This Article's set of 152 cases includes *all* accessible published cases in Virginia, Tennessee, Texas, Mississippi, and South Carolina that included an actual or alleged warranty of soundness on an enslaved person—not only those cases where the subject of litigation was the warranty itself.¹⁹⁷ And in most of these cases, the legal question presented was not about the scope of the warranty's coverage.¹⁹⁸ Thus, while this set of cases is not necessarily a representative sample of all kinds of warranty disputes, it does offer a cross section of the kinds of legal claims and disputes that arose in connection with slave sales more generally.

194. *See also infra* notes 226-33 and accompanying text (explaining that mental unsoundness would be framed in terms of labor lost). For example, in one South Carolina case, an overseer testified that the tumors on Henderson's back "did not lessen his strength, but lessened his value for work." *Verdier v. Trowell*, 40 S.C.L. (6 Rich.) 166, 167 (1853). In a different suit, purchasers supported claims of an enslaved woman's unsoundness with testimony explaining that Mary "had not strength to lift 'heavy vessels;' [and] complained of being overcome by heat, when cooking." *George v. Bean*, 30 Miss. 147, 148 (1855). A similar description can be found in a case involving a woman with a sore on her leg that "[d]id not endanger her life, but incapacitate[d] from work." *Boinest v. Leignez*, 31 S.C.L. (2 Rich.) 464, 468 (1846).

195. *See infra* Part II.A.1.

196. *See infra* Part II.B.1.a.

197. *See Appendix, supra* note 34, tbl.2.

198. *See, e.g., Rentfrow v. Shaw*, 5 Miss. 651 (1840) (asking whether one can defend against recovery of a promissory note by showing that the original note was for the sale of an unsound enslaved person named Scott and describing the note as "the remnant of Scott").

1. Unsound in body and mind

Claims of an enslaved person's physical unsoundness constitute the majority of unsoundness claims considered here.¹⁹⁹ This pattern is consistent with other studies on warranties of soundness.²⁰⁰ In Ariela Gross's research on slavery suits in the antebellum South, which is the most comprehensive study of warranties of soundness to date, Gross found that of the 330 slave warranty cases heard by the supreme courts of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, about 69% (229 total)²⁰¹ were brought because the purchased slave was allegedly "unsound in body."²⁰² This was also true at the trial court level in at least one county. In Adams County, Mississippi, "breach of warranty of physical soundness cases constituted half of *all slave-related trials*," not just those cases dealing with breach of warranty.²⁰³ Though Gross's samples differ from my own in terms of geographic, doctrinal, and jurisdictional scope, all three sets of cases point toward the prevalence of claims of physical unsoundness.

Bodily unsoundness would have included cases of illness, injury, disability, and death. In the plurality of the appellate cases where the cause of an enslaved person's unsoundness was identified (35 of the 97 cases that included such an identification), the enslaved person was afflicted with a disease.²⁰⁴ Among

199. See Appendix, *supra* note 34, tbl.2; see also GROSS, *supra* note 3, at 122-23 (noting similar findings); Schafer, *supra* note 3, at 310.

200. See, e.g., BOSTER, *supra* note 3, at 79-83 (describing how "sellers assessed the value of disabled slaves" and the range of disabilities that sellers would catalogue); GROSS, *supra* note 3, at 215 n.2, 122-23 (arguing that "at a general level" all warranty disputes were about slaves' physical bodies "because bodies seemed to offer the most concrete signs of slaves' condition"); WAHL, *supra* note 35, at 29-33 (describing the kinds of breach warranty claims that slave sellers were likely to bring); Schafer, *supra* note 3, at 310 ("[O]f all the cases about slavery that came before the Supreme Court of Louisiana during the antebellum period, redhibition actions for disease were the most common."); Omoyele Okunola, *Codifying Servitude: Unsound Slaves and Efforts to Maintain U.S. Slavery, 1830-1860* (Apr. 16, 2020) (B.A. thesis, Georgetown University) (on file with author) (analyzing the discussion of disability in seventy-two appellate slave warranty cases from North Carolina and Louisiana).

201. GROSS, *supra* note 3, at 162 tbl.2. This percentage combines Gross's numbers for cases of illness (44%) and death (25%), as death was always attributed to physical causes in soundness cases.

202. See, e.g., *Able v. Chandler*, 12 Tex. 88, 89 (1854) (describing an unnamed enslaved man as "unsound in body").

203. GROSS, *supra* note 3, at 122 (emphasis added). In terms of percentage of warranty cases, 88% (an estimated 81 of 92) of Adams County trial court cases were brought due to an enslaved person's physical unsoundness. *Id.* at 162 tbl.2. As above, this percentage combines Gross's numbers for cases of illness (68%) and death (20%) in Adams County cases. *Id.*

204. This was true in Gross's and Schafer's studies of warranties of soundness as well. See GROSS, *supra* note 3, at 122-23; Schafer, *supra* note 3, at 310-11.

those diseases, the most common was tuberculosis (also identified as “consumption,” “scrofula,” or “white swelling”).²⁰⁵ Other illnesses included syphilis and gonorrhea,²⁰⁶ other respiratory infections or problems,²⁰⁷ smallpox,²⁰⁸ typhoid fever,²⁰⁹ and measles.²¹⁰

Other conditions that could precipitate a suit for breach of warranty included hernias (also identified as “rupture”),²¹¹ “[d]isease[s] of the womb,”²¹² epilepsy (also identified as “fits”),²¹³ edema (known then as “dropsy” or “swelling”),²¹⁴ rheumatism,²¹⁵ asthma,²¹⁶ and cancer.²¹⁷

Because plainly perceptible defects were excluded from warranty coverage, visible musculoskeletal injuries were a less common cause for breach than the so-called “latent defects” described above.²¹⁸ Often when a purchaser

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205. SAVITT, *supra* note 10, at 42, 44 (2002) (capitalization altered) (explaining that “most of the cases which white Southerners described as Negro Consumption were miliary tuberculosis, the most serious and fatal form of the disease known,” and that “[a]nother form of tuberculosis which antebellum observers noted particularly among Negroes was scrofula,” or “white swelling”); *see, e.g.*, Appendix, *supra* note 34, tbl.3 (listing sixteen cases of tuberculosis, involving Lucy, Calvin, Mariah, Joe, Priscilla, Egerton, Enoch, Eda, Lucinda, Scott, Violet, James, and four other enslaved people whose names were not provided in the relevant opinions).
206. *See, e.g.*, Appendix, *supra* note 34, tbl.3 (listing seven cases of venereal disease, involving Malinda, Rose, Rachael, as well as three unnamed enslaved women and one unnamed enslaved man).
207. *See, e.g., id.* (listing six cases of respiratory problems (other than tuberculosis and measles), involving Prince, Jack, Catherine, Washington, Harry, and one unnamed enslaved woman).
208. *See, e.g., id.* (listing two cases of smallpox, involving Stepney and Hinson).
209. *See, e.g., id.* (listing three cases of typhoid fever, involving Clarissa, John, and an unnamed enslaved woman).
210. *See, e.g., id.* (listing one case of measles, involving Robin).
211. *See, e.g., id.* (listing six cases of hernia involving Harriet, Ann, Ned, Ben, Cavannah, and an unnamed enslaved woman).
212. *See, e.g., id.* (listing four cases where the unsoundness was due to the woman’s reproductive organs, involving Lucy, Mary, Hannah, and Jemima).
213. *See, e.g., id.* (listing five cases of epilepsy, involving Friday, Anderson, Peter, Milly, and an unnamed enslaved woman).
214. *See, e.g., id.* (listing seven cases of dropsy or swelling, involving Lewis, Philander, George, and four unnamed women).
215. *See, e.g., id.* (listing six cases of rheumatism, involving Vincent, Pembroke, Hannah, Dorcas, Violet, and an unnamed enslaved woman).
216. *See, e.g., id.* (listing one case of asthma, involving a man named Scott).
217. *See, e.g., id.* (listing three cases with a cancer diagnosis, involving Hannah, Lucia, and an unnamed woman). Hannah and the unnamed woman were diagnosed with other conditions as well. *Id.*
218. *See McKinney v. Fort*, 10 Tex. 220, 225-26 (1853) (“A warranty will be implied against all latent defects in two cases” (quoting WILLIAM W. STORY, A TREATISE ON THE
footnote continued on next page

sued for breach of warranty due to a musculoskeletal injury or disability, the court would reject the claim because the unsoundness should have been apparent to the seller at the time of sale.²¹⁹ Such was the case with fifteen-month-old Wesley, who was born with “a disease of the spine.”²²⁰ The purchasers sued for breach of warranty, claiming that Wesley’s condition meant that he was “of no value.”²²¹ The Tennessee Supreme Court held that warranties of soundness did not cover visible defects like Wesley’s because Wesley’s “unsoundness was so obvious that any one who had ever seen a negro might discover it by casual view.”²²²

Of course, warranties of soundness did not only warrant the bodily soundness of purchased slaves. As discussed above, the standard language in a warranty of soundness stated that an enslaved person was sound in body *and mind*.²²³ Even though such claims were less common than claims of physical unsoundness, some purchasers did sue because of a purchased slave’s alleged mental unsoundness.²²⁴ In these suits, purchasers would use terms like “idiocy,” “mental derangement,” or “weak mind” to characterize the mental unsoundness of the people about whom they were suing.²²⁵

LAW OF SALES OF PERSONAL PROPERTY § 374 (Boston, Little, Brown & Co. 2d ed. 1853)) (emphasis omitted).

219. *See, e.g.*, *Murphy v. Crain*, 12 Tex. 297, 297, 313 (1854) (writing that, though Catherine “had not a well developed chest, and that in this respect she was naturally weak,” the plaintiff did not establish a breach of warranty because Catherine’s “feebleness and incapacity to endure ordinary labor was open to the observation of the plaintiff as to his vendor”); *Long v. Hicks*, 21 Tenn. (2 Hum.) 305, 305-06, 308 (1841) (noting that Wesley’s spinal condition should have been excluded from his warranty because “the diseased condition of the boy was apparent to casual observation”); *Schuyler v. Russ*, 2 Cai. 202, 202 (1804) (per curiam) (holding that the “defect” in a man’s left arm “was clearly visible, the arm being thin and crooked” and was therefore not covered by the warranty). *Schuyler* was raised before courts in Alabama and Missouri for the proposition that visible defects are not covered in a slave’s warranty of soundness. *Livingston v. Arrington*, 28 Ala. 424, 426-27 (1856); *Stearns v. McCullough*, 18 Mo. 411, 413 (1853).

220. *Long*, 21 Tenn. (2 Hum.) at 305.

221. *Id.* *Long* brought an action of “trespass on the case,” which was a “special variety of assumpsit.” E. Allen Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 594 (1969). Early in the development of contract law as a body of doctrine, assumpsit was “a general basis for the enforcement of promises.” E. ALLEN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 51 (10th ed. 2023).

222. *Long*, 21 Tenn. (2 Hum.) at 307.

223. *See supra* note 3 and accompanying text.

224. GROSS, *supra* note 3, at 162 tbl.2 (showing that only 6% of the warranty cases in Gross’s five-state sample were for “insanity” or “idiocy”).

225. *See, e.g.*, Appendix, *supra* note 34, tbl.3 (listing fourteen cases of mental unsoundness involving Anderson, Bella, Martha, Aby, Henry, Clarissa, three unnamed enslaved women, and five unnamed enslaved men). The language used to describe mental illness or unsoundness due to moral characteristics was less standardized in the cases

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Common to all of these descriptions was the idea that the enslaved person's mental unsoundness made it difficult or impossible for her purchaser to control her behavior—and by extension, her labor. As one plaintiff put it, the woman he purchased, Candace, was “at the time of the trade badly diseased in body and mind, [and] was disobedient and unreliable as a servant.”²²⁶ Another claimed that the woman who had been warranted sound and described as a “good house servant” actually “had a dangerous and violent temper and disposition; was ungovernable, lazy, and totally unfit for a house servant.”²²⁷ In another, the purchaser's overseer made the following statement about an enslaved woman named Clarissa during his deposition: “[S]he stands still, and seems not to understand what is said to her. If she is ordered to do anything, if she goes at all, she is as apt to do anything else as that which she was bid to do.”²²⁸ In the overseer's estimation, Clarissa's mental unsoundness impeded her ability to perform her labor as a slave.

Claims of mental unsoundness were often made in conjunction with claims that the enslaved person in question was unsound in body.²²⁹ Indeed, Clarissa's purchaser claimed that she was unsound in both body and mind.²³⁰ This is likely because even though a buyer could theoretically recover for a slave's mental unsoundness, in general, soundness of mind did not include moral characteristics.²³¹ And it could be difficult for courts to parse the difference between behavior owing to a slave's mental unsoundness (that *would* be covered by a warranty of soundness) and a slave's moral character (which

examined here. See *id.* (noting language varying from “maniac,” to “lazy,” to “evilly disposed”).

226. Bill for Complainant at 5, *Dowell v. Sullivan* (Tenn. Ch. Smith Cnty. Aug. 18, 1853) (on file with Tenn. State Libr. & Archives, Box 243, Shelf 6).

227. *Rosson v. Hancock*, 35 Tenn. (3 Sneed) 434, 434-35 (1856). The plaintiff also alleged that the woman was physically unsound, stating that “one of her arms had been broken, or out of place, and she was otherwise unsound and disordered.” *Id.* at 435.

228. *Norton v. Moore*, 40 Tenn. (3 Head) 480, 484 (1859) (quoting witness testimony provided in the reported opinion).

229. For example, even a purchaser who claimed that the enslaved man he purchased was “in truth . . . evilly disposed” paired this with the claim that the man was “unsound in body.” *Able v. Chandler*, 12 Tex. 88, 89 (1854).

230. *Norton*, 40 Tenn. (3 Head) at 480.

231. See MORRIS, *supra* note 3, at 110; WAHL, *supra* note 35, at 32. *But see* GROSS, *supra* note 3, at 72, 143 (explaining some of the challenges of fully excluding moral characteristics from considerations of unsoundness). Louisiana, which followed civil law, was a notable exception. See Schafer, *supra* note 3, at 310. As discussed in Part I.B.1, some jurists believed South Carolina's implied warranty law to have been explicitly modeled on the civil law. Perhaps this is why South Carolina courts sometimes allowed implied warranties to cover a limited range of moral characteristics. See GROSS, *supra* note 3, at 72-73.

would *not* have been covered).²³² Complicating the issue further was the fact that slaves' physical illnesses and injuries were often given a moral valence in soundness trials.²³³ Thus pairing claims of mental and bodily unsoundness would have shored up a buyer's efforts to prove that the person he bought was unsound.

2. Death

Lastly, a buyer's suit was often initiated not because he discovered a slave's injury or illness, but because the enslaved person that he purchased had died. At least 59 (roughly one-third) of the 152 cases considered here—involving 60 enslaved persons—were initiated after the purchased slave died.²³⁴ In order to succeed on a breach of warranty claim after a slave's death, a purchaser-owner had to prove both that the slave was unsound at the time of purchase *and* that this unsoundness was the cause of her death.²³⁵ If a purchaser could prove both of these elements, then putting a value on the economic loss caused by the slave's unsoundness was straightforward. Damages were the slave's value at the time of sale (most often the purchase price) plus any medical bills incurred when caring for the slave prior to death.²³⁶

Even though the cost of doctors' bills was recoverable, enslavers were not required to have first provided medical care in order to recoup their purchase

232. GROSS, *supra* note 3, at 146-47; *see also* *Stinson v. Piper*, 14 S.C.L. (3 McCord) 251, 252 (1825) (“[W]hether unsoundness of mind proceeds from moral or physical causes, or may proceed from both, is a question respecting which, perhaps doctors will disagree. We do know, from actual observation, that a defect of understanding may result from physical causes.”). The historiography on warranties of soundness indicates that Southern courts’ responses to cases such as these varied. GROSS, *supra* (explaining that the “merging of moral and medical took clearest shape when white Southerners claimed that black slaves were insane”); MORRIS, *supra* note 3, at 109-10 (“The question of mental soundness rather than moral character occurred more often in the common law courts.”).

233. GROSS, *supra* note 3, at 86-89.

234. *See* Appendix, *supra* note 34, tbl.2.

235. *See, e.g.,* *Murphy v. Crain*, 12 Tex. 297, 300 (1854) (“If the jury believe from the evidence that the negro was diseased or unsound at the date of the sale, of which disease or unsoundness she died, or was the immediate cause of her death, then the plaintiff [buyer] is entitled to recover.”).

236. *See* *McGavock v. Wood*, 33 Tenn. (1 Sneed) 181, 183 (1853). If a purchaser could prove that he had gotten a good deal on the slave that he purchased, then he might also be able to recover more than the purchase price. *See id.* at 182-83 (“The difference between what is given for the property, and what it is worth in its unsound state, is not always the measure of damages. . . . [T]he purchaser may have made a good bargain, and is entitled to the benefit of it.”).

price.²³⁷ To be clear, and as will be discussed below, slaveowners could not recover under the warranty if they were found to have *caused* a slave's unsoundness, either through deliberate violence or negligence. But the corollary was not true. Warranty law did not make enslavers' monetary recovery contingent on their efforts to cure or care for an unsound slave.²³⁸ Had the law *required* slaveowners to provide medical care in order to recover under a warranty, some slaveowners may have been more likely to seek such care for warranted slaves. An increase in medical care would not have necessarily translated to a better quality of life for the enslaved, however. Given white doctors' racism and propensity for "heroic" medicine when treating slaves, it could easily have entailed greater suffering for enslaved Black Americans.²³⁹

Many times, the purchased person died shortly after sale. In *Conner v. Crunk*, for example, twenty-five-year-old Lucretia died only "a few days after the purchase."²⁴⁰ In a different case in South Carolina, Andrew Miller initiated a suit after the young man he purchased on a Tuesday died of tetanus less than a week later, on Sunday.²⁴¹ Elsewhere, a Mississippi woman who had a "hacking cough" on January 5, 1856, died of pneumonia just under a month later, on February 1.²⁴² After her death, the buyer David Ford successfully sued

237. See, e.g., *Welch v. Brooks*, 44 S.C.L. (10 Rich.) 123, 126-27 (1856) (describing an owner who did not hire a doctor to treat an enslaved man's fatal illness and holding this did not preclude recovery).

238. See *id.*

239. Historian of medicine and slavery Sharla Fett has described such "heroic measures of orthodox medical practice," stating, "Employing their medicines aggressively, antebellum professional and domestic practitioners assaulted the disease, aiming to restore the body's internal balance Bluntly put, antebellum therapies produced vomit, excrement, or blood that had to be cleaned away before the next course of medicines." FETT, *supra* note 3, at 118-19. Historian of medicine Gretchen Long has further argued such medical treatment "could easily be construed by a slave as punishment or at the very least as a manifestation of the master's sheer power over the slave's most private functions." GRETCHEN LONG, DOCTORING FREEDOM: THE POLITICS OF AFRICAN AMERICAN MEDICAL CARE IN SLAVERY AND EMANCIPATION 26 (2012).

240. 39 Tenn. (Head 2) 246, 247 (1858).

241. *Miller v. Yarborough*, 30 S.C.L. (1 Rich.) 48, 48-49 (1844). The unnamed man had stepped on a nail prior to his sale. *Id.* at 48. According to the court, he died of "lock-jaw," *id.* at 49, which is now known as tetanus, Anne S. Lee & Everett S. Lee, *The Health of Slaves and the Health of Freedmen: A Savannah Study*, 38 *PHYLON* 170, 175 (1977). The court describes the man as a "boy," but given his sale price (\$462.50) it is likely that he was either an adolescent or an adult and that "boy" was used in the pejorative sense to refer to any male slave. See *Miller*, 30 S.C.L. (1 Rich.) at 48; BERRY, *supra* note 3, at 33, 58 (listing the average sale prices of children as compared to adolescents and adults).

242. *Shewalter v. Ford*, 34 Miss. 417, 419-20 (1857).

the seller Jacob Shewalter for breach of warranty.²⁴³ As the court explained, the purchaser had the right to “protect himself against loss, by reason of [her illness’s] existence then, or its subsequent progress, by warranty from the vendor.”²⁴⁴

For obvious reasons, deaths shortly after sales regularly incited actions on the warranty. Slaves were among slaveowners’ most valuable assets, and their deaths were likely viewed as the loss of significant economic investment.²⁴⁵ For those who only owned a few slaves, the death of any one slave could also cause considerable disruptions to household and/or agricultural labor.²⁴⁶ In addition, many planters accounted for the depreciation in value of the slaves that they owned—a slave’s unexpected early death would have confounded these accounting efforts.²⁴⁷ In sum, deaths shortly after sale had the potential to greatly interfere with slaveowners’ household and business management, finances, and planning.

Nevertheless, it was also common for purchasers to initiate warranty suits months (and sometimes even years) after their purchase.²⁴⁸ Though he was unsuccessful, a purchaser in Tennessee brought an action against a seller two years after the sale, when the enslaved woman he purchased died.²⁴⁹ In a

243. *Id.* at 418, 423. The question on appeal was whether the woman’s cough at the time of sale qualified as an “obvious defect” that should be excluded under the warranty. *Id.* at 421–22. The court held that because the “extent and precise character” of her illness was not obvious, the plaintiff’s knowledge of her cough at time of sale did not prevent her later pneumonia from being covered. *Id.* at 422.

244. *Id.* at 422.

245. See JONES-ROGERS, *supra* note 63, at xiv; ROSENTHAL, *supra* note 16, at 155.

246. See TADMAN, *supra* note 53, at 112 (explaining that the average slaveowner owned “a fairly small number of slaves”).

247. Caitlin Rosenthal details planters’ use of depreciation in *Accounting for Slavery*. ROSENTHAL, *supra* note 16, at 122–37. Rosenthal writes: “From a business history perspective, the calculation of depreciation may be the single most remarkable aspect of plantation accounting. Widely regarded as a landmark in the advancement of management practices, depreciation involves allocating capital costs over the useful lifetime of an asset.” *Id.* at 127.

248. For example, in the Tennessee case of *Long v. Hicks*, Long and Byrne bought eighteen-year-old Hannah and her fifteen-month-old son Wesley for \$825 on February 7, 1837. 21 Tenn. (2 Hum.) 305, 305 (1841). Two years and two months later, on April 1, 1839, they initiated a suit against Hannah and Wesley’s vendor because “Wesley was unsound and diseased[] and became of no value.” *Id.* Such delays between sale and suit were thus not limited to instances where the purchased slave had died. The longest amount of time between breach and commencement of a suit in the cases considered here can be found in *Farnsworth v. Earnest*, wherein the purchaser waited nearly five years before suing the vendor. 26 Tenn. (7 Hum.) 24, 25 (1846). Unlike *Long*, however, the *Farnsworth* court considered the length of time between sale and lawsuit to be “persuasive evidence that the [unsoundness] of the slave did not diminish his value so much as complainant now alledges [sic].” *Id.*

249. *McKenzie v. Kerr*, 37 Tenn. (5 Sneed) 539, 540–42 (1858).

different case in Mississippi, William Perkins contracted for a woman (also named Lucinda) “some two or three years” before she died of consumption.²⁵⁰ Perkins successfully convinced jurors that Lucinda had been unsound at the time of exchange and recovered \$1,686.²⁵¹ Importantly, neither action was barred by their states’ statutes of limitations, which could range anywhere from three years (in North Carolina) to up to ten years (in Missouri), depending on the state.²⁵² The long delay between sale and suit was not limited to instances where the purchased person died, either. In *Long v. Hicks*, the Tennessee case discussed above, purchasers Long and Byrne sued for breach of warranty two years and two months after purchasing Wesley and his mother Hannah.²⁵³ Long and Byrne lost not because of the timing of their suit, but because Wesley’s warranty did not “extend to defects which are visible, or of which the vendee is informed at the time of the sale.”²⁵⁴

250. *Munn v. Perkins*, 9 Miss. (1 S. & M.) 412, 412, 418 (1843). The facts of the case do not give Lucinda’s exact date of death. *Id.* at 418 (noting that “a conversation between Perkins and Joseph Meek . . . took place . . . some two or three years after the contract and exchange of slaves took place between the parties, and a short time before the girl died”).

251. *Id.* at 412-13, 415. Lucinda was exchanged for a woman named Mary, plus \$200. *Id.* at 412. Prior to the final decision, the defendant successfully moved for the trial court to set aside the verdict and grant a new trial twice. *Id.* at 413. Ultimately, Perkins won at trial all three times, and on appeal, the High Court of Error and Appeals of Mississippi affirmed the judgment. *Id.* at 413, 421-22 (explaining that the verdict was not contrary to the evidence and also that no more than two new trials can be granted to either party in the same case).

252. North Carolina’s statute of limitations was three years from the time of breach of the warranty. *Taylor v. McMurray*, 58 N.C. 357, 358 (1860). In Missouri, after ten years, actions of debt or assumpsit on promissory notes were barred. *Marvin v. Bates*, 13 Mo. 217, 218 (1850). Mississippi’s statute of limitations was seven years. *Burrus v. Wilkinson*, 31 Miss. 537, 543 (1856). South Carolina had a statute of limitations of four years. *Ex’rs of Lance v. Parker*, 8 S.C.L. (1 Mill) 168, 170 (1817). Tennessee’s statute of limitations for warranties of soundness was three years, beginning “at the making of the warranty.” *Goodloe v. White*, 28 Tenn. (9 Hum.) 528, 529, 530, 532 (1848) (“All the covenants in the bill of sale . . . that he is sound, a slave for life, and the title good. If any of these things were false at the time, there was an instantaneous breach and cause of action and the [general] statute [of limitations] run at once.”). And Texas’s was “four or three years.” *Hall v. Phelps*, Dallam 435, 440 (Tex. 1841); *Pew v. Ward*, 10 Tex. 179 (1853) (applying the civil-law statute of limitations of four years for actions of “lesion,” a contract action brought when there has been a disproportionate exchange of values); see also MORRIS, *supra* note 3, at 64 (explaining that “rules of real property law were applied to slaves in some instances in over one-third of the jurisdictions that made up the slave South”).

253. 21 Tenn. (2 Hum.) 305, 305 (1841).

254. *Id.* at 308.

B. The Exclusions

As discussed above, warranties of soundness did not cover all claims of unsoundness. As one South Carolina court explained, the definition of soundness could not be too broad, otherwise “a defective tooth . . . [o]r even a fever” might qualify as plausible breaches of warranty.²⁵⁵ The result would be “an ample field of litigation.”²⁵⁶ It should come as no surprise then, that whether someone had a qualifying “defect” was one of the most contested elements in suits for breach of warranty.

1. Excluding “defects”

There were three important limitations to the kinds of injuries, illnesses, and disabilities that warranties of soundness covered. First, as in fifteen-month-old Wesley’s case, any “visible known defect” would be excluded.²⁵⁷ Second, if the unsoundness did not interfere with a slave’s ability to work or was not permanent, it was not considered to be a material defect and would not be covered.²⁵⁸ Lastly, any “natural weakness or deficiency” would not be covered by a warranty of soundness.²⁵⁹

a. Patent defects

Warranties generally (not just slave warranties) excluded “patent defects.”²⁶⁰ As one contemporaneous contracts treatise explained, the “doctrine stands upon the ground, that all patent defects would naturally be within the knowledge of the buyer.”²⁶¹ In the context of slavery, however, “patent defects” were often the result of an owner’s violence.²⁶² Consider, for example, John Brown, whose owner Thomas Stevens unexpectedly kicked him in the face when Brown was bending over.²⁶³ The kick broke Brown’s nose, “displaced”

255. *Lightner v. Martin*, 13 S.C.L. (2 McCord) 214, 217 (1822).

256. *Id.* at 217-18.

257. *E.g.*, *Hogan’s Ex’r v. Carland*, 13 Tenn. (5 Yer.) 283, 284 (1833).

258. *See, e.g.*, *Belew v. Clark*, 23 Tenn. (4 Hum.) 506, 509 (1844).

259. *Murphy v. Crain*, 12 Tex. 297, 311 (1854).

260. STORY, *supra* note 191, § 830; *see, e.g.*, *Shewalter v. Ford*, 34 Miss. 417, 422 (1857) (“The rule, however, in relation to obvious defects, applies to such imperfections as are plain and palpable, and cannot but be perceived and understood to their full extent by the purchaser, such as the want of a leg, or an arm, or a hand by a slave, or a tail or an ear by a horse . . .”).

261. STORY, *supra* note 191, § 830.

262. *See supra* Part I.A.1.

263. JOHN BROWN, *SLAVE LIFE IN GEORGIA: A NARRATIVE OF THE LIFE, SUFFERINGS, AND ESCAPE OF JOHN BROWN, A FUGITIVE SLAVE, NOW IN ENGLAND* 29 (L.A. Chamerovzow
footnote continued on next page)

his eye, and permanently damaged his vision.²⁶⁴ Ever after, Brown’s “right eye . . . remained out of its proper place.”²⁶⁵ For an owner such as Stevens, the doctrinal exclusion of patent defects from warranty coverage meant that if he decided to sell Brown with a warranty, there was no risk of Brown’s eye injury leading to future liability. Brown’s damaged eye was a visible defect.²⁶⁶ Moreover, its cause—slaveowner violence—was likely to “naturally be within the knowledge”²⁶⁷ of any prospective buyer, given the normalcy of whites’ violence against the enslaved.

The generally disabling conditions of slavery would have caused some additional percentage of slaves’ “patent defects.”²⁶⁸ Enslaved people who were not given adequate clothing or bedding to stay warm at night often slept close to unprotected fires.²⁶⁹ This practice often resulted in burns.²⁷⁰ As Dea Boster has written, “horse kicks, malfunctioning farm equipment, industrial accidents with mills or threshers, and the repetitive plucking of cotton bolls” could all lead to fractured bones.²⁷¹ When poorly set, as often happened, these injuries led to permanent disabilities.²⁷² Malnutrition may have caused others of these

ed., London 1855); see JOHNSON, *supra* note 74, at 168-70 (describing Brown’s assault and other “forcible reeducation[s]” that left enslaved people permanently scarred).

264. BROWN, *supra* note 263, at 29-30.

265. *Id.* at 30.

266. In a way, it was the quintessential visible defect. See *Herndon v. Bryant*, 39 Miss. 335, 335 (1860) (explaining in the synopsis that obvious defects “such as the want of an arm, a leg, or an eye” are excluded from a warranty’s coverage).

267. See STORY, *supra* note 191, § 830.

268. See, e.g., *Marshall v. Drawhorn*, 27 Ga. 275, 275-76, 279 (1859) (explaining that patent defects are usually not covered by warranties of soundness, and writing that “said warranty was inserted in said bill of sale, under the following circumstances: Marshall came to the house of plaintiff; the negro was confined to a tree in the yard, and pending the negotiation, plaintiff called his attention to his stiff neck, and informed him that he had been re-recently [sic] whipped, and that he would not warrant as to the stiff neck and whipping”).

269. BOSTER, *supra* note 3, at 40 (referencing the memoir of Moses Grandy, a former slave, where he describes the reasons for, and consequences of, sleeping too close to a fire for warmth).

270. For examples of warranty cases involving burns, see, for example, *Verdier v. Trowell*, 40 S.C.L. (6 Rich.) 166, 166 (1853) (describing the burns on Henderson’s body); and *Westmoreland v. Dixon*, 5 Tenn. (4 Hayw.) 223, 224 (1817) (per curiam) (describing Peter falling into a fire and becoming badly burned). Neither of these opinions explain exactly how or when the men became burned, but Boster’s explanation is a plausible one. See BOSTER, *supra* note 269, at 40. For more on Peter’s case, see Part III.C below.

271. BOSTER, *supra* note 3, at 40.

272. See, e.g., *supra* note 219; *Scarborough v. Reynolds*, 47 S.C.L. (13 Rich.) 98, 99 (1860) (describing a woman’s dislocated joint that was badly set in infancy).

patent defects.²⁷³ For example, some cases of blindness or “sore eyes” may have been caused by a vitamin A deficiency.²⁷⁴ And as Walter Johnson has written, in and of itself, “[m]alnutrition was visible to the eye.”²⁷⁵

To be clear, not all “patent defects” were caused by the medical neglect, harsh conditions, forced labor, and violences of slavery. Nevertheless, these other instances of injury and disability would not have been improved by enslavement either.

b. Nonmaterial defects

In addition to excluding coverage of “patent defects,” warranties were not considered breached unless “the property sold was subject to some permanent physical defect, calculated *materially* to affect its value.”²⁷⁶ In order for a “defect” to qualify as material, it had to have a lasting impact on an enslaved person’s labor value.²⁷⁷ For some courts, the “defect” also needed to be permanent.²⁷⁸

Significantly, even if a “defect” was likely to reduce someone’s future sale price, that did not necessarily mean it was a material defect. For example, in South Carolina, the Court of Appeals held that an unnamed enslaved woman’s “crooked” arm was not a “permanent physical defect” for the purposes of a

273. SAVITT, *supra* note 10, at 86-89. Savitt explains that the signs and symptoms of malnutrition mimic the symptoms of many other diseases and disorders. *Id.* at 87. This makes it difficult to give an accurate estimate of how often malnutrition was the source of an enslaved person’s unsoundness. However, as Savitt writes, even if we do not know precisely to what extent enslaved people were malnourished, or how many slaves suffered from malnutrition, some slaves “undoubtedly received inadequate diets from their masters.” *Id.* at 88.

274. BOSTER, *supra* note 3, at 41; *see, e.g.*, *Adm’rs of Caldwell v. Barkley*, 9 S.C.L. (2 Mill) 452, 452-53 (1818) (writing that an unnamed enslaved man had “sore eyes” and that “one of his eyes [was] weak, one worse than the other; that they were affected with a disorder, called by medical men a milky cataract; and that hard labour, and labouring in the sun, would each be injurious, and united might in time destroy his sight altogether”).

275. JOHNSON, *supra* note 74, at 179.

276. *E.g.*, *Smith v. Rice*, 17 S.C.L. (1 Bail.) 648, 650 (1830).

277. *Kornegay v. White*, 10 Ala. 255, 259 (1846) (explaining that a “plaintiff was entitled to recover to the extent that [the slave’s] value was impaired by the disease”).

278. *Wade v. De Witt*, 20 Tex. 398, 400 (1857) (“[T]o constitute [a] breach of warranty, the disease must have existed in a formed state at the time of the sale, and have been of a permanent nature, calculated materially to affect the value of the slave.”); *cf.* *Fry’s Ex’rs v. Throckmorton*, 41 Ky. (2 B. Mon.) 450, 451 (1842) (“Mere organic or constitutional predisposition to a particular malady is not unsoundness either in the popular, scientific or legal sense”); Argument at 4, *Glenn v. Moore* (Tenn. Cir. Ct. Oct. 14, 1854) (on file with Tenn. State Libr. & Archives, Range 34, Section B, Shelf 1) (recounting the circuit court’s definition of unsoundness as when “the slave is not in health, and is laboring under disease or injury produced by accident, and which has become permanent in its character”).

warranty of soundness because “the arm might not be as handsome as it was before, but [it] was strong and as useful as ever.”²⁷⁹ According to the court, “The only matter of complaint was, that *speculators* thought she would not sell in foreign markets for as much as if her arm was straight.”²⁸⁰ This potential reduction in her future sale price was not grounds for breach of warranty. Because “she could hoe and chop with an axe, as well as women generally can,” she was sound as far as the court was concerned.²⁸¹

The exclusion of nonmaterial defects from warranty coverage further limited the possibility of future liability for owners who grievously and/or permanently injured the people that they owned. A “crooked” arm that had been “dislocated in infancy” might reduce a child’s future sale price, but the owner who dislocated her arm would still have been able to sell the child with a warranty without worrying about her arm leading to future liability.²⁸² Of course, we cannot know for certain that it was the slaveowner who dislocated the woman’s arm in her infancy. Such brutality would be consistent with accounts of enslavers’ demonstrated cruelty toward enslaved children, however.²⁸³

If a slaveowner’s violence did cause the injury, it could be that the violence’s true target was the child’s mother, who would have been unable to protect her child from such an assault. This would have been an especially torturous punishment, and one that would have had the added benefit to the slaveowner of leaving his more valuable property—the child’s mother—physically unharmed.²⁸⁴

The range of violence that slaveowners could use to torment slaves without permanently or “materially” injuring them was vast. For example, it was not uncommon after whippings for enslavers to treat slaves’ wounded flesh with salt, turpentine, or red pepper.²⁸⁵ For someone looking to exact

279. *Scarborough v. Reynolds*, 47 S.C.L. (13 Rich.) 98, 101-02 (1860).

280. *Id.* at 102.

281. *Id.* at 101. The court also explained that the woman’s arm was a visible defect and thus would be excluded from warranty coverage on those grounds as well. *Id.* at 102.

282. *See id.* at 101-02.

283. *See* JOHNSON, *supra* note 74, at 197-99.

284. Prior to the age of ten, “the value of enslaved children was purely speculative: they were hypothetical.” *Id.* at 197.

285. BROWN, *supra* note 263, at 42-43 (“[T]hey carried him to his quarters, where the usual application of salt and water, and red pepper, was made to his wounds”); *Recollections of Slavery by a Runaway Slave*, EMANCIPATOR (N.Y.), Aug. 23, 1838, in I BELONG TO SOUTH CAROLINA, *supra* note 94, at 60-61 (“He then took a paddle and paddled [Edith] . . . almost to death, and made me wash her down with brine. The brine is to keep the raw flesh from putrifying, and to make it heal quick.”); Theodore D. Weld, *Slavery a System of Inherent Cruelty* (1839), in SOJOURNER TRUTH, NARRATIVE OF SOJOURNER TRUTH, A NORTHERN SLAVE, EMANCIPATED FROM BODILY SERVITUDE BY THE

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maximum suffering with a minimum amount of long-term effect, such treatments were ideal. Salt was used to stave off infection.²⁸⁶ Red pepper and turpentine were believed to have healing benefits.²⁸⁷ To be sure, such wounds would have scarred. But importantly, scars would not have been considered material defects, so long as the injured person was still able to work. Even though the presence of scars often impacted sale price, they did not create warranty liability. And of course, the paddle was always available for those enslavers who wanted to avoid even the scars.²⁸⁸

c. Natural defects

Lastly, antebellum courts excluded any “defect” deemed “natural” or “congenital” in nature.²⁸⁹ Lucinda’s case, with which this Article began, illustrates what this exception looked like. In Lucinda’s case, there was no dispute between the parties over the fact of her infertility.²⁹⁰ Instead, the case boiled down to whether Lucinda’s infertility was the kind of “defect” that was covered by a warranty of soundness at all. In the words of the trial judge, “[t]o

STATE OF NEW YORK, IN 1828, at 131 (Boston, J.B. Yerrinton & Son 1850) (“[T]hey are frequently flogged with terrible severity, have red pepper rubbed into their lacerated flesh, and hot brine, spirits of turpentine, &c., poured over the gashes to increase the torture . . .”).

286. SAVITT, *supra* note 10, at 112 (“Rubbing salt into these wounds, often complained of as a further mode of torture, actually cleansed the injured, exposed tissues and helped ward off infection.”); *Recollections of Slavery by a Runaway Slave*, *supra* note 285, at 61 (explaining the use of saltwater to treat wounds).

287. Paula De Vos, *Apothecaries, Artists, and Artisans: Early Industrial Material Culture in the Biological Old Regime*, 45 J. INTERDISC. HIST. 277, 287 (2014) (listing both turpentine and pepper as common ancient medicinal ingredients); Karol Kovalovich Weaver, *The Enslaved Healers of Eighteenth-Century Saint Domingue*, 76 BULL. HIST. MED. 429, 440-41 (2002) (“Cayenne pepper is known to have pain-relieving qualities, and may have aided healing.”); Carolyn Elizabeth Roberts, *To Heal and to Harm: Medicine, Knowledge, and Power in the Atlantic Slave Trade* 59 n.161 (2017) (Ph.D. dissertation, Harvard University) (ProQuest) (describing turpentine as a “medicine[] in [its] own right”).

288. SAVITT, *supra* note 10, at 111-12.

289. *Murphy v. Crain*, 12 Tex. 297, 311 (1854) (writing that in order to constitute unsoundness, a disease “must be a disease which diminishes the natural usefulness of the animal; not merely a natural weakness or deficiency in physical proportion and power; or a constitutional susceptibility to disease, which cannot be said to diminish the natural usefulness of the animal”); *Herndon v. Bryant*, 39 Miss. 335, 337 (1860) (“That a mere liability or predisposition to a particular disease arising from the form, size, or ancestry of a slave, is not the disease itself, and does not *in the eye of the law* constitute unsoundness, or a breach of warranty of soundness.” (emphasis added)); *Crouch v. Culbreath*, 45 S.C.L. (11 Rich.) 9, 16 (1857) (explaining that “congenital malformation was not unsoundness, instancing club-foot, short-sightedness, deafness and other defects”).

290. *See* Bill of Exceptions, *supra* note 11, at 9.

create unsoundness it is necessary that the negro should not be useful for the purposes for which she was purchased and that inability should arise from disease or from injury produced by accident and which injury has become permanent in its character.”²⁹¹

Thus, the jury had to decide whether Lucinda’s infertility was due to disease, injury, or accident, or if Lucinda was instead “naturally defective.”²⁹² As the court explained, the *legal* definition of unsoundness was limited to disease and accident, not conditions caused by a “mere malformation.”²⁹³ Or, as a Texas court put it, “it must be a disease which diminishes the natural usefulness . . . not merely a natural weakness or deficiency in physical proportion and power.”²⁹⁴

2. To understand slavery’s “defects”

One cannot understand the meaning of these three legal rules separate from the fact that these warranties were for people being held in bondage as property. In order to exclude “defects” that would “naturally” be within a buyer’s knowledge, courts would have first needed to understand the average buyer’s knowledge of slaves’ bodies and health. For example, hernias were a common condition among enslaved people.²⁹⁵ Consequently, most purchasers would have been able to recognize the signs and/or symptoms of a hernia in the person they were purchasing. But as one court explained, a hernia “is frequently very obvious, but its effects on the value of the negro, it requires skill and knowledge to ascertain.”²⁹⁶ Thus, even though Ned’s hernia was plainly visible to his purchaser, the court held that Ned’s hernia was *not* one of those defects that “requires ‘no skill to detect’” and which should therefore properly be excluded from the scope of his warranty’s coverage.²⁹⁷ Distinguishing a slave’s “patent defects” (which would *not* be covered) from those that required skill to detect (which *would* be covered by the warranty) required courts to be familiar with the commercial context of selling *people* specifically.

Courts’ decisions about whether an injury or “defect” was material enough to constitute unsoundness, on the other hand, required assumptions about the

291. *Id.*

292. *Id.*

293. *Id.* The jury returned a verdict for the seller, and the Tennessee Supreme Court affirmed. *See id.*

294. *Murphy*, 12 Tex. at 311.

295. BOSTER, *supra* note 3, at 39; FETT, *supra* note 3, at 33; SAVITT, *supra* note 10, at 134; SCHWARTZ, *supra* note 22, at 75.

296. *Stucky v. Clyburn*, 25 S.C.L. (Chev.) 186, 189 (1840).

297. *Id.* (quoting CHITTY, JR., *supra* note 171, at 360).

source of a slave's value to her owner. The judge mentioned above, who worried about soundness reaching claims of toothaches and fevers,²⁹⁸ believed that unsoundness must "impair the intrinsic value of the property."²⁹⁹ But just what was the "intrinsic value" of an enslaved person?³⁰⁰ Answering that question required an understanding of how and why American slavery functioned as it did.

Lastly, the exclusion of "natural" or "congenital" weaknesses or deficiencies raises the question of how courts understood the causal role that enslavement would have played in the health of the slaves being warranted.³⁰¹ After all, what sorts of physical conditions would be considered "natural" for someone held in the distinctly *unnatural* system of chattel slavery?

C. Timing and Causality

In addition to limiting the kinds of "defects" that qualified as unsoundness, warranty law required that purchasers prove the timing and source of a slave's unsoundness.³⁰² Importantly, the defect in question must have been present at the time of sale.³⁰³ In addition, purchasers had to show that this defect, which was present at the time of sale, actually was the cause of the purchased slave's eventual unsoundness.³⁰⁴

The state of antebellum medical science complicated both of these endeavors. The causes of many illnesses and medical conditions were not well understood by antebellum doctors. As historians of medicine have documented, "germ theory had not yet been accepted" in this time period.³⁰⁵ Some diseases were still believed to be caused by breathing "impure air," or

298. See *supra* text accompanying notes 255-56.

299. *Lightner v. Martin*, 13 S.C.L. (2 McCord) 214, 217 (1822).

300. As Daina Berry writes in *The Price for Their Pound of Flesh*, "multiple sets of values encompassed [enslaved people] and were placed on their bodies." BERRY, *supra* note 3, at 6. Berry argues that enslaved people's "spirit or soul value . . . was an intangible marker that often defied monetization yet spoke to the spirit and soul of who they were as human beings." *Id.* (emphasis omitted). This "internal quality," *id.*, was at odds with the commodified "intrinsic value" contemplated by the court in *Lightner*, 13 S.C.L. at 217.

301. See Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2200-11 (2000) (explaining how ideology gets imported into law through different definitions of causation).

302. See *McKinney v. Fort*, 10 Tex. 220, 230 (1853) (discussing an enslaved man named Washington, and explaining that a purchaser must prove that the enslaved person in question was sick with a disease at the time of sale *and* that this same disease was "the disease of which he died").

303. See *id.*

304. See *id.*

305. SAVITT, *supra* note 10, at 36.

being “exposed to the malaria of . . . swamps.”³⁰⁶ In this context, it could be hard for courts to know what it meant for a disease to have “existed at the time of sale.”³⁰⁷ It could be similarly difficult to discern whether a “defect” “constitute[d] the real source of unsoundness.”³⁰⁸

In response to these difficulties, courts attempted to differentiate between instances when a disease was in a “formed state” at the time of sale and cases of a slave not having “any thing more than a liability or predisposition to disease.”³⁰⁹ Yet the difference between a predisposition to a disease and a disease in its “formed state” could sometimes just be a matter of framing. For example, seventeen-year-old Catherine was sold in February 1850 while “laboring under a severe attack of pleurisy” (an upper respiratory infection).³¹⁰ Yet when she died the following year from another “violent attack of pleurisy,” her seller was unable to recover for breach of warranty.³¹¹ At trial, a doctor testified that someone with Catherine’s medical history and symptoms “would be, as a general rule, predisposed to disease; that pleurisy, as a general rule, leaves permanent effects in the system.”³¹² The court, however, was unconvinced that Catherine’s illness at the time of sale was the cause of her later death. According to the court, it was “quite too improbable to be seriously entertained.”³¹³

By contrast, one court found a seller liable for breach of warranty after an enslaved woman died of pneumonia, even though at the time of sale she was only sick with a cold.³¹⁴ Even though her illness at the time of sale was not the same as the one that killed her, a doctor testified that the cold may have made her “more liable to an attack of pneumonia.”³¹⁵ As the court explained,

It is not necessary to constitute a breach of warranty of soundness, that the slave be laboring at the time of the warranty under the disease which afterwards proves mortal; but it is sufficient to render a party liable upon his warranty, if the slave be at the time laboring under a disease which though not mortal in its

306. *See* *Stephens v. Chappell*, 34 S.C.L. (3 Strob.) 80, 83 (1848).

307. *See* *Williams v. Harris*, 3 Miss. (2 Howard) 627, 635 (1837) (explaining that the plea “specif[ied] the disease, and that it existed at the time of sale”).

308. *See* *Farr v. Gist*, 30 S.C.L. (1 Rich.) 68, 74 (1844).

309. *Stephens*, 34 S.C.L. at 84.

310. *Murphy v. Crain*, 12 Tex. 297, 297-98 (1845).

311. *Id.* at 298, 311.

312. *Id.* at 298.

313. *Id.* at 309.

314. *Shewalter v. Ford*, 34 Miss. 417, 419, 421 (1857).

315. *Id.* at 420.

character, is a specific disease, and conduces to, and results in, a disease that proves mortal.³¹⁶

The distinction between “[t]he mere predisposition to disease” and “disease in a legal sense” could evidently be a fine-grained one.³¹⁷

For this reason, challenging the medical explanations behind legal claims of unsoundness was a good strategy for purchasers defending against breach. Accordingly, both buyers and sellers regularly called multiple doctors as expert witnesses during trial.³¹⁸ As Ariela Gross has documented, “conflicting medical testimony was the rule rather than the exception.”³¹⁹

Contesting the timing and causation of soundness was not sellers’ only strategy either. Some sellers defended against breach of warranty claims by arguing that the slave in question was not unsound in the first place. This is what happened in ten-year-old Martha’s case. Her purchaser claimed that she was “absolutely an idiot” when he bought her four years prior, at the age of six.³²⁰ In response, the seller explained that Martha’s “dullness and refusal to talk” were not the result of an “absence of intellect” on her part.³²¹ Rather, she was of sound mind, but just “not sprightly” because “one of her legs had been broken, and that her feet had been frost bitten.”³²² To put it differently, Martha’s behavior owed not to unsoundness but to having been “badly treated.”³²³ The seller’s use of passive voice absented whoever was responsible for Martha’s broken leg and frostbite. That this abuse likely occurred either at his hand or under his watch had no bearing on the scope or enforceability of Martha’s warranty. Martha’s case established the rule that an enslaved person’s emotional distress and inability to follow directions does not constitute unsoundness.³²⁴ This rule would ultimately be applied in two other cases in Tennessee and Alabama concerning enslaved people’s mental capacity.³²⁵

316. *Id.* at 421.

317. *See Murphy*, 12 Tex. at 313.

318. GROSS, *supra* note 3, at 135-37.

319. *Id.* at 135.

320. *Belew v. Clark*, 23 Tenn. (4 Hum.) 506, 506-07 (1844) (statement of the case).

321. *Id.* at 507.

322. *Id.*

323. As the seller put it, Martha’s “dullness and refusal to talk, &c., resulted from her having been badly treated, and from want of tutoring, &c.” *Id.*

324. *See id.* at 507 (quoting a seller’s admission that an enslaved child’s abuse explained, at least in part, her “dullness”); *id.* at 509 (“The want of intellect must of such a character as disqualifies from the performance of the ordinary duties of life . . .”).

325. *Farnsworth v. Earnest*, 26 Tenn. (7 Hum.) 24, 24-25 (1846) (citing *Belew*, 23 Tenn. (4 Hum.) at 509); *Athey v. Olive*, 34 Ala. 711, 714-15 (1859) (citing *Belew*, 23 Tenn. (4 Hum.) at 506 (statement of the case)). According to the complaint in *Farnsworth v. Earnest*, a child named Bill was crying at the time he was sold and as a result “complainant was unable to judge of his mental capacity, but he has since ascertained that the boy is of

footnote continued on next page

Even though a vendor's abuse or neglect of the people that he held as property might have not had bearing on their warranties' coverage, the reverse was not true. A seller could challenge a buyer's claim of breach by showing that the purchased slave's unsoundness actually owed to the purchaser's neglect or mistreatment of the person in question.³²⁶ For example, in one Texas case, the seller responded to the purchaser's complaint by pleading that Jack "died from exposure and ill treatment."³²⁷ As economist Jenny Bourne Wahl has explained, excluding unsoundness caused by a buyer's own mistreatment or neglect "circumvented moral hazard problems."³²⁸ Without such a rule, it is possible that some owners would have opted to forgo a sick or injured slave's medical care and sue for breach of warranty instead.³²⁹ It also would have made sellers liable for purchasers' unchecked violence.³³⁰

weak mind, nearly, if not altogether, an idiot." 26 Tenn. (7 Hum.) at 24. According to trial testimony, Bill's purchaser, Henry Earnest, did not know "there was anything the matter with the mind of the boy Bill until the day of the sale of the negro." Testimony at 11, *Farnsworth* (Tenn. Ch. Greene Cnty. May 15, 1845) (on file with Tenn. State Libr. & Archives, Box 1124, Shelf 6). Another witness testified that he had "discerned a difference in [Bill's] mind, sometimes he appears lively . . . and smarter than he does at other times, and I have frequently wondered what was the cause of the difference." *Id.* at 10. Of course, we cannot know for certain whether these slaveowners were describing an intellectual disability or the behavior of a traumatized and enslaved child. It seems likely, however, that whether Bill had an intellectual disability, some of his behavior could be explained by the emotional hardship of being both a child and enslaved.

In *Athey v. Olive*, Henry Athey claimed failure of consideration, breach of warranty, fraud, deceit, and misrepresentation in the sale of a woman named Matilda. *See* 34 Ala. at 712. After the death of Matilda's one-month old infant shortly after her sale to Athey, Athey attempted to return Matilda to Littleton Olive, claiming that Matilda did not "come up to plaintiff's warranty and representations respecting her." *Id.* at 713. According to the doctor who testified on Athey's behalf, "while she was neither insane nor an idiot, [Matilda] wanted ordinary sense." *Id.* at 712. It is hard to imagine that Matilda's change in behavior was caused by anything other than the recent death of her child. While it is possible that Athey only wanted to return Matilda because she did not give birth to a healthy child (meaning his claims of mental unsoundness were merely pretextual), it seems strange that he only brought a claim for unsoundness of mind, rather than unsoundness of body.

326. Jenny Bourne Wahl describes several of these cases in *The Bondsman's Burden*, note 35 above, at 30-31.

327. *Wade v. DeWitt*, 20 Tex. 398, 398 (1857).

328. WAHL, *supra* note 35, at 30.

329. The harrowing story of the slave ship, *Zong*, discussed in Part I, is perhaps the deadliest recorded version of what this looked like. *See generally* *Gregson v. Gilbert* (1787) 99 Eng. Rep. 629, 629; 3 Dougl. 232, 232.

330. Enslavers likely still found ways around this. *See, e.g.,* JOHNSON, *supra* note 3, at 129 ("In the slave pens, wooden boards with holes drilled through them or wide leather straps attached to a handle, were substituted for the mortifying lash, because paddles raised blisters but left no permanent scars.").

III. Remedies and Recovery

There is very great difficulty in laying down any rule on this subject, which will not produce hardship and apparent injustice in some cases.

—*McGavock v. Wood*, 1853³³¹

On May 12, 1852, Archer J. Wood and Johnson Wood—brothers and slave traders—purchased a twenty-three-year-old woman named Mariah from Lysander McGavock for \$700.³³² At the time of the sale Mariah was warranted to be “sound and healthy.”³³³

After the sale, the Wood brothers traveled with Mariah from Tennessee to Alabama.³³⁴ Mariah was sold a second time, this time to a Dr. Rudolph for \$950, and again warranted to be sound.³³⁵ Shortly thereafter, however, Rudolph returned her under the warranty, believing her to have scrofula, a form of tuberculosis.³³⁶ The Woods agreed to take her back and refund the purchase price after Rudolph had her examined by a doctor.³³⁷ Rudolph complied, and Mariah was examined by two separate doctors, both of whom determined she was unsound.³³⁸ The Woods refunded Rudolph’s money.³³⁹

Having lost money on the trade, the Woods returned to Tennessee to take action on their own warranty for Mariah.³⁴⁰ They brought a suit against McGavock on the warranty and also argued for compensation for the money they spent on doctors, medicine, and travel for Mariah.³⁴¹ The Woods won \$250 in damages at trial.³⁴² On appeal, the Tennessee Supreme Court reversed and remanded the case, explaining that it would be “unreasonable” to make McGavock pay for the costs of Mariah’s medical expenses both in Alabama and

331. 33 Tenn. (1 Sneed) 181, 185 (1853) (capitalization altered).

332. *Id.* at 181-82. The young woman’s name was consistently written as “Mariah” in the case file rather than as “Maria” in the published opinion, but both refer to the same person. See Exhibit E at 20, *McGavock v. Wood* (Tenn. Cir. Ct. Williamson Cnty. Dec. 23, 1853) (on file with the Tenn. Sup. Ct. Trial Case Files, Middle Div., Record Grp. 170, Box MT 239) (“Record of a J. Wood & Brother seven hundred dollars in full for the purchase of a negro girl by the name of Mariah aged about 23 years . . .”).

333. Exhibit E, *supra* note 332, at 20.

334. *McGavock v. Wood*, 33 Tenn. at 181-82.

335. Exhibit E, *supra* note 332, at 20; Exhibits B & C at 20, *McGavock v. Wood* (Tenn. Cir. Ct. Dec. 23, 1853); *McGavock v. Wood*, 33 Tenn. at 181.

336. Exhibits B & C, *supra* note 335, at 22.

337. See *id.* at 21-22.

338. *Id.* at 23.

339. *Id.* at 22.

340. *McGavock v. Wood*, 33 Tenn. at 181.

341. *Id.* at 181-82.

342. *Id.* at 182.

on her return.³⁴³ The court did acknowledge, however, that there was some degree of “apparent injustice” to decisions like these.³⁴⁴

Obviously, the injustice to which the court referred was not about Mariah’s experience. Because of the rules governing remedies in slave warranties, Mariah was (1) quickly sold, resold, and returned (because rescission required a slave be returned to her seller), (2) forced to endure multiple pelvic exams from unknown doctors³⁴⁵ (so that the Woods had sufficient evidence upon which to calculate damages), and (3) made to walk back to Tennessee from Alabama while suffering from a serious and painful illness³⁴⁶ (in order for the Woods to sue her original seller). Yet the injustice that the Tennessee Supreme Court gestured toward in its opinion was the injustice of interstate slave buyers being unable to recoup their economic losses on an unsound slave’s medical care. Unsurprisingly, warranty remedies only recognized the harms suffered by buyers, and not the harm experienced by the people who were warranted.

This Part focuses precisely on the rules that existed to remedy the economic harm caused by breach of warranty. And it shows how easily these legal rules, which were designed to remediate harm experienced by one group of people, could simultaneously facilitate or worsen the harm done to another.

A. Measuring Damages

When a slave buyer discovered that a purchased person was unsound, he was often expected to first notify the seller and offer to return the person in question, thus rescinding the sale.³⁴⁷ If the seller refused to accept the slave’s

343. *Id.* at 184-85.

344. *See id.* at 185.

345. *See* Testimony of Dr. Cliff at 16, *McGavock v. Wood* (Tenn. Cir. Ct. Williamson Cnty. Dec. 23, 1853) (on file with the Tenn. Sup. Ct. Trial Case Files, Middle Div., Record Grp. 170, Box MT 239) (describing Mariah’s “ulceration of the neck of the uterus”); Testimony of Dr. Hightower, *supra* note 332, at 18 (“I was called to examine her and my recollection is that her affliction was a menstrual suppression.”).

346. Although the doctors who examined Mariah had conflicting opinions on the length and cause of her illness, all of them diagnosed her with serious, painful conditions. Testimony of Dr. Cliff, *supra* note 345, at 16; *see also* Testimony of Dr. Jordan at 11, *McGavock v. Wood* (Tenn. Cir. Ct. Dec. 23, 1853) (describing Mariah as “cramped all over and foaming at the mouth”); Exhibits B & C, *supra* note 336, at 23 (observing that Mariah “had an ulcer on the right side of her head about size of a half dollar, and the glands on the side of her neck were swollen . . . indicating pain or distress”).

347. *See, e.g.*, *Vaughan v. Campbell*, 4 S.C.L. (2 Brev.) 53, 56 (1806) (“Before the plaintiff can recover in such an action, however, it is incumbent on him, within a reasonable time, after the unsoundness is discovered, to give notice thereof to the seller, that he elects to rescind the contract, and return, or offer to return, the thing sold, if it is capable of being returned, or use due diligence for that purpose.”).

return, the buyer could then sue for breach.³⁴⁸ If he won, the buyer would recoup his purchase price, any costs of medical care (or burial expenses), as well as interest on the purchase price from the time of sale.³⁴⁹

If, however, the buyer opted to keep the unsound slave and sue for breach of warranty, his damages would then be calculated as the difference between the value of the enslaved person if he had been sound and “his value in the situation which he was.”³⁵⁰ In the language of contract doctrine, these are expectation damages.³⁵¹ A buyer was compensated for the difference in value between the person that he believed (or *expected*) he was buying and the person that he actually received.³⁵² This would have put the buyer in the position that he would have been in had the warranty not been breached. As many law students learn in their first week of law school, this is the goal of expectation damages, contract law’s standard remedy for breach.³⁵³

Calculating expectation damages required that courts determine the extent to which an enslaved person’s unsoundness depreciated her value.³⁵⁴ As one court explained, once an enslaved person’s unsoundness had been “conclusively established,” the only remaining question for “consideration and decision was,

348. *See id.*

349. *See, e.g.,* *Anderson v. Duffield*, 8 Tex. 237 (1852) (writing that in a breach of warranty suit, “the legal rate of interest on the purchase-money would form a correct and just criterion of damages”); *Seibles v. Blackwell*, 26 S.C.L. (1 McMul.) 56, 57-58 (1840) (“This is a sufficient statement of the plaintiff’s [buyer’s] loss to entitle him to recover the physician’s bill and burial expense, amounting to \$16, by law he can be permitted to recover them under the proof adduced in this case.”); *see also* *Shenault v. Eaton*, 12 Tenn. (4 Yer.) 98, 102 (1833) (describing a lower court’s decision to award the seller the full purchase price of a woman named Jemima, plus interest from “the time the note of the complainant fell due”).

350. *Wallis v. Frazier*, 11 S.C.L. (1 Nott & McC.) 516, 518 (1820).

351. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (A.L.I. 1981) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.”).

352. *See, e.g.,* *Smith v. Cozart*, 39 Tenn. (2 Head) 526, 531 (1859) (“The slave not having been returned, nor offered to be returned, the proper measure of damages was the difference in value between the slave, if in the condition in which she was represented to be at the time of the sale, and her then actual condition . . .”).

353. *See, e.g.,* *Hawkins v. McGee*, 146 A. 641, 644 (N.H. 1929).

354. *See, e.g.,* *Verdier v. Trowell*, 40 S.C.L. (6 Rich.) 166, 169 (explaining that once a jury has found the warranty of soundness breached, then the “only question left for their consideration and decision was, the extent of depreciation in value, arising from unsoundness”). For more on slaveowners’ use of depreciation calculations more broadly, *see* generally ROSENTHAL, note 16 above, at 143.

the extent of the depreciation in value, arising from the unsoundness.”³⁵⁵ Courts acknowledged that this was a difficult calculation to make.³⁵⁶ Yet judges and juries still attempted to do so. For example, in one South Carolina case, the court found that an unnamed enslaved man’s illness lessened his value by “twenty-five to thirty per cent.”³⁵⁷

The alternative to arguing for “partial unsoundness”³⁵⁸ was for a buyer to claim a “total loss.”³⁵⁹ As will be discussed in greater depth in the following Subparts, many buyers claimed that their purchased slaves’ unsoundness caused a “total loss,”³⁶⁰ either because the person had died or because her unsoundness had rendered her “of no value.”³⁶¹ In these scenarios, buyers could receive a full refund of someone’s purchase price without first returning the person in question.³⁶² For some buyers whose purchases were unsound but still alive, claiming a total loss of value would have had obvious practical and economic advantages.

Practically, claiming a total loss of value spared a buyer from dealing with the logistics of returning the enslaved person to a seller who might be located a great distance away. Economically, claiming a living person was “utterly worthless”³⁶³ allowed enslavers to maximize their damages while retaining an enslaved person who may have still been able to perform some labor, even if this labor value was functionally zero in the eyes of the courts. Enslaved people

355. *Verdier v. Trowell*, 40 S.C.L. (6 Rich.) 166, 169 (1865); *see also* *Stucky v. Clyburn*, 25 S.C.L. (Chev.) 186, 187 (1840) (including a defendant’s appeal that he should have received “such a sum . . . as the evidence proved the negro to have been depreciated by reason of the unsoundness”).

356. *See, e.g., Stucky*, 25 S.C.L. (Chev.) at 190 (“What the damages were, it is not easy to gather from the testimony.”).

357. *Wallis v. Frazier*, 11 S.C.L. (1 Nott & McC.) 516, 517 (1820); *see also Verdier*, 40 S.C.L. (6 Rich.) at 166, 169-70 (describing a doctor’s testimony, which explained that the burns on Henderson’s back made Henderson “decidedly unsound at the time of the sale, and his value is impaired 75 per cent”).

358. *Gadsden v. Raysor*, 43 S.C.L. (9 Rich.) 276, 280-81 (1856) (describing “a reduction in price, for a partial unsoundness”).

359. *Scranton v. Tilley*, 16 Tex. 183, 194 (1856) (writing about “the correct rule, where the slave has died, or become valueless, and a total loss to the plaintiff”).

360. *See Shewalter v. Ford*, 34 Miss. 417, 421-22 (1857) (explaining that a “warranty extends to all unsoundness which causes damage to the purchaser, whether by total loss of the property purchased, or by being compelled to sustain loss or incur expenses to a partial extent by reason of the unsoundness”).

361. *M’Laughlin v. Horton*, 19 S.C.L. (1 Hill) 383, 383 (1833) (stating that “the negro was unsound and of no value”).

362. *See, e.g., Franklin v. Ezell*, 33 Tenn. (1 Sneed) 497, 500 (1853) (explaining that when “goods” sold with a warranty of soundness “turn out to be utterly valueless, and not to answer the description, the contract is at an end, and they need not be even returned”).

363. *See infra* note 436.

who were unable to perform agricultural or domestic labor were sometimes employed as healers, midwives, or caretakers of enslaved children.³⁶⁴ Some slaveowners had elderly slaves drive coffins to burial grounds, rather than risking exposing younger (or free) laborers to the “pestilence” that the dead bodies might be carrying.³⁶⁵ And even after death, some owners were able to extract economic value from slaves’ bodies by selling their cadavers to physicians and medical schools for dissection.³⁶⁶

B. Claiming Valuelessness

If the care, attention and nursing of the slave was worth more by one cent than his labor, they should find that he was of no value at the time of the sale.

—*Mercer v. Hall*, 1847³⁶⁷

As discussed above, an enslaved person did not need to be dead to be declared “of no value” legally.³⁶⁸ To be sure, in many breach of warranty suits, a purchaser’s claim that the purchased slave was “valueless” owed to the death of said slave.³⁶⁹ Yet, in the hierarchy of breach-of-warranty claims, a claim based on a purchaser’s lost value due to a slave’s death, and a claim rooted in value lost because “the [human] property was utterly worthless,” could be equally strong legal claims.³⁷⁰ This trend is borne out by the 152 cases examined here, as well as by the historiography on warranties of soundness.³⁷¹

364. WHITE, *supra* note 24, at 116; ROSENTHAL, *supra* note 16, at 32.

365. See BERRY, *supra* note 3, at 142 (describing an elderly enslaved man who held one of these jobs, who “acknowledged that everyone who had had this job before him had died shortly after due to ‘pestilence,’” and who expected that he too would die).

366. *Id.* at 153.

367. *Mercer v. Hall*, 2 Tex. 284, 285 (1847) (statement of the case) (emphasis added) (capitalization altered) (jury instructions).

368. *E.g.*, *Otts v. Alderson*, 18 Miss. (10 S. & M.) 476, 477 (1848) (stating that for eighteen months while ill, Enoch “was of no value, but rather an expense”).

369. *E.g.*, *Mercer*, 2 Tex. at 286 (explaining to the jury that “if the negro at the time of the sale, had the incipient stages of that disease [consumption] and died of it, he was valueless”).

370. See *Wilson v. Ferguson*, 25 S.C.L. (Chev.) 190, 193 (1840).

371. Ariela Gross’s *Double Character* still provides the most comprehensive picture of what warranty of soundness suits looked like across the South. In 92 trial court cases in Adams County, Mississippi, involving a breach of warranty, 68% (63 total) were due to illness, as compared to 20% (18 total) wherein the person died. GROSS, *supra* note 3, at 162 tbl.2. In 51% of those cases involving illness (32 total), the verdict was for the buyer. *Id.* The buyer won in 78% of the cases involving death (14 total). *Id.* Gross also provides data on cases heard at the state supreme courts of Alabama, Georgia, Mississippi, South Carolina, and Louisiana. At the state supreme court level, 44% of breach of warranty cases involved illness (145 total), whereas 25% involved death (83 total). *Id.* at 161, 162
footnote continued on next page

1. After death

From one perspective, one might imagine cases where slaves died due to unsoundness to be the easiest for purchasers to win. After all, how better to demonstrate a total breach of a warranty than with proof that the person you purchased is no longer alive? In practice, however, the death of a slave did not necessarily make it any easier to win on breach of warranty.³⁷² This is due in large part to what purchasers had to demonstrate in order to prove unsoundness, and the kinds of evidence that sufficed as proof.

In the wake of a purchased slave's death, purchasers had to prove that the slave was unsound at the time of sale *and* that the unsoundness was the cause of death. A postmortem examination was functionally a prerequisite to doing so.³⁷³ Enslavers understood this. For example, one purchaser-owner, who declined to call a physician when his recent purchase complained of pain in his head and chest, *did* make sure to hire a physician to conduct a postmortem examination on the enslaved man after he died.³⁷⁴

The necessity of postmortem examinations would have added an element of complexity to warranty suits involving the death of an unsound slave for two reasons. First, postmortems were time-limited in a way that medical examinations of living people were not. This was especially true given that conflicting medical testimony was common in warranty of soundness suits.

tbl.2. Of the cases involving illness, 60% (87 total) were decided in favor of the buyer. *Id.* Of the cases involving death, 63% (55 total) were decided for the buyer. *Id.*

372. See GROSS, *supra* note 3, at 138-39; Schafer, *supra* note 3, at 311-12.

373. *Wade v. DeWitt*, 20 Tex. 398, 398-99 (1857) (stating that several doctors conducted a postmortem examination on an enslaved man named Jack thirteen hours after his death); *Gadsden v. Raysor*, 43 S.C.L. (9 Rich.) 276, 276 (1856) (stating that a postmortem examination was performed on an enslaved man named Peter in the presence of a Dr. Thomas Y. Simmons); *Keirn v. Carson*, 20 Miss. 431, 433 (1849) (stating that postmortem examinations were performed on Harry and Ann, both enslaved, by a Dr. Vallandingham); *McFall v. Walker*, 25 Tex. 327, 328-29 (1860) (stating that a postmortem examination was conducted on the twenty-two-year-old enslaved woman Lucy); *Parker v. Partlow*, 46 S.C.L. (12 Rich.) 679, 679-80 (1860) (stating that a postmortem examination was conducted on an enslaved man named Lewis by Drs. Pressley and Anderson); see also *Watson v. Boatwright*, 30 S.C.L. (1 Rich.) 402, 403 (1845) (describing a hypothetical breach of warranty scenario and explaining that unsoundness would be "ascertained by professional investigation, or by a *post mortem* examination").

Louisiana had both statutory and case law that barred recovery in warranty suits if a postmortem examination had not been performed. GROSS, *supra* note 3, at 139. Outside of Louisiana, however, purchaser-owners were sometimes able to recover without having conducted a postmortem. See, e.g., *Scranton v. Tilley*, 16 Tex. 183, 185-88 (1856) (explaining that the doctor did not conduct a postmortem examination on sixteen-year-old Friday "because without knowledge of the previous history of the case, it would have been valueless—it is a tedious operation").

374. *Welch v. Brooks*, 44 S.C.L. (10 Rich.) 123, 126-27 (1856).

Consequently, being able to have more doctors testify on one's behalf would only have been beneficial.³⁷⁵ It would have been easier for purchaser-owners to coordinate multiple doctor visits if the person being examined and diagnosed was still alive.

Second, many enslaved people resented and occasionally resisted postmortem examinations on their loved ones.³⁷⁶ In general, Black Americans, both enslaved and free, “viewed autopsies . . . as an unholy theft from the dead.”³⁷⁷ Post-mortem examinations entailed dissection and often the removal of organs, which many slaves viewed as further violation of the bodies of the enslaved by their enslavers.³⁷⁸ For some slaveowners, their slaves' attitudes toward postmortem examinations may have made conducting postmortem examinations more challenging.

2. While still living

Buyers claimed a “total loss” on a living person in 86 out of the 152 cases considered in this Article. Generally, this occurred after the purchaser-owner discovered a slave's serious illness or injury.³⁷⁹ In suits like these, slaveowners would describe their human purchases with phrases such as “unsound and worthless,”³⁸⁰ “unfit for service . . . and of no benefit,”³⁸¹ and “of no use or value.”³⁸² These assessments typically followed brief descriptions of the illnesses or injuries under which the enslaved person had been suffering. The underlying disease was the cause, but the harm (as suffered by the buyer, not the enslaved person) was economic, in the form of lost labor capacity. So long

375. See GROSS, *supra* note 3, at 133-38 (describing the “astounding number” of doctors that would testify in even routine warranty trials).

376. FETT, *supra* note 3, at 156.

377. *Id.*

378. *Id.* at 154-56.

379. See Appendix, *supra* note 34, tbl.3. In a substantial minority of suits, purchasers alleged the warranty had been breached for reasons of mental capacity or temperament, or because the slave in controversy had run away. *Id.*

380. *Conner v. Crunk*, 39 Tenn. (2 Head) 246, 247 (1858) (describing an enslaved woman named Lucretia who died a few days after purchase).

381. Declaration at 2-3, *James v. Harrison* (Tenn. Cir. Ct. Davidson Cnty. June 12, 1860) (on file with Tenn. State Libr. & Archives, Box 291, Shelf 4) (asserting that at the time of sale, fifteen-year-old Margaret was “then and there unsound and unhealthy and remained diseased with divers diseases and maladies until the time she died” six months later).

382. Declaration at 6-7, *Howard v. Jones* (Tenn. Cir. Ct. Greene Cnty. Feb. 25, 1860) (on file with Tenn. State Libr. & Archives, Box 1202, Shelf 4) (stating that, at the time of sale, three-year-old William was unsound).

as a purchaser could back up the claim that a living, but unsound, slave was “wholly valueless on account of disease,” a full recovery was possible.³⁸³

Demonstrating that a living slave was “wholly valueless” could also serve as an effective defense for a buyer who still owed a seller money. This is what happened in Harriet’s case, wherein her purchaser George Ezell got out of paying the remaining \$393 of her \$700 sale price to her former owner Benjamin Franklin.³⁸⁴ As the court explained, in “an action on a promissory note given for the price of goods sold with a warranty, it is a good defense that the goods turned out to be of no value.”³⁸⁵ When making such a defense, it was important that purchasers demonstrated that the “property be utterly valueless.”³⁸⁶ If they did not, a purchaser had to return the human property in question.³⁸⁷

In Harriet’s case, when Franklin sued to recover the money that Ezell still owed on her purchase price, Ezell was able to thwart Franklin’s recovery with a breach of warranty claim.³⁸⁸ Specifically, Ezell claimed that when he purchased Harriet “[she] was not sound and healthy, but on the contrary, was then greatly diseased [and] of no value to said defendant.”³⁸⁹

In order to demonstrate that Harriet was “wholly valueless,” Ezell emphasized the significant difference between the “sound and healthy” woman he believed himself to be purchasing and the “greatly diseased” woman that he actually received.³⁹⁰ Of particular importance for Ezell was that at the time of sale he believed Harriet to be pregnant. In actuality, Harriet only appeared to

383. *Franklin v. Ezell*, 33 Tenn. (1 Sneed) 497, 497-98 (1853) (describing Harriet as suffering from an “incurable” umbilical hernia that “render[ed] the slave almost, if not altogether valueless,” or “wholly valueless”). Harriet is not named in this opinion, but her name and age—“not over 21 or 22 years old”—can be found in the case’s second appeal to the Tennessee Supreme Court. *Ezell v. Franklin*, 34 Tenn. (2 Sneed) 236, 241 (1854) (including the text of the bill of sale). This information also appears in the case filings, available at the Tennessee State Libraries and Archives. *See, e.g.*, Declaration at 3, *Ezell v. Franklin* (Tenn. Cir. Ct. Giles Cnty. Dec. 24, 1853) (on file with Tenn. State Libr. & Archives, Box 246, Shelf 1); Exhibit C, *Ezell v. Franklin* (Tenn. Cir. Ct. Dec. 24, 1853).

384. *Franklin v. Ezell*, 33 Tenn. (1 Sneed) at 497-98, 501.

385. *Id.* at 500.

386. *Id.*

387. Prior to the suit, Ezell had attempted to return Harriet when he discovered her unsound. If Franklin had accepted, Ezell would have returned her, and Franklin would have returned whatever payments Ezell had made. Franklin refused to void the sale and accept Harriet’s return, however. In response, Ezell stopped making payments and Franklin sued. *Id.* at 497-98.

388. *Id.* at 499-501.

389. Pleas at 2-3, *Franklin v. Ezell* (Tenn. Cir. Ct. Giles Cnty. Aug. 20, 1853) (on file with Tenn. State Libr. & Archives, Box 246, Shelf 1).

390. *Id.* at 3.

be pregnant because of the severe hernia that she was suffering from. According to Harriet, as well as the doctors who examined her, the hernia occurred when she gave birth “a short time prior” to her sale to Ezell.³⁹¹

Harriet’s appearance of pregnancy likely increased her value to Ezell because when she gave birth, Ezell would have owned her child.³⁹² The law of *partus sequitur ventrem*, which dictated that children inherited the slave status of their mothers, also meant that whoever owned the mother would own her children by default.³⁹³ In addition, Ezell would have believed that Harriet’s reproductive capacity more generally would have added to his wealth.³⁹⁴ As Daina Berry and other historians of slavery have well documented, women’s appraisals and sale prices often hinged on their reproductive capacity.³⁹⁵

As Ezell quickly discovered, however, not only was Harriet not pregnant, but she likely would also not be able to give birth in the future.³⁹⁶ Moreover, her hernia prevented her from performing hard physical labor.³⁹⁷ During the trial, several doctors testified that Harriet would not be able to “perform

391. These details arose during a related trial, wherein Ezell sued Franklin for breach of warranty. Exhibit No. 1 at 9, *Franklin v. Ezell* (Tenn. Cir. Ct. Aug. 20, 1853). In the same proceeding, one physician witness speculated that Harriet’s hernia would have worsened significantly when her then-owner Franklin put her back to work in the fields roughly a month after giving birth. See Bill of Exceptions at 6-7, *Franklin v. Ezell* (Tenn. Cir. Ct. Aug. 20, 1853).

392. See BERRY, *supra* note 3, at 11. As Daina Berry has shown, not all slaveowners wanted to own small children. See *id.* In this example, however, Ezell wanted to invest in a woman in her reproductive prime. Cf. Argument, *supra* note 278, at 2 (discussing the material “impair[ment]” of “the value, and usefulness of the girl” due to the unsoundness of “the girl’s ‘organs of generation’”).

393. Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 215 (1987). As with all default rules, this could be contracted around. It was not uncommon to find terms of wills that willed a woman to one inheritor and her “future increase” to another. *Id.* at 198 n.44 (citation omitted); see Sharon Ann Murphy, *The Financialization of Slavery by the First and Second Banks of the United States*, 87 J.S. HIST. 385, 412 (2021).

394. According to the testimony of one of the doctors who examined Harriet in Franklin’s case, she had the appearance of a pregnant woman at the time of sale. See Exhibits E & F at 9-10, *Ezell v. Franklin* (Tenn. Cir. Ct. Giles Cnty. Dec. 24, 1853) (on file with Tenn. State Libr. & Archives, Box 246, Shelf 1) (“I saw the negro girl, and from her appearance thought she was some six or seven months advanced in pregnancy and was much surprised a few days thereafter from Mr. Ezell that she was not pregnant but badly diseased as he believed.”).

395. BERRY, *supra* note 3, at 11; see, e.g., GROSS, *supra* note 3, 128-29; ROSENTHAL, *supra* note 16, at 137-39; SCHWARTZ, *supra* note 22, at 67-68.

396. See Exhibit H at 13, *Ezell v. Franklin* (Tenn. Cir. Ct. Dec. 24, 1853).

397. Cross Examination of Dr. M.R. Fontaine at 11, *Ezell v. Franklin* (Tenn. Cir. Ct. Dec. 24, 1853) (affirming his opinion that Harriet’s “disease” made her unable to perform manual labor).

labor”³⁹⁸ or “ordinary service.”³⁹⁹ According to Ezell’s appellate brief, Harriet’s unsoundness and inability to perform the usual labor incident to slavery was a “grave” misrepresentation.⁴⁰⁰

As Harriet’s case indicates, proving that a living person had “no value” necessitated doctors’ participation.⁴⁰¹ When on the stand, doctors would explain how a slave’s injury or disease would impede their ability to labor, as they did with respect to Harriet. The doctors explained that the size of Harriet’s hernia would have made her movements clumsy,⁴⁰² prevented her from being able to lift objects,⁴⁰³ and limited her to performing “light services” at most.⁴⁰⁴

In addition, as expert witnesses, doctors were able to provide estimates of how Harriet’s injury impacted her value. During the trial, at least three doctors were asked to estimate (1) Harriet’s value if she had been pregnant, as Ezell believed, and (2) what Harriet’s value actually was in light of her unsoundness.⁴⁰⁵ Each doctor estimated that Harriet would have been worth between \$700 and \$800 if sound and pregnant, but that in her current condition, Harriet’s hernia made her “worthless.”⁴⁰⁶ Such physician testimony would likely have been persuasive for jurors.

398. Bill of Exceptions, *supra* note 391, at 6-7 (describing the testimony of Dr. Perkins, a “regular practicing physician”).

399. *Id.* at 6 (describing the testimony of Dr. William Balls, also “a regular practicing physician”).

400. Ezell’s Brief at 1-2, *Franklin v. Ezell* (Tenn. Cir. Ct. Giles Cnty. Aug. 20, 1853) (on file with Tenn. State Libr. & Archives, Box 246, Shelf 1). Though Ezell did not bring any claims of misrepresentation, other claimants did. For an example of a fraudulent misrepresentation action, see *Whitson v. Gray*, 40 Tenn. (3 Head) 441, 442 (1859).

401. See *Rentfrow v. Shaw*, 5 Miss. (4 Howard) 651, 652 (1840) (discussing Dr. Watkins testifying that Scott had consumption at the time of sale and “was of little or no value”). Many other cases included or referenced doctors’ testimony about the likely valuation of the enslaved person in question. See, e.g., *Pearson v. Johnson*, 34 Tenn. (2 Sneed) 580, 582 (1855) (discussing physicians testifying that George was “not worth half the price” he had been purchased for); *Otts v. Alderson*, 18 Miss. (10 S. & M.) 476, 478 (1848) (discussing Dr. Monette testifying that Enoch had scrofula and “did not think the boy of any value”).

402. Exhibit No. 3 at 13, *Ezell v. Franklin* (Tenn. Cir. Ct. Dec. 24, 1853).

403. Cross Examination of Dr. M.R. Fontaine, *supra* note 397, at 11.

404. Bill of Exceptions, *supra* note 391, at 6.

405. *Id.* (listing the doctor testimony included in Ezell’s Bill of Exceptions under Exhibit H).

406. Exhibit H, *supra* note 396, at 13 (deposition of Dr. Gibson); see also Exhibits E & F, *supra* note 394, at 12 (deposition of Dr. Fontaine, estimating that Harriet would have sold for upwards of \$800 if sound, but that the doctor “would not have given anything for her”); Exhibit No. 5 at 15, *Ezell v. Franklin* (Tenn. Cir. Ct. Dec. 24, 1853) (deposition of Dr. Hereford, agreeing with Dr. Fontaine’s testimony).

3. Neither alive nor dead

In Harriet's case, we know Harriet was still alive when Ezell declared her "of no use and value."⁴⁰⁷ In several other cases, the appellate record failed to mention whether the "slave in controversy"⁴⁰⁸ was still alive.⁴⁰⁹

The absences in the appellate record suggest that being found "wholly worthless" by a court entailed a further loss of cognizability for the enslaved.⁴¹⁰ Because when one's life was valuable only insofar as her body could endure hard physical labor, the inability to work could render her nonexistent. The nonexistence caused by valuelessness goes beyond the social death that Orlando Patterson described in *Slavery and Social Death*.⁴¹¹ In his canonical text on the sociology of slavery, Patterson describes the condition of slavery as social death, wherein the slave was a "social nonperson."⁴¹² To be a "social nonperson" was to have one's humanity reduced, selectively ignored, or

407. Declaration, *Ezell v. Franklin*, *supra* note 383, at 2.

408. *Roberts v. Fleming*, 31 Ala. 683, 685 (1858) ("Dr. Connor testified to his examination of the slave in controversy, about six weeks after plaintiff's purchase of her, and to the diseased condition in which he then found her . . .").

409. For example, in two Mississippi lawsuits, which arose after the sale of a woman named Amy, the appellate opinions simply stated that Amy was "unsound." *McLeod v. Tutt*, 2 Miss. (1 Howard) 288, 288 (1836) (describing Amy as an "unsound slave"); *Tutt v. M'Leod*, 4 Miss. (3 Howard) 223, 223 (1839) (stating that the declaration "concluded with averring [Amy's] unsoundness in the usual form"). For additional cases, see Appendix, note 34 above, tbl.2. The column titled "Status" indicates whether the enslaved person in question was still alive. Entries with an "N/A" indicate that the case did not specify whether the enslaved person was alive or dead. Even opinions that provided more detail about purchased slaves failed to mention whether they were still living. In *Norton v. Moore*, for example, more detail was given about the condition of Caroline, one of two women whose warranties were being litigated. See 40 Tenn. (3 Head) 480, 480 (1859). Caroline was alleged to be unsound at the time of her sale and, according to one witness was "very much diseased" and in "great pain" from her condition. *Id.* at 481. Yet the Tennessee Supreme Court's opinion did not mention that Caroline had died from her disorder. See Deposition of Sarah Hitchcock at 15, *Norton*.

410. *Anderson v. Duffield*, 8 Tex. 237, 237 (1852) (describing an unnamed enslaved woman as "unsound and wholly worthless").

411. PATTERSON, *supra* note 31, at 5. As historian Vincent Brown has pointed out, the concept of "social death" is "meant not to describe the lived experiences of the enslaved so much as to reduce them to a least common denominator that could reveal the essence of slavery." Vincent Brown, *Social Death and the Political Life in the Study of Slavery*, 114 AM. HIST. REV. 1231, 1233 (2009); see also Renisa Mawani, *From Slave Revolts to Social Death*, 48 THEORY & SOC'Y 835, 836-37 (2019) (describing the critiques and responses to Patterson's work).

412. PATTERSON, *supra* note 31, at 5; see also LISA MARIE CACHO, *SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED* 7 (2012) (describing social death as the circumstance where certain populations are neither included nor fully excluded, but rather are permanently socially and political liminal); SHARON PATRICIA HOLLAND, *RAISING THE DEAD: READINGS OF DEATH AND (BLACK) SUBJECTIVITY* 17-18 (2000) (describing social death as being "among the dead in the course of living").

excluded entirely.⁴¹³ Similarly, Hortense Spillers has written on the ways in which the transatlantic slave trade transformed people into “quantities” that could be tallied in account books.⁴¹⁴ More recently, Black studies scholar Christina Sharpe has described this exclusion as an “ontological negation.”⁴¹⁵ These scholars, and others, have illustrated how the practices of slavery situated enslaved people as existing outside of the category of human.⁴¹⁶ And they have linked how thinking of enslaved people in this way made it conceptually easier for slaveowners to objectify and commodify the enslaved.⁴¹⁷ Slave warranties raise the question of what happened next—when someone was treated not just as an object, but as an object with no value.⁴¹⁸

Consider, for example, Arzilla and the two unnamed children with whom she was sold.⁴¹⁹ In Arzilla’s case, her purchaser M.B. Duncan won a breach of warranty suit against her seller, receiving the entirety of the \$1,530 purchase price in damages.⁴²⁰ On an appeal challenging the validity of the warranty itself, the Tennessee Supreme Court stated, “No question is made upon the facts. The unsoundness of the slaves at the time of sale, of a nature and degree to render them of no value, and the defendant’s knowledge of such unsoundness, are sufficiently established.”⁴²¹

These two sentences, just under forty words, were the entirety of the court’s 700-word opinion about Arzilla and the two unnamed children sold

413. PATTERSON, *supra* note 31, at 5.

414. Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, DIACRITICS, Summer 1987, at 65, 72.

415. CHRISTINA ELIZABETH SHARPE, IN THE WAKE: ON BLACKNESS AND BEING 14 (2016).

416. *See, e.g.*, BERRY, *supra* note 3, at xiii; ÉDOUARD GLISSANT, POETICS OF RELATION 61-62 (Betsy Wing trans., 1997) (1990) (using the word “opacity”); FRED MOTEN, BLACK AND BLUR xiii (2017) (writing on the “animaterial ecology of black and thoughtful stolen life as it steals away”); WILLIAMS, *supra* note 33, at 73 (describing this phenomenon as “spirit murder”); Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation*, NEW CENTENNIAL REV., Fall 2003, at 257, 266-67 (describing how Western ideology made enslaved Blacks, among others, “reoccupy the matrix slot of Otherness—to be made into the physical referent of the idea of the irrational/subrational Human Other”).

417. *See* CACHO, *supra* note 412, at 7; PATTERSON, *supra* note 31, at 5; Spillers, *supra* note 414, at 72-73; Wynter, *supra* note 416, at 266-67.

418. Daina Berry has also pursued this question in her writing. *See, e.g.*, BERRY, *supra* note 3, at 150-51, 154, 167.

419. Transcript at 7, *Kearly v. Duncan*, 38 Tenn. (1 Head) 397 (1858) (on file with Tenn. State Libr. & Archives, Box 273, Shelf 6). The bill of sale, and then the opinion which quotes it, does not specify whether Arzilla was the mother of the two children with whom she was sold. *Kearly*, 38 Tenn. at 398. According to the archival case file, however, Arzilla was in fact their mother. *Id.*

420. *Kearly*, 38 Tenn. at 398.

421. *Id.* at 399.

alongside her. The bulk of the opinion instead focused on the question of how to interpret the writing of the contract. More specifically, the legal question at issue was whether the court could consider anything other than the writing on the contract as evidence of the parties' contractual intentions.⁴²²

There was a narrow range of legal questions for which an appellate court might have needed to know if Arzilla and the children had died. A common one dealt with the proper way to measure damages.⁴²³ This was not at issue in Arzilla's case.⁴²⁴ In particular, when the claim was a total loss of value, it did not matter if the slave was still living.⁴²⁵ Thus, from a legal perspective, the only detail about the three slaves that mattered on appeal was the fact that their valuelessness had been unquestionably proven. Whether Arzilla and the children were still alive was inconsequential for the legal questions at hand.⁴²⁶

Arzilla's case is far from the only example where the fact of the enslaved person's living status went unaddressed. For example, in the appeal of one South Carolina case, the court's opinion did not even address the unsoundness of the enslaved woman, which precipitated the lawsuit.⁴²⁷ Instead, the question of the woman's unsoundness only arose in the trial judge's report, which prefaced the appellate opinion.⁴²⁸ As stated in the report, "the woman was diseased and worthless, and the fact was established by abundant proof."⁴²⁹ The facts were not in question, nor were they relevant on appeal.⁴³⁰

In 9 out of 86 cases where a purchaser claimed a total loss, the appellate court did not mention whether the enslaved person in question was still living.⁴³¹ In other words, even as enslaved people's commodity values were being litigated in these cases, the fact of their aliveness remained absent from

422. In doctrinal terms, *Kearly* was a parol evidence case. *Id.* at 399-400. The court held that the contract was completely integrated, and as a result, no parol evidence could be used to supplement or qualify the meaning of the warranty. *Id.* at 400.

423. See GROSS, *supra* note 3, at 202 n.54 (explaining the damages implications of one of the common legal issues in warranty suits); WAHL, *supra* note 35, at 32 (describing the reasoning in damages cases).

424. See *Kearly*, 38 Tenn. (1 Head) at 399.

425. See *Scranton v. Tilley*, 16 Tex. 183, 194 (1856) (explaining that the measure of damages would be the same in cases of death on the one hand, and total loss on the other).

426. Instead, the living status of Arzilla and her children would have mattered at trial primarily with respect to the kinds of evidence that would have been provided to prove unsoundness. Doctors' testimony about postmortem examinations was fairly standard in cases where the slave(s) in question had died. See GROSS, *supra* note 3, at 138.

427. See *Matlock v. Gibson*, 42 S.C.L. (8 Rich.) 437, 438-39 (1832).

428. *Id.*

429. *Id.* at 437.

430. The question presented on appeal addressed whether and how a defendant could use breach of warranty as a defense in a debt action for a sealed instrument. *Id.* at 438-39.

431. See Appendix, *supra* note 34, tbl.2.

the appellate record. This absence could appropriately be described as erasure,⁴³² the violence of the legal archive,⁴³³ or “ontological negation.”⁴³⁴ However one characterizes it, in these cases the bodies of the enslaved were simultaneously inciting incident and absent presence.⁴³⁵

C. Peter’s Story

Thus far, I have primarily focused on the ways that warranty doctrine accommodated and facilitated the neglect and abuses inherent to the institution of slavery. Explaining the interaction between these legal rules and slavery’s practices has necessitated privileging the perspective of the people for whom the rules were intended—namely, those Americans who chose to assert property rights in people.

That these rules allowed for, enabled, and in some cases exacerbated the suffering endured by the enslaved people being bought and sold is clear. Nevertheless, when reading from a contemporary perspective—some two hundred years removed from slavery’s reality—it can be far too easy to underestimate slavery’s brutality, even for those of us who know its history well. For this reason, this Part focuses on Peter—who found himself injured, abandoned, and ultimately imprisoned, when his buyer decided that his warranty had been breached and that he was “worth nothing.”⁴³⁶

432. Many scholars have written on the erasure of the history of slavery and enslaved people within the law. *See, e.g.*, Park, *supra* note 47, at 1062, 1080-91 (examining all property law casebooks in order to demonstrate the erasure of the history of slavery from property doctrine and teaching); Simard, *supra* note 47, at 84, 119-24 (uncovering the large number of cases involving enslaved people that continue to be cited without reference to the case’s origins in slavery).

433. On violence and the archive, *see, e.g.*, ANN LAURA STOLER, *ALONG THE ARCHIVAL GRAIN: EPISTEMIC ANXIETIES AND COLONIAL COMMON SENSE* 1-15 (2009) (charting violence in the colonial archives of India); Hartman, *supra* note 46, at 11-12 (describing the violence and unrecoverable absences inherent to archives of slavery); Renisa Mawani, *Law’s Archive*, 8 ANN. REV. L. & SOC. SCI. 337, 339-40, 360 (2012) (bringing a critical archival studies perspective to legal archives); Stephanie E. Smallwood, *The Politics of the Archive and History’s Accountability to the Enslaved*, 6 HIST. PRESENT 117, 128-29 (2016) (explaining the importance of reading against the grain when dealing with archives of violence such as those left behind by slavery).

434. SHARPE, *supra* note 415, at 14.

435. I have written elsewhere on the absent presence of violence in the legal archive. Brittany Farr, *Witnessing an Absent Presence: Bringing Black Feminist Theory to Traditional Legal Archives*, 52 BLACK SCHOLAR 64, 65-66 (2022).

436. *Westmoreland v. Dixon*, 5 Tenn. (4 Hayw.) 223, 224, 226 (1817) (per curiam); E. Benoit, *Committed to the Jail of Davidson County as a Runaway*, NASHVILLE WHIG, May 24, 1814, at 2; *see also* *Wilson v. Ferguson*, 25 S.C.L. (Chev.) 190, 193 (1840) (“There have been cases, where the whole amount of the purchase money has been recovered in an action on the warranty, but then it was because the property was utterly worthless . . .”); *Hubby v. Stokes*, 22 Tex. 217, 218-19 (1858) (using the phrase “utterly worthless” to
footnote continued on next page

Peter was purchased by Reuben Westmoreland in February 1813.⁴³⁷ Unbeknownst to Westmoreland at the time, Peter suffered from seizures.⁴³⁸ And in the autumn of 1813, Peter had a seizure that caused him to fall into a fire and become badly burned.⁴³⁹ Several months later, Westmoreland went to Peter's seller—a man named Jesse Shelton—requesting that Shelton rescind the sale and take Peter back.⁴⁴⁰

Westmoreland likely offered to return Peter because of the legal rules governing breaches of warranty. As discussed above, in cases of breach, sellers had the option to accept the buyer's return of the slave in question and refund the purchase price.⁴⁴¹

Unless Westmoreland could prove that Peter was “utterly worthless” at trial, return was a necessary precondition to refund.⁴⁴² Westmoreland was likely hoping that returning Peter would allow him to get his money back while avoiding the time and money of litigation. Moreover, if Peter's burns made him expensive to care for, foisting Peter onto Shelton would have had an additional cost-saving benefit.⁴⁴³ Unfortunately for Westmoreland, Shelton refused to take Peter back.⁴⁴⁴

Even more unfortunately for Peter, Westmoreland refused to take no for an answer. One month later, Westmoreland attempted to return Peter to Shelton a second time. On this second attempt, Westmoreland left Peter outside of Shelton's father's distillery. In response, Shelton “ordered him [Peter] to go away.”⁴⁴⁵ Peter complied. It is not clear whether Peter attempted to return to Westmoreland, however. Two weeks after being abandoned by

describe a girl named Sarah); *Parker v. Partlow*, 46 S.C.L. (12 Rich.) 679, 681 (1860) (using the phrase “utterly worthless” to describe a slave who had “dropsy of the heart” when sold); *Hutchins v. Brooks*, 31 Miss. 430, 430 (1856) (using the phrase “utterly worthless” to describe an unnamed enslaved woman); *Patterson v. Kirkland*, 34 Miss. 423, 425 (1857) (using the phrase “utterly worthless” to describe an unnamed enslaved woman); *Murphy v. Crain*, 12 Tex. 297, 297, 303 (1854) (using the phrase “utterly worthless” to describe seventeen-year-old Catherine and her eight-month-old daughter Elizabeth).

437. *Westmoreland*, 5 Tenn. (4 Hayw.) at 223, 226.

438. *Id.* at 223-24, 226.

439. *Id.* at 224, 226.

440. *Id.*

441. See notes 350-53 and accompanying text above.

442. See *Westmoreland*, 5 Tenn. (4 Hayw.) at 223.

443. See BERRY, *supra* note 3, at 139. For more on the costs of caring for sick, disabled, and/or elderly slaves, see DIRK HARTOG, *THE TROUBLE WITH MINNA: A CASE OF SLAVERY AND EMANCIPATION IN THE ANTEBELLUM NORTH* 1-4 (2018).

444. See *Westmoreland*, 5 Tenn. (4 Hayw.) at 224, 226.

445. *Id.*

Westmoreland and rejected by Shelton, Peter was arrested and jailed as a runaway.⁴⁴⁶

Westmoreland failed to retrieve Peter from jail, and on May 11, the jailer placed an ad in the local paper requesting that Westmoreland “come forward, pay charges and take him away.”⁴⁴⁷ Peter remained in jail for at least a month.⁴⁴⁸ It is unknown whether Westmoreland ever went to retrieve him. What we do know, however, is that when Westmoreland died a year after the case’s final decision, there was no record of a man named Peter in his estate’s inventory.⁴⁴⁹

In Peter’s case, buyer and seller attempted to outmaneuver each other and used Peter as the tool with which to do so. By attempting to return Peter, Westmoreland was creating a paper trail of sorts, one which would back up his claim that Peter had been sold with a warranty of soundness. This paper trail took the form of Peter’s body as he was ordered to walk back and forth between the home of his purchaser-owner Westmoreland and the Shelton distillery.⁴⁵⁰ If Shelton had accepted Peter’s return, it is possible that a court would have interpreted his actions as rescinding the contract between him and Westmoreland. As a business owner who owned several slaves himself, Shelton would have understood the possible consequences of accepting Peter’s return.⁴⁵¹

Contract remedies doctrine only heightened Peter’s suffering. Peter was an older man who experienced dangerous seizures and who was badly, visibly

446. Benoit, *supra* note 436, at 2.

447. *Id.*

448. *See id.*

449. Only the following slaves were included in the inventory of Westmoreland’s estate: Dick, 47 years old; Claiborne, 25 years old; Aggy, 25 years old; Billy, 21 years old; Burrel, 18 years old; Sam, “7 or 8” years old; and Mary, “7 or 8” years old. Tilman R. Daniel, Adm’r, Tenn. C.P. Davidson Cnty., Reuben Westmoreland Dec’d. Inventory 291, *In re Estate of Westmoreland* (Tenn. C.P. Davidson Cnty. Dec. 28, 1818) (on file with Tenn. State Libr. & Archives, Davidson County Will Books, Vol. 7 (1816-1821), Roll 428), <https://perma.cc/W5V8-MXPS>.

450. *See For Sale, A Tract of Land*, CLARION AND TENN. STATE GAZETTE, Oct. 14, 1817, at 3 (on file with Newspapers.com by Ancestry), <https://perma.cc/PE33-U95L> (describing a tract of land with “a seat for a saw or grist mill and distillery” posted by Jesse Shelton).

451. *See Jesse Shelton, Last Will and Testament* (Dec. 15, 1828) (on file with the Metro. Gov’t Archives of Nash. and Davidson Cnty., Project Tenn 0190A, Roll No. 79, image 792), (bequeathing numerous enslaved people, thirty of whom were listed by name, to Shelton’s wife and children); MARTIN VAN BUREN, 1830 UNITED STATES FEDERAL CENSUS: SCHEDULE OF THE WHOLE NUMBER OF PERSONS WITH THE DIVISION ALLOTTED (on file with Nat’l Archives, Bureau of Census Rec. Grp. 29, NARA microfilm publ’n M19, Roll 174, page 234) (providing decennial census information for Jesse Shelton Jr. and indicating that Shelton Jr. owned sixteen slaves).

burned.⁴⁵² Being forced to travel back and forth between Westmoreland and Shelton likely was neither easy nor comfortable. Nevertheless, state courts held firm on the doctrine that required purchasers to offer to return unsound slaves. As the Tennessee Supreme Court explained in *Mariah's* case, discussed above, it was a “reasonable” doctrine for slaves as well as “any other property which it is expensive to keep.”⁴⁵³

Being deemed unsound could have devastating consequences for the enslaved people in question. Some unsound slaves like Peter were refused medical care or abandoned to die.⁴⁵⁴ Lucinda—whose story we started with—suffered several painful and invasive medical procedures due to enslavers’ attempts first to cure her unsoundness and then prove it at trial.⁴⁵⁵

Often those declared unsound were sold at a discount to traders who took them far from their homes.⁴⁵⁶ This is ultimately what happened to Harriet in *Ezell v. Franklin*.⁴⁵⁷ There was an especially cruel irony to Harriet’s sale. Her prior owner, Franklin, used her serious injury to sell her more easily. Shortly after the loss of her infant son, Harriet’s owner sold her as a young woman in her reproductive prime.⁴⁵⁸ The injury made Harriet appear to be in the early stages of pregnancy, when in actuality it had rendered her infertile.⁴⁵⁹

Common to all these stories are the ways in which the legal definition of soundness directly impacted slaves’ valuations—valuations which regularly had life or death consequences. These are more than just stories about law and the violence of slavery, however. On a broader level, these cases speak to the law’s ability to conceptualize, represent, and ultimately assimilate harm. Most simply, the warranty cases explored here provide countless examples of courts privileging some people’s harms (white, slave owning, economic) over others’

452. Peter was described as being “about 30 or 40 years of age.” *Westmoreland v. Dixon*, 5 Tenn. (4 Hayw.) 223, 223 (1817) (per curiam). As Daina Berry has written, the average life expectancy for an enslaved person was twenty-five years and “those who reached age forty were considered elderly.” BERRY, *supra* note 3, at 130-31.

453. *McGavock v. Wood*, 33 Tenn. (1 Sneed) 181, 183-84 (1853).

454. See *Westmoreland*, 5 Tenn. (4 Hayw.) at 224, 226; BOSTER, *supra* note 3, at 65 (writing that it was common for enslavers to “abandon[] elderly and disabled bondspeople unable to perform labor without sending them away from the plantation”); FETT, *supra* note 3, at 24-28, 180-81 (explaining the reasoning behind slaveowners’ reluctance to provide medical care for certain sick or disabled slaves).

455. Bill of Exceptions, *supra* note 11, at 5-8.

456. JOHNSON, *supra* note 3, at 102-05 (explaining that a buyer “stood to make some money if he could buy sick slaves on the cheap and sell them for a greater sum”); cf. *Trice v. Cockran*, 49 Va. (8 Gratt.) 442, 444 (discussing an unsound enslaved man who was sold for less than market value and then “shipped . . . to the south”).

457. 34 Tenn. (2 Sneed) 236, 241 (1854).

458. See Exhibit No. 1, *supra* note 383, at 10.

459. Exhibit H, *supra* note 396, at 13 (deposition of Dr. Gibson).

(Black, enslaved, existential). More significantly, the development of slave warranty doctrine shows that neutral common-law rules can easily be adapted to the most violent of regimes. In both of these threads, we see how easy it can be for courts whose reasoning rests upon legal internalism to either ignore, absent, or (re)characterize violence as something that is both natural and beyond a court's reach.

Conclusion

This Article has examined the ways that one kind of contract—warranties of soundness—accommodated and occluded slavery's violence. In so doing, warranties of soundness (re)distributed and consequently (re)shaped the violence of slavery.⁴⁶⁰

Warranties' transformation of slavery's violence occurred in three primary ways: (1) by redistributing the economic risks associated with enslavers' violence against the enslaved; (2) by requiring or incentivizing slaveowners to take actions that further harmed enslaved people; and (3) by shaping the market in people more broadly.

Warranties of soundness, like warranties generally, redistributed the economic risks between buyer and seller. In a market defined by violence, as slavery's was, this redistribution of risk was necessarily a redistribution of violence. Warranties of soundness insured slave buyers against the risk that the enslaved person they purchased had a hidden defect at the time of sale. Slaveowners' violence against enslaved people was one of the primary causes of these hidden defects, however. Thus, by shifting the economic risks associated with violence, warranties of soundness would have also changed the consequences of enslavers' violence. Of course, many enslavers likely did not

460. This argument may strike some readers as a causal one. To the extent that it is a causal argument, it is one that is deeply informed by both feminist and critical race theories of causation. As critical race theorist Mari Matsuda writes, causation is “a web [and] a circle” and not only the linear conception offered by legal liberalism. Matsuda, *supra* note 301, at 2210, 2218. Relatedly, I agree with feminist Chandra Mohanty's critique of the “hegemonic post-modernist discourse that labels as ‘totalizing’ all systemic connections, and emphasizes only the mutability and constructedness of identities and social structures,” CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* 225 (2003). My investment in understanding the impact of doctrinal intersections has also been profoundly informed by theories of intersectionality. The canonical piece on intersectionality is Kimberlé Crenshaw's, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, note 48 above. See generally *id.* at 1244-45 (introducing the concept of intersectionality and explaining the urgency of the approach). For a more recent gloss on how the theory has been taken up over the intervening decades, see Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 785, 785-87 (2013).

consider or care about how their violent actions would impact an enslaved person's future sale price. Professional slave traders certainly did, however.⁴⁶¹

Beyond the warranty itself, *breaches* of warranty also changed slaveowner behavior and, consequently, slaveowner violence. In order to rescind a contract after a breach of warranty, a slave buyer first had to attempt to return the enslaved person to her seller. This meant that in pursuit of rescission (and a refund), some slave buyers would make long journeys with an ill or injured person in tow. The demands of bringing a breach of warranty suit also often exacted a significant toll on the enslaved person in question. It was common for owners to have multiple doctors conduct physical exams on the unsound person in question, so that the doctors could testify on their behalf at trial. These exams would have been invasive at best and viciously painful at worst.

Lastly, warranties shaped the forms of slavery's violence by responding to and shaping slavery's market. The simplest reason for this is because warranties helped facilitate trust between buyer and seller. This trust was essential to the domestic slave trade.⁴⁶² Yet warranties likely had a more complex impact on the market as well. In general, an enslaved person with a warranty sold for more than one without. This pricing difference between a warranted and an unwarranted person, coupled with the fact that the antebellum South had many different slave markets often located at great distances from one another, created an opportunity for speculation. A few of the cases considered here suggest that some professional slave traders were buying an unwarranted person (at a "discount") and subsequently selling that same person with a warranty of soundness (and therefore for a much higher price) in a different market.⁴⁶³ Of course, doing so put sellers at risk of being sued for breach of warranty. But for some traders, it was likely worth the risk. For many enslaved people being speculated upon, speculation likely meant being sold further south, where conditions were worse.⁴⁶⁴

In all of the ways described above, warranties both responded to and shaped the economy of slavery—an economy dependent upon violence. Yet contracts' regulation and transformation of slavery's violence was not limited to warranties. After all, contracts and contract doctrine were central to the business of slavery. Through warranties, bills of sale, mortgages, and credit

461. See, e.g., ROSENTHAL, *supra* note 16, at 141 ("Slave traders' carefully calibrated punishments reflected their proximity to the market.").

462. SCHERMERHORN, *supra* note 30, at 9 (writing of the business of slavery that "[t]he system evolved to require extraordinary social trust, a hallmark of capitalist markets").

463. Ezell sold Harriet to a man named John Sparks, who testified that he "bought her as an unsound negro, giving six hundred dollars for her as such." Exhibits M & O, Ezell v. Franklin, *supra* note 383, at 16, 17.

464. See, e.g., SCHERMERHORN, *supra* note 30, at 174-92 (describing the process and political economy of selling slaves south).

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agreements, contracts provided the legal technologies that allowed slaveowners to profit from their slaves' status as movable and fungible property. This profit was often in addition to the economic benefit slaveowners extracted from slaves' labor. More research needs to be done into how these more innovative kinds of contractual agreements interacted with the violence of slavery. If the history of slave warranties is any indication, however, we may find that contract law was at the heart of it.