ENSLAVED AGENTS: BUSINESS TRANSACTIONS NEGOTIATED BY SLAVES IN THE ANTEBELLUM SOUTH

Elizabeth C. Tippett*

This Article explores the law of agency as applied to enslaved workers in the Antebellum South between 1798 and 1863. In particular, I examine legal disputes involving the delegation of agency power to enslaved workers. Southern courts generally accepted that an enslaved worker could serve as business agent for his or her slaveholder, which often meant binding a third party to a transaction negotiated or performed by an enslaved person.

These cases provide a window into business practices in slave states, where enslaved workers conducted business on behalf of slaveholders in a variety of contexts. While agency law served the economic interests of individual slaveholders—who could then avoid hiring paid labor for the same work—it also at times conflicted with the ideology of white supremacy and the associated southern laws meant to enforce racial dominance. Agency law bestowed the slaveholder's power on an enslaved worker in transactions with third parties, often white businessmen who later sought to unwind the deal. The law of agency also conflicted at times with state laws that prohibited sales and business dealings with slaves. Nevertheless, southern courts frequently sided with slaveholders, who insisted that their powers could be delegated to enslaved workers.

Agency-related jurisprudence also illustrates the economic exploitation of slavery, which allocated all of the proceeds from an enslaved person's labor, talent, and expertise to the slaveholder.

TABLE OF CONTENTS

---

* Associate Professor, University of Oregon School of Law. I am grateful to Juliet E. K. Walker, Allison Madar, Angela Addae, Andrew Fede, and Samantha Prince for comments on a draft of this Article. I am also grateful to Zachary M. Johnson for research assistance, and to the editors of the Arizona Law Review.

INTRODUCTION

Within the humanities, scholarly explorations of the "agency" of slaves generally refers to the ways in which enslaved people acted on their own behalf, engaged in acts of resistance, or otherwise preserved their humanity despite their bondage.[1] In the legal context, "agency" refers to the law that applies to acts taken

1. *See, e.g.*, ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 13 (2d ed. 2018) (noting "a long line of superb recent scholarship on slavery" that "demonstrat[es] how social death in all its existential constraints on the slave could coexist with agency, cultural creativity, and occasional rebellion"); ALINE HELG, SLAVE NO MORE: SELF-LIBERATION BEFORE ABOLITIONISM IN THE AMERICAS 274 (Lara Vergnaud trans., 2019) (comparative approach, noting that enslaved people strategically chose rebellion, flight, or self-purchase depending on the system of domination and opportunities to resist); JENNY SHARPE, GHOSTS OF SLAVERY: A LITERARY ARCHAEOLOGY OF BLACK WOMEN'S LIVES 14 (2003) (seeking to "piece together a range of subjectivities from the fragmentary appearance of slave women in the historical records" and thereby "complicate an equation of their agency with resistance"); MICHELLE MCKINLEY, FRACTIONAL FREEDOMS: SLAVERY, INTIMACY, AND LEGAL MOBILIZATION IN COLONIAL LIMA, 1600–1700, at 7 (2016) (studying litigation initiated by enslaved people in colonial Peru, noting that although "slaves did not possess conventional sources of political or economic power . . . [they] repeatedly recruited courts to redress their grievances and . . . often prevailed in their complaints"); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 30 (1998) (examining how Frances Ellen Watkins Harper and other Black female abolitionists presented a different model of freedom that would "guarantee women property in the self"); DAVID ROEDIGER, SEIZING FREEDOM: SLAVE EMANCIPATION AND LIBERTY FOR ALL 9 (2014) (examining self-emancipation, defection, and resistance to slavery by enslaved people during the Civil War); Jennifer Spear, *Using the Faculties Conceded to Her by Law: Slavery, Law, and Agency in Spanish New Orleans, 1763–1803*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 65, 67 (2013) (documenting the "agency of the enslaved people" in manumission in Louisiana); Graham Cassano, *Labour's 'Strange Blindless' and the End of Jubilee*, 39(3) ETHNIC & RACIAL STUDS. REV. 334, 334–35 (2016) (book review discussing author's depiction of Black agency in labor struggles); Erin Woodruff Stone, *America's First Slave Revolt: Indians and African Slaves in Espanola, 1500-1534*, 60(2) ETHNOHISTORY 195, 197 (2013); Perry Felton, *Kidnapping: An Underreported Aspect of African Agency During the Slave Trade Era (1440–1886)*, 35(2) UFAHAMU: A J. OF AFR. STUDS. 1, 3 (2009) (discussing "African agency" in the transatlantic slave trade, "that is, the active involvement by some of continental African's indigenous inhabitants"); Antonio

on another's behalf.[2] However, the two concepts intersect when applied to enslaved workers acting on behalf of a slaveholder. Although one can conceive of an enslaved person's acts on behalf of a slaveholder as devoid of human agency[3]—their actions are coerced and for the financial benefit of the slaveholder—legal disputes over agency status also reveal the authority and discretion exercised by enslaved people in business dealings with third parties. These disputes involved negotiations by enslaved people over the terms of transactions with third-party businessmen, slaveholders, and sometimes other enslaved agents. These transactions suggest some fluidity in power relationships, where enslaved agents stood in the shoes of the slaveholder in dealings with third parties and in some cases leveraged their expertise and business acumen to negotiate more favorable personal arrangements with their slaveholder.

As I explain in greater detail below, southern courts recognized enslaved workers as legal agents because enforcing such contracts tended to protect the interests of the planter class.[4] Slaveholders delegated authority to enslaved workers in such varied settings as transportation and seafaring, shopkeeping and mercantile transactions, and other small business settings.[5] The case law further reveals that their counterpart on the other side of the transaction—largely white merchants, business owners, or customers—accepted the delegated authority of enslaved workers at the time of the transaction, although they sometimes later sought to challenge that authority in court to avoid performing the contract.[6]

However, treating enslaved workers as legal agents proved ideologically threatening to the institution of slavery. At a basic level, legal agency presumed human agency, which conflicted with a slave's legal status as chattel property.[7]

T. Bly, *Pretty, Sassy, Cool: Slave Resistance, Agency, and Culture in Eighteenth-Century New England*, 89 NEW ENG. Q. 457, 465 (2016) (studying slaveholder notices for the return of escaped slaves for what they revealed about the resistance and cultural expression of enslaved people). *But see* Walter Johnson, *On Agency*, 37 J. OF SOC. HIST. 113, 115 (2003) (critiquing an agency-based approach for importing a "notion of the universality of a liberal notion of selfhood" defined by white men and ignoring "a consideration of humanness lived outside the conventions of liberal agency").

2. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

3. As I describe in greater detail below, Orlando Patterson's theoretical framework operates largely within this frame. See PATTERSON, *supra* note 1, at 10 ("The slave could have no honor because of the origin of his status, the indignity and all-pervasiveness of his indebtedness, his absence of any independent social existence, but most of all because he was without power except through another.").

4. *See infra* Parts III & IV.

5. *See infra* Parts III–V.

6. *See infra* Parts III, IV & VI.

7. For a more in-depth discussion of the property/human dichotomy in the law of slavery, see discussion *infra* at Part I. *See also* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 63, 115 (1996) (although slaves in some jurisdictions, and for some purposes were treated as real estate, "for most purposes most of the time" the "chattel" label

Agency status also interfered with racial hierarchy and domination—enslaved agents acted outside the supervision of a slaveholder and in positions of quasi-equality with white businessmen.[8] Agency law also conflicted with other laws in slave states, which prohibited business dealings with slaves, selling liquor to slaves, and self-hiring arrangements.[9] Southern courts dealt with these conflicts in a variety of ways, in some cases contorting agency law to conform to legal restrictions on slaves and in other cases upholding the authority of enslaved agents while attempting to minimize the significance of such decisions.

This Article sits within a broader category of literature using legal disputes and business records as a window into the social history of slavery. Such research illustrates both the economic exploitation of slavery and the respects in which enslaved people resisted, avoided, and even harnessed labor control by slaveholders, and engaged in various forms of entrepreneurial activity.[10] African Americans with valuable skills and business experience—including artisans, tradespeople, sailors, managers, shopkeepers, and entrepreneurs—feature prominently among the ranks of enslaved agents. These individuals could be particularly profitable for slaveholders, who could avoid hiring paid labor for the same work or pocket the proceeds from the enslaved person's business enterprise.

Although slaveholders were the primary and most consistent beneficiaries of the talents of enslaved businesspeople, agency status could offer tangible benefits for enslaved workers.[11] Agency status conferred work-related power and authority

---

applied); STANLEY ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 50 (1959) ("Slaves in seventeenth-century Virginia had become, as a matter of actual practice classed on the same footing as household goods and other personal property."); Dred Scott v. Sandford, 60 U.S. 393, 418, 550, 625 (1857).

8. *See infra* Part VI(B).

9. *See infra* Parts V & VI(B).

10. *See generally* JULIET E. K. WALKER, THE HISTORY OF BLACK BUSINESS IN AMERICA: CAPITALISM, RACE, ENTREPRENEURSHIP (1st ed. 1998) (using a variety of historical records, including credit reports, to document Black entrepreneurial activity over hundreds of years); CAITLIN ROSENTHAL, ACCOUNTING FOR SLAVERY: MASTERS AND MANAGEMENT (2018) (using planting and accounting records as a window into plantation labor practices); ARIELA GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000) (using breach-of-warranty lawsuits to assess slaveholder portrayals of slave character and to documents acts of resistance); RONALD LEWIS, COAL, IRON, AND SLAVES: INDUSTRIAL SLAVERY IN MARYLAND AND VIRGINIA, 1715–1865 (1979) (documenting employment practices involving enslaved workers in industrial operations); *see also* MCKINLEY, *supra* note 1 (analyzing lawsuits brought by slaves in colonial Peru).

11. *See* WALKER, *supra* note 10, at 53 (documenting the business activities of enslaved workers—both within slaveholder organizations (which she terms "intrapreneurs") or in connection with their independent businesses. Those with independent businesses could earn money and accumulate personal property—with their owner's approval—which might include cash, as well as "livestock, horses and carriages"); *see also, e.g.*, H.B. White v. Cline, 7 Jones 174 (N.C. 1859), *in* 2 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 232 (Helen T. Catterall ed., 1929) [hereinafter Catterall] (an enslaved man's nominal ownership of $410 permissible, provided "the master keeps the actual, as well as legal control of the fund").

upon enslaved workers.[12] An enslaved worker's power to make legally enforceable deals or management decisions on behalf of a slaveholder provided discretion over how they spent their working time, the authority to undertake (or decline) proposed transactions, and managerial control over other workers. These forms of workplace power are not dissimilar to the distinctions we draw in today's workplace between high- and low-status employees.[13] And if, as Orlando Patterson suggests, free workers are distinct from the unfree through "respect for the employee, recognition of his dignity and honor,"[14] then the power wielded by enslaved agents would have challenged racial hierarchy and dominance.[15]

In addition, historian Juliet Walker documents a handful of examples in which enslaved workers kept some of the revenue in connection with their agency arrangements and eventually purchased their freedom with those funds.[16] Entrepreneurial activity was, however, a precarious route to freedom in a legal system that treated an enslaved person's assets as slaveholder property and prohibited enslaved people from entering into contracts on their own.[17] In several cases, courts thwarted enslaved business people at the threshold of freedom—invalidating self-purchase agreements, divesting them of years or decades of

---

12. LEWIS, *supra* note 10, at 82 (in the context of enslaved workers hired out to work in coal mines and iron works, historian Ronald Lewis commented that these arrangements were a "triangular push-and-pull of self-interest" between and among enslaved workers, their industrial hirers, and the original slaveholder, through which enslaved workers "gained a degree of influence over the nature of their daily existence").

13. For example, current wage and hour law distinguishes between "exempt" (typically salaried) and "non-exempt" (hourly) workers for purposes of minimum wage and overtime eligibility. 29 U.S.C. § 213. White-collar workers who do administrative work are only eligible for an exemption if—among other requirements—their "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.202. Wage and hour law includes another exemption for managers who direct the work of two or more employees, and who have the authority to hire or fire other workers, or whose opinion in such matters is given particular weight. 29 C.F.R. § 541.104; *see also* Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013) (in the discrimination context, defining a supervisor as someone who has been "empowered . . . to take tangible employment actions against the victim . . . such as hiring, firing, failing to promote, [or] reassignment with significantly different responsibilities").

14. PATTERSON, *supra* note 1, at 25.

15. To borrow Michelle McKinley's framework, agency law conferred a fractional freedom on enslaved workers. MCKINLEY, *supra* note 1, at 28, 58, 178; *see also* Michael Zeuske, *Historiography and Research Problems of Slavery and the Slave Trade in a Global-Historical Perspective*, 57 INT'L REV. OF SOC. HIST. 87, 103 (2012) (describing comparative approaches to slavery, which "elaborate [on] the absoluteness of antique slavery vis-à-vis other forms of forced and involuntary labour" and "conceptualiz[ing] in an integrative way" the "characteristics of coerced and unfree labor").

16. WALKER, *supra* note 10, at 55, 60 (describing enslaved workers who used proceeds of self-hiring arrangements to purchase their own freedom); JULIET E. K. WALKER, FREE FRANK: A BLACK PIONEER ON THE ANTEBELLUM SOUTH 31, 33, 39, 157 (2015).

17. WALKER, *supra* note 10, at 77 (noting that slave entrepreneurs also contended with laws prohibiting them from acquiring property, entering into contracts or engaging in business transactions); *see also* WALKER, FREE FRANK, *supra* note 16, at 39, 46; *see, e.g.*, Whitley v. Daniels, 6 Ired. 480 (N.C. 1846), *in* 2 Catterall, *supra* note 11, at 117 (involving penalty for trading with a slave).

savings, or criminalizing profitable business activities.[18] Consequently, some enslaved agents deemed escape a better route to freedom. Indeed, case law suggests that some enslaved agents successfully used their freedom of movement, social networks, and familiarity with transportation systems, to escape to the North.[19]

---

18. *See* Grimes v. Hoyt, 2 Jones Eq. 271 (N.C. 1855), *in* 2 Catterall, *supra* note 11, at 196 (involving an enslaved carpenter with an elaborate self-hire agreement, who would remit the proceeds of his work for five years and then "enjoy his freedom as he is now doing" and "remain nominally the slave of defendant"; agreement declared void as contrary to state policy); Barker v. Swain, 4 Jones. Eq. 220 (N.C. 1858), *in* 2 Catterall, *supra* note 11, at 223–24 (involving enslaved businessman Daniel Jones, who ran his own buggy manufacturing business; a dispute over the sale of a donkey led to a court invalidating his self-hire arrangements and future self-purchase contract, after which the administrator for slaveholder's estate took possession of his assets); GROSS, *supra* note 10, at 63 (describing the case of Bob Leiper, who "lived apart from his master, raised his family, and hired out his own time" as well as "purchased a slave for his own use." Leiper ended up embroiled in a legal dispute when his owner sought to claim ownership of Leiper's slave); *see also* Commonwealth v. Gilbert, 6 J.J. Marsh 184 (Ky. 1831) (involving a slaveholder indicted for permitting enslaved woman to hire herself out); Stanley v. Nelson, 28 Ala. 514 (Ala. 1856), *in* 3 Catterall, *supra* note 11, at 209 (citing *Clay's Digest* at 541); Jackson v. Bob, 18 Ark. 399 (Ark. 1857), *in* 5 Catterall, *supra* note 11, at 251 (declining to enforce provision in will declaring that Bob should be permitted to "work out his value"; regardless of whether Bob had actually performed the work); Brown v. Wingard, 4 Fed. Cas. 438 (D.C. 1822) (refusing to manumit enslaved man who, through a self-hiring arrangement, saved and paid the agreed upon purchase price); WALKER, *supra* note 10, at 69 (discussing the case of a dressmaker who hired her own time but slaveholder disputed her self-purchase); Fisher v. Sybil, 9 F. Cas. 141 (Brun. Col. Cas. 1816), *in* 2 Catterall, *supra* note 11, at 300 (discussing a runaway enslaved man who was found to have worked on a ship for five years; his compensation was delivered to the slaveholder); Worthington v. Crabtree, 1 Met. Ky. 478 (Ky. 1858), *in* 1 Catterall, *supra* note 11, at 437 (life-estate holder of Henry, an enslaved man, entered into a self-hiring arrangement; however, reversioners claimed it rendered him "ungovernable"; court sided with reversioners, authorizing Henry's sale).

19. *See* WALKER, *supra* note 10, at 56 (noting that mobility increased the flight risk for enslaved managers, which slaveholders mitigated through incentives, such as allowing the enslaved manager to run his own side business); IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM 45 (1st ed. 1974) (noting that most enslaved people who ran away "were skilled artisans, mechanics, and house servants. Almost all were acculturated Afro-Americans; many were literate; and some had traveled widely . . . Before they ran off, most fugitives were already part of the Black elite."); Sill v. S.C. R.R. Co., 4 Richardson 154 (S.C. 1850), *in* 2 Catterall, *supra* note 11, at 418 (referring to the "slave of the plaintiff . . . skilled in the business of attending a drug store," who was hired out to druggists and later escaped to New York); Meekin v. Thomas, 17 B. Mon. 710, 714 (Ky. 1857) (discussing an enslaved person named Lewis hired out to work on a steamship, which stopped at Cincinnati, where Lewis escaped to freedom); O'Neall & Chambers v. S.C. R.R. Co., 9 Richardson 65 (S.C. 1856), *in* 2 Catterall, *supra* note 11, at 448 (involving a self-hire agreement for three enslaved siblings: a bricklayer/plasterer, barber, and house painter; they were also musicians. For a time there was an "arrangement . . . that they should pay to him a fixed sum, keeping for themselves the surplus of their earnings," each had "monthly pass for the town" but were prohibited from leaving the state; they eventually escaped, and the slaveholder sued the railroad for negligence in connection with their escape); Graham v. Strader, 5 B. Mon. 173, 173 (Ky. 1844), *in* 1 Catterall, *supra* note 11, at 365 (discussing three

This Article begins with a literature review (Part I), followed by an overview of agency law generally then in effect (Part II). It then delves into case law involving enslaved agents. In Part III, I examine the relatively straightforward cases in which enslaved workers acted as managers. Part IV then examines cases in which enslaved workers acted as intermediaries. Next, Part V examines criminal cases involving prohibited transactions with slaves, such as the sale of alcohol. These cases implicated agency law whenever overseers and slaveholders arranged sting operations, in which they directed an enslaved worker to purchase the prohibited goods. Courts in such cases were forced to decide whether the transaction was rendered lawful because the worker was acting as the agent of the overseer or slaveholder.

Finally, Part VI examines third-party hiring arrangements (where a slaveholder leased an enslaved person's services to a third party in exchange for a fee) as well as self-hiring arrangements (where an enslaved person paid a leasing fee to the slaveholder for use of their own time). Self-hiring cases expose the limits of agency law under slavery. Unlike third-party hiring, self-hiring was generally illegal in slave states. Courts largely enforced self-hiring prohibitions, and in doing so, articulated their ideological objections to granting workplace freedom and power to enslaved workers. These cases further reveal the complexity—and legal precarity—of successful business operations founded by enslaved Black entrepreneurs.

I. LITERATURE REVIEW

This project was inspired by historian Juliet Walker's book, *The History of Black Business in America*, which documented the business activities of Black workers and entrepreneurs over hundreds of years.[20] Walker described numerous business activities of enslaved workers, in many cases using legal cases as historical sources. I examined the cases Walker identified, researched the law that applied to these business activities, and located other legal cases documenting such activities.

Legal historians have discussed agency law in a variety of contexts, though not specifically with respect to business transactions in which enslaved persons served as agents.[21] Anthony Chase provided the most in-depth analysis of agency

---

enslaved men, who were "well trained as dining room servants and as scientific musicians" who—according to the plaintiff—were often hired out to perform at "balls and parties," boarded a steamboat from Louisville, and eventually escaped to Canada. The defendants argued that they were sent to Ohio by the slaveholder to learn music and in doing so gained their freedom); McClain v. Esham, 17 B. Mon. 146, 154 (Ky. 1856) (involving an enslaved man who, "accustomed, without restriction of his owner, to hire himself out to whom and whenever he pleased," successfully escaped to Ohio); Evans v. Gregory, 15 B. Mon. 317 (Ky. 1855), *in* 1 Catterall, *supra* note 11, at 414 (recounting how an enslaved man hired out to work on a steamboat successfully escaped).

20. *See generally* WALKER, *supra* note 10, at 54, 58, 63, 67, 72, 77–79. Many of the examples documented in Walker's book originated from a compilation of legal cases by Helen Tunnicliff Catterall, which also serves as a source for this research.

21. *See* Anthony R. Chase, *Race, Culture and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 6 (1995); Jacob I. Corré, *Thinking Property at Memphis: An Application of Watson*, *in* SLAVERY AND THE LAW 437, 438 (Finkelman ed., 1997); *see also* WALKER, *supra* note 10, at 54, 58, 78 (assembling tables containing numerous cases that referenced the economic activity of enslaved workers).

law during slavery through a law review article examining contract law through the "experience of African-Americans during the period of slavery and immediately thereafter."[22] Chase argued that agency law was a difficult fit for the institution of slavery because agency relationships were legally founded in the agent's consent to act on behalf of the principal, and enslaved people could not consent to their status.[23]

Agency law was further ill-suited to slavery, Chase argued, because it tended to attribute liability based on the principal's control over the agent.[24] But in a legal context where masters had unlimited control, traditional principles of agency law would have allocated liability to slaveholders for all of the enslaved person's actions.[25] Chase observed that agency law was nevertheless critical to the institution of slavery.[26] Without agency, third parties injured by the acts of a slave would otherwise "be unable to recover anything from the slave, who owned nothing and who legally could not enter into contracts."[27] It also would have forced slaveholders to conduct all their business on their own or through paid labor, "a situation that was obviously inefficient and unworkable."[28]

Paul Finkelman and Mark Tushnet examined another facet of agency law through their respective analyses of the fellow-servant rule during slavery.[29] As applied to free workers, the fellow-servant rule exculpated employers from negligence claims if a worker was injured through a co-worker's acts or negligence.[30] However, the justification for the fellow-servant rule—that workers should have reported or refused the dangerous conditions—did not apply to enslaved workers.[31] For example, in *Scudder v. Woodbridge*, a Georgia court declined to apply the fellow-servant rule when an enslaved man drowned while working on a riverboat.[32] Unlike a free worker, the court reasoned, an enslaved worker would not be able to refuse or call attention to dangerous working conditions:

> They dare not interfere with the business of others. They would be instantly chastised for their impertinence . . . they have nothing to do but silently serve out their appointed time, and take their lot

---

22. Chase, *supra* note 21, at 6; *see also* Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 18 (1997) (noting that "slaves acted as agents in such varied tasks as receiving and loading cotton, conducting a transaction for tanning leather, selling a horse . . . accepting a notice, delivering a boat, and keeping books").

23. Chase, *supra* note 21, at 25.

24. *Id.*

25. *Id.*

26. *Id.* at 26.

27. *Id.*

28. *Id.*

29. MARK TUSHNET, THE AMERICAN LAW OF SLAVERY: 1810–1860, 183–85 (1981); Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEGAL HIST. 269, 279 (1987).

30. Finkelman, *supra* note 29, at 271; *see also* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 44 (2004).

31. Finkelman, *supra* note 29, at 283.

32. Scudder v. Woodbridge, 1 Ga. 195, 195 (Ga. 1846).

> in the meanwhile in submitting to whatever risks and dangers are incident to employment.[33]

Tushnet and Finkelman took differing positions on what the fellow-servant jurisprudence revealed about the institution of slavery. Tushnet focused on the tension between a northern legal system adapted to bourgeois capitalism and southern law situated in "slave social relations" that were hierarchical and "totalistic."[34] Tushnet argued that judicial rejection of a purely contract-based allocation of loss illustrated the relational rather than market-based ideology of slavery.[35] Finkelman, by contrast, argued that southern courts' rejection of the fellow-servant rule ultimately served the economic interests of slaveholders, because such disputes tended to involve slaveholders suing third-party hirers for the death or injury of a slave.[36]

Jacob I. Corré examined a different facet of agency law—disputes between slaveholders and third parties over vicarious liability for tortious acts by slaves.[37] Southern courts did not impose strict liability on slaveholders for every act committed by an enslaved person and instead cobbled together a form of partial liability distinct from both the rules that applied to free workers and from property law.[38] According to Corré, southern courts acknowledged the free will of slaves who had injured other people or intentionally destroyed property and analogized them to other workers who committed tortious acts on the job.[39] Corré concluded that agency law "had the virtue of implying a realistic account of the slave's mental capacities, but it could not accommodate the slave's lack of legal rights."[40]

Corré's approach falls within a larger body of legal scholarship noting the duality of a legal system that treated people as property while acknowledging their human agency in certain limited respects. Southern courts presumed some human agency on the part of enslaved people; for example, in criminal prosecutions[41] or

---

33. *See* TUSHNET, *supra* note 29, at 183–85.

34. *Id.* at 6–7, 176–78 (arguing that a purely market-based assessment of such disputes would have faulted the slaveholder for failing to bargain with the hirer for limits on the slave's activities or presumed that the hiring contract compensated the slaveholder for the risk of the slave's injury or death).

35. *Id.* at 186.

36. *See* Finkelman, *supra* note 29, at 279.

37. Corré, *supra* note 21, at 439.

38. *Id.* at 441–42.

39. *Id.* at 443–44.

40. *Id.* at 438; *see also* Alan Watson, *Thinking Property at Rome*, *in* SLAVERY AND THE LAW, *supra* note 21, at 419 (discussing "some problems that occur when slaves are considered as 'thinking property'" under Roman law).

41. *See, e.g.*, Malick Ghachem, *The Slave's Two Bodies: The Life of an American Legal Fiction*, 60(4) WM. & MARY Q. 809, 834–35, 837 (2003) (describing the conviction of an enslaved person for treason as a grudging acknowledgement of his citizenship and noting that southern laws "inserted the slave into a legal web of restrictions, duties, and obligations, but merely theoretical protections"); Walter Johnson, *Inconsistency, Contradiction and Complete Confusion*, 22 LAW & SOC. INQUIRY 405, 410 (1997) (discussing how enslaved people had some common law protections when charged with a crime, but "except in the case of capital crimes, slaves were generally tried in separate courts and were subject to different

through prohibitions on racial intermarriage.[42] In her analysis of breach of warranty disputes involving slaves, Ariela Gross notes that human agency was often central to the legal dispute—a buyer might contend that a slave's tendency to run away was a personality trait, while the seller might insist that it was a reaction to poor treatment.[43] Whether nature or nurture won the legal argument, both were human attributes.

In *Slavery and Social Death*, Orlando Patterson rejects the property/humanity distinction, arguing that "proprietary claims and powers are made with respect to many persons who are clearly not slaves"[44] and that all slaveholding societies in history "recogniz[ed] the slave as a person in law."[45] Patterson argued that the enslaved person's status as a "human surrogate" rendered him powerless, because he was a mere "extension of his master's power"[46] rather than an independent actor.

In this Article, I follow Patterson's counsel and do not dwell on whether agency law does or does not acknowledge the humanity of the enslaved agents involved. However, I interrogate Patterson's claim that an enslaved person's use of the master's power was synonymous with powerlessness. Instead, agency law sometimes had the indirect effect of conferring power and status on enslaved workers.[47]

II. NINETEENTH CENTURY AGENCY LAW

The law of agency originated in British common law, as an offshoot of master servant law (what we would today call employment law), which regulated the circumstances in which a master would be liable for transactions conducted

---

laws," and even when "in the same courts and under the same laws, slaves received more severe punishments than did whites for the same offense" as well as "the total exclusion of their testimony" except confessions and statements implicating other slaves).

42. William Fisher, *Ideology and Imagery in the Law of Slavery*, *in* SLAVERY AND THE LAW, *supra* note 21, at 45.

43. GROSS, *supra* note 10, at 34 (breach-of-warranty lawsuits represented the majority of civil disputes involving slaves in the court files she reviewed).

44. PATTERSON, *supra* note 1, at 21.

45. *Id.* at 22. Patterson writes, "No slave society took the position that the slave, being a thing, could not be held responsible for his actions. On the contrary, the slave usually paid more heavily for his crimes when the victim was a freeman." *Id.* at 196.

46. *Id.* at 4.

47. Beyond Orlando Patterson—who examined slavery from a comparative perspective—this approach would also be theoretically aligned with scholars who examined gradations of freedom within unfree systems. *See generally* PATTERSON, *supra* note 1. Michelle McKinley, for example, examined the legal rights afforded to, and exercised by, enslaved people in colonial Peru between 1600 and 1700, which she characterized as "fractional freedoms." *See generally*, MCKINLEY, *supra* note 1; *see also* STANLEY, *supra* note 1, at 29, 34 (examining the "elements of autonomy and subordination" at play in slavery, marriage, contract and wage labor following the Civil War, looking in particular at the respects in which the husband's right to subordinate the wife through marriage was understood to be a privilege associated with emancipation from slavery).

between the servant and a third party on his behalf.[48] In an 1894 treatise, American jurist John Wigmore charted the history of British lawsuits against masters for the acts of "servants and other agents" from 1300 to 1850.[49] In the earliest cases, the master would not be liable for the servant's acts unless he commanded or assented to the act.[50]

As the economy in England grew in complexity, agency law grew in importance and breadth.[51] As jurist Francis Wharton wrote in 1876, agency law enabled capitalists to delegate acts to others, thus "enlarg[ing] business capacity by multiplying the modes by which the individual acts; so that instead of being restricted to the single acts of industry he is capable of performing by himself, he is able to undertake through others specialties of which they alone are capable."[52]

In a famous eighteenth century treatise, British jurist William Blackstone explained:

> [I]f the [waiter] at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master; for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to [pour] and sell it at all is impliedly a general command.[53]

Blackstone thus articulated a version of vicarious liability that still survives today with respect to employees—that "whatever a servant is permitted to do in the usual course of his business . . . is equivalent to a general command."[54] By the mid-1800s, courts in Britain started using terms that would now be familiar to the modern lawyer—whether the task was within the "scope" or "course" of employment.[55]

---

48. John H. Wigmore, *Responsibility for Tortious Acts: Its History. II. Harm Done by Servants and Other Agents: 1300–1850*, 7 HARV. L. REV. 383, 384–85 (1894); *see also* HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877) (employment law treatise characterized as "master servant" law).

49. Wigmore, *supra* note 48, at 384–85.

50. *Id.* at 391.

51. *Id.* at 393 ("The conditions of industry and commerce were growing so complicated, and the original undertaker and employer might now be so far separated from the immediate doer, that the decision of questions of masters' liability must radically affect the conduct of business affairs in a way now for the first time particularly appreciated. A time had come when persons administering the affairs of others could no longer be classed indiscriminately as 'servants' at the beck and call of the master for each bit of air, a time when in social development the position of a factor or agent vested with more or less authority and discretion was in fact no longer that of a servant.").

52. FRANCIS WHARTON, A COMMENTARY ON THE LAW OF AGENCY AND AGENTS 5 (1876).

53. Wigmore, *supra* note 48, at 396 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 429).

54. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 429).

55. *Id.* at 402; JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 23 (1839).

As England industrialized, agency became somewhat untethered from the master servant relationship.[56] An 1811 treatise by English barrister William Paley portrayed agency as closer to what we would now call commercial law: the law governing commercial transactions. Agency law, Paley argued, was motivated by the "extension of modern commerce" and "the novelty and variety of the channels through which it is carried on."[57] These new and varied channels were populated with third parties who specialized in representing others in business transactions, such as brokers and lawyers.[58]

However, agency status was not limited to those with full legal status. Paley wrote, "Persons who are disqualified from acting in their own capacity, as infants and femes coverts, may yet act as agents for others."[59] In his 1839 treatise on agency law, American jurist Joseph Story echoed Paley's position. He wrote:

> [T]he general maxim of our laws, subject only to a few exceptions . . . is that whatever a man *sui juris* may do of himself, he may do by another; and . . . that whatever is done by another is to be deemed done by the party himself.[60]

Even an individual without legal capacity "in his or her own right" such as "infants, femes covert, persons attained, outlawed, or excommunicated"[61] could act as an agent through the legal authority of another.

Having adapted over time to a wide variety of circumstances, nineteenth-century agency law tended to be fact specific.[62] Whether the principal could be bound by the agent's actions depended on whether the agent was hired to undertake a single transaction (a "special agency") or hired more generally, as in the case of an employee.[63] With respect to employees, the court inquired whether the acts were

---

56. OLIVER WENDELL HOLMES, THE COMMON LAW 232 (1881). Holmes claimed—inaccurately—that master servant law and the law of agency had always been one and the same: "There is no trouble in understanding what is meant by saying that a slave has no legal standing, but is absorbed in the family which his master represents before the law . . . the characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of his principal."

57. WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT: CHIEFLY WITH REFERENCE TO MERCANTILE TRANSACTIONS vii (1812).

58. *Id.* at 13; STORY, *supra* note 55, at 23.

59. PALEY, *supra* note 57, at 2; *see also* CHARLES MANLEY SMITH, A TREATISE ON THE LAW OF MASTER AND WORKMAN 27 (1852) (opining that a husband's liability for contracts entered into by the wife depends on whether she was expressly or impliedly authorized to do so, as in the case of a wife who hires a servant).

60. STORY, *supra* note 55, at 3, 115–17.

61. *Id.* at 8–9; *see also* PALEY, *supra* note 57, at 2 (stating that "[p]ersons who are disqualified from acting in their own capacity, as infants and femes coverts, may yet act as agents for others").

62. STORY, *supra* note 55, at 89 (noting that "incidental [agency] powers are generally deduced either from the nature and objects of the particular act or agency, or from the particular business, employment, or character of the agent himself").

63. *Id.* at 18–19, 67–68.

within the scope of the employment.[64] Otherwise,[65] the scope of agency would also depend on the actual and perceived[66] authority delegated to the agent based on the agreement between the agent and the client (if any),[67] past practice,[68] customs in the trade,[69] the type of transaction,[70] and other surrounding circumstances.[71]

Agency law promoted the economic interests of business owners by enabling workers to transact business on their behalf. Although agency-related rules might not favor an employer in a particular case—he might, for example, be on the hook for a worker's damage to a neighboring property—rules that made employers responsible for agreements made by workers favored commerce and predictability.[72] In other words, agency law was conducive to capitalism.

Agency law likewise greased the wheels of slavery. Agency enabled slaveholders to delegate authority to enslaved workers despite their status, which multiplied the amount of business that slaveholders could accomplish with unpaid labor. This delegation of power—and its implicit recognition of the skill, expertise, and judgment of enslaved workers—conflicted with the white supremacist ideology of slavery.

III. ENSLAVED MANAGERS

This Article uses case law regarding enslaved agents as a window into the business realities of the time. Such a methodology presents certain limitations. In particular, legal cases regarding the agency status of slaves are relatively sparse—the analysis herein is based on approximately 85 cases.[73]

---

64. *See* SMITH, *supra* note 59, at 112 ("Where the authority of a servant to bind his master upon contracts arises merely by implication, the general rule is, that the authority of a servant is co-extensive with his usual employment, and the scope of his authority is to be measured by the extent of his employment."); *see also* STORY, *supra* note 55, at 94 (identifying relevant questions as whether agent's activities "are usually done by such classes of agent" and of the typical rights and duties exercised by those agents).

65. SMITH, *supra* note 59, at 118 (noting that for matters outside the scope of employment, the worker would be treated as a special agent, and those principles would apply).

66. *See* STORY, *supra* note 55, at 72, 76, 84.

67. *Id.* at 58, 62–63, 66, 71.

68. *Id.* at 78, 80, 82, 86.

69. *Id.* at 60, 73.

70. *See id.* at 59, 63–64

71. *Id.* at 84–85.

72. *Id.* at 115–17, 126 (noting that agency law was also organized around protecting the interests of the innocent third party transacting with the agent and what they could reasonably infer about the agent's authority under the circumstances).

73. This figure includes self-hiring cases, which involve enslaved people acting on their own behalf, and only nominally on behalf of the slaveholder. It does not include all cases about leasing/hiring enslaved people, which was a relatively common practice, and has been examined by scholars examining other legal principles, such as the fellow-servant doctrine. *See* Finkelman *supra* note 29; TUSHNET, *supra* note 29. However, I include certain leasing/hiring cases where they relate to an enslaved person's authority or business dealings. Far more common were cases relating to whether white agents of slaveholders had the

In addition, the experiences of enslaved agents are filtered through the facts as characterized by the white litigants (typically the slaveholder and a third party), and ultimately by the court. These white litigants generally had a personal or legal incentive to distort the role of the enslaved intermediary, sometimes minimizing their role but other times highlighting their involvement to invalidate the transaction.[74] We rarely hear from the enslaved worker directly, because the law of slavery generally barred enslaved people from testifying against white people.[75]

Nevertheless, the case law suggests that slaveholders relied on agency law to delegate authority to enslaved workers, and that these workers exercised that authority in a variety of contexts. The following Parts of this Article divide the case law into four categories: those involving enslaved managers who ran the slaveholder's business (Part III); enslaved intermediaries who transacted business with third parties (Part IV); liquor-sale-sting-operation cases, where agency law came into direct conflict with state prohibitions on transactions with enslaved people (Part V); and complex hiring and self-hiring arrangements (Part VI).

The earliest dated case I located involving an enslaved agent with managerial authority was the 1798 case of *Booth v. L'Esperanza*.[76] In that case, a South Carolina court determined that an unnamed elderly slave was the true captain of a ship, and attributed ownership to his slaveholder.[77] *Booth* involved a dispute over ownership of a ship plundered by pirates. The nationality of the ship was contested because its surviving crew consisted of three people with different nationalities: an unnamed elderly slave, who was the acknowledged highest ranking crew member on the ship; Williamson, a free Black man; and a young Spaniard who claimed the ship on behalf of the pirates.[78]

The court attributed ownership to the slaveholder of the elderly man because the slaveholder had authorized him to command the ship.[79] The court also

---

authority to buy or sell a slave, often in connection with their transport out of state. *See, e.g.*, Travis v. Claiborn, 5 Munford. 435 (1817), *in* 1 Catterall, *supra* note 11, at 127 (referring to an agent of the slaveholder who transported an enslaved man and sold him for a commission); Cordell v. Smith, 6 Randolph 612 (Va. 1828), *in* 1 Catterall, *supra* note 11, at 157 (referring to the son of a slaveholder, who acted as his father's agent in moving enslaved people from Maryland to Virginia); Heffernan v. Grymes, 2 Leigh 512 (1831), *in* 1 Catterall, *supra* note 11, at 163 (discussing how an agent purchased 43 enslaved people and transported them to New Orleans, where they were to be sold); Lightfoot v. Strother, 9 Leigh 451 (Va. 1838), *in* 1 Catterall, *supra* note 11, at 192 (involving agent who transported enslaved people from D.C. to Richmond); Jameson v. Deshields, 3 Grattan 4 (1846), *in* 1 Catterall, *supra* note 11, at 209 (involving agent of slaveholder who sold enslaved person in Alabama).

74. As illustrated in the jurisprudence discussed in Parts IV through VI, white litigants might highlight the involvement of an enslaved person to invalidate a transaction that would be illegal when conducted by an enslaved person. Conversely, a slaveholder might minimize the role of an enslaved person to prove that the transaction was authorized and render the contract enforceable.

75. MORRIS, *supra* note 7, at 63, 193.

76. I located two earlier cases involving self-hiring—one from 1777 and one from 1792. *See* discussion *infra* Part VI.

77. Booth v. L'Esperanza, 3 F. Cas. 885, 885–68 (D.S.C. 1798).

78. *Id.*

79. *Id.* at 886.

conceded that such arrangements were common: "[A]s most of our coasters are navigated by slaves, and frequently commanded by a slave, there can be no doubt . . . that slaves in such a circumstance would be allowed to represent their owners."[80] While the ruling was inconsistent with how the law of slavery generally conceived of enslaved people,[81] it favored the economic interests of slaveholders. The court acknowledged the underlying conflict, but concluded that "the general policy of the country as to slaves must, therefore, admit of exceptions in particular cases."[82]

The court in *Booth v. L'Esperanza* did not lean heavily on doctrine or ideology; it seems to have accepted the business reality that boats were often commanded by slaves, such that the only way to protect the economic interests of slaveholders was to treat enslaved people as agents. The court reasoned, "because by the laws of this state, a slave authorized by his master to do an act, which a slave could not otherwise do, is justified, provided the master avows the order."[83]

A second case from South Carolina, *Chastain v. Zach & Bowman*, further illustrates the business practice of delegating authority to enslaved ship captains.[84] In 1833, Jack, an enslaved captain, was navigating a boat down the Savannah River. Jack and the others were instructed by the owners of the boat to "procure freight whenever they could,"[85] as they had done in the past. The plaintiff, Richard Chastain, hailed Jack from a landing on shore and inquired whether the boat could haul some cotton down the river to Augusta.[86] Jack agreed.[87]

To take on the freight, Jack presumably entered into an oral contract with Chastain, setting a fee in exchange for the service. It is possible that Jack and Chastain bartered over terms, though the court made no reference to the negotiation process. They must have agreed on a fee, however, because Jack and the crew loaded

---

80. *Id.*

81. MORRIS, *supra* note 7, at 63, 115 (enslaved people as chattel property).

82. *Booth,* 3 F. Cas. at 886.

83. *Id* at 885–86. *But see* Miles v. James, 1 McCord 157 (1821), *in* 2 Catterall, *supra* note 11, at 317 (involving a white ferryman who directed customers to Black ferryman for passage; court cited "the law declaring that ferries shall be kept by white men" and as such "could not be his agent").

84. Chastain v. Zach & Bowman, 1 Hill (SC) 270 (S.C. Ct. App. 1833); *see also* WALKER, *supra* note 10, at 54 (noting that, according to *Wilkes v. Clark*, colonial slaves in New England served as captains on their owners' ships); Wilkes v. Clark, 1 Devereux 178 (N.C. 1827), *in* 2 Catterall, *supra* note 11, at 52 ("The Defendant had a boat commanded by one of his slaves, plying for freight on the river Roanoke."); State v. Nat, 13 Iredell 154 (N.C. 1851), *in* 2 Catterall, *supra* note 11, at 162 (involving Nat, an enslaved man, who operated a river boat transporting goods in partnership with a white man); Doubrere v. Grillier's Syndic, 2 Mart N.S. 171 (La. 1824), *in* 3 Catterall, *supra* note 11, at 474 (involving an enslaved man who saved up $1,700 for self-purchase primarily through "carry[ing] on trade in a coasting vessel"); Wilson v. State, 21 Md. 1 (Md. 1864), *in* 4 Catterall, *supra* note 11, at 145 (referring to an enslaved man who was hired "to work on board of, and assist in, the management and sailing of the sail vessel of the defendants").

85. *Chastain*, 1 Hill (SC) 270, 271 (1833).

86. *Id.* at 270.

87. *Id.*

the cotton onto the boat.[88] In the end, the cargo never reached Augusta.[89] Sometime thereafter, the cotton (and possibly the boat) was burned, giving rise to the lawsuit.[90]

The legal issue in the case was whether Jack was authorized to take on freight on the boat owners' behalf.[91] If so, the boat owners would be liable for the loss of the cotton. The trial judge presumed that Jack could legally qualify as an agent: he instructed the jury that a "slave might be the agent of his master."[92] He further instructed the jury that the boat owners were not liable "unless [Jack] was his master's agent, and authorized to take in freight."[93] And such "authority might be proved by shewing [sic], that such was the custom of boat owners, or by proving that the defendants had given such authority."[94] To prove a custom "it must be proved to be universal."[95]

The jury's verdict provides further insight into what the white jurors considered common business practices at the time. The jury concluded that Jack had served as an authorized agent of the boat owners.[96] On appeal, the court left the jury's verdict intact, noting the ample evidence of such agency status.[97] Two white witnesses testified that they heard the boat owners telling the crew to take on freight.[98] The plaintiff also presented evidence that the crew had in fact delivered the payment associated with a prior freight shipment of produce, which the court recognized as "a distinct recognition of their authority to contract for them."[99]

Further, the court characterized Jack's authority as one of "general" authority, meaning he was generally authorized to represent the boat owners in a wide variety of matters, rather than a more limited form of "specific" authority that ended with a particular transaction.[100] This is the sort of authority that would be associated with longtime agency relationships or with employees generally.[101] The

---

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 271.
92. *Id.* at 271.
93. *Id.* at 270.
94. *Id.* at 271.
95. *Id.*
96. *Id.* at 271.
97. *Id.* at 271.
98. *Id.*
99. *Id.* at 271.
100. *Id.*; *see also* PALEY, *supra* note 57, at 2 ("The authority of an agent . . . is said to be general or special with reference to its object, i.e., according as it is confined to a single act, or is extended to all acts connected with a particular employment. With reference to the manner of its execution, it is either limited or unlimited, i.e., the agent is either bound by precise instructions, or left to pursue his own discretion.") However, as law professor Morton Horwitz observed, the distinction between special and general agency became increasingly problematic as the economy became more complex and transactions with strangers more common. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 40–41, 45 (1992).
101. *See* PALEY, *supra* note 57, at 2; *see also* discussion of general and specific agency *supra* at Part II.

court also alluded to substantial testimony that the practice of authorizing enslaved workers to accept freight was commonplace, if not universal.[102]

Similarly, in the 1802 South Carolina case of *Snee v. Trice*, the court instructed the jury that slaveholders would be liable for the negligent acts of enslaved workers "in all cases where [they] are permitted to perform any public duty, or to carry on any handicraft trade or calling, or to *perform or superintend any other kind of business where public confidence is to be reposed*: as, for instance, keepers of public ferries."[103] In doing so, the court implicitly acknowledged that enslaved workers served in positions of responsibility and authority, which produced "many" legal disputes over whether the slaveholder would be responsible for the consequences that flowed from an enslaved person's work-related decisions.[104]

Historian Juliet Walker documented numerous instances in which enslaved workers ran the businesses of their slaveholders,[105] which would have necessitated

---

102. Chastain v. Zach & Bowman, 1 Hill (S.C.) 272 (S.C. Ct. App. 1833).

103. Snee v. Trice, 2 Bay 345, 348–49 (S.C. 1802) (emphasis added) (reciting jury instructions); *see also* Corré, *supra* note 21, at 497–500 (discussing slaveholder liability for the acts of enslaved workers).

104. *Snee*, 2 Bay 345, 348 (jury instructions prefaced that "there were many cases . . . where masters were answerable" for decisions made by enslaved people). The court also referred to a variety of skilled trades performed by enslaved workers—blacksmiths, tailors, millers—who would be held to a negligence standard for their work. *Id.* at 349.

105. Walker characterized these workers as "intrapreneurs"—"bondesmen granted decision-making authority in managing the businesses of their owner in both the agricultural and nonagricultural sectors." WALKER, *supra* note 10, at 52–57 (noting that "large plantation owners and businesspeople . . . found it to their economic advantage to use their slaves in managerial positions, as opposed to paying wages to whites for such labor"), 63 (collecting cases). *See also* Gage v. McIlwain, 1 Strobhart 135, 135 (S.C. 1846), *in* 2 Catterall, *supra* note 11, at 402 (discussing how "Rogers ... carried on the blacksmith's business, by his slave, who had entire charge of the workshop." A posted notice on the workshop advised customers that "they consented to be charged according to the memorandum made by the" enslaved blacksmith); Hale v. Brown, 11 Ala. 87, 88 (1847), *in* 3 Catterall, *supra* note 11, at 163 ("blacksmith and wagon-making shop . . . conducted by slaves, the principal one having been purchased . . . and the others afterwards learned the trade."); Sill v. S.C. R.R. Co., 4 Richardson 154, 154–57 (1850), *in* 2 Catterall, *supra* note 11, at 418 (discussing a "slave of the plaintiff . . . skilled in the business of attending a drug store" who was hired out to druggists and later escaped to New York); *see also* Molett v. State, 33 Ala. 408, 409 (1859), *in* 3 Catterall, *supra* note 11, at 229–30 (prosecuting slaveholder who owned five different plantations but apparently did not have a white overseers, and traveling periodically between the properties, such that on one plantation there were "ten or fifteen slaves . . . who worked and lived on the place; and that no white person resided on the place"—suggesting that the enslaved workers managed the plantation themselves in the slaveholder's absence); Fath v. Meyerses Adm'r, 27 Mo. 568, 569 (1858), *in* 5 Catterall, *supra* note 11, at 208 ("Many farmers own shops entirely under the superintendence of a negro blacksmith."); Rippy v. Gant, 4 Ired. Eq. 443, 445 (N.C. 1847), *in* 2 Catterall, *supra* note 11, at 120 (blaming his "manager George"—an enslaved man—for his financial losses, due to George's decision to "clea[r] too much land, and ru[n] too often to the Smith's shop"); Foster v. Taylor, 2 Brevard 348, 348 (S.C. 1809), *in* 2 Catterall, *supra* note 11, at 293 (referring to a Black man who

full agency powers. Enslaved workers sometimes served as overseers and plantation managers, nominally in the role of "watchman" or "driver."[106] Walker also collected newspaper articles and advertisements referring to the managerial status or skills of enslaved workers.[107] Walker separately wrote a biography of entrepreneur Free Frank, who ran his slaveholder's farm for years while his slaveholder lived in another state.[108] To do so, Frank would likely have had to negotiate on the slaveholder's behalf to buy supplies and sell the proceeds of the farm.

Walker uncovered the additional example of Simon Gray, a corporate slave owned by the Andrew Brown Lumber Company.[109] Gray served as the captain of the company's riverboat on the Mississippi.[110] He supervised a crew that included both free white workers and slaves.[111] Gray was also "given the authority to negotiate prices, extend credit, and serve as the company's bill collector."[112] Gray received a salary of $20 per month, saving the lumber company about $2,000 per year in wages (about $60,000 in today's dollars) that it would have had to pay to a white worker in the same role.[113] Gray was also an entrepreneur with "his own riverboat business hauling lumber, sand, and cordwood to the New Orleans market."[114] Thus, Gray improbably embodied all Antebellum employment statuses at once—agent, business owner, wage laborer, and slave.

---

managed a cotton cleaning machine for its owner; it is unclear if the Black man was enslaved or free); WALKER, *supra* note 10, at 56 (documenting the case of Robert Gordon, an enslaved man who profitably managed a coal yard, and in exchange was allowed to sell the "slack" coal on his own behalf, through which he purchased his freedom and later went into business for himself).

106. *See, e.g.*, WALKER, *supra* note 10, at 62–66 (citing Frederick Law Olmsted); ROSENTHAL, *supra* note 10, at 96 (quoting a narrative from former slave Charles Thompson, who acted as an overseer); TRISTAN STUBBS, MASTERS OF VIOLENCE: THE PLANTATION OVERSEERS OF EIGHTEENTH-CENTURY VIRGINIA, SOUTH CAROLINA, AND GEORGIA 28–29 (2018) (noting that "bondpeople could also perform the managerial role capably and effectively," though noted that they were "generally few in number: the majority of supervisors were white, which southern plantation societies regarded as socially and legally necessary"); Garnett v. Sam & Phillis, 5 Munford 542 (Va. 1817), *in* 1 Catterall, *supra* note 11, at 128 (stating an enslaved man named Sam served as an overseer); Young v. Jones, 9 Hum. 551, 552 (Tenn. 1848), *in* 2 Catterall, *supra* note 11, at 539 (referring to a Black man who was hired to "conduc[t]" a farm, though unclear whether he was enslaved or free); Armstrong v. Baker, 6 Ired. Eq. 553, 554 (N.C. 1850) (quoting a will that directed the administrator to purchase an enslaved man to run a farm).

107. WALKER, *supra* note 10, at 54.

108. WALKER, FREE FRANK, *supra* note 16, at 31 (noting that Frank was one of Walker's ancestors); *see also* Maupin v. Wools, 1 Duvall 223, 224 (Ky. 1864), *in* 1 Catterall, *supra* note 11, at 447 (enslaved man, Simon, "managed much of her business on her farm, and so far, seemed to possess her full confidence, and might exercise some influence").

109. WALKER, *supra* note 10, at 55.

110. *Id.*

111. *Id.*

112. *Id.* at 55–56.

113. *Id.* at 56.

114. *Id.*

Industrialists and mining operators made use of slave labor, as Ronald Lewis documented in his book, *Coal, Iron and Slaves*.[115] Enslaved workers often worked alongside of and in some cases supervised white workers.[116] Lewis notes that two of the mine pits he examined included 21 white workers and 150 Black workers, of whom 24 were free.[117] Given the size of the work crews and shifts, Lewis estimates that some of supervisors were Black workers.[118] A visitor to one of those mines in 1837 reported that the "mining operations had been superintended and directed entirely by a . . . slave . . . [who was later] emancipated, and then paid $200 a year wages."[119]

Even when enslaved managers did not transact business with third parties outside the operation, they served as legal agents within the organization.[120] In

115. *See generally* LEWIS, *supra* note 10.

116. By the end of the Civil War, skilled Black tradespeople vastly outnumbered their white counterparts in the South. WALKER, *supra* note 10, at 150–51 ("According to an 1865 census of occupations in the South, there were only 20,000 skilled white craftsmen and tradesmen, compared to 100,000 skilled blacks, most of whom were former slaves."); *id.* at 57 (discussing Horace King, a bridge-builder and contractor who operated as "more of a junior partner" in the slaveholder's enterprise); *see also* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 17 (1985) (noting that in industrial operations in the late nineteenth century, skilled workers often played a formal or informal supervisory role over unskilled workers). However, this may not necessarily have been true for enslaved tradespeople in industrial settings, where their knowledge and expertise tended to be devalued. In his autobiography, Frederick Douglass remarked that he could not find paid work in his skilled profession in the North (caulking) and had to take a job as an unskilled laborer. *See* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 99 (1845), https://www.ibiblio.org/ebooks/Douglass/Narrative/Douglass_Narrative.pdf [https://perma.cc/59B4-G2WZ] ("Such was the strength of prejudice against color, among the white [caulkers], that they refused to work with me, and of course I could get no employment."). These barriers persisted during Reconstruction. John Hope Franklin wrote that Black workers moving north had "little prospect that they would secure employment in the new ventures (the mills were for whites . . .) but they went along hopefully and were there to perform the domestic chores for the white men and women who found jobs in the new stores, factories, and mills." JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 178 (1994).

117. LEWIS, *supra* note 10, at 71.

118. *Id.*

119. *Id.* at 70.

120. STORY, *supra* note 55, at 424 ("No action will ordinarily lie against an agent, for the misfeasance or for the negligence of those, whom he has retained for the service of his principal, by his consent, or authority."); *id.* at 165 ("It is not to be denied, that if a principal employes [sic] several agents to transact jointly a particular piece of business, he is equally responsible for the conduct of each . . . He cannot shift or avoid this responsibility by the multiplication of his agents."); *id.* at 39 ("Ship's-husband . . . general agent of the owners. . . intrusted [sic] with authority to direct all proper repairs . . . to hire the officers and crew; to enter into contracts for the freight or charter."); *id.* at 145 (discussing a ship master "usually intrusted [sic] with the discharge, as well as hiring, of the officers and seamen of the ship in the home port"); *id.* at 509–10 ("Where agents employ sub-agents in the business of agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations, and are bound to the same duties, in regard to their immediate employers, as if they were the sole and real principals").

directing the work of others, enslaved managers used the borrowed power of the employer. The more complex the organization, the more abstracted and delegated the agency relationship becomes, such that the owner primarily or even exclusively (in the case of corporations) acts through those agents.[121]

IV. ENSLAVED INTERMEDIARIES

As Anthony Chase observed, courts "applied traditional agency principles" to business disputes where enslaved people had transacted business on a master's behalf.[122] Under general principles of agency law, a principal would be liable for impliedly authorizing the acts of an agent where it was common practice to do so, either for that particular principal or among similar such businesses.[123] Consequently, southern courts would sometimes inquire as to whether delegating authority to an enslaved person was a common practice.[124] Legal cases involving enslaved agents thus illustrate not only the facts of individual cases but also common business practices in similar transactions.

Agency law applied to virtually any instance in which an enslaved person interacted with third parties on the slaveholder's behalf. This might be as mundane as an enslaved worker purchasing goods or services for the slaveholder.[125] In *Jones v. Allen*, for example, the Tennessee Supreme Court noted the common practice of sending enslaved workers out to perform business and fulfill community obligations:

> By universal usage, they are constituted the agents of their owners, and are sent on their business without written authority.

---

121. *See, e.g.*, *id.* at 175 ("The corporation is acting and speaking through the several directors, who jointly represent it in the particular transaction . . . there can be no actual notice to a corporation aggregate, except through its agents or officers."); *id.* at 136–37 (describing the many respects in which a cashier at a bank is entrusted to act on behalf of the bank); *see also* SMITH, *supra* note 59, at 31–32 (describing the circumstances under which a corporation can be liable for agreements made by its employees). The traditional rule Smith recounts is one where the corporation's agent is "appointed under seal." However, Smith notes that the rule interferes with "matters of trifling importance of frequent occurrence, such as the appointment of a servant, cook, or butler." Smith notes that British common law had begun recognizing exceptions for such matters and predicted that the seal formality would be abolished in the United States. *See also* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 39 (1992) (noting that "the law of agency . . . g[rew] in legal significance as the corporate form of business became dominant").

122. Chase, *supra* note 21, at 28.

123. Wigmore, *supra* note 48, at 395–97.

124. *See, e.g.*, Chastain v. Zach & Bowman, 1 Hill (S.C.) 270, 270 (S.C. Ct. App. 1833) ("There was also some evidence to shew [sic] the general custom of the river. Some witnesses proved, that it is the custom to allow patroons to take in freight generally."); Booth v. L'Esperanza, 3 F. Cas. 885, 886 (D.S.C. 1798) ("Most of our coaster are navigated by slaves, and frequently commanded by a slave."); Bailey v. Barnelly, 23 Ga. 582, 583 (1857), *in* 3 Catterall, *supra* note 11, at 59 (describing practices of blacksmith shops run by Black businessmen).

125. *See* Wahl, *supra* note 22, at 18 (noting that "slaves acted as agents in such varied tasks as receiving and loading cotton, conducting a transaction for tanning leather, selling a horse . . . accepting a notice, delivering a boat, and keeping books").

> And in like manner . . . sent to perform those neighborly good offices common in every community . . . without its ever entering the mind of any good citizen to demand written authority of them . . . verbal consent may be implied from circumstances.[126]

In a North Carolina case, *State v. Randall Presnell*, the slaveholder testified that he "usually furnished" a man named Nelson, one of his slaves, "with money and authorized [him] to provide necessaries, such as provisions for himself and horses, shoeing the horses, repairing the wagon and the like."[127] Likewise, in a South Carolina case, *Johnston et ux v. Barrett*, a court enforced an oral contract made between an enslaved woman and a third party whom she selected as a midwife.[128]

Agency law was implicated in routine exchanges where a third party entrusted the slaveholder's property with an enslaved person—such as in the Alabama case of *Governor v. Daily*, when a constable returned a disputed boat to a slaveholder via an enslaved man named Jim.[129] The transfer was not based on a negotiated arrangement between the constable and the slaveholder. Instead, it seems to have been a casual, implied arrangement. The constable noticed Jim passing by on a different boat with a white man—whom the constable apparently ignored.[130] Instead, the constable called out to Jim, pointed out the boat to be returned to the slaveholder, and said, "Jim, there is your boat."[131]

The Supreme Court quickly rejected the plaintiff's claim that "a slave cannot be an agent."[132] The court ruled that the constable rightly inferred Jim's status as an agent and his control of the boat, because the constable originally seized it

---

126. Jones v. Allen, 1 Head 626, 636–38 (Tenn. 1858), *in* 2 Catterall, *supra* note 11, at 570. The case also illustrated the physical peril that enslaved workers faced in their dealings with third parties. In *Jones*, Isaac was fatally stabbed by a drunk white man who had not been invited to the husking, which gave rise to the lawsuit. *See also* Stanley v. Nelson, 28 Ala. 514 (1856), *in* 3 Catterall, *supra* note 11, at 209 ("Held: a slave may act as the agent of his owner or hirer.").

127. State v. Presnell, 12 Ired. 103, 103 (N.C. 1851); *see, e.g.*, Whitley v. Daniels, 6 Ired. 480 (1846), *in* 2 Catterall, *supra* note 11, at 117–81 (reversing a penalty for trading with an enslaved man named Ganze where the trade occurred between defendant's agent and Ganze, and the agent claimed "he did not know there was no permission [from Ganze's slaveholder] in writing").

128. In that case, the enslaved woman was under the control of the slaveholder's brother, who told her to select from one of two designed midwives. The woman selected a different midwife, who had taken care of her in the past. That midwife charged $10, which was $6 more than the usual fee, but it "was a dark and stormy night" and the "slave [was] very ill." Johnston v. Barrett, 2 Bailey 562, 562–63 (S.C. App. L. & Eq. 1831), *in* 2 Catterall, *supra* note 11, at 347 ("The slave cannot, it is true, bind the master by a contract, made without his knowledge or consent; but here was a case in which the life of the slave was in great danger, as was probably saved by means of the services rendered.").

129. *See generally* Governor v. Daily, 14 Ala. 469, 471 (1848); *see also* Alston ads. Bowers, 1 Nott & McC. 458, 459 (1819), *in* 2 Catterall, *supra* note 11, at 311 (sherriff's service of legal papers to enslaved worker–whom the court referred to as an "agent" – in slaveholder's home deemed effective).

130. *Daily*, 14 Ala. at 471.

131. *Id.*

132. *Id.*

from Jim's possession: "[H]is agency is presumed to continue, and a return of the boat might well have been made to him."[133] The only remaining legal issue for the jury to decide was whether the constable's statement "there's your boat" was enough to signal that he was transferring possession to Jim, as opposed to merely pointing out the location of the boat.[134]

Likewise, in the 1833 Virginia case of *Gore v. Buzzard's*, the plaintiff (Gore) had a regular practice of sending his enslaved workers to exchange raw hides for tanned leather with a local tannery.[135] The court noted that the exchanges occurred "without written orders" from Gore or any other direct communication with the tanners.[136] It was in many respects a standard agency relationship, where the enslaved workers had the authority and discretion to act on behalf of the slaveholder.[137] Any negotiations over the quality of the hides, the quantity of leather the slaveholder should receive in exchange, or the balance of credit between the parties, would have been performed by the enslaved workers at Gore's instruction. This arrangement continued over four or five years and involved several tanneries.[138] The deal only went sour when one of the tanners died, and his estate tried to collect the balance owed by Gore in the tanner's records. Gore, however, claimed the tannery hadn't provided him the proper credits.

The parties' briefs in the case are particularly illustrative of business practices. Neither side argued that enslaved people could not serve as agents—both presumed they could.[139] Instead, the slaveholder argued that a state law prohibiting slaves from buying or selling goods "without the leave or consent of the master," meant that they needed written authorization for the contract to be valid.[140] The tanner disagreed, noting that prohibition on slave dealings did not apply to business

---

133. *Id.* at 472.

134. *Id.* ("The question whether there was a delivery, was one of fact, and the jury could alone judge whether the evidence sufficiently proved it.").

135. Gore v. Buzzard, 4 Leigh 231, 231 (Va. 1833); *see also* Chase, *supra* note 21, at 28; WALKER, *supra* note 10, at 56 (documenting a case involving a North Carolina slave who managed the business affairs of a tannery); Bailey v. Barnelly, 23 Ga. 582, 583–89 (1857), *in* 3 Catterall, *supra* note 11, at 59 (business dispute apparently enforcing collection of amounts owed to business run by enslaved blacksmith with "no white person in the shop" ruling that "it was reasonable to rely upon the habits even of the [enslaved man] for honesty, which were firmly fixed for such a length of time." Otherwise, "shops kept by [Black] smiths cannot collect their accounts—a startling proclamation to make to the country"—thus suggesting that there were other such blacksmith shops run by Black businessmen); Bryant v. Sheely, 5 Dana 530, 530–32 (Ky. 1837), *in* 1 Catterall, *supra* note 11, at 338 (enslaved man sold a horse, and the court held that transaction was enforceable: "if he [the enslaved person] makes a sale by authority, the master thereby loses all right to the thing sold, and acquires a legal right to the price agreed on").

136. *Gore*, 4 Leigh at 232.

137. *See, e.g.*, SMITH, *supra* note 59, at 113 ("Where the defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron, on trust, and paid for it afterwards. He sent the same waterman for a second time with the ready money, who received the goods, but did not pay for them, the defendant was held liable.").

138. *Gore*, 4 Leigh at 232.

139. *Id.* at 233–35.

140. *Id.* at 233.

dealings by the master when his slaves acted as agents.[141] Moreover, even the state prohibition on slave transactions did not require that consent be in writing. "The just inference from the evidence," argued the tanner, "is that Gore's slaves acted in these dealings by his directions and for him."[142]

The Supreme Court of Appeals of Virginia upheld the contracts created through the exchange. In a terse one-paragraph ruling, the court noted that the course of dealing suggested that Gore's slaves acted as his agents in an arrangement he clearly authorized.[143]

In summary, Southern courts generally held that enslaved people could serve as agents in business transactions. In doing so, they claimed to be untroubled by slave agency in business transactions. However, some of the language in these decisions suggested otherwise. Although courts were in fact applying general principles of agency law applicable to free workers, they claimed that the source of their law was the general principle that "the master is liable even for the act of his dog, done in pursuance of his command."[144]

This assertion was not, however, a recognized principle of agency law. While an individual could be held vicariously liable for destructive or dangerous acts of livestock and pets, there was no precedent for animals serving as agents.[145] Cases invoking this principle also did not seem to originate from a separate source in agency law. Instead, it seems to have originated in *Chastain v. Zach & Bowman,* the 1833 case involving the enslaved boat captain with the burned freight. Moreover, the assertion was unnecessary to recognize enslaved people as agents—comparisons to other people who did not have legal authority to contract, such as married women, would have been more in line with established agency law.[146] The court's animal analogy suggests that it considered the agency role of these enslaved workers a symbolic threat to white supremacy.

In an 1859 case from South Carolina, *Belcher v. McKelvey*, judicial discomfort with the power exercised by enslaved agents was on full display.[147] That case involved a dispute over a slaveholder's estate, in which the slaveholder's heirs sought to unwind a contract for undue influence by an enslaved man named George.[148] The slaveholder in that case, Tucker, was an "unlettered" 80-year old

---

141. *Id.* at 234.

142. *Id.* at 234–35.

143. *Id.* at 235.

144. Chastain v. Zach & Bowman, 1 Hill 270 (S.C. App. Ct. 1833) ("There is no condition however degraded, which deprives one of the right to act as a private agent, the master is liable even for the act of his dog, done in pursuance of his command."); Governor v. Daily, 14 Ala. 469, 471 (1848); Bailey v. Poindexter, 55 Va. 132, 177 (Va. 1858) ("Upon the same principle that he might be liable if he were habitually to send a well-trained and sagacious dog with a basket to bring him meat from the butcher.").

145. MORRIS, *supra* note 7, at 357 (noting that southern courts considered, but declined to apply, legal precedent involving livestock and vicious animals to cases involving tortious acts by enslaved people).

146. PALEY, *supra* note 57, at 13; STORY, *supra* note 55, at 23.

147. Belcher v. McKelvey, 11 Rich. Eq. 9, 11 (1859), *in* 2 Catterall, *supra* note 11, at 463.

148. *Id.*

man, whom the court characterized as "feeble, impaired by age and disease."[149] All of Tucker's "matters of trade" were handled "through the agency and under the supervision of some of his slaves"—particularly George, who selected merchandise on his behalf.[150] The court described George as literate, "shrewd and intelligent," noting that he worked in the community as a cabinetmaker.[151] George later orchestrated his own sale and that of Tucker's other slaves to a third party that he selected—a man named Belcher—paid for with George's own earnings.[152] George selected Belcher on the belief that Belcher would take him and the other enslaved people to a free state.[153] Indeed, George escaped to Pennsylvania some years later, along with his wife.[154] However, Tucker's estate and Belcher eventually ended up in litigation over the sale, and the court appears to have voided the contract.[155]

Although the court did not dispute George's legal authority to negotiate these arrangements on the slaveholder's behalf, it invalidated them on the narrower ground that George had exercised undue influence over Tucker.[156] In doing so, the court implicitly acknowledged that George was substantially more sophisticated than Tucker. From the court's standpoint, to admit George's sophistication was preferable to enforcing a contract negotiated by an enslaved man, which led to his freedom and more favorable conditions for Tucker's other slaves.

In an 1853 treatise, abolitionist William Goodell attacked the hypocrisy of a legal system that treated enslaved people as the slaveholder for business transactions while otherwise insisting on total subordination. Goodell wrote, "The slave is adjudged to be a mere thing, except where his master's interests or convenience require that he should be regarded a man."[157] Goodell's treatise described how a prominent slaveholder's credit had been so overdrawn that a merchant wouldn't sell him $50 worth of goods on credit.[158] However, "when his managing slave stepped forward and promised that the next loads of produce should be delivered in payment, the answer was: 'Very well, Cuffee, if you say so, I'll deliver ten times the amount of goods.'"[159] Goodell concluded that the business reality of slave agents could not be reconciled with slaveholders' argument that

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*; *see also* Maupin v. Wools, 1 Duvall 223, 224 (Ky. 1864), *in* 1 Catterall, *supra* note 11, at 447 (concluding that an enslaved man who managed slaveholder's farm "might exercise some influence" but had not "exercised any influence in prompting or moulding her will").
157. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 80 (1853).
158. *Id.* at 79.
159. *Id.*

"slaves cannot take care of themselves and must be benevolently superintended for their benefit, while they conduct the business of their masters."[160]

Goodell's story is noteworthy for the questions it raises about the business counterparts of enslaved agents. Goodell portrays white community members as savvy business people who evaluated enslaved agents on their own terms and may have held them in higher esteem than the slaveholders themselves. As an abolitionist, Goodell's narrative might have been an attempt to appeal to the better natures of his white brethren rather than a true portrayal of these business interactions.

Historian Juliet Walker's research presents a more complex view of white counterparts and intermediaries in Antebellum business transactions. Walker reviewed reports from the R.G. Dun & Company credit reporting agencies for entries regarding businesses owned by free Black entrepreneurs.[161] These entries describe Black entrepreneurs in explicitly racist terms while also reporting on their estimated wealth, reputation in the community, and payment history.[162] For example, the Dun credit reports characterized a Black New Orleans real estate developer as "steady, sober & prudent" and a Black "merchant tailor" as "very wealthy. Owns [real estate] all over the city."[163] Another entry, about merchant-tailor William Topp read "very upright discreet & worthy. Partly of col descent but has many friends in the city commercial life, without means he has made money. Retains all his customers. Doing a safe & profitable bus[iness]. Don't think would contract debts rashly, think him entirely good for modest credit."[164]

Walker argues that the business dealings of Black Americans, both enslaved and free, illustrate the respects in which capitalism can coexist with unfreedom.[165] Black business enterprise, Walker notes, was a matter of "economic necessity and survival" for these entrepreneurs.[166] Their presence in the historical record despite the overwhelming social, economic, and legal barriers is a testament

160. *Id.* at 80.

161. WALKER, *supra* note 10, at 97, 111, 126.

162. *Id.* at 97.

163. *Id.*

164. *Id.* at 111.

165. *Id.* at 126; *see also* GROSS, *supra* note 10, at 74 (noting that descriptions of enslaved workers in lawsuits over breach of warranty contracts were focused on characteristics relevant to their performance as workers, and noting that "the qualities slaveholders prized were those most useful in a market economy"); SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 3 (Sven Beckert & Seth Rockman eds., 2016) (observing that "the long-held presumption of slavery's prima facie irrelevance to capitalism has left us without many of the crucial details necessary to grasp slavery's influence on American economic development"); EDWARD BAPTISTE, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 123, 127 (2014) (noting a rise in picking productivity from 1800–1860, which he attributed to "oppressively direct supervision combined with torture ratcheted up to far higher levels than . . . before"); Seth Rockman, *Slavery and Capitalism*, 2 J. CIV. WAR ERA 5, 5 (2012).

166. WALKER, *supra* note 10, at 126.

both to their "remarkable business ability" and to the "persistence of a tradition" of enterprise.[167]

Judicial opinions do not reveal much about the white businessmen involved in the transactions, except that at least one party to the transaction—often the slaveholder—sought to enforce it, and the third party seems to have consented to the transaction at the time. Challenging the agency status of the enslaved worker in court seemed to have been a convenient pretext for business counterparts to avoid their contractual obligations, such as the outstanding balance owed in *Gore v. Buzzard's*, or the extra medical costs in *Johnston et ux v. Barrett*.

White business counterparts could also place enslaved entrepreneurs in peril, as illustrated by the 1858 North Carolina Supreme Court case of *Barker v. Swain* involving enslaved entrepreneur Daniel Jones.[168] Jones ran his own buggy manufacturing and sales business. His original slaveholder sold Jones to seven separate individuals, on the condition that he would be allowed to continue to run his business and use the proceeds for his eventual self-purchase.[169] The court case arose over the sale of a donkey in connection with Jones's business.[170] Jones hired a third party, Barker, to sell a buggy and donkey.[171] Barker sold them for $200 in cash and $250 in credit (a total of $450).[172] He remitted the cash to Jones but kept the subsequent $250 payment from the customer, even though he was only entitled to retain $25 for his fees.[173] Meanwhile, the man that originally sold the donkey to Jones—Swain—had not been paid.[174]

Barker sued Swain and one of Jones' slaveholders—Joshua Stanly—who had died.[175] Both Swain and Stanly's estate laid claim to the unremitted $225 payment, while the non-performing Barker insisted that he only wanted clarity from the court as to whom he should pay.[176] Although Barker instigated the dispute, and

---

167. *Id.*

168. Barker v. Swain, 4 Jones. Eq. 220, 220 (N.C. 1858), *in* Catterall, *supra* note 11, at 223–24.

169. Likewise, it seemed that slaveholders sometimes entered into agreements with an enslaved person—or a new owner—providing that the enslaved person could earn their manumission by working for a period of time. Such an arrangement did not necessarily involve a self-leasing fee. However, courts often declined to enforce such agreements when the slaveholder did not live up to their end of the bargain. *See, e.g.*, Stevenson v. Singleton, 1 Leigh 72 (Va. 1829), *in* 1 Catterall, *supra* note 11, at 158; Jackson v. Bob, 18 Ark. 399 (1857), *in* 5 Catterall, *supra* note 11, at 251 (holding contracts for manumission upon payment or labor unenforceable; the court "cannot compel the master to execute the contract, because both the money and the labor . . . belong to the master"); Carter v. Leeper, 5 Dana 261, 262 (Ky. 1837) (stating the property acquired through self-leasing "was, and still must have continued to be" that of the slaveholder); Cline v. Caldwell, 1 Hill 423 (S.C. 1833), *in* 2 Catterall, *supra* note 11, at 354 (describing lengthy series of sales of enslaved man, which permitted him to work off the balance of purchase price).

170. *Barker*, 57 N.C. at 220.

171. *Id.*

172. *Id.*

173. *Id.* at 221.

174. *Id.*

175. *Id.* at 222.

176. *Id.*

the lawsuit itself, Jones bore the brunt of its consequences. In the course of the litigation, Barker disclosed Jones's unenforceable self-purchase arrangement to the court, presumably for the purpose of influencing the outcome of his unrelated contract dispute.[177]

Barker's strategy worked. In an opinion written by the notorious jurist, Thomas Ruffin,[178] the court declared that selling the donkey to Jones's business was "criminal" as it represented "dealings with a slave."[179] "The purpose of the law" against dealings with a slave, Ruffin wrote, "is to suppress such transactions, and therefore, it will give no aid to a party to them."[180]

Second, the court declared the self-purchase condition on Jones's sale to be an unlawful self-hiring arrangement, which was an "indictable misdemeanor." Because Jones's deceased slaveholder had consented to the condition, the court declined to recognize the estate's interest in the property.[181] Consequently, the court ruled in Barker's favor, allowing him to keep his ill-gotten gains.[182] Presumably, Jones would no longer be able to continue to operate his business as he had before nor keep the proceeds. He likely also forfeited the money he had already saved, which the administrator from Stanly's estate had already claimed in the name of the estate. Even if Jones continued to carry on his business, the court ruling would have set him back substantially in his progress towards self-purchase,[183] because the $225 Barker withheld represented 75% of Jones's $300 self-purchase price.

Barker v. Swain illustrates the vulnerability of enslaved entrepreneurs in their business dealings with white businessmen. Barker's behavior suggests he believed he could cheat Jones with impunity, which was confirmed by the court's refusal to enforce the contract. As an enslaved man, Jones himself had no legal recourse to the courts for Barker's swindle, although the administrator for his slaveholder's estate claimed the funds.[184] The fact that the lawsuit was initiated by

---

177. *Id.* at 221.

178. In an infamous case, Ruffin declared that a hirer had been justified for shooting an enslaved woman in the back, claiming that "obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect." State v. Mann, 2 Dev. 263 (N.C. 1829).

179. *Barker*, 57 N.C. at 223.

180. Consistent with other agency-related cases, the court acknowledged that had the transaction been with the slaveholder's consent, it "would not be void." However, Swain's claim, upon the time of sale, "divested" his title to that particular property. *Id.* at 223–24. The implication perhaps of Ruffin's reasoning was that Swain's claim was in the nature of a debt vis-à -vis Stanly's estate, though again, Ruffin seemed unwilling to enforce the transaction on policy grounds.

181. *Barker*, 57 N.C. at 224. For more on self-hiring, see *infra* Part VI.

182. *Barker*, 4 Jones. Eq. at 223–24.

183. The Court notes that Jones had labored under the self-hiring arrangement for "a considerable period, and [had] carried on the business of making and selling buggies, in the county of Guilford, where all the parties lived." *Id.* at 221. The court however noted that "whether the [self-purchase] price was ever paid, or if so by whom, the plaintiff is not informed." *Id.*

184. *Id.* ("Afterwards, Joshua Stanly died, and the defendant, Abigail Stanly, administered on his estate, and, in that character . . . also demands the money in the plaintiff's hands, as the earnings of the slave.").

Barker, and not his slaveholder's estate, suggests that the estate considered its legal position weak—likely due to the unlawful self-hiring arrangement.

Given the legal context, it would have been relatively easy for someone like Barker to cheat on a contract or for counterparts like Swain to demand an inflated price to address the risk that the transaction would be deemed illegal. This placed enslaved entrepreneurs at a competitive disadvantage and ultimately served as an obstacle to self-purchase and wealth accumulation.

But an enslaved entrepreneur was most vulnerable of all to another white counterpart—the slaveholder (or his heirs)—who could claim the entrepreneur's assets as his own or fail to perform on a self-purchase agreement even after the purchase price had been paid. Courts did not enforce self-purchase agreements, even ones that were ancillary to a sale to a third party, as in Jones's case.[185] Courts claimed that enslaved people could not enter into contracts on their own behalf.[186] And even if they could, as one Arkansas court explained, the slaveholder already owned the entirety of an enslaved person and their assets.[187] Thus, any self-purchase agreement lacked consideration on the part of the enslaved person.[188]

V. CRIMINAL CASES INVOLVING PROHIBITED TRANSACTIONS WITH SLAVES

Slaveholder reliance on enslaved workers for ordinary business transactions also interfered with attempts to convict shopkeepers for selling liquor or engaging in other prohibited trades with enslaved people.[189] These cases illustrate

---

185. *See, e.g.*, Jackson v. Bob, 18 Ark. 399, 413 (1857), *in* 5 Catterall, *supra* note 11, at 251 (holding contracts for manumission upon payment or labor unenforceable); Stevenson v. Singleton, 1 Leigh 72, 73 (Va. 1829), *in* 1 Catterall, *supra* note 11, at 158 ("It is not competent to a court of chancery to enforce a contract between master and slave, even although the contract should be fully complied with on the part of the slave."); Carter v. Leeper, 5 Dana 261, 262 (Ky. 1837); Brown v. Wingard, 4 Fed. Cas. 438, 438–39 (D.C. 1822), *in* 4 Catterall, *supra* note 11, at 172 (refusing to enforce a self-purchase agreement after slaveholder reneged, despite full payment of purchase price). *But see* Doubrere v. Grillier's Syndic, 2 Mart. N.S. 171, 181 (La. 1824) (enforcing agreement for emancipation where all but $100 of self-purchase had been paid).

186. *Wingard*, 4 F. Cas. at 438–39 (concerning a slaveholder who successfully argued, "The petitioner is still a slave, and, in law, incapable of contracting."). *See also* MORRIS, *supra* note 7, at 337, 349—51 (all property was owned by the slaveholder, although the slaveholder could permit slaves to keep their own property; as a social practice however, it seems enslaved people did own personal effects and livestock which third parties acknowledged as theirs), 351–53 (noting that standard prohibitions on trading with slaves implicitly acknowledged that they could own property); WALKER, HISTORY OF BLACK BUSINESS, *supra* note 10, at 78; WALKER, FREE FRANK, *supra* note 16, at 39, 46.

187. *Jackson*, 18 Ark. at 413, *in* 5 Catterall, *supra* note 11, at 251 (ruling that the court "cannot compel the master to execute the contract, because both the money and the labor . . . belong to the master").

188. *Id.* ("the money and the labor of the slave belong to the master and could constitute no legal consideration for the contract").

189. Jolly v. State, 8 Smedes & M. 145, 149 (Miss. High Ct. Err. & App. 1847) (declaring that prohibition on seller liquor "is to prevent the demoralizing influence of

how agency principles and common business practices came in direct conflict with the ideology and law of slavery. Slave states prohibited the sale of liquor to enslaved people and imposed broader restrictions on independent commercial and business activity of enslaved people.[190] Ultimately, agency law—and the profits and convenience it assured for slaveholders—either complicated or defeated attempts to convict shopkeepers for liquor sales to slaves.[191]

One case from 1855, *Powell v. State*, made its way to the Alabama Supreme Court. At that time, Alabama prohibited selling an enslaved person "vinous or spirituous liquors without an order in writing, signed by the overseer or master of such slave."[192] The case seemed to have involved an attempted sting operation against a white man named Powell who sold liquor out of his house.[193] An overseer set up the sting operation.[194] He told Powell he would send a slave named John to pick up "a certain quality of spirituous liquor."[195] John showed up as instructed with a jug, Powell poured the agreed amount, and John left.[196] The prosecutor argued that Powell violated the statute by dispensing the spirits without a written note from the overseer.[197] The court disagreed. Under the law of agency, Powell was not actually delivering the wine to John, but to the overseer: "The slave, in such case, is merely the instrument of the overseer."[198]

Agency principles also tripped up an attempted sting operation against a liquor purveyor named Jesse Jolly, who was suspected of selling liquor to slaves in

---

drunkeness [sic], and its attendant vices, upon the slaves which constitute so large a portion of our population"); Murphy v. State, 24 Miss. 590, 590 (1852) (concerning indictments for violating an 1850 law "to suppress trade and barter with slaves"); Calvert v. Wynne, 49 Md. Arch. 495 (1665) ("noe person . . . shall trade, barger, commerce, or game, wth any servant, except hyred servants, wthin this Province without Lycence first had and obteyned from his or her Master, Mistresse, Dame, or Overseers"); Pendleton v. Guthrie, 2 Col. Rec. N.C. 114, 114 (1713), *in* 2 Catterall, *supra* note 11, at 8 (involving "trade to and with a negro . . . without the leave of" the plaintiff); State v. Chandler, 2 Strobhart 266, 268 (S.C. 1848), *in* 2 Catterall, *supra* note 11, at 406 (involving an overseer convicted of trading whiskey for corn with enslaved people without a permit).

190. MORRIS, *supra* note 7, at 352 (characterizing prohibitions on the sale of liquor as a "special variation" of broader prohibitions on "trading or dealing with slaves"). Morris observed that "virtually all" of the liquor sale prohibition cases were "indictments of white" defendants. *Id.* States varied, however, in how they enforced the prohibition on trading with slaves. While Georgia punished the enslaved person through whipping, "most jurisdictions" imposed a fine. *Id.*

191. *See, e.g.*, Powell v. State, 27 Ala. 51, 51 (1855); State v. McNair, 1 Jones 180, 181 (1853), *in* 2 Catterall, *supra* note 11, at 178 (reversing judgment for liquor sale, because purchase by enslaved man at written direction of overseer deemed "the legitimate use of his slave by the owner; . . . it is not denied he may use him as his agent").

192. *See, e.g.*, *Powell*, 27 Ala. at 51.

193. *Id.*

194. *Id.*

195. *Id.* at 52.

196. *Id.*

197. *Id.* at 51.

198. *Id.* at 52.

Mississippi.[199] In that case, an officious intermeddler and his friends decided to catch Jolly in the act.[200] In the middle of the night, one of the friends instructed one of his slaves (John) to buy liquor from Jolly using money the slaveholder provided.[201] John managed to buy some liquor.[202] However, he did so with the permission of his slaveholder, making John an agent.[203] The state tried to argue that John wasn't really an agent because the slaveholder had not communicated directly with Jolly.[204] However, this argument was contrary to agency law: the fact that John had been authorized by the slaveholder to purchase the liquor meant that Jolly was selling to the slaveowner, rendering the transaction lawful.[205]

The case was appealed to the Supreme Court of Mississippi, which had an interest in upholding the prohibition on liquor sales. At the same time, the Court likely did not want to deviate too far from agency law, which enabled slaveholders to transact business through their enslaved agents. Requiring direct communication with a slaveholder would have undermined the usefulness of agency arrangements.[206] As Judge Ruffin noted in another case involving the sale of spirits to an enslaved person, "to prevent imposition on trades-people, it is a rule that one, who habitually sends his servant to shops and pays for the articles taken up by the servant, is bound to pay for all thus taken up."[207]

The court in *Powell v. State* managed to avoid the conflict between the liquor laws and agency law.[208] It decided the case based on a technicality, concluding the jury should have been instructed to decide whether the owner had instructed John to buy the liquor, or merely inquire as to its availability.[209]

The most remarkable case involving trading prohibitions was the 1819 South Carolina case of *State v. Anone*.[210] That case involved a South Carolina

---

199. Jolly v. State, 8 Smedes & M. 145 (1847); *see also* State v. Anone, 2 Nott & McC. 27, 30 (S.C. Const. Ct. 1819) (involving an attempt to entrap merchant for transactions with a slave, which was complicated by the slaveholder's presence while the transaction took place and by the merchant's decision to appoint his slave as a shopkeeper); State v. Stroud, 1 Brevard 551, 551 (S.C. 1805), *in* 2 Catterall, *supra* note 11, at 286 (involving a sting operation organized by overseer who instructed enslaved person to trade corn with the defendant; judge instructed acquittal but jury convicted).

200. *Jolly*, 8 Smedes & M. at 145.

201. *Id.* at 146.

202. *Id.*

203. *Id.* at 145–46.

204. *Id.* at 148. Taylor v. State, 26 Tenn. 510, 511 (1847). Overly stringent restrictions on slaveholder authorization evidently proved unworkable in Tennessee. An 1829 statute prohibiting such sale without a "written permit" from the owner was later amended in 1842 to simply require "permission" from the owner, or an "agent" of the owner—making it easier for enslaved people to buy liquor on their behalf.

205. *Jolly*, 8 Smedes & M. at 146–48 (argument for the defendant).

206. State v. Presnell, 12 Ired. 103, 105 (N.C. 1851).

207. *Id.*

208. Powell v. State, 27 Ala. 51, 51–52 (1855).

209. *Id.*

210. State v. Anone, 2 Nott & McC. 27, 29 (S.C. Const. Ct. 1819).

prohibition on "trading . . . with a slave" without a permit or ticket.[211] An overseer named Thomas Fulton organized a sting operation against Francis Anone, a shop owner he suspected of trading with slaves.[212] Fulton sent one of his enslaved workers to sell a very large quantity of corn to Francis Anone's store without a permit.[213] Fulton's emissary was greeted by Polydore, the longtime store clerk, who took the corn and provided a few items from the store in exchange.[214]

Fulton's sting operation had several flaws. First, Fulton was physically present to observe the transaction—a legal necessity for the sting operation because the enslaved worker would not be allowed to testify against the white store owner. However, under agency principles, Fulton's presence suggested that he authorized and approved of the transaction, potentially removing it from the realm of "trading with a slave" to trading with a master.[215] Nevertheless, the court was willing to overlook this particular defect, noting that Fulton's observation was necessary for the sting operation and insisting that a principal who "merely eyes the traffic carried on" is not assenting to the transaction.[216] The court seemed to acknowledge that its reasoning was contrary to agency principles by noting that ruses of that sort when "prudently practiced" can be "very efficacious" in "detecting persons who notoriously trade with slaves."[217]

The bigger challenge the case presented involved Francis Anone's clerk, Polydore, who was himself a slave.[218] To convict Francis Anone, the state needed to show that Polydore was Anone's authorized agent in the transaction.[219] As a slave, Polydore was not permitted to testify about any instructions he had received from Anone.[220] Thus, to convict Anone, the court and the prosecution had to take an expansive view of Polydore's authority, which was not difficult. Although a white

---

211. *Id.* at 28; *see also* Pulse v. State, 5 Hum. 108 (1844) (involving a slaveholder convicted of selling whiskey to a slave; slaveholder argued that his own slave had sold the whiskey, but "was not prepared to prove that it had been done . . . against his positive orders") By convicting the slaveholder for the sale, the court treated the enslaved worker who sold the whiskey as the slaveholder's agent.

212. *Anone*, 2 Nott. & McC. at 31.

213. *Id.* at 33.

214. *Id.* at 28.

215. The Court admitted as much. *Id.* at 30 ("It is true, that where the owner or employer stands by, apparently sanctioning the transaction, it is a fair inference, that the trading is with him and not with the slave; as frequently happens when a carriage stops at a store, and a servant is sent in for some article.").

216. *Id.*

217. *Id.*

218. *See also* State v. Weaks, 7 Hum. 522, 522 (1847), *in* 2 Catterall, *supra* note 11, at 532 (involving conviction of slaveholder for "permitting . . . a slave . . . to trade in spirituous liquors as if a free person of color"; suggesting that enslaved person was waiting on customers in slaveholder's shop).

219. *Anone*, 2 Nott & McC. at 32–33.

220. *Id.* at 32 (noting, while giving instructions to the jury, that "it would be difficult to produce positive proof of guilt under this law, when the agent of dishonesty [Polydore] . . . could not be examined"); *see also* BERLIN, *supra* note 19, at 96 (discussing rules barring testimony); GROSS, *supra* note 10, at 42 (discussing ban on slave testimony).

clerk previously worked for Anone, Polydore had "the whole management"[221] in the other clerk's absence. When the white clerk moved away, Anone told Polydore to "take care of every thing, and to do as well as he could."[222] The prosecution also noted that Anone had authorized Polydore to buy as much corn as sellers had to offer: if they "brought in 10,000 bushels," he should buy it.[223] Because Polydore could not testify, the court concluded that the jury had to rely on the available circumstantial evidence: "to require specific authority to the slave, would . . . legalize that worst of crimes. For in slave countries, whenever the crime of assassination prevails, it will be practiced through the means of slaves."[224]

State v. Anone was unusual in the court's willingness to erode agency principles as to the enslaved worker sent to sell corn. Under ordinary agency principles, the court would have attributed the corn sale to Fulton (the overseer) since he authorized the transaction. Such a purchase would only be deemed unauthorized if slaveholders or overseers did not ordinarily instruct enslaved workers to do so on their behalf. The court did not rely on any such argument—and the prosecutor may not have attempted it—perhaps because such transactions were commonplace or because it would have undermined Polydore's agency status.

Polydore's race and status as a slave may have been especially threatening to the ideology of white supremacy. Here was a clerk serving in a role ordinarily performed by a business owner or a white wage laborer, and doing so without supervision. Polydore certainly would have had the opportunity to trade with enslaved people without detection—a fact that Fulton and likely the court found suspicious. Yet the court stopped short of stating that Polydore could not serve in a shopkeeper role or that his activity was unauthorized. To the contrary, the prosecution's claim depended upon Polydore's status as an agent because that was the only way to hold his slaveholder liable. Nevertheless, by criminally prosecuting Polydore's slaveholder, the case presumably would have discouraged Anone and other slaveholders from appointing enslaved workers to similar such positions.

VI. HIRING AND SELF-HIRING ARRANGEMENTS

Agency law was also implicated when enslaved workers were leased ("hired") to work for a third party or hired their own time from the slaveholder for a fee (known as "self-hiring," "self-leasing," or "hiring his/her own time"). Although courts considered leasing unobjectionable, self-leasing was another matter.

Self-leasing tested the limits of agency law as applied to slavery because self-hired slaves might make their own deals or hire their own agents. Self-hired

---

221. *Anone*, 2 Nott & McC. at 31.

222. *Id.* at 32. Under agency law, these sorts of instructions would be unproblematic. *See, e.g.*, SMITH, *supra* note 59, at 128 ("Where a servant is employed to transact business, and has no particular orders with reference to the manner in which the business is to be transacted, he is considered as invested with all the authority necessary for transacting the business entrusted to him, and which is usually entrusted to agents employed in matters of a similar nature.").

223. *Anone*, 2 Nott & McC. at 31.

224. *Id.* at 33.

slaves were also ideologically threatening to slavery because their freedom of movement and community interactions resembled that of free workers. Southern states prohibited self-hiring. Consequently, courts tended to invalidate transactions involving self-hiring arrangements, even if none of the parties to the agreement challenged the transaction.

A. Hiring Arrangements

Slaveholders routinely hired enslaved workers to third parties in exchange for payment of a fee.[225] Ariela Gross estimated that leasing arrangements encompassed "as much as 15% of the total slave population."[226] Hiring arrangements could be episodic and short—as when enslaved midwives were sent to care for pregnant women,[227] or when enslaved musicians were hired to play at parties and balls.[228] Hiring arrangements could also extend for many months or longer, as in the case of Frederick Douglass who was leased out to a shipbuilder working on warships for the Mexican government.[229] Slaveholders also leased enslaved people to work in industry[230] and transportation.[231] This work could be especially hazardous; the case law is replete with examples of enslaved workers injured or killed while hired to work on steamboats or railroads.[232]

---

225. *See* Finkelman, *supra* note 29, at 269, 280–81; *see also* Kelly v. White, 17 B. Mon. 124 (Ky. 1856); Harvey v. Skipwith, 16 Gratt. 393, 393 (1863), Gorman v. Campbell, 14 Ga. 137, 138 (1853); Scudder v. Woodbridge, 1 Ga. 195, 195 (1846); Helton v. Caston, 2 Bail. 95, 99 (1831); State v. Teideman, 4 Strob. 300, 300 (1850), *in* 2 Catterall, *supra* note 11, at 415; Burke v. Clarke, 11 La. 206, 207 (1837), *in* 3 Catterall, *supra* note 11, at 515; Penalta v. Borges, 18 La. 348, 384 (1841), *in* 3 Catterall, *supra* note 11, at 532; Russel v. Favier, 18 La. 585 (1841), *in* 3 Catterall, *supra* note 11, at 533; Smith v. Wiseman, 6 Ired. Eq. 540, 543 (N.C. 1850) (recovering payment associated with leasing two enslaved blacksmiths to the defendant).

226. Ariela Gross, *Slavery, Antislavery, and the Coming of the Civil War*, *in* CAMBRIDGE HISTORY OF LAW IN AMERICA 23 (Christopher C. Tomlins & Michael Grossberg eds., 2007).

227. Sharla Fett, *Consciousness and Calling: African American Midwives at Work in the Antebellum South*, *in* NEW STUDIES IN THE HISTORY OF AMERICAN SLAVERY 67 (Edward E. Baptiste & Stephanie M. H. Camp eds., 2006).

228. Graham v. Strader, 5 B. Mon. 173, 173 (1844), *in* 1 Catterall, *supra* note 11, at 365.

229. *Id.* at 65.

230. Echols v. Dodd, 20 Tex. 190, 190 (1857) (enslaved man beaten to death while being leased out to a sawmill).

231. Meekin v. Thomas, 17 B. Mon. 710 (1857) (involving an enslaved man, Lewis, hired out to work on a steamship which stopped at Cincinnati, where Lewis escaped to freedom); Scudder v. Woodbridge, 1 Ga. 195, 195 (1846) (involving an enslaved carpenter leased to work on a steamship who was killed); Beardslee v. Perry, 14 Mo. 88, 88 (1851) (involving an enslaved woman killed while hired out to work on a steamboat); Caldwell v. Smith, 4 Dev. & Bat. 64, 64 (1838), *in* 2 Catterall, *supra* note 11 (referencing the hiring out of an enslaved blacksmith); Huntington v. Ricard, 6 La. Ann. 806 (1851), *in* 3 Catterall, *supra* note 11, at 621 (involving an enslaved person hired to work as a cook on a boat, which "never returned" from its voyage).

232. *See* Finkelman, *supra* note 29, at 269, 280–81; *see also* Vanleer v. Fain, 6 Hum. 104, 106–07 (1845), *in* 2 Catterall, *supra* note 11, at 526–27 (referring to the death of

Agency law operated in the background of third-party hiring transactions by attributing the enslaved person's labor to the slaveholder, who was then owed compensation.[233] Indeed, the original authority upon which the court in *Booth v. L'Esperanza* based its 1798 decision was *Stone v. Godet*, an undated earlier case holding that "the owner of a slave could maintain a suit for his wages as mariner on board a coaster."[234] Much of the case law surrounding third-party hiring involved the injury or death of the enslaved person at the hands of a third-party hirer.[235] However, agency law was not central to these personal injury cases as southern courts could resort to property or contract principles to determine the outcome.

---

an enslaved man who had been hired out to an ironworks); George v. Smith, 6 Jones 273 (1859), *in* 2 Catterall, *supra* note 11, at 225 (concerning an enslaved agent injured in connection with delivering turpentine by rail); James v. Wilmington & M. R.R. Co., 9 Rich. 416, 417 (1856) (involving the death of enslaved fireman hired out to railroad); White v. Smith, 12 Rich. 595, 596 (1860), *in* 2 Catterall, *supra* note 11, at 468 (declaring that enslaved worker hired out to railroad was not considered a co-employee, and therefore fellow-servant rule did not apply); *Scudder*, 1 Ga. at 195 (involving enslaved carpenter who was killed while leased to work on a steamship); *Beardslee*, 14 Mo. at 88 (involving an enslaved woman killed while hired out to work on a steamboat); De Tollenere v. Fuller, 1 Mill 117, 117 (1817), *in* Catterall, *supra* note 11, at 301 (discussing an enslaved woman leased to a plantation and, in turn, subleased to "atten[d] a sick lady" where she contracted smallpox); Seay v. Marks, 23 Ala. 532 (1853), *in* 3 Catterall, *supra* note 11, at 191 (involving King, an enslaved man, leased to help with a stable, but who was apparently then subleased to work on "rafting lumber" and drowned); Kelly v. White, 17 B. Mon. 124, 134 (1856), *in* 4 Catterall, *supra* note 11, at 425 (involving an enslaved man killed when hired out to work in iron works).

233. *See, e.g.*, Beasley v. Downey, 10 Ired. 284, 284 (1849), *in* 2 Catterall, *supra* note 11, at 137 (noting that an enslaved man had been hired out by the plaintiff, "under the management of the defendant as the plaintiff's agent."); Russell v. Lynch, 28 Mo. 312 (1859) (involving an enslaved worker hired out to work as jailer of a private prison who opened the gate for a visitor, allowing another enslaved man to escape; owner of escapee sued owner of jailer for negligence); Marciacq v. H.M. Wright, 13 La. Ann. 27, 28 (1858), *in* 3 Catterall, *supra* note 11, at 660 (involving an enslaved runaway who worked as understeward on a boat for wages; once apprehended, wages assigned to slaveholder).

234. Booth v. L'Esperanza, 3 F. Cas. 885, 886 (D.S.C. 1798). The date associated with the *Stone v. Godet* case is not discernable from the cite, and I was unable to locate the case itself. *See* Fisher v. Sybil, 9 F. Cas. 141, 141 (1816), *in* 2 Catterall, *supra* note 11, at 300 (runaway enslaved man who was found to have worked on a ship for 5 years; compensation to be delivered to slaveholder).

235. GROSS, *supra* note 10, at 102; TUSHNET, *supra* note 29, at 183–85; Finkelman, *supra* note 29, at 279; *see, e.g.*, Haden v. N.C. R.R. Co., 8 Jones 362, 363 (1861), *in* 2 Catterall, *supra* note 11, at 246 (concerning the death of enslaved man of typhoid fever during hiring to railroad); Lexington & O.R. Co. v. Kidd, 7 Dana 245, 245–46 (1838), *in* 1 Catterall, *supra* note 11, at 341 (involving two enslaved workers leased to railroad who wanted to ride the train from Lexington to Midway and allegedly did so over the objection of the railway agent; one later had his leg crushed by a rail car); *De Tollenere*, 1 Mill at 117, *in* 2 Catterall, *supra* note 11, at 301; *Seay*, 23 Ala. at 532, *in* 3 Catterall, *supra* note 11, at 191 (involving King, an enslaved man, leased to help with a stable who was apparently then subleased to work on "rafting lumber" and drowned); *George*, 6 Jones at 273, *in* 2 Catterall, *supra* note 11, at 225; *James*, 9 Rich. at 416; *White*, 12 Rich. at 595, *in* 2 Catterall, *supra* note 11, at 468; *Scudder*, 1 Ga. at 195, *in* 3 Catterall, *supra* note 11, at 16.

The increase in the commercial value of enslaved people over the 1700s led southern industrialists to prefer leasing over the outright purchase of enslaved workers.[236] As prices largely continued to rise over the following century, "leasing provided an important way for both individuals and corporate entities . . . to obtain labor without making the major capital investment in slaves."[237] It also meant that agreements regarding an enslaved person's time might be carved up into ever smaller units by involving multiple parties—such as through subleasing arrangements.[238] As the Alabama Supreme Court observed in an 1853 case, "It was proved to be customary for persons who hired slaves to re-hire them out by the day or week, and this custom was known to the plaintiff."[239]

The line between leasing and self-leasing was porous. An enslaved person might operate her own independent business and generate revenue from third parties, but unlike other leasing arrangements, she might remain at her own worksite. But unlike self-leasing arrangements, her slaveholder might not allow her to keep some business revenue in exchange for the payment of a self-leasing fee. Indeed, two examples involving enslaved female entrepreneurs suggest that women may have been disproportionately consigned to this in-between status, where they did not personally benefit from their business enterprise.

Enslaved entrepreneur Elizabeth Keckley ran her own dressmaking business.[240] While enslaved, Keckley designed and sewed dresses for "the best ladies in St. Louis."[241] Although Keckley herself does not appear to have been physically loaned out to her customers, her business—like that of self-hired entrepreneurs—generated revenue from third-party customers. Keckley was so successful that her business revenue supported the slaveholder's extended family of 17 people.[242] Keckley described the experience in her biography, noting with some bitterness that she "was working so hard that others might live in comparative comfort," and that "the heavy task was too much for me, and my health began to give way."[243] The slaveholder did not remit any of the revenue to Keckley[244] nor enter into a self-hiring arrangement. The slaveholder eventually agreed to allow Keckley to purchase her own freedom and that of her son but set the price at $1,200, which was then equivalent to the price of a house.[245] And because Keckley received

---

236. LEWIS, *supra* note 10, at 83.

237. Gross, *supra* note 226, at 23.

238. *See, e.g.*, *De Tollenere*, 1 Mill at 117, *in* 2 Catterall, *supra* note 11, at 301; *Seay*, 23 Ala. at 532, *in* 3 Catterall, *supra* note 11, at 191; *see also* Gross, *supra* note 226, at 23–24 ("[S]laves . . . were fragmented property, with so many interest-holders in any particular slave that there was no such thing as a simple, unitary master-slave relationship for most slaves and most masters.").

239. *Seay*, 23 Ala. at 533, *in* 3 Catterall, *supra* note 11, at 191.

240. ELIZABETH KECKLEY, BEHIND THE SCENES, OR THIRTY YEARS A SLAVE, AND FOUR YEARS IN THE WHITE HOUSE 43, 45 (1868) (ebook).

241. *Id.*

242. *Id.*

243. *Id.* at 45–46.

244. *Id.* at 46–47.

245. Judith Thurman, *Ann Lowe's Barrier-Breaking Mid-Century Couture*, NEW YORKER, March 29, 2021, (Magazine), at 44 ("Abraham Lincoln and his wife had recently paid that sum for a house in Illinois.").

none of her business earnings, she was forced to borrow her purchase price through customer loans.[246] As a free woman, Keckley later rose to fame as the personal dress designer for First Lady, Mary Todd Lincoln.[247]

Figure 1: Photograph of entrepreneur Elizabeth Keckley, circa 1861 (Credit Moorland-Spingarn Research Center at Howard University)[248]

Case law also reveals the example of another female entrepreneur, an elderly enslaved woman who operated a boarding house for soldiers in North Carolina. She did so independently, with little interference from her elderly slaveholder, and was "frequently seen in the market and in the stores, buying supplies."[249] The slaveholder described the business enterprise as a way for her to "work her own way," and did not otherwise disclose the financial arrangement between the slaveholder and the woman. However, the North Carolina court declared the woman's boardinghouse a violation of the state prohibition on self-hiring and indicted the slaveholder.[250]

B. Self-Hiring Arrangements

Through a self-leasing arrangement, an enslaved person would pay the slaveholder's leasing fee from the proceeds of their business and then keep some

246. It appears that some of the women were willing to simply gift the funds to Keckley, but Keckley insisted on paying it back and did so "in a short time" upon gaining her freedom. KECKLEY, supra note 240.

247. *Id.* at ch. 5.

248. Downloaded from the WHITE HOUSE HIST. ASS'N, https://www.whitehouse history.org/photos/from-slavery-to-the-white-house-the-extraordinary-life-of-elizabeth-keckly-photo-1 [https://perma.cc/Y8E2-CTLB] (last visited Nov. 3, 2021).

249. State v. Brown, 2 Win. 54, 54 (N.C. 1864), *in* 2 Catterall, *supra* note 11, at 252.

250. *Id.* at 54–55.

portion of the profits. Slaveholders liked self-leasing arrangements because they could charge the enslaved workers higher fees than they would make through third-party hiring.[251] Self-hiring arrangements were common in the urban South[252] and spurred a variety of entrepreneurial ventures by enslaved people, including barbershops, bathhouses, food service, and transportation businesses.[253]

The earliest self-hiring cases I was able to find—a Louisiana case from 1777 and a South Carolina case from 1792—suggest that self-hiring was not outlawed until the nineteenth century.[254] The Louisiana case involved a Creole woman, Marguerita, who was accused of burglary.[255] In her testimony, she stated that she was "hired to herself, giving her master 4 pesos a month" and that she worked "by the day" to pay for her clothing.[256] Though the Louisiana court warned the slaveholder to "supervise more carefully his slaves," it may have been referring to the burglary rather than the self-hiring.[257]

The 1792 South Carolina case, *The Guardian of Sally v. Beaty*, involved an unnamed, enslaved woman, who "had, by her industry, acquired a considerable sum

---

251. WALKER, *supra* note 10, at 57 ("Had this slave hired out his own time, he would have to pay his owner much more than what the owner made by hiring him out.").

252. *Id.* at 61 ("[T]he practice of slaves hiring their own time was quite extensive in the urban South."); WALKER, FREE FRANK, *supra* note 16, at 31; *see also* Guyora Binder, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063, 2093–94 (1996) ("[S]ome slaves were given wide discretion to dispose of their own labor, paying a monthly rent on themselves."). *See also* McClain v. Esham, 17 B. Mon. 146, 154 (1856) (referring to an enslaved carpenter who "had been accustomed, without restriction of his owner, to hire himself out to whom and whenever he pleased"); Price v. Hicks, 14 Fla. 565, 567 (1874), *in* 3 Catterall, *supra* note 11, at 125 (involving Hicks, an enslaved man hired out by his slaveholder who entered into a business partnership with the hirer; hiring fee paid to slaveholder from Hicks' share of the business proceeds).

253. WALKER, *supra* note 16, at 61.

254. In the South Carolina case, which involved the manumission of a woman purchased through the proceeds of a self-hiring arrangement, the plaintiff argued that the case was one of first impression, that "there is no case similar to it, in the history of our judicial proceedings." Guardian of Sally v. Beaty, 1 Bay 258, 259–60 (1792); *see also* Voss v. Howard, 28 F. Cas. 1301, 1301 (D.C. 1805), *in* 1 Catterall, *supra* note 11, at 156 (concerning a possible self-hire arrangement involving mixed-race enslaved man who lived on his own with his wife, a free white woman, and who "hired himself, with his owner's permission in the City of Washington" to work for a man named Voss, "by the month" and "received the wages for his labor").

255. The earliest self-hiring case appears to have been from Louisiana—which applied civil law and thus differed somewhat from the laws of other slave states. In that case, *Re Negroes Cezario*, 12 La. Hist. Q 498 (La. 1777), the court quoted testimony from a married enslaved woman, Marguerita, who stated that "she was hired to herself, giving her master 4 pesos a month as wages, and that she is twenty-three years of age" and "for clothes she works out by the day." The case did not directly relate to self-hiring; it was a burglary case in which Marguerita and others were sentenced to "two hundred lashes in the public streets mounted on beasts of burden." Thereafter, the Court ruled that Marguerita and the others would be "returned to their master . . . who must supervise more carefully his slaves' conduct." Many of the other cases described herein originated from other states and occurred in the mid-nineteenth century.

256. *Id.*

257. *Id.*

of money, over and above what she had stipulated to pay her [slaveholders] for her monthly wages."[258] She used her savings to purchase a woman named Sally, who she then freed. After she did so, Sally brought a claim to establish her freedom. The slaveholder argued that all of the self-hired woman's assets belonged to him and that, by extension, so did Sally. The self-hired woman, he claimed, did not have the authority to manumit (free) Sally. Sally's lawyer—who was on shaky legal ground[259]—argued that the self-hired woman's decision to purchase Sally's freedom rather than her own was an act "so singular and extraordinary . . . and so replete with kindness and benevolence" that any other ruling would be "doing violence to some of the best qualities of the human heart."[260] The court declared that the slaveholder had received the benefit of his bargain through the self-hiring fee and sent the case to a jury.[261] The jury, without leaving the jury box to deliberate, ruled in Sally's favor.

Those early cases suggested that the courts did not initially view self-hiring arrangements as a public evil or nuisance. However, attitudes and laws regarding self-hiring hardened in the nineteenth century.[262] For example, an 1826 Maryland case, *Coale v. Harrington*, involved an enslaved woman named Henny, who "about the year 1812, and for some years after . . . hired herself about, in different places, as a free woman."[263] Thereafter, "some persons threatened to enforce the law against masters who suffered their slaves to go at large as free."[264] This appears to have triggered a family dispute among Henny's slaveholders over her ownership and the

---

258. *Guardian of Sally*, 1 Bay at 260, *in* 2 Catterall, *supra* note 11, at 275.

259. Helen Tunnicliff Catterall, who edited the volumes of slavery-related cases, highlighted the case in her introduction to the chapter on South Carolina, noting that "several axioms of slave law were violated in order to avoid doing violence to the benevolent act" by the self-hired woman. 2 Catterall, *supra* note 11, at 267; *see also* sources cited *supra* note 189.

260. *Guardian of Sally*, 1 Bay at 260.

261. *Id.* at 261.

262. *See* Gross, *supra* note 226, at 13. Kentucky passed a law in 1802 against "permitting slaves to go at large and hire themselves." Jarrett v. Higbee, 5 T.B. Mon. 546, 551 (Ky. 1827), *in* 1 Catterall, *supra* note 11, at 308–09 (describing prohibition enacted in 1802); Commonwealth v. Gilbert, 6 J.J. Marsh. 184, 184 (Ky. 1831) (citing the 1802 prohibition on self-hiring, and a related statute enacted in 1825); *see also* McClain v. Esham, 17 B. Mon. 146, 157 (Ky. 1856) (referring to a state prohibition on self-hiring); Evans v. Gregory, 54 Ky. 317, 324 (Ky. 1855), *in* 1 Catterall, *supra* note 11, at 414 (same); State v. Clarissa, 5 Ired. 221, 221 (N.C. 1844) (interpreting statute prohibiting self-hiring); Abrahams v. Commonwealth, 11 Leigh 675, 675 (Va. 1841), *in* 1 Catterall, *supra* note 11, at 201 (imposing $20 fine for "permitting a slave to go at large and hire himself out contrary to statute"); Rawles v. State, 15 Tex. 581, 581–84 (1855) (reversing indictment of slaveholder for allowing enslaved woman "to go at large and hire her own time for more than one day in a week," as statute suggested the remedy should have been to imprison the slave, rather than indict the slaveholder); Ruddle v. Ben, 10 Leigh 467, 467–71 (Va. 1839) (concerning a slaveholder who emancipated a self-hired slave—and back-dated the emancipation document—on the advice of a lawyer to avoid prosecution for violating the self-hiring statute).

263. Coale v. Harrington, 7 H. & J. 147, 150 (Md. 1826), *in* 4 Catterall, *supra* note 11, at 73.

264. *Id.*

freedom of movement that was appropriate for a woman of Henny's station. One family member hired her out to a third party, but another (Harrington)—who had a stronger claim to ownership—seized Henny and sold her to a Georgia slave trader, separating her permanently from her children.[265] Although another family member attempted to manumit the children, the court declared the children Harrington's property.[266]

Although southern states generally prohibited self-hiring, enforcement of those prohibitions appears to have varied by state. Tennessee, for example, prohibited self-leasing and would confine the enslaved person to jail until the slaveowner paid a fine.[267] However, an 1847 case before the Tennessee Supreme Court suggested that self-leasing arrangements were sometimes tolerated.[268] The case involved Edmund, a leased slave who made a self-leasing arrangement with his third-party hirer and escaped to freedom during the hiring period.[269] The court ruled the hirer was not responsible for Edmund's disappearance, because his slaveholder apparently had routinely allowed Edmund similar freedom of movement in the past.[270] Had Tennessee taken a more dogmatic view of self-leasing, it likely would have imposed liability on the hirer for violating the self-leasing statute.

Other states seem to have enforced self-leasing laws through white vigilantism. Alabama, for example, fined slaveowners $50 for allowing an enslaved person "to go at large and trade as a freeman" or "to hire himself out."[271] The law authorized white people to turn in any enslaved person who was "at large, or hiring himself out," for imprisonment by a justice of the peace.[272] Virginia likewise allowed white "informants" to report violations of the self-hiring law.[273] In one 1841 case, it awarded 2/3 of the fine imposed by the court to the informer.[274]

---

265. *Id.*

266. *Id.*

267. Hoggatt v. Bigley, 25 Tenn. 236, 237 (1845) (involving an enslaved man imprisoned while waiting for slaveholder to pay fine; slaveholder sued the justice of the peace for jailing him); Morrow v. State, 10 Hum. 120, 120 (Tenn. 1849), *in* 2 Catterall, *supra* note 11, at 541 (reversing the conviction of a slaveholder for permitting enslaved person to "trade in spirituous liquors, horses, cows, hogs, provisions and other property as if a free person of color" and "to hire his own time").

268. Bowling v. Stratton, 27 Tenn. 430, 434 (1847).

269. *Id.* at 431–32.

270. *Id.* at 434.

271. Stanley v. Nelson, 28 Ala. 514, 518 (1856) (citing *Clay's Digest* at §§ 12–13).

272. *Id.*

273. Abrahams v. Commonwealth, 1 Rob. 675 (1842), *in* 1 Catterall, *supra* note 11, at 202.

274. *Id.* The freedom of movement typical of self-hired workers also made them vulnerable to white vigilantes who claimed they were runaways and that their travel documents were forged. *See, e.g.*, Jarrett v. Higbee, 5 T.B. Mon. 546 (Ky. 1827), *in* 1 Catterall, *supra* note 11, at 308 (involving a self-hired man imprisoned for 68 days by an "informant" who initially persuaded a justice of the peace that he was a runaway with a forged travel pass).

North Carolina defined self-leasing narrowly but took a punitive approach toward those who violated the statute.[275] In one case, the North Carolina Supreme Court held that a woman had not violated the self-hiring statute because she did not go "at large," meaning going out in public and "act[ing] as freemen."[276] However, those found to have violated the statute faced severe penalties. In another case, the court characterized self-hiring as a public "nuisance" and ordered the sheriff to hire out a slave to the public even though the slaveholder had terminated the self-hiring arrangement.[277] The court insisted punishment was still necessary to deter others. Otherwise, slaveholders could simply "cal[l] home the slave the day before a grand jury is impaneled, and let[] him at large again to hire his own time immediately on the adjournment of the Court."[278]

In another North Carolina case, the court condemned self-leasing as an end-run around restrictive manumission rules.[279] The case involved an enslaved man who paid $80 a year in self-leasing fees to operate a riverboat, which the court condemned as the work of abolitionists.[280] Self-leasing was a "custom" that:

> [H]ad sprung up in the state, particularly among that class of citizens who were opposed to slavery, of permitting persons of color, who, by law, are their slaves, to go at large as free—thereby introducing a species of quasi emancipation, contrary to the law and against the policy of the state.[281]

Likewise, Kentucky seems to have treated self-leasing as a form of "temporary and unlawful manumission" and distinguished it from agency arrangements where "the slave was proceeding upon the lawful business of the master."[282] Several cases from Kentucky refer to stipulations or conditions of sale providing that the enslaved person could "go at large and trade as a free man."[283]

---

275. Barker v. Swain, 4 Jones. Eq. 220 (N.C. 1858), *in* 2 Catterall, *supra* note 11, at 223–24 (declaring "it is an indictable misdemeanor in the owner . . . to . . . let him go at large as a freeman"); *see also* Parker v. Commonwealth, 8 B. Mon. 30 (Ky. 1847), *in* 1 Catterall, *supra* note 11, at 380 (concerning a female slaveholder convicted of "permitting her slave to go at large and hire herself out"—which applied regardless of whether permission had been granted, or whether the enslaved person pays a fee or receives a wage).

276. State v. Clarissa, 5 Ired. 221, 224 (1844).

277. State v. Woodman, 3 Hawks 384, 387 (N.C. 1824).

278. *Id.* at 388.

279. Bowling v. Stratton, 8 Hum. 430, 433 (1847).

280. State v. Nat, 13 Ired. 154, 155 (N.C. 1851).

281. *Id.* at 157–58.

282. Jarrett v. Higbee, 5 T.B. Mon. 546, 546 (Ky. 1826), *in* 1 Catterall, *supra* note 11, at 309.

283. An unusual Kentucky case from 1844 treated self-hiring as a sort of quasi-emancipation. Fleming Thompson was owned by five siblings, three of whom "emancipate[d] him as far as they could, and license[d] him to go abroad and trade as a free man." Thompson v. Thompson, 4 B. Mon. 502, 504 (Ky. 1844), *in* 1 Catterall, *supra* note 11, at 364–65. However, the other two siblings did not emancipate him. The court declared that Thompson's freedom of work and movement did not violate the state prohibition on allowing a "slave to go . . . at large and trade as a free man"—because the three siblings had surrendered all rights

Broadly, judicial decisions suggested that courts considered self-hiring arrangements to be a direct threat to the institution of slavery. An enslaved person who could make business dealings on his own behalf might appear to be free.[284] In a case voiding a contract negotiated by a self-hired slave, the Supreme Court of Alabama insisted its decision was necessary to "prevent the demoralization and corruption of slaves, resulting from a withdrawal of discipline and restraint from them, and to prevent the pernicious effect upon the slave community of the anomalous condition of servitude without a master's control."[285] In a North Carolina self-hiring case, the court declared the harm of self-hiring as that of a "master [that] has abandoned all control of the slave."[286] Another North Carolina decision claimed that "the purpose of the law [against self-hiring] is to keep a slave always under the dominion and immediate ordering of the master."[287] Likewise, a Missouri court bemoaned the loss of control inherent in a self-hiring arrangement, where the self-hired slave crossed over the Illinois border to work: "it is much worse to permit the slave to go there to hire himself to labor, than for the master to take him along with himself to reside there under his own inspection."[288]

While self-leasing may have been ideologically threatening to the larger institution of slavery, it was entirely compatible with the economics of slavery. Indeed, self-leasing is perhaps the most transparent illustration of the economic exploitation of slavery, particularly as applied to high-skill workers. The enslaved person did not own her own time and would have to pay for its use, like a tenant in an apartment owned by the landlord. The proceeds of that time were transferred directly to the slaveholder. In the best-case scenario, the enslaved person could eventually save up and use the revenues in excess of the leasing fee to purchase his or her own freedom or that of family members.[289]

But even in that best-case scenario, the entrepreneur's economic output is once again transferred back to the slaveholder to purchase that freedom. The rent these workers paid on themselves through self-leasing fees generally did not count as mortgage payments. They would have to pay for that separately.[290] For example,

---

as slaveholders. The court declared that the status quo had "accomplished the work of freedom" and did not seem inclined to disturb it. *See also* Buckner v. Cotrell, 3 Bibb 257, 257 (Ky. 1814); Carter v. Leeper, 5 Dana 261, 263 (Ky. 1837), *in* 1 Catterall, *supra* note 11, at 337 (describing negotiations in which slaveholder refused to emancipate slaves but would be willing to "permit the slave to go at large and acquire property").

284. *See also* BERLIN, *supra* note 19, at 93 ("In 1793, the Virginia General Assembly, complaining of the 'great inconvenience' of slaves passing as free in the cities.").

285. *Id.* at 518.

286. *Id.* at 224.

287. Barker v. Swain, 4 Jones. Eq. 220, 224 (N.C. 1858).

288. Ralph v. Duncan, 3 Mo. 194, 195 (1833); *see also* Douglass v. Ritchie, 24 Mo. 177, 181 (1857) (involving illegal self-hiring by an enslaved entrepreneur with his own shoemaker's shop).

289. *See supra* note 17.

290. Not all arrangements for self-purchase involved paying a self-leasing fee. In the previously discussed case of *Barker v. Swain*, it appears that the terms of Daniel Jones's sale to a group of 8 individuals provided that he would "have his own time and the proceeds of his labor"—suggesting that he did not have to pay a separate self-leasing fee. This may

Walker documented the case of one of her ancestors, Free Frank, who established a small mining operation through a self-leasing arrangement involving the management of his slaveholder's farm.[291] Frank later made several shrewd real-estate investments and founded a town. However, the ultimate goal of his business operations was to purchase the freedom of his immediate and extended family, an outcome he would not fully achieve until after his death when proceeds from his estate were used to free his last enslaved grandchild.[292] Over the course of his lifetime, a substantial portion of the economic value of his business enterprise was a direct transfer of wealth to slaveholders.

That was, however, the best-case scenario. As previously noted, a self-leasing slave might find herself imprisoned or hired out by the sheriff, or her savings seized by the slaveholder or the slaveholder's heirs.[293] And courts also routinely invalidated purchase arrangements, even when some or all of the payments had already been made. [294]

Despite these risks, a few enslaved entrepreneurs used self-leasing to create complex business enterprises.[295] One famous example is enslaved entrepreneur Dick

---

explain in part why Jones's sale price was so low—$300—which was less than the $350 sale price of a donkey that was at issue in the lawsuit. The $300 may have been essentially a loan to Daniel for his self-purchase, which he would pay off through his business. *See also* cases cited *supra* note 169, describing unenforceable self-purchase agreements.

291. WALKER, FREE FRANK, *supra* note 16, at 32.

292. *Id.* at 159–61.

293. *See supra* notes 22, 169, and 185; Abrahams v. Commonwealth, 1 Rob. 675, 680 (Va. 1842), *in* 1 Catterall, *supra* note 11, at 202 (referring to imposing "jail fees" in connection with a violation of self-hiring law).

294. *See supra* notes 22, 169, and 185; WALKER, *supra* note 10, at 69 (discussing the case of a dressmaker who hired her own time where slaveholder disputed her self-purchase); *see also* Barker v. Swain, 4 Jones. Eq. 220, 221 (N.C. 1858), *in* 2 Catterall, *supra* note 11, at 223–24 (declaring self-hiring arrangement criminal, where business had been carried on for some time, suggesting some payments had been made toward self-purchase).

295. See WALKER, *supra* note 10, at 62 (collecting cases); Maverick v. Stokes, 2 Bay 511, 511 (S.C. 1803), *in* 4 Catterall, *supra* note 11, at 87 (discussing Michael, an enslaved man, who lived freely in Delaware where he owned a "cake and ale house" bearing a document from his slaveholder stating that he had "permission to go about his lawful business"; the nature of the financial arrangement between Michael and his slaveholder are not described in the court ruling); Bland v. Negro Beverly Dowling, 9 G. & J. 19, 19 (Md. 1837) (involving an enslaved man who operated "an oyster house" and "boot-black shop" with the owner's permission, the proceeds of which he used to make installment payments on his self-purchase); Commonwealth v. Major, 6 Dana 293, 293 (Ky. 1838), *in* 1 Catterall, *supra* note 11, at 340 (fining slaveholder for "tippling house" operated by enslaved man "with his master's knowledge and permission"); Jenkins v. Brown, 6 Hum. 299, 299 (Tenn. 1845) (concerning enslaved barbers who operated their own barbershop—which was highly profitable—and lost $2424 in revenue from the barbershop, which had been loaned to a third party who failed to repay the money); State v. Nat, 13 Ired. 154, 155 (N.C. 1851) (involving Nat, an enslaved man, who with a white business partner operated a boat; Nat paid slaveholder $80 per year for his time; Nat and his business partner split the proceeds from the boat operation 50/50; Nat was indicted and criminally convicted for hiring his own time, but the judgment was reversed for lack of jurisdiction); Douglass v. Ritchie, 24 Mo. 177, 178 (1857)

Herrington.[296] Following his slaveholder's death, Herrington would "hire himself out, made his own contract, and received the money that he earned by his labor."[297] Herrington's ventures included a shoe business where he employed several people. Herrington also owned a shop in town "where he sold candy, cheese, [and] tobacco."[298] Although Herrington was understood within the community as a free man, his freedom was tied up in a series of legally contested promissory notes.[299] Herrington may even have believed himself to be free after his owner died.[300] Unfortunately, Herrington was a valuable legal chit for those who would claim a property interest in him, not just for his value as a slave, but for his business assets.

Similarly, the 1856 Alabama case *Stanley v. Nelson* involved an enslaved entrepreneur named Spencer who ran his own house-painting business.[301] Spencer's various contractual arrangements in connection with his business were so complex[302] that the court had trouble differentiating permissible forms of agency from acts that could only be performed by freemen.

Spencer was owned by a slaveholder named Thompson, but at the time of the events leading up to the lawsuit, Thompson had leased Spencer's services to William Hoke for the year. Spencer made a deal with Hoke to pay his own leasing fee if Hoke allowed him to sell his painting services around town. Spencer would collect the payments for his services and keep the balance, and Hoke would sue if anyone refused to pay. Spencer's business, however, was not limited to his own services. He also went into business with a man named George, also a slave.[303]

The lawsuit related to George. Spencer cut a deal for George to work for another man (Stanley) for a one-year period, in exchange for $140.[304] The money would go to George's owner (Nelson).[305] The deal was memorialized in a promissory note signed by Stanley.[306] By all indications, Nelson accepted this deal because George in fact went to work for Stanley.[307] Nelson testified that Spencer

---

(discussing enslaved entrepreneur who operated his own shoe shop; the financial arrangement between the entrepreneur and slaveholder was not disclosed in the legal case).

296. WALKER, *supra* note 10, at 60.

297. Broadhead v. Jones, 39 Ala. 96, 97 (1863), *in* 3 Catterall, *supra* note 11, at 257.

298. WALKER, *supra* note 10, at 61 (discussing self-hired slave, Lunsford Lane, who sold his own brand of tobacco).

299. *Broadhead*, 39 Ala. at 96, *in* 3 Catterall, *supra* note 11, at 257.

300. *See also* WALKER, *supra* note 10, at 60 (describing the enterprise of a millwright who was "nominally free" and established his own business following his owner's death); Nancy v. Snell, 6 Dana 148, 148–55 (Ky. 1838), *in* 1 Catterall, *supra* note 11, at 339 (involving an enslaved woman, Nancy, who was freed pursuant to a will but re-enslaved six years later following her sale by the estate administrator; deemed free in part based on Nancy's years "at large . . . as a free woman" where she "supported herself as a free woman, and was regarded and dealt with, as such, by the neighborhood").

301. Stanley v. Nelson, 28 Ala. 514 (1856).

302. *Id.* at 514–16 (recounting the complex contractual arrangements).

303. *Id.* at 516.

304. *Id.* at 514.

305. *Id.*

306. *Id.*

307. *Id.* at 515–16.

had negotiated the deal and that Spencer "was in the habit of making his own contracts, which were sanctioned and acknowledged by . . . Hoke as his own."[308]

Spencer continued to serve as an intermediary, providing payments for George's work directly to Nelson.[309] It appeared that George, like Spencer, was also painting for various clients in the area because Spencer remitted both cash and promissory notes to Nelson.[310] Based on Nelson's testimony, it appeared everyone understood that Spencer's payments to Nelson would be credited against Stanley's promissory note for George's one-year hiring.[311]

The trial court submitted the case to the jury on the validity of the contract between Stanley (George's hirer) and Nelson (George's owner), as well as the validity of the credits against the contract. The trial court judge seemed to assume that Spencer was acting as an agent for Nelson in negotiating the contract, rendering the contract valid if the facts were as Nelson claimed. The case presented an unusual legal question under the law of slavery because Spencer was not representing his own slaveholder (Thompson) but a different slaveholder (Nelson) in negotiations with a third party (Stanley) regarding George. Thompson had no contractual arrangement at all with the other third parties. Enforcing the contract would have meant recognizing Spencer as a legal agent separate and apart from his slaveholder.

Stanley appealed the case to the Supreme Court of Alabama, which was troubled by the implications of treating the dispute as an ordinary breach of contract. The entire deal had been negotiated by a self-hired slave in a state that prohibited such arrangements.[312] It declared that any contract arising from an enslaved person's actions as a "freeman" or a self-hiring arrangement would be void as a matter of law.[313]

The case of *Stanley v. Nelson* and other cases involving self-leasing suggest that self-hiring arrangements were profitable and common enough that southern courts felt the need to crack down on those practices. As Ariela Gross observed, slave codes "can be read as timelines of every moment slaves resisted often enough to trigger a crackdown" and that "slaves were hiring out their own time and moving freely about towns frequently enough to merit a law."[314] Judicial rhetoric scolding slaveholders for "abandon[ing] all control of the slave" suggest that self-hiring arrangements provided substantial freedom of movement in everyday business pursuits.[315] The apparent willingness of third parties to transact for the services of these enslaved entrepreneurs further suggests that others within the community participated in this informal market. Indeed, third parties faced little legal peril in entering such transactions because legal penalties were either imposed on the enslaved person—who risked jail—or the slaveholder, who risked a fine.

---

308. *Id.* at 515.
309. *Id.*
310. *Id.*
311. *Id.* at 514–15.
312. *Id.* at 518.
313. *Id.* at 518–19.
314. Gross, *supra* note 226, at 13.
315. *See also* MARK M. SMITH, MASTERED BY THE CLOCK 106 (1997) (noting that slaveholders complained that self-leasing "undermine[d] discipline and control").

Broadly, the services market involving self-hiring arrangements appears to have been similar to those involving enslaved agents in other business transactions. Slaveholders enjoyed the profits from high-skill workers, third parties seem to have been willing to enter into these transactions, and enslaved people made maximal use of the freedoms associated with their role in those transactions. While courts tolerated agency arrangements, they considered self-hiring a bridge too far—a degree of freedom[316] fundamentally incompatible with bondage and white racial dominance.

CONCLUSION

Agency jurisprudence reveals the tension between the ideology of slavery, as embodied in judicial rhetoric and slave codes, and the economics of slavery. Individual slaveholders—or at least those represented in the case law—preferred to entrust enslaved workers with their business affairs. Courts tolerated this delegation of power while also attempting to maintain the broader institution of slavery and its insistence upon physical control, surveillance, and the suppression of independent business activity. Meanwhile, the ideology of white supremacy assumed a "paternalistic society" in which enslaved people were dependent on slaveholders, rather than the other way around.[317] As abolitionist William Goodell observed in 1853,[318] the business reality—where enslaved workers performed the same work as paid laborers or stood in for the slaveholder himself—was fundamentally incompatible with the ideology of white supremacy and claims of slave dependance.

Agency-related case law also presents a window into the many business roles of enslaved workers, who commanded ships; managed other workers in industry and on plantations; purchased, delivered, and negotiated over goods; and started their own enterprises. As Juliet Walker observed, their work is a testament to the continuity of Black business activity over hundreds of years.[319]

The stories of high-skilled and entrepreneurial slaves also highlight the economic exploitation of slavery, separate and apart from physical coercion. Historical characterizations of enslaved workers often illustrate economic exploitation through the threat or use of violence, or through the outright sale of enslaved people.[320] Although enslaved agents were not necessarily immune from violence or sale,[321] slavery exacted a separate toll through the slaveholder's total ownership of the enslaved person's time—and thus the entirety of their economic output. The immense value of a life's work for a high-skilled or entrepreneurial slave would be both an opportunity and obstacle to self-purchase. It provided some

316. See discussion *supra* note 47 regarding gradations of freedom.

317. Eugene Genovese, Roll, Jordan, Roll: The World that Slaves Made 4 (1976).

318. GOODELL, *supra* note 157, at 95.

319. WALKER, *supra* note 10, at 126.

320. *See, e.g.*, BAPTISTE, *supra* note 165, at 15–21, 119–28, 132–35.

321. In her autobiography, enslaved entrepreneur Elizabeth Keckley described severe beatings and rape in her early life and young adulthood. KECKLEY, *supra* note 240, at ch. 2. Many enslaved workers who were hired to work for third parties died or were severely injured. *See supra* note 235. See *supra* note 19 and Part VI for a more detailed discussion of how enslaved entrepreneurs also frequently risked the loss of their business assets, rescission of their self-hiring or purchase arrangements, imprisonment, or re-enslavement.

leverage for negotiating a small wage or a portion of revenue, but those precarious savings would be stacked against a towering purchase price.

The economic transfer from enslaved worker to slaveholder—a daily payment made by millions of Black workers over a lifetime—has not been repaid. Emancipation left those economic allocations in place. Some form of reparations would be the only way to reverse them.